Civil Liability for Violations of Personal Rights on the Internet from the German Point of View

-

*stud. jur. Christoph Gramlich**

Due to diverse cultural and historical backgrounds, the protection of personal rights varies nationally. Every state deals differently with the ideality and intangibility of personal rights. Combining these national problems with the global and anonymous world of the internet, that additionally is based on the division of labour, exponentiates the arising legal problems: How to cope with the structure of the internet on a national basis[1], how to determine the applicable law among many affected legal systems[1] and how to locate jurisdiction internationally[1]? These questions will be answered in the following from a German point of view.

A German Substantive Civil Law

The civil liability for violations of personal rights is determined by substantive civil law.

I. Personal Rights

Personal rights aim to achieve protection of the personality.[1] German substantive civil law knows two sorts of them - a general one and several special ones. Special personal rights (SPRs) are regulated by various statutes.[2] In contrast, the general personal right (GPR) is not set explicitly in a statute but subsumed under the term „another right" in section 823 paragraph 1 German Civil Code (GCC) whose range is indirectly affected by the evaluation of the Basic Law for the Federal Republic of Germany (BLG) that protects personal rights in article 1 paragraph 1 and article 2 paragraph 1.[3]

SPRs protect special areas of personal rights whereas the GPR does no have a final scope but is applied in few cases[4]. The GPR is therefore open to new developments. Concerning violations of personal rights the GPR is only applicable in case SPRs do not protect the violated part or in case they protect it insufficiently.[5]

1. Special Personal Rights

Special personal rights are the right to bear a name of section 12 GCC[6], the privilege as to one's own image of sections 22-24 German Authors Copyright Act (GACA)[7], the author's personal rights of sections 12-14 German Copyright Act (GCA)[8], the protection of one's honour and good reputation of sections 185-187 German Criminal Code (GCrC)[9] and section 824 GCC[10], the protection of the privacy of the spoken word of section 201 GCrC[11], the protection against violation of intimate privacy by taking photographs of section 201a GCrC[12], the protection of secrecy of sections 202, 203, 206 GCrC[13], the privacy of data of section 202a GCrC[14] and the right of sexual self-determination of section 825 GCC[15].

2. The General Personal Right

German case law admits interferences in the GPR in few cases which are not final but to some extent overlap each other and therefore show a common ground that permits the creation of an area of protection of the GPR.[16] The GPR protects persons from the falsification of their personality and the publication of untrue allegations about them[17], discrimination and decrease of their honour[18], their personal rights (such as name or pictures) being used economically against their will[19], the exposure of

*Der Autor ist Student der Rechtswissenschaften an der Universität Konstanz.

[1]Gounalakis/Rhode, Persönlichkeitsschutz im Internet, München 2002, marginal number (nm.) 36; Schwarz Wandt, Gesetzliche Schuldverhältnisses, 3.Auflage, München 2009, section (sect.) 16 mn.49.

[2]Roth, Die internationale Zuständigkeit deutscher Gerichte bei Persönlichkeitsrechtsverletzungen im Internet, Frankfurt am Main 2007, page (p.) 16; Gounalakis/Rhode (footnote (fn.) 4), mns.36-185; Münch, Der Schutz vor Verletzungen der Persönlichkeitsrechte in den Neuen Medien, Frankfurt am Main 2004, p.9; Wanckel, Persönlichkeitsschutz in der Informationsgesellschaft, Frankfurt am Main 1999, pages (pp.) 85 and the following one (f.); Fechner, Medienrecht, 9.Auflage, Ilmenau/Erfurt 2007, chapter (chap.) 4 mn.18.

[3]BVerfGE 30, 173; 34, 238; BGHZ 13, 334; 30, 7, 11 with further reference (wfr.); Ehmann, Das Allgemeine Persönlichkeitsrecht, Jura 2011, p.437, p.438, pp.442f..

[4]See A I. 2. The General Personal Right.

[5]Gounalakis/Rhode (fn.4), mn.37; Schwarz/Wandt (fn.4), sect.16 marginal numbers (mns.) 49-51.

[6]Wagner, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 5, 5.Auflage, München 2009, sect.823 mn.171; Brox/Walker, Besonderes Schuldrecht, 34.Auflage, München 2010, chap.41 mn.21.

[7]Ehmann (fn.6), p.437, pp.441f.; Wagner (fn.9), sect. 823 mn.171; Brox/Walker (fn.9), chap.41 mn.21.

[8]Ohrmann, Der Schutz der Persönlichkeit in Online-Medien, Wesel 2009, pp.66-73; Roth (fn.5), p.20; Fechner (fn.5), chap.5 mns.4f.; Gounalakis/Rhode (fn.4), mns.75-98.

[9]Ohrmann (fn.11), pp.73-75; Fechner (fn.5), chap. 4 mns.23f.; Münch (fn.5), p.10.

[10]Gounalakis/Rhode (fn.4), mns.99-165; Brox/Walker (fn.9), chap.41 mn.21.

[11]Ehmann (fn.6), p.437, pp.440, 441; Fechner (fn.5), chap. 4 mns.53-55.

[12]Ehmann (fn.6), p.437, p.442; Ohrmann (fn.11), pp.50-53; Fechner (fn.5), chap. 4 mn.28.

[13]Ehmann (fn.6), p.437, pp.440f.; Gounalakis/Rhode (fn.4), mns.178-183.

[14]Ehmann (fn.6), p.437, p.440; Gounalakis/Rhode (fn.4), mn.185.

[15]Wagner (fn.9), sect. 825, mns.14, 4.

[16]Ehmann (fn.6), p.437, p.439; Schwarz/Wandt (fn.4), sect.16 mn.53.

[17]BGHZ 13, 334; 30,7, 12f.; BGH NJW 2006, 599 and the following (ff.) ; Schwarz/Wandt (fn.4), sect.16 mn.54.

[18]BGHZ 39,124; Ehmann (fn.6), p.437, p.439; Roth (fn.5), pp.26f.; Schwarz/Wandt (fn.4), sect.16 mn.55.

[19]BGHZ 26, 349; 143, 214; Ehmann (fn.6), p.437, pp.441f.; Roth (fn.5), p.28.

personal information[20], the decrease of their freedom of choice[21] and pestering[22].

II. Violations of Personal Rights

An violation of a SPR exists in case its elements of an offence are matched. In contrast an violation of the GPR is determined differently: Because the area of protection of the GPR is not finally defined and open to new cases[23] an interference in the GPR does not automatically mean that the victim is granted remedies. The interference additionally has to be illegal to constitute an violation. Therefore each interference in personal rights has to be balanced with the interest of the person causing the interference. If the interfering interest (eg. freedom of press that is protected by article 5 paragraph 1 BLG) overweighs the interfered personal right (that is protected by article 2 paragraph 1 BLG), the interference is legal. If the personality right overweighs, the interference is illegal and an violation exists.[24]

III. Liability: Remedies

German substantive civil law knows multiple remedies that ensure an appropriate liability for violations of personal rights. These remedies are also utilised concerning violations of personal rights on the internet.

Provided that a person‘s personal rights were violated through publications in the media, the right of reply enables the violated person to demand the publication of a statement from his point of view.[25] It is a special remedy because it neither requires illegality - the personal right only needs to be interfered, not violated - nor fault.[26] It is explicitly regulated in section 56 German Interstate Broadcasting Treaty (GIBT) and the broadcasting and press (media) acts of the federal states of Germany.[27]

Moreover, revision of a violating statement referring to a person can be accomplished through four different types: by removing it (revocation), by adjusting its content to the truth (correction), by adding new content to it (addition) or by dissociating oneself from it (dissociation).[28] Claims of revision do not require fault.[29] The claims of revocation, correction or addition are derived from sections 823, 824, 826 GCC or section 1004 paragraph 1 GCC analogous.[30]

Furthermore, the affected person can be empowered to assert injunctive relief: The acting person is forbidden to carry out a certain action that will or already has violated a personal right.[31] This right is set explicitly set in section 12 GCC for the right to bear a name[32] and in section 97 paragraph 1 GCA for the author‘s personal rights of sections 12-14 GCA. Moreover it can be derived out of sections 823 paragraph 2 in conjunction with (icw.) sections 185-187 GCrC, sections 824, 826 GCC[33] for the protection of one‘s honour and good reputation. For the privilege as to one‘s own image, omission can be asserted out of section 823 paragraph 2 GCC icw. sections 22, 23 GACA.[34] Concerning the GPR, injunctive relief is derived from an analogy to sections 12, 862 and 1004 GCC.[35]

Compensation for damages can be granted for tangible and intangible damages - bases of claims (requirements) and legal consequences vary.

Compensation for tangible damages is regulated in section 823 paragraph 1 GCC for the infringement of „another right“ which is every SPR and the GPR.[36] It can also be granted by section 823 paragraph 2 GCC which requires the breach of a „statute that is intended to protect another person“. Such protective laws can be found in sections 22-24 GCA for the „privilege as to one‘s own image“[37], in 185-187 GCrC for the „protection of one‘s honour and good reputation“[38], in section 201 GCrC for the „protection against violation of intimate privacy by taking photographs“[39] and in sections 202 and 203 GCrC for the „protection of secrecy“[40]. Section 824 GCC allows compensation for tangible damages if the „protection of one‘s honour and good reputation“[41] is infringed. Section 97 paragraph 2 GCA grants compensation for tangible damages in case the „author‘s personality rights“ of sections 12-14 GCA is infringed.[42]

According to section 253 paragraph 2 GCC, compensation for intangible damages (damages) is only possible in case of „an injury to body, health, freedom or sexual self-determination“. Thus, if the violated SPR or GPR constitutes such an injury, compensation based on sections 823 paragraph 1, paragraph 2 or 824 GCC can be granted. Nonetheless, German case law admits compensation for intangible damages besides section 253 paragraph 2 GCC if a SPR or the GPR[43][44] is profoundly violated and cannot be just compensated through other claims such as the right of reply or an injunctive relief[45].

[20]BVerfGE 32, 373, 379; 34, 269, 281; WRP 2006, 1021; BGHZ 24, 72, 79; 27, 284, 286; 91, 233.
[21]BGH NJW 2006, 2477f.; OLG Hamm NJW 1983, 1436; LG Bonn JZ 1971, 56.
[22]BGHZ 106, 229, 233f.; Roth (fn.5), pp.28-31; Schwarz/Wandt (fn.4), sect.16 mn.59.
[23]See A I. Personal Rights.
[24]Ehmann (fn.6), p.437, pp.438f.; Schwarz/Wandt (fn.4), sect.16 mns.60f.
[25]Ohrmann (fn.11), pp.120-128; Fechner (fn.5), chap.4 mn.110.
[26]Roth (fn.5), pp.38f.; Wüllrich, Das Persönlichkeitsrecht des Einzelnen im Internet, Köln 2005, pp.157f..
[27]Fechner, chap.4 mns.111, 119.
[28]Fechner (fn.5), chap.4 mn.120; similarly: Münch (fn.5), p.240.
[29]Wüllrich (fn.29), p.161.
[30]Ehmann, Jura 2011, p.437, p.445; Roth, pp.41f.; Klein, p.22; Fechner, chap.4 mn.121.
[31]Ohrmann (fn.11), pp.108-120; Fechner (fn.5), chap.4 mns.104-109; Schwarz/Wandt (fn.4), sect.16 mn.63.
[32]Fechner, chap.4 mn.74; Gounalakis/Rhode, mn.323; Schwarz/Wandt, sect. 20 mn.22.
[33]Fechner, chap.4 mn.104.
[34]Fechner, ic..
[35]BGHZ 30, 7, 14; Schwarz/Wandt, sect.16 mn.63 icw.sect.20 mn.23.
[36]Ohrmann, pp.128ff.; MüKo-Wagner, sect. 823 mn. 171; Schwarz/Wandt, chap.16 mn.49.
[37]BGHZ 20, 345, 347; 26, 349, 351; OLG München, NJW 1988, pp.915f; Helle, p.50; Roth, pp.44f..
[38]Sect. 184: RGZ 140, 392, 395; sect. 186: BGHZ 95, 212; OLG Düsseldorf, NJW 1978, 704; RGZ, 115, 74, 79; 156, 372, 374; sects. 185-187: Fechner, chap.4 mn. 141; Roth, pp.44f.; Gounalakis/Rhode, mn.158.
[39]Gounalakis/Rhode, mn.176.
[40]Sect. 202: RGZ 94, 1, 2; sect. 203: OLG Hamm, MedR 1995, 328f..
[41]See A. I. 1..
[42]Fechner, chap. 5 mn.100; Gounalakis/Rhode, mn.97.
[43]Except for the postmortem GPR.
[44]Roth, p.46; Gounalakis/Rhode, mn.359.
[45]BGHZ 26, 349; Schwarz/Wandt (fn.?), sect.16 mn.64.

Compensation for intangible damages then is based on section 823 paragraph 1 GCC icw. articles 1, 2 paragraph 1 BLG.[46]

In addition to that, a levy of profit based on section 812 paragraph 1 sentence 2 GCC can be granted.[47]

Moreover, supporting claims, such as the revelation of personal information of the infringer, can be granted.[48]

IV. On the Internet: Responsibility of Content, Access- and Host-Providers

Due to the internet's anonymity and its global distribution of information[49] it is hard to find the person that caused the violation of personal rights (content-providers[50]). Thus, it is necessary to give consideration to a liability of access- and host-providers.[51]

In German substantive civil law, sections 7-10 German Telemedia Act (GTMA) regulate the „responsibility" of content, access- and host-providers (service providers). The regulations are based on the EU Electronic Commerce Directive (EUECD) which aims at harmonising the internet liability law of the members of the EU.[52]

1. Sections 7-10 GTMA

Section 7 GTMA refers to „general legislation" and sections 7-10 GTMA utilise extensive the term „responsibility", which shows that they apply in any field of German law (criminal, civil and public law).[53] Their regulatory content is exceptional: On the one hand, they do not regulate bases for claims but establish additional requirements for existing ones and, in this way, filter out violations of certain service providers (filtering solution). On the other hand they cannot extend liability but only limit it.[54] Overall, sections 7-10 GTMA privilege service providers.[55]

2. Section 7 Paragraph 1 GTMA: Responsibility of Content-Providers

According to section 7 paragraph 1 GTMA, services providers that keep ready own information on the internet (content-providers) are responsible „in accordance with general legislation". Thus, it clarifies that they are not granted any privilege which means that their liability is not limited.[56] The term „keep ready" means that content-providers have to exercise control on the information. It does not refer to providing information on the internet (hosting) and is thus unclear.[57]

German case law[58] and most of German academics[59] state that the content-providers' own information are those for which he accepts responsibility from an impartial point of view that embraces all relevant issues.[60] Nevertheless, this seems critical with regard to the regulatory target of the ECD.[61] Because of this, some providers that, in terms of the ECD, would be seen as access- or host-providers are in Germany defined as content-providers.

3. Section 8 GTMA: Responsibility of Access-Provider

Section 8 paragraph 1 GTMA, which is based on article 12 EUECD, privileges services providers who transmit information of third parties or give access to them (access-providers) as long as this works passively and automatically (eg. routing[62])[63].

Section 8 paragraph 1 sentence 2 GTMA makes an exception of this privilege if the service provider deliberately cooperates with a recipient of his service to commit illegal acts. Section 8 paragraph 2 GTMA extends the privilege of paragraph 1 sentence 1 by negating the liability for the temporarily storage of information of third parties which serve the purpose of paragraph 1.

4. Section 9 GTMA: Responsibility for Temporary Storage

Section 9 sentence 1 GTMA, that is based on article 13 EUECD, privileges service providers who temporarily storage information of third parties for the purpose of a more efficient transmission of these information (eg. caching)[64] as long as they do not change the information and consider several technological standards[65] (number 1 to 5).

Section 9 sentence 1 number 5 GTMA obliges service providers to remove or disable access to information of third parties once they obtain knowledge of the fact that the information at the initial source of the transmission has been removed from the network or that access to it has been disabled, or that a court or administrative authority has ordered such removal or disablement. Section 9 sentence 2 GTMA refers to the exception of section 8 paragraph 1 sentence 2 GTMA.

5. Section 10 GTMA: Responsibility of Host-Providers

[46]BVerfGE 34, 369; BGHZ 35, 363; 39, 124, 131f.; 143, 214, 218f.; Schwarz/Wandt (fn.?), sect.16 fn.126, mn.67.
[47]Ohrmann (fn.11), pp.134f.; Roth (fn.5), pp.42-44; Wüllrich (fn.29), pp.168f..
[48]Ohrmann (fn.11), pp.135-137.
[49]See B. II. 3. b) bb) aaa) (1) Place of Action.
[50]See A. IV. 2. Responsibility of Content-Providers.
[51]See A. IV. 3.-5..
[52]EUECD recitals 14, 22, 40, 42, 45, 46; Ohrmann (fn.11), pp.149f.; Fechner (fn.5), chap.12 mn.22; Freytag, in: Verantwortlichkeit im Netz, Bayreuth 2003, p.143.
[53]Ohrmann (fn.11), p.150 and fn.775; Fechner (fn.5), chap.12 mn.33.
[54]BGH MMR 2004, p.166, p.167; BT-Drucks.13/7385 p.20; BT-Drucks.13/7385 p.51; Ohrmann (fn.11), p. 151; Fechner (fn.5), chap.12 mn.33; Gounalakis/Rhode (fn.4), mn.264.
[55]Ohrmann (fn.11), p.150 and fn.776 wfr.; Münch (fn.5), p.174.
[56]Ohrmann (fn.11), p.176; Fechner (fn.5), chap.12 mns.34-38.
[57]Gounalakis/Rhode (fn.4), mn.274.
[58]BGH MMR 2010, 556; BGH MMR 2004, 668; OLG Zweibrücken MMR 2009, 541; OLG Hambrug ZUM 2009, 642; KG Berlin MMR 2010, 203.
[59]Kohl, Die Haftung der Betreiber von Kommunikationsforen im Internet und virtuelles Hausrecht, Regensburg 2007, pp.51f..
[60]BT-Drucks. 13/7385 p.19.
[61]Ohrmann (fn.11), pp.176-184.
[62]See B II. 3. b) aa) aaa) Place of Action.
[63]EUECD recital 42; Ohrmann (fn.11), p.195; Fechner (fn.5), chap.12 mns.39-41; Hoeren, p.452.
[64]Ohrmann (fn.11), p.189; Fechner (fn.5), chap.12 mn.42.
[65]Fechner (fn.5), chap.12 mn.50.

Section 10 GTMA, which is based on article 14 EUECD, privileges service providers who storage information of third parties (host-providers) as long as they have no knowledge of the illegal activity or the information and no knowledge of any facts or circumstances from which the illegal activity or the information is apparent (number 1). Furthermore the privilege does not apply if host-providers obtain such knowledge but do not act expeditiously to remove the information or disable access to it (number 2).

Section 10 sentence 1 letter a GTMA excludes the host-providers' privilege in case they know or should know of „the illegal activity or the information". This wording indicates that host-providers have to know about the illegal activity or about the - legal or illegal - information. Therefore knowledge of the illegality of the information would not be sufficient to exclude the privilege of section 10 GTMA but simple knowledge about the information would be. Thus, host-providers would have to supervise information of third parties. However this would contradict section 7 paragraph 2 sentence 1 GTMA that explicitly excludes an obligation of supervision for information of third parties.[66] Moreover, the knowledge of the information does not automatically show if it is illegal or legal, because the information's context is not identifiable[67] or a consent may exist[68]. Thus, it is generally accepted, that the second „the" in this part of the sentence is wrong and that host-providers shall only be responsible for obvious illegal information.[69] This is supported by article 14 paragraph 1 letter a EUECD that denies the host-providers' privilege in case they know or should know of „the illegal activity or information".

6. Section 7 Paragraph 2 Sentence 2 GTMA: Priority of „General Legislation"

Section 7 paragraph 2 sentence 1 GTMA states that access- and host-providers are not obliged „to monitor the information transmitted or stored by them or to search for circumstances indicating an illegal activity". Thus, a general monitoring obligation of access- and host-providers is explicitly forbidden. In this way, section 7 paragraph 2 sentence 1 GTMA transfers the regulatory content of article 15 paragraph 1 ECD into German law.

Nevertheless, section 7 paragraph 2 sentence 2 GTMA loosens the strict rule of sentence 1 by declaring that access- and host-providers can still be obliged „to remove or disable access to information under general legislation, even where the service provider does not bear responsibility pursuant to Sections 8 to 10". Basically, sentence 2 does not contradict sentence 1 or article 15 paragraph 1 ECD, because it only ensures that German general legislation is not annulled. However, the proviso of sentence 2 leads to problems in the event of its conjunction with a special rule known in German case law: If the violated party is granted an injunctive relief, German courts can also instruct an order for omission in the case of identical violations[70]. Thus, the violating party is obliged to make sure that no further violation will occur and for this reason monitor information that could cause further violations and even search for facts indicating further violations. The combination of section 7 paragraph 2 sentence 2 GTMA and the case law of the order for omission in the case of identical violations contradicts the regulatory target of article 15 paragraph 1 ECD.[71]

V. Result of the Examination of German Substantive Civil Law

German substantive civil law copes with violations of personal rights that occur on the internet by combining the general rules for violations of personal rights with a statute that explicitly determines the responsibility of content, access- and host-providers (GTMA).

B German International Private Law

Violations of personal rights on the internet, usually[72] have a connection with more than one state respectively more than one legal system. Due to the circumstance that every legal system has its own substantive law, it is thus questionable which one is applicable. This question is answered by international private law (private international law) which decides between the affected legal systems by providing rules how to find the right substantive law. International private law should assure a just balance of the affected interests and legal certainty.[73] Hence, it is necessary to describe how German international private law deals with violations of personal rights on the internet.

I. Qualification of Violations of Personal Rights on the Internet

First of all, it is required to track the conflict rules that suit to the „core area of the legal dispute" (qualification).[74] From a German point of view, there are two different sources of international private law that could apply to violations of personal rights: the EU's Rome II Regulation (Rome II) and Germany's national IPR, the Introductory Act to the German Civil Code (IAGCC). Both the EU's (Rome II) and Germany's (IAGCC) international private law do not have particular conflict rules for violations of personal rights[75], so that the trial courts[76] have to decide about their core area respectively their qualifica-

[66]München (fn.5), p.213.
[67]München (fn.5), ibid.em (ibid.).
[68]Ohrmann (fn.11), p.187 and fn.922 wfr..
[69]Ohrmann (fn.11), p.187; München (fn.5), pp.213f.; Fechner (fn.5), chap.12 mn.48.
[70]BGHZ 158, 236 ff..
[71]Ohrmann, pp.152ff.; Hoeren (fn.65), pp.452 f.; Fechner, chap.12 mn.50.
[72]Wüllrich (fn.29), p.187; Lütcke, Persönlichkeitsrechtsverletzungen im Internet, München 2000, p.123; Gounalakis/Rhode (fn.4), mn.8; Härting, Internetrecht, Berlin 1999, pp.1f..
[73]Rauscher, Internationales Privatrecht - Mit internationalem und europäischem Verfahrensrecht, 3.Auflage, Heidelberg 2009, mns.47, 49-51, 55, 66; Kropholler, Internationales Privatrecht, 6.Auflage, Hamburg 2006, sect.4 I., IV..
[74]Gounalakis/Rhode (fn.4), mn.8; Rauscher (fn.55), mns.46; Kegel/Schurig, Internationales Privatrecht, 9.Auflage, München 2004, sect.7 I.; v.Hoffmann/Thorn, Internationales Privatrecht einschließlich der Grundzüge des Internationalen Zivilverfahrensrechts, sect.6 mn.1.
Contrary to: Section 46 of the internation private law of the People's Republic of China; section 28 paragraph 3 of the international private law of the Republic of China on Taiwan; article 139 of the Switzerland's Federal Code on Private International Law.
[76]3 German Internatonal Jurisdiction.

tion.[77] This could lead to different qualifications of violations of personal rights because the courts of the EU (Court of Justice of the European Union) and the courts of Germany could interpret their international private laws in different ways.[78] Therefore, according to article 3 number 1 letter a IAGCC, the rules of Rome II basically take precedence over the ones of IAGCC avoiding problems mentioned above.

Nevertheless article 1 number 2 letter g Rome II excludes non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation from the scope of Rome II. This exception had to be made due to insurmountable differences between the EU's member states concerning their national regulations balancing the rights of individuals and the freedom of the press.[79] That is why international cases of violations of personal rights are only regulated by German international private law (IAGCC).

German international private law basically qualifies violations of personal rights as torts within the meaning of articles 40-42 IAGCC.[80] At least this is generally accepted for compensation, injunctive relief and revision (revocation, correction, addition and dissociation).[81] Moreover, the protection of the „right to bear a name" is consistently categorised within the meaning of articles 40-42 IAGCC.[82] The right of reply acts in accordance with articles 40-42 IAGCC because otherwise it would be detached from the closely related claims of revision.[83]

II. Articles 40-42 IAGCC

It remains to be examined in which way articles 40-42 IAGCC determine the applicable law in case of violations of personal rights on the internet.

1. Article 42 IAGCC: Choice of Law

Article 42 IAGCC enables the parties involved in violations of personal rights to choose a legal regime of a state after the violation occurred (choice of law). To determine the applicable law before violations occur, the parties have to conclude a contract of their choice of law. Afterwards, this contract constitutes a special legal relationship within the meaning of article 41 paragraphs 1, 2 number 1 IAGCC.[84]

2. Article 40 Paragraph 2 IAGCC: Common Habitual Residence

Article 40 paragraph 2 sentence 1 IAGCC regulates that in case a common habitual residence of the liable and the injured party exists at the time of the occurrence of violations of personal rights, the law of the state of the common habitual residence shall be applied (lex domicilii communis). Sentence 2 says that for legal persons „the principal establishment, or where a branch is involved, this establishment" replaces the habitual residence.

3. Article 40 Paragraph 1 IAGCC: Principle of the Scene of an Offence

In case neither a choice of law nor a common habitual residence exists, article 40 paragraph 1 IAGCC is applicable.[85]

a) Basic Rule

Article 40 paragraph 1 sentence 1 IAGCC regulates that the legal system is determined according to „the state in which the liable party has acted" (place of action). In contrast, article 40 paragraph 1 sentence 2 IAGCC enables „the injured party to demand" the application of „the law of the state in which the injury occurred" (place of occurrence). That option can be invoked only with certain time limits set forth by article 40 paragraph 1 sentence 3 IAGCC. Through this, article 40 paragraph 1 sentences 2, 3 IAGCC regulate the injured party's „option of determination" in favour of the place of occurrence.[86]

The differentiation between the place of action and the place of occurrence is not needed, they are located in the same state (local tort) but only in case they diverge into different states (distance tort).[87]

In case the place of action and the place of occurrence are different, article 40 paragraph 1 IAGCC regulates that basically the law of the place of action has to be applied, unless the injured person opts for the law of the place of occurrence. Therefore the applicable law acts in accordance to the place of action or the place of occurrence alternatively.[88] Hence, torts are generally committed at both places (lex loci delicti commissi) (principle of the ubiquity of torts)[89] but the place of

[77]BT-Drucks. 14/343, p.10; Wüllrich (fn.29), p.261; Münch (fn.5), p.255; Lütcke (fn.54), p.123; v.Hinden, Persönlichkeitsverletzungen im Internet, Hamburg 1999, p.39.
[78]Schmidt, Grundlagen des europäischen internationalen Privatrechts, Jura 2010, 117, 117f.; Kropholler (fn. 55), sect.10 III..
[79]Jayme/Kohler, Europäisches Kollisionsrecht 2007: Windstille im Erntefeld der Integration, IPrax 2007, p. 493, p.494; Wagner, Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäisches Deliktsgerichtsstand, IPRax 2006, p.372, p.384; idem, Änderungsbedarf im autonomen deutschen internationalen Privatrecht aufgrund der Rom II-Verordnung? Ein Überblick über den Regierungsentwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Rom II-Verordnung, IPRax 2008, p.314, p.316; v.Hein, Die Kodifikation des europäischen IPR der außervertraglichen Schuldverhältnisse vor dem Abschluss, VersR 2007, p.440; Thorn, in: Palandt Kommentar zum Bürgerlichen Gesetzbuch, Rome II 1 mn.10; Wurmnest (fn.76), article (art.) 40 IAGCC mn.67.
[80]BT-Drucks. 14/343, p.10; Wüllrich (fn.29), p.274; Gounalakis/Rhode (fn.4), mn.9; Junker, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 11, Auflage 5, München 2010, art.40 IAGCC mn.72; Kropholler (fn.55), sect.53 V.4.; Thorn (fn.61), art.40 IAGCC mn.10.
[81]BT-Drucks. 14/343, p.10; Wüllrich (fn.29), p.274; Kristin, Das Deliktsstatut bei Persönlichkeitsrechtsverletzungen über das Internet, München 2001, pp.87f..
[82]Wüllrich (fn.29), p.274; Neu, Die kollisionsrechtliche Behandlung von Persönlichkeitsrechtsverletzungen im Internet, Bielefeld 2002, pp.24f.; v.Hinden (fn.59), p.40; Junker (fn.62), art.40 IAGCC mn.84.
[83]Wüllrich (fn.29), p.276; Neu (fn.64), pp.27f.; Kristin (fn.63), p.90; Lütcke (fn.54), pp.127f..
[84]Rauscher (fn.55), mn.1289.
[85]Junker (fn.62), art.40 IAGCC mns.12-15.
[86]BT-Drucksache 14/343, p.11; Litterscheid, Das Bestimmungsrecht des Verletzen aus Art.40 Abs. 1 S. 2 und S. 3 EGBGB, Bonn 2005, pp.29-31.
[87]Wüllrich (fn.29), pp.66f.; Junker (fn.62), art.40 IAGCC mn.29; v.Hoffmann/Thorn (fn.56), sect.11 mns.22f..
[88]BT-Drucksache 14/343, p.11.
[89]Junker (fn.62), art.40 IAGCC mn.22.

occurrence is not considered as long as the injured party opts for it (limitation of the principle of the ubiquity of torts)[90]. Thus, article 40 paragraph 1 IAGCC regulates the principle of the scene of an offence which ties the applicable law up to the place, where the tort was committed.[91]

b) Article 40 Paragraph 1 IAGCC: Violations of Personal Rights on the Internet

Having explained the basic principles of articles 40-42 IAGCC, it is necessary to examine how article 40 paragraph 1 IAGCC deals with violations of personal rights on the internet. To provide a clear evaluation, it is necessary to distinguish between the problems that arise from violations of personal rights and those that arise on the internet (internet-torts[92]).[93]

aa) Violations of Personal Rights

Basically, articles 40-42 IAGCC take effect equally in case of violations of personal rights, but the place of action and the place of occurrence of article 40 paragraph 1 IAGCC have to be pinpointed.

aaa) Place of Action

The place of action of violations of personal rights is fixed, where they are carried out.[94] This definition is very abstract and resembles the general definition of the place of action[95]. It is thus hardly helpful for particular cases. This is due to the circumstance that the place of action in case of violations of personal rights depends on the kind of media (eg. letter, printed press, broadcasting, television or internet) that carries the violating information. Therefore it can only be pinpointed for the different kinds of media.[9697]

Preparatory acts (eg. the creation of a text or the decision about the publication) do not give reasons for a place of action.[98] A place of action comes into existence the moment the violating party cannot control the information anymore.

bbb) Place of Occurrence

The place of occurrence in case of violations of personal rights is fixed at the place, where the personal right is violated.[99] For knowing, where personal rights are violated, it is necessary to pinpoint the place, where they are located. Personal rights have no physical equivalent like property rights which are connected with detectable items.[100] Therefore it is questionable, whether personal rights can be located or not.

Some take the position that personal rights are situated everywhere and thus cannot be located at one specific place.[101]According to this opinion, violations of personal rights do not have a place of occurrence and in terms of article 40 paragraph 1 IAGCC the law of the place of action must apply. Other authors states that personal rights have to be distinguished from one‘s personality[102] and that personal rights as a legal structure can be located at the place where they are affected[103].

In favour of the first opinion argues the circumstance, that it is generally accepted that personal rights abstractly exist everywhere (ubiquity of personal rights).[104] Against the first opinion and in favour of the second opinion argues the consideration, that those abstractly unlocatable personal rights „update“ and „locate“ the time they get violated.[105] Moreover, it is the competence of substantive law to evaluate the legal range of violations of personal rights. By denying a place of occurrence in case of violations of personal rights, international private law would partly deprive substantive law of this competence.[106]

Therefore, violations of personal rights can be located at the places where they are affected, which is where they are recognised by the violated party or third parties (place of distribution).[107] Because of the categorical conflict with the freedom of opinion, only predictable places of violations can constitute places of occurrence (places of intended distribution).[108] A reputation of the violated party at the place of distribution favours celebrities and is not required.[109]

bb) Violations of Personal Rights on the Internet

Having examined how article 40 paragraph 1 IAGCC generally deals with violations of personal rights, it remains to be seen how they have to be assessed when they happen on the internet.

[90]Rauscher (fn.55), mn.1255; Wüllrich (fn.29), p.272.
[91]BT-Drucksache 14/343, pp.10, 11; Wüllrich (fn.29), p.270; Junker (fn.62), art.40 IAGCC mn.22.
[92]Wüllrich (fn.29), p.72; Junker (fn.62), art.40 IAGCC mn.78.
[93]v.Hinden (fn.59), p.76.
[94]Wüllrich (fn.29), p.273; Wurmnest (fn.76), in: juris Praxiskommentar Bürgerliches Gesetzbuch, Band 6 Internationales Privatrecht, 5.Auflage, 2010, art.40 IAGCC mn.71; Schaub, in: Prütting/Wegen/Weinreich Kommentar zum Bürgerlichen Gesetzbuch, 4.Auflage, Köln 2009, art.40 IAGCC mn.23.
[95]See B II. 3. a) Basic Rule.
[96]Wüllrich (fn.29), pp.273, 278ff.; Junker (fn.62), art.40 mns. 74-76; Wurmnest (fn.76), ibid.; Schaub (fn.76), ibid.; Kropholler (fn.55), sect.53 V.4..
[97]See B II. 3. b) bb) aaa) (1) Place of Action concerning the place of action of violations of personal rights on the internet.
[98]Wüllrich (fn.29), p.272; v.Hinden (fn.59), p.55; Lütcke (fn.54), p.129; Junker (fn.62), art.40 mn.76; Wurmnest (fn.76), art.40 IAGCC mn.72.
[99]Wüllrich (fn.29), p.273.
[100]Wüllrich (fn.29), p.69; v.Hinden (fn.59), p.79; Wurmnest (fn.76), art.40 IAGCC mn.73; v.Hoffmann, in: J. von Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Neubearbeitung 2001, Berlin, art.40 IAGCC mn.59.
[101]Kubis, Internationale Zuständigkeit bei Persönlichkeits- und Immaterialgüterrechtsverletzungen, Bielefeld 1999, p.122; v.Bar, Internationales Privatrecht Band 2: Besonderer Teil, München 1991, mn.665; Hohloch, Rechtsprechungsübersicht, Gerichtsstand der unerlaubten Handlung gem Art 5 Nr 3 EuGVÜ, JuS 1995, 928f.; Schack, Die grenzüberschreitende Verletzung allgemeiner Urheberpersönlichkeitsrechte, UFITA 108 (1998), 51, 64.
[102]Wüllrich (fn.29), p.70.
[103]v.Hinden (fn.59), pp.80, 81 ate., 82 , 83 ate.; v.Hoffmann (fn.82), art.40 IAGCC mn.59.
[104]Wüllrich (fn.29), p.70; v.Hinden (fn.59), p.80.
[105]Wüllrich (fn.29), ibid., pp.300f.; v.Hinden (fn.59), ibid..
[106]v.Hinden (fn.59), p.81 ate..
[107]v.Hinden (fn.59), p.110.
[108] OLG Celle OLGR 2003, p.43; OLG Düsseldorf AfP 2009, 159; Spickhoff, Persönlichkeitsrechtsverletzungen im Internet: Internationale Zuständigkeit und Kollisionsrecht, IPrax 2011, p.131, p.132; v.Hinden (fn.59), pp.98-101, 110f.; Kropholler (fn.55), sect.53 V.4..
[109]v.Hinden (fn.59), p.88.

The internet's technical structure[110] demands a separate examination of violations of personal rights that are caused by the own information of content-providers and third party information of access- and host-providers.

aaa) Violations of Personal Rights Caused by Content-Providers

Content-providers within the meaning of international private law, are those who create and upload information[111] and is thus different to the definition in German national law (GTMA)[112].

(1) Place of Action

Basically, the place of action of violations of personal rights on the internet is situated where violations of personal rights are carried out.[113] Thus, it has to be examined, where violations of personal rights are carried out on the internet.

The internet is a connection of worldwide spread networks (sub-networks) that consist of computers. These (sub-)networks again are connected among themselves by computers which are connected to more than one of the networks, the so-called „nodes" or „gateways".[114] Because of this structure, the internet forms a grid similar to a spider's web and information can be transferred between origin (uploading computer) and destination (server) over different wires.[115] To transfer information on the internet, the information first get separated into multiple packages and are combined with a protocol which guarantees that they can later be rebuild.[116] Each package then sets off from its origin to its for the destination but has no precise route how to get there. On the contrary, the particular network in which the package currently travels, routes it individually in terms of demand and availability of other networks (routing).[117] Therefore not only information but also the packages as parts of one information happen to be transferred over different routes.[118] To access information on the internet, users have to connect to the internet over a dial-in node and then recall information from a server (recall principle)[119].

Generally speaking, the location of the server, the gateways and the uploading computer are significant transition points of the information. Thus, all of these locations are discussed to establish a place of action.

Some want to establish a place of action at the location of the server and draws a parallel between internet torts and press torts and argues that the location of the server is the place of publication[120] where the violating information is published as recently as users recall it.[121]

Nevertheless, the circumstance that content-providers can choose the server to be anywhere in the world and thus would be able to determine their most favourable law of the place of action (law shopping), argues against that opinion.[122] Furthermore, by defining the location of the server to be the place of action, the place of action and the place of occurrence would be the same in case the destination of the information is not a server but the computer of a specific recipient (inter-individual communication[123]). Moreover, the crucial action of violations of personal rights is that content-providers release information into the internet and thus - in particular because of the routing - let go of the possibility to control the information (ubiquity of information[124]). Therefore, the place of action has to be pinpointed earlier when the content-provider still has control over their information.[125]

Hence, the place of action could be located earlier at the location of the dial-in node or the gateways. But these transition points cannot be controlled and thus disable the content-providers from being able to determine the law of the place of action and from being able to adjust themselves to the law of their place of action.[126] This also constitutes an argument against the location of the server.[127]

By and large, the place of action has to enable content-providers to prepare for the law they are liable under. Besides it has to be within the area that can be controlled by content-providers so that the violating information cannot spread independently. That is why the place of action can only be located at the place where the information is injected to the internet computer - the location of the uploading computer (place of uploading).[128] It is rebuttably presumed at the habitual residence of a natural person[129] and at the seat of a legal person[130]. The conceptual design of the offering does not cause a place of occurrence because its a preparatory act.[131]

(2) Place of Occurrence

Concerning violations of personal rights, the place of occurrence of article 40 paragraph 1 IAGCC is located where the violating information gets recognised by the violated party or

[110] See B II. 3. b) aa) aaa) Place of Action.
[111] Wüllrich (fn.29), p.50; v.Hinden (fn.59), p.9.
[112] See A. IV. 2..
[113] See B II. 3. b) aa) aaa) Place of Action.
[114] Loewenheim/Koch, Praxis des Online-Rechts, Frankfurt/München 1998, p.56; zur Mühlen (fn.98), p.3.
[115] zur Mühlen (fn.98), p.5; Kuner, Internet für Juristen - Zugang - Recherche - Kommunikation - Sicherheit - Informationsquellen, Frankfurt am Main 1996, pp.15-18.
[116] Roth (fn.5), p.7; Münch (fn.5), p.21.
[117] Loewenheim/Koch, pp.28f.; zur Mühlen, Internet: Historie und Technik, Arbeitsberichte des Instituts für Wirtschaftsinformatik der Westfälischen Wilhelms-Universität Münster - Arbeitsbericht Nr. 66, p.3; v.Hinden (fn.59), pp.54, 67.
[118] Kuner (fn.96), p.18; Wanckel (fn.5), p.55.
[119] Wüllrich (fn.29), p.74; v.Hinden (fn.59), p.13f..
[120] LG Düsseldorf, ibid.; Loewenheim/Koch (fn.95), pp.460f..
[121] Loewenheim/Koch (fn.95), ibid..
[122] v.Hinden (fn.59), pp.62f..
[123] See B II. 3. b) bb) aaa) (2) (a) Inter-individual Communication.
[124] Wüllrich (fn.29), p.73; similarly: v.Hinden (fn.59), pp.10f..
[125] v.Hinden (fn.59), pp.63-65.
[126] v.Hinden (fn.59), pp.67f..
[127] v.Hinden (fn.59), pp.65-67.
[128] Wüllrich (fn.29), pp.284f., 306; Münch (fn.5), p.256; Gounalakis/Rhode (fn.4), mn.12; Lütcke (fn.54), pp.128f.; v.Hinden (fn.59), pp.68-71, 77; Kristin (fn.63), p.135; Neu (fn.64), p.40.
[129] Mankowski, Das Internet im Internationalen Vertrags- und Deliktsrecht, RabelsZ 63 (1999), pp.203, 265ff.; v.Hinden (fn.59),p.71; Kristin (fn.63), ibid..
[130] Lütcke (fn.54), p.129.
[131] See B II. 3. b) aa) aaa) Place of Action; especially for violations of personal rights: v.Hinden (fn.59), pp.73-77.

third parties (place of distribution).[132] It remains to be examined, where this place is situated for the different forms of communication on the internet.

(a) Inter-individual Communication

Inter-individual communication between one sender and one recipient mainly occurs through the internet services[133] of electronic-mail (e-mail) or chat[134]. The information exchange is initiated and distributed by the sender (push technology)[135]. The place of distribution is therefore explicitly defined by the sender and the recipient can only access the information that are given to him by the sender. Hence, the place of occurrence is usually situated at the place of residence of the recipient even if the sender does not know about this place.[136]

Nevertheless, problems arise when the recipient receives information at a temporary residence (eg. in a foreign state during holidays). It is then questionable, whether the place of receipt (factual residence) or the place of the intended distribution (habitual residence). A place of receipt other than the habitual residence of the recipient, is not predictable because it can be influenced partially by the recipient that would deny the sender‘s right to determine his liability risk allow the recipient to determine the law of the place of occurrence (law shopping).[137] Thus, in inter-individual communication, the place of occurrence is situated at the habitual residence or seat of the recipient.[138] Exceptions can be made, if the sender knows about the temporary residence.[139]

(b) Public Communication

Public communication between one sender and an unlimited number of recipients mainly happens through the internet services of world wide web (www) and its contents that are visible for every internet user (public) such as guestbook, comments or public forums (eg. isharegossip.de, rottenneighbor.com). The information exchange is initiated and distributed by the recalls of the recipients (pull technology).[140] A notice of the violated party or third parties can only occur after recalling information from the server (recall principle[141]).[142]

(aa) Places of Recallability

Thus, the location of every recalling computer basically constitutes a place of occurrence (places of recall). Nevertheless, the factual number of recalls cannot be fixed definitely due to technical disabilities[143] and problems with data protection[144]. Moreover, it has to be mentioned that the sender loses control of the distribution of information the minute he uploads them to the internet.[145] It has also to be considered that users are able to conceal or manipulate their place of recall. Hence, the place of recall does not cope with the structure of the internet, which is why the place of the possible distribution (places of recallability) has to be implied as the basic place of occurrence.[146] Due to the internet‘s global networking[147], this leads to worldwide places of occurrence (multi-state tort[148]) in public communication. Hence, legal systems all around the world would be applicable and the violated party would be able choose the most favourable law (law shopping) which simultaneously would be the most unfavourable law for content-providers. Consequently, content-providers would be exposed to a „global liability risk“.[149]

(bb) Correction

Therefore, it is generally accepted that this result has to undergo a correction.[150] Nonetheless how to do this is highly controversial. Different approaches can be allocated to five main theories:

The first theory does not distinguish a place of action and a place of occurrence but determines the applicable law in accordance with the lex fori.[151]

The second theory reduces the places of occurrence to a single location by examining where the most severe violation of personal rights exists (theory of one core area).[152] Some representatives of this theory reduce the places of occurrence further by demanding that the place of occurrence is part of the „intended distribution area“.[153]

The third theory reduces the places of occurrence to multiple locations by detaching locations of light or insignificant violations from those of severe violations of personal rights (theory of core areas). Some representatives of this theory determine the core areas by requiring that the location belongs to the intended distribution and that the violated party has a „special relation“ to it.[154] Other authors utilise these requirements progressively.[155] Some reduce the places of occurrence to the intended distribution.

The fourth theory does not reduce the places of occurrence but limits the range of the claims that can be lodged at them:

[132] See B II. 3. b) aa) bbb) Place of Occurrence.
[133] The various possibilites of using the internet are referred to as „services“.
[134] Important forms: IRC, Webchat (facebook chat), Instant Messaging (QQ, ICQ, MSN) and Voicechat (Skype).
[135] Roth (fn.5), p.223; v.Hinden (fn.59), p.112.
[136] Neu (fn.64), p.46; Kristin (fn.63), p.148; v.Hinden (fn.59), p.114.
[137] Wurmnest (fn.76), art.40 IAGCC mn.78; v.Hoffmann (fn.82), art.40 IAGCC mn.63.
[138] Neu (fn.64), p.46; Kristin (fn.63), p.148; Wurmnest (fn.76), ibid.; Junker (fn.62), art.40 IAGCC mn.81.
[139] v.Hinden (fn.59), p.116.
[140] Neu (fn.64), p.43 ate.; v.Hinden (fn.59), p.118.
[141] See B. II. 3. b) bb) aaa) (1).
[142] See B II. 3. b) aa) aaa) Place of Action.
[143] Roth (fn.5), pp.235-237; Neu (fn.64), pp.43, 44; v.Hinden (fn.59), pp.121-125.
[144] Roth (fn.5), pp.237-240; v.Hinden (fn.59), pp.125-129.
[145] Neu (fn.64), p.44.
[146] Roth (fn.5), pp.242f.; Neu (fn.64), p.43; v.Hinden (fn.59), p.139.
[147] See B II. 3. b) aa) aaa) Place of Action.
[148] Riegl, Streudelikte im internationalen Privatrecht, Augsburg 1986, pp.4f..
[149] Münch (fn.5), pp.257, 258.
[150] Münch (fn.5), p.257 wfr..
[151] Wagner, Ehrenschutz und Pressefreiheit im europäischen Zivilverfahrens- und Internationalen Privatrecht, RabelsZ 62 (1998), p.243, pp.279ff..
[152] Neu (fn.64), pp.105-139; Kristin (fn.63), pp.154-181; v.Hoffmann (fn.82), art.40 mns.26 ate., 66; v.Hoffman/ Thorn (fn.56), sect.11 mn.32.
[153] v.Hinden (fn.59), pp.186f..
[154] Lütcke (fn.54), pp.135f..
[155] Gounalakis/Rhode (fn.4), mns.20f..

The violated party can choose every place of occurrence, however it can only claim those damages at each place of occurrence which happen there (distributive application of law[156]). The full range of damage can only be lodged at the place of action (mosaic theory).[157]

The fifth theory combines the theory of core areas and the mosaic theory by reducing the places of occurrence to those of severe violations of personal rights and limiting the range of the damages that can be lodged at them to those that happen there (combination theory). Parts of this theory determine the core areas of violations of personal rights by demanding that the violated party holds a certain prominence at the location.[158] Other parts determine them by imposing a duty of determination on the violated party that constitutes a correlate to his right of choice[159].[160]

(cc) Discussion of the Opinions

The first theory bears the the advantage that international private law and the law of international jurisdiction act in accordance.[161] By doing so, it virtually abolishes international private law and disrespects its regulatory content. Moreover, from a today's point of view this opinion is contradictory to the evaluation of article 1 paragraph 2 letter g Rome II[162] that explicitly forbids a EU's competence concerning the determination of the applicable law in case of violations of personal rights. Therefore, the first theory is to object.

The theory of one core area has the advantage that it pinpoints one place of occurrence and thus leads to a practicable handling of legal disputes and legal certainty.[163] However, the reduction of the places of occurrence to a single location bears the risk of becoming determinable by violators (content-providers) and thus of causing the most favourable law for them (law shopping). Moreover, the reduction to a single place of occurrence leads to practicability at the expense of the protection of the violated party because locations that contain even slightly less severe violations of personal rights are ignored.[164] Therefore a solution can only be found in theory that grants multiple places of occurrence.

The theory of core areas allows many places of occurrence and therefore protects the violated party. Yet it does not limit the range of the damages that can be claimed at these places and thus enables the violated party to lodge every violation of personal rights at the location that grants the most favourable law. This contains a great liability risk for content-providers and does not lead to legal certainty.[165]

The mosaic theory is able to create legal certainty because each violation of personal rights is judged according to the law that exists in the place of the violation. The violated party cannot claim all damages at the location that grants the greatest amount of personal rights or the most distinctive personal rights. Each violation of personal rights is assessed according to the historical and cultural backgrounds of the state that grants them.[166] This leads to legal certainty for both the violator and the violated party.[167] Furthermore, it makes the mosaic theory a just tool to balance the interests of both parties involved: the violated party is enabled to claim the damages of all countries but the violator is only liable according to the law that is affected.[168] Moreover, the mosaic theory is applied by the European Court of Justice (ECJ) in terms of jurisdiction.[169] The allegation that the mosaic theory disrespects the character of personal rights because they are not territorially divisible[170], can be objected by the fact that personal rights update and locate at the location of the violation the time they got violated.[171] The problem of the mosaic theory is that it lacks practicability as a result of numerous and worldwide spread places of occurrence.[172]

(dd) Assessment and Conclusion

The root of the excessive discussion is the conflict between the violated party's interest of just protection and the violator's interest of legal certainty: The violated party does not want to be violated and if she gets violated, she wants to be granted legal protection that compensate its violations. The violator does not want to be liable or at least wants to know which law determines its liability, so that he can prepare himself for the consequences.

A partial legal representation of the violated party's interest would allow her to choose the place of occurrence at any place of recall and lodge all claims there. An absolute legal representation of the violator's interest would allow her to determine the place of occurrence and therefore to be only liable at the place of action, which is under the control of the violator and inside of his territorial area.

None of these extremes can be justified, a balance has to be found. The theories of core areas try to find that balance by reducing the places of occurrence (quantitative restriction). The more places of recall are excluded from the places of occurrence, the more the theories lead to legal certainty and practicability but the more they also deprive the violated party of her protection in the denied states. In case of excluding only few places of recall from the places of occurrence, the violated party is favoured by these theories. If many places of recall are excluded, the violator is favoured. A balance can hardly be found. The mosaic theory tries to balance the interests by limiting the range of claims that can be lodged at the places of occurrence (qualitative limitation). By doing this, it leads to legal certainty and just protection of the violated party. Overall, the

[156] Wüllrich (fn.29), p.289.
[157] Mankowski, (fn.110) p.203, pp.270f.; Junker (fn.62), art.40 IAGCC mn.79; Wurmnest (fn.76), art.40 mn.77; Rauscher (fn.55), mns.1265f.; Kropholler (fn.55), sect.53 V.4.; Kegel/Schurig (fn.56), sect.18 IV.1.b); for jurisdiction: ECJ C-68/93, Fiona Shevill et al. vs Presse Alliance SA (NJW 1995, 1881).
[158] München (fn.5), p.258.
[159] See B II. 3. a) Basic Rule.
[160] Wüllrich (fn.29), pp.303-306.
[161] Wagner (fn.131), p.243, p.285.
[162] See B I. Qualification of Violations of Personal Rights on the Internet.
[163] v.Hoffmann (fn.82), art.40 IAGCC mn.62.
[164] Wüllrich (fn.29), p.297.
[165] Wüllrich (fn.29), p.295.
[166] See Introduction.
[167] Wüllrich (fn.29), pp.300f..
[168] Wüllrich (fn.29), p.301.
[169] ECJ C-68/93, Fiona Shevill et al. vs Presse Alliance SA (NJW 1995, 1881).
[170] v.Hoffmann (fn.82), art.40 IAGCC mn.60.
[171] See B II. 3) b) aa) bbb) Place of Occurrence.
[172] Wüllrich (fn.29), pp.303f..

mosaic theory creates a balance between interests of the violated party and the violator.

Nevertheless, the interest of practicability has also to be considered: The separate examination of all the violations' different laws is complex and makes the mosaic theory impracticable. Hence, the combination of the mosaic theory's qualitative limitation, that provides just protection and legal certainty, and the theory of core areas' quantitative restriction which provides practicability, can create a solution that considers not only idealistic interests but also practicable interests. Such a theory firstly reduces the places of occurrence to the core areas of violations of personal rights and secondly limits the range of the claims that can be lodged at them to those claims which happen there.

This conclusion is also made by the combination theories. Nonetheless, it is questionable whether a „certain prominence"[173] or a „duty of determination"[174] of the violated party constitutes the determining factor of the core areas. The requirement of a certain prominence of the violated party in the place of occurrence has to be declined.[175] A duty of determination of the violated party may constitute a harmonious addition to the right of choice[176] of article 40 paragraph 1 IAGCC[177] but it favours the violated party by letting her choose the applicable law and thus leads to law shopping. This problem is limited by the combination with the mosaic theory but it is not eradicated completely because the violated party can still choose from her place of occurrence from all of them.[178] Moreover it is not defined how many places are allowed to be determined by the violated party. Hence, the quantitative reduction needs to be done with the help of an impartial factor. At this point, the results of the examination of the places of occurrence concerning general violations of personal rights have to be reminded: Only places of distribution that are predictable can constitute places of occurrence (places of intended distribution).[179]This factor can impartially be defined by the language or subject of the information. The fact, that it can lead to many places of occurrence has to be accepted by content-providers because that constitutes a general risk of the internet.

Therefore, the places of occurrence of violations of personal rights on the internet in public communication have to be determined by a combination of the mosaic theory and the intended distribution.

(c) Limited Communications

Limited communication between one sender and a restricted number of recipients takes place through access restricted services such as mailing list, newsletters, newsgroups, conference chats, forums and social networks that require a registration or subscription (eg. QQzone, facebook). Basically these restrictions do not have an influence on the determination of the places of occurrence through the combination of the mosaic theory and the intended distribution, which means that the place of the intended distribution does not get defined by the restricted number of members.[180] Nevertheless, exceptions can be made if the restrictions do consist of a controlled identification (eg. through the proof of identity).

bbb) Violations of Personal Rights Caused by Access- and Host-Providers

Access- and host-providers do not create violating information but handle information of content-providers (third party information): Access-Providers ensure the connection to the internet and the information exchange on it.[181] Host-Providers save and keep contents ready on their servers.[182] Therefore, access- and host-providers could be liable for handling information of content-providers (of third parties) in terms of substantive law[183]. That is why, international private law has to determine the applicable law for access- and host-providers.

The determination of the liability of access- and host-providers could act in accordance to that of content-providers (accessory determination)[184] or could have to be determined independently (independent determination)[185].

An accessory determination avoids further examinations of the access- and host-providers' international private law and therefore boosts procedural economy. Moreover, the violated party does not get overwhelmed by an complex correlation of laws.[186] In contrast, an independent determination leads to the advantage, that another legal system is responsible for the liability of access- and host-providers, in case the legal system that evaluates the liability of content-providers is not satisfying.[187] Furthermore, the determination of the content-providers' place of action is the most technically challenging and the access- and host-providers do not have an influence on it.[188] That is why, the access- and host-providers' international private law has to be determined independently.

The access- and host-providers' place of action has to be determined according to the last chance of control, whether this is a action or a non-act.[189] Thus, it can be located at the place where the access- and host-providers' actions are managed (place of the centre of decisions).[190] Basically, this is the natural person's habitual residence[191] and the legal person's seat[192]. This is rebuttably presumed.[193]

[173] Münch (fn.5), p.258.
[174] Wüllrich (fn.29), pp.303-306.
[175] See B II 3. b) aa) bbb) Place of Occurrence.
[176] See B II 3. a) Basic Rule.
[177] Wüllrich (fn.29), p.305.
[178] Wüllrich (fn.29), p.219.
[179] See B II. 3) b) aa) bbb) Place of Occurrence.
[180] v.Hinden (fn.59), p.197.
[181] Wüllrich (fn.29), pp.51f.; Münch (fn.5), p.26; Gounalakis/Rhode (fn.4), mn.290.
[182] Wüllrich (fn.29), pp.52f.; Gounalakis/Rhode (fn.4), mn.278; v.Hinden (fn.59), p.9.
[183] See A IV. On the Internet: Responsibility of Content-, Access- and Host-Providers.
[184] Lütcke (fn.54), p.140.
[185] Neu (fn.64), p.147; Kristin (fn.63)a, p.136; v.Hinden (fn.59), pp.201, 206.
[186] Kristin (fn.63), p.136.
[187] Kristin (fn.63), p.137.
[188] Kristin (fn.63), pp.136f.; v.Hinden (fn.59), 201.
[189] Neu (fn.64), pp.144-147.
[190] Gounalakis/Rhode (fn.4), mn.13; v.Hinden (fn.59), p.203; v.Hoffmann (fn.82), art.38 IAGCC mn.482.
[191] v.Hinden (fn.59), pp.203f..
[192] Mankowski (fn.131), p.243, p.287; Gounalakis/Rhode (fn.4), mn.13; Junker (fn.62), art.40 IAGCC mn.75; v.Hoffmann (fn.82), art.40 IAGCC mn.58; Wurmnest (fn.76), art.40 IAGCC mn.71.

The places where violations of personal rights occur are not influenced by the access- and host-providers' actions, which is why the places of occurrence stay the same.[194]

4. Article 40 Paragraph 3 IAGCC: Proviso

At last, the proviso of article 40 paragraph 3 IAGCC has to be considered. It limits the claims that are governed by the law of a foreign state if these claims fundamentally and obviously object to German legal principles.[195] This rule primarily prevents the injured party from receiving claims for compensation that contravene the German rule against unjustified enrichment[196].[197] By doing so, article 40 paragraph 3 IAGCC forms a „special regulation of the ordre public" set forth in article 6 IAGCC.[198]

5. Article 41 IAGCC: Substantially Closer Connection

Article 41 paragraph 1 IAGCC differs from the basic principle of article 40 paragraph 1 IAGCC by declaring that the law of another state shall apply if the facts of the case feature a „substantially closer connection" with the law of that state. Paragraph 2 thereafter gives examples („in particular") for a substantially closer connections. Paragraph 2 number 1 regulates that „a special legal or factual relationship between the persons involved" which is linked to the violation of personal rights may constitute a substantially closer connection (accessory connection)[199].

6. Articles 40-42 IAGCC: Legitimacy of a Renvoi

According to article 4 paragraph 1 sentence 1 IAGCC, articles 40-42 IAGCC basically refer to the entire legal system of another state which consists of its international private law and substantive law.[200] Article 4 paragraph 1 sentence 1 at the end (ate.) IAGCC makes an exception to this rule „insofar as this is not incompatible with the meaning of the referral". This exception applies to article 41 paragraph 1 IAGCC[201] and article 41 paragraph 2 number 1 IAGCC (accessory connection)[202]. Furthermore article 4 paragraph 2 IAGCC excludes a renvoi in case of choices of law like article 42 IAGCC[203].

Article 40 paragraph 1 sentence 1 IAGCC includes a renvoi.[204] The option of article 40 paragraph 1 sentences 2,3 IAGCC only takes effect on the layer of international private law and allows the violated party to choose between the two alternatives - place of action and place of occurrence - of article 40 paragraph 1 IAGCC that both include a renvoi. Hence, article 40 paragraph 1 sentences 2,3 IAGCC do not constitute a choice of law similar to article 42 IAGCC and article 4 paragraph 2 IAGCC is not applicable.[205] The violated party has to choose the law of the place of occurrence. Therefore, the laws which are determined in this way, have to be applicable in the end. Hence according to article 4 paragraph 1 sentence 1 ate. IAGCC, a renvoi is incompatible with the meaning of the referral of article 40 paragraph 1 sentences 2,3 IAGCC.[206] Moreover, this serves the procedural economy.[207]

III. Section 3 GTMA: Influence of the State of Origin Principle towards International Private Law

Section 3 GTMA, that is based on article 3 EUECD, says that providers „established in the Federal Republic of Germany and their telemedia shall also be subject to the provisions of German law if the telemedia are commercially offered or provided in another state" of the EU. Because of this formulation it is questionable, whether section 3 GTMA is only part of Germany's substantive law or has an influence ob Germany's international private law and thus articles 40-42 IAGCC in favour of the state of origin principle or part of Germany's substantive law.

Owing to the explicit note in section 1 paragraph 5 IAGCC, which is based on article 1 Nr.5 EUECD, that says that the GTMA „does not stipulate rules in the field of international private law", it is generally believed that section 3 GTMA is part of Germany's substantive law and does not influence the regulatory content of articles 40-42 IAGCC.[208] Moreover, this would cuase an indirect influence of EU law on the legal evaluation of violations of personal rights which is objected by article 1 paragraph 2 letter g Rome II.

Nevertheless, this legal question will soon be answered by the ECJ that currently deals with this question after the FCJG submitted it to him.[209]

IV. Results of the Examination of German International Private Law

International private law handles international violations of personal rights on the internet (multi-state torts) by applying the law of the place of action or the law of the place of occurrence which gets determined by cutting back the possible places of occurrence with the help of a quantitative reduction (intended distribution) and a qualitative limitation (mosaic theory).

C German Law of International Jurisdiction

The law of international jurisdiction aims at defining the places of jurisdiction of a case that touches the legal systems of more

[193] v.Hinden (fn.59), pp.203f..
[194] Neu (fn.64), p.148; Kristin (fn.63), p.153; v.Hinden (fn.59), pp.204-206.
[195] Rauscher (fn.55), mn.1297.
[196] Like „treble damages" or „punitive damages" in the law of the United States of America.
[197] Rauscher (fn.55), ibid.; Kropholler (fn.55), sect.53 IV.6..
[198] Rauscher (fn.55), mn.1296; Kropholler (fn.55), ibid..
[199] Kropholler (fn.55), sect.53 IV.4..
[200] BT-Drucksache 14/343 pp.8, 15.
[201] Junker (fn.62), art.41 IAGCC mns.25, 26.
[202] Junker (fn.62), art.41 IAGCC mn.27.
[203] Junker (fn.62), art.42 IAGCC mn.29.
[204] Junker (fn.62), art.40 IAGCC mn.120; Rauscher (fn.55), mn.1252.
[205] Junker (fn.62), art.40 IAGCC mn.121; Rauscher (fn.55), mn.1260.
[206] Junker (fn.62), ibid..
[207] Gounalakis/Rhode (fn.4), mn.35.
[208] Wüllrich (fn.29), p.359; Münch (fn.5), p.254; Wurmnest (fn.76), art.40 IAGCC mn.80.
[209] ECJ C-509/09, eDate Advertising vs X (submitted by BGH EuZW 2010, 313).

than one state.[210] Thus, it is essential in the global world of the internet. The law of international jurisdiction needs to be defined exactly because it does not provide a referral in case of incompetence[211] and the German law of international jurisdiction is regulated in multiple sources of law.

I. Sources of Law

1. European Union: The Brussels Convention and the Brussels I Regulation

The law of the European Union (EU) provides two sources of law that can apply in terms of international jurisdiction concerning violations of personal rights on the internet: the Brussels Convention (Brussels C) and the Brussels I Regulation (Brussels I). According to articles 66, 68 paragraph 1 Brussels I, Brussels I replaced Brussels C for proceedings instituted on 1 March 2002 or after that date. In case of proceedings instituted before 1 March 2002, Brussels C is still applied. Nevertheless, the regulatory content of Brussels C and Brussels I is, in most instances, the same.[212] Concerning international jurisdiction for violations of personal rights on the internet, the essential regulations of Brussels C are identical to those of Brussels I.[213] That is why Brussels I has to be examined and the results can be transferred to Brussels C.

Brussels I applies within the European Union.[214] It takes precedence over national regulations[215] and therefore it is applied in most cross-border cases[216]. It applies if, according to article 1 paragraph 1, a civil or commercial matter exists that is not excluded by article 1 paragraph 2 and, according to article 3 paragraph 1, the defendant domiciles in a members state of the EU. The decision whether a civil or commercial matter exists is made autonomously by the EU[217] whereas national law (lex fori) has to decide the defendant‘s domicile according to article 59[218]. In case of a company or other legal person, a statutory seat, central administration or principle place of business inside the EU replaces the domicile of natural persons, article 60 paragraph 1[219]. This requirement is autonomously evaluated by the EU.[220]

If these criteria are matched, article 2 paragraph 1 Brussels I sets a general place of jurisdiction at the defendant‘s domicile, regardless of his nationality. Every possible claim for violations of personal rights can be lodged before the courts of this location.[221] But article 2 paragraph 1 only regulates international jurisdiction, local jurisdiction has to be defined by national procedure law (lex fori).[222]

Moreover, article 5 number 3 Brussels I, sets a special place of jurisdiction for torts at the place where the harmful event occurred in case the defendant domiciles in a member state different to the member state of jurisdiction. Only tort-related claims can be lodged before the courts of this location[223] and no accessory jurisdiction is granted[224]. Claims of unjust enrichment are excluded from the scope.[225] In contrast to article 2 paragraph 1, article 5 number 3 regulates international and local jurisdiction and no national law (lex fori) has to be applied.[226]

The special place of jurisdiction exists alongside of the general place of jurisdiction. The complainant can chose between the two of them.[227]Articles 23 and 24 Brussels I allow the parties to make an agreement concerning the international jurisdiction between them (prorogation).[228]

2. European Economic Area: The Lugano Convention

The Lugano Convention (LC) applies to the members of the European Economic Area (EEA) but, according to article 54b number 1 LC, does not influence relations between the member states of Brussels C, and thus Brussels I which replaced Brussels C[229]. LC equals Brussels I in its regulatory content concerning jurisdiction for violations of personal rights on the internet, which is why a separate examination is not necessary.[230]

3. Worldwide: The GCCP

If neither Brussels C or Brussels I nor LC applies (outside the EU and EEA) to set international jurisdiction for violations of personal rights on the internet, national law regulates international jurisdiction.[231]

German national law does not explicitly regulate international jurisdiction, yet rules of the German Code of Civil Procedure (GCCP) that determine the local jurisdiction are extended to also include international jurisdiction.[232] Therefore, sections 12, 13 GCCP set a general place of jurisdiction at the defendant‘s domicile for natural persons and sections 12, 17 GCCP set a general place of jurisdiction at the defendant‘s seat for legal persons whereas section 32 GCCP sets a special place of jurisdiction for torts at the district in which the performance was committed. General and special place of jurisdiction exist parallel, the complainant is allowed to choose between

[210] Roth (fn.5), p.58; Kropholler, Europäisches Zivilprozessrecht - Kommentar, 8.Auflage, Frankfurt am Main 2005, sect.58 I.2..
[211] Grunsky, Zivilprozessrecht, 13.Auflage, Bielefeld 2008, mn.68 ate..
[212] Rauscher (fn.55), mn.1601.
[213] Articles 2 paragraph 1, 5 number 3 Brussels C are identical to those of Brussels I.
[214] Although article 1 paragraph 3 Brussels I excludes Denmark from its field of application, Denmark signed an agreement which has the same regulatory content as Brussels I on the 01.07.2007 (OJ EU 2005 L 299/62).
[215] Rauscher (fn.55), mn.1600; Grunsky (fn.191), mn.68.
[216] Schack, Internationales Zivilverfahrensrecht, 4.Auflage, Kiel 2006, mn.234 irw. mn.235 ate..
[217] Rauscher (fn.55), mn.1604.
[218] Article 59 paragraph 1 Brussels I is identical to article 52 paragraph 1 Brüssels C.
[219] According to article 53 paragraph 1 Brussels C only the seat of a company or legal person is sufficient.
[220] Rauscher (fn.55), mn.1640.
[221] Rauscher (fn.55), mn.1648.
[222] Rauscher (fn.55), mn.1649.
[223] ECJ 189/87, Kalfelis vs Bankhaus Schröder, Münchmeyer, Hengst & Co; Rauscher (fn.55), mns.1684-1686.
[224] ECJ ibid.; Rauscher (fn.55), mn.1687.
[225] Kropholler (fn.190), art.5 mn.75; Rauscher (fn.55), mn.1686.
[226] Rauscher (fn.55), mn.1683.
[227] Rauscher (fn.55), mn.1651.
[228] Articles 17f. Brussels C are similar.
[229] See C I. 1. European Union: The Brussels Convention and the Brussels I Regulation.
[230] Articles 2 paragraph 1 and 5 number 3 LC are equal to those of Brussels I except for their addressees.
[231] Rauscher (fn.55), mns.2013-2015; Grunsky, mn.68.
[232] Rauscher (fn.55), mn.2023; Grunsky, ci..

them.[233]Section 38 GCCP enables the parties to make an agreement concerning the international jurisdiction between them (prorogation).

II. Determination of the Special Places of Jurisdiction

The special places of jurisdiction are abstract and thus need to be determined further.

1. Article 5 number 3 Brussels I/Brussels C/LC

At first, „the place where the harmful event occurred" of article 5 number 3 Brussels I also seems to be easily identifiable. One might think that the harm could only occur at a single place. But this only applies to violations of personal rights whose place of action and place of occurrence is situated in a single state (local tort).[234] In contrast, the „place where the harmful event occurred" is questionable in case the place of action and place of occurrence are situated in different states (distance tort): The „harmful event" could be the action of the violator that causes violations of personal rights at the place of action as well as the occurrence of these violations at the place of occurrence.[235] Both places can „constitute significant connecting factors from the point of view of the jurisdiction"[236] and „be particularly helpful from the point of view of the evidence and of the conduct of the proceedings"[237]. Furthermore article 5 number 3 Brussels I needs to be interpreted in such a wide way because it „covers a wide diversity of claims".[238] On the one hand, the exclusion of the place of occurrence would often lead to a coincidence of the remaining place of action of article 5 number 3 Brussels I and the place of the defendant's domicile of article 2 paragraph 1 Brussels I and therefore deprive article 5 number 3 Brussels I of its regulatory content. On the other hand, the exclusion of the place of occurrence would deny complainant a „helpful connecting factor with the jurisdiction of a court particularly near to the cause of damage".[239] Therefore, both the place of action and the place of occurrence are covered by article 5 number 3 Brussels I („principle of the scene of an offence"[240]) and both can basically determine its special place of jurisdiction („principle of ubiquity"[241]), yet the complainant has to choose between one of them („limitation of the principle of ubiquity"[242]).[243]

a) Comparability of International Private Law and the Law of International Jurisdiction

As in the case of article 40 paragraph 1 IAGCC[244], the scene of the offence, which consists of the place of action and the place occurrence, determines the collision of laws. Thus, it is questionable, whether the results of article 40 paragraph 1 IAGCC can be adopted to article 5 number 3 Brussels I or have to be identified separately.

Basically both international private law and the law of international jurisdiction are confronted by a collision of laws. International private law faces the challenge to determine the right out of multiple substantive laws, whereas the law of international jurisdiction deals with the challenge of determining right jurisdictions.[245] Moreover, International private law and the law of international jurisdiction aim to achieve legal certainty and consistency.[246]

Nevertheless, the law of international jurisdiction favours the defendant's interests of a nearby jurisdiction in contrast to the international private law's neutrality in finding the „closest connection" between the facts of the case and the substantive laws.[247] In addition, the law of international jurisdiction allows multiple competing jurisdictions, whereas international private law searches the one right substantive law and wants to avoid the application of multiple substantive laws.[248]

Hence, the initial situation of international private law and the law of international jurisdiction might resemble, but the underlying interests diverge.[249] That is why the international private law's determination of the scene of an offence cannot be adopted by the law of international jurisdiction and its determination of the scene of an offence.[250] Thus, the scene of an offence of article 5 number 3 Brussels I has to be determined separately, but some basic principles that are not based on the international private law's and the law of international jurisdiction's diverging interests can be adopted.

b) Violations of Personal Rights Caused by Content-Providers

aa) Place of Action

In case of violations of personal rights, the place of action of article 5 number 3 Brussels I is situated where the action that caused the violations took place.[251] On the internet, the location of the server, the location of the gateways and the location of the uploading computer are significant transition points of the information and could thus constitute a place of action.[252]

[233] Grunsky (fn.191), mn.65.
[234] Rauscher (fn.55), mn.1688.
[235] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mns.13f.; Roth (fn.5), p.168; Rauscher (fn.55), mn.1691; Kropholler (fn.190), art.5 mn.81.
[236] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mn.15.
[237] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mn.17.
[238] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mn.18.
[239] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mns.20f..
[240] Spickhoff (fn.90), p.131, pp.131f.; Wüllrich (fn.29), p.204.
[241] Wüllrich (fn.29), ibid..
[242] In case of international private law: Rauscher (fn.55), mn.1255.
[243] ECJ C-21/76, Bier vs Mines de potasse d'Alsace (NJW 1977, 493), mns.24f.; Rauscher (fn.55), ibid.; Kropholler (fn.190), ibid..
[244] See B II 3. a) Basic Rule.
[245] Roth (fn.5), p.74.
[246] Roth (fn.5), pp.76f..
[247] Roth (fn.5), pp.78f..
[248] Roth (fn.5), pp.79f..
[249] Roth (fn.5), pp.85f..
[250] Roth (fn.5), pp.85f..
[251] Nagel/Gottwald, Internationales Zivilprozessrecht, 6.Auflage, Köln 2007, sect.3 mn.68; Kropholler (fn.190), art.5 mn.81.
[252] See B II 3. b) aa) aaa) Place of Action.

The law of international jurisdiction needs to be close to the case and its evidences. Therefore every act, not only those that cause liability, are potential places of action. Even preparatory acts can serve the law of international jurisdiction's interest of a proximity.[253] Nevertheless, these potential places of action also have to be limited to essential acts, because the place of action has to provide information to assess the case. Hence, not every act - in particular preparatory acts - can constitute a place of action. To make sure that only places of action are determined that contribute information about the case it is necessary to connect the place of action with direct physical actions of the violating party.[254] That is why the automatic operations (location of the server and the gateways) of the internet after the physical action of the violator cannot constitute a place of action.[255] Moreover, the law of international jurisdiction protects the defendant by avoiding that he gets taken to court at places that are not reasonable.[256] Therefore, the places of action are limited to places that can be influenced by the defendant's behaviour. This also leads to the exclusion of the location of the server and the gateways.[257]

Concerning the acts that relate to the internet, only the place of uploading corresponds to these requirements.[258] In case of businesses that are based on the division of labour, the place of upload has to be changed to the „place of the decision about the publication".[259] These places have to be rebuttably presumed at the natural person's habitual residenceand the legal person's seat.[260]

Furthermore, it is questionable, whether preparatory acts cause places of action. On the on hand, preparatory acts often consist of multiple acts and thus would constitute multiple places of action which would lead to legal uncertainty.[261] On the other hand, the violating information are created at the places of preparatory acts. Moreover, preparatory acts cannot be manipulated as easily as the place of upload.[262] At last, the law of international jurisdiction allows multiple places of action without the risk of legal uncertainty.[263] Therefore, preparatory acts constitute places of action. As mentioned, above they have to match certain criteria in terms of concrete and case-related actions. Hence, only preparatory acts that prepare a concrete violation of personal rights constitute a place of action (place of creation).

bb) Place of Occurrence

In case of violations of personal rights, the place of occurrence of article 5 number 3 Brussels I is located at the place, where the violation steps in.[264] At this moment, abstract personal rights become tangible.[265]Thus, personal rights are violated the moment the information is recognised by the violated party or third parties (place of distribution).[266] To define this place on the internet, it is required to distinguish between the different forms of communication.

aaa) Inter-individual Communications

In inter-individual communications, the place of occurrence is basically located at the place where the recipient recalls the information (place of recall). Usually this is the place of the habitual residence of natural persons and the place of the seat of legal persons.[267]

Problematic is the question, whether the place of recall has to be limited to the place of habitual residence in case the sender intends the recipient to receive the information there but the recipient recalls the information at a temporary residence.

In favour of the place of recall speaks the argument that the violated party holds an interest of the place of occurrence being close to her.[268] Against the place of recall and argues the circumstance, that the sender cannot influence the place where the recipient recalls the information.[269] One could say that this is the usual risk of the ubiquity of information on the internet. Nevertheless, in individual communications, the sender unambiguously defines the recipient and the intended place of distribution. Moreover, the connection to the place of recall would virtually grant the recipient the opportunity of choosing his forum (forum shopping). Thus, the place of occurrence in individual communications has to be changed from the place of recall to the place of the habitual residence in case the recipient resides at a temporary residence.

An exception of this rule is made, if the defendant does not know about the habitual residence of the complainant. Here, the place of recall constitutes the place of occurrence.[270]

bbb) Public Communications

In public communications on the internet, places of occurrence are basically set worldwide.[271] However, it is generally accepted that they have to be limited because worldwide places of jurisdiction would discriminate against the defendant by enabling the complainant to choose his most favourable forum (forum shopping)[272] whereas the reduction of the places of

[253] Roth (fn.5), pp.193f..
[254] Roth (fn.5), pp.193-196.
[255] Roth (fn.5), pp.196f..
[256] See C II. 1. a) Comparability of International Private Law and Law of International Jurisdiction; Roth (fn.5), pp. 200-205.
[257] Roth (fn.5), p.205.
[258] Spickhoff (fn.90), p.131, p.132; ; Nagel/Gottwald (fn.231), sect.3 mn.71; v.Hoffmann (fn.82), art.40 mn.101.
[259] Roth (fn.5), pp.198, 205.
[260] Roth (fn.5), pp.206-211.
[261] Wüllrich (fn.29), p.231.
[262] Mankowski (fn.110), p.243, pp.262ff..
[263] See C II. 1. a) Comparability of International Private Law and the Law of International Jurisdiction; Roth (fn.5), p.188.
[264] Nagel/Gottwald (fn.231), sect.3 mn.68; Kropholler (fn.190), art.5 mn.81.
[265] See B II. 3. b) aa) bbb) Place of Occurrence; Roth (fn.5), pp.214-221.
[266] See B II. 3. b) aa) bbb) Place of Occurrence; Roth (fn.5), p.221.
[267] See B II. 3. b) bb) aaa) (2) (a) Inter-individual Communication.
[268] See C II. 1. a) Comparability of International Private Law and the Law of International Jurisdiction.
[269] Roth (fn.5), p.228.
[270] Roth (fn.5), p.231.
[271] See B II. 3. b) bb) aaa) (2) (b) Public Communication.
[272] Schütz, Deutsches Internationales Zivilprozessrecht unter Einschluss des Europäischen Zivilprozessrechts, 2.Auflage, Berlin 2005, mns.114-121; Köhler/Arndt/Fetzer, Recht des Internet, 5.Auflage, Stuttgart/ Mannheim 2006, p.277.

occurrence to a single one would deprive the complainant of his right of a fair trial[273].

One opinion wants to reduce the places of occurrence by requiring a qualifying factor (quantitative reduction[274])[275], whereas another opinion wants to limit the jurisdiction at the places of occurrence to the part of the damages that occurred in that state (mosaic theory) (qualitative limitation[276]).[277]

Against a qualitative limitation respectively the mosaic theory speaks the fact, that it leads to multiple proceedings and thus is not economical and stresses the complainant who has to lead proceedings in many different countries at the same time.[278] By doing this, article 5 number 3 Brussels I would cause a fragmentation of cases and jurisdictions which fosters legal discrepancies, although Brussels I aims to avoid such things.[279] Furthermore, the application of the mosaic theory virtually cancels the principle that the place of action and the place of occurrence of article 5 number 3 Brussels I are equally applied (principle of ubiquity). In addition, even the mosaic theory enables the complainant to choose his most favourable forum, yet makes it less beneficial.[280]

Against a quantitative reduction argues the circumstance, that it allows the complainant to choose his most favourable jurisdiction law and lodge all damages there. However, this disadvantage can be eradicated by requiring a qualifying factor that reduces the places of occurrence to those that provide a balance between the complainant‘s and defendant‘s interests.

It remains to be examined, which that qualifying factor is. The reduction to the places where the information virtually gets recalled (place of factual recalls[281]) is not technically accomplishable. Similarly, the place that unites the most recalls (quantitative core area) fails to be defined due to technical reasons. A reduction to places where the violated party holds a reputation needs to be rejected because violations of personal rights can equally occur to parties that hold no such reputation. Furthermore, a reduction to the violated party‘s relations to place of occurrence misjudges the possibility that violations of personal rights can be caused in addition to the relations of the violated party.[282]

From this it follows, that the qualifying factor that reduces the places of occurrence needs to be an abstract one, which can be adjusted to the particular case. The factor has to exclude insignificant places to secure the defendant‘s interest of a close connection of jurisdiction and the case and evidences while including significant places to serve the complainant‘s right to judicial review.[283] Hence, a „qualified connection to the state of the place of occurrence“ has to be established.[284]

ccc) Limited Communications

In limited communications on the internet, the places of occurrence are also basically determined through a „qualified connection to the state“.[285] Exceptions in favour of „the habitual residence of the violated party“ can be made in case the sender ensures that only members of certain states participate in the communication.[286]

c) Violations of Personal Rights Caused by Access- and Host-Providers

In case of violations of personal rights that are caused by access- and host-providers, the place of action has to be changed from the place of upload to the place of where the access- and host-providers‘ actions are managed.[287] The places of occurrence stay the same.

2. Section 32 GCCP

Section 32 GCCP establishes a special place of jurisdiction at the district in which the performance was committed. Although the wording does not suggest it, section 32 GCCP regulates that the „law of the place where the delict was committed“ to be applicable.[288] Therefore the places of action and the places of occurrence deliver places of jurisdiction has to be applied. The interpretation conforms to the one of article 5 number 3 Brussels I.[289]

3. Section 3 GTMA: Influence of the State of Origin Principle towards the Law of International Jurisdiction

The state of origin principle of section 3 GTMA respectively article 3 EUECD does not have an influence on the law of international jurisdiction.[290]

III. Results of the Examination of the German Law of International Jurisdiction

The law of international jurisdiction copes with the internationality of violations of personal rights on the internet by allowing places of jurisdiction at the place of action and the places of occurrence. The numerous places of occurrence are restricted through a quantitative reduction (qualified connection to the state of the place of occurrence).

[273] Spickhoff (fn.90), p.131, p.132.
[274] See B II. 3. b) bb) aaa) (2) (b) (dd) Assessment and Conclusion.
[275] Sujecki, Persönlichkeitsverletzungen über das Internet und gerichtliche Zuständigkeit, K&R 2011, p.315, pp.316-318; Spickhoff (fn.90), p.131, pp.131-133; Roth (fn.5), pp.338f..
[276] See B II. 3. b) bb) aaa) (2) (b) (dd) Assessment and Conclusion.
[277] ECJ C-68/93, Fiona Shevill et al. vs Presse Alliance SA (NJW 1995, 1881).
[278] Spickhoff (fn.90), p.131, pp.132f..
[279] Wüllrich (fn.29), p.217.
[280] Wüllrich (fn.29), p.219.
[281] See B II. 3. b) bb) aaa) (2) (b) (aa) Places of Recallability.
[282] Roth (fn.5), pp.269-271.
[283] Roth (fn.5), pp.276..
[284] BGH 29.03.2011 Az.VI ZR 111/10; BGHZ 184, p.313; Spickhoff (fn.90), p.131, p.132; Roth (fn.5), pp.293f..
[285] Roth (fn.5), 290-293.
[286] Roth (fn.5), pp.292 & 293.
[287] See B II. 3. b) bb) bbb) Violations of Personal Rights Caused by Access- and Host-Providers.
[288] Nagel/Gottwald (fn.231), sect.3 mn.356.
[289] Rauscher (fn.55), mn.2024.
[290] Wüllrich (fn.29), pp.358f..

Conclusion

The evaluation of the civil liability for violations of personal rights on the internet challenges all levels of German civil law: German substantive law determines the concrete liability by the means of its general remedies and a special statue that establishes responsibilities of content, access- and host-providers, whereas German international private law and the German law of international jurisdiction evaluate international cases with their general instruments.

On the international level, the principle of the scene of an offence is of outstanding significance: The place of action and the place of occurrence determine international private law and the law of international jurisdiction. At this point, it has to be emphasised that international private law and the law of international jurisdiction solve the same problem differently due to different interests: In terms of international private law, the combination of a quantitative reduction (intended distribution) and a qualitative limitation (mosaic theory) emerges as a satisfying solution. In contrast, a qualitative limitation contradicts the interests and aims of the law of international jurisdiction, which is why the restriction of the multiple places of occurrence is accomplish by a quantitative reduction (qualified connection to the state of the place of occurrence) only.