Casting the Net:
Has the Court of Justice's Approach to Online Torts Made the Brussels Framework Fit for the Internet Age?

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While the Brussels Convention predates the emergence of the internet as an established means of communication by several decades, the challenges it poses for the traditional legal framework of international jurisdiction were already well-known when the Convention became a Regulation. Still, its drafters resisted any temptation to react to these challenges by making technology-specific amendments – and so did the drafters of the Recast. Accordingly, the burden to apply broad and abstract provisions like (what is now) Art 7(2) Brussels Ia to internet cases fell exclusively upon the shoul-

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ders of the judges in Luxembourg. Over the last two decades, they have adopted a consistent, partly technology-specific interpretation, that seems to have given rise to two different regimes: one for infringements of personality rights committed through the internet and one for all other online torts. Questions remain with regard to the scope, interplay, and, indeed, the appropriateness of these two regimes.

1. Introduction: the Technology-Neutral Brussels Framework

When the Brussels Convention was signed in 1968, the internet was nothing more than the pet project of a handful of researchers.[1] But when the Convention became a Regulation in 2001, the rapidly growing use of online communication and the internet's unique features had already given rise to serious challenges for the traditional legal framework of international jurisdiction. In some widely reported cases,[2] courts in the United States in particular had struggled to apply established tests and criteria to a medium that made it possible to share content with users in countless states with a single mouse click.[3]

Still, the drafters of the Regulation were hesitant to make technology-specific amendments to the Convention's rather general rules on jurisdiction.[4] While the challenges created by the internet were discussed in relation to consumer contracts[5] (and are somewhat reflected in the relevant provisions), virtually[6] all other rules on jurisdiction remained technology-neutral. Even when the Regulation was recast in 2012 and the ECJ had already been confronted with several cases highlighting the difficulties

1 For a concise overview of the internet's history, see Jon Bing, 'Building Cyberspace: a brief history of Internet', in Lee A Bygrave & Jon Bing (eds), *Internet Governance: Infrastructure and Institutions* (OUP 2009), 8.

2 See, e.g., the decisions by US District Courts in *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa 1997) and *Cybersell, Inc v Cybersell, Inc* 130 F 3d 414 (9th Cir 1997), 419–20.

3 See Dan Jerker B. Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017), 92–96.

4 See AG Wathelet, Opinion on Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:843, para. 33.

5 See Explanatory Memorandum to Proposal COM(1999) 348, 4.5, Art 15.

6 Art 23(2) Brussels I seems to be the only explicitly technology-specific amendment.

resulting from the 'borderless' nature of online communication,[7] no attempt was made to address them through more specific rules.[8]

The provision on special jurisdiction for torts in what is now Art 7(2) Brussels Ia[9] is testimony to this approach, having remained virtually unchanged throughout all three iterations of the Brussels framework despite increasingly obvious difficulties to apply it to situations of intangible harm in general[10] and to torts committed online in particular.

The burden to apply the broadly-worded provision to the specific challenges of internet cases, with no easily identifiable 'place of the harmful event' thus fell solely on the shoulders of the judges in Luxembourg. Over the last two decades, the ECJ has had several opportunities to develop and refine its interpretation of the provision in light of torts committed via the internet. Although the Court's jurisprudence in this area undeniably reflects a certain coherence, it seems to have ultimately given rise to two slightly different regimes, the application of which depends on the allegedly violated right in question. This approach may not be entirely free of inconsistencies.

2. The ECJ's Technology-Specific Approach to Online Torts

In order to be able to discuss the present state and future viability of the ECJ's case law on special jurisdiction for online torts, this paper will first retrace the development of the Court's interpretation of what is now Art 7(2) Brussels Ia (2.1). It will isolate the 'mosaic approach' as a particularly problematic, but, at this point, well-established element of the emerging framework (2.2), before turning towards some further potential inconsistencies and remaining open questions (2.3).

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7 In addition to the examples given below, see, e.g., Joined Cases C-585/08 and C-144/09 *Pammer* and *Hotel Alpenhof* ECLI:EU:C:2010:740.

8 The Explanatory Memorandum to Proposal COM(2010) 748 does not even mention the internet.

9 Formerly Art 5(3) Brussels Convention, Art 5(3) Brussels I.

10 On which see recently AG Bobek, Opinion on Case C-304/17 *Löber*, ECLI:EU:C:2018:310, paras. 31–45; see also Johannes Ungerer, 'Pure financial loss and international jurisdiction for tort under the Brussels I (Recast) Regulation' (2017) 24 *MJ* 448.

2.1. The Good: Emerging Consistency

The foundation for the ECJ's approach to online torts was laid in a number of cases that preceded the internet, establishing a very wide understanding of the 'place of the harmful event' (2.1.1). While the Court extended this interpretation to internet cases with noticeable consistency, two different regimes emerged with regard to the specific connecting factor of the 'place of the damage': one for online infringements of personality rights (2.1.2), and one for other online torts (2.1.3).

2.1.1. *The starting point:* Bier *&* Shevill

The starting point for the ECJ's interpretation of what is now Art 7(2) Brussels Ia is its seminal decision in *Bier*,[11] according to which the 'place where the harmful event occurred' must be interpreted,

> *"in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."*[12]

The Court held that neither of these two places would necessarily be more closely connected to the tort (or otherwise be preferable);[13] accordingly, the 'place where the harmful event occurred' should be understood as covering both, with the claimant being allowed to choose between them.

Widening the scope of special jurisdiction, the Court's interpretation created many new questions. A particularly pertinent one concerned its application to the increasing number of torts that are committed through media that is distributed in multiple member states. Would the place 'where the damage occurred', or the place 'of the event giving rise to it', be located in each of these member states?

In *Shevill*,[14] the Court opted, again, for a wide interpretation of the provision. It held that

> *"the place of the event giving rise to the damage […] can only be the place where the publisher of the newspaper in question is established, since that is*

11 Case 21/76 *Bier* ECLI:EU:C:1976:166, para. 19.
12 *Ibid*, para. 19.
13 See *ibid*, para. 17.
14 Case C-68/93 *Fiona Shevill* ECLI:EU:C:1995:61.

> *the place where the harmful event originated and from which the libel was issued and put into circulation."*[15]

The damage caused by a defamatory publication, on the other hand,

> *"occurs in the places where the publication is distributed, when the victim is known in those places.*
> *It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation."*[16]

The claimant thus has the option to bring a claim in every country in which the defamatory publication has been made available (provided that they held a reputation there), which would however be limited to the damage caused in this member state. If they want to liquidate their entire damage in one forum, they have to seise the courts of the defendant publisher's establishment or domicile.[17]

This 'mosaic approach' raised the question of how it could be transposed to online publications. Would every country in which the content could be accessed have to be considered a 'place where the damage occurred', creating a mosaic of up to 27 jurisdictions?[18] The ECJ generally answered this question in the affirmative but also added further elements to the analysis, which has led to the creation of two distinct regimes of special jurisdiction for online torts.

2.1.2. *The regime for online infringements of personality rights:* eDate *&* Bolagsupplysningen

The first opportunity to apply the *Shevill* approach to an internet case arose in the context of two disputes involving personality rights. In *eDate* and *Martinez*,[19] the respective claimants sued two internet news portals over the publication of information that allegedly violated their right to privacy. The ECJ confirmed that the place of the causal event, the courts of

15 *Ibid*, para. 24.
16 *Ibid*, para. 29–30.
17 *Ibid*, para. 32.
18 If the defendant is domiciled in the 28th Member State.
19 Joined Cases C-509/09 and C-161/10 *eDate Advertising* and *Martinez* ECLI:EU:C:2011:685.

which would have jurisdiction for all damage flowing from the publication, would still be the place in which the publisher is established.[20] Regarding the place of the damage, the Court confirmed that the 'mosaic approach' developed in *Shevill* would also apply to online publications,[21] vesting jurisdiction in the courts of 'each Member State in the territory of which content placed online is or has been accessible', which would be limited to the damage 'caused in the territory of the Member State of the court seised.'[22]

In light of the resulting mosaic of the courts of up to 28 member states having jurisdiction, each for a territorially limited slice of the overall damage, the ECJ was concerned, though, that the difficulties to quantify the damage caused in a given member state would contrast

> *"with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis."*[23]

As a remedy, the Court introduced an additional forum at the claimant's centre of interests, in which they could seek compensation for their entire loss:

> *"The connecting criteria [established in* Shevill*] must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused […] where the alleged victim has his centre of interests."*[24]

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20 *Ibid*, para. 42. It seems unlikely, though, that this would be the case where the claimant tries to sue the author, rather than the publisher; in this case, the ECJ's decision in Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220, para. 34, seems to indicate that the place in which the technical process leading to the publication has been activated would be decisive (see also, more generally, Peter Mankowski, 'Der Deliktsgerichtsstand am Handlungsort – die unterschätzte Option', in Rolf A Schütze (ed), *Fairness Justice Equity. Festschrift für Reinhold Geimer* (Beck 2017), 429, 439–41).

21 *eDate* (n. 19), paras. 42–44.

22 *Ibid*, para. 51.

23 *Ibid*, para. 47.

24 *Ibid*, para. 48.

The introduction of this new forum was welcomed by some as a contribution to the better protection of the victims of online defamation[25] but also drew a fair bit of criticism, not least for its lack of any textual basis[26] and character of a *forum actoris*,[27] which runs counter to the Regulation's *actor-sequitur-forum* approach.[28] Besides, it constituted the first clearly technology-specific response to the challenges of internet torts.[29]

While the ECJ considered the new forum to allow 'both the applicant easily to identify the court in which he may sue and the defendant reason-

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25 See Jan Oster, 'Rethinking Shevill. Conceptualising the EU private international law of Internet torts against personality rights' (2012) 26 *International Review of Law, Computers & Technology*, 113, 120–22; Burkhard Hess, 'Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht' *JZ* 2012, 189, 190–91. See also Burkhard Hess, 'The Protection of Privacy in the Case Law of the CJEU' in Burkhard Hess & Cristina M Mariottini (eds), *Protecting Privacy in Private International and Procedural Law by Data Protection* (Nomos 2015), 81, 93, 105–06, arguing that the new forum 'evens the field for the parties' as the publisher also has the option to seise the courts of *their* domicile to seek a negative declaration (relying on Case C-133/11 *Folien Fischer* ECLI:EU:C:2012:664, [52]–[53]).

26 See Michel Reymond, 'The ECJ's *eDate* Decision: A Case Comment' (2011) 13 Yearbook of Private International Law 493, 499–501; Sylvain Bollée & Bernard Haftel, 'Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt *eDate Advertising* et *Martinez*', *Recueil Dalloz* 2012, 1285, 1287: 'un excès de pouvoir de la part de la CJUE'.

27 Peter Mankowski, in Ulrich Magnus & Peter Mankowski (eds), *European Commentaries on Private International Law (ECPIL). Brussels Ibis Regulation* (otto schmidt 2016), Art 7, [365]; Edina Márton, *Violations of personality rights through the Internet* (Nomos 2016), 263; Silvain Bollée & Bernard Haftel (n. 26), 1286–90; Jan von Hein, 'Der Schutz des Geschädigten bei grenzüberschreitenden Delikten im europäischen Zivilprozessrecht', in Jens Kleinschmidt et al (eds), *Strukturelle Ungleichgewichtslagen in der internationalen Streitbeilegung* (Peter Lang 2016), 45, 78–79: 'ein *favor laesi* in Internetfällen'.

28 See also Etienne Farnoux, DELENDUM EST FORUM DELICTI, Towards the Jurisdictional Protection of the Alleged Victim in Cross-Border Torts, in this volume. For references to the principle, see, e.g., Cases C-464/01 *Gruber* ECLI:EU:C:2005:32, [33]; C-168/02 *Kronhofer* ECLI:EU:C:2004:364, para. 20; C-269/95 *Benincasa* ECLI:EU:C:1997:337, para. 14; C-220/88 *Dumez France* ECLI:EU:C:1990:8, para. 19.

29 See the repeated references to the internet in paras. 45–48 of *eDate* (n 19), and in the operative part of the judgment ('[…] in the event of an alleged infringement of personality rights *by means of content placed online on an internet website*, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused […] before the courts of the Member State in which the centre of his interests is based.' [own emphasis]).

ably to foresee before which court he may be sued',[30] it also gave rise to questions regarding its precise definition. In *eDate*, the ECJ had explained that a person's centre of interests would be at the place where they had their habitual residence unless 'other factors, such as the pursuit of a professional activity' established a particularly close link with a different member state.[31] In *Bolagsupplysningen*,[32] the Court confirmed that the criterion also applied to legal persons;[33] in the case of a company incorporated in Estonia, but carrying out the main part of its activities in Sweden, this meant that their centre of interests was located in Sweden.[34]

As the claimant in *Bolagsupplysningen* had however seised the courts of their Estonian domicile – to seek an injunction for rectification and deletion of, and compensation for, certain allegedly defamatory statements the defendant had published online – the case also gave the ECJ an opportunity to answer another important question with regard to the framework of special jurisdiction established in *eDate*. In one of the *eDate* cases, the claimant had also sought an injunction; but the ECJ could leave open whether jurisdiction for it could be based on the territorially-limited competence created by the mosaic approach since the claimant had seised the courts of their centre of interests.[35] With centre-of-interests jurisdiction not being available in the claimant's country of establishment in *Bolagsupplysningen*, the Court (finally) had to answer the question.

In his opinion, AG Bobek, who had advised the court to abolish the mosaic approach for internet torts entirely,[36] argued that – should the Court maintain the mosaic approach – there would be no legal basis to limit the scope of a single court's jurisdiction with regard to injunctive relief:

> *"If it were, hypothetically speaking, established that […] the Estonian courts have international jurisdiction for the harm caused to the Appellant in Estonia, I am of the view that that court will also be competent to issue the requested remedy, provided that such a remedy exists under national law. This is so because of the unitary nature of the source of the alleged harm in*

30 *eDate* (n. 19), para. 50.
31 *Ibid*, para. 49.
32 Case C-194/16 *Bolagsupplysningen* ECLI:EU:C:2017:766.
33 *Ibid*, para. 38.
34 See *ibid*, paras. 41–42.
35 See also the subsequent decision by the German *Bundesgerichtshof* of 8 May 2012, NJW 2012, 2197.
36 AG Bobek, Opinion on Case C-194/16 *Bolagsupplysningen*, ECLI:EU:C:2017:554, paras. 73–90.

> *the present case. There is just one website. It simply cannot be rectified or deleted only 'in proportion' to the harm suffered in a given territory.*"[37]

Although the Court agreed with the Advocate General's assessment that injunctive relief was different from an award of (compensatory) damages in the sense that it could not easily be split into territorial slices, the Court came to the opposite conclusion:

> "*[I]n the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal, an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage […], and not before a court that does not have jurisdiction to do so.*"[38]

The ECJ thus drew a strong line between 'divisible' and 'indivisible' remedies.[39] While the former can be awarded by the courts of every member state in which defamatory online content has been made available (limited to the loss caused by publication in that member state), the latter can only be awarded by courts with 'full' jurisdiction, ie those at the claimant's centre of interests, those at the place in which the defendant has acted, and those of the defendant's domicile.

2.1.3. *The regime for other online torts:* Wintersteiger, Pinckney, Hejduk & Concurrence

Infringements of personality rights are not the only torts that can be committed through the internet and at countless places at once. The ECJ first had the opportunity to extend its *eDate* jurisprudence to other torts in relation to violations of IP rights.[40]

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37 *Ibid*, para. 126.

38 *Bolagsupplysningen* (n. 32), para. 48 (references omitted).

39 See also Tobias Lutzi, 'Shevill is dead, long live Shevill!' (2018) 134 *LQR* 208, 211–12.

40 All decisions regarding Art 7(2) Brussels Ia concerned IP rights that are still protected by the laws of the individual member states; IP rights protected through EU regulations are usually subject to particular rules of jurisdiction set out in the relevant regulation itself (see, e.g., Art 82(5) Regulation (EC) 6/2002 (on design rights); Art 125(5) Regulation (EU) 2017/1001 (on EU trade marks)).

The first such occasion arose in *Wintersteiger*[41], in the context of a trademark dispute. The ECJ readily extended the interpretation established in *eDate* with regard to the place of the causal event; as the ECJ reiterated, it refers to the place in which the defendant acted and where the relevant technical process was activated[42] – which the Court explicitly (and rightly) distinguished from the place of the server.[43] However, the Court refused to extend the centre-of-interest approach developed in *eDate*, given that

> *"[c]ontrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory."*[44]

As a consequence, jurisdiction based on the second limb of what is now Art 7(2) Brussels Ia (the place of the damage) can only be based on the mosaic approach – a solution the Court repeatedly justified by the perceived[45] territoriality of IP rights.[46] Thus, a claim for an infringement of intellectual property can be brought in every member state in which the right in question is protected and has allegedly been violated, limited to the damage caused by violations in this member state.[47] Accordingly, a claim based on the violation of a trademark can only be brought in the courts of the country of registration.[48] A claim based on the infringement of a copyright (which is protected in every member state)[49] can be brought in the courts of every member state in which the infringement complained

41 Above, n. 20.
42 *Ibid*, para. 34.
43 *Ibid*, para. 36.
44 *Ibid*, para. 25.
45 For authors questioning this concept, see Mireille Van Eechoud, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis* (Kluwer 2003), 97–103, 125; Dário Moura Vicente, 'The Territoriatlity Principle in Intellectual Property Revisited' (2016) 34 *NIPR* 724, 726–29.
46 See Cases C-441/13 *Hejduk* ECLI:EU:C:2015:28, paras 36–37; C-170/12 *Pinckney* ECLI:EU:C:2013:635, para. 46.
47 See *Hejduk* (n. 46), paras. 29, 36.
48 *Wintersteiger* (n. 20), para. 28. See also Art 24(4) Brussels Ia for questions regarding the validity of registration.
49 By virtue of Directive 2001/29/EC (…) on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive).

of is alleged to have happened[50] but will be limited to the damage caused through infringements in this state.[51] The threshold for an infringement to be localised in this sense is remarkably low, with the ECJ refusing invitations[52] to lift it beyond the accessibility of a given homepage from the member state in question in *Pinckney* and *Hejduk*.[53]

This approach has recently been extended to acts of unfair competition. In *Concurrence*,[54] the ECJ held that a claim based on an exclusive-distribution agreement for a certain member state that was allegedly breached by a website that could be accessed from that member state can be brought in the courts of this state,[55] with the Court leaving open whether the claimant would have to prove any actual sales having been made to customers in this member state.[56]

2.2. The Bad: a Mosaic of Jurisdictions

Even with its contours having been somewhat clarified by the ECJ in *Bolagsupplysningen*, the biggest problem of the approach to internet torts just sketched out arguably is the ECJ's continued reliance on the mosaic approach.[57]

This is, first, because the mosaic approach creates significant practical difficulties. Wherever their jurisdiction is territorially limited, courts have to determine the precise amount of damage that has been caused by online

50 *Hejduk* (n. 46), para. 29; *Pinckney* (n. 46), para. 43.
51 *Hejduk* (n. 46), para. 36; *Pinckney* (n. 46), para. 45.
52 See, in particular, AG Jääskinen, Opinion on Case C-170/12 *Pinckney*, ECLI:EU:C:2013:400, paras. 64–65, suggesting an extension of the targeting criterion used in Case C-173/11 *Football Dataco* ECLI:EU:C:2012:115 to localise the damage in cases of online infringements of copyright; see also AG Cruz Villalón, Opinion on Case C-441/13 *Hejduk*, ECLI:EU:C:2014:2212, para. 45, suggesting to disregard the 'place of the damage' as a basis for jurisdiction in these cases.
53 *Hejduk* (n. 46), para. 34; *Pinckney* (n. 46), para. 44.
54 Case C-618/15 *Concurrence* ECLI:EU:C:2016:976.
55 *Ibid*, 33–34.
56 See also Tobias Lutzi, 'Gerichtsstand am Schadensort und Mosaikbetrachtung bei Wettbewerbsverletzungen im Internet' *IPRax* 2017, 552, 556.
57 See also Tobias Lutzi, 'Internet Cases in EU Private International Law – Developing a Coherent Approach' (2017) 66 *ICLQ* 687, 690–95.

content having been made available in their member state.[58] In fact, the Court openly acknowledged these difficulties in *eDate*:

> *"[I]t is not always possible, on a technical level, to quantify that distribution [of online content] with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State."*[59]

Its reaction to give the claimant access to an additional forum with jurisdiction for the entire damage, though, makes it seem like the Court perceived this difficulty as primarily a problem for the claimant, who may not be adequately protected from the potential harms of worldwide publication of defamatory online content:

> *"The difficulties in giving effect, within the context of the internet, to the criterion relating to the occurrence of damage […] contrasts […] with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis."*[60]

The adverse effects for the defendant and, indeed, the court system, on the other hand, were apparently acceptable, with the Court explicitly upholding the mosaic approach as an alternative option for the claimant.[61]

Second, the mosaic approach is inherently one-sided. It gives the claimant access to the courts of (up to) 27 member states and (for the time being) the UK, while leaving the defendant exposed to the risk of as many lawsuits.[62] Although the competence of these courts will be territoriality-limited, these different actions can be burdensome to defend[63] and may

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58 See AG Bobek, Opinion on *Bolagsupplysningen* (n 32), [80]: 'Such apportioning of the harm is, in the light of the specific medium of the internet, difficult if not impossible to exercise.'; see also AG Cruz Villalón, Opinion on *Hejduk* (n. 52), paras. 20, 39–40, 42; Burkhard Hess (n. 25), 106.

59 *eDate* (n. 19), para. 46.

60 *Ibid*, para. 47.

61 *Ibid*, para. 51.

62 See Trevor Hartley, *Civil Jurisdiction and Judgments in Europe* (OUP 2017), para. 8.107; Eva Lein, in Andrew Dickinson/Eva Lein (eds), *The Brussels I Regulation Recast* (OUP 2015), para. 4.112; Michel Reymond (n. 26), 501; Wolfgang Hau, 'Klagemöglichkeiten juristischer Personen nach Persönlichkeitsrechtsverletzungen im Internet' GRUR 2018, 163, 165.

63 See Annette Kur, 'Trademark Conflicts on the Internet: Territoriality Redefined?', in Jürgen Basedow et al (eds), *Intellectual Property in the Conflict of Laws* (Mohr Siebeck 2005), 175, 181; Wolfgang Hau (n. 62), 165.

still result in the award of significant damages.[64] Where the claimant has access to centre-of-interests jurisdiction, the main benefit of mosaic-approach jurisdiction may therefore be to select one or numerous fora that are particularly disadvantageous for the defendant.[65] As AG Bobek explained in a well-stated critique of the mosaic approach in his Opinion on *Bolagsupplysningen*,

> *"I fail to see how the availability of a further 27 jurisdictions helps either party, beyond the manifest potential offered to the claimant to harass the defendant with oppressive claims in parallel jurisdictions."*[66]

Third (and maybe most importantly in the context of this conference), the mosaic approach sits quite uncomfortably with several principles underlying the Brussels I framework. Giving the claimant access to a wide range of fora the selection between which may be virtually impossible to predict for the defendant, it conflicts with the principle of legal certainty.[67] Where their availability is based on the accessibility of content alone, the mosaic approach similarly conflicts with the principle of proximity,[68] relying on a particularly weak connection between the case and the forum.[69]

In the same vein, the mosaic approach is in tension with the principle of *actor sequitur forum rei*, according to which

> *"persons domiciled in a [member state] are to be sued in the courts of that State, irrespective of the nationality of the parties.*
> *It is only by way of derogation from that fundamental principle that the [Brussels I framework] makes provision […] for, in particular, special juris-*

64 See *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB), where the £ 115,000 were awarded as compensation for 23 copies of an allegedly defamatory book that were sold in England and the first chapter that was made available online; see also Ali GR Auda, 'A proposed solution to the problem of libel tourism' (2016) 12 *JPIL* 106, 109–10.

65 Dan Jerker B Svantesson, *Private International Law and the Internet* (3rd edn, Kluwer 2016), 220; Peter Picht, 'Von eDate zu Wintersteiger – Die Ausformung des Art. 5 Nr. 3 EuGVVO für Internetdelikte durch die Rechtsprechung des EuGH' GRUR Int 2013, 19, 23.

66 AG Bobek, Opinion on *Bolagsupplysningen* (n. 32), para. 88.

67 As to which see, e.g., Case C-256/00 *Besix* ECLI:EU:C:2002:99, [26]. See also Picht (n. 65), 23.

68 As to which see, e.g., Case C-12/15 *Universal Music* ECLI:EU:C:2016:449, para. 27.

69 See also AG Cruz Villalón, Opinion on *Hejduk* (n. 52), para. 44; AG Jääskinen, Opinion on *Pinckney* (n. 52), para. 69.

> *dictional rules […] where the choice depends on an option to be exercised by the claimant.*"[70]

In every internet case before the ECJ in which the claimant tried to rely on mosaic-approach jurisdiction, they had seised the courts of the member state in which they were domiciled; with the exception of *Bolagsupplysningen*, all of these attempts were successful. As Etienne Farnoux has shown in his paper,[71] the Court, in many of these cases, may have been more concerned with providing jurisdictional protection to the alleged victim of an online tort than with establishing a particularly close connection to a specific forum that justifies a derogation from Art 4(1) Brussels Ia.

Finally, the mosaic approach conflicts with the principle of sound administration of justice, according to which

> *"it is necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions […]."*[72]

While the ECJ has (somewhat)[73] solved the problem of contradictory injunctions (by limiting mosaic-approach jurisdiction to compensatory damages), the mosaic approach still allows for numerous actions over different territorial slices of the same claim to be brought in different member states. Yet, it is unclear to what extent the Brussels Ia Regulation makes it possible to effectively coordinate these claims.[74] For courts that have 'full' jurisdiction (eg as the court of the defendant's domicile), an answer may be found in Art 29(1), (3) Brussels Ia, which give preference to the court first seised and may require other courts to decline their jurisdiction, possibly even where it is only for one part of the overall claim. Between courts with territorially limited jurisdiction, though, each claim is likely to be considered a different cause of action; pursuant to Art 30(1) Brussels Ia, it will then be in the discretion of each of these courts to decide whether they want to stay their proceedings. But even where they decide to do so, a stay will only solve the problem of parallel proceedings; nothing in the Regulation prevents a court from coming to a different conclusion regard-

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70 Case C-256/00 *Besix* ECLI:EU:C:2002:99, paras. 52–53. See also Case C-412/98 *Group Josi* ECLI:EU:C:2000:399, paras. 34–35.

71 See Etienne Farnoux, DELENDUM EST FORUM DELICTI, Towards the Jurisdictional Protection of the Alleged Victim in Cross-Border Torts, in this volume.

72 *Dumez France* (n. 28), paras. 17–18. See also Recital (21) Brussels Ia.

73 See below, under 2.3.2.

74 See also Wolfgang Hau (n 62), 165; Boris P. Paal, 'Online-Suchmaschinen – Persönlichkeitsrechts- und Datenschutz. Internationale Zuständigkeit, anwendbares Recht und sachrechtliche Fragen' *ZEuP* 2016, 591, 598.

ing the part of the damage for which it has jurisdiction than another court that has jurisdiction for another part of the damage.

All of these arguments are, of course, well-known to the ECJ. The Court had the benefit of several well-argued opinions by its Advocate Generals that advised it against maintaining and/or further extending the mosaic approach. In his opinion on *Pinckney*, AG Jääskinen proposed to supplement the mosaic approach with the targeting criterion the Court had developed in other contexts.[75] AG Cruz Villalón, in his opinion on *Hejduk*, argued that the mosaic approach should simply not be applied to cases in which the damage is 'delocalised'.[76] Similarly, AG Bobek urged the Court in his opinion on *Bolagsupplysningen* to

> *"bring the jurisdictional rules for internet-based defamatory statements back and arguably closer to the roots of extra-contractual/tortious liability of [the Brussels I framework] itself, limiting special jurisdiction to two scenarios: where the event giving rise to the harm occurred and where the harm occurred. The latter head of jurisdiction would be defined as where the reputation of the claimant was most strongly affected. That is the place of his centre of interests."*

With the ECJ having somewhat reduced the adverse effects of the mosaic approach in its decision on *Bolagsupplysningen* but having otherwise refused to follow any of the aforementioned opinions, it seems safe to say that the mosaic approach to online torts is here to stay for the foreseeable future.

2.3. The Ugly: Inconsistencies and Open Questions

While the Court seems to have somewhat consolidated the framework of special jurisdiction for online torts, there remain several potential inconsistencies and open questions.

2.3.1. Limited availability of centre-of-interests jurisdiction

The ECJ has made clear that the claimant's centre of interests is only available as a forum for claims based on violations of personality rights. This

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75 AG Jääskinen, Opinion on *Pinckney* (n. 52), paras. 59–71.
76 AG Cruz Villalón, Opinion on *Hejduk* (n. 52), paras. 33–47.

has been justified by reference to the particular risk to which the victims of these torts are exposed by publications that are made available worldwide via the internet.[77] The holders of other rights, such as the owners of intellectual property, might argue, though, that they are exposed to similar risks when it comes to torts committed via the internet; the loss they suffer can similarly be spread across countless jurisdictions.[78] Similarly, the difficulties to establish the territorial scope of a national court's jurisdiction that the centre-of-interests criterion aims to overcome,[79] is not limited to infringements of personality rights.[80]

Of course, the centre of interests as an additional forum is not only justified negatively – by the inability of other potential fora to reflect the claimant's particular need for protection in internet cases – but also positively – by the fact that a claimant's personality rights will often be concentrated and thus most severely affected in this country. Although the extent to which personality rights can actually be concentrated in a single country may be debatable, it is true that other rights would generally be much more difficult to localise in this way.

Still, the limited availability of the centre of interests as an additional basis of jurisdiction for the entire loss suffered inevitably creates a strong distinction between infringements of personality rights and other torts. While the claimant will regularly profit from a *forum actoris* with unlimited jurisdiction in the former case, they will have to either seise the courts of the defendant's 'home' country (domicile and/or place of acting) or rely on the mosaic approach.

Importantly, this requires not only a distinction between infringements of personality rights and other torts but also a distinction between online and offline torts, with the centre of interests only being available for the former.[81]

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77 *eDate* (n 19), para. 47. See also Christian Heinze, 'Der Deliktsgerichtsstand als Klägergerichtsstand? – Zum Einfluss materiellrechtlicher Wertungen auf die Auslegung des Art. 7 Nr. 2 EuGVO', in Wolfgang Büscher et al. (eds), *Rechtsdurchsetzung. Rechtsverwirklichung durch materielles Recht und Verfahrensrecht. Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag* (Carl Heymanns 2016), 521, 525.

78 See also Peter Mankowski (n. 27), Art 7, para. 370.

79 See *eDate* (n. 19), para. 46.

80 See Jan von Hein (n. 27), 84.

81 See Peter Mankowski (n 27), Art 7, para. 371.

2.3.2. 'Full' and 'partial' jurisdiction

The differences between infringements and personality rights and other torts are not (necessarily) limited to the availability of the centre of interests as an additional forum. So far, the ECJ has only had an opportunity to specify the scope of mosaic-approach jurisdiction in a personality-rights case. Clearly, there are strong reasons to believe that the Court did not intend for its decision in *Bolagsupplysningen* to be limited to these cases, with the Court holding in very general terms that

> *"[…] an application for the rectification of [information] and the removal of [content] is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage […] and not before a court that does not have jurisdiction to do so."*

Two observations may however cast some doubt on the transferability of this reasoning.

First, for violations of personality rights, the unavailability of mosaic-approach jurisdiction for injunctions is compensated by the claimant's ability to seise the courts at their centre of interests as a forum with 'full' jurisdiction. For other torts, the claimant will however only be able to obtain an injunction in the courts of the place in which the defendant has acted, which will often coincide with their domicile.[82] This might be seen as running counter to the otherwise rather protective position taken by the ECJ with regard to special jurisdiction for online torts.

Second, on at least one occasion (which arose after *Bolagsupplysningen* had been referred to the ECJ but before it was decided), the Court seems to have allowed an arguably 'indivisible' remedy to be based on mosaic-approach jurisdiction. In *Concurrence*, it held that the French courts had jurisdiction to order the defendant to remove products from websites that could be accessed in France.

From a policy point of view, however, there can be little doubt that it would be preferable for the mosaic approach – if not abolished entirely – to be generally limited to claims for compensatory damages. It would not only better align the two different regimes for online torts but also eliminate both the difficulty that consists in territorially limiting most other types of awards and the particular risk of vexatious litigation posed by injunctions that are based on 'partial' jurisdiction. Put differently, if a

82 See also Wolfgang Hau (n. 62), 165.

main justification of the mosaic approach consists in the fact that it strikes a fair balance between the interests of the claimant (by giving them access to the courts in every single member state in which they may have suffered a damage) and the defendant (by limiting the competence of these courts to a small slice of the overall claim),[83] it should not be available for remedies that cannot be so limited.

Paradoxically, though, if the restrictive understanding of the mosaic approach were applied to all online torts, the contrast between the two regimes distinguished above would increase even further. While the victims of personality rights will often be able to seek all possible remedies in the courts of their own country of domicile, the victims of other torts will often be limited to claiming monetary compensation outside the courts of the defendant's domicile.

2.3.3. Divisible and indivisible remedies

Finally, the decision in *Bolagsupplysningen* raises the question of what remedies qualify as 'divisible' and can therefore still be based on territorially limited jurisdiction. So far, it is clear that awards of compensatory damages (which have been sought in the vast majority of cases that have been referred to the ECJ) are divisible in this sense while injunctions to rectify or remove content are not. What about other kinds of damage awards and injunctions, though?

It is submitted that damages of a vindicatory or punitive nature as well as all injunctions that are not clearly limited to the forum state should be similarly considered as indivisible because they focus on the defendant's wrongdoing rather than the harm caused and would therefore indeed be very difficult to split into territorial slices.[84] Injunctions that are clearly limited to a single member state (such as an injunction not to make content available in this member state) might conceivably be based on mosaic-approach jurisdiction, if one accepts that they can only be implemented to a certain degree before having a *de facto* world-wide effect.

Of course, the more narrowly one construes the category of divisible remedies, the less attractive mosaic-approach jurisdiction becomes. But given the serious concerns about the mosaic approach raised above, such a narrow construction might actually constitute a step towards a viable com-

83 See Peter Mankowski (n. 27), Art 7, paras. 257–262.
84 See also Wolfgang Hau (n 62), 164.

promise between the claimant's interest in getting compensation in the courts of a member state in which they allegedly suffered a damage and these concerns.

3. Fit for New Challenges?

Seven years after the decision in *eDate*, the Court's interpretation of what is now Art 7(2) Brussels Ia remains strongly influenced by its initial reaction to the perceived dangers of online communication. Although the Court has since received numerous opportunities to clarify and refine its jurisprudence, it has been claimed – maybe not wrongly – that much of its case law is addressing the symptoms rather than the problem.[85]

There still is a lot to be said for the proposition that Art 7(2) Brussels Ia should not be applied to internet cases at all, at least to the extent that it refers to the place of the damage.[86] But with every decision in which the Court further refines individual elements of the framework described in this paper, such a radical change of approach becomes less likely.

Consequently, it may be time to look beyond the question of the appropriateness of the Court's approach to online torts and inquire about the interplay between its individual ingredients. Will the framework of interpretation that the Court has established be able to provide guidance as technology inevitably evolves?

Prima facie, one may be sceptical, considering the apparent limitation to certain media of both the centre-of-interests criterion and the mosaic approach.[87] This limitation may however turn out to be less problematic than it seems.

Firstly, some technological developments may actually facilitate the application of the aforementioned rules and criteria. The increasing reliability of geo-blocking technology, for instance, although in tension with

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85 Sebastian Kubis, 'Zum Tatortgerichtsstand bei grenzüberschreitenden Äußerungsdelikten' *WRP* 2018, 139, 144, for whom the actual root of the problem is the ECJ's broad approach to special jurisdiction in *Shevill*.

86 See Tobias Lutzi (n. 57), 710–12. See also AG Cruz Villalón, Opinion on *Hejduk* (n. 52), para. 45; Peter-Andreas Brand, 'Persönlichkeitsrechtsverletzungen im Internet, E-Commerce und "Fliegender Gerichtsstand"' NJW 2012, 127, 129.

87 The centre-of-interests criterion has been limited to 'person[s] who ha[ve] suffered an infringement of a personality right by means of the internet': see *eDate* (n. 19), para. 48; *Bolagsupplysningen* (n. 32), paras. 32–33. Given its origin in an offline case, the mosaic approach is not necessarily so limited, although the Court has only ever applied it in online cases since.

the EU Commission's aim of creating a 'Digital Single Market',[88] may allow for injunctions that can be limited to the territory of an individual member state without having a *de facto* worldwide effect.

At the same time, the emergence of increasingly pervasive online platforms may have a concentrating effect on jurisdiction. It not only seems to move certain disputes out of the court system entirely (which are instead resolved directly by the platform hosts), but has also caused a certain shift of litigation away from the individual relationships between users towards claims brought against the platform hosts, who are often easier to identify and able to provide an effective remedy to the aggrieved party.[89] It is not unlikely, for instance, that if the two lawsuits referred to the Court in *eDate* were brought today, they would not be brought against the publisher of the online articles in question but against some social-media platform that actually made them available to a wider audience.[90]

Secondly, the ECJ's case law ultimately seems to focus on the risk of worldwide dissemination of information, rather than on the specific technology through which this risk is created. It relies on a combination of action-based and effects-based reasoning that may easily enough be extended to new technologies and challenges.

In order to preserve this flexibility, it is suggested that the Court should put an emphasis on carefully drawing the line between cases in which the claimant's need for protection merits the benefit of a centre-of-interests *forum actoris* and cases in which they do not. As the Court seems unlikely to abandon this criterion, it should consider its extension to all infringements of personality rights (a category that should, in turn, be narrowly construed).[91] This would dissociate the criterion from the medium in question and, instead, align it more firmly with the underlying idea of protecting the victims of these torts by concentrating jurisdiction in the courts of the member state in which the alleged infringement 'is usually felt most

88 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM(2015) 192 final.

89 See, e.g., *Camille Saskia Richardson v Facebook, Google (UK) Limited* [2015] EWHC 3154 (QB) and *CG v Facebook Ireland* [2016] *NICA* 54, both involving claims by Facebook users complaining about the company's failure to remove defamatory or otherwise objectionable information that had been posted by third parties.

90 In the case underlying the ECJ's widely reported decision in *Google Spain* (Case C-131/12 ECLI:EU:C:2014:317), for instance, the removal of allegedly privacy-infringing information was not requested from the initial publisher but from the search engine run by Google.

91 See also Jan von Hein (n. 27), 78; Heinze (n. 77), 535; Boris P. Paal (n. 74), 596.

keenly' and in which 'the damage caused by online material occurs most significantly'.[92]

In the same vein, it is hoped that the limitation of mosaic-approach jurisdiction to (a narrowly construed group of) 'divisible' remedies becomes a general feature of the Court's interpretation of Art 7(2) Brussels I. While not eliminating all potential for vexatious litigation, it would significantly reduce the risk of mosaic-approach jurisdiction being used to obtain remedies that are territorially limited in nothing but name. Indeed, the close link between the limitation to 'divisible' remedies and the concept of territorially divided jurisdiction that seems to be implicit in the decision in *Bolagsupplysningen*[93] indicates that said limitation applies to all online torts.

If the Court of Justice remains committed to maintaining both the centre-of-interests criterion and the mosaic approach – despite the serious concerns that have been raised with regard to each of them individually, and with regard to their coexistence[94] – it must continue its effort to refine their respective scopes in light of both the underlying policy considerations and their interplay with the Brussels framework more broadly.

92 *Bolagsupplysningen* (n. 32), para. 33.
93 See *ibid*, para. 48.
94 See also Heinze (n. 77), 535; Boris P. Paal (n. 74), 596.