MULTI-STATE ADVERTISING OVER THE INTERNET AND THE PRIVATE INTERNATIONAL LAW OF UNFAIR COMPETITION

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I. INTRODUCTION

The characteristics of market places do not nowadays correspond to the characteristics of national territories of states. Goods and services are marketed throughout the world without respecting national barriers. This is why advertising activities are designed to reach many customers in many countries. The Internet has forced this development in the last 15 years. It has been transformed from a means of communication among research scientists into a means of mass communication, an indispensable part of many peoples every-day lives.

In 1997 Worldwide Web users were measured at 48 million people. The number of people who actually made purchases on the Worldwide Web had reached almost 10 million.[1] That year, in the US and Canada the number of adults using the Internet grew by 32 per cent, and in 1998 growth was estimated at 50 per cent with over 100 million users online.

New statistics say that Worldwide Net advertising was $3.3 billion in 1999 whereby it is expected to reach $33 billion worldwide by 2004.

The Internet has an inbuilt tendency towards internationality. Legal regulation is—despite considerable inter- and supranational binding legal rules—mainly national. These national laws which are organised according to national borders are perhaps outdated in a world of networks and Internet Service Providers (ISPs).[2]

Traditional private international law principles rely on actions linked to a fixed physical location,[3] except for nationality which is rather typical in international family law and law of succession, at least in civil law jurisdictions. Connecting factors such as *lex rei sitae* and *lex loci delicti*[4] may become

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[1] See the study by commerce-net/Nielsen Media research <http://www.commerce.net/news >.

[2] M Burnstein, 'A Global Network in a compartmentalised legal environment', in K Boele-Woelki and C Kessedjan, *Internet—Which court decides, which law applies* (The Hague, London, Boston: Kluwer Law International, 1999), 26.

[3] Burnstein (n 2), 24; Dicey & Morris, 1–074; Schack MMR (Multimedia und Recht) (2000), 59.

[4] See Private International Law (Miscellaneous Provisions) Act 1995, ss 9–13.

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inconsistent with the decreasing relevance of territory-based rules[5] in a deterritorialised electronic medium, the internet.

Online commerce is inevitably accompanied by a rise in deceptive marketing practices.[6] Sellers should have an interest in the development of mechanisms to control deceptive marketing practices on the internet since, if deceptive trade practices on the Internet are allowed, consumers will regard it as an unsafe place to purchase.

But which law will assess the legality of a certain website by which a company advertises its products or services? Should it be the law of the country where the customer is located or rather the law of the country where the advertising activity comes from? The location of tortious activity over the internet constitutes the crucial practical issue private international law has to deal with.

This paper proposes an approach to the question of the applicable law in terms of deceptive marketing practices ('unfair competition') over the Internet by examining the existing rules of private international law and by promoting what shape such a rule should take in the future to deal adequately with the problem.

II. 'UNFAIR COMPETITION' AND PRIVATE INTERNATIONAL LAW IN THE UK

Deceptive Marketing Practices are judged, at least in civil law countries, mainly on the basis of the law of unfair competition.

A. Scope of the Law of Unfair Competition

1. Delimitation of the 'Law of Unfair Competition' and Competition Law

First of all, a distinction has to be made between the law of unfair competition and competition law. Competition law aims to ensure that there is competition between firms, and thus wishes to grant free access to the market for everyone. The law of unfair competition wants to protect the fairness of the—already existing and working—market by prohibiting certain behaviour which is considered to contravene the 'honest usages' or the 'bonos mores' (gute Sitten)[7] of trade.[8] Schricker[9] considers the law of unfair competition as being

[5] T Hoeren, 'E-commerce—Germany' (2000) *Computer Law & Security Report*, 113 (114).

[6] J Rotchild, 'Protecting the digital consumer: the limits of cyberspace utopianism' (1999), *Indiana Law Journal*, 895 (897).

[7] Section 1 of the German Code against unfair competition; § 1 UWG.

[8] A Robertson and A Horton, 'Does the United Kingdom or the European Community need an Unfair Competition Law?' in A Firth, S Lane, and Y Smyth, *Readings in Intellectual Property* (London: Sweet & Maxwell, 1997), 264 (276).

[9] G Schricker, *Twenty-Five Years of Protection Against Unfair Competition*, IIC (Munich: Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, 1995), 782 (794).

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part of the protection of the honesty of competition whereas competition law is aimed at the protection of freedom of competition.

2. Definition of the Law of Unfair Competition

A coherent body of unfair competition law can be made out in continental Europe and all over the world whose common elements can be identified as follows: provisions dealing with comparative advertising, confusion, parasitic behaviour, special offers, low prices, prohibiting disparagement of competitors and discriminatory sales conditions, including price discounting.[10] In most legal orders, one can find a flexible general clause the object of which is the prevention of unfair trade practices.[11] The legal basis of unfair competition can generally be found in civil code principles,[12] in *leges speciales*[13] or in common law.[14] Unfair competition laws differ considerably, both in content and policy, between *laissez-faire* and highly interventionist.[15] This stresses the significance of the search for an appropriate conflicts rule.

Article 10*bis* of the Paris Convention for the Protection of Industrial Property contains a definition: It considers 'any act of competition contrary to honest practices in industrial or commercial matters' constituting an act of unfair competition. It even contains a list of acts that should be prohibited.

A law of unfair competition is unknown in the UK as such. Courts in the UK are reluctant to 'draw a line between fair and unfair competition, between what is reasonable and unreasonable',[16] stating that this would be beyond the power of the courts.[17]

Hence, in the UK, competitors have not been given a right of civil action against misleading advertisements having as their objective the redressment of dishonest behaviour. The UK approach towards the problem of deceptive behaviour can be considered as being to a great extent part of criminal or administrative, not private law,[18] for example, the British Code of Advertising Practice drawn up by the industry,[19] the Control of Misleading

[10] A Robertson and A Horton, 'Does the United Kingdom or the European Community need an Unfair Competition Law?', in A Firth and S Lane and Y Smyth, *Readings in Intellectual Property* (London: Sweet & Maxwell, 1997), 264 (277).

[11] See s 1 of the German Law against Unfair Competition; Art 1382, 1383 of the French Civil Code; Arts 22–9 of the Belgian Law on Unfair Practices and the Protection of the Consumers; Art 260 of the Portuguese Codigo da Propiedade Industrial; s 52(1) of the Australian Trade Practices Act 1974; s 43(a) of the US Lanham Act.

[12] I.e. France.

[13] I.e. Belgium, Germany.

[14] See AK Sanders, *Unfair Competition Law* (Oxford: Oxford University Press, 2000), 22–77, who adds a 'concurrent approach' (69).

[15] C Wadlow, *Enforcement of Intellectual Property in European and International Law* (London: Sweet & Maxwell, 1998, 340, 6–37.

[16] *Mogul Steamship Co v McGregor* (1889) 23 QBD 598, at 626.

[17] See Jacob J in *Hodgkinson v Wards Mobility Services Ltd* (1995) FSR 169.

[18] See also G Schricker IIC (1995), 782 (785).

[19] WR Cornish, *Intellectual Property* (Sweet & Maxwell, 1999), 15–19.

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Advertisements Regulations 1988, Chapter 29 of the Trade Descriptions Act 1968 which contains provisions concerning criminal offences[20] in the case of false or misleading advertising[21] and the Financial Services and Markets Act 2000 by virtue of which an investment advertisement is subject to authorisation (s 21(2)).[22]

Moreover, the law of torts protects companies in the market place against economic misconduct. Thus, a person may not pass off his goods as those of his rival.[23] To impede a rival, the requirements for passing-off must be fulfilled, ie the plaintiff has to prove good will[24] attached to his goods or services, a misrepresentation[25] made by the defendant making the public believe that there is a connection between the goods or services of the defendant and those of the plaintiff and likelihood of damage.[26] Furthermore, the tort of injurious (or malicious) falsehood protects competitors against publishing of false words or facts, that were published maliciously and which entail special damage as a direct result of their publication.[27]

B. Unfair Competition on the Internet

What are the differences between advertising over the internet and traditional advertising?

Of course, the internet offers a platform which invites companies to the same economic behaviour as in the 'real' world. Therefore, it is understandable that unfair competition provisions can be relevant when assessing the lawfulness of an advertisement contained in a website.[28]

On the other hand, in order to examine the nature of advertising over the internet one also has to take into account typical forms of advertising inherent to the internet. The system of user selected 'linking', for example, works 'like a reference in the footnotes of a book.'[29] By such a link or 'hyperlink' a third party website is linked to the linking website.

If the viewer clicks on that part of the screen, the linked-to website is displayed on the screen. At first sight, this procedure might be considered as lawful since it is the viewer's choice to click on the link. However, the

[20] See s 18 of Chapter 29 of the Trade Description Act 1968.
[21] Section 5 of Chapter 29 of the Trade Description Act 1968.
[22] The FSMA was passed in July 2000 replacing the FSA 1986; see S Shooter, 'Website content and the Financial Services Regulations (Feb 2001), *Electronic Business Law*, 6.
[23] *Reddaway v Banham* (1896) AC 199, HL.
[24] *Anheuser-Busch v Budejovicky Budvar Narodni Podnik* (1984) 128 SJ 398; (1984) FSR 413, CA.
[25] See, eg, *Reckit & Colman v Borden* (1990) 1 WLR 491, HL.
[26] *Lego System v Lego M. Lemelstrich* (1983) FSR 155; *Stringfellow v McCain Foods* (1984) RPC 501, CA.
[27] eg, K*aye v Robertson* (1991) FSR 62, CA.
[28] See MW Stecher (ed), Webvertising, *Unfair Competition and Trademarks on the Internet* (London: Kluwer Law International, 1999).
[29] C Reed, *Internet Law* (London, Edinburgh, Dublin: Butterworths, 2000), 67.

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company of a linked-to website wants to generate revenue via advertising on its website. By the process of linking, the viewer would not see the advertising contained in the linked website at its full length.[30] In these cases, the plaintiff regularly objected to the links to its site from the defendant's web page. The fact that under English law 'linking' is not likely to be considered as 'passing-off' for not constituting a diminution of the plaintiff's goodwill, makes these cases relevant for the question of the applicable law. A link helps rather to increase the plaintiff's reputation having a positive marketing effect on the consumer. A more consumer-orientated law of unfair competition might consider this type of advertising differently.

Moreover, typical forms of internet advertising are the sending of unsolicited e-mails ('spamming'), 'framing' (display of a second website within a frame which is on the first Website after the viewer has clicked on a link) and 'meta-tagging'. The latter has as its object the achievement of favourable rankings in lists of search results displayed to users of search engines. Therefore, many websites place keywords—ie the name of a well-known trademark which has nothing to do with the website—in data fields invisible to users but which are identifiable to search engines, such as AltaVista or Yahoo.[31]

The technological methods in order to take advantage of the reputation of a competitor must be taken into account when searching for the appropriate conflict rule.

C. The Role of Unfair Competition in Private International Law

Having said this, one has to examine if the law of unfair competition falls within the reach of the English private international law of torts.

First, one has to consider which rule of private international law has to be applied. The Rome Convention which has been incorporated in the law of the United Kingdom by the Contracts (Applicable Law) Act 1990 does not cover non-contractual obligations. However, there are plans to introduce a Convention on the Law applicable to non-contractual obligations (Rome II). Article 4(b) of a proposal for a European Convention on the law applicable to non-contractual obligations contains a special presumption that in case of unfair competition or restrictive trade practices a non-contractual obligation is most closely connected with the country whose market is affected by the harmful event.[32]

[30] See as an example: *Shetland Times v Shetland News* (1997) FSR 604 (Scotland); *Dubuc, Cyberspace—the Advertising Super Highway—some bumps need repair*, Practising Law Institute Commercial Law and Practice Course Handbook Series (PLI) (Apr 1999), 165 (171 et seq.); C Reed, 'Controlling World Wide Web links—Property Rights, Access Rights, Unfair Competition' (Fall 1998), *Indiana Journal of Global Legal Studies*, 167 (200 et seq.).

[31] Dubuc PLI, Apr (1999), 165 (172 et seq.).

[32] Session of the European Group for Private International law on 25–27 Sept 1998, see M Fallon, 'Proposition pour une convention européenne sur la loi applicable aux obligations non-contractualles' (1999) *European Review of Private Law*, 45 (48).

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Article 6 of the preliminary draft proposal for a Council Regulation on the Law applicable to non-contractual obligations dating from May 2002 (Rome II Regulation) provides that

> The law applicable to a non-contractual obligation arising from unfair competition or other unfair practices shall be the law of the country where the unfair competition or other practice affects competitive relations or the collective interests of consumers.

Since these are only proposals, the problem has to be contemplated on the basis of national conflict rules. Part III of the Private International Law (Miscellaneous Provisions) Act 1995 contains choice of law rules relating to tort and delict.[33] According to the general rule of section 11(1) of Part III of the Act, the law of the country in which the events constituting the tort or delict in question occur is applicable. Section 10 of Part III of the Act abolishes certain common law rules so far as those rules apply to any claim in tort or delict which is not excluded by section 13. Section 13 excludes the applicability of Part III of the Act to 'issues arising in any defamation claim'. This exclusion is a problematic issue.

1. Characterisation of Unfair Competition

To decide if unfair competition falls within the scope of Part III of the Act at all, it is important to consider the problem of 'characterisation' under a foreign law as a tort. There is no disagreement that if the cause of action takes the form of passing-off this will give rise to an application of the rules of Part III of the Act.[34] But what if it takes the form of unfair competition known as such in the Netherlands, for example?

The characterisation process has to give due account to the reference to the purposes of private international law which is contained in section 9(2) of the 1995 Act. This sentence does not give guidance as to how characterisation works. Characterisation is 'a process of refining English conflict rules by expressing them with greater precision'[35] or the determination of 'which juridical concept or category is appropriate in a given case'.[36] According to recent English case law, the process of characterisation is performed according to the domestic law of the forum (*lex fori*).[37] However, as English law as *lex fori* does not have the concept of unfair competition, the conflict rule contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995 cannot be 'refined' in relation to unfair competition law.

[33] Dicey & Morris, 35–002.

[34] JJ Fawcett and P Torremans, *Intellectual Property and Private International Law* (Oxford: Oxford University Press, 1998), 680.

[35] Dicey & Morris, 2–034

[36] Ibid, 2–003.

[37] Macmill*an Inc v Bishopsgate Investment Trust plc* (1996) 1 WLR 387, 407 (CA): 'the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown put by the claim and the defence.'

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Moreover, the *lex fori* approach would be inconsistent with the purpose of Part III of the Act which aims to abolish to a certain extent the common law conflict rule which required actionability under English law in order to allow the application of foreign law. Therefore, characterisation of an action based on unfair competition cannot be effected exclusively by reference to what the forum regards as tort in its own domestic law of tort.[38] Consequently, the *lex fori* approach will not bring us any further.

That is why one has to consider the rationale of the conflict rule and the purpose of the substantive law rule to be characterised.[39] This proceeding is consistent with the prevailing concept of characterisation ('*Qualifikation*') in German private international law known as '*funktionelle Qualifikation*': characterisation according to the function of the rule of substantive law.[40]

A court should take into account the nature and the content of the foreign rule in order to determine whether it falls within the rubric of liability in tort.[41] Some authors emphasise the necessity of 'flexible' interpretation of the domestic conflict rule in this context.[42]

Is unfair competition tortious? The purpose, function or the objective of unfair competition law is the interest 'of the honest trader in having the right to restrain his competitors from causing him injury by unfair conduct'[43] whereas the equivalent English tort of passing-off 'is a remedy for the invasion of a right of property not in the mark, name or get up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made'.[44] At least, these illustrated purposes have to be considered as very similar. By adopting an 'internationalist'[45] view of the conflict rule in question, it follows that unfair competition can be characterised as a tort in the sense of Part III of the Act. Furthermore, a claim based on unfair competition under a foreign law is likely to be coupled with claims in tort for passing-off or infringement so that it is desirable from a practical point of view not to allow different choice of law rules which apply for parallel claims in a single action.[46] This argument militates for the necessity of a tortious characterisation of unfair competition.

[38] R Morse, 'Torts in private international law: a new statutory framework' (1986), *ICLQ* 45, 888 (894).
[39] Dicey & Morris, 2–035.
[40] B von von Hoffmann, *Internationales Privatrecht* (Munich: Beck, 2000), § 6 at 27.
[41] Dicey & Morris, 35–023.
[42] Ibid, 35–023; Morse, above n 38.
[43] F-K Beier, 'The law of unfair competition in the European Community—its development and present status' (1985) *EIPR*, 284.
[44] *Lord Diplock in Star Industrial Co. Ltd v Yap Kwee Koi* (1976) FSR 256, at 269.
[45] See Morse, above n 38.
[46] Fawcett and Torremans, op cit, 682.

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2. Exclusion by Virtue of Section 13 of Part III of the Act

Part III of the 1995 Act does not apply to actions based on defamation. If unfair competition can be assessed as 'any defamation claim', this would mean that Part III of the Act would entirely or partly not be applicable having as a consequence the application of the common law rule concerning private international law of torts. The relevant English common law rule can be found in the case of *Phillips v Eyre*[47] according to which in respect of 'a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.' Hence, under this so called 'double actionability' rule,[48] an action based on deceptive behaviour committed abroad which constitutes an infringement of a—relatively strict—provision belonging to the law of unfair competition might exclude the application of foreign law because 'the wrong' might not be actionable under English law as not constituting a case of passing-off or injurious falsehood. This would mean a certain hostility of English law against a wider protection of the competitor abroad.

The expression 'any defamation claim' means any claim under the law of any country other than the UK corresponding to or otherwise in the nature of a claim for malicious falsehood, libel or slander.[49] A claim for unfair competition under a foreign law can take the form of false and disparaging statement about another's goods or services. Nevertheless, the exclusion of such disparaging statements in relation to the reputation of businesses and their products from Part III of the 1995 Act would not be coherent with the objective pursued by section 13. The reason for the exclusion of defamation claims was the concern to protect the media by avoiding the application of a foreign law that does not protect freedom of speech and the press to the same extent as the law of the UK does.[50] The exclusion of foreign laws of unfair competition was not envisaged at all when Part III of the 1995 Act was adopted. As long as injurious falsehood is made in relation to the reputation or good will of a business, the action is not excluded by virtue of section 13 of Part III of the 1995 Act.[51] Thus, an action based on a foreign law of unfair competition falls entirely within the scope of Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

47 (1870) LR 6 QB 1.
48 *Boys v Chaplin* (1971) AC 356 (377, 381, 388); Dicey & Morris 35–006.
49 Fawcett and Torremans, op cit, 683.
50 Ibid; Morse, above n 38.
51 Wadlow, op cit, 341, 6–39, suggests the contrary solution.

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3. Particularities of Choice of Law Concerning Trademark Infringement

On the internet, does anybody who uses names for products or services on his or her website have to perform a worldwide trademark search for each of these names?

Advertising activities are often related to trademark infringement. The treatment of trademark infringement in private international law is a special issue following its own rules.

The classical concept of the law of the protecting country[52] (*lex loci protectionis*) means that the applicable law is the law of the country for the territory of which the claimant seeks protection of his (registered) trademark.[53] It is only relevant to acquisition, scope, termination, validity, and transferability of trademark rights. The question of whether there is an infringement is assessed by the law of the country where the act of alleged infringement has taken place, that is where the event constituting the tort occurred.[54] This distinction is vital for the understanding of conflicts rules relating to trademark law.[55]

The protection under one country's laws does not automatically result in the same protection outside that country's territory even though US case law tends to a doubtful extraterritorial application of its trade mark law.[56] Intellectual property rights are therefore always 'located' in the country that granted the rights and can be infringed only by acts occurring there. The answer to the initial question depends on whether a trademark is used in the respective country granting protection merely by operating the website which is accessible throughout the world.

In contrast, the law of unfair competition is independent of the grant of a certain protected right but relies on the concepts of misrepresentation and good will or, rather in continental Europe, of 'unfairness' of certain economic behaviour. A relevant indicator to be taken into account in that context is not territoriality but economic activity as such. Contrary to the law of industrial property and copyright, the principle of territoriality cannot be transferred to a choice of law rule concerning unfair competition;[57] despite these differences, however, conflicts rules of trademark law and unfair competition law can have something in common.

The essay will only focus on the applicable law concerning the law of unfair competition, and will not deal with choice of law rules relating to trademark infringement.

[52] See Fawcett and Torremans, op cit, 518.
[53] For Germany: Sack WRP (Wettbewerb, in Recht and Praxis) (2000), 269 (270).
[54] Fawcett and Torremans, op cit, 620.
[55] Schack MMR (Multimedia und Recht) (2000) 59 (60).
[56] See T Bettinger and D Thum, 'Territorial Trademark Rights in the Global Village' (2000) *IIC*, 162 (167–9).
[57] A Troller, *International Encyclopaedia of Comparative Law* , ch 34, 1.

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4. Existing Conflict Rules Concerning Multi-State Torts of Unfair Competition

Section 11(1) of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 provides that 'the applicable law is the law of the country in which the events constituting the tort in question occur'. Consequently, for there to be single country unfair competition, the act and the damage of an act of unfair competition must occur in the same foreign country.[58] This paper is concerned with cases where the ISP of the internet advertiser and its competitors are located in different countries respectively so that act and damage do not take place in the same foreign country. Therefore, the paper only focuses on section 11(2) of the Act.

(i) Choice of law rules for unfair competition within already existing systems of tort choice of law rules

Section 11(2) of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 provides that where the elements constituting the tort occur in different countries,

> the applicable law is to be taken as being … (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

Section 11(2)(b) will not be relevant in our context since the right protected by 'unfair competition' in a broad sense is not only the competitor's business, but also to a great extent the fairness of market behaviour or consumer protection. The term 'property' is too narrow for the notion of unfair competition.[59]

Therefore, everything depends on where the most significant elements of an act of unfair competition occur (Section 11(2)(c)). This gives rise to the problem of whether the significant elements occur in the place of acting or in the place where the damage occurs.

An argument against a place of damage rule is that every legal order has a different notion of damage concerning unfair competition whereas the action is almost always easy to locate. Additionally, the place of acting becomes important in the case of a tortfeasor who affects competition in several countries at the same time and more or less to the same extent[60] so that it would seem inappropriate to apply the laws of many different countries.

On the other hand, the fact that an act of competition affects consumers as well as other competitors in a market[61] may well militate for a rule taking due account of the place of damage. Moreover, the choice of the place of acting can give the opportunity of manipulation by the tortfeasor acting in a country

[58] Fawcett and Torremans, op cit, 685. [59] Similarly ibid, 685.
[60] Troller, op cit, ch 34, 6. [61] Wadlow, op cit, 339, 6–37.

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with a low-level standard of unfair competition law. The place of acting also can simply be fortuitous[62].

It seems that English law—inspired by authors of other jurisdictions—tends to declare applicable the law of the country where the direct economic loss to the victim occurs[63] (place of damage rule). To date, the question has not been answered by a court.

Section 12(1) of the 1995 Act provides for the displacement of the general rule if, from a comparison of the significance of the connecting factors taken into account under the general rule and 'the significance of any factors connecting the tort or delict with another country' that application of the latter law is regarded as 'substantially more appropriate'.

Section 12 of the 1995 Act offers a great flexibility as to its interpretation, but there is uncertainty as to whether and how to operate the displacement of the general rule.[64] For example, the parties' common nationality has given rise to such a displacement in a German private international law case dealing with unfair competition.[65]

The Law Commission considered three situations in which such a displacement could take place.[66] These situations are characterised by the fact that the place where the damage occurs is fortuitous,[67] that there exists a close connection between the parties which precedes the tort[68] or that 'every factor in the case other than the place of the accident points to a particular system of law'.[69] In cases of unfair competition on the internet, such situations only arise if the competitors in question are established in the same country or are otherwise closely connected. The relevant problems of multi-state internet advertising, however, arise when the parties are located in different countries. From this point of view, the importance of the displacement of the general rule contained in section 12 is considerably reduced. For the purposes of this paper, section 11 provides enough guidance as to the determination of the applicable law.

In the case of passing-off, the applicable law would be the law of the country in which the product is passed off. The most significant element of the English tort of passing-off is the act of misrepresentation. Thus, the law of the country where the misrepresentation is made would be applicable. This is the law of the country where the defendant acts on the market. Consequently, if the place where the misrepresentation was made is equal to the place of acting, a 'pure' *lex fori* interpretation leads to the preference of a place-of-acting-rule. Yet, in a case where the place of acting is the place where economic interests in the market are influenced, the place of acting and place of damage can

[62] Fawcett and Torremans, op cit, 687 citing Troller, op cit, ch 34, 10 (concerning Swiss Private International Law).

[63] Fawcett and Torremans, op cit, 687.

[64] Ibid, 688.

[65] BGH 20 Dec 1963, BGHZ 40, 391; the parties' common residence in the same country has been laid down as a displacement rule in the new Act reforming private international law dating from 1999: Art 40 (2) EGBGB.

[66] Law Commission no 193 (1990) para 3.8.

[67] Ibid, para 3.8 at (1).

[68] Ibid, para 3.8 at (2).

[69] Ibid, para 3.8 at (3).

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easily coincide. This is an issue that adds an element of uncertainty to the problem.

A more precise approach seems to be the application of the law of the market where the competing interests collide,[70] that is where the market, in which injury to a competitor's business is caused, is situated. This rule follows the continental, especially Swiss,[71] law. This approach is desirable having in view the necessity of a unification of private international law in Europe which is not yet entirely achieved.

In Germany, the reform of private international law rules (EGBGB) of 1 June 1999 has not lead to the insertion of a special conflicts rule of the 'place of the market' or 'place of competing colliding interests'. Nevertheless, the courts apply the law of the country where the competitive act forming the subject of the complaint affects the competitors in the local market.[72]

(ii) Example of independent tort choice of law rules for unfair competition

Apart from other special conflict rules regarding unfair competition[73] a special choice of law rule concerning unfair competition is included in Article 136 Swiss PIL Statute.[74] Article 136(1) provides that 'claims of unfair competition are governed by the law of the country in whose market the unfair act has its effect'. The provision focuses on the direct effects of acts of unfair competition irrespective of where the defendant is domiciled or where the place of acting is located. It follows a trend that can be made out according to comparative conflict of laws studies.[75]

The scope of this choice of law rule is remarkably wide since it is intended to apply 'to a category of acts and behaviour which is broader than that represented by "unfair competition" as defined by Swiss law'.[76] This approach arguably avoids characterisation problems.

The already mentioned Article 6 of the preliminary draft proposal for a Council Regulation on the Law applicable to non-contractual obligations dating from May 2002 (Rome II Regulation) adopts a similar approach.

To what extent are such conflict rules challenged by the internet?

[70] Fawcett and Torremans, op cit, 717.

[71] See Troller, op cit, ch 34, 11.

[72] Federal Supreme Court (Bundesgerichtshof), BGHZ 35, 329 (334, 336)—*baby feeding bottles*; BGH GRUR (Gewerblicher Rechtsschutz und Urheberrecht) (1961), 316 (318)—*steel export*; BGH GRUR (1982), 495 (497)—*Domgarten*; GRUR (1988), 453 (454)—*A Champagne among mineral waters*; GRUR (1991), 463 (464)—*purchases abroad*.

[73] In 1983, the Institute of International Law adopted a Resolution on the Conflict of Laws on Unfair Competition in which it recommended a special place-of-market rule; see Fawcett and Torremans, op cit, 708.

[74] PA Karrer, KW Arnold, and PM Patochi, *Switzerland's Private International Law* (Dordrecht: Kluwer Law International, 1994), 124.

[75] A-C Imhoff-Scheier and PM Patochi, *Torts and Unjust Enrichment in the New Swiss Conflict of Laws* (Zurich: Schultheiss, 1990), 157.

[76] Ibid, 155.

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III. SEARCH FOR THE 'PROPER' TORTS CHOICE OF LAW RULE CONCERNING UNFAIR COMPETITION IN THE INTERNET

Whether an advertisement is considered to be unfair should be determined with regard to the public to which it is addressed. Internet advertising, however, is directed at the world public which leads to the conclusion that the same advertisement might be perfectly legal in one country and against the laws of another country at the same time. Therefore, criteria aimed to reduce the number of applicable laws have to be found. There are three possible laws that may be chosen: the law of the country where the advertiser is based, where the server is based or where the advertisement is received.

A. Transferring the Conflict Rule of 'Colliding Competing Interests' on Advertising Activities over the Internet

As internet advertising activities are ubiquitous, one may doubt whether a rule of 'colliding competing interests' is still appropriate for new technology media.[77] The location of the market in which competing interests collide can become impossible in view of the increasing dematerialisation of world trade. Since a website can be viewed from every corner of the world, how is it possible to take account of a multiplication of applicable laws?

1. 'Over The Internet, Competing Interests Collide Everywhere'

The most extreme approach conceivable is that the advertising activity contained in or linked to a website has to observe the strictest national law of unfair competition in the world and its high standards[78]. The justification could be that it is at least possible to view the website in question also in that country. This approach seems to ignore economic realities. The fact that a website is accessible throughout the world does not mean at the same time that the advertiser wants to do business all over the world. It therefore does not seem convincing that the advertiser has to obey strict unfair competition rules of a country in which he never will do business.

2. Foreseeability Test

In order to reduce the number of national legal orders applicable, some authors propose a foreseeability test with regard to the question whether a content provider could reasonably foresee that a certain website will be accessed in a

[77] An affirmative answer is given by Fawcett and Torremans, op cit, 717: under (I).

[78] Thus apparently H Kronke, 'Applicable law in torts and contracts in cyberspace', in K Boele-Woelki, C Kessedjian, *Internet—Which court decides, which law applies* (The Hague, London, Boston: Kluwer Law International), 65 (71).

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particular country.[79] On the other hand, an ISP is aware of the ubiquitous availability of the website in every country so that an ISP foresees that the website is accessible anywhere. Therefore, this criterion is not very useful for our purposes.

3. The Doctrine of 'Perceivable Effects'

Some authors favour the application of the law of the recipient country when an advertisement is placed on the internet by a foreign company which is directly or indirectly targeted at consumers in that country or which has a significant effect on that market.[80] But what criteria will determine whether an advertisement is targeted at consumers in a certain country?

German case law on internet advertising applies unfair competition legislation 'if the internet advertising is at least also aimed at the German market'.[81] Swiss and German authors tend to apply the law of the country where the advertising activity has 'perceivable effects' ('*Spürbarkeitsregel*').[82] Rather than stressing the relevance of the intention of the advertiser,[83] the generation of perceivable effects has to be measured on an objective basis.[84] This approach takes account of the inherent determination, nature, organisation, and structure of a website.[85] The criterion of perceivable effects is at first sight reasonable because it avoids an exaggerated cumulation of applicable laws. However, it is a vague criterion and has to be concretised.

An English case goes in the same direction.[86] It deals with the question whether a trademark on a web site is used in the course of a UK trade according to section 10(1) of the Trade Marks Act 1994. After acknowledging that 'the mere fact that websites can be accessed anywhere in the world does not mean . . . that the law should regard them as being used everywhere in the world,'[87] Jacob J goes on to say that 'one must also ask where is the trade of the advertiser conducted'[88] whereby he does not rule out the intention of the advertiser as a relevant criterion. In order to decide if there is use of a trademark in the UK, Jacob J stresses the importance of the purpose and effect of

[79] K Burmeister, 'Jurisdiction, Choice of Law, Copyright and the Internet: Protection against framing in an international setting', *Fordham Int Prop Media & Ent LJ* (1999), 625 (664/665).

[80] MW Stecher and H Stallard, in Stecher (ed.), op cit, 9.

[81] *Estée Lauder Cosmetics Ltd & Anr v Fragrance Counter Inc & Anr* (2000) ETMR 843 (859).

[82] Mankowski GRUR Int (Gewerblicher Rechtsschutz und Urheberrecht International) (1999), 909 (915) and ZVglRWiss (Zeitschrift für vergleichende Rechtswissenschaft) 100 (2001), 137 (157); Glöckner ZVglRWiss (2000), 278 (293); Dethloff NJW (Neue Juristische Wochenschrift) (1998), 1596 (1600).

[83] T Hoeren, *Rechtsfragen des Internet* (Köln, 1998), 166.

[84] P Mankowski GRUR Int (1999), 909 (917); G Spindler, *Vertragsrecht der Internet-Provider*, pt XI, at 65.

[85] See Stecher and Stallard in Stecher (ed), op cit, 9.

[86] See *Euromarket Designs Incorporated v Peters & Anr*, 25 July 2000, HC (1999), No 04494 (Jacob J).

[87] At para 12.

[88] At para 13.

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the advertisement in question. Although the case deals with trademark infringement, it indicates the necessity of finding reasonable indicia in order to determine the country which is targeted by the advertisement in question, be it by use of a trademark or by means of (un)fair competition.

Indicia in order to assess the purpose or the perceivable effects of a website can be, for instance, the language: making the communication in a language that is understood almost exclusively by residents of the recipient country and thereby offering a means of responding to the solicitation by domestic communications (such as a local telephone number or mailing address) within the recipient country. For example, if a website is worded in Swedish, the owner of the site may be subject to the law of Sweden because the site is directed to residents in Sweden. Problems arise when the website is entirely written in English. One could assert that such a website is directed at consumers all over the world since large parts of the world population understand English. This point disqualifies 'language of the website' as an appropriate criterion in order to determine the applicable law of unfair competition.

Moreover, the method of payment, currency[89] and the multinational activity of the advertiser (eg Mercedes-Benz) have to be taken into consideration, as well as nature or location of the product (eg, advertisement of a restaurant located in London).

Finally, the way of presentation including economic and tax information can be relevant. A website that stresses the buyer's ability to avoid US income taxes would be deemed to be directed at US residents or taxpayers.

It may seem paradoxical that the real effects of the advertising activity are irrelevant. But the website has only to be directed to customers of a certain country in order to declare its law applicable. Whether an increase of orders made by customers in a certain country has as its cause the successful internet advertising campaign of a certain company, can often not be confirmed. There may be other reasons of an economic nature not linked to the internet which account for the success of a product.

B. Transferring Jurisdiction Principles to Choice of Law Problems

1. 'Minimum contacts'

Are choice of law concepts, like personal jurisdiction concepts, driven by the notion of 'minimum contacts' and, thus, are these criteria—developed by US courts—also to be taken into account for the purposes of tort choice of law rules?[90] Globalisation of trade has challenged the standard of the physical forum presence which was a prerequisite to exercise jurisdiction over a person in the US.[91] This was the incentive for the courts to develop the doctrine of

[89] See *Euromarket Designs v Peters & Anr* (2001) FSR 288, point 25.
[90] WC Altreuter, in Stecher (ed), op cit, 231.
[91] *International Shoe Co v State of Washington, Office of Unemployment Compensation and Placement*, 326 US 310, 315 (1945).

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'minimum contacts'. Although this rule was developed in the context of jurisdiction as to states within the US, it also applies in relation to international jurisdiction problems.[92] In order to establish minimum contacts with the country in question, it is necessary that the defendant could reasonably foresee being sued in a United States court by having 'purposefully availed' himself of the privileges and the advantage of conducting activities within the United States[93].

The so-called 'interactivity approach'[94] distinguishes between passive and interactive web pages.[95] A passive website only permits anyone to view the website. On the other hand, a website becomes interactive when it allows users to communicate and entails a purposeful availment. This approach is similar to the 'perceivable effects' doctrine.

However, in other decisions, the courts found that by 'simply setting up, and posting information at a Web site in the form of an advertisement or solicitation, one has done everything necessary to reach the global internet audience'.[96] They consider it necessary to broaden the permissible scope of jurisdiction of the courts in order to prevent the defendant taking advantage of modern technology and thus escaping traditional notions of jurisdiction.[97]

The minimum contacts approach leads to an overbroad affirmation of jurisdiction. The transfer of the minimum contacts approach to a choice of law rule is not at all consistent with the desire to avoid a cumulation of several national legal orders since mere accessibility is apparently sufficient to establish a minimum contact.

In a German decision,[98] the *Landgericht* Bremen denied jurisdiction in a case dealing with unfair competition on the internet. The defendant, a management and finance consultants company established in *Saxonia*, had built up a website. The plaintiff, a lawyer established in Bremen, sued the defendant for breach of the German law on Legal Advice (*Rechtsberatungsgesetz*). The *Landgericht* ruled that the mere accessibility of a website from Bremen was not enough to establish jurisdiction there, taking into account that the defendant's economic activity was only located in *Saxonia*; therefore the web site was not targeted at potential clients in Bremen. This example shows that the tendency of an overbroad affirmation of jurisdiction is not considered to be normal in other jurisdictions.

[92] See *Asahi Metal Industry Co, Ltd, v Superior Court of California, Solano County*, 480 US 102, 109 (1987).

[93] *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 297 (1980).

[94] K Burmeister, 'Jurisdiction, Choice of Law, Copyright and the Internet: Protection against framing in an international setting', 625 (645).

[95] *Cybersell, Inc v Cybersell, Inc* 130 F 3d 414 (9th Cir 1997).

[96] *Maritz, Inc, v Cybergold, Inc*, 947 F Supp. 1328, 1332 (ED Mo 1996).

[97] *EDIAS Software International v Basis International Ltd*, 947 F Supp. 413, 420 (D Arizona 1996).

[98] LG Bremen, 12 O 440/99 (25 Nov 1999).

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2. Brussels Regulation

Within the European Union, as to matters of tort, Article 5(3) of the Brussels Regulation[99] provides that the courts of the country where 'the harmful event occurred or may occur' will have jurisdiction. The expression 'the harmful event occurred' is subject to an autonomous understanding in its interpretation.[100] The expression also includes the place where the *effects* of the harmful event took place.[101] According to *Shevill v Presse* Alliance,[102] this is the place where the harmful event has caused damage to the injured party, ie the place of the distribution of the publication when the victim is known in those places.

When transferring these rules to torts or infringements of intellectual property rights committed on the Internet, the place where damage has been caused to the injured party has to be determined on an objective basis,[103] ie where the offensive or 'unfair' material is likely to be downloaded. Only the courts which have their judicial district within the 'targeted area'[104] where the 'economic loss' is located will have jurisdiction.

This approach meets the same difficulties as the doctrine of 'perceivable effects' concerning unfair competition on the internet since the localisation of a 'targeted area' is a difficult task. Therefore, Article 5(3) of the Brussels Regulation does not add useful arguments to the question of applicable law of unfair competition over the internet.

However, the case law in relation to Article 5(3) of the Brussels Regulation indicates that the court of the place of the establishment of the tortfeasor[105] can also have jurisdiction. Thus, in any case concerning advertising over the internet, this will be the court of the country where the ISP is established. Consequently, the Brussels Regulation at least does not rule out the possibility of the application of a place-of-acting-rule in terms of jurisdiction—provided that place of acting and place of establishment coincide.

Can the concept of a place-of-acting-rule be transferred to choice-of-law problems on the internet? And if so, under which circumstances? One has to bear in mind that even though a court has jurisdiction, it can apply different laws in cases dealing with multi state torts. Although there is no need to answer the question in a definitive manner, it can be suggested that the transfer of jurisdiction principles to questions of applicable law is—to a certain extent—justifiable, as it is desirable, from a judicial efficiency perspective, that a court having jurisdiction applies the substantive law of the *lex fori*.

[99] Council Regulation (EC) No 44/2001of 22 Dec 2000 in force since 1 Mar 2002.
[100] ECJ in *Marinari v Lloyds Bank* 1995 ECR 1–49.
[101] ECJ in *Bier v Mines de Potasse d'Alsace* 1976 ECR 1735. [102] 1995 ECR I-415.
[103] See V Conan, M Foss, P Lenda, S Louveaux, and A Salaun, *Legal issues for personalised advertising: the AIMedia case study* (Agent Mediated Electronic Commerce—IJCAI, 1999), 48; available at <http://www.jura.uni-muenster.de/eclip/assistance/aimediadocw6.doc>.
[104] Conan *et al*, op cit, 48. [105] Shevill, 1995 ECR I-415 , para 25.

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C. Approaches Favouring the Country of Origin Principle

Interestingly, the place-of-market-rule is gradually called in question.[106] But can one conceive another rule which would satisfy the needs of information technology?

To declare applicable the law of the country of origin would mean that the legality of an advertisement is to be assessed according to the laws of the country where the advertiser or the ISP is established. This, of course, will increase the responsibility of the advertiser or the ISP.

In the English legal literature, the law of the country of 'uploading' is partly favoured because of its similarity to the problem of unfair competition arising out of television broadcasting.[107]

1. ICC Guidelines on Advertising and Marketing on the Internet

A country of origin rule is contained in Article 1(2) of the ICC Guidelines on Advertising and Marketing on the Internet:[108] 'All advertising and marketing should be legal, decent, honest and truthful. "Legal", in the context of these guidelines, is presumed to mean that advertising and marketing messages should be legal in their country of origin . . .'. At the same time, the Guidelines emphasize in Articles 2 to 7 the importance of decency and truthfulness in the marketing and advertising industry. The interesting point about them is that they mention the country of origin principle explicitly.

2. The E-Commerce Directive of the EC

The Directive 2000/31/EC of the European Parliament and of the Council (of 8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) harmonizes national requirements on information society services, including the areas of internet service, commercial communications, electronic contracts, liability of intermediaries, codes of conduct, arbitration, and court actions. The adoption of the Directive is based on the principles of mutual recognition and country of origin.[109]

It does not intend, however, to establish additional rules of private international law or interfere with the jurisdiction of the courts. This issue will be discussed below. The Directive defines the term 'service provider' broadly and includes all 'information society services' such as internet access, internet

[106] Dethloff JZ (Juristenzeitung) (2000), 179 (182).
[107] Fawcett and Torremans, op cit, 686.
[108] See <http://www.iccwbo.org/home/statements_rules/rules/1998/internet_guidelines.asp>.
[109] D Church, M Pullen, and JK Winn, 'Recent Developments regarding US and EU regulation of electronic commerce' (1999), *International Lawyer*, 347 (353).

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communications, advertisements and so on. Article 3 contains the country of origin principle which is only limited to the European Internal Market.

Recital (21) makes clear that the country of origin principle applies to on-line advertising and thus also to the law of unfair competition. According to Article 3(3) and the annex of the Directive, contractual obligations concerning consumer contracts are not caught by the country of origin principle. This means, in return, that the country of origin principle is applicable to business-to-business transactions in the absence of an agreement on choice of law.

3. UCITA

UCITA is the US Uniform Computer Information Transactions Act that was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and must be ratified by each state in order to become law.[110] So far, it has passed into law in a few states.[111]

It contains a country of origin principle dealing with choice of law in the field of 'access contracts' or contracts providing for electronic delivery of a copy.

Subsection §109(b)(1) states that—in the absence of an agreement on choice of law—'access contracts' are 'governed by the law of the jurisdiction in which the licensor is located when the agreement is made'. UCITA, in adopting a place of origin rule for applicable law in online information commerce, further provides that the licensor's location is defined as its place of business at its chief executive office, if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.[112]

It has been said that in online commerce in information, there was 'only one rule that implements the goals of certainty and cost savings associated with a planning perspective' and that 'UCITA provides that rule'.[113] Although the cited rule only concerns contract law, it aims to enhance certainty in planning for on-line vendors, small, medium and large, who make direct access available to the world via the internet[114] and thereby helps to avoid a cumulation of applicable laws.

§ 109(c) UCITA provides:

[110] See <http://www.cpsr.org/program/UCITA/ucita-fact.html> (web site of the 'Computer Professionals for Social responsibility').

[111] See <http://www.cpsr.org/program/UCITA/UCITA_update.html>.

[112] UCITA § 109 (d).

[113] RT Nimmer, 'International Information Transactions: An Essay on law in an information society' (2000) 26 *Brook. J. Int'l Law* 5, 24.

[114] David A Cohn and Mary Jo Dively, 'The Need For A More Objective Look At the Myths of the Proposed Uniform Computer Information Act' (4 Apr 1999), *The 2B Guide*; see <http://www.2bguide.com/bkgd.html>.

> In cases governed by subsection (b), if the jurisdiction whose law governs is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise the law of the State that has the most significant relationship to the transaction governs.

The cited rule expresses the concern of the legislator to protect US nationals in case of the lack of existence of a certain minimum standard of protection in the country of origin.

The country of origin principle implies a certain level of harmonisation that is necessary to avoid a misuse of low-level standard protection regarding unfair competition in certain countries. The more different national legal orders are within a certain area, the more likely such a principle does not make sense because of a considerable divergence of protection standards. Therefore, in order to avoid a 'race to the bottom' and thus a loss of protection against unfair competition, the country of origin principle requires a harmonisation to a certain extent within the area in which it is supposed to apply.[115]

Another approach favours a necessary self-regulation of the advertising industry enforced by conduct codes.[116] However, although self-regulation may be desirable, it cannot be relied upon.

D. The Choice between Country of Origin and Place of Colliding Competing Interests

1. Arguments against the Country of Origin Principle

(i) The country-of-origin principle comes from public law

Point 8 of the Proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market dating from January 1999 points out the objective of the supervision of information society services at the source of the activity in order to ensure an effective protection of the public interest. This approach, emphasising the element of intervention of the state, could lead to the conclusion that a country of origin principle only aims at the compliance of ISPs with national public law. However, as stated above, point 21 of the E-commerce Directive militates for the inclusion of private law concerning the law of advertising that is predominant in European continental countries.

Originally, the country of origin principle emanates from European administrative business law.[117] This gives rise to the question to what extent concepts of public law can be transferred to private international law.

Broadly speaking, some areas of public law, such as the law of civil proce-

[115] Schack MMR (2000), 59 (63); Mankowski GRUR Int (1999), 909 (913, 914).
[116] ICC Guidelines on Advertising and Marketing on the Internet, introduction and Art 1(1); see <http://www.iccwbo.org/home/statements_rules/rules/1998/internet_guidelines.asp>.
[117] eg, Second Council Directive 89/646/EEC of 15 Dec 1989 (Banking Directive).

dure that determines *inter alia* the law of which state governs the capacity to bring proceedings, the course of the proceedings, the jurisdiction and the recognition and enforcement of foreign judgments, contain similar concepts as provisions of private international law. Moreover, it may be doubted that private international law is part of private law in the sense of substantive law.[118] Conflict rules do not regulate relationships between private persons directly, but declare applicable a law that will govern the relationship in question.

However, private international law does not always pursue purposes of regulation and protection, as public law does, but has in view to a great extent the interests of the parties whose relationship needs to be governed by a law yet to be determined.[119] For example, one has to consider the interest of a party to be subject to a law it is familiar with.

The question whether a transfer of concepts of public law is possible cannot be answered without having regard to the subject matter the conflict rule in question deals with. The country of origin principle concerning advertising law has been introduced by Article 2(1), 3(2), and 23(2) of the Television Broadcasting Directive[120] as a conflicts rule. The difference between television and internet is the existence of a licensing system in the field of television broadcasting. The country of origin principle is therefore perhaps only appropriate in the field of television broadcasting.

(ii) Proof of foreign law

Objections against the country of origin principle could be raised on the ground of the rule that in common law countries foreign law is treated as a fact.[121] This principle has long been established in England[122] and is known as the 'fact-doctrine'. According to it, foreign law must be pleaded and proved. Unless a party asks for the application of foreign law, the court decides a case clearly containing foreign elements as though it were a purely domestic English case.[123] Moreover, foreign law is to be proved by the testimony of witnesses.[124]

In European continental jurisdictions, foreign law does not have to be proven by the parties. Judges are obliged to apply foreign law *of their own motion* if the case presents a sufficient amount of foreign elements.[125] Therefore, one could argue that the application of foreign law is not equally efficient in every country of the EU.

[118] See von Hoffmann, op cit, § 1, at 39–41.
[119] Roth, RabelsZ 55 (1991), 623 (668).
[120] Council Directive 89/552/EEC dated 3 Oct 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.
[121] A recent example is *University of Glasgow v The Economist* (1997) EMLR 495.
[122] Dicey & Morris 9–002.
[123] Ibid, 9–025.
[124] Sussex Peerage case (1844), II Cl & F. 85, 116, 8 ER 1034, 1036.
[125] eg in Germany; 'iura novit curia': von Hoffmann, op cit, § 3, at 130.

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In the light of the country of origin principle, which may declare applicable foreign law, this divergence could give rise to different levels of efficiency of the application of foreign law in European national courts.[126]

However, these concerns are not to be taken too seriously. The party favoured by the country of origin principle will certainly invoke the application of foreign law. Furthermore, according to the House of Lords,[127] the expert witness must be qualified to give advice on foreign law. The courts in England attach great importance to the practical experience of the expert witness in the foreign country in question.[128] The fear of a substantial difference as to the efficiency of the application of foreign law in European national courts is therefore not justified.

(iii) The country of origin principle is based on the objective of mutual recognition

The finding that a country of origin principle can only be introduced as a rule of private international law when there is a certain level of harmonisation is based on the idea of mutual recognition, especially in the EU. This idea is considered as being alien to rules of private international law[129] that unconditionally lead to the application of only one law regardless its level of protection, quality or political convenience. Yet, the principle of recognition was contained in some rules of private international law concerning intellectual property in the somewhat weaker form of the requirement of reciprocity.[130] Additionally, § 109(c) UCITA is an expression of the principle of reciprocity.

This shows, that private international law uses the technique of recognition in order to guarantee the application of a foreign law with a similar standard compared to the *lex fori* which leads to the conclusion that the political background of the country of origin principle cannot prevent it—in principle—from being introduced as a conflicts rule.

(iv) Race to the bottom

The country of origin principle gives an incentive for suppliers of goods and services (ISPs) to relocate to the country whose regulatory structure is least interventionist, ie which possesses a low protection standard in terms of unfair competition. This gives rise to a 'delawarisation' or *race to the bottom*.[131] Thus, the country-of-origin principle tends to reduce the protections available to consumers. Whether this argument is convincing or merely seductive, will be examined below.

[126] Mankowski GRUR Int (1999), 909 (913, n 58).

[127] See *Sussex Peerage* case.

[128] I Zajtay, 'The application of foreign law', in *International Encyclopaedia of Comparative Law*, vol. III, ch 14, at 14–19, p 20.

[129] Mankowski GRUR Int (1999), 909 (913); ZVglRWiss (Zeitschrift für vergleichende Rechtwissenschaft) 100 (2001), 137 (148).

[130] See Troller, Industrial and Intellectual Property', in op cit, vol. III, ch 22, at 22–14, p 11: who refers to the French Patent Law of 2 Jan 1968.

[131] Mankowski ZVglRWiss 100 (2001), 137 (158).

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(v) Creation of European and non-European choice-of-law regimes

The introduction of a country of origin principle at a European level engenders a division of choice of law regimes concerning EU and non-EU cases. As long as a country of origin rule is not introduced at the world level,[132] this concern is justified on the basis that it leads to a slightly more complicated system of choice of law rules. Additionally, it might contribute to the creation of a 'fortress Europe'.

(vi) Inconsistency with the country of destination approach in international consumer contract law

It has been argued that the country of origin principle is not in line with choice of law rules of consumer contract law[133] that follows the country-of-destination approach[134].

Article 5(2) of the Rome Convention declares applicable the consumer law of the country of the consumer's domicile 'if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract . . .'. First, a website may be considered as a specific invitation if it does not indicate an exclusion of an unwanted jurisdiction.[135] As technical possibilities to block viewers from specified countries have not yet been developed such as to work in an efficient way,[136] it is the website owner's responsibility to make clear that the website is not intended for consumers from certain countries in order to be able to reject certain offers. Secondly, by clicking a button on a website, the consumer is deemed to have taken all the steps necessary in the country of his habitual residence if he accesses the website from that country,[137] even if the offer will be viewed by the supplier's staff in the supplier's country of establishment. Although one has to admit that it is the consumer who is active and takes the initiative to dial up a certain website, the application of Article 5(2) of the Rome Convention to those cases makes sense since the mere fact that a new technology is used for the conclusion of consumer contracts rather than traditional means, such as letters or phone calls, should not entail a loss of a high level of consumer protection which is provided by laws that were drafted in times in which the internet had not yet reached its full potential. Consequently, contracts concluded between suppliers and consumers who are domiciled in different

[132] This is the very objective of Art 1 of the ICC Guidelines on Advertising and Marketing on the Internet.

[133] Mankowski GRUR Int (1999), 909 (915); ZVglRWiss 100 (2001), 137 (165 et seq.).

[134] D Marino and D Fontana, 'European Parliament and Council Draft Directive on Electronic Commerce' (2000) *CTLR*, 45.

[135] See the example in C Gringras, *The Laws of the Internet* (London: Butterworths, 1997), 51.

[136] Ibid, 51; *The Economist*, 13 Jan 2001, 25 et seq. (Yahoo! case).

[137] Dicey & Morris, 33–013; Gringras, op cit, 50.

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Member States will be governed by the consumer law of the consumer's habitual residence under the terms of the Rome Convention.[138]

In contrast, the country of origin principle declares applicable the unfair competition law of the country of establishment of the ISP. Thus, a multiplication of several different national legal orders exists in international consumer contract law, a phenomenon the country of origin principle seeks to avoid. This may be considered as an undesirable contradiction that entails a heavy burden on the industry as companies have to comply with many different consumer protection laws.

However, the different treatment of unfair competition law and consumer contract law in terms of private international law might be justified by the different nature of both subject matters.

(vii) Different treatment of internet advertising as opposed to traditional advertising

At last, cases dealing with multi country unfair competition over the internet would be solved differently to cases dealing with traditional advertising methods. Conflicts rules would become more complicated. Should retailers utilising the internet as a medium to promote their products be put in a more favourable position than the ones that utilise traditional media for promotion?

2. Arguments in Favour of the Country-of-Origin-Principle

(i) Country-of-origin principle as an incentive for harmonisation

Despite a considerable divergence of the laws of unfair competition in the EU, the E-commerce Directive has opted in favour of a country of origin principle. In terms of unfair competition, harmonisation as a short-term objective can be attained by putting national legislators under pressure to abolish 'excessive' prohibitions, such as price discounting or free gifts, in order to attract companies doing business in the field of information technology. This reaffirms the possibility of using conflict rules as means of short-term legal integration. It remains unclear if a certain harmonisation should have been attained *before* the country-of-origin principle was introduced. However, the abolition of unfair competition rules concerning free gifts and price discounts[139] in Germany shows the success of a certain harmonisation of unfair competition law in Europe by introducing the country-of-origin principle.

Although the approach adopted is still frowned upon, especially by German lawyers,[140] the above mentioned short-term harmonisation effect of the prin-

[138] D Church, M Pullen, and JK Winn, 'Recent Developments Regarding US and EU Regulation of Electronic Commerce' (Summer, 1999), *International Lawyer*, 347 (354).

[139] Zugabeverordnung, Rabattgesetz.

[140] Bodewig GRUR Int. (Gewerblicher Rechtsschutz und Urheberrecht International), (2000), 475 (481 et seq.); Henning-Bodewig WRP (Wettbewerb in Recht und Praxis) (2001), 771 et seq.;

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ciple can nevertheless be considered to constitute a desirable step towards European market integration and cancels out the fear of a 'race to the bottom' (see 1.(iv)).

(ii) Against a cumulation of applicable laws

The statement that an advertiser has to observe the highest standards and that he must be prepared to be judged by the strictest rules in force in any country targeted[141] entails a severe practical problem for advertisers. For example, an advertiser resident in Europe has to bear in mind all national legal systems regarding unfair competition. A cautious advertiser will therefore invest time in structuring and organizing his website or a banner contained in other websites to make it consistent with the various unfair competition laws in and outside Europe. From the practical point of view, this makes the advertising process slower and constitutes an obstacle which won't further the objective of economic freedom of movement of goods and services. Of course, some advertisers will risk law suits or are not aware of the problem. Following the country-of-origin principle, an advertiser will have to obey only one law (of unfair competition). This falls nicely with the approach adopted in the field of copyright and intellectual property in general: Torremans[142] suggests that the 'normal rule should be that any infringement issue is governed by the law of the country in which the server that hosts the allegedly infringing content is located' provided that that law meets the minimum standards laid down in the Berne Convention. Nimmer[143] compares the 'information service with the "centre" (or hub) of a wheel consisting of numerous spokes, each one of which leads to a client in a different location'. Thus, a provider can serve his clients around the world in a 'frictionless' manner from a single location.

(iii) Reduction of legal advising costs

The significance of legal costs has been raised as an issue in the Executive Summary of the Proposal for the E-commerce Directive dating from 18 November 1998.[144] According to this Summary, a survey undertaken by the

Ahrens CR (Computer und Recht) (2000), 835 et seq.; Gierschmann DB (Der Betrieb) (2000), 1315 et seq.; U Fritze and C Holzbach WRP (2000), 872 et seq.; Sack WRP (2001), 1408 et seq.; K-H Fezer and S Koos IPRax (Praxis des internationalen Privat- und Verfahrensrechts) (2000), 349 et seq.; Ohly GRUR Int (2001), 899 et seq; Nickels DB 2001, p. 1919 (1923); Lehmann EuZW (Europäische Zeitschrift für Wirtschaftsrecht) (2000), 517 (518); Veelken RIW (Recht der internationalen Wirtschaft) (2002), Heft 2, 'Die erste Seite'; B Lurger and SM Vallant RIW (2002), 188 (194); Halfmeier ZEuP (Zeitschrift für europäisches Privatrecht) (2001), 837 (868).

[141] H Kronke, *Applicable law in torts and contracts in cyberspace*, K Boele-Woelki and C Kessedjian, op cit, 71.

[142] 'Private International Law Aspects of IP—Internet Disputes', in Edwards and Waelde, *Law & The Internet* (Oxford: Hart Publishing, 2000), 225 (245).

[143] 'International Information Transactions: An Essay on law in an information society' (2000) 26 *Brook J Int'l Law*, 5, 25.

[144] The summary was available in 2001 under <http://www.europa.eu.int/ispo/ecommerce/legal/documents/596DC0392/596DC0392_en.pdf>; at pp 8 and 9.

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Directorate-General XV showed that 36 per cent of the questioned companies did not undertake a legal analysis of the regulatory situation regarding the cross-border context, 30 per cent of which could not afford to undertake such an evaluation. Moreover, the survey stated that 53–55 per cent of the questioned companies answered that unfair competition and promotional offers were considered the main subjects requiring legal analysis.

As companies, especially Small- and Medium-sized Enterprises (SMEs) who cannot afford separate establishments in each Member State, were discouraged from exploiting the opportunities afforded by the internal market, a country-of-origin rule was proposed in order to assure that they can advertise online in countries where the company is not established without having to comply with many different sets of national requirements and regulations (in Europe) or even many more (throughout the world). By minimising legal advising costs economic efficiency and competitiveness of SMEs is now furthered.

The obligation to comply with several laws can be an expensive task even for a large company when it would have to comply with different state laws (in the US) or with different national laws (in the EU). For ordinarily sized companies advertising over the Internet would be almost impossible. The latter are likely to ignore the laws of most states. This is certainly not a result a legislator should aim to achieve.[145]

(iv) Judicial efficiency

As a matter of fact, the courts whose task it is, according to the procedural rules in a number of countries, to establish and apply foreign law will not have to face a variety of legal orders in which the advertisement in question may have had economic effects. They only will be obliged to consider *one* national legal order even if this may not be the law of the forum. This leads to judicial efficiency.

A country of origin rule also serves 'enforcement concerns because it encourages litigation in a forum that has good access to evidence and provides the law that decides whether the defendant acted unlawfully'.[146]

(v) New possibilities for consumers

In order to enhance consumer information, member states shall, according to Article 5(1) E-commerce Directive, ensure that the service provider shall render easily, directly, and permanently accessible to the recipients of the service and competent authorities, at least the name of the ISP, the geographic address at which the ISP is established, etc. Thus, the user will be aware of the country of origin of the internet service.

[145] RT Nimmer, 'International Information Transactions: An Essay on law in an information society' (2000) 26 *Brook J Int'l Law*, 5, 26.

[146] AP Reindl, 'Choosing Law in Cyberspace: Copyright Conflicts on Global Networks' (1998), 19 *Mich J Int'l L*, 799 (831).

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Despite the different treatment of advertising law and consumer contract law (see 1.(vi)), consumers will continue to enjoy a high level of protection. According to Article 3(3) in combination with the annex, the E-commerce Directive does not affect contractual obligations concerning consumer contracts. Moreover, consumers will keep their right to sue suppliers in their country of residence under Article 15 and 16 of the Brussels Regulation.[147]

This means that the consumer can benefit from advertising offers which would probably not be possible under the law of his country of residence, whereas, at the same time, he keeps the right to sue the supplier on grounds of consumer contract law of his country of residence which will still apply.

Finally, it can be argued that the different treatment of conflict of law provisions concerning unfair competition law and consumer contract law reflects the fact that they have entirely different primary purposes: consumer contract law is to protect the consumer, unfair competition law protects business competitors.

This cancels out the argument given in 1.(vi)).

(vi) Indivisibility of advertising over the internet

If offers and advertisements are made to the public internet audience, the advertiser no longer actively controls the place of reception that can potentially occur almost everywhere in the world. That is, the retailer himself does not commit any active actions in order to distribute the advertisement to a certain country; it is the end user who initiates the transmission.

The economic effects should not operate as a principal connecting factor for choice of law purposes.[148] An advertisement over the internet is not divisible; a website can be looked up from everywhere, but is created only once. Therefore, an advertising activity over the internet should only be refrained as a whole. A country of origin principle would correspond with the indivisibility of a web page whereas a market-place rule would not.[149]

Cases dealing with traditional advertising methods, in contrast, should be resolved on the basis of a place of market rule. The traditional advertiser actively controls the place of reception of the advertisement by deciding in which countries to distribute the advertisement (eg newspaper) and thereby bears the risk of complying with several national laws. The justification of the different treatment of internet and traditional advertising in terms of private international law therefore lies in the lack of control of the place of reception and the indivisible nature of a website. The internet advertiser should not bear the same risks as in traditional advertising (see 1.(vii)).

[147] See also S Dutson, 'E-commerce-European Union' (2000) *Computer Law & Security Report*, 105 (106).

[148] For copyright law: AP Reindl, 'Choosing Law in Cyberspace: Copyright Conflicts on Global Networks', 799 (832).

[149] Dethloff JZ (Juristenzeitung) (2000), 179 (182) emphasises this point.

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(vii) Legal certainty

Finally, the need of legal certainty militates for a country-of-origin rule concerning advertising over the internet.

Following the 'perceivable effects' approach, it is remarkable that the skilful design of a website can make it 'legal' by making clear that it is not targeted at consumers of a certain country. The website can contain a disclaimer that the offer is not valid for certain countries/marketplaces. This mechanism allows marketers to 'opt out' of certain jurisdictions when a place of market rule is followed.

Surprisingly, books that give recommendations about how to create websites, only give advice in relation to copyright issues having in view merely national legal provisions.[150] The globalisation of the trade will generate the need of legal advice in relation to the applicable law. This could give rise to a danger of manipulation. The opting-out mechanism implies the danger of circumvention. A consumer can ask another person resident in a state where the advertisement is legal, to order the goods or services in question. This danger exists especially in areas where countries or states are lying close together and cross-border contacts are very common.

The country-of-origin principle is not to the same extent subject to a danger of manipulation provided that the country of origin of an advertisement can be determined with sufficient certainty. According to Article 3(1) of the E-commerce Directive, the Member States are directed to ensure that any service provider complies with national provisions within the 'coordinated field', a service provider being defined as any natural or legal person providing 'an information society service'.[151] Article 2(c) defines an 'established service provider' as someone who 'effectively pursues an economic activity using a fixed establishment for an indeterminate duration'. It also provides that the 'use of the technical means and technologies required to provide the service does not constitute an establishment'. Where a company is 'established' does not focus on where the computer or data reside, but on where there is an ongoing business presence. Hence, a service provider is not easily established in a country. This helps to avoid manipulation of a relevant connecting factor. The mere use of a server geographically located within the territory of a state does not constitute establishment and will not trigger the applicability of the law of the country where the server computer is geographically located.

3. Result

In total, the arguments in favour of a country of origin principle cancel out the arguments against it in the field of unfair competition law in the internet.

However, one has to accept that—in the case of the E-commerce

[150] eg, JE Alexander and MA Tate, *Web Wisdom* (Mahwah, NJ: Lawrence Erlbaum, 1999), 100.
[151] Art 2(b) of the E-commerce Directive.

Directive—two different choice of law regimes are created: one dealing with cases exclusively taking place in the EU and one dealing with cases having non-EU elements[152] (see 1.(vi)). Bearing in mind the overwhelmingly advantageous legal and economic factors of the country of origin principle (see 2.), this has to be accepted.

Furthermore, the above mentioned difference between television and internet, the existence of a licensing system in the field of television broadcasting (see 1.(i)), cannot be used in order to negate the application of the country of origin principle to internet advertising. The TV licensing system does not deal with the legality of commercials so that the lack of a licensing system for ISPs does not entail that the suggested conflict rule is inappropriate in the field of internet advertising.

Article 3 of the E-commerce Directive is a desirable provision seen from a planning perspective of European advertisers. Yet, the Brussels Regulation, the Rome Convention and Article 6 of the preliminary draft on a proposal for a Council Regulation on the Law applicable to non-contractual obligations dating from May 2002 'are heading in a different direction to the proposed E-commerce Directive'.[153] European legislation will have to work out a more differentiated solution in that respect.[154]

IV. TO WHAT EXTENT DOES ARTICLE 3 OF THE E-COMMERCE-DIRECTIVE AFFECT ENGLISH PRIVATE INTERNATIONAL LAW?

A. Scope of the Country of Origin as Connecting Factor

Article 3(1) and (2) of the E-commerce Directive apply nearly to all legal requirements relevant for electronic commerce[155] except for copyright, the freedom of the parties to choose the law applicable to their contract, contractual obligations concerning consumer contracts, the formal validity of contracts creating or transferring rights in real estate and the permissibility of unsolicited commercial communications by electronic mail ('spamming').[156] The exemption of spamming from the country of origin principle can be justified by the

[152] Mankowski ZVglRWiss (Zeitschrift für vergleichende Rechtswissenschaft) 100 (2001), 137 (163 et seq); Lurger and Vallant RIW (Recht der internationalen Wirtschaft) (2002), 188 (194 at d) (3)).

[153] MD Powell and PM Turner-Kerr, 'Issues in e-commerce—European Union (2000) *Computer Law & Security Report*, 23 (26).

[154] Art 23(2) of the preliminary draft on a proposal for a Council Regulation on the Law applicable to non-contractual obligations dating from May 2002 may provide for a solution of the problem; see section IV.C below.

[155] Regarding the ambit of application of Art 3 see Alexandre Cruquenaire and Christophe Lazaro, 'La Clause de Marché Intérieur: clef de voute de la Directive sur le commerce électronique', in *Le commerce électronique européen sur les rails ?; Analyse et proposition de mise en œuvre de la directive sur le commerce électronique* (Bruxelles: Cahiers du Centre de Recherches Informatique et Droit, Bruylant, 2001), 41 et seq.

[156] Annex of the E-commerce Directive: derogations from Art 3.

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fact that spamming implies an active role of the vendor who therefore cannot benefit from the advertising law of his home country.

B. Country of Origin Principle and Basic Liberties

Recital 5 of the Directive points out that the development of information society services within the EC is hampered by a number of legal obstacles to the proper functioning of the internal market that arise from divergences in legislation. The application of the unfair competition laws of other member states to acts of competition often constitutes a restriction of either the free circulation of goods contained in Article 28 of the EC Treaty or the free circulation of services provided for in Article 49 of the EC Treaty. The ECJ's ruling in *Keck*[157] did not necessarily contribute to a clarification of the question if national advertising—including unfair competition—laws are caught by Article 28 EC as it held that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[158]

Finally, the recent ruling of the ECJ in *Gourmet International Products*[159] makes it clear that an outright advertising ban—the case dealt with a Swedish ban on alcohol advertising—'is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar'[160] and thus falls within the ambit of Article 28 EC. Moreover, the ECJ held that an advertising ban could also constitute a restriction on the freedom to provide services.[161] Despite this important shift in the court's attitude, it will still be possible to argue that national measures are in the interest of public policy.

It is the aim of the Directive to eliminate these obstacles by clarifying certain legal concepts at Community level.[162]

The application of the law of the country of origin does not mean that it has to be more favourable than the laws of the market place. It also applies in cases where it is stricter than the latter.[163] Thus, Article 3 does not correspond entirely to the basic liberties according to which only stricter laws at the market place can restrict the free movement of goods and services. A country of origin principle as connecting factor entails no necessity of comparison between different legal rules.[164]

[157] ECJ 24/11/1993, ECR 1993, I-6097—Keck and Mithouard.
[158] Ibid, at para 16.
[159] Case C-405/98, 8 Mar 2001.
[160] Ibid, at para 21.
[161] Ibid, at para 39.
[162] Recital 6 of the Directive.
[163] Dethloff JZ (Juristenzeitung) (2000), 179 (183).
[164] Ibid.

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C. Does Article 3 Contain a Conflicts Rule or a Rule of Substantive Law?

Conflict of laws mechanisms for determining the substantive governing law are not themselves restrictions of freedom, but the chosen governing law might lead to a restriction if it contains stricter rules of substantive law compared to other provisions of substantive law which do not apply because they have been ruled out by virtue of the choice of law rule.[165]

Since both the internet and television are media, conveying advertising information in a similar way, they are comparable. It is therefore submitted that similar, if not the same, choice of law rules should apply to both media. According to the Directive on television without frontiers,[166] television advertising is subject to the law of the transmitting state. Thus, it contains the principle of the country of origin (transmitting state) as a conflicts rule.
Article 2(1) provides:

> Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

Article 2a(1) provides:

> Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

The transmitting state principle does not only apply to the public-law provisions that are primarily covered by the scope of the directive. Even for private unfair competition claims, the transmitting state principle means that the law of the country of origin is the governing law.[167]

However, the ECJ has held that the Directive does not preclude a Member State from taking measures based on general consumer protection legislation against misleading advertising *provided that* those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.[168] The Directive aims to avoid a 'secondary control of television broadcasts in addition to the control which the broadcasting Member State must exercise'.[169] It introduces the country of origin principle only as far as the coordinated field is concerned. As the ECJ puts it, the Directive 'does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes'.[170]

[165] Sonnenberger ZVglRWiss 95 (1996), 3 (22).
[166] Council Directive 89/552/EEC dated 3 Oct 1989 amended by Directive 97/36/EC of 30 June 1997.
[167] Dethloff JZ (Juristenzeitung) (2000), 179 (180).
[168] (1998) ETMR, 44, para 38, 59 (*de Agostini*).
[169] Ibid, para 61 (*de Agostini*).
[170] Ibid, para 33.

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The E-commerce Directive adopts an almost identical approach. The country-of-origin-principle applies in the coordinated field that is explicitly defined. The wording of Article 3 is taken almost literally from the Directive on television without frontiers. Bearing in mind that the Television Directive introduces a country of origin rule as a conflicts rule, it is not understandable why an almost identical provision in the field of electronic commerce should not constitute a conflicts rule.[171] This militates for the necessity of a conflicts rule containing the country-of-origin principle in the field of the information society and therefore in the field of unfair competition on the internet.

However, Article 1(4) provides that the Directive does not establish additional rules on private international law. According to this provision, the courts are not obliged to 'throw out' all the governing law in favour of the law of the service provider's country of origin. Courts only should overturn the rule in question insofar as it constitutes an obstacle.

This gives rise to a complicated three-step-procedure: first, the activity in question has to be assessed on the basis of the law of the establishment of the ISP; secondly, if conflict rules point to another applicable law, the assessment has to be made according to the rules of that applicable law; the third—and perhaps most complicated—step involves the difficult task of deciding whether the law applied in the second step constitutes a restriction of the freedom of services. National judges will have to face problems the ECJ had major difficulties to cope with.

The country-of origin principle should therefore be looked at as a conflicts rule. First, Article 3 resembles a conflicts rule: Article 3 IV(a) allows the Member States to take measures to derogate from paragraph 2, in particular for the reason of public policy, prosecution of criminal offences, protection of minors, etc. Article 3 IV(b) however obliges the Member States to ask the Member State of origin to take such measures; this means that, in the first place, the law of the state of origin is to be respected. Hence, Article 3 IV resembles strongly the mechanism of the exception of public policy. Secondly, a conflicts rule would serve the interest of judicial efficiency. A judge only would have to apply one law and he would not be exposed to an assessment of the freedoms contained in the EC Treaty.

[171] A controversial debate is going on in Germany as to if Art 3 of the E-Commerce-Directive constitutes a choice of law rule or not; against a classification as a choice of law rule: Fezer and Koos IPRax (Praxis des internationalen Privat- und Verfahrensrechts) (2000), 349 (352); Sack WRP (Wettbewerb in Recht und Praxis) (2002), 271 (273); WRP (2001), 1408 (1409, 1417); WRP (2000), 269 (282 et seq.); Nickels DB (Der Betrieb) (2001), 1919 (1922); Ahrens CR (Computer und Recht) (2000), 835 (837); Ohly GRUR Int (Gewerblicher Rechtsschutz und Urheberrecht International) (2001), 899 et seq.; Arndt and Köhler EWS (Europäisches Wirtschafts- und Steuerrecht) (2001), 102 (106); Veelken RIW (Recht der internationalen Wirtschaft) (2002), Heft 2, 'Die erste Seite'; Halfmeier ZEuP (Zeitschrift für europäisches Privatrecht) (2001), 837 (864); in favour of a classification as a choice of law rule: Spindler IPRax (2001), 400 (403); ZRP (Zeitschrift für Rechtspolitik) (2001), 203 (204); RIW (2002), 183 (185); Mankowski ZVglRWiss (Zeitschrift für vergleichende Rechtswissenschaft) 100 (2001), 137 (142, 143); Lurger and Vallant RIW (2002), 188 (191) and MMR (Multimedia und Recht) (2002), 203 (205, 208).

Additionally, the above explained three-step-procedure will produce many preliminary rulings based on Article 234 EC which will take much time and overstretch the capacities of the ECJ.

Moreover, the classification of Article 3 of the E-Commerce Directive as a conflicts rule can be reconciled with Article 6 of the preliminary draft proposal for a Council Regulation on the Law applicable to non-contractual obligations dating from May 2002 (Rome II Regulation) which declares applicable the law of the country where the unfair competition or other practice affects competitive relations or the collective interests of consumers. This is because Article 23(2) of the latter provides that

> this regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.

It exempts internet-related cases governed by the provisions of the E-Commerce-Directive and its national implementations from the ambit of Article 6 of the Rome II Regulation and thus implicitly recognises the 'choice of law character' of Article 3 of the E-Commerce-Directive.

V. CONCLUSION—THE EFFECT ON ENGLISH PRIVATE INTERNATIONAL LAW

In order to give effect to the country-of-origin principle in internet advertising cases, the implementation of Article 3 of the E-Commerce Directive should entail an amendment of section 11(2)(c) of the Private International Law (Miscellaneous Provisions) Act 1995. Until now[172], the E-commerce Directive has not yet been implemented by the Electronic Commerce (EC Directive) Regulations 2002 although the implementation is overdue. However, the DTI consultation on implementation of the Directive (2000/31/EC) summary of responses shows that the country of origin principle is highly welcomed by the industry.[173]

It is desirable that section 11(2)(c) of the Private International Law (Miscellaneous Provisions) Act 1995 is interpreted in a way that, in the case of internet advertising cases, the most significant elements of the relevant events occur in the country of the establishment of the service provider instead of the country where the economic effects take place. It is submitted that the interpretation of national law according to a European Directive[174] is not only limited to provisions of substantive law, but can also be applied to conflict

[172] June 2002.

[173] See under <http://www.dti.gov.uk/cii/ecommerce/europeanpolicy/edirec_resp.shtml/coforigin#coforigin> at points 15 et seq.

[174] See *Marleasing SA v La Comercial Alimentacierce/* (1990) ECR I-4135.

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rules.[175] English private international law is in principle flexible enough to be interpreted in such a manner.

This result corresponds to the fact that even before the E-commerce Directive was adopted, the place of acting rule—which corresponds in most cases to a country of origin rule—was suggested as an appropriate rule concerning advertising over the internet under section 11(2)(c) of the 1995 Act.[176]

[175] E Brödermann, in Brödermann and Iversen, *Europäisches Gemeinschaftsrecht und internationales Privatrecht* (Tübingen: Mohr, 1994), at 422; Münchener Kommentar-Sonnenberger, BGB, Introd. IPR at 155.

[176] Fawcett and Torremans, op cit, 686.

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