Issue | July 2015
No.2 | Special Issue: Privacy

Montesquieu Law Review

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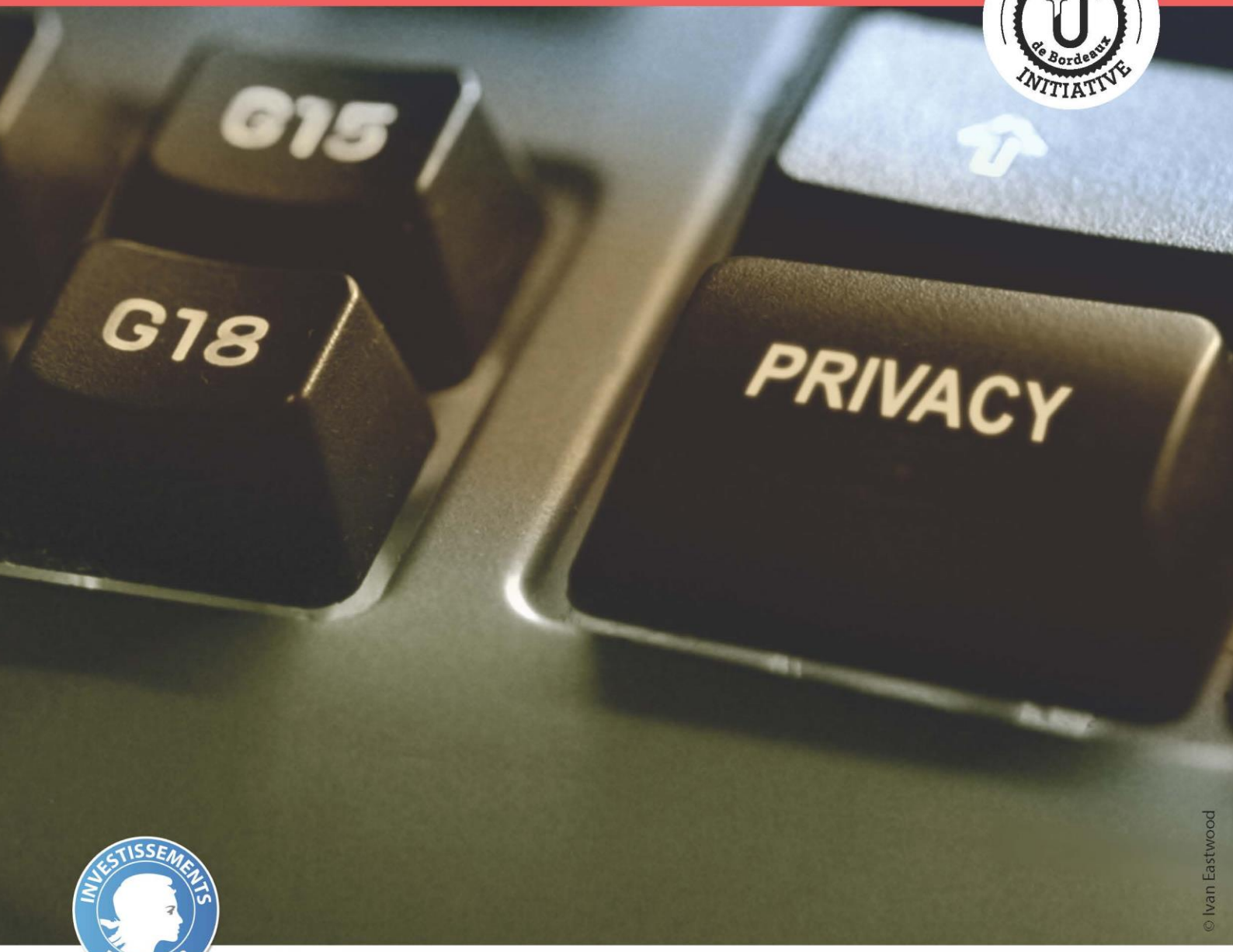

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Program supported by the ANR
n°ANR-10-IDEX-03-02

Faculté de droit et science politique

université de BORDEAUX

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Suggested citation: Jean Sagot Duvauroux, Invasions of privacy via the internet: aspects of private international law, 1 Montesquieu Law Review (2015), issue 2, available at http://www.montesquieulawreview.eu/review.htm

Evidently, all national legal systems are concerned about protecting individual privacy. However, in spite of this common objective, we cannot help but note that the technical arrangements for and the scope of that protection vary palpably from one country to the next (1). In particular, the relationship between the right to respect for private life and competing fundamental rights and freedoms (such as freedom of expression and freedom of the press) is the subject of very different conceptions depending on the legal culture, legislative policy or even the very meaning of what constitutes a person's privacy.

The great disparity between national regulations explains for the most part the lack of standard legislation in this field. The protective rationales being so far removed from one another at this juncture, any attempt to reach a compromise seems doomed to fail.

In the absence of international agreements fully unifying legislation in this area, in the event of a legal relationship affected by an "international" element, it falls to private international law to perform the difficult task of ensuring the co-ordination of national legal systems.

This co-ordination is undertaken through the traditional mechanisms found in private international law, which allow the court hearing a given case to rule on its own international jurisdiction and to determine which of the various national protection systems concerned is applicable. Admittedly, this rationale is not exclusive to the protection of privacy. It is a line of reasoning that the court follows each time a situation between private individuals exceeds the framework established in one State and where there is no international unification of substantive law for the case in point.

Nevertheless, as regarding invasions of privacy, the expansion of the internet has considerably altered the situation.

Firstly, this technological and social development has conferred a hitherto unknown importance to private international law. Indeed, a consequence of the internet has been to multiply the possibilities of invading a person's privacy, which possibilities are increasingly taking on an international character.

Next, from a more methodological point of view, we are currently witnessing a reconsideration of the relevance of the classic co-ordination procedures that are traditionally enshrined in French private international law. The latter, inspired by Savigny's doctrine, usually founded such co-ordination on the location of the legal relationship based on a central aspect of the legal situation. It goes without saying that where electronic media are involved, that location is more difficult to

establish, "*cybercrime being characterised by a sort of passive, generalised internationalisation*" (2).

Faced with these new challenges, private international law – which is still under construction on both a French and a European level – has strived to develop solutions adapted to this new social and technological situation. From a methodological point of view, these solutions do not appear to be revolutionary in any sense. They are simply the result of a modernisation of traditional rules of private international law – a modernisation most often brought about by case law acting in accordance with the function naturally attributed to it. Moreover, this proves, in some sense, the timelessness and continuity (so often disputed) of the abstract logic of co-ordinating national legal systems as conceived by Savigny.

As regards invasions of privacy via the internet, this modernisation concerns the rules establishing the international jurisdiction of French courts (section I) and those serving to identify the applicable law (section II).

I – The jurisdiction of the French courts to hear cases involving invasions of privacy via the internet

In the event of an international invasion of privacy, the first question to be asked from the French point of view is naturally that of the jurisdiction of French courts to hear the case. Indeed, the international nature of the legal situation leaves room for doubt as to the relevance of the French court's involvement.

Are the links between the French legal system and the legal relationship in question sufficient to justify the jurisdiction of the French courts? Do the twin objectives of the proper administration of justice and access to a judge militate in favour of the French legal system taking charge of and deciding the case?

These are issues which, in the French legal system, cannot be left to a judge's discretion. This is why international jurisdiction is governed by relatively precise rules which strive to delineate the field of intervention open to national courts. These essentially national rules may only, for reasons linked to State sovereignty, determine the jurisdiction of French courts within the international legal order.

This co-ordination was previously far from perfect. Indeed, as each State unilaterally established the jurisdiction wielded by its courts, there were frequent positive and negative conflicts. We cannot help but acknowledge the progress made by the European Union which, as soon as it was competent to do so, strove to streamline the various alternatives available by unifying the rules of direct jurisdiction between Member States.

Nowadays, the European rules are close to supplanting national solutions. The fact remains, however, that in cases of invasion of privacy, the application of European solutions is subject to the condition that the defendant's domicile be located on the territory of the European Union. Thus, where the defendant is domiciled outside the Union, the French court must no longer accept or decline jurisdiction on the basis of the European rules (section A) but rather on that of the French rules of direct jurisdiction (section B).

A – The court's jurisdiction based on European rules of direct jurisdiction

Firstly, Article 4.1 of the Brussels I (recast) Regulation (3) states that a person may be sued by a claimant before the courts of the Member State in which said claimant is domiciled. This provision is general in scope and applies to all cases, with the exception of those for which exclusive jurisdiction is provided by the Regulation. The result is that, in cases of invasion of privacy via the internet, French courts will accept jurisdiction when the defendant is domiciled in France.

Next, with the aim of facilitating access to justice, Article 7 of the Regulation allows the claimant to sue before a court in a Member State other than that in which the defendant is domiciled. This choice of court varies depending on the subject of the dispute.

In order to identify the relevant provision of Article 7, invasions of privacy committed via the internet must therefore be qualified. As this involves European legislation; the qualification must be made independently, i.e. in light of European law and without reference to concepts under national law.

The European Court of Justice considers that infringements of personality rights belong without the slightest doubt to the law of tort, delict and quasi-delict. Indeed, the Court has a very broad conception of that area, which it defines negatively as "*all actions which seek to establish the liability of a defendant and which are not related to a 'contract'*" (4). Consequently, in order to see whether the French courts can accept jurisdiction even when the defendant is domiciled outside France, we must refer to Article 7.2. Pursuant to that provision, the claimant can bring an action before "*in the courts for the place where the harmful event occurred or may occur*". As a result, French courts may also accept jurisdiction on the basis of the Regulation where the invasion of privacy has taken place on French territory and even where the defendant is domiciled in another Member State of the European Union.

The application of the above provision has raised three types of difficulty owing to the ambiguity of the expression "harmful event".

Firstly, there are many scenarios in which the event that caused the harm and the damage did not take place in the same legal order. There is, in many cases, a dislocation between the different elements of the tort. Does the expression "harmful event" refer to the event that caused the damage or the actual damage suffered by the victim? The Court of Justice was quick to take up the difficulty of so-called "complex torts", stating in a landmark decision that the expression "*'place where the harmful event occurred or may occur' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it*" (5). In other words, as regards complex torts the victim may, on the basis of Article 7.2, choose to bring an action before the courts of the Member State in which the harmful event took place or those of the Member State in which the damage occurred.

Thus, in application of that section of the Regulation, the French courts will also be able to accept jurisdiction where the event giving rise to the infringement occurs in France or where the damage has been suffered by a victim on French territory.

Secondly, the same event – all the more so where it concerns an invasion of privacy via the internet – is likely to cause damage in various States.

In such a scenario, on the basis of Article 7.1 as interpreted by the Court of Justice, can the victim bring an action before any court of a Member State on the territory of which a part of the dispute has taken place or, on the contrary, must the victim focus on bringing their action before the courts of the Member State where the main part of the damage has been suffered?

The Court of Justice answered the question by stating that the victim could sue the person responsible for the invasion of privacy before all Member States on the territory of which part of the damage has been suffered (6). It did, however, stipulate in the same judgment that while the courts of the place where the harmful event occurred or those of the defendant's domicile had jurisdiction to hear the full application for compensation, those of each Member State in which damage had been suffered could only, for their part, order compensation in respect of damage caused in the territory of their respective State. Thus, where the victim decides (most often for reasons of expediency) not to bring an action before the courts of the State where the defendant is domiciled (Article 4.1) or those of the place where the harmful event occurred (first branch of the option granted by the *Mines de Potasse* decision on the basis of Article 7.2), they will be forced to split their claim between each of the courts in the various places where the damage occurred.

Lastly, regarding invasions of privacy via the internet more specifically, a difficulty emerges as to the location of the various elements of the tort. Where did the harmful event take place? Where is the damage located?

The answer to those questions assumes above all else that what is understood by "event giving rise to the damage" and "damage" has already been determined in scenarios involving invasions of privacy via the internet. If, as is shown by the various European positive laws, several conceptions can be considered, the Court of Justice at least gave a clear decision in this issue. It stated that the place of the causal event had to be understood as being that of the publication or disclosure of the information at issue whereas the damage was located in the place where said information was disseminated (7).

As a result, in a scenario involving the dislocation of the elements of the tort, delict or quasi-delict, the French court will have jurisdiction on the basis of Article 7.2 of the Regulation if the information was disclosed (event giving rise to the damage) or disseminated (damage) in France.

This case law, which was developed for infringements of personality rights in general, then had to be adapted to the more specific scenario of invasions of privacy via the internet. In such a setting, the place of the event giving rise to the damage can easily be equated with the place where the website is hosted as the place where the information at issue was communicated.

Conversely, identifying the location of the damage poses greater difficulties. Indeed, in the case of electronic media, the broadcasting or disclosure criterion loses its relevance. It simply means that any European court can have jurisdiction to hear the case, the offensive information being disseminated on the internet being, by its very nature, accessible all over the world. However, despite that line of argument, the Court of Justice has taken the view that the accessibility of the

site at issue in a given State suffices to give its courts jurisdiction (8). The Court was not receptive to the theory of "focalization" identified by the American courts (9). However, the ECJ did add that the victim could also bring an action before the courts of the Member State in which the victim habitually resided, those courts having jurisdiction to order compensation for all the damage suffered (10).

In summary, where European law is applicable owing to the defendant being domiciled within the territory of the European Union, a French court can accept jurisdiction in accordance with various criteria. On the one hand, it will have jurisdiction to hear the case in its entirety if the defendant is domiciled in France, if the information at issue has been communicated from France or where the victim is habitually resident in France. On the other hand, the court will also have jurisdiction to order compensation solely for damage suffered in French territory where the website at issue can be accessed in France, which will almost systematically be the case.

Where the defendant is not domiciled within European territory, the French courts must assess their jurisdiction in light of French rules of direct jurisdiction.

B - The jurisdiction of French courts based on French rules of direct jurisdiction

Since the well-known decisions in *Pelassa* (11) and *Sheffel* (12), it is established that the international jurisdiction of French courts is determined by the extension of the rules of territorial jurisdiction contained in the *Code de procédure civile* (Civil Procedure Code).

Given the qualification of invasions of privacy via the internet as torts, delicts or quasi-delicts (13), two provisions are likely to form the basis of the jurisdiction exercised by French courts: Article 42 and Article 46 paragraph 2 of the Civil Procedure Code.

There is no need to go over those articles, which reiterate the criteria relating to domicile (Article 42) and the place where the harmful event occurred (Article 46 para. 2) previously discussed in the context of European law. It must also be noted that as regards the application of the legislation, French case law has adopted the same interpretations overall as the European Court of Justice, particularly as regards the scenario of complex torts that is so frequently encountered.

The particularity of French law on direct jurisdiction is even more apparent in Articles 14 and 15 of the Civil Code. By virtue of these exemptions from jurisdiction, French courts have the subsidiary possibility of accepting jurisdiction where the claimant (Article 14) or the defendant (Article 15) is a French national.

The criteria for the jurisdiction of French courts having been detailed, there now remains the task of establishing which law will apply to invasions of privacy via the internet.

II - The law applicable to invasions of privacy via the internet

In the absence of any applicable European legislation (14) or specific rule on conflicts of laws, the law applicable must be identified by means of the traditional mechanisms found in private international law. In other words, invasions of privacy via the internet should first be classified in order to include these questions in a connecting category provided by private international law (section A). Secondly, in order to identify the law applicable, it will simply be a latter of applying

the connecting factor allocated to the "go-to" category of invasions of privacy via the internet (section B).

A - Classifying invasions of privacy via the internet

In private international law, the classification of invasions of privacy has been the subject of significant doctrinal discussion. Indeed, the debate in national law relative to the existence of personality rights as independent subjective rights quickly extended to the international legal order.

Once it is accepted that the right to respect for private life exists independently of any violations thereof, the tortious classification loses its relevance and other connecting categories can be considered.

Firstly, invasions of privacy could, from a conceptual point of view, come under the personal status category defined as "*rules, taken as a whole, that govern the civil status of individuals and the non-proprietary relations that they form*" (15). It is true that personality rights are, generally speaking, dissociable from persons and contribute to defining their status by establishing their legal status with respect to the law (16).

Next, in view of the expansion of the patrimonialization of personality attributes, some authors have put forward a classification of personality rights based on actual status. We cannot fail to note that personality rights secure non-proprietary and proprietary prerogatives for the holder of such rights, which prerogatives consist in a monopoly over the exploitation of some aspects of an individual's personality.

Despite these proposals, which can lay claim to strong conceptual arguments, French case law has stuck to the tortious classification traditionally applied in this area (17).

The reason for this attachment to the tortious classification - and this in spite of the emergence of independent subjective rights - is quite certainly due to the eminently functional, contingent nature of the classification process in private international law (18). It is not a matter of simply classifying the legal relationship in the appropriate category depending on its legal character. The ultimate purpose of the operation is to infer an appropriate, relevant connection in light of the interests at play.

As regards invasions of privacy, neither the application of national law (19) not that of the location of property (20) appears satisfactory. This is undoubtedly why the tortious classification has been retained in spite of the ambiguous legal character of instances of invasions of privacy via the internet.

B - Implementing the corresponding connection

The tortious classification of invasions of privacy entails the application of the law relating to "*the place where the tort, delict or quasi delict occurred*" (21). Being easy to use when all the elements of the tort are located within a single national legal system, this connecting factor can prove more difficult to implement in cases of dislocation between the harmful event and the damage. As

regards invasions of privacy via the internet, such a dislocation will be relatively common, the harmful event being the disclosure of the information at issue and the damage its dissemination.

Generally, for scenarios involving complex torts, the Court of Cassation has enshrined the equal purpose of the law on the harmful event and that on damage (22). Furthermore, after setting down that principle, the Court stated that between those two laws, a choice had to be made as to which was most closely related to the case in question (23).

In cases involving invasions of privacy via the internet, this arbitration aspect of the proximity principle ought to have led a court to choose, on a case by case basis, between the law on the disclosure of the information at issue and that on the location of its disclosure.

Nevertheless, the Court of Cassation slightly amended the terms of the option by qualifying the dissemination of the harmful event giving rise to the damage (24). By examining the act of disclosing the information in this way, it tends to deny the potentially complex nature of invasions of privacy via the internet. Indeed, the two components of the tort – damage and harmful event – are consequently located in the same place.

This single connection to the place where the information at issue is disclosed thus contradicts the definition of the place where the harmful event occurred as set down by the Court of Justice in matters of direct jurisdiction (25). Moreover, it carries with it the downside of resulting in the application of several laws when the information is disclosed in several States, which is almost systematically the case when dealing with invasions of privacy via the internet. In such scenarios, it must therefore be considered that there are as many separate torts as there are disseminations, the legal consequences of each being subject to the laws of the country in which it arose.

Notes:

(1) On this diversity in Europe, see in particular M. Decker, *Aspects internes et internationaux de la protection de la vie privée en droit français, allemand et anglais,* thèse multigr., Paris II, 2000.

(2) D. Bureau et H. Muir Watt, *Droit international privé,* t. II, PUF, 3ème éd., 2014, n° 1016.

(3) Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(4) CJEC, Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others* [1988] ECR 05565; and CJEC, Case C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR I-06511

(5) CJEC, Case 21-76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 01735

(6) CJEC, Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, [1995] ECR I-00415

(7) *Ibid*.

(8) CJEU, Joined Cases C-509/09 and C-161/10 Case C-509/09 *eDate v X* and Case *Olivier & Robert Martinez v MGN Limited*, [2011] ECR I-10269. Jurisdiction is then based on the place where part of the damage occurred.

(9) By virtue of this theory, the mere accessibility of a site does not constitute sufficient grounds to

justify the application of a law or the bringing of an action before a court. Other objective elements must serve in considering that the site content was consciously directed at this or that State which, on that basis, can claim jurisdiction or the application of its national law.

(10) Judgment cited above.

(11) Cass. 1st civ., 19 October 1959, *Dalloz* 1960, p. 37, note G. Holleaux; *Rev. crit. DIP* 1960, p. 215 note Y. Lequette.

(12) Cass. 1st civ., *Sheffel*, 30 October 1962, *Rev. crit. DIP* 1963, p. 387, note Ph. Francescakis.

(13) See *infra*.

(14) For the time being, the rules on conflicts of laws have not been subject to unification on a European Union level. Indeed, in spite of a willingness in that sense, no consensus could be reached between Member States, in such a way that situations involving personality rights were ultimately excluded from Regulation n° 864/2007 of 11 July 2007, known as "Rome II", on the law applicable to non-contractual obligations. The European Parliament adopted a Resolution on 10 May 2012 containing recommendations to the Commission on the amendment of the "Rome II" Regulation. The EP asked the Commission to submit two proposals aiming to add provisions to Rome II, concerning:
"- a proposal designed to add to the Rome II Regulation a provision to govern the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation;
- a proposal for the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution".

(15) M.-L. Niboyet et G. de Geouffre de la Pradelle, *Droit international privé*, LGDJ, 4ème éd. 2013, n° 5.

(16) P. Bourel, « Du rattachement de quelques délits spéciaux en droit international privé », *RCADI* 1989, II, t. 214, p.261, spéc. n° 63.

(17) Cass. 1st civ., 13 April 1988, *Farah Diba*, *JDI* 1988, p. 752, note B. Edelman; *Rev. crit. DIP* 1988, p. 546, note P. Bourel ; *JCP G*, II, 21320, obs. E. Putman

(18) M.-L. Niboyet et G. de Geouffre de la Pradelle, *Droit international privé*, LGDJ, 4ème éd. 2013, n° 243.

(19) In a number of scenarios, applying national law would result in an extra-territorial application of law which would not fail to surprise third parties. Indeed, the protection of personality generally operates by striking a balance between the interests at stake and, on that basis, is part of a given social context. Third parties quite legitimately expect the application of laws that usually govern the social setting in which they exercise their activities and find it difficult to understand that the protection of personality, which delineates the limits of some of their freedoms, can fluctuate depending on the nationality of the persons concerned.

(20) See P. Bourel, *« Du rattachement de quelques délits spéciaux en droit international privé »*, cited above, n° 58: "*while the concept of property points towards a well-defined category, namely the actual status, it does however leave untouched the issue of connection. The non-material nature of the subject-matter of the right (name, image, etc.) does not allow the effective location of the property in space to be used* (…)".

(21) Cass. 1st civ., 25 May 1948, *Lautour*, *Rev. crit. DIP* 1948, p. 89 note H. Batiffol; *S.* 1949, p. 21, note J.-P. Niboyet.

(22) Cass. 1st civ., 14 January 1997, *Sté Gordon & Breach*, *D.* 1997, p. 177, note M. Santa-Croce; *JCP G* 1997, II, 22903, note H. Muir Watt ; *Rev. crit. DIP* 1997, p. 504, note J.-M. Bischoff.

(23) Cass. 1st civ., 11 May 1999, *Mobil North Sea*, *JCP G* 1999, II, 10183, note H. Muir Watt; *JDI* 1999, p. 1048, note G. Léger; *Rev. crit. DIP* 2000, p. 1999, note J.-M. Bischoff.

(24) Cass. 1st civ., 14 January 1997, *Sté Gordon & Breach,* cited above.

(25) See *supra*.