APPLICABLE LAW IN CASES OF TORT DAMAGES CAUSED BY DIRECT BROADCAST SATELLITES

*Dr. Christian Patermann**

Of the large number of legal questions raised by direct television broadcasting via satellite, one special question, which initially appears to be of only minor importance, but which interrelates international law, space law, and private international law, is what law will govern liability for damage caused by direct satellite broadcasts which are transmitted on a world-wide or region-wide scale to States having differing legal systems. The damage referred to is, of course, tort damage. This question has hitherto hardly been mentioned in space law literature.[1] To illustrate the kind of tort problem in question here, consider the following example: A commercial advertisement for an internationally-known product is prepared and broadcast in State A via a direct television satellite and the broadcast is received in State B. The advertisement is of the form known as "comparative advertising;" that is, it compares the sponsor's product with competitive products. The law of State A where the commercial was produced and broadcast permits "comparative advertising," but the law of State B, like the law of many countries, does not permit it. A manufacturer of a competitive product in State B that feels that it is handicapped in the distribution of its products by such "comparative advertising" may want to recover such damages as it can prove have resulted from the televising of the type of commercial banned in State B. Whether the manufacturer in State B can recover or not may well depend upon whether the law of the broadcasting state (State A) or the law of the receiving state (State B) is dispositive of the claim.

Probably the most obvious approach would be to try first to resolve this problem on the basis of private international law using the conflict rule in torts since the damage will usually have been caused by a tortious act such as infringement of property rights, infringement of personal rights, and unfair competition.[2] Furthermore, one might also resort to the rules governing so-called "broadcasting offenses" as the same kind of problem already exists in the radio-broadcasting and terrestrial television-broadcasting industries.

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*First Secretary and Science Attaché, Embassy of the Federal Republic of Germany, Washington, D.C. He was previously with the division for industrial affairs of the Federal Ministry for Research and Technology, Bonn, Germany. He studied law and economics at the Universities of Freiburg, Munich and Bonn (Germany), the University of Lausanne (Switzerland), and the Universidad de Santander (Spain) The views expressed on this paper are those of the author and are not necessarily related to those of any organization of which he is a member.

[1]This problem has apparently been dealt with only briefly in the literature. *See generally* Catala-Franjou, Responsabilité civile et pénale des émissions, retransmises, in Les Télécommunications par Satellites, Aspects juridiques 196-97 (1968).

[2]Damage caused by infringements of copyrights and patent rights are not dealt with in this article because of the special features of infringements of copyrights and patent rights in the conflict of laws on tort. These special features stem from the so-called "Bündeltheorie", according to which copyrights and industrial property rights are only protected against actions and effects occurring within the territory of those countries which confer or recognize such rights.

However, it is open to doubt whether it is at all possible to apply the provisions of private international law to an act which takes place partly in space. Direct television broadcasts are transmitted via geo-stationary satellites which orbit the earth at an altitude of 36,000 km. It is therefore conceivable that instead of private international law, only space law might be applicable. Against this position, it may be argued that while the transmission of television broadcasts via geo-stationary satellites in outer space constitutes part of the unlawful act as such, outer space is *neither* the *place* where that *act* takes place, *nor* is it the *place* where the *damage* occurs. Outer space is rather what may be called the "medium of transmission". If allowance is made for the act as such, it would be unreasonable to say that the *only* law applicable is space law. Although attempts are being made in the pertinent literature to distinguish between space law and other branches of law,[3] it is not generally assumed that space law and private international law are legal systems which exclude each other. On the contrary, it is held that the general principles of private international law—to the extent that they are locally independent and generally applicable—must be observed and will not be superseded by space law.[4] This is why, when one attempts to solve the issues dealt with here, it is generally safe to resort to the principles of private international law.

It must first be determined whether the provisions of private international law provide a satisfactory solution; that is, whether there are any generally applicable principles of the conflict rule to torts which make it possible to reach an unequivocal decision. Whether an act is tortious is usually decided, almost without exception, on the basis of the *lex commissi loci*[5] under both German and foreign private international law. However, there is no uniform opinion in international literature with regard to the question which is suggested by this statement—namely that of what is meant by *lex commissi loci*. Does it refer to the law of the place where the act constituting a tort was committed (place of action) or to the place where the effect occurred (place of the effect)?

According to German jurisprudence, in particular according to jurisdiction and to the greater part of the literature on the subject, it is held that the *lex commissi loci* may refer both to the place where the tort was committed and to the place where the effect occurred, and the person having suffered damage may claim that solution which is most favorable for him.[6] Both places are so-called points of departure of the same intrinsic

[3]E. Fasan, Weltraumrecht 119 (1965); M. McDougal, H. Lasswell & I. Vlasic, Law and Public Order in Space 691 (1963).

[4]E. Fasan, *supra* note 3 at 128.

[5]For details on the German law on torts as well as the conflicting foreign laws on torts see Schneeweiss, Das Verhältnis von Handlungs und Erfolgsort im deutschen und internationalen Privatrecht unter Berücksichtigung der Rechtsprechung 1 nn.1 & 2, 3 (dissertation Cologne 1959). *See also* 7 Soergel-Siebert, Bürgerliches Gesetzbuch, art. 12 n.1 (Kegel ed.) [hereinafter cited as Soergel-Siebert].

[6]Soergel-Siebert, *supra* note 5, at art. 12 n.48. *Contra* M. Wolff, Das internationale Privatrecht Deutschlands 165 (3rd ed. 1954), which rejects the equivalence of the place of action and the place of effect and holds that the law of the place of effect can only be applied if an act of civil offense can be asserted under the law of the place of action *and* if claims can be set up which are *only* admitted by the law of the place of effect.

value. This is most important whenever the place where the tort was committed and the place where the effect occurred are situated in different countries, and therefore that law which is the most favorable for the injured party is applicable with regard to the requirements and consequences of the tortious act.[7] In the United States, the prevailing view is that the *lex commissi loci* refers to the place where the effect took place (last-event rule).[8] However, in the Romance and other European countries, it is often assumed that the *lex commissi loci* refers to the place where an act was committed.[9] As stated at the outset, there is no uniform opinion in German and foreign literature and jurisdictions regarding private international law, and the same is true of so-called torts by broadcasting.[10]

Another difficulty which complicates the application of the above-mentioned principles of private international law to torts by television broadcasting arises during determination of what is meant by the place where an act was committed. In the case of a live transmission, one may decide that it refers to the place where the television broadcast was *actually produced.* One could also decide, however, that the broadcasting studio always constitutes the place where the act was committed,[11] especially in the case of so-called "canned programs"; that is, programs which were produced at some date prior to broadcast. On the other hand, the determination of the place where the effect took place does not raise any problems. It is the place where a program is received; it is where the television audience watches "comparative advertising" and gains the impression that a given well-known personality consumes a given product in preference to a competitive product.

When trying to apply the basic principles of private international law to solve the problem of which law is applicable to torts by television broadcasting, difficulties arise for two reasons:

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[7]Soergel-Siebert, *supra* note 5, at art. 12 n.48.

[8]Restatement of Conflicts § 145 (1971).

[9]The majority of Italian, Netherlands, Belgian, and French authors hold this view. Binder, Zur Auflockerung des Deliktrechts, 20 Rabel Z at 421, 427-28, 525 (1955) [hereinafter cited as Binder]. The French authors increasingly insist, however, that *only* the rights of the place of effect should apply. *See* 2 W. Battifol, Droit international privé, tit. IV, ch. 1, sec. I § 2 no. 560-61 (1971).

[10]Rabel, Conflict of Laws II at 335 (1947) asserts that the law applicable at the place of the editor and broadcasting unit should be exclusively applied. Other writers maintain that the injured party should be able to also appeal under the law of the place of effect instead of the law of the place of action if he has a justified interest in doing so. Soergel-Siebert, *supra* note 5, at art. 12 n.8; Binder, *supra* note 9, at 446. Some practical examples of "broadcasting offense" problems are presented in Binder, *id.*, at 403.

[11]German publications dealing with torts in the field of television broadcasting consider the transmitting room to be the place of action and the place where the television broadcast is received to be the place of effect *without* any differentiation being made. Soergel-Siebert, *supra* note 5, at art. 12 n.82.

1. There is no *uniform* international legal opinion as to whether the law of the place at which the tort was committed, or of that at which the effect occurred, is applicable to international torts.[12]

2. Even if the principles of private international law are applied, it is not possible in the case of torts by television broadcasting to determine unequivocally the place where the act was committed.

This analysis must therefore examine whether, because of the great cultural, political and social significance of direct satellite broadcasts,[13] the principles of private international law could be "enriched" by other aspects; that is to say, in addition to the conflict law on torts, other aspects would be considered as well, such as space-related aspects, to find a uniform solution tailored to the specific features of torts by television broadcasting. Such an attempt at a solution would be in keeping with recent trends—at least in German private-international-law literature—according to which the traditional concepts of the *lex commissi loci* and of the laws of the place of action and of the place of the effect are loosened in terms of their meaning and the status of tort determined in each individual case with special consideration for the sociological, economic and other conditions of the tortious act.[14]

In the case of torts by television broadcasting, specific aspects such as the following may have to be taken into account:

1. The effects of direct television broadcasting are *international* to a degree unknown to date; they approach being *universal.*

2. The combined audio-visual impressions on the individual viewer are more *intensive* than, for example, the impressions made by international short-wave radio programs.

3. Receiving countries with the most varied social and legal systems will be affected by *one* act to a much *larger extent* than in the case of short-wave radio broadcasts.

4. Because of the high cost of developing broadcasting satellites, there will probably be only a *few* countries which will be in a position to develop this advanced technology.

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[12]*See also* Ehrenzweig, Der Tatort im amerikanischen Kollisionsrecht der ausservertraglichen Schadenersatzansprüche, in 1 Festschrift für Rabel 655 (1954).

[13]U.N. G.A. Res. 2916/XXVII (1972).

[14]As to the problem of whether the place where the wrong is committed is the right point of departure, set Soergel-Siebert, *supra* note 5, at art. 12 n.21 fn.1; Binder, *supra* note 9, at 403; Bröcker, Möglichkeiten der differenzierten Regelbildung im internationalen Deliktrecht 1 (dissertation Munich 1967).

5. According to the Outer Space Treaty,[15] the exploration and use of space is to be carried on "for the benefit and in the interests of *all* countries, irrespective of their degree of economic or scientific development"[16] and "without discrimination of any kind, on a basis of equality."[17] (emphasis added)

6. The Convention on International Liability for Damage Caused by Space Objects.[18]

In view of the large magnitude of damage that could be caused by TV satellite broadcasts with their world-wide effects, and because of the potential virtual *monopoly* of the few countries that will have the financial and economic resources to develop such broadcasting satellites and decide on the contents of their programs, the idea of *maximum protection* against *acts causing damage* should be given early *priority* when discussing the question of which law shall be applicable to determine whether or not there has been an act requiring payment of damages. The *exclusive* applicability of the law of the *place where the tort was committed* would be least suited to meet the need for protection because, if the law of the country of transmission was the only law applicable, producers or sponsors of "canned" programs and commercials would probably choose a country of transmission where the legal requirements for the existence of a tortious act are favorable to them. It is conceivable that, similar to "tax haven" countries, there could in the future be "television haven" countries; that is, countries preferred by producers because, under the national legislation of such countries, an act requiring the payment of damages is made dependent on the existence of very specific preconditions, and certain protected interests are either not safeguarded or are less protected than in other countries. To avoid such a risk, the alternatives should be either (a) to apply exclusively the law of the country where the effect has taken place, or (b) to apply the law of either the State of transmission or the State where the effect has occurred that is the most favorable for the injured party.

The latter alternative has the practical disadvantage that it will probably be difficult to decide in each individual case which law is the most favorable for the injured party by simply comparing the law of the broadcasting country and that of the country of reception. Should the decisive factor be that, according to the law of the place of action, the amount of damages may in general be larger than that available under the law of the country of reception? How does a less clear-cut degree of fault in the law of the country of reception affect the determination if the national law of the broadcasting country provides for the possibility of claiming additional compensation, such as for intangible

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[15]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, [1967] 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967).

[16]*Id.* at art. I.

[17]*Id.*

[18]March 29, 1972, [1973] 24 U.S.T. 2389, T.I.A.S. No. 7762 (effective Oct. 9, 1973) [hereinafter cited as Convention].

damage? It would be a disadvantage of solution (a) if in individual cases the law of the broadcasting country was more favorable than that of the country of reception.

In the interest of legal security and unambiguousness, and in particular to avoid practical legal determinations as to which law is more favorable for the injured party, it is the author's opinion that solution (a) should be chosen; that is, the law of the country of reception (place of the effect) should be the only one applicable. An advantage of this choice is that such a provision has for some time been a recognized principle in the conflict of laws on torts in some countries and the above-mentioned aspects are taken into full account there, which would not be the case if the law of the place of action was exclusively applicable.

As to the Convention on International Liability for Damage Caused by Space Objects,[19] it is clear that the Convention cannot be applied to the type of damages under discussion here because the Convention only covers corporal damages and not intangible or inconsequential damages.[20]

The solutions described above correspond to the special situation of torts by television if television programs are intentionally broadcast to one particular country or to an intended group of countries. In such a case, the population or society of the country or countries deserve protection. The populations involved can insist that their legal systems be respected and be made the bases for assessing whether or not a tortious act has been committed. The broadcasting country in such a case must accept the risk of the television programs' contents being assessed as tortious by the law of the country of reception.

However, it is questionable whether the principle of exclusive applicability of the law of the country of reception should also be adhered to in the case of spill-over, the technically unavoidable illumination of marginal zones by a broadcasting satellite.[21] When spill-over occurs, for technical reasons, programs are received "en passant" in a country for which they were not intended. It is doubtful whether in such a case the broadcasting country must comply with the possibly more rigorous law of the country in which the programs are only received "en passant". This would, in practice, be almost tantamount to a kind of "absolute liability", and there are practical reasons for asserting the position that all broadcasting countries must, from the beginning, consider the risks of spill-over. They will be aware of which countries with their respective laws will be affected and which of those countries are unlikely to "offer resistance" to the programs of the broadcasting country. The broadcasting country creates what might be called a "source of increased danger" in a field of technological development which, for financial and economic reasons, cannot be created by all countries with equal efforts. It is hence

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[19] *Id.*

[20] *Id.* at art. I.

[21] *See* Kolossov, Legal Consequences of "Spill-Over" Resulting from Satellite Direct Broadcasting, Proc. 15th Colloquium on the Law of Outer Space 73 (1973).

quite reasonable to argue that even in cases of spill-over, the legislation of the country of reception should be applicable and not that of the place of action. It is, however, also possible to hold the opposite view, namely that such an "absolute liability" is an unjustified "inconvenience" for a country which is thus being "punished" for its leading position in the use of outer space. The intention of this paper is not to provide a definite assessment and solution of this problem area, but rather to point out the tort-related legal problems involved in direct broadcasting.

It is uncertain whether there are any prospects for the above-mentioned principles becoming internationally recognized, for instance, by being passed as a resolution or even by being included in an international agreement on the principles for regulating legal problems involved in direct broadcasting by satellite. A problem similar to the one dealt with in this paper was raised in connection with the question of which law should be applicable in the event of damage caused by space objects—the law of the country which owns the space object, or of the country which has launched it, or from whose territory it was launched, or of the country on whose territory the damage occurred. In Article XII of the Convention on International Liability for Damage Caused by Space Objects, the contracting parties have only agreed that such damage shall be compensated in accordance with international law and the principles of equity and justice.[22] The view that the laws of the *place of the effect* should be applicable was *not accepted.* Consequently it seems optimistic to assume that the principles described above will be incorporated in an international agreement or an international resolution on direct television broadcasting. However, at its XVIIth General Conference, the General Assembly of UNESCO in its XXXth Plenary Session on 15 November 1972, at the recommendation of the Communication Commission, adopted the "Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange".[23] Article X of that Declaration states that: "In the preparation of programmes for direct broadcasting to other countries, account shall be taken of differences in the national laws of the countries of *reception.*"[24] (emphasis added)

This emphasis on the national laws of the *countries of reception* in the UNESCO Declaration might be a topical point of departure for further discussion of this problem in the terms outlined above.

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[22]Convention, *supra* note 18, at art. XII.

[23]U.N. Doc. A/AC.105/109/Corr. 1 (1973), and reprinted in 1 J. Space L. 161 (1973).

[24]*Id.*