Applicable Law
Draft Rome II Regulation

To safeguard freedom of expression and of the media, a solution is needed which offers legal certainty, prevents “law-shopping” by claimants and avoids a multiplication of applicable laws in cases where there is a flow of information across frontiers.

Defamation and privacy

The application of the country-of-origin principle would best fulfil the above objectives but the EBU will continue to consider also other solutions. However, to offer claimants a choice from a vast buffet of applicable law, as is sometimes suggested, would run wholly counter to those objectives.

Clear identification of the applicable law, and particularly with respect to transfrontier cases of defamation, privacy and other content issues, is crucial for broadcasters, and the media in general, in their role as guarantors of freedom of expression.

Broadcasting has always had a transfrontier aspect because airwaves do not stop at frontiers. Today’s reality is that crossborder reception of television and radio has greatly increased in Europe thanks to cable and satellite networks (and is now also starting on the Internet), and this has contributed to the free flow of information.

The application of the general rule of Rome II as proposed by the Commission, i.e. the application of the law of the country in which the damage arises, could lead to the simultaneous application of numerous foreign laws in transfrontier media cases. With regard to transmission via satellite, for example, this could result in the application of the laws of all countries covered by the satellite footprint. Through Internet streaming, services can even be received worldwide. However, concerning the protection of privacy and personality rights, laws differ significantly from one EU Member State to another. Differences are even greater with regard to countries outside Europe, where there is no equivalent to the European Court of Human Rights to supervise respect for freedom of expression.

A situation may arise where a publication or broadcast would be blocked outright, or its further dissemination prevented, because the law of just one other country differs from the law of the country where the publisher or broadcaster is established. The application of a foreign law could also lead to claims for financial compensation even though the content of a particular publication or broadcast is perfectly legal in the country where the publisher or broadcaster is established.

Whereas journalists and programme-makers naturally have to know and respect privacy and personality rights in the country in which they work, they cannot be expected to be aware of all the laws of all the countries where the programme can be received. They would constantly be working in a situation of legal uncertainty. This would have a chilling effect on them, reduce the scope for difficult and controversial information programmes and thus ultimately limit freedom of expression and the media.

In trying to avoid any possible problems, broadcasters might also seek ways of restricting the transfrontier reception of their (free-to-air) broadcasts, particularly through the use of encryption, thereby reducing citizens’ access to information. Furthermore, such a situation would create obstacles for the functioning of the internal market, for which the Television without Frontiers Directive and the Satellite/Cable Copyright Directive lay the foundations with regard to broadcasting. Both Directives have been established to facilitate transfrontier broadcasting, an objective that has been achieved by applying the country-of-origin principle in the Directives’ respective areas.
As regards transfrontier media cases, specific rules are necessary. Accordingly, the EBU’s main proposal is to amend the provision of the draft Regulation dealing with violations of privacy and rights relating to the personality with a view to designating, in principle, the law of the country of origin, which normally coincides with the main distribution area. With this solution, legal certainty, freedom of the media and the proper functioning of the internal market will be ensured.

**Intellectual property rights**

In line with the general objective of the draft Regulation to provide legal clarity and certainty, a further amendment proposed by the EBU is aimed at clarifying the provision regarding infringements of intellectual property rights. It is important that this provision should specifically refer to the law of the country in which the act of infringement was committed.

For further information see the EBU Position Paper on Rome II of 23 January 2004 (available at the EBU website [www.ebu.ch](http://www.ebu.ch) under “Position Papers”).

### State of procedure

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