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# Private International Law and the Internet

Ulf Maunsbach



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# Private International Law and the Internet

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Lezioni su

## “INFORMATION TECHNOLOGY AND LAW”

di **Ulf MAUNSBACH**

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*Visiting Scholar presso l'Università di Macerata / Dipartimento di Giurisprudenza*

mercoledì **25 febbraio** / ore 16.00 - 18.00

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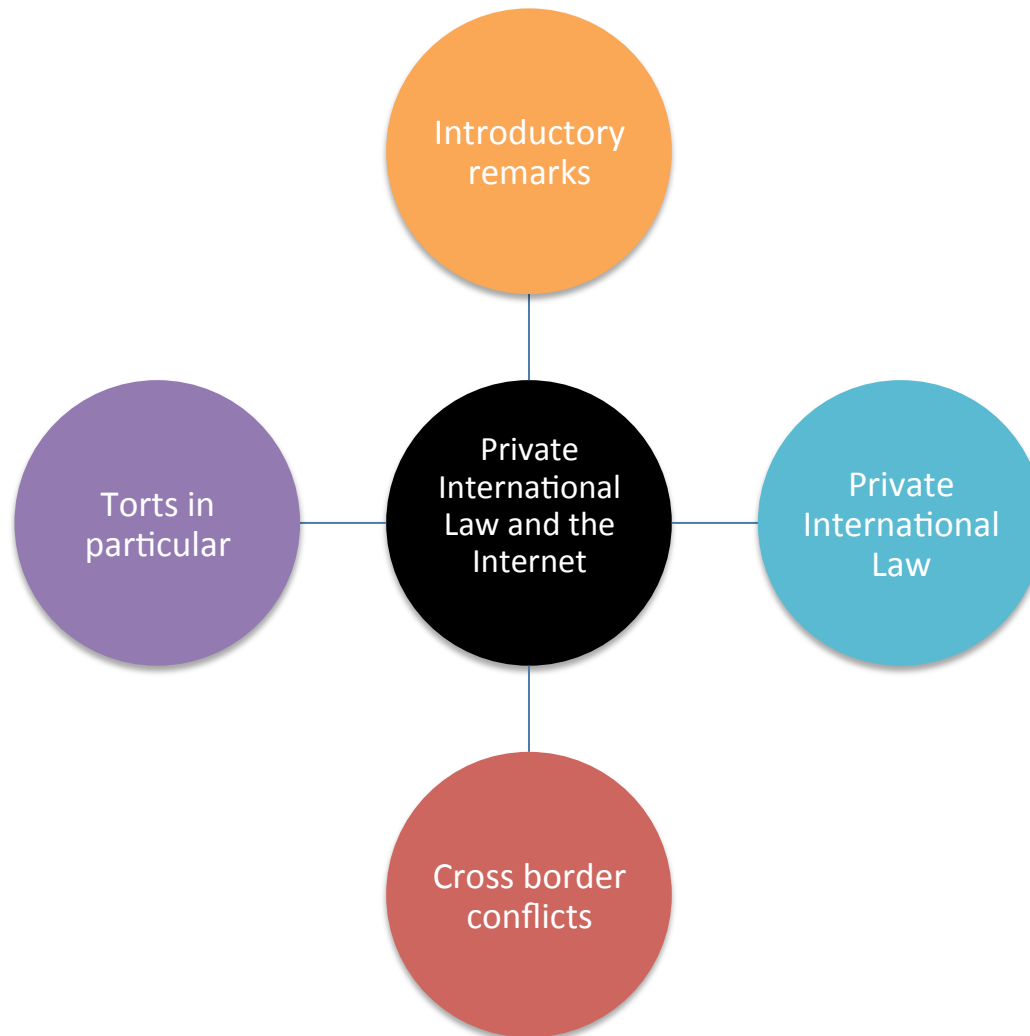
**The Future of Information Technology – Multiplication or Simplification**

**25 FEBBRAIO - 28 APRILE 2015**

**AULA VIOLA 2 / POLO DIDATTICO DIOMEDE PANTALEONI**

**VIA PESCHERIA VECCHIA / MACERATA**

# Structure





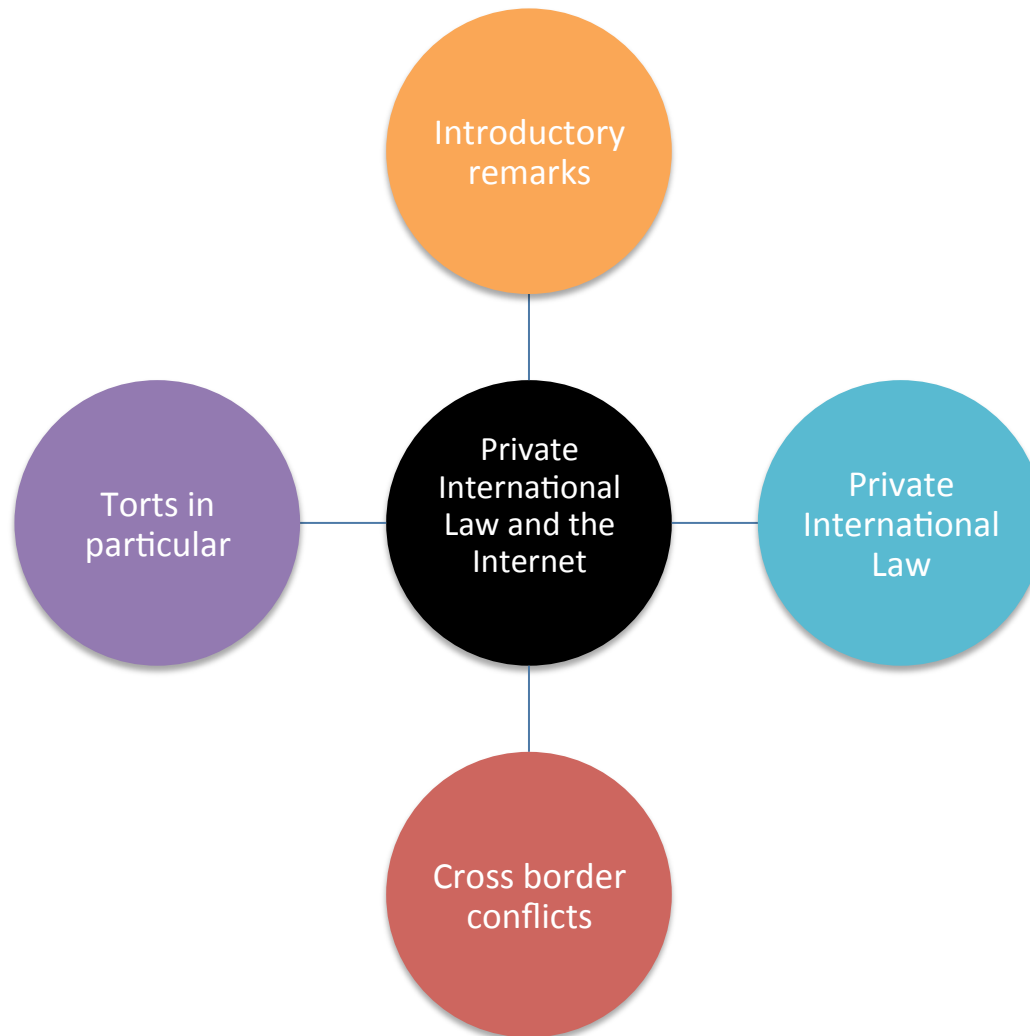
# INTRODUCTORY REMARKS

Why does this apply to me, I'm staying  
here in Macerata?

# Cross-border is all over...

- E-Commerce
- Social media (webb 2.0)
- File sharing
- CLOUD services

# Structure







# PRIVATE INTERNATIONAL LAW

# What is Private International Law

1. Jurisdiction – which court is competent to entertain a claim that sources from a legal relationship containing a foreign element, such as two parties in different countries.
2. Choice of Law – the problem to determine which legal system that should be applied to the case by the competent court.
3. Recognition and enforcement – to specify the circumstances in which a) a judgment can be recognized in a foreign country and b) whether the judgment can be enforced there.

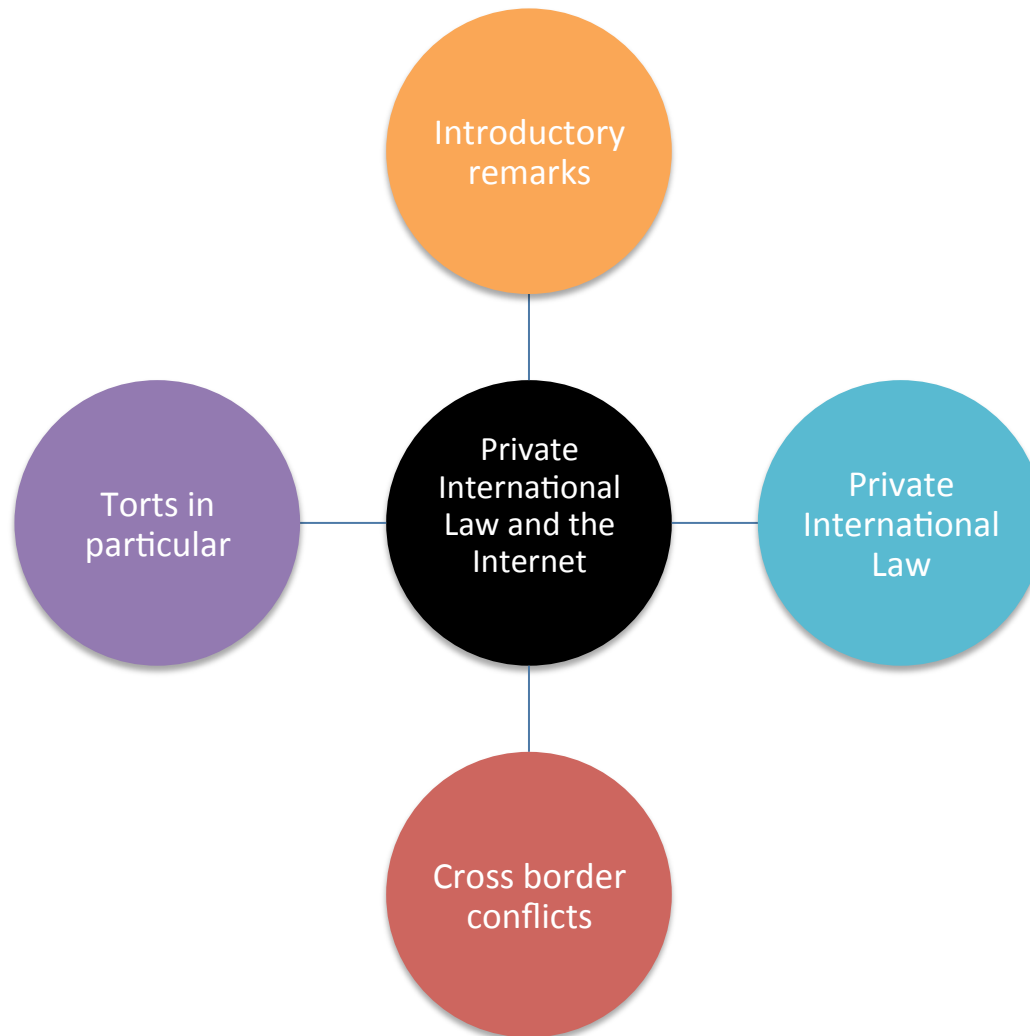
# European harmonisation

- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
- 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 (Brussels 1a)

# European harmonisation

	<b>Contractual obligations</b>	<b>Non-contractual obligations/tort</b>
<b>Jurisdiction</b>	Brussels Ia-Regulation	Brussels Ia-Regulation
<b>Choice of law</b>	Rome I-Regulation	Rome II-Regulation
<b>Recognition/ Enforcement</b>	Brussels Ia-Regulation	Brussels Ia-Regulation

# Structure





# CROSS BORDER CONFLICTS

# Defining cross border

- More than one State...
- The Internet? Ubiquitous!

# Defining "conflict"

- Qualification
  - Contractual or non-contractual?
  - In the course of trade or consumers?
  - Purposeful or unintentional (good faith)?
  - Public or private?
  - Civil or criminal?





# C-585/08 and C-144/09 (Pammer and Hotel Alpenhof)

## C-585/08 and C-144/09 (Pammer and Hotel Alpenhof)

- Legal context:
  - Regulation (EC) No 44/2001 – Article 15(1)(c) and (3) -> Brussels 1a regulation, article 17(1)c and (3).
  - Recital 7, Rome I: states that the substantive scope and the provisions of that regulation should be consistent with those of Brussels Ia regulation.
  - (Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours)

## C-585/08 and C-144/09 (Pammer and Hotel Alpenhof)

2. In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

## C-585/08 and C-144/09 (Pammer and Hotel Alpenhof)

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely:

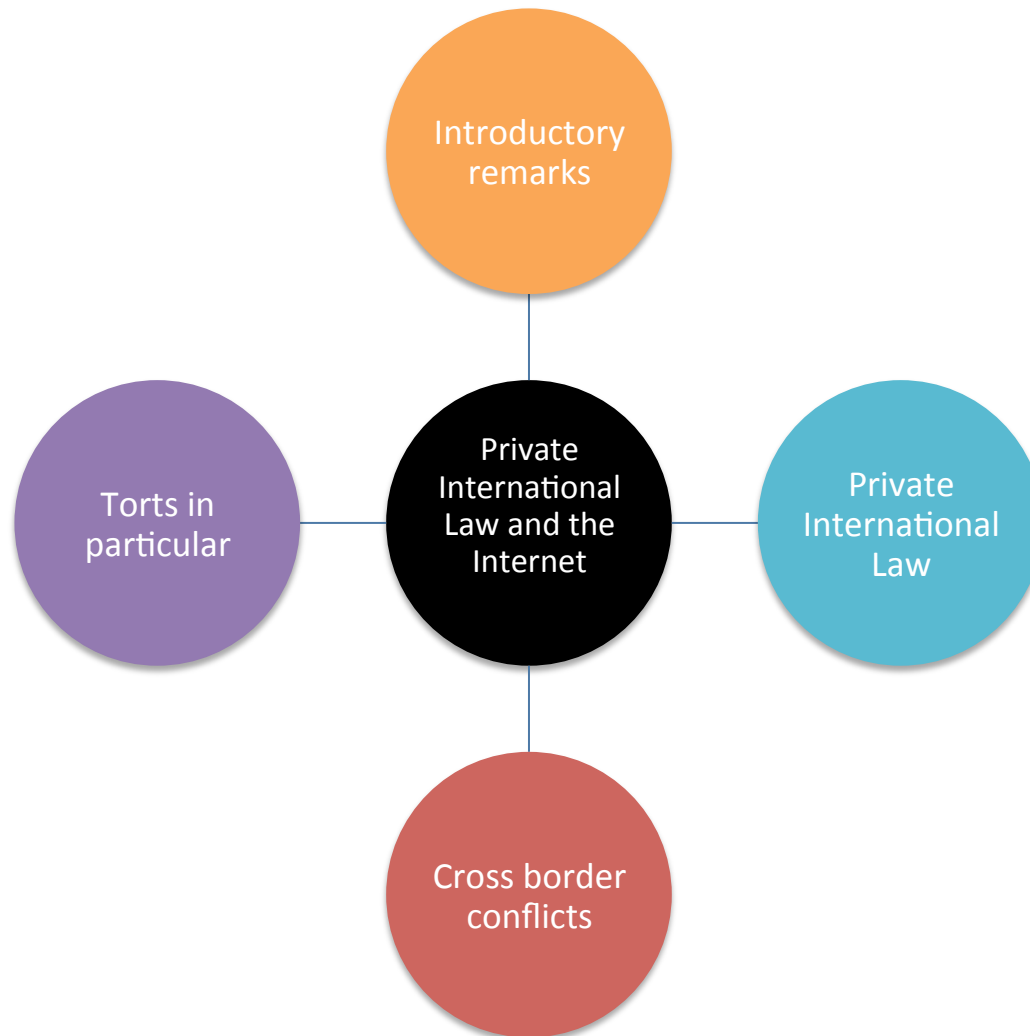
- the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established,
- use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language
- mention of telephone numbers with an international code,
- outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States,
- use of a top-level domain name other than that of the Member State in which the trader is established,
- mention of an international clientele composed of customers domiciled in various Member States.

It is for the national courts to ascertain whether such evidence exists.

C-585/08 and C-144/09 (Pammer and Hotel Alpenhof)

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.

# Structure





# TORTS IN PARTICULAR

# Applicable regulations

- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
- 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 (Brussels 1a)





# **JURISDICTION AND INTERNET RELATED TORTS**

## **- A DIVE INTO AN UBIQUITOUS OCEAN**

# Cases – article 7(2)

1. 21/76, [1976] *Bier v. Mines de potasse d'Alsace*
2. 189/87, [1988] *Kalfelis v. Bankhaus Schröder*
3. C-220/88, [1990] *Dumez v. Helaba*
4. C-261/90, [1992] *Reichert v. Dresdner Bank*
5. C-68/93, [1995] *Shevill v. Presse Alliance*
6. C-364/93, [1995] *Marinari v. Lloyd's Bank*
7. C-51/97, [1998] *Réunion Européenne v. Spliethoff's*
8. C-167/00, [2002] *Verein für Konsumenteninformation v. Henkel*
9. C-334/00, [2002] *Tacconi v. HWS*
10. C-18/02, [2004] *Danmarks Rederiforening v. LO*
11. C-168/02, [2004] *Kronhofer v. Maier*
12. C-189/08, [2009] *Zuid-Chemie v. Philippo's Mineralenfabriek*
13. C-509/09, [2011] *eDate v. X*
14. C-161/10, [2011] *Martinez v. MGN*
15. C-292/10, [2012] *G v. Visser*
16. C-523/10, [2012] *Wintersteiger v. Products 4U*
17. C-173/11, [2012] *Fotball Dataco v. Sportradar*
18. C-133/11, [2012] *Folien Fischer v. Ritrama*
19. C-228/11, [20xx] *Melzer v. Global*
20. C-147/12, [20xx] *ÖFAB v. Frank Koot*
21. C-170/12, [2014] *Pinckney v. Mediatech*
22. C-360/12, [2014] *Coty Germany*
23. C- 441/13, [2015] *Pez Hejduk*

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# On-Line Cross-border Infringement Cases

- C-509/09 and C- (eDate and Martinez)
- C-441/13 (Pez Hejduk)
  
- Cases C-236/08 to C-238/08 Google France and Google
- Case C-324/09 L'Oréal and Others
- [...]



# C-509/09 and C-161/10 (eDate and Martinez)

## C-509/09, *eDate* and *Martinez*

- Legal context
  - Regulation 44/2001 (Brussels I regulation), art 5(3)  
-> Brussels Ia Regulation, art 7(2)
  - Directive 2000/31/EC (Directive on electronic commerce), art 3

## C-509/09, *eDate* and *Martinez*

46 It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. [...]

48 The connecting criteria [...] must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused [...]

## C-509/09, *eDate v. X* and C-161/10, *Martinez v. MGN*

50 The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content.

The view must therefore be taken that the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued.



# C-441/13 (Pez Hejduk)



# C-441/13 (Pez Hejduk)

- Legal context:
  - Regulation 44/2001 (Brussels I regulation), art 5(3) -> Brussels Ia Regulation, art 7(2)
  - Directive 2001/29/EC , INFOSOC

# C-441/13 (Pez Hejduk)

Article 5(3), Brussels I - > Article 7(2) Brussels Ia, must be interpreted as meaning that, in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction.

That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

# On-Line Cross-border Intellectual Property Disputes

## - Swedish perspectives

### On-Line Cross-Border

- RH 2008:4 (Arbeiderbladet)
- Swedish Supreme Court, the “Tylden-case”, Ö 4891-09, decided on the 4 July 2012

# Swedish Supreme Court, the “Tylden-case”

no. Ö 4891-09, decided on the 4 July 2012

25. [...] The ECJ found that the publication of content on a site is different from territorial distribution of such printed media so that the publication of content on a site in principle is addressed to an unlimited audience. The content online can be instantly accessed by an unlimited number of Internet users everywhere in the world, completely independent of the sender's intentions regarding availability outside the Member State where the sender is established and exercises control (para 45 of the *eDate* Judgment). Further, the ECJ emphasized the serious violation of personality rights because the content that violates personal rights is available anywhere in the world (para. 47).

26. This [eDate] case concerns the application of Article 5.3 and should be applied *mutatis mutandis* to infringement of copyright by the content on a website.

# In summary...

- This is what we now
  - Article 7(2) embraces three jurisdictional heads (where the action took place, where the damage occurred and where the centre of interest is...)
  - It may be used also in relation to actions regarding negative declaration
  - It may be argued that the rule only applies in relation to intentional on-line infringements?

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“Imagine that everything stays 99 percent the same, that people continue to consume 99 percent of the television they used to, but 1 percent of the time gets carved out for producing and sharing. The connected population still watches well over a trillion hours of TV a year; 1 percent of that is more than one hundred Wikipedias worth of participation per year.”

Clay Shirkey “Cognitive Surplus”

# Questions?

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