

# The Jurisdiction of Foreign-related Online Defamation and the Determination of the Applicable Law

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**Abstract:** *Internet defamation arising with the increasing development of the Internet. The efficiency, unboundedness, and wide range of the Internet distinguish Internet defamation from traditional defamation. The traditional jurisdiction and the determination of applicable law seem out of place. Major countries have developed new rules for online defamation based on traditional rules. Our country should introduce the comprehensive and objective "accessibility principle" based on the principle of the most intimate. In terms of the application of the law, the law of the court should be introduced based on the principle of the most intimate, rather than uniformly applying the law of the habitual residence of the infringed.*

**Keywords:** *Parallel litigation; Online Defamation; Private international law*

## 1. Introduction

Network defamation based on the Internet. The information exchange on the Internet allows traditional defamation confined to a certain area and a specific group of people to spread outside the area where the parties live through the Internet. The scope of the infringement of the parties' reputation rights is broad and difficult to clarify.

The efficiency of publishing defamatory information on the Internet is very high. Compared with traditional forms of defamation, defamation through the Internet is really efficient. Once the defamatory information is published on the Internet, it will be obtained by a third party. Choosing different publishing channels will also affect the efficiency of defamation. For example, defamation against a student can be directly published on the school's forum, and defamatory information can be obtained by a third person in the subject's study and living area in a very short time. Therefore, compared with traditional defamation, Internet defamation will have an impact once it occurs, and it is difficult for slanderers to stop the defamation promptly to reduce harm.

The second point is that defamatory information on the Internet is very easy to reprint. Compared with traditional defamation methods such as "oral reports" and "big-character posters," defamatory information on the Internet is very easy to reprint. Therefore, once defamatory information is published on the Internet, the speed of the information may spread in an exponential function, and the efficiency of damage to the party's reputation is very high. The reprinted information is also difficult to eliminate the impact by deleting the original information, whether it is difficult for the publisher of defamatory information or the victim to stop the loss in time.

The third point is that the scope of Internet damage is very wide. If defamatory information is published in multiple Internet domains related to the victim at the same time, and the information is obtained by a third person in the domain related to the victim at the same time, the damage to the reputation of the victim will be quite serious. All aspects of the life of the injured.

Finally, compared with traditional defamation methods, the damage caused by online defamation is not unique. If the defamatory information is published on the Internet, the damage can also be considered to have occurred in all parts of the world that received the defamatory information.

In summary, compared with traditional defamation, online defamation is more efficient in information dissemination, it is difficult to stop loss in time, it damages reputation rights more deeply, spreads more widely, and is more likely to occur at the same time as the confirmation of the place where the damage occurred and traditional defamation. There are also big differences.

## 2. Jurisdiction of online defamation

The Internet is virtual, so the boundaries of the Internet are difficult to determine, and traditional spatial concepts cannot be used to perfectly describe the boundaries of the Internet. Therefore, the traditional rules based on identity and region as the basis of jurisdiction have encountered challenges, and all countries have made adaptive regulations based on their traditional jurisdiction rules.

### 2.1. In the United States

The U.S. traditionally determines jurisdiction based on the principle of "effective control". In person-to-person litigation, as long as the plaintiff issuing in a domestic court and the defendant is in the United States and there is no obstacle to the service of documents, the domestic court has the right to exercise jurisdiction. This has nothing to do with the defendant's international domicile, and it has nothing to do with whether the cause of the case occurred in China.[1]

In traditional defamation cases, the US court established the "minimum contact" standard at an earlier stage. In the *Keeton v. Hustler Magazine* case, the court ruled that the defendant hustler had a low circulation in the state and the main infringement facts occurred outside the state. It held that the defendant lacked the minimum close contact with the state and thus did not have jurisdiction over others. In the *Calder v. Jones* case, although the writer and editor only worked in Florida, the U.S. Supreme Court ruled that their work "targeted" California where the actress lives and would suffer the most damage. In other words, the defendants have a great connection with California, not because of what they did when they went there in person, but because they deliberately caused an impact there. The connotation of this "minimum connection" eventually developed into: First, whether the plaintiff deliberately took advantage of the favorable conditions of the court in question. Second, whether the defendant's actions caused actual damage in the court where the complaint was filed. Third, whether the court's exercise of jurisdiction can fully protect the defendant's litigation rights.

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the Western District Circuit Court of Pennsylvania established a "sliding standard" for Internet defamation. The defendant's degree of control and utilization of the Internet was divided into positive websites, passive websites, and interactive websites to determine jurisdiction.[2]

The "sliding standard" judges jurisdiction based on the nature of the website, which improves the predictability of jurisdiction to a certain extent and restricts the expansion of jurisdiction in Internet-related cases. But in Internet defamation cases, the point is that once the publisher publishes the defamatory information on an influential website, the damage will likely occur. This has little to do with the nature of the website, especially now that the development of Internet websites is diversified. Era. However, due to the protection of freedom of speech in the United States, there are now fewer and fewer cases that can develop Internet defamation jurisdiction.

### 2.2. In Germany

The standards of civil law countries to determine infringement jurisdiction mainly include territorial jurisdiction and personal jurisdiction. The jurisdiction of the defendant's domicile is Germany's general standard for determining the jurisdiction of foreign-related civil litigation, and Germany calls it the "general jurisdiction". Germany has foreign jurisdiction based on the fact that the defendant has a domicile in Germany, provided that it does not conflict with special jurisdiction. The so-called special jurisdiction is called "special jurisdiction" in Germany, and it adopts the jurisdiction of infringement. At the same time, Germany also recognizes the jurisdiction based on the defendant's act of responding to the suit.

Regarding Internet defamation standards, Germany adopts the "Conflict of Interest Analysis Standard". In 2010, the German Federal Court established the conditions for the exercise of jurisdiction by the infringement of personality rights network in the *New York Times* case. The Court noted, questioned if the content is clearly related to a place, will be able to establish jurisdiction based on this, provided that such must lead to conflicts of interest involving a certain extent. Only when readers are interested in reading the information can they damage the personality rights of the relevant parties. Therefore, the courts should pay more attention to the content rather than the "accessibility" on the Internet. The court also pointed out, appearing content to this conflict is not questioned or highlighted by the user directly to the case to court is a necessary condition. [3] The core of the court is to analyze the effect of the content of the article on the German readers, and the amount of information visits is only

one of the factors to evaluate the benefits. Therefore, whether the German court can exercise its jurisdiction depends on the assessment of the connection between the plaintiff and the court and whether the residents have an objective interest in obtaining information. The latter may be achieved through the relevance of specific information or the pertinence of readers.

### ***2.3. In China***

Regarding the jurisdictional rules of foreign-related defamation cases, my country has not made special regulations. Combined with the provisions of the Civil Procedure Law and the applicable law of foreign-related legal relations, the jurisdiction is based on the place of the defendant's domicile and the place where the infringement occurred, and no clear distinction is made between foreign-related defamation and domestic defamation.[4] But at the same time, our country has clear regulations on infringement jurisdiction rules that use the Internet, that is, the places where information is uploaded, downloaded, and availability are all places of infringement

### ***2.4. Announcement of The Hague Conference on Private International Law***

The Hague Conference on Private International Law paid close attention to private international law issues on the Internet and held several meetings to discuss the jurisdiction of Internet cases. Five consensus were reached at the 1997 "Internet Private International Law Issues" seminar: I) The nature of the Internet is transnational; II) There may be a legal surplus rather than a legal vacuum on the Internet, so it needs to be redefined The rules of private international law; III) When there is a certain connection between virtual space and real space, the location of online activities can be determined; IV) Before the balance between private and public interests and the government's death is not irreplaceable, cyberspace's Autonomous rules seem to be more favored by the parties; V) Countries should cooperate in formulating internationally accepted rules, rather than acting alone.

### ***2.5. Summary***

The Internet does have an impact on the traditional jurisdiction theory of defamation litigation, but the courts of various countries choose to reform and develop on the traditional rules. The author recognizes the formula reached by the Conference on Private International Law-the Internet is not a legal vacuum, but a legal surplus. The surplus of laws will inevitably lead to active conflicts of jurisdiction and at the same time affect the determination of the applicable law.

## **3. Determination of the applicable law for online defamation**

The determination of the applicable law is as important as the determination of jurisdiction. Compared with the civil law system, the United Kingdom and the United States pay more attention to the determination of jurisdiction, and usually, the law of the forum is applied according to the jurisdiction. But sometimes, the law of the court may not have the closest connection with defamation. The impact of the Internet has also brought challenges to traditional rules. Traditional rules seem out of place in defamation using the Internet, and some countries and regions have also explored them.

### ***3.1. In the United States***

The United States has specific applicable laws against defamation infringement. The United States believes that the release of defamatory information is a substantive factor for defamation infringement, and therefore regards the release of defamatory information as the place where the defamation infringement is carried out, so it will also choose the law of the place where the infringement is carried out. In 1971, the "Second Conflict of Laws Restatement" also made provisions, but as the protection of the freedom of speech of the US team has deepened, there has been an upsurge of anti-defamation travel, which made the United States refuse to apply and recognize the laws and judgments of other countries unless they protect freedom of speech better than the United States.

### ***3.2. In the United Kingdom***

The British Phillips case (Phillips v. Eyre) established the double actionable rule, while the Chaplin case (Chaplin v. Boys) and Red Sea Insurance Co. Ltd v. Bouygue SA (Red Sea Insurance Co. Ltd v.

Bouygue SA) developed Exception to the double actionable rule: the principle of the closest connection. According to this principle, the United Kingdom has a closer relationship with the two disputes. This approach expands the scope of application of the law of the court and at the same time increases the uncertainty of the double actionable rule. In 1995, the British International Private Law abolished the doctrine of double action in areas other than defamation.[5]

### **3.3. In European Union**

To improve the rules for the infringement of personality rights, the "European Commission Proposal" proposes a rule system that focuses on the place where the damage occurs. Its purpose is to strengthen the protection of victims in the infringement of personality rights. However, it is not pointed out whether the place where the damage occurs refers to the place where the result of the damage occurs or the place where the injurious act occurs.

The "Resolution of the European Parliament" proposes a system of rules that focuses on the place where the offending act is committed. It is more inclined to protect media practitioners and emphasizes the principle of offensive behavior in the choice of applicable law. In terms of rules, this system enhances the predictability of the results of the application of the law.

The "Final Proposal" is a compromise between the focus of the perpetration and the focus of the damage. The application of law should be predictable, which is the consensus of EU countries. However, due to the special nature of defamation involving the Internet, it is difficult to achieve a balance between freedom of speech and speech regulation. The "Final Proposal" adopted the principle of the law of the place where the damage occurred in general, and set up several exceptions. The specific manifestation is when the infringer cannot reasonably foresee the damage caused by the infringement, the law of the infringer's habitual residence shall be applied. In addition, when the location of the damage result is not clear, the editorial management location method is used.[6]

### **3.4. In China**

Article 46 of the "Applicable Law" stipulates that in the case of infringement of personal rights such as name rights, portrait rights, reputation rights, privacy rights, etc., through the Internet or by other means, the law of the place where the infringed person's habitual residence is applied shall be applied. Our country follows the traditional territorial legal choice, and may not consider the particularity of reputation infringement. However, such regulations clarify the applicable laws, so that the parties can better foresee the resulting legal effects, to a certain extent, to avoid the parties' tendency to choose the court and to maintain the consistency of the application of the law.

## **4. Conclusions**

Judging from the perspective of substantive value, my country advocates the balanced protection of freedom of speech and reputation. In practice, the current jurisdictional rules may tend to protect the plaintiff more, and may even impose excessive restrictions on freedom of speech.

Taking the plaintiff's domicile as the basis for jurisdiction is considered by scholars to be an excessive concern. The jurisdiction of the plaintiff's domicile has been abandoned by more and more countries. In addition, judges in our country lack the discretionary power of judges in Britain and the United States. Under the current jurisdiction rules, judges cannot consider the influence of other factors, which leads to the rigid application of the law. Of course, if you want to consider the introduction of the "accessibility principle", you should pay attention to adopting more comprehensive and objective standards to prevent parties from using jurisdictional rules to create connection points and create the jurisdictional basis to bring judicial risks.

In terms of the application of the law, the law of the place of court can be introduced based on the principle of the closest, instead of uniformly applying the law of the place of residence of the infringed, to avoid the fact that the place of the infringed habitual residence is different from the place of the court, causing the defendant to be unable to predict the punishment. The standard of compensation. On the other hand, the determination of the closest relationship should not be illusory. A habitual residence often reflects his social relationship better than his nationality. Therefore, the determination of the closest connection should also be based on the place of habitual residence. In summary, the author believes that the law of the court should be introduced on the premise of retaining Article 46 of the Law on the

Application of Laws so that judges have a certain degree of discretion and determine the applicable law according to the actual situation of the case.

### References

- [1] Qu Guangqing and Ou Fuyong, *Introduction to International Civil Procedure* [M]. People's Court Press, 2004 edition.
- [2] Liu Renshan, *The European Union's Legislative Practice to Balance the Right of Personality and Freedom of Speech—From the perspective of the legislative attempt of the applicable rules of the infringement of personality rights* [J]. *Global Law Review*, 2014 (6).
- [3] Laura E. Little, *internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States* [J]. *LEGAL STUDIES RESEARCH PAPER SERIES*, 2013-09-01.
- [4] Jiang Youyou, *Research on the Legal Application of Foreign-related Network Defamation* [J]. *Wuhan University Law Review*, 2019 (3).
- [5] Katharina Boele-Woelki and Catherine Kessedjian, *Internet: Which Court Decides? Which Law Applies?* [M], *Kluwer Law International*, 1998, p.179.
- [6] Tan Xiaojie, *Coordination of Transnational Network Defamation Jurisdiction Rules* [J]. *Times Law*, 2019 (5).