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BRUSSELS I: RECENT DEVELOPMENTS IN THE INTERPRETATION OF SPECIAL JURISDICTION PROVISIONS FOR INTERNET TORTS

by

MARTIN ŠRÁMEK*

The paper deals with recent rulings of the European Court of Justice regarding the international jurisdiction of European courts in connection with infringements over the Internet. The aim of the paper is to illustrate a shift in the judicature of the Court and the need for a recast of the special jurisdiction provisions in the Brussels I Regulation.

The main focal point is the ruling in the case C-170/12 Peter Pinckney v KDG Mediatech AG, which contains two surprising conclusions. Firstly, the intentions of the alleged infringer to target a certain jurisdiction are not to be taken into consideration. The decisive connecting factor is solely the fact that the harmful event may occur within the jurisdiction of the court. Secondly, the actions of an independent third party can now establish the jurisdiction for a suit against the alleged infringer. This has been the subject of two other recent cases C-387/12 Hi Hotel HCF Sparl v Uwe Spoering and C-360/12 Coty Germany GmbH v First Note Perfumes NV. In both of these cases the sole actions of the alleged infringer would not suffice to establish the jurisdiction of the court in question. The paper tries to evaluate these rulings in light of procedural fairness and the traditional interpretation of special jurisdiction provisions.

KEY WORDS

international jurisdiction, special jurisdiction for torts, Brussels I Regulation

* Martin Šrámek, researcher at European Information Society Institute, email: sramek@eisionline.org .

1. INTRODUCTION

One of the most important problems in cross-border proceedings is the determination of the competent court. Plaintiffs want to know where they can sue and defendants need to know where they can expect to be sued. The answer to this question determines if the plaintiff initiates proceedings, how these will be administered and their possible outcome.

The European rules on international jurisdiction are unified by the Brussels I Regulation.¹ Its system and many of its provisions date back to its predecessor, the Brussels Convention², signed in 1968. The creators of these provisions could not foresee the Internet era and, therefore, it is understandable that the CJEU is being confronted with many preliminary proceedings concerning the interpretation of Brussels I provisions in connection with the Internet. In this paper we will focus on the decision *Pinckney vs. KDG Mediatech AG* and the shift from the traditional interpretation of special jurisdiction provisions.

2. CURRENT RULES ON INTERNATIONAL JURISDICTION

As mentioned above, the rules on international jurisdiction are set out in the Brussels I Regulation. The regulation makes a distinction between the general and special jurisdictions.³

The general jurisdiction rule, set out in Art. 2⁴, defines that a person domiciled in a Member state shall be sued in the courts of that Member state. The two main reasons for this jurisdiction are practicality and procedural fairness. The defendant's domicile is usually the place where his or her estate is located, which is where the plaintiff will want to enforce his or her rights. However, practicality is not the reason why the CJEU considers *actor sequitur forum rei* to be a 'fundamental principle'. The new

¹ In January 2015 the old Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, was replaced by the 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. The provisions mentioned in this paper have been unchanged. Only the numbering has changed. For reasons of consistency we will use the old numbering, since all the literature and decisions use it as well.

² Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

³ Exclusive jurisdiction in Art. 22 falls out of the scope of this paper.

⁴ Now 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, Art. 4.

rules on recognition and enforcement of judgments from other Member states have weakened the practical side of Art. 2.⁵ The fundamental reason behind the general jurisdiction is the 'balance of weapons'. Procedural rules should be set in a way that they do not give one party an advantage over the other. Since plaintiffs can decide when and what exactly they claim and the defendants have limited time to prepare their cases, defendants should be sued before a court with which they are familiar.⁶ Exceptions to this fundamental rule should be interpreted restrictively⁷ and be highly predictable.⁸

Since the court in the defendant's domicile may not always be the court with the closest connection to the case⁹ and in order to 'facilitate the sound administration of justice'¹⁰, the Brussels I Regulation foresees special jurisdictions where the plaintiff can also initiate proceedings. The special jurisdiction for matters relating to torts can be found in Art. 5 Nr. 3¹¹ and specifies that a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

Claims resulting from copyright infringement fall within the scope of this provision.¹² The claimant can sue for damages and also for issuing an injunction¹³ or a negative declaration.¹⁴ The damage itself cannot be based

⁵ 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, Art. 39.

⁶ See Berger, Ch 2005, 'Die internationale Zuständigkeit bei Urheberrechtsverletzungen in Internet-Websites aufgrund des Gerichtsstands der unerlaubten Handlung nach Art. 5 Nr. 3 EuGVO', *GRUR Int.*, vol. 6, p. 465.; Thiede, T 2012, *Aktivgerichtsstand für Betroffene von Persönlichkeitsrechtsverletzungen im Onlinebereich*, *ecolex*, p. 131.

⁷ CJEU in *Melzer*, C-228/11, EU:C:2013:305, para 24; *Jääskinen*, Opinion in *Coty Germany*, C-360/12, EU:C:2013:764, para 61.

⁸ 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, Recital 15.

⁹ Fawcett, JJ, Torremans, P 2011, *Intellectual Property and Private International Law*, Oxford University Press, Oxford, para 5.11.

¹⁰ 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, Recital 16.

¹¹ Now 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, Art. 7, Nr. 2.

¹² Kropholler, J, von Hein, J 2011, *Europäisches Zivilprozessrecht*, Recht und Wirtschaft, Frankfurt am Main, p. 204.

¹³ Leible in Rauscher, T 2011, *Europäisches Zivilprozess- und Kollisionsrecht*, Sellier, München, p. 266.

¹⁴ CJEU in *Folien Fischer and Fofitec*, C-133/11, EU:C:2012:664, para 55.

on an indirect infringement.¹⁵ If a plaintiff suffers damage in one member state and this causes secondary damage in another member state, he or she cannot sue the tortfeasor at the place where the secondary damage occurred.¹⁶

The focal point of our paper is the interpretation of 'the place where the harmful event occurred or may occur.' If the tortfeasor acts in one Member state and his or her actions cause damage in another Member state, courts of both countries are competent to decide in the matter.¹⁷ This interpretation, usually referred to as the ubiquity approach, applies also in cases where the damage is spread across multiple Member states.¹⁸ However in cases regarding personality rights, the Court decided that the jurisdiction of the courts for the place where the damage occurred is limited to the damage that occurred in the particular Member state.¹⁹ This is referred to as the mosaic principle, since all limited jurisdictions combined together sum up the whole damage.

The first case in which the CJEU had to deal with online infringement concerned personality rights.²⁰ The Court confirmed the application of the mosaic theory and introduced another connecting factor – the center of interests. The plaintiff can initiate proceedings at the court where his or her center of interests lies. This is most likely his or her domicile.²¹ The court's competence is not limited to the damage that occurred in the Member state. This connecting factor is, however, only relevant in connection with personality rights. The CJEU rejected the application of the eDate doctrine to trade mark infringement via Google AdWords.²² Instead the Court defined that the 'place where the event giving rise to the damage occurred' is the domicile of the defendant, where the decision to infringe a trade mark online has most likely been made. Further it stated that 'the place where the damage occurred' can only be the Member state in which the trademark is registered.²³

¹⁵ CJEU in *Dumez*, C-220/88, EU:C:1990:8.

¹⁶ CJEU in *Marinari*, C-364/93, EU:C:1995:289.

¹⁷ CJEU in *Bier*, C-21/76, EU:C:1976:166.

¹⁸ For instance when the damage is caused via mass media or the Internet.

¹⁹ CJEU in *Shevill*, C-68/93, EU:C:1995:61.; CJEU in *eDate Advertising and others*, C-509/09, EU:C:1995:61.

²⁰ CJEU in *eDate Advertising and others*, C-509/09, EU:C:1995:61.

²¹ *Ibid*, para 49.

²² CJEU in *Wintersteiger*, C-523/10, EU:C:2012:220, para 24.

²³ *Ibid*, para 28.

The application of the *eDate* or the *Wintersteiger* judgments to cases where copyright is infringed online is hardly possible.²⁴ The infringed copyright does not have any connection to the center of the plaintiff's interests²⁵, and registration is not a prerequisite for its existence. Instead it was reasonable to assume that the damage occurs in the Member states at which the tortfeasor directed his or her activities. The criteria used to determine if an activity has been directed at a certain Member state had already been set by the CJEU in the joint cases *Pammer* and *Hotel Alpenhof*²⁶, and the Court has already applied this principle on the level of substantive law.²⁷ These considerations have been rejected by the CJEU in the *Pinckney* case, which we will discuss more thoroughly.

3. PINCKNEY V. KDG MEDIATECH AG

The proceedings for preliminary ruling have been initiated by the *cour de cassation* which struggled with the interpretation of Art. 5 Nr. 3 in the following scenario. The plaintiff Peter Pinckney, a British songwriter, claimed he was the author of 12 songs, which the defendant, the Austrian company Mediatech, pressed onto CDs in Austria. These CDs had subsequently been sold on the Internet by two UK companies which were not parties to the dispute. Mr. Pinckney lives in France, which is where he commenced proceedings against Mediatech for infringement of his copyright. The French high court wanted to know if the French courts were competent to decide the matter.

The CJEU's response was the following:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company

²⁴ The *tribunal de grande instance de Nanterre* applied the *eDate* principles to neighbouring rights of performers. This decision is, however, not to be followed. See more at The 1709 Blog 2012, *Extension of eDate Principles to Performers' Neighbouring Rights*, viewed 7 June 2015, <<http://the1709blog.blogspot.co.at/2012/10/extensionofedateprinciplesto.html>>.

²⁵ Jääskinen, *Opinion in Pinckney*, C-170/12, EU:C:2013:400, para 70.

²⁶ CJEU in *Pammer and Hotel Alpenhof*, C-585/08, C-144/09, EU:C:2010:740.

²⁷ Husovec, M 2014, 'Jurisdiction on the Internet after *Pinckney*', *International Review of Intellectual Property and Competition Law*, vol. 45, no. 3, p. 370.

established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.²⁸

Three general principles can be inferred from this ruling:

- I. The actions of a third party can constitute special jurisdiction for the defendant.
- II. The mere accessibility of a website suffices to establish special jurisdiction.
- III. The competence of the courts at the 'place where the damage occurred' is limited to the damage that occurred in the particular Member state (*mosaic theory*).

4. ATTRIBUTION

In the case at hand, the distribution of the CDs by the UK companies caused the damage to occur in France directly. The reproduction of the CDs by the defendant caused the damage only indirectly. The above mentioned case law²⁹ indicates that the effects of third-party actions should not be attributed to the defendant when assessing jurisdiction according to Art. 5 Nr. 3.

In a recent case³⁰, the Court stated that an alleged tortfeasor cannot be sued at the place where his co-tortfeasor has acted. This leads to a perplexing situation where the actions of a third party cannot be attributed to the defendant, but the effects of these actions can be. The CJEU dismissed the doubts that it might have been misunderstood in the *Hi Hotel* case, in which it fully confirmed the coexistence of the *Pinckney* and *Melzer* doctrines.³¹

This situation is not only confusing, but also highly problematic if we take the already mentioned principles of fairness and predictability into account. The attribution of the effects of third-party actions, over which the

²⁸ CJEU in *Pinckney*, C-170/12, EU:C:2013:635.

²⁹ CJEU in *Dumez*, C220/88, EU:C:1990:8.; CJEU in *Marinari*, C364/93, EU:C:1995:289.

³⁰ CJEU in *Melzer*, C-228/11, EU:C:2013:305.

³¹ CJEU in *Hi Hotel HCF*, C-387/12, EU:C:2014:215.

defendant has no control, is unpredictable.³² The defendant cannot influence where he or she will be sued and cannot steer his or her actions accordingly.

5. ACCESSIBILITY AND THE MOSAIC APPROACH

The Court dismissed the directing of activity as a connecting factor.³³ Instead it stated that every Member state which protects the copyright and in which the damage could potentially occur, namely where the website is accessible, is competent.³⁴ Other connecting factors such as the language of the website, the Top-Level-Domain or the willingness of the website operator to deliver to certain countries are not to be taken into consideration.

The courts whose competence is based on the accessibility of the website have jurisdiction limited to the damage that occurred in that Member state. The determination of the particular damage in each Member state may be difficult. In the case at hand, it is certainly difficult for the rightsholder to determine how many CDs were distributed in France, but not necessarily impossible. This approach is questionable mainly in cases where no physical dissemination of the damage can be observed, for instance when a website contains infringing content, such as photos or videos available for streaming.³⁵

6. CONCLUSION

The practical consequences of this ruling are unfavorable towards defendants, since the actions of a third party can constitute jurisdiction of a foreign court. However at the same time the ruling can hardly be labeled as 'plaintiff-friendly'. The extension of the *mosaic approach* to copyright infringement has confronted the plaintiff with many difficulties.

Furthermore the Court has caused a substantial amount of uncertainty regarding the role of the general jurisdiction rule. The traditional interpretation regarded the special jurisdiction to be an exception from Art. 2, which was to be interpreted restrictively. In the past three years, the

³² von Hein, J 2014, 'Markenrecht: Internationale Zuständigkeit bei Markenrechtsverletzung durch mehrere Beteiligte', *Europäische Zeitschrift für Wirtschaftsrecht*, no. 17, p. 668.; Müller, M 2011, 'EuGVVO: Deliktsgerichtsstand bei Teilnahmehandlung in anderem Mitgliedstaat', *Europäische Zeitschrift für Wirtschaftsrecht*, no. 11, p. 434.

³³ CJEU in *Pinckney*, C-170/12, EU:C:2013:635, para 42.

³⁴ *Ibid*, para 44.

³⁵ Villalón, C, Opinion in *Hejduk*, C-441/13, EU:C:2014:2212, para 39.

Court has been issuing rulings³⁶ which tend to negate this concept. For reasons of legal certainty it would be much more helpful if it said so out loud. The next possibility to do so will be the case C-572/14 *Austro-Mechana*.

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³⁶ CJEU in *Pinckney*, C170/12, EU:C:2013:635.; CJEU in *Hi Hotel HCF*, C387/12, EU:C:2014:215.; CJEU in *Coty Germany*, C360/12, EU:C:2013:764.; CJEU in *Hejduk*, C441/13, EU:C:2014:2212.

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