CJEU rules on Jurisdiction in cases of copyright infringement via the internet: C-441/13 – Pez Hejduk ./. EnergieAgentur.NRW GmbH

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On 22 January 2015, the Court of Justice of the European Union delivered another judgment on international jurisdiction with regard to the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation in a case of copyright infringement via the internet.

The facts:

The facts of the case are relatively straightforward: The claimant, a professional photographer residing in Austria, claims the infringement of her copyright rights on several photographs which were made available by the German-based defendant on a German website without her consent. As a consequence of this, the claimant brought proceedings in her home state before the *Handelsgericht Wien* for damages, justifying the selection of that jurisdiction with a reference to Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation. The *Handelsgericht Wien* decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

"Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only

– in the Member State in which the alleged perpetrator of the infringement is established; and

– in the Member State(s) to which the website, according to its consent, is directed?"

The ruling:

After having made some general remarks on the functioning of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation (para. 16-20), the CJEU pointed out that copyright rights in the EU are harmonised according to the Directive 2001/29 and that they are subject to the principle of territoriality (para. 22). Although clearly not being relevant for the case at hand, the CJEU referred to its ruling in *Wintersteiger* (C-523/10) and stated that the place where the causal event took place in the case at hand would be the seat of the infringing company (para. 26). Only then the Court addressed the core problem of the case, asking whether the place where the damage occurred could be located in Austria. Here, the Court made reference to the judgment in *Pinckney* (C?170/12), where the Court already had decided on the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation to a copyright infringement via the internet. The decision of the CJEU can be summarised with three statements:

First, the location of the place where the damage occurred in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State (para. 29). This follows from the fact that the application of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation may vary according to the nature of the right allegedly infringed. Copyright rights are protected in all Member States subject to the territoriality principle (para. 30). Second, if the infringement is being made through a publication on a website, there is no requirement that this website is 'directed to' the Member State where the damage occurred (para. 31-33). The mere accessibility of the content which is protected by copyright law is sufficient (para. 34). Third and last, the mosaic principle applies which means that a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State (para. 35-37).

Comment:

The decision itself is no groundbreaking news. For the most part, the Court

referred to the previous decisions and particularly to the *Pinckney* case. However, the decision is interesting from a wider perspective, as the CJEU is about to build up a system of international jurisdiction in intellectual property cases. In the *Wintersteiger* case (C-523/10), where an alleged infringement of a national trademark via the internet was at issue, the CJEU had declined to localise the place where the damage occurred at the place where the relevant website can be accessed. Instead, the Court held that the place where the damage occurred is the Member state where the national trademark is registered and the entire damage may be claimed there. As the Court itself puts it, the interpretation of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation may vary according to the nature of the right allegedly infringed. The interpretation in cases involving copyright infringements is therefore a different one. Unlike national trademark rights, copyright rights are protected in every Member State according to the relevant national law without registration. For copyright infringements, the Court now established the jurisdictional rule that the mere accessibility of a website is sufficient to establish jurisdiction according to the second prong of Art. 7 No. 2 / former Art. 5 No. 3 Brussels I Regulation. This rule is not subject to any further limitation such as e.g. the 'directed to'-criteria (which has been criticised by e.g. Husovec, IIC 2014, 370 *et seqq.*). The CLIP project of the European Max Planck Group on Conflict of Laws in Intellectual Property provides for such limitation in Art. 2:202. Rather, the Court upholds the mosaic principle which it had created in the *Shevill* case (C-98/93) as a certain form of limitation.