Is the Shevill Doctrine Still Up to Date? Some Further Thoughts on CJEU's Judgment in Hejduk (C-441/13)

By Kristina Sirakova. Kristina is currently a research fellow at the MPI Luxembourg. In this post she takes up again the CJEU's Hejduk *case and provides her (to my mind, quite interesting) insights into the outcome.*

After Jonas Steinle commented on the judgment from a wider perspective, the CJEU's *Hejduk* case is to be addressed with regard to its ambiguous outcome. On the one hand, the CJEU blindly follows its controversial decision in *Pinckney* (C-170/12) missing the opportunity to relativize it. On the other hand, the fact that the Court does not adopt a restrictive interpretation of Article 5 (3) of the Brussels I Regulation as proposed by AG Cruz Villalón is to be welcomed.

In his Opinion of 11 September 2014, AG Cruz Villalón very precisely elaborated the core question that arises in the case at hand: How does *Hejduk* fit into the scheme of *eDate Advertising & Martinez* (C-509/09 and C-161/10), *Wintersteiger* (C-523/10) and *Pinckney* (para. 21 of the Opinion)? According to the AG, none of the three criteria – the center of the alleged victim's interests, the direction of the website to a specific Member State and the principle of territoriality – should be applied. Therefore, he rather proposed to restrict the scope of Article 5 (3) of the Brussels I Regulation to the place where the tort was committed.

This would be very often the place where the infringer/defendant is established. Therefore, whether jurisdiction is based on Article 5 (3) or Article 2 (1) of the Brussels I Regulation would most likely be irrelevant. This result contradicts the ratio of Article 5 (3) which aims at guaranteeing a jurisdictional balance. The restrictive approach effectively creates a risk that the provision could be deprived of its substance in those cases as the claimant would be entitled to bring his action only before the court at the place of the infringer's seat irrespective of where the damage occurred.

Fortunately, the Court decided not to follow the restrictive approach. Instead, it

applied the principle of territoriality which has already been the key criterion in *Wintersteiger* with regard to a national trade mark and in *Pinckney* concerning copyrights. It should be noted, however, that the principle of territoriality also bears some risks (see Opinion of AG Cruz Villalón in *Hejduk*, paras. 33-40; Opinion of AG Jääskinen in *Coty Germany* (C-360/12), para. 68; *Husovec*, IIC 2014, 370). Especially when the mere access to the website is sufficient to establish jurisdiction this opens up the floodgate for forum shopping. The only limitation set by the CJEU – as Jonas Steinle correctly points out in his post – is the mosaic principle created in *Shevill* (C-98/93).

The mosaic principle has been developed twenty years ago for an offline infringement of personality rights where the harm caused in each Member State could be easily quantified. However, this is not the case with infringements of rights committed via the internet. Here, the application of the mosaic principle causes more practical problems than it solves, therefore it might be worth reconsidering it.

There is thus a need for a criterion limiting the EU-wide jurisdiction which the CJEU created in *Pinckney* and now in *Hejduk*. The answer might be *eDate Advertising & Martinez* (as suggested by Professor Burkhard Hess in his speech 'The CJEU's Decision in eDate Advertising and Its Implementation by National Courts' at the Conference on 'The Protection of Privacy in the Aftermath of the Recent Judgments of the CJEU – eDate Advertising, Digital Rights Ireland and Google Spain' hosted at the Max Planck Institute Luxembourg on 29 September 2014, the proceedings of which will be published shortly).

Admittedly, the center of the alleged victim's interests has also been developed for an infringement of personality rights which, however, occurred in a case of an online infringement. Furthermore, it has to be stressed that personality rights and copyrights share many similarities. They are both ubiquitous rights, the nature of which is inextricably linked to the person itself and are protected in every Member State without the need for registration.

The main advantage of that approach would be, besides creating a balance between a too restrictive and a too extensive interpretation of Article 5 (3) of the Brussels I Regulation/ Article 7 (2) of the Recast, that the claimant would be able to claim the whole damage at one place and would not be forced to initiate various proceedings in order to receive compensation for the same infringement

which is almost impossible to be quantified.