AG Opinion in Case C-572/14 Austro Mechana on the Scope of Tort in Brussels I

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AG Saugmandsgaard Øe has delivered his opinion in Case C-572/14 *AustroMechana*, raising an interesting question as to the scope of Art. 5(3) Brussels I (= Art. 7(2) Brussels I recast).

The case concerns the so-called 'blank-cassette levy' that sellers of recording equipment have to pay under § 42b(1), (3) of the Austrian Copyright Act (Urheberrechtsgesetz – UrhG). The levy constitutes a compensation for the right to make private copies for personal use provided in § 42 UrhG. It is collected on behalf of the individual copyright holders by a copyright-collecting society called Austro-Mechana. According to the ECJ's decision in Case C-521/11 *Amazon.com*, this system is consistent with the requirements of Art. 5(2) of the Copyright Directive (Directive 2001/29/EC).

Austro-Mechana had seized an Austrian court based on Art. 5(3) Brussels I in order to seek payment of the blank-cassette levy from five subsidiaries of Amazon, established in Luxembourg and Germany, which were selling mobile phones and other recording material in Austria. Austro-Mechana argued that the blank-cassette levy was intended to compensate the harm suffered by the copyright holders by reason of the copies made pursuant to § 42 UrhG and would thus fall within the scope of Art. 5(3). Amazon objected that the levy was payable upon the mere act of selling recording equipment, which in itself was neither unlawful nor harmful; the copyright holders would only suffer harm from the (equally lawful) use of the equipment by

third parties; as a consequence, Art. 5(3) would be inapplicable to the present case. Amazon did not contest, however, that if Art. 5(3) would apply, Austria would be the place of the harmful event.

In his opinion, AG Saugmandsgaard Øe first gives a detailed account of the blank-cassette levy system created under §§ 42, 42b UrhG (paras 28–51). In order to decide whether a claim brought under this system would fall within the scope of Art. 5(3) Brussels I, he then refers to the well-known two-stage test from Case C-189/87 *Kalfelis*, according to which an action falls under Art. 5(3) if it 'seeks to establish the liability of a defendant' and is 'not related to a "contract" within the meaning of Article 5(1)' (para 56). The AG first assesses the second condition and rightly points out that the defendants' obligation to pay compensation under § 42b UrhG was not 'freely entered into' and could thus not be qualified as contractual (paras 58–61).

The difficulty of the present case, however, clearly lies in the first condition established in *Kalfelis*, the role of which has always remained somewhat unclear and subject to debate. While its German translation ('Schadenshaftung') and the ECJ's decision in Case C-261/90 *Reichert (No 2)* seemed to indicate that a claim would only 'seek to establish the defendant's liability' in the sense of Art. 5(3) if its aim was to have the defendant ordered to 'make good the damage he has caused', the court's recent decision in Case C-548/12 *Brogsitter* seems to be understood, by some, as promoting a wider interpretation of Art. 5(3), covering all obligations not falling under Art. 5(1). Yet, AG Saugmandsgaard Øe seems to adhere to the former interpretation when he states that 'a "claim seeking to establish the liability of a defendant" must be based on a harmful event, that is to say, an event attributed to the defendant which is alleged to have caused damage to another party' (para 67).

Surprisingly, though, the AG considers as this harmful event

the fact ‘that Amazon EU and Others failed, as is alleged, deliberately or through negligence, to pay the levy provided for in Article 42b of the UrhG, thus causing damage to Austro-Mechana’ (para 72). Therefore, he concludes, ‘a case of this type is an absolutely quintessential instance of a matter relating to tort or delict’ (para 75).

This understanding of Art. 5(3) seems hardly reconcilable with the commonly accepted interpretation of Art. 5(3) established in Case 21/76 *Bier*, according to which the ‘harmful event’ refers to the (initial) event ‘which may give rise to liability’. Besides, if it were correct, the first condition established in *Kalfelis*, which the AG appears to uphold, would be rendered completely meaningless since every claim potentially falling under Art. 5(3) is ultimately motivated by the defendant’s failure to comply with an alleged obligation.

Instead, the correct question to ask seems to be whether the initial sale of recording material constitutes a ‘harmful event’ in the sense of Art. 5(3). Of course, the ECJ may still hold that it does, promoting a rather broad reading of the notion of ‘tort, delict or quasi-delict’ that also accommodates lawful behavior if it triggers a legal obligation to pay some sort of compensation. But the court may also come to the conclusion that the obligation to pay a ‘blank-cassette levy’ simply does not constitute a ‘matter relating to tort, delict or quasi-delict’, relegating the claimant to proceedings in the defendants’ home jurisdiction(s) pursuant to Art. 2(1) Brussels I (= Art. 4(1) Brussels I recast).