

Kluwer Copyright Blog

Jurisdiction issue over the sale of copyright-infringing CDs: a new referral to the CJEU by the French Court of Cassation

Catherine Jasserand (Institute for Information Law (IViR)) · Friday, May 4th, 2012



On 5 April 2012, the French [Court of Cassation](#) stayed of proceedings in a copyright infringement case opposing a French songwriter to an Austrian CD manufacturer and referred preliminary questions to the CJEU on the interpretation of Article 5 (3) of [Regulation 44/2001](#) (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

At national level, a songwriter and performer discovered that his songs had been reproduced, without his consent, on a CD printed in Austria. The CDs were then offered for sale on different websites by UK companies. In October 2006, the songwriter and performer sued the Austrian manufacturer before the Court of First Instance in Toulouse to obtain damages for copyright infringement. The Court of First Instance found the defendant guilty; whereas in appeal, the higher Court reversed the judgment for lack of jurisdiction of the French Courts. Article 5(3) of Regulation 44/2001 on jurisdiction provides that in matters relating to tort (liability), a person domiciled in one Member State can be sued in another Member State where the harmful event has occurred (or may occur). This article applies in addition to the general rule (Article 2 of Regulation 44/2001), which states that in principle a person is sued in the Courts of the Member State where he is domiciled. The issue at stake lies in the interpretation of the expression “place where the harmful event has occurred”.

According to the plaintiff, who challenged the Court of Appeals’ decision before the Court of Cassation, the place where the harmful event ha(d) occurred should be understood in a copyright infringement context as the place where the infringer is established or as the place where the infringed work is distributed. The plaintiff considered that the Court of Appeals had failed to check whether the infringed works were available on a website accessible from France and whether the products could be sold to French customers.

Following the Court of Cassation’s assessment, the interpretation of the place of the harmful event does not seem to be as easy to determine as what the plaintiff claims. First of all, in the previous cases of the European Court of Justice, the Court interpreted the expression in a context different from copyright infringement. In two defamation cases ([Case Fiona Shevill](#) and [Case eDate Advertising /Martinez](#)), the Court ruled that in addition to the jurisdiction of the Courts where the publisher was established, the Courts of the Member States in which a (print) newspaper article

was distributed were also competent as well as the Courts of the Member State in which the victim had the centre of his interests or the Courts of each Member State in the territory of which the material (online article) had been placed or was accessible. In that latter case, the jurisdiction of the Courts would be limited to the harm caused in that territory. The Court of Cassation also relied on a third case law (*Case l'Oréal SA v. eBay*) in which the European Court of Justice ruled that the accessibility of a website from a specific territory in the context of sale of counterfeited goods on an online marketplace was not sufficient to conclude that the customers in that territory were the targets of the offers for sale.

According to the Court of Cassation, the dispute did not fall under the hypotheses analyzed in the three previous decisions since in the case at stake the alleged harm resulted from the online offer of a physical support illegally reproducing works for which the plaintiff claimed author's rights. In consequence, the Court of Cassation referred two preliminary questions to the CJEU on the interpretation of Article 5(3) of Regulation 44/2001 to be answered in the context of copyright infringement. The questions are reproduced below and freely translated from the original French version of the decision (and somehow simplified). The first question seeks to determine whether in a case of alleged copyright infringement via material put online on an Internet website, Article 5(3) of Regulation 44/2001 should be interpreted as allowing the alleged victim to bring a liability action in the Courts of each Member State in the territory of which the online material is (or was) accessible in order to obtain damages for the harm caused in that territory? Should in addition the material be (or have been) targeted to the public in that territory or should another linking factor be taken into consideration? The second question seeks to determine whether the answer would be the same way, if the alleged copyright infringement would not result from the online placement of an intangible material but from -as this is the case in the current dispute- the online offer of a physical support reproducing the material.

This referral seems to be a good opportunity for the CJEU to provide guidance on jurisdiction rules not only in the context of copyright infringement but more broadly in the context of the Internet, which has dematerialised the frontiers between the Member States.

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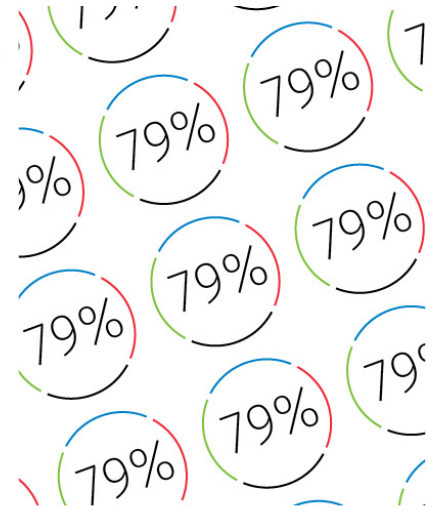
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