Kluwer Copyright Blog

Jurisdiction in EU copyright cases: accessibility of a website is a criterion

Brad Spitz (REALEX) · Monday, December 2nd, 2013

"*For the ECJ, in the meaning of Article 5(3) of the Regulation 44/2001, a harmful event may arise from the possibility of obtaining a reproduction of a work from an internet site accessible within the jurisdiction of the court seised.*"

In its judgement *Pinckney v. KDG Mediatech AG* of 3 October 2013 (case C-170/12), the European Court of Justice answered a request for a preliminary ruling from French Supreme Court, concerning the interpretation of Article 5(3) of the Regulation 44/2001 on jurisdiction and recognition, which provides 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".

The facts of the case are the following: Mr Pinckney, who lives in France, claims to be the author, composer and performer of 12 songs recorded by the group Aubrey Small on a vinyl record. He discovered that those songs had been reproduced without his authorisation on a CD pressed in Austria by Mediatech, and then marketed by UK companies through various internet sites accessible from his residence in France. Mr Pinckney, who had been able to purchase the allegedly infringing records from France, brought an action against Mediatech before a French Court seeking compensation on the grounds of copyright infringement. Mediatech challenged the jurisdiction of the French courts, arguing that the CDs had been pressed in Austria at the request of a UK company which marketed them through an internet site.

The French Supreme Court referred the following questions to the ECJ:

"1. Is Article 5(3) of … [the Regulation] to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed online on a website,

– the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed online

is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State of the court before which the action is brought,

or

– does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?

2. Is the answer to Question 1 the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?"

The ECJ explains that given the specificity of copyright, which is (unlike industrial property) automatically protected (para. 39), and the fact that Article 5(3) lays down, as a sole condition, the existence of a harmful event (para. 41), Article 5(3) "does not require, in particular, that the activity concerned to be 'directed to' the Member State in which the court seised is situated" (para. 42).

For the ECJ, in the present case, the likelihood of a harmful event arises from the possibility of obtaining a reproduction of the work "from an internet site accessible within the jurisdiction of the court seised" (para. 44).

The ECJ therefore ruled that Article 5(3) of the Regulation 44/2001 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 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".

The position of the ECJ as regards copyright therefore differs from the case law it developed in trade mark law (case C-324/09 *L'Oréal and Others*, para. 64, and joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, para. 69), in which it ruled that the localisation of an act of infringement depends on there being evidence that the act discloses an intention to target persons in that territory.

The ECJ therefore allows, in a certain way, 'infringement forum shopping' for copyright cases, since the victims will be able to take action more easily from their country.

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