Kluwer Copyright Blog

CJEU: Mere Accessibility of Websites Enough for Jurisdiction

Martin Husovec (London School of Economics) · Wednesday, February 11th, 2015

Is the mere accessibility of a copyright infringing website sufficient to establish jurisdiction in a Member State? The Court of Justice of the European Union says a resounding "yes" in Pez Hejduk C-441/13.

The decision does not come as a big surprise, given the earlier (in)famous *Pinckney* C-170/12 ruling (reported on this blog here) – the ruling which many were refusing to believe was true. But it is. *Pez Hejduk* clears up any doubts.

Ms Hejduk is an author of photographic works depicting the buildings of the Austrian architect, Georg W. Reinberg. The defendant – EnergieAgentur – used Ms Hejduk's photographs on its ".de" website. Taking the view that her copyright had been infringed, Ms Hejduk brought an action before the Handelsgericht Wien for damages in the sum of EUR 4.050, and for authorisation to publish the judgment at the expense of the defendant. In order to justify the selection of that jurisdiction, Ms Hejduk relied on Article 5(3) of Regulation No 44/2001 (Brussels I.). EnergieAgentur raised an objection that the Handelsgericht Wien lacked international and local jurisdiction, claiming that its website is not directed at Austria and that the mere fact that a website may be accessed from Austria is insufficient to confer jurisdiction on that court.

According to the CJEU case-law, Article 5(3) Brussels I. contains two separate heads of special jurisdiction. First, "the place of the act giving rise to damage", and secondly, "the place where the damage occurred". The former makes it possible to pursue the full damage and other remedies against the defendant. The latter, according to the *Shevill* C-68/93 rule, is limited only to local damage in the forum Member State. The Court uses tort-specific criteria to establish the requisite elements.

For copyright law, the most important development came in *Pinckney*. The CJEU here accepted that a French plaintiff may collect local damages against an Austrian company in France, based on the fact that the infringements of the Austrian company were furthered by a UK website freely accessible in France.

In a set of circumstances where the connection between the Austrian and UK companies was

unclear, the CJEU refused the Advocate General's suggestions and held that accessibility of websites is sufficient to base the jurisdiction under Article 5(3). Such jurisdiction is, however, limited to the local damage. The ruling attracted a considerable amount of criticism in copyright circles. Many, including this author (Husovec, IIC 2014, 370), were of the opinion that the Court must have overlooked the apparent lack of connection between the Austrian company and the UK website, and also that accessibility is not the most sensible criterion (as many academic projects such as CLIP said before).

A few months later, the Advocate General in *Coty Germany* formulated an unusually strong criticism of the *Pinckney* decision. The Court did not respond to it and confirmed the possibility of attribution of effects among several parties. Now the same has been repeated with the second part of *Pinckney* heritage – the accessibility criterion. The Advocate General in *Pez Hejduk* tried to limit undesirable consequences and proposed some alternative ways of resolving what he referred to as "de-localized damage". The CJEU refused to give in.

The Court held that Article 5(3) does not require that the activity concerned be 'directed to' the Member State in which the court seised is situated (§ 32). Therefore, for the purposes of determining the place where the damage occurred with a view to attributing jurisdiction on the basis of Article 5(3) of Regulation No 44/2001, it is irrelevant that the website at issue in the main proceedings is not directed at the Member State in which the court seised is situated (§ 34). It must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility of the website in the Member State of the referring court (§ 35). 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 (§ 36).

The current case-law of the CJEU sends an unambiguous signal: "Luxembourg stands behind what it said in *Pinckne*y". Although the lack of receptiveness of the Court to arguments of the Advocate Generals is lamentable, the current cases and associated opinions of Advocate Generals give us a lot to chew on and test out in practice for the coming years. In particular, it seems that, unlike some people, the CJEU believes that it can easily divide damage caused by on-line copyright infringements into its local parts. Well then, we should encourage the national courts to ask the CJEU about this 'secret recipe' sometime soon.

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