

Court of Justice EU, 5 June 2014, Coty v First Note Perfumes



TRADEMARK LAW – INTERNATIONAL PRIVATE LAW

Community trade mark regulation does not allow jurisdiction to be established to hear an infringement action against the original seller who did not himself act in the Member State where the court seised is situated

- In the light of the foregoing, the answer to Question 1 is that the concept of the ‘Member State in which the act of infringement has been committed’ in Article 93(5) of Regulation No 40/94 must be interpreted as meaning that, in the event of a sale and delivery of a counterfeit product in one Member State, followed by a resale by the purchaser in another Member State, that provision does not allow jurisdiction to be established to hear an infringement action against the original seller who did not himself act in the Member State where the court seised is situated.

JURISDICTION

No jurisdiction on the basis of the place where the event giving rise to the damage resulting from the infringement of that law occurred, for a court in that Member State where the presumed perpetrator who is sued there did not himself act there

- In the light of the above considerations, the answer to Question 2 is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the event of an allegation of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, prohibited by the law against unfair competition of the Member State in which the court seised is situated, that provision does not allow jurisdiction to be established, on the basis of the place where the event giving rise to the damage resulting from the infringement of that law occurred, for a court in that Member State where the presumed perpetrator who is sued there did not himself act there.

CTMR does allow jurisdiction to be established an act which caused or may cause damage within the jurisdiction of that court

- By contrast, in such a case, that provision does allow jurisdiction to be established, on the basis of the place of occurrence of damage, to hear an action for damages based on that national law brought against a person established in another Member State who is alleged to have committed, in that State, an act which caused or may cause damage within the jurisdiction of that court.

Source: curia.europa.eu

Court of Justice EU, 5 June 2014

L. Bay Larsen, K. Lenaerts, M. Safjan, J. Malenovský and A. Prechal

JUDGMENT OF THE COURT (Fourth Chamber)

5 June 2014 (*)

(Judicial cooperation in civil matters – Regulations (EC) No 40/94 and No 44/2001 — Community trade mark — Article 93(5) of Regulation (EC) No 40/94 — International jurisdiction relating to infringement — Determination of the place where the harmful event occurred — Cross-border participation by several persons in a single unlawful act)

In Case C-360/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 28 June 2012, received at the Court on 31 July 2012, in the proceedings

Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH,

v

First Note Perfumes NV,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a judge of the Fourth Chamber, M. Safjan (Rapporteur), J. Malenovský and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2013,

after considering the observations submitted on behalf of:

– Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH, by K. Schmidt-Hern and U. Hildebrandt, Rechtsanwälte,

– First Note Perfumes NV, by M. Dinnes, Rechtsanwalt,

– the German Government, by F. Wannek, J. Kemper and T. Henze, acting as Agents,

– the United Kingdom Government, by A. Robinson, acting as Agent,

– the Swiss Government, by D. Klingele, acting as Agent,

– the European Commission, by F. Bulst and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 93(5) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), and of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The request has been made in proceedings between Coty Germany GmbH ('Coty Germany'), formerly Coty Prestige Lancaster Group GmbH, and First Note Perfumes NV ('First Note') concerning an alleged infringement of a Community trade mark and of the Law against unfair competition (Gesetz gegen den unlauteren Wettbewerb), on account of the sale in Belgium of counterfeit products to a German trader which resold them in Germany.

Legal context

Regulation No 40/94

3 The 15th recital in the preamble to Regulation No 40/94 reads:

'Whereas decisions regarding the validity and infringement of Community trade marks must have effect and cover the entire area of the Community, as this is the only way of preventing inconsistent decisions on the part of the courts and the Office [for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)], and of ensuring that the unitary character of Community trade marks is not undermined; whereas the rules contained in the [Convention of 27 September 1968 on] Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [(OJ 1978 L 304, p. 36, "the Brussels Convention")] will apply to all actions at law relating to Community trade marks, save where this Regulation derogates from those rules.'

4 Article 9 of that regulation, entitled 'Rights conferred by a Community trade mark', provides in paragraphs 1 and 3:

'1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with or similarity to the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is

detrimental to, the distinctive character or the repute of the Community trade mark.

...

3. The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of matters arising after the date of publication of a Community trade mark application, which matters would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. The court seized of the case may not decide upon the merits of the case until the registration has been published.'

5 Article 14(2) of that regulation states:

'This Regulation shall not prevent actions concerning a Community trade mark being brought under the law of Member States relating in particular to civil liability and unfair competition.'

6 Article 90 of that regulation, entitled 'Application of the Convention on Jurisdiction and Enforcement', is worded as follows:

'1. Unless otherwise specified in this Regulation, the [Brussels Convention], as amended by the Conventions on the Accession to that Convention of the States acceding to the European Communities, the whole of which Convention and of which Conventions of Accession are hereinafter referred to as the "Convention on Jurisdiction and Enforcement", shall apply to proceedings relating to Community trade marks and applications for Community trade marks, as well as to proceedings relating to simultaneous and successive actions on the basis of Community trade marks and national trade marks.

2. In the case of proceedings in respect of the actions and claims referred to in Article 92:

(a) Articles 2, 4, 5(1), (3), (4) and (5) and Article 24 of the Convention on Jurisdiction and Enforcement shall not apply;

...

7 Article 91(1) of that regulation states:

'The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance, hereinafter referred to as "Community trade mark courts", which shall perform the functions assigned to them by this Regulation.'

8 In accordance with Article 92 of that regulation, headed 'Jurisdiction over infringement and validity':

'The Community trade mark courts shall have exclusive jurisdiction:

(a) for all infringement actions and — if they are permitted under national law — actions in respect of threatened infringement relating to Community trade marks;

(b) for actions for declaration of non-infringement, if they are permitted under national law;

(c) for all actions brought as a result of acts referred to in Article 9(3), second sentence;

(d) for counterclaims for revocation or for a declaration of invalidity of the Community trade mark pursuant to Article 96.'

9 Article 93 of that regulation, headed ‘International jurisdiction’, provides:

‘1. Subject to the provisions of this Regulation as well as to any provisions of the Convention on Jurisdiction and Enforcement applicable by virtue of Article 90, proceedings in respect of the actions and claims referred to in Article 92 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

3. If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the Member State where [OHIM] has its seat.

...

5. Proceedings in respect of the actions and claims referred to in Article 92, with the exception of actions for a declaration of non-infringement of a Community trade mark, may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened, or in which an act within the meaning of Article 9(3), second sentence, has been committed.’

10 Article 94 of that regulation, entitled ‘Extent of jurisdiction’, provides in paragraph 2:

‘A Community trade mark court whose jurisdiction is based on Article 93(5) shall have jurisdiction only in respect of acts committed or threatened within the territory of the Member State in which that court is situated.’

Regulation No 44/2001

11 According to Recital 2 in the preamble to Regulation No 44/2001, that regulation is intended, in the interests of the sound operation of the internal market, to implement ‘[p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation ...’

12 Recitals 11, 12 and 15 in the preamble to that regulation state:

‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. ...’

13 The rules of jurisdiction are set out in Chapter II of that regulation, in Articles 2 to 31.

14 Chapter II, section 1, entitled ‘General provisions’, includes Article 2(1), which is worded as follows:

‘Subject to the provisions of this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

15 Article 3(1) of that regulation, which belongs to the same section, provides:

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

16 Article 5(3) of that regulation, which is included in section 2 of chapter 2 thereof, entitled ‘Special jurisdiction’, provides:

‘A person domiciled in a Member State may, in another Member State, be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’

17 Article 68(2) of that regulation provides:

‘In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 According to the order for reference, Coty Germany, established in Mainz (Germany), produces and distributes perfumes and cosmetic products. It is the proprietor of rights to the three-dimensional Community trade mark (black/white) No 003788767, representing a bottle, registered with respect to perfumes.

19 Coty Germany markets the ladies’ perfume ‘Davidoff Cool Water Woman’ in a coloured bottle with lettering on it reproducing that Community trade mark.

20 First Note, a company established in Oelegem (Belgium), is a perfume wholesaler. In January 2007, it sold a perfume called ‘Blue Safe for Women’ to Stefan P. Warenhandel (‘Stefan P.’), whose place of business is in Germany. The order for reference states that Stefan P. took delivery of those products at the premises of First Note in Belgium and subsequently resold them in Germany.

21 Coty Germany brought an action against First Note, claiming that the distribution by First Note of that perfume in a bottle similar to that represented in the trade mark referred to above constituted an infringement of a trade mark, unlawful comparative advertising and unfair imitation.

22 That action was dismissed both at first instance and on appeal. It was held on appeal that the German courts

had no international jurisdiction. Coty Germany brought an appeal on a point of law before the Bundesgerichtshof. In support of that appeal, it relied on Community trade mark No 003788767 and the fact that, under the Law against unfair competition, such commercial practices are prohibited and, in the alternative, it relied, in the event that such a cumulative claim was not possible, primarily on the Community trade mark and secondly on the German Law against unfair competition.

23 In those circumstances the Bundesgerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 93(5) of Regulation ... No 40/94 to be interpreted as meaning that an act of infringement is committed in one Member State (Member State A), within the meaning of [that provision], in the case where, as a result of an act in another Member State (Member State B), there is participation in the infringement in the first-named Member State (Member State A)?

2. Is Article 5(3) of Regulation ... No 44/2001 to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) if the tortious act which is the subject of the action or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tortious act (principal act) which took place in the first-named Member State (Member State A)?'

Consideration of the questions referred

Question 1

24 By question 1, the referring court asks, in essence, whether the concept of *'the Member State in which the act of infringement has been committed'* in Article 93(5) of Regulation No 40/94 must be interpreted as meaning that, in the event of a sale and delivery of a counterfeit product in one Member State, followed by a resale by the purchaser in another Member State, the courts of the latter State, in accordance with that provision, have jurisdiction to hear an infringement action against the original seller which did not itself act in the Member State where the court seised is situated.

25 As is apparent from the order for reference, the referring court questions whether the concept of *'Member State in which the act of infringement has been committed'* in Article 93(5) of Regulation No 40/94 must be interpreted in a manner analogous to that of the *'place where the harmful event occurred'* in Article 5(3) of Regulation No 44/2001.

26 In that regard, it should be noted that, notwithstanding the principle that Regulation No 44/2001 applies to court proceedings relating to a Community trade mark, the application of certain provisions of that regulation to proceedings in respect of the actions and claims referred to in Article 92 of Regulation No 40/94 is precluded under Article 90(2) of that regulation.

27 In the light of that exclusion, the jurisdiction of the Community trade mark courts provided for in Article 91(1) of Regulation No 40/94 to decide actions and

claims referred to in Article 92 of that regulation results from rules directly provided for by that regulation, which, as was stated by the Advocate General in point 36 of his Opinion, have the character of *lex specialis* in relation to the rules provided for by Regulation No 44/2001.

28 More specifically, under the combined provisions of Articles 90(2) and 92 of Regulation No 40/94, the application of Article 5(3) of the Brussels Convention, to which Article 5(3) of Regulation No 44/2001 corresponds, to Community trade mark infringement actions is expressly precluded.

29 In that regard, it should be noted that Article 93 of Regulation No 40/94 provides for several grounds of international jurisdiction.

30 In particular, Article 93(5) of Regulation No 40/94 establishes, inter alia, jurisdiction in favour of the courts of the Member State in which the infringement was committed or is threatened.

31 With regard to the interpretation of Article 93(5), in the light of the findings in paragraphs 27 and 28 above, the concept of *'the Member State in which the act of infringement has been committed or threatened'*, referred to in that provision, must be interpreted independently of the concept of *'the place where the harmful event occurred or may occur'* referred to in Article 5(3) of Regulation No 44/2001.

32 Consequently, the duality of linking factors, namely the place of the event giving rise to the damage and that where the damage occurred, accepted by the Court's case-law relating to Article 5(3) of Regulation No 44/2001 (see [Case 21/76 Bier, EU:C:1976:166, paragraph 19](#), and, most recently, Case C-45/13 Kainz, EU:C:2014:7, paragraph 23 and the case-law cited), cannot automatically apply to the interpretation of the concept of *'the Member State in which the act of infringement has been committed or threatened'* in Article 93(5) of Regulation No 40/94.

33 In order to determine whether an independent interpretation of the latter provision nevertheless leads to an acknowledgement of such a duality of linking factors, it is necessary, in accordance with the Court's settled case-law, to take into account not only the wording of that provision, but also its context and purpose.

34 With regard to the wording of Article 93(5) of Regulation No 40/94, the concept of *'the Member State in which the act of infringement has been committed'* implies, as the Advocate General stated in point 31 of his Opinion, that that linking factor relates to active conduct on the part of the person causing that infringement. Therefore, the linking factor provided for by that provision refers to the Member State where the act giving rise to the alleged infringement occurred or may occur, not the Member State where that infringement produces its effects.

35 It should also be noted that the existence of jurisdiction under Article 93(5) based on the place where the alleged infringement produces its effects would conflict with the wording of Article 94(2) of that regulation, which limits the jurisdiction of Community

trade mark courts under Article 93(5) to acts committed or threatened in the Member State where the court seised is situated.

36 Furthermore, as the Advocate General stated in points 28 and 29 of his Opinion, both the origin and the context of Regulation No 40/94 confirm the intention of the EU legislature to derogate from the rule on jurisdiction provided for in Article 5(3) of Regulation No 44/2001 in the light, in particular, of the inability of the rule on jurisdiction to respond to the specific problems relating to the infringement of a Community trade mark.

37 Consequently, jurisdiction under Article 93(5) of Regulation No 40/94 may be established solely in favour of Community trade mark courts in the Member State in which the defendant committed the alleged unlawful act.

38 In the light of the foregoing, the answer to Question 1 is that the concept of the 'Member State in which the act of infringement has been committed' in Article 93(5) of Regulation No 40/94 must be interpreted as meaning that, in the event of a sale and delivery of a counterfeit product in one Member State, followed by a resale by the purchaser in another Member State, that provision does not allow jurisdiction to be established to hear an infringement action against the original seller who did not himself act in the Member State where the court seised is situated.

Question 2

39 By question 2, the referring court asks, in essence, whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the event of an allegation of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, prohibited by the law against unfair competition of the Member State in which the court seised is situated, that provision attributes jurisdiction to hear an action for damages based on that national law against one of the presumed perpetrators who is established in another Member State and is alleged to have committed the infringement in that State.

40 In that regard, it should be noted that Article 14(2) of Regulation No 40/94 provides expressly that actions concerning a Community trade mark may be brought under the law of Member States relating in particular to civil liability and unfair competition.

41 Those actions do not come within the jurisdiction of the Community trade mark courts. The jurisdiction to hear such actions is therefore not governed by Regulation No 40/94. Therefore, the jurisdiction to hear actions based on national law against unfair competition must be determined on the basis of Regulation No 44/2001.

42 Therefore, with regard to a claim based on the infringement of the national Law against unfair competition, Article 5(3) of Regulation No 44/2001 is applicable in order to establish the jurisdiction of the court seised.

43 With regard to the interpretation of Article 5(3) of Regulation No 44/2001, it should be recalled at the outset that the provisions of that regulation must be

interpreted independently, by reference to its scheme and purpose ([Case C-228/11 Melzer EU:C:2013:305, paragraph 22](#) and the case-law cited).

44 It is only by way of derogation from the fundamental principle laid down in Article 2(1) of Regulation No 44/2001, attributing jurisdiction to the courts of the Member States in which the defendant is domiciled, that Section 2 of Chapter II makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation ([Melzer EU:C:2013:305, paragraph 23](#)).

45 In so far as the jurisdiction of the court of the place where the harmful event occurred or may occur constitutes a rule of special jurisdiction, it must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that regulation ([Melzer EU:C:2013:305, paragraph 24](#)).

46 The fact remains that the expression '*place where the harmful event occurred or may occur*' in Article 5(3) of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places ([Melzer EU:C:2013:305, paragraph 25](#)).

47 In that connection, according to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings ([Melzer EU:C:2013:305, paragraph 26](#)).

48 Since the identification of one of the linking factors recognised by the case-law set out in paragraph 46 above enables the court objectively best placed to determine whether the elements establishing the liability of the person sued are present to take jurisdiction, it follows that only the court in the jurisdiction of which the relevant linking factor is situated may validly be seised (see, to that effect, Case C-133/11 Folien Fischer and Fofitec EU:C:2012:664, paragraph 52, and [Melzer EU:C:2013:305, paragraph 28](#)).

49 With regard to the place where the causal event occurred, it is apparent from the order for reference that several perpetrators are presumed to have caused the alleged harmful event and that First Note, which is the single defendant in the main proceedings, acted solely in Belgium and, therefore, outside the jurisdiction of the court before which it was sued.

50 As the Court has already held, in circumstances in which only one among several presumed perpetrators of the alleged harmful act is sued before a court within whose jurisdiction he has not acted, the event giving rise to the damage may not be regarded as taking place within the jurisdiction of that court for the purpose of

Article 5(3) of Regulation No 44/2001 (see [Melzer EU:C:2013:305, paragraph 40](#)).

51 Accordingly, Article 5(3) of that regulation does not allow jurisdiction to be established, on the basis of the place of the event giving rise to the damage, to hear an action for damages based on the law on combating unfair competition of the Member State in which the court seised is situated against one of the presumed perpetrators of that damage who has not acted within the jurisdiction of the court seised (see [Melzer EU:C:2013:305, paragraph 41](#)).

52 However, in contrast to [the Melzer case \(EU:C:2013:305\)](#), in the present case the referring court has not limited its question to the interpretation of Article 5(3) of that regulation for the sole purpose of establishing the jurisdiction of the German courts on the basis of the place of the event giving rise to the alleged damage.

53 Accordingly, it must also be examined whether, in circumstances such as those at issue in the main proceedings, where several supposed perpetrators of the alleged damage have acted in different Member States, Article 5(3) of Regulation No 44/2001 allows jurisdiction to be established, on the basis of the place where the damage occurred, for the courts of a Member State to hear an action for damages based on the law on combating unfair competition of that Member State, in which the court seised is situated, against one of the presumed perpetrators of the damage who did not act within the jurisdiction of the court seised.

54 It is settled case-law that the place where the damage occurred is the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage (see Case C-189/08 *Zuid-Chemie* EU:C:2009:475, paragraph 26).

55 With regard to damage resulting from infringements of an intellectual and commercial property right, the Court has stated that the occurrence of damage in a particular Member State is subject to the protection, in that State, of the right in respect of which infringement is alleged (see [Case C-523/10 Wintersteiger EU:C:2012:220, paragraph 25](#), and [C-170/12 Pinckney, EU:C:2013:635, paragraph 33](#)).

56 That requirement is capable of being applied to cases in which the protection of such a right by means of a national law against unfair competition is at issue.

57 It must therefore be held that, in circumstances such as those of the main proceedings, an action relating to an infringement of that law may be brought before the German courts, to the extent that the act committed in another Member State caused or may cause damage within the jurisdiction of the court seised.

58 In that regard, it is for the court seised to assess, in the light of the evidence at its disposal, the extent to which the sale of the 'Blue Safe for Women' perfume to Stefan P., which occurred in Belgium, was capable of infringing provisions of the German law against unfair competition and, thereby, of causing damage within the jurisdiction of that court.

59 In the light of the above considerations, the answer to Question 2 is that Article 5(3) of Regulation No

44/2001 must be interpreted as meaning that, in the event of an allegation of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, prohibited by the law against unfair competition of the Member State in which the court seised is situated, that provision does not allow jurisdiction to be established, on the basis of the place where the event giving rise to the damage resulting from the infringement of that law occurred, for a court in that Member State where the presumed perpetrator who is sued there did not himself act there. By contrast, in such a case, that provision does allow jurisdiction to be established, on the basis of the place of occurrence of damage, to hear an action for damages based on that national law brought against a person established in another Member State who is alleged to have committed, in that State, an act which caused or may cause damage within the jurisdiction of that court.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. The concept of '*the Member State in which the act of infringement has been committed*' in Article 93(5) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark must be interpreted as meaning that, in the event of a sale and delivery of a counterfeit product in one Member State, followed by a resale by the purchaser in another Member State, that provision does not allow jurisdiction to be established to hear an infringement action against the original seller who did not himself act in the Member State where the court seised is situated.

2. Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of an allegation of unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark, prohibited by the law against unfair competition (*Gesetz gegen den unlauteren Wettbewerb*) of the Member State in which the court seised is situated, that provision does not allow jurisdiction to be established, on the basis of the place where the event giving rise to the damage resulting from the infringement of that law occurred, for a court in that Member State where the presumed perpetrator who is sued there did not himself act there. By contrast, in such a case, that provision does allow jurisdiction to be established, on the basis of the place of occurrence of damage, to hear an action for damages based on that national law brought against a person established in another Member State and who is alleged to have committed, in that State, an act which caused or may cause damage within the jurisdiction of that court.

[Signatures]

* Language of the case: German.

OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 21 November 2013 (1)

Case C-360/12

Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH,

v

First Note Perfumes NV

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(International jurisdiction in civil matters — Regulation (EC) No 40/94 — Article 93(5) — Jurisdiction in matters relating to infringement of a Community trade mark — Regulation (EC) No 44/2001 — Article 5(3) — Special jurisdiction in tort or delict — Act committed by the defendant in another Member State which constitutes assistance in the act of infringement or tortious act committed in the Member State in which the court seised has its seat)

I – Introduction

1. In its request for a preliminary ruling the Bundesgerichtshof (Federal Court of Justice) (Germany) calls upon the Court to rule as to whether the sole fact that purportedly unlawful acts committed by a third party are attributed to a defendant who is said to have participated indirectly in that act in another Member State, as though he had himself acted within the jurisdiction of the court seised, can be taken as the basis for the international jurisdiction of a court of a Member State.

2. This issue is raised, first, from an entirely novel perspective, in connection with the interpretation of the rule of jurisdiction laid down in Article 93(5) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, (2) with regard to the defendant's purported indirect assistance in acts of infringement committed by a third party.

3. Inasmuch as it concerns, secondly, Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (3) this reference for a preliminary ruling follows the general trend of a number of recent cases concerned with whether the tortious acts of a third party might be a valid connecting factor, for the purpose of establishing that the ground of jurisdiction laid down by that provision is present. (4) Analysis of this aspect of the case reveals a disparity between two lines of case-law, one advocating a less broad interpretation of that provision than the other, of which the Court will have to be mindful.

4. Furthermore, the two questions raised by the referring court overlap, since the first seeks, inter alia, to establish the extent to which, provided that an extension of jurisdiction such as that envisaged is allowed under Article 5(3) of the Brussels I Regulation, that interpretation could be transposed onto Article

93(5) of the Community Trade Mark Regulation. The links which may exist between those two regulations will, therefore, also have to be investigated.

5. In specific terms, this reference for a preliminary ruling follows the action brought before a German court by a German company against a Belgian company on the ground that the latter company had participated in an infringement of the Community trade mark from which the former company derives rights and had assisted in acts of unfair competition against it. Against that background, the Court is asked whether the jurisdiction of the German courts can be founded on the fact that the defendant, which acted in Belgium, is purported to have assisted in the execution of the unlawful acts committed in Germany by a German trader which, for its part, was not being sued.

II – The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

6. Coty Germany GmbH (5) ('Coty Germany') produces and distributes perfumes and cosmetic products in Germany. It markets, in particular, a ladies' perfume in a bottle based on a three-dimensional Community trade mark, the rights for which it has held since its registration.

7. First Note Perfumes NV ('First Note Perfumes') operates, in Belgium, as a perfume wholesaler. In January 2007, it sold one of the products from its catalogue to Stefan P. Warenhandel ('Stefan P. '), whose place of business was in Germany. The referring court states that the bottles of women's perfume that had been ordered were delivered in Belgium. Subsequently, in August 2007, according to Coty Germany, Stefan P. resold those products in Germany.

8. Taking the view that the marketing of a perfume in a bottle similar to the Community trade mark from which it derives rights constituted an infringement, unlawful comparative advertising and unfair imitation, Coty Germany brought an action before a German court against First Note Perfumes (6) only, in which it claimed that the defendant be ordered, first, to provide information on its supplier, secondly, to indemnify the applicant for all damage which had arisen or would yet arise from the marketing of that product in Germany, and to reimburse to it the costs borne in the pre-litigation procedure.

9. Since the rejection of those claims at first instance was upheld on appeal, on the ground that the German courts have no international jurisdiction, Coty Germany brought an appeal on a point of law before the Bundesgerichtshof. It relied on infringement of the Community trade mark concerned and the use of practices which constitute unfair competition.

10. Concerning the Community trade mark, the Bundesgerichtshof states that the international jurisdiction of the German courts depends, in accordance with Article 93(5) of the Community Trade Mark Regulation, (7) on whether Coty Germany legitimately asserted that the sole defendant had committed an act of infringement in Germany.

11. First Note Perfumes can have been a participant in such an act in Germany only by virtue of the sale, in Belgium, of the bottles of perfume at issue to Stefan P., which is alleged to have subsequently committed, in Germany, a trade mark infringement for the purposes of Article 9(1)(b) of that regulation. (8) In this regard, Coty Germany maintained that First Note Perfumes had assisted in the purported infringement of its rights in Germany: given that the defendant was not unaware of its German customer's intention to resell in Germany the products it had purchased in Belgium, it had thus assisted in it and, therefore, was also responsible for bringing about the element constituting the infringement.

12. Furthermore, according to Coty Germany's claims alleging infringement of German law on unfair competition, (9) Article 5(3) of the Brussels I Regulation (10) is also capable of establishing the jurisdiction of the German courts with regard to the action brought against First Note Perfumes on the basis of the place where the harmful event occurred. The questions referred by the Bundesgerichtshof with regard to the Community Trade Mark Regulation will, therefore, also arise *mutatis mutandis* in this context.

13. By decision lodged on 31 July 2012, the Bundesgerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 93(5) of [the Community Trade Mark Regulation] to be interpreted as meaning that an act of infringement is committed in one Member State (Member State A), within the meaning of Article 93(5) of [the Community Trade Mark Regulation], in the case where, as a result of an act in another Member State (Member State B), there is participation in the infringement in the first-named Member State (Member State A)?'

2. Is Article 5(3) of [the Brussels I Regulation] to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) if the tortious act which is the subject of the action or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tortious act (principal act) which took place in the first-named Member State (Member State A)?'

14. Written observations were submitted to the Court by Coty Germany, First Note Perfumes, the Swiss and United Kingdom Governments and the European Commission. The parties to the main proceedings, the German Government and the Commission were represented at the hearing, which took place on 19 September 2013.

III – Analysis

A – Preliminary observations

15. At the outset I must point out that, since the facts underlying the main proceedings date from 2007, only those provisions of the Community Trade Mark Regulation and Brussels I Regulation cited in the questions referred for a preliminary ruling are applicable *ratione temporis*, to the exclusion of the equivalent provisions under Regulation (EC) No

207/2009 (11) and Regulation (EU) No 1215/2012 (12) respectively amending the former two regulations. Nevertheless, the provisions relevant in this case were not subject to amendments affecting their wording.

16. I would add that the crux of the two questions referred by the national court lies in the settled case-law of the Court emerging from the Bier judgment, known as 'Mines de Potasse d'Alsace'. (13) It is clear from that case-law that, in respect of jurisdiction in matters relating to tort or delict, the expression '*place where the harmful event occurred*' in Article 5(3) of the Brussels Convention (14) refers both to the place of the causal event giving rise to the damage and to the place where the damage occurred, with the result that the defendant may be sued, at the option of the applicant, in the courts in either of those two places.

17. Although that option is, clearly, also available under Article 5(3) of the Brussels I Regulation which replaced that convention, (15) uncertainty persists, as reflected in the second question, as to whether that option can be extended to include a connecting factor relating to acts committed by a person against whom no action has been brought, more specifically from the perspective of the place where the damage occurred. The first question first of all calls on the Court to rule as to whether that case-law could be implemented in a similar manner in respect of Article 93(5) of the Community Trade Mark Regulation or whether that provision must be interpreted independently and, in any event, whether this could give rise to a ground of jurisdiction for any court seised of an action for infringement in a situation such as that arising in the main proceedings.

B – Interpretation of Article 93(5) of the Community Trade Mark Regulation – Introductory remarks

18. By its first question the referring court asks the Court, in essence, whether Article 93(5) of the Community Trade Mark Regulation must be interpreted as meaning that it allows the courts of the place where the act of infringement of a Community trade mark occurred which is attributed to one of the presumed perpetrators of that infringement, who is not a party to the dispute, to assume jurisdiction over another presumed perpetrator of that infringement who, for his part, has not acted within the jurisdiction of the court seised.

19. In more specific terms, the Bundesgerichtshof is uncertain whether, in this instance, an act of infringement, within the meaning of that article, was committed in Germany in so far as the sale of the bottles of perfume at issue by First Note Perfumes to Stefan P., although taking place in Belgium, contributed to the infringement of Coty Germany's rights over the Community trade mark which was committed by Stefan P. in Germany, with the result that the German courts would have jurisdiction over First Note Perfumes.

20. The referring court and Coty Germany are in favour of an affirmative answer, unlike First Note Perfumes and the Commission. The German Government

maintained that Article 93(5) of the Community Trade Mark Regulation does not provide for any jurisdiction of the courts based on the place where the result of the infringement arises, but that it allows jurisdiction to be conferred where several persons have knowingly participated in a cross-border infringement of a Community trade mark. The Swiss and United Kingdom Governments did not submit observations on this matter.

21. In support of its analysis, the referring court proceeds from the principle that, in order to determine whether a court of a Member State has jurisdiction, identification of the place where the act of infringement has been committed within the meaning of Article 93(5) of the Community Trade Mark Regulation must meet the same criteria as those relied upon to identify the place where the harmful event occurred within the meaning of Article 5(3) of the Brussels I Regulation.

22. However, I take the view, for the reasons set out below, that an analogy of that nature cannot succeed. Therefore, the former provision should, to my mind, be interpreted separately from the latter.

– **Non-applicability of the case-law on the interpretation of Article 5(3) of the Brussels I Regulation**

23. The referring court considers that determining the Member State in which a purported act of infringement has been committed within the meaning of Article 93(5) of the Community Trade Mark Regulation depends both on the place of the event giving rise to the damage (16) and on the place where the damage occurred, (17) in accordance with the line of authority devolving from *Mines de Potasse d'Alsace*. It asserts that this interpretation deriving from an analogy with the accepted alternative for Article 5(3) of the Brussels I Regulation is predominantly upheld in academic writings (18) and is also consistent with the meaning and purpose of those two provisions.

24. Assuming that those two connecting factors are indeed relevant, in the Court's opinion, in terms of applying that article, it would then be necessary to examine whether, in this case, one of those factors could be considered to be established in respect of *First Note Perfumes*, which would presuppose that the acts of infringement committed in Germany by the purported principal perpetrator, *Stefan P.*, could be attributed to the former company in so far as it participated in those acts indirectly. The German courts would as a result have jurisdiction to adjudicate in respect of *First Note Perfumes* even though *Stefan P.* was not being sued.

25. However, in my view, various arguments militate against the possibility of interpreting Article 93(5) of the Community Trade Mark Regulation in the light of the case-law on Article 5(3) of the Brussels I Regulation.

26. First of all, I recall that the Community Trade Mark Regulation expressly addresses the relationship between those two instruments in that Article 90(1) of the regulation, the terms of which are expressed more succinctly in its fifteenth recital, lays down the

principle that the Brussels Convention will apply in the event of actions at law relating to a Community trade mark, which is also true of the Brussels I Regulation. (19)

27. However, there are exceptions to that principle. In particular, Article 90(2)(a) of the Community Trade Mark Regulation precludes the application of Article 5(3) of the Brussels I Regulation to proceedings in respect of the actions and claims referred to in Article 92 of the former regulation, (20) including in particular '*all infringement actions*'. (21) Having regard to that exception, Article 93 of the Community Trade Mark Regulation provides for several grounds of jurisdiction, applying in descending priority, which are specific to the matter covered by that provision and are at times notably different to the grounds provided for in the Brussels I Regulation, (22) in particular in Article 93(5). (23) At this juncture I should point out that the express statement (24) to the effect that Article 5(3) of the Brussels Convention is not to apply to infringement actions, for which Article 93(5) of the Community Trade Mark Regulation is substituted, laying down a specific rule of jurisdiction in the matter, precludes in my view a joint interpretation of those two provisions.

28. Contrary to the viewpoint expressed by the referring court, my view is that the specific nature of the latter provision cannot be denied, especially having regard, secondly, to its origin. Indeed, the drafting history shows that, even before the legislative phase, in the strict sense, was initiated, the process of drawing up the draft regulation on the Community trade mark involved consideration of the rules of jurisdiction contained in the Brussels Convention and the case-law of the Court relating to their interpretation. (25) Within the Commission, the Working Group on the Community Trade Mark pointed out that those rules seemed to be insufficient for resolving the particular problems created where the rights arising from a single Community trade mark are infringed in several Member States. In particular, the working group considered that, in view of the specific nature of the Community trade mark, it was necessary to amend the rule under Article 5(3) of the Brussels Convention. (26) I would add that the content of what constitutes the specific feature of the special ground of jurisdiction laid down in Article 93(5) of the Community Trade Mark Regulation (27) has never been called into question, in spite of the series of amendments applied to the regulation. (28)

29. Thirdly, contextual factors reinforce the argument that the draftsmen for the Community Trade Mark Regulation had the intention of differentiating between that provision and the provision existing in the Brussels Convention. Comparison with instruments adopted in related areas shows that the Community legislature consciously opted to reject the ground of jurisdiction contained in Article 5(3) of the convention, an approach which it chose to adopt in other texts concerning intellectual property (29) but, on the contrary, departed from in Regulation (EC) No 2100/94 on plant variety rights. (30) This contrast cannot be

reduced to a mere clerical error as the referring court appears to be suggesting. In my view, it is all the more telling that the drafting and adoption of the latter instrument are contemporary with the drafting and adoption of the Community Trade Mark Regulation.

30. Fourthly, it is my view that the series of grounds leading the Court to make the distinction between the place of the event giving rise to the damage and the place where the damage occurred which applies with regard to Article 5(3) of the Brussels I Regulation cannot be transposed onto Article 93(5) of the Community Trade Mark Regulation in view of the many disparities which exist in terms of the content of each of those provisions.

31. Thus the place where the act of infringement was committed is a narrower concept than the place where the harmful event occurred. (31) Moreover, the vocabulary used in Article 93(5) seems to point to active conduct, which would be more meaningful if applied to the place of the event giving rise to the damage rather than to the place where the damage occurred, whereas the broad interpretation of Article 5(3) of the Brussels I Regulation appears to have been facilitated by the more neutral terminology used there. (32) Lastly, I would point out that the scope of the jurisdiction conferred by either of those provisions differs in various aspects, (33) which lessens correspondingly the usefulness of any assimilation.

32. It can, in my view, be inferred from the specific features of the wording of Article 93(5), (34) viewed in the context in which this provision was drafted, that it does not create jurisdiction by reason of the place where the damage occurred. Analogous application of the *Mines de Potasse d'Alsace* judgment to that provision must therefore be ruled out.

33. Nevertheless, according to the referring court, Article 93(5) of the Community Trade Mark Regulation, which, in derogation from Article 93(1) to (4), establishes jurisdiction in the place where the act of infringement has been committed, proceeds from the same considerations as those underlying Article 5(3) of the Brussels I Regulation. In this regard, it has recourse to the existence of a particularly close connection between the dispute and the courts of the place where the harmful event occurred, a factor which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

34. In the light of that argument, one final question may remain outstanding, namely whether, although an analogous interpretation is not possible, the guiding principles applying to the interpretation of the Brussels I Regulation should still be applied to the interpretation of Article 93(5) of the Community Trade Mark Regulation, even though that instrument does not refer to them. Those principles include the requirements relating to a close link between the dispute and the court seised, the sound administration of justice and the efficacious conduct of proceedings, but also to the predictability of the rules of jurisdiction and legal certainty.

35. In this regard I would point out that those diverse requirements were primarily derived from principles of interpretation established by the Court in its case-law on the Brussels Convention and subsequently on the Brussels I Regulation, the latter referring to some of them expressly. (35) They are the result of conditions arising implicitly from the provisions assessed by the Court as well as of general and common sense considerations. Those universal principles could therefore be applied in relation to another instrument, on the condition that this is not prohibited by the content or objective of the rule of jurisdiction concerned.

36. I would observe that it cannot be argued that a lack of predictability or legal certainty could be the result of a non-uniform interpretation of the provisions of those two instruments: conflating them would effectively mean denying that the rules of jurisdiction laid down by the Community Trade Mark Regulation constitute, as it were, a *lex specialis* as compared with the rules under the Brussels I Regulation. The choices made by the Community legislature in that other legal context must be respected.

37. Consequently, I propose that the Court should undertake an independent interpretation of Article 93(5) of the Community Trade Mark Regulation while taking account of the requirements mentioned above to the extent that the regulation allows, in order to answer the first question referred.

– **Assessment of possible extension of jurisdiction on the basis of the place where the damage occurred, including damage caused by a third party who is not a defendant in the proceedings**

38. The Court is called upon to give a ruling as to the possibility of conferring jurisdiction by virtue of a connecting factor, whereby under Article 93(5) of the Community Trade Mark Regulation it would be possible to sue a defendant on the sole ground that he had participated indirectly, in one Member State, in a purported act of infringement committed principally, in another Member State, by a third party who is not a defendant in the proceedings brought in the courts of the latter Member State.

39. It is apparent, in my view, from Article 94(2) of the Community Trade Mark Regulation that the rule of jurisdiction laid down in Article 93(5) of that regulation is based on the principle of territoriality, which is defined here in narrow terms. (36) Article 94(2) provides that a court with jurisdiction under Article 93(5) may *'have jurisdiction ... only in respect of acts committed or threatened within the territory of the Member State in which that court is situated'*, whereas the courts whose jurisdiction is based on Article 93(1) to (4) may have jurisdiction also in respect of acts of infringement committed outside the territory of the Member State.

40. Moreover, the drafting history for the Community Trade Mark Regulation suggests that the special ground of jurisdiction deriving from Article 93(5) of the regulation should be interpreted restrictively. That approach is necessary for reasons specific to that

instrument which relate to the difficulty in reconciling the unitary character of the protection granted by the Community trade mark (37) and the risk of infringements in several places within the European Union. (38) First Note Perfumes, the German Government and the Commission focus, and rightly so, on the fact that where a Community trade mark is infringed, each Member State could in practice be considered to be the place where the infringement occurred, since the protected right produces its effects across the entire territory of the European Union.

41. I would add that the legislature had initially contemplated the idea of a unified court (39) and that the ultimate decision to grant the jurisdiction to the national courts appears to be a compromise. This points in favour of an interpretation which limits the fragmentation of the proceedings relating to this uniform intellectual property right. The objective of preventing inconsistent decisions is indeed mentioned expressly in the preamble to the Community Trade Mark Regulation. (40)

42. A further objective of that regulation, which is apparent from the legislative history, (41) is that of avoiding *'forum shopping'*. This also militates against the broad interpretation that it is possible to sue a person suspected of having participated in an act of infringement on the basis of any connecting factor relating to the unlawful activity of another person who, for his part, is not being sued.

43. Lastly, it is necessary to ascertain whether the guiding principles established by the Court when interpreting the Brussels I Regulation (42) would justify a contrary interpretation of Article 93(5) of the Community Trade Mark Regulation. In my view, that should not be the case here in the light of the specific features of that ground of jurisdiction which are described above. It seems to me that, in the specific matter of the protection of the unified intellectual property right in the form of the Community trade mark, the legislature identified priorities relating primarily to the concentration of the proceedings in the courts of one Member State, that is to say, in the Member State where the act of infringement has been committed or threatened.

44. I therefore consider that the answer to the first question referred for a preliminary ruling should be that, for an alleged act of infringement to be regarded as having been committed in a Member State for the purposes of Article 93(5) of the Community Trade Mark Regulation, and thus to make it possible to establish the jurisdiction of the courts of that Member State, it is not sufficient that the defendant participated indirectly, by means of an act taking place in another Member State, in the infringement of the rights relating to the Community trade mark which was committed in the former Member State by a third party who is not a defendant in the proceedings before the courts.

C – Interpretation of Article 5(3) of the Brussels I Regulation

– Introductory remarks

45. The second question relates to whether Article 5(3) of the Brussels I Regulation must be interpreted as meaning that it allows the courts to assume jurisdiction over one of the presumed perpetrators of the alleged damage, even though that defendant has not acted within the jurisdiction of the court seised, where the tortious act of which he is accused was committed in another Member State and consists in participation in a *'principal act'* (43) committed by another presumed perpetrator in the Member State where that court has its seat.

46. In this connection, the referring court, Coty Germany and the German and Swiss Governments have expressed their support for such a ground of jurisdiction based on the connection to the acts of a third party. The United Kingdom Government was more subtle in its approach, proposing that this possibility be subject to detailed requirements, namely that it be allowed only if there is a sufficiently clear and direct link between the alleged unlawful act committed in the Member State where the court seised has its seat and the actions of the defendant in another Member State. However, First Note Perfumes and the Commission expressed their opposition to that option.

– Lessons to be drawn from the case-law

47. At the outset it must be recalled that all the provisions of the Brussels I Regulation must be interpreted independently, by reference to its scheme and purpose. (44)

48. According to recital 11 in the preamble to that regulation, *'[t]he rules of jurisdiction [laid down by that regulation] must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.'*

49. Thus, it is only by way of derogation from the fundamental principle laid down in Article 2(1) of the Brussels I Regulation, attributing general jurisdiction to the courts of the Member State in which the defendant is domiciled, that Section 2 of Chapter II thereof makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation. (45)

50. As regards, in particular, the rule of special jurisdiction laid down in Article 5(3) of that regulation, the Court has already ruled that the rule is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings, (46) in accordance with the guidance given in recital 12 in the preamble to the Brussels I Regulation. Identification of the place of the event giving rise to the damage must enable the court objectively best placed for determining whether the elements establishing the liability of the person sued are present to take jurisdiction. (47)

51. As a rule of special jurisdiction, thus taking the form of a derogation, that provision must be interpreted restrictively and, accordingly, cannot give rise to an interpretation going beyond the cases expressly envisaged, (48) given that the general rule on the jurisdiction of the courts of the defendant's domicile cannot be reversed.

52. Nevertheless, in accordance with the settled case-law arising from the *Mines de Potasse d'Alsace* judgment, the expression 'place where the harmful event occurred or may occur' in Article 5(3) of the Brussels I Regulation is intended to cover both the place where the damage occurred and the place of the event giving rise to it. (49)

53. The Court has already given a negative answer, in part, to the second question referred in this case as regards one of those two connecting factors, that is to say the place of the event giving rise to the damage, in which connection the possibility of establishing jurisdiction based solely on a person's imputation as an accomplice in an act was ruled out. It is evident from *Melzer* that 'Article 5(3) of [the Brussels I Regulation] must be interpreted as meaning that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised'.

54. Admittedly, by its reference to the term 'place where the harmful event occurred', the referring court seems to focus, in its second question, on both the place of the event giving rise to the damage and the place where the damage occurred. In point of fact, the jurisdiction of the German courts might, in view of the facts of the case in the main proceedings, be based on either of those criteria, provided that it is possible to take into account, in connection with *First Note Perfumes*, the acts committed in Germany by Stefan P.

55. However, it should be noted that the referring court was unable to take the findings made in *Melzer* into consideration, since that judgment was given after it submitted its request for a preliminary ruling. Notwithstanding the general wording of the question referred, my observations below will be confined to the ground of jurisdiction relating to the place where the damage occurred, (50) since the other aspect of the matter raised by this case has already been addressed by the Court in the *Melzer* case.

56. The Court has also given a ruling on the connection resulting from the place where the damage occurred, in an even more recent judgment concerning a specific area, namely a tortious act consisting in an infringement of copyrights. According to the judgment in *Pinckney*, 'Article 5(3) of [the Brussels I Regulation] 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 within 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.' It will be necessary to draw conclusions from this judgment too, in so far as that decision may be transposed onto this case.

– **Assessment of possible extension of jurisdiction on the basis of the place where the damage occurred, including damage caused by an independent third party**

57. The second question referred for a preliminary ruling, as reworded in the light of the established case-law set out above, calls upon the Court, in essence, to rule as to whether Article 5(3) of the Brussels I Regulation must be interpreted as meaning that it allows jurisdiction to be established, on the basis of the place where damage occurred, the causal act of which is attributed to one of the presumed perpetrators of the damage, over another presumed perpetrator of that damage who has not himself acted within the jurisdiction of the court seised.

58. It should be pointed out that, having regard to the principle of independent interpretation which must be applied to the provisions of the Brussels I Regulation, a clear distinction must be made between, on the one hand, the conditions for liability in tort which fall within the scope of an assessment of the merits of the case in accordance with the law applying to the dispute and, on the other hand, the spatial connections which are relevant at the stage of determining jurisdiction based on the concepts contained in that regulation. According to the Court's case-law, (51) there is no systematic coherence as between those two groups of legal rules, with the result that, in my view, for a court to be allowed to take jurisdiction pursuant to Article 5(3) of that regulation, in particular by reason of the place where the harmful event occurs, it cannot be sufficient that the applicable law or the *lex fori* allows redress for a certain type of damage or follows specific arrangements, such as attributing to the defendant acts committed by a third party assisted by the defendant, as envisaged by the referring court.

59. If an approach of that kind had to be allowed as regards the concept of the place where the damage occurred for the purposes of Article 5(3) of the Brussels I Regulation, the Court would in that case be confronted with the need to create a quantitative and/or qualitative 'threshold' for imputation above which, in the event that there are several participants in the commission of a tortious act, one of them might or might not be sued in the place where the damage resulting *inter alia* from its action occurred. That specific issue did not arise in the *Melzer* case, since, with regard to the place of the event giving rise to the damage, the act of each of the perpetrators acting in different Member States can be pinned down in spatial terms more easily than the place where the damage occurred. Although the facts of the main proceedings in

the present case enable a clear distinction to be drawn between the principal and the accessory liability, (52) it is necessary not to lose sight of the fact that other sets of circumstances could prove more complex, both quantitatively (53) and qualitatively. (54)

60. On the latter point, I recall that the United Kingdom Government proposes to make acceptance of the envisaged ground of jurisdiction conditional upon a criterion relating to the existence of a *'sufficiently clear and direct link'* between the actions of the defendant in a first Member State and the alleged unlawful act committed by a third party in the Member State where the court seised has its seat, going on to suggest how this approach might be applied specifically in the light of the facts of the main proceedings. (55) However, if the issue were to be assessed from such a perspective, it would first be necessary to define material criteria which could be difficult to pinpoint, (56) with the risk that it might be necessary in each individual case to carry out a lengthy and complex assessment of the facts, not unlike an examination of the merits of the dispute. To my mind, that would be contrary to the objective of the Brussels I Regulation which is to lay down rules of jurisdiction which are both common to all the Member States and foreseeable for the parties to a dispute, (57) recourse to which is thus both certain and rapid.

61. Furthermore, it seems reasonable to me to fear that an interpretation of Article 5(3) of the Brussels I Regulation as broad as the interpretation proposed by Coty Germany might lead to generalisation of the jurisdiction of the forum actoris and thereby encourage forum shopping. As the Court has pointed out, (58) by retaining the general jurisdiction of the courts of the defendant's domicile and clearly excluding the jurisdiction of the courts of the applicant's domicile, the European Union legislature opted for a principle subject to the fewest possible exceptions. Furthermore, a multiplication of courts having jurisdiction heightens the risk of irreconcilable decisions that the Brussels I Regulation specifically sought to avoid, (59) bearing in mind that mutual recognition of decisions is impossible in such circumstances. (60)

62. In the circumstances of this case, I consider there to be no grounds for that derogation, based on the existence of a particularly close connection between the dispute and the courts of the place where the harmful event occurred. If the jurisdiction of the German courts was to be allowed solely on the basis of a connection to the acts committed in Germany by a third party purported to be the perpetrator of the alleged principal act, that would result in inconsistency with those grounds. In specific terms, those courts would find it necessary to assess the liability of a defendant who purportedly assisted in that tortious act by means of acts committed solely in another Member State.

63. There is some risk that such a broad interpretation will foster litigious strategies, with purported victims merely suing the most solvent opposing party before a court in the jurisdiction of which one of the connecting factors relating to the activity of another person who

participated in the event giving rise to the purported damage arises. By that means, an applicant could easily circumvent the arrangement which is specifically established, in Article 6(1) of the Brussels I Regulation, (61) for the purpose of consolidating separate legal proceedings involving a number of defendants and of avoiding irreconcilable decisions in the case. (62) The general risk of such manoeuvres cannot be overlooked, even if, in this instance, it appears that the applicant has not sued the third party purported to be the perpetrator of the principal act for reasons relating to the conclusion of an out-of-court settlement with it. (63)

64. Thus, it seems to me that the place where the damage occurred, caused by the voluntary acts of persons other than the defendant, in a purported chain of causality, should not in itself establish a ground of jurisdiction with regard to that defendant, particularly as the scope of that chain is not clearly defined and could therefore be infinite. In other words, Article 5(3) of the Brussels I Regulation should not, to my mind, allow the person purportedly liable for an alleged tortious act to be sued in a court having its seat in a Member State in which that person is not domiciled on the sole ground that another tortious act allegedly committed by a third party who is not being sued produced its harmful effect in that Member State and the defendant's act facilitated the acts which that third party decided to commit subsequently.

65. This position seems to me to be consistent with the interpretation adopted by the Court in *Melzer*, the terms of which could, in my view, be generalised, with the result that the jurisdiction of the courts over one of the presumed perpetrators of damage who has not committed a tortious act within the jurisdiction of the court seised cannot be extended either to the place where the act occurred which is attributed to another presumed perpetrator who, for his part, has not been sued, or to the place where the damage resulting from that act occurred. I consider that it would be preferable to find that a sufficient causal link must exist with regard to the sole defendant against which proceedings are brought for a court to be able to assume jurisdiction.

66. Notwithstanding those considerations, I cannot omit to note that, unless the view is taken that the position recently adopted by the Court in *Pinckney* (64) is specific to the particular circumstances concerned, (65) the reasoning set out there may lead in the present case to an outcome contrary to that which would seem capable of arising from the *Melzer* judgment.

67. In *Pinckney*, the Court ruled that *'as regards the alleged infringement of a copyright, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the court seised if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and [if] the harmful event alleged may occur within the jurisdiction of the court seised.'* (66)

68. If other types of tortious act were to be extrapolated from this, (67) that approach could, in my view, result in a court having jurisdiction, on the basis of the place

where the damage occurred, where, as in the main proceedings in this case, that damage stems from the fact that the suspect product 'may' be made available to consumers in the Member State where that court has its seat and such an act is penalised in respect of civil liability under the *lex fori*. In the light of the Pinckney judgment, it appears to be irrelevant that the purportedly unlawful act produced effects, within the jurisdiction of the court seised but as a result of the actions of an independent third party who has acted outside the Member State both of the court seised and of the applicant and who has not been sued.

69. Given that the facts underlying this case have similarities with those in the Pinckney case, (68) while the differences between those two cases do not seem to me to be crucial, (69) it is difficult for me to find arguments to justify deviating from the accepted path for the purpose of identifying the place where damage has occurred as defined by Article 5(3) of the Brussels I Regulation.

70. Consequently, I consider that if the Court intended in this instance to follow the broad approach adopted in Pinckney, it should answer the second question referred for a preliminary ruling in the affirmative, in the manner set out below. However, in the interests of completeness, I shall also draft a proposed negative answer in the alternative, should the Court, on the contrary, consider that the position adopted in that judgment was specific to the situation at issue in the case giving rise to it.

IV – Conclusion

71. In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Bundesgerichtshof for a preliminary ruling should be as follows:

(1) Article 93(5) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark must be interpreted as meaning that it does not allow jurisdiction to be established, on the basis of the place of the act of infringement of a Community trade mark which is attributed to one of the presumed perpetrators of that infringement, over another presumed perpetrator of that infringement who has not acted within the jurisdiction of the court seised.

(2) Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it allows jurisdiction to be established, on the basis of the place where the damage occurred, the origin of which is attributed to one of the presumed perpetrators of that damage, over another presumed perpetrator of the damage who has not acted within the jurisdiction of the court seised.

In the alternative:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it does not allow jurisdiction to be established, either on the basis of the place of the act giving rise to the damage which

is attributed to one of the presumed perpetrators of that damage or on the basis of the place where that damage occurred, over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.

1 – Original language: French.

2 – OJ 1994 L 11, p. 1, 'the Community Trade Mark Regulation'.

3 – OJ 2001 L 12, p. 1, 'the Brussels I Regulation'.

4 – See Case C-228/11 Melzer [2013] ECR and Case C-170/12 Pinckney [2013] ECR, and pending Case C-387/12 Hi Hotel HCF.

5 – Formerly Coty Prestige Lancaster Group GmbH.

6 – It is apparent from the documents in the case that Coty Germany claims to have entered into an out-of-court agreement with Stefan P. to dispense with legal proceedings against it on the condition that it cease the alleged practices, on pain of criminal penalties, it being explained that the German court seised had heard Stefan P. as a witness in the proceedings brought against First Note Perfumes.

7 – Article 93 of that regulation comes under the heading 'International jurisdiction'. Article 93(5) provides, *inter alia*, that '[p]roceedings in respect of the actions and claims referred to in Article 92[, which include infringement actions,] may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened'.

8 – That provision defines the parameters of the 'exclusive right' conferred on the proprietor of the trade mark.

9 – Namely, unfair comparative advertising as defined by Paragraph 6(1) and (2), point 6, of the Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), and unfair imitation as defined in Paragraph 4, point 9(a) and (b), of that law.

10 – That provision lays down a rule of special jurisdiction under which 'in matters relating to tort, delict or quasi-delict', '[a] person domiciled in a Member State may, in another Member State, be sued ... in the courts for the place where the harmful event occurred or may occur'.

11 – Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009.

12 – Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). Under Article 81 of the regulation, it is to apply from 10 January 2015, with the exception of Articles 75 and 76 thereof.

13 – Case 21/76 [1976] ECR 1735.

14 – Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the successive conventions on the accession of new Member States to that Convention ('Brussels Convention').

15 – The application of the case-law in *Mines de Potasse d'Alsace* is justified by the equivalence of the

provisions at issue (see, inter alia, Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR, paragraphs 31 and 32).

16 – In German, ‘Handlungsort’, or place of the event giving rise to the damage.

17 – In German, ‘Erfolgort’, or place where the damage occurs.

18 – See, inter alia, the German case-law and academic writings mentioned by Magnus, U., and Mankowski, P., *European Commentaries on Private International Law*, Brussels I Regulation, 2nd edition, Sellier, Munich, 2012, p. 247, note 1380.

19 – In accordance with Article 68(2) of the Brussels I Regulation.

20 – Actions in respect of which the Community trade mark courts have exclusive jurisdiction *ratione materiae* under Article 92 of that regulation.

21 – A certain paradox can be observed in that Article 90 of the Community Trade Mark Regulation establishes recourse in principle to the ‘ordinary’ rules on jurisdiction arising from the Brussels I Regulation before the lengthy list set out in Article 92 precludes the application of the latter instrument to most of the actions that may be brought in practice with regard to Community trade marks (Gastinel, E., *La marque communautaire*, LGDJ, Paris, 1998, p. 203, No 395).

22 – Article 93(1) provides for the jurisdiction in principle of the courts of the Member State in which the defendant is domiciled or has an establishment, as is the case for Article 2 of the Brussels I Regulation. Article 93(2), however, lays down entirely new arrangements as compared with the Brussels I Regulation by providing that the courts of the Member State in which the applicant is domiciled have jurisdiction where the defendant is neither domiciled nor has an establishment in the European Union. Article 93(3) provides for the alternative jurisdiction of the courts of the Member State in which the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) has its seat, in Alicante, Spain. Under Article 93(4) it is possible to derogate from those rules of jurisdiction by way of express or tacit prorogations of jurisdiction, as in the Brussels I Regulation.

23 – The wording of that provision is set out in footnote 7 to this Opinion.

24 — In Article 90(2)(a) of the Community Trade Mark Regulation.

25 – See, in particular, the ‘Memorandum on the creation of an EEC trade mark’ adopted by the Commission on 6 July 1976 (SEC(76)2462, p. 36, paragraphs 155 and 156).

26 – See the Commission working paper of October 1979 entitled ‘The need for a European trade mark system. Competence of the European Community to create one’ (III/D/1294/79-EN).

27 – From the first proposal for a regulation, submitted on 25 November 1980 (COM(80)635 final), the connection to the place where the act of infringement has been committed was accepted, and that connection was subsequently extended to cases where that act has

been threatened. The same applies in respect of the resulting restriction of the scope of the jurisdiction to acts purportedly committed in the Member State whose courts are designated for that purpose.

28 – The successive amendments to that text, which are listed on the OHIM website (<http://oami.europa.eu/ows/rw/pages/CTM/legalReferences/originalRegulations.en.do>), did not affect that provision, apart from its renumbering.

29 – See, for example, Article 82(5) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) which reproduces the ground of jurisdiction set out in Article 93(5) of the Community Trade Mark Regulation.

30 – Article 101(3) of Council Regulation of 27 July 1994 on Community plant variety rights (OJ 1994, L 227, p. 1) provides that ‘[p]roceedings relating to actions in respect of claims for infringement may also be brought in the courts for the place where the harmful event occurred’, as in the case of Article 5(3) of the Brussels Convention.

31 – The Court has emphasised that ‘by its comprehensive form of words, Article 5(3) of the [Brussels] Convention covers a wide diversity of kinds of liability’ (*Mines de Potasse d’Alsace*, paragraph 18).

32 – To this effect, see Tritton, G., *Intellectual Property in Europe*, Sweet & Maxwell, London, 2002, p. 1025, paragraphs 13 to 101.

33 – The scope of the jurisdiction granted under Article 5(3) of the Brussels I Regulation is broader than that granted under Article 93(5) of the Community Trade Mark Regulation, the latter provision restricting jurisdiction to acts occurring within the Member State where the court seised has its seat (see also Article 94(2) of the latter regulation). The former provision provides for special jurisdiction by designating a specific court, whereas the latter provision refers more generally to ‘the courts of the [relevant] Member State’. Furthermore, the former provision does not include jurisdiction in the case of a defendant not domiciled within the European Union, unlike the latter provision.

34 – See, inter alia, Fawcett, J., and Torremans, P., *Intellectual Property and Private International Law*, Clarendon Press, Oxford, 1998, p. 330; Huet, A., ‘La marque communautaire: la compétence des juridictions des États membres pour connaître de sa validité et de sa contrefaçon (Règlement CE No 40/94 du Conseil du 20 décembre 1993)’, *J.D.I.*, 1994, 3, p. 635.

35 – The objectives relating to the ‘predictability’ of the rules of jurisdiction and the need to ‘facilitate the sound administration of justice’, which were not included in the Brussels Convention, are mentioned in recitals 11 and 12 in the preamble to that regulation.

36 – In this regard, Mr Desantes Real notes that Article 93(5) of the regulation affords the greatest respect to the principle of territoriality since the tortious act normally takes place only in one State, and if it has been committed in several States, the proceedings should be divided up between those States (‘La marca comunitaria y el Derecho internacional privado’, *Marca*

y Diseño Comunitarios, Arazandi, Pamplona, 1996, p. 225).

37 – The second recital in the preamble to that regulation states that a Community trade mark is afforded uniform protection and produces its effects throughout the European Union.

38 – To this effect, on page 31 of its working paper on the draft Community Trade Mark Regulation (mentioned in footnote 26 to this Opinion) the Commission stated that ‘[t]he system instituted by the Judgments Convention fails, however, to solve the special problems which arise where one Community trade mark can be infringed in several Member States’ (word emphasised in the text).

39 – See p. 36, paragraph 156, of the memorandum cited in footnote 25 to this Opinion.

40 – According to the fifteenth recital, ‘decisions regarding the ... infringement of Community trade marks must have effect and cover the entire area of the Community, as this is the only way of preventing inconsistent decisions on the part of the courts and the Office and of ensuring that the unitary character of Community trade marks is not undermined’. See also the sixteenth recital.

41 – See p. 76 of the proposal for a regulation cited in footnote 27 to this Opinion.

42 – Mentioned at point 34 of this Opinion.

43 – In line with the classification adopted by the referring court.

44 – See, *inter alia*, Melzer (paragraph 22 and the case-law cited) and Pinckney (paragraph 23).

45 – Melzer (paragraph 23) and Pinckney (paragraph 24).

46 – Melzer (paragraph 26 and the case-law cited) and Pinckney (paragraph 27).

47 – Melzer (paragraph 28 and the case-law cited) and Pinckney (paragraph 28).

48 – Melzer (paragraph 24 and the case-law cited) and Pinckney (paragraph 25).

49 – Melzer (paragraph 25 and the case-law cited) and Pinckney (paragraph 26).

50 – In the Pinckney case, the question was also whether a court could be considered to have jurisdiction on the ground that it is the court for the place where the alleged damage occurred (paragraph 29 of the judgment), but in circumstances unlike those prevailing in the main proceedings, since it concerned copyright infringement occurring through an internet site accessible within the jurisdiction of the court seised, where those copyrights were protected.

51 – Thus, the Court has consistently held that only the courts of the place of the direct damage had jurisdiction, even if redress could be obtained for indirect damage under the *lex fori* or the law applying to the merits of the case. See, with regard to redress for damage suffered indirectly, Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49 and, concerning damage consecutive to initial damage suffered by the victim in another Member State, Case C-364/93 *Marinari* [1995] ECR I-2719, paragraphs 16 to 19.

52 – By referring to it as ‘participation in the ... principal act’, the referring court makes clear that the situation envisaged is that of damage resulting indirectly from acts committed by the defendant but directly from acts committed by the third party which is considered to be the principal perpetrator of those acts.

53 – Accordingly, it ought to be considered whether the Court’s position should be the same in the case of complete joint participation, that is to say where the cause of the event is attributable to the perpetrators on an equal basis, or if two individuals were to participate directly but to differing degrees.

54 – Assuming that Article 5(3) of the Brussels I Regulation makes it possible in some cases to sue in the Member State of the place where the damage occurred any of the persons purported to have participated in the commission of the alleged tortious act, the Court will still have to give a clear definition of the nature of the imputation permitting such jurisdiction by virtue of a connecting factor.

55 – The UK Government states that in view of the facts of the main proceedings, that criterion presupposes that the applicant is able to establish that, when the defendant sold the products to the third party concerned in one Member State, it actually knew or could have reasonably foreseen that the sale would result directly in the alleged unlawful act committed by that third party in another Member State.

56 – Criteria other than the criterion proposed by the United Kingdom Government could be adopted, such as the predictability of the damage and the place where it occurs, or the existence of a deliberate intention on the part of the defendant when he assisted in the commission of the alleged unlawful act.

57 – The objective of legal certainty, including the ability to predict the court having jurisdiction, was taken into consideration in Melzer (paragraph 35) and is highlighted in recital 16 in the preamble to the new version of the Brussels I Regulation following Regulation No 1215/2012.

58 – As regards the Brussels Convention, see *Dumez France and Tracoba* (paragraph 19) and *Marinari* (paragraph 13).

59 – According to recital 15 in the preamble to that regulation, ‘[i]n the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States.’

60 – Article 34(3) of that regulation provides that the irreconcilable nature of a court decision with another is a ground for rejecting its recognition outside the Member State in which that decision was given.

61 – Article 6(1) of the regulation provides that a person may also be sued ‘where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.

62 – Both First Note Perfumes and the Commission point out that the German courts could have easily taken Article 6(1) of the Brussels I Regulation as the basis for their jurisdiction if Stefan P. had been jointly sued.

63 – See Footnote 6 to this Opinion.

64 – See the operative part of that judgment, cited in point 56 of this Opinion.

65 – Paragraph 30 of that judgment states that the Court should ‘set out the circumstances in which, for the requirements of Article 5(3) of the [Brussels I] Regulation, the damage resulting from an alleged copyright infringement occurred or may occur in a Member State other than that in which the defendant reproduced the author’s work onto a material support which is then sold via an internet site which is also accessible within the jurisdiction of the court seised’ (my emphasis).

66 – See paragraph 43 of that judgment, my emphasis.

67 – It being recalled that the place where the damage occurred for the purposes of Article 5(3) of the Brussels I Regulation is, however, liable to vary depending on the nature of the right allegedly infringed (Pinckney, paragraph 32).

68 – At issue is an allegedly unlawful act committed by the defendant in another Member State but the effects of which were produced in the Member State of the court seised as a consequence of independent actions by another person.

69 – In Pinckney, it was noted that the third party had marketed compact discs through an internet site accessible in the Member State of the court seised, but it seems to me that the court would also have had jurisdiction, if not with even more reason, if the sale of those goods had occurred, as in this case, in a shop located in that Member State. In that case, the purported tortious act concerned copyrights, protected by the relevant national legislation, whereas here the claims relate to the Community trade mark, protected throughout the European Union, and to unfair competition, but those distinctions seem irrelevant to me since Article 5(3) of the Brussels I Regulation applies to any type of tortious act.
