

Court of Justice EU, 22 January 2015, Hejduk v EnergieAgentur



PRIVATE INTERNATIONAL LAW - COPYRIGHT LAW

Court of a Member State wherein an allegedly infringing website can be consulted has jurisdiction on the basis of the place where the damage occurred

• 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 infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

Seised court has jurisdiction only in regard of damage caused in own Member State

• That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

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**Court of Justice EU, 22 January 2015**

(L. Bay Larsen, K. Jürimäe, J. Malenovský, M. Safjan (Rapporteur) and A. Prechal)

JUDGMENT OF THE COURT (Fourth Chamber)

22 January 2015 (\*)

(Reference for a preliminary ruling — Regulation (EC) No 44/2001 — Article 5(3) — Special jurisdiction in matters relating to tort, delict or quasi-delict — Copyright — Dematerialised content — Placing online — Determination of the place of the event giving rise to the damage — Criteria)

In Case C-441/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria), made by decision of 3 July 2013, received at the Court on 5 August 2013, in the proceedings

Pez Hejduk

v

EnergieAgentur.NRW GmbH,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– Ms Hejduk, by M. Pilz, Rechtsanwalt,  
– EnergieAgentur.NRW GmbH, by M. Wukoschitz, Rechtsanwalt,  
– the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,  
– the Portuguese Government, by L. Inez Fernandes and E. Pedrosa, acting as Agents,  
– the Swiss Government, by M. Jametti, acting as Agent,  
– the European Commission, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 11 September 2014,  
gives the following

#### Judgment

1 This request for a preliminary ruling concerns the interpretation 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 Ms Hejduk, domiciled in Vienna (Austria), and EnergieAgentur.NRW GmbH ('EnergieAgentur'), which has its seat in Düsseldorf (Germany), concerning an application for a declaration of an infringement of copyright as a result of photographs created by Ms Hejduk being made available on the website of EnergieAgentur without her consent.

#### Legal context

##### Regulation No 44/2001

3 It is apparent from recital 2 in the preamble to Regulation No 44/2001 that the regulation aims, in the interests of the proper functioning of the internal market, to put in place

*'[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 ...'*

4 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. ...*

5 The rules of jurisdiction are set out in Chapter II of that regulation.

6 Article 2(1) of Regulation No 44/2001, which comes under Section 1 of Chapter II, entitled 'General provisions', reads 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.'*

7 Article 3(1) of that regulation, which also features in Section 1 of Chapter II, 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.'*

8 In Section 2, ('Special jurisdiction') of Chapter II of that regulation, Article 5(3) provides the following:

*'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'.*

#### **Directive 2001/29/EC**

9 Article 1(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) provides:

*'This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.'*

#### **The dispute in the main proceedings and the question referred for a preliminary ruling**

10 According to the order for reference, Ms Hejduk is a professional photographer of architecture and is the creator of photographic works depicting the buildings of the Austrian architect, Georg W. Reinberg. As part of a conference organised on 16 September 2004 by EnergieAgentur, Mr Reinberg used Ms Hejduk's photographs in order to illustrate his buildings, which he was authorised to do by Ms Hejduk.

11 Subsequently, EnergieAgentur, without Ms Hejduk's consent and without providing a statement of authorship, made those photographs available on its website for viewing and downloading.

12 Taking the view that her copyright had been infringed by EnergieAgentur, Ms Hejduk brought an action before the Handelsgericht Wien for damages in the sum of EUR 4 050, and for authorisation to publish the judgment at the expense of the defendant.

13 The referring court states that, in order to justify the selection of that jurisdiction, Ms Hejduk relies on Article 5(3) of Regulation No 44/2001. EnergieAgentur raised an objection that the Handelsgericht Wien lacked international and local jurisdiction, claiming that its website is not directed at Austria and that the mere fact

that a website may be accessed from Austria is insufficient to confer jurisdiction on that court.

14 Accordingly, the Handelsgericht Wien decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

*'Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only*

*– in the Member State in which the alleged perpetrator of the infringement is established; and*

*– in the Member State(s) to which the website, according to its content, is directed?'*

#### **Consideration of the question referred for a preliminary ruling**

15 By its question, 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 infringement of rights related to copyright which are guaranteed by the Member State of the court seised, that court has jurisdiction to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction.

16 As a preliminary point, it should be noted, first, that Article 5(3) of Regulation No 44/2001 must be interpreted autonomously and strictly (see to that effect, judgment in Coty Germany, C-360/12, EU:C:2014:1318, paragraphs 43 to 45).

17 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 of that regulation makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation (judgment in Coty Germany, EU:C:2014:1318, paragraph 44).

18 It is clear from the Court's case-law 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 (judgment in Coty Germany, EU:C:2014:1318, paragraph 46).

19 In that connection, according to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of that regulation 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 (judgment in *Coty Germany*, EU:C:2014:1318, paragraph 47).

20 Since identification of one of the linking factors recognised by the case-law referred to in paragraph 18 above thus establishes the jurisdiction of the court objectively best placed to determine whether the elements establishing the liability of the person sued are present, it follows that only the court in whose jurisdiction the relevant linking factor is situated may validly be seised (judgment in *Coty Germany*, EU:C:2014:1318, paragraph 48 and the case-law cited).

21 Secondly, it must be stated that, although in the action in the main proceedings Ms Hejduk alleges an infringement of copyright by the placing of her photographs online on a website without her consent, that allegation, according to the referring court, specifically concerns rights related to copyright.

22 In that regard, it must be observed that, although copyright rights must be automatically protected, in particular in accordance with Directive 2001/29, in all Member States, they are subject to the principle of territoriality. Those rights are thus capable of being infringed in each Member State in accordance with the applicable substantive law (see judgment in [Pinckney, C-170/12, EU:C:2013:635](#), paragraph 39).

23 In the first place, it must be stated that the causal event, defined as the event which gives rise to the alleged damage (see judgment in *Zuid-Chemie*, C-189/08, EU:C:2009:475, paragraph 28), is not relevant for the purpose of attributing jurisdiction to the court before which a case such as that in the main proceedings has been brought.

24 In a situation such as that at issue in the main proceedings, in which the alleged tort consists in the infringement of copyright or rights related to copyright by the placing of certain photographs online on a website without the photographer's consent, the activation of the process for the technical display of the photographs on that website must be regarded as the causal event. The event giving rise to a possible infringement of copyright therefore lies in the actions of the owner of that site (see, by analogy, judgment in [Wintersteiger, C-523/10, EU:C:2012:220](#), paragraphs 34 and 35).

25 In a case such as that in the main proceedings, the acts or omissions liable to constitute such an infringement may be localised only at the place where EnergieAgentur has its seat, since that is where the company took and carried out the decision to place photographs online on a particular website. It is undisputed that that seat is not in the Member State from which the present reference is made.

26 It follows that in circumstances such as those at issue in the main proceedings, the causal event took place at the seat of that company and therefore does not attribute jurisdiction to the court seised.

27 It is therefore necessary to examine, secondly, whether that court may have jurisdiction on the basis of the place where the alleged damage occurred.

28 Thus, the Court must determine the conditions in which, for the purposes of Article 5(3) of Regulation

No 44/2001, the damage arising out of an alleged infringement of copyright occurs or is likely to occur in a Member State other than the one in which the defendant took and carried out the decision to place photographs online on a particular website.

29 In that regard, the Court has stated not only that the place where the alleged damage occurred within the meaning of that provision may vary according to the nature of the right allegedly infringed, but also that the likelihood of damage occurring in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State (see judgment in [Pinckney, EU:C:2013:635](#), paragraphs 32 and 33).

30 With regard to the second aspect, in the case in the main proceedings, Ms Hejduk alleges infringement of her copyright as a result of the placing of her photographs online on the website of EnergieAgentur. It is not disputed, as is clear in particular from paragraph 22 above, that the rights on which she relies are protected in Austria.

31 With regard to the likelihood of the damage occurring in a Member State other than the one where EnergieAgentur has its seat, that company states that its website, on which the photographs at issue were published, operating under a country-specific German top-level domain, that is to say 'de', is not directed at Austria and that consequently the damage did not occur in that Member State.

32 It is clear from the Court's case-law that, unlike Article 15(1)(c) of Regulation No 44/2001, which was interpreted in the judgment in [Pammer and Hotel Alpenhof \(C-585/08 and C-144/09, EU:C:2010:740\)](#), Article 5(3) does not require, in particular, that the activity concerned be 'directed to' the Member State in which the court seised is situated (see judgment in [Pinckney, EU:C:2013:635](#), paragraph 42).

33 Therefore, for the purposes of determining the place where the damage occurred with a view to attributing jurisdiction on the basis of Article 5(3) of Regulation No 44/2001, it is irrelevant that the website at issue in the main proceedings is not directed at the Member State in which the court seised is situated.

34 In circumstances such as those at issue in the main proceedings, it must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, via the website of EnergieAgentur, of the photographs to which the rights relied on by Ms Hejduk pertain.

35 The issue of the extent of the damage alleged by Ms Hejduk is part of the examination of the substance of the claim and is not relevant to the stage in which jurisdiction is verified.

36 However, given that the protection of copyright and rights related to copyright granted by the Member State of the court seised is limited to the territory of that Member State, a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member

State (see, to that effect, judgment in [Pinckney, EU:C:2013:635](#), paragraph 45).

37 The courts of other Member States in principle retain jurisdiction, in the light of Article 5(3) of Regulation No 44/2001 and the principle of territoriality, to rule on the damage to copyright or rights related to copyright caused in their respective Member States, given that they are best placed, first, to ascertain whether those rights guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused (see, to that effect, judgment in [Pinckney EU:C:2013:635](#), paragraph 46).

38 Having regard to all the foregoing considerations, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

#### Costs

39 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:

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 infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

[Signatures]

\* Language of the case: German.

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#### OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN

delivered on 11 September 2014 (1)

Case C-441/13

Pez Hejduk

v

EnergieAgentur.NRW GmbH

(Request for a preliminary ruling from the Handelsgericht Wien (Austria))

*(Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Regulation No 44/2001 — Article 5(3) — Jurisdiction for ‘matters relating to tort, delict or quasi-delict’ — Copyright — Content disseminated over the internet — Criteria for determining the place where the damage occurred — ‘Delocalised’ damage)*

1. In this case, the Handelsgericht Wien asks the Court of Justice about the criterion or criteria for attributing jurisdiction in the event of an infringement of copyright committed over the internet in conditions which do not enable the territory where the damage occurred to be located. Unlike the situation in *Pinckney*, (2) where the Court was faced with a risk of infringement of copyright as a result of the reproduction and distribution of music CDs on the internet, the present case concerns the copyright of a photographer whose works were disseminated on a website without her consent.

2. The online dissemination of photographs protected by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (3) has characteristics which are markedly different from those of the online sale of a product. Therefore, such dissemination can hardly be said to take place in one or more places which are possible to locate territorially. On the contrary, the damage ‘dematerialises’; in other words, it becomes diffuse and is therefore ‘delocalised’, thus making it difficult to locate the place where the damage occurred for the purposes of Article 5(3) of Regulation (EC) No 44/2001. (4)

3. Accordingly, the present case will enable the Court to determine whether, in circumstances like those of the present case, where ‘delocalised’ damage has occurred over the internet and copyright exists, the general criterion previously established in *Pinckney* must be applied or whether, on the other hand, it is necessary to take a different approach.

#### I – Legal framework

4. Recitals 2, 11, 12 and 15 in the preamble to Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters state as follows:

*‘(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions 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 are essential.*

...

*(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 ...'

5. The rules for determining jurisdiction are set out in Chapter II of the regulation, which contains Articles 2 to 31.

6. Article 2(1) of the regulation, which forms part of Chapter II, Section 1, entitled 'General provisions', is worded as follows:

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

7. In the same section of the regulation, Article 3(1) provides as follows:

*'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.'*

8. Article 5 is in Section 2, entitled 'Special jurisdiction', of Chapter II of the regulation. According to Article 5(3):

*'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.'*

## II – The facts

9. Ms Hejduk is a professional photographer specialising in architectural photography, and she is resident in Austria. Throughout her career, Ms Hejduk has created a number of photographic works dedicated to the work of the Austrian architect Georg W. Reinberg.

10. On 16 September 2004, as part of a conference organised by the undertaking EnergieAgentur, established in Germany, Mr Reinberg gave a lecture for the purposes of which he used a number of photographs taken by Ms Hejduk depicting some of his works. According to the case-file, the photographer had given prior consent to the presentation and use of those photographs.

11. EnergieAgentur, proprietor of the website www.energieregion.nrw.de and responsible for the content published on it, disseminated the aforementioned photographs taken by Ms Hejduk on its website. The photographs were accessible to the public and could be downloaded directly from that website, although Ms Hejduk had not given her consent at any time.

12. After she became aware of those facts, Ms Hejduk brought an action against EnergieAgentur before the Handelsgericht Wien, the referring court. The applicant requests that the defendant be ordered to pay EUR 4 050 by way of compensation for the damage suffered since 2004, and to bear the costs of publication of the decision.

13. EnergieAgentur raised a plea of lack of jurisdiction, alleging that the Handelsgericht Wien did not have international jurisdiction. In the defendant's opinion, since its registered office is in Düsseldorf and its website uses the top-level national domain '.de', it is the German courts which have jurisdiction to hear the case.

## III – The reference for a preliminary ruling and the procedure before the Court of Justice

14. In the light of the arguments advanced by the parties in the main proceedings, the Handelsgericht Wien decided to refer to the Court for a preliminary ruling a question which is worded as follows:

*'Is 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 to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only:*

- *in the Member State in which the alleged perpetrator of the infringement is established; and*
- *in the Member State(s) to which the website, according to its content, is directed?'*

15. Written observations were lodged by the parties in the main proceedings, by the governments of the Czech Republic, the Portuguese Republic and the Swiss Confederation, and by the Commission.

## IV – Arguments of the parties

16. Ms Hejduk contends that the case-law laid down in Pinckney must be supplemented since, in her view, that case did not deal with a situation like the present one. In Ms Hejduk's opinion, in a situation where damage committed on the internet is 'delocalised', the ground of jurisdiction laid down in Article 5(3) must allow the victim to sue, in respect of all the damage sustained, in the courts for the place where he or she is domiciled. Ms Hejduk maintains this position in accordance with the case-law of the Court in eDate Advertising and Others. (5)

17. EnergieAgentur cites Pinckney and submits that the approach taken in that judgment is applicable to the present case. The copyright at issue is delimited territorially and, therefore, is subject to the limits laid down in Pinckney, pursuant to which an action may be brought in the defendant's State of domicile or in the State in which the event giving rise to the damage occurred, but only in respect of the damage sustained in that State.

18. The Czech Republic and the Swiss Confederation invite the Court to extend the solution applied in *eDate Advertising and Others* to a situation such as that in the present case, in the interests of the sound administration of justice and predictability in the application of the rules on international jurisdiction. In their opinion, it is possible to dispose of this case by introducing the criterion of the victim's centre of interests, a place where the applicant could sue in respect of all the damage suffered.

19. The Portuguese Republic puts forward a different view but also acknowledges that the present case is not identical to *Pinckney*. In the opinion of the Portuguese Republic, the difficulty raised by the dissemination of photographs on the internet will lead the Court to establish a linking factor based on the accessibility of the photographs. However, the limited reliability of that factor leads the Portuguese Republic, in a situation such as that in the present case, to circumscribe the jurisdiction laid down in Article 5(3) exclusively to the courts for the place where the event giving rise to the damage occurred.

20. For its part, the Commission considers that *Pinckney* is applicable to the present case, but, nevertheless, it submits that the application of that judgment to the case before the Court raises practical difficulties. In the Commission's opinion, the solution in *Pinckney* would enable Ms. Hejduk to sue in the Austrian courts but only in respect of the damage sustained on Austrian territory. According to the Commission, where damage has been sustained as a result of the dissemination of photographs on the internet, that limitation may ultimately be ineffective, as neither Ms. Hejduk nor the Austrian court with jurisdiction will have at their disposal adequate means to circumscribe the latter's jurisdiction strictly to the damage perpetrated in Austria. In those circumstances, the Commission alludes to the possibility of limiting the special jurisdiction provided for in Article 5(3) of Regulation No 44/2001 solely to the courts for the place where the event giving rise to the damage occurred.

#### **V – Analysis**

21. As I have stated, the present case raises a rather complex interpretative difficulty. The Court has had occasion to address the problems raised by the internet in relation to the application of the rules of private international law but never in a case like the one before the Court. To summarise briefly, in this case it will be necessary to choose which of the many remedies made available by case-law is best adapted to diffuse infringements of copyright committed over the internet.

22. Although the referring court refers only to the possibility of using two linking factors (the defendant's domicile and the State to which the website's content is directed), the parties and the participating States have suggested other possible linking factors which could be applied to the present case and which I shall now go on to examine.

#### **A – The centre-of-interests criterion**

23. The Czech Republic and the Swiss Confederation have argued that it is possible to apply to the present case the case-law laid down in *eDate Advertising and Others*. However, for the reasons I shall now explain, I do not believe that this view can be accepted.

24. In *eDate Advertising and Others*, the Court provided a solution for the problems resulting from the infringement of personality rights by means of the internet. As we know, the earlier case-law had addressed the issue at a time before the emergence of the internet, in particular in *Shevill and Others*. (6) That judgment held that, under Article 5(3) of the then Brussels Convention, a victim could bring an action in the State of the place where the event giving rise to the damage occurred (the place where the publisher responsible for the defamatory information was established) and in the State where the damage occurred, a criterion which depended on the territorial distribution of the medium on which the defamatory information was contained. (7) In the latter case, the court concerned will have jurisdiction to rule only on the specific damage which occurred on its territory, a matter which is determined by reference to the level of distribution and sales of the medium in that State. (8)

25. In *eDate Advertising and Others*, the Court had to deal with a situation similar to that which arose in *Shevill and Others*, but in the case of an online communication medium. In those circumstances, as in the present case, the damage was 'delocalised' as the medium was accessible in any Member State, making the practical application of any method of measuring the territorial impact of the harmful information difficult or even impossible. That led the Court to create an additional criterion based on the victim's centre of interests, the place where the latter could bring an action and, more importantly, claim for all of the damage suffered. (9)

26. It is important to point out that the judgment in *eDate Advertising and Others* referred solely to cases of infringement of personality rights. That is because otherwise the aim of Article 5(3) of Regulation No 44/2001 might be subverted. On the one hand, the criterion of the victim's centre of interests attaches importance to the accessibility of the medium, a factor which the Court has rejected or limited on many occasions, and also in different contexts from that of Article 5(3) of Regulation No 44/2001. (10) The fact that the medium is accessible in the place where the victim's centre of interests is situated triggers the right to sue in that State and, moreover, to do so in respect of all of the damage suffered, which makes it possible to alter considerably the balance sought by the jurisdiction laid down in Article 5(3). On the other hand, account must also be taken of the proximity between the centre of interests and the forum actoris, since, in the vast majority of cases, although not always, (11) the centre of interests will be situated in the place where the victim, and claimant in the dispute, is domiciled.

27. It is precisely because of the risks entailed by the criterion of the victim's centre of interests that I believe that this criterion should not be extrapolated to

copyright, including in the case of ‘delocalised’ damage perpetrated by means of the internet. The Court rejected that option in relation to intellectual property rights in Wintersteiger (12) and also when dealing with the case of ‘localisable’ damage perpetrated on copyright. (13) I believe that this should also be the solution in a situation such as that in the present case, where it is alleged that ‘delocalised’ damage has been perpetrated on copyright.

#### **B – The focalisation criterion**

28. Both the referring court and Ms. Hejduk consider that the fact that, in their view, the photographs concerned were directed to Austria means that the Austrian courts have jurisdiction. I do not believe that this approach can succeed either.

29. The possibility of declaring that jurisdiction rests with the court of the State on which the harmful activity is focused has been considered by a number of national courts and the legal literature. (14) As we know, this is also the criterion used by Regulation No 44/2001 in the case of the special jurisdiction for consumers provided for in Article 15(1)(c). (15) Advocate General Jääskinen put forward strong arguments in support of its proposed application in Pinckney, (16) and the Court of Justice, while rejecting the criterion in that case, has applied it in other contexts which were different from but related to that of the present case in L’Oreal and Others, (17)Donner (18) and Football Dataco and Others. (19)

30. However, the Court rejected the focalisation criterion in Pinckney, and it did so expressly by declaring that, *‘unlike Article 15(1)(c) of ... Regulation [No 44/2001] ..., Article 5(3) thereof does not require, in particular, that the activity concerned be “directed to” the Member State in which the court seised is situated’*. (20)

31. Admittedly, that paragraph of the Pinckney judgment is open to some interpretation, (21) but it seems to me that it clearly follows from the wording that it was the Court’s intention to exclude the focalisation criterion from the interpretation of Article 5(3) of Regulation No 44/2001. The focalisation criterion has been used in jurisdictions where an economic activity exists which is preceded by a clear intention to offer for sale goods and services in the Member State to which the activity is directed. Accordingly, I believe that Pinckney rules out in principle the possibility of extending the focalisation criterion to cases of non-contractual damages based on infringements of intellectual property rights.

32. It still needs to be established whether the focalisation criterion should be applied in the case of an act of public communication, giving rise to ‘delocalised’ damage, which is clearly and indisputably directed to another Member State. However, I do not believe that that is the situation with which we are now dealing, as, according to the case-file, at no time did the defendant in the main proceedings direct the allegedly harmful activity to other Member States. Therefore, I do not consider it to be necessary to take a view on that scenario.

#### **C – The territoriality criterion and the judgment in Pinckney**

33. Having rejected the centre-of-interests and focalisation criteria, we come to the solution reached in Pinckney, the application of which to the present case is advocated by the Portuguese Republic and the Commission, although with different emphases.

34. In Pinckney, the Court was required to rule on the interpretation of Article 5(3) of Regulation No 44/2001 in an action for damages brought by the author of a musical work which was reproduced on CD and subsequently distributed by means of the internet without his consent.

35. The difficulty which arose in Pinckney was that of extrapolating the eDate Advertising and Others and Wintersteiger case-law to the field of copyright. As I have already stated, eDate Advertising and Others dealt with the issue of determination of the place where the damage is sustained in the case of an infringement of personality rights on the internet, while Wintersteiger was concerned with the infringement of intellectual property rights, specifically a trade mark. The Court opted for different solutions in each case. While, in the case of personality rights, the Court chose to maintain the so-called ‘mosaic rule’, with the exception of the place where the victim’s centre of interests is located (where the victim may claim in respect of the whole of the damage suffered), in Wintersteiger, in the case of infringement of intellectual property rights, the Court decided to apply a strict principle of territoriality and to limit the place where the damage is sustained to the State or States where the right is protected (in other words, where the right is registered).

36. Like intellectual property rights, copyright is subject to the principle of territoriality. However, copyright has two features which made it difficult to categorise for the purposes of disposing of the case in Pinckney: it is not necessary to register copyright in order to enjoy protection, while at the same time copyright is protected in all the Member States as a result of Directive 2001/29. (22) Accordingly, copyright shares features with the rights which gave rise, respectively, to eDate Advertising and Others and Wintersteiger, since copyright may be infringed in all the Member States (like personality rights) but copyright protection is effected by means of State-sized ‘territorial segments’ in the same way as intellectual property rights. Copyright in the European Union may be said to form a bundle of rights which are territorially delimited by each State but the sum of which encompasses the whole territory of the European Union.

37. In Pinckney, the Court decided that copyright was territorial in nature; in other words, it opted for an approach similar to that developed in Wintersteiger. At paragraph 39 of the judgment, the Court observed that ‘copyright, like the rights attaching to a national trade mark, is subject to the principle of territoriality’. Next, the Court pointed out that Directive 2001/29 harmonised copyright, which means that copyright ‘may be infringed in each [Member State] in

accordance with the applicable substantive law'. On the basis of that premiss, the Court held that, for the purposes of Article 5(3) of Regulation No 44/2001, in a situation like the one in question, the place where the damage was sustained is the place where the copyright relied on by the claimant is protected and where the alleged damage may occur. The courts of the State concerned will have jurisdiction to deal only with the damage caused in the territory of that State. (23)

38. In short, the Pinckney case-law is characterised by three features which lead to the identification of jurisdiction in the case of a cross-border infringement of copyright: substantive protection, factual protection and protection which is limited territorially. For the purposes of a ruling on whether damage has been suffered as a result of an infringement of copyright, jurisdiction will rest solely with the court on whose territory the copyright is protected, where there exists a factual risk of an infringement occurring, and only in respect of damage suffered in that State.

39. The application to the present case of the case-law cited is not without difficulty. Although Ms. Hejduk's copyright is protected in Austria and the unauthorised reproduction and distribution of her photographs on the internet may be accessed in Austria, it is difficult, or perhaps impossible, to determine the damage suffered in that State alone. Unlike what happened in Pinckney, where the infringement of copyright was committed by the reproduction of CDs and their subsequent sale on the internet in any Member State, the present case is concerned with damage the occurrence of which is difficult to establish, as the mere accessibility of a photograph on the internet does not offer any indication as to the location of the damage. The damage which occurred in Pinckney was the result of a financially remunerated service (the manufacture of CDs and their subsequent sale on the online market), whereas in the present case there is no remunerated service but rather an act of public communication on the part of an undertaking.

40. Therefore, the application of a solution such as that in Pinckney to a case like the present one would lead, as the Commission has pointed out, either to the applicant being denied the right to bring an action in Austria, in view of the absence or low visibility of an infringement of her copyright in Austria, or to the applicant being awarded compensation in respect of all the damage suffered, in view of the fact that it is impossible to segment the infringement territorially, a solution which, in short, would be contrary to the case-law in Pinckney.

#### **D – The criterion applicable to the present case**

41. I believe that the automatic application of Pinckney to a case in which the damage is 'delocalised' may prove to be impracticable. The solution reached by the Court in that judgment applies to cases in which the risk of infringement, or the actual infringement, of copyright clearly occurs in a territorial area, even though the medium used is the internet. However, when the damage is 'delocalised' as a result of the type of work and the medium used to communicate it, I

believe, as the Portuguese Republic and the Commission have argued, that it is not possible to apply the criterion of the place where the damage occurred, laid down in Article 5(3) of Regulation No 44/2001. In such a case, that provision establishes only the jurisdiction of the courts for the place where the event giving rise to the damage occurred.

42. That solution appears to me to be the most consistent with the objectives pursued by Regulation No 44/2001, the most important of which is the sound administration of justice. (24) A criterion which requires an applicant to restrict the scope of his application in accordance with territorial criteria that are difficult, not to say impossible, to determine is not a criterion which is consistent with the spirit of Regulation No 44/2001. As the Commission has observed, an applicant in a case like the present one will not be able to produce verifiable material which precisely delimits only the damage sustained in the Member State where proceedings have been brought. That factor would lead the court of that State to order compensation which is lower than the damage actually sustained, or which is higher, thereby exceeding the scope of the territorial criterion which the Court of Justice has imposed in such cases. The Commission rightly contends that the application of the Pinckney case-law to the present case entails a serious risk that the competent court will exceed the limits of its jurisdiction.

43. Moreover, in my view, the application of the Pinckney case-law to the present case would contribute to the creation of legal uncertainty for both parties to the proceedings. The claimant would not have any certainty concerning the outcome of proceedings in which the criteria for delimiting the scope of the jurisdiction of the court hearing the case cannot be verified. The defendant would be in an equally critical situation, at risk of being sued more than once in several Member States where 'delocalised' damage has occurred or of being sued in a single Member State but without any certainty about the scope of the jurisdiction of each court. I believe that that outcome is incompatible with the general objectives of Regulation No 44/2001, but also with the more specific objectives of the special jurisdiction laid down in Article 5(3).

44. As Regulation No 44/2001 and the case-law of the Court state, the purpose of Article 5(3) is to provide for jurisdiction close to the relevant facts of the dispute. (25) That proximity affords the court greater safeguards when it deals with the claims advanced by the applicant and the arguments in defence put forward by the defendant. However, that proximity is lost when, owing to the 'delocalised' nature of the damage, the facts do not permit the damage to be established in accordance with conventional means of proof. Moreover, they would allow that only in respect of a fraction of the damage suffered, thereby depriving the court of an overall view of the damage, which could impede the global assessment of the context of the case of which that court is seized. The benefit afforded by the proximity of the court to the facts of the case thus

disappears, and with it the usefulness of Article 5(3) of Regulation No 44/2001.

45. In such circumstances, in cases where ‘delocalised’ damage occurs on the internet and infringes copyright, I believe that the best option is to exclude the possibility of suing in the courts of the State where the damage occurred and to limit jurisdiction, at least that which is based on Article 5(3) of the regulation, to that of the courts of the State where the event giving rise to the damage occurred. Furthermore, that option in no way excludes the jurisdiction provided for in Article 2 of the regulation, pursuant to which an action may also be brought in the courts of the Member State where the defendant is domiciled. Although in the majority of cases both criteria will lead to the same court (as occurs in the present case), that will not always be so.

46. It is clear that in a case of public communication in which the harmful activity originates in one Member State and is clearly and indisputably directed to one or more other Member States, the possibility of qualifying or supplementing the conclusion I have just outlined is open to discussion. (26) However, as I explained at point 32 of this Opinion, that is not the scenario referred to the Court by the Handelsgericht Wien in these preliminary-ruling proceedings, as it is clear that at no time did the defendant choose to direct the communication at the origin of the dispute to Austria. I therefore do not consider it necessary to express a view on the linking factor in a case where the activity is directed to one or more other Member States.

47. Accordingly, I propose that, in circumstances such as those in the present case, where the applicant has suffered ‘delocalised’ damage by means of the internet, which infringes her copyright, the Court should rule that, in accordance with Article 5(3) of Regulation No 44/2001, jurisdiction rests with the courts for the place where the event giving rise to the damage occurred.

#### VI – Conclusion

48. Accordingly, I propose that the Court answer the question referred for a preliminary ruling by the Handelsgericht Wien as follows:

*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 a dispute relating to infringement on the internet of rights related to copyright, as a result of which ‘delocalised’ damage occurs the territorial location of which cannot be determined in accordance with reliable evidentiary criteria, jurisdiction rests with the courts for the place where the event giving rise to the damage occurred.*

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1 – Original language: Spanish.

2 – C-170/12, EU:C:2013:635.

3 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

4 – 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).

5 – C-509/09 and C-161/10, EU:C:2011:685.

6 – Judgment in *Shevill and Others*, C-68/93, EU:C:1995:61.

7 – Judgment in *Shevill and Others*, EU:C:1995:61, paragraphs 30 to 33.

8 – Judgment in *Shevill and Others*, EU:C:1995:61, paragraphs 30 and 31.

9 – Judgment in *eDate Advertising and Others*, EU:C:2011:685, paragraph 48.

10 – The Court expressly rejected it in, inter alia, *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, EU:C:2010:740, paragraphs 69 to 75, and, as regards Article 5(3), significantly limited it, as in *eDate Advertising and Others*, EU:C:2011:685, paragraph 51.

11 – That was so in one of the cases in *eDate Advertising and Others* (EU:C:2011:685), since the claimant’s domicile was in the United States but his centre of interests was situated in France.

12 – C-523/10, EU:C:2012:220.

13 – Judgment in *Pinckney*, EU:C:2013:635.

14 – See, for example, the case of the French Cour de cassation (Com. 13 July 2010, No 06-20-230), and the opinion of authors such as Treppoz, E., ‘Croniques. Droit européen de la propriété intellectuelle’, *Revue Trimestrielle de Droit Européen*, 4 2013.

15 – See judgment in *Pammer and Hotel Alpenhof*, EU:C:2010:740.

16 – See, in particular, points 61 to 65 of the Opinion of Advocate General Jääskinen in *Pinckney*, EU:C:2013:400.

17 – C-324/09, EU:C:2011:474, paragraph 65.

18 – C-5/11, EU:C:2012:370, paragraph 27.

19 – C-173/11, EU:C:2012:642, paragraph 39.

20 – Judgment in *Pinckney*, EU:C:2013:635, paragraph 42.

21 – See De Miguel Asensio, P., ‘Tribunales competentes en materia de infracciones de derechos patrimoniales de autor cometidas a través de Internet’, *La Ley — Unión Europea*, 11 2014, point 5.

22 – In that connection, see the Opinion of Advocate General Jääskinen in *Pinckney*, EU:C:2013:400, points 44 to 50.

23 – Judgment in *Pinckney*, EU:C:2013:635, paragraph 43. Reiterating the same case-law, see judgments in *Hi Hotel*, C-387/12, EU:C:2014:215, paragraph 39, and *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 55.

24 – See recital 12 in the preamble to Regulation No 44/2001 and, inter alia, judgment in *Wintersteiger*, EU:C:2012:220, paragraphs 27 and 31.

25 – See recital 12 in the preamble to Regulation No 44/2001.

26 – In the same way as it could be asked whether the *Pinckney* case-law is applicable to the cross-border infringement of an author’s moral rights. In that connection, see Kur, A., ‘The CLIP Principles and Commentary’, *Conflict of Laws in Intellectual Property*, Oxford, OUP, 2013, point 2:203.C10.