

Client Alert

7 May 2015

Copyright: Europe Explores Its Boundaries

EU Expands Principle of Pan-European Jurisdiction over Copyright to Online Materials

By Alistair Maughan and Laura Steen

One focus of the European Union's Digital Agenda is to break down barriers to cross-border exploitation of intellectual property rights. Consistent with this goal, the European Court of Justice (ECJ) has recently dismantled one such barrier to harmonisation by ruling that a copyright owner has the right to bring infringement proceedings in any EU country in which allegedly infringing material is made available or accessible online. The decision is welcome news for content owners, although there remain national limitations on the damage that can be recovered.

The case, *Pez Hejduk v EnergieAgentur.NRW GmbH*, arose as a result of the posting of allegedly infringing photos on a ".de" website by a German company. The Austrian photographer who owned the copyright to the photographs complained and brought a legal action in the Austrian courts. One element of EnergieAgentur's defence was that the claim should have been brought in the German courts where it was domiciled and where any alleged infringement occurred.

The ECJ held that the Austrian courts did have jurisdiction to hear the case based on the fact that EnergieAgentur's website was accessible in Austria, and it didn't matter that the website was not specifically directed at Austria. The Court did, however, add that the Austrian court would only be able to award a remedy based on damage caused within that EU Member State.

BACKGROUND

Under the EU's so-called Brussels Regulation (Reg. 44/2001), a person is entitled to be sued in the Member State of their domicile, regardless of nationality. However, Article 5(3) of that Regulation allows a person to bring a legal action in relation to a tort in other Member States in some circumstances, including in the courts of a Member State where any harmful events occurred. As a result, a person may sue in either the Member State where (1) the damage occurred or (2) the event that led to the damage occurred.

In a prior ruling (*Peter Pinckney v KDG Mediatech AG* (Case C-170/12)), the ECJ also ruled that the activity which leads to the damage need not be "directed at" the Member State where the court hearing the case is located.

FACTS

Pez Hejduk is a photographer who had taken photographs of buildings designed by an Austrian architect, Georg W. Reinberg. EnergieAgentur organised a conference in September 2004, at which Mr. Reinberg used Ms. Hejduk's photographs (with her permission) to illustrate his buildings and designs. Subsequently, EnergieAgentur, without Ms. Hejduk's consent, made those photos available to view and download on its website.

Client Alert

Ms. Hejduk brought a legal action in the *Handelsgericht Wien* (the Commercial Court of Vienna) arguing that EnergieAgentur had infringed her copyright. In response, EnergieAgentur argued, firstly, that any alleged copyright infringement was committed by a German company on its “.de” German website, and so the *Handelsgericht Wien* lacked international and local jurisdiction; and, secondly, that the mere fact that the website could be accessed from Austria was insufficient to establish the jurisdiction of the *Handelsgericht Wien*.

The *Handelsgericht Wien* ordered a stay of proceedings and referred the question of jurisdiction over the alleged online copyright infringement to the ECJ for a preliminary ruling. Essentially, the question for the ECJ was whether Article 5(3) of the Brussels Regulation afforded the Austrian court jurisdiction over the claim with respect to the alleged copyright infringement committed by a German company on its “.de” website.

JUDGMENT

The ECJ ruled that, under Article 5(3), the mere accessibility of a website within a jurisdiction can be sufficient cause for that Member State court to be a suitable forum to hear the case. There are two grounds upon which jurisdiction may apply: (1) the location of the event giving rise to the damage, and (2) the location where the damage occurred. The ECJ noted that the case law in the area clearly points to the fact that Article 5(3) is intended to allow claims to be brought both in the place where the damage occurred and in the place of the event giving rise to the damage; and, therefore, a defendant may be sued, at the claimant’s option, in the courts of either place.

Where did the event giving rise to the damage occur?

In this case, the event giving rise to the damage was the placing of the photographs on the website; and that event consisted of the decision to place the photographs on the EnergieAgentur website and the implementation of that decision. In relation to this element of the potential claim, the facts supported EnergieAgentur. In ruling that Austria was not the appropriate country with respect to the event giving rise to the infringement, the ECJ reasoned that the action was approved by the owner of the website and, because EnergieAgentur is a German company based in Germany, the appropriate jurisdiction for a claim founded on this basis would be Germany.

Where did the damage occur?

The ECJ first noted that Ms. Hejduk’s copyright right was a protected right under Austrian law. In a key previous case – *Pinckney*, referred to above – the ECJ had already ruled that a Member State’s courts can claim jurisdiction over a copyright case on the basis of the “damage suffered” test, if the allegedly infringing content is accessible in that country. But *Pinckney* related to the sale of physical copies of DVDs loaded with infringing copies of copyrighted works that were sold online. Would the same rule apply to content posted on a website in one country that could be viewed in other countries via the Internet?

Yes, it would, said the ECJ. In rejecting EnergieAgentur’s argument that the website was not directed at Austria, the ECJ stated that the allegedly infringing activity in question need not be “directed to” the country where the court hearing the case is located, thus making it irrelevant that the website was not directed at Austria for the *Handelsgericht Wien* to be the appropriate court to hear the case.

Client Alert

An important point made by the ECJ in its concluding remarks is that, while the *Handelsgericht Wien* is the appropriate court for this matter, it may only rule in relation to any alleged damage that has occurred within its jurisdiction, *i.e.* any damage that occurred in Austria. Given the territorial nature of the scope of protection of copyright and rights related to copyright, individual Member States therefore only have jurisdiction to rule on alleged damage resulting from infringement of the rights granted in their respective states.

IMPACT

The ECJ's ruling means that a copyright owner based in the EU may bring a claim for infringement that occurs on a website before the courts of any Member State of the European Union where the website in question is made available, regardless of whether the website is "directed at" users in that country or not.

The ruling has widened the scope of the rule established in the earlier *Pinckney* case which allowed copyright infringement cases to be brought in any place where the infringing content is distributed. However, in *Pinckney*, the damage was limited to those Member States where physical copies of the DVD had been received by customers. As the infringement in this case was perpetrated online, the potential jurisdiction (and any claim for damages) is much wider.

As a result of the ECJ's ruling, EU copyright claimants will, in the future, have a greater ability to bring copyright infringement cases in their home Member State and/or in the Member State offering the most favourable copyright protection, which may result in cases occurring more frequently. In addition, the requirement for damage to have occurred in the Member State hearing the case may lead to claimants bringing proceedings in multiple jurisdictions within the EU in which their copyrights are protected so as to seek to recover their losses in full. Rights owners may also use this option to implement a more effective defence strategy against repeat infringers. On the other hand, infringing content users risk facing multi-national litigation – with consequently greater legal costs – outside their home market. Depending on the preferred litigation strategy and the damages occurring, claimants may prefer to sue infringers in the infringers' home Member States so as to recover damages across all jurisdictions and not simply in one jurisdiction.

This ruling is an important reminder to content users that they must hold all relevant permissions for the content that they host or post, or they could be exposing themselves to copyright infringement claims in multiple jurisdictions.

Read previous Alerts in our series "Copyright: Europe Explores Its Boundaries":

[No Resale of Digital Content Except for Software? How Does the European Court of Justice Decision on Exhaustion of the Distribution Right upon First Sale Impact the Resale of Digital Copies?](#)

["Meltwater" – EU rules that browsing does not need a licence – a victory for common sense \(or for pirates\)?](#)

[New UK Infringement Exceptions - The Ones That Got Away \(and Came Back Again\)](#)

[The Umpire Strikes Back: European Court Rules That ISPs Can Be Forced to Block Pirate Websites](#)

[Hyperlinking and Link Hubs](#)

Client Alert

Contact:

Alistair Maughan

+44 (20) 79204066

amaughan@mofocom

Laura Steen

+44 20 7920 4171

lsteen@mofocom

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofocom.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.