

LETTER FROM EUROPE

Copyright and Forum Shopping

The CJEU provides a snapshot of jurisdiction and court competence.

Having been brought up at a time when the humour of Monty Python was influential on a young mind, I can't help thinking of the 'nudge, nudge, wink, wink', sketch when reading about photographs. In the sketch, Eric Idle asks a fellow pub-goer (Terry Jones) whether Jones' wife was interested in 'photographs', with heavy innuendo on the word, closely followed by 'nudge, nudge, snap, snap, grin, grin, wink, wink, say no more', with poor Jones getting ever more confused about the purpose of the question (the answer to which, I will leave you to find out). So, when I read of a dispute in which a German photographer sought to prevent a hip designer hotel in Nice from using certain photographs ... well, it's an easy mistake to make, right?

No matter how often I deal with clients in the UK about copyright in photographs, whether for brochures, websites, products, etc., there seems to be some kind of blind spot when it comes to nailing down, in writing, what exactly is being paid for. There is invariably some vague wording on the photographer's invoice, and no one's quite sure whether they've got an assignment, an exclusive licence, or maybe some sort of licence but for what purpose?

Thanks to the Berne Convention, copyright is a right which effortlessly crosses borders. That makes it a prime candidate for law and jurisdiction forum shopping, and the

forum in which you particularly want to shop is going to be the one you think is going to give you what you want. Hardly a novel concept, and it's certainly been a well-trodden path from the days when the Dutch courts used to hand out pan-European injunctions in relation to European patents (even though these are a bundle of national rights, and the pan-European injunctions prompted much furore and ire amongst other jurisdictions' patent practitioners).

The case I read illustrates neatly the complexities that arise when forum shopping. The dispute involved a German photographer travelling to the south of France, where he carried out the task of photographing the hip hotel, he then provided the hotel with a number of images, together with his vague invoice, which was endorsed with the phrase 'includes the rights – only for the hotel'. He received payment of €2,500 ... but for what?

The hotel, clearly happy with the photos and proud of its establishment, provided the photos to a publisher in Paris, which happens to be the sister company of a very large German publisher. It is the latter which produces a book on interior design and includes some of the photos. I am sure, being a reputable publisher, they would have given the appropriate attributions to the photographer (and knowing publishers as I do, will probably have sought confirmation from the hotel that the hotel had copyright, but that's probably



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another case in another jurisdiction somewhere...).

The German photographer was cross enough that when his photographs appeared in a book on sale in Germany, he sued the hotel *in* Germany. His home jurisdiction.

You may wonder, at this stage, whether the photographer was even allowed to do that, especially as there are lots of Conventions and Regulations floating around in EU law that dictate so much of our lives and what we can and cannot do. I confess, my initial reaction was to consider he had sued in the wrong country. France is the domicile of the defendant, and the country where the contract was performed and where the photographs were handed over (which is the only act I can see that would enable the hotel to be sued, either because that act constituted publication itself, or they were 'aiding and abetting', as we'd say in England).

Yet an infringement occurred in Germany, with the publication of the book including the offending photographs.

And yes, unsurprisingly, there is a regulation which covers the rules of conflict when dealing with a tort, delict or quasi-delict, fondly referred to as 'Brussels I'. It follows the original 1968 Brussels Convention on jurisdiction and enforcing judgements.

First and foremost, the defendant is to be sued in its domicile even if the individual or company is a national of another Member State. That bit is clear and fairly obvious. However, there's the prospect of suing where the tort (in this case, infringement of copyright) took place. No doubt the photographer's German lawyers considered that, when the German publisher sold the book in Germany, this meant they could sue in Germany. Yes, but the hotel, I hear you ask?

Having won in the court of first instance and the Appeal Court, the photographer must have been decidedly upset when the Federal Court of Justice referred the matter to the CJEU. Worst still, the CJEU decided that the Regulation does not allow the court hearing the case to do so if the alleged infringer did not act in that jurisdiction, but will allow it if the damage occurred in that jurisdiction. However, the court can only rule on the damage in the jurisdiction.

What an unutterable mess! Both sides may well claim victory: the

hotel can say it did nothing wrong in Germany; the photographer can claim he was still able to sue in Germany. But you have to ask yourself: for what? The original contract was only for €2,500, so how much does the photographer consider he will get out of the publication (always assuming, of course, the court does award him damages)? And after he's paid his lawyers, he'll have how much left exactly? Oh no, wait, he'll still owe the lawyers, most likely!

You might say, 'It's the principle that matters!' But let's think carefully about this scenario. Under what law did the hotel consider it had received its rights or licence? Who prepared the contract and so who should have made it clear what right or licence the hotel had, and under what law and jurisdiction should the contract be judged? Does the hotel have any right under its domestic laws to challenge the photographer's right or even claim some sort of defence?

It is human nature to want to win (particularly if there exists a feeling of grievance), and one way to increase the chance of winning is to determine the place where those chances of success are highest. And though international courts and copyright disputes are not like the school playing fields of my youth, where I was always told that it was the taking part and not the result that was important (especially true in the case of my school, where there was never any doubt the other side was going to win!), there is or should be a duty on

the litigants' lawyers, and particularly the court, to ensure that justice and fairness for all takes place. Rules, after all, is rules.

It remains to be seen how the German Federal Court interprets the CJEU's decision, and what it will require the courts below to do. How amazing would it be if the Federal Court pointed out that the hotel only ever acted in France, and that it was the German publisher's French sister company that acted with the German publisher, and those are the ones that could and should be sued in Germany? Let's face it, we all know the photographer didn't want to sue a huge German publisher in a German court because the outcome might well have been very different. So come on Federal Court, do what's right!

The CJEU's decision isn't going to stop forum shopping overnight, but if it at least sends a message to Member State's Courts dealing with IP that they need to look very closely at the issue of correct jurisdiction and the laws applicable in a given situation, it will be a step in the right direction.

And as for the protagonists in this case, how about the hotel offers the photographer a weekend at the hotel, and at the end they all pose in front of the camera shaking hands or slapping backs, in one final Kodak moment?

Weekend, eh, eh? Hotel, weekend, eh, eh, know what I mean, nudge, nudge, wink, wink!