Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 October 2013*

(Regulation (EC) No 44/2001 — Jurisdiction — Matters relating to tort, delict and quasi-delict — Copyright — Material support reproducing a protected work — Placing on line — Determination of the place where the harmful event occurred)

Case C-170/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by judgment of 5 April 2012, received at the Court on 11 April 2012, in the proceedings

Peter Pinckney

v

KDG Mediatech AG,

THE COURT (Fourth Chamber),

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

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Pinckney, by J. de Salve de Bruneton, avocat,

— the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,

— the Greek Government, by S. Chala, acting as Agent,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

— the European Commission, by A.-M. Rouchaud-Joët, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2013,

* Language of proceedings: French.

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) ('the Regulation').

2 The request has been made in proceedings between Mr Pinckney, a French resident, and KDG Mediatech AG ('Mediatech') a company established in Austria, concerning a claim for damages resulting from the infringement of Mr Pinckney's copyright.

Legal context

The Regulation

3 Recitals 2, 11, 12 and 15 in the preamble to the Regulation state:

'(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. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.'

4 The rules of jurisdiction in Chapter II of the Regulation consist of Articles 2 to 31.

5 Article 2(1) of the Regulation, in Section 1 of Chapter II, 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.'

6 Article 3(1) of the Regulation, also in Section 1, 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.'

7 Article 5 is in Section 2 of Chapter II, which is entitled 'Special jurisdiction'. 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'.

Directive 2001/29/EC

8 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), in Chapter II, entitled 'Rights and Exceptions', contains, inter alia, Articles 2 to 4 which concern, respectively, the reproduction right, the right of communication to the public of works and the right of making available to the public other subject-matter and the distribution right.

The dispute in the main proceedings and the questions referred

9 Mr Pinckney, who lives in Toulouse (France), claims to be the author, composer and performer of 12 songs recorded by the group Aubrey Small on a vinyl record.

10 When he discovered that those songs had been reproduced without his authority on a compact disc (CD) pressed in Austria by Mediatech, then marketed by United Kingdom companies Crusoe or Elegy through various internet sites accessible from his residence in Toulouse, Mr Pinckney brought an action, on 12 October 2006, against Mediatech before the Tribunal de grande instance de Toulouse (Regional Court, Toulouse) seeking compensation for damage sustained on account of the infringement of his copyrights.

11 Mediatech challenged the jurisdiction of the French courts. By order of 14 February 2008, the judge preparing the case for trial at the Tribunal de grande instance de Toulouse dismissed that plea of lack of jurisdiction on the ground that the very fact that Mr Pinckney had been able to purchase the records concerned at his residence in France from an internet site accessible to the French public was sufficient to establish a substantial connection between the facts and the alleged damage, justifying the jurisdiction of the court seised.

12 Mediatech appealed against that judgment, arguing that the CDs had been pressed in Austria, where its headquarters is situated, at the request of a United Kingdom company which marketed them through an internet site. Thus, it claimed, the only courts having jurisdiction are the courts of the place of the defendant's domicile, which is in Austria, or the courts of the place where the damage was caused, that is the place where the alleged infringement was committed, in the United Kingdom.

13 By a judgment of 21 January 2009, the Cour d'appel de Toulouse (Court of Appeal, Toulouse) held that the Tribunal de grande instance de Toulouse lacked jurisdiction on the ground that the defendant is domiciled in Austria and the place where the damage occurred cannot be situated in France, and that there was no need to examine the liability of Mediatech and Crusoe or Elegy in the absence of any allegation of collusion between them and Mediatech.

14 Mr Pinckney brought an appeal in cassation against that judgment, relying on Article 5(3) of the Regulation. He argued that the French courts have jurisdiction and that his action was wrongly rejected.

15 In those circumstances the Court of cassation decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 5(3) of … [the Regulation] to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed online on a website,

— the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed online is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State of the court before which the action is brought,

or

— does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?

(2) Is the answer to Question 1 the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?'

The questions referred for a preliminary ruling

Admissibility

16 The Austrian Government submits that the questions are inadmissible. They are hypothetical as regards the facts of the case in the main proceedings because they do not concern the act of reproduction by Mediatech, but subsequent acts of distribution by the United Kingdom companies concerned. It does not appear from the summary of the facts in the main proceedings that Mediatech organised the distribution of the CDs by those companies or that it had any connection with them whatsoever.

17 In any event, according to the Austrian Government, the first question is inadmissible because it starts from the incorrect premiss that dematerialised content, that is the work itself, was offered on line, whereas the offer at issue in the main proceedings only concerned a material support reproducing that content.

18 In that connection, it must be recalled that, according to settled case-law, the Court can decline to rule on a request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or to its subject-matter, where the problem is hypothetical, or where the Court does not have before

it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-11/07 *Eckellkamp and Others* [2008] ECR I-6845, paragraph 28, and Case C-259/12 *Rodopi-M 91* [2013] ECR, paragraph 27).

19 The Court has also held that the justification for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 42).

20 In the present case, it is common ground that the referring court is dealing with an allegation of copyright infringement resulting from the online offer of a material support reproducing a protected work and that the issue as to whether the French courts have jurisdiction to hear that allegation is the very subject-matter of the dispute in the main proceedings. In the light of all the information before the Court, it does appear that the outcome of that dispute depends on the answer to the questions referred, which, furthermore, require reformulation.

21 Therefore, the questions referred are admissible.

Substance

22 By its questions, which it is appropriate to reformulate, the referring court asks essentially whether Article 5(3) of the Regulation must be interpreted as meaning that where there is an alleged infringement of a copyright which is protected by the Member State of the court seised, that court has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State, which has in the latter State reproduced that work on a material support which is subsequently marketed by companies established in a third Member State through an internet site which is also accessible in the Member State of the court seised.

23 In order to answer those questions, it must be recalled from the outset that the provisions of the Regulation must be interpreted independently, by reference to its scheme and purpose (Case C-228/11 *Melzer* [2013] ECR, paragraph 22).

24 By way of derogation from the fundamental principle laid down in Article 2(1) of the Regulation, attributing jurisdiction to the courts of the defendant's domicile, 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 (*Melzer*, paragraph 23).

25 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 the Regulation (*Melzer*, paragraph 24).

26 The fact remains that the expression 'place where the harmful event occurred or may occur' in Article 5(3) of the Regulation 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*, paragraph 25).

27 In that connection, according to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of the Regulation 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 (*Melzer*, paragraph 26).

28 Since identification of one of the connecting factors recognised by the case-law, set out in paragraph 26 of the present judgment, is to enable the court objectively best placed to determine whether the elements establishing the liability of the person sued are present to take jurisdiction, only the court before which an action may properly be brought is the court within whose jurisdiction the relevant connecting factor is to be found (see, to that effect, Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR).

29 It must be observed that, in the present case, unlike the facts which gave rise to the judgment in *Melzer*, the case in the main proceedings does not concern the possibility to sue one of the presumed perpetrators of the alleged damage before the court seised on the basis that it is the place of the event giving rise to the damage. It is common ground that that place is not situated within the jurisdiction of the court seised by Mr Pinckney. However, the question arises as to whether that court has jurisdiction on the ground that it is the court for the place where the alleged damage occurred.

30 Therefore, it is appropriate to specifically set out the circumstances in which, for the requirements of Article 5(3) of the 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.

31 The Court has already interpreted Article 5(3) of the Regulation with respect to allegations of infringements committed via the internet and which may, as a result, produce their effects in numerous places (see, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Martinez* [2011] ECR I-10269 and Case C-523/10 *Wintersteiger* [2012] ECR).

32 First, it is clear from that case-law 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 (see, to that effect, *Wintersteiger*, paragraphs 21 to 24).

33 Second, the likelihood of the damage occurring in a particular Member State is subject to the requirement that the right in respect of which infringement is alleged is protected in that Member State (see, *Wintersteiger*, paragraph 25).

34 Finally, it is clear from that case-law that, in accordance with the objectives set out in paragraph 27 of the present judgment, in order to attribute jurisdiction to a court to hear an allegation of infringement in matters of tort, delict and quasi-delict, the identification of the place where the alleged damage occurred also depends on which court is best placed to determine whether the alleged infringement is well founded (*eDate Advertising and Martinez*, paragraph 48 and *Wintersteiger*, paragraph 27).

35 In applying those principles, for the purpose of identifying the place where damage allegedly caused via the internet occurred, the Court has distinguished between infringements of personality rights and infringement of intellectual and industrial property rights.

36 Thus, the alleged victim of an infringement of personality rights by means of content placed online, which is protected in all the Member States may, on the basis that the harmful even occurred there, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised (see, *eDate Advertising and Martinez*, paragraph 52). Furthermore, given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the alleged victim may choose to bring an action in one forum in respect of all of the damage caused (*eDate Advertising and Martinez*, paragraph 48).

37 However, the allegation of an infringement of an intellectual and industrial property right, in respect of which the protection granted by registration is limited to the territory of the Member State of registration, must be brought before the courts of that State. It is the courts of the Member State of registration which are the best placed to ascertain whether the right at issue has been infringed (see, to that effect, with respect to national marks, *Wintersteiger*, paragraphs 25 and 28).

38 It is appropriate to verify to what extent the abovementioned conclusions apply to the alleged copyright infringements.

39 First of all, it is true that copyright, like the rights attaching to a national trade mark, is subject to the principle of territoriality. However, copyrights must be automatically protected, in particular by virtue of Directive 2001/29, in all Member States, so that they may be infringed in each one in accordance with the applicable substantive law.

40 In that connection, it must be stated from the outset that the issue as to whether the conditions under which a right protected in the Member State in which the court seised is situated may be regarded as having been infringed and whether that infringement may be attributed to the defendant falls within the scope of the examination of the substance of the action by the court having jurisdiction (see, to that effect, *Wintersteiger*, paragraph 26).

41 At the stage of examining the jurisdiction of a court to adjudicate on damage caused, the identification of the place where the harmful event giving rise to that damage occurred for the purposes of Article 5(3) of the Regulation cannot depend on criteria which are specific to the examination of the substance and which do not appear in that provision. Article 5(3) lays down, as the sole condition, that a harmful event has occurred or may occur.

42 Thus, unlike Article 15(1)(c) of the Regulation, which was interpreted in Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527, Article 5(3) thereof does not require, in particular, that the activity concerned to be 'directed to' the Member State in which the court seised is situated.

43 It follows 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 that the alleged damage may occur within the jurisdiction of the court seised.

44 In circumstances such as those at issue in the main proceedings that likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction of the court seised.

45 However, if the protection granted by the Member State of the place of the court seised is applicable only in that Member State, the court seised only has jurisdiction to determine the damage caused within the Member State in which it is situated.

46 If that court also had jurisdiction to adjudicate on the damage caused in other Member States, it would substitute itself for the courts of those States even though, in principle, in the light of Article 5(3) of the Regulation and the principle of territoriality, the latter have jurisdiction to determine, first, the damage caused in their respective Member States and are best placed to ascertain whether the copyrights protected by the Member State concerned have been infringed and, second, to determine the nature of the harm caused.

47 In the light of all of the foregoing, the answer to the questions referred is that Article 5(3) of the 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 with 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.

Costs

48 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 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 with 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.

[Signatures]