
10. Jurisdiction over cyber torts under the Brussels I Regulation

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I. INTRODUCTION

In a series of four recent cases, the European Court of Justice has devised a new jurisdictional framework for jurisdiction over cyber torts under art. 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 ('Brussels I Regulation'). In these cases, the Court has been called to rethink its classical interpretation of this provision dating back to 1976. The cases concern respectively the online infringement of personality rights (*eDate Advertising and Martinez*¹), the online infringement of trademark (*Wintersteiger*²), the online use of databases (*Football Dataco*³), and the online infringement of copyright (*Pinckney*⁴).

In the meantime, the Brussels I Regulation has been the subject of a recast. It has been replaced, as from 10 January 2015, by Regulation (UE) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Bis Regulation'). Because of the removal of the specific rule of jurisdiction for alimonies (a matter which is now subject to a separate instrument), what was art. 5(3) of Brussels I has now become art. 7(2) of Brussels I Bis, though the wording of the provision has not been changed.

This chapter presents an analytical overview of the matter, with a focus on the latest developments that stem from the four recent cases identified above. The purpose of the contribution is to identify the principles applied by the European Court of Justice in cyber torts cases. Section II undertakes a brief review of the classical case law, outside the online

¹ Joined Cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Olivier Martinez and Robert Martinez v MNG Limited* [2011] ECR I-10269.

² Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, not yet published in ECR.

³ Case C-173/11 *Football Dataco and Others*, not yet published in ECR.

⁴ Case C-170/12 *Pinckney*, not yet published in ECR.

232 *Research handbook on EU Internet law*

context. Section III reviews the *eDate*, *Wintersteiger* and *Football Dataco* cases, and highlights the weaknesses of these decisions. Section IV discusses the attempts by the Advocate General and the Court to address these weaknesses in *Pinckney*. Section V summarizes the principles that govern the matter of online torts today, and shows that much work remains to be done to overcome the problems associated with the application of art. 5(3) in the online context.

II. THE CLASSICAL INTERPRETATION OF ARTICLE 5(3) OF BRUSSELS I REGULATION

Article 5(3) of Brussels I Regulation (art. 7(2) in the recast) provides as follows: ‘A person domiciled in a Member State may, in another Member State, be sued ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’

This rule offers to claimants an alternative *forum* to the defendant’s domicile (art. 2 of Brussels I Regulation; and art. 4 in the recast) when the claim ‘seek[s] to establish [the] liability of [the] defendant and [is] not related to a “contract” within the meaning of Article 5(1)’.⁵ This definition covers of a wide range of claims, including, for example, actions for defamation, infringement of intellectual property rights and unfair competition. The rationale of art. 5(3) is that it provides for a better efficiency of proceedings and administration of justice, as the place where the harmful event occurred is meant to have particularly close connecting factors with the dispute.⁶

The tort rule was first interpreted by the Court of Justice in *Bier* (1976), which involved environmental damage caused by negligence. As is well known, the Court ruled in that case that what is now art. 5(3) allows claimants to bring an action before the courts of the place where the event giving rise to damage occurred or where damage occurred, that is, where the event giving rise to damage produces its harmful effects upon the victim.⁷ One of the reasons for that duplication of jurisdiction is that the place of damage often coincides with the place of defendant’s

⁵ Case 189/87 *Kalfelis v Schröder and Others* [1988] ECR 5565, para. 18. For the definition of contractual cases under Article 5(1), see Cases C-26/91 *Handte v TMCS* [1992] ECR I-03967 and C-167/00 *Henkel* [2002] ECR I-08111.

⁶ Case C-189/08 *Zuid Chemie* [2009] ECR I-6917, para. 24 (and the case law cited).

⁷ Case 21/76 *Handelskwekerij Bier v Mines de Potasse d’Alsace* [1976] ECR 1735.

domicile of art. 2, so that having that location as the sole connecting factor under art. 5(3) would render this provision ineffective.⁸

The Court has later stated in *Dumez* that the ‘damage’ referred to under art. 5(3) as interpreted in *Bier* covered only direct damage, and therefore precluded indirect damage. In that dispute, the claimant’s subsidiaries had suffered financial loss due to an allegedly negligent decision taken by the defendant, which had then caused financial damage to the claimant as well.⁹ Thus, art. 5(3) does not permit claimants to initiate legal proceedings against one person before the courts of the Member State where their loss occurred, if this loss is only a consequence of damage caused by the defendant’s acts to other persons or to themselves. In *Marinari*, the Court also held that the person who had suffered damage in one State, which caused him financial damage located in another Member State, could not bring a legal action before the courts of the latter State under art. 5(3).¹⁰

In *Shevill*,¹¹ a defamation case, the Court of Justice has further limited the scope of the *forum damni* of *Bier*. The Court ruled that the courts of the Member State where damage occurred may only adjudicate the claim in respect of the portion of the damage that occurred in that State (by contrast, the courts of the Member State where the event giving rise to damage occurred can adjudicate the whole dispute).¹² This restriction is based on the consideration that the court of the place where damage occurred is the best placed to assess the libel committed in that State (and not elsewhere) and to determine the extent of the corresponding damage.¹³ In that case, the Court was called to rule on the application of art. 5(3) in the context of non-material damage allegedly caused by defamatory content published in a newspaper distributed in several Member States. The Court held that in such a context, the victim may bring an action for damage to his reputation against the publisher either before the court of the place where the publisher of the defamatory publication is established (place where the event giving rise to damage occurred), or

⁸ *Ibid.*, para. 20.

⁹ Case C-220/88 *Dumez France and Others v Hessische Landesbank and Others* [1990] ECR I-49.

¹⁰ Case C-364/93 *Marinari v Lloyd’s Bank* [1995] ECR I-6511.

¹¹ Case C-68/93 *Shevill and Others v Presse Alliance* [1995] ERC I-415.

¹² This rule obviously does not apply when the place where the damage occurred coincides with the place of the defendant’s domicile (in such cases, the competent courts have jurisdiction over the entire case by virtue of art. 2 of Brussels I Regulation).

¹³ Case C-68/93 *Shevill*, para. 32.

234 *Research handbook on EU Internet law*

before the courts of each Member State where the publication was distributed and where the victim claims to have suffered injury to his reputation, that is, when the victim is known in those places (place where the damage occurred).¹⁴

III. STRUGGLING WITH THE FIRST CYBER TORTS CASES: *E-DATE*, *WINTERSTEIGER* AND *FOOTBALL DATACO*

With the principles summarized above as background, the Court of Justice first approached the application of the tort jurisdiction in cyber cases through a dispute involving personality rights, in *eDate Advertising and Martinez* (see A). The Court then drew a distinction between personality rights and intellectual property rights cases in *Wintersteiger*, opening a range of new questions (see B). Subsequently, the Court addressed in *Football Dataco* the issue of tort jurisdiction in an ancillary way in a case involving the interpretation of the Database Directive, which led to further confusion with regard to the application of art. 5(3) in cyber torts-related disputes (see C).

A. Personality Rights: *eDate Advertising and Martinez*

The joined cases *eDate Advertising and Martinez* involve the civil liability respectively of eDate Advertising GmbH and MGN Limited in respect of information and photographs published on the Internet, which claimants alleged violated their privacy.¹⁵

In both cases, the claimants brought legal proceedings before the courts of their own domicile (in Germany and France, respectively) against companies that were established in another Member State (Austria and the UK, respectively). This led the German and French Courts to submit a preliminary question to the Court of Justice to assess whether it

¹⁴ Ibid, para. 33.

¹⁵ In the first case, a German individual who was convicted for murder sued the Austrian company eDate Advertising before the German courts, following the publication on its website of a report naming the claimant, describing the crime that he had committed and informing the reader about his filing of an appeal against his conviction. In the second case, the French actor Olivier Martinez and his father brought legal proceedings in France against the English company MGN for the posting of a text about their private life on the website of the English newspaper *Sunday Mirror*.

is sufficient for the courts of a Member State to have jurisdiction under art. 5(3) that the website where the content allegedly infringing upon personality rights is accessible in that State; or whether it is necessary to establish the existence of a complementary link between the case and that State.

Even though the preliminary questions were phrased in respect of the opposition between the accessibility and the targeting criteria used by the Court in other Internet-related cases, in particular in consumer disputes,¹⁶ the Court based its ruling on the classical jurisprudence in respect of art. 5(3) without considering the accessibility/targeting dichotomy of the consumer disputes case law. The Court applied the traditional connecting factors devised in *Bier* and *Shevill* to the Internet context, while at the same time creating a new ground for jurisdiction. The Court consequently identified the courts of three Member States where the victims of alleged infringement of personality rights could bring proceedings.

First, the victim can bring action for liability in respect of all damage before the courts of the Member State where the publisher of litigious content placed online is established (which reflects the criterion of the 'place where the event giving rise to damage occurred'). This is an application in the context of the Internet of the establishment of the publisher criterion that is applied to paper-based contents cases, as per *Shevill*. As in respect of other kinds of torts,¹⁷ the Court therefore defines the place of the causal event by reference to the person whose liability is engaged, rather than with regard to the alleged harmful activity. This means that, in the online context, the place where the harmful content was posted online (computer or website server) is not relevant for the purpose of the application of art. 5(3).

Second, the victim can bring an action for liability relating to all the damage before the courts of the Member State where the centre of the victim's interests is based (which reflects the criterion of the 'place where damage occurred'). This new connecting factor is grounded on two

¹⁶ See Case C-585/08 *Pammer and Hotel Alpenhof* [2010] ECR I-12527 and Case C-324-09, *L'Oreal and Others* [2011] ECR I-06011. For a theorization of the targeting method, see Olivier Cachard (2010), 'Jurisdiction compétente et loi applicable en matière délictuelle: retour sur la méthode de la focalisation' *RLDI* 15.

¹⁷ For an analysis of the Court case law in that respect, see A. Nuyts (2008), 'Suing at the place of infringement of Article 5(3) of Regulation 44/2001 to IP matters and internet disputes' in A. Nuyts (ed.), *International Litigation in Intellectual Property and Information Technology*, Alphen aan den Rijn: Kluwer Law International, pp. 118–19.

236 *Research handbook on EU Internet law*

main considerations.¹⁸ First, the Court takes into account the ubiquity of contents placed online, which results both from those contents being instantly available to Internet users all over the world, and from the difficulty in quantifying those users. According to the Court, this reduces the usefulness of the ‘distribution’ criterion applied to cases relating to paper-based infringement of personality rights, in so far as the scope of the distribution of content placed online is in principle universal. Second, the Court considers the seriousness of the infringement to which the holder of a personality right is subject when a content breaching such right is available to all Internet users over the globe.

As a consequence of these two ‘cyber peculiarities’, the Court has devised a new *forum* for victims of breaches of personality rights caused by contents placed online, which extends to all damages, and not only to damages located within the *forum* State.¹⁹ This is the most innovative aspect of this new ‘centre of interests’ criterion, as it breaks with the *Shevill* approach in giving an ‘extraterritorial’ scope to the *forum damni*.

Moreover, the Court adapts the traditional criterion of *Shevill* and finds that the place where the damage occurs can be situated where the victim has the centre of his interests. This centre of interests often equals the victim’s habitual residence but can also be located in a Member State with which the victim has a particularly close tie, given other factors such as the pursuit of a professional activity.²⁰ According to the Court of Justice, the courts of the Member State where the victim has his centre of interests might best assess the impact which material placed online is liable to have on an individual’s personality rights, so that the attribution of jurisdiction to those courts corresponds to the objective of the sound administration of justice.²¹ The availability of such *forum* is also, according to the Court, in accordance with the aim of predictability of the rules governing jurisdiction regarding defendants: the publisher of harmful content should be in a position to assess *ex ante* the centre of interests of the persons who are the subject of that content when it is placed online.²²

Third, and finally, the victim may bring an action before the courts of each Member State where the content placed online is or has been accessible in respect of domestic damage. This third criterion results from the transposition to the Internet context of the ‘distribution’ criterion

¹⁸ Joined Cases C-509/09 *eDate* and C-161/10 *Martinez*, paras. 45–47.

¹⁹ *Ibid.*, para. 48.

²⁰ *Ibid.*, para. 49.

²¹ Case C-189/08 *Zuid Chemie*, para. 24 (and the case law cited).

²² Joined Cases C-509/09 *eDate* and C-161/10 *Martinez*, para. 50.

of *Shevill*. This is quite surprising as the Court has justified the introduction of the ‘centre of interests’ criterion by the inappropriateness of the criteria of *Shevill* to the Internet context.

Aside from this point of principle, the transposition of the ‘distribution’ criterion of *Shevill* to the online context means that this criterion should not be applied without any limitations or restrictions. In particular, it is doubtful that *eDate* stands for the principle that mere accessibility to a website from a Member State necessarily provides jurisdiction to the courts of that Member State under art. 5(3), irrespective of the existence of any sort of link between this State and the litigious facts. Indeed, under *Shevill*, for jurisdiction to be established, it must be shown, first, that the paper-based content was distributed in the *forum*, and second, that the victim is known in that *forum*. It is doubtful that jurisdiction would be proper under *Shevill* only because readers would have brought themselves the newspaper from abroad. In printed publication, the notion of distribution suggests affirmative actions by the defendant to place or push the publication in the *forum*, such as by the decision to print enough copies for international circulation, to enter into agreements for distribution, or to channel by other means the publication to certain markets. Transposing that restriction to the online context should lead to subjecting a Member State’s jurisdiction to the existence of a connecting factor other than simple accessibility of the website.²³

B. Trade-marks: *Wintersteiger*

The case of *eDate and Martinez* left several questions unanswered, in particular in relation to its scope of application (are the three criteria to be applied in all online torts cases or only in those involving infringement of personality rights?) and to the meaning of the third criterion (is accessibility sufficient to establish jurisdiction? in which cases?). The case of *Wintersteiger*, which came a little bit more than one year after *eDate*, was therefore ardently anticipated. This case involves proceedings initiated by the Austrian undertaking Wintersteiger AG (‘Wintersteiger’) against the German company Products 4U Sondermaschinenbau GmbH (‘Products 4U’), in respect of the use by Products 4U of the Austrian trade mark ‘Wintersteiger’ as a keyword on the website of a paid

²³ For a discussion of this case from the perspective of the principle of freedom of expression, see P. Stone (2013), ‘Territorial targeting in EU private law’ *C&TLR* 17. The Court had the occasion to clarify *eDate* when it ruled a few months later in the *G* case, but it did not do so (Case C-292/10 *G*, not yet published in ECR).

238 *Research handbook on EU Internet law*

referencing service provider (Google.de, that is, Google Germany). Wintersteiger had alleged that this use infringed its Austrian trade mark. It therefore sought to obtain from the Austrian courts an order to prevent Products 4U from using 'Wintersteiger' as a keyword in Google.de. Products 4U disputed jurisdiction of the Austrian courts on the basis that 'Google.de' is directed towards German Internet users only even though it is also available to Austrian Internet users. The Austrian courts asked, as a preliminary question to the Court of Justice, what criteria were to be used under art. 5(3) to establish jurisdiction in that case.²⁴

For the Court of Justice, the place where the event giving rise to damage occurred is located where the advertiser (that is, Products 4U) is established, and not where the server is established nor where the advertisement is displayed. In that respect, the Court referred to *Google France and Google* where it had held, in another context, that 'it is the advertiser choosing a keyword identical to the trade mark, and not the provider of the referencing service, who uses it in the course of trade'.²⁵ The Court further explained that the place of establishment of the advertiser was a definite and identifiable place, both for the applicant and for the defendant. It is therefore likely to facilitate the taking of evidence and the conduct of proceedings and fulfils the objective of foreseeability.²⁶

The solution may appear logical as the action at hand aimed at preventing the advertiser (Product 4U) from trademark infringement. By contrast, it is doubtful that the same solution could have been applied if the proceedings had been brought against an intermediary, such as the referencing service provider (in this case, Google). In respect of legal action, it would seem that the event causing the damage which is the basis of the action is the provider's activity. If this is correct, then the courts of the Member State where the provider is established would have jurisdiction. That being said, the interpretation upheld by the Court in respect of this aspect of the case seems consistent with *eDate* and *Shevill*, as the causal event is defined again by reference to the establishment of the person whose liability is at stake, and not by reference to the location of the allegedly harmful conduct of that person.

²⁴ Case C-523/10 *Wintersteiger*, para. 17.

²⁵ Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-0000, paras 52 and 58.

²⁶ Case C-523/10 *Wintersteiger*, paras 36–37.

As for the place where damage occurred, the Court held that it is located in the Member State where the national trade mark²⁷ is registered. The Court does not apply the new centre of interests criterion. Nor does it actually apply the accessibility criterion as it did in *eDate*. The Court explains that those criteria are to be used in ‘the particular context of infringements of personality rights’ and therefore do not apply ‘to the determination of jurisdiction in respect of infringements of intellectual property rights’.²⁸ Instead, the place of damage in such context is necessarily and exclusively deemed to be located in the Member State where the infringed trade mark is registered. This, according to the Court, is due to the territorial nature of the protection provided by national trade marks. As the Court put it:

Contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory.²⁹

In other words, the interpretation of art. 5(3) is determined by considerations relating to substantive law, namely the issue of whether and where the proprietor can rely on the protection. This is quite disturbing. It seems entirely accurate to decide that the place of damage must coincide with the place where the trade mark is registered when assessing the substance of the dispute. However, it seems unfitting to infer from this that the courts of that Member State *ipso facto* have jurisdiction over all tort cases relating to this trade mark.³⁰ This approach in fact is contrary to the well established principle that international jurisdiction is based on

²⁷ *Wintersteiger* involved the alleged infringement of a national trade mark, and it should not apply to European trade marks based on Council Regulation (EC) no. 40/94 of 20 December 1993 on the Community trade mark. This instrument provides for a specific jurisdictional framework. Jurisdiction is provided to the courts of the Member States where the event giving rise to damage occurred.

²⁸ Case C-523/10 *Wintersteiger*, para. 24.

²⁹ *Ibid*, para. 25. According to the Court, this interpretation is further supported by other considerations, namely it serves the objectives of foreseeability and of sound administration of justice; and the courts of the Member State in which the trade mark at issue is registered are able to assess whether a situation such as that in the main proceedings actually infringes the protected national mark (*ibid*, paras. 27–28).

³⁰ See further A. Nuyts, *supra* n. 17, pp. 105–30.

240 *Research handbook on EU Internet law*

considerations which are different from those that are relevant under the substantive law. In *Marinari*, the Court ruled that:

[The Brussels I Regulation] did not intend to link the rules on territorial jurisdiction with national provisions concerning the conditions under which non-contractual liability is incurred. Those conditions do not necessarily have any bearing on the solutions adopted by the Member States regarding the territorial jurisdiction of their courts, such jurisdiction being founded on other considerations [that is, mainly the proximity between the *forum* and the factual elements of the dispute].³¹

Consequently, the existence of a jurisdictional basis under art. 5(3) *in casu* should not depend on the protection (under the applicable law) of the right in trade mark, patent, or copyright relied upon by the plaintiff. Instead, it should depend on the proximity between the *forum* and the factual elements of the dispute.

According to *Bier*, one of the places fulfilling the ‘proximity objective’ is the place where the damage occurred. The jurisdictionally meaningful element constituting the place of damage must therefore be identified and localized. This must be done in view of the settled principle that the place where the damage occurs is the place where the causal event directly produces its harmful effect on the victim.³² A financial loss may constitute such harmful effect provided, however, that it is immediately felt by the victim, and not only indirectly felt where the victim has established its centre of assets.³³ In infringement matters, the direct harmful event will usually be the financial loss which is suffered by the holder of the right at the place where the infringing material is marketed, advertised or used. In trade marks, this place is located where the sign is used in support of the marketing or offering of the products, and not where it is registered.³⁴ The decision of the Court is therefore difficult to justify by reference to the usual principles of interpretation of art. 5(3).

³¹ Case C-364/93 *Marinari*, para. 18.

³² See *supra*, section I, Case C-220/88 *Dumez*.

³³ See Case C-18/02, *DFDS Torline* [2004] ECR I-01417, para. 42; Case C-168/02, *Kronhofer* [2004] ECR I-6009, para. 21.

³⁴ It should then be determined whether the courts of the Member States where the infringing material is marketed, advertised or used have jurisdiction over the whole dispute or only with respect to domestic damage. This question does not arise if the place where the damage occurred is said to be located in the Member State where the national trade mark is registered, as all damage is deemed to be located in that Member State in this case.

Moreover, even if one accepts that the place of damage must be located, from a jurisdictional standpoint, in the Member State where the trade mark is registered, is such registration in itself sufficient to establish jurisdiction of the courts of that Member State? In our view, the answer should be negative. The simple fact that a trade mark has been registered in a Member State does not necessarily imply that the damage alleged in the claim has a meaningful connection with the *forum*. It would be clearly excessive to infer from *Wintersteiger*, say, that the Court has forever erased any requirement of a connection between the tort and the *forum* other than the registration of the trade mark. As a matter of fact, it would seem that in the case at hand, there was a meaningful connection between the alleged damage and the *forum*, as several elements of this alleged damage had connections with Austria: the website was available in Austria, in the German language (that is, the language spoken in Austria) and the products were thereby offered for sale to Austrian Internet users.

C. Online Database: *Football Dataco*

Aside from the doubts surrounding the meaning of the ‘registration’ criterion, the case of *Wintersteiger* raised again the issue of the scope of the interpretation principles upheld in that case.³⁵ These issues have been addressed, albeit in an indirect way, in *Football Dataco*. In that case, the plaintiffs were UK companies owning a database which compiles data about English and Scottish football matches in progress. They brought legal action before the English courts against a German company which provides online data relating, *inter alia*, to English league matches. This was done by copying the information from the plaintiffs’ database which was then sent to users in England via a UK company providing betting services aimed at the UK market. The English Court of Appeal asked the Court of Justice whether such scheme entailed an act of re-utilization under Directive 96/9/EC on the Legal Protection of Database. Article 7 of that Directive requires Member States to give the maker of a database a *sui generis* right to prevent anyone from re-utilizing the contents of the database. The question was therefore about substantive rights under

³⁵ Geert Van Calster restricts the precedent value of *Wintersteiger* to cases where there is only one trade mark held, in only one Member State (Geert Van Calster (2013), *European Private International Law*, Oxford: Hart Publishing, p. 96). On the contrary, Peter Stone expects the Court to extend its approach in *Wintersteiger* to other national trade mark, copyright and design rights cases where art. 5(3) is applied – see Peter Stone, *supra* n. 23, 23.

242 *Research handbook on EU Internet law*

European law, and the Court was not requested to interpret art. 5(3).³⁶ Yet, the Court noted that localizing the act of re-utilization was 'liable to have an influence on the question of jurisdiction'.³⁷ In this respect, the Court noted that when the web server is located in one Member State, an act of re-utilization can be situated in another Member State where the person re-utilizing the database intends to target the public there.³⁸ This statement is based on the Court's consideration that the ubiquitous nature of the Internet as a method of making contents available must be distinguished from traditional modes of distribution so that:

The mere fact that the website containing the data in question is accessible in a particular national territory is not a sufficient basis for concluding that the operator of the website is performing an act of re-utilisation caught by the national law applicable in that territory concerning protection by the sui generis right.³⁹

As a result, the Court localized an act of re-utilization under Directive 96/9/EC to determine both international jurisdiction and substantive law. The approach followed by the Court is not unlike the one applied in *Wintersteiger*, as has been seen above. This does not mean however that the Court used the same criterion for the localization of the damage under art. 5(3). In fact, in *Wintersteiger*, the damage was held to be located in the Member State where the national trade mark is registered (that is, protected under domestic law). By contrast, in *Football Dataco*, the damage was held to be situated in the Member State where the person re-utilizing the database intends to target the public. In other words, *Football Dataco* seems to support the analysis proposed above, namely that registration is not sufficient for jurisdiction to be established: a further link is required between the tort and the *forum*.

But of course, contrary to *Wintersteiger* which directly interprets art. 5(3), *Football Dataco* only defines the location of an act, and it is only indirectly that this location can assist in the determination of jurisdiction under art. 5(3). In other words, the fact that *Football Dataco* does not directly interpret art. 5(3) may explain the uncommon use of the targeting criterion for defining international jurisdiction.

Thus, *Football Dataco* has not provided much clarity to the matter. Many points have remained unanswered. First, it is uncertain whether the

³⁶ Even though the jurisdiction of the English courts had been disputed by the defendant before the English court.

³⁷ Case C-173/11 *Football Dataco*, para. 30.

³⁸ *Ibid*, para. 47.

³⁹ *Ibid*, para. 36.

Jurisdiction over cyber torts 243

place where the act of re-utilization occurs being the targeted Member State corresponds to the ‘place where the event giving rise to damage occurred’ or to the ‘place where the damage occurred’, even though it should logically refer to the latter. In support of this interpretation, the Court noted that the courts of the targeted Member State ‘at least’ had jurisdiction, so that an act of re-utilization may also be located in another Member State. This other Member State may correspond to the ‘place where the event giving rise to damage occurred’ (such as the Member State where the author of the act of re-utilization is established).

Second, the Court has not explained whether the Member State targeted by the act of re-utilization has jurisdiction over the whole dispute or only with regard to domestic damages. Consistency with *Shevill* would call for jurisdiction to be limited to domestic damages.

IV. WILL CLARITY COME FROM COPYRIGHT? THE *PINCKNEY* CASE

The series of decisions from the Court of Justice in *eDate*, *Wintersteiger* and *Football Dataco* have left open a number of major questions about the jurisdiction over cyber-torts:

- (1) Does *eDate* create jurisdiction for the courts of the Member State where litigious online content is simply accessible in personality rights-related cases, as far as domestic damage is concerned?
- (2) In intellectual property rights-related disputes, is the ‘place where damage occurred’ to be defined based on the protection of the infringed right by domestic law (*Wintersteiger*) or on the notion of the targeted public (*Football Dataco*), or is each type of intellectual property right to be treated differently under Article 5(3)?
- (3) Is the matter of infringement of copyrights governed by the principles upheld in *Wintersteiger* and/or *Football Dataco*, or by the principles applicable over personality rights disputes under *eDate*, or is it subject to different set of principles in view of the specific nature of copyrights?

The *Pinckney* case⁴⁰ gave rise to high hopes that these questions, amongst others, would finally find an answer from the Court of Justice. However, as will be seen the decision is quite disappointing in this

⁴⁰ Case C-170/12 *Pinckney* (Opinion of Advocate General Jääskinen).

244 *Research handbook on EU Internet law*

respect. Before reviewing the decision of the Court (see B), it is useful to look at the very interesting analysis and proposals put forward by Advocate General Nilo Jääskinen in his Opinion in that case (see A).

A. The Dispute and the Analysis and Proposals of the Advocate General

Mr. Pinckney, a French resident, brought proceedings in France against an Austrian company (KDG Mediatech AG) in relation to the reproduction on Compact Discs (CD) of songs that he had written and interpreted, and which had been placed online for sale by two English companies. The action was brought before French courts on the basis that this was the place of Mr Pinckney's domicile and because the websites where the CDs could be bought were accessible in France. The defendant challenged the jurisdiction of French courts. The French Court of Cassation referred two questions to the Court of Justice as follows:

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?⁴¹

Mr. Jääskinen's position on the interpretation of art. 5(3) was straightforward: when applied to copyright disputes, the mere accessibility of a

⁴¹ The reference to 'accessibility', which is not used in *Wintersteiger*, while this case concerns intellectual property rights as *Pinckney* does, may be explained by the fact that the Court had not yet ruled in *Wintersteiger* when the French Court of Cassation referred the case *Pinckney* to the Court.

website comprising litigious content in a given Member State is not sufficient for the courts of that Member State to have international jurisdiction. Instead, as alluded to in *Football Dataco*, it must be proven that the website is directed towards that Member State. For the Advocate General, the courts of that State have jurisdiction over the case in respect to domestic damage, while the courts of the Member State where the person who placed the content online is established have jurisdiction over the case regarding all damages.⁴²

The Advocate General explained this proposed interpretation of art. 5(3) as follows. First, the principle of territoriality characterizes intellectual property as a field of law so that this principle helps determining international jurisdiction, applicable law and substantive law all together. Nonetheless, the Court (in *Wintersteiger* and *Football Dataco*) has qualified the impact of the principle of territoriality on international jurisdiction because of the ubiquity of contents placed online. In the Advocate General's opinion, this ubiquity should result in a new definition of the link between a virtual behaviour and a territory.

Based on that consideration, Mr. Jääskinen examined the question of jurisdiction by localizing copyright infringements depending on their nature. In that context, he considered that the placing online of the CDs infringes upon distribution and communication rights, and is consequently located in different places, as it involves both an act and several addressees of this act, which may be situated in various countries. He then focused on the localization of the 'place where damage occurred' under art. 5(3) in cyber cases and welcomed thereby the decision of the Court in *Football Dataco*. From his point of view, using the same criterion for both determining competent courts and the territorial scope of national law protecting *sui generis* rights in a database implies more coherence and should therefore be done in cases involving infringement of distribution rights. Moreover, simple accessibility should be avoided as criterion under art. 5(3) because it multiplies the available *fora*. It is therefore contrary to the objectives of foreseeability and sound administration of justice of the Brussels I Regulation. As for the centre of interest criterion used in *eDate*, the Advocate General considered that it is not appropriate for economic rights-related cases as damage resulting therefrom first appears where the public is targeted by the litigious act rather than where the victim has his centre of interests.

⁴² Case C-170/12 *Pinckney* (Opinion of Advocate General Jääskinen), para. 73.

246 *Research handbook on EU Internet law*

Waiving the ‘mere accessibility’ criterion would indeed clarify the Court case law on art. 5(3) as applied to cyber tort cases. It would also enhance it with regard to the specific objectives of that provision, that is, a better efficiency of proceedings and administration of justice. Moreover, it would ensure better consistency between this case law and that which concerns paper-based cases, mainly *Shevill*, as the latter case law necessitates affirmative action from the publisher.

On the other hand, the Advocate General’s proposal to approach the matter from the perspective of the alignment of substantive law and international jurisdiction is, again, questionable. Mr. Jääskinen appeared to consider that the case concerns primarily a question of intellectual property rather than a question of international jurisdiction. This is probably the reason why he considered that consistency is to be reached amongst cases relating to that field of law rather than between art. 5(3)-related cases. To the contrary, if it is accepted that international jurisdiction must be based on considerations that are proper to this discipline and that are different from those of substantive law, then consistency should be searched for rather with regard to this second category of cases.

Besides, aligning the criteria both for the determination of jurisdiction and the application of substantive law seems to contradict the considerations on which Mr. Jääskinen based his Opinion, namely that while the principle of territoriality is meant to help in determining international jurisdiction, applicable law and substantive law all together in copyright-related cases, this principle of territoriality has a much lesser importance in the online context given the ubiquity of content placed online, which calls for a new definition of the link between a dispute and a Member State.

B. The Court’s Decision in *Pinckney*

The Court did not follow the Opinion of the Advocate General. The starting point of the analysis of the Court was that the case was to be treated as fact specific, and not as a case that would justify devising general principles of interpretation for online infringement of copyright. This is apparent from the decision of the Court to reformulate the preliminary question as follows:

[T]he 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

Jurisdiction over cyber torts 247

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.⁴³

In order to answer this quite specific and narrow question, the Court stated that as art. 5(3) constitutes a rule of special jurisdiction, it is to be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by the Regulation.⁴⁴ Interestingly, the Court referred in that regard (and in several others) to its recent decision of 16 May 2013 in the case of *Melzer*,⁴⁵ which did not concern the online context. In this case, the Court had addressed the question of whether, where there is a cross-border participation of several persons in a tort or delict, the reciprocal attribution of the place where the event occurred is admissible for determining the 'place where the harmful event occurred' under art. 5(3) of Brussels I Regulation.⁴⁶ By doing so, the Court made it clear that what matters more is the fact that the infringement alleged in *Pinckney* involved several persons located in different Member States, rather than the online infringement of copyright aspect.⁴⁷

Still referring to *Melzer*, the Court called on the usual rationale that the rule of specific jurisdiction laid down in art. 5(3) 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,⁴⁸ which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and efficacious proceedings.⁴⁹

⁴³ Case C-170/12 *Pinckney*, para. 22.

⁴⁴ Ibid, para. 25.

⁴⁵ Case C-228/11 *Melzer*, not yet published in ECR.

⁴⁶ Mr. Melzer (domiciled in Berlin) had been solicited as a client by telephone and had his file managed by a German company, while an account had been opened with a UK company trading for Mr. Melzer in return for remuneration. Mr. Melzer had put €172,000 into that account and had been given back only €924.88, so he claimed the difference as damages before German courts against the UK company.

⁴⁷ The Court however acknowledges that contrary to *Melzer* which concerns the localization of the 'place where the harmful event occurred', *Pinckney* entails the localization of the 'place where damage occurred' (Case C-170/12 *Pinckney*, para. 29).

⁴⁸ As this was the matter discussed in *Melzer*.

⁴⁹ Case C-170/12 *Pinckney*, para. 27.

248 *Research handbook on EU Internet law*

Based on these principles, the Court found it appropriate to specifically set out the circumstances in which the damage resulting from an alleged copyright infringement ‘occurred in a Member State’ under art. 5(3) other than that in which the defendant reproduced the author’s work onto a material support which is then sold via a website which is also accessible within the jurisdiction of the court seized.⁵⁰

In that respect, *eDate* and *Wintersteiger* appeared to be relevant precedents for the Court. The Court confirmed the distinction to be made between the application of art. 5(3) in respect of personality rights and in relation to intellectual property. The Court also stressed that *Wintersteiger* is only to be applied in intellectual property cases where the existence of the infringed right is subject to national registration.

Moreover, the Court stated that, while ‘the place where damage occurred’ varies according to the nature of the rights allegedly infringed, two elements are to be taken into account to define such place.⁵¹ First, 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.⁵² Second, which court is best placed to determine whether the alleged infringement is well founded should be considered.⁵³

Based on these considerations, the Court examined the specificity of the alleged copyright infringements in the case at hand. The Court considered that, like the rights attaching to a national trade mark, copyright is subject to the principle of territoriality. Nonetheless, copyrights may be infringed anywhere in the EU in that all Member States must protect copyrights in their substantive law due to Directive 2001/29,⁵⁴

Then, quite significantly, the Court considered that the question as to whether a right protected under substantive law has been infringed (and also the question of attribution of infringement to the defendant) falls within the scope of the examination of the substance of the action by the court having jurisdiction.⁵⁵ At the stage of examining the jurisdiction of a court to adjudicate on damage caused, the localization of the ‘place

⁵⁰ Ibid, para. 30.

⁵¹ Ibid, para. 32.

⁵² Ibid, para. 33.

⁵³ Ibid, para. 34.

⁵⁴ Ibid, para. 39.

⁵⁵ Ibid, para. 40.

Jurisdiction over cyber torts 249

where the harmful event giving rise to damage occurred or may occur'⁵⁶ cannot, according to the Court, depend on criteria which are specific to the examination of the substance and which do not appear in that provision.⁵⁷ Consequently, the Court decided that, contrary to art. 15(1)(c) of Brussels I Regulation, art. 5(3) does not require that the activity concerned is 'directed to' the Member State in which the court seized is situated.⁵⁸

Based on these considerations, the Court concludes 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 seized if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and that the harmful event alleged may occur within the jurisdiction of the court seized.⁵⁹

The solution and reasons provided by the Court are questionable in several aspects. First, the overall argument of the Court seems to be

⁵⁶ Provided that this place covers both the place where the event giving rise to the damage occurred and that where the damage occurred, since *Bier*.

⁵⁷ *Ibid*, para. 41.

⁵⁸ *Ibid*, para. 42. As is known, under art. 15(1)(c), the application of the protective jurisdictional regime for consumers is subject to the condition that the professional 'pursues' or 'directs' commercial or professional activities to the Member State of the consumer's domicile. In *Pammer and Hotel Alpenhof*, the Court ruled that when applied to cyber cases, this provision commends that there is a body of evidence showing that before the conclusion of the contract with the consumer involved in the dispute, it was apparent from the website presenting the trader's activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile (Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527). This body of evidence implies looking at, notably, the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established, with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an Internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists (*ibid*, para. 95).

⁵⁹ Case C-170/12 *Pinckney*, para. 43.

250 *Research handbook on EU Internet law*

somewhat contradictory. The conclusion of the Court was based on the consideration that the likelihood of the damage occurring in a particular Member State depends on the protection of the infringed right by the domestic law of the same, and that the place of registration was correctly chosen in *Wintersteiger* as the place where damage occurred. But the Court also stated that substantive law should not be taken into account at the stage of finding international jurisdiction – and this finding is to be welcomed, for the reasons explained earlier.⁶⁰

Second, it is difficult to understand why the choice of the simple accessibility criterion instead of the targeting criterion stems from the decision not to consider substantive law for the issue of international jurisdiction.

Third, the Court referred to the wording of art. 15 of the Brussels I Regulation for presenting the choice of the targeting criterion as going beyond the terms of art. 5(3) and therefore rejecting it. Nonetheless, it may be reasonably considered that this choice would only corroborate *Shevill*, which requires the infringing paper-based content to be distributed in a Member State, which appears to involve affirmative actions (see above), for that State to be ‘the place where damage occurred’ under art. 5(3). The attempt by the Court to distinguish the specific case of consumer protection (where the targeting approach applies) is therefore not entirely convincing.

Fourth, the Court did not answer the second preliminary question raised by the referring court as to whether infringing content placed online and infringing content placed on material supports which are accessible online are to be treated in the same way under art. 5(3). This issue actually forms part of another broader question on the scope of *Pinckney*: does it mean that online accessibility of infringing content in one Member State gives that Member State jurisdiction regarding domestic damage in all copyright cases? Or does it only concern the specific situation where the claimant’s copyright is infringed in the Member State of the claimant’s domicile, where the infringing website is also accessible provided that the infringing content was not put online by the defendant but by another company? There is no guidance on this question.

Fifth, *Pinckney* leaves open the question of whether the simple accessibility criterion is to be applied for defining the place where damage occurred in Internet-related cases, or if there must be another connecting factor, provided that *in casu*, the claimant is also domiciled in the Member State where the litigious website is accessible. The first

⁶⁰ See the comments on *Wintersteiger* (Section II.2).

alternative would support the interpretation of *eDate* as creating jurisdiction for domestic damage in cyber personality rights cases for all Member States where the litigious online content is accessible. This seems even truer as it is re-stated to be so in *Pinckney*.⁶¹ Similarly, it would confirm that *Wintersteiger* created jurisdiction as far as domestic damages are concerned for the Member State where the infringed trade mark was registered without it being necessary therefore that another connecting factor exists between that State and the factual elements of the dispute. As already suggested, this might, however, not be the best alternative as it would contradict both *Shevill* (using the notion of distribution) and the avoidance of the multiplication of *fora*.

So, most of the questions left open by *eDate*, *Wintersteiger* and *Football Dataco* have remained unanswered, and a number of additional uncertainties have been created.

V. CONCLUDING REMARKS: ARTICLE 5(3) OF BRUSSELS I REGULATION APPLIED TO CYBER TORT CASES AFTER *PINCKNEY*

Based on the four recent cases of the Court of Justice that have been analysed in the preceding paragraphs, the principles that govern the international jurisdiction for online infringement of intellectual property can be summarized as follows.

First, when the dispute involves the infringement of personality rights (*eDate* case law as confirmed in *Pinckney*), the claimant may bring proceedings before: (1) the courts of the Member State where the defendant is established (in respect of all damages); (2) the courts of the Member State where the claimant's centre of interests is situated (in respect of all damages); (3) the courts of the Member State where infringing content placed online is accessible (in respect of domestic damages only). However, it is not yet clear after *Pinckney* whether 'simple' accessibility is always sufficient for creating jurisdiction, or whether some other form of connection between a State and the facts alleged in the claim are necessary. The term 'accessibility' itself may, however, suggest, quite regrettably, that the first alternative is correct until there is further clarification from the Court of Justice.

Second, when the dispute involves the infringement of intellectual rights, the legal protection of which is subject to national registration (such as a

⁶¹ See Case C-170/12 *Pinckney*, para. 36.

252 *Research handbook on EU Internet law*

national trade mark), given that Member States are free not to insert that provision in their national law (*Wintersteiger* case law as clarified and confirmed in *Pinckney*), the claimant can bring proceedings before the courts of: (1) the Member State where the defendant is established (in respect of the whole damage), for sure when the defendant is an advertiser, and probably also when the defendant is an intermediary such as a service provider. This, however, does not result automatically from *Wintersteiger* and is subject to further clarification by the Court; (2) the Member State where the infringed right is registered, even though it may be that other connecting factors are needed for creating international jurisdiction for that State under art. 5(3). This requirement would in fact be preferable. However, as long as the Court does not state that registration must be accompanied by other connecting factors, or replace that criterion by another (as recommended by Advocate General Jääskinen), the current case law could lead to jurisdiction being established in the Member State where the infringed right was registered without any further verification.

Third, when the dispute involves the infringement of copyright and where damage resulting from it occurred in a Member State other than that in which the defendant reproduced the author's work onto a material support, which was then sold via a website, which is also accessible within the jurisdiction of the court seized, that Member State has jurisdiction over the case as far as domestic damage is concerned (*Pinckney*).

Fourth, when the dispute involves other intellectual property rights (including copyrights), the available *fora* under art. 5(3) are still to be defined by the Court. In view of *Pinckney*, it seems unlikely that the targeting criterion used in *Football Dataco* and praised by Advocate General Jääskinen will be applied in that context, even though this might be the best translation in the online context of the 'distribution' criterion of *Shevill*, and consequently the best way to find coherence in the overall case law of the Court of Justice on art. 5(3). It would also have the advantage of avoiding the extension of the use of the accessibility criterion which goes against the goal of preventing the multiplication of *fora* required by the sound administration of justice.

As a final note, it is quite striking to note the difference in approach between the two connecting factors of art. 5(3). In respect of the 'place where the harmful event occurred', the Court of Justice's case law is clear, certain and coherent.⁶² The connection between the *forum* and the

⁶² Even though it still needs to be confirmed in cases involving the infringement of intellectual property rights other than those involved in *Wintersteiger*.

Jurisdiction over cyber torts 253

causal event depends on a connection with the allegedly liable person and not on the allegedly harmful conduct of that person, so that the courts having jurisdiction (in respect of all damages) are those of the Member State where that person is established. This approach provides uniformity and predictability.

By contrast, 'the place where damage occurred' remains a very uncertain criterion as far as intellectual property rights are concerned. *Pinckney* was very much expected to clarify the matter, but the Court has chosen to reduce the scope of the case by rephrasing the preliminary questions, with the consequence that the precedent value of the case is very limited. Moreover, the definition of the *forum damni* as elaborated in *eDate*, *Wintersteiger*, *Football Dataco* and *Pinckney* is questionable at best. In any event, it is to be regretted that after a series of four cases addressing the online infringement of personality rights, trade marks, databases and copyrights, the matter remains so murky and uncertain.