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Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU

Sari Depreeuw and Jean-Benoît Hubin*

Introduction

It has never been easier to share information with the whole world than in our current ‘information society’. We have websites, blogs, peer-to-peer networks and social networking sites that allow us to post, share or stream anything we can come up with and impart it to a worldwide public. It goes without saying that much of this content is subject to exclusive rights, and that consent of authors, performers, publishers or producers is not always sought. When relevant rightholders want to counteract behaviours that they consider infringing, they may face complicated questions due to the cross-border effects that their actions may have. An international news site, for example, may offer information that appeals to citizens in different parts of the world, while an online music streaming website with a Hungarian interface may be accessible in Hungary and in Portugal but will attract mainly a Hungarian public. When one of those services allegedly infringes copyright, the rightholder has several options for taking legal action when ‘extraneous’ or ‘foreign’ elements are present. For instance, when the person making the work accessible is located in a different country from the persons accessing it, and these visitors are not necessarily concentrated in the territory of one single country either, questions of ‘private international law’—in particular jurisdiction and applicable law—arise.

In this article we will focus on questions such as what courts have jurisdiction in the event of an alleged infringement with cross-border effects, and how far their jurisdiction extends. We will not treat the question of the applicable law on this occasion, although it may be a puzzling issue. Copyright law is not entirely harmonized at the EU level, and important differences remain between EU Member States: a certain behaviour may constitute an infringement in one Member State, but may be non-infringing under the law of another Member State. Hence the interest in having one law applied rather than another.

First, we will examine what exclusive rights may be involved and how they are localized in the EU Member

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This article

- This contribution explores some territoriality aspects related to online copyright infringements.
- Faced with a cross-border exploitation of protected subject-matter, the rightholder will have to determine the acts protected by copyright (right of making available to the public, right of reproduction), and tie these to the territory of one or more Member States of the European Union (EU). The localization criteria thus operated will have an effect on jurisdiction.
- This article examines such criteria within the framework of applicable EU legislation and case law of the Court of Justice of the European Union (CJEU). It considers how jurisdiction can be established by reference to the localization of the protected acts, in order to achieve a satisfactory treatment of an alleged online infringement of copyright.

States. We will then determine whether and how the localization criteria affect the jurisdiction of national

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1 The Study is available at http://ec.europa.eu/internal_market/copyright/studies/index_en.htm (last accessed 9 July 2014).

courts. We will see that both legal issues have their own rules that apply autonomously, but their relation will be examined in this article.

National territoriality of copyright and the localisation of protected acts

One of the key features of copyright is its national character.² International protection of literary and artistic works is indeed organized on the basis of national laws rather than a universal copyright law. The Berne Convention created a ‘bundle’ of national protections for the authors who qualify for protection. It thus operates a two-tier approach: it defines a minimum level of protection (harmonization) and guarantees that foreign authors can rely on national copyright protection in other states of the Berne Union (national treatment).³ This system was sufficient when it was first adopted and the exploitation of works was largely organized per national territory.

The same principles apply at the EU level: copyright protection is harmonized to a great extent, but it is granted by the Member States at the national level in the first place.⁴ Protection is in principle limited to the territory of that Member State, so the right holder can only rely on his/her exclusive right against acts that take place on that territory.⁵ Important divergences remain between the national copyright laws, so it matters where an act protected under copyright is localized. While the rights of reproduction, distribution and communication to the public (including making available to the public) are fairly well harmonized, this is much less the case for the exceptions granted by Member States. Rightholders, intermediaries and end users may consequently have an interest in localising their acts in a certain Member State rather than another one.

Before examining in which countries legal action can be brought (jurisdiction), we will verify where the acts protected under copyright are localized.

Localization criteria in EU copyright

With the increase of cross-border traffic, especially since the development of the Internet, it is not so straightforward to narrow down the acts of exploitation to one country. In the largely analogue era, an act of reproduction took place in the country where the copy was made. Little confusion existed on this point: the person who made the copy, the equipment for making the copy and the copy were all in the same place.⁶ The same was true for public performances and local broadcasts that were mostly confined to the territory of one country (except for some incidental spill-over around the borders to the neighbouring country). With the adoption of structurally cross-border technologies, the question has become more pressing. Satellite broadcasts, for example, are meant to be received in all the countries within a certain reception zone: their so-called footprint covers several countries by design. The question is then whether the work is communicated to the public in the country of emission, the countries of reception or both in the country of emission and the countries of reception.⁷ In the former situation, the broadcaster would only have to clear the rights in the country of emission, while in the two latter cases the consent of the rightholders would be required in all countries of the footprint. In Europe, the uncertainty was resolved in the Satellite and Cable Directive,⁸ which explicitly states, in Article 1(2)(b), that the satellite broadcast only takes place in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. This ‘country of origin’ principle entails that the broadcaster does not have to clear the rights in each Member State of reception.

Other directives that harmonized copyright in the EU do not explicitly define a localization criterion. The Information Society Directive,⁹ for example, harmonized the reproduction right and the right of communication

2 On this topic, see PB Hugenoltz ‘The Last Frontier: Territoriality’ in M van Eechoud et al (eds), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009), available at http://www.ivir.nl/publications/eechoud/Harmonizing_European_Copyright_Law_chap9.pdf (last accessed 9 July 2014); A Peukert ‘Territoriality and Extraterritoriality in Intellectual Property Law’ in G Handl and J Zekoll (eds), *Beyond Territoriality: Transnational Legal Authority In An Age Of Globalization* (Brill Academic Publishing 2011), available at <http://ssrn.com/abstract=1592263> (last accessed 9 July 2014).

3 JC Ginsburg ‘Berne Without Borders: Geographic Indiscretion and Digital Communications’, Stephen Stewart Memorial Lecture, Intellectual Property Institute, London, UK, 29 October 29, 2001 (2001), Columbia Law School, Pub Law Research Paper No. 01-30. Available at SSRN: <http://ssrn.com/abstract=292010> or <http://dx.doi.org/10.2139/ssrn.292010>.

4 The CJEU has confirmed this in several decisions, eg Judgment in *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475; Judgment in *Football Dataco and others* C-173/11, EU:C:2012:642.

5 With regard to database rights, see Judgment in *Football Dataco*, above, n 4, para 27.

6 A complicating factor could be that the copy was made at the request and on behalf of another person and that these two people were not present at the same place. Moreover, national laws differed on whom should be considered responsible for the copy: the person actually making the copy or the person on whose behalf it was made.

7 This interpretation is known as the Bogsch theory. See W Dillenz ‘La protection juridique des oeuvres transmises par satellites de radiodiffusion directe’ (1986) *Le droit d’auteur*, 1986, 346.

8 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15 (Satellite and Cable Directive).

9 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 L 167/10.

to the public, including the making available right, but it did not determine in which Member States such acts would take place in case of cross-border exploitations. Yet this directive was adopted to make sure that the national copyright laws would be fit for technical developments, in particular Internet technologies.¹⁰ Similarly, copies of protected works are commonly distributed across borders, but it is not indicated where acts of import or export protected under the distribution right should take place.

Different criteria could be used to tie cross-border exploitation to the territory of one or several Member States: accessibility, exploitation, material acts. Where protected subject matter is offered for streaming on a website,¹¹ some may hold the opinion that a distinct act of communication to the public is performed in every country where the website is accessible. By default, content on a website is accessible worldwide, so that the rights should be cleared for every country where the public can access the content, even if realistically they are not going to. For example, an online music streaming service with a Hungarian interface, for example written in the Hungarian language with prices expressed in Hungarian Forint, will mainly attract a Hungarian audience; but if it is also accessible in Portugal, it makes the works available in Portugal, and thus requires that rights be cleared in Portugal. The only way to restrict the geographical scope of the licence or to prevent infringement, is then to apply technical measures to restrict the service to some countries (geo-blocking). Others consider such interpretation excessive and find that acts of communication to the public only occur in the countries where an act of exploitation can be established. On this view, it matters little that a Hungarian streaming service is accessible in Portugal: if the public in Portugal is not targeted by the service provider, the exploitation only takes place in Hungary (where its audience resides). As such, the work is only communicated to the public in Hungary and should be authorized there (not in Portugal). Alternatively, relevant acts of communication to the public may be found in those countries where a material act constitutive of the technical process is performed, for

example upload to the server, transmitting, receiving the work.

The Court of Justice of the European Union (CJEU) has considered several cases involving acts protected under copyright (or other laws). We will first discuss two cases in the field of copyright (*Lagardère* and *Donner*), and then examine three decisions in which the court localized certain acts that had taken place via the Internet (*Pammer and Alpenhof*, *L'Oréal v eBay* and *Sportradar*).

The issue of interest in *Lagardère*¹² was whether acts of broadcasting by the television station Europe 1, directed to the French public, took place in Germany, where *Lagardère* had a ground station. *Lagardère* had indeed set up a complex technical system to make sure its broadcasts were received in the entire French territory, including the border areas. It sent the programmes by satellite to ground stations in France and Germany, and from there the television programmes were broadcast via Hertz waves. The programmes were mainly meant for the French public (the programmes were in French, the broadcast could be captured mainly in France and the advertisement slots were offered to French advertisers), but they could also be captured on the German side of the border, where a ground station was located. This led a German collecting society to claim that an act of broadcasting took place in Germany and that, consequently, the equitable single remuneration for performers and producers was due in Germany (Art 8 of Rental and Lending Directive¹³), in addition to the remuneration paid in France.

Having excluded the application of the country of origin principle provided by the Satellite and Cable Directive for acts of communication to the public via satellite, the court decided that such acts could be located in France and Germany, and that payment was due. The territoriality principle led to the conclusion that Member States can only regulate activities that occur on their territories.¹⁴ Since *Lagardère* performed the material acts of broadcasting in France and Germany through terrestrial transmitters located in France and Germany, the national copyright laws of those countries

10 This was agreed in the WIPO framework, in particular the 1996 WIPO Copyright Treaty. See Commission, Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97)0628, OJ C 108, 7 April 1997, 25; S von Lewinski and MM Walter 'Information Society Directive' in MM Walter and S von Lewinski (eds), *European Copyright Law A Commentary* (Oxford University Press 2010) 973; S Bechtold, 'Information Society Dir.' in T Dreier and PB Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2006), 360.

11 On that issue, see E. Treppoz, 'Droit européen de la propriété intellectuelle' (2011) RTDE 853; J-P Moïny, 'Droit international et droit européen -

"l'intention géodéterminée": un facteur de rattachement confirmé?' (2012) RDTI 217.

12 Judgment in *Lagardère Active Broadcast*, above, n 4.

13 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376/28.

14 Judgment in *Lagardère Active Broadcast*, above, n 4, para 46.

should determine whether remuneration was due. The amount of the equitable remuneration, by contrast, should be determined taking into account all parameters of the broadcast, ‘in particular, the actual audience, the potential audience and the language version of the broadcast’¹⁵—criteria that refer to the commercial exploitation in that territory. Logically, this meant that the remuneration would be higher in France (where Lagardère was established and where the exploitation value was higher since the programmes in French could reach a greater actual or potential French-speaking public) than in Germany (where fewer people would be interested in programmes in French).

In summary, the relevant act that triggered the application of the national law (and the obligation to pay an equitable remuneration) was the material act of transmission from a ground station located in a Member State. Subsequently the amount of the remuneration per Member State should reflect the value of the exploitation in that Member State in function of the actual or potential audience.

A different criterion was applied in the *Donner* case.¹⁶ The issue here was where, in case of a cross-border distribution, the protected act takes place (Article 4(1) InfoSoc Directive). Mr Donner, a German citizen, was involved in a cross-border sales operation of replica furniture set in Italy but serving the German market. Moreover, he directed his marketing efforts to the German public and had organized a system for the payment for, delivery and return of the goods in Germany. Since Italy and Germany allowed a different level of protection for goods such as furniture, it mattered to know whether the goods were distributed in Germany, where Mr Donner faced criminal prosecution.

The CJEU applied a different criterion than in *Lagardère* and considered that an act of distribution had indeed taken place in Germany, where the public was *targeted*. The court found that an act of distribution might encompass several acts, from the conclusion of the (sale) contract to the delivery of the object to the recipient. Where the transaction crosses State borders, the distribution right may be infringed in a number of Member States,¹⁷ in particular where the public is targeted.¹⁸ The CJEU stated that ‘a trader who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a

specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same Member State, makes, in the Member State where the delivery takes place, a distribution to the public’.¹⁹ Relevant factors for finding such targeting activity in this case were the existence of a website in German, the content and the distribution channels of advertising materials and a cooperation with a freight forwarding company making deliveries in Germany.

This ‘targeting’ criterion has been also applied to online activities. In *Pammer and Hotel Alpenhof*,²⁰ the CJEU was asked to decide under what circumstances commercial or professional activities are ‘directed to’ a Member State where a consumer has his domicile.²¹ The first case concerned a shipping company established in Germany that had been brought before the Austrian courts by a customer, Mr Pammer, who resided in Austria and was not satisfied with a freighter voyage that he had booked via an intermediary. The intermediary had advertised the voyage via the Internet, and the freight company had no commercial activity in Austria. The question submitted to the court was whether the circumstance that the website of the intermediary could be consulted in Austria meant that the trader’s activities were ‘directed at’ that country. In the second case, the operator of a hotel in Austria had a dispute with a consumer residing in Germany and brought legal proceedings against him before the Austrian courts. The hotel operator argued that the Austrian courts lacked jurisdiction because it did not pursue any professional or commercial activity in Austria. The question was whether the trader’s activity was ‘directed’ at the consumer’s domicile when the hotel operator had a website with general information and advertisement but without the possibility directly to conclude a contract online (reservations had to be made using the general information on the site).

In both cases the question was whether a trader (operating via the Internet) ‘directed its activity to the Member State of a consumer’s domicile’ in order to establish jurisdiction on the basis of Article 15 of Regulation 44/2001 of 22 December 2000, also known as Brussels I Regulation.²² The court observed that an intention to target a Member State is more easily derived when an advertisement is spread using some media (press, radio,

15 Ibid.

16 Judgment in *Criminal proceedings against Titus Alexander Jochen Donner*, C-5/11, EU:C:2012:370.

17 Ibid., para 26.

18 Ibid., para 27.

19 Ibid.

20 Judgment in *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, ECLI:EU:C:2010:740.

21 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 L12/1, Art 15 (‘Brussels I Regulation’).

22 Judgment in *Pammer and Hotel Alpenhof*, above, n 19, para 52.

television, cinema, catalogues or offers in person) than others, notably the Internet. The mere fact that an advertisement on a website is accessible outside the Member State where the trader has its establishment does not entail that such content is directed to other Member States. Instead, it should be ascertained whether the trader has manifested its intention to establish commercial relations with consumers in one or more other Member States, including that of the consumer's domicile.²³ The court provided a non-exhaustive list of indicia in this respect: 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.²⁴ By contrast, no such intention could be established based on the mere accessibility of a website in the Member State where the consumer resides, the mention of an email address and other contact details, the use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.²⁵

The same criterion of 'consumer targeting' in some territory was applied in *L'Oréal v eBay*,²⁶ this time not in order to establish jurisdiction but to determine whether trade mark protection applied to goods offered online for sale in the EU but originating outside the EU.

The CJEU decided that (Community or national) trade mark protection applies 'as soon as it is clear that the offer for sale of a trade-marked product located in a third State is targeted at consumers in the territory covered by the trade mark.'²⁷ Any other understanding would undermine the effectiveness of trade mark protection in the EU: the owner of the trade mark would not be able to oppose the unauthorized use of his/her sign, directed at consumers in the EU, merely because

the person behind the offer or the advertisement, the hosting server for the website or the product offered for sale are established or located in a different country. It is not, however, sufficient that the website is merely *accessible* from the territory covered by the trade mark: Additional elements should be provided to establish the 'targeting'. It is for the national court to assess 'on a case-by-case basis whether relevant factors exist, on the basis of which it may be concluded that an offer for sale or an advertisement displayed on an online marketplace accessible from the territory covered by the trade mark is targeted at consumers in that territory'.²⁸ Any details of 'the geographic areas to which the seller is willing to dispatch the product'²⁹ on the website where the offer to sell is displayed are particularly important to assess whether the public in the territory (in this case the EU) are targeted.

In this case, goods were offered for sale via eBay using the domain name www.ebay.co.uk. For the court, supposedly deriving this from the geographical indication in the domain name, this website appeared targeted at consumers in the territory covered by the national and Community trade marks, and the court concluded that the offers for sale via this website were subject to EU protection of trade marks.

Finally, in *Sportradar*,³⁰ the CJEU has decided where acts of re-utilization of a database should be localized. At stake was the protection of a database by means of a *sui generis* right.³¹ The database was exploited via the Internet, across several countries, so the question was whether such use was an act of re-utilization and in which Member State(s) the act took place.

The claimants organized football competitions in England and Scotland and managed the exploitation of the data relating to those matches via the 'Football Live' database. Sportradar was a German company that offered (live) data on English football matches, inter alia, to betting companies, which in turn aimed their services at the UK market. End users who visited the betting companies' websites in the UK were guided to Sportradar's Betradar service. It was clear that Sportradar's operations spread over several Member States. Technically, in order to provide its service, Sportradar uploaded data from the protected database 'Football Live' to a server in Member State 'A' and sent the data to users residing in another Member State 'B' (at the request of those users), where the

23 Ibid., para 75.

24 Ibid., para 93.

25 Ibid., para 94.

26 Judgment in *L'Oréal SA and others v eBay International AG and others*, C-324/09, EU:C:2011:474.

27 Ibid., para 61–62.

28 Ibid., para 67.

29 Ibid., para 65.

30 Judgment in *Football Dataco*, above, n 4.

31 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77-20.

data would be stored in the computer memory and displayed on the screen. Football Dataco claimed that Sportradar's data services constituted an infringement of its database rights in the Football Live database and brought a legal action before the UK courts. The High Court partially declined jurisdiction to state the primary liability of Sportradar, established outside the UK. The Court of Appeal referred a preliminary question to the Court of Justice, not asking the CJEU directly to state whether the UK courts had jurisdiction but to localize the protected acts so the Court of Appeal could decide whether it had jurisdiction.³²

The Database Directive defines re-utilization as 'any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission'.³³ The directive does not contain a criterion to localize this act on the territory of one or more Member States.

The Advocate General held the opinion that the act of sending information obtained from a protected database to a user's computer, upon his/her request, clearly was an 'act forming a necessary constituent part of a process of making available to the public, which . . . constitutes a re-utilisation'.³⁴ The act of 'sending' was considered one of the necessary component parts of the complex act that is 're-utilization'.³⁵ Then the Advocate General localized the re-utilization in both Member States 'A' and 'B'. Instead of locating the re-utilization in the countries where the data were sent (country of emission) or where they were received (country of reception), he applied the 'intended target' criterion that the CJEU had developed in *L'Oréal* and *Pammer and Hotel Alpenhof*. The re-utilization would include a 'sequential succession of a number of acts, which having as their purpose the "making available" of certain data via a networked and multi-polar communication medium',³⁶ hence the place of each of the acts needed to produce the result of the re-utilization determined the place of that re-utilization, ie the both in Member States 'A' and 'B'.

The court followed the Advocate General's Opinion and qualified the sending of data at the user's request as an act of re-utilization, which covers an act 'in which a person sends, by means of his web server, to another

person's computer, at that person's request, data previously extracted from the content of a database protected by the *sui generis* right. By such a sending, that data is made available to a member of the public'.³⁷ In order to establish an infringement of the re-utilization right under UK law, it must be ascertained whether the acts of 'sending' took place in the UK. The court stated that, as in the definition itself, the localization of an act of re-utilization should correspond to independent criteria of EU law. Since a re-utilization may consist of successive operations (including the placing online for the public to consult the data via a website and the transmission of the data to a member of the public), these relevant acts may take place in several Member States.³⁸ In line with its previous decisions, the court stated, however, 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 Instead, the localization of an act of re-utilization depends on the intention of the person performing the act to target users in that territory.⁴⁰ In this case, this intention could be demonstrated by the nature of the data (English football matches), the contracts that Sportradar had with betting services operating in the UK, the remuneration scheme (access by UK users) and the language used that was different from the language of the Member State where Sportradar pursued its activities. Subject to this, the referring court could localize the act of re-utilization in the Member State where the user was present to whose computer the data were transmitted, at his/her request, for purpose of storage and display on screen, ie Member State 'B'.⁴¹ The court concluded that this act of sending is localized—at least—in the Member State 'where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in [that Member State]'.⁴²

In summary, the Advocate General and the court applied the same criteria to localize the protected acts of re-utilization (sending the data following an individual request) but to different results. The database was re-

32 Court of Appeal 6 February 2013, case Nos A3/2012/1349, 1352, 1354 and 1366 [2013] EWCA Civ 27. Available at <http://www.bailii.org/ew/cases/EWCA/Civ/2013/27.html>.

33 Database Directive, Art 7(2)(b).

34 Opinion of Advocate-General P Cruz Villalón in *Football Dataco*, C-173/11, EU:C:2012:377, para 41.

35 *Ibid.*, para 42, 47.

36 *Ibid.*, para 59.

37 Judgment in *Football Dataco*, above, n 4, para 20–21.

38 *Ibid.*, para 34.

39 *Ibid.*, para 36.

40 *Ibid.*, para 39.

41 *Ibid.*, para 43.

42 *Ibid.*, para 47.

utilized in the Member State where the public was targeted and the mere accessibility of the database was not sufficient to establish such targeting intention. This led the Advocate General to place the act of re-utilization in the Member States where the data were stored on a server and where the end-user received the data, transmitted to him/her at his/her request. The court left this issue open and decided that the act of re-utilization was 'at least' localized in the Member State of destination, provided that there was evidence of an intention to target the public residing in that Member State (and possibly other Member States).

Based on the case law discussed above, two principles appear to have guided the CJEU. First, the principle of national territoriality continues to apply to copyright, despite extensive harmonization efforts. Rightholders enjoy the protection of a national copyright law if a material act can be tied to a particular Member State. Where a work is transmitted across borders, it is not excluded that the copyright laws of several Member States apply to the same operation, except in the context of acts of communication to the public by satellite, for which the Satellite and Cable Directive specifically opts for the application of the copyright law of the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication ('country of origin').

Secondly, in order to tie an act that spreads across several countries to the territory of a particular Member State (or several Member States), the court developed a 'targeting' criterion. The national judge is called to verify whether under this criterion there are factual indications that the operator of the act (distributor, trader, etc) had the intention of targeting specifically the public of a Member State. Such intention may be established through a number of factors, but it is not sufficient that a website is merely accessible in a Member State.

So far the court has not applied this criterion to the making available right or the right of communication to the public to online infringements. However, the decisions rendered so far give reasons to assume that this could be the case: the cross-border distribution (protected under copyright) of furniture has been localized using this targeting criterion in *Donner* and in *Sportradar* the re-utilization of a database (technically similar to the making available of a work) was held to take place (among others) in the Member State of targeting.

Localizing acts of online exploitation within the EU

Having identified and described the principles applied in EU copyright, we will try to apply these to two typical

forms of online exploitation: streaming (or the offer for streaming) and downloading (or the offer for download).

Reducing both forms of exploitation to their most characteristic features, we will treat as 'streaming' those forms of exploitation where protected subject matter (eg music or films) is transmitted by a content provider to an end user in a way that allows the end user to access the subject matter without possessing a permanent copy. When a work is instead made available for download, the end user receives a permanent copy of the subject matter over which he/she has complete control and that allows him/her to access the work whenever he/she wants without having to request another transmission of the work from the content provider ('downstream copy'). In both cases, the protected subject matter is hosted on a server from which the files containing the film or the music are transmitted to the end users (either by streaming or for download). This copy is referred to as the 'upstream copy'.

In order to qualify such exploitations in copyright terms, it should be verified whether there are any acts of reproduction or communication to the public (Arts 2 and 3 of the InfoSoc Directive). Without going into the details and for the sake of this exercise of localizing the restricted acts, it can be assumed that the application of these exclusive rights leads to the following analysis.

When protected subject matter (such as music, film or text and images on a website) is offered for streaming or download to users, a copy is stored on a host server. This upstream copy can be qualified as an act of reproduction. This copy also makes it technically possible to offer that content to the public: whenever a member of the public has access to the service, he/she can request the transmission of the file containing the film or the music. This availability can be qualified as an act of making available to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them. Finally, in order to receive and consult the file, the end user will make some downstream copies. When a work is streamed to the recipient, these copies are not permanent: they allow the end user to see the video or listen to the music but do not give him/her a permanent control over the file (many end users of course find ways to make a permanent copy from the temporary copies). In most Member States of the EU, such downstream copies are qualified as 'temporary reproductions' and may then be exempted as temporary acts of reproduction under Article 5(1) of the InfoSoc Directive, which is the only mandatory exception for EU Member States to implement into their national laws. The situation is different for works offered for download: an end user who downloads a work generally makes a permanent copy on his/her device. Such permanent copy cannot be exempted on the same basis, and

consequently it requires the author's consent unless another exception applies, such as the exception for private use within Article 5(2)(b) of the InfoSoc Directive.

Whenever a work is offered for streaming or download, we can thus identify three restricted acts: a reproduction on the hosting server (upstream copy), an act of making available to the public, and a reproduction at the end user's device (downstream copy).⁴³ This leads us to the question of where the reproductions and the act of making available take place.

So far we have found no criteria in the EU *acquis* to determine the localization of the upstream reproduction. Logically the reproduction takes place where it is made, ie in the country where the person making the copy is located when he/she makes the copy. A reproduction indeed does not imply any transfer or any directing activity, which makes a targeting criterion unsuitable to be applied to this exclusive right.

This is straightforward for all analogue copies: the person making the copy and the copy are in the same place (eg a photocopy). The Advocate General in *Pinckney* considered that 'infringements of the reproduction right assume in principle a strictly territorial dimension' and localized the reproduction in the country where the pressing of the unauthorized CDs had occurred.⁴⁴ He added that extra-territorial effects could result from subsequent acts of communication to the public or distribution, but not from the act of reproduction itself. This is not so clear for copies made and stored at a distance, copies made and saved in the cloud: the person making the copy could be in Member State 'A', while the copy might be hosted on servers in Member State 'B' (or even outside the EU). Also, storage on a server is a continuing situation, which means that the location of the copy might change throughout its existence. Where should such reproduction be localized? Arguably, it makes most sense to localize the copy where the person was when she made it or where she usually uses it. The territoriality principle indeed allows a country to regulate behaviour taking place on its territory, and the behaviour of the person making the copy is probably more significant than its physical storage. A professional content provider, such as an online music store, could be established in Member State 'A' and save its music database in Member State 'B'. Based on where the copies of the works are stored, the reproduction takes place in Member State 'B'. The music store provider, however, takes its commercial, technical and legal decisions where it is established, ie in

Member State 'A'. This may be a more significant country to situate the copy than the country where the copy is stored, which may be chosen for other reasons (such as competitive hosting services, favourable tax conditions or even a lower-level copyright protection). Similarly, the downstream copy on the end user's device could be seen as a reproduction made in the country where the end user was when he/she downloaded the copy on his/her device (eg MP3 player, CD, phone, computer). We assume that the downstream copies, following the streaming of a file, are of a transient or incidental nature and that they are exempted under the national equivalent of Article 5(1) of the InfoSoc Directive. Other copies should be either covered by a licence or exempted by an exception/limitation under national copyright law. This is precisely where the localization of the reproduction shows its importance: the exceptions/limitations listed in the InfoSoc Directive are implemented in the national copyright laws in an uneven way: a certain act that may be covered by a specific exception/limitation in one Member State may not be in another one (one of the most notorious examples being probably the private copy exception). The end user has a clear interest in knowing where his/her copy is made, since a copy made without the rightholder's consent could be exempted by an exception/limitation in one country but infringing the copyright law of another country. In many cases the reproduction takes place in the country where the end user has downloaded the file to his/her device. When he/she downloads a copy to a remote server, he/she may not even know where the copy is physically stored. Arguably, it matters little in which country the hosting servers are located, when the purpose of the law is to regulate the behaviour of the end user. It can be contended that the reproduction is located in the country where the end user makes and uses the copy. At the same time, the work is also communicated to the public, more precisely it is made available to the public and transmitted to any user at his/her individual request. Several criteria could be used to localize this protected act in one or several countries (country of emission, reception or target).

It seems unlikely that *de lege lata* the 'country of origin' principle can be applied to the making available right: it is provided in the Satellite and Cable Directive, which can be considered a *lex specialis* that only deals with the localization of satellite broadcasts. Instead, the 'targeting' criterion of the CJEU could be applied to the making-available right. The CJEU has applied it to the dis-

43 Some Member States do not qualify the upstream copy and the availability for transmission separately but rather as one act of making available to the public. We will not go into this discussion here.

44 Opinion of Advocate-General Jääskinen in *Pinckney*, C-170/12, EU:C:2013:400, para 25.

tribution right under copyright and to several cases relating to Internet communications, including one communication protected under the re-utilization right of protected databases. These decisions give us good reasons to think that the CJEU would not shy away from applying the targeting criterion to the making-available right under copyright.

In each specific case, it should then be verified whether the content provider had the intention of targeting the public of a given Member State. Elements could be found in the advertisement of the service, its content, the languages used and the delivery methods. For example, an online music service may offer new releases from international artists that are popular in all Member States, but it may also present local artists with a large fan base in their home State or playlists composed by a local festival or national broadcasters. In our example, a content provider offers a Hungarian version of its online music store: the interface is in Hungarian, subscriptions fees are stated in Hungarian Forint, the cheapest package is funded by advertisements in Hungarian and its home page features playlists inspired by the Sziget festival in Budapest. Such elements may be seen as indications that the content provider targets the Hungarian public, and consequently the protected subject matter is made available to the public in Hungary. Inversely, it can be derived that the subject matter is not made available in other Member States, even if the music service is accessible everywhere else. Any user in Portugal may have the opportunity to listen to the music via this service, but for obvious reasons most may be unlikely to do so. The circumstance that some members of the perhaps more significant community in a city like Brussels, as the capital of Europe, continue to use the Hungarian version of the music service while residing in Belgium may not suffice either to establish that the public in Belgium is targeted: these transmissions may be seen as overspill into another country rather than active and intentional targeting by the provider of the online music store. The consequence of this exercise is that the content provider is under the obligation to clear the making available right from the persons and entities holding the rights for Hungary (or rely on an exception in the Hungarian copyright law) but not for the accessibility in Portugal or Belgium.

While the targeting criterion is not too difficult to apply in specific cases such as our previous example or

the cases before the CJEU, it may lead to more uncertainty in case of services that are appealing to a broader audience. For example, websites that offer international news in a widely understood language (mostly English) can raise the interest of the public in many Member States and are not designed to select a territorially defined public and exclude others.⁴⁵ Similarly, websites streaming popular sports games (such as football games during the FIFA World Cup) will attract a lot of visitors, regardless of the language of the commentaries.⁴⁶ Such websites do not 'target' the public of one Member State or selected Member States. Arguably, these websites make the works or other subject matter (eg articles, photographs, images, videos) available in all the Member States where they are accessible, and the making-available right needs to be cleared for all these Member States. Moreover, whenever certain content is offered for download, the reproduction right should be cleared for the same territory.

One final observation must be made. While the intention to target the public in one Member State is certainly likely to be a criterion for localizing the making available of a work to the public of one or more Member States, it is not excluded that other criteria apply. As the CJEU stated in *Sportradar*, the protected act takes place at least in the countries where the public is targeted. It is possible, then, that the act of making available takes place in the targeted Member States and, for instance, in the country of origin. This remains to be seen.

In summary, online exploitation of protected subject matter can be analysed in copyright terms as involving acts of reproduction and communication to the public, in particular making available to the public. Most of the time, such online exploitation entails acts in several Member States, in particular in countries where the files are hosted, where the content provider is established and conducts its business, where the end users reside and access the work and engage in copying activities.

Apart from a criterion for satellite broadcasts in the Satellite and Cable Directive, the directives that constitute the copyright *acquis* do not expressly provide any localization criteria. In line with the decisions of the CJEU, we have applied a targeting criterion to the making-available right. Where no specific public is targeted, the work is arguably made available to the public that has access to the work. The targeting criterion can hardly be applied to the reproduction right, so we have

45 Some newspapers, such as *Der Spiegel*, are traditionally published in the language of one country (German) and offer an international version in English, with a selection of their articles of most interest to the public outside Germany.

46 Even if football games are not protected under copyright, the broadcast may be protected by neighbouring rights (producer, broadcaster). See on

this point the CJEU's decision in CJEU C-403/08 and C-429/08, *Football Association Premier League, NetMed Hellas, Multichoice Hellas c. QC Leisure, David Richardson, AV Station, Malcolm Chamberlain, Michael Madden, SR Leisure, Philip George Charles Houghton, Derek Owen; Karen Murphy v. Media Protection Services*, para 98.

argued that this should be localized by reference to the person making the copy, rather than a technical criterion that verifies where the copies are stored but that has no other significance for the exploitation of the protected subject-matter. There is no absolute legal certainty regarding the localization of the reproduction right and other criteria (in addition to the targeting criterion) for the making available right.

More legal certainty on the localization criteria would be welcome. As the CJEU pointed out in *Sportradar*, the localization of the acts may have an influence on the questions of jurisdiction and applicable law.⁴⁷ In the next section, we will examine the rules of jurisdiction applicable to copyright infringements laid down in the regulations and in the decisions of the Court of Justice (leaving aside the rules to determine the applicable law). In the final section, we will apply these rules to online exploitations and the rights of making available and reproduction localized as described.

Jurisdiction

Having determined where a copyright-protected act is localized and an alleged infringement has occurred, the copyright holder has to determine the country(ies) where he/she will bring legal proceedings against the person(s) allegedly liable for that infringement. The courts of a certain Member State may only hear copyright infringement cases if, and to the extent that, the territory in which they have jurisdiction is concerned.⁴⁸ Hence, the principles that help to localize copyright-protected acts have also an impact on issues of jurisdiction, although the rules used to determine jurisdiction are autonomous from localization of the copyright-protected act. They are based on factual localization criterion and apply independently from the debate on the substance of protection,⁴⁹ even if both issues are related.⁵⁰

In the present section, we will present the rules applicable to establish jurisdiction in the EU in the context of an alleged copyright infringement. We will then focus on the application of those principles to online acts of exploitation of protected works.

Rules on jurisdiction applicable to copyright infringements

The principles on jurisdiction in civil and commercial matters are determined by the Brussels I Regulation.⁵¹

Recital 11 to the Regulation states that the rules of jurisdiction must be highly predictable and founded on the general principle that jurisdiction is based on the defendant's domicile. Article 2 therefore provides that the claimant may always sue the defendant before the courts of the Member State where the latter is domiciled.

In addition to the general rule of jurisdiction of the defendant's domicile, the Brussels I Regulation also proposes alternative grounds of jurisdiction based either on a close link between the court and the action or the objective of facilitating the sound administration of justice. One of these alternatives (Art 5(3)) gives jurisdiction to the courts of the Member State 'where the harmful event occurred or may occur'. That provision applies in the context of copyright infringements and justifies the competence of the courts of the Member State where the infringing acts take place. This raises the question where to localize the infringement in case of complex acts, for example the making available to the public that consist in several material acts and that may be localized in different countries. The expression '[the] place where the harmful event occurred' may thus appear unclear and result in a lack of legal certainty for the rightholders and alleged infringers alike. Moreover, in the context of cross-border exploitation of copyright-protected works, a 'harmful event' may refer to the event giving rise to an infringement or the resulting damage, and these elements may occur in different countries. In cases like these, the 'harmful event' rule does not answer the question as to what elements have to be taken into account as a connecting factor to determine jurisdiction.

For simple acts, such as a reproduction, the question of jurisdiction may be fairly straightforward. This was the view of Advocate General Jääskinen, who found that the reproduction of a CD was made in the country where the pressing was made, and that the infringement of an author's reproduction right did 'not assume any cross-border nature, since the place of the event giving rise to the harm and the place where the harm occurred are the same'.⁵² Interestingly, he added that the harm occurs in the same place because it 'is entirely brought about by the sole fact of the carrying-out of the act of reproduction'.⁵³

Other copyright-protected acts, such as the right of communication to the public or the distribution right, are more likely to contain an extraneous element, which

47 Judgment in *Football Dataco*, above, n 4, para 29.

48 Opinion in *Pinckney*, above, n 42, para 25.

49 Judgment in *Pinckney*, C-170/12, EU:C:2013:635, para 41.

50 Opinion in *Pinckney*, above, n 42, para 45; E Treppoz, 'Droit européen de la propriété intellectuelle' (2011) RTDE 847, 851.

51 Brussels I Regulation, above, n 20.

52 Opinion in *Pinckney*, above, n 42, para 53.

53 Ibid: opinion in *Pinckney*, para 53.

entails that ‘the various elements of the alleged liability are separate’, the connecting points are not the same and ‘the harm resulting from infringements of distribution or communication rights assumes a potential addressee or public, which may be in a different place from that act’.⁵⁴

We will now examine how the CJEU has interpreted the concept of ‘place where the harmful event occurs’ in Article 5(3) of the Brussels I Regulation. First, we will recall the general interpretation provided in the *Mines de Potasse*⁵⁵ and *Shevill*⁵⁶ decisions. Then, we will analyse how the court has applied this criterion in the context of online uses not relating to copyright in the judgments in *eDate Advertising*⁵⁷ and *Wintersteiger*. Finally, we will focus on *Pinckney* and *Hejduk*⁵⁸ in which the court was asked to apply Article 5(3) in the context of online copyright infringements.

In its 1976 decision in *Mines de Potasse* the then European Court of Justice was asked to guide the national court in establishing jurisdiction in a case of water pollution that had been allegedly caused in France and had effects in The Netherlands. The court stated that the wording “place where the harmful event occurred” in Article 5(3) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters provides an option for the plaintiff, faced with complex infringements, to start proceedings either at the place where the damage occurs or at the place of the event giving rise to it.⁵⁹

The court confirmed that interpretation in *Shevill*.⁶⁰ That case arose from the publication of a libellous newspaper article in the United Kingdom and its distribution in different Member States, causing damage to the individual affected by that article in each country where the newspaper was distributed. The court built further on the *Mines de Potasse* principle, and distinguished between the two criteria for jurisdiction (the event giving rise to the damage or the place where the damage occurred) in terms of the scope of jurisdiction of the courts seized. First, the victim/claimant has the option of bringing his/her claim in the country of the event giving rise to the damage, this being the country of publication. This court would have jurisdiction to decide on the entire claim, ie the full amount of the damage suffered. Secondly, the plaintiff can bring legal action in the

countries where the damage occurs, ie the countries where the newspaper was distributed. The Court of Justice, however, brought an important limitation to the scope of jurisdiction of the courts of the countries where the damage occurs: these courts would only be competent for the damage suffered in each respective country. A judge seized on this basis cannot award compensation for the entire damage, but only for the damage on his/her territory.

The Court of Justice has recently applied the principles resulting from *Mines de Potasse* and *Shevill* to infringing acts committed over the Internet.

In *eDate Advertising*,⁶¹ the court dealt with online publication of newspaper articles in breach of two individuals’ privacy. These publications caused damage to these persons in many countries besides those where the publishers of the article were located and where the victims were domiciled. In its decision, the court pointed out the specific issues relating to the Internet and the difficulty to apply the existing case law relating on Article 5(3). It considered that:

the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person’s Member State of establishment and outside of that person’s control. It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.⁶²

The court stressed the necessity of adapting the existing criterion of the place where the damage occurs. For the first time, it allowed a plaintiff to bring an action for the entire damage in the country where the damage was suffered. In this case, the plaintiffs had suffered an infringement of a personality right, and the court accepted that they bring a claim in respect of the entire damage in the country where they had ‘the centre of their interests’.⁶³

54 Ibid., para 55.

55 See footnote 59.

56 See footnote 60.

57 See footnote 61.

58 See footnote 74.

59 Judgment in *Handelskwekerij Bier v Mines de potasse d’Alsace*, 21/76, EU:C:1976:166, para 19.

60 Judgment in *Shevill and v Presse Alliance*, C-68/93, EU:C:1995:61.

61 Judgment in *eDate Advertising and others*, C-509/09 and C-161/10, EU:C:2011:685.

62 Ibid., para 45–46.

63 Ibid., para 48.

The court thus nuanced its previous position that claims for the entire damage should be brought before the courts of the country of the event giving rise to the damage or the defendant's domicile. That connecting factor was based on the objective of the sound administration of justice and on the aim of predictability of the rules governing jurisdiction.

However, some uncertainty remains regarding the scope of application of the *eDate Advertising* decision: some scholars consider that it is strictly limited to the protection of personality rights and that does not extend to the infringement of other kinds of rights (in particular copyright), while others see an opportunity for more flexibility.⁶⁴

Still, the plaintiff has the alternative to sue the person allegedly liable for the infringing act in the country of the event giving rise to the damage, or in each country where the damage occurred. In theory, damage could occur in every country where the website containing the infringing article was accessible. So the courts of the countries where the content is accessible would have (limited) jurisdiction: every Member State would have jurisdiction with regard to a part of the damage for the mere reason that a website was accessible on its territory. According to E. Treppoz, the criterion of accessibility might even provide jurisdiction to Member States where no real prejudice is suffered.⁶⁵ However, the courts in these countries would not award any damages, since their jurisdiction is limited to the harm suffered in their territory.

In respect of what we observed in the first part of this article on the localization of acts, we can already observe a difference. In the context of online infringements the CJEU localized the relevant acts in the Member States where the public was targeted and rejected the criterion of accessibility. Jurisdiction for deciding of infringements, by contrast, can be established based on the accessibility of the website. This difference can be explained by the different objectives of these provisions. The localisation of a protected act will determine inter alia for which territories a licence should be obtained. The criteria to establish jurisdiction may be larger, considering principles such as the sound administration of justice. The CJEU also deviated from the criterion of the 'intention to target', which it applied in *Pammer and Hotel Alpenhof*⁶⁶ precisely in order to establish jurisdiction. That decision was however based on another provi-

sion (Art 15) of the Brussels I Regulation, which focuses on the existence of activities directed to a Member State. That criterion of the directing of activities of the service provider to a consumer is not mentioned in Article 5(3) of the Brussels I Regulation, which probably explains the difference in the application of these provisions.

The *Wintersteiger* case⁶⁷ gave the court the opportunity to apply Article 5(3) to online infringing, and delineate the scope of the *eDate Advertising* doctrine. In this case, an advertiser based in Germany made unauthorised use of a trademark registered in Austria, by means of a web search engine focused on Germany. The court re-stated the possibility for the holder of a trade mark of suing the advertiser in the country of the event giving rise to the infringing act or in the country where the damage occurs. As to place of the event giving rise to a damage caused through the use of Internet, the court rejected the interpretation that this is the place where a server is installed: the server's location is uncertain and would lead to unforeseeable outcomes in terms of jurisdiction. Instead, the event giving rise to the infringement of the trademark was described as the 'activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications',⁶⁸ not the display of the advertisement itself. This event takes place where the activation of the technical process displaying the infringing content occurs, which in this case was the place of establishment of the advertiser. It is a definite and identifiable place, and therefore likely to facilitate the taking of evidence and the conduct of the proceedings.⁶⁹ In this case, the action regarding the alleged trademark infringement by means of keywords to a search engine could be brought before the courts of the Member State of the establishment of the advertiser.

With regard to the criterion of the place where the damage occurs, the court gave the courts of the Member State in which the right at issue is registered the jurisdiction to determine whether the right has been infringed and to assess all the damage allegedly caused to the proprietor of the protected right. If *eDate Advertising* provided an accessibility criterion for establishing jurisdiction, the decision in *Wintersteiger* imposed a restriction to this approach, which was justified by the fact that the right at issue (a trademark) has to be registered to receive protection.

64 JC Ginsburg 'Where does the act of "making available" occur?' *The Media Institute* (29 October 2012), available at <http://www.mediainstitute.org/IPI/2012/102912.php> (last accessed 7 February 2014). See however Treppoz, above, n 48, 847. See below on the pending preliminary question in *Hejduk*.

65 Treppoz, above, n 48, 853.

66 See footnote 20.

67 Judgment in *Wintersteiger*, C-523/10, EU:C:2012:220.

68 *Ibid.*, para 34.

69 *Ibid.*

In *Pinckney*, the Court of Justice applied Article 5(3) of the Brussels I Regulation to a copyright infringement, following the claim of a singer-songwriter living in France, whose songs were reproduced without his consent on CDs in Austria by an Austrian company.^{70,71} The CDs were then marketed on the Internet by UK companies, whose websites were accessible in France. The songwriter brought proceedings against the Austrian company in France. The defendant challenged the competence of the French courts and the case was referred to the CJEU to decide whether France had jurisdiction on the basis of Article 5(3) of the Brussels I Regulation.

In this case, it was clear that the event giving rise to the damage had not taken place in France, so it had to be verified whether this was nonetheless the place where the damage occurred. The court confirmed the application of the theory of the accessibility and stated that, contrary to Article 15 of the Brussels I Regulation, Article 5(3) does not require the activity to be ‘directed to’ the Member State in which the court seized is situated. The CJEU consequently decided that a court has jurisdiction over a copyright infringement 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. According to the CJEU, ‘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 a website accessible within the jurisdiction of the court seized’.⁷² Nevertheless, the CJEU reminded that, if the protection granted is applicable only in that Member State, the court seized on this basis would only have jurisdiction to determine the damage caused within the Member State in which it is situated. Broader jurisdiction allowing a court to decide on the damage caused in other Member States would imply that this court could ‘substitute itself for the courts of those States’, even though these other courts have jurisdiction (in principle, in the light of Article 5(3) of the Brussels I Regulation and the principle of territoriality)

to determine the damage caused in their respective Member States, the nature of the harm and they are best placed to ascertain whether the copyrights protected by the Member State concerned have been infringed.^{73,74}

Like *eDate Advertising*, the *Pinckney* decision departs from the notion of ‘intention to target’ which was used as to the localization of the material acts in the decision *Sportradar*.

A reference for a preliminary ruling from Austria is currently pending before the CJEU, concerning the interpretation of Article 5(3) in the context of alleged online copyright infringements. The background proceedings related to a dispute between an Austrian photographer and a German company that operated a website with a ‘.de’ top-level domain on which her photograph was accessible without her consent. The photographer sued the German company in Austria because the website was accessible in Austria, and, based on the principles in *eDate Advertising*, she considered that she could choose whether to bring legal action in the Member State where the defendant had its establishment (Germany) or in the Member State where she has the centre of her interests (Austria). The defendant challenged the jurisdiction of the Austrian courts and argued that, under Article 5(3), the courts of the place of upload (Germany) were competent to hear the case. Accessibility, according to the defendant, may only be a criterion for jurisdiction if the damage occurs on the territory of, and the website is (at least) directed to, this Member State. The CJEU was asked to consider whether, under Article 5(3), there would be jurisdiction only in the Member State in which the alleged infringer is established and in the Member States to which the website is directed.⁷⁵ The answer to this question will clarify whether mere accessibility of a website (in Austria) suffices to establish jurisdiction. The decision is also eagerly awaited, because for the first time the CJEU will apply Article 5(3) in the context of alleged infringement of the making-available right.

In summary, it follows from this analysis that a legal action may always be brought before the courts of the Member State where the defendant is domiciled (Art 2

70 Judgment in *Pinckney*, above, n 47.

71 See footnote 49.

72 Ibid., para 44.

73 Ibid.

74 The French Supreme Court has applied the judgment of the CJEU on 22 January 2014: *Pinckney v KDG Mediatech*, Cass, 22 January 2014.

75 *Hejduk*, C-441/13, Reference for a preliminary ruling, 11 October 2013. The question referred:

Is Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that, in a dispute concerning an infringement of rights

related to copyright which is alleged to have been committed in that a photograph was kept accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only in the Member State in which the alleged infringer is established; and in the Member State(s) to which the website, according to its content, is directed?

See ‘Prejudiciële vraag: Rechterlijke bevoegdheid bij topleveldomein van een andere lidstaat’, IEF 13169 (22 October 2013), with a link to a translation of the decision of the referring court, available at <http://www.ie-forum.nl/> (last accessed 9 July 2014).

Brussels I regulation). Complementary to that general rule, in the context of copyright infringements legal proceedings may be also brought before the courts of the Member States where the event giving rise to the damage takes place or the damage occurs (Art 5(3) Brussels I Regulation). The courts of the Member State where the event giving rise to the damage occurs can award the entire damage, while the courts of the Member States where the damage is localized will have jurisdiction only for the damage occurring on their territory. Keeping in mind the territoriality of copyright, the damage will be the largest in the Member State where the act is localized (ie targeting) and the right holder has an interest in acting in that Member State or, if it is not the same, in the country where the defendant is domiciled (for efficiency reasons). This does not mean that he/she cannot act in those Member State where the work is accessible, but he/she may be acting there for negligible damages. Even though it may theoretically act in several European countries, the rightholder should opt either for the country where the defendant is domiciled (this generally corresponds to the place where the event giving rise to the infringement is localized) or for the Member State targeted by the unauthorized exploitation.

Finding jurisdiction for online exploitation of works in the EU

It appears, from the brief description of the principles as interpreted by the CJEU, that the author (or other holder of a copyright or neighbouring right) can bring her claim regarding the infringement of her copyright before the courts of different Member States. The scope of jurisdiction depends on the legal ground. The courts of the Member State where the defendant is established and those of the 'event giving rise to the damage' have jurisdiction for the entire damage suffered by the victim of the infringement. The courts of the Member States where the damage occurs have jurisdiction with regard to the damage caused in that Member State exclusively.

Where the alleged infringement results from unauthorized use of protected subject matter over the Internet, the event giving rise to the damage could be the upload of the subject-matter to a server from where it is accessible to the public. The act of uploading could take place in the Member State where the defendant has his/her domicile or elsewhere, depending on where he/she is located at the time when he/she makes the subject matter accessible online.

For online copyright infringements, there remains some doubt as to the place where the damage occurs, which the CJEU could solve in *Hejduk*. If it confirms the

choice made in *eDate Advertising* and *Pinckney*, it could consider that the accessibility of a website in a Member State provides jurisdiction to the courts of that country because this accessibility could potentially cause damage to the rightholder. Such accessibility could suffice, even if the infringing act is not localized in that country according to the targeting approach the CJEU applies as to the localization of the material acts. As a consequence, the courts of a Member State of access might have jurisdiction to hear a case resulting from a copyright infringement but they would have difficulty to grant damages if the work is merely accessible. Where the content provider has made a discernible effort to target the public residing in a certain Member State, the courts of that Member State will have jurisdiction and be able to decide on a larger part of the damages that can be established.

In the context of the online exploitation of copyright protected works, we have identified the existence of several restricted acts: a reproduction on the hosting server (upstream copy), an act of making available to the public and a reproduction at the end user's device (downstream copy). If these acts infringe the exclusive rights of the author, the rules of the Brussels I Regulation may provide jurisdiction to the courts of different Member States.

According to Article 2, the person liable for the infringement may always be sued in the Member State where he/she is domiciled. The alleged infringer may be required to answer for the damage caused by the reproduction (upstream and downstream) and the making available to the public without the rightholder's consent. This does not mean that the competent court gets to apply its own law: it is well possible that the competent court will have to assess these acts and their infringing character by the law of other Member States (*lex loci protectionis*).

Furthermore, the courts of the Member States in which the events causing the damage take place are competent to decide on the entire damage. Similarly to *Wintersteiger*, these 'events giving rise to the damage' could be the decision of the content provider to make protected subject matter accessible from a website or some other online service. It could also be the act of uploading the files to the server or the material act of making a copy on a server. A further question is then how the event giving rise to the damage should be described where a file is offered for download: should the fact of the availability for download offered by the content provider be emphasized or rather the actual download by the end user? Arguably, either interpretation could justify the jurisdiction of a court, but any choice thus operated will have implications for the scope of the juris-

diction. Finally, the rightholder has the possibility of bringing legal action before the courts of the Member States where he/she suffers the consequences of the preceding 'event' and where he/she suffers the damage. Arguably, this could be the Member States where files are downloaded, ie where the end user makes and stores the copies of the downloaded files. Where a work is made available for the end user to access it (streaming), the damage could occur in every Member State where the work is accessible. It follows that the courts of all Member States where the work is accessible online have jurisdiction, or, in other words, that a court should decline jurisdiction when the content provider has used technical means (geoblocking) to prevent people staying in a particular Member State from accessing the content. Where a court's jurisdiction is based on mere accessibility of a website, it will have a limited margin to award damages. In our example, a rightholder may seize a Portuguese court for infringement of copyright in her work (music, film) due to mere accessibility of a website in Portugal, even if the website is entirely presented in Hungarian, offers mainly Hungarian films or music and allows payment only in the Hungarian currency. The Portuguese court will be able to award limited damages because the rightholder will have suffered limited damage in Portugal. The concerned rightholder will be probably more successful if he/she seizes the Hungarian courts, even if the content provider is established in another Member State. The content provider would be deemed to have organized the offer of the works in such a way that the Hungarian public is targeted in order to maximize the commercial return of his/her investment (eg income from advertisers for the Hungarian market, paying customers staying in Hungary).

Finding a satisfactory solution

In the first section, this article has recalled the principle of territoriality of copyright, and examined CJEU case law localization of protected acts of reproduction, distribution and making available to the public on the territory of one or more Member States. It was established that the CJEU started from a technical criterion (the presence of a broadcasting station on the territory of a Member State in *Lagardère*) to a more economic criterion, i.e. the 'targeting' of a public within the EU (*L'Oréal v eBay*) or within a Member State (*Pammer and Hotel Alpenhof*; *Donner*; *Sportradar*). In *L'Oréal* the Court applied the "targeting" criterion to localise the act within the EU (as opposed to third countries) and in the

other cited cases this criterion was used to localise the act in one particular member state. In the context of online activities, the CJEU stated that mere accessibility of a website in a Member State is not sufficient to localize the relevant act there. This localization criterion was often connected to a question on jurisdiction but it could also clarify whether there was an infringement of a territorial intellectual property right (a community trademark in *L'Oréal v eBay* and copyright in *Donner*).

In the second section, the rules establishing jurisdiction according to the Brussels I Regulation were analysed together with relevant CJEU decisions. Starting from the general principle that the defendant might be sued before the courts of the Member State where he/she has his/her domicile and where the claimant could claim compensation for the entire damage, we have also discussed the possibility of initiating proceedings before a court in the Member State where the harmful event occurred. The CJEU has interpreted this criterion as meaning the courts of the Member State of the event giving rise to the damage or the Member State(s) where the damage occurred or may occur. The choice of one or the other criterion is not irrelevant: the court of the place where the event occurred is competent to decide on the entire damage (regardless of where the damage occurred or may occur), while the courts of the place of the damage can only rule on the damage occurred or occurring on the territory of their Member State.

It seems then that accessibility of a website is a necessary condition for establishing jurisdiction but accessibility alone does not guarantee a satisfactory treatment of the case from the rightholder's perspective because the court's jurisdiction is restricted to the damage arising in that Member State. From a practical standpoint, it should be first ascertained whether the level of the damage in the Member State of accessibility would justify the cost and burden of litigation. The most obvious option is then to seize the court of the Member State where the public is targeted and where the exploitation of the work can be established. The 'targeting' of a public in a Member State may not be a condition for jurisdiction, but in practice it will allow the rightholder to claim compensation for an important part of his/her alleged damage. This criterion would be a natural choice for the content provider, whose intentions and efforts to establish a large audience are decisive for establishing the 'targeting' of a local public. Even if there is no formal criterion that imposes a choice for the courts of the Member State where the public is targeted, it seems that in practice this offers most chances of a satisfactory treatment of an online copyright infringement claim.