

Max Planck Institute
for Intellectual Property and Competition Law

Internet Infringement – which courts are
competent to decide in the EU?

Annette Kur
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Prelims, I

- IF DEFENDANT IS DOMICILED IN THE EU, Jurisdiction of European courts seized with internet infringement cases is determined by the Brussels Regulation (BR) or the Lugano Convention
- IF NOT, domestic procedural law applies, which may allow invoking ‘exorbitant’ heads of jurisdiction (domicile of plaintiff; location of defendant’s assets, etc.)
- The BR I (No. 44/2001) was replaced by BR I^{bis} (No. 1215/2012), applying to proceedings initiated after 15 Jan. 2015
- The changes affect the numbering of provisions, but not the content of what is reported in the following



Prelims, II

- In the following remarks, a basic distinction applies between
 - A) **territorially unlimited jurisdiction**, i.e. jurisdiction covering infringements occurring in other countries and potentially worldwide;
 - B) **territorially limited jurisdiction**, i.e. jurisdiction covering only infringements occurring in the forum state
- The point shall be made that the CJEU is rather restrictive in granting jurisdiction of type A, whereas the rules governing jurisdiction of type B are applied in a(n overly) generous fashion



Territorially unlimited jurisdiction ('type A'): defendant's domicile

- Article 2 BR I (4 BR I^{bis}) allows bringing all claims against a person domiciled in the EU before the courts in his home country ('general jurisdiction')
 - This includes claims for violation of foreign IP rights, including infringements outside the EU (see UK Supreme Ct., *Lucasfilm v. Ainsworth*)
- An exception from the rule applies (only) if the validity of a registered right becomes an issue in the proceedings (CJEU's interpretation of article 22(4) BR I in *GAT v. Luk*; now explicitly enshrined in 24 (4) BR I^{bis})



Territorially unlimited jurisdiction ('type A'): tort jurisdiction; place of ACTING

- Remedies under article 5(3) BR I/7(2) BR I^{bis} for an infringement in its entirety may also be claimed before the courts at the place where the infringer has acted, giving rise to the harm resulting therefrom
 - For internet infringements, this is regularly the place where the decision leading to the infringement was taken (*Wintersteiger*)
 - That place typically coincides with the defendant's domicile, i.e. it doesn't grant a genuine choice of venues



Territorially unlimited jurisdiction ('type A'): victim's center of interest (for personality rights only)

- Courts at the place where the harmful event occurred (article 5 (3) BR I/7(2) BR I^{bis}), may, under certain circumstances, exercise 'type A' jurisdiction
 - In case of personality rights, the courts at the place of the infringed party's center of interest can adjudicate on the infringement in its entirety, i.e. including the acts and effects occurring in other countries (*eDate* and *Martinez*)
 - However, the rule does NOT apply to IP infringement (*Wintersteiger*), but what about 'moral right' violations in copyright?



Territorially limited jurisdiction ('type B'): tort jurisdiction; place of EFFECT

- Contrary to jurisdiction at the place of the 'act', jurisdiction at the place(s) of 'effect' is **territorially limited**
 - Only two elements are required to establish such jurisdiction:
 - the allegedly infringing content must be or have been accessible
 - the infringed right must be registered or otherwise protected in the forum state (*Wintersteiger; Pinckney*)
 - NO element of targeting is required
 - It doesn't even have to be pleaded that the defendant is responsible for, or has contributed to, the upload (*Pinckney*)
 - [NB: Contributors and intermediaries are amenable to proceedings in any country where the main infringement causes harm, irrespective of whether claims are also raised against the main infringer(s); *Hi Hotel*]
- BUT: the claim will be dismissed as unfounded** if forum state was not targeted! (*Football Dataco; L'Oréal v. eBay*)



problems & questions

- Why does the CJEU make establishing type B jurisdiction so easy, thereby inviting claims that will lead to nothing but costs and useless efforts?
- If, in case of type B jurisdiction, the claim is sustainable on the merits: What does it mean in practice that the judgement is territorially limited? How can such a judgement be enforced in case of internet infringements?
- What would be a sensible alternative to the CJEU's approach?

That's for discussion... Thank you for your attention!

