

WHERE CAN ONLINE INFRINGEMENT ACTIONS OCCUR?

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Article 5(3) of Regulation (EC) No. 44/2001, referred to as 'Brussels I', which covers the competence of courts in matters concerning tort, among others, provides that "a person domiciled in a member state may be sued in another member state, in the courts of the place where the harmful event occurred or may occur".

In the case *Samsung v Concurrence*, Samsung had terminated business relations with its distributor Concurrence because the latter had sold high-end Samsung products online even though the contract between them prohibited this. Concurrence then filed a summons against distributors Samsung France and Amazon Services Europe, based in Luxembourg, in order to withdraw Samsung's products from Amazon's various foreign websites.

The French Court of Appeal decided on February 6, 2014 that French courts lacked jurisdiction because "French judges have jurisdiction in disputes concerning sales on the internet only if the website on which the distribution is performed is specifically aimed at the French public".

Concurrence further appealed to the Court of Cassation (Supreme Court) on the grounds that when a website is accessible in a territory, the state courts there have jurisdiction. It added that the Court of Appeal had failed to clarify whether the system implemented by Amazon enabled the shipment of goods to France, which would justify the jurisdiction of the French courts.

In its decision on November 10, 2015, the Supreme Court recalled the interpretation of article 5(3) of Brussels I previously given by the Court of Justice of the European Union (CJEU) in two cases: *Wintersteiger v Products 4U Sondermaschinenbau* (2012), dealing with trademarks and keywords; and *Peter Pinckney v KDG Mediatech* (2013), regarding copyright infringement online.

In *Wintersteiger* the CJEU was ruling on alleged infringement of a trademark registered in a member state by third party use of a keyword identical to that trademark on a website operating under a country-code top-level domain of another member state. It ruled that the litigation could be brought either before the courts in the state where the trademark was registered or where the third party was based.

In cases of trademark infringement on or through a website, French national courts have further decided that a website has to target the French public and not be intended exclusively for a foreign public.

In the *Pinckney* case, the CJEU considered (i) that copyright infringement was more likely to occur in many places when happening online; (ii) that the place where the damage takes place may also vary; and (iii) that it was not necessary for the harmful activity to be directed to one state.

The CJEU added that the competent court in cases of copyright infringement was the court of the member state where the claimed right was registered or where the alleged harm occurred.

The Supreme Court held that these previous rulings could not apply to *Samsung*. This was because that case concerned harm alleged by a former

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selective distributor established in France and operating an e-commerce site following online sales performed by other websites accessible in and outside France which were forbidden by the supplier's selective distribution contract.

The Supreme Court then decided to stay the proceedings and asked the CJEU for the following preliminary ruling: "Is article 5(3) of Regulation No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to be understood as meaning that in a case of an alleged infringement of obligations not to re-sell outside a selective distribution network and through a marketplace, by means of online offers of sale on several websites operated in various member states, the authorised distributor who considers himself aggrieved is able to bring an action for an injunction to prevent the resulting unlawful disturbance before the courts on the territory of which the online content is accessible or has been accessible, or should another connecting link be characterised?"

The CJEU's ultimate decision may not allow French courts to standardise their approaches in the fields of trademarks and copyright. However, it may clarify and give consistency to some of the applications of these different approaches. ■

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