

Tax & Legal Weekly Alert

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Legal Updates

A ruling of the Court of Justice of the European Union (CJEU) makes it possible to seek damages for online copyright infringements in any EU jurisdiction where the copyright can be illegally accessed

In the case C-441/13 (*Pez Hejduk v EnergieAgentur.nrw GmbH*), CJEU confirmed that it is possible to request damages for online infringements in any jurisdiction where the copyright is unlawfully made available, not only in the jurisdiction of the defendant.

In this case, the claimant, an Austrian citizen, requested damages for the infringement of copyright in his national jurisdiction, even though the defendant was domiciled in Germany and the event of the damage also took place in Germany.

Article 2 paragraph (1) of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "*Regulation*") sets out the applicable principle in determining the jurisdiction, namely the defendant's domicile. Thus, according to this provision: "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*".

However, Section 2 of Chapter II of the Regulation allows for certain exceptions. Among these exceptions Article 5 paragraph (3) provides that "*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*".

The question addressed by the national court to CJEU was: "*Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph 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 (i) in the Member State in which the alleged perpetrator of the infringement is established; and (ii) in the Member State(s) to which the website, according to its content, is directed?*"

The court interpreted the provisions of the Regulation in the sense that Article 5 paragraph (3) of the Regulation provides jurisdiction on both the basis of (i) the place where the damage occurred and (ii) the place of the event giving rise to it.

Based on the above, the Court considered irrelevant that the causal event of the damage (i.e. the uploading of the photographs) took place in Germany in determining the jurisdiction. Also, the Court considered that the Regulation does not require the website to "*be directed*" to an Austrian audience. On this basis, the Csourt determined that the mere accessibility of the copyright works in Austria meant that the Austrian courts did have jurisdiction to hear the Claimant's claim for copyright infringement.



However, it is important to note that the court did impose a limiting factor on this jurisdictional basis. It determined that although a national court is best placed to judge whether the rights guaranteed in that country had been infringed in accordance with the national implementation of the Information Society Directive, it could only rule on and award damages in respect of infringement which took place within that territory.

Implications. The Information Society Directive provides in Article 8 paragraph 1 that "*Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive*". From the wording it is clear that the member states are granted the freedom to decide on what sanctions they consider as effective, proportionate and dissuasive.

These leads to the problem of deciding in which jurisdiction (the jurisdiction of the perpetrator of the infringement or the jurisdiction/s where the damages occurred) it is more convenient for the owner of the infringed right to seek damages.

Also, in choosing the jurisdiction one must also bear in mind the fact that a decision granted by a national court may be difficult (both time consuming and costly) to enforce in the domestic court of the defendant.

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