

Enforcing Copyright Infringements Online

In Search of Balanced Private International Law Rules

by Rita Matulionyte, Dr., LL.M., lecturer at the University of Newcastle (Australia); associated research fellow at the Law Institute of Lithuania

Abstract: Enforcement of copyright online and fighting online “piracy” is a high priority on the EU agenda. Private international law questions have recently become some of the most challenging issues in this area. Internet service providers are still uncertain how the Brussels I Regulation (Recast) provisions would apply in EU-wide copyright infringement cases and in which country they can be sued for copyright violations. Meanwhile, because of the territorial approach that still underlies EU copyright law, right holders are unable to acquire EU-wide relief for copyright infringements online. This article first discusses the recent CJEU rulings in

the Pinckney and Hejduk cases and argues that the “access approach” that the Court adopted for solving jurisdiction questions could be quite reasonable if it is applied with additional legal measures at the level of substantive law, such as the targeting doctrine. Secondly, the article explores the alternatives to the currently established *lex loci protectionis* rule that would enable right holders to get EU-wide remedies under a single applicable law. In particular, the analysis focuses on the special applicable law rule for ubiquitous copyright infringements, as suggested by the CLIP Group, and other international proposals.

Keywords: Copyright Enforcement; Targeting Doctrine; Copyright Violations; Lex Loci Protectionis

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A. Introduction: IP, PIL and the Internet

1 With the emergence of the Internet, the enforcement of cross-border intellectual property (IP) infringements has become highly relevant, especially in the area of copyright law. With the prevalence of online copyright “piracy”, the efficient enforcement of copyright has proven to be an especially challenging task for both the legislators¹ and the courts.² Private international law (PIL) issues raise some of the most difficult questions in this area. First, it is necessary to decide which court has jurisdiction in EU-wide (and worldwide) copyright infringement cases online. Secondly, once the court jurisdiction is established, one needs to determine which law the court has to apply when establishing EU-wide infringement and granting EU-

wide remedies. The currently applicable EU Brussels I Regulation (Recast) allows infringers to be sued either in the place of the defendant’s domicile or in the place of the harmful event.³ However, it does not specify where the “harmful event” is supposed to occur when copyright infringement is taking place online. With regard to the applicable law, the EU Rome II Regulation subjects copyright infringement to the law of the country “for which protection is claimed”.⁴ This so called “*lex loci protectionis*” rule means that national copyright law applies only in respect of infringement occurring inside the territory of a particular state. Therefore in order to get EU-wide remedies, the copyright laws of each EU Member State (currently, 28 such laws) would need to be applied.

2 The CJEU has recently clarified some of the PIL issues relevant to cases of copyright infringement

online. Namely, in the *Pinckney*⁵ and *Hejduk*⁶ cases it clarified that the courts of the state where the infringing content can be accessed have a territorially-limited jurisdiction over the online copyright infringement case. At the same time, this “access approach” has been heavily criticised by a number of commentators.⁷ Furthermore, a number of questions in the area still remain open, such as the applicable law rule in online copyright infringement cases.

- 3 This, and other questions related to IP and PIL, have been addressed in detail in doctrine, including several international academic proposals, such as the proposal from the European Max Planck Group on Conflict of Laws and Intellectual Property (CLIP Proposal).⁸ Currently, the Committee on Intellectual Property and Private International Law at the International Law Association is working on a set of international guidelines in this area.⁹
- 4 The question addressed in this paper is what jurisdiction and applicable law rules should apply in order to ensure both the effective enforcement of copyright law online and sufficient protection of legitimate interests of users.¹⁰ For this purpose, I will first focus on evaluating jurisdiction rules for copyright infringements online as established by the CJEU and analyse possible alternatives. Secondly, I will analyse the suitability of the *lex loci protectionis* rule in solving copyright disputes online and discuss some other solutions that could facilitate the granting of EU-wide relief in such cases.

B. Jurisdiction in copyright cases online

- 5 The first question to be analysed here is which courts should have jurisdiction to hear cases of copyright infringement occurring online. According to the Brussels I Regulation (Recast), right holders can bring the case before the court of the State where the defendant has his/her domicile¹¹, or in the State where the harmful event occurred or is to occur¹². Whereas the former rule does not raise problems that are specific to the Internet environment, applying the second rule and determining the “place of the harmful event” in an online environment has proven to be a difficult task¹³.
- 6 As mentioned, the CJEU had a chance to provide an interpretation of “place of the harmful event” in two recent cases. In the *Pinckney* case,¹⁴ the French right holder discovered that his 12 songs had been reproduced without his authority on a CD in Austria by Mediatech and then marketed by the United Kingdom companies through various Internet sites accessible *inter alia* in France. He brought an action against Mediatech before the court in his own

domicile, France. The CJEU found that, in online copyright infringement cases, the place of damage under article 5(3) of Brussels I Regulation is the place where the infringing content could be accessed (so called “access approach”). As a result, the French court was granted jurisdiction, however, it was limited to the territory of France only.

- 7 This decision was met with “shock” both by the Advocate General and the IP community, and was criticised for enabling extensive forum shopping by right holders.¹⁵ In previous cases regarding the localisation of online activities, the CJEU had applied the so called “targeting doctrine” which would allow a finding of infringement of the IP right in a particular country only if its territory was targeted by the website.¹⁶ Advocate General Jääskinen had suggested applying the same targeting doctrine when determining jurisdiction in the *Pinckney* case,¹⁷ which the CJEU rejected.
- 8 The same access approach has been upheld in the recent *Hejduk* case.¹⁸ A German company EnergieAgentur, without Ms Hejduk’s consent and without providing a statement of authorship, made her photographs of architectural buildings available on its website www.energieregion.nrw.de for viewing and downloading. Ms Hejduk brought a copyright infringement action before an Austrian court. The CJEU confirmed the *Pinckney* approach and once again established that, under ex article 5(3) Brussels I, the court of the place where the infringing content can be accessed has jurisdiction to hear the case but it can grant only territorially-limited damages. The Court rejected the suggestion by Advocate General Cruz Villalón to distinguish the *Pinckney* case, reject the access approach and establish jurisdiction only in the country “where the causal event took place”.¹⁹
- 9 The following subsections will analyse the suitability of these three approaches for the establishment of jurisdiction in copyright cases online: the access approach, the targeting doctrine, and the “causal event” rule.

I. Access approach

- 10 As mentioned above, the access approach adopted by the CJEU in copyright cases online has been met with a number of criticisms. From the perspective of private international law and the Brussels I Regulation (Recast) in particular, the access approach seems to contradict both general and specific goals set under the Brussels I Regulation (Recast).²⁰ First, predictability and foreseeability principles, as entrenched in the Brussels I Regulation (Recast),²¹ seem to be undermined. The access approach allows a defendant to be sued in any place where the infringing content could be accessed online, that

is, in virtually every EU Member State (assuming that no geo-location measures are applied). Thus, a defendant acting in one state cannot predict the place of the suit in advance. The situation gets even worse if a defendant is actually and clearly targeting some countries but the website can still be accessed in other countries (“overspill” effects). In such a situation, the case can still be initiated in the courts of countries that are not targeted.²² Secondly, an underlying purpose of the Brussels I Regulation (Recast) and CJEU practice is to curb forum shopping. The access criterion enables the broadest possible forum shopping by the right holder who can now initiate a case in any country with access to the website.²³

- 11 Thirdly, as the CJEU itself has highlighted, “the rule of special jurisdiction laid down in Article 5(3) of the Regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred” (emphasis added).²⁴ However, it is very doubtful whether courts of the place where the content can merely be accessed have a “particularly close connection” with the dispute. The state of the court would be one of the many states where content can be accessed. The fact that the content can be accessed does not automatically lead to the fact that it was (or will be) accessed and in this way caused (or will cause) damage in that state. Thus, it is questionable whether the court of a place of mere access would be “the court objectively best placed to determine whether the elements establishing the liability of the person sued are present”.²⁵
- 12 Similarly, it is also doubtful whether the access approach helps to attain the goal of “sound administration of justice and the efficacious conduct of proceedings”.²⁶ As the Advocate General in the *Hejduk* case noted, where the work is merely accessible for viewing and downloading in a country, it is impossible to estimate the exact damage that occurs in that country. Then, it is likely that the court would either underestimate the damage in the jurisdiction or overestimate it, and in this way cross the limits of court jurisdiction.²⁷ Furthermore, if the same activity is adjudicated by several courts on a territorial basis, this may lead to conflicting outcomes or excessive damages.
- 13 From the perspective of a balance of interest approach underlying copyright law, one may question what implication the access approach, as applied when determining the jurisdiction under ex article 5(3) Brussels I (art 7(2) Brussels I Recast), has on the parties involved in the dispute.²⁸ The permission for right holders to sue for copyright infringement online in each country from where the content can be accessed gives great advantages to right holders.²⁹ This strengthens the possibilities of copyright enforcement online and copyright protection in general. On the other hand, such forum shopping possibilities cause legal insecurity and a lack of foreseeability for users, in particular, online service providers. As mentioned, such a situation is even more unreasonable from the perspective of online service providers if they are targeting only a specific country (or several countries) and access in other countries is a mere “overspill” effect. For instance, an online service provider runs a Lithuanian website in a Lithuanian language, with advertising targeting a Lithuanian audience and members residing essentially in Lithuania. The website operator makes a French work available on the website without authorisation from the right holders. It would be quite unreasonable from the perspective of the online service provider if the French right holder was able to sue this Lithuanian website in France merely because the illegal content is accessible in France.
- 14 Thus, the access approach may further discourage online service providers from offering EU-wide services. Actually, it invites them to apply geolocation measures technically restricting the access to certain EU Member States only.³⁰ Here one should ask how such practices are likely to affect the EU digital market and whether they are compatible with recent EU policies on copyright and creative markets online. If defendants choose to use geolocation or other measures and geographically limit access to their websites, this would lead to further territorial segmentation of the EU online market. In recent studies³¹ and Commission policy papers³² the geographical segmentation of creative markets online has been highlighted as one of the most significant problems and the Commission is expected to take measures to address this single market problem in the near future.³³ The “access” approach adopted by the CJEU reinforces the territorial nature of copyright on the Internet and in this way contributes to the problem.
- 15 Despite these criticisms, there are also arguments that justify the establishment of jurisdiction of a local court based on mere access to the website in that country. First, contrary to what some commentators argue,³⁴ the *Pinckney* and *Hejduk* decisions are consistent with the previous CJEU rulings on jurisdiction issues online. In the *eDate Advertising* case,³⁵ dealing with the violation of personality rights online, the CJEU applied article ex 5(3) of Brussels I and allowed the case to be brought in any country where the content was accessed (scope of jurisdiction limited to the territory of the state).³⁶ In the *Wintersteiger* case,³⁷ which concerned the infringement of national trade mark rights online, the Court seems to have followed the same access approach. However, since trade mark protection is limited only to those countries where the trade mark is registered, the Court logically restricted jurisdiction only to those Member States

where the trade mark is registered. Copyright, on the contrary, is automatically protected in all Member States without registration; therefore, the general access criterion was applied.³⁸

- 16 As both the Advocate General in the *Pinckney* case and some commentators have pointed out, in a number of previous cases the CJEU has followed another, targeting, approach.³⁹ However, it has been applied in cases analysing the scope of exclusive rights at the level of substantive law,⁴⁰ rather than when determining jurisdiction of the court. Both the Advocate General and the Court highlighted that the jurisdiction and localisation questions should not be mixed up.⁴¹ Although the Advocate General suggested also applying the targeting approach to the analysis of jurisdiction questions, the CJEU took a different approach. The Court decided that there is no need to apply the targeting approach when analysing the question of jurisdiction; rather, broader grounds of jurisdiction (i.e. any place of access) shall be allowed. This different approach towards the targeting doctrine at the level of jurisdiction and when determining the scope of exclusive right can be explained by the different objectives of PIL and substantive law provisions. The localisation of a protected act will determine not only the question of infringement but also for which territories a copyright licence should be obtained. The criteria to establish jurisdiction may be broader and consider various principles of PIL, such as the sound administration of justice.⁴²
- 17 Furthermore, although the access approach allows forum shopping by right holders, this threat is minimal since other legal mechanisms, if applied together with the access approach, will to a large extent discourage right holders from forum shopping. First, as the CJEU highlighted, the courts of the place where the content can merely be accessed would have a limited scope of jurisdiction. That is, they will only be able to grant damages that occurred in the territory of that country. Since damages in a country with mere access would be minimal or equal to zero, suing in that country would not be the most optimal solution for the right holder.⁴³ Thus, the right holder that wishes to obtain EU-wide relief is encouraged to approach the court of the state where at least some damage could be established. Alternatively, the right holder could obtain entire cross-border damages in the courts of the defendant's domicile (art 4(1) of Brussels I Recast; ex art 2(1) Brussels I) or in the courts of the place where the causal activity leading to harm took place (art 7(2) Brussels I Recast; ex art 5(3) Brussels I).
- 18 Another way to solve the forum shopping problem caused by the access approach would be to apply the targeting doctrine at the level of substantive law. As will be discussed later, the targeting doctrine has already been extensively applied when localising

various uses online and offline. It is suggested here that it should apply when localising copyright infringement online as well.⁴⁴ According to this doctrine, if the courts find that the country where the infringing content was accessible was not targeted by the website, they will dismiss the claim of copyright infringement in that country. That is, even if the access approach allows right holders to sue defendants in the countries where the website can merely be accessed, according to the targeting doctrine, the claim of infringement in such countries would fail at a substantive law level. As a result, right holders would have little incentive to sue infringers in such "empty jurisdictions".⁴⁵ Meanwhile, only the courts of the targeted Member State will be able to establish infringement in the state and award damages.⁴⁶ Such an approach has been followed *inter alia* by the Austrian court in the abovementioned Wintersteiger case. As a consequence of the CJEU decision in the Wintersteiger case, the Austrian court accepted jurisdiction in the case of a trade mark infringement online. However, it rejected a finding of trade mark infringement under Austrian law since no targeting or commercial effects had been established in Austria.⁴⁷

- 19 Thus, it is true that allowing jurisdiction on the basis of mere access to the content provides right holders with extensive forum shopping opportunities. However, this problem is reduced since courts of the place of access have only territorially limited jurisdiction; in the absence of targeting and marketing effects in the country, they will not be able to establish damages. Further, if the targeting doctrine applies when allocating the place of copyright infringement at the level of substantive law, the courts of the place of mere access would not be able to establish copyright infringement in their territory at all. The combination of these rules would result in a rather balanced outcome. Although the access approach provides right holders with broad jurisdiction choices, they would be effectively limited since in jurisdictions with mere access, right holders would not be able to get any relief. Meanwhile, users would get more legal security since they can foresee that only the courts of targeted countries would eventually be able to establish infringement and that the damages such courts grant would be limited to the forum territory only. In order to get EU-wide remedies, right holders would need to approach courts in the country of the defendant's residence.

II. Targeting Doctrine

- 20 As an alternative to the access approach, the targeting doctrine has been broadly discussed. It has been applied in a number of the CJEU cases, either at the level of substantive law when localising the

activity in a cross-border scenario, or in relation to jurisdiction based on art 17 (ex art 15) of the Brussels I Regulation (Recast).⁴⁸ It was also proposed by the Advocate General in the *Pinckney* case.⁴⁹ A similar market effect approach has been recommended by the World Intellectual Property Organization (WIPO) when determining infringement of trademarks online.⁵⁰ This market effect approach was followed by some national courts⁵¹ and suggested by commentators.⁵² The European CLIP Group also suggests limiting unreasonable forum shopping by right holders by applying a targeting approach.⁵³ Unsurprisingly, lawyers expected that the targeting doctrine would be the approach that the CJEU adopted in the *Pinckney* case.⁵⁴

- 21 The underlying idea of the targeting doctrine, as suggested at the level of jurisdiction, is welcomed. It intends to limit the number of courts that could hear the case by excluding jurisdiction of courts in the countries that were not targeted and not substantially affected by the online activity. It means more predictability for online users, including online service providers. By targeting their conduct to some countries only, they can be sure that they may be sued in those countries only, and not in any other country where the website can merely be accessed. This means less possibility of forum shopping for the right holders since the number of potential forums decreases. Also, the courts that would be granted jurisdiction under these rules would have a closer connection to the dispute since the activity would have (actual or potential) effects in that country; they would be better able to estimate the harm done, which would also lead to sounder administration of court proceedings.
- 22 From a copyright law perspective, the balance between right holders' and users' (potential infringers') interests in IP enforcement procedures is also better maintained. By applying the targeting doctrine, right holders' possibilities of enforcement may be reduced (e.g. they may not be able to sue in their home country just because the content is accessible there). Meanwhile, this solution would better serve the legal certainty and foreseeability interests of online service providers. In addition, the balance of interests here can also be adjusted by defining which party would have to prove whether the country at stake is targeted. According to the CLIP proposal, the burden should be on a defendant to prove that a forum country has not been targeted, since the defendant possesses more information about the access and usage of the website.⁵⁵ Such an allocation of the burden of proof would decrease the disadvantages that the targeting doctrine causes to right holders.
- 23 On the other hand, a few problems would arise if the targeting doctrine is applied when determining jurisdiction in copyright infringement cases online.

One of the most difficult tasks is finding a proper definition of "targeting". What criteria should be taken into account when determining whether the country was targeted? What criteria are sufficient to establish targeting? What activities by the internet service provider are sufficient to claim that it did not target particular countries? How high should the standard be? For instance, if a Lithuanian news website primarily targeting a Lithuanian audience is also being accessed by a number of Lithuanian immigrants in France, would France be "targeted" by this website? Does the answer change if the online publisher "wanted" it to be read by Lithuanian emigrants abroad? Would the answer differ if a service provider simply "did not care"? Another example could be the case scenario in the *Hejduk* case: would the German architects' website under the domain name .de also be targeting German speaking architects in neighbouring Austria? How explicitly should the website include or exclude Austria as a potential audience? Even if the website explicitly excludes the Austrian audience (e.g. by using disclaimers) but the website is still widely accessed by the specialist audience in Austria, would the website still be considered as targeting Austria?

- 24 Several guidelines could be useful in determining targeting. The 2001 WIPO Recommendation for the use of signs on the Internet⁵⁶ sets a number of factors that could be *mutatis mutandis* taken into consideration when determining targeting in copyright cases. Also, the CJEU and national courts have already been applying the targeting doctrine at the level of substantive law, and despite the lack of a clear definition, they came to some reasonable solutions.⁵⁷ The question, however, remains whether such a fact-based analysis should be undertaken when establishing jurisdiction. It seems to be more reasonable at the level of substantive law. Further, let us assume that in order to establish targeting at a jurisdictional level, a more general evaluation of the situation is sufficient. Then, the question emerges as to how the "targeting" at the level of jurisdiction and "targeting" when allocating the conduct online (at the level of substantive law) should be distinguished; the same term would refer to different standards. Overall, the difficulty in defining the term "targeting" speaks in favour of applying it at the level of substantive law rather than when determining jurisdiction of the court.
- 25 The other problem is when no countries are specifically targeted by online conduct or, alternatively, all countries are targeted.⁵⁸ This would often happen with websites using a broadly spoken language, such as English. For instance, these might be the websites that have popular content or services in which users from across the EU are interested (such as file-sharing websites), or news websites that target specialist audiences across the EU (e.g. the IPKat blog). Also, one may imagine that

under the *Pinckney* scenario, UK online companies are interested in making any possible sales not only in the UK but also across the EU. In such cases the targeting doctrine would be difficult to apply. Would that mean that those Internet service providers who have not undertaken careful measures to target just specific markets could be sued in any country where the content may be accessed? On the one hand, this might be quite reasonable. If a service is intended for an EU-wide audience, the service provider is exposing itself to all jurisdictions across the EU. On the other hand, such a legal situation discourages online service providers from offering EU-wide services.⁵⁹ In order to avoid risks, they are likely to restrict their online services to several markets and this is not compatible with the EU goal of creating a single digital market for creative content.

- 26 Also, the recent national court practice in applying the targeting doctrine when allocating copyright infringements online shows that it is applied by courts quite broadly. Often, very few connecting factors are sufficient to establish targeting in the forum country.⁶⁰ In order to make this doctrine effective in restricting the forum shopping by right holders, the CJEU would need to establish a more rigid standard of what constitutes targeting.
- 27 Thus, the targeting approach could be helpful in deciding jurisdiction of the court when websites clearly target one or several countries and right holders sue in countries clearly not targeted by these websites.⁶¹ This would prevent right holders from suing in a jurisdiction where the website is merely accessible.⁶² However, the application of the targeting doctrine at the level of jurisdiction would often require a careful factual analysis. Such analysis could be better carried out at the level of substantive law when localising the infringing activity.⁶³
- 29 On the one hand, such a “causal event” rule would guarantee great legal certainty for online service providers. They could be sued only in the country from where they acted, which would normally be the country of their domicile. On the other hand, such a rule, especially if applied at the level of jurisdiction, would lead to unreasonable disadvantages to right holders and may significantly weaken the enforcement of copyright online. Right holders would be required to sue foreign infringers outside their jurisdiction; they would not have a chance to get local remedies in any other country, including their home country, even if damage is felt there. It may be unreasonably difficult for right holders to enforce their rights against websites operating abroad. This would weaken the enforceability of copyright law online. Also, such an approach would encourage forum shopping by online service providers; they may want to provide their services from countries where the court system is not functioning well or where copyright protection is weakest. Further on, this rule would normally lead to the same results as the “defendant’s domicile” rule. This means that an additional ground of jurisdiction based on the place of a harmful event would be largely eliminated. For this reason, applying the “causal event” rule for determining jurisdiction in copyright cases online does not seem to be a viable option.
- 30 To conclude, the above discussion has demonstrated that the access approach, as adopted by the CJEU, is not as unreasonable as some commentators argue. It is true that the access approach per se may encourage forum shopping by right holders and could undermine the legal certainty and foreseeability interests of online service providers. However, this danger is diminished to a minimum by two legal mechanisms if they are applied in parallel to the access approach. First, the targeting approach could be applied to allocate the online activity at the level of substantive law, which means that the courts in the countries with mere access to the infringing content will not be able to establish infringement and grant remedies in their territories. Secondly, as the CJEU has clarified, courts in the place of mere access have jurisdiction to grant territorial remedies only. These two rules would discourage right holders from bringing cases in countries with mere access to the illegal content. Furthermore, although the targeting doctrine may seem, at a first glance, to be a more suitable alternative than the accessibility approach, the analysis shows that it has its own problems. Namely, the establishment of targeting would often require a detailed factual analysis, which could be better carried out when allocating the online conduct at the level of substantive law. Finally, the “causal event” rule, as suggested by the Advocate General in the *Hejduk* case, is the least suitable option for determining jurisdiction in copyright cases online. It would give overly significant advantages to the

III. “Causal event” approach

- 28 The third solution could be subjecting copyright infringement online to the jurisdiction of the court where the infringing conduct originated. As the Advocate General proposed in the *Hejduk* case, under ex article 5(3) Brussels I (art 7(2) Brussels I Recast), jurisdiction could be granted only to the courts of the state where the “causal event” took place.⁶⁴ This would mean that the place of a harmful event under Article 7(2) of the Brussels I Regulation (Recast) would be only the place from where the defendant acted to initiate the allegedly infringing activity. It would often coincide with the place of residence of the defendant, but this would not necessarily always be the case. As will be discussed later, a similar “country of origin” approach has already been applied at the level of substantive law.⁶⁵

online users (potential defendants) by unreasonably weakening the position of right holders.

C. Applicable law and copyright online

- 31 After the court establishes jurisdiction, the next question that should be addressed is what law applies to cross-border copyright infringement online. Up to now courts have seldom discussed applicable law questions in these cases. At best, they simply mention the *lex loci protectionis* rule and conclude that it leads to the application of forum law. This is an easy and correct solution in some cases, but not in others. When the defendant is sued in the place of the harmful event, the court would have jurisdiction only with respect to the infringement occurring inside that country. Here, the *lex loci protectionis* rule would coincide with *lex fori* and the law of the forum country would apply as the law of the country “for which protection is sought”. However, the situation would be different if the defendant is sued, for example, in the defendant’s domicile. The court of the defendant’s domicile is granted jurisdiction to adjudicate EU-wide copyright infringement. The question arises as to which national law such cross-border infringement could be adjudicated under and EU-wide remedies granted. In other words, how the *lex loci protectionis* rule, as established under the Rome II Regulation, would apply to EU-wide infringements occurring online?
- 32 I will first provide an overview of the problems related to the application of *lex loci protectionis* in copyright infringements online.⁶⁶ Then, I will analyse two possible alternatives that would mean a departure from an established territoriality principle; the country of origin rule and a special applicable law rule for ubiquitous copyright infringements.

I. Lex loci protectionis

- 33 The *lex loci protectionis* rule is implemented by Article 8(1) of the Rome II Regulation and requires subjecting each IP infringement to the law of the country for which protection is sought.⁶⁷ This applicable law rule is based on the territoriality principle that still underlies EU copyright law. The territoriality principle generally means that copyright law of one state applies only in the territory of that state and does not extend to any acts outside that state’s territory.⁶⁸ The result of this is that the same work is protected under multiple national laws that may grant different scope of protection and enforcement measures. *Lex loci protectionis*, as an applicable law rule that mirrors the territoriality principle, requests that the infringement of an IP right is adjudicated by the law of the country that grants that right. If

the right is infringed in several states, the law of each state would apply with respect to the (part of) infringement occurring in that state.

- 34 The territoriality approach and *lex loci protectionis* rule have traditionally been justified by the need for states to maintain sovereignty over their own national copyright laws, which constitute a part of national cultural policies.⁶⁹ However, with the increasing globalisation of creative markets and especially with the emergence of the Internet, it has become increasingly difficult to justify a strict territoriality approach in copyright.⁷⁰ First, although infringements online have EU-wide (or worldwide) reach, the *lex loci protectionis* rule does not allow a right holder to acquire, under a single applicable law, EU-wide relief. Instead, even if the case is brought before a court having international jurisdiction over the dispute, the court would have to apply 28 national copyright laws for the same online infringement.⁷¹ Secondly, for users, such as Internet service providers, this means that they have to comply with the law of each Member State in which their service is available. This encourages service providers to limit their services to certain territories, which is not compatible with the EU single digital market policy.⁷² Therefore, the European Commission has several times raised the question of abandoning or limiting the territoriality principle, at least in an online environment.⁷³ Similarly, a number of academic proposals have suggested introducing a single-law approach at least to multi-state copyright disputes.⁷⁴ Therefore, the alternatives to the territoriality approach and *lex loci protectionis* rule need to be discussed.

II. Country of origin rule

- 35 The main alternative to the *lex loci protectionis* rule has traditionally been the country of origin, or *lex originis*, rule. Generally, it suggests subjecting copyright disputes to the law of the country from where the work originates. That is, instead of the territoriality approach, it promotes a universality approach and suggests that a single law should apply in respect of a single work, regardless of where it has been exploited. Although it has been advocated by some commentators⁷⁵, it has been accepted in few jurisdictions⁷⁶, and often only to a limited extent⁷⁷. The reasons against the introduction of the *lex originis* rule for copyright infringements online have been discussed by a number of authors⁷⁸. In short, *lex originis* is not compatible with the national treatment provision implemented in article 5(2) of the Berne Convention⁷⁹. As a result of *lex originis*, works used in the same country would be subject to different rules of different countries (depending on the origin of the work). Furthermore, *lex originis* does not ensure more legal certainty for users of

works, as compared to *lex loci protectionis*. When commercial users want to use a number of different works (e.g. communicate works over the radio, TV or on the Internet), each of these works might be subject to a different national law, depending on its place of origin. In addition, *lex originis* prevents states from pursuing their territorial copyright policies in their own territories in respect of works originating abroad. That is, according to *lex originis*, national laws would apply in respect of works created inside the country, but not in respect of works created in other countries but used inside the forum country⁸⁰. These and other reasons have led to the general rejection of *lex originis* as a possible alternative to the *lex loci protectionis* rule.

- 36 On the other hand, European policy makers have been discussing the idea of introducing a similar country of origin approach at the level of substantive law.⁸¹ Although this would be a solution to the territoriality problem at the level of substantive law rather than private international law, it is worth a short discussion here.
- 37 The country of origin doctrine was implemented as a substantive law rule in the EU Cable and Satellite Directive,⁸² where communication to the public by satellite was defined as occurring only in the country where the broadcasting signals were emitted. Outside copyright law, a similar concept was used in the E-commerce directive⁸³ where e-service providers were subjected only to the laws of the country of their establishment.⁸⁴ Following this approach, in the case of online communications, the act of making available works online could be defined as taking place only in the country where the defendant is established (E-commerce directive approach) or in the country where the act leading to the making available online originates (Satellite and Cable directive approach).⁸⁵
- 38 I argue here that such an approach would not be the most suitable one. On the one hand, it is true that the country of origin doctrine, if implemented at a substantive law level, would ensure much greater legal certainty for Internet service providers. They would need to comply only with the law of the country from where the activity originates. The single-law approach that this doctrine follows would also enable right holders to get EU-wide relief under a single law, namely, the law of the country from where the infringing activities originate. For instance, in the *Hejduk* case, after the jurisdiction of the court is established (be it in Austria or elsewhere), the court would have to apply German law with respect to the making available of photos online; German law would apply in determining EU-wide remedies, and there would be no possibility whatsoever of applying Austrian law.⁸⁶
- 39 On the other hand, the definition of the act of making available as taking place only in the country of origin would lead to several problems. First, this may lead to forum shopping by service providers where they establish themselves in (or provide their services from) a country with the lowest copyright protection standards.⁸⁷ It is true that national copyright laws of Member States are harmonised to a certain extent.⁸⁸ However, a number of issues remain non-harmonised (most importantly, copyright exceptions), which means that the scope of protection in different Member States still differs.⁸⁹ Thus, the country of origin rule could be suitable when the full harmonisation of copyright laws has been achieved,⁹⁰ which is unlikely to happen in the near future.⁹¹ Secondly, when the defendant is situated abroad, right holders would be forced to go to a foreign court (of country of origin) to adjudicate the dispute; that court would apply their own law. Alternatively, if jurisdiction rules allow, a right holder may sue a foreign defendant in the right holder's own home jurisdiction; however, these courts would need to apply foreign copyright law to establish EU-wide infringement and grant remedies. For instance, following the scenario in the *Pinckney* case, if the jurisdiction of a French court was established⁹² and the making available is defined as taking place in the UK (a country from where making available originates), French courts would have to apply UK copyright law to establish the EU-wide infringement.⁹³
- 40 Thirdly, such a definition of the making available right would contradict the targeting doctrine that has been recently established by the CJEU in defining/localising other intellectual property rights in the online environment. A country of origin approach would replace the targeting doctrine and entirely eliminate territoriality with respect to the making available right online. Fourthly, a country of origin approach would prevent right holders from adjudicating a copyright infringement originating abroad in a home country and getting at least a territorially limited relief. This has been the most popular practice up to now. Right holders may prefer territorially-limited national relief that they could get in their local court, instead of the EU-wide relief which they would need to acquire in a foreign court or by proving foreign law. Fifthly, the law of the country of origin might be in some cases not sufficiently related to the entire dispute. For instance, the activity may originate in one country, but the internet service may target and/or have its main impact in other countries.⁹⁴ In such cases, it may be unreasonable to apply the law of the country of origin and entirely ignore the laws of the countries impacted, especially if the laws of these countries provide for different legal solutions. In addition, the application of a country of origin approach would lead to the situation where players in the same market would be subject to different

laws which means the infringement of *par condition concurrentium* principle.⁹⁵

- 41 As a result, the country of origin approach, even if implemented at the level of substantive law, does not seem to be a viable solution, at least so long as there is no full harmonisation of copyright law across the EU.

III. Special applicable law rule for ubiquitous infringements

- 42 Another way to restrict the negative effects of territoriality in online copyright cases is to introduce a special applicable law rule for ubiquitous copyright infringements. The rule suggested in art 3:603 of the CLIP Proposal could serve as an example:⁹⁶

- 43 Article 3:603: Ubiquitous infringement

- (1) *In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law or the laws of the State or the States having the closest connection with the infringement, if the infringement arguably takes place in every State in which the signals can be received.*
- (2) *In determining which State has the closest connection with the infringement, the court shall take all the relevant factors into account, in particular the following:*
 - (a) *the infringer's habitual residence;*
 - (b) *the infringer's principal place of business;*
 - (c) *the place where substantial activities in furthering of the infringement in its entirety have been carried out;*
 - (d) *the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.*
- (3) *Notwithstanding the law applicable pursuant to paragraph 2, any party may prove that the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision. The court shall apply the different national laws unless this leads to inconsistent judgments, in which case the differences shall be taken into account in fashioning the remedy.*

- 44 The rule means that in the case of ubiquitous (online) infringements of copyright, the court may apply to the entire cross-border dispute the single law that has the closest connection with the dispute. In addition, the CLIP proposal suggests an exception which allows any party to prove that the law of any country covered by the claim provides for a different solution; this has to be taken into account when granting a remedy.

- 45 For instance, if in the *Pinckney* scenario a French right holder wanted to get international relief against the

UK online service providers, he would have to go to a competent court with an EU-wide jurisdiction and ask for the application of the single law with the closest connection (which would probably be UK law). The UK defendants could claim, for instance, that their activity is not infringing some of the laws in the EU or that damages in some countries would be lower than damages under UK law. This would have to be taken into account by the court when designing the remedy.⁹⁷ Similar rules have been suggested by the ALI,⁹⁸ Joint Japanese-Korean Proposal⁹⁹ and are currently discussed as a possible international guideline by the Committee on Intellectual Property and Private International Law at the International Law Association.¹⁰⁰

- 46 This rule has a number of advantages and some disadvantages. The latter, however, could still be eliminated. First, under this ubiquitous infringement rule the right holder gets possibility to request an EU-wide relief, even if this may need to be done in a foreign court and applying a foreign law. At the same time, s/he remains a possibility to request the relief in his/her own country (if there are sufficient grounds of jurisdiction and infringement could be established here); however, this relief would be territorially limited. Second, this special applicable law rule for ubiquitous copyright infringements could be applied only to cases where EU-wide infringements are obvious,¹⁰¹ i.e. *prima facie* infringement cases, but not in cases when it is clear that infringement is possible in some states but potentially not possible in other states.¹⁰² This may happen when the case concerns the issues that have not been harmonized at the EU level. For instance, in *Pinckney* case, where the UK companies were selling unauthorised DVDs online, the *prima-facie* infringement is likely to be established across the EU since making available right has been harmonized at the EU level and no exceptions would arguably apply to the case. However, this would not be so obvious in less straightforward cases. For instance, in the German Thumbnail case¹⁰³ the courts struggled with the question whether showing of pictures in a form of thumbnails in Google search engine would infringe copyright or, rather, whether this use would be covered by any of the copyright exceptions. Since copyright exceptions are not fully harmonized at the EU level, it would be meaningful to limit German court decision in this case to the single territory and allow courts of other Member States to give their say on the matter.

- 47 Third, this rule envisages that the law “with the closest connection” would apply. This helps to avoid the potential problem of a country of origin rule, namely, that online service providers decide to run their services from the state with laws most favourable to them. Also, it helps to deal with scenarios when an online service has more connection to the country other than the country where activity originated.

However, the flexible “closest connection” factor leads to certain legal uncertainty.¹⁰⁴ Although the CLIP proposal has a number of factors that should be taken into account when determining the closest connection,¹⁰⁵ for Internet service providers it may still be difficult to in advance foresee which law has the closest connection and what law they have to comply with. Therefore, in order to ensure more legal certainty, it is advisable to introduce some presumption in the ubiquitous infringement rule. For instance, it could be presumed that the country from where the activity originated or where the defendant is established has the closest connection to the dispute. However, this presumption could be rebutted by proving that other country is more related to the dispute (e.g. when website clearly targets an audience in another country).¹⁰⁶

48 Fourthly, this ubiquitous infringement rule also allows for taking into account the possible divergences among national copyright laws. As mentioned, this rule would apply only to *prima facie* infringement cases where the issues are essentially harmonised at EU level. However, if certain issues remain divergent (e.g. calculation of damages or type of relief available) the parties may refer to these differences and the court should take these differences into account when determining the remedy.¹⁰⁷

49 Thus, such a special applicable law rule for ubiquitous infringements would have a number of advantages compared with the country of origin doctrine as discussed above. Right holders would get an opportunity in *prima facie* online copyright infringement cases to get EU-wide remedies under a single applicable law. If right holders do not wish to adjudicate such EU-wide infringement in a foreign court or under a foreign law, they still retain the opportunity to request relief in their home jurisdiction;¹⁰⁸ this relief would be limited to the forum territory. Further on, legal security for users, including online service providers, would be ensured by allowing such cross-border relief only in the jurisdiction that is most closely related to the dispute and only in cases where *prima facie* infringement can be established across the EU. Cases that address issues not yet harmonised would be left to the discretion of national courts. Also, it is likely that the courts, applying the ubiquitous infringement rule, would often have to apply forum law which would make court proceedings easier and more efficient. Currently, only the courts of the defendant’s domicile seem to have EU-wide jurisdiction (and, thus, the jurisdiction to apply this ubiquitous infringement rule).¹⁰⁹ At the same time, it is likely that in most cases the defendant’s domicile will have the closest connection to the dispute.

50 One of the potential problems with the ubiquitous infringement rule could be that national courts are

not used to engaging in analysis and application of such a flexible applicable law rule. The ubiquitous infringement rule would require a more careful discussion in selecting the applicable law, and the weighting of different factors when establishing the closest connection. However, a similarly flexible rule has been introduced in the Rome I Regulation.¹¹⁰ Also, some lower instance courts in Europe have already demonstrated some attempts to consider more carefully applicable law issues in copyright.¹¹¹

51 Thus, the special applicable law rule for ubiquitous infringements, as suggested in the CLIP and other international proposals, could be quite a reasonable rule that would contribute to the effective and balanced enforcement of EU-wide copyright infringements online. It would not only provide improved enforcement possibilities for right holders but also, if slightly amended, would adequately take into account the legal certainty and foreseeability interests of users. Also, parties would be left with the possibility of claiming infringement under national copyright law and acquiring territorial remedies.

D. Conclusions

52 Copyright enforcement online has proven to be a difficult task. PIL questions, such as jurisdiction and applicable law, are currently some of the most problematic issues that courts have to address in cases of copyright infringement online. It has been a challenging task to determine which states have jurisdiction over copyright infringement online, the scope of their jurisdiction and what law should apply where a right holder wants to obtain EU-wide remedies.

53 Recent CJEU decisions on jurisdiction in copyright cases online have been met with criticism. However, the analysis has shown that the “access approach”, as applied by the Court, could be quite reasonable if courts of a place of access are given only territorially limited jurisdiction and if the access approach (at the level of jurisdiction) is applied together with the targeting doctrine (at the level of substantive copyright law). This combination of these rules would reduce the forum shopping possibilities for right holders and grant users a reasonable level of certainty.

54 The next question that courts will have to answer is how to enable right holders to obtain EU-wide remedies in cases of copyright infringement online. Following the current territoriality principle and the *lex loci protectionis* rule, this task seems to be impossible. The country of origin approach does not seem to be a reasonable solution either, at least as long as there is no full harmonisation of national copyright laws across the EU. As an alternative option, a special applicable law rule for ubiquitous

copyright infringement could be considered, as suggested in CLIP and other academic proposals. It would enable right holders in cases of copyright infringement online to get EU-wide remedies; it also has the potential to ensure the necessary safeguards for users.

- 1 For the most recent EU initiatives see, e.g., European Commission, Action Plan on the Enforcement of Intellectual Property Rights (1 July 2014) <http://ec.europa.eu/internal_market/ipenforcement/action-plan/index_en.htm>.
- 2 E.g. in recent years the CJEU has issued a number of decisions in this area, e.g., C-275/06 Promusicae (concerning disclosure of IP addresses of alleged infringers); C-70/10 Scarlet Extended (concerning ISP's duty to filter illegal content online); C-314/12 UPC Telekabel Wien (concerning blocking foreign illegal websites), C-466/12 Svensson (application of copyright exceptions for linking).
- 3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32 (Brussels I (Recast)), respectively, art. 4(1) and 7(2).
- 4 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40-49 (Rome II Regulation), art. 8(1).
- 5 CJEU case C170/12, Peter Pinckney v KDG Mediatech AG, EU:C:2013:635.
- 6 CJEU case C-441/13, Pez Hejduk v EnergieAgentur NRW GmbH, EU:C:2015:28.
- 7 For a comment see, e.g., Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2), E.I.P.R. 2014, 137-138; Husovec, "European Union: comment on Pinckney", IIC 2014, 45(3), 372-373.
- 8 European Max Planck Group on Conflict of Laws in Intellectual Property, Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary (Oxford, Oxford University Press, 2013); CLIP principles (without commentary) are available on <www.cl-ip.eu> (last visited 2 Feb. 2015). Other international proposals include the American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes (Chestnut, ALI Publishers, 2008); Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property", in: Basedow, Kono & Metzger(eds.), Intellectual Property in the Global Arena (Mohr Siebeck, 2010), pp. 394-402; Joint Japanese-Korean "Principles of Private International Law on Intellectual Property Rights of October 14, 2010", The GCOE Quarterly Review of Corporation Law and Society (2011), pp. 112 et seq
- 9 See <<http://www.ila-hq.org/en/committees/index.cfm/cid/1037>> (last visited on 2 Feb. 2015); the draft ILA Guidelines were presented in WIPO Seminar on 16 January 2015, Geneva; seminar materials and a recorded webcast are available at <http://www.wipo.int/meetings/en/details.jsp?meeting_id=35183> (last visited 2 Feb. 2015)
- 10 The third area of PIL law, the recognition and enforcement of judgments, is not addressed in this article.
- 11 Art 4(1) of Brussels I Recast; ex art 2(1) Brussels I.
- 12 Art 7(2) Brussels I Recast, ex art 5(3) Brussels I
- 13 Generally, it is an established practice that the harmful event occurs either in the place where the harmful activity originated (the causal event took place) or in the place of the damage that resulted from this activity (the so called "ubiquity theory"). The courts of the place of the harmful activity have jurisdiction over the entire dispute, while the courts of the place of damage have jurisdiction limited to the territory of that state only. While establishing the place of the causal event in online infringement cases may be quite manageable, determining the "place of damage" online is a challenging task, see Case C-68/93 Shevill v Presse Alliance SA [1995] ECR I-415.
- 14 C-170/12, Pinckney.
- 15 For a comment see, e.g., Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2), E.I.P.R. 2014, 137-138.
- 16 For more see the section "Targeting doctrine".
- 17 C-170/12, Pinckney, Opinion of Advocate General Jääskinen, delivered on 13 June 2013, para. 73
- 18 C-441/13, Hejduk.
- 19 C-441/13, Hejduk, Opinion of Advocate General Pedro Cruz Villalín, delivered on 11 September 2014, para. 44.
- 20 See also C-441/13, Hejduk, AG Opinion, para. 43.
- 21 Recital 15 of the Brussels I Regulation (Recast).
- 22 In addition, some argue that legal certainty and predictability from the perspective of the right holder is also undermined. Namely, in cases such as Hejduk, the courts would not be able to estimate the exact damage that occurred in the specific territory; so right holders cannot foresee in advance the potential outcomes of the case, see C-441/13 Hejduk, AG opinion, para 43.
- 23 See C-170/12 Pinckney, AG opinion, para 68; Paul Torremans, "Jurisdiction in intellectual property cases", in Torremans (ed), Research Handbook on Cross-border Enforcement of Intellectual Property (Edward Elgar 2014) 381-420, at 385-389.
- 24 CJEU C-170/12 Pinckney, para 27.
- 25 CJEU C-170/12 Pinckney, para 28.
- 26 Brussels I Regulation (Recast), Recital 16.
- 27 C-441/13 Hejduk, AG opinion, paras 39, 42.
- 28 For a general discussion on how PIL provisions relate to IP enforcement see Neumann, "Ubiquitous and multistate cases", in Torremans (ed.), Research Handbook on Cross-Border Enforcement of Intellectual Property 497-525 (Edward Elgar 2014), at 498-505.
- 29 See also Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2) E.I.P.R. 2014, 137-138, 138.
- 30 Similarly, the eDate Advertising case (C-509/09 and C-161/10) that allowed jurisdiction in each place of access was criticised as harmful for publishers, making them more cautious in publishing online, see Jennifer Agate, "Jurisdiction in the Context of internet Publication", Journal of Intellectual Property Law & Practice, 2012, Vol. 7, No. 4, 241-243, 243.
- 31 See IBF International Consulting, Study on Digital Content Products in the EU, p. 43 <http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf> (last visited 2 Feb. 2015).
- 32 See previous draft Impact Assessment on the Modernisation of the EU Copyright Acquis that was leaked to the public in April 2014, available at <<http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf>> (last visited on 5 Dec. 2014).
- 33 See Essers, "EU Commission goes after geo-blocking, 'absurd' digital barriers", blogpost of 25 Mar 2015, available at <http://www.pcworld.com/>; A Digital Single Market Strategy for Europe, Brussels, 6.5.2015 COM(2015) 192 final.

- 34 See contra Husovec, *supra* note 7, at 372-373.
- 35 Joint Cases C-509/09 and C-161/10, eDate Advertising and Martinez, EU:C:2011:685.
- 36 In addition, the courts of the place of the “centre of interests” of a victim was granted jurisdiction over the entire dispute.
- 37 CJEU Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, EU:C:2012:220.
- 38 Such an approach has been previously applied in cross-border broadcasting of copyright subject matter, see CJEU case C-192/04 - Lagardère Active Broadcast ECLI:EU:C:2005:475 (the cross-border broadcasting act takes place both in the country of emission and country of reception of the signal except for satellite broadcasting, which is subject to country of origin under the EU Satellite and Cable directive); discussed in Depreeuw and Hubin, “Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU”, *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9, No. 9, 750-764, at 752-753.
- 39 For relevant case law see the section “Targeting doctrine”.
- 40 Alternatively, in these cases a special jurisdiction ground under art 17 (ex art 15) of Brussels I Regulation (Recast) was applied.
- 41 See CJEU C-170/12 Pinckney, AG Opinion, para 65.
- 42 See Depreeuw and Hubin, *supra* note 38, at 761.
- 43 In contrast, some critics still argue that such a mosaic theory, caused by the territorial scope of jurisdiction is a very weak remedy against possible jurisdictional abuse, see Husovec, *supra* note 7, at 373.
- 44 See Depreeuw and Hubin, *supra* note 38, at 763.
- 45 See Paul Torremans, “Jurisdiction in intellectual property cases”, in Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar 2014) 381-420, at 385-389.
- 46 Depreeuw and Hubin, *supra* note 38, at 763.
- 47 “Austria: Regulation 44/2001, art.5(3) - Wintersteiger III”, 44(8) IIC 2013, 992-998.
- 48 See, CJEU cases C-324/09 L’Oréal and Others, ECLI:EU:C:2011:474, para. 65 (concerning national and Community trade marks), C-5/11 Donner, ECLI:EU:C:2012:370, paragraph 27 (concerning an alleged infringement of an author’s exclusive distribution right), CJEU Case C-604/10, Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, EU:C:2012:115 and Case C173/11, Football Dataco Ltd and Others v Sportradar and others, ECLI:EU:C:2012:642 (para 36) (regarding the infringement of the ‘sui generis’ right over a database); C-585/08 - Pammer and Hotel Alpenhof, ECLI:EU:C:2010:740; for an overview of these cases see Depreeuw and Hubin, *supra* note 38, at 573-576.
- 49 C-170/12 Pinckney, AG opinion, para. 73.
- 50 See Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted by the Paris Union for the Protection of Industrial Property and WIPO, between 24 September and 3 October, 2001 (2001 WIPO Recommendation). For more on this instrument see Wichard, “The Joint Recommendation Concerning Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet”, in Drexel and Kur, *Intellectual Property and Private International Law: Heading for the Future* 257-264 (Hart Publishing 2005).
- 51 E.g. [BGH, 13.10.2004 - I ZR 163/02](#) - Hotel Maritime (Germany), Austria: Regulation 44/2001, art.5(3) - Wintersteiger III”, 44(8) IIC 2013, 992-998 (Austria), Cour de cassation decision of 13 July 2010, Nr. 06-20.230 (France).
- 52 E.g. Treppoz, E., “Croniques. Droit européen de la propriété intellectuelle”, *Revue Trimestrielle de Droit Européen*, Nr. 4, 2013.
- 53 The relevant provision of Art. 2:202 of the CLIP Proposal stipulates that: “In disputes concerned with infringement of an intellectual property right, a person may be sued in the courts of the State where the alleged infringement occurs or may occur, unless the alleged infringer has not acted in that State to initiate or further the infringement and her/his activity cannot reasonably be seen as having been directed to that State.” (emphasis added).
- 54 See Husovec, *supra* note 7, at 374.
- 55 See CLIP Principles, art 2:202, comment by Husovec, *supra* note 7, at 373-374.
- 56 2001 WIPO Recommendation, see *supra* note 50, Art. 3.
- 57 See *supra* note 48.
- 58 See similar Ohly, “Choice of Law in the Digital Environment – Problems and Possible Solutions”, in Drexel and Kur, *Intellectual Property and Private International Law: Heading for the Future* 241-256 (Hart Publishing 2005), at 255.
- 59 Also, under art. 3 of the E-commerce Directive, online service providers should only comply with the law of a country of establishment; this rule, however, does not apply to copyright law, see Annex to the E-Commerce directive.
- 60 See, e.g., German Supreme Court decision of 29 April 2010 - I ZR 69/08 - Vorschaubilder, GRUR 628, para. 14 (2010) (international jurisdiction of German courts has been confirmed on the basis that “the thumbnails in a search engine of the defendant can be seen (also) in Germany”); German Supreme Court decision of 21 September 2006 - 29 U 2119/06 Haftung von eBay als Mitstörer für Urheberrechtsverletzungen, JurPC Web-Dok. 124/2006, Abs. 1-76, 46 (the connection to the country is established when the service “is in German language and directed to domestic commerce”).
- 61 CLIP Principles art 2:202 seems to be limited to these situations only, see CLIP Proposal, art. 2:202C13-C18.
- 62 See similar argument Husovec, *supra* note 7, at 374.
- 63 Interestingly, CLIP suggests a similar “de minimis” rule at a substantive law level, see art. 3:602 CLIP Proposal; see also James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press 2011), at 17.25. There are a number of differences between applying the targeting doctrine at the jurisdiction and at the substantive law level. For instance, if the targeting doctrine was applied at the level of jurisdiction, the court has to apply this doctrine ex officio. If it was applied at substantive law level, it would be up to the parties (mainly the defendant) to raise the issue of targeting. Also, the question of burden of proof would be answered differently depending on whether this rule is applied at jurisdiction or substantive law level. If the targeting doctrine is implemented at the jurisdiction level, it would be up to the *lex fori* to determine who bears the burden of proof. If it is applied at the substantive law level (as in CJEU cases, such as Football Dataco), it will be up to the *lex substantiae* to determine who bears this burden.
- 64 C-441/13 Hejduk, AG opinion, paras 39, 42.
- 65 See *infra* section “Country of origin rule”.
- 66 This discussion focuses on infringement only and does not touch upon such issues as initial ownership; for more on this topic see, e.g. Eechoud, “Alternatives to the *lex protectionis* as the Choice-of-Law Rule for Initial Ownership of Copyright”, in Drexel and Kur, *Intellectual Property and Private International Law: Heading for the Future* 289-307 (Hart Publishing 2005).
- 67 A number of issues relating to this rule are not clear, such as the scope of *lex loci protectionis*, its international origin, relationship with *lex loci delicti* and others, for more see, e.g., Leistner, Matthias, “The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights”, in Leible, Stefan & Ohly, Ansgar (eds.),

- Intellectual Property and International Private Law (Mohr Siebeck 2009); Basedow & Metzger, “Lex loci protectionis europea”, in: Trunk, A. et al. (eds.) *Russia in the International Context: Private International Law, Cultural Heritage, Intellectual Property, Harmonization of Laws*. Festschrift für Mark Moiseevic Boguslavskij 153, 162 (Berliner Wissenschafts-Verlag 2004).
- 68 For more about the territoriality principle in the context of copyright law see, e.g., Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law* para. 1-22 (London Sweet & Maxwell 1998); Kegel, Gerhard & Seidl-Hohenveldern, Ignaz, “Zum Territorialitätsprinzip im internationalen öffentlichen Recht”, in Heldrich, Andreas & Henrich, Dieter & Sonnenberger, Hans-Jürgen, *Konflikt und Ordnung* 233-277, 234 (C.H. Beck’sche Verlagsbuchhandlung 1978).
- 69 See Ohly, supra note 58, at 244. For more see Matulionyte, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (Edward Elgar 2011), at 19-20.
- 70 See also Drexl, “The Proposed Rome II Regulation: European Choice of Law in the Field of Intellectual Property”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 151-176 (Hart Publishing 2005), at 169-171.
- 71 See Fawcett and Torremans, supra note 63, at 17.26. On the other hand, the right holder may “shop” for the most favourable national law and get at least a territorially-limited relief that may still lead to extraterritorial effects; e.g. courts often grant an injunction requiring the entire closure of the website without specifying the territorial scope of the remedy; see Rita Matulionyte, “The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interest Needed?”, 2 (2011) JIPITEC 26-36, at 26.
- 72 For more criticisms of *lex loci protectionis* see Matulionyte, supra note 71, at 27.
- 73 More recently, the need to redefine exclusive reproduction and making available rights online or introduce a community copyright title is discussed in the draft Impact Assessment, supra note 32.
- 74 See the special applicable law rule for ubiquitous infringements, as proposed in CLIP, ALI and Joint Japanese-Korean Proposals, infra section “Special applicable law rule for ubiquitous infringements”.
- 75 E.g. Schack, Haimo, *Urheber- und Urhebervertragsrecht* (Mohr Siebeck 2007).
- 76 It is found in copyright statutes in Romania, Greece and Portugal.
- 77 It has been applied to determine the law applicable to the initial ownership question in France and the US, see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2nd Cir. 1998) (USA).
- 78 E.g. Evert, Till, *Anwendbares Urheberrecht im Internet* (Verlag Dr. Kovač 2005), pp. 217-221; Muth, Susanne, *Die Bestimmung des anwendbaren Rechts bei Urheberrechtsverletzungen im Internet* (Peter Lang 2000), p. 147; Birkmann, Andrea, *Die Anknüpfung der originären Inhaberschaft am Urheberrecht Ein Vergleich der Rechtslage in Deutschland, Frankreich und den USA unter Berücksichtigung internationaler Konventionen* (Nomos Verlagsgesellschaft 2009), pp. 46-50.
- 79 1886 Berne Convention for the protection of literary and artistic works, September 9, 1886, Paris.
- 80 For more see Matulionyte, *Law Applicable to Copyright: A comparison of the ALI and CLIP Proposals* (Edward Elgar 2011), General part: 2.A.II.
- 81 This idea has also been raised for discussion by the European Commission, see, e.g., draft Impact Assessment on the Modernisation of the EU Copyright Acquis, op. cit. supra note 32, p 60; the Commission Green Paper on the online distribution of audiovisual works in the European Union COM (2011) 427 final.
- 82 Art. 1.2(b) of 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, 06.10.1993, pp. 15-21.
- 83 Art. 3 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-17 (however, copyright and related rights are excluded from its scope, see Annex to the Directive).
- 84 For discussion on the country of origin approach in other areas of law, see Leistner, “Comments: The Rome II Regulation Proposal and its Relation to the European Country-of-Origin Principle”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 177-200 (Hart Publishing 2005).
- 85 Compare with the proposal of AG Villalón to allow jurisdiction in the place of “causal event”, as discussed above.
- 86 In contrast, the Austrian plaintiff Mediatech would, under this rule, be subject to the law of Austria since the unauthorised reproduction of works took place in Austria.
- 87 See Matulionyte, Rita M, *IP and Applicable Law in Recent International Proposals: Report for the International Law Association*. JIPITEC, Vol. 3. 263-305(2012), at paras 114-115; CLIP Commentary, para N7; Neumann, supra note 28, at 516.
- 88 This has been achieved by a number of EU directives, e.g., [Directive 2009/24/EC](#); [Directive 96/9/EC](#) Directive 2001/84/EC; [Directive 2006/115/EC](#); [Directive 2012/28/EU](#); Directive 2001/29/EC.
- 89 In contrast, some argue that the current level of harmonisation is sufficient for the introduction of the country of origin principle in copyright law, see Ohly, supra note 58, at 253-254.
- 90 Neumann, supra note 28, at 522.
- 91 Instead, the introduction of the Community copyright title should be considered, see draft Impact Assessment, supra note 32.
- 92 This becomes difficult if making available is defined as taking place in the UK only; in such a case, it is difficult to prove that the harmful event occurred in France.
- 93 In some countries, like the UK, the courts presume that foreign law is of the same content as local law, and only if the presumption is challenged do parties have to prove the content of foreign law. However, such rules do not necessarily exist in other countries.
- 94 E.g., in the *De Agostini* case, the broadcaster situated in the United Kingdom transmitted TV programmes in the Swedish language to Sweden, which infringed Swedish laws on advertising. Despite the minor connection to the United Kingdom, under the E-Commerce Directive, UK law had to be applied, at least for certain parts of the claims, see Ohly, A. (2001) ‘Herkunftslandprinzip und Kollisionsrecht’, *GRUR International*, 50(11), 899, p. 906.
- 95 Ohly, A. (2001) ‘Herkunftslandprinzip und Kollisionsrecht’, *GRUR International*, 50(11), 899, 905 et seq.
- 96 It has also been suggested by Fawcett and Torremans, supra note 63, at 17.28.
- 97 For more on this rule see CLIP Proposal, commentary to art 3:603; Matulionyte, supra note 71, at 166-202.
- 98 ALI Principles, supra note 8, sec 321.
- 99 Joint Japanese-Korean proposal, supra note 8, art. 306
- 100 ILA Committee Drafts have not yet been publicly made available but they have been accessible to the author of the article, as a member of the Committee.

- 101 See CLIP Proposal art 3:603(1) (“...if the infringement arguably takes place in every State in which the signals can be received”).
- 102 For more see Matulionyte, supra note 71, at 14.
- 103 German Supreme Court decision of 29 April 2010 - I ZR 69/08 - Vorschaubilder, GRUR 628, para. 14 (2010).
- 104 See also Matulionyte, supra note 71, para 26.
- 105 See CLIP Proposal, art 3:603(2).
- 106 Similarly, in an early CLIP draft, the “defendant’s residence” rule was provided as an escape clause, see Art. V.3.(3) of CLIP, Possible Structure of the Principles, Draft of 2008 (unpublished); in comparison, early drafts of the ALI Principles contained *lex fori* as a “last resort” rule, see ALI Principles, Discussion Draft, 2006, available (for sale) at <www.ali.org> [last accessed on 1 April 2015], §321(2).
- 107 In addition, this rule eventually shifts the burden of proof from plaintiff to defendant. In order to avoid a sometimes unreasonable burden on infringers, the burden of proof should be allocated on a case-by-case basis, for more see Matulionyte, supra note 71, at 32.
- 108 This is possible if there are sufficient grounds of jurisdiction and if infringement could be established under the targeting theory.
- 109 As discussed, this is generally allowed under the Shevill doctrine, but it is to be seen whether this doctrine is confirmed in copyright cases.
- 110 Art 4(4) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16 (refers to the “law of the country with which it is most closely connected”).
- 111 See *On Editions du Seuil v Google Inc. And Google France*, Paris TGI, December 18, 2009, commented on in Mitchell, “Google Books infringes Copyright: Fair Use Doctrine Inapplicable, TGI says”, 24/2 World Intellectual Property Report 9 (2010).