

Leibniz Universität Hannover

Institut für Rechtsinformatik

Universitet i Oslo

Norwegian Research Center for Computers and Law

MASTER THESIS

**Jurisdictional Issues and
Online Copyright Infringements in Europe**

by

Alyssa Shoutiwoth Soomphong
EULISP XXI

for

Ioannis Revolidis, LL.M.
Thesis Supervisor

Date of submission: 17th August 2016

Table of Contents

1. Jurisdictional Issues and the Unique Characteristics of the Internet.....	1
1.1 What is the problem?	2
1.2 Why is this problem relevant?	2
1.3 How will this problem be addressed?	5
2. Jurisdiction and Brussels I Regulation.....	6
2.1 Art 4 of the Brussels I Regulation: the General Provision.....	6
2.2 Art 7(2) of the Brussels I Regulation: Special Jurisdiction.....	7
2.2.1 Scope of ‘tort, delict or quasi-delict’.....	7
2.2.2 The place where the harmful event occurred or may occur: The landmark decisions.....	9
2.2.3 The Road to Online Copyright Cases: the application of Bier and Shevill in Cyber Torts.	12
2.2.4. Art 7(2) in Online Copyright Cases.	16
3. Problems with Jurisdiction in Online Copyright as established by CJEU.....	20
3.1 Attribution of Effects	20
3.1.1 Legal uncertainty of the attribution of effects.....	22
3.1.2 Indirectness of damage vs indirect act causing damage.....	23
3.1.3 The end of <i>Melzer</i> ?	24
3.1.4 Distinction and reconciliation	26
3.2 The mere accessibility approach.....	27
3.2.1 Mere accessibility: an unexplained departure from the targeting approach.....	28
3.2.2 Establishing <i>Forum Actoris</i> and Encouraging Forum Shopping.	31
3.2.3 Effectiveness of the Mosaic Principle?	32
3.3 Addressing the other side of the coin: Flexibility vs Predictability.	35
4. Proposals <i>de lege feranda</i>.....	37
4.1 The CLIP Principles.....	37
4.2 ALI Principles and the Transparency Proposal.....	41
4.3 The Proposal.	41
4.4 Defending the proposal.	42
5. Conclusion	47
Bibliography	i

List of Abbreviations

AG	Advocate General
ALI	American Law Institute
Art	Article
CJEU	Court of Justice of the European Union
CLIP	Conflict of Laws on Intellectual Property
	Electronic Commerce Law
IIC	International Review of Intellectual Property and Competition Law
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
Masaryk U. J.L. & Tech	Masaryk University Journal of Law & Technology
OUP	Oxford University Press
Para	Paragraph

1. Jurisdictional Issues and the Unique Characteristics of the Internet.

John Perry Barlow once wrote in the *Declaration of the Independence of Cyberspace* that,

“Cyberspace does not lie within your [the Government] borders. ... Ours is a world that is both everywhere and nowhere, ... Your legal concepts of property, expression, identity, movement, and context do not apply to us.”¹

More than two decades after this was written, it has become clear that activities taking place in the borderless cyberspace may fall within a government’s borders and that the legal concepts of property and expression do indeed apply in the Internet world. One such legal concept is Copyright. Nonetheless, Barlow was right in claiming that Cyberspace is ‘a world that is both everywhere and nowhere’ and it is the truthfulness in this statement that makes jurisdictional issues² in online copyright infringements such an interesting and complex topic.

In this age of Information, the Internet has now become more accessible and easier than ever for people to obtain information, that is more often than not protected by Copyright law. Hence, the enforcement of Copyright laws in Cyberspace is often seen as a challenge.³ The problem is exacerbated further due the globalised nature of the Internet. When a copyrighted work is infringed over the internet, the effect of the infringing act often extends across borders. Therefore, the question of which court have the jurisdiction to hear an online copyright case is an important one.

It is the intention of this paper to address the question of whether the current position on jurisdictional issues in online copyright infringement cases is satisfactory. It is noted that the focus of this paper will be limited to the current position of the law in the European Union. Hence, this paper will seek to analyse to what extent does the interpretation given by the Court of Justice of the European Union (CJEU) with regards to Art 7(2) of the

¹ Barlow, J.P., “A Declaration of the Independence of Cyberspace”, 1996. Available at <https://www.eff.org/cyberspace-independence>. <Last Accessed: 16 August 2016>

² The term ‘jurisdiction issues’ is referred to the judicial jurisdiction specifically, i.e. whether the Courts have the jurisdiction to adjudicate on a proceeding. cf Svantesson, D.J.B. (2012) *Private International Law and the Internet* (2nd ed.). The Netherlands: Kluwer Law International. at p. 25.

³ Indeed, the challenge of copyright enforcement online has led the music and movie industry to evolve their business models that capitalise on their copyrighted works via intermediaries such as Netflix, Spotify or even to a certain extent YouTube through advertisements or subscriptions.

Brussels I (Recast) Regulation for cases involving copyright infringement is compatible with its rationale.

As it will be repeatedly pointed out throughout this paper, the rationale of the existence of an alternative jurisdiction in Brussels I regulation is based on a close connection between the court and the action, to ensure legal certainty as well as to avoid the possibility of the defendant being sued in a court in which he could not reasonably have foreseen.⁴ Hence, it is submitted that this is the yardstick in which the current law on jurisdiction will be measured against in the discussion of this paper.

1.1 What is the problem?

In a series of CJEU cases concerning online copyright infringement cases and jurisdiction, the CJEU has held that the test for establishing jurisdiction is based upon a mere accessibility approach. This would mean that the court seised would have the jurisdiction to hear an online copyright case due to the fact that the infringing material is accessible in its State. This is true even when the defendant did not act in that territory. It is to be noted that all original works are granted automatic copyright protection across the Member States in the European Union (EU) by virtue of the InfoSoc Directive.⁵ Hence, due to the unregistered nature of copyright, it is questionable if the position reached by the CJEU is prone to abuse.

1.2 Why is this problem relevant?

Dan Svantesson often points out that the way the Internet is consumed has changed dramatically over the last two decades.⁶ In the past, being online has been a choice; a conscious decision to connect to the Internet and to spend a certain amount of time in Cyberspace.⁷ Fast forward to the present time, with the exponential growth in technology,

⁴ Recital 16 of the Brussels I Regulation.

⁵ 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.

⁶ See: Svantesson, D.J.B., “Celebrating 20 years of WWW – A Reflection on the concept of jurisdiction” (2012) 6 Masaryk U. J.L. & Tech. 177 at p.179, Svantesson, D.J.B., “Sovereignty in International Law – How the Internet (Maybe) Changed Everything, but Not for Long”, (2014) 8 Masaryk U. J.L. & Tech. 137 at p. 144.

⁷ *Ibid.*

it has become clear that the Internet has now been engraved in our lives. Almost everyone that has a smartphone today is connected to the internet at all times. Therefore, it is noted that this new way of Internet consumption has raised concerns on the impact of cyberspace on Private International Law.

Indeed, it is undeniable that Cyberspace poses unique challenges to the enforcement of the law in general. Courts have been struggling to apply traditional models of law in novel situations created by the Internet. It should then follow that the next question that ought to be asked is how should the law regulate Cyberspace. The focus on this debate has swirled around the question on how the Internet ought to be governed. In short, there have been emerging theories of self-regulation, co-regulation and state-regulation of the Internet.⁸ The plausibility of these theories are outside the scope of this paper. Nonetheless, what is important to note is that regardless of the outcome on the discussion of internet governance, illegal activities taking place online will have legal repercussions. Therefore, the question of jurisdiction is the first line of defence in tackling the unique challenges of the Internet to traditional models of law.⁹ In other words, this paper would like to focus on how the traditional models of law on jurisdiction could be applied to the online context, particularly in online copyright infringement cases.

In order to evaluate the jurisdiction issues in online copyright infringement, it is firstly important to understand that the unique characteristics of the Internet do differentiate online copyright infringement cases with copyright infringements occurring offline. Unfortunately, some scholars (and perhaps the CJEU) do not see this point; Andrew Dickinson in a comment on an online forum applauded the approach that avoids a distinction “between real and online worlds” and criticises the ones that treat “the internet as changing everything”.¹⁰ However, this paper would respectfully point out that the

⁸ Many have written on this topic, see: Lessig L, “Code: Version 2.0” (2006) Basic Books, Reidenberg, J., “Lex Informatica: The formulation of Information Policy Rules Through Technology” (1998) Texas Law Review 76 553-596, Koops B.J., et al, “Should Self-Regulation be the Starting Point?” Koops et al (2006) Starting Points for ICT-Regulation: Deconstructing Prevalent Policy One-Liners, TMC ASSER Press, The Hague, p. 109-149.

⁹ cf Menthe, D., “Jurisdiction in Cyberspace: A Theory of International Spaces”, (1998) 4 Michigan Telecommunications and Technology Law Review 69-103 at p. 70-71.

¹⁰ Dickinson, A. Comment on 26 January 2016 in response to Sirakova, K., “Is the Shevill Doctrine Still Up to Date? Some Further Thoughts on CJEU’s Judgment in Hejduk (C-441/13)” Blogpost on 24 January 2015. Available at: <http://conflictflaws.net/2015/is-the-shevill-doctrine-still-up-to-date-some-further-thoughts-on-cjeus-judgment-in-hejduk-c-44113/#comment-471013> <Last accessed: 16 August 2016>

internet does, to a certain extent, change everything. Therefore, it is submitted the problem that arises in this paper stems from the refusal of the CJEU in realising that copyright infringement taking place in a ubiquity medium such as the Internet warrants a careful approach in establishing the test for jurisdiction.

Therefore, before delving into the substantive discussion of this paper, it is important to briefly analyse the reasons why the Internet do indeed change the way jurisdiction issues ought to be solved.¹¹ Svantesson in his book on *Private International Law and the Internet* dedicated a whole chapter on this issue and this paper will now attempt to highlight a few important points he raised that will be relevant to the current problem of jurisdiction in online copyright infringement.¹²

First of all, it is important to note that even though the Internet does not change the importance of principle of territoriality, the “borderlessness” of cyberspace means that the communication can flow freely between most countries without the need for any border checks.¹³ Moreover, the Internet is said to be geographically independent.¹⁴ This means that the geographical identity of people using the internet is irrelevant in relation to the online activity. Publishers can make materials available to people regardless of their geographical location and the receivers of such information generally do not care where the information originates from geographically. Besides, limited language dependence is also a relevant factor that needs to be taken into account when analysing the law on jurisdiction.¹⁵ With online translation tools, it is now easier than ever to overcome the language barrier that may subsist in Cyberspace. Last but not least, one important characteristic of the Internet that is relevant to our discussion today is the reactive nature of a webserver.¹⁶ Svantesson noted that web communications, unlike television and radio broadcast as well as emails, are reactive in nature. It involves the active act of the person making the information available and the person seeking the information.¹⁷ This final

¹¹ For a more substantive discussion see: Svantesson, D, “The Characteristics Making Internet Communication Challenge Traditional Models of Regulation- What every International Jurist Should Know about the Internet” (2005) 13 (1) International Journal of Law and Information Technology, 39-69.

¹² Svantesson (n.2) at pp. 29-59.

¹³ Svantesson (n.2) at p. 34.

¹⁴ Svantesson (n.2) at p. 35

¹⁵ Svantesson (n.2) at p. 37.

¹⁶ Svantesson (n.2) at p. 46.

¹⁷ Svantesson (n.2) at p. 49.

characteristic forms the basis of the mere accessibility and targeting approach dichotomy that will be featured in the discussion on this paper.

Hence, with all these peculiar characteristics combined, it is easy to understand why the debate on how to best fit traditional models of the law on jurisdiction in online copyright infringements are controversial. Therefore, this paper aims to undertake research in an attempt to analyse whether the CJEU approach overcomes the problems posed by the peculiarity of the Internet on jurisdiction issues in online copyright infringements.

1.3 How will this problem be addressed?

In addressing the problem raised, it is hoped that the research undertaken by this paper would contribute to the academic debate that the mere accessibility approach undertaken by the CJEU is undesirable. It will be submitted that the targeting approach is the better option. A particularly inventive proposal by this paper is to draw inspiration from the CJEU cases on personality rights. Whilst most of the literature and the CJEU itself seem to brush away or even criticise the approach undertaken by the CJEU in *eDate and Martinez*, this paper would like to submit that the ‘centre of interest’ test may be a useful indicator in evaluating the place where the infringing material is directed towards. It is hoped that this paper will fill the gap in the literature with a focused discussion on Art 7(2) of the Brussels I Regulation by combining both the targeting approach and the centre of interest test.

In order to do so, this paper will adopt a simple 3-step structure in its evaluation. The first step involves an analysis on the law on jurisdiction issues in the EU leading up to the current position of the law in cases involving online copyright infringements. It will then highlight the problems posed by the position adopted by the CJEU before proposing its very own interpretation of the law on how it should be in Art 7(2) of the Brussels I Regulation in cases involving online copyright infringement. In doing so this paper will look at several legislative proposals such as the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), the American Law Institute (ALI) and the Japanese Transparency Proposal.

2. Jurisdiction and Brussels I Regulation.

This section of the paper will aim to provide an overview of the current state of laws in the EU with regards to jurisdiction issues in online copyright infringement. The starting point in analysing the law on jurisdiction with regards to civil and commercial matters¹⁸ is the Brussels I (Recast) Regulation¹⁹ (hereinafter, the Brussels I Regulation). It is submitted that the relevant law with regards to the issue of jurisdiction in online copyright cases is Art 4 and Art 7(2) of the Brussels Regulation. Moreover, it is important to point out that, the cornerstone of controversial issues within this area lies on the difficulty of the CJEU in interpreting the technologically neutral Art 7(2) in a technologically dependant phenomena. Therefore, it should come as no surprise that the focus of this section is mainly based upon Art 7(2). Lastly, it is important to note that the purpose of the overview is not only for the reader to understand how the CJEU had come about to the current state of law but also to illustrate the piecemeal approach taken by the CJEU with regards to jurisdiction in online copyright infringement.

2.1 Art 4 of the Brussels I Regulation: The General Provision.

The general provision with regards to jurisdiction in the EU can be found in Art 4 of the Brussels Regulation. According to this provision, jurisdiction is granted based upon the defendant's domicile in one of the Member State.²⁰ Indeed, Recital 15 of the Brussels Regulation clearly mentions that 'jurisdiction should always be available on the grounds of the defendant's domicile' 'save in a few well-defined situations'.²¹

It is submitted that this provision is relatively straightforward and non-controversial. Hence, with regards to a case involving online copyright infringement, Art 4 of the Brussels I regulation would grant the court, where the copyright infringer is domiciled, the *prima facie* jurisdiction. The rationale of this provision is to ensure legal certainty. In the interest of justice, a defendant should not be dragged into a court that it could not reasonably

¹⁸ Art 1 of the Brussels Regulation.

¹⁹ Regulation (EU) No 1215/2012 Of The European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

²⁰ Art 62 and Art 63 provides the rules in determining the Member State in which the defendant is domiciled.

²¹ Recital 15 of the Brussels Regulation.

foresee. However, as will be analysed in the next subsection, alternative grounds of jurisdiction also exist in line with the predictability rationale.

2.2 Art 7(2) of the Brussels I Regulation: Special Jurisdiction.

As with every rule, there is always an exception. Hence, although jurisdiction should generally be based on the defendant's domicile, it is crucial that alternative grounds of jurisdiction should exist in situations where it is fair to do so. Indeed, Recital 16 provides that this alternative grounds of jurisdiction should be provided 'based on a close connection between the court and the action or to ensure the sound administration of justice'.²² Therefore, such alternative grounds of jurisdiction can be found in Art 7 of the Brussels Regulation. Nonetheless, it is important to note that Art 7 only applies where the defendant is domiciled in one of the Member States in which the Regulation applies to.²³ This means that Art 4 must be satisfied even before Art 7 could be considered. Hence, it is important to point out that the existence of the alternative grounds of jurisdiction in Art 7 is parallel to the existence of Art 4 and not in replacement of it.

Art 7(2)²⁴ provides that a person domiciled in a Member State may be sued in another Member State where 'the harmful event occurred or may occur' in matters relating to tort, delict or quasi-delict. Hence, in order to argue that online copyright cases fall within this provision, the first question that needs to be addressed is concerning the scope of 'tort, delict or quasi-delict'.

2.2.1 Scope of 'tort, delict or quasi-delict'.

It is important to note that the CJEU had given a broad interpretation in defining the expression 'tort, delict or quasi-delict'. In *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co*²⁵, the CJEU held that the term 'tort, delict or quasi delict' ought to be given an independent meaning and it must be regarded to encompass all actions in establishing

²² Recital 16 of the Brussels I Regulation.

²³ Dickinson, A., Lein, E. (2015) "The Brussels I Regulation Recast", OUP at p.135, para 4.12.

²⁴ It is to be pointed out that cases analysed in this paper referred to the old numbering of Art 5(2). In order to ensure consistency and clarity, this paper will use the updated numbering throughout this paper.

²⁵ CJEU Case C-189/87 *Athanasiou Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst und Co., Bankhaus Schröder, Münchmeyer, Hengst International SA, Luxembourg, and Ernst Markgraf*. Judgment of the Court (Fifth Chamber) of 27 September 1988.

the liability of the defendant and which are not related to the contract,²⁶ as provided by Art 7(1). This means that the scope of Art 7(2) is defined in a negative sense; all liability claims that are non-contractual are tortious for the purposes of the Brussels I Regulation.

Having established that, it must be noted that liability claims are not restricted to claims for damages but would also include injunction claims.²⁷ This is rightly so, especially in copyright infringement cases, both claims for damages and injunctions are of equal importance.

Nonetheless, it is important to note that civil liability claims that are classified as a tort under national law must nonetheless be considered as a contractual claim if the act complained of may be considered as a breach of contract.²⁸ This means that claims involving contracts may not fall within the scope of Art 7(2) even if it is framed as a tort claim. Thus, applying this observation in a copyright case, Art 7(2) will not apply in a copyright infringement case that hinges upon the validity of a contract involving a transfer of copyright ownership (a license). This would include cases where a copyright is infringed when the licensee acts beyond the terms of a licence. Hence, even though it can be classified as a copyright infringement case, if the contract needs to be pleaded or proved to establish the infringement,²⁹ Art 7(1) would apply instead of Art 7(2). With that said, it must nonetheless be noted that not all cases that have a contractual element will fall within Art 7(1). In *Hi Hotel v Spoerling*³⁰, the CJEU ruled over a case regarding the reproduction and distribution of a copyrighted photograph in accordance with Art 7(2). Even though the case involved a contract, the essence of the case did not hinge on the validity of the contract.

Hence, to sum up, online copyright claims that do not depend on the validity of a contract will generally fall within the scope of Art 7(2) of the Brussels I Regulation. Having established that, this paper will now evaluate the gist of Art 7(2).

²⁶ C-189/87 at para 18.

²⁷ CJEU Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel*, Judgment of the Court (Sixth Chamber) of 1 October 2002.

²⁸ CJEU Case C-548/12 *Bogsitter v Fabrication de Montres Normades*, Judgement of the Court (Seventh Chamber) of 13 March 2014.

²⁹ Briggs, A. “Civil Jurisdiction and Judgements” (2015) 6th Edition, Informa Law from Routledge, at p. 239.

³⁰ CJEU Case C-387/12 *Hi Hotel HCF SARL v Uwe Spoerling*, Judgment of the Court (Fourth Chamber) of 3 April 2014.

2.2.2 The place where the harmful event occurred or may occur: The landmark decisions.

In accordance with Art 7(2), a person domiciled in a Member State may be sued for copyright infringement in another Member State ‘where the harmful event occurred or may occur’. The CJEU in the landmark decision of *Bier v Mines de Potasse d'Alsace*³¹ held that the place ‘where the harmful event occurred or may occur’ can include two courts, which is firstly, the place where the damage occurred (the damage limb) and secondly, the place of the event giving rise to the damage occurred (the causal event limb). The choice between the two location in which the proceedings is to be heard is up to the plaintiff to decide. The rationale of this provision is to be found in Recital 16 which states that an alternative jurisdiction, in addition to the defendant’s domicile, should be based on a close connection between the court and the action.

Nonetheless, Adrian Briggs QC noted that the Bier decision can be relied on even when the actual connection between the court and the action is not close. However, this paper would respectfully disagree. Although he was right in pointing out that this ‘jurisdiction generosity’ ‘is and remains good law’³², his initial concern is argued to be misleading. His observation may be correct in theory but in practice, such fears are unfounded. The very wording of the expression and its interpretation does, by definition, ensure a close connection between the court and the action. It is hard to conceive a claim whereby the court would not have a close connection with the action if damages did indeed arise in that place or if the event giving rise to the damage occurred in that particular place. This is most probably the reason why this decision has not been challenged in subsequent cases that is referred to the CJEU.

Nevertheless, one issue that has not been brought up with *Bier* is as to whether would the decision apply in cases whereby the damage occurred outside the territory of the Member

³¹CJEU Case C- 21/76 *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A*, Judgement of the Court 30 November 1976.

³² Briggs (n.29) at p. 251.

States but the event giving rise to it occurs within the Member State or vice-versa.³³ Given that this issue is framed as a ‘yes or no’ question, two possible positions can be taken.

First, it could be argued that unless both limbs in *Bier* occurred within a Member State, Art 7(2) would not apply. The second possible position is that as long as either the damage limb or the causal event limb occurs in one of the Member State, the courts in that particular Member State will have jurisdiction. Briggs provided justification for the former position by arguing that a defendant should only be deprived of the general jurisdiction of being sued in his domicile if there is a strong connection with another Member State.³⁴ In other words, unless both the damage limb and the causal event limb occur within a Member State, there is no close connection between the courts and an action. However, this paper would like to provide an alternative argument to his view.

Thus, this paper would like to submit that it is sufficient for either the damage or the event to occur in one of the Member State for Art 7(2) and thereby *Bier* to apply. There is no requirement for both limbs of *Bier* to occur in a Member State. It must be recalled that the decision in *Bier* was given in response to a preliminary ruling regarding the interpretation of the meaning ‘the place of the harmful event’. Thus, Brigg’s observation, that the ‘two limbs of *Bier* may only operate to confer special jurisdiction *after and not before* it has been decided that the harmful event occurred within the territory of Member States’,³⁵ seems rather peculiar. Instead, it is submitted that the two limbs of *Bier* should operate neither *before* nor *after* deciding if the harmful event occurred but *during* such a decision. Therefore, once a place is deemed to be the place where the harmful event occurred or may occur in a Member State, (either the place where the damage occurred or the place giving rise to that damage), that place shall have alternative jurisdiction. Thus, as long as either the damage limb or the causal event limb occurs in a Member State, the plaintiff should be able to rely on the special jurisdiction provided by Art 7(2) as defined in *Bier*.

Nonetheless, it is conceded that with regards to Cyber torts, Briggs’s observation may not seem that far-fetched. It seems pointless to require both limbs of *Bier* to occur in a Member State for Art 7(2) to apply only because both limbs will indirectly occur in Cyber torts. To

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* (emphasis added)

follow this argument, it must be recalled that the prerequisite for Art 7(2) to apply is that the defendant be domiciled in at least one of the Member State. Moreover, as it will soon be clarified in this paper, the CJEU has interpreted the place of the event giving rise to a damage to be where the defendant is established, and not where the physical place where the infringing material is uploaded nor where the server is located.³⁶ Having established that, given the fact that plaintiff that relies on Art 7(2), would like to obtain an alternative jurisdiction from the defendant's domicile as established in Art 4, it is most likely that the said plaintiff would like to rely on the limb 'where the damage occurred'. Thus, having turned to Brussels Regulation, it is most likely that the plaintiff's damage did occur within a Member State. Hence, it is submitted that with regards to Cyber Torts, if a plaintiff would like to rely on the Brussels Regulation, it is most likely that both limbs in Bier will have occurred within the territory of Member States.

Having submitted that, this paper will now evaluate the opposite scenario whereby the place giving rise to damage resulted in the damages occurring across a few Member States. With regards to damages occurring in several Member States, one important principle that needs to be highlighted is the 'mosaic principle'. In *Shevill v Presse Alliance*³⁷, the CJEU held that a court will only have the special jurisdiction to assess damages that occur within the State of the court seised and not the whole of the damage. It is important to note that this 'mosaic principle' only applies to the 'damage' limb of the Bier decision. In other words, if a plaintiff decides to sue at the place where the damage occurs, the Court seised would only have the jurisdiction to adjudicate on the damage that arose in the territory of that particular Member State. Moreover, it is important to note that if the plaintiff chooses to sue at the place where the event giving rise to the damage occurred, he or she could sue for the whole of the damages. This situation would also arise if the plaintiff decides to rely on Art 4 by suing in the court of the defendant's domicile. As it will be shown later in the paper, this principle also applies in an online context.

One final issue that needs to be addressed with regards to the interpretation of 'the place where the damage occurs' is with regards to the kind of damages that is relevant for Art

³⁶ See: CJEU Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, Judgment of the Court (First Chamber) of 19 April 2012 at para 36, CJEU Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH*. Judgement of the Court (Fourth Chamber) on 22 January 2015 at para 24.

³⁷ CJEU Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*. Judgment of the Court of 7 March 1995.

7(2) to apply. It is now widely accepted by scholars that Art 7(2) only applies to direct damages suffered by immediate victims.³⁸ Indeed, the CJEU in *Dumez* held that an indirect victim that suffers damages which occurred as a consequence to damages sustained by a direct victim cannot rely on Art 7(2).³⁹ Moreover, the CJEU in *Marinari* held that indirect or consequential damages suffered by a direct victim also does not qualify as a relevant damage for Art 7(2) to apply.⁴⁰ Therefore, in a classic copyright infringement case, it is safe to conclude that only the copyright owner that has suffered damages directly from the copyright infringement can rely on Art 7(2).⁴¹

2.2.3 The Road to Online Copyright Cases: the application of Bier and Shevill in Cyber Torts.

Given the fact that *Bier* and *Shevill* both provided the basis in analysing Art 7(2), this paper will now evaluate how the CJEU interprets the question of, ‘where the harmful event occurs’ in online torts. Hence, it may be interesting to observe that interpreting Art 7(2) is a two-fold exercise. Once the expression ‘the place where the harmful event occurs or may occur’ had been interpreted to mean 1) the place where the damage occurs and 2) the place where the event giving rise to the damage occurred, the second step involves interpreting these two limbs in various online legal situations. Thus, this section of the paper will attempt to guide the reader into understanding how the CJEU cases have evolved into the current (and rather unfortunate) situation.

The first cyber tort case involves an online infringement of personality rights in the joined cases of *eDate Advertising and Martinez*⁴². In this case, it is noted that the questions

³⁸ Hess, B., Pfeiffer, T., and Schlosser, P., “Report on the Application of Regulation Brussels I in the Member States”, (2007) Ruprecht Karls Universität Heidelberg, Institut für Ausländisches und Internationales Private und Wirtschaftsrecht, at p 95-97.

Available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. <Last accessed: 16 August 2016>

See also, Dickinson (n.23) at p. 167 and Briggs (n.29) at p.253.

³⁹ CJEU Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, Judgment of the Court (Sixth Chamber) of 11 January 1990.

⁴⁰ CJEU Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, Judgment of the Court of 19 September 1995.

⁴¹ Unless the alleged defendant, that has not been sued, would like to seek for a declaration of non-liability. See: CJEU Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA.*, Judgment of the Court (First Chamber) of 25 October 2012.

⁴² Joined CJEU Cases C-509/09 *eDate Advertising GmbH v X* and (C-161/10) *Olivier Martinez and Robert Martinez v MGN Limited*, Judgment of the Court (Grand Chamber) of 25 October 2011.

referred to the CJEU were framed in a way that places importance on the ‘targeting’ and ‘mere accessibility’ dichotomy that surrounds previous online cases⁴³, particularly in a consumer context. Instead, it will be seen that the CJEU chose to ignore such dichotomy and decided to base its decision on the traditional landmark decisions of *Bier* and *Shevill*. Thus, the CJEU held that there were three alternative jurisdictions that the plaintiff could rely on. First, relying on *Bier*’s causal event limb, the plaintiff could sue at the place where the event giving rise to the damage occurred, which is held to be the place where the publisher is established. The CJEU then formulated a new second alternative jurisdiction based upon *Bier*’s damage limb and held that jurisdiction lies at the place where the damage occurred and this place was considered to be the place where the centre of the claimant’s interests is based.

Lastly, the Court applied *Shevill*’s (also a personality rights case) distribution criteria and noted that the third alternative jurisdiction lies in the court of the Member State in which the content placed online is or has been accessible.⁴⁴ This rather controversial observation by the CJEU has been largely ignored due the application of the restrictive ‘mosaic principle’ that applies here. This is to be contrasted with the new ‘centre of interest’ formulation where the plaintiff may claim for the whole of the damage. Hence, it is more desirable for plaintiffs to rely on the new ‘centre of interest’ criteria instead of the so-called accessibility criteria in order to obtain the full damage.

Nonetheless, for the purposes of this paper, this third alternative jurisdiction warrants further analysis. It is important to note that in *Shevill*, two further criterion needs to be satisfied in order to rely on the distribution criteria. Firstly, it must be shown that the paper-based defamation was distributed in that forum and secondly, the victim is known in that particular forum in order for the victim’s reputation to have suffered injury.⁴⁵ Hence, with the globalised nature of the Internet, the distribution of defamatory material is more appropriately associated with a targeting approach as compared to a mere accessibility approach. This is because a publisher in print publication would need to take affirmative

⁴³ Brachotte S., Nuyts A. “Jurisdiction over cyber torts under the Brussels I Regulation” in Savin, A., Trzaskowski, J., (2014) *Handbook on EU Internet Law* at p. 234.

⁴⁴ Joined CJEU Cases C-509/09 and C-161/10 at para 51.

⁴⁵ C-68/93 at para 33.

measures in deciding where to distribute its printed content. Thus, to equate a mere accessibility test with *Shevill*'s distribution criteria would not do it justice.

The next Cyber Tort case that went up to the CJEU is a case involving the use of trademark as a keyword in an online referencing provider. In *Wintersteiger v Products 4U*⁴⁶, the CJEU held that the place where the event giving rise to the damage occurred is where the advertiser is established, and not where the server is established⁴⁷ nor where the advertisement is displayed⁴⁸. This is in line with the decisions in *Bier* and *Shevill*, where the causal event limb is defined in accordance with the place of the establishment of the defendant and not the physical location of the allegedly harmful act of the defendant.⁴⁹

With regards to the damage limb, the court held that the place where the damage occurred is in the Member State where the infringed trademark is registered. It is important to note that the court in *Wintersteiger* specifically rejected the new criterion established in *eDate and Martinez* by noting that the 'centre of interest' criterion is solely restricted to 'the particular context of personality rights' and does not apply to the infringement of intellectual property rights.⁵⁰ Hence, it could be observed that Art 7(2) for registered intellectual property rights would mean that alternative jurisdiction exists in the place where the defendant is established and where that right is registered.⁵¹

One final cyber tort case that is worth mentioning before analysing online copyright law cases is a case involving online database. Even though the decision in *Football Dataco v Sportradar*⁵² does not directly concern the issue of jurisdiction and Art 7(2), the CJEU noted that the localization of the infringement at issue (the reutilization of the online database) may be relevant for the question of jurisdiction.⁵³ The CJEU in that case noted that the localisation of the infringing act is based upon evidence that may conclude an intention to target the public that is located within that territory.⁵⁴ Transposing this decision

⁴⁶ C-523/10.

⁴⁷ C-523/10 at para 36.

⁴⁸ C-523/10 at para 34.

⁴⁹ Brachotte (n.43) at p. 238.

⁵⁰ C-523/10 at para 24.

⁵¹ C-523/10 at para 29.

⁵² CJEU Case C-173/11 *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, Judgment of the Court (Third Chamber) of 18 October 2012.

⁵³ C-173/11 at para 30.

⁵⁴ C-173/11 at para 39.

on the question of jurisdiction, it could be argued that for the *sui generis* database protection, the place where the damage occurs is the place where the defendant intended to target the public with the reutilized database. Moreover, it is important to note that the CJEU expressly held that the mere accessibility of the reutilized data is insufficient to conclude that the operator of the website is performing the infringing act of reutilizing the database.⁵⁵ Hence, even though the *Football Dataco* does not concern Art 7(2) of the Brussels Regulation, the analysis of the localisation of the infringing act is very much relevant to the discussion of this paper as it puts forward another plausible method in determining jurisdiction.

Therefore, up till this point, it can be observed that the state of law with regards to the interpretation of Art 7(2) in Cyber Torts seems varied. To sum up, for online personality infringement cases, the three alternative jurisdictions lie at the courts of the place where the publisher is established, the place where the plaintiff's centre of interest is established for the whole of the damage and where the infringing content 'is assessed or may be accessible' for the damage limited by the 'mosaic principle'. For registered intellectual property rights, the alternative jurisdiction lies at the place where the victim is established and where the rights were registered. Lastly, with regards to the *sui generis* online database, although the CJEU's decision was not authoritative, a possible alternative jurisdiction may lie at the place where the online database was reutilized with the intention to target the public located within that territory.

Therefore, as was rightly pointed out by Brachotte and Nuyts, this conundrum raises a few questions. This paper will summarize the questions raised as follows;⁵⁶ Will each type of Intellectual Property right be treated differently when deciding the relevant jurisdiction? Does the decision in *eDate and Martinez* establish jurisdiction in cyber torts in reference to a mere accessibility test, as long as the damages is restricted to the particular territory? Would jurisdiction in copyright cases be established according to one of these cases, or will a separate set of new principles be put forward by the CJEU? Hence, when the first preliminary ruling concerning copyright infringement and jurisdiction were referred to the

⁵⁵ C-173/11 at para 37.

⁵⁶ Brachotte (n.43) at p. 243.

CJEU in the case of *Pinckney*⁵⁷, there were high hopes that the CJEU would address these concerns.

2.2.4. Art 7(2) in Online Copyright Cases.

In order to critically evaluate the decisions of CJEU in establishing jurisdiction for online copyright issues in the next chapters, a more in-depth analysis on the facts of the case is warranted here.

As it was previously noted, the case of *Pinckney* was the first case concerning the question of jurisdiction and online copyright infringement that went up to the CJEU for a preliminary ruling. This case concerns Mr. Pinckney, who is the plaintiff in this case. He was domiciled in France and had claimed to be the copyright owner of 12 songs recorded on vinyl. The songs were then reproduced on compact discs (CD) that were pressed in Austria by the defendants in this case, Mediatech. These CDs were then marketed by two United Kingdom companies, both of which were not part of this case. Unsurprisingly, Mr Pinckney wanted to sue at his domicile in France whilst Mediatech challenged the jurisdiction.

The French Court (the Regional Court of Toulouse) dismissed the request of lack of jurisdiction on the basis that the CDs were available to be purchased in France from an internet site that was accessible to the French public.⁵⁸ Mediatech appealed against the judgement and argued that the CDs pressed in Austria were made at the request of the United Kingdom company.⁵⁹ Thus, Mediatech argued that only the national courts of Austria and the United Kingdom would have had the jurisdiction to hear the case. The Court of Appeal in Toulouse agreed with the argument and granted the appeal on the basis that the place of damage cannot be situated in France.⁶⁰ Mr Pinckney then brought an appeal in cassation against that judgement in which the French Court then stayed the proceedings and referred two questions to the CJEU.

⁵⁷ CJEU Case C-170/12 *Peter Pinckney v KDG Mediatech AG*, Judgment of the Court (Fourth Chamber) of 3 October 2013.

⁵⁸ C-170/12 at para 13.

⁵⁹ C-170/12 at para 13.

⁶⁰ C-170/12 at para 14.

The first question referred to the CJEU concerns as to whether Art 7(2), establishes jurisdiction in the event of an alleged infringement of copyright by placing the content on a website, where a) the online infringing material is or has been accessible in the territory of the Member State of the Court seised or b) whether the infringing material needs to be ‘directed to’ a public located in that Member State or whether must some other clear connecting factors be present. The second question concerns whether would the answer differ in the first question if the alleged infringement resulted from the online sale of a material carrier medium (i.e. the CDs) which reproduces the online and not from the placing of dematerialised content online.

It is worth noting that the Austrian government had submitted that these questions ought to be inadmissible. They submitted that the questions were hypothetical as regards to the facts of the case because the questions referred to the placing of content online, which concerns the act of distribution by the UK companies and not the act of reproduction by the defendant, Mediatech.⁶¹ As it will be shown, this important distinction had been sidestepped by the CJEU where it had reformulated the questions in its Judgement.

The reformulated question essentially asks whether Art 7(2) of the Regulation must be interpreted to mean that the Court seised have jurisdiction to hear an alleged copyright infringement case where, a company established in another Member State reproduced copyrighted work on material support which was then marketed online by a company from a Third Member State where the internet site is also accessible in the Member State of the court seised.

In answering this question, the Court reiterated the decisions in *Wintersteiger* and *eDate Martinez* and concluded that the decisions do not apply to copyright cases.⁶² The Court held that personality rights differ from intellectual property rights⁶³ and unlike registered trademarks, copyrights are unregistered rights and are automatically protected by virtue of the InfoSoc Directive.⁶⁴ Moreover, the court held that it is contrary to Art 17(1)(c), which

⁶¹ C-170/12 at para 16.

⁶² C-170/12 at paras 36-37.

⁶³ C-170/12 at para 36.

⁶⁴ C-170/12 at para 39.

protects consumer contracts, Art 7(2) does not require that the activity is ‘directed to’ to the Member States.⁶⁵

Finally, the Court answered the reformulated questions in the affirmative. Thus, the court seised can establish jurisdiction against the defendant, who has reproduced the work on a material support which was subsequently sold by a third party through an internet site that is accessible within the jurisdiction of the court seised. The court however, only has jurisdiction to determine the damage caused in the Member State.

Exactly six months after the decision in Pinckney was handed down, the Court answered another preliminary ruling regarding the interpretation of Art 7(2) concerning a copyright infringement case in *Hi Hotel v Spoering*.⁶⁶ This case involves Mr Spoering, a German photographer who was commissioned by Hi Hotel to take 25 photographs of the interior views of the rooms in the hotel based in Nice, France.⁶⁷ These copyrighted photographs were licensed for use on advertising brochures and the website of Hi Hotel. Mr Spoering then discovered that the photos were then published in a book on interior design by the German based publishers, Phaidon-Verlag⁶⁸ and brought proceedings against Hi Hotel for copyright infringement. The hotel then argued that the photographs could have been passed to the publishers who also has a place of business in Paris and was not aware that the photographs were then passed on to the publisher’s office in Germany.⁶⁹ Hence, the question referred to the CJEU essentially asks whether the harmful event occurred in Art 7(2) could mean the place where the actual act of making available and reproducing the copyrighted photographs (in Paris) or the place where the damages arises from the subsequent infringing act (in Berlin) that is derived from the first infringing act. In other words, the question focuses on whether jurisdiction can be established at the place where the defendant in the proceedings did not act in.

In answering this question, the court held that in cases where there are several perpetrators of damage, jurisdiction cannot be established on the basis of the causal event of the damage where the supposed perpetrator did not act. Nonetheless, jurisdiction can be established

⁶⁵ C-170/12 at para 42.

⁶⁶ C-387/12.

⁶⁷ C-387/12 at para 9.

⁶⁸ C-387/12 at para 10.

⁶⁹ C-387/12 at para 12.

where the place of the damage occurs, but the court could only rule on the damage caused within the territory of that Member State.

The final case that involves the interpretation of Art 7(2) and online copyright infringement is the case of *Hejduk*⁷⁰. This case involves the use of copyrighted photographs owned by the plaintiff domiciled in Austria against EnergieAgentur, a company established in Germany. Ms Hejduk had initially authorised defendant to use her copyrighted photographs in a conference in which the defendant then made available on its website without providing a statement of authorship.⁷¹ The defendants website had a country-specific top level domain of .de. Thus, it has been argued that the website was not directed to Austria.⁷² It was argued that the mere fact that a website may be accessed in Austria is insufficient to confer jurisdiction to the court.⁷³ Hence, the question referred to the CJEU essentially asks whether jurisdiction in online copyright infringements, such as the keeping a photograph available on a website operated on a top-level domain, can be established only where the alleged perpetrator is established and the place where the website is directed.

The CJEU held that the place where the harmful event giving rise to the damage is where the defendant has its seat, since that is where the “activation of the process for the technical display” of the photographs online is located.⁷⁴ The Court then reiterated the fact that Art 7(2) of the Brussels I regulation does not require that the activity concerned be directed to the territory of the court seised. Instead, jurisdiction can be established on the basis of the place where the damage occurred when the copyrighted material can be accessible in its territory. However, the jurisdiction of the court seised is limited to the territory of the Member State.

In a nutshell, the current position of the law on jurisdiction in online copyright infringements is based upon the mere accessibility of the infringing material. Having explained how the CJEU has reached to this position, this paper will now turn to analyse if this position is satisfactory.

⁷⁰ C-441/13.

⁷¹ C-441/13 at para 11.

⁷² C-441/13 at para 31.

⁷³ C-441/13 at para 13.

⁷⁴ C-441/13 at para 24.

3. Problems with Jurisdiction in Online Copyright as established by CJEU.

Due to the ubiquity of the Internet and the desire to base jurisdictional issues upon landmark decisions of *Bier* and *Shevill*, it appears that the CJEU had adopted a piecemeal approach towards establishing jurisdiction for Cyber Torts. This is argued to be a problem in itself. The fact that different kinds of torts occurring online are being subjected to different sets of jurisdictional rules, unfortunately creates a complex state of law. Nonetheless, sometimes such complexity can be justified in favour of legal certainty and foreseeability. However, unfortunately it is submitted that this was not what the CJEU achieved.

Instead, it will be argued that the core problem with the question of jurisdiction in online copyright issues is that the state of law set by the CJEU is contrary to the intentions of the legislators of the Brussels I Regulation. Hence, this paper will now attempt to analyse the main problem that arises from the current state of law. In order to do so, the analysis will be divided into two angles from which the two overarching positions that emanate from current CJEU jurisprudence on online copyright infringement can be ascertained. The first part of this chapter focuses on the fact that jurisdiction can be established even when the alleged defendant did not act within the territory of the court seised or did not directly cause the damage that arose within the territory of the court seised. The second part of this chapter will then focus on the fact that the CJEU adopted the mere accessibility criterion. This chapter will end with a brief overview of the counter-arguments to the problems raised before putting forward its proposal in the next chapter.

3.1 Attribution of Effects

One of the main difficulties with the CJEU decision in *Pinckney* and *Hi Hotel* was that a defendant may be sued at a court of a Member State where he was not domiciled and did not act in or directly cause the damage that was instead caused by a third party. It is important to point out at this stage that, this paper does not disagree with the Courts wanting to rely on the ‘damage limb’ as opposed to the ‘causal event limb’ when establishing jurisdiction. This paper believes that this was indeed in line with the *Bier* decision. Hence, it should follow that this paper does not disagree with the fact that a defendant may be sued in a country, in which he did not act in, by relying on the ‘damage limb’. That is precisely why an alternative jurisdiction from the defendant’s domicile exists. However, a particular

problem arises when the ‘damage limb’ is relied on when the damage occurred as a result of a subsequent act by a third party.

In his commentary on *Pinckney*, Martin Husovec labelled this situation as an ‘attribution of effects’.⁷⁵ He argued that the decision in *Pinckney* extended the scope of Art 7(2) by attributing to the defendant the effects that were caused by a second person against whom jurisdiction can be established.⁷⁶ Although this argument could be justified by using the concept of joint tort feasorship, the lack of explanation by the CJEU regarding such requirement is worrisome.⁷⁷

In order to illustrate the difficulty of this position, it is important to point out that the Advocate General (AG) Jääskinen in *Pinckney* had the opinion that the case should be held inadmissible.⁷⁸ He highlighted the distinction between the act of reproduction by the defendant, Mediatech and the subsequent acts of distribution and communication to the public by the UK companies.⁷⁹ It is to be recalled that, the questions referred to the CJEU centred around the act of distribution of the CDs online which had nothing to do with the defendant at issue. Therefore, the AG opined that the questions referred to the CJEU were hypothetical and were not relevant to the outcome of the proceedings.⁸⁰ He was not alone in his observation. Martin Husovec in his blog had also lent support in his prediction that the *Pinckney* case will be held to be inadmissible.⁸¹ Therefore, it should have come with no surprise that the admissibility of the case and the subsequent confirmation in the decision of *Hi Hotel* is to be met with some criticisms. In the following subsections, this paper aims to highlight the specific reasons as to why this ‘attribution of effects’ rule is problematic.

⁷⁵ Husovec, M., “European Union: Comment on Pinckney”, (2014) International Review of Intellectual Property and Competition Law 370-374 at p. 372.

⁷⁶ Husovec (n.75) at p. 371.

⁷⁷ *Ibid.*

⁷⁸ Opinion of the Advocate General Jääskinen CJEU Case C-170/12 *Peter Pinckney v KDG Mediatech AG*. Opinion delivered on 13 June 2013 at para 40.

⁷⁹ AG Opinion C-170/12 at para 25.

⁸⁰ AG Opinion C-170/12 at para 39.

⁸¹ Husovec, M., “CJEU received a new case on online jurisdiction Online Copyright Infringement and Jurisdiction” Blogpost entry on 19 September 2013. Available at: <http://www.husovec.eu/2013/09/cjeu-receives-new-case-on-online.html>. <Last accessed: 16 August 2016>

3.1.1 Legal uncertainty of the attribution of effects.

Although ‘legal uncertainty’ is and will be the recurring theme in this chapter, it is necessary to point out that the main problem with this ‘attribution of effect’ lies with the uncertainty surrounding the question of when a defendant can be attributed the effects caused by a third party. It is to be noted that the CJEU paid no heed to the various warnings provided by its very own Advocate Generals when coming up with these decisions.⁸² Indeed, before the CJEU confirmed the attribution of effects position in *Hi Hotel*, Jääskinen, this time acting as the AG in *Coty Germany*, had already addressed his fear that this ‘attribution of effects’ will lead to the need to create a quantitative or qualitative threshold for such attribution.⁸³ The question then is, what are the suitable thresholds? Must the defendant have acted in a way that would have made the subsequent act of a third party possible? This paper believes that there has to be some sort of a connection between the actions of the defendants and the unlawful act of the third party that eventually led to the damage.

The UK government proposed in *Coty Germany*⁸⁴ that there ought to be a requirement that a ‘sufficiently clear and direct link’ between the actions of the defendant and the unlawful act of the third party must exist.⁸⁵ However, as it was rightly pointed out by the AG, such a requirement would lead to a substantive assessment of the facts, which may amount to the assessment of the merits of the case that goes beyond the stage of establishing jurisdiction. Having said that, this paper would like to propose that there ought to be some kind of a *de minimis* rule that can be applied at the stage of determining jurisdiction without considering the merits of the case.

Svantesson in his book noted that good private international law needs to meet legitimate party’s expectation.⁸⁶ He pointed out that this could be met by either genuine legitimate

⁸² The Opinions of Advocate Generals are not binding. For an editorial of the role (or the absence of such role) of AG in copyright, see: Rosati, E., “Luxembourg, we have a problem: where have the Advocates General gone?”, (2014) Journal of Intellectual Property Law & Practice, Vol. 9, No. 8 at p. 619. Available at: <http://jiplp.oxfordjournals.org/content/9/8/619.extract>. <Last accessed: 16 August 2016>

⁸³ Opinion of Advocate General Jääskinen Case C-360/12 Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH, v First Note Perfumes NV. Opinion delivered on 21 November 2013, at para 59.

⁸⁴ A case concerning the EU Community trademark with rather similar facts to Pinckney.

⁸⁵ AG Opinion C-360/12 at para 60.

⁸⁶ Svantesson (n.2) at p. 72.

expectation and constructive legitimate expectation.⁸⁷ Therefore, it is proposed that in cases involving several perpetrators, a co-perpetrator may be sued at a court in which he did not act in as long as the subsequent act by the third party could be reasonably foreseen. Indeed, there is no doubt that the question of foreseeability is essential for the legal certainty to exist. Moreover, a brief overview of the facts of a case could, without delving deeper into the merits of the case, establish such foreseeability. Nonetheless, it is unfortunate that the CJEU had failed to see the need for such a *de minimis* rule for a defendant to be attributed the effects that were caused by a subsequent action from a third party.

3.1.2 *Indirectness of damage vs indirect act causing damage.*

Moreover, it is important to note that this ‘attribution of effect’ situation would also undermine the requirement of a direct damage to occur for a plaintiff to be able to rely on Art 7(2). It will be recalled that this requirement was put forward by the CJEU decisions in *Dumez* as well as in *Marinari*. In those cases, the plaintiffs were not able to rely on Art 7(2) where he or she claims to have “suffered damage following upon initial damage arising and suffered by him in another Contracting State”⁸⁸. Therefore, as it was rightly pointed out by Husovec, the *Pinckney* decision allows plaintiffs to sidestep the possibility of failing a claim if the damage is seen as a collateral damage to the defendant’s action.⁸⁹ Whereas if the damage is a direct damage from an act that is caused by the third party (i.e. an indirect act from the defendant), it appears that the claim could now succeed. In order to illustrate this argument, this paper will now attempt to apply the quoted rule in *Marinari* to the facts of the case in *Pinckney* and *Hi Hotel*.

In *Pinckney*, it could be argued that the damage arising from an act of distribution is merely consequential to the damages that arose from the act of reproduction in Austria. Similarly, in *Hi Hotel*, it could be argued that the damage arising from the act of publishing the copyrighted photos in Germany is consequential to the damages that arose from distributing the copyrighted photos to the publishers in France. Nonetheless it could be argued that in these cases, the facts may enable an identification of a joint-tort liability and it is important

⁸⁷ *Ibid.*

⁸⁸ C-364/93 at para 15.

⁸⁹ Husovec (n.75) at p. 372.

to remember that “other sets of circumstances could prove more complex”⁹⁰. Therefore, it may be observed that the CJEU decisions in *Pinckney* and *Hi Hotel* effectively render its own decisions in *Dumez* and *Marinari* unimportant.

Once again, it should be pointed out this position raises problems with regards to legal certainty. A plaintiff would not be able to foresee if the CJEU will view its damage as an indirect damage flowing from the direct damage that occurred in another Member State or whether it will view the damage as a direct damage that arises from an indirect defendant. Hence, once again, the proposed *de minimis* rule may overcome this problem.

3.1.3 The end of Melzer?

In addition to the ‘attribution of effect’ position being contrary to the decisions in *Dumez* and *Marinari*, the ability to sue a defendant in a place in which he or she did not act in or caused any damage directly from its action seems to also be contrary to the position taken by the CJEU in *Melzer*⁹¹. For the purpose of this paper, it is sufficient to note that *Melzer* is a case regarding a tortious liability with obvious financial loss and does not concern jurisdiction for intellectual property rights cases nor cyber torts. Nonetheless, the question referred to in *Melzer* was about whether the jurisdiction could be established in ‘a place where the harmful event occurred’ when the damage is imputed to one of the presumed perpetrators who has not acted within the jurisdiction of the court seised. The CJEU answered in the negative. In other words, the CJEU in *Melzer* held that a plaintiff was not allowed to sue at the place where a harmful event occurred if the defendant had not acted in the territory of the court seised.

Having established that, it is important to highlight that the CJEU in *Pinckney* and *Hi Hotel* distinguished these cases from the decision in *Melzer*. The CJEU noted that the preliminary ruling in *Pinckney* seeks to establish jurisdiction based on the place where the damage occurred (damage limb) as compared to *Melzer* which concerned the place where the event giving rise to the damage (causal event limb).⁹² Similarly, the CJEU in *Hi Hotel* distinguished *Melzer* by noting that the questions referred to in *Hi Hotel* did not limit itself

⁹⁰ AG Opinion C-360/12 at para 59.

⁹¹ CJEU Case C-228/11 *Melzer v MF Global UK Ltd*, Judgment of the Court (First Chamber) of 16 May 2013.

⁹² C-170/12 at para 29.

merely to the causal event limb but encompasses the whole place where ‘harmful event’ occurred.⁹³

Nonetheless, whilst this may be true in theory and may seem harmless at first instance, in practice, the decisions in *Pinckney* and *Hi Hotel* may render the *Melzer* case insignificant. Indeed, even AG Jääskinen in *Coty Germany* noted that unless the decision in *Pinckney* is specific to the circumstances of the case, its reasoning may lead to an outcome contrary to what could arise from the *Melzer* judgement.⁹⁴ Therefore, even though in theory the decisions differ factually, it could be argued that the reasoning involved in the decisions are based upon the same premise. Especially in online copyright infringement cases, it is submitted that plaintiffs that were initially deprived of the possibility of relying on *Melzer* will now be able to rely on the decisions in *Pinckney* and *Hi Hotel* to obtain jurisdiction at the court seised. In order to illustrate this argument, this paper will now seek to apply the assertion in a hypothetical online copyright infringement case.

First of all, it must be recalled that the CJEU had held that the place where the damage occurs in online copyright infringement is where the infringing content is accessible within the jurisdiction of the court seised.⁹⁵ Given that ubiquity of the Internet, infringing material is most likely accessible at place of the causal event. Also, given the fact that copyright is automatically granted by virtue of the InfoSoc directive, the material will most likely be protected by copyright there too. Hence, in a hypothetical situation where the plaintiff would like to claim jurisdiction at the place where the event giving rise to the damage, such plaintiff could indeed claim jurisdiction there, by arguing that the infringing material is accessible in that place, thereby relying on the damage limb. Moreover, for the sake of completeness, it must be pointed out that given that in online copyright infringements, the place where the event giving rise to the damage is usually where the defendant is established.⁹⁶ Therefore, the plaintiff could just rely on Art 4 of the Brussels I Regulation in the hypothetical example.

⁹³ C-387/12 at para 33.

⁹⁴ AG Opinion C-360/12 at para 66.

⁹⁵ C-170/12 (*Pinckney*) and C-441/13 (*Hejduk*).

⁹⁶ C-441/13 at para 24.

Therefore, it could be seen that although the decisions in *Pinckney* and *Hi Hotel* endorse the Melzer decision by referring to it several times in the judgment⁹⁷ and also took the time to distinguish the facts of the case from the case in *Melzer*, what the court essentially achieved was throwing away the applicability of *Melzer*, at least in cases involving online copyright infringement.⁹⁸ Hence, once again, it can be shown that this attribution of effects is problematic.

3.1.4 Distinction and reconciliation

A keen-eyed (and doubtful) reader at this point may want to argue that the position adopted by this paper in criticising this ‘attribution of effects’ position may seem contrary to the argument raised earlier in Chapter 2 whereby this paper asserted that “as long as either the damage limb or the causal event limb occurs in a Member State, the plaintiff should be able to rely on the special jurisdiction provided by Art 7(2)”.⁹⁹ This paper would now like to address this discrepancy by noting the differences between these two assertions. Firstly, it is to be noted that these two observations take place at different stages in assessing a jurisdictional claim. The first stage involves the question of whether Art 7(2) can be applied to the facts of the case at hand. Thus, once either the damage or the causal event occurred within a Member State, a plaintiff may seek to rely on Art 7(2). The second stage then involves the substantive interpretation of Art 7(2). Hence, when relying on Art 7(2), (i.e. a plaintiff seeking to rely on either the damage limb or the causal event limb) it is of utmost importance there must be some connections between the act of the defendant and the effects that is produced. The importance of this distinction can be explained by using the following example.

Let’s say in Case A, a defendant’s act did not directly cause the damage occurring at the territory of the court seised but instead the damage was caused by a subsequent act of a third party. This is where we currently stand in accordance with *Pinckney* and *Hi Hotel*. Hence, unless it can be established that there is a form of constructive legitimate expectation or a joint-tortfeasorship, the criticisms raised in this chapter applies. On the other hand, in the alternative Case B, if a defendant acting outside a Member State (where

⁹⁷ C-170/12 at paras 23-27 and C-387/12 at paras 25-32.

⁹⁸ *Melzer* would most probably remain good law for Art 7(2) for torts that do not occur online.

⁹⁹ Paragraph accompanying fn.35.

the Brussels I Regulation applies), knowingly caused the damage that arise within a Member state, the question of foreseeability does not arise. The defendant ought to legitimately expect that he may be sued in a foreign court if his actions could have been reasonably foreseen to have caused the damage. There is no reason to deprive a plaintiff from Art 7(2) as questions of legal certainty does not arise.

Hence, to sum up this argument, it is problematic when a defendant is being sued in a place that he did not act, solely on the basis that damage had occurred in that territory, if it could not be foreseeable for the defendant that he may be sued there. It is unproblematic if the defendant acts outside of the territory of a Member State in which the Brussels I Regulation applies and yet is being sued within the territory of a Member State if it is foreseeable that he may be sued there. Therefore, this paper would like to reiterate its stance that foreseeability is an important element in cross-border litigation and hence, the absence of a *de minimis* rule with regards to the attribution of effects position is unsatisfactory. This paper will now turn to the problems surrounding the current state of jurisdiction in online copyright infringement evaluated from the angle of the substantive interpretation of Art 7(2), namely the adoption of the mere accessibility approach.

3.2 The mere accessibility approach.

Apart from questioning the issue of foreseeability in the CJEU decisions from the view of the ‘attribution of effects’, it is submitted that the mere accessibility approach adopted by the CJEU raises questions on legal certainty as well. Before delving into the criticism of the mere accessibility approach, it is important to highlight that the mere accessibility approach is one half of a dichotomy that normally surrounds the debate on internet communication. The other half is the targeting approach. As it was noted in the introduction of this paper, this dichotomy arises from the way the World Wide Web usually works. An internet publisher uploads materials online which is then accessible for the receiver. It normally requires an active action on the receiver’s end to access the published material, such as searching through a search engine via an online intermediary.

Therefore, in line with the market rules of supply and demand, the act of uploading of such material on the Internet is more often than not accompanied with an intention to disseminate such information to a certain group of people. Hence, online infringing materials may

contain evidences that show such ‘intentions to target’. Nonetheless, it is to be recalled that the CJEU had adopted the mere accessibility test in establishing jurisdiction for online copyright cases. It might be interesting to highlight the fact that the AG in *Pinckney* had proposed that the appropriate test for jurisdiction in online copyright infringement cases was the targeting test.¹⁰⁰ Hence, the paper will now seek to evaluate as to whether the mere accessibility approach is a satisfactory test in line with the principles of international private law.

3.2.1 Mere accessibility: an unexplained departure from the targeting approach.

First of all, it is submitted that not only the ‘attribution of effects’ position adopted by the CJEU was not in line with previous CJEU positions, the mere accessibility approach also differs from previous CJEU decisions. Although it had been established that the CJEU decisions with regards to cyber torts vary, it is submitted that the mere accessibility approach by the CJEU on jurisdiction in online copyright infringement marks a sudden departure from previous CJEU decisions of *Pammer and Hotel Alpenhof*¹⁰¹, *Donner*¹⁰², and *Football Dataco*¹⁰³ where the targeting approach had been adopted.¹⁰⁴

Nonetheless, proponents of *Pinckney* and *Hejduk* may argue that the departure from targeting approach was not that sudden as it merely follows the CJEU decision that dates back to the decision in *eDate and Martinez*. It is to be recalled that the CJEU in that case noted that a possible jurisdiction lies with the place where the defamatory content is accessible or may be accessible. Hence, it could be argued that this mere accessibility criterion is not really that novel for establishing jurisdiction. Even so, this paper would like to propose that the more appropriate way to interpret the CJEU decision in *eDate and Martinez* was the targeting approach.

¹⁰⁰ AG Opinion C-170/12 at paras 64-68.

¹⁰¹ CJEU Joined cases *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08)* and *Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)* Judgment of the Court (Grand Chamber) of 7 December 2010

¹⁰² CJEU Case C-5/11 Criminal Proceedings against *Donner*. Judgement of the Court (Fourth Chamber) of 21 June 2012.

¹⁰³ C-173/11.

¹⁰⁴ Rosati, E., “‘Intention to target’ is dead, long live ‘intention to target’? A Kat reflects.” Blogpost entry dated 22 October 2013. Available at: <http://ipkitten.blogspot.se/2013/10/intention-to-target-is-dead-long-live.html> <Last accessed: 16 August 2016>

To refresh the reader's memory, it is recalled that *Shevill* establishes jurisdiction at the place where the defamatory material is distributed. Applying this criterion to the online world, the CJEU in *eDate and Martinez* held that jurisdiction can be established where the defamatory publication is available online. Nonetheless, it must be noted that such a literal interpretation may not be accurate. An affirmative action was required in offline distribution; there must have been contemplations on where the publication in print shall be distributed. This is why the mere accessibility of an online publication cannot be equated with the distribution of a publication in print. Indeed, even the CJEU in *eDate and Martinez* case in itself took note of the ubiquity of internet and admitted that the distribution criteria is no longer useful in an online context,¹⁰⁵ before remarking that jurisdiction could be established at the place where the infringing content 'placed online is or has been accessible'¹⁰⁶. Therefore, unless it is accepted that the CJEU had inexplicably wanted to adopt a position in which they had criticised, it could be argued that the more accurate analogy of distributing a printed publication in an online world would be to determine where the publication was targeted towards. Hence, it is submitted that this mere accessibility approach was indeed a break away from the established case law with regards to online torts.

One of the peculiarities that arises from this departure is that even though the mere accessibility approach allows jurisdiction to be established, the court's approach may differ when analysing the merits of the case.¹⁰⁷ This means that the 'mere accessibility' approach may lead to an empty jurisdiction. In other words, even though jurisdiction can be established in that Member State, the case will then be thrown out because no claim can be awarded. For example, in the United Kingdom¹⁰⁸, the test for communication to the public of a copyrighted work (a form of copyright infringement) is based upon whether the website containing the copyrighted work targets the public.¹⁰⁹ Although it is admitted that the assessment of a case on a jurisdictional level differs from the substantive level, it still seems

¹⁰⁵ Joined CJEU Cases C-509/09 and C-161/10 at paras 45-47.

¹⁰⁶ Joined CJEU Cases C-509/09 and C-161/10 at para 51.

¹⁰⁷ Pryke, M., "Online copyright infringement - is jurisdiction now simply a matter of accessibility?", (2015) Entertainment Law Review 26(4), 152-154 at p. 154.

¹⁰⁸ At the time of writing, the United Kingdom is still part of the European Union and its copyright laws are still based upon the EU Copyright Law, namely the InfoSoc Directive.

¹⁰⁹ Cusworth, A., "Targeted titillation - IPEC considers whether escort website intends to target the UK to establish copyright infringement", (2015) Entertainment Law Review 26(3), 108-109 at p. 109.

pointless for the courts to establish jurisdiction when the case will most probably fail at substantive law.

Whilst it is admitted that online copyright infringements do differ from other cyber torts, however, it remains questionable whether such differences can justify the CJEU's departure from the targeting test. Moreover, the problem with the current position of the law is that the CJEU gave no such justification as to why the targeting approach was rejected. Although AG opinions are non-binding upon the CJEU, a departure from the Opinion of the AG normally deserves a good explanation. Instead, the CJEU had merely noted that Art 7(2) of the Brussels I Regulation differs from Art 17(1)(c) which concerns consumer contracts and where the targeting approach was expressly mentioned.¹¹⁰ This argument could possibly be taken to mean that adopting a targeting approach to Art 7(2) would be contrary to the intentions of the legislature because if the legislator wanted to adopt a targeting approach, it would have been specifically included in the legislation. Nonetheless, this explanation is unconvincing. It is submitted that various laws have been derived from other areas of law and there is no reason that the CJEU could not draw inspiration from jurisdiction on consumer contracts. Although it was not specifically mentioned in the legislation, this does not mean that such interpretation is against the intentions of the legislator. Instead, the interpretation of the law must reflect the accompanying recitals. Unfortunately, as it will soon be argued, the mere accessibility approach does not do so.

Moreover, the same argument can be put forward for the mere accessibility test. It is submitted that the current position adopted by the CJEU appears to favour strong copyright protection¹¹¹ at the expense of legal certainty. Perhaps, it is the difficulty of EU laws in enforcing copyright protection in cyberspace that warrants more protection for copyright owners. However, this over-protection is contrary to the intentions of the legislator. This is because if the legislator perceived the need to grant extra protection to copyright owners, they would have come up with a separate section on its own in the legislation, just like how consumer contracts are protected in Art 17(1)(c). On the contrary, it must be noted that the recitals in Brussels I regulation specifically mentioned that the jurisdictional rule is founded

¹¹⁰ CJEU Case C-170/12 at para 42.

¹¹¹ The mere accessibility test had been heralded as "good news" for copyright owners. See: Smith, J. and Leirche, A., 'CJEU ruling in *Pinckney v Mediatech*: jurisdiction in online copyright infringement cases depends on the accessibility of website content', (2014), European Intellectual Property Review, Volume 36 (2), 137-138 at 138.

on the principle that jurisdiction is generally based on the defendant's domicile and that alternative jurisdiction should exist only on the basis that there is a close connection between the court and the action.¹¹² Therefore, granting jurisdiction based merely upon the accessibility of an infringing content online is far from achieving this principle. Instead, it is the opposite of such principle. In order to attest to this assertion, this paper will now turn to a more specific analysis of how the mere accessibility approach undermines the rationale accompanying Art 7(2).

3.2.2 Establishing Forum Actoris and Encouraging Forum Shopping.

As it was previously noted, one of the rationales of the Brussels I Regulation is based upon the principle that the defendants should normally be sued in the place of the domicile and alternative grounds of jurisdiction should only exist in very well-defined cases.¹¹³ One could argue that the problem with the mere accessibility approach adopted by the CJEU is that it could establish jurisdiction based on *forum actoris*. *Forum actoris* refers to the forum in which the plaintiff is domiciled¹¹⁴. By permitting copyright holders to sue at any place where the infringing material is merely accessible basically allows the plaintiff to sue at his or her own domicile instead.¹¹⁵ The fact that a defendant can be dragged to a court of the plaintiff's domicile without the need for some sort of a close connection between unlawful act and the court seised to exist is argued to be against the intentions of the legislator. Although it may be argued that *Shevill's* mosaic principle provides a counter-balance to this concern by limiting the jurisdiction of the court seised to the damage that occurs within that territory, the effectiveness of the mosaic principle is questionable as it will be addressed in the next section.

Similarly, it could be argued that the mere accessibility approach adopted by the CJEU opens up the possibility for forum shopping. Forum shopping refers to the ability of the plaintiff to pick whichever forum that is most favourable for the plaintiff to win the case.¹¹⁶

¹¹² Recitals 15 and 16 of the Brussels I Regulation.

¹¹³ Recital 15 of the Brussels I Regulation.

¹¹⁴ Fellmeth, A.X., Horwitz, M., (2011) 'Guide to Latin in International Law', OUP.

¹¹⁵ Assuming that the website is free from any geo-blocking measures that may be placed in the territory of the plaintiff's domicile.

¹¹⁶ For a more detailed discussion on forum-shopping, see Savola, P, "The ultimate copyright shopping opportunity- jurisdiction and choice of law in website blocking injunctions", (2014), IIC, Volume 45, Issue 3, 287-315, at pp 291-304 (despite being primarily focused on cases against website operators, it provides a good analysis on forum shopping)

It is submitted that the mere accessibility approach would mean that jurisdiction is already established in favour of the court seised as long as copyright was protected there and that damage may be suffered there.¹¹⁷ This would indeed facilitate the act of forum shopping. The recitals of the Brussels I Regulation noted that alternative grounds of jurisdiction exist to avoid the possibility of a defendant being sued in a court in which he could not reasonably have foreseen. Given the fact that copyright is automatically protected across the EU and the fact that websites are generally accessible across the EU, this means that a defendant may be vulnerable to an EU-wide litigation. Therefore, in that case a defendant would not be able to foresee where he would be sued. Hence, it is reiterated that the CJEU in adopting mere accessibility approach in interpreting Art 7(2) goes against the rationale of the legislation. However, similarly with the concern regarding *forum actoris*, it may be argued that the mosaic principle will reduce the chance of the abuse for forum shopping. This paper will now seek to evaluate the extent to which the mosaic principle could provide a sufficient safeguard to the mere accessibility approach.

3.2.3 Effectiveness of the Mosaic Principle?

When plaintiffs rely on the damage limb of Art 7(2) of the Brussels I Regulation, the mosaic principle establishes the fact that the court seised will only have jurisdiction to determine the damage caused in the Member State within which it is situated. This principle ties closely with the territorial principle that accompanies copyright. In *Hejduk*, the Court reiterated the fact that although copyrights are automatically protected by virtue of the InfoSoc Directive, they are still subjected to the principle of territoriality and therefore “are capable of being infringed in each Member State in accordance to applicable substantive law”.¹¹⁸ This is certainly true. Therefore, Magnus and Manowski noted that the mosaic principle and the principle of territoriality are a good match.¹¹⁹ Indeed, one complements the other. However, having said that, just because the Courts have found an approach that seems complementary does not mean that the approach is the best way forward. Toshiyuki Kono and Paulius Jurčys noted that in cases involving ubiquitous infringement, what was important for both the plaintiff and the defendant is the requirement of efficiency ‘which

¹¹⁷ Alexander, R, “Questions of Jurisdiction- Pinckney” (2014) Entertainment Law Review Vol 25 Issue 3 67-69 at p. 68.

¹¹⁸ C-441/13 at para 22.

¹¹⁹ Magnus, U., Mankowski, P., (2015) “Brussels Ibis Regulation: European Commentaries on Private International Law” Sellier European Publishers at para 393.

ideally would mean concentration of the proceedings in one forum and prevention of parallel litigation'.¹²⁰ In order to assess this statement, this paper will attempt to evaluate the mosaic principle and its effectiveness in limiting the concerns raised earlier regarding the mere accessibility approach.

Proponents of Shevill's mosaic principle will argue that the mosaic principle is an appropriate counter balance for the risk of establishing *forum actoris* and the risk of forum shopping. Due to the fact that the Court seised only has jurisdiction to assess the damage that occurs in the territory of the Member State, the plaintiff will be discouraged from forum-shopping because a right holder will most probably seek legal action only in the court where there ought to be some real damages.¹²¹ The same argument holds true for the concern regarding the establishment of a *forum actoris*. Unless there are some real damage occurring at the place of the plaintiff's domicile, the effect of the mosaic principle reduces the incentive for the plaintiff to sue at his domicile. Nonetheless, this paper submits that these views may be over-simplified. The potential for abuse still exists.

First of all, the mosaic principle does not prevent multiple actions be taken against the defendant in several courts of Member States at the same time. Although a plaintiff may choose to limit its proceedings to places where there is real damage, this is not always the case. A plaintiff, especially a powerful and resourceful one, might still decide to bring a legal action in several courts of Member States just because they can afford to do so. There is nothing to stop him or her from doing so. Hence, the earlier concerns regarding the requirement of close connection to ensure legal certainty and to avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen still exist. The 'accessibility' test, although arguably is restricted by the 'mosaic principle', still creates a position where the defendant could not foresee where he would be sued. Nonetheless, in an ideal and naïve world, defendants should not need to worry about being brought to courts in which there have been no real damage as the saying goes, the truth will prevail. However, unfortunately in reality, the threat of a lawsuit will most

¹²⁰ Kono, T., Jurčys P., "Jurisdiction over Ubiquitous Copyright Infringements: Should Right-Holders Be Allowed to Sue at Home?" (2015) Kyushu University Legal Research Bulletin Volume 5 at p.29. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181671 <Last assessed 13 August 2016>

¹²¹ Matulionyte, R., "Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules" 6 (2015) JIPITEC 132. Available at: <http://www.jipitec.eu/issues/jipitec-6-2-2015/4274/matulionyte.pdf>. <Last assessed: 13th August 2016> at p. 135, para 17.

probably cause the defendant to settle even when innocent, as the cost of a lawsuit itself may amount to more than the settled amount.¹²²

Moreover, on the other hand, it is submitted that this position is not satisfactory for copyright holders either.¹²³ The ‘mosaic principle’ approach would create a position where copyright holders will need to bring multiple actions in multiple Courts of Member States to obtain all the necessary redress.¹²⁴ This will be costly for less wealthy plaintiffs. Although it is possible for the plaintiff to sue the defendant for the whole damages at the defendant’s domicile by virtue of Art 4 of the Brussels I regulation, this paper would submit that the lack of alternative grounds of jurisdiction may not be that desirable. Heinze noted that in the ubiquitous world of the internet and the unique challenges surrounding the enforcement of intellectual property, jurisdictional grounds based solely on the defendant might not suffice.¹²⁵ He reasoned that a focus solely on the defendant may encourage infringers “to hide in jurisdictions inaccessible for efficient enforcement and distribute the infringing material online”.¹²⁶

Arguably, the right holder could instead rely on Art 4 of the Regulation and obtain all the necessary redress from the Courts of the defendant’s domicile. However, for cases involving online copyright infringements, an infringer might choose a domicile where there is insufficient protection for intellectual property and perhaps lack of enforcement grounds.¹²⁷ Therefore, it is submitted that the mere accessibility approach, even if coupled with the mosaic principle is still unsatisfactory.

¹²² A phenomenon similar to copyright trolling. See: <https://fightcopyrighttrolls.com/reference/about/>

¹²³ Šrámek M, ‘Brussels I: Recent developments in the interpretation of special jurisdiction provisions for internet torts’, 2015, Masaryk University Journal of Law and Technology, Volume 9, 165-173 at p.171.

¹²⁴ Smith, J. and Leirche, A., (n.111) at p.138.

¹²⁵ Heinze, C. ‘A Framework for International Enforcement of Territorial Rights: The CLIP Principles on Jurisdiction’, in Basedow J et al. ‘Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgements in Europe, Japan and the US’, 2010, pp. 53-76, at p.64.

¹²⁶ *Ibid.*

¹²⁷ Metzger, A. ‘Jurisdiction in Cases Concerning Intellectual Property Infringements on the Internet: Brussels I Regulation, ALI-Principles and Max Planck Proposals’ in Leible, S. and Ohly, A. ‘Intellectual Property and Private International Law’, 2009, pp 251-267 at 254.

3.3 Addressing the other side of the coin: Flexibility vs Predictability.

Before this paper continues on with assessing a suitable proposal as an alternative to the current state of law, it is essential that this paper addresses the argument that despite the criticisms raised, the current state of law is still the only plausible approach that ensures legitimate party expectation. The criticisms previously raised in this chapter is based upon the presumption that the lack of predictability for where jurisdiction can be established is undesirable. Nonetheless, it is to be remembered that although predictability is the safest way to ensure legitimate party expectations, another important factor to take into account is flexibility.¹²⁸ Indeed, flexibility of a rule ensures that individual circumstances are properly considered. Therefore, this paper will now address the arguments that may be put forward in justifying the attribution of effects and the mere accessibility approach in the name of flexibility.

Firstly, proponents of the *Pinckney* and *Hi Hotel* would most probably argue that a total rejection of the ‘attribution of effects’ rule in *Melzer* is inflexible. They will then perhaps rejoice in the current (flexible) state of law. Professor Jan von Hein in a comment on an online forum on international private law, noted that the *Melzer* decision is a setback in civil combat against terrorism.¹²⁹ In illustrating his view, von Hein gave a fictitious example of an attempted assassination of a third-state diplomat with the plan of installing a bomb on the diplomat’s plane. The co-perpetrator in that example decides to stay at his place of domicile and was not physically present at the place where a bomb is installed. Von Hein noted that according to *Melzer*, this co-perpetrator would not be able to be sued by the diplomat’s relatives at a place where a bomb is installed (causal event limb) nor where the plane was blown up over a third-state (damage limb). He commented that this result made no sense. This paper does see the merits of his argument. Therefore, it is suggested that a constructive legitimate expectation ought to be supplemented as a *de minimis* rule for cases involving multiple perpetrators. In that case, the co-perpetrator will most likely be attributed the effects of unlawful act by some form of tort-feasorship.

¹²⁸ Svantesson (n.2) at p. 74.

¹²⁹ Von Hein, J. Comment on 30 May 2013 in response to Cuniberti, G., “ECJ Refuses to Extend Scope of Art 5(3) to Co-perpetrator”, Blogpost on 30 May 2013. Available at: <http://conflictoflaws.net/2013/ecj-refuses-to-extend-the-scope-of-article-5-3-brussels-i-regulation-to-coperpetrator/#comment-458593> <Last accessed: 16 August 2016>

Secondly, the same argument of flexibility could be observed with regards to the ‘mere accessibility’ approach taken by the CJEU. The reluctance of the CJEU to enforce a strict rule with regards to the interpretation of the place where the damage occurred can be seen as a desire to provide a flexible rule. By combining the *Shevill* principle with the mere accessibility rule, the Court could be seen to have taken a more flexible route and leaving it up to the national courts to decide if jurisdiction can be established. Indeed, the globalised nature of the Internet does ensure that the ‘mere accessibility’ approach is as flexible as it can be. It will most probably be able to suit any kind of online copyright infringement. However, a rule that is too flexible can hardly ensure any party’s legitimate expectation.

Therefore, it is submitted that the other problems raised in this chapter cannot be ignored in favour of flexibility. Hence, in the following chapter, this paper would like to provide a proposal on how the law should be by taking into account the requirement of flexibility in a way that also ensures the parties’ legitimate expectation.

4. Proposals *de lege feranda*.¹³⁰

It should come as no surprise by now that this paper believes that the current state of law on jurisdiction and online copyright infringement in the EU is far from satisfactory. Nonetheless, it is conceded that such problems are not new and have always been a challenging issue on a wider scale and on a global level. Therefore, various continents across the globe had come up with several academic proposals with the intention to address these challenges. Examples of such proposal include the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), the American Law Institute (ALI) and the Japanese Transparency Proposal.¹³¹ Given that the Max Planck group is the European representative of these academic proposal, the CLIP principles is chosen to be discussed at a greater length.

One important point to note is that none of the academic proposals on jurisdiction envisages that different approaches should be taken with regards to the different types of intellectual property rights. However, as it was repeatedly mentioned throughout this paper, this was indeed what the CJEU had achieved in its decisions. Hence, the proposal put forth by this paper will attempt to reconcile the differences of the CJEU's decision in order to propose an encompassing interpretation of the Brussels I Regulation that can be applied in a harmonious manner. In order to do so, this chapter will firstly analyse the academic proposal provided by the European Max Planck Group and briefly point out some proposals from the ALI Principles and the Transparency Proposal, before submitting this paper's proposal on interpreting Brussels I Regulation for online copyright infringement cases.

4.1 The CLIP Principles.

The final text of the CLIP principles published on 1 December 2011 proposes the following rule for jurisdiction for infringement of an intellectual property right.

¹³⁰ *De lege feranda* is the latin term for ‘what the law ought to be’ as opposed to *de lege lata* (the law as it is).

¹³¹ For a good comparison of the various academic proposals, see: Jurčys, P., “International Jurisdiction in Intellectual Property Disputes: CLIP, ALI Principles and other Legislative Proposals in a Comparative Perspective”, 3 (2012) JIPITEC 3, 174. See also: Committee Reports by International Law Association Intellectual Property and International Private Law Conferences. Available at <http://www.ilanhq.org/en/committees/index.cfm/cid/1037>. <Last accessed: 16 August 2016>

Article 2:202 Infringement

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.¹³²

This means that a defendant may *prima facie* be sued in any court of a Member State, unless the mentioned exception applies. This proposal can be viewed as providing the defendant with an “escape clause” to prove that the defendant did not act in the territory of the state and it cannot reasonably be seen that the defendant’s activity is being directed to that State.¹³³ Husovec argued that this provides a better position than the targeting approach, because in cases of simple infringement by merely placing infringing material online, it can be difficult to ascertain where the infringing material is directed to.

Nonetheless, this paper would respectfully submit that this provision is not without its faults. A defendant could still possibly be sued in every court of Member States unless he can prove that he did not act within the territory of a Member State or it is unreasonable to conclude that his activity is directed to that State. Thus, the concerns raised earlier regarding the possibility of being sued in multiple jurisdictions and the opportunity for forum shopping still exists.

However, it is important to note that Art 2:203(2) could possibly be said to counter this problem by specifying the extent of jurisdiction of the Court seised in cases involving infringements over ubiquitous media such as the Internet.

Article 2:203: Extent of jurisdiction over infringement claims

- (1) Subject to paragraph 2, a court whose jurisdiction is based on Article 2:202 shall have jurisdiction in respect of infringements that occur or may occur within the territory of the State in which that court is situated.

¹³² Article 2:202: Infringement, European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles on Conflict of Laws in Intellectual Property, Final Text of December 1, 2011 Available at: http://www.imprs-ci.ip.mpg.de/_www/files/pdf2/Final_Text_1_December_2011.pdf <Last accessed: 16 August 2016>

¹³³ Husovec, (n.75) at p.373

- (2) In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court whose jurisdiction is based on Article 2:202 shall also have jurisdiction in respect of infringements that occur or may occur within the territory of any other State, provided that the activities giving rise to the infringement have no substantial effect in the State, or any of the States, where the infringer is habitually resident and
- (a) substantial activities in furtherance of the infringement in its entirety have been carried out within the territory of the State in which the court is situated, or
 - (b) the harm caused by the infringement in the State where the court is situated is substantial in relation to the infringement in its entirety.

Here, it could be seen that the CLIP principles recognises the challenge of cases involving ubiquitous media and thus the need to provide a *de minimis* rule to ensure that jurisdiction can be extended and yet contained. It is acknowledged that this requirement of ‘substantiality of damage’ could circumvent the problems identified earlier about the possibility of forum shopping and pitfalls of the ‘mosaic principle’. This is because the court seised may extend its jurisdiction to the territory of other states as long as there is no substantial effect at the defendant’s domicile¹³⁴ and court seised must be either the place where substantial damage had occurred (in relation to the infringement in its entirety) or the place where substantial activities (in relation to the infringement in its entirety) had been carried out. Therefore, according to the CLIP principle, there is no need to bring separate actions in different Member States to obtain damages in online copyright infringement.

Moreover, it is submitted that this requirement of substantiality does provide more legal certainty. This effectively narrows down the possible forum to a very small number of places. This is because substantiality is a relative term and the CLIP principle noted that the term ‘substantiality’ is in relation to the infringement in its entirety. Hence, if applied strictly, there can technically only be one forum that has jurisdiction to hear the whole claim. This is because if one is less substantial than the other in its entirety, it is

¹³⁴ The wordings used in CLIP principle is ‘habitual residence’ but for sake of continuity, this paper adopted the term used in Brussels I regulation.

unsubstantial, regardless of how substantial it may be. In order to illustrate this, consider a case where 55% of its damage is suffered in country A and 45% of its damage is suffered in country B. 45% is indeed substantial, but viewed in relation to its entirety, it is not substantial. This observation is of course a very strict interpretation of the CLIP principles, and is by no means an assertion of the truth. However, the purpose of this argument was to show how precise the CLIP principles can be and how limited is the possibility for forum shopping. Legal certainty could without a doubt be achieved in this case. However, it can be questioned as to whether legal certainty that is achieved in such a sense is desirable.

This paper would argue that the requirement to assess the substantiality of damage in relation to the infringement in its entirety would blur the lines of the Courts in assessing the extent of court's jurisdiction and in looking into the merits of a case. Indeed, it is interesting to note that the Max Planck Group had decided to remove the requirement of substantiality for establishing jurisdiction in its draft but somehow retained it for the purpose of ascertaining the extent of jurisdiction. Heinze noted that in some copyright infringement cases, a plaintiff might only find a single infringing article in the jurisdiction and would like to obtain an information order with the aim of determining the extent of the infringement.¹³⁵ Therefore, in that case, a requirement of substantial harm or substantial activities may seem too burdensome for the enforcement of copyright.¹³⁶ Therefore, it appears that even though the CLIP principles removes the requirement of substantiality in its general provision on jurisdiction in infringement, the principle with regards to the extent of the jurisdiction in internet cases is still burdensome. This paper is evaluating the position of copyright infringements occurring online after all. Therefore, it is observed that although the CLIP principles seems to provide a better alternative than the current state of law, it is submitted that the proposal can be too complicated and burdensome to be done at the stage of determining the extent of the jurisdiction. Nonetheless, the generality of the CLIP principles is to be commended. For the sake of completeness, this paper will now briefly discuss the ALI Principles and the Transparency Proposal before submitting its very own proposal.

¹³⁵ Heinze, (n.125). 53-76 at p.67.

¹³⁶ *Ibid.*

4.2 ALI Principles and the Transparency Proposal

§ 204(1) of the ALI Principles provides that an action can be brought in any state in which the alleged infringer has substantially acted or taken substantial preparatory acts to initiate or further an alleged infringement.¹³⁷ Alternatively, if the infringement occurs online, § 204(2) provides that the place where the infringing acts were directed to will obtain the necessary jurisdiction.¹³⁸ Indeed, this paper does favour the targeting approach over the current mere accessibility approach that is prevailing in the EU. Nonetheless, questions may arise with regards to the targeting approach for cases where the infringements occurring on a non-interactive website. The clue in the answer lies with the Japanese Transparency Proposal where it is provided that jurisdiction should be based upon a market effect test. Art 105 of the Transparency Proposal provides that the place where the effect of the infringement that is maximised will have the necessary jurisdiction.¹³⁹ With this in mind, this paper will now seek to provide a proposal on how to interpret Art 7(2) of the Brussels I regulation.

4.3 The Proposal.

In accordance with the arguments raised in the earlier chapter concerning the unsatisfactory position of the current state of law on jurisdiction in online copyright infringement, and drawing inspirations from the various legislative proposals, this paper will now attempt to propose an interpretation of the law for how it ought to be. It is proposed that:

1. Art 7(2) of the Brussels I Regulation must be interpreted as meaning that, in the event of an allegation of infringement of an intellectual property right¹⁴⁰ (i.e. copyright and rights related to copyright) occurring online, the place where the damage occurred is to be interpreted to mean the place where the infringing material is targeted towards the public located within the jurisdiction of the court seised and that intellectual property right must be protected within that Member State.

¹³⁷ Kono, Jurcys (n.120) at p.26.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ The word Intellectual Property Right is used here in order to propose a more generalised approach that can be used for both registered and unregistered rights.

2. In cases involving multiple perpetrators, an alleged defendant can be sued on the basis where the damage occurred only if it can be reasonably foreseen that the defendant's action may lead the third party in causing the damage.

In order to assess as to whether the action of the alleged defendant amounts to 'targeting', it is submitted that the non-exhaustive list provided by the CJEU in *Pammer and Hotel Alpenhof*¹⁴¹ should be used. With that said, it is admitted that copyright infringements that occurred on a non-interactive website may be difficult to ascertain where the infringing content was targeted to. Therefore, this is where this paper would like to submit an inventive approach in dealing with the 'targeting' test. It is submitted that the 'centre of interest' criterion established by the CJEU in *eDate and Martinez* could be of some help. In determining where an infringing material placed online is directed to, another criterion that national courts can take into account, is where the first author of the copyright's 'central interest' is placed. Given the fact that copyrights can be transferred, focus is made on the first author's 'central interest' as this will be the most relevant for observing the localisation of the public interested in the work.¹⁴²

4.4 Defending the proposal.

In his short paper on jurisdiction in cases concerning Intellectual Property infringements on the Internet, Axel Metzger argued that jurisdiction should be limited to the place where the alleged infringement has commercial effect or substantial impact when compared to the infringement as a whole.¹⁴³ He noted that "such concept has already gained international consensus on a substantive law level in the WIPO Joint Recommendation¹⁴⁴ on Internet trademark conflicts" and that it should also be used on a jurisdiction level, "although in a less fine grained version".¹⁴⁵ Therefore, transposing his idea to online copyright infringement, it is submitted that such 'commercial effect' can be ascertained from the place where the author of the copyrighted work has as its centre of interest. Moreover,

¹⁴¹ Joined Cases C-585/08 and C-144/09.

¹⁴² cf Opinion of AG Cruz Villalón in C-523/10 *Wintersteiger AG v Products 4U GmbH*. Opinion delivered on 16 February 2012 at para 20.

¹⁴³ Metzger, (n.127) at p. 258.

¹⁴⁴ See: WIPO Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of October 2001, WIPO Publication No. 845.

¹⁴⁵ Metzger, (n.127) at p.258.

drawing inspiration from the Japanese Transparency proposal, it is observed that this central interest could roughly be translated to the economic interest of the right holder.

Nonetheless, in all fairness it must be noted that the decision in *eDate and Martinez* itself was not uncontroversial. Indeed, Magnus and Manowski noted that the centre of interest approach adopted by *eDate and Martinez* undermines the mosaic principle by introducing jurisdiction based *forum actoris*.¹⁴⁶ They then went on and noted that “only those that disliked and mistrusted the mosaic principle would rejoice in *eDate and Martinez*”.¹⁴⁷ The first statement will be addressed shortly, however this paper would concede that the second statement is indeed true. As it was pointed out in the earlier chapter, this paper believes that not only is the mosaic principle ineffective in curbing the possibility of forum shopping, it also does not benefit either parties in a proceeding. This is because right holders would need to bring proceedings against each and every Member State in order to obtain damages for the alleged infringement. This is arguably inefficient and would be financially costly for the plaintiff as well as the defendant. Therefore, it is indeed true that this paper proposes that a targeting approach coupled with the *eDate and Martinez* approach is far better than the fragmented approach caused by the mosaic principle. In addition to that, support for this view can be found in the CLIP principles, where subject to the mentioned requirements, the court seised can assess damages that arise outside the territory of the court seised. Hence, it could be seen that even the CLIP principles realises that a fragmented approach does not suit cases involving the Internet where the effect can stretch across various borders.

In order to defend this interpretation, this paper will address three possible arguments that can be raised against the proposed interpretation.

The first argument that can be raised against the proposed interpretation is that the targeting approach seems to encroach into an examination of the merits of the case. However, it must be noted that whilst an examination of the case on its merits is not to be done at the jurisdiction level; it is essential to establish a *prima facie* evidence of some damage

¹⁴⁶ Magnus Manowski (n.119) at p. 372 para 370.

¹⁴⁷ *Ibid.*

occurring in the Member State.¹⁴⁸ It is submitted that the targeting approach is a more effective approach in establishing such *prima facie* evidence. Moreover, this paper would like to point out that differences do exist when applying the targeting approach at jurisdiction level and at substantive law level.¹⁴⁹ Therefore, it is proposed that a rough evaluation of the targeting test at the jurisdiction level, that does not equate to an examination of the merits of a case, is preferred.

The second argument that can be made against this paper's proposed interpretation is that the targeting approach is sufficient as a test in itself and that the supplementary 'central of interest' criterion just adds a further element of confusion and uncertainty. The reply to this argument is that, as it was rightly pointed out by Metzger, a mere 'directed to' approach might be too narrow in many cases.¹⁵⁰ He noted that the test is not always adequate for copyright infringement cases. This is especially so when the targeting criterion is too difficult to apply in cases where the infringement appeals to a broader audience.¹⁵¹ In the examples provided by Depreeuw and Hubin, infringing contents such as websites streaming football games¹⁵² or international news in English arguably do not target the public of a specific Member State or even a few Member States.¹⁵³ This is especially true when an infringing material is placed on a non-interactive website where it is hard to ascertain where the infringing material is directed towards. In these cases, a targeting approach will need to be supplemented with a test that can ensure legitimate expectations of both the plaintiff and the defendant. It is submitted that the centre of interest test is objective and thus defendants are more likely to know where the plaintiff's centre of interest lies.¹⁵⁴ Hence, this supplementary 'centre of interest' enhances the foreseeability of a defendant on where he or she may be sued.

¹⁴⁸ Farah, J., "Jurisdictional aspects of electronic torts, in the footsteps of *Shevill v Presse Alliance SA*" (2005) Computer and Telecommunications Law Review 196 at p. 199.

¹⁴⁹ Fawcett J. J and Torremans, P., Intellectual Property and Private International Law (Oxford University Press 2011), at 17.25. Extract found in fn.63 of Matulionyte (n.121).

¹⁵⁰ Metzger (n.127) at p. 257.

¹⁵¹ Depreeuw, S., and Hubin, J., "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 p. 758.

¹⁵² Football matches are not subjected to copyright protection but be affected by neighbouring rights such as producer and broadcaster. See: CJEU Joined cases *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08). Judgment of the Court (Grand Chamber) of 4 October 2011.

¹⁵³ Depreeuw and Hubin (n.148) at fn.45.

¹⁵⁴ Kono, Jurcys (n.120) at p. 28.

Finally, the third argument can be made by stating that the ‘centre of interest’ test in *eDate and Martinez* essentially establishes a *forum actoris*.¹⁵⁵ Hence, one may question and argue that after all the criticisms put forward by this paper on the current state of law, this paper had the audacity to introduce a criterion that could possibly lead online copyright cases to the same position as it was. To frame that statement in a question, why would this paper suggest narrowing the test only to have it widened again?

In order to answer this question, it needs to be reiterated that this paper believes that the main test for establishing jurisdiction ought to be based upon the targeting approach. Therefore, it is to be reminded that the suggestion put forward by this paper is to use the centre of interest test merely as one of the criteria that can be used to establish the evidence that the activity is directed to the territory of the court seised. Therefore, this centre of interest test does not establish jurisdiction automatically but it needs to be taken into account with other criterions. The non-exhaustive list provided by the joined cases of *Pammer and Hotel Alpenhof* can be a point of reference.¹⁵⁶ It is submitted that this interpretation will be flexible enough for the court and yet equally predictable for the parties in the proceedings.

Moreover, a second counter-argument that can be made against argument, that the proposed interpretation will lead to jurisdiction based upon *forum actoris*, is not necessarily true. For example, an Englishman may have copyright ownership of songs written in French and is widely known in France. In this hypothetical case, it is at least arguable that the centre of interest of the owner of the copyright lies in France and not at the place of his domicile in England. With that said however, this paper concedes that more often than not, the place where a copyright owner has his central of interest will most likely also be the place of his domicile. It is recalled that Brussels I Regulation does not prohibit alternative jurisdiction being established at the plaintiff’s domicile. Instead, the requirement is that there must be some sort of a close connection between the action and the court. Therefore, if it can be established that the infringing material is targeting the place in which the author of the

¹⁵⁵ Kuipers, J., “Joined Cases C-509/09 & 161/10, *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Limited*, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011.” (2012) Common Market Law Review Vol 49 Issue 3, 1211-1232 At p.1221.

¹⁵⁶ Joined Cases C-585/08 and C-144/09.

copyright has as its place of interest, the close connection requirement is satisfied, even if it establishes jurisdiction at the plaintiff's domicile.

Therefore, it is submitted that the proposed interpretation for Art 7(2) of the Brussels I Regulation is more in line with the rationale of Art 7(2) than the current 'mere accessibility' approach. Unfortunately, just like the various legislative proposals made, it remains to be seen when and how the EU would adopt some of these suggestions.

5. Conclusion

In the final analysis, it could be seen that the ubiquity of the Internet does represent a challenge to jurisdictional issues in online copyright infringements.

Due to the unique characteristics of the internet, the CJEU struggles to find a balance between the interest of the plaintiffs and the interest of the defendants. In its piecemeal approach in applying the traditional models of law in online context, it is argued that the current position is both too wide and too restrictive at the same time. The mere accessibility approach allows a wide-range of possible forum at the expense of legal certainty for the defendant. The application of *Shevill's* mosaic principle to the mere accessibility approach then creates a restrictive situation for effective copyright enforcement. Copyright owners will need to bring an action in a few member states to obtain the full damage and the alleged infringers will need to defend themselves at several places. Therefore, in answering the question to what extent is the current position of the law on jurisdiction in online copyright infringement compatible with its rationale, it is submitted that the only positive point that can be observed by the CJEU's approach is the flexibility it provides. Nonetheless, the proposed interpretation provided by this paper is argued to achieve such flexibility at a much lower cost. The targeting approach alongside the 'centre of interest' allows the Court to assess the legitimate expectations of the parties involved. Therefore, it is the hope of this paper that the legislative branch of the EU will consider the various legislative framework that submitted both from the European Max Planck group and from abroad.

Bibliography

Books

- Brachotte S., Nuyts A. “Jurisdiction over cyber torts under the Brussels I Regulation” in Savin, A., Trzaskowski, J., (2014) *Handbook on EU Internet Law*, pp. 231-253.
- Briggs, A. (2015) “Civil Jurisdiction and Judgements” 6th Edition, Informa Law from Routledge.
- Dickinson, A., Lein, E. (2015) “The Brussels I Regulation Recast” OUP.
- Fellmeth, A.X., Horwitz, M. (2011) ‘Guide to Latin in International Law’ OUP.
- Heinze, C. ‘A Framework for International Enforcement of Territorial Rights: The CLIP Principles on Jurisdiction’, in Basedow J et al. (2010) *Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgements in Europe, Japan and the US*’, pp. 53-76.
- Koops B.J., et al, “Should Self-Regulation be the Starting Point?” in Koops et al (2006) *Starting Points for ICT-Regulation: Deconstructing Prevalent Policy One-Liners*, TMC ASSER Press, The Hague, p. 109-149.
- Lessig L, “Code: Version 2.0” (2006) Basic Books.
- Magnus, U., Mankowski, P. (2015) “Brussels Ibis Regulation: European Commentaries on Private International Law” Sellier European Publishers.
- Metzger, A. ‘Jurisdiction in Cases Concerning Intellectual Property Infringements on the Internet: Brussels I Regulation, ALI-Principles and Max Planck Proposals’ in Leible, S. and Ohly, A. (2009) *Intellectual Property and Private International Law*’, pp. 251-267.
- Svantesson, D.J.B. (2012) *Private International Law and the Internet* (2nd ed.). The Netherlands: Kluwer Law International.
- Fawcett J. J and Torremans, P. (2011) Intellectual Property and Private International Law, OUP.

Journal Articles

- Alexander, R, “Questions of Jurisdiction- Pinckney” (2014) Entertainment Law Review Vol 25 Issue 3 67-69.

- Cusworth, A., “Targeted titillation - IPEC considers whether escort website intends to target the UK to establish copyright infringement”, (2015) Entertainment Law Review 26(3), 108-109.
- Depreeuw, S., and Hubin, J., “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.
- Farah, J., “Jurisdictional aspects of electronic torts, in the footsteps of Shevill v Presse Alliance SA” (2005) Computer and Telecommunications Law Review 196.
- Hess, B., Pfeiffer, T., and Schlosser, P., “Report on the Application of Regulation Brussels I in the Member States”, (2007) Ruprecht Karls Universität Heidelberg, Institut für Ausländisches und Internationales Private und Wirtschaftsrecht. Available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. <Last accessed: 16 August 2016>
- Husovec, M., “European Union: Comment on Pinckney”, (2014) International Review of Intellectual Property and Competition Law 370-374.
- Jurčys, P., “International Jurisdiction in Intellectual Property Disputes: CLIP, ALI Principles and other Legislative Proposals in a Comparative Perspective”, 3 (2012) JIPITEC 3, 174. See also: Committee Reports by International Law Association Intellectual Property and International Private Law Conferences. Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1037>. <Last accessed: 13 August 2016>
- Kono, T., Jurčys P., “Jurisdiction over Ubiquitous Copyright Infringements: Should Right-Holders Be Allowed to Sue at Home?” (2015) Kyushu University Legal Research Bulletin Volume 5. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181671 <Last assessed 13 August 2016>
- Kuipers, J., “Joined Cases C-509/09 & 161/10, *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Limited*, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011.” (2012) Common Market Law Review Vol 49 Issue 3, 1211-1232.
- Matulionyte, R., “Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules” 6 (2015) JIPITEC 132. Available at:

<http://www.jipitec.eu/issues/jipitec-6-2-2015/4274/matulionyte.pdf>. <Last assessed: 13th August 2016>

- Menthe, D., “Jurisdiction in Cyberspace: A Theory of International Spaces”, (1998) 4 Michigan Telecommunications and Technology Law Review, 69-103
- Pryke, M., “Online copyright infringement - is jurisdiction now simply a matter of accessibility”, (2015) Entertainment Law Review 26(4), 152-154.
- Reidenberg, J., “Lex Informatica: The formulation of Information Policy Rules Through Technology” (1998) Texas Law Review 76, 553-596.
- Rosati, E., “Luxembourg, we have a problem: where have the Advocates General gone?”, (2014) Journal of Intellectual Property Law & Practice, Vol. 9(8), 619. Available at: <http://jiplp.oxfordjournals.org/content/9/8/619.extract>. <Last Accessed: 16 August 2016>
- Savola, P, The ultimate copyright shopping opportunity- jurisdiction and choice of law in website blocking injunctions, (2014), IIC, Volume 45, Issue 3, 287-315.
- Smith, J. and Leirche, A., ‘CJEU ruling in *Pinckney v Mediatech*: jurisdiction in online copyright infringement cases depends on the accessibility of website content’, (2014) European Intellectual Property Review, Volume 36 (2), 137-138.
- Šrámek M, ‘Brussels I: Recent developments in the interpretation of special jurisdiction provisions for internet torts’, (2015), Masaryk University Journal of Law and Technology, Volume 9, 165-173.
- Svantesson, D, “The Characteristics Making Internet Communication Challenge Traditional Models of Regulation- What every International Jurist Should Know about the Internet” (2005) 13 (1) International Journal of Law and Information Technology, 39.
- Svantesson, D.J.B., “Celebrating 20 years of WWW – A Reflection on the concept of jurisdiction” (2012) 6 Masaryk U. J.L. & Tech. 177.
- Svantesson, D.J.B., “Sovereignty in International Law – How the Internet (Maybe) Changed Everything, but Not for Long”, (2014) 8 Masaryk U. J.L. & Tech. 137.

Online Resources

- Barlow, J.P., “A Declaration of the Independence of Cyberspace”, 1996. Available at <https://www.eff.org/cyberspace-independence>. <Last Accessed: 13 August 2016 >

- Dickinson, A. Comment on 26 January 2016 in response to Sirakova, K., “Is the Shevill Doctrine Still Up to Date? Some Further Thoughts on CJEU’s Judgment in *Hejduk* (C-441/13)” Blogpost on 24 January 2015. Available at: <http://conflictoflaws.net/2015/is-the-shevill-doctrine-still-up-to-date-some-further-thoughts-on-cjeus-judgment-in-hejduk-c-44113/#comment-471013> <Last assessed: 13 August 2016>
- Husovec, M., “CJEU received a new case on online jurisdiction Online Copyright Infringement and Jurisdiction” Blogpost entry on 19 September 2013. Available at: <http://www.husovec.eu/2013/09/cjeu-receives-new-case-on-online.html>. <Last accessed: 13 August 2016>
- Rosati, E., “‘Intention to target’ is dead, long live ‘intention to target’? A Kat reflects.” Blogpost entry dated 22 October 2013. Available at: <http://ipkitten.blogspot.se/2013/10/intention-to-target-is-dead-long-live.html> <Last accessed: 13 August 2016>
- Von Hein, J. Comment on 30 May 2013 in response to Cuniberti, G., “ECJ Refuses to Extend Scope of Art 5(3) to Co-perpetrator”, Blogpost on 30 May 2013. Available at: <http://conflictoflaws.net/2013/ecj-refuses-to-extend-the-scope-of-article-5-3-brussels-i-regulation-to-coperpetrator/#comment-458593> <Last assessed: 13 August 2016>
- Website on copyright trolls. <https://fightcopyrighttrolls.com/reference/about/>

CJEU Cases

- CJEU Case C- 21/76 *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A.*, Judgement of the Court 30 November 1976.
- CJEU Case C-189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst und Co., Bankhaus Schröder, Münchmeyer, Hengst International SA, Luxembourg, and Ernst Markgraf*, Judgment of the Court (Fifth Chamber) of 27 September 1988.
- CJEU Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, Judgment of the Court (Sixth Chamber) of 11 January 1990.
- CJEU Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, Judgment of the Court of 19 September 1995.
- CJEU Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*. Judgment of the Court of 7 March 1995.

- CJEU Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel*, Judgment of the Court (Sixth Chamber) of 1 October 2002.
- Joined CJEU cases *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09) Judgment of the Court (Grand Chamber) of 7 December 2010.
- Joined CJEU cases *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08). Judgment of the Court (Grand Chamber) of 4 October 2011.
- Joined CJEU Cases C-509/09 *eDate Advertising GmbH v X* and (C-161/10) *Olivier Martinez and Robert Martinez v MGN Limited*, Judgment of the Court (Grand Chamber) of 25 October 2011.
- CJEU Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, Judgment of the Court (First Chamber) of 19 April 2012.
- CJEU Case C-5/11 Criminal Proceedings against *Donner*. Judgement of the Court (Fourth Chamber) of 21 June 2012.
- CJEU Case C-173/11 *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, Judgment of the Court (Third Chamber) of 18 October 2012.
- CJEU Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA.*, Judgment of the Court (First Chamber) of 25 October 2012.
- CJEU Case C-228/11 *Melzer v MF Global UK Ltd*, Judgment of the Court (First Chamber) of 16 May 2013.
- CJEU Case C-170/12 *Peter Pinckney v KDG Mediatech AG*, Judgment of the Court (Fourth Chamber) of 3 October 2013.
- CJEU Case C-548/12 *Bogsitter v Fabrication de Montres Normades*, Judgement of the Court (Seventh Chamber) of 13 March 2014.
- CJEU Case C-387/12 *Hi Hotel HCF SARL v Uwe Spoering*, Judgment of the Court (Fourth Chamber) of 3 April 2014.
- CJEU Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH*. Judgement of the Court (Fourth Chamber) on 22 January 2015.

Opinion of the Advocate General in CJEU cases

- Opinion of AG Cruz Villalón in C-523/10 *Wintersteiger AG v Products 4U GmbH*. Opinion delivered on 16 February 2012.
- Opinion of the Advocate General Jääskinen CJEU Case C-170/12 *Peter Pinckney v KDG Mediatech AG*. Opinion delivered on 13 June 2013.
- Opinion of Advocate General Jääskinen Case C-360/12 Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH, v First Note Perfumes NV. Opinion delivered on 21 November 2013.

Legislations

- 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.
- Regulation (EU) No 1215/2012 Of The European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Reports

- European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles on Conflict of Laws in Intellectual Property, Final Text of December 1, 2011 Available at: http://www.imprs-ci.ip.mpg.de/www/files/pdf2/Final_Text_1_December_2011.pdf <Last accessed: 13 August 2016>
- WIPO Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of October 2001, WIPO Publication No. 845.