



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
JÄÄSKINEN  
delivered on 13 June 2013<sup>1</sup>

**Case C-170/12**

**Peter Pinckney**  
v  
**KDG Mediatech AG**

(Request for a preliminary ruling from the Cour de cassation (France))

(Inadmissibility — No connection between the questions referred and the reality or the subject-matter of the main proceedings — Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 5(3) — Special jurisdiction in matters relating to tort, delict or quasi-delict — Criteria for determining the place where the harmful event occurred — Infringement of copyright — Directive 2001/29/EC — Articles 2, 3 and 4 — Pressing of a CD — Online offer of that CD — Placing online of the content of that CD in dematerialised form)

### I – Introduction

1. The Cour de cassation (Court of Cassation) (France) has referred two questions to the Court for a preliminary ruling in the context of an action for damages brought by Mr Pinckney, a French resident who claims to be, inter alia, the author of musical works, against KDG Mediatech AG ('Mediatech'), a company established in Austria, based on the alleged infringement of those works by that company.
2. The present case might have given the Court the opportunity to rule on the conditions in which the courts of a Member State have jurisdiction *ratione loci* to determine a dispute arising from an alleged infringement of copyright via the internet on the basis of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>2</sup>
3. The referring court is uncertain as to the relevant criterion for establishing a connection in the case of a crossborder infringement of copyright resulting either from the placing online of dematerialised content or the online sale of a material support reproducing that content. The Cour de cassation states that the request for a preliminary ruling was made on account of the difference between the dispute before it and the situations considered by the Court in *L'Oréal and Others*<sup>3</sup> and also in *eDate Advertising and Others*.<sup>4</sup>

1 — Original language: French.

2 — OJ 2001 L 12, p. 1.

3 — Case C-324/09 [2011] ECR I-6001.

4 — Joined Cases C-509/09 and C-161/10 [2011] ECR I-10269.

4. None the less, having regard to the description of the facts by the referring court, and owing to what I believe to be the inevitable characterisation of the legal basis of the action for damages brought by Mr Pinckney, the questions for a preliminary ruling seem to me to have no relevance to the outcome of the main proceedings and must therefore be declared inadmissible. It is therefore only in the alternative that I shall make some observations on the substance of the case.

## II – Legal framework

### A – Regulation (EC) No 44/2001<sup>5</sup>

5. Recital 12 in the preamble to Regulation No 44/2001 states that ‘[i]n addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice’.

6. Article 2(1) of that regulation, which appears in Section 1 of Chapter II, entitled ‘General provisions’, provides that ‘[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’.

7. Article 5(3) of that regulation, which is part of Section 2 of Chapter II, entitled ‘Special jurisdiction’, provides that a person domiciled in a Member State may be sued in another Member State, ‘in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’.<sup>6</sup>

### B – Directive 2001/29/EC

8. Article 2 of 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,<sup>7</sup> entitled ‘Reproduction right’, provides, in essence, that Member States are to provide, inter alia, for authors the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction, by any means and in any form, in whole or in part, of their works.

9. Article 3(1) of that directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides that ‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’ Paragraph 3 of that article provides that ‘[t]he rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication or making available to the public as set out in this Article.’

5 — I note that no substantial change was made to the relevant provisions at the time of the revision of Regulation No 44/2001 by **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 (OJ 2012 L 351, p. 1)**.

6 — The case-law on the interpretation of Article 5(3) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32), as amended by the successive conventions relating to the accession of the new Member States to that convention, is also valid for the interpretation of the equivalent provisions of Regulation No 44/2001, as the Court observed in Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR, paragraphs 31 and 32.

7 — OJ 2001 L 167, p. 10. In view of the wording of the questions for a preliminary ruling, which refer only to copyright, the provisions relating to neighbouring rights have not been reproduced, although Mr Pinckney is likely to benefit from the protection provided for by certain of those provisions in his alleged capacity as performer of the songs in question.

10. In the words of Article 4(1) of that directive, entitled ‘Distribution right’: ‘Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.’ In addition, paragraph 2 thereof provides: ‘The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent’.

### III – The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

11. In the light of the request for a preliminary ruling and the parties’ observations, the facts and the main proceedings may be summarised as follows.

12. Mr Pinckney, who lives in Toulouse (France), claims to be the author, composer and performer of 12 songs recorded on a vinyl disc in the 1970s. He found that those songs had been reproduced without his authority on compact discs (‘CDs’) pressed by Mediatech in Austria, where the latter company is domiciled. Those CDs were subsequently marketed by two United Kingdom companies on various websites accessible, in particular, from Mr Pinckney’s place of domicile in Toulouse.

13. Mr Pinckney brought proceedings against Mediatech before the Tribunal de grande instance de Toulouse (Regional Court, Toulouse) (France), seeking compensation for the harm which he claimed to have suffered by reason of the infringement of his copyright. By order of 14 February 2008 the judge preparing the case for trial considered that that court had jurisdiction to determine that claim, notwithstanding the objection of lack of jurisdiction *ratione territoriae* raised by Mediatech.

14. Mediatech appealed against that decision and the Cour d’appel de Toulouse (Court of Appeal, Toulouse) held that the French courts lacked jurisdiction, on the ground that the defendant’s place of domicile was Austria and that the place where the damage occurred could not be in France.

15. Mr Pinckney then lodged an appeal in cassation against that judgment, relying on an infringement of Article 5(3) of Regulation No 44/2001. It was in that context that, by decision of 5 April 2012, the Cour de cassation decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed on line on a website,

— the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed on line is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State of the court before which the action is brought,

or

— does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?

(2) Is the answer to [the first question] the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?’

16. The request for a preliminary ruling was lodged at the Court Registry on 11 April 2012. Written observations have been submitted by Mr Pinckney, by the French, Greek, Austrian and Polish Governments and by the European Commission. No hearing has been held.

#### IV – Analysis

##### A – Admissibility

17. In addressing the two relevant grounds of inadmissibility in the present case, I shall take into account, first, the exceptional nature of inadmissibility decisions in requests for preliminary rulings, which follows from the fundamental principle of good cooperation with the national courts, and, second, the need for the national courts to allow the Court to rule on the interpretation of the provisions of EU law sought in the light of and for the needs of the main proceedings.

18. It has consistently been held that questions for a preliminary ruling referred by the national courts enjoy a presumption of relevance<sup>8</sup> and, in that regard, that a request may be refused ‘only if it is quite obvious that the interpretation of European Union law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it’.<sup>9</sup> That seems to me to be the position in this case.

##### 1. The insufficient description of the factual context of the case

19. The first ground of inadmissibility, which, admittedly, has not been raised by any of the parties to the proceedings, but which may be raised by the Court of its own motion,<sup>10</sup> relates to the fact that the Court is unable to answer the questions put to it owing to the insufficient description of the factual context of the case by the referring court. The present request for a preliminary ruling contains no information relating, in particular, to the nature of the relationship between the Austrian company and the United Kingdom companies, any parallel actions brought by Mr Pinckney against those companies, the activities of the websites in question or the technological process in the first question for the placing of the protected content online to which that question refers.

20. The gaps in the order for reference render more difficult the Court’s task of giving as useful as possible an answer to the questions referred to it, as explained by the facts of the case. None the less, it seems to me that the Court is not unable to provide the requested interpretation of Article 5(3) of Regulation No 44/2001, since, as the case-law requires, it has sufficient information to enable it to determine the scope of the questions raised,<sup>11</sup> in this instance the definition of the relevant point of connection where there has been an infringement of copyright. The request for a preliminary ruling is therefore not inadmissible from that aspect.

8 — See, in particular, Case C-197/10 *Unió de Pagesos de Catalunya* [2011] ECR I-8495, paragraph 17 and the case-law cited.

9 — See, in particular, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 42 and the case-law cited.

10 — Since it is for the Court, as for all courts, to determine whether it has jurisdiction; Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 31 and the case-law cited.

11 — See, in particular, Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraph 29.

## 2. The lack of relevance of the questions referred to the outcome of the main proceedings

21. The second ground of inadmissibility, which was raised by the Austrian Government and the Commission, concerns the usefulness of the Court's answer to the outcome of the main proceedings, given the absence of any apparent relationship between the questions referred and the dispute before the referring court.

22. The Court has repeatedly held that there is no need to answer the questions for a preliminary ruling where the interpretation of EU law sought is incapable of shedding light on the outcome of the main proceedings, in particular where the subject-matter of the proceedings is different from the subject-matter of the questions referred.<sup>12</sup>

23. From that point of view, the particular feature of this case relates to the fact that that aspect of admissibility is not immediately apparent but assumes a preliminary examination of the system of copyright protection in the European Union. Where it is dealing with an action for infringement of copyright on the basis of Article 5(3) of Regulation No 44/2001, a national court must first of all characterise the alleged activities by reference to the autonomous concepts set out in Directive 2001/29,<sup>13</sup> in order to localise one of the elements of alleged liability on the territory of the Member State in which it sits in order, where appropriate, to confirm that it has jurisdiction.<sup>14</sup>

24. It is for that reason that I take the view, as the Commission does, that the various relevant exclusive copyrights in this case should be considered separately, notwithstanding the general wording of the questions referred for a preliminary ruling, which refer without distinction to 'copyright'. When that qualification has been made, the lack of relationship between the questions referred and the main proceedings will be more apparent.

(a) The characterisation of the acts of infringement by reference to the exclusive copyright provided for in Directive 2001/29

25. In the first place, there is to my mind no doubt that the alleged copy in CD form of the works in question alleged to have been made by Mediatech comes within the exclusive reproduction right within the meaning of Article 2 of Directive 2001/29. In that respect, I would observe that infringements of the reproduction right assume in principle a strictly territorial dimension. In the present case, so far as the pressing of the CDs is concerned, that territory is Austria. Even if the person who made the unauthorised reproduction also communicated or distributed the content at issue abroad, either acting alone or with the help of an accomplice, the resulting extraterritoriality would be a consequence of the subsequent acts of communication or distribution and not of the act of reproduction itself.

26. As regards, in the second place, the alleged online offer of those CDs by the United Kingdom companies, I am of the view that it falls within the scope of the exclusive distribution right provided for in Article 4 of Directive 2001/29. Such an online offer has the objective of transferring the ownership of the material support of content protected by copyright.<sup>15</sup> To my mind, that classification does not differ according to whether that offer was made in a shop or on the internet.

12 — See, in particular, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paragraphs 40 to 42 and the case-law cited.

13 — See, in particular, Case C-5/11 *Donner* [2012] ECR, paragraph 25.

14 — See, to that effect, J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, Oxford University Press, 2011, p. 561, No 10.86, and p. 564, No 10.95.

15 — That characterisation is supported by recital 29 in the preamble to Directive 2001/29, which contrasts online services and physical carriers, and is itself based on the 'Common declaration concerning Articles 6 and 7' of the WIPO Copyright Treaty (WCT) adopted in Geneva on 20 December 1996, approved on behalf of the European Union by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

27. The difficulty is therefore, above all, in the third place, to determine which exclusive rights relate to the placing online of copyright-protected content in a dematerialised form, which forms the subject-matter of the first question. In that respect, the technological process in question, which has not been identified by the referring court, might consist in ‘streaming’, the downloading of files stored on a central server, or ‘peer to peer’ file sharing.

28. It seems to me that the intention of the legislature, expressed in recital 23 in the preamble to Directive 2001/29, was that all of those processes should come within the scope of the concept of ‘communication to the public’ within the meaning of Article 3(1) of that directive, which refers to ‘any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them’.<sup>16</sup> In *ITV Broadcasting and Others*,<sup>17</sup> moreover, the Court recently held that the retransmission of works in a terrestrial television broadcast made by an organisation other than the original broadcaster by means of an internet stream made available to subscribers who may receive that retransmission by logging on to its server (‘live streaming’) comes within the concept of ‘communication to the public’.

29. The placing online of songs in a dematerialised form might also, where appropriate, fall within the scope of the exclusive reproduction right within the meaning of Article 2 of Directive 2001/29, which refers to ‘temporary or permanent reproduction by any means and in any form’.<sup>18</sup> In particular, the Court has made clear that that concept may apply to the reproduction, even if temporary and in part, by the storing of an extract from a protected work.<sup>19</sup> If the placing online of the songs to which the referring court makes reference constitute an act of reproduction, it seems to me that it would be localised at the place at which it was placed online (‘uploaded’).<sup>20</sup>

30. It follows that the three transverse categories of exclusive copyright established by Directive 2001/29 are relevant in the main proceedings, so that the basis of the actions against each of the presumed infringing parties is separate and the localisation of the acts that might be imputed to them varies according to the right concerned.

(b) The consequences of the relevance of the questions for a preliminary ruling

31. The Austrian Government disputes the admissibility of the request for a preliminary ruling in its entirety, based on the absence of any relationship between the questions referred and the main proceedings, while the Commission seems to be in favour of partial admissibility, since it distinguishes the question of the infringement of Mr Pinckney’s reproduction right, which should be examined, from that of the infringement of his distribution right, which it considers inadmissible.

16 — On the contrary, I do not believe that the Court’s reasoning in Case C-128/11 *UsedSoft* [2012] ECR can be transposed to the present case. In that judgment the Court considered that there is no need to distinguish between downloading a computer program from an internet site and its delivery on CD-ROM, as both of those processes come within the concept of ‘distribution’ within the meaning of Article 4 of Directive No 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16). However, the Court had emphasised the specific nature of that solution in the context of that directive, which constitutes a *lex specialis* in relation to Directive 2001/29, which is relevant in the present case (paragraphs 51, 56 and 60 of the judgment).

17 — Case C-607/11 [2013] ECR.

18 — According to Article 9(3) of the Convention on the Protection of Literary and Artistic Works signed in Berne on 9 September 1886, in the version following the amendment of 28 September 1979 (‘the Berne Convention’), ‘[a]ny sound or visual recording shall be considered ... a reproduction’. However, Article 5(1) of Directive 2001/29 exempts temporary acts of reproduction ‘which are transient or incidental [and] an integral and essential part of a technological process’ and ‘which have no independent economic significance’, subject to a condition relating to their purpose, which must be ‘a transmission in a network between third parties by an intermediary’ or ‘a lawful use’.

19 — Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 51.

20 — See, to that effect, U. Magnus and P. Mankowski, *European Commentaries on Private International Law, Brussels I Regulation*, 2<sup>nd</sup> Ed., Sellier, Munich, 2012, No 226, p. 250. The internet allows the circulation of content beyond borders, but the act of transferring files itself may be localised. In the situation to which the Cour de cassation refers, the act of reproduction is of a ‘technological’ nature, in that it exists only for the purpose of another act, in this instance an act of communication that may be covered by Article 5(1) of Directive 2001/29.

32. As concerns the alleged infringement of the reproduction right on which Mr Pinckney relies, I have already explained that the acts of offering CDs online or placing content online in dematerialised form, which alone form the subject-matter of the questions referred to the Court, come within the distribution right and the communication right respectively.<sup>21</sup> Consequently, I am of the view that there is no need to undertake an examination, which has not been requested by the referring court, of the criteria for the definition of the place in which the harmful event occurred by reference to the infringement of the reproduction right, although that right appears to be the only exclusive right that Mediatech might have infringed.

33. As concerns the alleged infringement of the distribution right and communication right, I consider, in the light of the material available to the Court, that this is a case in which the interpretation of EU law sought has no link with the reality or the subject-matter of the main proceedings.

34. In effect, the first question proceeds on the assumption that dematerialised content was placed online, as the Austrian Government observes. However, it is apparent both from the summary account of the factual context in the request for a preliminary ruling and upon reading *a contrario* the wording of the second question<sup>22</sup> that that situation does not correspond with the facts that gave rise to the dispute before the referring court. According to oft-reiterated case-law, there is therefore no need to answer that first question.<sup>23</sup>

35. Nor would the answer which the Court might give to the second question be of any use to the referring court, since that court is dealing not with an action relating to the online distribution of CDs from a website but with an action relating to the reproduction of works resulting from the pressing of CDs in Austria.

36. In fact, it is not disputed that the online offer of CDs forming the subject-matter of the second question was made at the initiative of United Kingdom companies, which are not parties to the main proceedings.<sup>24</sup> In reality, the file available to the Court contains no material on which it might be determined whether and to what extent the sole defendant in the main proceedings, Mediatech, directly or indirectly participated in those acts of distribution or communication via the internet.

37. In that regard, I observe that the answer that the Court might give to the questions referred to it would be of use to the referring court only if Article 5(3) of Regulation No 44/2001 made it possible to bring the presumed perpetrator of an alleged act of infringement before a court sitting in a Member State in which he is not domiciled on the ground that another alleged act of infringement committed by a third party not a defendant to the action produced its harmful effect in that Member State and the defendant's act was a condition which rendered the subsequent acts of that third party possible.

38. However, the Court has recently held that such jurisdiction, based on the presumed unlawful act of a third party who is not a defendant, cannot be established in the place of the harmful event committed by that third party in order to deal with an action against a presumed author who has not himself acted there.<sup>25</sup> Such secondary jurisdiction does not seem to me to exist, either, in the place in

21 — While the placing online of dematerialised content is in theory likely to require the production of a digital copy and also to be covered by the reproduction right, in so far as that reproduction is not covered by Article 5(1) of Directive 2001/29, as I explained at point 29 of this Opinion, I shall not examine this aspect further, as it is purely hypothetical by reference to the questions referred.

22 — Which distinguishes the placing on line of dematerialised content to the case, '*as in the present case*, from the online sale of a material carrier medium' (emphasis added).

23 — See, in particular, Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 51, and Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 44.

24 — I would add that it is apparent from Mr Pinckney's appeal on a point of law, which is annexed to the request for a preliminary ruling, that Mr Pinckney did not rely before the French courts on the complicity of the Austrian company in the activities of the United Kingdom companies.

25 — Case C-228/11 *Melzer* [2013] ECR.

which harm resulting from the alleged acts of third parties who are not defendants occurs in a situation such as that at issue in the main proceedings, since the localisation of the damage resulting from an infringement of Mr Pinckney's reproduction right seems to me to be different from the localisation of the damage resulting from an infringement of his distribution or communication rights.

39. Since the question of the definition of the place in which the harmful act occurs within the meaning of Article 5(3) of Regulation No 44/2001 in the event of the crossborder broadcast via the internet of material support media or immaterial content reproducing the protected works is relevant only in an action against the alleged perpetrators of those acts, the two questions referred to the Court do not to my mind meet an objective need for the outcome of the main action.<sup>26</sup>

40. Consequently, I propose that the Court should declare that the request for a preliminary ruling submitted by the Cour de cassation is inadmissible.

#### B – *Alternative observations on the substance*

41. Since I propose that the Court should reject the request for a preliminary ruling as inadmissible in its entirety, it is purely in the alternative that I shall examine the definition of the 'place where the harmful event occurred' for the purposes of Article 5(3) of Regulation No 44/2001.

42. In that regard, I observe that, since the referring court submitted its request, the Court has had occasion to rule in similar questions to those forming the subject-matter of these proceedings in other areas of intellectual property, namely trade marks<sup>27</sup> and, incidentally, the '*sui generis*' law on databases.<sup>28</sup> While the guidelines in the case-law on such matters are now undoubtedly clearer, the explanations that might be given by the Court concerning the localisation of an infringement of copyright via the internet for the purposes of determining jurisdiction are none the less still awaited.<sup>29</sup>

43. In the light of certain contradictory observations submitted to the Court,<sup>30</sup> I think that it would be useful to recall the scope of the principle of territoriality that characterises that matter before drawing actual consequences in relation to jurisdiction in the event of a complex crossborder infringement of copyright involving the internet, as in the situations mentioned by the referring court.

#### 1. The scope of the principle of territoriality of copyright

44. The principle of territoriality of copyright is the key to the interaction between the 27 different national regimes which are required to protect the same work in parallel in the European Union.<sup>31</sup>

26 — According to the words used by the Court in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14 and the case-law cited. See, in particular, by analogy, *Volker und Markus Schecke and Eifert*, paragraphs 41 and 42; Case C-313/07 *Kirtruna and Vigano* [2008] ECR I-7907, paragraphs 30 and 31; and also Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraphs 45 and 46.

27 — Case C-523/10 *Wintersteiger* [2012] ECR.

28 — Within the meaning of Chapter III of **Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases** (OJ 1996 L 77, p. 20), in Case C-173/11 *Football Dataco and Others* [2012] ECR.

29 — See, illustrating the multiple interpretations of the Court's case-law, M.-E. Ancel, 'Quel juge en matière de contrefaçon?', in C. Nourissat and É. Treppoz (ed.), *Droit international privé et propriété intellectuelle*, Ed. C. Nourissat and É. Treppoz, Lamy, 2010, p. 173; É. Treppoz, 'Droit européen de la propriété intellectuelle', *RTDE* 47 (4), October-December 2011, p. 847; T. Azzi, commentary on the judgment Cass. Civ. 1, 12 July 2012, No 11-15.165, *Journal du droit international (Clunet)*, No 1, January 2013, 2, No 22 et seq.

30 — The Polish Government refers to the universal nature of copyright protection in the EU, while Mr Pinckney and the Commission emphasise that the principle of territoriality is predominant in that matter.

31 — In spite of the harmonisation of certain of its aspects by the seven sectoral or general directives adopted in the EU in that area since 1991. See, on that subject, point 3 of the Opinion of Advocate General Mengozzi in Case C-521/11 *Amazon International Sales and Others*, pending before the Court.

45. That principle, which provides inspiration for the whole of intellectual property law, may be broken down into the threefold dimension of jurisdiction, applicable law and material right. As is apparent from *Football Dataco and Others*, there is in that respect a close link between all three of those aspects.<sup>32</sup>

46. As regards jurisdiction, I consider as a starting point that the principle of territoriality means that the courts of a Member State can deal with infringements of copyright only if and to the extent that the territory in which they have jurisdiction is concerned. That link between territory and jurisdiction may be severed, however, where the court has jurisdiction for the entire case, independently of the localisation of the elements of the dispute, for example where its jurisdiction is based on Article 2 of Regulation No 44/2001.<sup>33</sup>

47. As regards the conflict of laws, under Article 8(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II),<sup>34</sup> the ‘law of the country for which protection is claimed’ is exclusively applicable to a non-contractual obligation arising from an infringement of an intellectual property right which is not a ‘unitary Community’ right and no derogation from that rule is possible.<sup>35</sup> That rule, which is based on a subjective connection which initially leaves the choice of applicable law to the claimant, means that anyone who claims that his copyright has been infringed must seek the protection of national legislation, as there is no copyright outside such legislation.<sup>36</sup> In that regard, that rule of the conflict of laws is not so much a consequence of the principle of territoriality as one of the manifestations of its existence.

48. It is therefore in terms of the material right that the idea of territoriality becomes fully effective. From that aspect, it means that the protection of a work by copyright is dependent on national legislation, both from the viewpoint of recognition of that right, which is conditional on compliance with the conditions laid down in the legislation in question, and from the viewpoint of its extent, which is limited to the territory concerned.<sup>37</sup> In other words, copyright is subject, for its existence as well as for its effects, to the frontiers of a legal order.<sup>38</sup> It is at this stage of the reasoning that the territorial scope of the protection provided for by copyright of the Member State whose protection is claimed must be determined.<sup>39</sup>

32 — In that judgment the Court, which had been requested to rule on a question relating to the localisation of an act of ‘re-utilisation’ within the meaning of Article 7 of Directive 96/9, considered it necessary to reason jointly on the material and private international law levels.

33 — To my mind, such general jurisdiction does indeed exist in intellectual property matters, as suggested at paragraph 30 of *Wintersteiger*, where it was held that ‘the territorial limitation of the protection of a national mark is not such as to exclude the international jurisdiction of courts other than the courts of the Member State in which that trade mark is registered’.

34 — OJ 2007 L 199, p. 40.

35 — That solution, which, according to recital 26 in the preamble to that regulation, is ‘universally acknowledged’, is consistent with that provided for in Article 5(2) of the Berne Convention.

36 — P. Huber and M. Illmer, *Rome II Regulation*, Sellier, Munich, 2011, Article 8, paragraphs 29 to 31 and 34, p. 241.

37 — See, in particular, with respect to copyright, Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 46. It should be added that regional rights regimes for intellectual property rights exist, such as the Community and Benelux trade marks.

38 — It being noted that it follows from Article 5(1) of the Berne Convention that foreign works and authors enjoy the same protection as national works and authors do.

39 — See, by analogy, *Football Dataco and Others*, paragraph 28.

49. It seems indisputable to me that the system of protection of intellectual property, and of copyright in particular, remains, as EU law currently stands,<sup>40</sup> fundamentally dominated by that principle of territoriality. However, the recent case-law of the Court has attenuated certain negative effects of the territoriality of copyright in order to adapt it to the everyday reality of crossborder broadcasting of protected works, in relation both to the criteria of jurisdiction<sup>41</sup> and to the conditions of the existence of an infringement of various intellectual property rights at the material level.<sup>42</sup>

50. Consequently, failing legislative intervention in that sense,<sup>43</sup> I am of the view that infringements of copyright which have the specific feature of having been committed via the internet do imply not a revolution in the traditionally territorial approach to that category of rights, but rather a new definition of the way in which the link between virtual conduct and a given territory manifests itself.<sup>44</sup>

2. The courts with jurisdiction to deal with an alleged infringement of the various categories of exclusive copyright via the internet

(a) The framework of the analysis

51. It is apparent upon reading together Articles 2 and 5(3) of Regulation No 44/2001 that, in relation to actions brought in order to establish tort or delict, the plaintiff has the option of bringing proceedings either before the courts of the State in which the defendant's domicile is situated or the courts in whose jurisdiction the 'place where the harmful act occurred' or 'is likely to occur' is situated.

52. According to settled case-law, the second basis for jurisdiction is divided into two parts, namely 'the place where the damage occurred' and 'the place of the event giving rise to that damage and, in consequence, the defendant may be sued, at the option of the applicant, in the courts of either of those places'.<sup>45</sup> It is appropriate to consider in turn each of those points of connection in the situation at issue in the main proceedings.

(b) The localisation of an infringement of the reproduction right

53. I have stated earlier that the infringement of an author's reproduction right does not in principle assume any crossborder nature, since the place of the event giving rise to the harm and the place where harm occurred are the same. The harm resulting from the infringement of a reproduction right is entirely brought about by the sole fact of the carrying-out of the act of reproduction and therefore arises in the same place as the latter.<sup>46</sup>

40 — The Commission is currently studying the feasibility of revising EU copyright with respect, in particular, to territoriality (COM(2012) 789 final).

41 — *Wintersteiger and Football Dataco and Others*.

42 — See, concerning an infringement of an exclusive distribution right in the context of crossborder distance selling operations, *Donner*, and also, concerning an online infringement of a Community trade mark, *L'Oréal and Others*.

43 — See, regarding radio broadcasting by cable and satellite, which in principle gives rise to the same location difficulties as the internet, the single point of connection adopted by the Community legislature in order to centralise the applicable law, is the control and responsibility of the related copyright in a State, Article 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

44 — Thus, as regards infringement of the rights of personality, the Court adapted the criteria defined in Case C-68/93 *Shevill and Others* [1995] ECR I-415 to the particular features of broadcasting via the internet in *eDate Advertising and Martínez*.

45 — That option has been accepted since Case 21/76 *Bier* [1976] ECR 1735, paragraph 19, and has been repeated many times, notably in *Folien Fischer and Fofitec*, paragraphs 39 and 40.

46 — It will be recalled that it follows from Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 15, and Case C-168/02 *Kronhofer* [2004] ECR I-6009, paragraph 20, that the place of the 'place where the victim's assets are concentrated', in which the consequences of any economic damage are ultimately felt, is not the place in which the damage occurred.

54. It follows that, in principle, only the Austrian or United Kingdom courts have jurisdiction to deal with the legal consequences of the pressing of the CDs in Austria or the hypothetical placing of the songs online in the United Kingdom respectively, through the recording of a copy on a host server connected to the internet,<sup>47</sup> and the harm arising therefrom.

(c) The localisation of an infringement of the distribution right or communication right

55. On the contrary, the infringement of the distribution and communication rights is liable to introduce an element of extraneousness, with the consequence that the various elements of the alleged liability are separated and, consequently, the various points of connection for the purposes of the application of Article 5(3) of Regulation No 44/2001 are not the same. The harm resulting from infringements of distribution or communication rights assumes a potential addressee or public, which may be in a different place from that act.

56. Where there has been a crossborder infringement of copyright via the internet, the determination of the ‘place of the event giving rise to the damage’ does not seem to me to have to correspond to any different fundamental principles according to whether it is the infringement of one or the other of those rights that is involved.<sup>48</sup> Like the parties to the proceedings before the Court, I therefore consider that it would be appropriate, if they were admissible, to provide the same answer to the two questions referred.

– (i) The place of the event giving rise to the damage

57. As regards the place of the event giving rise to the damage, which confers jurisdiction on the court before which proceedings are brought for all the damage sustained,<sup>49</sup> I believe that the same approach should be taken in respect of copyright as the Court took in *Wintersteiger* in the field of trade marks,<sup>50</sup> which consists in conferring jurisdiction on the courts of the place of establishment of the alleged infringers as the place where the online sale of CDs – for the act of distribution – or the uploading of the songs – for the act of communication – was decided.

58. In either case that criterion leads, in the present case, to the United Kingdom courts of the place of establishment of the companies in question being designated and is therefore of only limited interest to the applicant by comparison with the rule on general jurisdiction arising from Article 2(1) of Regulation No 44/2001.

47 — On the assumption that the technological process employed does indeed entail a reproduction.

48 — J. Fawcett and P. Torremans, *op. cit.*, p. 575, No 10.157.

49 — This results from paragraph 25 of *Shevill and Others* and was confirmed in *Wintersteiger*, in spite of the principle of territoriality in relation to trade mark infringement (paragraph 30).

50 — Paragraph 37 of the judgment.

(ii) The place where the damage occurred

59. In view of the ubiquity of the broadcast of pirate musical works via the internet, it is with respect to the localisation of the place where the damage resulting from acts of communication or distribution online occurred that the essential part of the difficulties arises. In that regard, the multiplicity of the interpretations proposed to the Court in the present proceedings<sup>51</sup> reflects the varying solutions applied by the courts of the Member States<sup>52</sup> and the numerous proposals made in the literature in that respect.<sup>53</sup>

60. It seems to me, however, that the principles for the resolution of those difficulties can henceforth be identified quite clearly in the recent developments in the Court's case-law.

61. As regards the material right, the Court has ruled on many occasions on the criteria for localising the infringement of various intellectual property rights via the internet for the purposes of delimiting the scope *ratione territoriae* of the right protection of which was sought by reference to the reality of the link between the alleged infringement of the intellectual property rights and the territory in question. In those judgments, the Court has systematically favoured a criterion based on whether the site in question was aimed at the public of the European Union or of a Member State, respectively.<sup>54</sup> It recently explained the content of that criterion, stating that the activity of the site must reveal 'the intention on the part of its performer to target persons in that territory'.<sup>55</sup> I would observe that that condition of targeting applies independently of the material or immaterial support medium of the alleged infringement.<sup>56</sup>

62. As regards jurisdiction, the Court has not yet been called upon to adjudicate directly on the criteria for localising the place where the damage occurs for the purposes of designating the competent court in the event of an alleged infringement of an intellectual property right which has not been recorded via the internet.<sup>57</sup> However, it is self-evident that the solutions applied by the Court at the level of substantive law cannot automatically be transposed to the rules for determining jurisdiction.

63. None the less, such solutions could provide useful inspiration for the interpretation of Article 5(3) of Regulation No 44/2001, since there is a particular interest in that being so. To my mind, it follows from *Football Dataco and Others* that the Court sought to ensure consistency in its case-law, by aligning the localisation criteria for the purposes of designating the competent court with those defined for the purposes of delimiting the territorial scope of a national regime for the protection of the '*sui generis*' right in databases. In effect, when questioned about the localisation of an act involving

51 — Almost all the parties to the proceedings before the Court have suggested a different point of connection – Mr Pinckney alone has suggested three alternative definitions.

52 — See, in particular, in favour of jurisdiction solely by reason of the accessibility of the website through which the infringement of copyright occurred, in Sweden, the decision of the Svea hovrätt of 4 February 2008 (RH 2008:4); contra, in Germany, the decision of the Oberlandesgericht Köln (30.10.2007, GRUR-RR 2008, 71), requiring intentional direction of the activity of the website. For an account of the solutions applied in the United States, see J. Hörnle, 'The jurisdictional challenge of the Internet', in L. Edwards, *Law and the Internet*, Hart Publishing, Oxford, 2009, p. 143.

53 — Private international law on intellectual property, and copyright in particular, has been the source of great interest to writers for around the last 15 years, leading to the development of different methods of resolving conflicts as to jurisdiction. See, in particular, on alternative heads of jurisdiction to the residence of the defendant, the CLIP Principles of the European Group of the Max Planck Institute on the conflict of laws in intellectual property (Articles 2:202 and 2:203) and also the Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes relating to intellectual property adopted by the American Law Institute (ALI) (article 204), referred to, in particular, by A. Metzger, 'Jurisdiction in Cases Concerning Intellectual Property Infringements on the Internet', in S. Leible and A. Ohly, *Intellectual Property and Private International Law*, Mohr Siebeck, Tübingen, 2009, p. 251.

54 — See, concerning national and Community trade marks, *L'Oréal and Others*, paragraph 65; concerning an alleged infringement of an author's exclusive distribution right, *Donner*, paragraph 27; and also, regarding the infringement of the '*sui generis*' right over a database, *Football Dataco and Others*, paragraph 39.

55 — *Football Dataco and Others* (paragraph 39).

56 — Since *Donner* dealt with crossborder furniture sales operations, while *L'Oréal and Others* and *Football Dataco and Others* related to online activities.

57 — For obvious reasons to do with the automatic nature of copyright protection, the criterion of the place of recording as the place where the damage occurred established by the Court for infringements of national trade marks via the internet in *Wintersteiger*, cannot be applied to infringements of copyright.

the sending of data, independently, according to Advocate General Cruz Villalón, of the question of jurisdiction, the Court, after citing the relevant provisions of Regulation No 44/2001, considered that ‘the question of the localisation of the acts of sending at issue in the main proceedings, which Football Dataco and Others claim[ed had] caused damage to the substantial investment involved in creating the Football Live database, [was] liable to have an influence on the question of the jurisdiction of the referring court’.<sup>58</sup>

64. In this instance, concerning an alleged infringement of certain categories of exclusive copyright via the internet, it seems to me that the approach to localisation developed by the Court at the substantive level in the abovementioned judgments could also be followed when determining the place where the damage occurred for the purposes of the application of Article 5(3) of Regulation No 44/2001. I consider that analysis to be supported by the specific nature of the damage resulting from an infringement of distribution and communication rights within the meaning of Directive 2001/29. As that infringement may be analysed as a failure to profit from the unauthorised broadcast of the works, it seems to me to be appropriate to favour a court that would be designated following an analysis of the way in which the activity was aimed at a given public by the internet site in question, an approach described in the literature as the ‘theory of focalisation’.<sup>59</sup> The court thus designated would have only jurisdiction limited to the damage that has arisen on the territory<sup>60</sup> deliberately targeted by the alleged perpetrator of the infringement.<sup>61</sup>

65. Thus, I propose that the Court should confirm the direction thus taken and extend it to copyright, having already emphasised that the principle of territoriality gives rise to a particular link between the extent of the scope *ratione territoriae* of the applicable national legislation and that of jurisdiction, although those two aspects remain separate and must not be confused with each other.<sup>62</sup>

66. In order to implement such a link, the Court might take inspiration from the non-exhaustive criteria identified in *Pammer and Hotel Alpenhof*,<sup>63</sup> although I should make clear that in my view those criteria should be applied by the national courts with a certain flexibility, taking into account, in particular, the nature of the activity at issue.

67. A further point must be made concerning the need to adapt the scope of the basis for jurisdiction resulting from Article 5(3) of Regulation No 44/2001 to the harm suffered via the internet. In principle, the rules on jurisdiction laid down in Article 5 of that regulation lead to the designation of a specific court, with special jurisdiction, and not to all the courts of a Member State.<sup>64</sup> However, since the point of connection applied is the place at which the activity of the website is aimed, I consider that Article 5(3) of that regulation should be interpreted as meaning that it confers jurisdiction on each of the courts of the Member State whose public is targeted,<sup>65</sup> on condition that they have, under the national procedural rules, jurisdiction *ratione materiae* for disputes relating to copyright. Furthermore, such jurisdiction could exist only subject to special national rules reserving disputes relating to harm occurring in several places to certain courts, for example those of the national capital.

58 — Point 2 of the Opinion of Advocate General Cruz Villalón in *Football Dataco and Others* and paragraph 30 of that judgment.

59 — On this point, see also points 49 to 55 of my Opinion in Case C-462/09 *Stichting de ThuisKopie* [2011] ECR I-5331.

60 — The extent of the jurisdiction of the courts of the place where the damage occurred is limited to damage that occurred on the territory of the Member State in question (*Shevill and Others*, paragraphs 28 and 30).

61 — Criterion defined at paragraph 39 of *Football Dataco and Others*.

62 — For analyses in the literature underlining the interest in taking a joint approach to these aspects, see, inter alia, H. Gaudemet-Tallon, ‘Droit international privé de la contrefaçon: aspects actuels’, *Recueil Dalloz*, 2008, p. 725, paragraph 8; M. Vivant, *Lamy Droit du Numérique*, Lamy, 2012, No 2383; and Azzi, T., op. cit., paragraph 24.

63 — Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527, paragraphs 78 to 89. Criteria as applied, in particular, at paragraphs 40 to 43 of *Football Dataco and Others*.

64 — With the exception of Article 5(6) of that regulation. See, to that effect, point 34 of my Opinion in *Melzer*.

65 — By definition, the direction of the activity of the website most often takes place to the public of a State than towards the public coming within a particular jurisdiction.

68. I should make clear that to my mind the criterion of accessibility, according to which the potential harm is considered to arise in all the places from which the website in question can be consulted, should be rejected. Such a point of connection would encourage forum shopping, contrary to the case-law of the Court, which has consistently attempted to curb that risk in its interpretation of Regulation No 44/2001. I observe, moreover, that the criterion of the place where protection is sought, advanced by Mr Pinckney, would mean that the choice of court in which to bring proceedings would be as wide as if the criterion of accessibility were to apply, since copyright is automatically protected in the legal orders of all Member States. I am opposed to such a multiplication of courts with jurisdiction, for reasons to do with both the principle of territoriality and the objectives of foreseeability and the sound administration of justice pursued by that regulation.<sup>66</sup>

69. Mr Pinckney proposes an alternative, which consists in extending the criterion of the place of the centre of interests of the victim resulting from *eDate Advertising and Martínez* to infringements of copyright rights committed on the internet, which would permit a concentration of the resolution of the dispute by conferring jurisdiction on the courts of that place for the entire damage. It seems to me that that choice would help to generalise the jurisdiction of the *forum actoris*. Such an interpretation might well deprive Article 2 of Regulation No 44/2001 of its practical effect and distort the legislature's intention expressed in the requirement of a close link between the action and the special court in Article 5(3) of that regulation.

70. In effect, the non-material damage that might result from an infringement of the reputation or the private life of an individual is, as a general rule, more intense in the place where he has the centre of his interests, a matter that naturally clashes with the jurisdiction rules. Conversely, 'that assessment ... does not apply also to the determination of jurisdiction in respect of infringements of intellectual property rights'.<sup>67</sup> The material damage resulting from the infringement of one of the categories of exclusive copyright referred to above does not have the necessary link with the localisation of the centre of the author's interests, but rather with the localisation of his public.<sup>68</sup>

71. Consequently, in the alternative, if the Court should declare the request for a preliminary ruling admissible, I propose that the questions referred to it should be answered together, as follows: Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that in proceedings relating to an alleged infringement of the exclusive distribution right by the online sale of material support media reproducing content protected by copyright or of the exclusive communication right by the placing online of dematerialised content, the person claiming to have been harmed may bring proceedings either before the courts of the place of establishment of the persons who sold the compact discs (CDs) online or placed the content online in order to seek compensation for all the damage suffered, or before the courts of the Member State at which the website in question aims its activity in order to seek compensation for the damage suffered on that territory.

## V – Conclusion

72. Consequently, I propose that the Court should declare that the request for a preliminary ruling submitted by the Cour de cassation (France) is inadmissible.

66 — See, for a criticism of such a connection, A. Lopez-Tarruella, 'The International Dimension of Google Activities: Private International Law and the Need of Legal Certainty', *Google and the Law*, Springer, The Hague, 2012, p. 329.

67 — *Wintersteiger* (paragraph 24).

68 — See also point 20 of the Opinion of Advocate General Cruz Villalón in *Wintersteiger*.

73. In the alternative, if the Court should declare the request for a preliminary ruling admissible, I propose that the questions for a preliminary ruling referred by the Cour de cassation be answered together, as follows:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that in proceedings relating to an alleged infringement of the exclusive distribution right by the online sale of material support media reproducing content protected by copyright or of the exclusive communication right by the placing online of dematerialised content, the person claiming to have been harmed may bring proceedings either before the courts of the place of establishment of the persons who sold the compact discs (CDs) online or placed the content online in order to seek compensation for all the damage suffered, or before the courts of the Member State at which the website in question aims its activity in order to seek compensation for the damage suffered on that territory.