



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 11 September 2014¹

Case C-441/13

Pez Hejduk

v

EnergieAgentur.NRW GmbH

(Request for a preliminary ruling from the Handelsgericht Wien (Austria))

(Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Regulation No 44/2001 — Article 5(3) — Jurisdiction for ‘matters relating to tort, delict or quasi-delict’ — Copyright — Content disseminated over the internet — Criteria for determining the place where the damage occurred — ‘Delocalised’ damage)

1. In this case, the Handelsgericht Wien asks the Court of Justice about the criterion or criteria for attributing jurisdiction in the event of an infringement of copyright committed over the internet in conditions which do not enable the territory where the damage occurred to be located. Unlike the situation in *Pinckney*,² where the Court was faced with a risk of infringement of copyright as a result of the reproduction and distribution of music CDs on the internet, the present case concerns the copyright of a photographer whose works were disseminated on a website without her consent.
2. The online dissemination of photographs protected by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society³ has characteristics which are markedly different from those of the online sale of a product. Therefore, such dissemination can hardly be said to take place in one or more places which are possible to locate territorially. On the contrary, the damage ‘dematerialises’; in other words, it becomes diffuse and is therefore ‘delocalised’, thus making it difficult to locate the place where the damage occurred for the purposes of Article 5(3) of Regulation (EC) No 44/2001.⁴
3. Accordingly, the present case will enable the Court to determine whether, in circumstances like those of the present case, where ‘delocalised’ damage has occurred over the internet and copyright exists, the general criterion previously established in *Pinckney* must be applied or whether, on the other hand, it is necessary to take a different approach.

1 — Original language: Spanish.

2 — C-170/12, EU:C:2013:635.

3 — Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

4 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

I – Legal framework

4. Recitals 2, 11, 12 and 15 in the preamble to Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters state as follows:

‘(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

...

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In 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.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States ...’

5. The rules for determining jurisdiction are set out in Chapter II of the regulation, which contains Articles 2 to 31.

6. Article 2(1) of the regulation, which forms part of Chapter II, Section 1, entitled ‘General provisions’, is worded as follows:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

7. In the same section of the regulation, Article 3(1) provides as follows: ‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

8. Article 5 is in Section 2, entitled ‘Special jurisdiction’, of Chapter II of the regulation. According to Article 5(3):

‘A person domiciled in a Member State may, in another Member State, be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’

II – The facts

9. Ms Hejduk is a professional photographer specialising in architectural photography, and she is resident in Austria. Throughout her career, Ms Hejduk has created a number of photographic works dedicated to the work of the Austrian architect Georg W. Reinberg.

10. On 16 September 2004, as part of a conference organised by the undertaking EnergieAgentur, established in Germany, Mr Reinberg gave a lecture for the purposes of which he used a number of photographs taken by Ms Hejduk depicting some of his works. According to the case-file, the photographer had given prior consent to the presentation and use of those photographs.

11. EnergieAgentur, proprietor of the website www.energieregion.nrw.de and responsible for the content published on it, disseminated the aforementioned photographs taken by Ms Hejduk on its website. The photographs were accessible to the public and could be downloaded directly from that website, although Ms Hejduk had not given her consent at any time.

12. After she became aware of those facts, Ms Hejduk brought an action against EnergieAgentur before the Handelsgericht Wien, the referring court. The applicant requests that the defendant be ordered to pay EUR 4 050 by way of compensation for the damage suffered since 2004, and to bear the costs of publication of the decision.

13. EnergieAgentur raised a plea of lack of jurisdiction, alleging that the Handelsgericht Wien did not have international jurisdiction. In the defendant's opinion, since its registered office is in Düsseldorf and its website uses the top-level national domain 'de', it is the German courts which have jurisdiction to hear the case.

III – The reference for a preliminary ruling and the procedure before the Court of Justice

14. In the light of the arguments advanced by the parties in the main proceedings, the Handelsgericht Wien decided to refer to the Court for a preliminary ruling a question which is worded as follows:

'Is 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 to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only:

- in the Member State in which the alleged perpetrator of the infringement is established; and
- in the Member State(s) to which the website, according to its content, is directed?'

15. Written observations were lodged by the parties in the main proceedings, by the governments of the Czech Republic, the Portuguese Republic and the Swiss Confederation, and by the Commission.

IV – Arguments of the parties

16. Ms Hejduk contends that the case-law laid down in *Pinckney* must be supplemented since, in her view, that case did not deal with a situation like the present one. In Ms Hejduk's opinion, in a situation where damage committed on the internet is 'delocalised', the ground of jurisdiction laid down in Article 5(3) must allow the victim to sue, in respect of all the damage sustained, in the courts for the place where he or she is domiciled. Ms Hejduk maintains this position in accordance

with the case-law of the Court in *eDate Advertising and Others*.⁵

17. EnergieAgentur cites *Pinckney* and submits that the approach taken in that judgment is applicable to the present case. The copyright at issue is delimited territorially and, therefore, is subject to the limits laid down in *Pinckney*, pursuant to which an action may be brought in the defendant's State of domicile or in the State in which the event giving rise to the damage occurred, but only in respect of the damage sustained in that State.

18. The Czech Republic and the Swiss Confederation invite the Court to extend the solution applied in *eDate Advertising and Others* to a situation such as that in the present case, in the interests of the sound administration of justice and predictability in the application of the rules on international jurisdiction. In their opinion, it is possible to dispose of this case by introducing the criterion of the victim's centre of interests, a place where the applicant could sue in respect of all the damage suffered.

19. The Portuguese Republic puts forward a different view but also acknowledges that the present case is not identical to *Pinckney*. In the opinion of the Portuguese Republic, the difficulty raised by the dissemination of photographs on the internet will lead the Court to establish a linking factor based on the accessibility of the photographs. However, the limited reliability of that factor leads the Portuguese Republic, in a situation such as that in the present case, to circumscribe the jurisdiction laid down in Article 5(3) exclusively to the courts for the place where the event giving rise to the damage occurred.

20. For its part, the Commission considers that *Pinckney* is applicable to the present case, but, nevertheless, it submits that the application of that judgment to the case before the Court raises practical difficulties. In the Commission's opinion, the solution in *Pinckney* would enable Ms. Hejduk to sue in the Austrian courts but only in respect of the damage sustained on Austrian territory. According to the Commission, where damage has been sustained as a result of the dissemination of photographs on the internet, that limitation may ultimately be ineffective, as neither Ms. Hejduk nor the Austrian court with jurisdiction will have at their disposal adequate means to circumscribe the latter's jurisdiction strictly to the damage perpetrated in Austria. In those circumstances, the Commission alludes to the possibility of limiting the special jurisdiction provided for in Article 5(3) of Regulation No 44/2001 solely to the courts for the place where the event giving rise to the damage occurred.

V – Analysis

21. As I have stated, the present case raises a rather complex interpretative difficulty. The Court has had occasion to address the problems raised by the internet in relation to the application of the rules of private international law but never in a case like the one before the Court. To summarise briefly, in this case it will be necessary to choose which of the many remedies made available by case-law is best adapted to diffuse infringements of copyright committed over the internet.

22. Although the referring court refers only to the possibility of using two linking factors (the defendant's domicile and the State to which the website's content is directed), the parties and the participating States have suggested other possible linking factors which could be applied to the present case and which I shall now go on to examine.

⁵ — C-509/09 and C-161/10, EU:C:2011:685.

A – *The centre-of-interests criterion*

23. The Czech Republic and the Swiss Confederation have argued that it is possible to apply to the present case the case-law laid down in *eDate Advertising and Others*. However, for the reasons I shall now explain, I do not believe that this view can be accepted.

24. In *eDate Advertising and Others*, the Court provided a solution for the problems resulting from the infringement of personality rights by means of the internet. As we know, the earlier case-law had addressed the issue at a time before the emergence of the internet, in particular in *Shevill and Others*.⁶ That judgment held that, under Article 5(3) of the then Brussels Convention, a victim could bring an action in the State of the place where the event giving rise to the damage occurred (the place where the publisher responsible for the defamatory information was established) and in the State where the damage occurred, a criterion which depended on the territorial distribution of the medium on which the defamatory information was contained.⁷ In the latter case, the court concerned will have jurisdiction to rule only on the specific damage which occurred on its territory, a matter which is determined by reference to the level of distribution and sales of the medium in that State.⁸

25. In *eDate Advertising and Others*, the Court had to deal with a situation similar to that which arose in *Shevill and Others*, but in the case of an online communication medium. In those circumstances, as in the present case, the damage was ‘delocalised’ as the medium was accessible in any Member State, making the practical application of any method of measuring the territorial impact of the harmful information difficult or even impossible. That led the Court to create an additional criterion based on the victim’s centre of interests, the place where the latter could bring an action and, more importantly, claim for all of the damage suffered.⁹

26. It is important to point out that the judgment in *eDate Advertising and Others* referred solely to cases of infringement of personality rights. That is because otherwise the aim of Article 5(3) of Regulation No 44/2001 might be subverted. On the one hand, the criterion of the victim’s centre of interests attaches importance to the accessibility of the medium, a factor which the Court has rejected or limited on many occasions, and also in different contexts from that of Article 5(3) of Regulation No 44/2001.¹⁰ The fact that the medium is accessible in the place where the victim’s centre of interests is situated triggers the right to sue in that State and, moreover, to do so in respect of all of the damage suffered, which makes it possible to alter considerably the balance sought by the jurisdiction laid down in Article 5(3). On the other hand, account must also be taken of the proximity between the centre of interests and the *forum actoris*, since, in the vast majority of cases, although not always,¹¹ the centre of interests will be situated in the place where the victim, and claimant in the dispute, is domiciled.

27. It is precisely because of the risks entailed by the criterion of the victim’s centre of interests that I believe that this criterion should not be extrapolated to copyright, including in the case of ‘delocalised’ damage perpetrated by means of the internet. The Court rejected that option in relation to intellectual property rights in *Wintersteiger*¹² and also when dealing with the case of ‘localisable’ damage perpetrated on copyright.¹³ I believe that this should also be the solution in a situation such as that in the present case, where it is alleged that ‘delocalised’ damage has been perpetrated on copyright.

6 — Judgment in *Shevill and Others*, C-68/93, EU:C:1995:61.

7 — Judgment in *Shevill and Others*, EU:C:1995:61, paragraphs 30 to 33.

8 — Judgment in *Shevill and Others*, EU:C:1995:61, paragraphs 30 and 31.

9 — Judgment in *eDate Advertising and Others*, EU:C:2011:685, paragraph 48.

10 — The Court expressly rejected it in, inter alia, *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, EU:C:2010:740, paragraphs 69 to 75, and, as regards Article 5(3), significantly limited it, as in *eDate Advertising and Others*, EU:C:2011:685, paragraph 51.

11 — That was so in one of the cases in *eDate Advertising and Others* (EU:C:2011:685), since the claimant’s domicile was in the United States but his centre of interests was situated in France.

12 — C-523/10, EU:C:2012:220.

13 — Judgment in *Pinckney*, EU:C:2013:635.

B – *The focalisation criterion*

28. Both the referring court and Ms. Hejduk consider that the fact that, in their view, the photographs concerned were directed to Austria means that the Austrian courts have jurisdiction. I do not believe that this approach can succeed either.

29. The possibility of declaring that jurisdiction rests with the court of the State on which the harmful activity is focused has been considered by a number of national courts and the legal literature.¹⁴ As we know, this is also the criterion used by Regulation No 44/2001 in the case of the special jurisdiction for consumers provided for in Article 15(1)(c).¹⁵ Advocate General Jääskinen put forward strong arguments in support of its proposed application in *Pinckney*,¹⁶ and the Court of Justice, while rejecting the criterion in that case, has applied it in other contexts which were different from but related to that of the present case in *L'Oreal and Others*,¹⁷ *Donner*¹⁸ and *Football Dataco and Others*.¹⁹

30. However, the Court rejected the focalisation criterion in *Pinckney*, and it did so expressly by declaring that, 'unlike Article 15(1)(c) of ... Regulation [No 44/2001] ..., Article 5(3) thereof does not require, in particular, that the activity concerned be "directed to" the Member State in which the court seised is situated'.²⁰

31. Admittedly, that paragraph of the *Pinckney* judgment is open to some interpretation,²¹ but it seems to me that it clearly follows from the wording that it was the Court's intention to exclude the focalisation criterion from the interpretation of Article 5(3) of Regulation No 44/2001. The focalisation criterion has been used in jurisdictions where an economic activity exists which is preceded by a clear intention to offer for sale goods and services in the Member State to which the activity is directed. Accordingly, I believe that *Pinckney* rules out in principle the possibility of extending the focalisation criterion to cases of non-contractual damages based on infringements of intellectual property rights.

32. It still needs to be established whether the focalisation criterion should be applied in the case of an act of public communication, giving rise to 'delocalised' damage, which is clearly and indisputably directed to another Member State. However, I do not believe that that is the situation with which we are now dealing, as, according to the case-file, at no time did the defendant in the main proceedings direct the allegedly harmful activity to other Member States. Therefore, I do not consider it to be necessary to take a view on that scenario.

C – *The territoriality criterion and the judgment in Pinckney*

33. Having rejected the centre-of-interests and focalisation criteria, we come to the solution reached in *Pinckney*, the application of which to the present case is advocated by the Portuguese Republic and the Commission, although with different emphases.

14 — See, for example, the case of the French Cour de cassation (Com. 13 July 2010, No 06-20-230), and the opinion of authors such as Treppoz, E., 'Croniques. Droit européen de la propriété intellectuelle', *Revue Trimestrielle de Droit Européen*, 4 2013.

15 — See judgment in *Pammer and Hotel Alpenhof*, EU:C:2010:740.

16 — See, in particular, points 61 to 65 of the Opinion of Advocate General Jääskinen in *Pinckney*, EU:C:2013:400.

17 — C-324/09, EU:C:2011:474, paragraph 65.

18 — C-5/11, EU:C:2012:370, paragraph 27.

19 — C-173/11, EU:C:2012:642, paragraph 39.

20 — Judgment in *Pinckney*, EU:C:2013:635, paragraph 42.

21 — See De Miguel Asensio, P., 'Tribunales competentes en materia de infracciones de derechos patrimoniales de autor cometidas a través de Internet', *La Ley — Unión Europea*, 11 2014, point 5.

34. In *Pinckney*, the Court was required to rule on the interpretation of Article 5(3) of Regulation No 44/2001 in an action for damages brought by the author of a musical work which was reproduced on CD and subsequently distributed by means of the internet without his consent.

35. The difficulty which arose in *Pinckney* was that of extrapolating the *eDate Advertising and Others* and *Wintersteiger* case-law to the field of copyright. As I have already stated, *eDate Advertising and Others* dealt with the issue of determination of the place where the damage is sustained in the case of an infringement of personality rights on the internet, while *Wintersteiger* was concerned with the infringement of intellectual property rights, specifically a trade mark. The Court opted for different solutions in each case. While, in the case of personality rights, the Court chose to maintain the so-called ‘mosaic rule’, with the exception of the place where the victim’s centre of interests is located (where the victim may claim in respect of the whole of the damage suffered), in *Wintersteiger*, in the case of infringement of intellectual property rights, the Court decided to apply a strict principle of territoriality and to limit the place where the damage is sustained to the State or States where the right is protected (in other words, where the right is registered).

36. Like intellectual property rights, copyright is subject to the principle of territoriality. However, copyright has two features which made it difficult to categorise for the purposes of disposing of the case in *Pinckney*: it is not necessary to register copyright in order to enjoy protection, while at the same time copyright is protected in all the Member States as a result of Directive 2001/29.²² Accordingly, copyright shares features with the rights which gave rise, respectively, to *eDate Advertising and Others* and *Wintersteiger*, since copyright may be infringed in all the Member States (like personality rights) but copyright protection is effected by means of State-sized ‘territorial segments’ in the same way as intellectual property rights. Copyright in the European Union may be said to form a bundle of rights which are territorially delimited by each State but the sum of which encompasses the whole territory of the European Union.

37. In *Pinckney*, the Court decided that copyright was territorial in nature; in other words, it opted for an approach similar to that developed in *Wintersteiger*. At paragraph 39 of the judgment, the Court observed that ‘copyright, like the rights attaching to a national trade mark, is subject to the principle of territoriality’. Next, the Court pointed out that Directive 2001/29 harmonised copyright, which means that copyright ‘may be infringed in each [Member State] in accordance with the applicable substantive law’. On the basis of that premiss, the Court held that, for the purposes of Article 5(3) of Regulation No 44/2001, in a situation like the one in question, the place where the damage was sustained is the place where the copyright relied on by the claimant is protected and where the alleged damage may occur. The courts of the State concerned will have jurisdiction to deal only with the damage caused in the territory of that State.²³

38. In short, the *Pinckney* case-law is characterised by three features which lead to the identification of jurisdiction in the case of a cross-border infringement of copyright: substantive protection, factual protection and protection which is limited territorially. For the purposes of a ruling on whether damage has been suffered as a result of an infringement of copyright, jurisdiction will rest solely with the court on whose territory the copyright is protected, where there exists a factual risk of an infringement occurring, and only in respect of damage suffered in that State.

39. The application to the present case of the case-law cited is not without difficulty. Although Ms. Hejduk’s copyright is protected in Austria and the unauthorised reproduction and distribution of her photographs on the internet may be accessed in Austria, it is difficult, or perhaps impossible, to determine the damage suffered in that State alone. Unlike what happened in *Pinckney*, where the infringement of copyright was committed by the reproduction of CDs and their subsequent sale on

22 — In that connection, see the Opinion of Advocate General Jääskinen in *Pinckney*, EU:C:2013:400, points 44 to 50.

23 — Judgment in *Pinckney*, EU:C:2013:635, paragraph 43. Reiterating the same case-law, see judgments in *Hi Hotel*, C-387/12, EU:C:2014:215, paragraph 39, and *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 55.

the internet in any Member State, the present case is concerned with damage the occurrence of which is difficult to establish, as the mere accessibility of a photograph on the internet does not offer any indication as to the location of the damage. The damage which occurred in *Pinckney* was the result of a financially remunerated service (the manufacture of CDs and their subsequent sale on the online market), whereas in the present case there is no remunerated service but rather an act of public communication on the part of an undertaking.

40. Therefore, the application of a solution such as that in *Pinckney* to a case like the present one would lead, as the Commission has pointed out, either to the applicant being denied the right to bring an action in Austria, in view of the absence or low visibility of an infringement of her copyright in Austria, or to the applicant being awarded compensation in respect of all the damage suffered, in view of the fact that it is impossible to segment the infringement territorially, a solution which, in short, would be contrary to the case-law in *Pinckney*.

D – *The criterion applicable to the present case*

41. I believe that the automatic application of *Pinckney* to a case in which the damage is ‘delocalised’ may prove to be impracticable. The solution reached by the Court in that judgment applies to cases in which the risk of infringement, or the actual infringement, of copyright clearly occurs in a territorial area, even though the medium used is the internet. However, when the damage is ‘delocalised’ as a result of the type of work and the medium used to communicate it, I believe, as the Portuguese Republic and the Commission have argued, that it is not possible to apply the criterion of the place where the damage occurred, laid down in Article 5(3) of Regulation No 44/2001. In such a case, that provision establishes only the jurisdiction of the courts for the place where the event giving rise to the damage occurred.

42. That solution appears to me to be the most consistent with the objectives pursued by Regulation No 44/2001, the most important of which is the sound administration of justice.²⁴ A criterion which requires an applicant to restrict the scope of his application in accordance with territorial criteria that are difficult, not to say impossible, to determine is not a criterion which is consistent with the spirit of Regulation No 44/2001. As the Commission has observed, an applicant in a case like the present one will not be able to produce verifiable material which precisely delimits only the damage sustained in the Member State where proceedings have been brought. That factor would lead the court of that State to order compensation which is lower than the damage actually sustained, or which is higher, thereby exceeding the scope of the territorial criterion which the Court of Justice has imposed in such cases. The Commission rightly contends that the application of the *Pinckney* case-law to the present case entails a serious risk that the competent court will exceed the limits of its jurisdiction.

43. Moreover, in my view, the application of the *Pinckney* case-law to the present case would contribute to the creation of legal uncertainty for both parties to the proceedings. The claimant would not have any certainty concerning the outcome of proceedings in which the criteria for delimiting the scope of the jurisdiction of the court hearing the case cannot be verified. The defendant would be in an equally critical situation, at risk of being sued more than once in several Member States where ‘delocalised’ damage has occurred or of being sued in a single Member State but without any certainty about the scope of the jurisdiction of each court. I believe that that outcome is incompatible with the general objectives of Regulation No 44/2001, but also with the more specific objectives of the special jurisdiction laid down in Article 5(3).

²⁴ — See recital 12 in the preamble to Regulation No 44/2001 and, inter alia, judgment in *Wintersteiger*, EU:C:2012:220, paragraphs 27 and 31.

44. As Regulation No 44/2001 and the case-law of the Court state, the purpose of Article 5(3) is to provide for jurisdiction close to the relevant facts of the dispute.²⁵ That proximity affords the court greater safeguards when it deals with the claims advanced by the applicant and the arguments in defence put forward by the defendant. However, that proximity is lost when, owing to the ‘delocalised’ nature of the damage, the facts do not permit the damage to be established in accordance with conventional means of proof. Moreover, they would allow that only in respect of a fraction of the damage suffered, thereby depriving the court of an overall view of the damage, which could impede the global assessment of the context of the case of which that court is seised. The benefit afforded by the proximity of the court to the facts of the case thus disappears, and with it the usefulness of Article 5(3) of Regulation No 44/2001.

45. In such circumstances, in cases where ‘delocalised’ damage occurs on the internet and infringes copyright, I believe that the best option is to exclude the possibility of suing in the courts of the State where the damage occurred and to limit jurisdiction, at least that which is based on Article 5(3) of the regulation, to that of the courts of the State where the event giving rise to the damage occurred. Furthermore, that option in no way excludes the jurisdiction provided for in Article 2 of the regulation, pursuant to which an action may also be brought in the courts of the Member State where the defendant is domiciled. Although in the majority of cases both criteria will lead to the same court (as occurs in the present case), that will not always be so.

46. It is clear that in a case of public communication in which the harmful activity originates in one Member State and is clearly and indisputably directed to one or more other Member States, the possibility of qualifying or supplementing the conclusion I have just outlined is open to discussion.²⁶ However, as I explained at point 32 of this Opinion, that is not the scenario referred to the Court by the Handelsgericht Wien in these preliminary-ruling proceedings, as it is clear that at no time did the defendant choose to direct the communication at the origin of the dispute to Austria. I therefore do not consider it necessary to express a view on the linking factor in a case where the activity is directed to one or more other Member States.

47. Accordingly, I propose that, in circumstances such as those in the present case, where the applicant has suffered ‘delocalised’ damage by means of the internet, which infringes her copyright, the Court should rule that, in accordance with Article 5(3) of Regulation No 44/2001, jurisdiction rests with the courts for the place where the event giving rise to the damage occurred.

VI – Conclusion

48. Accordingly, I propose that the Court answer the question referred for a preliminary ruling by the Handelsgericht Wien 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 a dispute relating to infringement on the internet of rights related to copyright, as a result of which ‘delocalised’ damage occurs the territorial location of which cannot be determined in accordance with reliable evidentiary criteria, jurisdiction rests with the courts for the place where the event giving rise to the damage occurred.

25 — See recital 12 in the preamble to Regulation No 44/2001.

26 — In the same way as it could be asked whether the *Pinckney* case-law is applicable to the cross-border infringement of an author’s moral rights. In that connection, see Kur, A., ‘The CLIP Principles and Commentary’, *Conflict of Laws in Intellectual Property*, Oxford, OUP, 2013, point 2:203.C10.