

Jurisdiction in cross-border copyright infringement cases

Citation for published version (APA):

Rebero - van Houtert, B. (2020). *Jurisdiction in cross-border copyright infringement cases: rethinking the approach of the Court of Justice of the European Union*. [Doctoral Thesis, Maastricht University]. ProefschriftMaken Maastricht. <https://doi.org/10.26481/dis.20201027br>

Document status and date:

Published: 01/01/2020

DOI:

[10.26481/dis.20201027br](https://doi.org/10.26481/dis.20201027br)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Valorisation addendum

The addendum on valorisation to the dissertation, is in accordance with Article 22 of the “Regulation Governing the Attainment of Doctoral Degrees at Maastricht University”, decreed by resolution of the Board of Deans, dated 24 January 2018.

1) Relevance: What is the social and/ or economic relevance of the research results?

The reasons of states to protect copyrights concern individual authors as well as the public since copyright protection enhances, inter alia, creativity, innovation, cultural heritage, legal certainty and economic growth.²⁷¹⁶ The attribution of jurisdiction in cross-border copyright infringement cases involves various social and economic interests. Efficient copyright protection at procedural level is particularly relevant to increase creativity which yields knowledge and innovation. An efficient approach to jurisdiction will therefore be beneficial for public sectors such as education and healthcare. While the CJEU’s approach to jurisdiction seems to favour copyright holders, a copyright holder may not be able to receive efficient redress in multistate copyright infringement cases. In ubiquitous copyright infringement cases, this dissertation argued to adopt the combination of the ‘directed activities’ criterion and the ‘flagrant substantial damages in relation to the entire damage’ criterion that will increase the opportunities for copyright holders to receive efficient and full redress before a suitable court. This combined approach to jurisdiction will frequently address the societal problems of online piracy and copyright havens. From an economic perspective, consolidation of litigation will be lesser costly for both litigants. It will also put a lower financial burden on the judicial system of the Member States of the European Union if the court in the Member State that has a strong territorial connection to the copyright infringement case can adjudicate the entire case.

This dissertation demonstrated that the lack of predictability due to the CJEU’s approach to jurisdiction in cross-border copyright infringement cases can be detrimental to the cross-border flow of information. If providers of information cannot reasonably predict in which state(s) they can get sued, the cross-border flow of information may be impeded which will negatively affect the increase of knowledge, education, innovation and healthcare. The Geo-blocking Regulation does not prevent providers of information to block or limit the access of online interfaces. For the cross-border flow of information, it is relevant that the Internet stays ‘open’.

In the context of the proper functioning of trade, it is important that traders will be able to predict in which state they may get sued. Since the Geo-blocking Regulation, traders will frequently not be allowed to block or limit their websites for customers in the European Union. In view of the CJEU’s accessibility approach to jurisdiction in cross-border copyright infringement cases, traders can thus often not prevent getting sued in certain Member States by blocking their websites. Particularly small trading companies may therefore not want to sell their products and services via the Internet to customers in the European Union. Audiovisual services or electronically provided services that contain copyrighted content are for now excluded from the prohibitions under the Geo-blocking Regulation.²⁷¹⁷ In view of the mere

²⁷¹⁶ Hua 2014(a), xiii. See also paragraph 2.2.1.1.

²⁷¹⁷ See paragraph 4.5.2.3.

accessibility approach, traders who provide these excluded services may thus block or limit their online interfaces to customers of certain Member States which will not enhance the proper functioning of the internal market.

When rethinking the CJEU's approach to jurisdiction in cross-border copyright infringement cases and searching an alternative approach, the social and economic relevance of this dissertation has been reflected by the aim to balance the interests between copyright holders, on the one hand, and users of information and traders, on the other hand. The proposed 'directed activities' approach provides traders and users of information predictability as regards where they can get sued. In ubiquitous copyright infringement cases, the suggested combination of the 'directed activities' criterion and the 'flagrant substantial damages in relation to the entire damage' criterion will entail predictability as regards which court can be competent and enhance efficient copyright protection at procedural level as mentioned above. Taking into consideration the global interests of copyright holders, traders, and users of information suits the contemporary way of policy-making referred to as global governance. Various academics advocate that private international law should play an important role in addressing global issues.²⁷¹⁸

2) Target Groups: To who, in addition to the academic community, are the research results of interest and why?

The Court of Justice of the European Union can learn from the research results that their interpretation of European Union law related to private international law should not undermine the principles underlying the latter field in view of legitimacy. In addition, the Court has to seek to balance the broader interests involved. The latter suits the increasing demand for global governance. Considering the criticism of the European Union's legitimacy and democratic deficit, it is also particularly relevant that the CJEU interprets European Union law in light of fundamental rights.²⁷¹⁹

To achieve legal certainty and predictability, the European Union legislature should consider to codify the approach to jurisdiction in cross-border copyright infringements as proposed in this dissertation. This approach can be incorporated in a separate provision in the future recast of the Brussels Ibis Regulation. If a European Union copyright law comes into existence, the suggested approach to jurisdiction can be laid down in the future European Union Copyright Regulation.

By 23 March 2020, the European Union Commission has to review the Geo-blocking Regulation by taking "into account the overall impact of the Regulation on the internal market and cross-border e-commerce".²⁷²⁰ The research results of this dissertation will be relevant for the latter review. Although the Geo-blocking Regulation claims not to affect the 'directed activities' approach to jurisdiction in consumer disputes under Article 17(1)(c) Brussels Ibis

²⁷¹⁸ See, for instance, Carballo Pineiro & Kramer 2014, pp. 109-112; Muir-Watt 2011, pp. 347-428; Muir-Watt 2016, pp. 862-881; Waj 2002, pp. 209-274; Van Den Eeckhout 2017; Van Loon 2008, pp. 197-208.

²⁷¹⁹ See paragraph 4.4.2.4.1.

²⁷²⁰ Article 9(1) Geo-blocking Regulation.

Regulation, this dissertation demonstrated that the traders' tools to prevent jurisdiction are frequently reduced since they are often not allowed anymore to block or limit access to their websites or use other forms of discrimination based on customers' nationality, place of residence or place of establishment within the European Union. Due to this prohibition to block or limit access to online interfaces, traders can easily get sued in multiple Member States for copyright infringing activities as the CJEU adopted the mere accessibility approach to jurisdiction in cross-border copyright infringement cases. The latter side effects of the Geo-blocking Regulation can impact the internal market and cross-border e-commerce. Due to fear of getting sued in multiple Member States, particularly small trading companies may decline to offer their goods and services via the Internet to customers within the European Union. As audiovisual services and electronically supplied services that provide copyright protected content are, for now, excluded from the Geo-blocking Regulation, traders can still block websites involving these services which will not enhance the proper functioning of the internal market and cross-border e-commerce. The review of the Geo-blocking Regulation will focus on whether the latter services should also be covered by the prohibitions.²⁷²¹

At international level, the research results in this dissertation can be employed by interest groups that aim to enhance copyright protection, protect the right to information, or serve the interests of traders. Due to globalization and the Internet, the issue of jurisdiction in cross-border copyright infringement cases has become more pressing for the latter groups. Online piracy and copyright havens are global issues that need to be addressed at international level. The abovementioned interest groups can lobby with states to adopt the approach to jurisdiction as proposed in this dissertation into a convention such as the Berne Convention for the Protection of Literary and Artistic Works of 1979 or a new convention under the auspices of the Hague Conference of Private International Law or the World Intellectual Property Organization.

3) Activities/Products: Into which concrete products, services, processes, activities or commercial activities will the research activities be translated or shaped?

As mentioned at point two above, the approach to jurisdiction in cross-border copyright infringement cases as proposed in this dissertation can be incorporated in European Union law such as the future recast of the Brussels Ibis Regulation or the future European Union Copyright Regulation. At international level, the suggested approach to jurisdiction could be laid down in a Convention on jurisdiction of the Hague Conference on Private International Law or a Convention related to copyrights, or intellectual property rights, such as the Berne Convention for the Protection of Literary and Artistic Works of 1979.

The proposed approach to jurisdiction in cross-border copyright infringement cases in this dissertation can also serve as a model for scholarly groups that deal with jurisdiction rules in cross-border copyright infringement cases. Point five below will mention scholarly groups that could benefit from this research results.

²⁷²¹ See Article 9 Geo-blocking Regulation.

4) Innovation: To which extent can the research results be considered as innovative compared to existing proposals

Although several scholars have discussed the instrumentalisation of private international law with respect to certain policy areas of the European Union,²⁷²² the area of copyright law has not been scrutinised in this setting yet. As demonstrated in this dissertation, various scholars have proposed connecting factors to establish jurisdiction in cross-border copyright infringement cases. Unlike these proposals, the desirable approach in this dissertation has been the result of an extensive assessment that includes principles of private international law, public international law, copyright law, the principle of balancing the broader interests, and the impact of the Geo-blocking Regulation.

While various scholars have suggested connecting factors that confer full jurisdiction in cross-border copyright infringement cases, this dissertation has examined the concept of full jurisdiction in view of the principle of international comity. Due to the lack at worldwide level of a uniform copyright law or conflict-of-laws rule related to cross-border copyright infringements, this dissertation argued that the exercise of full jurisdiction of the court of the *Erfolgsort* under Article 7(2) Brussels Ibis in practice should be limited to alleged infringing activities and damage caused within the Member States of the European Union.

This dissertation can also be considered as innovative as it compares the approaches to jurisdiction in cross-border copyright infringement cases in the European Union and states of the United States of America. Despite the differences between civil law and common law, this dissertation demonstrates that a common approach with respect to effects-based jurisdiction in cross-border copyright infringement cases could be possible. The proposed connecting factors in the conclusion appear to suit both legal systems and could therefore be laid down in a convention at international level.

5) Planning and implementation: how will this valorization plan be shaped?

The research results will be brought to the attention of scholarly groups that deal with jurisdiction rules related to cross-border copyright infringements. This dissertation has demonstrated proposals of various scholarly groups such as the European Max Planck Group for Conflict-of-Laws in Intellectual Property (the CLIP group) at the Max Planck Institute. While the CLIP group has drafted the final text of the Principles on Conflict of laws in Intellectual Property of 1 December 2011,²⁷²³ revisions may come. As mentioned in this dissertation, the Committee on Intellectual Property and Private International Law under the auspices of the International Law Association (the ILA Committee) has drafted their final

²⁷²² Van Den Eeckhout refers to the instrumentalisation of private international law with respect to, inter alia, migration law, labour law, social security law, nationality law, human rights and environmental law. See Van Den Eeckhout 2002, pp. 144-158; Van Den Eeckhout 2010(b); Van Den Eeckhout 2013(a). See Meeusen (2007, p. 288) on the instrumental function of private international law for the achievement of the internal market of the European Union.

²⁷²³ See <https://www.ip.mpg.de/en/research/research-news/principles-on-conflict-of-laws-in-intellectual-property-clip.html>.

guidelines on ‘Intellectual Property and Private International Law’ in 2018.²⁷²⁴ The work of the ALI Committee “builds upon the earlier projects conducted by the Hague Conference of Private International Law as well as several academic initiatives that followed it”.²⁷²⁵ The ALI Committee appears to be an ongoing group that will have meetings in future. While this Committee acknowledged that in complex multistate IP disputes, there may be situations where there is a need to consolidate objectively related claims, they pointed out that “at the heart of the discussion is the question about the minimum connection that has to be met in order to consolidate objectively related claims”²⁷²⁶. In the latter context, the combined approach to jurisdiction in ubiquitous copyright infringement cases as proposed in this dissertation can be considered in the next meeting of the ALI Committee.

The research results can also contribute to the current discussion on the scope of the jurisdiction of courts in cross-border infringement cases. The recent *report on Internet and Jurisdiction Global Status* points out that it is relevant to critically examine the trend of too broad jurisdictional claims by states that yields several issues such as enforcement difficulties.²⁷²⁷ It is also important to keep assessing the CJEU’s interpretations of private international law in light of the underlying principles to prevent that this important field of law will be undermined.

²⁷²⁴ See International Law Association Committee on Intellectual Property and Private International Law (hereinafter the ILA Committee) <http://www.ila-hq.org/index.php/committees>. See *Report International Law Association Sydney Conference (2018) Intellectual Property and Private International Law*.

²⁷²⁵ See *Report International Law Association Washington Conference (2014) Intellectual Property and Private International Law*, p. 2. See *Report International Law Association, Sofia Conference (2012) Intellectual Property and Private International Law*, p. 3.

²⁷²⁶ See *Report International Law Association Washington Conference (2014) Intellectual Property and Private International*, p. 4.

²⁷²⁷ See Svantesson 2019(a), pp. 50-51.