

COPYRIGHT ACROSS BORDERS

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1. Introduction

We think of copyright as a global phenomenon. Copyright owners enjoy protection around the globe for their literary and artistic works just as users similarly benefit from exceptions and limitations. But the reality of copyright across borders is more complex. Indeed, there is no such thing as ‘international copyright’, no single global and uniform copyright regime or model law.

The purpose of this Guidance Note is to explain how national borders and copyright law interact. It discusses the regulations that affect international copyright law and explores some key questions on copyright infringement.

2. Practical Questions

2.1. Do I (potentially) infringe everywhere in the world when I post material online?

The answer to the question is very simple but not very satisfactory: it depends. It depends on the local copyright law in each country where the question of infringement is raised. The court will – along the lines of article 8 of the *Rome II Regulation* – apply the national copyright law on a country by country basis for the allegedly infringing activity in each of the countries where the claimant asserts copyright protection in the material that has been posted online.

That said, as a general rule of thumb, making work available on a website for viewing and downloading anywhere in the world without the permission of the copyright owner might theoretically give rise to a potential claim of infringement in most jurisdictions around the world, so long as the owner enjoys copyright protection within the relevant jurisdiction (and provided no exceptions or limitations apply).

2.2. Can I be sued in the UK for infringement of foreign copyright?

Article 4 of the *Brussels I Regulation* sets out the general rule: the claimant can always sue the defendant (that is, the alleged copyright infringer) in the courts of the country in which the defendant resides. So, if you are accused of infringing a foreign copyright, the claimant can sue you in the UK. Moreover, because the jurisdiction of the court to hear the case is linked to the defendant (that is: you), irrespective of any other facts of the case, the case might cover an alleged infringement anywhere in the world.¹

¹ See the judgment of the UK Supreme Court in *Lucasfilm Limited and others (Appellants) v. Ainsworth and another (Respondents)* [2011] UKSC 39.

2.3. If a UK court has jurisdiction in relation to a foreign infringement, what law applies?

The logical answer here is the law of the country where protection is sought. In other words, the UK court will apply the national copyright law of the country where the claimant argues the work enjoys copyright protection. If protection is claimed in several countries the national copyright law of each country will apply on a country by country basis.

But what about exceptions and limitations: which law applies? The answer is the same: the law of the country where protection is sought. That is, just as the UK court will apply the relevant national copyright law of the country where the claimant argues the work enjoys protection, so too will the limitations and exceptions set out within that country's copyright regime apply. Put another way, if a claimant seeks to argue before a UK court that the defendant has infringed in accordance with the law of another jurisdiction, the defendant is entitled to rely upon the limitations and exceptions within that other jurisdiction's copyright law to deny any liability.

Whether the relevant law of another jurisdiction applies at all, however, is a decision that needs to be made by the relevant judge. Only the judge who hears the case can determine the applicable law in a particular case. This inevitably brings us back to the rules on jurisdiction.

2.4. Can I be sued in another jurisdiction for infringement of copyright in that jurisdiction?

In this situation, article 7.2 of the *Brussels I Regulation* presents the claimant with two options.

First, they might rely on the *place of the event giving rise to the damage* to establish the required link between the facts of the case and the court. For example, this might involve someone uploading content without permission in jurisdiction D. In this case, a court based in jurisdiction D will be able to hear the whole case, even if damage is alleged to have taken place in jurisdictions E, F and G also.

However, determining whether the alleged infringer has actually acted within the relevant jurisdiction (in our example, jurisdiction D) is for the court to decide as a matter of fact (not law). There is no room here for presumptions or other legal arguments about whether the event giving rise to the alleged damage has in fact taken place in the relevant jurisdiction.² This will always be determined on a case by case basis.

The second option concerns *where the damage occurs* (or might occur). It relies on the link between the court and the place where the damage resulting from the alleged copyright infringement arises. The CJEU has made clear that in order to sue for infringement of copyright on the basis of where the damage occurs, the work in question must be protected by copyright in that jurisdiction (within a European context, this will rarely present any problems).³ Moreover, in this situation, the national court

² See case C-228/11 *Melzer v MF Global UK Ltd* EU:C:2013:305.

³ See Case C- 523/10 *Wintersteiger* EU:C:2012:220, paragraph 25, and C- 170/12 *Pinckney*, EU:C:2013:635, paragraph 33.

will only have authority to deal with local damage, that is, damage that occurs *only* within that country (and not anywhere else in the world).

That said, the implications of bringing litigation in any country where damage occurs are potentially far reaching, and especially when making copyright protected material available online. Consider, for example, the decision of the CJEU in *Pez Hejduk v. EnergieAgentur* (2015).⁴ In this case, the defendant company (EnergieAgentur) was based in Germany while the claimant, a professional photographer, lived in Austria. The defendant made photographs taken by the claimant available on its website for viewing and downloading, without permission. The claimant sued for copyright infringement in Austria. The defendant argued that although the photographs were accessible in Austria, and elsewhere in the world, the website in question was not directed (or targeted) at Austria or indeed any jurisdiction other than Germany; as such, if the claimant wanted to sue for infringement, she should do so before the German courts.

Did the Austrian court have jurisdiction on the grounds that damage or harm occurred in Austria? Did it matter that the website in question was country-specific, in the sense that it involved a German top level domain (that is: .de)? The CJEU decided it was irrelevant that the website at issue was not directed at the Member State in which the court was based, that is Austria. The Austrian court had jurisdiction, on the basis of the place where the alleged damage occurred, to hear an action for damages in respect of copyright infringement where the photographs were placed online on a website that could be accessed from Austria.

As already indicated in section 5.1 above, the approach of the CJEU in *Pez Hedjuk* and other cases suggests that anyone making copyright material available online, without appropriate permission, could hypothetically be subject to the jurisdiction of any court in the world. But again, this must be determined on a country by country basis.

3. Legislative Context

The Berne Convention 1886 is the preeminent international treaty on copyright protection. Although it lays down grand principles, key concepts such as literary and artistic works and originality are not defined. In other words, there is no harmonised single criterion for deciding which works could be copyright works and what threshold of originality must be satisfied before a work will effectively qualify for copyright protection. And there is no standard or complete list of exceptions and limitations to guarantee and safeguard the interests of users, such as the right of access to information.

On a more positive note, the Berne Convention does deliver protection within an international context by way of the principle of national treatment. This means that 'international copyright' is based on the simple technique of giving foreign authors and creators access to the national copyright systems of the various countries that have signed up to the Convention; that is, by treating an author in one member state as if they were a national of every other signatory member state (at the time of writing, the Berne Convention has 171 member states⁵). The simplicity of this system is almost baffling.

⁴ C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* ECLI:EU:C:2015:28.

⁵ For details, see: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

However, national treatment also embeds an underlying and problematic reality within the international copyright regime. That reality is one of a patchwork of territorial laws based on the idea of one national copyright regime per country, albeit that each national regime adheres to common ideas and certain minimum standards established in the Convention. Consequently, international copyright protection is founded upon a patchwork of national copyright acts.

This approach may have worked in an era where copyright works were exploited on a national basis, that is, where authors of literary works typically had a different publisher in each country, and where each publisher roughly covered their own national market. In such a model there is an obvious, pragmatic parallelism between the national exploitation of copyright works and the national copyright regimes that govern the protection, use and exploitation of such works. But that model no longer exists. In the online environment, copyright works are exploited globally. Cross-border exploitation operates at a global scale, and the user may not know from where in the world they are downloading a copyright work. What has not changed, however, is the territorial, national character of copyright law. In other words, the parallelism between copyright law and copyright exploitation no longer exists. Instead one finds inconsistency, uncertainty, and many opportunities for potential conflict.

4. The Role of Private International Law

Just like each country has its own national copyright law, each country has its own private international law. There is no universal international system that takes over. Each country merely has rules in its own national legal system to deal with cases that involve an 'international' aspect. The word 'international' merely indicates that the situation with which one is concerned involves an international dimension, for example, that the litigating parties are of different nationalities, or have their place of residence or business in different countries. The solution to these questions about jurisdiction and choice of law is not 'international'. Rather, it is 'private' in that the sense that we are concerned with issues of private law (rather than public law). And, like any other aspect of private law, private international law is a matter for each country to determine.

Each national set of rules on private international law first needs to address the issue of jurisdiction. This concerns the question of whether a court in a particular country is able to hear and decide the case. The presence of an international element means there are at least two potential countries involved whose courts could hear the case. Each of these countries – for example, on the one hand the country where the alleged infringer of copyright has its principal place of business and on the other hand the country where the infringing copies are put onto the market – has a link with the case and has an interest in facilitating a solution to the copyright problem between the parties by offering access to the courts. Essentially, this involves an offer of a forum for the resolution of the dispute between the private parties. Rules on jurisdiction will decide in which circumstances the link between the case and the country concerned are strong enough for such an offer of a forum to be made. But, when is a country closely enough concerned for it to be willing (in the sense of offering to, but also in the sense of demanding to) to hear and decide the case? Every country speaks for itself on this point and the approaches (and therefore the expectations) may differ.

Once the issue of jurisdiction has been resolved, judges must next decide which national copyright law to apply when hearing the case. This need not be the law of the

jurisdiction in which the case is being heard. Rather, the court's national rules on private international law will also determine the relevant choice of copyright law, and the international aspects of the case will once again mean that there is more than one option on this point, as well as an absence of international harmony on this issue.

For reasons of completeness, private international law also deals with the recognition and enforcement of foreign judgments. The party that obtained a judgment in one national court may wish to enforce it in another country, for example, where the defendant has assets or where the infringing behaviour took place. Again national rules will apply, but this aspect is not directly relevant for our current purposes and so we leave it to one side.

5. Where does this leave us?

At a global level the answer to our question about copyright infringement and limitations and exceptions across borders is as follows: there is no single or harmonised approach that can be relied upon; both in terms of copyright and the applicability of private international law answers must be sought on a country by country basis. This gives rise to a confusing and complex picture.

Within the EU, however, the picture that emerges is slightly more hopeful. While the European harmonisation of copyright law has only been partially successful, the EU has agreed a single approach when dealing with private international law issues.

5.1. Jurisdiction of the court: which forum?

When it comes to the jurisdiction of the court, the matter is governed by the *Brussels I Regulation*.⁶ For our purposes articles 4 and 7 are particularly relevant.

- Article 4.1: Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
- Article 7: A person domiciled in a Member State may be sued in another Member State ... (2) in matters relating to tort, delict or quasi-tort, in the courts for the place where the harmful event occurred or may occur.

Article 4 lays down the general rule that the claimant can always sue the defendant (that is, the alleged copyright infringer) in the courts of the country in which the defendant habitually resides (or is 'domiciled'). This represents the default position.

But what if the claimant does not want to litigate in the defendant's jurisdiction? As long as the defendant has a habitual residence in one of the member states, then the claimant has an alternative option. That option does not depend on where the defendant resides; rather, what matters is that the facts of the case – that is, the nature of the alleged infringement – provide a necessary link to the relevant court in another country. In this respect, it is important to appreciate that copyright infringement is a tort (a civil wrong that unfairly causes someone to suffer loss or harm) and the place where that harmful event occurs – or may occur – falls, according to the case law of the Court of Justice of

⁶ 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(recast), [2012] OJ L351/1.

the European Union (CJEU), *either* in the place where the act of infringement takes place *or* in the place where the damage arising (directly) from the infringement occurs.

So, within Europe, if the copyright owner suffers damage or harm in jurisdiction A (where the owner resides) as a result of the infringing activity of a defendant who resides in jurisdiction B, the copyright owner might choose to sue the defendant either in jurisdiction B where the defendant is domiciled (in accordance with A.4) or in jurisdiction A where the claimant has (also) suffered damage or harm (in accordance with A.7). Moreover, if the copyright owner can establish that damage or harm occurred or may occur in jurisdiction C, they might equally decide to bring legal proceedings in that jurisdiction (again, in accordance with A.7).

5.2. What is the applicable law?

When it comes to the issue of applicable law (that is, which country's law should apply?) the relevant piece of legislation to consider is the *Rome II Regulation*.⁷ The law applicable to the infringement of copyright and the limitations and exceptions that apply in that respect is set out in two key provisions of article 8 of the Regulation:

- Article 8.1: The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed
- Article 8.3: The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14

In practice this means that the applicable law for both the question of whether copyright infringement did take place *and* whether any limitations or exceptions apply in a particular case will be governed by the law of the country in which the claimant argues that his or her work benefits from copyright protection.

6. Conclusion

The daunting reality of the 'country by country' approach is that when making material available online one has to consider whether copyright permission is needed in each and every country where the material is made available. And just because an exception to copyright might apply in one country this does not mean it applies in another. On that point too, the country by country approach applies.

In terms of jurisdiction, one can be sued for infringement occurring globally in one's country of habitual residence or in the country where the allegedly infringing act of uploading occurs. And for local damage one can be sued in each country where the material that has been made available online can be accessed.

But in practice, things may not be that dire. Institutions holding collections of national interest are unlikely to attract litigation from outwith national borders. It is also important to remember that litigation is often driven by competition between commercial entities and the possibility to collect substantial amounts by way of damages. Generally speaking, cultural institutions who merely want to provide access to

⁷ 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) [2007] OJ L199/40.

their collections occupy a different position in this respect. They are not directly in competition with commercial entities and there is no lucrative market where sizeable damages can be collected. Cultural institutions are rarely sued for copyright infringement, even less so in a transnational context. Most national laws also have some limitations and exceptions that will be applicable.⁸

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⁸ See Crews, K (2015) *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216 (accessed 28th March 2016)