

# Copyright enforcement in Austria and Europe – selected problems of international copyright law

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## Agenda

- **I. Introduction**
- **II. International jurisdiction**
- **III. Preliminary injunctions**
- **IV. Conflict of laws – selected issues**
- **V. Proposals for Reform**

## I. Introduction

- **19th century: territorial concepts**
- **New technology has made it possible to transmit, reproduce and obtain copyrighted materials around the world**
- **21st century:**
  - terrestrial broadcasting,
  - satellite broadcasting
  - internet

Folie 3

## II. International Jurisdiction - Brussels I Regulation

- **A practical consideration:**
- **first determine **where** protection is to be sought**
  - where can the **lawsuit** be brought
  - where can a judgment be **enforced**?
- **alternatively, look for local defendants**

Folie 4

- **Art 2: A person domiciled in a Member State shall be sued in the courts of that Member State**

**Note:** against defendants domiciled outside the EU, national rules on jurisdiction apply, including „exorbitant jurisdiction“

- **Art 5 para 3: „... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur“**

- **ECJ *Bier v Mines d'Alsace*: place where commencing act took place or where the damages were suffered (theory of „ubiquity“)**

**But see ECJ *Shevill v Presse Alliance*:**

- **the victim of a libel by a newspaper article distributed in several contracting states may bring an action for damages against the publisher either**
  - before the courts of the state where the publisher is established
  - or in the state where publication was distributed, but in this case the court only has jurisdiction for the damage suffered in the respective state („**mosaic theory**“)

**Art 22 para 4:**

- **Exclusive jurisdiction for the courts where the deposit or registration has been applied in „proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered“**
- **Generally **not** applicable to copyright cases (copyright is obtained by fixation, not by registration)**

### III. Preliminary injunctions

- **France: preliminary injunction to stop infringing activities and the confiscation of infringement activities**
- **United Kingdom: *Mareva* injunction (freezing order)**
- ***Anton Piller* order („nuclear bomb of civil procedure“)**

Folie 9

- **ECtHR: *Micallef v Malta*: full application of Art 6 ECHR to preliminary injunctions**

Folie 10

## Recognition of foreign preliminary injunctions

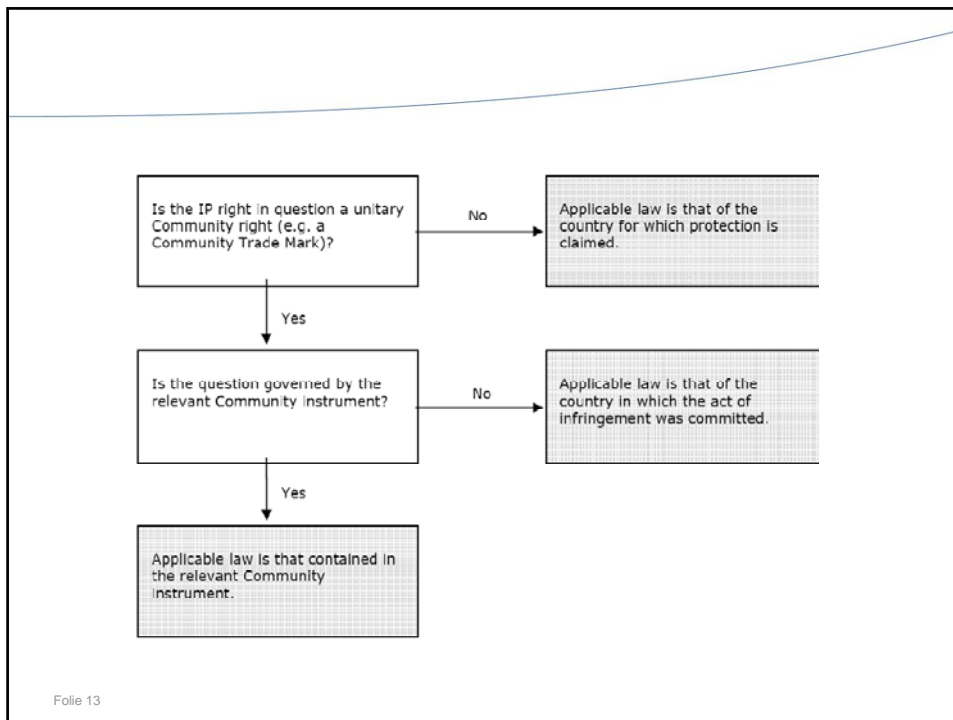
- **Art 31 Brussels I: preliminary injunctions**  
(„as may be available under the law of that State, even if ... the courts of another Member State have jurisdiction as to the substance of the matter“)
- **Recognition pursuant to Art 32 Brussels I („judgment“)**
- **ECJ *Denilauler v Couchet Frères*:**
- **Preliminary injunctions issued ex parte (*inaudita parte altera*) cannot be recognized in other countries**

Folie 11

## IV. Conflict of Laws – selected issues

- **Rome II Regulation Article 8**
- **Infringement of intellectual property rights**
  - 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.**
  - 2. In the case of a non-contractual obligation arising from an infringement of a **unitary Community intellectual property right,** the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the **act of infringement was committed.**
  - 3. The law applicable under this Article **may not be derogated** from by an agreement pursuant to Article 14.

Folie 12



- **Note:** Do not confuse the concept of *lex loci protectionis* with *lex delicti commissi*
  - For purposes of the *lex loci delicti commissi*, the place where the act is committed, has to be determined independently and then, in turn, determines the applicable law
  - Under the *lex loci protectionis*, the place of violation has to be determined under the applicable substantive law
- Folie 14

- **Scope of Art 8 is unclear in light of different national concepts:**
  - France: lex originis (in international private law)
  - Germany: lex loci protectionis
  - Greece: scope of protection and violation determined according to lex originis
- **Prevailing view: Art 8 does not apply to existence of right and to the question of who is the holder of the right**

Folie 15

- **Scope of liability unclear:**
- „contributory infringement“
- **example: seller of file-sharing software**
- **See Art 15 lit a Rome II Regulation**

Folie 16



**Note:**

- **misuses of confidential information** (e.g. trade secret cases) probably do not fall within Article 8, but rather Article 6(2), which effectively results in them being dealt with under Article 4 (i.e. where the damage occurs).
- This could result in different laws being applied for IP infringements from trade secret cases in some cases.
- Issues of **privacy** are excluded from the regulation and national conflict rules apply.

Folie 17

**A view across the Atlantic:**

- See also e.g. *London Film Productions Ltd v Intercontinental Communications Inc* (SDNY 1984):
- **Motion pictures in public domain in U.S.**
  - Protected in Chile, Peru, Costa Rica and Panama
  - Foreign law applied out of considerations of comity and reciprocity

Folie 18

## Multi-state cases

- **Problem: How to localize the violation?**
- **German BGH „Sender Felsberg“:**
  - French radio programme
  - Broadcast from Germany into France
  - German law applied because broadcast took place in Germany

Folie 19

## *Los Angeles News Service v Reuters Television*

- **videos of 1992 Los Angeles riots**
- **copied by other news agencies in US without license**
- **retransmitted to European TV**
- **„predicate act of infringement occurring within the US enabled further reproduction abroad“**
  - 9th Cir 1998 (cert den 1999)

Folie 20

***Update Art v Modiin Publ'g (2d Cir 1988):***

- application of US Copyright Right Act for distribution of materials abroad when originating copy was made in US;
- mere „authorization“ in US not sufficient
  
- See also „root copy“ doctrine: copies made outside USA subject to US law if „root copy“ was made in US

• ***Ginsburg:***

- **US law to apply if US is the „nerve center“**(planning and intellectually implementing the offshore acts) **for foreign distributions**
- *Ginsburg*, Extraterritoriality and Multiterritoriality in Copyright Infringement

### Satellite signals:

- **Allarcom Pay Television v General Instrument Corp (9th Cir 1995):**
  - Targeted market rule, transmission only completed there („completed act theory“)
- **Nat'l Football League v Primetime 24 (2d Cir 2000):**
  - US copyright act governs uplinking of signal (emission theory)

Folie 23

- **„Bogsch theory“: law of country where broadcast is received**
- **Satellite Broadcasting Directive 93/83/EEC:**
  - Communication occurs in the Member State where the signal is uplinked to the satellite
- **in other cases Bogsch theory probably still applies**
- **„mosaic theory“**
- **BGH: Hotel Maritime (2005)**
  - German mark used on Danish website (in German language)
  - BGH refused to apply German law in light of marginal economic effects on the German owner of the mark

Folie 24

- **BGH „Wagenfeld Leuchte“ (2007)**
- **Copies of Bauhaus lamps offered on the internet in Germany (German language website) for sale in Italy**
- **BGH: violation of German copyright law**
  - offer has effects on the economic use of copyright in Germany

Folie 25

- **LG Hamburg (2008): Google case**
  - thumbnails in hyperlinks
  - German law applied
  - under US law: fair use exception
- **Society of Composers, Authors and Music Publishers v Canadian Ass'n of Internet Providers (Canada 2004)**
  - telecommunication occurs both in
    - country of transmission and
    - country of reception
  - no extraterritorial application of Canadian law („real and substantial connection“ test)

Folie 26

- **National Inquirer v News Group News Ltd (SDFIa 1987)**

- Subject matter jurisdiction for lawsuit against British publisher of a journal with 5 million copies
- US market: 85 copies (0.0017 %) „not trivial“

Folie 27

## **V. Reform Proposals**

- **ill-fated Hague Convention**
- ***Dreyfuss-Ginsburg* proposal**
- **see also European Patent Litigation Agreement**
- **WIPO Joint Recommendation Concerning Provisions of Marks, and Other Industrial Property Rights in Signs, on the Internet (2001)**

Folie 28

- **ALI Principles (2007): Intellectual Property Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes**

- „ubiquitous infringement“: judge *may* choose to apply law of one country based on
  - residence of the parties
  - center of gravity
  - investments
  - most important market

Folie 29

- **CLIP Principles: European Max Planck on Conflict of Laws in Intellectual Property (2009)**

- **mosaic theory**
- **ubiquitous media:**
  - application of the law of the closest connection, based on
  - residence of defendant
  - place of business
  - place of activities leading to violation
  - place of substantial damage

Folie 30

**Thank you for your attention**