# Critical Analysis of the „Mosaic Principle" Under Art. 7 Para 2 Brussels Ibis Regulation for Disputes Arising out of Non-Contractual Obligations on the Internet[1]

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This article analyzes the „mosaic principle" under Art. 7 Para 2 Brussels Ibis Regulation for disputes arising out of non-contractual obligations on the Internet, online defamation and online infringements of copyright in particular. The subject of the analysis are decisions of the Court of Justice of the EU, namely *Shevill, eDate, Bolagsupplysningen*, *Pinckney* and *Hejduk*. The aforementioned decisions are critically analyzed in terms of the nature of dissemination of information on the Internet and the appropriateness and usefulness of their interpretation in the context of the objectives and principles underlying the Brussels Ibis Regulation.

## Introduction

Internet and modern communication technologies have changed the way information is distributed and shared. In the „printed age" it was possible to predict and limit reach of published information. Nowadays, in the „Internet age", the dissemination of information is relatively easy and fast; it is possible to share information with unlimited number of people. On the Internet, there are no borders as we know them from the „physical" world. This development creates many legal challenges. On the Internet, it is relatively „easy" to enter into private law relationship with international (cross-border) element. These legal relationships are governed by the private international law rules (hereinafter referred to as PIL). The PIL rules are deeply rooted in the principle of territoriality; they „anchor" legal conduct to a territory of a particular state in order to determine competent court and law applicable. This is particularly difficult in case of legal conduct on the Internet[3].

This article is aimed at the analysis of one of the problematic areas, i.e. jurisdictional rules for disputes arising out of non-contractual obligations on the Internet (online infringements of privacy, online defamation and online infringements of copyright). In order to determine the court, which has international jurisdiction, it is necessary to answer following questions: Where can the claimant sue the infringer for alleged online infringement if the infringed information is accessible everywhere on the Internet? What types of remedies and amount of damages is possible to claim at that *forum*? In case of damage that occurred on the territory of several states, how could the remedy be divided among all potential *forums*?

To answers these questions it is necessary to analyze PIL and jurisdictional rules[4]. However, the majority of EU PIL rules were created in the „print age". For this reason, these rules are „technologically neutral" and do not consider rather specific characteristics of the Internet. Therefore, it is necessary to turn to case law of the Court of Justice of the European Union (hereinafter referred to as „CJEU") and its interpretation of the relevant jurisdictional rules contained in relevant EU jurisdictional rules.

The aim of this article is a critical analysis of the case law of the CJEU regarding interpretation of jurisdictional rules for disputes arising out of non-contractual obligations on the Internet. This analysis will be focused in Article 7 Para 2 of the Brussels Ibis Regulation[5] containing jurisdictional rule „place where the harmful event occurred or may occur". According to the CJEU, this rule consists of the place of the casual event and place of the damage. The „place of the damage" criterion is highly problematic. On numerous occasions, the CJEU has interpreted it as every place where the Internet content can be accessed, i.e. using „the mosaic principle". The aim of this article is to test this criterion with regards to the principles the EU jurisdictional rules and Brussels Ibis Regulation.

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[3] For analysis of other challenges the PIL faces in the Internet era, see for instance *T. Kyselovská*, Působnost práva na internetu, [in:] *R. Polčák* et al., Právo informačních technologií, Praha 2018, s. 29–64, p. 36; *T. Kyselovská*, Elektronizace a její vliv na vybrané aspekty evropského mezinárodního práva soukromého, [in:] *N. Rozehnalová, J. Valdhans, K. Drličková, T. Kyselovská*, Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I), Praha 2013, p. 411–439; *T. Kyselovská*, Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní: (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů), Brno 2014, p. 228. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia; sv. č. 487.

[4] This article deals only with European private international law rules, i.e. relevant EU regulations.

[5] 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.

This article will focus on the most relevant judgments, namely *Bier*,[6] *Shevill*,[7] *eDate*,[8] *Bolagsupplysningen*[9] (for online defamation); and *Pinckney*[10] and *Hejduk*[11] (for infringements of copyright).

For the purposes of this article, five research questions will be analyzed: Is the interpretation of the CJEU in compliance with the goals and principles of the Brussels Ibis Regulation and its provisions? Has the CJEU taken into account the specific characteristics of the Internet and the way in which information is distributed online? Is the mosaic principle in compliance with the principles of legal certainty and predictability under the Brussels Ibis? Does the interpretation of the CJEU result in favoring special jurisdictional rules in Article 7 Para 2 instead of the general jurisdictional rule in Article 4 of the Brussels Ibis Regulation?

Based on these five research questions, the goal of this article is to verify or refuse following working hypothesis: The mosaic approach used in Article 7 Para 2 Brussels Ibis Regulation is contrary to the principles of legal certainty and predictability for disputes arising out of non-contractual obligations on the Internet.

Structure of this article follows the research questions and working hypothesis. The article is structured into six parts. In the second part, brief description of jurisdictional rules in the Brussels Ibis Regulation for disputes arising out of non-contractual relationships is introduced. The third part deals with the development of the CJEU case law regarding interpretation on Art. 7 Para 2 (defamation in printed media, defamation on the Internet, infringement of copyright on the Internet). The fourth part contains critical analysis of the mosaic principle. The fifth part introduces possible solutions instead of the mosaic principle. The sixth part contains conclusion and verification of the working hypothesis.

The author of this article hopes this text will contribute to the discussion in this area of law and will be a relevant asset for both legal theory and practice.

## International jurisdiction of courts in disputes arising out of non-contractual obligations

Rules for international jurisdiction of courts for disputes arising out of non-contractual obligations with international element are provided for in Article 4 and Article 7 Para 2 Brussels Ibis Regulation.

Article 4 Brussels Ibis Regulations contains general rule of jurisdiction. The general rule is based on the domicile of the defendant. Domicile of legal persons is autonomously defined in Art. 63. Domicile of natural persons is determined under Art. 62 Para 1 according to *lex fori*.

The Brussels Ibis Regulation allows for several exemptions from the general rule. One of these exemptions is special jurisdictional rule in Article 7[12].

Article 7 Para 2 Brussels Ibis Regulation[13] prescribes rules for international jurisdiction of courts in matters relating to tort, delict or quasi-delict. It is applicable, *inter alia*, to disputes arising out defamation and violations of privacy and infringements of intellectual property rights. Under this provision, a person domiciled in a Member State may be sued in the courts of another Member State „where the harmful event occurred or may occur". The reason for this special (alternative) rule is a close connection between the court and the action. Its objective is to ensure legal certainty and predictability for the defendant[14]; sound administration of justice, effectivity in evidentiary matters[15] and procedural economy[16]. This provision shall be interpreted autonomously[17]. It derogates from the general rule of the defendant's domicile; therefore, it shall be interpreted also restrictively and in consideration of the purpose of the special jurisdictional rules[18].

[6] Judgment of the Court of 30 November 1976. Handelskwekerij G.J. Bier BV v. Mines de potasse d'Alsace SA. Case 21–76.

[7] Judgment of the Court of 7 March 1995. Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA. Case C-68/93(hereinafter referred to as Shevill).

[8] Judgment of the Court (Grand Chamber) of 25 October 2011. eDate Advertising GmbH and Others v X and Société MGN LIMITED. Joined Cases C-509/09 and C-161/10 (hereinafter referred to as eDate).

[9] Judgment of the Court (Grand Chamber) of 17 October 2017. Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB. Case C-194/16 (hereinafter referred to as Bolagsupplysningen).

[10] Judgment of the Court (Fourth Chamber) of 3 October 2013. Peter Pinckney v KDG Mediatech AG. Case C-170/12 (hereinafter referred to as Pinckney).

[11] Judgment of the Court (Fourth Chamber) of 22 January 2015. Pez Hejduk v EnergieAgentur.NRW GmbH. Case C-441/13 (hereinafter referred to as Hejduk).

[12] This type of jurisdiction is in the Czech legal literature called as alternative jurisdiction, because it better describes its meaning and purpose, [in:] *J. Valdhans*, Nařízení Brusel I (alternativní příslušnost), [in:] *N. Rozehnalová, J. Valdhans, K. Drličková, T. Kyselovská*, Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I), Praha 2013, p. 224–265. Also, see Preamble to the Brussels Ibis Regulation, Para 16, where the term „alternative grounds of jurisdiction" is used.

[13] This Article is based on the analysis of the CJEU case law regarding „predecessors" of the Brussels Ibis Regulation. Legal rules contained in Art. 7 Para 2 Brussels Ibis Regulation is similar to the Art. 5 Para 3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); resp. Art. 5 Para 3 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels I Convention).

[14] This objective is important, in particular, in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, [in:] Preamble to the Brussels Ibis Regulation, Para 16.

[15] Bolagsupplysningen, Para 27, Pinckney, Paras 27–28.

[16] Preamble to Brussels Ibis Regulation, Para 16. From case law, see for instance Bier, Para 11; Shevill, Para 19; *eDate*, Para 40; Bolagsupplysningen, Para 26.

[17] Bolagsupplysningen, Para. 25; eDate, Para 38; Pinckney, Para 23.

[18] *J. Valdhans*, Nařízení…, p. 224; Hejduk, Para 17; Pinckney, Paras 24–25.

## Development of the CJEU case law

The Court of Justice of the EU has had several opportunities to interpret the criterion „place where the harmful event occurred or may occur". First, in judgment *Bier*, the CJEU laid down the fundamental principle underlying this provision. In judgment *Shevill* the interpretation was further developed for disputes arising out of defamation and violations of privacy in print media. In case of online defamation and violations of privacy the CJEU interpreted this provision in judgments *eDate* and *Bolagsupplysningen*. For infringements of intellectual property rights and copyright in particular, judgments in *Pinckney* and *Hejduk* will be also critically analyzed.

### 1. Setting the Scene – Judgments in *Bier* and *Shevill*

The expression „place where the harmful event occurred or may occur" was interpreted for the first time in 1976 in judgment *Bier*. According to the CJEU, this expression was intended to cover both the place where the damage occurred (*forum damni infecti*) and the place of the event giving rise to it (*forum delicti commissi*). It is up to the claimant, which courts he would choose; he has the option for either of these places[19]. Thus, the claimant has an „alternative within alternative jurisdictional rules".

This interpretation was further developed in 1996 in judgment *Shevill*. The *Shevill* case concerned defamation in printed media (newspaper) that were distributed in several Member States. The CJEU confirmed that the claimant could bring an action before courts where the illegal conduct occurred[20]. Courts of the place of the illegal conduct are competent to decide on the entire harm and damages. As another possibility, the claimant could bring an action for damages against the publisher also before the courts of each Member State in which the publication was distributed and where the victim claimed to have suffered injury to his reputation. These courts, however, have jurisdiction to rule solely in respect of the harm caused on the Member State of the court seized[21]. This type of territorially limited jurisdiction for damages is called „the mosaic principle" (*Mosaiktheorie*)[22].

The CJEU was aware of possible problems and challenges the mosaic approach might bring; courts in different Member States would decide about different aspects of one dispute. The CJEU, however, reasoned that the claimant has the possibility to file an action claiming full amount of damages before either court of the publisher's domicile (Art. 4) or the court of place where the event giving rise to the damages occurred, generally at the place of the publisher's domicile (Art. 7 Para 2), again claiming full amount of damages[23].

To sum up, in disputes arising out of defamation and violations of personality rights in printed media, combining outcomes of the judgments in *Bier* and *Shevill*, the claimant could bring proceedings before following courts:

1) Article 4: defendant's domicile – full amount of damages.
2) Article 7 Para 2: place of the illegal conduct giving rise to damage (i.e. place of publication) – full amount of damages.
3) Article 7 Para 2: place of the actual damage (i.e. states of distribution; place, where the claimant has suffered injury to his reputation) – territorially limited amount of damages.

### 2. The Scene is Set for Online Defamation – Judgments in *eDate* and *Bolagsupplysningen*

With the widespread use of the Internet, distribution and publication of information has changed. As Advocate General Bobek ironically stated: „As inevitably happens in the era of anonymous Internet bravery, universally known for its genteel style, subtle understanding, and moderation…"[24], on the Internet, any data can be distributed freely and without any limitations.

In 2011, for the first time, the CJEU dealt with the applicability and interpretation of the special jurisdictional rules in Art. 7 Para 2 Brussels Ibis Regulation for disputes arising out of online defamation and violations of privacy on the Internet in judgment *eDate*. Thus, the CJEU had the opportunity to be both the „inventor of new and innovator of existing rules"[25].

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[19] Pinckney, Para 18; Coty German, Para 46; *P. Mankowski*, Art. 5, [in:] *U. Magnus, P. Mankowski*, Brussels I Regulation. European Commentaries on Private International Law. Sellier. European Law Publishers 2007, p. 190.

[20] Place of the illegal conduct will be, in most cases, the same as the place of the defendant's domicile. For the purpose of the „place of the harmful act" is essential the place the wrongdoer, not the place of the actual publication. Shevill, Para 24.

For online cases, the CJEU has repeatedly adjudicated that the place of the casual event is identical with the place of domicile of an information society service provider. See Hejduk, Paras 23–26; Wintersteiger, Paras 34–38; eDate, Paras 42–43.

[21] Shevill, Paras 30–31; Bolagsupplysningen, Para 31; *T. Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EUIPR. Kommentar. Band I. Brüssel Ia-VO. 4. Auflage, Köln 2016, p. 343.

[22] According to *P. Mankowski*: „The mosaic principle provides a very effective counter-incentive against forum shopping by supposed or alleged victims and thus effectively safeguards the legitimate jurisdictional interests on the alleged wrongdoer's side." [in:] *P. Mankowski*, Art. 5…, p. 194.

[23] Shevill, Para 32.

[24] Opinion of Advocate General Michal Bobek delivered on 13 July 2017. Bolagsupplysningen OÜ a Ingrid Ilsjan against Svensk Handel AB. C-194/16. Para 1.

[25] „In this case, the CJEU is indeed both an inventor and innovator. […] the CJEU may be said to adhere to proactive innovation rather than reactive.", [in:] *U. Maunsbach*, The CJEU as an Innovator – a New Perspective on the Development of Internet Related Case law. *Masaryk University Journal of Law and Technology* [online]. 2017, vol. 11:1, p. 85–86 [cit. 12.8.2018]. Available at: https://journals.muni.cz/mujlt/article/view/6669.

In *eDate*, the CJEU confirmed the applicability of jurisdictional criterion in Art. 7 Para 2 for disputes arising out of defamation and privacy violations on the Internet. According to the CJEU, it is possible to bring proceedings to courts of the place of the damage (i.e. the mosaic principle) or courts of the place of the event giving rise to the damage (place of the publication)[26].

However, problem with the mosaic principle on the Internet is, that following the place of the damage criterion it is possible to bring proceedings to courts of every State from which territory of the information was accessible[27]. These courts can rule only on the amount of damages that occurred within their territory[28]. The CJEU, somehow, tried to respond to the worldwide distribution of information on the Internet, the seriousness of the damage and protection of fundamental rights and freedoms[29]. For these reasons, the CJEU created a third jurisdiction „limb" for the Art. 7 Para 2, the „center of interest", „Mittelpunkt der Interessen" of the claimant[30]. Center of interest of the claimant (natural person) will usually be in the Member State of his domicile. However, it could also be a State where the person does not have his habitual residence, but pursues a professional activity or established any other particularly close link with that State. Courts in the State of the center of interest have jurisdiction in respect to all the damage caused[31].

To summarize this decision, in disputes arising out of defamation and violations of personality rights on the Internet via website, combining judgments in *Bier*, *Shevill* and *eDate*, the claimant could choose and bring action before four courts. In three courts it is possible to claim full damages, in third court it is possible to claim only territorially limited damages.

1) Article 4: defendant's domicile – full amount of damages.
2) Article 7 Para 2: place of the illegal conduct giving rise to damage (i.e. place of publication) – full amount of damages.
3) Article 7 Para 2: place of the actual damage (i.e. states of distribution; place, where the claimant has suffered injury to his reputation) – territorially limited amount of damages.
4) Article 7 Para 2: center of interest[32] – full amount of damages.

Judgment in *eDate* has been criticized. Firstly, the CJEU automatically applied the mosaic principle to the Internet, without considerations as to the practical problems with determination of the amount of damages for the respective territory; strengthening possible *forum shopping* and pro-claimant approach[33]. In this decision, The CJEU weakened the principle of *actor sequitur forum rei*; the center of interest allows claimant to bring proceedings claiming full amount of damages to his „home" court. In the vast majority of cases, the center of interest will be situated in the place where the claimant (the harmed person) is domiciled. Thus, the CJEU stressed the application of the principle *forum actoris*[34]. The decision of the CJEU might be interpreted that the victim has only one center of interest. However, this is not entirely correct view; one person could have more than one center of interest in different States[35].

In 2017, the CJEU further developed its interpretation of „place of the harmful act" in case of online defamation in *Bolagsupplysningen*. This case differs from the previous one in two important aspects: a legal person (not a natural person) claimed primarily rectification and removal of information made accessible on the Internet and only secondarily claimed damages for the alleged harm to their reputation[36].

In *Bolagsupplysningen*, the CJEU decided on the material scope of Art. Para 2 Brussels Ibis Regulation. The CJEU confirmed that the special jurisdictional rule is applicable, regardless whether the damage allegedly suffered is material or non-material in nature[37]; and that the criterion center of interest is applicable to both natural and legal persons[38]. For

[26] eDate, Para 41; Bolagsupplysningen, Para 29.

[27] eDate, Para 51. The CJEU in this respect changed its initial interpretation. In Shevill, the information should have been actively distributed in printed form and be available on the territory on the state; in eDate, it was sufficient that the information is or has been available.

[28] eDate, Paras 51-52.

[29] Opinion of Advocate General Cruz Villalón delivered on 29 March 2011. eDate Advertising GmbH vs. X (C-509/09) and Olivier Martinez and Robert Martinez vs. MGN Limited (C-161/10). Joined cases C-509/09 and C-161/10; Opinion of AG Michal Bobek in Bolagsupplysningen, Para 36.

[30] According to *U. Maunschach*, the CJEU found inspiration for „centre of interest" in *common law* and its principles, [in:] *U. Maunsbach*, The CJEU…, p. 85.

[31] eDate, Para 52; Bolagsupplysningen, Para 32.

[32] Questionable in this respect is whether the criterion „centre of interest" creates a third, independent jurisdictional rule within the Article 7 Para 2, or is it a second „limb" of the place of damage. In the first case, we had to question what is the legal base for this new jurisdictional rule. This is more of a theoretical and doctrinal issue that has no real consequences for the result in this case. However, it is interesting and important question in the context of the approach of the CJEU to the interpretation of the special jurisdictional rules in the Brussels Ibis Regulation, [in:] *T. Lutzi*, Internet Cases in EU Private International Law – Developing a Coherent Approach. International and Comparative Law Quarterly [online]. 2017, vol. 66, p. 695 [last visited 18.12.2018]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2988596.

[33] eDate, Para 49.

[34] Opinion of AG Villalón in Hejduk, Para 26. The structure of jurisdictional rules in the Brussels Ibis Regulation does not, with the exception of the special jurisdiction, prioritize the domicile of the claimant. *T. Lutzi*, Internet…, p. 696.

[35] In eDate, the CJEU used the term „center of interest" as one single center, not „centers", which would indicate possible multiplicity of these centers. However, the Advocate General Bobek stated that both natural and legal persons might have more than one center of interest in respect of a particular claim. This interpretation could lead to further fragmentation of claims, thus decreasing legal predictability and certainty of the parties. Opinion of AG Bobek in Bolagsupplysningen, Para 116.

[36] In Shevill and eDate it was natural persons who claimed primarily damages for violations of privacy and defamation.

[37] Bolagsupplysningen, Para 36.

[38] AG Bobek extensively analyzed the issue whether legal persons also have some personality rights. Based on analysis of the case law of the European Court of Human Rights and CJEU, he concluded that they do; some Member States even expressly protect their good name or reputation. Opinion of AG Bobek in Bolagsupplysningen, Para 58.

natural persons, their center of interest generally corresponds to the Member State of their habitual residence (unless other factors establish particularly close link with another Member State)[39]. For legal persons, in general, it is the place where their commercial reputation is most firmly established. In other words, where they carry out the main part of their economic activities. This place will generally coincide with the place of their registered office or seat; the location of that office is not, however, in itself, a conclusive criterion for the purpose of the center of interest[40].

Secondly, the CJEU decided on the jurisdictional rule itself and confirmed the previous decision in *eDate*. The CJEU maintained (to some degree) the mosaic principle. The claimant may bring his action before the courts of each Member State of which territory online content is or has been available. These courts have jurisdiction only in respect of the harm caused in the territory of the Member State of the court seized[41]. However, the CJEU took into consideration the ubiquitous nature of content place online and universal scope of distribution of information. The application for the rectification and removal of information published online could be only a single and indivisible act. Therefore, such a request can only be made before a court with jurisdiction to rule on the entirety of an application for compensation for the damage[42]. The claim for rectification and removal of information placed online cannot be brought before the courts of each Member State in which the information is or was accessible[43].

To summarize the decision in *Bolagsupplysningen*, the CJEU confirmed and slightly adjusted its interpretation in *Shevill* and *eDate*. The claimant could choose and bring the action before four courts. In three courts, it is possible to claim full damages, including rectification and removal of information placed online. Jurisdiction of the fourth court to decide on damages is territorially limited.

1) Article 4: defendant's domicile – full amount of damages, including rectification and removal of content placed online.
2) Article 7 Para 2: place of the illegal conduct giving rise to damage (i.e. place of publication) – full amount of damages, including rectification and removal of content placed online.
3) Article 7 Para 2: place of the actual damage (i.e. states of distribution; place, where the claimant has suffered injury to his reputation) – territorially limited amount of damages.
4) Article 7 Para 2: center of interest – full amount of damages, including rectification and removal of content placed online.

The decision in *Bolagsupplysningen* has also been criticized[44]. The main issue is that the CJEU maintained the mosaic principle, even if in modified form. The CJEU unfortunately did not follow AG Bobek's suggestion to revisit the scope of Art. 7 Para 2 and to disregard the mosaic principle all-together[45].

## 3. The Curious Case Continues for Online Infringements of Copyright – Judgments in *Pinckney* and *Hejduk*

The interpretation of „place of the harmful act" for disputes arising out of the infringement of copyright on the Internet was the core of two decisions of the CJEU. In 2013, the CJEU rendered judgment in *Pinckney*; in 2015, judgment in *Hejduk*. In both cases, the CJEU followed the previous case law in *Shevill* and *eDate*, with emphasis on the difference between intellectual property rights and personality rights.

In *Pinckney*, the claimant (author and composer residing in France) claimed infringement of his copyright to 12 songs recorded on a vinyl record. These songs were reproduced without his consent on a CD pressed in Austria by company Mediatech; then marketed in UK company through different Internet websites accessible in France. The claimant brought proceedings against Madiatech in France according to Art. 7 Para 2 Brussels Ibis Regulation, seeking compensation for damage sustained because of the infringement of his copyright.

In *Hejduk*, the claimant, a professional photographer residing in Austria, claimed infringement of her copyright on her photographs, which were made available on a German website by the German based defendant without her consent. The claimant brought proceedings in her home court in Austria, arguing the jurisdiction was based on the Art. 7 Para 2.

In both cases, the CJEU pointed out that the copyright law is in the EU harmonized according to the Directive 2001/29 and they are subject to the principle of territoriality[46]. As to the application of the Art. 7 Para 2, the CJEU followed its judgment in *Wintersteiger*[47] and stated that the casual event

[39] Bolagsupplysningen, Para 40; eDate, Para 49.
[40] Bolagsupplysningen, Para 41.
[41] Bolagsupplysningen, Para 47.
[42] Bolagsupplysningen, Para 48.
[43] Bolagsupplysningen, Para 49.
[44] For more in-depth analysis and criticism of this CJEU judgment, see *T. Kyselovská*, Kritická analýza judikatury Soudního dvora EU ve věcech určení mezinárodní příslušnosti soudů v případě pomluvy a porušení osobnostních práv na internetu, Časopis pro právní vědu a praxi, Masarykova univerzita, 2018, XXVI, 4/2018, p. 589–610. doi:10.5817/CPVP2018-4-1.
[45] Advocate General Bobek argued that the place where the harm occurred should be limited to one jurisdiction. That is, before the courts of the Member State in which its center of interests is located. At these courts, the claimant could claim the entirety of the harm sustained. Opinion of AG Bobek in Bolagsupplysningen, Paras 96–97.
[46] Hejduk, Para 22; Pinckney, Para 39.
[47] Judgment of the Court, 19 April 2012. Wintersteiger AG v Products 4U Sondermaschinenbau GmbH. Case C-523/10.

took place at the seat of the infringing company[48]; i.e. Austria and the UK in *Pinckney*, and Germany in *Hejduk*.

The crucial question, however, was, where is the place of the actual damage; i.e. whether it is France in *Pinckney*, resp. Austria in *Hejduk*. The CJEU stated that the location of the place where the damage occurred in a particular Member State is subject to the right whose infringement is alleged is protected in that Member State[49]. The CJEU further stated that if the infringement is being made through a publication on a website, there is no requirement that this website is „directed" to the Member State where the damage occurred[50]. The mere accessibility of the content protected by copyright is sufficient[51].

In this judgment, the CJEU confirmed the applicability of the mosaic principle. The court, seized on the basis of the place where the alleged damage occurred, has jurisdiction only to rule on the damage caused within that Member State[52].

To summarize, the *Pinckney* and *Hejduk* judgments, in disputes arising out of online infringements of copyright, the claimant could choose and bring action before three courts. In two courts it is possible to claim full damages, in third court it is possible to claim only territorially limited damages.

1) Article 4: defendant's domicile – full amount of damages.
2) Article 7 Para 2: place of the illegal conduct giving rise to damage (i.e. place of the infringing company) – full amount of damages.
3) Article 7 Para 2: place of the actual damage (i.e. states where the content prohibited by copyright laws is available) – territorially limited amount of damages.

These two decisions were substantially criticized. In *Hejduk*, the CJEU blindly followed its ruling in *Pinckney*. Unfortunately, the CJEU did not adopt more restrictive interpretation of Art. 7 Para 2, as proposed by the Advocate General Villalón[53]. The AG Villalón suggested that none of the criteria – the center of interest of the alleged victim's interest, the direction of the website to a specific Member State and the territoriality principle – should be applied[54]. Rather, he proposed that in case of delocalized damage, the Art. 7 Para 2 shall be interpreted that the jurisdiction rests only with the courts for the place where the event giving rise to the damage occurred. This would be often the place where the defendant (the infringer) is established or domiciled.

It is obvious, that the CJEU is building a system of international jurisdiction in intellectual property cases. However, the interpretation of Art. 7 Para 2 may vary according to the nature of the right allegedly infringed[55]. Therefore, the mosaic approach was not applied in the *Wintersteiger* case, where an alleged online infringement of a national trademark was at issue. The CJEU declined to localize the place where the damage occurred at the place where the relevant website can be accessed. The CJEU held that the place where the damage occurred is the Member State where the national trademark is registered; the entire damage can be claimed only there.

Unlike national trademark rights, copyright law is protected in every Member State according to the relevant national law without registration. For copyright infringement, the CJEU established the jurisdictional rule that the mere accessibility of a website is sufficient to establish jurisdiction under Art. 7 Para 2. This rule is not subjected to any limitations, e.g. „targeting" or „directing" of activities. Rather, the CJEU upheld the mosaic principle created in *Shevill* as a certain form of limitation.

## Critical Analysis of the Mosaic Principle for Online Infringements of privacy rights and copyright law – *cui bono*?

From the analysis in the previous parts, it is clear that the mosaic approach was used primarily for damages in connection with defamation and violations of privacy and personality rights under Article 7 Para 2 Brussels Ibis Regulation. Later, it was used for online infringements of copyright law[56]. Presumably, it could be used also regarding violations of other territorially protected IP rights[57].

In the author's opinion the mosaic principle causes more practical problems, therefore, it is time to reconsider it. The mosaic principle is very problematic; not only in the „offline" context, but especially on the Internet.

To analyze this problem it is necessary to distinguish the characteristics of privacy rights and copyright. Both of these areas of law are governed by different principles. Copyright is ubiquitous only in the sense that it is attached to the right holder wherever he or she might be. It is attached to the manifestation of the creation of human

[48] Hejduk, Para 26. Furthermore, „the allegation of an infringement of an intellectual and industrial property right, in respect of which the protection granted by registration is limited to the territory of the Member State of registration, must be brought before the courts of that State. It is the courts of the Member State of registration which are the best placed to ascertain whether the right at issue has been infringed", [in:] Pinckney, Para 37.

[49] Hejduk, Para 29; Pinckney, Para 33. Copyright rights are protected in all Member States subject to the territoriality principle. Hejduk, Para 30.

[50] Hejduk, Paras 31 to 33; Pinckney, Para 42.

[51] Hejduk, Para 34.

[52] Hejduk, Paras 35 to 37; Pinckney, Para 45.

[53] Opinion of Advocate General Villalón delivered on 11 September 2014. Pez Hejduk v EnergieAgentur.NRW GmbH. Case C-441/13. Para 33 et seq.

[54] Opinion of AG Villalón in Hejduk, Para 48.

[55] Hejduk, Para 26; Pinckney, Para 32.

[56] The mosaic principle was used also in unfair competition law disputes in Judgment of the Court (Third Chamber) of 21 December 2016. Concurrence Sàrl v Samsung Electronics France SAS and Amazon Services Europe Sàrl. Case C-618/15.

[57] The CJEU refused application of the mosaic principles in disputes arising out of infringements of trademarks in Wintersteiger, Para 25. See also *T. Lutzi*, Internet…, p. 691.

mind. It protects the exploitation of the copyright work within a certain territory.

On the other hand, privacy rights and copyright share some similarities. They are both ubiquitous rights, the nature of which is linked to the person itself and are protected in every Member State without the need for registration.

As was stated before, the territoriality principle[58] that the mosaic principle relies on, is problematic[59]. Especially if mere access to the website is sufficient to establish jurisdiction. This could lead to excessive *forum shopping*. Therefore, the main issue is the application of mosaic principle in the context of the Internet.

In some legal literature it is still argued that if a person posts or uploads information on the Internet, he does it knowing that the information might reach a worldwide audience; therefore, if a dispute arises, he can expect to be sued in multiple *fora* and under multiple laws applicable[60].

This argument is, in the author's opinion, not valid anymore. The mosaic principle was applied in *Shevill* for distribution of information in the printed media. The harm caused in offline infringement could be easily quantified. In 1995, when *Shevill* judgment was rendered, the Internet was not as widely used as today. Internet changed „rules of the game", distribution is not relevant factor any more. Internet changed the ways we share, publish and consume information. Information on the Internet is readily available, for unlimited number of people, in a wide range of languages thanks to automatic translators, „irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control"[61]. Many distribution channels, services and platforms are based on the Internet and online activity[62]. Services like Uber, AirBnB, Wikipedia could not exist without the Internet. These services are run not only by professionals. The fact that a person uses the Internet to reach his customers does not automatically mean that he intends to reach worldwide audience[63].

Both private international law and intellectual property rights (copyright) are traditionally rooted in the principle of territoriality. Therefore, the idea of territorially limited jurisdiction of courts (the mosaic principle) as to the amount of claimed only on the territory of that particular state, damages is, theoretically, in accordance with this principle. On the other hand, the mosaic principle leads to possible jurisdiction of courts of all 28 Member States. Information published online is available, thus, capable of infringing a person's rights, in all of them. Even a few „hits" on a website, where the information is published, might establish jurisdiction of courts of that State[64].

The mosaic principle creates a multiplicity of potential *forums*. Thus, in the context of online activity, it is not in accordance with several legal principles governing private international law and Brussels Ibis Regulation in particular.

The multiplicity of potential *forums* is contrary to the principle of legal certainty and predictability of jurisdictional rules[65]. It gives the claimant an advantage to choose the most suitable forum for him; i.e. his own forum or any of the 28 Member States. It disproportionately supports *forum shopping*[66]. The defendant cannot predict where he might be sued. This amounts to the risk of harassment[67]. In practice, it will not be as common for the claimant to file a suit at multiple courts in different States; however it could be a part of his deterrent procedural strategy.

The mosaic principle is contrary to the principle of *actor sequitur forum rei* (the claimant must follow the *forum* of the thing in the dispute, i.e. the defendant's domicile)[68].

The multiplicity of *forums* leads to multiplicity of applicable laws. However, this problem is more relevant in defamation

[58] The territoriality principle was the key criterion in Wintersteiger, Para 30; Pinckney, Para 39; and Hejduk, Para 22.

[59] Opinion of AG Villalón in Hejduk, Paras 33–40, Opinion of AG Jääskinen in Coty Germany, Para 68.

[60] See Dow Jones & Company Inc. v. Gutnick (2002) 210 CLR 575, [in:] *D. Svantesson*, Solving the Jurisdiction Puzzle, Oxford 2017, p. 97–98.

[61] eDate, Para 45.

[62] *T. Lutzi*, Internet…, p. 700. The accessibility ot information can be limited using geoblocking technologies, see *D. Svantesson*, Solving…, p. 201 et seq. However, even these technologies are not without flaws and might lead to restrictions on the EU internal market. For these reasons, the EU adopted Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

[63] It is possible to limit some types of services to a particular territory, e.g. vis paid subscription (e-publications, e-books), registration (to research databases), declaration of non-delivery (Amazon, eBay). Many services are based on free access to information (e.g. Wikipedia, TripAdvisor etc.), [in:] *T. Lutzi*, Internet…, p. 701.

[64] According to the AG Villalón: „While it is true that the number and origin of „hits" on a website may be indicative of a particular territorial impact, they are, in any event, sources which do not provide sufficient guarantees for the purpose of establishing conclusively and definitely that unlawful damage has occurred." Opinion of AG Villalón in eDate, Para 50. See also Hejduk, Para 34; Pinckney, Para 44.

[65] Preamble to Brussels Ibis Regulation, Para 15; Opinion of AG Bobek in Bolagsupplysningen, Para 79.

[66] *Forum shopping* is usually associated with negative connotations. Such an approach is not appropriate. Brussels Ibis Regulation provides for *forum shopping*, because apart from general jurisdictional rule it contains also special jurisdictional rules (Art. 7) and prorogation of jurisdiction (Art. 25). However, in the context of the Internet, the mosaic principle leads to *ad absurdum* application of *forum shopping*. Therefore, it is contrary to the principle of legal certainty and predictability.

[67] Opinion of AG Bobek in Bolagsupplysningen, Para 88; similarly, *C. Vanleenhove*, The European Court of Justice in Bolagsupplysningen: The Brussels I Recast Regulation's jurisdictional rules for online infringement of personality rights further clarified. *Computer Law & Security Review* [online]. 2018, no. 34, p. 643 [cit. 17.8.2018]. Available at: https://biblio.ugent.be/publication/8561503.

[68] The system of jurisdictional rules in the Brussels Ibis Regulation is based on general rule (defendant's domicile) and exceptions from this rule. One of these exceptions is protection of a weaker party (sections 3 to 5). These special rules take precedence before general rule. Preamble to the Brussels Ibis Regulation, Para 18.

and violations of privacy disputes[69] rather than in copyright infringements (the latter being governed by *lex loci protectionis* according to Article 8 Para 1 Rome II Regulation).

The mosaic principle is contrary to the principle of sound administration of justice. The mere fact that the information is accessible in every Member State leads to the risk of defendant to be sued in any of these States.

According to some authors, the mosaic principle indicates a degree of bias of the CJEU in favor of protecting the victim (especially in defamation cases)[70]. However, interests of the claimant and the defendant should be considered equally. The aim of the special jurisdictional rules in Art. 7 is not to protect the weaker party (as in the case of consumer or employment contracts)[71]. Their purpose is to offer alternative grounds of jurisdiction based on a close connection between the court and the action ("principle of proximity")[72]. This goal, however, is not ensured in case of 28 potential fora that the claimant might choose from. Additionally, in case of information available online, it is practically very difficult to establish the amount of damage that occurred within the relevant territory of the competent court. Due to the delocalized nature of the damage, the courts could decide only „in respect of a fraction of 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 seized. The benefit afforded by the proximity of the court to the facts of the case thus disappears, and with it the usefulness of [Art. 7 Para 2 Brussels Ibis Regulation]"[73].

The mosaic principle leads to fragmentation of the claims within all the possible *forums*. Each court will be competent to decide about the damages limited to the national territory concerned. This, in the light of the Internet, is „difficult if not impossible to exercise"[74].

The mosaic principle leads to an issue of dissonance between the scope of the jurisdiction and the remedies sought (e.g. court injunction, preliminary measures)[75]. Courts that have jurisdiction to decide about territorially limited damages cannot decide about removal of information from the Internet. This can be done only once; it is not possible to remove only a part of infringing content. In other words, it limits the competent court in respect of types of remedies that it may issue. In copyright infringements cases the claimant usually claims for the material to be taken down. The question is whether the partially competent court should be also reflected at the level of partial competence to issue an injunction. Is it possible to ask the defendant to delete only a proportional part of the content? As AG Bobek clearly stated, „provided that a court of a Member State is competent to hear an extra-contractual/tortious action for damages, it should also be entitled to rule on issue of all the remedies that are available under national law [not only damages]"[76].

Moreover, each of the competent courts will decide on claims with the same object[77]. This could enhance the risk of irreconcilable judgments. The Brussels Ibis Regulation is based on the principle of procedure economy and harmonious administration of justice[78] that is ensured by rules on lis pendens (Arts. 29 to 34) and concentration of claims (Art. 8). Question is how could the lis pendens rules solve the situation if there is one proceeding claiming „full" damages (in courts of the illegal conduct that lead to the damage) and several proceedings claiming „partial" damages (territorially limited damages claimed in courts where the damage occurred)[79].

Another problematic question is the effect *res iudicata* in case of judgment awarding full amount of damages and its relationship to possible subsequent claim for damages under one or more of the partial jurisdictions[80].

The mosaic principle is contrary to the requirement of restrictive interpretation of special jurisdictional rules in the Brussels Ibis Regulation. In the author's opinion, the application of the mosaic principle in the context of Internet infringements is fruitless. The CJEU is trying to apply existing rules and their interpretation to online activity. The main objection to the mosaic principle is the multiplicity of *forums* it creates. The CJEU should have resorted to its former case law; in case there could be multiple possible *forums* or it could be difficult to establish them, it is necessary to refuse the application of special jurisdictional rules and „return" to the general jurisdictional rule based on the defendant's domicile[81].

[69] Conflict-of-law rules for non-contractual relationships are contained in 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 Regulation). However, non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from its scope (Art. 1 Para 2 letter g). The applicable law shall be determined according to the national private international law rules.

[70] *C. Vanleenhove*, The European…, p. 646.

[71] Bolagsupplysningen, Para 39; similarly in Opinion of AG Bobek in Bolagsupplysningen, Paras 61 to 69.

[72] Bolagsupplysningen, Para 39.

[73] Opinion of GA Villalón, Pez Hejduk, Para 44.

[74] Opinion of AG Bobek, Bolagsupplysningen, Para 80.

[75] Opinion of AG Bobek, Bolagsupplysningen, Para 123.

[76] Opinion of AG Bobek, Bolagsupplysningen, Para 129.

[77] *T. Lutzi*, Internet…, p. 695.

[78] Preamble to Brussels Ibis Regulation, Para 21.

[79] *Lis pendens* and related actions are regulated in Art. 30 et seq. Brussels Ibis Regulation. See also Preamble to Brussels Ibis Regulation, Para 21; *T. Lutzi*, Internet…, p. 695.

[80] Opinion of AG Bobek, Bolagsupplysningen, Para 82.

[81] The requirement of restrictive interpretation of special jurisdictional rules stems from, see e.g. Judgment of the Court of 19 February 2002. Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog). Case C-256/00.

This decision dealt with the interpretation of Art. 7 Para 1 letter a) Brussels Ibis Regulation (jurisdiction for contractual relationships and criterion place of performance). Nevertheless, its conclusions are applicable also to Art. 7 Para 2. According to the CJEU, in case „where the place of performance of the obligation in question cannot be determined because it consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterized by a multiplicity of places of performance. In such a case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of Article [4 of the Brussels Ibis Regulation]", [in:] Besix, Para 55.

As resulting from the aforementioned analysis the mosaic principle does not serve the legitimate interest of any party and is contrary to the objectives of predictability and sound administration of justice governing the Brussels Ibis Regulation[82].

## Proposed *de lege ferenda* solutions instead of the mosaic principle

The mosaic principle in the context of the Internet is useless for both online defamation and online infringement of copyright law. The claimant will usually claim the full amount of damages in one court; there is no practical need for partial damages at several different courts.

There is a need for a criterion limiting the EU-wide jurisdiction which the CJEU created with the aforementioned case law. The aim of this article is not only to criticize the current status quo, but also present some ideas *de lege ferenda*. In the author's opinion the answer could be the judgment in *Bolagsupplysningen,* resp. the Opinion of AG Bobek.

In case of delocalized damage on the Internet caused by infringement of copyright the mosaic principle should be abolished. The CJEU should exclude the possibility to sue in the courts of the State where the damage occurred. The CJEU should limit jurisdiction under Art. 7 Para 2 Brussels Ibis Regulation only to the courts of the State, where the event giving rise to the damage occurred. This exclusion still allows the claimant to sue according to the Art. 4 Brussels Ibis Regulation, i.e. in the defendant's domicile (for full amount of damages). In most of infringement cases, both criteria (defendant's domicile and place, where the illegal conduct occurred) will lead to the same court[83]. As Lutzi pointed out: „Instead of bending and twisting the interpretation of these provisions until they can be applied to Internet cases, the approach […] would allow the courts to disregard these provisions altogether where their application would lead to results that cannot be justified by the considerations that underline them. Instead, one would naturally fall back to criteria that do not raise these difficulties – the place of acting in Article 7 (2), the place of establishment in Article 7 (5), or the domicile of the defendant"[84].

The main advantage of this solution would be for the claimant to be able to claim the whole damage at one place and would not be forced to initiate various proceedings in order to receive compensation for the same infringement which is almost impossible to be quantified.

Also, the claimant could sue at the place of his or her „center of interest". Admittedly, the „center of interest" criterion was created for an infringement of personality rights. However, as was stated before, personality rights and copyright share many similarities. Under the „center of interest" criterion the claimant is entitled to sue for full amount of damages, as would be the majority of cases in practice.

## Conclusion

The mosaic principle under Art. 7 Para 2 Brussels Ibis Regulation brought many legal issues. Disregarding this principle will increase legal predictability and certainty determining jurisdiction in disputes arising out of non-contractual obligations in general, and copyright infringements in particular.

In the introductory part of this article several research questions were presented. Based on the above analysis it is possible to conclude that the interpretation of the CJEU in *eDate*, *Bolagsupplysningen***,** *Pinckney* and *Hejduk* is not in accordance with goals and principles governing Brussels Ibis Regulation. The CJEU did not consider the characteristics of the Internet and the mode of distribution and accessibility of the information online. The mosaic principle is contrary to the principle of legal certainty and predictability. It favors special jurisdictional rules before general rule and is detriment to both claimant and defendant.

The analysis in this article verified the working hypothesis: The mosaic approach used in Article 7 Para 2 Brussels Ibis Regulation is contrary to the principles of legal certainty and predictability for disputes arising out of non-contractual obligations on the Internet.

[82] Opinion of AG Bobek, Bolagsupplysningen, Para 90.
[83] Opinion of AG Villalón in Hejduk, Para 45.
[84] *T. Lutzi*, Internet…, p. 711.

**Keywords:** Jurisdiction, Brussels Ibis Regulation, non-contractual obligations, place of harmful event, center of interest, mosaic principle, defamation, infringement of personality rights, infringement of intellectual property rights, copyright, online, Internet, case law, Court of Justice of the EU, *Shevill, eDate, Bolagsupplysningen Pinckney*, *Hejduk*