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European law gives a more expansive reading, alas, to jurisdiction over Internet activities

by David Post

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A few days ago I noted a recent California Court of Appeal ruling holding that an Internet posting (on a Facebook page, in that instance) that was accessible in California and caused harm to California residents was not a sufficient basis for finding that the defendant was subject to the personal jurisdiction of the California courts. As I pointed out, this ruling continued a trend in US courts rejecting the more expansive “effects test” for personal jurisdiction – a test that in my view is a “a wildly inappropriate doctrine for the Internet Age; if you’re subject to jurisdiction where the “effects” of your actions or communications are felt, then given that the “effects” of communications over the Internet can plausibly be felt everywhere and anywhere, simultaneously and instantaneously, the [effects test] has the potential to nullify any and all limits on personal jurisdiction and subject everyone to jurisdiction everywhere – not a reasonable outcome.”

Interestingly, along comes the European Court of Justice with a ruling endorsing (at least in the copyright context) this very test (and, therefore, that unreasonable outcome). [The opinion in the case, *Hejduk v EnergieAgentur.NRW GmbH*, is available [here](#); people unfamiliar with reading CJEU decisions might find Martin Husovec's excellent summary write-up easier to digest and understand]. In short, because the allegedly infringing content was available on a website that was accessible in Austria (the plaintiff’s country of residence, and the location of the court in which she sued), the damage occurred in Austria, and jurisdiction over the action is proper in Austria. The “targeting” or “purposeful availment” requirement that is so central to U.S. law before a court can find jurisdiction doesn’t apply:

For the purposes of determining the place where the damage occurred with a view to attributing jurisdiction on the basis of Article 5(3) of Regulation No 44/2001, it is irrelevant that the website at issue in the main proceedings is not directed at the Member State in which the court seised is situated. In circumstances such as those at issue in the main proceedings, it must thus be held

that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, [i.e. Austria] via the website of [the defendant] of the photographs to which the rights relied on by [plaintiff] pertain.

So it sets up (another) potentially difficult cross-border legal conundrum: if I'm sued in Austria because something I post here on the VC allegedly infringes an Austrian resident's copyright, and a judgment is issued against me in an Austrian court (which has held that it can properly assert jurisdiction over me on the basis of EU law), can that judgment be enforced in the United States against me? Or has the Austrian court violated my rights to due process (under US law) by asserting jurisdiction over me?

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