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**UNIVERSITY OF SOUTHAMPTON**  
**FACULTY OF LAW, ARTS & SOCIAL SCIENCES**

School of Law

**CHALLENGES FOR COPYRIGHT HOLDERS ON THE INTERNET:  
A Turkish Case Study**

by

Hakan Kayaaslan, LL.M.

Thesis for the degree of Doctor of Philosophy

February 2011

For the late Professor Gerrit Betlem

Professor Gerrit Betlem has been the most important academic influence in my life. Without his supervision, advice and effort this thesis would not exist.

He will be missed.

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

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In September 2004, scientists from the California Institute of Technology and the European Organization for Nuclear Research succeeded in sending 859 gigabytes of data from California to Switzerland in less than 17 minutes. At such speed, a full-length feature film can be downloaded in 4 seconds. In those 4 seconds, the copyright of a piece of work can easily be infringed on the internet.

In recent years, with the improvement of the technology, it has become possible to convert analogue work into digital work through a simple process: it can then be distributed to millions of people from all over the world in a few minutes, using the Internet. In the 1990s, Peer-to-Peer (P2P) file sharing networks exploited this new technology. Using file sharing networks, users started to download songs and movies without paying for them. As a result, the music and movie industry suffered great financial losses. While courts are still dealing with the legal issues caused by P2P networks, an even greater issue has materialised, that of transnational digital copyright infringement through websites.

Traditional copyright laws operate territorially and some websites use this territoriality, by going beyond national boundaries and operating abroad. They sometimes use the loophole-ridden copyright laws of foreign countries. Therefore, copyright infringements on the Internet have become an international problem and this situation poses a new challenge for copyright holders.

The principle of territoriality is not sufficient anymore. It is obvious that those infringements on the Internet are a global problem, affecting all nations. International issues are usually best solved through international cooperation. The solution clearly lies in the reform and harmonisation of International Private Law (IPL) of copyright at global level.

In this Ph.D. thesis, three different scenarios have been examined to show the challenges encountered by copyright holders on the Internet. Jurisdiction and applicable law issues have been identified in these scenarios. The aim of this study is to examine the IPL of copyright on the internet.



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[http://www.wipo.int/treaties/en/ip/rome/trtdocs\\_wo024.html](http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html)

[http://www.wipo.org/academy/en/publications/Coll\\_of\\_documents\\_on\\_IP/pdf\\_img/07\\_INTRODUC\\_WCT.pdf](http://www.wipo.org/academy/en/publications/Coll_of_documents_on_IP/pdf_img/07_INTRODUC_WCT.pdf)

<http://www.wipo.int/documents/en/diplconf/distrib/97dc.htm#a7>,

[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)

<http://www.yargitay.gov.tr>



## **DECLARATION OF AUTHORSHIP**

I, Hakan Kayaaslan, declare that the thesis entitled “Challenges for Copyright Holders on the Internet: A Turkish Case Study” and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

-this work was done wholly or mainly while in candidature for a research degree at this University;

-where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

-where I have consulted the published work of others, this is always clearly attributed;

-where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

-I have acknowledged all main sources of help;

-where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

-none of this work has been published before submission.

**Signed:** .....

**Date:** .....





## **FOREWORD**

When I started studying this topic, copyright infringement on the Internet through websites was a real concern for Turkish copyright holders: it is now their greatest problem, worsening each day, and solutions have yet to be found.

This work is the revised version of my thesis in the light of the report following the viva. While working on the revised version, I have updated the legislation and bibliography by January 2011. I have used the latest editions of the books from the libraries of University of Southampton.

While a number of academics have influenced my work, I would like to express my gratitude for the supervision I received from the late Professor Gerrit Betlem. This man was the single most important academic influence in my life, and I will miss him very much.

I would like to express my deepest gratitude for the constant support, understanding and love that I received from my wife Habibe and my parents during the past years.

I acknowledge the financial support of the Ministry of Education of the Turkish Republic.



## ABBREVIATIONS

ARPA	Advanced Research Project Agency
ABLR	Australian Business Law Review
AC	Law Reports Appeal Cases
AC	Appeal Cases
AD	New York Supreme Court Appellate Division Reports
AD 2d	New York Supreme Court Appellate Division Reports, 2 <sup>nd</sup> Series
AEPO	Association of European Performers Organizations
AIPC	Australian Intellectual Property Cases
AIPJ	Australian Intellectual Property Journal
ALI	American Law Institute
All ER	All England Law Reports
All ER (Comm)	All England Reports (Commercial Cases)
All ER (EC)	All England Law Reports, European Cases
ALR	American Law Reports
B.L.R.	Business Law Review: journal of commercial law and practice
BGB	Bürgerliches Gesetzbuch (German Civil Code) of 18 August 1896
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGH NJW	Decisions of the BGH published in the Neue Juristische Wochenschrift
BGHZ	Official Collection Federal High Court in Civil Cases
BHB	British Horseracing Board
BPI	British Phonographic Industry
BSA	Business Software Alliance
CA	Court of Appeal

Can. Bar Rev	Canada Bar Review
CARDOZO ARTS & ENT. L.J	Cardozo Arts & Entertainment Law Journal
CCPA	Court of Customs and Patent Appeals Reports
CD	Compact Disc
CDPA	Copyright Design and Patents Act 1988
CDPC	European Committee on Crime Problems
CDT	Center of Democracy and Technology
Ch	Chancery Law Reports (from 1891)
Ch App	Law Reports Chancery Appeals (1865-1875)
Ch D	Chancery Division Law Reports
CIPR	Canadian Intellectual Property Reports
CISAC	International Confederation of Societies of Authors and Composers
Colum. L. Rev.	Columbia Law Review
Colum-Vla J.L&Arts	Columbia-VLA Journal of Law & the Arts
Conn. L. Rev.	Connecticut Law Review
CoO	Turkish Code of Obligations
CPI	French Intellectual Property Code
CPR	Canadian Patent Reporter
CPR	Canadian Patent Reporter
CTLR	Computer and Technology Law Review
D.A.R.P.A	Defense Advanced Research Project Agency
DFC	Digital File Check
DMCA	Digital Millennium Coopyright Act 1998
DVD	Digital Video Disc

E.C.R.	European Court Reports
ECDR	Electronic Commerce and Development Reports
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
Ed. L. Rev.	Edinburg Law Review
EEA	European Economic Area
EFTA	European Free Trade Association
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (German Private International Law is the Civil Code)
EIPR	European Intellectual Property Review
ELR	European Law Review
EMD	Electronic Music Distribution
EMLR	Entertainment and Media Law Reports
Ent. L. R.	Entertainment Law Review
EPC	European Patent Convention
EPO	European Patent Office
EPOR	European Patent Office Reports
ER	English Reports
EU	European Union
EWCA	Court of Appeals of England and Wales Decisions
EWCA Civ	Court of Appeal of England and Wales Decisions (Civil Division)
F 2d	Federal Reporter (2 <sup>nd</sup> Series) (USA)
F. Supp.	Federal Supplement (USA)
F. Supp. 2d	Federal Supplement, Second Series (US)
FRCP	Federal Rules of Civil Procedure

FSR	Fleet Street Reports
Ga. St. U.L.Rev.	Georgia State University Law Review
GATT	General Agreement on Tariffs and Trade
GEMA	German Performing Rights Association
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GVG	German Courts' Constitution Act
GVL	Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (Society for the Utilization of Achievement Patent Rights)
HASTINGS COMM. & ENT.L.J.	Hastings Communication and Entertainment Law Journal
HD.K.	Hukuk Dairesi Karari (Decision of Turkish Supreme Court)
HMUK	Hukuk Usulu Muhakemeler Kanunu (Turkish Code of Civil Procedure)
IBK	İctihadi Birleştirme Karari (Turkish Landmark Decision)
IFPI	International Federation of the Phonographic Industry
IFRRO	International Federation of Reprographic Reproduction Organisations
IIC	International Review of Industrial Property and Copyright Law
IIPA	International Intellectual Property Alliance
IJLIT	International Journal of Law and Information Technology
ILO	International Labour Office
IP	Internet Protocol
IPQ	Intellectual Property Quarterly
IPRS	Intellectual Property Rights
ISP	Internet Service Provider
IT	Information Technology

ITRB	IT Rechtsberater
J. Marshall J. Computer& Info. L.	John Marshall Journal of Computer& Information Law
J.Int. Arb.	Journal of International Arbitration
LRC.	Law Reports of the Commonwealth
MCPS	Mechanical Copyright Protection Society
MESAM	Musical Work Owners' Society of Turkey
MOCT	Ministry of Culture and Tourism of Turkey
MOHUK.	Milletlerarasi Ozel Hukuk Usulu Kanunu (Turkish Private International Procedure Act)
MPAA	Motion Picture Association of America
MPI	Max Planck Institute
MUYAP	Turkish Phonographic Industry Society
NJW	Neue Juristische Wochenschrift
NJW	Neu Juristische Wochenschrift
NSF	National Science Foundation
O.J. C	Official Journal C Series(Information, notices and preparatory EU legislation)
O.J. L	Official Journal L Series (Legislation)
OECD	Organization for Economic Co-operation and Development
OSP	Online Service Provider
OUP	Oxford University Press
P2P	Peer-to-Peer
PLC	Practical Law Company
PPL	Phonographic Performance Limited
PRS	Performing Right Society
Q.B.	Queen's Bench



RAM	Random Access Memory
RG	Resmi Gazete (Turkish Official Gazette)
RGBI	Reichsgesetzblatt (German Imperial Law Gazette)
RIAA	Recording Industry Association of America
ROM	Read Only Memory
RPC	Reports of Patent Cases
SDMI	Secure Digital Music Initiative
Shidler J. L. Com. & Tech	Shidler Journal of Law, Commerce & Technology
SSRN	Social Science Research Network
Stan. L. Rev.	Stanford Law Review
TCA	Turkish Copyright Act
TCP	Transmission Control Protocol
TDG 1997	German Tele Services Act 1997
TDG 2001	German Tele Services Act 2001
TRIPS	Trade-Related aspects of Intellectual Property Rights
TRO	Temporary Restraining Order
TUBISAD	Turkish Informatics Industry Association
TUIK	Turkish Statistical Institute
U. Chi. L. Rev.	University of Chicago Law Review
U. Cin. L. Rev.	University of Cincinnati Law Review
U. Dayton L. Rev.	University of Dayton Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.III.L.Rev	University of Illinois Law Review
U.S.App.D.C.	United States Court of Appeals Reports, District of Columbia

U.S.F.L.Rev.	University of San Francisco Law Review
UCLA L. Rev.	University of California at Los Angeles Law Review
UNESCO	United Nations Educational, Scientific and Cultural Organization
URAA	Uruguay Round Agreement Act
UrhG	Urheberrechtsgesetz, (German Copyright Act)
US Rep	United States Reports
USC	United States Copyright Act
USCA	United States Court of Appeal
USPQ	United States Patents Quarterly
Va. J. Int'l L	Virginia Journal of International Law
Vol.	Volume
Va.App.	Virginia Court of Appeals Reports
WCT	World Intellectual Property Organization Copyright Treaty
WIPO	World Intellectual Property Organisation
WLR	Weekly Law Reports
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty
WTO	World Trade Organization
WWW	World Wide Web
Yale Rev.Law & Soc.Act'n	Yale Review of Law and Social Action
ZPO	Zivilprozeßordnung (German Code on Civil Procedure) of 12 September 1950



# CHALLENGES FOR COPYRIGHT HOLDERS ON THE INTERNET:

## A Turkish Case Study

### CHAPTER 1 INTRODUCTION

With the rapid emergence of new forms of technology in the past 20 years combined with the greater mobility of goods and services, international intellectual property law has had difficulties. Intellectual property law has its power from the local law and intellectual property right is limited to the territory for which it has been granted whereas the Internet is a global instrument without borders.<sup>1</sup> The digital networked environment has created scope for ‘multi-territorial simultaneous communication of works’<sup>2</sup> with the consequent risk of globally widespread infringement of rights in such material. It is sure that the Internet has many advantages for its users on the other hand it has left IP rights-holders open to much greater risk of piracy from all over the world. In the time it takes to read this page, approximately 240.000 songs will have been downloaded illegally.<sup>3</sup> The problem is that even if plaintiffs have IP protection under the laws of multiple countries, there is still the dilemma of enforcing such rights effectively.<sup>4</sup>

Most of the States have tried to find solution to Internet content related problems by means of bringing in new laws or amending existing laws. Many governments believe that the Internet “is just another new device, from the governance perspective, no different to its predecessors”<sup>5</sup> such as the telegraph, the telephone, radio or satellite systems. However, it is obvious that none of the governments can directly or systematically control the Internet by itself.<sup>6</sup> The most important problem related to the Internet is extraterritoriality. Illegal and/or harmful content hosted or distributed from outside the jurisdiction may cause damage to the rights of authors. This situation makes territorial copyright against global Internet. My contention is that the infringement of copyright on the Internet is not a lack of substantive law problem. Rather, the issue is relevant to international private law and its enforcement.

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<sup>1</sup> Article 5 of Berne Convention.

<sup>2</sup> The American Law Institute (ALI), Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, Proposed Final Draft, March 30, 2007, p. 20.

<sup>3</sup> IFPI Digital Music Report 2009 indicated that 95% of music downloads are unauthorised, with no payment to authors and producers. <http://www.ifpi.org/content/library/DMR2009-real.pdf>, p.5.

<sup>4</sup> ALI 2007, p. 20.

<sup>5</sup> Gelbstein & Kurbalija, 2005, p. 16.

<sup>6</sup> Saxby, 2000, p.28.

The issue of the relationship between the universality of the Internet and the territoriality of intellectual property is what is at the heart of this thesis. Here, I attempt to examine whether current Turkish laws can be applied to the borderless online world or if we need new laws just for intellectual property infringements on the Internet.

In addition to examining current Turkish law, this thesis will also examine the international aspect of the problem such as jurisdiction and choice of law and the role of ISPs. As it will be discussed in the following chapters, none of the Governments' law making process can achieve the protection of IP rights on the Internet by itself. Therefore, international actors such as international organizations must deal with this issue very seriously. In order to protect the IP rights on the Internet, it is also discussed that an ISP should work as a gatekeeper. The role of the ISP will be discussed in this thesis as well.

Until 1980s, the areas of private international law and intellectual property have had little interaction. IP disputes related to international issues were just a few and therefore, judges did not have to consider the application of existing rules to litigation involving foreign issues. The most of the intellectual property disputes were totally domestic in nature, concerning parties within a single national territory, rights conferred by the law of that territory and infringements taking place there. However, the operations of global networks do not pay attention to national boundaries;<sup>7</sup> therefore, national boundaries lose their significance in the global world created by the Internet.

The improvement of digitalisation makes converting an analogue work into a digital work very simple and easy. After the digitisation of the copyrighted work, it is easy to transfer, share, adapt and modify. The nature of digital goods, mainly intangible, and the widespread use of networks and mechanisms to exchange information mean that these goods are not restricted by national boundaries. The copyright infringement problem relevant to the Internet is an international problem; therefore, different national solutions may not be enough to solve this problem. There are many causes of differences in national copyright laws such as different local requirements, cultural, theoretical, political and economic backgrounds.<sup>8</sup>

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<sup>7</sup> Lloyd, 2008, p. 457, Professor Lloyd stated that "Almost from its outset, the Internet has functioned on an international basis and the question of who controls it assumes considerable political and legal importance."

<sup>8</sup> Sterling, 2002, p. 272.

The use of the Internet is increasing day by day. The quality of the Internet connection is increasing whereas the price is decreasing. As a pragmatic result people use the Internet more often. There were 1.966.514.816 Internet users all over the world as of June, 2010 whereas there were 360.985.492 by the end of December, 2000. The growth rate from 2000 to 2010 is 444.8%.<sup>9</sup> There were 125.767.149 general Top Level Domains (gTLD) by December, 2010.<sup>10</sup> These numbers alone display the consequences of any problem somehow related to the Internet.

While courts still deal with the problems caused by P2P networks, an even greater problem lies on the horizon.<sup>11</sup> This problem is digital copyright infringements through websites such as allofmp3.com. A research which was prepared by Harris Interactive, a research company, indicates that, although P2P piracy is the biggest problem in the UK in 2009, the illegal distribution of illegal music through non-P2P channels is growing significantly. The research indicated the biggest increase in usage for overseas unlicensed MP3 pay sites which is 47% and newsgroups 42%.<sup>12</sup>

Turkish copyright holders have had this challenge since 1995 when Turkish people met the Internet. There are still thousands of websites which offer thousands of illegal Turkish mp3s and movies from Turkey and other countries. According to a survey of TUBISAD,<sup>13</sup> Turkish Informatics Industry Association, 85% of Internet users in Turkey use Internet to download mp3s, movies and watch TV series from websites and read newspapers.<sup>14</sup>

The amount of Internet users in Turkey, which is 35.000.000 by June 2010,<sup>15</sup> makes this problem important. There are more than 3000 websites from which you can illegally download mp3s, movies, and TV series.<sup>16</sup> I argue that as a developing country, Turkish governments' view on the protection of IP is different than the developed EU's view. Unlike many other countries, the Turkish government adopted a hands-off approach to the regulation

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<sup>9</sup> <http://www.internetworldstats.com/stats.htm> last visited on 19.12.2010.

<sup>10</sup> <http://www.domaintools.com/internet-statistics/> last visited on 19.12.2010.

<sup>11</sup> Pietsch, 2002, p. 278-79 (hypothesising that even if the U.S. closes P2P file sharing networks in this country, a greater problem may arise if a similar website began operating in another country.); Benko, 2007, p. 300.

<sup>12</sup> International Federation of the Phonographic Industry (IFPI) Report 2010.

<sup>13</sup> <http://www.tubisad.org.tr> .

<sup>14</sup> <http://turk.internet.com/haber/yazigoster.php3?yaziid=18436> .

<sup>15</sup> <http://www.domaintools.com/internet-statistics/> last visited on 19.12.2010. See figures at the last page of this chapter for the numbers related to the Internet.

<sup>16</sup> <http://www.milliyet.com.tr/2005/06/02/yasam/ayas.html>; See Appendix 1 which shows a sample of 75 Turkish illegal websites which offer free mp3 and TV series.

of the Internet until 2001. The research I have done show that the Turkish government deals only with the criminal issues such as defamation, child porn, to betray the secrets of government and etc. which occur on the Internet. However, the economic aspect of the copyright infringement on the Internet shows that more importance must be given to this issue. According to MU-YAP, the Turkish Phonographic Industry Society, the Turkish Government's tax revenue loss from this sector because of digital piracy was approximately 200 million Turkish Liras in 2009.<sup>17</sup>

The business model used by international digital download websites utilizes the territorial system of copyright law and relies on national boundaries. International digital download website is operated in a foreign country. They offer music to the Internet users residing in another country. The website operators think that it is too difficult for a copyright holder to stop a website from other country. Therefore, transnational digital download website business model poses a new challenge for copyright holders, threatens the survival of the Turkish music industry.

By offering music to the Internet users by the way of websites, the right of making available to the public is infringed by the website owner. This right is implemented into Turkish Copyright Act in 2001. However, nobody has been sued for the infringement of this right in Turkey yet. This situation shows us that, the copyright holder thinks that he cannot cope with this huge amount of illegal websites by himself even if this right was given to him. The right of making available to the public is one of the main substantive law issues which I will try to explain in Chapter 3.

Although criminal sanctions were implemented into Turkish Copyright Act (TCA)<sup>18</sup> by the end of June 2006, there are still about 3000 websites which are providing illegal Turkish mp3s, e-books, and movies. It is still very easy to find and download a copyrighted work from a website by using search engines.<sup>19</sup> With the improvement of Internet connections in Turkey, the use of these websites will be greater.

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<sup>17</sup> <http://www.mu-yap.org>.

<sup>18</sup> Act No. 5846, of December 5, 1951.

<sup>19</sup> If you google 'indir' which means 'download' and the name of the copyrighted work you want to download, you will find hundreds of websites from which you can easily download copyrighted works.

Most of these illegal websites' operators and host providers are not domiciled in Turkey. The main problem starts at this point. This situation will be discussed through three hypothetical case studies. The first and second scenarios are about the infringement of Turkish copyright holders' rights by website operators who are domiciled in Germany and UK whereas the third scenario is about the infringement of foreign copyright holders' rights by an individual who is domiciled in Turkey.

There are also share-sites, such as *rapidshare.com* and *hemenpaylas.com*. Every user can upload the copyrighted works to these share-sites and provide the link of uploaded work from forum sites or from their own websites. Internet users can download about 100mb per day freely from these share-sites. Apart from the free services, one may purchase Premium Accounts that offer additional convenience. Each download of the copyrighted work which was uploaded by the uploader makes points in uploader's account which he can use to download other works from that share-site. Technically, the user is not uploading the work on to his website's server but just providing links. As a result, most of the Internet users use these share-sites to upload and download copyrighted works.

These share-sites do not provide search options for their databases. To download from these share-sites, users must know the direct link of the work which they want to download. It is obvious that these share-sites just store the copyrighted works as a warehouse. Accordingly, these share-sites are different than P2P networks which provide search options to their users and make the infringement easier.

It is obvious that individual Internet users cause most of the Internet copyright infringements by uploading or downloading or sharing the copyrighted material. A website operator usually uploads the copyrighted works into the server of his website from one country, whereas the Internet users can download those copyrighted works from that website in any country which is connected to the Internet. When the website operators upload the copyrighted work without the consent of the copyright holder, they infringe the reproduction and communication to the public (making available to public) rights of the copyright holder whereas downloaders infringe only the reproduction right.

From the view of copyright holders, suing uploaders is more reasonable. A copyright holder can sue the website operator for the infringement of his reproduction and public



communication rights (making available to public) and stop the infringements. On the other hand, copyright holder cannot stop the infringement by just suing the downloaders. The other difficulty about suing downloaders is the number of downloaders from many different countries and the determination of identities of downloaders which means a huge workload and legal costs for the copyright holder. There is no provision about disclosure of user identities in Turkish law yet. My contribution is that a provision can be enacted which provides a fair balance between the various fundamental rights, including intellectual property rights and privacy.

Article 9 of the Berne Convention,<sup>20</sup> indicates the rights of copyright owners by reference to certain acts that can only be done by the author or authorised person. In most countries, infringement of copyright only occurs if one of the exclusive rights of the copyright owner has been infringed. Turkish copyright holders' reproduction and communication to the public rights are mostly infringed on the Internet by uploading copyrighted works to the websites without any consent. Therefore in Chapter 3 how the copyright infringement occurs on the Internet will be discussed in detail.

The primary subjects of this study are jurisdiction and choice of law issues for the infringement of copyrighted works on the Internet through websites. In chapter 4, Internet related jurisdiction problems in copyright cases will be discussed. The question is 'does the fact that a website is accessible from anywhere in the world mean that any court anywhere has jurisdiction over the infringement claim'? Firstly, the alternative rules and legislations will be studied, then the EU and current Turkish law on jurisdiction will be examined.

In chapter 5, choice of law addresses the question of which country's substantive law applies to the disputes. The Turkish Statute Regarding International Private Law and Procedure 1982 (MOHUK 1982) was amended in December 2007. The Law 1982 provided that infringement of intellectual property was a tort; therefore, the law of place where the infringement occurs must apply to the case. However with the new Law MOHUK 2007, *lex protectionis* is accepted as the applicable law to intellectual property infringements. However, it is my

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<sup>20</sup> Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979, has been signed by 164 countries by January 2011.

contribution that this amendment of applicable law as *lex loci protectionis* is not enough for the Internet related issues; therefore, there should be some exceptions to the ubiquitous infringements such as Internet issues.

The majority of authors argue that the *lex protectionis*, the law of the country where protection is sought, is the general rule of choice of law for copyright. However, in today's networked world, a copyrighted work which was uploaded to a website can be infringed from many countries at the same time. This makes the simultaneous application of various laws to the same complex of facts.<sup>21</sup> *Lex protectionis* and the other alternative rules will be discussed in Chapter 5.

The questions of this thesis are examined according to EU and Turkish jurisdictions. Since the main focus of this thesis is Turkish copyright holders, Turkish law will be examined in first place, and as Turkey is a candidate country for the EU, EU law will be examined where appropriate.

Outside Turkey, the biggest Turkish community is in Germany and the second biggest one is in the UK. Accordingly, the application of Private International law of EU will be examined under English and German laws.

As technology becomes more sophisticated and easy to use, copyright holders may need the aid of more efficient enforcement procedures to be able to stop infringement which occurs in foreign countries, including protecting themselves even in countries where the activity is not otherwise considered an infringement of rights. In case of the infringement of copyrighted works, copyright holders' primary aim is to stop infringing activities as soon as possible. An interim injunction is a court order to stay events pending a final decision. Therefore, interim injunctions are of greater importance to right holders than monetary compensation. The remedies will be discussed in Chapter 6.

There are many issues of copyright related to the Internet, yet the Turkish legislator has not seen fit to regulate it efficiently. An amendment to the protection of copyrighted works on the Internet was made in 2004 by the Turkish Copyright Act. The Act regulates the process of

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<sup>21</sup> Eechoud, 2003, p. 106.

‘notice and takedown’ procedure, unlike that of EU countries. It is obvious that the new Turkish legislation, namely Law No 5651, regarding liability of ISPs in Turkey is still causing difficulties.<sup>22</sup>

Typically, the economic life of a copyrighted work is much shorter than the period associated with the legal life of the copyright. Copyrighted works such as albums, movies or games lose their popularity and commercial value within a few years time.<sup>23</sup> Therefore, a very fast and simple law system is needed to prevent authors’ economic loss from copyright infringements. This can only happen with the cooperation of ISPs.

Section 4 of the E-Commerce Directive has just been implemented into Turkish law in order to provide immunity to ISPs from any liability for caching, transferring and storing, when the provider does not have actual knowledge that the activity is illegal or the provider, upon obtaining such knowledge or awareness, acts expeditiously to disable access to the information. However, it remains difficult to enforce this immunity in Turkey. This immunity is not acceptable since it means that ISPs do not have any responsibility for any infringement. The Turkish Government should therefore force ISPs to cooperate with copyright holders.

Copyright holders argue that ISPs must take a bit more of an active role, whereas ISPs usually consider themselves as passive intermediaries of internet communication. A new Act, the Digital Economy Act 2010 (DEA 2010), was passed by the UK Parliament, imposing obligations onto ISPs to monitor and report on IP addresses that copyright holders report as infringing copyright. The High Court found section 3 to 18 of this Act incompatible with EU legislation. Privacy of internet users and immunity of ISPs under the E-Commerce Directive will make enforcement of the Act rather difficult.

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<sup>22</sup> Law No 5651: Bill on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications came into force on 23 November, 2007.

<sup>23</sup> The sales of Turkish albums, movies and games show that a popular Turkish singer’s album lose its popularity approximately in 2-3 years time; <http://www.mu-yap.org>. After two years time, it is very difficult to find that album from music stores.

Chapter 7 proposes that disclosing the true identities behind IP addresses, which are caught by the software programs while downloading, to the collective management organisations has been a controversial issue between ISPs and collective management organisations.<sup>24</sup> The new Law of the UK, DEA 2010, will also be examined under Chapter 7.

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<sup>24</sup> Cf. C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*, [2008] E.C.D.R. 10.



## CHAPTER 2 INTERNET AND DIGITISATION

In order to conduct an adequate legal analysis of copyright infringements on the Internet, an understanding of technical aspects of the Internet and digitisation is necessary. The Internet, the process of exchange of information on the World Wide Web, digitisation and other deriving issues will therefore be examined in this Chapter.

### 2.1. The INTERNET

From the early 1960s, the United States' Department of Defence funded research into the interconnection of computers through the Advanced Research Projects Agency (ARPA). ARPA developed its own WAN, known as ARPANET, and explored connecting computers using satellite and radio transmission technology. The Internet created by the connection of different LANs and WANs to ARPANET became known as the Internet project.<sup>1</sup>

In 1995 the Federal Networking Council, defined the Internet as “the global information system that (I) is logically linked together by a globally unique address space based on Internet Protocol or its subsequent extensions/follow-ons; (II) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP)<sup>2</sup> suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (III) provides, uses or makes accessible, either publicly or privately, high level services, layered on the communications and related infrastructure”.<sup>3</sup>

The United States' government initially designed the Internet as an alternative form of communication, sophisticated enough to continue operation during a variety of situations, including war. The Internet was able to withstand such situations because it was "capable of rapidly transmitting communications without direct human involvement or control and with

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<sup>1</sup> Gillies & Cailliau, 2000, p. 5.

<sup>2</sup> Transmission Control Protocol/Internet Protocol, the suite of communications protocols used to connect hosts on the Internet. TCP/IP uses several protocols, the two main ones being TCP and IP. TCP/IP is built into the UNIX operating system and is used by the Internet, making it the de facto standard for transmitting data over networks. Even network operating systems that have their own protocols, such as Netware, also support TCP/IP.

<sup>3</sup> F.N.C. Resolution, “Definition of Internet”, adopted October 24, 1995. The word “internet” is contained in 12 current status of UK and none of these status define it. The Adoption and Children Act 2002, the Copyright, Designs and Patents Act 1988, the Gambling Act 2005, the Government of Wales Act 2006, the Horserace Betting and Olympic Lottery Act 2004, the Legal Deposit Libraries Act 2003, the London Olympic Games and Paralympic Games Act 2006, the Northern Ireland Act 1998, the Scotland Act 1998, the Terrorism Act 2006, the Tobacco Advertising and Promotion Act 2002 and the Violent Crime Reduction Act 2006; Smith, 2007, p. 1.

the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable."<sup>4</sup>

During the early 1980s the Internet was being used for science-led projects. By 1984, the National Science Foundation (NSF), the federal government's scientific and technical agency and A.R.P.A. NET's<sup>5</sup> administrator realised that to support continued network growth, and provide reliable service, the system's infrastructure needed upgrading. The NSF strengthened the "backbone" of the network that year by installing five "supercomputers" throughout the nation to handle the increased flow of United States' Internet traffic.<sup>6</sup>

The US government further loosened its control of the network in 1983 when it officially adopted TCP/IP as the standard protocol suite for the A.R.P.A. NET. The Internet's open architecture, along with the availability of TCP/IP, meant that almost any network could connect to the Internet using a telephone line and a modulator/ demodulator or "modem". Accordingly, no government alone is capable of regulating or controlling the Internet , because the Internet is clearly a multi-national phenomenon.<sup>7</sup>

The most characteristic identifier on the Internet is the IP number,<sup>8</sup> i.e. the 32 bit form consisting of four 8 bit blocks number. This number is permanently or temporarily allocated to every device on the Internet. IP addressing alone is however not enough to allow identification on the Internet.

Internet access has increased exponentially since its inception. From the early 1990s to the dawn of the new millennium, the number of countries with access to the Internet increased from just over ten to more than 200.

In today's world, the Internet is in fact a global medium in every sense of the term. The Internet has a worldwide broadcasting capability. It is a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers regardless of their geographic location.

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<sup>4</sup> *ACLU v. Reno*, 929 F. Supp. 824, 830.

<sup>5</sup> The Advanced Research Projects Agency (ARPA) changed its name to Defense Advanced Research Projects Agency (DARPA) in 1971, then back to ARPA in 1993, and back to DARPA in 1996.

<sup>6</sup> Fazio, 2004, p. 3.

<sup>7</sup> Saxby, 2000, p. 28.

<sup>8</sup> Smith, 2007, p. 2.

### **2.1.1. EXCHANGE OF INFORMATION ON THE WORLD WIDE WEB**

The process of a simple exchange of information on the World Wide Web is explained in the following paragraphs. It is essential to understand this process, in order to apply rules of private international law wherever relevant.

The first step is for a web page to be created by a content-provider. From his own computer, the content-provider transmits and places (uploads) the web page in a storage area (website) of a computer (server) that runs server software and is operated by the content-provider or a third party (host).<sup>9</sup> A user connects to the Internet (online) and, through client software (browser), requests and receives documents from remote servers. Once the request for the transmission of the nominated web page has been issued, the browser uses the IP address to identify the remote server on which the relevant web page is stored.<sup>10</sup> The browser makes a TCP connection to the server, and requests the web page. The server analyses the request. It breaks down the content into packets, each with a destination address attached to it. The server transmits the packet to a router which reads the packet's address and performs computations to determine the most appropriate transmission route over which to send the packet to its destination. The router does not access the data portion of the packet, merely the address. The packets are forwarded from router to router until they reach the user's server. The user's server responds to the request by delivering (downloading) a copy of the requested web page to the browser, which the user can access and view on his screen. The TCP connection is released. If the web page is a file, the user may save it onto a disk.<sup>11</sup>

The server's software communicates with the browser using protocols which instruct the browser how to format and display the page on the user's computer screen. The user can access any web page that is available, except those to which access is restricted by password or subscription. Geographically, the electronic communications described in the example occur in one or a combination of the location of (i) the content-provider, (ii) the host server,

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<sup>9</sup> Smith, 2007, p. 6.

<sup>10</sup> Gralla, 2004, p. 135.

<sup>11</sup> Gralla, 2004, p. 23.



(iii) the user's server and/or (iv) the user. In more complex situations there may be numerous content-providers, servers and users, spread throughout several locations.<sup>12</sup>

## **2.2. DIGITISATION**

For copyright infringement to occur in the offline world, there has to be many of copies of the original work and a distribution network to sell the works to end-users to affect the market for a copyrighted work before digitisation. In the offline world, a photocopier is needed to copy the original work. It takes time and money to copy a book, and the result is a lower quality than the printed-and-bound original even if done with a modern photocopier. If the infringer is caught and brought to trial, the money spent printing the infringing copies will be lost because those copies will be destroyed.

On the other hand, with digitisation, it became very easy to reproduce and widely distribute copyrighted works. A perfect copy of a digital work can be made and sent anywhere in the world in a minute with a computer and Internet access. Since it is practically impossible to control copying and distributing activities of individuals using such technologies, it is practically impossible for the producer of copyrighted works to prevent their works from being illegally distributed.

Digital technology introduced a number of challenges to copyright. The two most significant aspects are the digitisation of copyright works and the creation of purely digital products, such as software. A further challenge is the growth of networks such as the Internet, which allow the rapid global transmission of digital information. The Internet provides for the storage, identification and distribution of literary, artistic, audio and audio-visual material held in digital format.<sup>13</sup> Ease of replication of digital works is the most important issue for copyright holders. Once loaded to a website, digital work can be transmitted over and over again with no loss of quality. While this has obvious benefits for humankind, it also makes copyright infringement achievable on a scale previously unknown. The situation has become even more untenable for authors, since digitisation effectively introduced the following:<sup>14</sup>

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<sup>12</sup> Bigos, 2005, p. 591.

<sup>13</sup> Agarwala & Prasad, 2008, p. 254.

<sup>14</sup> Stokes, 2005, p. 9.

- 1. Ease of reproduction:** the reproduction of digital work takes just a few seconds, with a simple click.
- 2. Ease of transmission:** the incredible speed of transfer of copyrighted work between networked computers is one of the biggest potential concerns for rights holders.<sup>15</sup>
- 3. Plasticity of works:** with the digitisation of works, modifying, enhancing or adapting works has become very easy.
- 4. Similarity of works:** All works look alike once in code: this means it is easy to combine digital works into new products such as ‘multimedia’. This is also an aspect of convergence: the merger of media, technology and networks in areas such as the Internet, digital broadcasting, cable services and so on.<sup>16</sup>
- 5. Compactness of works:** with the new generation DVD-ROMs, at least 40 movies can be stored on one DVD-ROM.
- 6. Links:** search engines make finding copyrighted works on the Internet much easier. Unfortunately, search engines do not distinguish legal and illegal content while searching the words.
- 7. Ease of finding copyrighted works on the Internet:** Day by day, search engines are improving their facilities but they still display illegal works. Initially, only websites could be searched on the Internet, but it is now possible to search inside books, videos, images, scholarly papers, etc.

Creation of computer programs and electronic databases has been made possible by information technology. Additionally, information and communication technologies have allowed different forms of electronic reproduction and transfer online via digital networks. The development of inexpensive computing power and bandwidth has made it relatively effortless to transform many kinds of information from analogue to digital form, for easy transmission.

In an effort to adapt copyright law to the computer era , and especially to infringement of copyright in computer programs, the idea was born that infringement could occur through the creation of a transient copy in the Random Access Memory (RAM) of a computer.

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<sup>15</sup> In September 2004, 859 gigabytes of information sent halfway around the world in less than 17 minutes. This speed shows that it takes only a few seconds to download or upload a movie, John G. Malcom, Hearing before the Committee on Government Reform House of Representatives 108 Congress, Second Session, September 23, 2004, available via: <http://www.gpo.gov/congress/house>

<sup>16</sup> Stokes, 2005, p. 9.

The market of copyright-protected works was based on tangible products. With digital technology those products became intangible. It may therefore be difficult to apply traditional copyright law, which is based on tangible media, to the Internet because of digitisation, or in other words, dematerialisation of copyright-protected works.

### **2.2.1. CONVERSION OF ANALOGUE WORKS INTO DIGITAL WORKS**

One copy of a work that can be accessed online may be used as model for hundreds of further copies. The real threat of illegal websites, share-sites and forum-sites therefore seems to lie with the uploaders, who make music available on the Internet. Uploaders recently became the main target of international music and recording associations in their battle against online piracy in the U.S. and Europe.<sup>17</sup>

In order to store analogue copyrighted work on a computer, the work needs to be previously converted into an appropriate digital format, such as an e-book format or MP3 format. The question is whether this conversion is an adaptation, a reproduction, or both.

According to Turkish, English and German Copyright Acts,<sup>18</sup> adaptation of a work does not require the author's consent unless the adaptation is being published. It could be argued that this conversion just changes the technical way of storage and this is a result of an automated process performed by the software. It may be argued that the expression of an idea remains unaffected by the mere conversion of the work. It could therefore be contended that the conversion of analogue work is not an adaptation.

After the conversion, the original copy still remains; therefore, this is a reproduction of the work in another format.<sup>19</sup> Being stored on the hard drive of a computer, the digital copies fulfil the recording requirement. The conversion of the work is therefore subject to the author's exclusive right of reproduction.

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<sup>17</sup> The Recording Industry Association of America (RIAA) has filed thousands of subpoenas against individuals targeting only substantial copyright infringements since August 2003.

<sup>18</sup> Turkish Copyright Act (TCA), Article 6; German Copyright Act (UrhG), s. 23; Copyright Design and Patents Act (CDPA) s. 21.

<sup>19</sup> Lloyd, 2008, p. 399.

The reproduction of copyrighted work is limited to private use in Turkey and Germany, whereas it is described as ‘fair dealing’ in the UK. The issue is, clearly, to define the boundaries of private use.

In Turkish and German law, adaptation of copyrighted work and reproduction of work are mutually exclusive whereas in UK law, adaptation and reproduction may co-exist.<sup>20</sup> There is therefore no need, under UK law, to determine whether the conversion is an adaptation or a reproduction. It is obviously difficult to draw a line between adaptation and reproduction; “the same act may infringe both the adaptation right and the reproduction right”.<sup>21</sup>

In fact, conversion of the copyrighted work into digital format for private use is not a real concern for copyright holders, whereas making these digital works available to other users certainly is a major issue. Article 8 of the WIPO Copyright Treaty has introduced the uploading of the work on a server as an exclusive right of communication to the public in non-material form. Accordingly, uploading copyrighted work is an infringement of the exclusive right of the copyright holder.

### **2.3. POTENTIAL PROBLEMS**

The speed of Internet connection is increasingly very quickly, making downloading and uploading fast and easy. This gives an opportunity to infringers to general substantial profits from illegal activities without any serious commensurate legal sanctions.<sup>22</sup>

Legal cross-border issues arise out of the fact that uploaders of websites that contain unauthorised copyrighted works can be based in any jurisdiction. That jurisdiction may have within its legislation insuperable obstacles to the enforcement of copyright works and/or may even be may be happy to play host to them. One act can be an infringement in one jurisdiction and not in another jurisdiction. International treaties address the issue to some extent, yet there are still significant discrepancies between international copyright laws and even greater ones between enforcement procedures.

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<sup>20</sup> S. 21(5) of CDPA.

<sup>21</sup> Bentley & Sherman, 2008, p. 152; CDPA s. 21(6).

<sup>22</sup> Explanatory Memorandum of the Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, Brussels, 12.7.2005 COM(2005) 276 final

The Berne Convention was the first international effort to protect copyright. 164 countries were parties to this Convention by the end of December 2010. It may be considered the most important international Copyright Treaty, since the latest Treaties in this area, the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS Agreement) and the WIPO Copyright Treaty (WCT) are based on the Berne Convention in its version of 1971. The Berne Convention has gone further than any other intellectual property treaty to provide minimum standards of protection to copyright owners and authors, to address differences between the legal systems of member States.

The Berne Convention provides for a nationality principle, according to which member states must accord the same protection to the copyrighted works of nationals of other member states as to their own. However, even with these innovative principles and obligations, copyright protection ultimately depends on whether a nation's laws adequately protect against copyright infringement<sup>23</sup> such as in the *Allofmp3.com* case. *Allofmp3.com* sold music and complied with Russian copyright law by paying a small amount of royalty to the Russian Multimedia and Internet Society.<sup>24</sup> According to Russian copyright law, the collective societies can grant licences without the permission of the copyright holder. Even though Russia is a party to the Berne Convention, it took a long time for copyright holders from other countries to stop *Allofmp3.com*, because it was legal in Russia.

This is a useful illustration of how even the parties to the Berne Convention may have different rules and different levels of protection because of their distinct local requirements, as well as different cultural, theoretical, political and economic backgrounds.<sup>25</sup>

As explained, national intellectual property protection is by definition territorial, whereas the Internet is by definition global. Intellectual property regulates only the enjoyment of rights within the borders of the country concerned.<sup>26</sup> What constitutes an act 'within', or sufficiently connected with, a country is merely a matter of definition. A country can always, by legislation, extend the range of connecting factors that attract the protection of its laws. The

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<sup>23</sup> Caviedes, 1998, p. 171.

<sup>24</sup> Articles 44 and 45 of the Law of the Russian Federation No. 5351-1 'on Copyright and Related Rights', 9.7.1993

<sup>25</sup> Sterling, 2002, p. 272.

<sup>26</sup> Fentiman, 2005, p. 137.

borderless dimension of the Internet therefore poses many problems to the protection of intellectual property.

A further difficulty, caused by the anonymous nature of the Internet, is that of the identification of infringers.<sup>27</sup> It is technologically possible to identify infringers, but the process of doing so is difficult and certainly not cost-effective. ISPs must take more responsibility to prevent infringement.<sup>28</sup> Making new laws to provide more obligations to ISPs should strike a fair balance between Human Rights, privacy and intellectual property. As will be discussed in chapter 7, finding the details of infringers is the cause of many conflicts between copyright holders and ISPs

The standardization of software programmes and operating platforms means that the same file is accessible to almost anyone with a computer; which shows the ease of access to digital files. Copyright holders therefore try to protect their works using technological solutions, but even if digital watermarking techniques may in the future identify and secure files, unprotected sources of the same files can still be digitised, and then distributed on the Internet. Circumvention counter-technology is capable of annihilating the protection afforded by digital rights management techniques.

Without technological controls in place, infringements can only be prevented by a series of threats, most of which would be perceived as empty, against the primary infringers of copyright. Three types of technological controls may be usefully envisaged:

- “(a) Over access to files, using digital rights management techniques. These are already being applied by on-line music stores, among others;
- (b) At Internet service provider level. Since these providers operate the gateway to the bulk of Internet access, a series of technological controls (required by law) would in principle appear to be an effective way of policing infringement;
- (c) At hardware level. There could, for instance, be a requirement that all MP3-type players play only material protected by standardised rights management technology.”<sup>29</sup>

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<sup>27</sup> C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*, [2008] E.C.D.R. 10.

<sup>28</sup> Such as provided in the Digital Economy Act 2010.

<sup>29</sup> Nasir, 2005, p. 106.

Internet service providers are already required to take down infringing material from their own servers (certainly in the United States and effectively in Europe) upon being given appropriate notification. By a process of simply joining the dots, they could also be compelled by law to immediately cancel the subscriptions of offending users. They may indeed already be entitled to do so under contracts with subscribers. Yet such an entitlement is rarely enforced. By making it explicit and mandatory, its impact, by way of deterrence, would be considerably enhanced.

Of course, copyright owners would probably still have to notify the Internet service providers of infringing usernames. Yet they would not be forced to follow up by pursuing the end-users through the courts, a course of action that is at once unpopular and disproportionately costly.<sup>30</sup>

Throughout the 1980s, developed countries paid more attention to the lack of improvement of the substantive standards for intellectual property in the international field. There are still fundamental gaps in substantive copyright law and enforcement procedures in developing countries, often made worse by official un-interest and the courts' inability or unwillingness to understand or assist.<sup>31</sup>

The matter of cross-border enforcement is of high interest to copyright holders. If a judgment is valid and enforceable in one of the countries, it is, in most cases involving the Internet, not completely satisfactory for copyright holders, who are not even entitled to obtain another judgment for the same case in any of the other Member States. Copyright holders can sue the infringer in a few places, such as where the infringer is domiciled and in the country where the infringement took place. However, according to Article 27 of the Brussels I, and *lis pendens* regulations the first court to confirm its jurisdiction will be officially seized and the other courts will be forced to decline further proceedings in that case.<sup>32</sup>

The improvement of digitisation and internet technology is clearly generating new difficulties that the law simply cannot keep up with. The law is currently racing to catch up with the rapidly exploding world of the internet. These difficulties will be examined in the following chapters.

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<sup>30</sup> Nasir, 2005, p. 107.

<sup>31</sup> Cornish, Llewelyn & Aplin, 2010, p. 52.

<sup>32</sup> Article 27 of the Brussels Regulation.

## CHAPTER 3      INFRINGEMENT OF COPYRIGHT ON THE INTERNET

### 3.1.            INTRODUCTION

There are a few ways in which reproductions can be carried out during the online distribution process. Reproduction occurs while converting an analogue work to digital. It also occurs while uploading the digital work to a server of a hosting service provider and lastly, reproduction may occur while downloading that work from the uploaded server to the downloader's computer. If these works are original copyrighted works and these reproductions occur without the consent of the copyright holder, then it is obvious that these acts are copyright infringements.<sup>1</sup> In the following scenarios, it is assumed that all acts referred to have been carried out without the consent of the copyright holder.

International copyright protection was traditionally based on the application of national copyright laws with strictly territorial effects and on the application of choice of law rules to determine which country's copyright laws would apply. Immediate and concurrent global access to copyrighted works over digital networks deeply challenges territorial notions in copyright and complicates traditional choice of law doctrine because it is often difficult to decide where specific acts have occurred.<sup>2</sup> Copyright laws, like laws concerning jurisdiction, rely upon geographical boundaries among nation-states and whether they can be maintained in the new online context is questionable. The development of electronic cyberspace copyright on cyberspace territory will contribute to the enforcement of copyright protection in the electronic era.<sup>3</sup>

Before starting to examine the infringements of copyright on the Internet, it is essential to clarify which works are protected under copyright, what the requirements are and what kind of protection authors have. In this thesis, I will only examine in detail the infringements of exploitation rights of the copyright holder as they occur on the Internet.

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<sup>1</sup> Koelman, 2000, p. 15; Lloyd, 2008, p. 355.

<sup>2</sup> Reindl, 1998, p. 801.

<sup>3</sup> Zekos, 2007, p. 21.



### 3.2. ELEMENTS OF COPYRIGHT

In order to benefit from copyright protection, the works have to meet the dual requirements of Article 1 of the Turkish Copyright Act (TCA). The first requirement is that of the individuality of the authorship of the work and the second requirement is that the work should fall under one of the four numbered categories of works that are listed in Article 1, namely:

- (1) Scientific and literary works (Art. 2),
- (2) Musical works (Art. 3),
- (3) Works of fine art (Art. 4),
- (4) Films (Art. 5).

Under these Articles, examples of work types are listed, but they do not constitute an exhaustive list. In addition, adaptations are protected as an individual category under Article 6. Pursuant to Article 2, computer programs are protected as literary works. The written or other fixation of content, subject matter of scientific or literary value is of no relevance.<sup>4</sup> After the amendment to the Act by the Amendment Act No 4110 of June 7, 1995, computer programs are also included in the definition of “works of literature”, whereby Art. 1(1) of the Council Directive<sup>5</sup> on computer programs was taken into account. According to this Directive “Member States should accord protection to computer programs under copyright law as literary works...”.

After the 1995 Amendments, the Act was amended by Law No. 4630 of 21 February 2001 in order to implement the provisions of TRIPS. According to amended Article 13 of the TCA<sup>6</sup>: “The authors of musical and cinematographic works and the producers thereof shall record and register their works without the purpose of establishing the copyright in order to prevent the infringement of their economical and moral rights. Likewise for the same purpose the authorized beneficiaries in respect of the works and the economical rights thereof may be registered/recorded also for the other groups of works upon the request of the author. All the procedures and the guidelines for the registration and the recordable of such rights are to be

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<sup>4</sup> Erel, 2010, p. 39.

<sup>5</sup> 91/250/EEC of 14 May 1991.

<sup>6</sup> Turkish Copyright Act (TCA), Act No. 5846

specified and determined in the implementing Regulation to be issued by the Ministry of Culture”<sup>7</sup>.

With the amendment of Article 13 of the TCA, a registration system of copyrighted works was introduced into Turkish law. Until 2001, there was no registration system by the Ministry of Culture, but Turkish authors were using public notary attestations as proof of authorship. The registration system, which is not mandatory, will be an easy way for the Turkish courts to determine the author of the work.

The latest amendment to Article 13 was carried out in 2004. According to this new amendment, the Ministry of Culture will not be responsible for the declaration of the person who registered himself as the author of the work pursuant to the registration of the copyrighted work. Accordingly, the Ministry of Culture has no obligation to examine the individuals’ declarations. In case of false registration, the person who registered himself as author will simply be liable as an infringer of the copyrighted work.<sup>8</sup>

Copyrighted works are protected during the lifetime of the author and continues for a period of 70 years after the author’s death. During this period, civil and criminal penalties may be imposed on whoever infringes the following exclusive rights of author.

### **3.2.1. RIGHTS OF AUTHOR**

The Copyright Act divides authors’ rights into moral rights and exploitation rights.

#### **3.2.1.1. MORAL RIGHTS OF AUTHOR**

“The term “moral rights” is a translation of the French term “droit moral,” and refers not to “morals” as advocated by religious or other beliefs, but rather to the ability of authors to control the eventual fate of their works.”<sup>9</sup> Moral rights are intangible rights of the author and protect the personal and reputational value of a work, rather than its purely financial value.

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<sup>7</sup> Article 13(2) of TCA.

<sup>8</sup> Amendment Act No. 5101/10, of March 3, 2004.

<sup>9</sup> Rosenblatt, 1998, p.1.

The moral rights of the author are not transferable and these rights may not be restricted by legal transactions. Moral rights are protected under Article 14 to 17 and are comprised of:

Rights of Publication (Article 14)

Recognition of Authorship (Article 15)

Distortion of the Work (Article 16)

Article 14 of the Copyright Act regulates the publication right of authors'. The author has the right to decide whether, when and how his work may be published.<sup>10</sup> For as long as neither the work nor its essence nor even a description of the work has been published with his consent, only the author has the exclusive right to publicly communicate or make statements about the content of his work.<sup>11</sup>

If the appearance of the work in public damages the author's honor or standing, the author can prohibit such public appearance even if he has transferred the rights to somebody else.<sup>12</sup> The damage is assessed according to objective criteria. If the author, according to an objective assessment, has inappropriately prevented publication, the opposing party is entitled to claim compensation for damages. On the other hand, the tangible rights holder can sue the infringer in his own name if the author does not want to use his rights under Article 14 to 16 against the infringer.<sup>13</sup> In addition to this, Article 19(5) provides that if neither the author nor the tangible rights holder exercises their rights against the infringer, the Ministry of Culture can also intervene if the work is relevant to national culture.

### **Right of Authorship**

According to Article 15(1) the author shall have a right to recognition of his authorship of the work. He may decide whether the work is published under his name, pseudonym or without a name. In addition to this, Article 15(2) provides for the right of the author to decide how he is named on the publication or on copies of fine art. The author also has the right to be named in situations where the work may be freely used.<sup>14</sup>

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<sup>10</sup> Article 14(1) of TCA.

<sup>11</sup> Article 14(2) of TCA.

<sup>12</sup> Article 14(3) of TCA, Amended by Act No 4630/8 of 21 February 2001.

<sup>13</sup> Article 19(3) of TCA.

<sup>14</sup> Articles 33, 34(4), 35(2), 36(3), and 40(4) of TCA.

## **Right to Prohibit Distortion of the Work**

The author has the right to prohibit any distortion to his work without his consent.<sup>15</sup> There is an exception for the publisher, editor or holder of the tangible rights if it is necessary to change the work.<sup>16</sup>

## **Additional Personality Rights**

Additional personality rights are provided for under Article 17:

**Right of access:** the owner of the work shall allow the author or the holder of the named tangible rights to use the work to the extent necessary to exercise the reproduction and adaptation right.<sup>17</sup>

**Prohibition of destruction:** the owner of the original work may not spoil or destroy the work.<sup>18</sup>

**Exhibition right:** the author of work which is only one and original can require that the work is surrendered to him in order to use it in works or exhibitions on condition that the work is carefully kept and handled and returned after use.<sup>19</sup>

**Right of rescission owing to non-use:** if the licensee of a user right does not use his right on time according to contract terms, the author may withdraw from the contract.<sup>20</sup>

### **3.2.1.2. EXPLOITATION RIGHTS**

The author shall have the exclusive right to exploit his work in material form; his rights are:

1. Right of Reproduction;<sup>21</sup>
2. Right of Distribution;<sup>22</sup>
3. Right of Adaptation;<sup>23</sup>

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<sup>15</sup> Article 16(1) of TCA.

<sup>16</sup> Article 16(2) of TCA.

<sup>17</sup> Article 17(1) of TCA, Amended by Act No 4630/8 of 21 February 2001.

<sup>18</sup> Article 17(2) of TCA, Amended by Act No 4630/8 of 21 February 2001.

<sup>19</sup> This right was added to Article 17 in 1995 by Act No 4110/7 of 7 June 1995.

<sup>20</sup> Article 58(1) of TCA; Tekinalp, 2009, p.145.

<sup>21</sup> Article 22 of TCA.

<sup>22</sup> Article 23 of TCA.

<sup>23</sup> Article 21 of TCA.

4. Right of Communication to the Public;<sup>24</sup>

5. Right of Broadcasting.<sup>25</sup>

In its definition of exploitation rights, the TCA distinguishes between published and unpublished works: exploitation of unpublished works in whichever form and manner is reserved exclusively to the author. The author has the legal position of a property owner.<sup>26</sup>

The infringement of exploitation rights will be discussed in detail in the section relating to the infringement of copyright on the Internet.

### **3.3. TRANSNATIONAL INFRINGEMENT: THREE SCENARIOS**

In this chapter, three scenarios of internet infringement of copyrighted works will be examined. In the first and second scenarios, infringers who are domiciled in the U.K. and Germany infringe Turkish copyright holders' works. In these scenarios, infringers are owners and operators of the websites. They are operating their websites from servers located in different countries. In the third scenario, a Turkish website owner operates a website that infringes English and German authors' rights.

Different countries have different copyright laws because of the different levels of technological capabilities, their economic and cultural priorities, their wealth, and their political systems. What is protected under the UK law may not be protected under Turkish law. What is legal within Turkey may be illegal in China.

If the case contains foreign elements, then there are three 'layers' to be determined: jurisdiction of the court, applicable law, and enforcement of judgments.<sup>27</sup> Which law applies and how the case should be handled are questions of private international law. Additional questions such as the constitutive elements of the infringement, authorship of the copyrighted work, "moral rights", "fair use or fair dealing", duration of copyright, exhaustion of rights, circumvention of encryption technologies and the liability of the Internet service providers are a matter for the law governing the dispute (*lex causae*).<sup>28</sup> With regard to the strong territorial

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<sup>24</sup> Article 24 of TCA.

<sup>25</sup> Article 25 of TCA.

<sup>26</sup> Article 20(1) of TCA.

<sup>27</sup> Sterling, 2002, p. 282.

<sup>28</sup> Fawcett & Torremans, 1998, p. 124; Suluk & Orhan, 2010, p. 27; Yu, 2001, p. 3.

limits of copyright laws, the localization of an act of copyright infringement within a particular jurisdiction for the unauthorized transmission of online copyrighted materials in a spatial dimension like cyberspace is a complex and arduous exercise.

In most of the copyright infringements on the Internet, the potential copyright infringers might be the content providers as uploaders for websites and the end-users as downloaders.

The following copyright infringement scenarios include the right of reproduction by uploading and downloading copyrighted works, the right of communication by transmission by the ISPs from the website to the end user and the right of making available by uploading digitally formatted copyrighted works on a website.

### **3.3.1. The SCENARIOS<sup>29</sup>**

#### **I. Turkish copyright holder's copyrighted works are infringed by the following websites:**

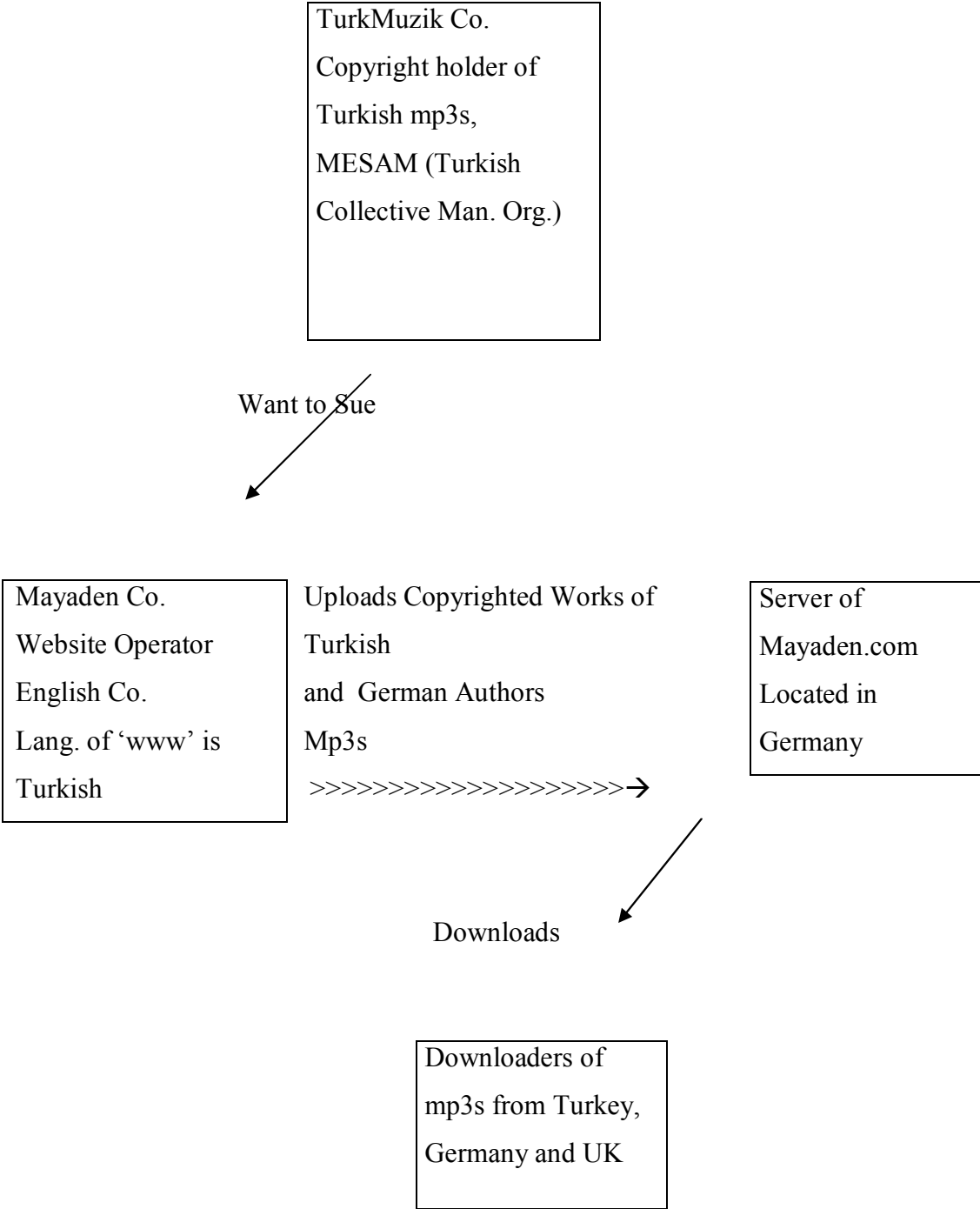
Scenario 1: Mayaden Co. is an English Company and operates a website, Mayaden.com, which is accessible to anyone with Internet access anywhere in the world. Mayaden Co uploads mp3 songs from Turkish authors to its website. The website's language is Turkish and Mayaden Co. generates revenue by advertising Turkish companies. Website users must first click on the advertisement in order to start downloading mp3 files. Most of the mp3 songs offered by the website are Turkish authors' works. Mayaden Co. makes its website available to a world-wide public from a server located in Germany. Downloaders of these mp3 songs are mostly from Turkey and Germany. TurkMuzik Co. is the copyright holder of many of the copyrighted works which are available from Mayaden.com. TurkMuzik Co. wants to sue Mayaden Co. for infringement of its copyrighted works. In addition to this, MESAM, the Turkish Collective Management Organisation, wants to sue Mayaden Co for its members' copyrighted works as well.

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<sup>29</sup> All the names in the following scenarios are fictional.

**SCENARIO 1**

Copyright Holders



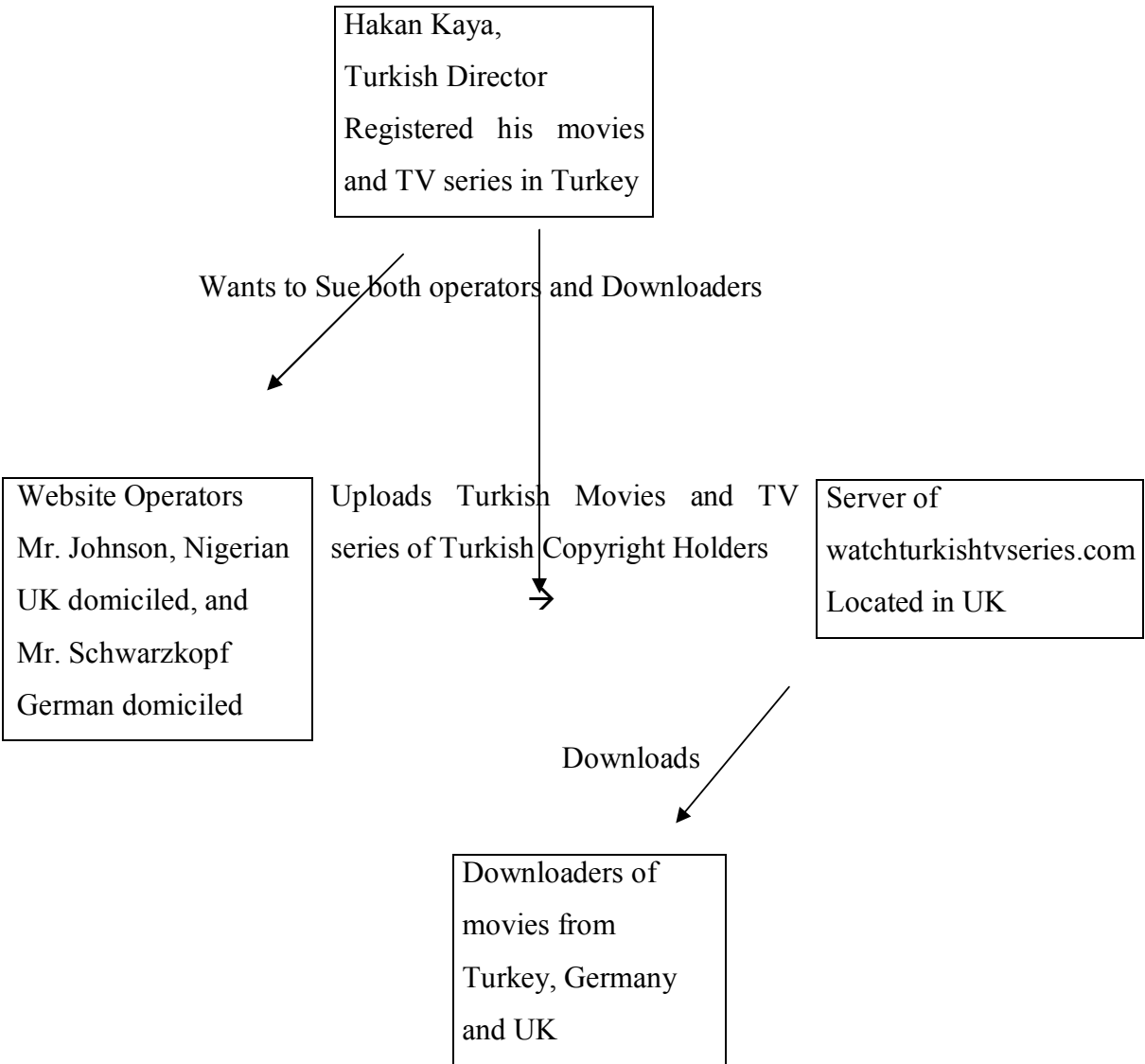
**Scenario 2:** Mr. Johnson, a Nigerian individual who lives in the UK, and Mr. Schwarzkopf, a German resident, operate watchturkishtvseries.com together, which is available to all Internet users to watch and download Turkish movies, TV series and music videos. Most of the videos downloaded from this website are video captures of copyrighted material originally shown on

Turkish TV channels. While these videos are displayed, advertisements are also shown on the page. The server of this website is located in UK.

Hakan Kaya is a director of a few movies and TV series which are uploaded to watchturkishtvseries.com. Hakan Kaya has registered his movies in Turkey in order to protect them. He is planning to sue the operators of the website and the Internet users who download his copyrighted works from this website.

**SCENARIO 2**

Copyright Holder



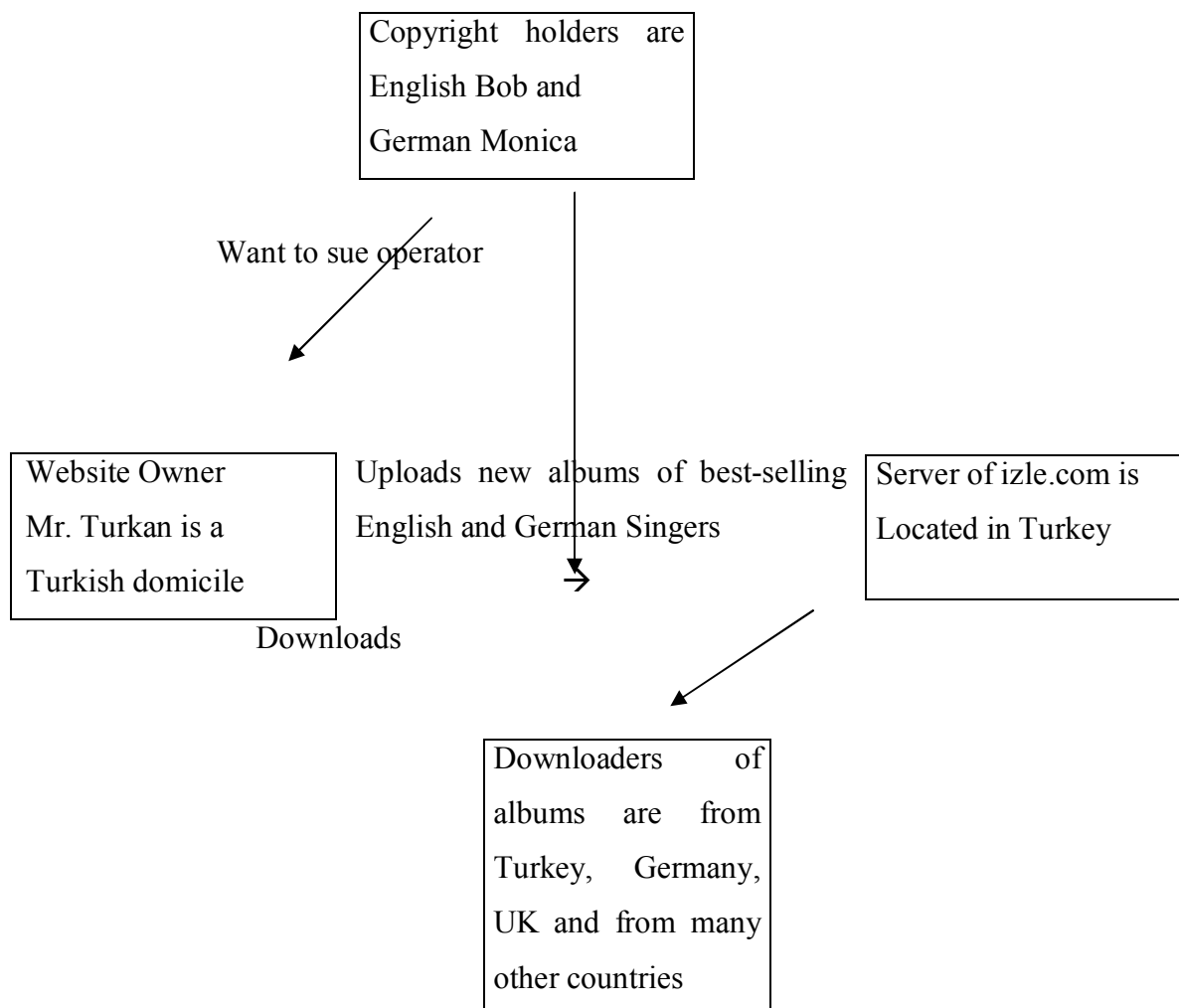


## II. English and German Authors' copyrighted works infringed by a Turkish website operator

**Scenario 3:** Mr. Turkan, a Turkish individual who lives in Turkey, operates izle.com, a website available to all Internet users to download European artists' copyrighted works. There are only pictures of albums on the website and users can download the albums by clicking on the pictures. New albums of best-selling English Bob and German Monica are uploaded to the website by the operator. Hundreds of thousands of Internet users have downloaded the albums. These two singers want to stop the infringements immediately and then sue the operator for their losses.

On the other hand, there is a legal notice on the website, which indicates that 'notice and takedown' procedure is applied for the videos on the website.

### SCENARIO 3



### 3.4. INFRINGEMENT of COPYRIGHT ON THE INTERNET

Six distinctive characteristics of digital technology may generate the need for adjustments to be made to existing intellectual property protection systems.<sup>30</sup> The most significant challenges are the ‘digitisation’ of copyright works and the creation of purely digital products such as software as well as the growth of networks such as the Internet, which allows storage and rapid global transmission of digital information.<sup>31</sup> A further challenge regards legislation. There has been no change to provisions of Turkish Copyright Act following digitisation; therefore these rights are protected by existing copyright law. However, Article 22 of TCA provides the exclusive right to authorise or prohibit direct or indirect reproduction of the work in any manner and form, in whole or in part for authors of their works:

**Ease of Replication:** (Infringement of Reproduction Right)

**Ease of transmission and multiple use:** (Infringement of Distribution Rights)

**Plasticity of works:** (Infringement of Adaptation Rights)

**Equivalence of works:** “Any work that converted into digital form can be used together. This means it is easy to combine digital works into new products such as ‘multimedia’.”<sup>32</sup>

**Compactness of works**

**Nonlinearity:** “Internet sites can be easily linked. Service engines do not distinguish between legal and illegal content. This is the main problem for piracy.”<sup>33</sup>

As explained, the process of ‘digitisation’ allows for copyrighted works to be converted into a digital format, which can then be transmitted across the Internet, and then re-distributed, copied and stored.<sup>34</sup> It started with the transmission of text, sound and images and computer programs over the Internet and with the improvement of Internet technology and the

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<sup>30</sup> Samuelson, Pamela, Digital Media and the Law, <http://www.ifla.org/documents/infopol/copyright/samp4.txt>

<sup>31</sup> Stokes, 2006, p.9.

<sup>32</sup> Stokes, 2006, p.9.

<sup>33</sup> Stokes, 2006, p.9.

<sup>34</sup> Digitisation: The process of converting a non-digital object into a digital object.

Digital Imaging: The process where by non-electronic materials (books, manuscripts, newspapers, pictures, photographs, sounds, performances...) are scanned or otherwise automatically processed to generate digital files

Digital Object: A digital object is a description of an object that can be represented by a computer. This may include databases, spreadsheets, word processor documents, web pages, video, audio, images, maps, 2 and 3-d models etc

increasing speed of broadband usage, it is now used for transmission of audiovisual works such as films and computer games.<sup>35</sup>

An individual Internet user can perpetrate Internet copyright infringements by posting or downloading copyrighted material.<sup>36</sup> The Recording Industry Association of America (RIAA) and the British Phonographic Industry (BPI) have sued thousands of individual users for uploading and downloading copyrighted works, whereas Turkish professional defence bodies are yet to sue any infringer. The aim of suing individuals is to deter users. Although there are millions of downloaders from all over the world, RIAA and BPI only sue infringers who are domiciled in the US or the UK. This evidences the great difficulty of putting a stop to copyright infringements by suing individuals.

Infringements are assessed according to the facts and merits of each case. Bently and Sherman make a number of general comments about the way the importance of the infringement is likely to be judged<sup>37</sup>:

The crucial question is whether the part taken is important and thus, according to the courts, substantial.<sup>38</sup> The courts may rely on expert evidence to determine the case.

The courts will assess the substantial character of the part from the point of view of the persons to whom the work is addressed.<sup>39</sup>

The relative significance of the part taken is judged in relation to its importance to the copyrighted work and not to the defendant's work.<sup>40</sup> In *Warwick Films v. Eisnger*,<sup>41</sup> the court said that the importance of the part taken by the defendant is a poor guide as to whether or not it is a substantial part of the work from which it was taken' particularly where the recordings

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<sup>35</sup> WIPO, 2002, p.25; see also presentation of A. Khana, Chairman, Reliance Entertainment, Ltd., and presentation of T. Dow, Vice President and Counsel, Technology and New Media, Motion Picture Association of America(MPAA), Second WIPO International Conference on Electronic Commerce and Intellectual Property at <http://ecommerce.wipo.int/meetings/2001/conference/program/index.html> .

<sup>36</sup> Lemley, Menell & Merges, 2010, p. 327.

<sup>37</sup> Bently & Sherman, 2008, p. 186-195.

<sup>38</sup> *Designers Guild v. Russell Williams* [2000] FSR 121, 132 (CA)

<sup>39</sup> *Billhofer Maschinenfabrik v. Dixon* [1990] FSR 105; *Francis Day & Hunter v. Bron* [1963] Ch 587, 623.

<sup>40</sup> *Designers Guild v. Russell Williams* [2000] FSR 121, 131.

<sup>41</sup> [1969] 1 Ch 508.

were in different styles. Accordingly, whether it is a substantial part of the defendant's work is irrelevant.

The quality of what is taken must be considered by reference to the interest protected by the copyright. In *Chappell v. D.C. Thompson*,<sup>42</sup> the court considered that the importance of four lines taken from a twenty-line poem depended on its literary merit. In *Ladbroke (Football) v. William Hill (Football)*,<sup>43</sup> the defendants had infringed the plaintiffs' copyright in a compilation by reproducing a substantial part of it, even though large parts had not been copied. The test of infringement depended on the worth of the part taken, not the quantity.

Where a large part of the work is copied, it should be enough to constitute infringement. Therefore, in such cases, the quality of the taken part is not essential. In other cases, where a small part was taken from the plaintiff's copyrighted work, the quality of that small part will be fundamental in determining its substantial nature.

One of the most important questions about copyright infringement on the Internet is whether regular taking insubstantial and small parts of the copyrighted work over a period of time amounts to taking of a substantial part of the work. For instance, using one of the file sharing programmes, one can download 5% of a movie one day and another 5% the next day, amounting to a full download in 20 days. Whereas downloading 5% of a movie may not be an infringement, downloading 50% of that movie is an infringement. In *Football League Ltd v. Littlewoods Pools Ltd*<sup>44</sup> the defendant copied a single chronological list of all the Football League fixtures in a season, every two weeks. The defendant was held by Upjohn J. to have infringed the plaintiff's copyright in the list. According to Upjohn J, the repeated systematic copying from the same work so that the entire list was in the end copied satisfied the requirement of a substantial part. In *Newspaper Licensing Agency v. Marks & Spencer*,<sup>45</sup> Peter Gibson LJ took the same position. But this throws no light on situations where there is repeated copying from different works.

A particular item available on the Internet may be accessed (I) at a time decided by the person accessing the site, or (II) at a time chosen by some person other than the "accessor". The first

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<sup>42</sup> [1928-35] MacG CC 467, Bently & Sherman, 2008, p. 188.

<sup>43</sup> [1964] 1 W.L.R. 273, p. 276.

<sup>44</sup> [1959] Ch. 637

<sup>45</sup> [2000] EMLR 704 p. 717.

type of access may be called “on-demand” or “interactive” transmission, the second type may be called “non-interactive” or “passive” transmissions.<sup>46</sup> The contents of the transmission will determine the subject matter such as author’s works, films, sound recordings, etc. and the rights involved.

### **3.4.1. THE RIGHT OF REPRODUCTION ON THE INTERNET**

“The Reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of work in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”<sup>47</sup>

The WIPO Copyright Treaty does not include a separate provision on the right of reproduction. It however refers to Article 9 of the Berne Convention. The WIPO Memorandum for the Second Session of the Committee of Experts decided that digitisation, the transfer of a work embodied in an analog medium to a digital one always constitutes an act of reproduction. In addition to this, it is proposed that Contracting Parties clarify their agreement as to whether the right of reproduction in the Berne Convention includes direct and indirect reproduction, whether permanent or temporary, in any manner or form.<sup>48</sup>

Any transmission of a work on the Internet needs uploading of that work into the random access memory (RAM) of a computer or other digital device and multiple copies are made in the memory of network computers at several points. Therefore, where temporary copies are made in a computer’ RAM, a further question of the law applicable to the infringed right arises, either at national or international level. Are such copies infringements or not?

The Committee of Experts provided two options for dealing with the scope of the reproduction right, with respect to digital storage. The first option was to confirm that storage of a work in a computer system was to be considered an act of reproduction within the meaning of Article 9 Berne Convention. The second option was to consider ‘that any storage

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<sup>46</sup> Ficsor, 2002, p. 223.

<sup>47</sup> Annex to Article 1(4) of the WIPO Copyright Treaty.

<sup>48</sup> Memorandum for the Second Session, Copyright 1992, notes on Article 7.03.

of a work by any method now known or later developed, in an artificial memory from which memory the work cannot be directly perceived by seeing or hearing it, with the aid of a machine or other device can be so perceived and, if so desired, further reproduced or communicated, is to be considered reproduction within the sense of Article 9 of the Berne Convention.<sup>49</sup>

Article 9 of the Berne Convention provides that the exclusive right of authorising the reproduction of copyrighted work, ‘in any manner or form’ belongs to the author of the work. Accordingly, the Memorandum emphasized that the storage in, and recovery from, computer systems had already been considered to be acts of reproduction within the meaning of Article 9(1) Berne Convention at earlier WIPO meetings.<sup>50</sup>

Accordingly, when the website operators in our scenarios upload the copyrighted works to the server of the websites, they reproduce the copyrighted works. The digital form of the copyrighted work indisputably belongs to the author of the work. Therefore, website operators infringe the reproduction right of authors’. Technically, website operators may well upload a copyrighted work just once but anybody can download that copyrighted work as many times as they wish, giving rise to a substantial economic loss whereas, in the offline world, one copy of a copyrighted work does not usually generate such a big loss. This is one of the differences between online and offline worlds.

When the phrase ‘in any manner or form’ is used in the Acts, it covers the storage of works in any electronic medium, such as uploading and downloading of a work to or from the memory of a computer. The scope of the words “in any manner or form” could not be interpreted more broadly. Additionally, the term ‘indirect’ was clarified by the Basic Proposal to include the copying of a work from a broadcast.

The Basic Proposal for the Substantive Provisions of the WIPO Copyright Treaty on Certain Questions permitted certain limitations to the right of reproduction with particular reference to the digital environment in Article 7(2) states that:<sup>51</sup>

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<sup>49</sup> Memorandum for the Second Session, Copyright 1992, pp66, 68/para 75, Reinbothe & Lewinski, 2002, p. 37.

<sup>50</sup> Memorandum for the Second Session, Copyright 1992, p 68/para 72-74, Reinbothe & Lewinski, 2002, p. 38.

<sup>51</sup> Reinbothe & Lewinski, 2002, p. 39.

“Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.”<sup>52</sup>

The Council supports the clarification that “reproduction” includes storage in computer, and other forms of storage from which the work can be retrieved. This should be regarded as clarification, rather than extension, of existing obligations.

At the Fifth Session, it was emphasized that there is a need for interpreting reproduction rights broadly and to cover temporary reproduction.<sup>53</sup> However, at the Seventh Session, the EU and its Member States suggested that:

“the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made.”<sup>54</sup>

Therefore, the following activities that are common in the daily use of the Internet may be free from the claim of unlawful reproduction of the copyrighted work: browsing movies, pictures or literature or listening to music on the Internet; using a computer program that is embedded in and delivered together with the computer purchased; and transmitting information through the Internet to receivers by network service providers.

Article 2 of the InfoSoc Directive contains similar provisions to those of Article 9 of the Berne Convention:

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<sup>52</sup> Article 7(2) of the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, WIPO doc CRNR/DC/4 of 30 August 1996.

<sup>53</sup> Report on the Fifth Session, WIPO doc BCP/CE/V/9-INR/CE/IV/8, pp 59-68/paras 312-350, Reinbothe & Lewinski, 2002, p. 38.

<sup>54</sup> Recital 33 of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

“Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite”<sup>55</sup>.

Consequently, it is indicated under the InfoSoc Directive that temporary copies are included in the wider definition of reproduction. This definition therefore includes technical, incidental or transient copies made for the purposes of caching, browsing, or storing in electronic memories.<sup>56</sup> Limitations and exceptions are however provided for in Article 5(1). Accordingly, there is an exception to the right of reproduction for temporary acts of reproduction, “which are transient or incidental, which are an integral and essential part of a technological process and whose sole purpose is to enable:

a transmission in a network between third parties by an intermediary; or

a lawful use; of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2”<sup>57</sup>.

In our scenarios, uploading copyrighted works to a website without authors’ consent is not a lawful use or a transmission in a network between third parties by an intermediary. Therefore, limitations and exceptions to the right of reproduction which are provided in Article 5(1) of the InfoSoc Directive could not be used by website operators in our Scenarios 1, 2 and 3.

The wide definition of the acts of reproduction arising out of the Report of the Second WIPO/UNESCO Committee of Experts, further indicates that ‘Storage in and retrieval from computer systems (input and output) of protected works may, as the case may be, involve at

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<sup>55</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>56</sup> Lloyd, 2008, p. 394.

<sup>57</sup> Article 5(1) of the InfoSoc Directive.



least the following rights of authors provided for in either international conventions or national legislation on copyright or both:...(b) the right to reproduce any work involved<sup>58</sup>.

As it is stated under Annex to Article 1(4) WCT, the rights of reproduction under Article 9 of the Berne Convention ‘fully apply in the digital environment’. This indicates a general understanding about the wide definition of reproduction. This Article applies to any act of reproduction such as, temporary or permanent, visible or invisible, and irrespective of the process applied. In fact, the digital environment necessitates in many cases a re-evaluation of existing limitations and exceptions and also new exceptions. Article 9(2) of the Berne Convention, a three step test allows for limitations and exceptions. The statement allows that Contracting Parties may apply exceptions, which are permitted under Article 9(2) of the Berne Convention and therefore under Article 10 WCT, in the digital environment.

In the past, excluding the public did not seem to be a problem, because even though in theory copyright exists to benefit the public, the principles of copyright were largely invisible to those outside the copyright industries. The law worked silently in the background, providing incentives for the creation of works of authorship which, in the fullness of time, became the common property of everyone. The TCA includes almost nothing addressing the rights of the public to use copyrighted works. This is unusual for a statute that spells out copyright owner's rights in broad, inclusive language and precisely as well as narrowly carves out the rights of users. The few provisions that exist seem almost accidental; the first sale doctrine, for instance, according to which the owner of a legally-made copy may “dispose of the possession of that copy” without the copyright owner's permission, expands the scope of permitted activity by permitting members of the public to lend copies to their neighbours.<sup>59</sup>

For many years, members of the public were not being sued, or threatened with lawsuits, by content owners, and it therefore didn't really matter that their rights were not spelled out clearly, or at all. Since the advent of digital technology, however, the public has for the first time been able to obtain content in ways that bypasses intellectual property. Today, lawsuits against the public for copyright infringement are not uncommon.<sup>60</sup>

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<sup>58</sup> The Report of the Second WIPO/UNESCO Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, 1982; Reinbothe & Lewinski, 2002, p.43.

<sup>59</sup> Schaumann, 2004, p. 250.

<sup>60</sup> Schaumann, 2004, p. 251.

In 2001, a provision about computer programs was added into Article 22(3) of the TCA. According to this provision, reproduction rights include loading, running, displaying, transmitting and storing, to the extent that these acts necessitate a temporary reproduction of the program.

### **3.4.2. DISTRIBUTION RIGHT ON THE INTERNET**

Every Internet transmission of a copyrighted work constitutes a public performance of that work. Internet transmissions also involve the reproduction and distribution rights in copyrighted works. Compression breakthroughs have made it easy to quickly download and distribute copyrighted works. It is now up to the artist and copyright owner to decide how their music will be heard, distributed and promoted.

Anyone can give copies of software or music to others on the Internet in a variety of ways: by putting it on a Web page, e-mailing it to friends or to a listserv, swapping it on IRC, or making it available for download on a peer-to-peer file sharing site. It costs virtually nothing to do so. And unlike end user copying in the analogue environment, online copying by end users can be quite substantial.

WIPO Copyright Treaty (WCT) is the first Treaty in which a general exclusive right of distribution has explicitly been recognised in an international Treaty on the protection of copyright.<sup>61</sup> Neither the Berne Convention nor the TRIPS Agreement contain a right of distribution. Article 6 of the WCT provides the definition of the right of distribution. The expression ‘through sale or other transfer of ownership’ was used to make clear that only permanent acts of distribution are subject to the distribution right.<sup>62</sup>

Article 4 of the InfoSoc Directive 2001/29/EC<sup>63</sup> gives authors the exclusive right to authorise or prohibit any form of distribution to the public. Although all member states broadly recognise a distribution right, member states differ in their application of the exhaustion

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<sup>61</sup> Apart from the in Articles 14 and 14bis of the Berne Convention.

<sup>62</sup> Reinbothe & Lewinski, 2002, p. 86.

<sup>63</sup> Official Journal of the European Communities: L 167/10; 22.6.2001.

principle (i.e. broadly, a principle whereby a rightholder loses his exclusive distribution right when he first sells a copy of the work in question).<sup>64</sup>

Copyright protection under the InfoSoc Directive 2001/29/EC includes the exclusive right to control distribution of the work incorporated in tangible material. The first sale in the EU of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the EU. This right should not be exhausted when the original or copies thereof are sold by the rightholder or with his consent outside the EU.<sup>65</sup>

Article 4.2 of the InfoSoc Directive is intended to harmonise the different approaches and states that the distribution right will only be exhausted in the EU upon the first sale in the EU by the rightholder or with his consent. Sales outside the EU will not affect the exclusive distribution right.<sup>66</sup>

Technology has enabled access to copyrighted works in digital formats, i.e. in an intangible format. Easy distribution of copyrighted works in digital form over the Internet provides remarkable opportunities for two parties: firstly, the owner of the copyright in these works, whether the author, the licensee or the copyright owner; and secondly, for the users of those works, those who wish to access and use them, whether for personal pleasure, the advancement of knowledge, or in the creation of new works. Both sides have much to gain from digital distribution. Both, however, may have much to lose.<sup>67</sup>

Copyright owners are faced with the most effective form of production and distribution of creative works yet known. It is quick, easy and cheap to make perfect digital copies of creative works from an original work, or from copies of an original. The costs of production could therefore tumble. Distribution of these works is easier than it ever was where much is streamed in the form of ‘digital bits’ over the Internet.

“Forward and delete” technology is being developed that will allow the digital transfer of a digitalized copyrighted work without implicating the reproduction right. Even though the

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<sup>64</sup> Recital 27 of InfoSoc Directive.

<sup>65</sup> Recital 28 of InfoSoc Directive.

<sup>66</sup> Dehin, 2010, p. 221.

<sup>67</sup> Waelde, 2001, p. 3.

ability to separate the distribution right from the reproduction right through such technology, it remains unclear whether digital transfers conform to the first sale doctrine.<sup>68</sup>

*If the infringement was committed by the distribution of a work being prepared for commercial distribution, **by making it available on a computer network accessible to members of the public**, any person accessing and using it who knew or should have known that the work was intended for commercial distribution may be punished.*

Globally, there are very few successful business models for the online distribution of copyright materials. Exceptions include proprietary financial and legal information services (e.g. Bloomberg or Lexis-Nexis, relying on continuous updates, often in real time), academic publishers (with a small and highly profitable customer base and often unsatisfactory terms of access), Internet radio stations (which in some jurisdictions have been able to take advantage of blanket non-exclusive licences), and pornography.<sup>69</sup>

As mentioned regarding reproduction rights, if temporary copies were not allowed, the Internet could only be used for communication. Therefore, the legal treatment of the temporary copy and the extension of the scope of copyright through technological measures and anti-circumvention provisions are only symptoms of a more insidious illness contaminating copyright within the digital environment. Regulating the mere use of the works, or access to the works, anti-circumvention laws and temporary reproduction rights enable the regulation of the distribution of the work to any individual.<sup>70</sup>

According to Article 23(2) of the TCA, copies of the work that were produced abroad with the permission of the author shall not be imported into Turkey without consent of the author or the copyright holder. In the case of relinquishment of the rental right in a sound recording or the original or reproduction of a film to a producer of sound recordings or film producer, the claim to adequate compensation, corresponding to Article 4 of the Directive on rental and lending rights, is also not reserved to the author, resulting in inadequate protection of the author as the weaker party to a contract.<sup>71</sup> In the second sentence of Article 23(2) of the TCA, it is stated that when the rights holder sells the copy of the work within Turkish borders,

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<sup>68</sup> Mencher, 2002, p. 47.

<sup>69</sup> Kretschmer, 2003, p. 334.

<sup>70</sup> Dusollier, 2005, p.203.

<sup>71</sup> Nal, 2001, p. 804.

resale of the work does not infringe the distribution right.<sup>72</sup> It is interesting to note that this rule is not applied between the European Union and Turkey, although there is a custom union agreement between them.<sup>73</sup>

The question arises as to whether the transmission of material from a server site, resulting as it may in the making of an enduring copy on the receiving hard disk, and a copy, at least of temporary duration, in the RAM and on the screen of the receiving computer, constitutes distribution in the sense of the respective legislative instruments. The point has not yet been the subject of international agreement.

### **3.4.3. COMMUNICATION TO THE PUBLIC (MAKING AVAILABLE TO THE PUBLIC)**

With the usage of technology, such as Internet, the category of broadcasting and cable-casting has been further generalised. Copyrighted works can therefore be infringed by any “communication to the public”<sup>74</sup>.

Article 8 of the WCT provides a new right, “making available to public”: this protects the rights of copyright holders to communicate with the public through the Internet and gives copyright them an exclusive right to control the placement of their copyrighted works on the Internet and other online services accessible by the public.

Article 8 of the WCT defines this right as “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. This new right under the right of communication to public will be our main focus in the scenarios envisaged here, because uploading a copyrighted work on a website infringes the “making available to public” right.

Article 8 has two main purposes. Firstly, it aims to complement the fragmentary set of provisions of the Berne Convention concerning the exclusive right of communication to the public and thereby to fill certain gaps, in particular regarding the original cable transmission

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<sup>72</sup> The principle of exhaustion is regulated in 2001 by the Act No 4630/14.

<sup>73</sup> Association Council Resolution No: 1/95.

<sup>74</sup> Cornish, Llewelyn & Aplin, 2010, p. 496.

of works other than literary, dramatic, dramatico-musical and musical works. Secondly, it lays down the minimum right of ‘making available’ works online.<sup>75</sup>

The InfoSoc Directive implemented Article 8 of the WCT into EU law. According to Article 3 of the InfoSoc Directive, Member States must provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making accessible to the public of their works in such a way that members of the public may access them from a place and at a time independently chosen.<sup>76</sup>

Right of public communication includes the right of:

**Recitation:** the right of live delivery of a work to the public;

**Performance:** the right of live performance to the public of a musical work or of public performance of a work on stage;

**Presentation:** the right to make a work of fine art, a photographic work, a cinematographic work, or illustrations of a scientific or technical character accessible by the public by means of technical devices.<sup>77</sup>

The scope of the “making available to the public” is not defined in all its aspects in those instruments. In particular, what constitutes the act of making available, who makes the work available or where the making available takes place are neither defined in WIPO Treaties nor in the InfoSoc Directive. Following the InfoSoc Directive Article 3, liability arises from communicating a copyrighted work to the public, an activity which includes copyright material in an on-demand service or other interactive service. Included in the communication to the public right is, therefore, the making available to the public right, the infringement of which does not require *communication* to the public, but the granting of *access* to the public to the material provided by the uploader.<sup>78</sup>

Article 3 of the InfoSoc Directive implemented into CIPA 1988 in 2003 by the Copyright and Related Rights Regulation 2003.<sup>79</sup> After this implementation an on demand service is

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<sup>75</sup> Reinbothe & Lewinski, 2002, p. 101.

<sup>76</sup> Article 3(1) of InfoSoc Directive.

<sup>77</sup> Article 24(1) of Turkish Copyright Act.

<sup>78</sup> Larusson, 2009, p. 125; The author's exclusive right therefore applies irrespective of the number of times the work or other subject matter is transmitted online. It is the act of offering the service which will need the authorisation of the right-holder.

<sup>79</sup> Statutory Instruments 2003 No. 2498: the Copyright and Related Rights Regulation Article 6.

defined in Article 20 of CDPA 1988 as “interactive service for making a work available to the public by electronic transmission in such a way that member of the public may access the work from a place and at a time individually chosen by them.” Article 3.1 of the InfoSoc Directive follows Article 8 of the WCT almost word-for-word. The difference between the CDPA, on the one hand, and the InfoSoc Directive and the WCT, on the other, lies in the words “by electronic transmission” in the CDPA, which replace “by wire or wireless means” found in the international instruments.<sup>80</sup> This difference does not make any change. This definition, together with that of broadcasting, incorporates the exclusive right to engage in communication by cable.<sup>81</sup> The communication of the work to the public includes: literary, dramatic, musical or artistic works, sound recordings, films or broadcasts.

It is suggested that the following activities are to be included as “making available” in the sense of Article 8 of the WCT and Article 3 of the InfoSoc Directive:

transmitting representative signals to a server site or providing such signals for transmission from a server site to “accessors”;  
retaining representative signals on a server site;  
maintaining the facility of access to representative signals retained on a server site;  
effecting transmissions of representative signals to “accessors”.<sup>82</sup>

Persons who make available to the public include content providers, website operators, general service providers, access providers and hosting providers. It is also suggested that other persons may contribute to activities of making available by providing linking or other facilities permitting another person to carry out those activities.<sup>83</sup>

Reinbothe and Lewinski indicate that copyrighted works may be made available not only on the Internet websites but also on the Intranet. They state that where there is more than one

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<sup>80</sup> Haque, 2008, p. 376.

<sup>81</sup> Cornish, Llewelyn & Aplin, 2010, p. 890; Making available to the public has been the subject of several references, although in the context of onward transmission of television broadcasts to television sets via a central system: SGAE v. Rafael Hotels SA [2006] ECR I-11519; and pending references in Case 403/08 FAPL v. QC Leisure OJ C 301 of 22.11.2008, p.19 and Case 136/09 Organismos Sillogikis v. Divani Acropolis Hotel OJ C 141 of 20.06.2009, p.32.

<sup>82</sup> Reinbothe & Lewinski, 2002, p. 337.

<sup>83</sup> Sterling, 2003, p. 394.

terminal from which the work may be accessed, the requirement as to choice of place is fulfilled.<sup>84</sup>

There is no specification on where the making available takes place. It has been suggested that an approach similar to that of the “communication theory” should be applied in determining the place where material is made available through Internet transmissions rather than applying the “emission theory”.<sup>85</sup> It is proposed that it is not practical or logical to apply the “emission theory” in the context of the Internet, which involves multiple transmission points, totally different from a satellite broadcast transmission system, which has an identifiable transmission point. On the Internet, it is very difficult to identify the location of the initial transmission because the copyrighted work may be stored on one site, or on many interlinked sites, and these sites may or may not be located at the place where the service provider offering the site subscription is located.<sup>86</sup>

It is submitted that neither satellite broadcasting nor traditional cable distribution programmes contain the on-demand element. In terms of physical means of transmission, where cabling is involved, some analogies may be drawn, where, for instance, a cable broadcasting company located in Germany is transmitting the copyrighted works from Germany to cable programme subscribers in Turkey, but to none in Germany. It is submitted that this would constitute communication of the work to the public in Turkey within the meaning of Article 11 of the Berne Convention. Permission of the copyright holder would therefore be needed in that country.<sup>87</sup>

A major case in the United States, which determines the place of infringement, is that of *National Football League v. TV Radio Now Corp. and others*<sup>88</sup>, otherwise known as the “iCrave” TV case. The plaintiff was the copyright holder of the materials in television programmes transmitted from the US. The defendants captured the signals of the television

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<sup>84</sup> Reinbothe & Lewinski, 2002, p.111.

<sup>85</sup> Ficsor, 2002, p. 405.

<sup>86</sup> Sterling, 2003, p. 395.

<sup>87</sup> Article 8 of WCT. If the Internet transmission involves cable retransmission this submission is reinforced in respect of the European Community by the provisions of the Directive 1993/98/EC: Article 1(3) provides that for the purposes of the Directive “cable retransmission” means “the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air... of television or radio programmes intended for reception by the public”; Sterling, 2003, p. 395.

<sup>88</sup> 53 U.S.P.Q. 2d 1831.



programmes in Canada and placed the converted signals on their websites in Canada. Internet users from the US could access the website and view the plaintiff's programmes. The plaintiff sought an injunction to prevent the infringement. The case involved issues of private international law. The court held that the defendants were unlawfully performing the plaintiff's copyrighted works publicly in the US by transmitting performances of the works to the public by the Internet. These infringements occurred in the US and violated US copyright law.<sup>89</sup>

The concept of "in public" is only defined under the Turkish Press Act.<sup>90</sup> Accordingly, "in public" means in a place available to everyone, regardless of whether this requires payment or not. There is a further issue to consider when differentiating direct and indirect communication. According to Article 24(1) of the TCA, indirect communication means communication to the public by transmission of images, sound or pictures by any equipment. In addition to this, Article 24(2) of the TCA provides that the transmission of the performance through technical equipment from the place of performance to another location is within the author's exclusive right. Article 24(1) deals with the copies of the work, whereas Article 24(2) concerns transmitting live performances to another location.

Turkey ratified the WIPO 1996 Treaties in November 2008.<sup>91</sup> However, the amendments related to the WIPO Copyright Treaty made in 2001. The phrase "distribution or communication to the public rights include in any manner or form" was added into the TCA with the amendment in 2001.<sup>92</sup>

Consequently, website operators in our illustrative scenarios, Mayaden Co, Mr. Johnson, Mr. Schwarzkopf and Mr. Turkan would be responsible for the infringements of reproduction right and right of making available to the public by their act of uploading the copyrighted works.

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<sup>89</sup> 53 U.S.P.Q. 2d 1831 at 1837.

<sup>90</sup> Turkish Press Act, Article 2.

<sup>91</sup> Ratification of Treaties is regulated under Article 90 of the Turkish Constitution. Article 90(1) states as follows: "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.", <http://www.tbmm.gov.tr/english/constitution.htm>

<sup>92</sup> The Turkish Council of Ministers recommended these two agreements to the Turkish Assembly to accept it and implement into Turkish law in 2004. However, these two agreements had been waiting in the commissions of the Turkish Assembly for 4 years. There was no urgency of implementation because it was already added into the TCA in 2001.

### **3.5. RIGHT OF MAKING AVAILABLE TO THE PUBLIC UNDER TURKISH LAW**

Pursuant to a 2001 amendment, the right of transmission to the public were added to the Article 25 of TCA. The “right of transmission to the public” is an inadequate translation of the “right of making available to the public” which stems from Article 8 of WCT. In the first paragraph of the Article, the content of the right is determined. In the second paragraph, it is provided that “The author also has the right to grant authorization for or prohibit the sale of the original or reproduced copies of his work through instruments, whether by cable or over the air, or their public distribution or presentation in any other manner and their public transmission by providing access to his work at the time and place designated by real persons”.<sup>93</sup>

Two aspects are determined by Article 25/II of TCA. In the first sentence of Article 25/II, “distribution of copyrighted work” is defined and in the second sentence “public transmission” is clarified. The right of making available to the public is the main topic of this study and it is determined in Article 25/II of TCA on public transmission.

In fact, the right of distribution is defined under Article 23 of TCA. The right to distribute, lease, lend or sell or make a subject of trade in any way whatsoever a work and its copies obtained by duplication from the original or adaptation of it and to benefit from this way belongs only to the owner of the work.

Even if the meaning of copy is not determined in Article 23, it is arguable that Article 23 of TCA only covers distribution of copyrighted work in the offline world, as in German copyright law<sup>94</sup>. For that reason I would tend to argue that Article 23 of TCA cannot be applied to digital copies.<sup>95</sup> Accordingly, distribution of originals or copies reproduced from the original are protected by Article 23 whereas the right to transmission of digital copies of work using technology, whether by cable or wirelessly, or their public distribution or

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<sup>93</sup> Article 25/II of TCA sentence 2.

<sup>94</sup> Before the amendments in German Copyright Act in 2003, the acts of uploading and downloading copyrighted Works from the Internet was argued that these acts infringe the distribution right did not accepted as a good argument . It is argued that distribution right does not cover the digital copies; Schricker, 1997, p. 128; Ernst, 1997, p. 592.

<sup>95</sup> Kendigelen & Bozbel, 2009, p. 513; Oztan, 2010, p. 364.

presentation in any other manner and their public transmission by providing access to the work at the time and place chosen by individuals are protected by Article 25/II of TCA.

### **3.5.1. 'PUBLIC TRANSMISSION' of the COPYRIGHTED WORK**

In Turkey, the right of making available to the public is granted to the authors pursuant to Statute No. 4630 of 2001. This Statute amended Article 25 of TCA. In practice, this right is especially relevant to the protection of copyrighted works on the Internet.<sup>96</sup>

In order to use the right of making available to the public, the work must first be digitalized and recorded to a data storage facility, then the digital copy must be uploaded to the Internet. During this preparation period, all acts carried out by the infringer are infringements of other rights granted to the author by TCA. Accordingly, without authorization, reproduction of the copyrighted work in any manner is an infringement pursuant to Article 22 of TCA. Converting analogue work into digital work is a reproduction and needs authorization from the right owner.

#### **3.5.1.1. Elements of 'Making Available to the Public'**

##### **A. Wired or Wireless**

The phrase contained in the second sentence of Article 25/II of TCA covers the making available to the public in any manner, including radio and television. Examples for transmission by wire from the telephone modem are DSL (Digital Subscriber Line), VDSL (Very High Speed Digital Subscriber Line), Ethernet, Intranet and LAN (Local Area Network). On the other hand, examples of wireless networks are WLAN (Wireless Local Area Network), UMTS (Universal Mobile Telecommunications Systems = 3G), GPRS (General Packet Radio Service), EDGE (Enhanced Data Rates for GSM Evolution) and HSCSD (High Speed Circuit Switched Data).

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<sup>96</sup> The importance of this right is getting more with the increasing of share and pirate websites numbers. As an example: youtube, google video, myvideo.de, yahoo video, msn video; share sites rapidshare.com, 4shared.com, Music and Video sites, simfy.de, mediamaster.com, anywhere.fm.

## **B. Accessing must be public-oriented**

In reference sources, the definition of “public” was established in relation to the author’s right of transmission to the public, and some restrictive wording has been added to this definition. Besides, the term “public”, which is one of the criteria of the “right to make available to the public”, cannot be defined; it may even be argued that the notion of “public”, in this new legal context has been widened.

“Public” means persons who have no personal relation or contact with person or persons who use the work, and yet could receive or access it. The most important aspect of this definition is personal contact. Personal contact may occur between (i) user of the work without permission of author and persons who could receive or access this work, or (ii) persons who could receive or access this work.

There must be more than one person in order to be a “public”. To perform or display a work "publicly" means –

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons, beyond a normal family and/or social circle, is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public in a position to receive the performance or display, actually receive it in the same place or in separate places and at the same time or at different times.

According to Article 25/II of TCA, members of the public can be in different places. Therefore, members of the public may access these works from a place and at a time individually chosen by them, such as public communication on the Internet.<sup>97</sup>

If the work is made available to a group of people who have communication only between themselves, this group of people is not considered to be “the public”. In examining the nature of a group of people, the first thing to determine is whether the group is limited to a few persons or not. If any person can join this group even with a password, this group must be considered as “the public”. The second criterion is the number of members in the group and

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<sup>97</sup> Bozbel, 2009, p. 200.

the type of relationship between them. If this group is formed of family or friends and is limited in number, then it will not be seen as “the public”. The relationship between the group members must be very close. Personal contacts stemming from a contract are not enough to be treated as a group of friends, such as in halls or prisons. If a copyrighted work is made available to a group of people in halls or prisons without the consent of the author, this is an infringement of the right of making available to the public.

On the other hand, even if the members of the group consider themselves as friends, there must be an internal relation between the members. Therefore, if the members have only technical relations such as file-sharing groups, the group cannot be seen as personal.<sup>98</sup>

As a main rule, less members means closer relations. Recently, the European Court of Justice has interpreted the concept of “right of communication to the public” rather widely. In its decision<sup>99</sup>, the installation of television sets in hotel rooms constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29.<sup>100</sup> Accordingly, it is not important whether the members of the public need to sign up or use a password in order to access to the works. The test is who allows the signing up and gives the password to the members of the public.

### **C. Access to these works from a place and at a time individually chosen by the public**

According to Article 25/II sentence 2 of TCA, the author shall enjoy the right of making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. Users of the copyrighted work must be able to decide from where and when to access the work. This provision shows that the legislator aims to regulate the issues related to the internet. Each internet user can indeed access the work from their personal computers from a place and at a time individually chosen by them. If the place is limited to a designated area, such as a library, then this act does not constitute making available to the public within the meaning of Article 25/II of TCA.

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<sup>98</sup> Oztan, 2010, 372; this argument is supported also by Kendigelen & Bozbel, 2009, p. 524.

<sup>99</sup> On 7 December 2006, the Court of Justice delivered its judgment in the case C-306/05(SGAE v. Rafael Hotels SA). A reference for a preliminary ruling had been made regarding the interpretation of Article 3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>100</sup> Case C-306/05 SGAE v. Rafael Hotels SA [2006] ECR I-11519

In addition, members of the public must be able to access the work at a time individually and personally chosen. This provision distinguishes the rights of making available to the public from broadcasting rights.<sup>101</sup>

#### **D. Making Available**

The subject-matter of this right is to make the work available for downloading, listening, or viewing on the Internet. Even if the work is not downloaded and/or listened to by a member of the public, making the work available to the public without the consent of the author is sufficient to infringe this right. A deep-link from the website is however not enough to create an infringement of the right of making available to the public.

According to Article 25/II of TCA, the author does not have to prove whether the work was downloaded or not. Infringement of the reproduction right is not a factor of infringement of making available to the public. When we apply these rules into our scenarios, if the applicable law is Turkish in our scenarios, claimants should only need to prove whether or not the website owners are making their work available.

#### **3.5.2. Differences from Broadcasting Right**

The right of making available to the public must be distinguished from the right of broadcasting. First of all, it is important while making a contract for transferring the rights of author. In practice, “internet rights” or “online rights” terms are usually used in the contract. These terms are not clear and it always creates contractual difficulties at some point. However, Article 25/II of TCA does not cover the use of all types of copyrighted works on the internet. In Turkish law, the broadcasting right is usually protected by unions or associations whereas the right of making available to the public is protected by the author himself.

Even though it is crucial, distinguishing these two rights is not straightforward in practice.. First of all, those two rights have many components in common. Under both rights, members of the public can access copyrighted works from different places. Therefore, the time of use of

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<sup>101</sup> Bozbel, 2009, p. 203; Tekinalp, 2009, p. 349.a

the copyrighted work is important to determine. If the time of use can be chosen individually by the user, then this situation is covered by the right of making available to the public. However, Near-On-Demand-Services make this determination more difficult. Generally, pay-tv services use this technique and it is not a real video-on-demand system. Movies can be watched during a specific period of time from different channels. A good illustration is that of a 90 minute movie being broadcast from different video channels in one hotel for a short period of time. If the user of this system gets the impression that he can reach the work at a time of his choice, then this system amounts to making available to the public within the meaning of Article 25/II of TCA.<sup>102</sup> The important aspect is the experience of the user, not the technique itself. This kind of interpretation of Article 25/II will prevent the use of near-on-demand techniques to avoid paying fees to the author for his right of making available to the public. On the other hand, this interpretation is controversial in doctrine. In German literature, near-on-demand services are not accepted as a right of making available to the public by most academics who consider that an objective criterion is more important than the subjective take on the user's impression and experience of the situation. Therefore, the personal experience of the members of the public is not a decisive element in this regard.<sup>103</sup> I however consider that this situation does not fit in with the aim of Article 25/II of TCA.

### **3.5.3. Applications and Acts accepted as Making Available to the Public**

According to Article 25/II of TCA, the following applications and acts are accepted as infringements of the right of making available to the public: uploading a copyrighted work to a website or a server without the consent of author. Making the copyrighted work available through a blog or newsgroup is also an infringement.

If third parties can access the database of an intranet network from a place they have individually and personally chosen, the works available in this intranet is considered to be available to the public. The ability to access the intranet is enough for it to be considered an infringement of the right of making available to the public.

On-Demand Services also fall within the scope of the right of making available to the public. If the user can access a copyrighted work on the internet from a place and a time that he has

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<sup>102</sup> Wandtke & Bullinger, 2009, p. 219; Oztan, 2010, p. 473.

<sup>103</sup> Bozbel, 2009, p. 208; Reinbothe, 2001, p. 733.

and personally chosen, then the right of making available to the public is infringed. Near on Demand services which have very short time periods for re-starting the work are also considered as making available to the public under Article 25/II of TCA. Downloading a copyrighted work is considered as an infringement of the right of making available to the public.

#### **3.5.4. Applications and Acts which are not accepted as Making Available to the Public**

ISPs are not responsible if they only provide technical supports to websites that are making the work available to the public.<sup>104</sup> Providing links to hyperlinks websites is not an infringement of the right of making available to the public. However, if the website provides inline-links to the website that infringes the right of making available, then it is also infringing that same right because the user does not realise that he has been directed to another website.<sup>105</sup> In addition, sending a copyrighted work by e-mail is not an infringement of this right, since emails are personal communications.

Another technique of data transferring is streaming. With this technique, the user can start displaying the data before the entire file has been transmitted. This technology is very useful for internet users who have slow internet connections. If the streaming client receives the data faster than required; the excess data needs to be saved in a temporary memory (Random Access Memory). If the data does not come fast enough, however, the presentation of the data will not be smooth.<sup>106</sup> The data must be therefore be saved to the computer's RAM, which is a reproduction. As a result, streaming is considered to be an infringement of the reproduction right instead of that of making available to the public, if it is done without the consent of the author. According to Turkish academics, Article 22 of TCA must be applied to streaming.<sup>107</sup>

### **3.6. SECONDARY INFRINGEMENT**

Merely providing remedies against those who copy or perform the copyrighted work without permission of the copyright holder is not sufficient. Copyright owners can protect their rights

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<sup>104</sup> Add. Article 4 of TCA; Preamble 27 of Directive 2001/29.

<sup>105</sup> Haberstumpf, 2008, p. 512.

<sup>106</sup> <http://www.webopedia.com/TERM/S/streaming.html>

<sup>107</sup> Bozbel, 2009, p. 212; Tekinalp, 2009, p. 413.



against those who assist and support the primary infringer. This infringement is secondary infringement. The main difference between primary and secondary infringement is that the prior involves production of the infringing copy or the infringing performance, whereas the latter involves ‘dealing’ with those copies, providing the means or equipments for the performance or producing an item for the purpose of making infringing copies.<sup>108</sup>

The liability of an ISP for the activities of its users is a significant question for the industry. In the UK, the House of Lords decided in the case of *CBS Songs Ltd v. Amstrad Consumer Electronics plc*<sup>109</sup> that the critical issue of third party liability for copyright infringement was whether the equipment could be put to legitimate as well as to illegitimate use. These principles can be applied to an ISP whose facilities were used by customers for infringement of copyright.<sup>110</sup> The provisions of the Electronic Commerce Directive and the liability of ISPs will be examined in Chapter 7 in more detail.

There are two categories of secondary infringement. First, those who distribute or deal with infringing copies once they have been made; and second, those who facilitate copying by providing the equipment or means that enable the copying to take place.

It is obvious that the following are infringement of the copyrighted work:

possessing an infringing copy in the course of business,  
selling or letting for hire, or offering or presenting for sale or hire an infringing copy,  
in the course of business presenting to the public or distributing an infringing copy,<sup>111</sup>  
distributing an infringing copy, otherwise than in the course of a business, to such an extent as to adversely affect the copyright owner.<sup>112</sup>

The copyright in a work is also infringed by any person who, without the licence of the copyright owner, imports into the country, other than for his private and domestic use, an item that is, and which he knows or has reason to believe is, an infringing copy of the work.<sup>113</sup> The

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<sup>108</sup> Bainbridge, 2008, p. 25.

<sup>109</sup> [1988] AC 1013; Lloyd, 2008, p. 401.

<sup>110</sup> Lloyd, 2008, p. 402.

<sup>111</sup> *Pensher Security Doors v. Sunderland City Council* [2000] RPC 249, (An art gallery carries on business even though certain paintings are not for sale).

<sup>112</sup> Bently & Sherman, 2008, p. 196.

<sup>113</sup> CDPA, s. 22.

plaintiff has to prove the element of “guilty knowledge” reflects the fact that traders and others may handle infringing copies without necessarily supposing or having the means of knowing that they are infringing. In addition to this, there may be situations in which someone who sells or distributes infringing copies is also liable for the primary act of infringement of issuing copies to the public, in respect of which “guilty knowledge” is not an element.<sup>114</sup>

Copyright laws do not expressly provide for secondary liability for copyright infringements. But the courts, in a long series of cases, have imposed liability on those who facilitate or profit from copyright infringement. Therefore, there are two main strands of secondary liability for copyright infringement: contributory infringement and vicarious infringement.<sup>115</sup>

### **3.6.1. CONTRIBUTORY INFRINGEMENT**

Contributory copyright infringement can be defined as when the defendant, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”.<sup>116</sup> Copyright owners must show that the defendant 1) had knowledge of the infringing activity and 2) materially contributed to the infringing conduct.

Accordingly, when the website owner uploads the copyrighted works on his website, he also engages in contributory infringement by making the copyright holder’s work available on the Internet with the knowledge that third parties can and will further infringe the copyright holder’s copyrighted work by downloading it.

### **3.6.2. VICARIOUS INFRINGEMENT**

In order to find a defendant liable under the theory of vicarious liability for the actions of an infringer, it must be shown that the defendant 1) has the right and ability to control the infringer's acts, and 2) receives a direct financial benefit from the infringement.<sup>117</sup> Unlike contributory infringement, knowledge is not an element of vicarious liability. Courts have however determined that the combination of the right and ability to control the infringer's acts and the receipt of a direct financial benefit from the infringement suffices to hold a defendant

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<sup>114</sup> Garnett & Davies, 2002, p. 54.

<sup>115</sup> <http://www.futureofmusic.org/articles/grokster.cfm#notes>

<sup>116</sup> *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (2d Cir. 1971)

<sup>117</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F. 2d 304, 306 (2d Cir. 1963).

vicariously liable for copyright infringement, even if the defendant had no knowledge of the particular infringement.<sup>118</sup> The main distinction between the two is that knowledge (actual or constructive) is required for contributory infringement, whereas it is not required for vicarious infringement.

### 3.7. CONCLUSION

It is mostly the right of reproduction and the right of making available to the public as stemming from the copyright holder's right of communication to the public that are infringed on the Internet. Reproduction will take place in the operation of recording the material in the website owner's computer for the transmission to the server site, at the points of transmission which includes caching, when storing at the server site and at the points of transmission from the server to the hard drive of the downloader. Reproduction will also occur when material is copied from any of these points on to another medium.<sup>119</sup>

With the uploading of copyrighted work to a server without the consent of the copyright holder, the website operator infringes the copyright holder's right of making available to the public. The question with this type of infringement is where the infringement takes place. The communication theory supports the submission that communication takes place, inter alia, at the point of reception. The same approach applies as regards the rules on cable transmission. Accordingly, when the copyrighted work is uploaded on a website, it will be made available at every point where there is a computer, PDA, or mobile phone, etc. from which the copyrighted work on the website can be accessed.

Consequently, the copyright holder should be able to obtain relief for actual or threatened infringement in the countries of transmission to the server site, of location of the server, or of the actual or potential reception point. This means that when the website operator uploads the copyright owner's work without his/her consent, the copyright holder's right of making available to public is infringed at many locations synonymously. This situation makes copyright infringement on the Internet a very complex issue from the point of view of choice of jurisdiction and applicable law.

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<sup>118</sup> <http://www.futureofmusic.org/articles/grokster.cfm#notes>

<sup>119</sup> *Sony Music v. Easyinternetcafé* [2003] EWHC 62, customer at Internet cafe downloaded music files from Internet site and cafe proprietor's staff made copy of file at customer's request.



## CHAPTER 4                    JURISDICTION ON THE INTERNET

### 4.1.                    INTRODUCTION

An activity can be legally carried out in one jurisdiction and may be unlawful in another. This is of particular importance for acts undertaken on the Internet, which can, theoretically, have an impact on any place in the world. Although territorial borders are not directly recognizable in ‘cyberspace’, the Internet depends on an infrastructure that is very well connected to the physical world. In theory, this makes it possible to detect when data present in the cable network crosses national borders. Potentially, many courts could have jurisdiction.

The notion that the plaintiff may bring any suit in the defendant’s court is firmly established in private international law. Further principles specify other bases of jurisdiction and provide courts with a framework for facilitating consolidation by determining which, of the courts that may have jurisdiction, is the most appropriate one for resolving a multinational dispute.

The courts of the defendant’s domicile have general jurisdiction and therefore may entertain claims, regardless of whether or not the claim arises out of forum-related activity. In intellectual property cases, however, some courts, particularly in Commonwealth countries, hold that they lack subject matter jurisdiction over intellectual property claims arising under foreign law.<sup>1</sup>

For Internet related disputes, if the place of the infringing acts is regarded as the place where the material is uploaded to the Internet or where the servers are located, it will be very easy for the defendant to locate its activities in a place where intellectual property protection is weak.<sup>2</sup> This covers the situation in which the non-resident defendant may not have regular contacts with the forum State, but has intentionally directed an infringement into the forum State from outside and causes harm. In such cases, the scope of jurisdiction is limited; it only covers losses sustained in the Forum State.

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<sup>1</sup> American Law Institute Report (ALI) 2007, p. 35.

<sup>2</sup> Activities on the Internet are difficult to locate, since location is irrelevant for Internet functionality; Hörnle, 2009, p. 137.

If the defendant uploads from a state whose procedural and substantive laws are not consistent with international norms, then the plaintiff should be permitted to sue in a state towards which the defendant has directed infringing activities, and with which it has regular contacts. In these cases, the scope of jurisdiction must be extended to all infringement claims that arise out of the conduct out of state that led to the alleged in-state infringement.<sup>3</sup> In this situation, a dichotomy has developed in the legal debate on competence, especially on the internet issues, which distinguishes between the ‘country of origin’ and the ‘country of destination’ as alternative or concurrent would be regulators.<sup>4</sup>

For instance, in our scenario 1, if mayaden.com’s operator goes on holidays to a country whose copyright law is lenient and uploads Turkish copyright holders’ copyrighted works to mayaden.com’s server from this country, then forcing Turkish copyright holders to sue in this country would not be fair. It is obvious that the operator has directed infringing activities towards Turkey and countries where substantial Turkish communities live. The question of whether the copyright holder can sue the infringer in the state where infringing activities are directed will be discussed in this chapter.

In our scenarios, there are two kinds of copyright infringements. The first one is the infringement of the right of communication to the public. The second one is the infringement of the right of reproduction. Right of communication to the public is infringed when the digitally formatted copyrighted works are displayed on the website and the right of reproduction is infringed by the end user with the act of downloading into the hard drive of his computer.

The main difficulty in our scenarios is to determine and address infringements of the right of communication to the public. In addition to the general principle, the court at the place of uploading and the court at the server location may have jurisdiction. However, there is a problem with the server location.

Sometimes a website is ‘spread out’ on two or more servers. It is, for instance, possible to store the text of a website on one server and the pictures on another. The text and pictures are then assembled as an Internet user uses a web-browser to access the website. The reason for

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<sup>3</sup> ALI, 2007, p. 94; Kur, 2005, p. 27.

<sup>4</sup> Kohl, 2007, p. 24.

doing this is again found in the technical structure of the Internet. Placing significance on the location of the server could in such a situation point to two or more separate states.<sup>5</sup> Therefore, the location of the server would not be a good jurisdiction choice.

The focus may be on the alleged infringer's act. A tortious act committed on the Internet attaches to the place where the defendant uploads the copyrighted works onto the website. The act is the event that causes the damage. The alleged infringer's act is the uploading of the copyrighted work.<sup>6</sup>

In this chapter, questions of when Turkish and EU courts have jurisdiction will be examined. In addition, issues of identification of internationally competent courts concerning the infringements resulting from exploitation of intellectual rights via the Internet will be discussed and I will put forward suggestions regarding the solution to procedural law difficulties.

## **4.2. CHOICES OF JURISDICTION**

There are a few choices of jurisdiction for copyright infringements that occur on the Internet. The general rule is that the courts of the place of the defendant's domicile have jurisdiction, or possibly the court of the place where the tortious act is committed. The jurisdiction of these courts will be examined in this section.

### **4.2.1. PLACE OF DEFENDANT'S DOMICILE**

The general jurisdiction rule is the place where the defendant is domiciled.<sup>7</sup> The courts located at the place of domicile or business of the defendant can be granted international jurisdiction. It is however likely that this rule may be inefficient by itself and could even be misused. On the other hand, it may also be an incidental contact point which is not related to the tort at all. Even though the court located in the place of residence of the defendant may be preferred because the defendant normally focuses/centralizes his/her business affairs in such place, it is evident that such court may be inefficient or that there may be some difficulties in

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<sup>5</sup> Svantesson, 2005, p. 53.

<sup>6</sup> Bigos, 2005, p. 605.

<sup>7</sup> Article 2(1) of Brussels I Regulation; Article 9 of HUMK.

proving that such a tort has been committed or in determining the actual impact/damage, if the place in question is not the place where the tortious act is committed, or if the work is not protected there.<sup>8</sup> The judicial rulings of the court of the place in question can be enforced without an *exequatur* if the defendant's headquarters for his/her operations is located in that country. On the other hand, the conventional jurisdiction rule taking the place of residence of the defendant as a basis will not point to an appropriate competent court for abstention/prohibition/ prevention rulings to be made by the court. Provided that such contact points, which will arise depending on the defendant, are not the places of the server where the defendant uploads the website, the effectiveness of such a ruling may also be uncertain.

Besides, it is not always possible to identify the place of residence of the defendant. Even though in some countries, it is a requirement of "online" trading to provide the consumers with the identity information including the physical place of the merchants' own businesses and to obtain information on the identities and addresses of the consumers, imposed on merchants<sup>9</sup> who provide their goods and services to the consumers through the Internet, in fact the vendor is not obliged to indicate his/her business place in drawing up the contract as it is not required for the execution of a commercial transaction on "online" products. Presumably, the vendor will send the invitation to deal to the purchaser via electronic mail or s/he will present the digital product to the consumer through a product catalogue in a "www". As long as there is no digital signature or document, it will be impossible to identify the business place/ customary domicile/ residence place of the website owner who exploits the digital work. In fact, there is no address or a contact number on "www" for most "online" transactions.<sup>10</sup>

In addition to this, those people who earn money through advertising on the Internet are not obliged to have a commercial enterprise in the real world. Entities who provide electronic services on "www" can perform their activities without headquarters, place of registration or office, branch or similar commercial establishment. In other words, such commercial transactions can be realized in a purely virtual environment. In cases where the person committing the infringement of intellectual property rights does not have any assets beyond the Internet and is a virtual entity, it is difficult to define the "place of business", which is

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<sup>8</sup> Hörnle, 2009, p. 137-138.

<sup>9</sup> In fact, Distance Selling Directive 85/577/EEC is shown as an example in EU Law for this situation, SCHU, 1997, p. 227.

<sup>10</sup> Lenda, 2005, p. 25.



usually defined as the place where the person performs his/her economic activities continuously via a commercial enterprise except for providing services to a certain country temporarily. This is reflected in international literature or legislation, which avoid such definition.<sup>11</sup>

Accordingly, in scenario 1, as a general rule, the English courts would have jurisdiction over the alleged infringements activities which are carried out via mayaden.com because the defendant, Mayaden Co., is an English Company. In scenario 2, German courts have jurisdiction for Mr. Schwarzkopf who is domiciled in Germany and English courts have jurisdiction for Mr. Johnson who is domiciled in the UK. The crucial question in scenario 2 is whether English or German courts have jurisdiction for both operators or not. This question was effectively answered by the European Court of Justice in *Roche Nederland BV v. Primus*<sup>12</sup> and *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG*<sup>13</sup>. These judgments will be examined in the section relating to Jurisdiction under EU law. For scenario 3, since the domicile principle is also a general rule under Turkish law, the copyright holders, Bob and Monica, can sue the website owner, Mr. Turkan, before the Turkish courts according to their general jurisdiction rule.

The place of domicile can be misused by infringers. For example, in scenario 1, Mayaden Co. could easily find someone who is domiciled in a copyright free “haven” and post the copyrighted works via mails that person can upload it from that country. The real infringer is Mayaden Co. but it is too difficult to prove it.

A rule whereby information about the headquarters/ domicile/ place of business should appear on the website that the ISP and website owners develop and be compliant with the legal position should be imposed on ISPs and website owners, so that they must comply with those when concluding the contract before uploading the content to the Internet. This would benefit

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<sup>11</sup> Article 6 of UN Convention on the Use of Electronic Communications in International Contracts states that: “4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.” For this Convention: [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf), last visited 25.01.2011.

<sup>12</sup> Case C-593/03, *Roche Nederland BV and Others v. Frederick Primus and Milton Goldenberg*, [2007] F.S.R. 45.

<sup>13</sup> Case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG* [2006] F.S.R. 45.

all involved, and would be further enhanced if enforceability of such rules was ensured through a multilateral international agreement. The fact that an apparent business place or headquarters declared by the website owner has been created by the defendant for the purpose of “forum shopping” would be no different from the situation that would occur in such case in an “offline” environment.

If the defendant establishes the abovementioned contact points in one of the countries that is safe from his point of view and damageable to the plaintiff it will be considered to be “forum shopping” by the defendant. Therefore, an objective jurisdiction should be chosen as the basis in order to prevent “forum shopping”, which decreases the responsibility of the defendant and the dissuasiveness of the law. Ultimately, and independently from the position of the defendant or the plaintiff, the latter should be granted with the possibility of filing a suit in more than one court by preferring bilateral strategic choices, which can be made according to the situation that both the defendant and the plaintiff are in, to unilateral strategic choices, in a way to diminish this impact.

Otherwise, as it is emphasized in the doctrine on this point, the defendant can select the most appropriate “copyright-free haven” country, which has very limited responsibility for copyright infringers, by establishing connecting factors with the law of that country. This country will not be the real domicile of the defendant but he/she will use that country as his/her domicile for internet infringement purposes and, therefore, any resulting cases. Depending on the choice of connecting factor, one party or the other may have a greater opportunity to influence forum selection. In such a case, the claimant shall be granted with the opportunity to file a suit in the most appropriate court for him and in more than one country in order to avoid misuse that would give rise to “forum shopping” in favour of the defendant. For example, if the competent forum is linked to the place of residence of the defendant, the defendant has a better control than the plaintiff over such a connecting factor. Likewise, if the competent jurisdiction for products liability is the place of the accident, the plaintiff has a better opportunity to control the jurisdictional choice by choosing where to use the product. In a world with costless virtual relocation, several of the traditional connecting factors (e.g., place of business, residence, etc.) can be manipulated by the parties, effectively granting them direct control over the jurisdictional choice.

#### **4.2.2. PLACE OF TORT**

There are two possibilities while looking at the connecting factors under the rules of private international law for tort. The first connecting factor is the place where the harmful act was committed and the second connecting factor is the place where the damage occurred.<sup>14</sup> The “place of server” and the “place of uploading”, which are emphasized in the doctrine as the place where the tort was committed will be examined here followed by a final assessment and the identification of the boundaries of the courts of the place where the act was committed. The place where the damage occurred will be examined with the Brussels Regulation in the “jurisdiction under EU law” section.

##### **4.2.2.1. Place of the Website Server**

It should first be assessed whether there is a technical reason for differentiating intellectual property rights infringement cases arising out of the infringement of the rights by directly downloading the work from the web site from intellectual property rights infringement cases arising out of commercial relations in the real world with no use of the Internet, when determining the competent court. In such case, the Internet just becomes the intermediary in communicating the work in a CD whereas goods and services are delivered to the consumers in the real world through means other than the Internet in accordance with the demands of the consumers who are contacted through the Internet.<sup>15</sup> The place where the activities giving rise to the infringement of intellectual property rights are realized and those people who realize such activities are present in the real world. Therefore, when it is considered in this perspective, it can be concluded that regarding intellectual property rights infringement cases, the conventional jurisdiction rules which take the geographical contact points as the basis can be applied for intellectual property rights infringement cases in which the Internet has been used as a means of advertising.<sup>16</sup>

As for digital products, the situation is different. In this case, the Internet allows for a copy to be made of a digital product, which does not exist in the real world, for example a copy of an mp3. It is then directly communicated to the consumer, which exists in the real world; and in

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<sup>14</sup> Hörnle, 2009, p. 136.

<sup>15</sup> Lenda, 2005, p. 25.

<sup>16</sup> Sargin, 2005, p. 221; Suluk & Orhan, 2010, p. 341.

this case, there is no need for an activity other than the Internet for delivering the product. The receiver downloads the digital product from a website or via “ftp”/ “file transfer protocol” or receives the product through electronic mail.<sup>17</sup> In this case, what is understood from the place of the tortious act can be confusing.

In the commission of activities such as producing the work or making the work available, introducing the work to the commercial field, advertising the work for sales, distributing, selling, importing, exporting the work, extending the scope of the license agreement contrary to the agreement without obtaining the permission of the right owner is defined as the infringement of the intellectual property rights and in cases when advertisements are made only through Internet, each of the acts of keeping the work for production, distribution, sales, import and etc in the physical world will be described as the act giving rise to infringement. Therefore, in this case, uploading to the Internet for advertisement in order to make the work available to the consumers will not play an effective distinctive role in identifying the place of tort. In other words, the activity giving rise to the tort is not completed by uploading the content of the website to a “server”. Each of the activities including production, storage, distribution, making available for reproduction and sales of the product advertised on the Internet, which are carried out before it is advertised on the Internet within a territory of a country and within a logical time is described as an activity giving rise to the tort.

As for digital products, storage of the digital product to be made available to internet users will be realized “online” and in this case, the place of “server” where the content is stored rather than the place where the website owner prepares and actually uploads the website content will be of greater importance in identifying the place of tort. The completion time of the tort regarding the digital product can be considered as the moment when the content is uploaded to the “server” and therefore when the content is made available for the internet users.<sup>18</sup>

Indeed, as a rule, even though the place of the tortious act is described as the place of the “server” where the content is uploaded, the place of tort can be different from the place of

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<sup>17</sup> Sargin, 2005, p. 234.

<sup>18</sup> Sargin, 2005, p. 234; Memis, 2009, p. 116.

uploading.<sup>19</sup> Uploading may, indeed, not be carried out in any place where the website owner prepares the work, that is to say, the website owner prepares the website to the ISP in a country, where his/her business place/customary domicile is located, or where s/he carries out production relying on the work on which s/he does not have any right, where s/he stores, makes available for sales, distributes, imports the works which are protected by the intellectual property rights, in the same way as would give rise to tortious liability where non-digital works are involved.<sup>20</sup> On the other hand, the “server” where the information, which is physically available in a country where it is uploaded may have the address of another country and as a rule the person uploading the content does not have to know the place of the “server”. For this reason, it cannot be expected that the owner of the website must be in compliance with the law of the place of the “server”.<sup>21</sup> Therefore, the place where the website is uploaded to the “server” via Internet can be a completely incidental place which does not bear any logical connection with the place where the tortious act was committed. On the other hand, the place of such “server” can be changed in a matter of seconds; the website can be copied to another “server” or the defendant can provide the same content to internet users through more than one “server”. This possibility may naturally create “forum shopping”.<sup>22</sup>

In our scenarios, if the website operators knew where the servers are located, they would prefer the servers which are located in countries whose copyright laws do not protect foreign authors’ copyrighted works or provide less protection. Accordingly, if the place of the server was accepted as the place where the infringement occurs, most server providers would look for copyright-free havens with no stringent intellectual property laws for their servers to relocate.<sup>23</sup> In our scenarios, the places of servers are, Germany in Scenario 1, UK in Scenario 2, and Turkey in Scenario 3. Accordingly, in our scenarios, copyright holders will have no difficulties if the places of the servers are accepted as the place of infringement because Germany, UK and Turkey are members of WTO and have minimum IP protection, pursuant to the Berne Convention and TRIPs. However, relocating the server is very easy for the infringers. Therefore, in our scenarios, website operators can easily relocate the servers if they have any difficulties with the copyright holders.

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<sup>19</sup> Ginsburg, 1997-II, p. 166; Other possibilities include the place where the information provider is physically located or legally established or the place where the information is generated or accumulated or where the information is accessed and read, Hörnle, 2009, p. 135.

<sup>20</sup> Menthe, 2002, p. 7.

<sup>21</sup> Uyanik & Cavusoglu, 2008, p. 978, 983.

<sup>22</sup> Sargin, 2005, p. 235.

<sup>23</sup> <http://www.dmwmedia.com/news/2007/01/12/swedish-p2p-site-the-pirate-bay-looks-to-buy-island-copyright-haven>; <http://thepiratebay.org/blog/102>

The courts of the place of the “server” should nevertheless, as a matter of exception, be granted jurisdiction for tort cases to cover both the digital products due to their nature and also some cases in which the work is produced/stored in the real world. Thus if the rulings to be made by the court cover only prohibiting/modifying the content of the website, incorporating some additional explanations on the website which can be described as warnings or taking provisional precautions as a consequence of these results, it would be appropriate to provide the possibility to sue the offender in those courts of the place of the tortious act that have the legal means to implement such precautions and to modify the website content. In cases where the offender and its location cannot be identified, the existence of such jurisdiction will be of greater importance in order to achieve such decisions. Although it is a lengthy and difficult process, the fact that the place of “server” can be detected through “IP” numbers<sup>24</sup> supports my opinion.

On the other hand, if the jurisdiction of the courts of place of “server” arises only due to this reason, then they should not have jurisdiction for actions for “damages” due to the intellectual property rights infringements. In this case, the enforceability of the rulings to be made by such courts shall depend on exequatur. The person knowingly committing the tort will definitely not select the country where his/her identity is available as the “place of server”. On the other hand, the “place of server” does not appear to be in a close objective connection with the concrete legal dispute in terms of actions for damages.

At this stage, “proxy service providers” which provide auxiliary services should be addressed. Such places work as the auxiliary services to the main “server” and their data of such places are picked up from the address of the main “server”.<sup>25</sup> While an Internet user surfs the Internet, most of the time he/she will not obtain the information from the service provider which actually stores the information; the proxy service providers will carry out the operation. In this context, service providers which are not far from the “host server” of the user in technical terms provide a solution for providing the service faster and if the digital “bits” received from the user have not changed, they transfer the digital “bits” that they store in their own memories to the user. If the proxy service providers serve only this technical purpose; in other words, if these service providers are not developed for the purpose of reproduction, it

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<sup>24</sup> Lenda, 2005, p. 108.

<sup>25</sup> Uyanik & Cavusoglu, 2008, p. 980-981.

will not be considered that the digital “bits” that they store are copies.<sup>26</sup> The abovementioned proxy service providers have the technical facility to implement the filtering system.

Therefore, in my opinion, within the framework of the abovementioned conditions, the place of the tort as the place of “server” can be considered to be the place where the main “server” and/or the proxy service providers are present.

As for digital works, the digital work will be sent to the electronic mail address of the receiver on a server in any part of the world or to the “host service provider”. As long as neither the digital signature nor the identity information is provided by the receiver, in other words as long as the “password system” is not applied, it cannot be detected in which territorial area the identity of the receiver is available and therefore where the customary domicile/business place of the receiver is located, and only the IP number of the computer on which the downloading operation is realized can be detected. It is very difficult to find the abovementioned places and such places can be changed rather quickly. Furthermore, when considering the actual downloading operation rather than the downloading of the digital work to a “server” as an act of infringement as it is possible to find the place of IP number, that is to say, the place of the computer, it will be possible to detect the place of the act in terms of digital works. Within this framework, the existence of more than one similar act in a territorial area rather than the individual downloads will be relevant, it will be easier to detect the country in which the courts can apply their jurisdiction.<sup>27</sup> However, in my opinion, in the latter case, the courts of the abovementioned places will not be effective in taking the precautions in advance to eliminate the probable damage because, as the act of infringement will not be completed without downloading, it is not possible to determine the place and therefore the competent courts.

#### **4.2.2.2. Place of Uploading**

The view that considers the “place of uploading” of the content giving rise to tortious liability, that is to say, the place where the work is transferred to a “web-server”, as the place of the tortious act should be analysed.

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<sup>26</sup> Memis, 2002, p. 121.

<sup>27</sup> Kaplan, 2009, p. 183.

The appropriateness of describing the place of uploading as a contact point which ensures that the court has jurisdiction, without describing it as the place of the tortious act must be discussed. Even though the place of residence/ customary domicile/ capital place of business of the defendant may point to the same place in most cases, it is possible for the defendant to enter the “ISP” and upload the website to a “server” in a territory of a country other than the abovementioned places. Therefore, as long as the abovementioned places point to the customary domicile/capital place of business of the defendant at the same time, since this place can be selected randomly and consciously in terms of the tortious act and also as it is difficult to detect the place where the content giving rise to the tort is uploaded to the memory, it should be avoided to accept this as an objective jurisdiction rule while determining the competent court.<sup>28</sup>

Accordingly, if the website operators in our scenarios go to a copyright-free haven once a year and upload all the copyrighted works they have, it would be very unfair for copyright holders, should the place of uploading be accepted as an objective jurisdiction. Therefore, in our scenarios, TurkMuzik Co., MESAM, Hakan Kaya, Bob and Monica must first find where the operators uploaded their copyrighted works and then sue them before the court of a copyright-free haven.

Provided that the exploitation of the work through publishing on the Internet without any possibility to download such work from the web site is classified as an “activity” giving rise to tort, and following my suggestion that the moment when such act is committed should be determined as the moment when the Internet user enters the website of the defendant in the country in which the user is present, or the moment when the web site is uploaded to the “server”, the competent courts will vary.

Even though the scope of the jurisdiction of the courts shall be determined by the content of the website, which itself determines the field of activity of the website owner within the scope of the concerned jurisdiction rules, it can be concluded that there will be a risk of being sued in any country in which the work can be viewed on a computer monitor. The “place of the server” as the place of the tortious act will not give rise to a court having jurisdiction for an “action for damages”. For this reason, in my opinion, the sole fact that the work can be

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<sup>28</sup> Uyanik & Cavusoglu, 2008, p. 976.



viewed on a website should not be regarded as the activity giving rise to tortious liability in terms of relations established through the Internet, in other words, a passive website should not be considered as point of contact sufficient to give rise to a court's jurisdiction.<sup>29</sup>

### **4.3. JURISDICTION UNDER EU LAW**

As the International Copyright Treaties make no provision for jurisdiction in this regard, the European law solution is to be found in the Brussels I Regime. Article 220(4) of the EC Treaty, now repealed by the Lisbon Treaty, provided that "...the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."<sup>30</sup> This article encouraged the six original Member States to conclude a Convention for the reciprocal recognition and enforcement of judgments in civil and commercial matters.<sup>31</sup> The Brussels Convention was adopted on 27 September 1968 to implement this system. When new members joined the EC, they agreed to the Brussels Convention as well.

There was however a demand to update some aspects of the Brussels Convention.<sup>32</sup> These demands were highlighted in the Commission's explanatory memorandum of the Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters.<sup>33</sup> This explanatory memorandum states as follows:

"The form chosen for the instrument-a regulation-is warranted by a number of considerations. The Member States cannot be left with the discretion not only to determine rules of jurisdiction, the purpose of which is to achieve certainty in the law for the benefit of individuals and economic operators, but also the procedures for the recognition and enforcement of judgments, which must be clear and uniform in all Member States. Moreover, transparency is a vital objective in this context; it must be possible to come to an immediate uniform understanding of the rules applicable in the Community without the need to seek the

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<sup>29</sup> Cizek, 1999, p. 290; Sargin, 2005, p. 240.

<sup>30</sup> Article 220(4) of the EC Treaty; Article 81 of the Consolidated Version of the Treaty on the Functioning of the EU provides similar provision.

<sup>31</sup> Briggs, 2002, p. 52.

<sup>32</sup> The Commission was required to present a Report on the application of the Regulation, accompanied by proposals for such changes as are thought necessary. In pursuance of this obligation, the Commission produced a Green Paper on the Regulation and published on 21 April 2009. Reference MEMO/09/169.

<sup>33</sup> O.J. L12 of 16.01.2001

provisions of national law that transpose the context of the Community instrument, bearing in mind that national law will very often be foreign to the plaintiff. And opting for a Regulation enables the Court of Justice to ensure that it is applied uniformly throughout the Member States”.<sup>34</sup>

According to this explanation, the Regulation aims to achieve certainty, transparency and uniformity within the European Union. With effect from 1 March 2002, the Brussels Convention was replaced by the Regulation in the Member States of the European Union except Denmark. It came into force in Denmark by an agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 19 October 2005. According to this agreement, the rules of the Regulation have become binding on Denmark as a matter of international law.<sup>35</sup>

The Regulation determines the jurisdiction of the court where the matter is within the scope of the Regulation and the defendant is domiciled in a Member State. Article 1 provides the scope of the Regulation. Accordingly, the Regulation will be applied in civil and commercial matters. In *Pearce v. Ove Arup Partnership Ltd and Others*,<sup>36</sup> Lloyd J. confirmed that actions pertaining to infringements of an intellectual property right are civil and commercial matters. It should be noted that the Brussels I regime deals with the international jurisdiction of E.U. Member States.<sup>37</sup> This Regulation must be applied if the defendants, regardless of their nationality, are domiciled in a Member State.<sup>38</sup> It is clear that the fundamental principles of the Regulation are the same as they were in the Brussels Convention.

Cheshire, North & Fawcett explained the position of English courts very clearly as follows:

“a) Where the defendant is domiciled in a Member State the bases of jurisdiction under the Brussels Regulation will apply and not the traditional rules of jurisdiction of the forum.

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<sup>34</sup> Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/99/0348 final - CNS 99/0154, O.J. C 376 E , 28/12/1999 P. 0001 – 0017.

<sup>35</sup> O.J. L 299/62 of 16 November 2005; Council of the European Union, 8402/06 (Presse 106) Press Release 2725<sup>th</sup> Council Meeting, Justice and Home Affairs, Luxembourg, 27 April 2006, <http://ue.eu.int/Newsroom>.

<sup>36</sup> [1997] Ch 293, at 298.

<sup>37</sup> Preamble of the Brussels I Regulation.

<sup>38</sup> Article 2 of the Brussels I Regulation.

b) Where the defendant is not domiciled in a Member State, in general, the traditional rules of jurisdiction of the forum will apply.

c) There are exceptions to b), ie some of the bases of jurisdiction under the Regulation (Articles 22 and 23) will apply to defendants, even though they are not domiciled in a Member State”<sup>39</sup>.

Article 2 of the Regulation provides the main jurisdictional rule of the Regulation. The main jurisdictional rule is that the defendant, who is domiciled in a Member State, may be sued in the courts of that Member State regardless of his or her nationality. Article 59(1) of the Regulation provides that the court dealing with the case is to apply its internal law in order to determine whether a party is domiciled in a Member State. According to Civil Jurisdiction and Judgments Order 2001, an individual is domiciled in the U.K., if and only if he or she is resident in the United Kingdom.<sup>40</sup>

By application of general rules, in our scenario 1, if TurkMuzik Co. and MESAM want to claim their rights in the UK courts, then they must issue proceedings against Mayaden Co. in the U.K. courts. In scenario 2, copyright holder Hakan Kaya, can issue proceedings against Mr. Johnson in the UK and Mr. Schwarzkopf in the German courts. Brussels I Regulation cannot be applied to our illustrated scenario 3, because the defendant is a Turkish citizen and domiciled in Turkey.

According to Article 59(2), if the defendant is not domiciled in the Member State whose courts are seized of the matter and if it is needed to determine whether the defendant is domiciled in another Member State, then, the law of that state is applied.

Article 22(4) of the Regulation is an exception to the main rule. It states that the courts referred to in Article 22 have exclusive jurisdiction and this Convention can be applied regardless of domicile. Article 22(4) gives exclusive jurisdiction to Member States’ courts about registration or validity of intellectual property rights. Copyright is not affected by this article, because copyright does not require any registration. Therefore, actions for copyright

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<sup>39</sup> Cheshire, North, Fawcett & Carruthers, 2008, p. 222.

<sup>40</sup> Civil Jurisdiction and Judgments Order 2001, Sch. 1, para. 9(2); McClean & Beever, 2009, p. 65.

infringement are not covered by this Article. These actions are governed by the general rules of the Regulation.<sup>41</sup>

Article 5(3) of the Regulation provides special jurisdiction over issues relating to tort or delict. Accordingly, a person domiciled in a Member State might be sued in the courts of another Member State “where the harmful event occurred or may occur”.<sup>42</sup> This approach provides one or more alternative forums for the plaintiff. The plaintiff may therefore sue in the Member State where the act or omission causing the injury occurred<sup>43</sup> or may occur and in addition to this he may sue where the damage occurred or may occur.<sup>44</sup> The Regulation’s definitions of tort, delict and quasi-delict are effectively the liability of the defendant outside the field of matters relating to contract.<sup>45</sup>

The Brussels I Regulation states that “...in the courts for the place where the harmful event occurred or may occur.”<sup>46</sup> This statement clearly provides a basis for jurisdiction. “The place where the harmful event occurred” can be understood as the place where the damage occurred and the tort was committed.<sup>47</sup> In *Handelskwekerij Bier*, the meaning of the wording “‘place where the harmful event occurred’ in Article 5(3) must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it”.<sup>48</sup>

The court, with regard to tortious, delictual or quasi-delictual liability, gave the plaintiff the option to sue the defendant either before the court where the damage occurred, or before the court where the event giving rise to it occurred, in order to give jurisdiction to the court best placed to hear the dispute, with a view to the efficient conduct of the proceedings.<sup>49</sup>

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<sup>41</sup> Case 288/82 *Ferdinand M.J.J. Duijnste v Lodewijk Goderbauer* [1983] E.C.R. 3663 at 3667; Fawcett & Torremans, 1998, p. 19.

<sup>42</sup> Article 5(3) of the Brussels I Regulation.

<sup>43</sup> Article 5(3) of the Brussels I Regulation.

<sup>44</sup> Groote, 2009, p. 453; According to Profesor Groote “Article 5(3), at least in the way it is interpreted by the European Court of Justice, cannot guarantee a reasonable exercise of ‘judicial’ scrutiny in all possible hypotheses.”

<sup>45</sup> Case 189/87 *Kalfelis v. Shroder, Munchmeyer, Hengst & Co.* [1988] E.C.R. 565; McClean & Beevers, 2009, p. 84; Cheshire, North, Fawcett & Carruthers, 2008, p. 249 .

<sup>46</sup> Article 5(3) of Brussels I Regulation.

<sup>47</sup> Case 21/76 *Handelskwekerij Bier Bv. v. Mines de Potasse d’Alsace SA*, [1976] ECR 1735.

<sup>48</sup> Case 21/76 [1976] E.C.R. 1735 at 1747.

<sup>49</sup> Case C-68/93, *Shevill and Others v Presse Alliance* [1995] E.C.R. I-415. Cheshire, North, Fawcett & Carruthers, 2008, p. 247.

There was a discussion about the decision of *Handelskwekerij* case. This case involved physical damage. Whether or not this case can be applied to the cases of loss or damage other than physical damages is unclear. In *Shevill and Others*, the Court of Justice decided that the distinction adopted in the *Mines de Potasse d'Alsace* case must apply equally in the case of loss or damage other than physical damage such as damage to reputation in a defamation context.<sup>50</sup>

According to Lloyd J in *Pearce v. Ove Arup Partnership Ltd. and Others*, there is no doubt that the infringement of copyright action can be classified as relating to tort, delict, or quasi-delict.<sup>51</sup> Therefore, we can apply Article 5(3) to infringements of intellectual property rights into our scenarios.

In *Pearce v. Ove Arup Partnership Ltd. and Others*,<sup>52</sup> Lloyd J. decided that:

“Two of the special rules of jurisdiction could be relevant to such a case as the present. The first is Article 5(3): ‘A person domiciled in a contracting state may, in another contracting state, be sued . . . 3. In matters relating to tort, delict or quasi- delict, in the courts for the place where the harmful event occurred.’

An action for compensation for infringement of copyright is a matter relating to tort, delict or quasi-delict. It would therefore be possible to bring this action, as regards Dutch copyright, in the Netherlands, no doubt in the courts of Rotterdam, as the place where the harmful event occurred”.<sup>53</sup>

General rules of the Regulation mean, in our illustrative scenarios, that Turkish plaintiffs TurkMuzik Co., MESAM in scenario 1, director Hakan Kaya in scenario 2 can sue the defendant:

- a) where the defendant is domiciled (Article 2(1));
- b) where the harmful event occurred or may occur (Article 5(3)).

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<sup>50</sup> Case C-68/93, [1995] E.C.R. I-415; Fawcett & Torremans, 1998, p. 153; McClean & Beevers, 2009, p. 85.

<sup>51</sup> [1997] 2 WLR 779, at 784, per Lloyd J., Torremans, 2000, p. 229.

<sup>52</sup> [1997] Ch. 293.

<sup>53</sup> [1997] Ch. 293 at 302.

According to these rules, the first option is the UK courts for scenario 1. In scenario 1, Mayaden Co. is the defendant party and is domiciled in the UK. There is no therefore doubt that TurkMuzik Co and MESAM would be able to issue proceedings against the defendant in the UK courts.

In the above scenarios, one of the fundamental questions is whether or not the court of the place of the server has jurisdiction. As explained in the introduction part of the section on jurisdiction, technically, the right to make available to the public right is infringed at the place of the server. This is also mentioned in the International Association for the Protection of Intellectual Property (AIPPI) Resolution. The AIPPI Resolution includes several considerations relevant to determining the appropriate court. The main factor is the “country where the infringements or the acts leading to infringement (‘infringing acts’) take place”.<sup>54</sup> But the Resolution continues: “to avoid abuse of forum shopping, there should be some nexus (based on serious and objective criteria) between the forum chosen and the infringing acts.” If the place of the infringing acts is regarded as the place where the material is uploaded to the Internet or where the servers are located, it will be too easy for the defendant to place its server where intellectual property protection is low. According to ALI Principles, requiring a nexus between the forum State and the acts does not solve the problem, because the focus remains on the acts. Therefore, ALI Principles rejected this option. If the focus remains on the acts, the defendant will have a chance to escape from the responsibility.

As it is determined in the *Shevill* case,<sup>55</sup> restrictions apply if the infringement occurs in more than one country. If the case is not brought before the court of the domicile of the defendant, the only court to have jurisdiction to deal with the infringement will be that of the country of the court in which the action is brought.<sup>56</sup> Accordingly, if an English company uploads the copyrighted works in the UK and multiple copies are downloaded in Turkey, Germany, the UK, France and the US, the French courts will only have jurisdiction to deal with the damage that resulted from the downloading in France and the infringing copies that resulted from that activity.<sup>57</sup>

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<sup>54</sup> AIPPI, Q174 Resolution, Recital b.

<sup>55</sup> C-68/93, *Shevill and others v. Presse Alliance* [1995] ECR I-415.

<sup>56</sup> C-364/93, *Marinari v. Lloyds Bank plc and others* [1995] ECR I-2719.

<sup>57</sup> French Cour de Cassation, first civil chamber, Judgment dated 16 July 1997 [1997] JCP IV No/ 1993 and [1998] J Dr. Int. 136 (annotated by A. Huet), *Torremans*, 2001, p. 229.

This situation makes Article 2 of the Regulation the best option for the plaintiff. Otherwise, the plaintiff must issue proceedings in each country for the damage that occurs in that country. This will lead to the fragmentation of Internet-related claims. On that basis, the UK would be the best option for the plaintiffs of the scenario 1.

The European Court of Justice limited the effect of Article 5(3) of the Regulation.<sup>58</sup> When the infringement takes place in two or more countries, and the action is not brought before the court of the domicile of the defendant, the court of the Member State where the action is brought will only have jurisdiction to deal with the damage that occurred in that Member State and could only make an award to the extent that the claimant suffers damage in that Member State.<sup>59</sup> The Court of Justice was concerned to keep Article 5(3) within certain bounds so as to avoid multiplication of competent place. It also wanted to avoid the situation where the plaintiff was able to sue in the place where he was domiciled.<sup>60</sup> Accordingly, there is no jurisdiction in the Member State where there is financial loss of author occur. Therefore, the European Court's limitation will affect Internet-related cases.

Pursuant to this limitation, downloaders of illegal copyrighted works who are from different countries will be sued where they are domiciled or where they infringed the work. Accordingly, in our scenarios, if the right holders commence proceedings against illegal downloaders from France, Italy, Spain, they must claim damages separately from French courts, Italian courts and Spanish courts. French courts will not have jurisdiction for the downloading in Italy and Spain.<sup>61</sup> For this reason, copyright holders must commence proceedings against illegal downloaders or uploaders who are downloading or uploading from the same country.

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<sup>58</sup> *Crucial Music Corp v. Klondyke Management AG* [2007] EWHC 1782 (Ch), [2007] IL pr 54; *Bank of Tokyo-Mitsubishi Ltd. v. Baskan Gida Sanayi ve Pazarlama AS* [2004] EWHC 945 at [223] (Ch); *London Helicopters Ltd. v. Heliportugal LDA-INAC* [2006] EWHC 108 at [21]

<sup>59</sup> Case C-364/93 *Marinari v. Lloyd's Bank plc* [1995] E.C.R. I-2719; Torremans, 2000, p. 229; McClean & Beevers, 2009, p. 85; Murphy, 2006, p. 372;

<sup>60</sup> Cheshire, North, Fawcett & Carruthers, 2008, p. 257.

<sup>61</sup> French Cour de Cassation, first civil chamber, Judgment dated 16 July 1997 [1997] JCP IV No. 1993 and [1998] J Dr. Int. 136; Torremans, 2000, p. 229 and the same approach taken in *Mazur Media Ltd. v. Mazur Media GmbH* [2004] 1 W.L.R. 2966; Murphy, 2006, p. 372.

Even if the defendant argues that there no tort was committed, the court will use *lex fori* to qualify the basis of the plaintiff's claim to decide whether the defendant did or did not commit a tortious act. In *Shevill and Others*,<sup>62</sup> this was explained as:

“The outcome is necessarily the same where a court before which proceedings are brought pursuant to article 5(3) has to give a ruling on an objection of lack of competence raised by a defendant denying the existence of the tort. In order to be able to rule on that objection, the court has to verify, on the basis of the evidence adduced by the plaintiff, whether the defendant did or did not commit an act which might render him liable and giving rise to damage within the judicial district of the court”.<sup>63</sup>

In our Scenario 2, there are two defendants from different Member States. The main question is whether the Article 6(1) of the Regulation can be applied to scenario 2 or not. The aim of this Article is to hear and determine closely connected cases together “to avoid the risk of irreconcilable judgments resulting from separate proceedings”.<sup>64</sup> Article 6(1) of the Regulation provides that:

“A person domiciled in a contracting state may also be sued:

1. Where he is one of a number of defendants, in the courts of the place where any one of them is domiciled.”

The European Court of Justice clarified Article 6(1) of the Regulation in its one of recent case *Roche Nederland BV v. Primus*.<sup>65</sup> In that case, the European Court of Justice was asked to determine whether a national court hearing a European patent infringement claim against a company within its jurisdiction also had jurisdiction to hear claims against other companies which had acted in an identical or similar manner and belonged to the same group but were established in other contracting states.

It was decided that, although Article 6(1) of the Regulation allowed a defendant domiciled in a contracting state to be sued in another contracting state where one of the other defendants was domiciled, there had to be a connection such that it was expedient to determine the actions together to avoid the risk of irreconcilable judgments arising from separate

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<sup>62</sup> Case C-68/93 *Shevill and Others v. Presse Alliance SA* [1995] ECR I- 415.

<sup>63</sup> [1995] 2 A.C. 18 at 50.

<sup>64</sup> McClean & Beevers, 2009, p. 80.

<sup>65</sup> Case C-539/03, [2006] E.C.R. I-6535



proceedings.<sup>66</sup> There was however no risk of irreconcilable judgments involving patent infringement proceedings: under the Munich Convention on the Grant of European Patent Convention 1973 and Article 64(1), a European patent was governed by the national law of each state for which it had been granted, and under Article 64(3), any infringement was to be dealt with by national law. Therefore, since the legal situations would be different, any divergent judgments in separate proceedings would not be contradictory or irreconcilable. It followed that the connection required for Article 6(1) of the Regulation could not be established. That would still be the case where defendant companies belonging to the same group had acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

Copyright law is harmonized by the Copyright Directive which sets out minimum provisions. There are still differences between Member States' copyright law such as fair dealing and fair use in German and UK copyright Acts, and separation of moral rights and economic rights. For example, in the German monistic conception of copyright, economic and moral rights cannot be viewed separately from one another whereas, in the French dualist conception, which is shared by many other civil law countries, the moral rights and economic rights are separate concepts. Therefore, this recent judgment of the ECJ can be applied to copyright infringement cases as well, which makes the situation worse for the copyright holders. According to this decision, copyright holders must sue each infringer in the Member States where they are domiciled.

For scenario 2, as a first option, there are two defendants from two different countries. According to the wording of Article 6(1) of the Regulation, Turkish director Hakan Kaya could sue the defendants either in a German court or a UK court. However, with the judgment of ECJ in *Roche Nederland*, application of Article 6(1) of the Regulation has changed. According to this recent judgment, if the infringement is covered by the national law of each state, it would not be possible to sue two defendants from different Member States in the same court. Copyright is governed by national laws in the EU. Hakan Kaya cannot therefore sue Mr. Johnson and Mr. Schwarzkopf together in the UK or German courts.

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<sup>66</sup> Case C-189/87, *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co* (t/a HEMA Beteiligungsgesellschaft mbH) [1988] E.C.R. 5565 ECJ (5th Chamber)

Under the Regulation, there is a strict and absolute ‘first seized’ rule, which has been abused by would-be infringers.<sup>67</sup> In our scenarios 1 and 2, potential infringers Mayaden Co, Mr. Johnson and Mr. Schwarzkopf could bring an action in one of the EU Member States (for example Italy) seeking a declaration of non-infringement. The effect of the plaintiffs issuing proceedings in Italy is that its courts are ‘first seized’ of the matter within Article 27 of the Regulation and as a result, all other EU courts are deprived of jurisdiction. The victims of infringements, the Turkish copyright holders, are therefore ‘torpedoed’<sup>68</sup>, that is, left without enforceable rights, especially where the chosen court is slow in adjudicating, because the Turkish copyright holders would have to wait for the decision of the first seized court.

#### **4.4. JURISDICTION UNDER TURKISH LAW**

The Turkish Statute Regarding International Private Law and Procedure<sup>69</sup> (MOHUK 2007) includes jurisdiction rules, choice of law and international civil procedure rules. In addition to this Statute, there are other acts and international agreements to which Turkey is a party that contain jurisdiction and choice of law provisions.

In a case involving a foreign element, the first thing that a court has to decide is whether it has jurisdiction. In many of these cases, there are two or more countries that may have jurisdiction. The plaintiff decides where to sue and this decision is one of the most important parts of the case. In our scenarios, when the plaintiffs sue the infringers in Turkish courts, the first question will be whether a Turkish court will hear and determine the case.

MOHUK 2007, not differing from the MOHUK 1982, refers the international jurisdiction of Turkish courts to the domestic jurisdictional rules.<sup>70</sup> The general jurisdictional rule in Turkish procedural law is that a suit could be initiated before a Turkish court of the domicile of the defendant (Article 9 of Code of Civil Procedure (HUMK)). Thus, it is possible to pursue a law suit before the Turkish courts against anyone who has a domicile in Turkey.

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<sup>67</sup> Garnett, 2006, p.344.

<sup>68</sup> This expression was first used by the Italian writer Franzosi in 1997, see M Franzosi, ‘Worldwide Patent Litigation and the Italian Torpedo’ (1997) 19 *European Intellectual Property Review* 382.

<sup>69</sup> Statute Regarding Turkish International Private Law and Procedure (MOHUK), Law No. 5718, Date of Enactment 27.11.2007.

<sup>70</sup> The international jurisdiction of Turkish courts is established based on stable connecting factors according to the Turkish International procedural law system. Thus, the principle of forum non convenience is alien to the Turkish procedural law. Nomer & Sanli, 2008, p. 457; Yesilirmak, 2009, p. 1266.

Article 40 of the MOHUK 2007 provides that the rules of internal law on local jurisdiction determine the international jurisdiction of Turkish courts. The nationality of parties is not decisive, while making this decision.

Before examining the contents of this article, it should be noted that the jurisdiction of the courts to be identified by this article is obviously limited to the works protected under Article 88 of Turkish Copyright Act.

According to Article 88 of TCA, proceedings against third parties commenced by an author will be heard by the courts of the place where the defendant's residence is registered or where the offence was committed, or where the effects of the infringement act were observed. Pursuant to related provisions, the courts whose jurisdiction is determined pursuant to this article may be granted jurisdiction to prevent the infringement that can be detected as per the substantial law applicable for the work in question, confiscate, commence compensation proceedings, identify of infringements and events that may give rise to an infringement.

The Turkish Code of Civil Procedure<sup>71</sup> (HUMK) was adopted to determine procedural law in Turkey. According to the Turkish Code of Civil Procedure (HUMK), the general provision for jurisdiction for real persons is the courts in the area of where the defendant domicile<sup>72</sup> have jurisdiction.<sup>73</sup> If the defendant has no present domicile in Turkey, courts where the defendant lastly domiciled in Turkey have jurisdiction. On the other hand, according to the Turkish Code of Civil Procedure, objection to the jurisdiction is a preliminary objection; therefore, the objection must be done before the proceedings start.<sup>74</sup> If the defendant does not object to the jurisdiction before the proceedings, he cannot object to it during further stages of the proceedings. According to Article 23 of the HUMK, the Turkish court does not *ipso jure* examine its international jurisdiction. Therefore, the jurisdiction shall, in principle,<sup>75</sup> be assumed unless the respondent raises a jurisdictional objection.<sup>76</sup>

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<sup>71</sup> Law No. 1086, Date of Enactment 18.6.1927

<sup>72</sup> The term "domicile" is determined according to Article 19 of Turkish Civil Code, Law No. 4721, Date of Enactment 22.11.2001.

<sup>73</sup> Article 9(1) of Turkish Code of Civil Procedure (HUMK), Law No. 1086, Date of Enactment 18.6.1927.

<sup>74</sup> Article 23(1) of HUMK.

<sup>75</sup> It is obvious that, when the claimant asserts an exorbitant jurisdiction, the court would deny adjudicating a case. As an example: Even if the defendant refrains from raising an objection to the court's jurisdiction, a claim on the ownership of an immovable located in a foreign country would not be adjudicated in Turkey.

<sup>76</sup> On the other hand, it is obvious that when the claimant asserts an exorbitant jurisdiction, the court would deny adjudicating a case.

There are also special jurisdictional rules in the HUMK (articles 10-23). Cases relating to contracts may be decided by a Turkish court if the place of performance is in Turkey or the contract was entered into in Turkey (Article 10 of HUMK). Cases arising in tort may be decided by a Turkish court if it is the place of occurrence of the tortious act (Article 21 of HUMK).

Accordingly, in our scenarios, the general rule should be determined first. According to Article 9(1) of the HUMK, in our scenario 1, Turkish courts will not have jurisdiction because the defendant Mayaden Co. is not domiciled in Turkey and has never been domiciled in Turkey before. However, pursuant to Article 17 of the HUMK, if Mayaden Co. has a branch in Turkey, then they could be sued where their branch is. They do not have a branch in Turkey; therefore, Mayaden Co. can be sued in England as their place of business.

In the second scenario, since as a general rule, there is no doubt that the website operators can be sued at their places of domicile, Mr. Johnson can be sued before the UK courts whereas Mr. Schwarzkopf can be sued before the German courts. The question whether they can be sued in the same Member State will be discussed in the following Section.

In our scenarios, Mr. Turkan is the only individual who can be sued in the Turkish courts according to the general provision of HUMK. In scenario 3, Bob and Monica can sue Mr. Turkan where he is domiciled, i.e. in Turkey.

However, in addition to the general provisions, there are special provisions in the Turkish Code of Civil Procedure (HUMK), giving jurisdiction to Turkish courts.<sup>77</sup> One of the special provisions concerns liability in tort. According to Article 21 of the HUMK, Turkish courts also have jurisdiction, if the tort was committed within Turkey. Under article 21 of the HUMK, it is not clear which court will have jurisdiction if the place where the tortious act was committed and the place where the damage occurred are different. According to Professors Kuru, Arslan and Yilmaz, it should be understood that the courts of both places will have the jurisdiction.<sup>78</sup> Therefore, Turkish courts will have jurisdiction if the tortious act

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<sup>77</sup> Articles 10, 11(2) and (3), 12, 19, 20, 21, of Turkish Code of Civil Procedure; Pekcanitez, Atalay & Ozekes, 2010, p. 103.

<sup>78</sup> Kuru, Arslan & Yilmaz, 2010, p. 181; Nomer & Sanli, 2008, p. 403; Ansay & Schneider, 2002, p. 179.

was committed in Turkey or the damage occurred in Turkey. For that reason, in the scenarios, whether the damage occurred in Turkey or not should be determined.

According to Article 21 of the HUMK which is a procedural rule, the meaning of tort will be decided under *lex fori*.<sup>79</sup> In this situation, if a part of the tortious act was committed in Turkey or damage occurred in Turkey, then, the place of the tortious act can be determined according to Turkish law. On the other hand, the issue of whether an act of the defendant's includes tort under the governing law is a matter of substantive law. Even if the applicable law is foreign substantive law, a Turkish judge must apply Turkish procedural law to the case.<sup>80</sup> As evidence is a procedural matter, the court will apply Turkish law to the evidence and evaluate whether to admit the defendant's or plaintiff's evidence or written evidence from a foreign country.<sup>81</sup>

If the place where the tortious act was committed and the place where the damage occurred are different places then both courts will have jurisdiction.<sup>82</sup> Accordingly, in our scenarios, we should first examine whether the tort was committed or the damage occurred in Turkey or not. In our Scenarios, website operators upload copyrighted works to their servers, which are located in Germany, UK and Turkey. The place where the damage occurred can be any place where the copyrighted works are accessed and downloaded. Therefore, copyright holders can sue the website operators in Turkey for the damage that resulted from the downloading in Turkey and for the infringing copies that resulted from that activity.<sup>83</sup>

With the infringement of copyright on the Internet, the infringer causes damage to economic and moral rights of the author. The damage therefore occurs in the various affected markets. One of these markets is where the author is domiciled. Although the infringement may be committed in another country than Turkey, the Turkish author will suffer economical loss in Turkey, where he is domiciled.<sup>84</sup>

If the Turkish author wants to sue operators of websites or downloaders who are from different nations at the same time, he has to sue all of them in a common jurisdiction if there

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<sup>79</sup> Nomer & Sanli, 2008, p. 402; Ansay & Schneider, 2002, p. 176.

<sup>80</sup> Nomer & Sanli, 2008, p. 402.

<sup>81</sup> Ansay & Schneider, 2002, 176.

<sup>82</sup> Kuru, Arslan & Yilmaz, 2010, p. 181; Nomer & Sanli, 2008, p. 403; Ansay & Schneider, 2002, p. 179.

<sup>83</sup> Torremans, 2001, p. 229.

<sup>84</sup> Nomer & Sanli, 2008, p. 401.

is any.<sup>85</sup> It is obviously too costly to take actions against thousands of infringers separately to stop infringement on the Internet. Collective management organisations are therefore only suing major uploaders.<sup>86</sup> Until now, around 18000 major uploaders have been subject to legal proceedings by RIAA and European countries associations.

According to the general rules of HUMK,<sup>87</sup> if a Turkish defendant is domiciled in Turkey or was previously domiciled in Turkey, the Turkish court where the defendant is domiciled or was last domiciled will have jurisdiction. As mentioned above, while making this decision, it is not important whether the infringer is a Turkish citizen or not.<sup>88</sup> Therefore, the question that foreign plaintiffs must preliminarily answer is that of which law will be applicable to the case, if he commences proceedings in Turkey. It is then important to examine the substantive aspects of the applicable law. However, especially for authors who are “one-shotters”<sup>89</sup> it is rather complex to issue proceedings in another country because of the distance, different language, accommodation and travel cost.<sup>90</sup>

In addition, Article 40 states that, if the local jurisdiction is not determined by “ordre public” or according to the rules of exclusive jurisdiction, the parties may agree that a dispute among them involving a foreign element and resulting from contractual relations, be heard at the court of a foreign State. If the foreign court finds itself incompetent, the case will be heard by the Turkish court having jurisdiction.<sup>91</sup> However, in our scenarios, there is no contractual relation therefore, we cannot apply this rule to our cases.

There is a special jurisdiction clause in the Turkish Copyright Act. According to Article 66(5) of the Act, the plaintiff (author) shall also be entitled to bring an action seeking an injunction in the district where he resides.<sup>92</sup>

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<sup>85</sup> Article 21(2) of HUMK.

<sup>86</sup> NPD, an U.S. research group, estimates that around 15% of filesharers are responsible for uploading 75% of illegal content to the internet; [http://www.bpi.co.uk/index.asp?Page=piracy/content\\_file\\_79.shtml](http://www.bpi.co.uk/index.asp?Page=piracy/content_file_79.shtml), visited on 08.02.2006.

<sup>87</sup> Article 9 of HUMK.

<sup>88</sup> Kuru, Arslan & Yilmaz, 2010, p.213.

<sup>89</sup> One-shotter v. One-shotter, Galanter analysis; Galanter, 1974, p. 99. According to this Analysis, one-shotters are persons who go to court one or two times in their life. They are afraid from going courts.

<sup>90</sup> McClean & Beevers, 2009, p. 59.

<sup>91</sup> Article 40 of MOHUK Ansay & Schneider, 1990, 152.

<sup>92</sup> Amended by Law no: 4110/19, 7.6.1995.

According to TCA, Article 66, civil proceedings commenced by the author against third parties may be filed before the courts located where the defendant resides or where the tortious act was committed or where the effects of the infringement were observed. In the event that the defendant does not reside in Turkey, the tortious act should have taken place in Turkey or the effects of infringement should have been observed in Turkey for the Turkish courts to be deemed competent. The area affected by the tortious act shall always be Turkey, other than exceptional cases in which direct substantial financial damage may be observed abroad. This may seem as an advantage for the plaintiff who always has at his disposal several courts to apply to. However, the actual aim is not to protect the plaintiff but the rights of the works together with their status within the national economy, as well as the general public interest. In other words, the objective jurisdiction selected, always suggests a Turkish court having international jurisdiction.

It can be concluded that the nationality principle corroborates the opinion that the legal existence of the intellectual work as an immovable case, is deemed to fall within the scope of the state's exercise of its authority based on its sovereignty, therefore, decisions concerning the validity of the rights and the claims on the infringement thereof shall only be made by the courts of the country which has created them.

Under Turkish positive legal rules, according to opinions that suggest that courts which have jurisdiction concerning the torts due to intellectual property right infringements by the use of Internet should also be provided under TCA Article 66 since there are no special provisions. The fact that the right owner has the opportunity to file a case before the courts where the tort was made or its effects were observed, in practice, would cause the defendant to be brought before a court located in a place which the defendant would never know or anticipate. In other words, having regard to the complex technological structure of the Internet that goes beyond the boundaries of territories, the application of traditional rules of jurisdiction to the tortious acts committed on the Internet will not yield satisfactory results. In this framework, if the plaintiff had the right to file a case where he resides, in the event that he files the case before Turkish courts by application of the rule of jurisdiction resulting from the fact that he is residing in Turkey, it is apparent that the workload of Turkish courts would unnecessarily increase. This situation may result in the defendant being tried in a distant country, before which he would never know or foresee without having the opportunity for an adequate defence. However, Internet users should be able to foresee where they may be tried and the

victims should be able to foresee where they can commence proceedings. Standard rules of jurisdiction should be provided so as to determine the final international jurisdiction for ensuring certainty and consistency.<sup>93</sup>

This opinion also suggests an objective rule of jurisdiction and acknowledges the signing of international agreements to ensure the application of uniform rules as the final solution for achieving certainty and foreseeability. Therefore, it would be appropriate to grant jurisdiction concerning the liability in tort to the “courts located in the country of closest contact”, in accordance to the Turkish Private International Act, Article 25 providing for the law applicable to tort.<sup>94</sup>

#### **4.4.1. JURISDICTION for INTERLOCUTORY INJUNCTIONS**

Article 77 of TCA concerning interlocutory injunctions provides in its second paragraph that the request may be made before or during the proceedings or afterwards. However, the competent court is not defined. Therefore, it can be concluded that the courts defined in by Article 77 are also competent to take related decisions since the competent court in the context of interlocutory injunctions to be decided before the substantial case is filed shall be provided under the framework of the provisions of Turkish Law of Civil Procedure.<sup>95</sup> As it is provided by Turkish Law of Civil Procedure Article 104/1, the interlocutory injunctions before the main proceedings shall be requested from the court competent for the main proceedings or from the court located in the place where the related interlocutory injunctions could be taken most rapidly at the lowest cost. Interlocutory injunction requests to be made once the case is filed shall be made from the court dealing with the main proceedings (Turkish Law of Civil Procedure Article 104/2).<sup>96</sup>

As regards the doctrine, there is no difference between TCA Article 77 and Turkish Law of Civil Procedure Article 9, in that the rule of jurisdiction and the courts located where the defendant resides are considered to be the competent courts. However, in Article 63 of Regulation no 556 on trademark rights the plaintiff may commence proceedings before the

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<sup>93</sup> Bilgic, 2004, p. 271.

<sup>94</sup> Bilgic, 2004, p. 235 and 269-270.

<sup>95</sup> Yildirim, 2007, p. 30-31

<sup>96</sup> Yildirim, 2007, p. 31.



courts located where he resides, pursuing an objective to provide the trademark right owner with more guarantees.

I am of the opinion that this facilitation, as provided by the abovementioned regulation benefiting trademark right holders should also be afforded to copyright holders due to the current increase in volume of intellectual property right infringements on the Internet. There is no uniformity of opinion concerning the quality of the jurisdiction of the courts stated in Article 63 of Regulation 556 concerning trademark rights. One doctrinal opinion puts forward that the jurisdiction of the courts provided through the jurisdiction rules stated in Article 63 of the Regulation are based on “public order”.<sup>97</sup> The court would always spontaneously (ipso jure) consider its incompetence until the case is decided by res judicata. Accordingly, it is controversial that the related article should provide for a final and general jurisdiction rule based on the place of residence of the defendant, stemming from Article 9 of Turkish Law of Civil Procedure. Another opinion is that Article 63 of the Regulation was introduced to increase the number of competent courts to facilitate the plaintiff’s action and that the denial of the case for reasons of incompetence in the event that the intellectual right owner of his own volition, commences proceedings before the courts located where the defendant resides would not conform to the protective values aimed at by the article in question. Yet another opinion states that the wording of the article indicates the existence of a jurisdiction rule, which is too clear and definite to generate any hesitations.<sup>98</sup>

Another parallel opinion in doctrine suggests that the rule of jurisdiction stated in TCA should be considered separately for each actual case having regard to its objective and merits.

According to another opinion put forward in doctrine<sup>99</sup>, the jurisdiction of Turkish courts stated as competent as per TCA for infringement acts is not an exclusive jurisdiction. Accordingly, the objective of the provision providing the jurisdiction of the court in infringement cases is not to ensure that proceedings are always commenced before Turkish courts but to allocate specialized courts so as to provide the right owner with the best access to justice and to make sure that there exists a Turkish court that may be applied to under any circumstances. The right holder, should he consider it in his interest, may commence

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<sup>97</sup> Karan & Kilic, 2008, p. 508.

<sup>98</sup> Sanli, 2005, p. 127.

<sup>99</sup> Suluk & Orhan, 2010, p. 185; Baspinar & Kocabey, 2007, p. 289; Erdem, 2007, p. 195.

proceedings abroad and ends up unable to enforce the judgment of foreign court in Turkey.<sup>100</sup> Therefore, this rule is not a final jurisdiction rule in terms of internal legislation. In line with this idea, the opinion further suggests that there is no legal obstacle to assigning the jurisdiction to a foreign court after the infringement by signing an agreement on jurisdiction under the scope of Article 40 of MOHUK, where the liability is in tort and results from an intellectual right infringement.<sup>101</sup>

As stated in the doctrine, the last paragraph of Article 40 of MOHUK aims to combine cases before the same court in the event that different entities infringe the same intellectual property rights. In this context, cases can be filed against those who reproduce, distribute and communicate the works to the public, before the same court.<sup>102</sup>

This is a crucial provision to stop the infringement as quickly as possible. As was stated earlier, time is extremely important for the author to prevent Internet infringements therefore, with the interlocutory injunction; access to the website can be suspended. However, if the Turkish ISPs' users change the DNS (Domain Name Server) numbers for a foreign DNS number, then the users can still access the website that has been suspended.

The other way to access suspended websites is by using free web based anonymous proxy services.<sup>103</sup> These services allow users to visit websites through an anonymous proxy so that they can visit sites that are blocked by their ISPs, companies, universities or schools. Therefore, injunctions may decrease the number of infringements but cannot put an end to them.

#### **4.4.2. FORUM NON CONVENIENS UNDER TURKISH LAW**

Turkey does not recognize the doctrine of *forum non-conveniens*.<sup>104</sup> Therefore, defendants cannot apply to the court to have the claim stayed even if another court has more connection with the dispute. In our illustrations, it is a very important advantage for Turkish plaintiffs,

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<sup>100</sup> Erdem, 2007, p. 195.

<sup>101</sup> Erdem, 2007, p. 203-204.

<sup>102</sup> Tekinalp, 2009, p. 483.

<sup>103</sup> There are many websites which are provide this service such as: <http://proxify.com>, <http://anonymouse.org>, <http://theproxyfree.com>,

<sup>104</sup> Nomer & Sanli, 2008, p. 421.

TurkMuzik Co, MESAM and Hakan Kaya, when they sue websites' operators, Mayaden Co., Mr. Johnson and Mr. Schwarzkopf in Turkey.

As a general rule in Turkish law, the burden of proof is on the defendant to show that the court does not have jurisdiction over the issue. According to Turkish civil procedural law, an objection to jurisdiction is a preliminary objection and can be done only at the first court hearing.<sup>105</sup> Accordingly, in a case involving a foreign element, the defendant can object to the jurisdiction of Turkish courts by raising a preliminary objection and he does not need to show which country's court has jurisdiction.<sup>106</sup> If the defendant does not object to jurisdiction by raising a preliminary objection, it means he accepts the jurisdiction of Turkish courts.<sup>107</sup> However, if a Turkish court has exclusive jurisdiction over the dispute, then the court can determine at any stage of the proceedings whether it has jurisdiction or not.<sup>108</sup>

Turkish courts have exclusive jurisdiction over disputes related to real estate located within Turkey<sup>109</sup> and over proceedings brought against foreign businessmen doing business through agents in Turkey.<sup>110</sup> Additionally, Turkish courts have exclusive jurisdiction in bankruptcy cases.<sup>111</sup>

In internal law on local jurisdiction, if proceedings are commenced before two different courts in Turkey, the parties have the right to object to a second set of proceedings by raising a preliminary objection.<sup>112</sup> However, MOHUK and HUMK are silent on proceedings brought in different countries. According to Professors Nomer and Sanli, commencing proceedings in another country that has jurisdiction, does not preclude proceedings before a Turkish court if there is no bilateral agreement between Turkey and that country about pending cases.<sup>113</sup>

Consequently, individual plaintiffs or small companies who are referred to as "one-shotters" by Galanter, may prefer to issue proceedings in their home country, even if they can have

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<sup>105</sup> Article 187(2) of HUMK.

<sup>106</sup> Nomer & Sanli, 2008, p. 412.

<sup>107</sup> Nomer & Sanli, 2008, p. 412.

<sup>108</sup> Article 23 of HUMK; Pekcanitez, Atalay & Ozekes, 2010, p. 108.

<sup>109</sup> Article 13 of HUMK.

<sup>110</sup> Ansay & Schneider, 2002, p. 174.

<sup>111</sup> Article 17 of HUMK.

<sup>112</sup> Article 187(2) of HUMK; Nomer & Sanli, 2008, p.411.

<sup>113</sup> Nomer & Sanli, 2008, p. 412.

more compensation in another country.<sup>114</sup> However, the high number of infringements show that authors have to become Repeat Players as soon as possible.

	JURISDICTION RULES	
Article 9 of HUMK (General Rule)	Courts of where the defendant is domicile	If the defendant has no present domicile in Turkey, courts where the defendant lastly domiciled in Turkey
Article 17 of HUMK (General Rule)	If natural or legal person has a branch in another place, the court of that place has jurisdiction as well	
Article 21 of HUMK (Special Rules)	Courts of where the tort was committed	Courts of where the damage occurred has also jurisdiction as well (if different than committed place)
Article 66(5) of Turkish Copyright Act	The claimant (author) shall also be entitled to bring an action in the district in which he resides for an injunction	

#### 4.5. JURISDICTION UNDER TRADITIONAL ENGLISH RULES

The traditional English rules on jurisdiction will apply in the case where the Brussels I Regulation and Lugano Convention do not apply. Additionally, if there are other international Conventions containing jurisdiction rules about the subject-matter of the case then it will take priority over traditional rules.<sup>115</sup> English courts are competent under the traditional rules to try an action in personam, if:

the defendant is served with a claim form in England;

the defendant submits to the English court's jurisdiction;

<sup>114</sup> Galanter, 1974, p. 100.

<sup>115</sup> Clarkson & Hill, 2006, p. 59.

there is service of a claim form out of the jurisdiction according to Civil Procedure Rule Part 6.<sup>116</sup>

The applicable rules for our scenarios will be the traditional English rules on jurisdiction when the plaintiff issues proceedings in the United Kingdom against a defendant who is not domiciled in one of the Member States. Accordingly, we could apply the traditional English rules to our Scenario 3 if the operator of izle.com who is domiciled in Turkey was served a form of claim in England.

A court's jurisdiction over a person requires that notice of the origination of any process in that court to be properly served on the person. Generally, this requires that the person be physically present in the territorial jurisdiction of the court. In addition to service in person, service of the claim form can be made by post, or through a document exchange, or by fax or other means of electronic communication within the jurisdiction.<sup>117</sup> Thus, those who are ordinarily resident within the territorial jurisdiction of that court are typically amenable to the court's jurisdiction.

In our Scenario 3, the defendant, the operator of izle.com, is domiciled in Turkey and outside of the jurisdiction of the U.K. courts. In such cases, Civil Procedure Rules Part 6.20 is applied.

CPR Part 6 provides for extraterritorial service where a “claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.” Until 1 May 2000, Order 11 of the Rules of the Supreme Court set out the procedure. After that date, the CPR Part 6 replaced these provisions.<sup>118</sup>

The decision in *Tyburn Productions Ltd* in 1991 held that a claim that acts done outside the United Kingdom constitute an infringement of the copyright law of a foreign country was not

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<sup>116</sup> Until April 1999, the defendant had to be served with a writ of summons, or its equivalent.. Order 11 of the Rules of the Supreme Court was replaced by the Civil Procedure Rule Part 6; Cheshire, North, Fawcett & Carruthers, 2008, p. 354.

<sup>117</sup> Clarkson & Hill, 2006, p. 87. There are also rules allowing for service of a writ to be effected by way of newspaper advertisement, where the address of the defendant is unknown; Hood, 2007, p. 112.

<sup>118</sup> The authorities on the interpretation of the Order 11 of the Rules of the Supreme Court are still pertinent: *Petroleo Brasileiro SA v. Mellitus Shipping Inc.* [2001] CA Civ. 418, [2001] 1 All ER (Comm.) 993, Briggs, 2008, p. 114.

considered to be within the jurisdiction of the English courts.<sup>119</sup> However, in *Pearce*,<sup>120</sup> it was held that any claim against a defendant who is domiciled in a Member State party to Brussels or Lugano Convention, or with regard to actions claiming infringement of intellectual property rights to which either the Judgments Regulation, the Brussels Convention or the Lugano Convention applies,<sup>121</sup> the English court will have jurisdiction in conformity with the Regulation rules.<sup>122</sup> Moreover, there is still doubt as to the main authority that states that such issues are not within the jurisdiction in proceedings that are not subject to the Regulation or the Conventions. On the other hand, Dicey & Morris argue that, if a case about an act committed outside the U.K. territory and constituting an infringement of intellectual property is brought before an English court, the English court should not apply any limitation on claims for breach of IP rights and it should not prevent the reference to the choice of laws rules.<sup>123</sup>

There are two requirements on jurisdiction matters. Firstly, there must be a basis for jurisdiction in respect of a foreign defendant and secondly, there must not be any uncertainty about whether or not the English courts will exercise their discretionary powers to stay the action.<sup>124</sup>

Until 1987, Order 11 (now Civil Procedure Rule Part 6) was out of line with Article 5(3) of the Brussels Convention and the decision of the European Court of Justice in *Bier v. Mines de Potasse d'Alsace SA*.<sup>125</sup> The English extraterritorial service rule relating to tort provided for a claim founded on “tort committed within the jurisdiction” until 1987. The new version of the rule brought Order 11 into line with Article 5(3) of the Brussels Convention.

According to C.P.R. r.6.20 (8), the English court will have jurisdiction either if damage was sustained within the jurisdiction or if the damage sustained resulted from an act committed within the jurisdiction. In *Metall and Rohstoff AG*, the court held that it is not necessary that

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<sup>119</sup> *Tyburn Productions Ltd v Conan Doyle* [1991] Ch. 75.

<sup>120</sup> *Pearce v. Ove Arup Partnership Ltd* [1999] 1 All ER 769 at 802, CA

<sup>121</sup> Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] O.J. L 12/1, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters. The position as between different parts of the United Kingdom is governed by the Civil Jurisdiction and Judgments Act 1982 (c.27), Sch.4.

<sup>122</sup> [2000] Ch 403 C.A., McBride & Bagshaw, 2008, p. 379.

<sup>123</sup> Dicey, Morris & Collins, 2006, vol. 2, p. 1521.

<sup>124</sup> Fawcett & Torremans, 1998, p.241; Hood, 2007, p. 82.

<sup>125</sup> Case-21/76, [1976] ECR 1735.

the entirety of the damage should have been sustained within the jurisdiction; it is enough if some significant part of the damage was sustained in England.<sup>126</sup> Also, it is not necessary that all the acts have been committed within the jurisdiction; Slade L.J. stated that a judge must “look at the tort alleged in a common-sense way and ask whether damage has resulted from substantial and efficacious acts committed by the putative defendant within the jurisdiction, whether or not other substantial and efficacious acts have been committed elsewhere”.<sup>127</sup>

According to C.P.R., r.6.21 (2A), the burden of proof is on the plaintiff. The plaintiff must satisfy the court that England is the appropriate place in which to bring the claim in order to obtain permission from the court. In deciding whether England is the forum conveniens or not, the nature of the claim, the legal and practical issues involved, availability of witnesses and legal costs will be taken into account by the court.<sup>128</sup>

The rules for defamation cases, in which an act in one country may give rise to damage in a number of countries, might be applied into our scenario 3. By the act of izle.com’s operator, Copyright holders may suffer economic loss in more than one country because of the act of izle.com’s operator. In this situation, such as in defamation case Berezovsky, the English court will assume that England may be an appropriate proper forum, even if izle.com’s operator is domiciled in Turkey.<sup>129</sup>

As argued by Torremans, the territoriality principle may be applied, since the availability of a website that provides illegal copyrighted works to persons in the U.K. will be deemed as leading to infringing acts being committed in the U.K., even if the defendant is not physically present in the U.K.<sup>130</sup> Accordingly, in our scenario 3, if the plaintiff meets the requirements of traditional English jurisdiction rules, Mr. Turkan can be sued in England.

#### **4.5.1. FORUM NON CONVENIENS**

Although there are rules that govern where proceedings must be issued, sometimes the court chosen by the plaintiff is inconvenient for witnesses or causes undue hardship to the

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<sup>126</sup> *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391.

<sup>127</sup> [1990] 1 Q.B. 391 CA at 437

<sup>128</sup> *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460; *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, McClean & Beevers, 2009, p. 108.

<sup>129</sup> *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, McClean & Beevers, 2009, p. 109.

<sup>130</sup> Torremans, 2000, p. 233.

defendants. If the defendant is able to present sufficient evidence of the inconvenience of the jurisdiction of the court, the common law principle of forum non-conveniens allows a judge to decline to hear, or to transfer a case, even though the court might otherwise be an appropriate forum.

English courts apply two tests in order to determine the validity of the objection of the defendant. The first test is whether the defendant can show that there is an alternative forum available, more appropriate than the court's forum, where the case will be more suitably tried in the interest of parties and those of justice. The second test is applied once the defendant has discharged the above burden of proof, the court may grant a stay, unless the plaintiff can show that, even though factors connect the case with the alternative forum, special circumstances exist to show that substantial justice cannot be obtained there.<sup>131</sup>

This principle is not applicable when the defendant is domiciled in the U.K. (or any other E.U. Member States). Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters provides its own rules to determine jurisdiction and does not indicate the proper parameters for Member States, which may stay proceedings on the ground of forum non conveniens in favour of either another Member State or a non Member State.

*Owusu v. Jackson and others*<sup>132</sup> answered the question of whether a Member States' court could apply forum non-conveniens or not. Until the *Owusu* decision of, the English Court of Appeal had decided that the Regulation did not apply if the choice of forum was between the courts of England and a non-Member State, so the principle of forum non-conveniens was applied.<sup>133</sup>

The main criterion of applicability of the Regulation is whether or not the defendant is domiciled in a Member State.<sup>134</sup> In *Owusu*, the Court of Appeal asked the ECJ to determine whether the courts of a Member State could apply the forum non-conveniens principle to the

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<sup>131</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 A.C.460.

<sup>132</sup> Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*, E.C.R. 2005 I-01383

<sup>133</sup> *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, Griffiths, 2005, p. 1.

<sup>134</sup> Case No C-412/98, *UGIC v Group Josi Reinsurance Co SA* [2001] Q.B. 68.



case in favour of the courts of a non-Member State where a defendant is sued in the Member State of his domicile.

The ECJ ruled that “Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention and there is no exception on the basis of the *forum non conveniens* doctrine.”<sup>135</sup> In addition, The Court ruled that the general rule laid down in Article 2 should be interpreted to provide legal certainty in Member States<sup>136</sup>, whereas the application of the *forum non conveniens* principle is liable to undermine the principle of legal certainty, which is the basis of the Convention.<sup>137</sup>

Accordingly, in our scenarios 1 and 2, if the Turkish copyright holders commence proceedings against English operators in England, the English operators would not invite the English court to decline jurisdiction on the basis that it was not the *forum conveniens*.

#### **4.6. JURISDICTION UNDER GERMAN LAW**

German private international law is only applicable when Brussels I or Lugano Convention are not applicable. This arises when a German author wants to issue proceedings against an alleged infringer who is not domiciled in one of the Contracting States, as in our Scenario 3. German copyright holder Monica may want to issue proceedings against Mr. Turkan in Germany. This situation will be examined in this section.

German international procedural law is part of the domestic procedural law and governed by the Code on Civil Procedure (ZPO)<sup>138</sup> and the Courts’ Constitution Act (GVG).<sup>139</sup> In German law, the basic rule is that even if the claim has contacts with a foreign jurisdiction, a German court will apply German procedural law as the *lex fori* to determine whether or not it is competent and has international jurisdiction.<sup>140</sup> According to Dietrich and Wittuhn, German courts are very respectful of foreign parties and international claims. “There are no legal

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<sup>135</sup> Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*, paragraph 37.

<sup>136</sup> Case C-281/02, paragraph 40.

<sup>137</sup> Case C-281/02, paragraph 41.

<sup>138</sup> Zivilprozessordnung of January 30, 1877, RGBl, 1877, S.83.

<sup>139</sup> Gerichtsverfassungsgesetz of January 27, 1877, RGBl, p. 41.

<sup>140</sup> Geimer, 2001, p. 7, Dietrich & Wittuhn, 2005, p. 5A-6.

privileges for German parties” whereas the French Civil Code grants jurisdiction to French Courts in all proceedings issued by a French citizen.<sup>141</sup>

Sections 14 to 40 of the German Code on Civil Procedure provide the general rules on jurisdiction. The principal basis for jurisdiction, set out in Sections 12 et sequitur, is that of the place where the defendant is domiciled. On the other hand, according to Sections 21, 22, 23, 23a, 27 and 29-34 of ZPO, special jurisdiction may be granted in respect of a specific subject matter in dispute. Section 35 of ZPO provides for the plaintiff’s between general and special jurisdiction. However, the plaintiff cannot consolidate all his claims connected with the same matter before one jurisdiction. German courts may have jurisdiction over the infringement of copyright but may not have jurisdiction over the initial ownership of the copyright.

According to Section 32 of ZPO, a general venue is established at the place where a tort is committed (*forum delicti commissi*). The most important question is what will happen if there are more than one forums such as one at the place where the tort was committed and one at the place where the damage occurred. In cases of libel or slander committed through information released on the Internet, it was held that the tortious act had been committed at each particular place where the information could be obtained.<sup>142</sup> Therefore, Monica could sue Mr. Turkan in Germany for damages she suffered in Germany from the actions of of izle.com.

#### **4.7. CONCLUSION**

The aim of jurisdiction rules is always to identify the most appropriate court to try the action. However, the application of domestic private international law rules to Internet disputes is uncertain and unpredictable because the location of activities is irrelevant for internet functionality. Therefore, the application of current IPL rules to the internet related cases may have surprising effects and this uncertainty enables parties to engage in ‘forum shopping’.<sup>143</sup>

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<sup>141</sup> Article 14 of the French Civil Code, Dietrich & Wittuhn, 2005, p. 5A-6.

<sup>142</sup> LG Munchen I RIW 2000, 466; IPRax 1998, 208; LG Dusseldorf NJW-RR 1998, 980, Dietrich & Wittuhn, 2005, p. 5A-13.

<sup>143</sup> Hörnle, 2009, p. 157.

Private International law firmly establishes the notion that the plaintiff may issue any proceedings before the courts of a state in which the defendant is domiciled. The Brussels Regulation and Turkish law contain the same rule in that regard. Accordingly, the courts of the defendant's domicile have "general jurisdiction" and therefore may entertain claims, regardless of whether or not such claims arise out of forum-related activity.

Although private international law accepts the competence of courts of the defendant's domicile as a cornerstone, the principle of preference for the defendant's forum or the limitation of the defendant's forum to a single state for internet related cases are rejected by the American Law Institute project, which was prepared by academics and experts from several continents.<sup>144</sup> The reason for that rejection is the volatile localisation of many "virtual enterprises" present only on the Internet. Many of these may not in fact be domiciled in the state identified in the domain-name registration. As many national registers do not require that the applicant for a given domain name be domiciled in the state indicated by the second-level domain name, the sole indication is the one given to the registrar at the time of application; however, the holder of a domain name can change domicile and easily relocate in a state in which the enforcement policy might be lax. In my opinion, changing domiciles is too difficult for a natural person in Turkey and Europe. Therefore, this rejection is not a good argument for natural person infringers. For legal persons, there are too many procedural hurdles to be registered in a state. For example, in Turkey, if one of the partners of the company is a foreigner, then the company must pay \$ 50000 as a deposit.<sup>145</sup> This shows that changing domiciles is costly and difficult for current registered companies. However, this argument is acceptable for "virtual enterprises" which organizes the most of the infringements on the internet.

Therefore, for our scenarios the first and best option is the court of the state where the defendants are domiciled because of the website 2 and 3's owners are real persons and website 1 is operated by a registered company. The court where the defendant is domiciled can try all claims regardless of whether or not the claim arises out of forum-related activity.

If the case is not brought before the court of the domicile of the defendant, the court will only have jurisdiction to deal with the infringement that took place in the country of the court in

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<sup>144</sup> ALI Report, 2007, p. 78.

<sup>145</sup> Law on Direct Foreign Investment, Law No: 4875, 05.06.2003.

which the action is brought.<sup>146</sup> Accordingly, in our scenarios, the Turkish courts will only have jurisdiction to deal with the damage that resulted from the downloading in Turkey and the infringing copies that resulted from that activity.<sup>147</sup>

Article 40 of the MOHUK 2007 provides that the rules of internal law on local jurisdiction determine the international jurisdiction of Turkish courts. The nationality of parties is not decisive in determining the jurisdiction.

For the purpose of jurisdictional provisions, there may be more than one place where the alleged infringement occurs or may occur, giving the claimant a choice of where to issue proceedings. It is submitted that a useful approach for the courts is to consider the balance between (1) the party to be sued for infringement, whether it is a content provider, ISP/host server or an end user; and (2) the specific copyright which has allegedly been infringed, whether it is a right of reproduction, right of communication or right of making available to the public. The proper interpretation of these exclusive rights is the key to a balance between the relevant connecting factors for the purpose of localizing the respective acts of infringement.

Mindful of the pace of change, courts prefer technologically-neutral rules which do not require amendment for each innovation. Concerned about the impact of cross-border communications, courts gave a broad reading of the ‘tort committed within the jurisdiction’ ground, holding that the tortious act occurs not where the communication originates but in the place to where the communication is directed.<sup>148</sup>

Consequently, the proposals of the American Law Institute and the Max Planck Institute should be taken into consideration and the Statute Regarding Turkish International Private Law and Procedure (MOHUK) should be amended. This amendment should include:

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<sup>146</sup> C-364/93, *Marinari v. Lloyds Bank plc and another* [1995] ECR I-2719.

<sup>147</sup> French Cour de Cassation, first civil chamber, Judgment dated 16 July 1997 [1997] JCP IV No/ 1993 and [1998] J Dr. Int. 136 (annotated by A. Huet), *Torremanans*, 2001, p. 229.

<sup>148</sup> *Bigos*, 2005, p. 596.

### Infringement:<sup>149</sup>

(1) In disputes about infringement of an intellectual property right, a person may be sued in any State in which that person has substantially acted, or taken substantial preparatory acts, to initiate or to further an alleged infringement.

(2) The court's jurisdiction extends to the activity which the right is claimed to be infringed has substantial effect within, or is directed to, the territory of that State.

### Extent of jurisdiction over infringement claims:

“(1) Subject to paragraph 2, a court whose jurisdiction is based on Article 2 shall have jurisdiction in respect of infringements that occur or may occur within the territory of the State in which that court is situated.

(2) In disputes concerned with infringement carried out through Internet, the court whose jurisdiction is based on where the alleged infringement occurs or may occur shall also have jurisdiction in respect of infringements that occur or may occur within the territory of any other State, provided that the infringement has no substantial effect in the State, or any of the States, where the infringer is habitually resident and

(a) substantial activities in furtherance of the infringement in its entirety have been carried out within the territory of the country in which the court is situated, or

(b) the harm caused by the infringement in the State where the court is situated is substantial in relation to the infringement in its entirety.”<sup>150</sup>

### Choice of Court<sup>151</sup>

(1) The parties are free to choose a court or the courts of a State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction to decide on all contractual and non-contractual obligations and all other claims arising from that legal relationship unless the parties express an intent to restrict the court's jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

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<sup>149</sup> American Law Institute Proposal, Article § 204; Max Planck Institute Proposal, Article 2:202.

<sup>150</sup> Max Planck Institute Proposal, Article 2:203.

<sup>151</sup> American Law Institute Proposal, Article § 202; Max Planck Institute Proposal, Article 2:202



## CHAPTER 5 CHOICE OF LAW

### 5.1. INTRODUCTION

It is clear that international legislation on conflict of laws has so far been unwilling to determine the applicable law for copyright infringements on the Internet. The World Intellectual Property Organisation has adopted two Internet Treaties, the WIPO Copyright Treaty (WCT)<sup>1</sup> and the WIPO Performers and Phonograms Treaty (WPPT)<sup>2</sup>; however neither of the two Treaties included rules on the applicable law. On the other hand, these two Treaties adopted a new exclusive online right of the author that reveals an approach based on a certain country of origin. This right provides that the act of exploiting a work on the Internet remains under the control of the particular right holder.

The principles of resolution of conflicts of law are addressed by the court whose jurisdiction is invoked to resolve the merits of an international intellectual property claim. Intellectual property rights are traditionally considered territorial; that is, their existence and infringement are determined under the law of each country in which an infringement has occurred.<sup>3</sup>

Copyrighted works can be infringed by uploading and downloading. In order to determine the applicable law, the first question that needs answering is where the infringement occurs and where the protection is claimed. The alternative places for the uploading are a) the place of server b) the place of uploader. The place of the uploader can be either the domicile of the uploader or the place of uploading.

The alternative places for infringement are a) the place of downloading b) the affected market. The copyright holder will obviously want to protect his or her rights where the market is affected by the infringement act. The place of downloading and the affected market will most probably be the same. If a person goes on a holiday to another country and downloads a large

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<sup>1</sup> <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>, came into force on 6 March 2002.

<sup>2</sup> <http://www.wipo.int/clea/docs/en/wo/wo034en.htm>, came into force on 20 May 2002.

<sup>3</sup> There is not any international convention which has been adopted globally in the areas of jurisdiction, choice of law and the enforcement of foreign judgments. Therefore, countries and their courts have a great deal of discretion to decide issues of jurisdiction, to decide the applicable law for protection of copyrighted works at an international level, and to decide the enforcement of foreign rulings; Morris, 2009, p. 299; Xalabarder, 2002, p.79

number of mp3s, the affected market will not be where he is downloading but that where he will use these mp3s.

The courts will clearly have to apply different laws to each affected market for the same infringement. For Internet related issues, the law of the country where the unauthorized uploading of the work took place (place of server or place of uploading or domicile of uploader), or the law of the country where the work was downloaded is likely to be the applicable law. Accordingly, the court may have to apply the law of many different countries to different aspects of the infringement that is being trialled. Transmission occurs on the Internet as all of the packets required to communicate the work are transmitted from the server on which the work is located to the end user and is therefore, seen as the communication of information.<sup>4</sup>

It is submitted that the Satellite Directive<sup>5</sup> can provide inspiration.<sup>6</sup> According to Article 1(2)(d) of the Satellite Directive, transmissions from foreign countries are dealt with in the following way:

“(d) Where an act of communication to the public by satellite occurs in a non-Community State which does not provide the level of protection provided for under Chapter II,

(i) if the program-carrying signals are transmitted to the satellite from an uplink situation situated in a Member State, that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station; or

(ii) if there is no use of an uplink station situated in a Member State but a broadcasting organisation established in a Member State has commissioned the act of communication to the public by satellite, that act shall be deemed to have occurred in the Member State in which the broadcasting organisation has its principal establishment in the Community and the rights provided for under Chapter II shall be exercisable against the broadcasting organisation”.<sup>7</sup>

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<sup>4</sup> Canadian Copyright Board, *Re Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication of Musical or Dramatico--Musical Works*, 1 C.P.R. (4th) 417 (1999), Gervais, 2001, 1369.

<sup>5</sup> Council Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. [1993] OJ L248/15.

<sup>6</sup> Lucas, 1998, 247; Torremans, 2000, p. 245.

<sup>7</sup> Council Directive 93/83/EEC, Article 1(2)(d).



As a result of those provisions, if the broadcaster was located in a third country that had a lower level of protection, but the uplink to the satellite was in an EU Member State, then that EU Member State would be considered the point of origin of the transmission. If the uplink and the broadcaster were located in a non-Member State, but “a broadcasting organisation established in a Member State had commissioned the act of communication to the public by satellite,” then the act would be considered to have occurred in that Member State. It is argued that similar principles can be applied to Internet transmissions. If the server of origin of the transmission was located in a country where copyright protection is insufficient, but the transmission used a mirror or cache site located in a Member State, then that could be considered the point or origin of the transmission--and the point where a license would be sought.<sup>8</sup>

In the Copyright Directive and the E-Commerce Directive, the European Union decided “not to apply the principle of the country of emission of the transmission that applies to satellite transmissions and to apply the law of the country of reception”.<sup>9</sup>

As Professor Ginsburg argued in the paper that she prepared for the WIPO, choosing the law of a single country as an applicable law for the infringement case would simplify court actions but differences between national copyright laws make it risky. The copyright law of one country might be under-protective or overprotective compared with the laws of other affected countries.<sup>10</sup>

As illustrated in our scenarios, if a foreign person uploads Turkish authors’ copyrighted works on a website, it is very likely that the target community is the Turkish community, since Turkish copyrighted works are not particularly popular or commonly encountered in other communities.<sup>11</sup>

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<sup>8</sup> Gervais, 2001, p. 1405; Ginsburg, 2001, p. 12, In paragraph 24, Ginsburg determines it as follows: “If the law of the country identified in paragraph 23 does not conform to the Berne Convention, WTO [and WTC] norms, then the law applicable to the entirety of the defendant’s alleged Internet infringement is the law of the country in which the server that hosts the alleged infringing content is located, so long as this country’s domestic copyright law is consistent with the Berne Convention, WTO [and WCT] norms.”

<sup>9</sup> Gervais, 2001, p. 1410.

<sup>10</sup> Ginsburg, 2001, p. 11.

<sup>11</sup> Unfortunately, only a few Turkish authors’ books have translated to English such as Orhan Pamuk’s two novels and Nazım Hikmet’s poems. In addition to this, only one Turkish singer, Tarkan, has an English album. This situation shows that Turkish copyrighted works are not very popular.

If the law of the country in which the server that hosts the alleged infringement meets the minimum standards that have been laid down in the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, that law can be applied to the case. However, as discussed above, the problem with the place of server is that the server of a website might be mirrored on any number of servers located anywhere in the world and a copyrighted work from this website might be located on a server located in Country A while the other copyrighted work is stored in Country B.<sup>12</sup>

If the uploader does not have detailed knowledge of Internet technology, he will not know where the server carrying the website is geographically located; because the uploader might know where the host provider company is registered but he cannot know where the server is located. The law of the place of server is clearly not a good option for copyright infringements on the Internet.

In this chapter, characterisation as a preliminary issue to determine the choice of law will be first discussed according to Turkish and English law. The second section will envisage the choice of law in the EU. The third section will examine current Turkish issues of choice of law. Finally, I will discuss the various approaches that are theoretically possible concerning the law applicable to the claims due to IPR infringements on the Internet.

## **5.2. CHARACTERISATION**

Characterisation of the basis of a case is the most important aspect of determining the governing law. After the Turkish or English court finds itself as the competent court, characterisation can be done by allocating the relevant legal questions as revealed by the factual situation before the court, to the appropriate legal category.<sup>13</sup> Firstly, the judge must determine and discover the basis of the claim being made.<sup>14</sup> The claim might be about procedure, contract, tort and so on. For example, if software is uploaded to a website without permission of the copyright holder, the first thing that should be determined is whether this act is a breach of contract, in which case it would be governed by the applicable law as specified in the software contract, or an infringement of copyright, in which case, it would be governed by tort law, which is determined by *lex fori* or *lex causae*.

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<sup>12</sup> Torremans, 2001, p. 245.

<sup>13</sup> Mc Clean & Beevers, 2009, p. 522; Nomer & Sanli, 2008, p. 101.

<sup>14</sup> *Re Musurus's Estate* [1936] 2 All ER 1666 at 1667, Cheshire, North, Fawcett & Carruthers, 2008, p. 42.

Definition and interpretation of connecting factors may vary between countries. In most cases, it is done without difficulty.<sup>15</sup> On the other hand, Collier argues that characterisation is one of the most difficult aspects to resolve in a conflict of laws.<sup>16</sup> Even at the beginning of the case, there has been confusion about what it is characterised. The question is whether it is a ‘legal relation’, or ‘a legal claim’, or ‘a legal question’, or ‘a factual question’?<sup>17</sup> This question must be examined under English and Turkish law.

If the claim is relevant to two difficult judicial categories<sup>18</sup> and when *lex fori* and the relevant foreign law have different views on the correct characterisation, difficulties may occur.<sup>19</sup> If there are two different views, then the most important issue to determine is that of which law must be applied by the court to categorize the claim.

There are three sets of tools that show how to classify the cause of action: the *lex fori* method, the *lex causae* method, and the comparative method. These theories are dealing with whether the connecting factor of the case should be defined according to the terms of *lex fori* or *lex causae* or another law. Section 9(2) of the Private International Law (Miscellaneous Provisions) Act 1995, deals with the characterization of the cause of action, as follows:

“The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.” In England, characterisation is on the basis of the *lex fori*.<sup>20</sup>

The most prevailing theory is *lex fori*.<sup>21</sup> According to the *lex fori* theory, the court will characterise the claim consistently with its own domestic law. Accordingly, a Turkish court will classify the issue under Turkish substantive law.<sup>22</sup> However, this characterisation may

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<sup>15</sup> O’Brien, 1999, p.94 ; Cheshire, North, Fawcett & Carruthers, 2008, p. 42.

<sup>16</sup> Collier, 2001, p. 14 .

<sup>17</sup> Collier, 2001, p. 15; Cheshire, North, Fawcett & Carruthers, 2008, p. 41.

<sup>18</sup> For instance: whether the question relevant to the administration of assets or to succession, breach of a contract or tort, succession to land or matrimonial rights, etc.

<sup>19</sup> Cheshire, North, Fawcett & Carruthers, 2008, p. 43.

<sup>20</sup> There are examples in the case law of classification by the *lex fori* such as: *Huber v. Steiner* (1835) 2 Bing NC 202; *Simonin v. Mallac* (1860) 2 Sw & Tr 67; *Ogden v. Ogden* [1908] p. 46, All ER Rep 86, McClean & Beavers, 2009, p. 523..

<sup>21</sup> This theory was discovered by Franz Kahn and Bartin.

<sup>22</sup> Nomer & Sanli, 2008, p. 102.

cause a distortion of the foreign rule if there is no close analogy in the domestic law, in which case the theory would not work.<sup>23</sup>

The second theory is *lex causae*. This theory was conceptualised by Despagnet, who argued that the characterisation should be made by the *lex causae* (governing law). The first objection against this theory is that the governing law cannot be known until the process of characterisation is completed.<sup>24</sup> Martin Wolff answered this question with the assertion that the court has to consider all possible laws according to the rules of choice of law of that country.<sup>25</sup> The second objection is against this assertion in that if there are two different possible laws that characterise the issue, different from each other, which law will be applied to the case? According to Collier, the adoption of *lex causae* theory might compel the adoption of idiosyncratic foreign characterisation.<sup>26</sup>

In practice, the modified *lex fori* theory seems to represent the real technique employed by English courts. They determine the claim and define the ambit of the legal category for themselves, and then they decide whether a question posed by a foreign rule fits into that category.<sup>27</sup>

The Turkish Statute Regarding International Private Law and Procedure (MOHUK) is not clear as to whether the law of the forum or of a foreign legal system should determine the characterisation of the issue. On the other hand, scholarly opinions generally agree that the law of the forum should determine the characterisation.<sup>28</sup> Nevertheless, in one of the Turkish Supreme Court's old decisions, the *lex causae* was used for characterisation of the issue.<sup>29</sup> However, in that decision, it was not obvious whether there was a characterisation problem or not. This decision did not, therefore, how Turkish courts should characterize the issue.<sup>30</sup>

Copyright legal disputes can be seen as disputes that emerge within established general private law categories: property (ownership of copyright), contracts (transfers, licenses of copyright) and tort (copyright infringement). Infringement of a copyrighted work is qualified

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<sup>23</sup> Collier, 2001, p. 16.

<sup>24</sup> Nomer & Sanli, 2008, p. 103; Collier, 2001, p. 16.

<sup>25</sup> Wolff, 1954, p. 54; Nomer & Sanli, 2008, p. 103.

<sup>26</sup> Collier, 2001, p. 16.

<sup>27</sup> *Re Cohn* [1945] Ch. 5.; Collier, 2001, p. 18.

<sup>28</sup> Nomer & Sanli, 2008, p. 309.

<sup>29</sup> Decision no: 24.5.1945 t. 2, HD.K.; Berki & Erguney, 1954, p. 80/81; Nomer & Sanli, 2008, p. 104.

<sup>30</sup> Goger, 1973, p. 89; Nomer & Sanli, 2008, p. 104.

as tort in most countries. The category of tort, beyond that of copyright infringement, encompasses different prohibited forms of conduct such as libel, defamation and unfair competition.

### **5.3. SCENARIOS**

In order to determine the law applicable to our scenarios, the first thing that should be determined is whether the place where the tortious act was committed and the place where the damage has occurred (where damage is suffered) are different or not. The focus must be on the defendant's act. The act is the event that causes the damage. Therefore, the place where the tortious act was committed is where the alleged infringer acts and the law of the place where the act is committed must be applied to the case for the infringement of copyright owner's exclusive right of communication to the public.<sup>31</sup>

In our scenario 1, the server hosting the Turkish and German authors' sound recordings is located in Germany. Mayaden Co. uploads the copyrighted works from the UK to its server. In scenario 2, the first website operator is UK domiciled and the second website operator is German domiciled. From both countries they upload copyrighted works to their server, which is located in UK. In scenario 3, the Turkish defendant lives in Turkey and uploads copyrighted works to its website's server from Turkey.

With the act of uploading, the copyrighted works are stored in the server and the copyright owner's exclusive right of communication to the public is infringed. As explained above, technically, there can be more than one server for a website in more than one country and in addition, the server can be moved to another country in a very short time and very easily. The question of which country's law should be applicable will be discussed in the following sections.

### **5.4. CHOICE OF LAW UNDER EU LAW**

In order to ensure that courts in all EU Member States apply the same rules as to the applicable law in cross-border disputes concerning non-contractual obligations, the Community Legislature adopted a new Regulation on the law applicable to non-contractual

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<sup>31</sup> Bigos, 2005, p. 604.

obligations, the so-called ‘Rome II’ Regulation.<sup>32</sup> Given the current state of EU-Turkish membership negotiations, adaptation of Rome II is not a priority for the Turkish government. Turkey should however adopt the Rome II as soon as possible in order to fall into line with the EU.

The effort to unify the regulations on applicable law in non-contractual obligations in the European Community goes back more than 35 years.<sup>33</sup> In 1972, the Commission of the European Communities first proposed a draft convention for the contractual and non-contractual obligations. However, only the Convention on the Law Applicable to Contractual Obligations was adopted in 1980 (“Rome I”) while leaving the law applicable to the non-contractual obligations unresolved. To extend the harmonization of the rules of private international law to non-contractual obligations, the Commission proposed a draft Convention on the Law Applicable to Non-contractual Obligations (the “Commission Draft”) in July 2003, which was revised by the European Parliament in November 2004 (“the Parliament Draft”).<sup>34</sup>

Regulation 864/2007, known as “Rome II”,<sup>35</sup> which came into force on January 11, 2009, regarding events giving rise to damage occurring as from on January 11, 2009 achieves this unification over a broad scope of matters: damage caused by products, environmental damage, matters of unfair competition, infringement of intellectual property rights, damage caused in traffic accidents, damage due to unjust enrichment, *negotiorum gestio*<sup>36</sup>, *culpa in contrahendo*<sup>37</sup> and other instances of non-contractual obligation.

The basic principle of the Regulation takes the *lex loci delicti commissi*, i.e. “the law of the country in which the damage arises or is likely to arise” as a general rule.<sup>38</sup> However, this general rule will be supplemented by the following presumption in order to determine the

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<sup>32</sup> 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)

<sup>33</sup> Cheshire, North, Fawcett & Carruthers, 2008, p. 770.

<sup>34</sup> European Parliament, *Draft Report (Revised Version) on the Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligation*, COM (2003) 427-C5-0338/2003-2003/0618 (COD) November 5, 2004. The first draft of the European Parliament was published in April, 2004: European Parliament, *Draft Report (Revised Version) on the Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligation*, COM (2003) 427-C5-0338/2003-2003/0618 (COD) April 5, 2004.

<sup>35</sup> 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)

<sup>36</sup> Means that acts performed without due authority in connection with the affairs of another person.

<sup>37</sup> Dealings prior to the conclusion of a contract.

<sup>38</sup> Article 4(1) of Rome II.

applicable law in a particular case: if plaintiff and defendant have their habitual residence in the same country when the damage occurs, the law of that country shall apply.<sup>39</sup>

On the other hand, Article 4(3) takes the position that the governing law for non-contractual obligation is to be called as the “more closely connected” rule which means the law applicable to a non-contractual obligation arising out of tort or delict shall be the law of the country with which the non-contractual obligation is most closely connected. Article 4(3) should be understood as an ‘escape clause’ from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is obviously more closely connected with another country.<sup>40</sup>

The ‘Common habitual residence’ rule is used as an alternative to the *lex loci delicti*. According to this rule, the law of the common residence of the tortfeasor and the injured party is applicable. In international copyright infringement cases, this rule is not very useful.<sup>41</sup>

The ‘common habitual residence’ rule is based on the same principle. Article 5(2) of the Rome II Regulation provides that a tortious situation is governed by the law of the common habitual residence of the tortfeasor and the injured party. It is stated in the explanatory memorandum of the Preliminary Draft Rome II regulation as follows:

“A comparative law analysis of the rules of conflict of laws reveals that the present situation does not meet economic operators' need for foreseeability and that the differences are markedly wider than was the case for contracts before the harmonisation achieved by the Rome Convention. Admittedly, the Member States virtually all give pride of place to the *lex loci delicti commissi*, whereby torts/delicts are governed by the law of the place where the act was committed”.<sup>42</sup>

Rome II reflects the traditional view of *the lex loci protectionis* in dealing with intellectual property rights. Article 8(1) of the Regulation provides that “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.” Recital 26 of Rome II states that

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<sup>39</sup> Article 4(2) of Rome II.

<sup>40</sup> Recital 18 of Rome II.

<sup>41</sup> Eechoud, 2003, p. 207.

<sup>42</sup> Doc. COM(2003) 427 final, 2003/0168 (COD) (July 22, 2003), p. 5.

“regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved.” Accordingly, Rome II recognizes the *lex protectionis* provisions of Article 5 of the Berne Convention. The law of the country for which protection is claimed also known as the “territorial principle”. This rule enables each country to apply its own law to an infringement of an intellectual property right, which is in force in its territory.<sup>43</sup>

In the context of copyright infringement on the Internet, it is clear that, a copyrighted work can be downloaded in all countries at the same time. Therefore, with the application of *lex protectionis* to the case, the judge will have to apply the law of many countries to different bits of the infringement of the same copyrighted work.<sup>44</sup>

In general, Rome II tends to favour effects-based conflicts rules, which tend to create greater exposure to foreign law for online activity than for offline situations. The impression that insufficient attention was paid from the outset to the differential impact on online activity is reinforced by the fact that the European Commission's original Proposal adopted on July 22, 2003 contained not a single mention of the Internet or e-commerce. For a document prepared at a time when the most significant challenges for conflict of laws are those presented by the Internet, this is an extraordinary omission.<sup>45</sup>

According to the Explanatory Memorandum of the proposal Rome II Regulation, most of the consultants offered the existence of the universally recognized principle of the *lex loci protectionis*, meaning the law of the country in which protection is claimed under the Berne Convention.<sup>46</sup> On the other hand, the German delegation proposed that intellectual property rights should be excluded from the Regulation because this rule already exist in Articles 5 and 6 of the 1886 Berne Copyright Convention and Articles 3 and 4 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.<sup>47</sup> However, “national treatment” provisions in these Articles do not lay down any rule of applicable law for infringement of IP rights, let alone one that favours the *lex protectionis*.<sup>48</sup>

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<sup>43</sup> The Explanatory Memorandum of Rome II Regulation, p. 20.

<sup>44</sup> Torremans, 2001, p. 244; Cheshire, North, Fawcett & Carruthers, p. 816.

<sup>45</sup> Smith, 2007, p. 49.

<sup>46</sup> Drexler, 2005, p. 156.

<sup>47</sup> Dickinson, 2008, p. 449.

<sup>48</sup> Pertagas, 2006, p. 226.



It is not clear that Article 4(1) of the Rome II Regulation<sup>49</sup> – the general provision governing tort liability – would, depending upon judicial interpretation, necessarily be inconsistent with the Berne Convention and the specific requirements in the field of intellectual property.<sup>50</sup>

“To reflect this incompatibility, two approaches were discussed in the course of preparatory work. The first is to exclude the subject from the scope of the proposed Regulation, either by means of an express exclusion in Article 1 or pursuant to Article 24, which preserves current international conventions. The second is to lay down a special rule, and this is the approach finally adopted by the Commission with Article 8.”<sup>51</sup>

After all these discussions, it was decided that, regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term ‘intellectual property rights’ should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.<sup>52</sup>

As regards the applicability of the “*lex protectionis*” rule, the role of the freedom of choice principle under certain conditions was discussed and the Commission considered that to allow such choice would be ‘inappropriate’ because a choice in favour of any law other than that of a country for which protection is to be sought would result in a legal vacuum and the main aim of the Regulation to improve the legal certainty.<sup>53</sup> This exception provision is highlighted as a natural consequence of the territoriality principle.

When the *lex loci protectionis* is applied to Internet related cases, the law of the country where the work is uploaded without authorization or that of the place of the server is the

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<sup>49</sup> Article 5(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II): “Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that, (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that, (c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).”

<sup>50</sup> See Rome II Regulation That said, Article 8(1) makes EU compliance with Berne certain (even if the provision is bedeviled by the same uncertainty of meaning).

<sup>51</sup> The Explanatory Memorandum of Rome II Regulation, p. 20.

<sup>52</sup> Preamble 26 of Rome II Regulation.

<sup>53</sup> Dickinson, 2008, p. 469.

applicable law for the infringement of the right of communication to the public of the copyright holder and the law of the country where the unauthorized downloading happens is the applicable law for the infringements that occur by downloading. The court will obviously need to envisage the laws of a number of countries.<sup>54</sup> This shows us that *lex protectionis* is a good option for initial ownership, scope of copyright and proprietary aspects of transfer and for the infringement if it only occurs in one place. However, problems arise if the infringing act is not limited to one territory. Therefore, the Rome II should have included a provision for ubiquitous infringements of intellectual property, which might be governed by the laws of the state or states having the closest connection with the infringement. The court should take all the relevant factors into account while determining which State has the closest connection with the infringement. What the relevant factors could be will be examined under the section on the Max-Planck Proposal.

According to current law, in scenario 1, if TurkMuzik Co and MESAM sued MAYADEN Co., the applicable law would be English law, where the protection is sought for infringement of communication to the public. In Scenario 2, the applicable law would be English law where Mr. Johnson sued in the UK courts and German where Mr. Schwarzkopf sued in Germany.

Difficulties will inevitably occur when the copyright holders want to sue downloaders from different countries at the same time. In scenario 3, new albums of English Bob and German Monica are downloaded from many countries because of their popularity, especially in Asian countries. The law of each country where the protection is sought must be applied to each infringement. This situation is especially problematic for copyright holders of developed countries such as American, English and German copyright holders. Therefore, as offered pursuant to the Max-Planck Institute proposal, the law of the most closely connected state might be applied to Internet infringements, which are accepted as ubiquitous infringements.

Rome II has replaced all rules on choice of law except for defamation under English and German laws. Therefore, for the infringement of intellectual property rights, the law of the place where the protection is sought has been the applicable law in UK and German courts.

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<sup>54</sup> Torremans, 2000, p. 233.

Accordingly, English law applies to copyright infringements that are committed within the United Kingdom and German law for the infringements that are committed within Germany. This is by application of Article 8 of Rome II.

With the application of this principle, in our scenario 1, Turkish copyright holders TurkMuzik Co and MESAM can sue Mayaden Co who has uploaded Turkish copyrighted works to its website in the United Kingdom and the applicable law will be English law. On the other hand, if it is accepted that the infringement was committed at the point where the website can be accessed, English law will be the applicable law for the infringements that occur in the UK and Turkish law will be the applicable for infringements that occur in Turkey.<sup>55</sup> In our scenario 2, the applicable law will be English for the infringements that occur in the UK for Mr. Johnson and Mr. Scharwzkopf. The applicable law will be German law for the infringements that occur in Germany. In scenario 3, the place where the protection sought is Turkey. Turkish law will therefore be applicable.

## **5.5. CHOICE OF LAW UNDER TURKISH LAW**

In 2000, a new drafting Commission was created in order to reform the MOHUK 1982. The main aims of the reform were reflection and adoption of international trends in private international law as well as the EU law; and the changes in substance and language of the new Civil Law entered into force in 2002. Following seven years of drafting, discussion and enactment, the new MOHUK 2007 was adopted and came into force on 27 November 2007. Before the new MOHUK 2007, infringement of copyright was characterised as tort; therefore ex Article 25 of Turkish Statute Regarding International Private Law and Procedure 1982 was applied to cases prior to November 2007.<sup>56</sup> Article 25 of the MOHUK was as follows:

“Obligations arising from tort are subject to the law of where the tortious act was committed. If the place where the tortious act was committed and the place where the damage occurred are in different countries, the law of the country where the damage has occurred shall govern. If the tortious obligation has a closer connection to another country, then the law of this other country may govern.”<sup>57</sup>

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<sup>55</sup> *Szalatnay-Stacho v. Fink* [1947] K.B.1., Murphy, 2006, p. 374.

<sup>56</sup> Law No. 5718, Date of Enactment 27.11.2007 on Private International Law and International Civil Procedure; Nomer & Sanli, 2009, p.50; Celikel & Erdem, 2009, p. 35.

<sup>57</sup> Article 25 of MOHUK.

According to MOHUK 1982, there were two possible applicable laws in tort cases: those focusing on the place where a tort is committed, and those focusing on the place where damage is suffered. If the place where the act is committed and the place where the damage occurred are different from each other, then the law of the place where the damage occurred will be applied to the case.<sup>58</sup> It should be pointed out, however, that if the injurious act is more closely linked with the law of another State, then the law of the more connected place may be applied.

According to ex Article 25(2) of the MOHUK 1982, when these two places are different, then the law of where the damage occurred, where the plaintiff suffers economic loss, would be applied to the case. Therefore, Turkish law would be the applicable law in our scenarios for infringements occurring prior to November 2007 when the plaintiffs would issue proceedings against the alleged infringers for damage suffered on the Turkish market.

The new Law on Private International Law and International Civil Procedure (MOHUK) has just been prepared by the Office of Prime Minister, the General Directorate of Legislation, which provides different applicable law from the previous law. According to Article 22(1) of this new MOHUK 2007, intellectual property rights are governed by the law of the country for which protection is claimed (*lex protectionis*).<sup>59</sup> Rome II was adapted into Turkish law by this new Law. In addition to this, different from Rome II, the parties to a dispute concerning the infringement of an intellectual property right may agree on *lex fori* as applicable law after the dispute has arisen.

There has not been any Turkish case related to copyright infringements on the Internet. Therefore, the legislator did not take Internet related copyright cases into consideration. This will cause great difficulties in the future, when Internet related copyright infringement cases are brought before Turkish courts. Turkish copyright holders' works are downloaded mainly in Germany, UK, France and Netherlands because of there are substantial Turkish communities in these countries, whereas the work of better known copyright holders from developed countries are downloaded from all over the world. When the *lex protectionis* would be the applicable law, then the court has to apply the law of the country where unauthorised

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<sup>58</sup> Article 25(2) of MOHUK.; Celikel & Nomer, 2008, p. 42.

<sup>59</sup> <http://www.kgm.adalet.gov.tr/mohuk/>. Sent to General Directorate of Legislation by the Commission on 01.06.2005.

uploading of the work or the law of the country where unauthorised downloading takes place.<sup>60</sup> Accordingly, there will be no difficulty for uploading situations; however, for downloading, the Turkish courts will have to apply the law of a few EU countries to different aspects of the infringements that are being dealt with. As mentioned in our section on choice of law in EU, the laws of the state having the closest connection with the infringement should be applied to ubiquitous infringements of intellectual property.

According to the new MOHUK 2007, for scenarios 1 and 2, if the Turkish copyright holders commenced proceedings before the Turkish courts, then Turkish law would be applicable for damage suffered in Turkey. In scenario 3, if the foreign copyright holders sued Turkish infringer izle.com in Turkey, the applicable law would also be Turkish law as well. This is evidence that the new MOHUK 2007 is no different from the MOHUK 1982 in respect of intellectual property issues. Therefore, it can be said that *lex loci delicti* and *lex protectionis* can be used interchangeably,<sup>61</sup> because the copyright holder needs protection where the infringement occurs. Additionally, if the parties agree on *lex fori* as applicable law, then Turkish law will be applicable law according to this new MOHUK 2007.

The Rome II Regulation provides for the application of the *lex loci delicti commissi* as a general rule, except for intellectual property. Article 8 of the Regulation is also providing the *lex loci protectionis* for intellectual property infringements, like the new MOHUK 2007.<sup>62</sup>

Eechoud argues that the *lex loci protectionis* is not a good option for today's networked world, where one act of exploitation or use, -the uploading copyrighted works on a website, downloading copyrighted works from the website- is carried out from different geographical locations. This might lead to apply different laws to the same set of facts.<sup>63</sup>

Article 22(2) of the new MOHUK 2007 provides that if an infringement occurred, then plaintiff and defendant can only agree on the *lex fori* as applicable law in the infringement of IPRs cases. This freedom of choice for applicable law is a limited freedom. First limitation is that the parties cannot choose any other law except *lex fori* and second limitation is about the time of choice that the parties can only agree after the dispute has arisen. Article 14 of Rome

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<sup>60</sup> Ginsburg, 1998, p. 22; Torremans, 2000, p. 244; Baspinar & Kocabey, 2007, p. 258.

<sup>61</sup> Eechoud, 2003, p. 106.

<sup>62</sup> Article 22 of Private International Law and International Civil Procedure 2007(MOHUK 2007).

<sup>63</sup> Eechoud, 2003, p. 106; Professor Drexl also agrees that "legal territoriality can no longer be applied where territoriality has vanished in reality", Drexl, 2005, p. 170.

II Regulation provides the parties freedom to choose the applicable law after the non-contractual obligation occurred. However, Article 8(3) of Rome II excludes choice of agreement in any event. Therefore, there is no exception to principle of the *lex loci protectionis* regarding infringements of IPRs under Rome II and this is the difference between the new MOHUK 2007 and Rome II.

The question for the new MOHUK 2007 is whether a German or UK uploader or downloader would agree to choose Turkish law as the applicable law or not. It is obvious that all these countries are parties to the Berne Convention and reproduction and making available of the copyrighted works are infringements of copyright in all these three countries. In order to answer this question, the advantages and disadvantages of Turkish copyright law must be known by the foreign copyright owners or alleged infringers.

#### **5.6. ALTERNATIVES of CHOICE OF LAW RULES**

As regards the national or international/supranational/ transnational law applicable to the unlawful exploitation of intellectual property rights in general, including on the Internet, there is much to be understood from foreign doctrine as well as regulations and practices of national/international law. It has been observed that different answers are available depending on the meaning attached to intellectual property rights and functions thereof, as well as the criteria and interests taken as a basis. Differing views are split between two main groups and while some emphasise the need to redefine substantive intellectual property law rules and concepts instead of harmonising the rules of conflict of laws applicable to tort on the Internet, others who favour indicative rules assume that applicable foreign law can be selected through traditional rules or new rules for the choice of law to be constituted exclusive to the cyberspace.

In the following sections, I will initially examine the view that suggests application of the *lex protectionis* principle with the exception of *lex fori* and *supranational law*. I will then consider whether there is a need to create an independent field of cyberspace law or rules for the choice of law stemming from traditional rules for the choice of law or reinterpretation thereof. I will provide an overview of the perspective that includes substantive intellectual property law rules, which will help the identification of infringements on the Internet and may prevent the present infringements and/or results thereof within the framework of the

arguments adopted by working groups and international organizations. I will also suggest some rules for the choice of law that could be applied under Turkish Law.

#### **5.6.1. APPLICATION of “*LEX LOCI PROTECTIONIS*” PRINCIPLE WITH THE EXCEPTION of “*LEX FORI*” and “SUPRANATIONAL LAW”**

This alternative rule states that even if the *lex protectionis* is the general rule, particular issues arise in two cases: those where a court considers that the content of the applicable law has not been satisfactorily established; and those involving multiple infringements in different countries.<sup>64</sup> The burden and inconvenience of applying many different laws falls upon the court. There is also some element of irrationality in applying those different laws to what is essentially a single wrong perpetrated by a single infringer. According to this alternative rule, one law should govern in such a case.

In our scenarios, copyright holders will seek protection in the country where they have suffered the greatest economical loss. Accordingly, in scenarios 1 and 2, Turkish copyright holders TurkMuzik Co., MESAM, and Hakan Kaya will seek protection first of all in Turkey and then in Germany and the UK. In scenario 3, Bob will seek protection in the UK and Monica in Germany. There should consequently be no difficulty with the application of *lex protectionis* in our scenarios for the single infringements of single infringers. However, it would be more awkward to determine which law should govern if the copyright holders want to sue multiple infringers from different countries.

According to the view that *lex protectionis* with the exception of *lex fori* and supranational law should apply,<sup>65</sup> applicable law should be selected having regard to the characteristics and effect of intellectual property rights. In this context, it would be indispensable that both economic and cultural national interests are respected. On one hand, intellectual and industrial property rights are exclusive rights provided and protected by a certain State for the realization of economic activities such as production or consumption/ exploitation within the country or in relation to it. The extent to which these rights exist is determined by the exclusive rights that are protected and is closely related with the economic order of the state which has granted these rights. On the other hand, these rights may also reflect the state's

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<sup>64</sup> Fentiman, 2005, p. 144.

<sup>65</sup> Fentiman, 2005, p. 132; Sargin, 2005, p. 266.

cultural policy and interests concerning the development of specific creative activities. The interests concerned will make the application of a foreign law problematic since application of such law will be considered as a violation of the right of sovereignty of the state which has granted the rights. Even if such a consequence is not considered possible, the state will still continue to be a major interest owner in the creation of these rights and granting them effect.<sup>66</sup>

Even if there is a difference in the definition of territorial connections and the appropriateness of universalisation, intellectual property rights protection is territorial by its character and is limited to the territory of a national State. The abovementioned character of the rights will play a substantial role in the selection of applicable law.<sup>67</sup>

In this general framework, the rule of “*lex loci protectionis*” is an inevitable rule for the selection of applicable law concerning intellectual property right infringements. Apparently, there is no state other than the country of protection that has a larger interest in the administration of intellectual property right protection. The territorial character of these rights brings about the question of which other law can be applied and consequently supports the applicability of the abovementioned rules for the choice of law.<sup>68</sup>

In addition to these, even if accepted as a general rule, the applicability thereof will create problems in some particular conditions. One of these is failing to determine the content of the applicable law and the other is infringements occurring in several territories simultaneously regardless of whether there are one or more defendants. In the event that the content of the applicable foreign law cannot be determined, as is observed in jurisprudence, the judge will either apply “*lex fori*” as a default rule or opt for precedents on analogous issues. However, in this situation, the plaintiff will always lose his case because of the principle of territoriality. The forum is unlikely to govern an infringement elsewhere, the outcome is therefore likely to be that no infringement has occurred.<sup>69</sup>

In the event that the infringement is committed on the Internet, as a rule, the court where the case has been filed will subject each infringement separately to the law of the country of protection where the infringement was committed. Even though this situation does not create

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<sup>66</sup> Fentiman, 2005, p. 131-132.

<sup>67</sup> Fentiman, 2005, p. 137.

<sup>68</sup> Eechoud, 2003, p. 105.

<sup>69</sup> Fentiman, 2005, p. 144; Sargin, 2005, p. 268.



a conceptual quandary, it will cause serious difficulties in practice.<sup>70</sup> In such a case, expecting the plaintiff to issue separate proceedings for each infringement would result in unfair consequences. It is also unrealistic given judicial expenses and the delay caused by the research concerning the applicable laws of several different countries. Research concerning various different laws will be a burden also for the courts.

Additionally, in the event of multiple infringements committed in different countries by a single offender, the application of various different laws may be considered meaningless. Therefore, to a certain extent, fairness, effectiveness and common sense will require the applicability of a single law in such a case.<sup>71</sup>

The problem arising at this stage is which law to take as a basis. The law of the court, the law of the common residence of the parties or that of the place of infringement may be suggested as the contact points to be considered in the selection of applicable law since only two connection points are common factors connected to every infringement. Furthermore, the attempt to select a single law will encounter two major problems, the territoriality principle under the traditional system of conflict of laws and the statutory character of intellectual property rights protection. Since such kind of protection is limited to the territories of a protecting State and a State's law will never be selected as the applicable law for an infringement committed outside its territories, a single law, in practice, will never be able to administer all acts of infringement committed in other States. There is no alternative but to apply, for each infringement separately, the law of the protecting state where the infringement was committed.<sup>72</sup> Additionally, it is possible to use some tactics that will indirectly eliminate the abovementioned difficulty. In practice, the difficulty caused by the application of different countries' laws can be eliminated through harmonizing the protection of the related right. Even if harmonization of protection is limited to the establishment of minimum standards, the application of different laws will be facilitated since there will be common characteristics.<sup>73</sup>

The selection of the law of the court as the applicable law may be suggested as the last remedy in the event that the content of foreign law cannot be identified and the infringement has been committed in several territories. While in the former case, "*lex fori*" is applied as the

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<sup>70</sup> Echoud, 2003, p. 240.

<sup>71</sup> Fentiman, 2005, p. 145.

<sup>72</sup> Ohly, 2005, p. 254.

<sup>73</sup> Fentiman, 2005, p. 145-146.

law administering the conflict, in the latter case the law of the court where several infringements have been caused by the same party and the same act may be considered as the law applicable to each related demand. This solution will be in line with the conceptual principle since there is no reason to limit a legal system to selecting the situation in which it will enforce its own law. Despite the fact that the scope of the applicable foreign law should not be in such a manner, extending the area of practice for the laws regulating national intellectual and industrial property rights and thereby making them transnational so as to eliminate a difficulty concerning a legal conflict to be solved in a case referred to its court, concerns the law of the court. The suggested solution will not prejudice the principle of interpretation of the applicable foreign law within its own concepts and principles. The suggestion simply modifies the concepts of the court concerning the application of intellectual and industrial property law. Such a solution, in reality, is an issue relating to the scope and application of the national law of the court outside the law on the conflict of laws.<sup>74</sup>

According to this theory, an analogy might be drawn with the practice of identifying general principles of decision that is common in “delocalised” arbitration. Where such principles are employed the parties’ rights and duties are not determined according to the laws of any one national legal system, and the choice of law process is redundant. Instead, the tribunal applies norms that might be described as “denationalised”, or supranational. If such a methodology were transposed to the intellectual property area, the effect would be to substitute for national law something akin to a *lex mercatoria* for intellectual property.

In order to achieve such a delocalised regime, this theory implies that the parties to a particular dispute might be enabled to ask a court to apply such generally applicable norms. Alternatively, a court might be empowered or required to determine multi-state intellectual property disputes in this fashion, either in every case, or in those where a straightforward application of the *lex protectionis* is not possible.<sup>75</sup>

As a rule, intellectual property rights protection is only possible in the territory where the legal requirements for such a protection, i.e. registration or exploitation, have been fulfilled. Therefore, the traditional rule in field of intellectual property rights is the territoriality of intellectual property rights. The traditional substantive law rule states that origination of

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<sup>74</sup> Fentiman, 2005, p. 146.

<sup>75</sup> Fentiman, 2005, p. 147; Sargin, 2005, p. 270.

intellectual property rights, existence, scope and exhaustion thereof in addition to their infringement should be determined as per the law of the protecting country where protection is requested. This is conceptualised as “*lex loci protectionis*” in the law on the conflict of laws, which is accepted as applicable law by Rome II and the Statute of Turkish Private International Law 2007.<sup>76</sup>

In other words, the rights in question can only be protected in the country where the legal requirements for protection are fulfilled. Since the essence of those rights is to provide the right holder with the right to take steps in the country where these rights are granted, to prevent some actions performed by others it is natural to assume that the work exists in the territory of the country which has recognized it. On the other hand, the close relation of these rights with the social and economic policies of the state which grants them requires that each country applies its own law within its own territory.

Accordingly, it is inevitable for intellectual and industrial property rights to be administered by the law of the state where the right has been created.<sup>77</sup> This approach requires a connection between the law concerning right ownership and transfer of rights and the law concerning infringements. This condition is confirmed by article 5 of the Berne Convention providing for equal treatment for foreigners. In this framework, the decisive factor concerning the applicability of a country’s law is whether an act would be regarded as an infringement of a national intellectual right under the law of the state where territorial protection is demanded; therefore, the judges should also identify the place of an infringing act as identified by the law of the country where protection is demanded, provided that international agreements are complied with.<sup>78</sup>

## **5.6.2. CYBERLAW FOR TORTS ON THE INTERNET**

This theory states that the law applicable to tort on the Internet in general, cannot be selected through traditional rules on conflict of laws based on national territories. This would indeed rely on specific geographical contact points since cyberspace consists of communication networks, domain names and users and is transnational in the same way as open

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<sup>76</sup> It has been suggested that this result could be achieved by means of a creative interpretation of the existing Article 5(2) of the Berne Convention. Ginsburg, WIPO 1998, p. 23; Torremans, 2000, p. 245; Erdem, 2007, p. 39.

<sup>77</sup> Cornish, 1996, p. 287.

<sup>78</sup> Cornish, 1996, p. 286-288; Erdem, 2007, p. 44; Sargin, 2005, p. 264.

sea/space/Antarctica, which does not belong to the sovereignty of any State.<sup>79</sup> It is therefore logical that there should be a need for an independent field of law determining the law applicable to legal transactions and actions in cyberspace. However, for the dispute to be subject to the new cyber law, a significant relationship between cyberspace and Internet activity or electronic commerce would be required.<sup>80</sup>

This view shows that it is difficult for traditional rules for the choice of law of “*lex loci delicti*” and “*the most significant relationship*” to provide an adequate solution of clarity and facilitation in cyberspace as it does in the physical world, based on a number of factors. Primarily, when the “*lex loci delicti*” rule is considered as the law of the place of last event, i.e. the place where the damage occurred, the place of tort will point to all States that have access to the Internet. In the event that this damage is observed in cyberspace, it can be concluded that the place of the damage or last event is cyberspace itself. Then, in such a situation it is not easy to locate where the event took place. Therefore, the abovementioned rules are not suitable to determine the applicable law for copyright infringements on the Internet.<sup>81</sup> On the other hand, the rules for the choice of law based on “*the most significant relationship*” will create problems in the selection of applicable law, because there are various connecting points such as the place where the action causing the damage took place, the place of damage, the residence or customary domicile of the parties or the centre of the relationship between the parties, which are based on geographical contacts for the selection of the most relevant law. A choice has to be made amongst these various connecting points.<sup>82</sup>

The theory, thereby emphasising the difficulty and impossibility of applying traditional rules for the choice of law, first makes a distinction between the possible types of conflict in such an environment and suggests solutions depending on this distinction. As underlined by the theory, the user becoming a part of a wider cyber place via “Access Provider” may encounter three types of conflicts. These are disputes between users logging in through the same ISP, conflicts between users logging in through different ISPs which do not have contractual relations and legal conflicts between Internet users and those who are not Internet users in the real world.<sup>83</sup>

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<sup>79</sup> Burnstein, 1996, p. 79-82

<sup>80</sup> Burnstein, 1996, pp. 89-92.

<sup>81</sup> Burnstein, 1996, pp. 92-95; Akinci, 2003, p. 118.

<sup>82</sup> Sargin, 2005, p. 258.

<sup>83</sup> Burnstein, 1998, p. 27-28.

In this context, the regime for open seas, “*lex maritime*” can be applied to cyberspace, which has similar characteristics.<sup>84</sup> Users will be assumed to be citizens of the country of the ISPs they are connected to, ensuring their Internet access. According to this theory, while accessing cyberspace through service providers, a “cyber residence” can be assigned to each user. Pursuant to this approach, the law in the service provider’s location, in the same way as that of the “flag state”, will select the applicable law. Accordingly, a person’s “cyber residence” may be assumed as the residence of that person under the law on conflict of laws.<sup>85</sup>

Following this theory, in the event that both parties have Internet access but cannot both be subjected to cyber law, i.e. when the defendant is an Internet user but the plaintiff is not, adopting a new law regime will bring about a totally unfair result. This new regime will only be effective if both parties are Internet users; therefore it may have harmful results for a person outside this space. It will not be appropriate to give authority to those persons and establishments that act in cyberspace to control the court concerning legal conflicts involving those that do not have Internet access. This kind of authority would result in the defendants’ establishing false contact points so that they can be freed from the liability of tort.

In conclusion, infringements are already taking place and the problem is not a lack of law. People in the real world are not a party to an agreement having been concluded in cyberspace and there is no reason to consider a dispute should be resolved by the law selected having regard to cyberspace. In this framework, the problem should be solved based on the law to be selected by either traditional rules on conflict of laws or a multilateral international agreement. In such case, in order to select the applicable law, the courts should find a solution taking into consideration and reaching a balance between the laws of the place of tort, the location of ISPs the residence of the plaintiff and the defendant or the place of which the plaintiff and the defendant are citizens.<sup>86</sup>

### **5.6.3. “MARKET IMPACT RULE” and MOST CLOSELY CONNECTED APPROACH**

According to the *lex protectionis* theory, there is no reason to withdraw from the law of the country of protection, which is considered as the main rule, in the selection of the applicable

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<sup>84</sup> For more information about *law of flag* see Tetley, 1993, p. 139-184.

<sup>85</sup> Sargin, 2005, p. 260.

<sup>86</sup> Sargin, 2005, p. 262; Baspinar & Kocabey, 2007, p. 251.

law in order to determine the existence and validity of intellectual property rights causing transnational legal conflicts. Furthermore, so as to achieve practical and reasonable results internationally, it should be ensured that the concept of infringement committed in a certain territory is limited adequately under the market impact criteria. Therefore, an approach able to combine the two principles should be adopted. In this context, “*lex loci protectionis*” should be the law to administer the existence and scope of all intellectual property rights. Furthermore, in cases of transnational infringements, it should be provided that infringement exists only if there is a substantial impact in the target country market.<sup>87</sup> Accordingly, applicable laws in our scenarios will not be different from the law of the country where protection is required.

There is a risk that this exceptional rule may be turned into a general rule by the courts, since the courts are likely to abstain from the application of the general rule, on the basis that it is very difficult to apply a foreign rule. In order to prevent such tendencies, the exceptional character of the rule should be emphasized to clear any kind of doubt. Therefore, any exception to the abovementioned rule should be carefully determined, ensuring that it is only applied in case where it is actually required.

In this context, “*lex loci protectionis*” supported by a market impact principle should be applied, on condition that each foreign country from whom protection is required can be identified one by one and a valid decision can be made concerning infringements aimed at or realized in the countries that are exclusively targeted. Having said that, application of exceptional provisions should be allowed, since it is not possible to identify these countries one by one given the nature of the Internet, making universal communication possible and enabling simultaneous acts of infringement to be committed in an unlimited number of countries. The most reasonable solution in such a situation seems to be to defer to the law of the state that is the most relevant to the act of infringement when considered as a whole.<sup>88</sup>

In order to determine the closest relevance the fundamental choice to be made will be between the country where the impact of infringement is felt the most and the country where the infringement has originated. These countries are the main work places of the copyright holder and the defendant, respectively. If the two legal systems contain substantial differences, this

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<sup>87</sup> Basedow, Drexl, Kur & Metzger, 2005, p. 186.

<sup>88</sup> Ohly, 2005, p. 254.

will have a definite effect on the decisions to be taken at this stage; therefore, a choice must be made. In this concrete situation, there will be a strong tendency to apply “*lex fori*”.<sup>89</sup> When considering the possibility of combining intellectual and industrial property right infringements committed in several countries before the court of a single country, one should very seriously evaluate the potentially negative consequences that may arise for the defendant. In other words, lawful interests of both parties shall be considered equally during the process under which legal measures are taken. Therefore, instead of deciding in favour of the application of a single law and withdrawing from applying other applicable laws, the courts should try to find dispute settlement solutions such as limiting the measures taken to some countries, if possible, or applying principles enabling the legal measures taken to be proportionate with the actual damage, thereby preventing unfair intervention in the defendant’s lawful exploitation of intellectual property rights in other countries.<sup>90</sup> However, consolidation of these claims before one court under Article 6(1) of Brussels Regulation is no longer possible after *Roche Nederland*.

Due to the unique character of the Internet, it is sometimes very difficult and even impossible to foresee the problems that may arise while the decision is enforced. Even if the parties and courts do their best in taking into consideration the possible transnational effect of the decision and the scope of its enforcement is determined accordingly, there will still be doubt about which court decisions will be enforced, under which conditions.<sup>91</sup>

In conclusion, according to the market impact rule and that of the most closely connected approach and despite the difficulty that may arise during enforcement, a rule for the choice of law based on connection points with the protecting country and supported by the condition of substantial impact should be generally accepted. Although the commercial impact rule has been shaped as a part of substantive law, principles concerning the law on the conflict of laws or international agreements should also be integrated so as to guarantee legal security and transparency in international relations.<sup>92</sup>

The effects of market impact criteria are also observed, though partially, in the draft text prepared on this very issue by the Max-Planck Institute.

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<sup>89</sup> Hellstadius & Meier-Ewert, 2005, p. 335.

<sup>90</sup> ALI draft principles, 2007, Article 24.3.

<sup>91</sup> Kur, 2005-II, p. 969.

<sup>92</sup> Kur, 2003, p. 191-192.

#### 5.6.4. MAX-PLANCK INSTITUTE PROPOSAL

A corpus of rules in order to determine and administer intellectual and industrial property rights in general, including their exploitation via Internet is being prepared by the Max-Planck Institute. It is observed that traditional territoriality principles and rules for the choice of law of “*lex loci protectionis*” should be applied as much as possible, even in cyberspace. The focus is also on exceptional situations under which deviating from the rule is required and includes alternative rules for the choice of applicable law, limited to these exceptional situations.<sup>93</sup>

Firstly, the appropriateness of involving a market impact criterion in the rules for the choice of law is discussed, with regard to the fact that determination of what will constitute an act of infringement effectively concerns substantive law. However, taking into consideration the universal communication enabled by the Internet, it is suggested that a separate and clear criterion to ensure legal security on a wider international scale should constitute a part of the rules for the choice of law.

In this context, the suggestion is based on the opinion that, as a rule, “*lex loci protectionis*” rules for the choice of law supported by market impact criterion shall select the applicable law concerning the existence, validity and infringement of all intellectual and industrial property rights. Therefore, the exceptional conditions under which deviating from the rule is possible are included in the suggestion, provided that these are limited to conflicts which “actually require” these exceptions and the pre-requisites of applicability and legal consequences thereof are stated as much as possible. Accordingly, in line with the demands of the case, the general rule shall always be applied so long as the countries in which the infringement has been committed can be identified. This rule will still be used in case of infringements on the Internet provided that one or several states are explicitly identified as the place of infringement. In other cases, the exceptional rule should include conditions to prevent the courts from always applying their own law and the related rule should not provide the possibility for the court to apply legal measures that unfairly affects the defendant’s lawful commercial activities in another state.<sup>94</sup>

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<sup>93</sup> For the draft text see: Kur, 2005-II, p. 979-981 and 966.

<sup>94</sup> Kur, 2005-II, p. 979.



Even though it will be rarely observed in practice, the suggested rules also provide the parties, in principle, with the possibility of an “ex-post” selection of law. The opinion that there is no fair reason to restrict the right holders to mutually withdraw from some of the ways to seek legal remedies due to the act of infringement through application of a foreign law agreed by common will, proved to be positive for granting effect to the selection of law after the infringement. However, this condition was not finally adopted in the suggested rules. Although it is included, the suggested rules underline that some points need to be considered carefully before making a final selection. The first is to consider whether the acceptance of “ex-post” law selection in a way that may be made void by superior public order interpretations will prejudice the interests of third parties. The other is whether the freedom to choose the law to be applied will only cover the financial aspect or all possible ways of seeking legal remedies covering also those which are not included in the applicable law under normal conditions. Finally, interpretations of effectiveness and appropriateness and whether such a possibility shall be limited to “*lex fori*” selection only should be discussed and the conditions concerning the selection of law should be finalized.<sup>95</sup>

The case where the claimed infringement cannot be located in one or several territories, in other words when the infringement has been committed simultaneously in several places, is included in the suggestion, justifying the autarchy of will in addition to the exceptions to be introduced to the “*lex protectionis*” rule. This situation will arise in case of Internet use or in the event that there is one legal conflict, but the decision to be taken will have a transnational effect also concerning the other States. The solution suggested in such a case is the selection of the closest relevant law. As stated by those having prepared the suggestion, the major selection will be between the country where the impact of infringement is felt and the country where the infringement has originated and typically, these are the places where the main commercial establishments of the defendant and that of the right holder are located. The problem will arise when the two places indicate different states and the selection to be made will have the risk of being random. The tendency of the judge to apply his own law will increase. An alternative has been stated in the suggestion so as to balance the interests of the plaintiff and the defendant as well as to eliminate the negative results that may arise in such a case.<sup>96</sup>

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<sup>95</sup> Kur, 2005-II, p. 975.

<sup>96</sup> Kur, 2005-II, p. 976.

Under the scope of this interpretation, the general framework of which has been identified, the general rule is explained by the related articles as that the law of the country of protection. It shall be the law of the state(s) where the infringement has been committed and the legal remedy applied must or will be in effect (Article 1/2(b)). Furthermore, for the application of this article in the event of transnational conflicts, the existence of the act of infringement shall be dependent on its (substantial) impact on the local market of the related State (Article 1/3).

The conditions to withdraw from the applicability of “*lex loci protectionis*” supported by the market impact criterion in the event of universal infringements and the exceptional rules for the choice of law preferred, are under Article 2 of the suggested rules. As stated above, they are based on the possibility to identify the States affected by the infringement. In this context, in the event that the infringement has been committed in several states, if stated by the plaintiff in his initial request, the law of each country of protection can be applied separately (Article 2/1). The second paragraph of the same article provides the parties with the possibility to select the law applicable to the ways of seeking legal remedies for the infringement.

Article 3 of the Proposal determines that what would be the applicable law if the act of infringement is simultaneously committed in an indefinite number of countries. If all aspects of the infringement cannot be identified simultaneously the courts must solve the conflict by applying the closest relevant state law to cover the whole act of infringement. As stated under paragraph 2 of the Article 3, the court must have regard to the following in determining the closest relevance: identification of the main activity of the defendant claimed to have committed the infringement, the scope concerning the activities and the value of the assets of the right holder based on objective criteria. In the 3rd and 4th paragraph of article 2 in the suggestion, two other alternatives are provided. According to the first alternative, if these two factors depending on the commercial activities of the plaintiff and the defendant indicate two different countries the court shall adopt the law of the defendant’s residence. However, if the plaintiff proves that the legal conflict is more relevant to another state considering the act of infringement as a whole, the law of the related state shall be the applicable law. In such a case, an exception is introduced to the applicability of the law of the defendant’s residence, provided that the onus of proof belongs to the plaintiff (Alternative A/3). The objective

pursued by this rule is to protect the defendant having regard to the fact that the plaintiff will select the court, which is likely to be the court of his own country.<sup>97</sup>

According to Alternative A/4, in the event that the court has identified that the closest relevant state concerning the actual legal conflict cannot be determined for the act of infringement as a whole through applying the criteria provided in the 2<sup>nd</sup> paragraph of the abovementioned Article 2 and Alternative B/3, the ways to seek legal remedies as per the law of the related states should be limited in proportion to the harmful effects observed in these state(s) where the act of infringement will be prohibited.<sup>98</sup>

Another alternative submitted in the suggestion is based on a rule that will be significant in the event that the court has decided to apply a single national law concerning simultaneous acts of infringement. It has been prepared having regard to WIPO Common Recommendation, Articles 13-15<sup>99</sup>: the remedies to be applied based on the law selected by the court having regard to the closest relevance should be proportionate to the effect caused by the activities deemed unlawful by the laws of the state of the court and/or the national law applied in these countries (Alternative B/3). It is also stated that measures prohibiting or interfering with the lawful commercial activities of the defendant in another state affected by the same activity cannot be applied unless it is required to protect the legal interests of the plaintiff. Finally, despite the existence of the closest relevant law determined by the court, the defendant who has allegedly committed the tortious act shall reserve the right to request, if necessary, that continuing his lawful activities be considered acceptable by the law of a state which is also affected by the same unlawful activities (Alternative B/4).

#### **5.6.5. “LEX LOCI DELICTI COMMISSI”**

In order to select the applicable law using the “*lex loci delicti commissi*” rule, it is required that some contact points other than those objective contact points, such as the place where the work indicating the place of act and the place of the copyrighted work is uploaded on the Internet and the place where it is downloaded, shall be found<sup>100</sup> In this framework, “*locus delicti commissi*”, the place where the website can be accessed and the language, currency

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<sup>97</sup> Kur, 2005-I, p. 25.

<sup>98</sup> Kur, 2005-I, p. 25-26.

<sup>99</sup> Kur, 2005-II, p. 979.

<sup>100</sup> Dossena, 2003, p. 291.

unit, degree of interactivity, the quality and quantity of commercial activity used in the website should be taken into consideration, although they are not sufficient to determine the applicable law.<sup>101</sup>

Using this principle for tortious acts that involve damage to non-material interests, such as intellectual property and reputation, gives rise to some difficulty in determining where the place of the wrong is. In cases where there is only one place of use or wrongful act, this principle will work. However, problems arise if the infringing act is not limited to one territory, but takes place across borders or has cross-border effects. Copyright infringement on the internet is a multi-local tort, which occurs when an act takes place in one country, while the harmful effect of it materialises in more than one country. If there is unauthorised reproduction in one country and unauthorised distribution in the other, this will generate two separate torts.

The question for this theory is not only which of the two connecting factors should be given preference (if either), but also how they should be defined in a digitally networked environment.

#### **A. Inter-applicability of the Place of Uploading and the Closely Relevant Law**

As suggested by *lex loci delicti*, intellectual property right infringements in general should be separated from other kinds of tort and special rules on conflict of laws should be developed.<sup>102</sup> Accordingly, introduction of rules for the choice of law based on the law of the country where the infringement has been committed or where there is a danger of infringement would be appropriate. Furthermore, it is fairly difficult to identify the place where the infringement has been committed in the case of infringements of the right of exploitation of the work on the Internet. According to this theory, for the same motives as those regarding the devolution of international jurisdiction, the applicable law concerning intellectual property right infringements on the Internet should be the law of the “place where the information is uploaded”. Since this very place has also been accepted as the objective element of

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<sup>101</sup> Dossena, 2003, p. 293.

<sup>102</sup> Fawcett & Torremans, 1998, p. 619-647.

jurisdiction concerning the devolution of international jurisdiction, and courts thereby granted with jurisdiction can also apply their own substantive laws.<sup>103</sup>

This theory submitted that the Satellite Directive<sup>104</sup> can provide inspiration.<sup>105</sup> In the context of satellite transmissions and the Internet, the initial act of reproduction or communication of the protected work, performance, broadcast, etc., is the relevant act to be localised. For example, the place of initial broadcast via satellite is in terms of the Satellite and Cable Directive Article 1(2)b: ‘the place where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.’ In Internet terms, the place of the upload is often considered to be the place from where the protected subject-matter was introduced into a network for the purpose of further distributing it via servers. Alternatively, the place where the server itself is located and on which the content was first hosted is viewed as the relevant place.

The disadvantages of this theory is illustrated by our scenarios. In scenario 1, Mayaden Co. could send one of their employees to one of the ‘copyright free havens’ country to upload copyrighted works on their website. In this situation, uploading would occur in one of the countries that have very weak copyright protection. To select this country’s law as applicable law for the copyright infringement in scenario 1 would be unfair for the Turkish copyright holder. In addition, the place of server is yet another problem for the networked world because infringers can easily direct files to a server in the place of their choice.<sup>106</sup> A further difficulty with using the place where the server is located or where the communication was initiated as connecting factor is that the place of the server can be accidental and therefore does not lead to the determination of the law most closely connected.<sup>107</sup>

According to scholars such as Ginsburg and Dessemontet, the better option seems to be to consider the place where infringement occurs from an ‘organisational’ perspective, as the place where the initiative for using the work and the organisation of its exploitation originates. Ginsburg proposes exactly such an interpretation: the place of the upload is the place of initiation of the infringement, which should be understood as the place where the alleged infringer ‘devised its plan to make the work available over digital media...Most often, in the

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<sup>103</sup> Fawcett & Torremans, 1998, p. 647.

<sup>104</sup> Council Dir. 93/83/EEC.

<sup>105</sup> Lucas, 1998, p. 247; Torremans, 2000, p. 245.

<sup>106</sup> Buhler, 1999, p. 400; Lucas, 1998, p. 85.

<sup>107</sup> Lucas, 1998, p.81.

case of a juridical person, that place will correspond to its headquarters.’<sup>108</sup> Dessemontet similarly regards the country of upload as the country where the entity that uses the allegedly protected subject-matter has its effective seat.<sup>109</sup>

To select the law of the uploading place as applicable law will give a chance to the infringer to choose a ‘copyright free haven’ country to upload others’ copyrighted works onto its website. Therefore, this principle gives the infringer the freedom to choose the law applicable to his own case. This is one of the most problematic parts of the principle.

The *lex loci delicti* does not determine when to apply exceptions in advance but explains some possible factors ensuring this close relevance and their significance as follows: the key factors in intellectual and industrial right infringements are the event(s) causing the infringement and the conditions around these events. These factors are considered highly significant since they are in line with the territoriality principle underlying the substantive law applicable to the acts of infringement. For the same reason, the factor concerning the creation of the right is given similar significance. This factor will ensure both the validity of the right and application of the same law in case of claims concerning the infringement thereof. Another significant factor is the request for discontinuation of the infringement in a certain country. However, the residence/customary domicile of the parties should not be considered a decisive factor in the determination of the applicable law since in such cases there are several defendants, requiring several applicable laws.<sup>110</sup>

#### **5.6.6. THE LAW OF THE COPYRIGHT HOLDER’S DOMICILE**

The law of the copyright holder’s domicile principle means that international agreements regulating intellectual property rights require that “an absolute nationality” shall be accepted, making it possible for the national courts to apply exclusively their own law concerning this type of rights, taking into consideration the economic development, public health and cultural policies of their own countries. However, despite the significant effects on the related policies, international liabilities under the scope of universally accepted human rights doctrine makes nationality approach adopted as regards intellectual property rights no longer important. The texts regulating human rights provide for the fact that everyone shall have the

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<sup>108</sup> Ginsburg, 1999, p. 329.

<sup>109</sup> Dessemontet, 1998, p. 54-55.

<sup>110</sup> Fawcett & Torremans, 1998, p. 630-631.

right to become a part of cultural life and benefit from scientific developments and practices thereof, and that the economic and moral assets/interests of scientific, artistic and literary authors shall be protected. Therefore, the abovementioned rights will no longer be dominant in economic and cultural policies or the subject of rigid rules based on territoriality principle and national policies established by the legislator of national states. This proves that in respect of conflicts of laws, it is required to choose and apply the law of the state whose policies are deemed most significant.<sup>111</sup>

In scenarios 1 and 2, copyright holders are domiciled in Turkey and in scenario 3 copyright holders are domiciled in Germany and in the UK. Accordingly, the law of the copyright holder's domicile and the law of the place where the protection is requested will mostly be the same for locally known copyright holders such as Turkish copyright holders, because they are only known within the Turkish community.

Nevertheless, the general opinion is that the principle of territoriality, which has lost its importance, has not yet totally lost its effect completely in the Internet environment. It then proposes a contact point that subjects the legal dispute to a single legal system.

Within the framework of the applicability of the rules for the choice of law, which takes as a basis the connection point of the place where the tort has been committed, a difficulty that arises in traditional tort cases also arises in respect of intellectual property rights. In cases where the conduct giving rise to tort and the damage occur within the borders of the same territory, there will not be any ambiguity and therefore the law of that country will apply. On the other hand, in Internet matters, it is usual that those two places are located in different states and the applicable law will therefore have to be determined. In this case, the place where the last act giving rise to tort was committed can be taken into consideration as a principal link; however, applying the law of the country in which the person is subject to the damage may be an option. Furthermore, as provided in some legal systems, if the place of damage is different from the place of act, it can be considered that the law of the place of damage will apply, on condition that it is determined that the damage has occurred. In this case, the applicability of the law of the place of damage which is bound to the abovementioned condition shall be rarely realized in the Internet. For these reasons, where tortious acts are committed in more than one country through Internet, the necessity to favour

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<sup>111</sup> Dessemontet, 2001, p. 492-493.

a “single” contact point in the long term is emphasized and the place where the damage has occurred is defined as the place of customary domicile or capital place of business of the person exposed to tort. Financial damages shall be determined based on the difference between the actual value of the assets after the tort has been committed and the value should the tortious act not have been committed. For this reason, the only important geographical contact point for the financial damage should be the place where the accounts have been finalised.<sup>112</sup>

The opinion that it is possible to determine the law to be applied based on the country where the intangible goods giving rise to the act of infringement are received is criticised because it brings about the possibility to apply the law of every country in the world. The law of the receiving country can be directly enforced in such areas as criminal law and public law. However, it is not required to enforce such law directly within the context of intellectual property rights. The receiving countries have principal policies to the extent that requires such countries to enforce their own laws as a result of the risk of free circulation of the ideas/information and risk of interruption of trade through the Internet. Insisting on the applicability of the law of the receiving country will result in copyright holders having to seek remedy for their rights, subject to different laws in various countries. It will be unavoidable that uncompromising judicial rulings will be made in such cases.<sup>113</sup>

Within this framework, according to the abovementioned opinion, the applicability of the law of the place of customary domicile/ capital place of business where the person is exposed to the tort is based on the following rationale: notwithstanding the fact that the law that will be enforced in actions based on tort is provided for in contract, it shall be determined according to the characteristic performance. Such law naturally provides for legal systems that have the same arrangements for intellectual property rights as well as extremely strict protection measures against the damages arising from faulty goods and services. It is indeed not possible to subject the advantage to be obtained and the responsibility it will create to two different legal systems whilst retaining fairness and equality. The highest level of protection will guarantee that the right-holders who conduct their business in the real world will act in compliance with the obligations that they have to fulfil, as a result of the responsibility they bear. The right-holders will need their rights to be protected in the Internet environment. As

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<sup>112</sup> Dessemontet, 2001, p. 503.

<sup>113</sup> Dessemontet, 2001, p. 504.



such right-holders depend on the intellectual property rights granted by the law where their capital places of business are located, it will be reasonable to require enforcement of the law of that country within the context of protection of the concerned rights. This place will not point to the place where the service provider is located but it will point to the place where the electronic company is actively administered. It will be necessary to distribute the asset values of the commercial enterprises to different countries where the market is located, or determining the identity of the important will be necessary for the determination of the enforceable law.<sup>114</sup>

For all these reasons, the contact points mentioned in the proposal on intellectual property rights exploited through the Internet, suggest the applicability of a single legal system under three different perspectives. First of all, the real and legal persons exploiting the intellectual property rights benefit from the advantage that the exploitation of the rights provides on one hand and they face contractual or civil liabilities due to the goods and services they provide on the other hand. Furthermore, the place of economic damage caused by a complex tortious act is the place of *the financial point where the damage is exposed to is mostly located*???. This place is the one where the person exposed to the damage holds the intellectual and industrial property rights. As the concerned rights cannot be available in various countries, the damage cannot be caused in any other place. Finally, it will be possible to enforce the rules of a single legal system both on all proceedings issued because of those damages and on all proceedings issued for the possible damages. In most cases, the place of the damage will not be determined due to the difficulty of establishing the asset value that has been lost. The plaintiff will often be unable to prove the scope of the loss that s/he has been subject to and the scope of the responsibility of the defendant; however, in the latter case, there will be no need to prove the loss.<sup>115</sup>

#### **5.6.7. THE ALLEGED INFRINGER'S DOMICILE AND THE LAW OF THE JOINTLY TARGETED COUNTRY**

It is provided that the content of the alleged infringing website has been directed to another country distinct from the place of residence of the party liable for the tort or provided that the work has been communicated through electronic mail, the liability arising out of the unlawful

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<sup>114</sup> Dessemontet, 2001, p. 507.

<sup>115</sup> Dessemontet, 2001, p. 507; Sargin, 2005, p. 288.

acts related to the infringement of the intellectual property rights shall be determined according to the law of the country to which the work has been directed or communicated.<sup>116</sup>

As it can be understood from this remark, the applicability of the law of the place of residence of the perpetrator of the tort depends on whether the concerned target country should also be the country where the place of residence is located at the same time. Within this scope, provided that it becomes possible to apply more than one national law depending on more than one country which is targeted by the website or the electronic mail messages, the party aggrieved as a result of the tort shall be able to choose the law to be applied. The chosen law shall be the single law which can be applied in that dispute.<sup>117</sup>

For the applicability of the law of the targeted country that is different from the country where the residence of the perpetrator of the tort is located, it is important that the following presumptions which are not “numerous clauses” are also considered: The website owner should direct towards the related countries after announcing that it is possible to download the works through the Internet on that website. Furthermore, the language used, other than English, shall be considered as evidence of a request to establish a contact with the country of the language in question. The fact that it is specified in the website that the payment shall be made in US Dollars or in Euros will not be sufficient evidence to identify the country to which the content of the website is directed. On the other hand, the “disclaimers” used by the person responsible for the website will not form sufficient evidence to demonstrate that a certain country is excluded from the scope of the communication established.<sup>118</sup>

On that basis, the following possibility is still available: Every national court will be able to make judicial rulings ordering that while the persons responsible for the content of the website establish the communication, they must in future make special reference to the substantive law of the state of the court where an action introducing a different arrangement from the substantive law determining the applicability of the law in terms of the case but which does not bear any enforceable law .<sup>119</sup>

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<sup>116</sup> Dossena, 2003, p. 295.

<sup>117</sup> Dossena, 2003, p. 295.

<sup>118</sup> Dossena, 2003, p. 295.

<sup>119</sup> Dossena, 2003, p. 295.

#### 5.6.8. LAW OF THE “COUNTRY OF ORIGIN”

This principle suggests that the strict practice of the “territoriality principle” should be discontinued and it should be possible to provide some flexibility to this rule in situations where it is claimed that an infringement of intellectual property rights is caused.<sup>120</sup> A distinction should be made between the conflict of laws which arises between the national laws and the conflict of interests among the holders of the existing intellectual property rights within the territorial borders in compliance with the law.<sup>121</sup> This principle amounts to questioning which law should be applicable if there are more than one copyright holders from different countries. Accordingly, from this point, this principle is different from the principle of law of copyright holder’s domicile.

Within this context, the above-mentioned opinion seeks an answer to two questions, which allegedly fall under the law of conflict of laws. These questions are the possibility of subjecting the infringements of rights arising through the Internet to the national legal principles of a single legal system and the possibility of a certain state to ensure the applicability of the law of that country, respectively. At this point, it is discussed whether the “criterion of affecting the market” will point to the enforceable law or not and this criterion is evaluated negatively.<sup>122</sup> In practice, this means that a website owner who enters into an international market through Internet would have to obtain information about many different legal systems and as a result would have to try and comply with the national law containing the strictest rules in order to minimize the likelihood of infringement. In other words, it is not sufficient that anybody using the Internet for commercial purposes be aware of such rights that are likely to cause infringement in other states; the person exploiting the work must also take into consideration the risk that the scope of the protection area of the rights belonging to such work can be different.

The legal principles regulating intellectual property rights have been uniformised to a great extent; therefore opinions regarding the scope of such rights can vary even within the laws of the member states of the European Union. For this reason, in the conventional approach, the application of “*lex loci protectionis*” may be an obstacle to the development of electronic

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<sup>120</sup> Ginsburg, 1995, p. 318; Morris, 2009, p. 301.

<sup>121</sup> Oghly, 2005, p. 251.

<sup>122</sup> Ginsburg, 1995, p. 318.

commerce.<sup>123</sup> This determination brings about the question of whether the scope of all the rights can be determined based on the legal principles of a single national law or not. It is much easier to obtain information about the existence of a work rather than determining the legal principles that can be applied to the interpretation of the rights infringement claims in more than one country. Therefore, the commercial communication established through Internet, and the appropriateness of adoption of the rule of “country of origin” should be discussed.<sup>124</sup> According to this rule, the scope of such rights can be subject to the law of “Country of origin” with the awareness that there are independent intellectual property rights in various countries. This approach will grant freedom to every website owner to take advantage of various exceptional situations provided for in the legal provisions regulating the intellectual property according to their interpretation in their own countries. In addition, as mentioned in respect of this opinion, the applicability of the proposed rule mostly depends on the uniformity of the principles of the substantive law regulating the intellectual property rights.<sup>125</sup>

This opinion draws attention to the negative and positive aspects of the adoption of the proposed rule. While this solution provides significant convenience for website owners in their commercial endeavours, it will also give them the opportunity to manage their commercial activities in copyright havens, benefiting from the weaker protection of such rights and hindering the applicability of the laws of the states which provides for a strong protection. At this point, this opinion also specifies another rightful plea which can be claimed against the proposal. The rule of “*lex loci protectionis*” makes it possible to apply the same national law to the protection conditions of such rights as well as to the legal disputes related to the infringement of such rights. It is clearly appropriate to manage the acts of infringement according to the rules of conflict of laws. Furthermore, the issue of determining whether the infringement has been realized or not in the field of intellectual property rights is related to the conditions and attributes of the local markets and especially to the language used as well as the habits of the consumers. As a result, in spite of all the above-mentioned difficulties, the rate of harmonization of the legal principles regulating the intellectual property rights is still high. For EU Member States- it is worth considering the law of “Country of origin” as an alternative, which makes it possible to apply a single law to the acts of infringement

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<sup>123</sup> Sargin, 2005, p. 293.

<sup>124</sup> Oghly, 2005, p. 251-252.

<sup>125</sup> Oghly, 2005, p. 254.

committed within the borders of more than one country, at the same time, through the Internet.<sup>126</sup>

The concept of “exploitation of the work” through the Internet should also be redefined in the substantive law and the fact that the exploitation of the work caused the infringement of intellectual property rights should be bound to the criterion of “commercial effect and the damage it caused”. The courts should take into account the fact that decisions made on Internet related issues are likely to have a transnational effect and should be commensurate to the effect of the activity causing the infringement of a foreign work. It will for instance be deemed sufficient for the court to prohibit the release of a work within a certain territorial area in order to bring the infringement to an end, instead of issuing a transnational order, which completely prohibits the exploitation of the work in the Internet. For that reason, the relevant principles are in fact contained within the scope of the national substantive law; however, the application of the rule of “*lex loci protectionis*” should be classified as an exception in the field of international private law.<sup>127</sup>

## 5.7. CONCLUSION

In this chapter, it has been examined which conflict rules are applied in Turkish and EU law and which conflict rules would be appropriate for the infringement of copyright on the Internet. The law of the place where the tort was committed or the damage has occurred, “*lex loci delicti*”, was the applicable law under Turkish law until November 2007. With the new Turkish Private International Law Act (MOHUK 2007), *lex protectionis* has become the applicable law for intellectual property disputes and came into line with the Rome II Regulation.

Intellectual property rights are traditionally considered territorial; that is, their existence and infringement are determined under the law of each country in which an infringement has occurred. The Rome II Regulation has therefore adopted “*lex protectionis*” as applicable law for intellectual property rights infringements.

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<sup>126</sup> Oghly, 2005, p. 253-254.

<sup>127</sup> Oghly, 2005, p. 256.

For infringements of copyright, *lex loci delicti* and *lex protectionis* can be used interchangeably,<sup>128</sup> because the copyright holder needs protection wherever the infringement occurs. These rules can work perfectly if the infringement only occurs in one place. However, the questions are where the infringement occurs and what would happen if the infringement occurred simultaneously in more than one country.

There has been considerable debate among scholars<sup>129</sup> and legislators<sup>130</sup> as to which country should be the *locus* of infringement in an internet copyright action: the place of posting or emission of the infringing work or the place where the material is received or accessed?

However, with the implementation of the WIPO Copyright Treaty, making available to the public became a part of the right of communication to the public. Therefore, the place of infringement of the digital right will be the country where the defendant-website operator made the infringing works available to the public. This place is likely to be the country of emission or of uploading of the material, rather than the place where such material is received since access to the work by the public is not a necessary element of the act of making available.<sup>131</sup>

Accordingly, when the website operator uploads a copyrighted work to its server, copyrighted work becomes available to the public all over the world but it is infringed where internet users download it. This means, the copyright holder's right of making available to the public is infringed simultaneously in more than one place.

Even if the *lex protectionis* is the universally accepted rule and a good option for single infringements, specific difficulties may arise in two cases: those where a court considers that the content of the applicable law has not been satisfactorily established; and those involving multiple infringements in different countries, involving either one defendant or several.

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<sup>128</sup> Eechoud, 2003, p. 106.

<sup>129</sup> A Lucas, *Private International Law Aspects of the Protection of Works and of the Subject matter of Related Rights Transmitted Over Digital Networks* (2001) World Intellectual Property Organisation <[http://www.wipo.org/edocs/mdocs/mdocs/en/wipo\\_pil\\_01/wipo\\_pil\\_01\\_1\\_prov.pdf](http://www.wipo.org/edocs/mdocs/mdocs/en/wipo_pil_01/wipo_pil_01_1_prov.pdf)> and J Ginsburg, *Private International Law Aspects of the Protection of Works and of the Subject matter of Related Rights Transmitted Over Digital Networks* (2000) World Intellectual Property Organisation <<http://www.cptech.org/ecom/hague/Ginsburg2000.pdf>>.

<sup>130</sup> See, eg, European Commission, *Green Paper on Copyright and Related Rights in the Information Society* (1995) (supporting a country of emission approach) at <<http://europa.eu/scadplus/leg/en/lvb/l24152.htm>>.

<sup>131</sup> Garnett, 2006, p. 351-352.

In practice, the needs of Turkish copyright holders are different from those of developed countries' copyright holders. Unfortunately, there is only one internationally known Turkish Author, Orhan Pamuk, who won a Nobel Prize for one of his novels, whereas other Turkish copyright holders are only known within the Turkish community. Therefore, even in today's networked world, *lex protectionis* might be a good option for Turkish copyright holders and for other developing countries' authors.

In principle, each infringement is a separate wrong and each is subject to the law of the country where each infringement occurs. Conceptually this is not necessarily a problem but it has serious practical consequences, especially for worldwide known authors. The legal cost and delay involved in seeking to apply the laws of several different countries can be forbidding. For multiple claims, as it is proposed in the Max-Planck Institute Proposal, for infringements carried out through the Internet, the court may apply the laws of the State or the States having the closest connection with the infringement, if the infringement takes place in every State in which the signals can be received. The court should take all the relevant factors into account while determining which State has the closest connection with the infringement. These relevant factors might be the infringer's habitual residence, the infringer's principal place of business, the place where substantial activities in connection with the infringement in its entirety have been carried out and the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety. Accordingly, the principle of territoriality may need to be relaxed in some respects.

While determining the law of the state having the closest connection with the infringement, if the state where the protection is sought or the tort is committed is a party to the Berne Convention and meets the minimum standards that have been laid down in the Convention, it is acceptable from the point of view of the copyright holder. If the applicable law under the normal rule does not meet the minimum standards that have been laid down in the Berne Convention and the TRIPs Agreement, the law in question should be replaced by that of the country in which the website operator has its residence or its principal place of business, if it is different from the uploading place.<sup>132</sup>

Consequently, the characteristics of intellectual property show that the only law that can realistically apply is *lex protectionis*. National intellectual property protection is distinctively

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<sup>132</sup> Torremans, 2000, p. 245.

territorial, regulating only the enjoyment of rights within the borders of the country concerned, even if the concept has become limited in an era of rapid communications.<sup>133</sup> For multiple claims of internet infringements, *lex protectionis* means application of more than one countries' law. For any attempt to identify a single applicable law encounters two more fundamental problems of principle, involving respectively the territoriality and the mandatory character of intellectual property protection.

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<sup>133</sup> Austin, 2000, p. 575; Fentiman, 2005, p. 137



## CHAPTER 6 RECOGNITION, REMEDIES AND ENFORCEMENT

### 6.1. INTRODUCTION

The main aim to obtain a judgment is to enforce it. However, it is sometimes easier to obtain a judgment than to enforce it, if it contains foreign element. “A court must recognize every foreign judgment which it enforces, but it need not enforce every foreign judgment which it recognizes.”<sup>1</sup> Consequently, if one wishes for a foreign judgement to be enforced in another country, then steps of recognition and then enforcement of the relevant legal system must be followed.

Accordingly, within the context of EU law, Article 33 of the Brussels Regulation states that a “judgment given in a Member State shall be recognised in the other Member State without any special procedure being required.”<sup>2</sup> If a right holder prevails in a trial in one Member State, he or she is therefore not obliged to go through proceedings in another Member State where the enforcement of the ruling might also be important to him or her. The official authorities have to accept the ruling and assist with enforcement procedures. In the case of a dispute relevant to recognition, it is possible to appeal with the aim to reach a decision that the judgment is to be recognized.<sup>3</sup>

In the Berne Convention, the TRIPs and the WIPO Treaties, which are paramount to the Brussels I Regime, there are no provisions that would exclude the recognition of a judgment related to copyrights in another country which makes the situation worse for the copyright holders.

### 6.2. THE RECOGNITION OF FOREIGN COURT JUDGMENTS BY TURKISH COURTS

In our *scenarios 3 and 4*, to obtain a judgment might be easier for claimants than to enforce it. In the scenarios, the defendants are a Turkish company and a Turkish individual, and all their

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<sup>1</sup> McClean & Beevers, 2009, p. 158.

<sup>2</sup> Article 33(1) of Brussels I Regulation.

<sup>3</sup> Article 33(2) of Brussels I Regulation.

assets are in Turkey. Therefore, judgments are bound to be brought before the Turkish court for recognition, in order to be enforced in Turkey.

Article 50 of MOHUK 2007 states that enforcement of the judgement rendered by a foreign court regarding a civil action, which is finalized according to that foreign legal system, requires the competent Turkish court to render decision of recognition. Accordingly, the main requirements are: (i) the judgment is related to civil or commercial matters, and (ii) the judgment is final and binding according to the law of the foreign state under which the judgment was rendered.

The Basic Civil Court of First Instance<sup>4</sup> is competent to render a decision of enforcement. As mentioned above, in order to enforce the judgement, it must above all be rendered by a legitimate court. Within the meaning of MOHUK 2007, ‘payment orders’ and ‘enforceable titles’ are not considered as judgments and therefore these are not enforceable in this context.<sup>5</sup> Furthermore, the judgement for which recognition is requested must be regarding a civil action or a civil right rendered within a criminal action. In other words, according to MOHUK 2007 decisions made in criminal cases by foreign courts will not be recognised. Additionally, the relevant judgement must be final in respect of the legal system to which it belongs. The finalization has to be both substantial and procedural. There are no particular conditions for finalization and in Turkish legal practice, an official indication of finalization by the foreign court is generally found adequate.

In our *scenario 3*, plaintiffs *Bob* and *Monica* must take the judgment to the court where the defendant, *izle.com*, against whom enforcement is sought, is domiciled in Turkey. If the defendant has no domicile or is not sojourning in Turkey, the decision of enforcement may be applied at any of the courts in Ankara, Istanbul or Izmir.<sup>6</sup>

When the request of recognition and enforcement comes before the Turkish court, there will be a hearing to determine whether all the statutory preconditions necessary for recognition are present or not. In this hearing, the Turkish court will not review the subject matter of the judgement; but will examine the form. Few defences are available: the other party may object

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<sup>4</sup> Asliye Hukuk Mahkemesi, Article 51(1) of MOHUK 2007.

<sup>5</sup> Ansay & Schneider, 2002, p. 177; Yesilirmak, 2009, p.1275.

<sup>6</sup> Article 51(2) of MOHUK 2007.

to the recognition by proving that the statutory conditions for enforcement do not exist; or may argue that the foreign court decision has already been partly or fully fulfilled; or may allege the occurrence of an event, which hinders its fulfilment.<sup>7</sup>

The request for recognition and enforcement must be in writing, and shall include the name of the country, the title of the court from which the decision was obtained, and a summary of the judgment. The documents shall be translated by a licensed translator through a notary or by the Turkish Embassy. Subsequent to the submission of the required documents, the competent Turkish court will examine the request on the following grounds. Provided that there is a reciprocity agreement between the Turkish Republic and the relevant foreign country or a statutory provision or even actual practice of relevant foreign country, which enables the enforcement of judgement awarded by the Turkish court; the foreign judgment is not on a matter over which Turkish courts have exclusive jurisdiction; the foreign judgment is not obviously against Turkish “ordre public”; the person against whom the enforcement is sought has been duly summoned, defended or given the opportunity to defend himself or has been represented properly before the foreign court; has not been tried in absence and has not raised any of the above stated objections before the Turkish court; the foreign judgment relevant to personal status of a Turkish national is taken in respect of the proper law under Turkish choice of law rules, the Turkish defendant has not objected to enforcement on that ground<sup>8</sup> the Turkish court may grant enforcement.

Generally, recognition of a judgment takes approximately two years in Turkish courts. In our *scenario 3*, if Bob and Monica obtain a judgment from another country than Turkey, they would have to wait a few years to enforce it in Turkey. In that time, their popular songs might already be forgotten. This is proof that an international recognition and enforcement system should be accepted by WIPO or WTO.

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<sup>7</sup> Article 55(1) of MOHUK 2007.

<sup>8</sup> Article 54 of MOHUK 2007.

### **6.2.1. RECOGNITION OF TURKISH JUDGMENTS: UK-GERMANY**

MOHUK 2007 does not absolutely prevent the Turkish court from granting enforcement even if there is no reciprocity between the country of judgment and Turkey.<sup>9</sup> De facto reciprocity is also sufficient for the Turkish courts in order to consider granting enforcement. In the absence of a reciprocity agreement, the Turkish court may therefore rely on de facto reciprocity.

There is no reciprocity agreement for recognition and enforcement of judgments between the U.K. and Turkey. Despite lack of formal agreement, there is *de facto* reciprocity between both countries.<sup>10</sup> Unless the U.K. court decision does not concern a matter under the exclusive jurisdiction of Turkish courts, it will therefore be recognized and enforced in Turkey.

Likewise, even though millions of Turkish individuals are living in Germany, there is no reciprocity agreement between Germany and Turkey but de facto reciprocity is well established.<sup>11</sup>

### **6.3. REMEDIES**

The plaintiff can obtain injunctions to stop infringing activities and money damages to compensate and, in some cases sentence the defendant for copyright infringement. It is in the best interest of the copyright holder to stop the infringement with a court ruling. In our scenarios, if the claimants *MuzikCo.*, *MESAM*, *Hakan Kaya*, *Bob* and *Monica* ask for the compensation in the first place, the court processes will take much longer than interim injunctions because of the difficulties of damages calculation.

Courts generally presume that copyright infringement will cause irreparable harm; they often issue temporary injunctions and preliminary injunctions if infringement appears likely.

The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>12</sup> (TRIPS) provides a set of remedial standards such as: requiring local judicial authorities to have power to issue

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<sup>9</sup> Article 54(a) of MOHUK.

<sup>10</sup> The list of countries having agreement on recognition and enforcement can be found at website of the Ministry of Justice of Turkey: <http://www.uhdigm.adalet.gov.tr/ts.htm>, visited on 22/11/2007.

<sup>11</sup> Ansay & Schneider, 2002, p. 178.

injunctions,<sup>13</sup> assess damages,<sup>14</sup> order seizure and disposition of offending goods,<sup>15</sup> and impose border controls.<sup>16</sup> In addition to the TRIPS, the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty explicitly oblige Contracting Parties to “ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”<sup>17</sup>

### **6.3.1. REMEDIES UNDER TURKISH COPYRIGHT LAW**

#### **A. Sanctions**

According to Article 66 of the Turkish Copyright Act, if the author’s moral or economic rights have been infringed, then he may take legal action against the infringer for the prevention of infringement. Moral rights provide authors with a right of communication to the public, a right to be named and a right to prohibit modification.

If the infringement has been committed by the manager or employees of a company in the execution of their duties, legal action may be taken against the owner of such company. The employer will usually be vicariously liable. It is not necessary that the infringer or the owner of the company is at fault.<sup>18</sup>

The court shall order such measures as the circumstances require for the discontinuation of the infringement, taking into consideration the moral rights and economic rights of the author, the extent of the infringement, the existence and degree of fault, and the probable damage suffered by the defendant if an injunction is issued.

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<sup>12</sup> Annex 1C of the [Marrakesh Agreement Establishing the World Trade Organization](#), signed in Marrakesh, Morocco on 15 April 1994.

<sup>13</sup> Article 44 of TRIPS Agreement.

<sup>14</sup> Article 45 of TRIPS Agreement.

<sup>15</sup> Article 46 of TRIPS Agreement.

<sup>16</sup> Article 50-60 of TRIPS Agreement.

<sup>17</sup> Article 14(2) of WIPO Copyright Treaty; Article 23(2) of WIPO Performances and Phonograms Treaty.

<sup>18</sup> Article 66(2) and (3) of the T.C.A.

## **B. Infringement of Moral Rights**

Where a work that has not yet been made public is released to the public without the consent of the author or against his wishes, action for infringement may only be taken if release has been made to the public by publication of the reproduced copies. This provision shall also apply if the author's name is placed on the work against his wishes.<sup>19</sup>

Where the author's name has not been placed on the work or has been given erroneously or in such a way as to cause confusion, and if the court recognizes his authorship in accordance with Article 15 of the T.C.A. and orders the discontinuance of the infringement, the infringer shall be required to place the author's name on the original work and on reproduced copies already distributed. The author may also require that the decision of the court is published in no more than three newspapers at the expense of the infringer.

In case the work has been improperly changed, the author may require that reproduction, publication, performance and broadcasting of the modified work is prohibited and that the reproduced copies already distributed are corrected by the infringer or restored to their original form. If the changes are made in connection with publication in a newspaper or magazine or by broadcasting, the author may require that the newspapers, magazines or broadcasting organizations which have used the work must correct the modifications.

## **C. Damages and Destruction**

If a work has been translated without the author's consent, has been published outside the scope of the contract or in excess of the number stipulated in the contract, or has been adapted in some other way or broadcast by radio or television or performed, the author may require the payment of compensation of up to three times (treble) the damages incurred, based on the current value. Such treble payment should be based on the amount that the author would have

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<sup>19</sup> Article 67 of the T.C.A.

demanded if a contract had been concluded.<sup>20</sup> The setting of this amount is essentially based on the opinions of the related professional associations.<sup>21</sup>

If a copyrighted work is used by unauthorized reproduction and the reproduced copies have not been put into commercial circulation, the author may require destruction of the reproduced copies and of devices such as films, plates and the like, that permit reproduction, or may require the reproduced copies and the devices that permit reproduction, to be handed to him in return for suitable remuneration not exceeding their cost price, or may require payment of three times the amount he would have demanded if a contract had been concluded. These claims shall not remove the legal liability of the person undertaking the unauthorized production.<sup>22</sup>

To the extent that the work is reproduced without authorization, the author may choose from the following options:

- a) destruction of the unauthorized reproduced copies and of devices or,
- b) to be handed reproduced copies and devices for a reasonable price.

If copies of a work reproduced without the consent of the author have been put up for sale or if the nature of the sale constitutes an infringement, the author shall have a choice of the alternatives referred to in Article 68(2) with respect to copies in the possession of the infringer.

Any person demanding compensation may claim all the rights and prerogatives he would have enjoyed if he had concluded a contract. This element is very important. Should the author choose payment of three times the amount, then the Turkish court will apply the part of the Turkish Law of Obligations on contracts. Should the author claims his rights under Article 68 of the T.C.A., then he cannot claim another injunction for prevention of the harmful event, because it is accepted that there is a contract between author and the infringer. If he chooses

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<sup>20</sup> In Article 68(2), it is not clear what it should be understood from the “three times the amount”. The question is whether the damage is included in it or not. According to Professor Tekinalp, the damage is included, Tekinalp, 2009, 274; on the other hand, Professor Kilicoglu argued that, the damage is not included, Kilicoglu, 2008, p. 387.

<sup>21</sup> Art. 68 of the T.C.A.- (Amendment: 21.2.2001-4630/25); Suluk & Orhan, 2010, p. 784.

<sup>22</sup> Article 68(2) of the T.C.A, Tekinalp, 2009, p. 303.

one of the other two options, the Turkish Law of Obligations provisions on tort will be applied.

#### **D. Action for Threatened Wrong Acts**

Where his moral or economic rights are threatened by infringement, the author may take legal action to prevent such infringement. The same provision shall apply where there is some likelihood that an infringement will be continued or repeated. The provisions of Article 66 of the T.C.A., which concerns employer liability for copyright infringements, shall also apply in such cases.<sup>23</sup>

If the infringer is found to be at fault, the person whose economic rights have been infringed may claim damages under the provisions of Turkish Obligation Act. In such cases, any person whose rights are infringed may also claim, in addition to damages, that the profits made be surrendered to him. Consequently, any sum claimed in accordance with Article 68 shall be deducted from the above amounts.<sup>24</sup>

#### **6.3.2. REMEDIES UNDER UK COPYRIGHT LAW**

According to s. 96(1) and (2) of the Copyright Design Patents Act (CDPA), the copyright owner can bring actions for the infringement of copyright to request damages, interim injunctions, account of profits or otherwise in the same way as relief is available in respect of the infringement of any other property right. These rights exclude each other, therefore the claimant has to choose one of them.

The Limitation Act 1980 indicates that an action for infringement of copyright must be commenced within six years of the wrongful act.<sup>25</sup> Accordingly, in our scenario, if the copyright holder wants to issue proceedings against the website owner in the UK, it has to be within six years of erasing of the copyrighted work from the server of the website.

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<sup>23</sup> Article 69 of the T.C.A.

<sup>24</sup> Article 70 of the T.C.A.

<sup>25</sup> S. 2 of Limitation Act 1980.



## **A. Injunctions**

The copyright holder may claim a prohibitive injunction which orders the infringer not to make or to cease the making of infringing copies or mandatory injunctions ordering him to destroy infringing copies or articles used for the making of such copies, provided they are in the possession of the infringer.<sup>26</sup> Under UK law, interlocutory injunctions are provided for by Civil Procedure Rules, r.25.1(a). In order to obtain an interlocutory injunction, the matter must be urgent. In a copyright infringement case, damages are not an adequate remedy to compensate the claimant, therefore immediate action is necessary and the infringement must be prevented by an interlocutory injunction.

*American Cyanamid Co v. Ethicon Ltd.*<sup>27</sup> is the leading case on interlocutory injunctions. The claimants were the patent holders of ‘absorbable surgical sutures’. In due time, the defendants were proposing to put a similar infringing product on the market. The court of first instance issued an interlocutory injunction against the defendant and the House of Lords agreed with that decision.<sup>28</sup>

## **B. Damages**

According to s. 97(1) of CDPA, damages are only awarded if the copyright holder proves that the infringer knew or had reason to know that the work he used was a copyrighted work. Infringement of a copyrighted work by a website is a tortious act; therefore, the claimant is compensated for the damage that is caused by the tort.

There is no standard rule for the evaluation of damages in relation to intellectual property cases,<sup>29</sup> nevertheless damages are generally calculated on the basis of lost profits or on a royalty basis and primarily serve compensatory purposes. As it is stated in s. 97(2) of CDPA, additional damages may be awarded by the court. As there is no competitive relation between claimant and defendant, damages are calculated on the basis of a reasonable royalty for a

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<sup>26</sup> Bainbridge, 2005, p. 146.

<sup>27</sup> [1975] AC 396, [1975] 1 All ER 504, Torremans, 2005, p. 580.

<sup>28</sup> Torremans, 2005, p. 580.

<sup>29</sup> Torremans, 2005, p. 583.

licence for non-competing use. Another way for the claimant is to choose between “damages calculated on the basis of lost profits or damages calculated on a royalty basis”.<sup>30</sup>

### **C. Delivery up**

The copyright holder can claim the delivery up of infringing copies or items specifically designed or adapted for making copies.<sup>31</sup> Generally, the court orders to hand over all infringing articles or documents and these will normally be destroyed. The copyright holder can demonstrate prima facie infringement and he may also request an ex parte search order to inspect the premises of the alleged infringer and globally seize evidence of infringement. In our scenario, this may include the seizure of the infringers’ computers where the digitalized copyrighted works are stored before uploading to the server.

### **D. Right of Information**

The copyright holder may request for a disclosure order to be made against an innocent third party for the discovery of names of those who are ultimately responsible for an infringement. Accordingly, the right of information entitles the copyright holder to request an ISP to disclose the names and addresses of website owners and individuals who are uploading and downloading.

In *Totalise Plc*<sup>32</sup>, the court forced the defendant ISP to reveal the identity of an individual who had anonymously posted defamatory information on an Internet bulletin board. This disclosure was held not to be restricted by s. 35 of UK Data Protection Act 1998.

In my opinion, the details of website-owner and ISP should be found on the website. This should be a legal obligation to ISPs and website-owners. It is obvious that if the identity of website owners was known, it would not be so easy for website owners to upload copyrighted works to their websites. In addition, it would be easier for copyright holders to send a notice to an ISP if it can be identified from the website. This would make ‘notice and take-down’ procedures more effective.

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<sup>30</sup> Torremans, 2005, p. 583.

<sup>31</sup> S. 99 of CDPA; Bently & Sherman, 2009, p. 1116.

<sup>32</sup> *Totalise Plc. v. Motley Fool Ltd and Another* [2001] EWCA Civ 1897, <http://www.hrothgar.co.uk/YAWS/frmreps/totalise.htm> (accessed on 01.06.2006)

## **E. Criminal Sanctions**

According to CDPA, copyright infringers may also have a criminal liability. S. 107 CDPA states that a person is committing an offence if he infringes copyrighted work for commercial purposes<sup>33</sup> or “distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright”.<sup>34</sup>

In the past, there have been a few cases on the subject of criminal liability of infringers. However, recently, there has been an increase in interest to protect intellectual property rights with criminal sanctions. The Copyright, Designs and Patents Act 1988 was amended to include criminal offences, search warrants, powers of seizure and orders for forfeiture in 2002.<sup>35</sup>

With the implementation of the Information Society Directive,<sup>36</sup> a new subsection on criminal liability for infringing copyright by communicating a work to the public was added.<sup>37</sup> With this addition, any infringement of the copyright in a work by releasing the copyrighted work to the public either in the course of a business or otherwise than commercial purposes to such an extent as to adversely affect the copyright holder, is an offence if the perpetrator knows or had reasons to know that he was infringing the copyright.<sup>38</sup>

Section 107(2A) of CDPA may apply to website owners who make copyrighted works available to the public without commercial purposes if the right owner’s interests are adversely affected.<sup>39</sup>

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<sup>33</sup> S. 107(1)(a)-(b)-(c)-(d) of CDPA; Bently & Sherman, 2009, p. 1128.

<sup>34</sup> S. 107(1)(e) of CDPA.

<sup>35</sup> Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002.

<sup>36</sup> 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>37</sup> S. 107(2A) of CDPA.

<sup>38</sup> S. 107(2A)(a)-(b) of CDPA.

<sup>39</sup> Kretschmer, 2003, p. 337.

### **6.3.3. REMEDIES UNDER GERMAN COPYRIGHT LAW<sup>40</sup>**

#### **A. Injunctions**

Under German copyright law, the copyright owner is protected by private law and criminal law. According to Article 97 of the German Copyright Act, the author's right can be infringed by a third party if he:

- 1) makes the copyrighted work public prior to its publication;
- 2) produces copies;
- 3) distributes the work.

Section 97(1)(1) of German Copyright law (UrhG) entitles the author to bring actions for injunctive relief either as prohibitive injunctions, if there is a danger of repetition, or as mandatory injunctions, requesting the wrongdoer to cease and desist from the infringement. It is accepted that requests for injunction can also include preventative injunctions if specific facts lead to the suspicion that an infringing act is about to happen.<sup>41</sup> In place of damages, the injured party may require surrender of the profits derived by the infringer from the acts of infringement together with detailed accounting reflecting such profits.<sup>42</sup> The infringer has to pay all the damages. A website owner will also be obliged to remove all copyrighted works from his server.

#### **B. Damages**

If the copyright holder can prove that the infringer (website owner) intentionally violated his copyright, he may also have a claim for damages.<sup>43</sup> Damages are either calculated as compensation for the actual suffered losses, including loss of profits, or as hypothetical adequate licence fees. Instead, the author may also request the handing over of the profits made by the infringer and accounts of such profits.<sup>44</sup>

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<sup>40</sup> Gesetz Urheberrechte und verwandte Schutzrechte, 9 September 1965, BGBl I 1965, 1273, as amended.

<sup>41</sup> Weidert, 2002, p. 303.

<sup>42</sup> Article 97 of German Copyright Act (UrhG).

<sup>43</sup> S. 97(1)(1) UrhG.

<sup>44</sup> S. 97(1)(2) UrhG.

The courts have accepted that the German Performing Rights Association (GEMA)<sup>45</sup> can claim twice its normal fixed rates for the infringement, whereas Turkish collective management organizations cannot claim more than the actual loss. The idea behind the double damages claim is that GEMA has to invest money into investigating possible infringers.<sup>46</sup> However, in Turkish law, the monies spent on investigating possible infringers can be claimed as litigation costs from each infringer.<sup>47</sup>

It is difficult for the copyright holder to prove his actual loss caused by a website. In addition, a request for loss of profits may equally be ruled out. One of the options is to request payment of royalties which would have accrued if the user had applied for the requisite licence, possibly also taking into account the amount of reproductions the user enabled to be made.

### **C. Destruction and Delivery up**

In case of unlawful copying, the court can decide to impound (seizure) all copies made or distributed illegally by the infringer. In addition to copies, the court can order seizure of devices which are used or designed to make unlawful reproductions.<sup>48</sup> Accordingly, the copyright holder can request the destruction of all physical copies and deletion of all non-physical copies from the website-owner's computer and from the server of the website. The court may also order the seizure of computers and software which are used for the infringement of copyrighted works. However, "if the infringer can prove that he has acted in good faith, then he might be able to avoid the court order for impounding copies by paying compensation".<sup>49</sup>

### **D. Right of Information**

With the aim to particularise his claim for damages or destruction, the copyright holder can bring an action against the infringer in order to be provided with the essential information that allow the calculation of his claim.<sup>50</sup> Additionally, according to s.101a UrhG, the copyright

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<sup>45</sup> Gesellschaft für musikalische Aufführungs und Mechanische Vervielfältigungsgesellschaft.

<sup>46</sup> Andres, et al., 2005, p. 15-81. (in Business Transactions in Germany, Bernd Ruster, 2005)

<sup>47</sup> Turkish Civil Procedure Act (HMUK) Articles 417/b and 423/b-6.

<sup>48</sup> S. 99 UrhG.

<sup>49</sup> Andres, et al., 2005, p. 15-81. (in Business Transactions in Germany, Bernd Ruster, 2005)

<sup>50</sup> This is the application of principle of bona fide (s. 242 German Civil Code), Eren, 2008, p. 300

holder can demand information about third parties and especially about the source of infringing copies.

If the copyright holder cannot find the identification of the website-owner, he can bring action against the ISP of the website to disclose names and addresses of the owner of the website who is involved in the infringement.

#### **6.4. ENFORCEMENT**

Typically, the commercial or economic life of copyrighted work is much shorter than its legal life. The legal life of a copyrighted work is 70 years after the death of its author. However, the commercial life is an expectation of the period of popular recognition of the book, movie, song or other copyrighted work.<sup>51</sup> The original aim of the Enforcement Directive is to set minimum standards for the enforcement of intellectual property rights across the European Union. This aim is stated in Recital 10 of the Directive as: “to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.”<sup>52</sup> Until the Enforcement Directive, the European Community mainly focused on substantive IP law.<sup>53</sup> As stated in recital 9, the Commission justified that the effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. With this Directive, the EC also took action to harmonise the enforcement mechanisms for the first time.<sup>54</sup>

It was proposed that the Enforcement Directive could be applied only to infringements “carried out for commercial purposes or which cause significant harm to the right holder.”<sup>55</sup> However, it was removed from the proposal after much criticism<sup>56</sup> because it would have had minimum effect since infringement of patent, trade mark, and design right is in any case

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<sup>51</sup> Landes & Posner, 2003, p. 240.

<sup>52</sup> Recital 10 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights

<sup>53</sup> Commission of the European Communities, Proposal for a Directive of the European Parliament and the Council on measures and procedures to ensure the enforcement of intellectual property rights (presented by the Commission), Brussels 30.1.2003 COM (2003) 46 Final, the Explanatory Memorandum.

<sup>54</sup> Recital 9 of Enforcement Directive

<sup>55</sup> Recital 10 of Proposal for a Directive of the European Parliament and of the Council on Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights (COM(2003) 46 – C5-0055/2003 – 2003/0024(COD))

<sup>56</sup> Cornish, Drexler, Hilty, & Kur, 2003, p. 447, this article became a joint initiative for European IP law professors.

limited to commercial actions. In addition, infringement of copyright, even if done privately, would cause significant harm to copyright holders.<sup>57</sup> In any case, the infringement of copyright carried out on the Internet would have been within the scope of the Directive.<sup>58</sup>

Although the aim of the Directive is approximation of legislative systems in order to provide high and equivalent levels of protection, the success of the Directive will also be affected from the angle of the level of protection it offers to the right holders. The balance between copyright holders' interests and users' interest should be carefully managed. If the protection is too low, the public could not take it seriously and the Directive might fail to reach its aims. The Commission's approach was to follow the rule that any right is only as good as the available enforcement systems.<sup>59</sup> From the perspectives of the right holders and users, the draft Directive was heavily criticized and therefore, it was set out as a minimum standard and not as a strong enforcement tool.

While defining the scope of the Enforcement Directive, Article 2(1) indicates that if the national provisions on this issue are more favourable to the rightholders, then the national provisions remain unaffected. Recital 13 is therefore relevant, providing that Member States may also choose to apply the provisions of the Directive to "acts involving unfair competition, including parasitic copies or similar activities".

The question of how an infringement can be proved before a court is one of the fundamental questions. Infringements of copyright on the Internet are particularly difficult to prove. The infringer can stop the infringement by closing his website. Most of the copyrighted works can be stored in electronic form and uploaded to any sharing website such as *hemenpaylas.com* and *rapidshare.de*. The main characteristics of these kinds of share sites are that users are not allowed to search inside them. In order to download a file from these share-sites, the downloader has to know the complete link exactly.

There are two procedural principles laid down by Article 6 of the Enforcement Directive. Firstly, as it is stated in Article 6, a party to a copyright infringement case who has 'presented reasonably available evidence sufficient to support its claims, and has, in substantiating those

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Musker & Marsland, 2004, p. 8.

claims, specified evidence which lies in the control of the opposing party' can request the court to order the opposing party to release evidences supporting the claim. Accordingly, in our scenarios, if claimants *TurkMuzikCo.*, *MESAM* and *Hakan Kaya* present ed evidence sufficient to support their claims, they could request the courts to order the opposing party to release evidence such as computers, hard drives, etc., which are under the control of the defendants.

The second procedural principle, which can be interpreted quite differently by different judges in the courts, must be implemented by Member States considering the possibility that reasonable evidence is given when the claimant presents a substantial number of copies of the protected work. In this situation, the question is “what number is a ‘substantial number’”<sup>60</sup>. The judge will decide how many reasonable samples of a substantial number of copies are enough for being reasonable evidence.<sup>61</sup> This means the judge is in a position to evaluate the worth of the evidence. However, if a copyrighted work was uploaded to a website, the judge should not look at the numbers of copies for substantial numbers.

The copyright holder must specify the evidence that is allegedly within the control of the opposing party and must be produced. Accordingly, the court will not order for undefined and speculative evidence to be presented by the opposing party. Therefore, evidence that the copyright holder seeks to be produced should be described clearly and accurately, even though it does not have to be identified in detail.

Article 7 of the Directive provides that parties may apply for certain measures to be taken for the preservation of relevant evidence relating to an infringement that is supposed to have taken place. The evidence might be at risk of destruction. If the copyright holder is claiming that his copyrighted works are distributed from a website and thereby infringing his copyright, he must provide informative evidence that his copyright is about to be infringed. In our scenario, this evidence could be presented with the download of a website where the copyrighted works are offered without a license.

According to Article 8 of the Enforcement Directive, judges could order certain persons such as ISPs to disclose the names and addresses of those involved in distributing the illegal

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<sup>60</sup> Article 6(1) of Enforcement Directive; Morris, 2009, p. 288.

<sup>61</sup> Ibid.



copyrighted works, along with details of the quantities and prices involved. However, in the *Promusicae* case<sup>62</sup>, the European Court of Justice (ECJ) has refused to uphold a decision of the Commercial Court of Madrid that an internet service provider (ISP) was required, in civil proceedings, to disclose the identities of people allegedly infringing copyright by illegally downloading content.

The ECJ pointed out that one of the Directives it considered, Directive 2004/48, specifically provides that efforts to ensure effective protection of copyright apply without prejudice to statutory provisions that govern the protection of confidentiality of information sources or the processing of personal data.

Accordingly, claimants in our scenarios cannot force the ISPs to disclose the names of downloaders. At this point, there occurs a dilemma, which makes the situation very difficult for copyright holders.

In internet copyright situations, it is especially crucial to discover and exploit information sources. The copyright holders' main target is not the downloaders, but the uploaders, website owners, and file-sharing websites. There are several hundreds of thousands of websites that offer illegal copyrighted works. It is a burden for copyright holders to obtain the information of names and addresses of infringers in order to use the 'notice and take down' procedure.

Even if the Internet is a huge and borderless place, there are technical possibilities to find the actual person behind an IP number. The main sources of information on the Internet are the Internet service providers (ISPs). The ISPs have refused to disclose names and addresses of subscribers, who are potential infringers, without a court's disclosure order.

Article 9 states that interlocutory injunctions, seizure of allegedly infringing goods, and in cases of commercial scale infringements, precautionary seizure of movable and immovable property or blocking of bank accounts, are provisional measures in order to prevent future infringements. These provisions are improvements of Article 50 of the TRIPS Agreement.<sup>63</sup>

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<sup>62</sup> C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*, [2008] E.C.D.R. 10.

<sup>63</sup> Commentary to Article 10 of the Proposal, Brussels 30.1.2003 COM (2003) 46 Final.

It is important for the copyright holder to be able to act swiftly. Therefore, interlocutory injunctions are extremely important to stop the infringement of copyright. In most of the Member States and in Turkey, urgency is the main criterion in order to issue an ex parte preliminary injunction.<sup>64</sup> If the copyright holder provides sufficient evidence in order to satisfy the judicial authority that he is the right holder, that his right is being infringed and that any delay would be such as to cause irreparable damage to him, then provisional measures may be taken without the defendant being heard.<sup>65</sup>

Article 9(1)(a) states that the InfoSoc Directive 2001/29/EC is the governing legislation for injunctions against ISPs whose services are used by a third party to infringe copyright or related right. The idea behind this cross reference is that the relevant provision in the Enforcement Directive does not lay down detailed regulations which leave a legal uncertainty. In addition to this, avoiding double regulation is another reason for this cross reference to the InfoSoc Directive. Accordingly, it is specifically stated in recital 59 that the services of intermediaries may be increasingly used by third parties for infringing activities in the digital environment.

It is also stated that such intermediaries are best placed to bring such infringing activities to an end. For that reason, without prejudice to any other sanctions and remedies available, right holders should have the possibility of applying for an injunction against an intermediary who carries out a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.<sup>66</sup>

#### **6.4.1. CORRECTIVE MEASURES**

Additional measures can be taken, when a court has found that intellectual property rights have been infringed. These measures include the recall, removal and destruction of infringing goods.<sup>67</sup> Article 10 of the Enforcement Directive regulates the recall and definite removal from channels of commerce and destruction orders for the goods which have been found to be

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<sup>64</sup> Kur, 2004, p. 825.

<sup>65</sup> Commentary to Article 10 of the Proposal, Brussels 30.1.2003 COM (2003) 46 Final.

<sup>66</sup> Recital 59 of InfoSoc Directive.

<sup>67</sup> Article 10(1) of Enforcement Directive.

infringing an intellectual property right. In addition to this, the order can be about materials and any other equipment which was principally used in the creation of or the manufacture of those goods. Accordingly, until the decision on merits, the removal measure can be taken against the website owner or operator.

In our scenarios, copyright infringements are carried out by personal computers, adequate software and Internet connections. The courts can order the removal of websites including infringing files and software from the Internet. That measure would be followed by the destruction of the infringing files, which means the erasure of those files from any storage.

On the other hand, this is not an absolute solution to prevent infringement on the Internet. It is easy for infringers to provide a new personal computer and software to commit the infringement over and over again. This is one of the most problematic aspect of copyright infringement on the Internet. Therefore, there would have to be other measures necessary in order to guarantee the protection of copyrighted works.

#### **6.4.2. INJUNCTIONS**

When copyright infringement is established, courts are often willing to issue an order to prevent the infringer from copying and distributing illegal copies of copyrighted works.<sup>68</sup> In case the court finds the defendant infringing an intellectual property right, it may issue an injunction in order to prevent the continuation of the infringement.<sup>69</sup> An injunction against the infringing party which prohibits him from continuing with the infringement seems to be the most effective in order to ensure that the infringement will be ceased.

In the event of non-compliance with an injunction, recurring penalty payments shall be available where the laws of the Member States provide it. Aggrieved right holders can also apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC. In our scenarios, the intermediaries are the ISPs. This provision applies to ISPs only if the judge held the ISP responsible and liable for the infringement as a party to the trial.

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<sup>68</sup> Stim, 2006, p. 252.

<sup>69</sup> Article 11 of Enforcement Directive.

On the other hand, even if the ISP is not party to a trial, measures under Article 8(3) of the InfoSoc Directive can be injunctions against the ISP when the ISP is aware of unlawful use of its services.

### **6.4.3. DAMAGES AND LEGAL COSTS**

Once the infringement has been stopped, it is very important for a copyright holder to recover his economic loss caused by the infringement. Article 13 of the Enforcement Directive provides that:

“Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.”<sup>70</sup>

In order to require compensation, the copyright holder will therefore need to provide evidence that the infringer knew or had reasonable grounds to know that he was infringing the copyright.

The calculation of damages shall be dependent on “all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer as well as elements other than economic factors.”<sup>71</sup>

As stated in the Explanatory Memorandum of the Enforcement Directive, there are three scenarios for calculation of damages in the Member States: “compensation for the actual losses suffered; a request for the handing over of the profits made by the infringer; and payment of the royalties which would have been due if the infringer had requested authorisation to use the right.”<sup>72</sup>

The damage can be set as a lump sum determined by the amount of royalties or fees that the infringer would have had to pay to the copyright holder if he had duly obtained from the

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<sup>70</sup> Article 13 of Enforcement Directive.

<sup>71</sup> Article 13(1)(a) of Enforcement Directive.

<sup>72</sup> Brussels 30.1.2003 COM (2003) 46 Final, Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights.

copyright holder the right to use the copyrighted work in question.<sup>73</sup> Mere payment of the calculated damages does not compensate the harm itself. The court should order penalizing damages instead of or in addition to ordinary damages, such as the triple damages penalty of competition law. There are high potential profits for infringers, which should consequently be reflected in severe legal penalties, in order to prevent them from repeating their actions and to deter the newcomers.

On the other hand, even if the infringer who did not know, or had reasonable grounds to know, that he had engaged in infringing activity, the judicial authorities of the Member States may order the recovery of profits or the payment of damages, which may be pre-established.<sup>74</sup>

The amount that has to be paid as compensation is calculated in relation to the negative economic consequences and lost profits on the side of the copyright holder. Additionally, any unfair profit made by the infringer will increase the amount payable.

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<sup>73</sup> Article 13(1)(b) of Enforcement Directive.

<sup>74</sup> Article 13(2) of Enforcement Directive.



## CHAPTER 7            LIABILITY OF ISPs

### 7.1.            INTRODUCTION

Cooperation from ISPs is a very important component of tackling copyright infringements that occur on the internet. The customers' use policies of all ISPs make it very clear that their internet service cannot be used to infringe copyright material. This is a matter of contract, and for a breach of this obligation by the customers, ISPs can terminate their contracts. In practice, this never happens, for commercial reasons.<sup>1</sup>

ISPs usually consider themselves as passive intermediaries of internet communication. On the other hand, copyright owners defend that ISPs are the "gatekeepers" of the internet and that they should be more active and cooperative to fight infringements. Nonetheless, most countries provide immunity to ISPs. This might change with the UK Digital Economy Act 2010. The DEA 2010 imposes more obligations to ISPs. However, two British ISPs have won the right to a judicial review of the DEA. They argued that provisions of the DEA were incompatible with EU legislation.

### 7.2.            LIABILITY OF ISPs UNDER EU LAW

The ISP contributes to the harmful or illegal activity of the third party and may be otherwise involved, simply by providing its service. It can be held liable for this involvement or contribution. However, it is unreasonable and impractical to expect an ISP to examine all of the services that it may give access to. For that reason, it would be unjust to hold ISPs liable in relation to every illegal content, illegitimate use and/or criminal activity.<sup>2</sup>

The InfoSoc Directive<sup>3</sup> exempts temporary copies from the reproduction right and incidental copying as part of the transmission process. As stated in Recital 16 of the InfoSoc Directive, it

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<sup>1</sup> *EMI Records (Ireland) Ltd, Sony Music Entertainment Ireland Ltd, Universal Music Ireland Ltd, Warner Music Ireland Ltd and Wea International Inc v UPC Communications Ireland Ltd*, [2010] E.C.D.R. 17; None of ISPs has applied this rule to their customers strictly. ISPs think that if they apply rules strictly, customers may choose rival ISPs.

<sup>2</sup> Recital 47 and Article 15(1) of the Directive 2000/31/EC of the European Parliament and the of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("E-Commerce Directive"), Official Journal L 178, 17/07/2000, p.0001-0016; Rowland & Macdonald, 2005, p. 494.

<sup>3</sup> Directive 2001/29/EC.

does not explicitly deal with liability issues in the context of network environment activities, accordingly the respective provisions of the E-Commerce Directive remain the fundamental norms for liability on the Internet.<sup>4</sup>

Section 4 of the E-Commerce Directive provides in detail for the conditions under which the ISP can gain immunity from liability and, therefore, introduces a distinction between the main kinds of services provided: mere conduit, caching and hosting.<sup>5</sup> ISPs that only deal with the mere technical, automatic and passive transmission of data, which cannot all be reasonably monitored, are fully exempted from liability.<sup>6</sup> ISPs that actually store information to a certain extent by way of caching for the sole purpose of making data transmissions more efficient may be required to take some action in order to avoid liability, if they know that the information in question has been removed from the network at its initial source of transmission.<sup>7</sup> According to Article 15(1) of the E-Commerce Directive, there is no obligation for ISPs to monitor the information they transmit or store in their servers, or to actively seek facts or circumstances that indicate illegal activity. However, further to injunctions that prohibit the ISP from storing the same infringing information more than once, this requires a certain amount of monitoring by the ISP and in fact constitutes a kind of monitoring obligation.<sup>8</sup>

On the other hand, ISPs have a duty to prevent or stop illegal activities by removing or disabling access to illegal information so that, even if they are exempted from liability, they may still remain subject to an injunctive relief under general laws, in order to prevent further infringements.<sup>9</sup> According to Recital 46 of the E-Commerce Directive, blocking access to certain data needs in turn to be balanced against the freedom of expression of uploading users and requires more than a mere suspicion that the information may be unlawful.

Another difficulty relating to this issue is that the E-Commerce Directive leaves the decision up to the ISP to judge whether the information or the activity is illegal or not. Copyrighted

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<sup>4</sup> Recital 16 InfoSoc Directive.

<sup>5</sup> Articles 12 to 14 of E-Commerce Directive; Lloyd, 2008, p. 583.

<sup>6</sup> Article 12(1) of E-Commerce Directive.

<sup>7</sup> Article 13(1) of E-Commerce Directive; According to the IFPI, caching does not mean that a service is automatically excluded from copyright liability (The Register, 8 August 2003, at <http://www.theregister.co.uk/content/6/32243.html>, accessed 20 April 2006).

<sup>8</sup> Spindler, 2002-I, p. 925.

<sup>9</sup> Articles 12(3), 13(2), 14(3) and Recital 45 of E-Commerce Directive; Spindler, 2002-I, p. 922; Tiberi & Zamboni, 2003, p. 55..



works are consumed very quickly. The first month of the copyrighted work in the market is crucial for the copyright holder. Therefore, the decision of the ISP should be taken very quickly. Even if the decision is taken by a legally trained person, this puts the ISP in a difficult position because, if it does not take action against the third party's notice, it can be held liable for it; on the other hand if it takes action against the notice, it can become liable for breach of contract between itself and the owner of the website.

The difficulty for the right holder might be to find the ISP of a website. One of the ways to find the ISP is to check the domain name registration records<sup>10</sup> but this may not always be available or useful. In order to have a proper 'notice and takedown' procedure, it should be a legal obligation for websites to indicate the name and contact details of their ISPs.

Copyright holders do not have to use the "notice and take-down" procedure before going to court. They can always go straight to court and issue proceedings for copyright infringement against the infringer and/ or ISP. However, the "notice and take-down" procedure is very easy and a quicker way to stop the infringement. Every copyright holder can easily fill the Notice of Claimed Infringements by themselves. If the notice is successful, there will be no need to file an action. In addition, copyright holders will still have the right to sue the infringer for damages.

The InfoSoc Directive provides for a new liability for ISPs, under Article 8(3), which reads:

"Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

Article 8(3), referred to as the Take-down Clause, provides that the rightholder can ask for an injunction against the ISP if the ISP does not comply with its request. Many ISPs are complying with the rightholders' request and deleting customers' websites the very moment a complaint is received. The contractual arrangements between ISPs and customers will

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<sup>10</sup> This process can be done at the following website, <http://www.allwhois.com>. Type in the name of the website where the infringing material is found in search field, then all the registration details will be given. This way mostly works but not always.

normally give them exclusive control over their accounts. On the other hand, ISPs' customers have a right to give counter-notice against the rightholder.

An ISP who provides Internet access to its customers will not be subject to contributory infringement because it is unfeasible to detect what its users are using that access for. Nevertheless, ISPs who provide website storage to their customers might be liable if they benefit from these websites.

### **7.2.1. DISCLOSURE OF USER IDENTITIES**

Disclosure of user identities has been a controversial issue for ISPs and copyright holders. This issue appeared with the case of *Totalise v. Motley Fool and Interactive Investor plc* in UK.<sup>11</sup> In this case, the defendants operated financial websites, which contained electronic discussion boards. In one of these discussion boards, an anonymous user posted various defamatory remarks about *Totalise*. After these defamatory posts, *Totalise* asked *Motley Fool* and *Interactive Investor* to remove the material from their sites. This was eventually done and the anonymous user was barred from both sites. *Totalise* sought disclosure of the anonymous user's identity in order to commence proceedings against them.

The defendants refused to disclose the identity of the user saying that it would be in breach of their own privacy policies and the Data Protection Act 1998. When *Totalise* applied for a court order to force disclosure, the court ordered that disclosure should be made to *Totalise* in the interest of justice. The court believed that respect for the privacy of internet users must take second place to website owners' obligations against a defamed party. The court also ruled that such personal data was indeed exempt under sections 35(2) (a) and (b) of the Data Protection Act from the non-disclosure provisions of the Act and therefore could be disclosed for the purposes of establishing, exercising or defending legal rights.

“It was later held on appeal that the *Motley Fool* was not to be responsible for *Totalise's* litigation costs, thus avoiding the dilemma where a website has a choice between breaking

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<sup>11</sup> *Totalise plc v Motley Fool and Interactive Investor* [2001] EWCA Civ 1897.

data protection regulations and its own privacy policy, where it hands over information voluntarily, and court costs where it does so only after a court order is granted.”<sup>12</sup>

However, with the judgment of ECJ in *Promusicae* case,<sup>13</sup> this situation has now changed. In November 2005, *Promusicae*, a non-profit organisation representing producers and publishers of music and films, asked the Commercial Court of Madrid to order that *Telefónica*, a Spanish telecommunications provider, disclose the personal details of people to whom *Telefónica* provided various internet services, since they were engaged in copyright-infringements. *Promusicae* were in possession of the internet protocol (IP) addresses of the alleged infringers, together with the exact dates and times of the infringements, but needed their identities and physical addresses to be able to issue civil proceedings against the concerned individuals.

In December 2005, the Commercial Court granted *Promusicae's* request. *Telefónica* appealed the decision on the grounds that forced disclosure of personal data should only be permitted in relation of a criminal investigation, or for the purposes of public security or national defence, not in relation of prospective or actual civil proceedings. The Commercial Court stayed the proceedings and made a reference to the ECJ. The question was whether Community law permitted Member States to limit the duty of disclosure of personal data by ISPs and other operators of electronic communications networks in relation to criminal investigations, in order to safeguard public security and national defence.

The national court in Spain had specifically referred to three Directives, all of which, the national court suggested, might require Member States to oblige ISPs to disclose personal data in the context of civil proceedings. The ECJ held that nothing in the wording of any of these Directives required that they be interpreted as compelling Member States to lay down such an obligation.

The decision of first instance, that ISPs were required to hand over details of file-sharers, has been overturned and the ECJ has left content owners with the prospect of having to lobby across 27 jurisdictions, and to tailor their enforcement programmes to a large number of

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<sup>12</sup> Worth, 2005, p. 3.

<sup>13</sup> C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*, [2008] E.C.D.R. 10.

different regimes. It could have been worse for content owners--the ECJ could have decided as a matter of policy that the right to privacy overrode the rights to property and an effective remedy--but ISPs will be relieved that, although subject to future decisions of national courts, the ECJ has preserved the status quo.<sup>14</sup>

However, as the ECJ also explains, the decision of the ECJ in *Promusicae* does not mean that the Member States cannot enact laws requiring ISPs to release personal data for that purpose, provided that any such laws strike a fair balance between the various fundamental rights in Community law, including intellectual property rights on the one hand privacy on the other.<sup>15</sup>

The ECJ confirmed that Community law recognizes both data privacy and copyright as fundamental rights and requires a balance to be struck between them.<sup>16</sup> As it was accepted in *Anheuser-Busch Inc. v. Portugal*<sup>17</sup> the protection of intellectual property is recognised by Article 1 Protocol 1 of the European Convention on Human Rights and Article 17 of the Charter of Fundamental Rights of the European Union, while data protection rights are recognised in Article 8 of the European Convention on Human Rights<sup>18</sup> and Article 8 of the Charter of Fundamental Rights of the European Union.<sup>19</sup> The judgment stresses that Member State courts and authorities (including data protection authorities) must balance these rights in the decisions they make, and must strike a “fair balance” between them. The Court further refers to the principle of proportionality in European law, which requires a balance to be struck between the means used and the intended aim of their actions,<sup>20</sup> thus strengthening the balancing requirement contained in the judgment. These conclusions should be a reference to Member States, national courts and authorities that neither data protection nor IP protection should be given precedence over the other. This should hopefully lead to more innovative mechanisms being developed for reconciling these two fundamental interests.

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<sup>14</sup> McKenna, 2008, p. 308.

<sup>15</sup> Hetherington, 2008, p. 81.

<sup>16</sup> Nagle, 2010, p.210; In *EMI Ltd. and Others v. Eircom Ltd* case, Charleton J. ruled that the graduated “three strikes” policy which could result in an internet subscriber being cut off from Eircom’s internet service because of persistent infringements of copyright law online was lawful. Accordingly, when a copyright holder supplies the IP addresses of file sharers to the ISP, the ISP will inform the subscriber that his IP address is being used to infringe copyright, in the second stage, the ISP will issue a warning if the file sharing does not stop, his IP address will be disconnected, in the last stage, if the subscriber keeps sharing files, the ISP will disconnect the IP address.

<sup>17</sup> (73049/01) [2006] E.T.M.R. 43; (2007) 44 E.H.R.R. 42, p. 72.

<sup>18</sup> *Rotaru v. Romania*, App. No. 28341/95, judgment of 4 May, 2000, 8 B.H.R.C. 449.

<sup>19</sup> [2000] OJC 364/1.

<sup>20</sup> Lenearns & Nuffel, 2005, p. 109; Kuner, 2008, p. 201.

Member States already differ in the extent to which they allow the disclosure of personal data for IP enforcement purposes. In Italy, the Court stated that identity disclosure requests are unacceptable because of the protection afforded to the secrecy of electronic communications between private parties, which is granted by the Italian Constitution as a fundamental right.<sup>21</sup> In the Netherlands, the Dutch Supreme Court ruled that Dutch privacy law did not necessarily prohibit the disclosure of personal data by ISPs to third parties, and whether or not such disclosure is allowed depends on the specific circumstances of the case,<sup>22</sup> and in the UK, as it is discussed above, the House of Lords held that website operators should disclose the identity of infringers.<sup>23</sup>

By allowing Member States to refuse the disclosure of personal traffic data related to copyright infringements for the purpose of bringing civil proceedings, the ECJ's judgment may lead to further fragmentation of the law, in which some Member States allow such use but others do not. In other areas (such as the detection of payment fraud online), European law has created a more uniform legal basis for the processing of personal data,<sup>24</sup> and a similar European approach should be taken with regard to the enforcement of IP rights. Indeed, the internet is a global medium, and substantial legal uncertainty can arise regarding issues such as which Member State law should apply to a particular enforcement action. Thus, it would be preferable for a pan-European approach to be taken, under which online enforcement would be possible in all Member States under the same legal conditions. Such an approach would also reduce the risk of forum-shopping. However, following the *Promusicae* judgment, an amendment of at least the E-Privacy Directive would be required to create a legal basis for such an approach.<sup>25</sup>

This indicates that most sensible solutions would seem to be for the ISP to respond to the copyright owner explaining that the names of users will not be disclosed without a court order, but (if the request is specific-enough) indicating no opposition to such an order.<sup>26</sup>

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<sup>21</sup> *Techland Sp. Z O.O. e Peppermint Jam Records GmbH v. Wind Telecomunicazioni S.p.A.*, Tribunale di Roma, Sezione IX civile, ordinanza del 14 luglio 2007 Giudice Costa

<sup>22</sup> *Lycos v. Pessers, Hoge Raad*, November 25, 2005, LJN:AU 4019.

<sup>23</sup> *Totalise plc v Motley Fool and Interactive Investor* [2001] EWCA Civ 1897.

<sup>24</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market [2007] OJ L319/1

<sup>25</sup> Kuner, 2008, p. 202.

<sup>26</sup> Conradi, 2003, p. 293.

### 7.3. LIABILITY of ISPs UNDER UK LAW

The E-Commerce Directive came into force on 21 August 2002 in the UK via the Electronic Commerce Regulations 2002.<sup>27</sup> The Electronic Commerce Regulations 17, 18 and 19 are implementation of the E-Commerce Directive.

With this Regulation, an exemption from liability has been afforded to ISPs. As examined above, the primary rule is that an ISP is not liable as long as it does not have actual knowledge of the illegal activity or information.<sup>28</sup> Since the E-commerce Directive was implemented into the UK law, the principles of immunity for ISPs have all been exactly the same. However, with the enactment of the Digital Economy Act 2010 (DEA 2010), ISPs are obliged to monitor and report on IP addresses that copyright holders allege to be infringing copyright. This Act creates a system of law which intends to increase the ease of tracking down and suing constant infringers and if required, ISPs may have to enforce 'technical measures'.<sup>29</sup> These technical measures are technical penalties to reduce the quality of infringer subscriber's internet connection in order to prevent further copyright infringements.

The UK Government outlined its strategic vision in the 'Digital Britain' report<sup>30</sup> for ensuring that the country is at the leading edge of the global economy. The key concern of this report was illegal filesharing. The Final Report states that the industry itself should create a organisation in order to draft codes of practice relating to the enforcement of rights.<sup>31</sup> The objective of the UK Government's policy to improve the digital economy was stated in this Report. According to the Digital Britain report, ISPs and Ofcom<sup>32</sup> must take more responsibility in order to reduce the copyright infringements that occur on the internet. The report states that Ofcom should have a duty to take steps aimed at reducing copyright infringements and ISPs should have obligations to a) notify account holders when informed in an agreed format that their account appears to have been used to infringe copyright, and b) to

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<sup>27</sup> Statutory Instrument 2002 No. 2013, Electronic Commerce (EC Directive) Regulations 2002.

<sup>28</sup> Cornish & Llewelyn, 2004, p. 800.

<sup>29</sup> DEA Guidance prepared by JISClegal information,  
<http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/DEA%20Guidance.pdf>.

<sup>30</sup> This Report released jointly by the Department for Business, Innovation and Skills and the Department for Culture, Media and Sport, *Digital Britain Final Report* (June 2009).

<sup>31</sup> Burbridge & Maguire, 2009, p. 483.

<sup>32</sup> Ofcom is the Independent Regulator and Competition authority for the UK communications Industry.  
<http://www.ofcom.org.uk/about>.

maintain and make available data to enable the minority of serious repeat infringers to be identified.<sup>33</sup>

There are four main objectives of the DEA 2010 as:

to advance and modernise the United Kingdom's competitive digital communications infrastructure, in particular the mobile network spectrum and digital radio;

to support the United Kingdom's creative industries by taking action to tackle online copyright infringement, thus strengthening the framework for the creation of successful business models;

to support local and regional news around the United Kingdom, updating the licences and functioning of Channel 4 to specified respective degrees;

to improve the public's confidence in digital activities by providing security of the communications network.

To support the UK's creative industries, the following clauses are included:

online infringement of copyright—Articles 3 to 18;

increase of penalties relating to infringing articles and illicit recordings—Article 42;

Public Lending Right—Article 43.

Clauses 3 to 16 introduced new sections 124A to 124N to the Communications Act 2003, following its section 124. These sections are related to obligations of ISPs in order to prevent copyright infringement.

According to this new section of the Communication Act 2003, if it appears to a copyright owner that a subscriber to an internet service provider or that another person allowed by the subscriber has infringed his copyrighted work using the service, the copyright owner may make a copyright infringement report to the ISP. Following an infringement report, the ISP must notify the report to the subscriber within one month of the day on which the provider received the report. The ISP must also provide a copyright infringement list of the relevant subscriber to the copyright owner. This list does not however enable any subscriber to be identified. If the copyright owner wants to identify the alleged infringer, he will need a court order.

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<sup>33</sup> Digital Britain Report, 2009, p. 17 n. 45-46.

The practical details are to be agreed between the stakeholders (ISPs, copyright owners, consumers) in the form of a Code of Practice to be approved by Ofcom.<sup>34</sup> If stakeholders are not able to reach an agreement, Ofcom imposes such a Code subject to the consent of the Secretary of State. Before approving the Code, Ofcom is expected to carry out a consultation and be satisfied that the Code is objectively justifiable, proportionate and transparent. The existence of a Code, approved or made by Ofcom, is a condition for the two initial obligations of ISPs to be effective.<sup>35</sup> However, there was still no code of practice prepared by Ofcom as of 1st January 2011.

Ofcom must prepare full reports once a year and interim reports four times a year for the Secretary of State about infringements of copyright by subscribers to ISPs. These reports will provide details of progress made to the Secretary of State, for the purpose of assessing copyright infringements.<sup>36</sup>

If the initial obligations of ISPs fail to fulfil the Government's objective to reduce copyright infringement, the Secretary of State is granted the power to direct Ofcom to assess the effectiveness of technical measures and the power to introduce a third obligation on ISPs, that to impose technical measures on serious infringers.<sup>37</sup>

Technical measures that may have to be taken by ISPs are set out in section 124G of the Communications Act 2003, as follows:

- “(a) limits the speed or other capacity of the service provided to a subscriber;
- (b) prevents a subscriber from using the service to gain access to particular material, or limits such use;
- (c) suspends the service provided to a subscriber; or
- (d) limits the service provided to a subscriber in another way.”<sup>38</sup>

Additionally, this Act amended the s.107 and s.198 of the CDPA 1988 and increased the penalties relating to infringing articles or illicit recordings. In these sections, “the statutory maximum” substitute “£50,000”.<sup>39</sup>

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<sup>34</sup> Section 5 of DEA; Section 124C of the Communications Act 2003.

<sup>35</sup> Koempel, 2010, p. 40.

<sup>36</sup> Section 8 of DEA; Section 124F of the Communications Act 2003.

<sup>37</sup> Koempel, 2010, p. 41.

<sup>38</sup> Section 124G(3) of the Communications Act 2003.



BT and TalkTalk, the two largest ISPs, applied for judicial review of the provisions in July 2010. They argued that the provisions represented a disproportionate response to concerns surrounding unlawful peer-to-peer file sharing and raised serious problems about the privacy and confidentiality of internet users. They also claimed that “obligations imposed by the Act may not be compatible with important European rules that are designed to ensure that national laws protect users’ privacy, restrict the role of ISPs in policing the internet and maintain a single market”.<sup>40</sup>

BT and TalkTalk argued that the provisions of DEA 2010 were incompatible with Article 3(4) of the E-Commerce Directive, Article 15(1) of the Privacy and Electronic Communications Directive and Articles 8 and/or 10 of the European Convention on Human Rights.<sup>41</sup> The High Court accepted the claimants’ argument in November 2010 and allowed BT and TalkTalk to apply for judicial review of sections 3 to 18 of the DEA 2010. Following this decision the House of Commons Culture, Media and Sport Select Committee has extended the deadline for written submissions to its inquiry into the protection of intellectual property rights.

If the provisions of DEA 2010 become compatible with the EU law, then it could set a good example for Turkish law. Coordination of ISPs is absolutely crucial for copyright holders.

#### **7.4. LIABILITY of ISPs UNDER GERMAN LAW**

In Germany, the issue of ISP liability was first addressed in 1997 by the Statute regarding the legal framework for information and communications services.<sup>42</sup> Article 1 of this Statute introduced the Tele Services Act 1997 (TDG 1997) and Section 5 provided for a system of ISP liability. With effect from December 2001, the TDG 1997 has been amended into the recent version of the Tele Services Act 2001 in order to implement the E-Commerce Directive. (TDG 2001).

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<sup>39</sup> Section 42, the Digital Economy Act 2010

<sup>40</sup> Charles Dunstone, Chairman of TalkTalk: <http://www.talktalkblog.co.uk/2010/07/08/judicial-review-of-the-digital-economy-act>.

<sup>41</sup> *British Telecommunications PLC and TalkTalk Telecom Group PLC v. The Secretary of State of Business, Innovation and Skills*, Claimants Statement of Facts and Grounds.

<sup>42</sup> Gesetz zur Regelung der Rahmenbedingungen für Informations und Kommunikationsdienste, Bundestagsdrucksache 13/7934 vom 11.06.1997.

According to Section 11 of the TDG 2001, the fundamental basis for granting an exemption from liability is the lack of knowledge regarding claims for damages under civil law or lack of awareness of facts and circumstances that show that the activity or information is illegal. Even if the ISP has knowledge of the information, it cannot be held liable where it has not got the knowledge of the illegality. Accordingly, there is no obligation for ISPs to control the content for its legality. Therefore, ISP will benefit from the exemption more easily.<sup>43</sup>

## **7.5. CIVIL LIABILITY OF ISPs UNDER TURKISH LAW**

With the new amendments in TCA, a new solution has been implemented in respect of the intermediaries.<sup>44</sup> However, there is no provision concerning the civil liability of ISPs. Whether or not legal provisions regarding the liabilities of ISPs in other countries can be applied in Turkey is controversial.<sup>45</sup> Some authors argue that since most of the liabilities regarding ISPs stem from US cases and each case has its own facts, the concepts do not fit into Turkish law. Therefore, these kinds of liabilities should not be applied to ISPs in Turkey.<sup>46</sup>

In the TCA system, the infringer does not have to be at fault, in order to be liable for the copyright infringement. This situation is clearly indicated in Articles 66/III, 69/II of TCA. But the presence of fault is important to take steps against the infringement within the meaning of Articles 66/IV and 69/II. According to Article 70/I of TCA, the author can claim compensation for his moral rights even if the infringer is not at fault. On the other hand, in case of infringement of an author's` financial rights, the author can claim his damages according to general provisions of tort law, if the infringement occurs through the fault of infringer.

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<sup>43</sup> Spindler, 2002-I, p. 924.

<sup>44</sup> Article 72/4 and Additional Article 4 of TCA.

<sup>45</sup> Akipek & Dardagan, 2004, p. 67.

<sup>46</sup> Memis, 2009, p. 151

### 7.5.1. APPLICATION OF ARTICLE 41 ET SEQ. OF TURKISH CODE OF OBLIGATION (CoO)

According to another view, Article 41 et seq. of CoO, which deals with damages, must be applied to ISPs when an infringement occurs.<sup>47</sup> Article 41/I of CoO states that “whoever unlawfully causes damage to another, whether willfully or negligently shall be liable for damages”. According to Article 41 of CoO, the components of tort are: -act, -unlawfulness, -fault, -causal connection.<sup>48</sup> In this kind of liability, the fundamental aspect is ‘fault’. ‘Fault’ can be divided into two: a) intentional b) negligence. The level of the fault is important while determining the amount of compensation.<sup>49</sup>

The main issue in this part is whether the general provisions about tort shall be applied to ISPs or not, since it is not possible for a user to infringe copyrighted works on the Internet without using any ISP’s services. Therefore, infringement can only occur when the user’s act and the ISP’s service meet. In tort law, this is called common causality.

In this situation, an ISP can be jointly liable only when it is at fault. Joint liability occurs only from an Act or Parties’ enactment. The most fundamental aspect of legal joint liability is in tort law. Article 50 of CoO determines the liability of joint tortfeasors, which occurs from their common act.

There are two concepts in Article 50 of CoO, that of actual infringer and that of contributory infringer. An actual infringer infringes the copyright by his own act. A contributory infringer facilitates the copyright infringement of another person with his faulty acts.<sup>50</sup>

In one Turkish case, the plaintiff sued an Internet user and its service provider jointly. The Internet user had published a “children’s name dictionary” on the internet, which belonged to him. *Superonline Ltd. Co.* was the service provider of the Internet user who infringed the copyright. Surprisingly, Supreme Court found *Superonline* jointly liable with the actual infringer.<sup>51</sup>

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<sup>47</sup> Akipek & Dardagan, 2004, p. 68.

<sup>48</sup> Eren, 2008, p. 468.

<sup>49</sup> Article 43/I of CoO.

<sup>50</sup> Eren, 2008, p. 806.

<sup>51</sup> Turkish High Supreme Court 9th Chamber, E. 2001/1854, K. 2001/2649.

The decision of the Supreme Court states that “...the agreement between the Internet user and the service provider which is relevant to irresponsibility of service provider regarding the infringement of third parties’ rights is valid in internal relationship and does not neutralize service providers’ legal responsibility against third parties”. With this legal ground, the court found the ISP liable for its user’s direct infringement. Unfortunately, the Turkish Supreme Court did not adequately explain why the ISP was held liable, because it negatively construed its decision on what cannot be a defence for an ISP.

Under the general provisions of Turkish Obligation law, content providers are held liable for all their infringements. According to Article 41 of CoO, host providers must be jointly liable with the actual infringer if they know of the infringement and have had the technical opportunity to prevent it.<sup>52</sup>

In doctrine, some authors<sup>53</sup> argue that tort law provisions cannot be applied to copyright infringements occurring on the Internet. According to these authors, tort is only relevant to damages in respect of movable tangible assets; it is therefore not possible to apply these provisions for damages to virtual works which are not tangible assets.

## **7.5.2. CURRENT SITUATION IN TURKISH LAW**

As discussed above, the EU legal system contains specific provisions relevant to ISPs, under InfoSoc and E-Commerce Directives, which Turkey has just implemented. Before 2004, there was no legal grounds for ISPs’ liabilities within Turkish law. With the amendments in Turkish Copyright Act in 2004, a general provision was added to Article 72 of TCA and a simple “notice and take down” system was implemented into Additional Article 4.

According to Additional Article 4, in the event of a violation of the rights to which authors of works and owners of associated rights are entitled under this Law by providers of service and content through the transmission of signals, sounds, and/or images including digital transmission, the works which have been subject to violation will be removed from the content upon the request of the right holders. The person whose rights have been violated will

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<sup>52</sup> Memis, 2002, p. 154.

<sup>53</sup> Eren, 2008, p. 238; Yildirim, 2003, p. 285; Baspinar & Kocabey, 2007, p. 349.

initially contact the content provider and request that the violation be discontinued within three days, should the violation persist a request will next be made to the Chief Public Prosecutor asking that the service being provided to the content provider persisting in the violation should be discontinued by the relevant service provider.

Access to well known websites providing access to pirated content including music, and movie files such as the pirate-bay.org, megaupload.com, and torrentturk.com<sup>54</sup> are currently blocked in Turkey. Ironically, the Ankara 1<sup>st</sup> Criminal Court of Peace attempted to block access to the popular movie database site www.imdb.com because of an alleged intellectual property infringement in December 2007 but a typo resulted in the blocking of [www.imbd.com](http://www.imbd.com), a non-existing website and as of November 2008 access to this non-existing website is still blocked in Turkey while users can access the Internet Movie Database website.<sup>55</sup>

The intellectual property related access blocking order was obtained by a Turkish pay TV on 20 October, 2008. With the order of the Diyarbakır First Criminal Court of Peace,<sup>56</sup> access to popular Google owned blogging services Blogger and Blogspot were banned. Digiturk, a subscription based digital TV platform in Turkey, which owns the right to transmit live coverage of the Turkish football league games, obtained the blocking order as Digiturk identified blog entries through Blogger and Blogspot providing information and links to known websites, which showed pirated transmission of the live football league games transmitted through its LigTV channel. Firstly, Digiturk contacted Blogger.com and requested the blog entries to be taken down but no action was taken by Blogger, and Digiturk had no other option than requesting the Diyarbakır court to block access to the two domains and their IP addresses. Access blocking is allowed under additional article 4 of the TCA and Digiturk previously obtained similar access blocking orders for JustinTV, MyP2P TV, and sporlig.com.<sup>57</sup> The Court lifted its blocking order on 28 October, 2008 with regards to

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<sup>54</sup> Access to this web site is banned by “Telekomünikasyon İletişim Başkanlığı” according to the order of: İstanbul 1st Court of Peace, Decision no: 2007/1715, dated 04.12.2007. This order also blocked access to the domains frmdivx.com, divxcity.org, forumefsane.org and turkdivx.net.

<sup>55</sup> Ahi,2008, p.3.

<sup>56</sup> Diyarbakır 1st Criminal Court of Peace, Decision no: 2008/2761, dated 20.10.2008.

<sup>57</sup> İstanbul Küçükçekmece 2nd Criminal Court of Peace, Decision no 2008/114, dated 20.10.2008; Akdeniz & Altıparmak, 2008, p. 72.

Blogger.com and Blogspot. “It is understood that the ban is lifted until Digiturk provides to the court further evidence with regards to its claims for football streaming piracy.”<sup>58</sup>

According to Additional Article 4 of the TCA, ISPs must send the list of websites which they are hosting to the Ministry of Culture. With this provision, the Turkish legislator tries to draw borders on the Internet. This clause can be applied only to the ISPs which are based in Turkey. It is obvious that this application is a disadvantage from the competition perspective for Turkish ISPs and ISPs are located in Turkey. However, this is the only way that the legislator found in order to determine whether the alleged infringer website is hosted by a Turkish ISP or not. If it is hosted by a Turkish ISP, then the chief prosecutor sends an injunction directly to the ISP of the website. On the other hand, if the website is not hosted by a Turkish ISP, then the injunction is sent directly to the Telecommunications Communication Presidency to restrict the access to the website.

The first reported Turkish case concerning the ISP liability was *Coskun Ak* case.<sup>59</sup> This case demonstrated that the judiciary had treated Internet related cases like ordinary mass media cases.<sup>60</sup> *Coskun Ak*, a former moderator of various forums, was sentenced to 40 months in prison due to a particular message about human rights abuses in Turkey sent to a Superonline, one of the largest ISPs in Turkey, forum by an anonymous poster. Forum member *A* sent a letter to the forum which contained illegal content. Forum member *B* then sent a notice to the operator to takedown the letter from the forum because of the illegality of the letter. After the examination of the letter by the operator, Mr Ak rejected this claim. Forum member *B* then complained about the operator to the office of the director of public prosecutions. Although the public prosecutor admitted that there was no legislation covering crimes committed on the Internet, he claimed that Mr. Ak’s position was similar to the editor of a newspaper. Thus, existing rules of the time were applicable by analogy. The defence counsel opposed the decision on the basis of the principle *nullum crimen nulla poena sine lege*, to no avail. With this complaint, the Prosecutor started proceedings against *Coskun Ak* according to the Turkish Media Act, which covers Editors’ civil and criminal liability. The court decided to sentence Mr. Ak for insulting and weakening the Republic of Turkey, the Military Forces, the Security Forces, and the Ministry of Justice, to one year in prison for each insult separately, totaling

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<sup>58</sup> Akdeniz & Altiparmak, 2008, p. 72.

<sup>59</sup> Case No:1999/348, 28.07.1999.

<sup>60</sup> Akdeniz & Altiparmak, 2008, p. 9.

four years. His good conduct in court was taken into account and his sentence was reduced to 10 months for each insult, totaling 40 months. On 14<sup>th</sup> November, 2001, the 9<sup>th</sup> Criminal Chamber of the Court Cessation reversed this ruling.<sup>61</sup> It was decided that Ak's case should be reconsidered, once experts selected from universities had decided whether Mr. Ak or another person could be held responsible for the criminal content. On 12<sup>th</sup> March, 2002, the 4<sup>th</sup> Istanbul Assize Court entered a second verdict against Coskun Ak. The sentence of 40 months' imprisonment was commuted to a fine of 6 TL (app. \$4). On 24<sup>th</sup> April, 2003, this second sentence was also reversed by the Plenary of Criminal Chambers of the Court of Cessation, thanks to an amendment made to Article 159 of the Turkish Criminal Code, but not because of the claims put forward by the defence counsel.<sup>62</sup>

However, during the same period, the Court of Cessation, in some civil law cases, decided that since there was no law governing the Internet, claims made to get web pages taken-down or blocked should be rejected. According to the Court, decisions to that effect were destined to be inapplicable.<sup>63</sup>

With the amendments in TCA in 2004, a new 'notice and takedown' procedure has been implemented into Turkish law.<sup>64</sup> According to this new 'notice and takedown' procedure, the copyright holder must send a written notice to the content provider of the website that infringes his exclusive rights. The content provider must take the copyrighted work down in three days. If he does not, then the author may complain to the public prosecutor for the infringement. Within those three days, the public prosecutor must investigate and send an order to the ISP of the website to block the alleged infringer's website. If the alleged infringer takes the copyrighted material from his website, then the ISP shall unblock the website.

A new Act, which is relevant to ISPs' liabilities, after long discussions at the Justice Committee of the Turkish Grand National Assembly (TBMM), came into force on 22 May 2007.<sup>65</sup> This Act implemented the E-Commerce Directive provisions related to immunity of ISPs.

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<sup>61</sup> Court of Cessation 9th Criminal Chamber, k.t. 25.10.2001, 1854/2649, E/K.

<sup>62</sup> Court of Cessation Plenary of Criminal Chamber (Yargıtay CGK), k.t. 15.10.2002, 9-172/360 E/K.

<sup>63</sup> Court of Cessation 4th Civil Chamber (Yargıtay 4. Hukuk Dairesi), k.t. 8.2.2001, 755/1157, E/K.

<sup>64</sup> Additional Clause 4(3) of TCA, Amendment Act No: 5101 of March 3, 2004.

<sup>65</sup> Law No 5651: Act on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications

The proposal of the Act has been prepared by a group of scholars, judges, representatives of Ministries, ISPs, and Telecommunications Communication Presidency. This Act has been sent to over 100 bodies, including universities, courts, relevant ministries and bar associations for comments. However, there are also criticisms alleging that the Commission preparing the draft has not shared its opinions with the public.<sup>66</sup> The Act can be separated into two parts:

Provisions envisaging institutional responsibilities for content providers, hosting companies, ISPs; and

Provisions concerning individual criminal responsibility.

The content of the Act is broad but it does not include IP infringements because of Additional Article 4 of TCA. However, this Act is important for ISPs' liabilities. With the enactment of this law ISPs got benefit from the immunity provided by the E-Commerce Directive.

Article 3 of this Act introduces an "information requirement" which imposes a duty on content, hosting, and access providers to make available to the recipient of that service certain information through their websites. Accordingly, content providers acting with commercial and economic purposes as well as hosting and access providers must provide information including name, tax number, trade record number, residence, e-mail address and telephone number on the front page of their websites. Article 3(2) of this Act provides that content, hosting, and access providers who fail to provide the required information could face an administrative fine by the Telecommunications Communication Presidency between 2000 TL (app. 800 pounds) and 10000 TL (app. 4000 pounds).<sup>67</sup>

Content providers are regulated through Article 4 of the Act, which provides that content providers are responsible for the content they generate through their websites. However, they are not liable for third party content that they link to. According to Article 4(2), if it can be understood from the presentation that the content provider adopts the content as its own or it aims to deliberately make the content reachable, the provider could be held responsible according to general principles. It remains to be seen how this provision will be interpreted but "linking" in certain scenarios could trigger liability for content providers. There has not yet been any case related to this Article.

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<sup>66</sup> İlkiz, 2007, p. 3.

<sup>67</sup> Akdeniz & Altiparmak, 2008, p. 33.



In terms of hosting providers' liability, Article 5 introduces a notice-based liability system and the provision states that there is neither general obligation to monitor the information which the hosting companies store, nor they have a general obligation to actively seek facts or circumstances indicating illegal activity. This provision is consistent with Article 15 of the EU E-Commerce Directive. However, through Article 5(2) the hosting companies are obliged to take down illegal or infringing content once served with a notice through the Telecommunications Communication Presidency, or subject to a court order. Hosting companies may be prosecuted under Article 5(2) if they do not remove the notified content in accordance with the terms of the EU E-Commerce Directive.

Access and Internet Service Providers are regulated through Article 6 of the Act, and so far 105 ISPs obtained an "activity certificate".<sup>68</sup> This provision is similar to that applicable to hosting companies and is in line with the EU E-Commerce Directive provisions. Under Article 6(1)(a) the access providers would be required to take down any illegal content published by any of its customers once made aware of the availability of the content in question through the Telecommunications Communication Presidency, or subject to a court order insofar as it is technically possible.

The access providers are required under Article 6(1)(b) to retain all communications (traffic) data for a period of six months minimum and two years maximum from the date of the communication. More specifically, the Act requires the traffic data to be retained for a year. Access providers are also obliged to maintain the accuracy, security, and integrity of the retained data. Currently, in the absence of a specific Data Protection law in Turkey, the risk of intrusions into privacy of communications are even higher.

Even though there were strong opposite opinions, the EU has imposed similar provisions through the Data Retention Directive (DR Directive). However, "the EU provisions are subject to certain conditions based on data protection, and Article 8, European Convention on Human Rights (ECHR) privacy principles, as well as subject to the necessity and proportionality requirements of the European Court of Human Rights (ECtHR)".<sup>69</sup>

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<sup>68</sup> For a list of these ISPs see [http://www.tib.gov.tr/ES\\_listesi.html](http://www.tib.gov.tr/ES_listesi.html). Applications can be made through <http://faaliyet.tib.gov.tr/yetbel/>.

<sup>69</sup> Akdeniz & Altıparmak, 2008, p. 64.

Additionally, Member States must adopt measures to ensure that data retained in accordance with the DR Directive are provided only to the competent national authorities in specific cases and in accordance with national law. For this reason the Act's approach appears rather unsophisticated and introduces the data retention provisions to Turkish law without any safeguards or oversight mechanism.<sup>70</sup> Member States of both EU and CoE do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.<sup>71</sup> These above reasons show that data retention provisions of the Act must be revised.

Article 6(2) does not give any obligation to access providers to monitor the information that goes through their networks. In addition to this, they do not have a general obligation to actively seek facts or circumstances indicating illegal activity with regards to the transmitted data.

The Act provides that those who have convictions under Anti-Terrorism law and the Criminal Code concerning crimes committed against the Republic of Turkey, cannot have more than 5% shares in ISP companies. They cannot be managers or representatives of these companies either.<sup>72</sup> It is argued that one of the funding sources of terrorist groups is illegal copyright infringements. Therefore, I think those who have convictions under Anti-Terrorism law should not even be allowed 5% shares.<sup>73</sup>

Article 7 of Law No 5651 provides that the mass use providers, otherwise known as Internet cafes, and those providers can only operate subject to being granted an official activity certificate obtained from a local authority, representing the central administration. The providers are required under Article 7(2) to deploy and use filtering tools to block access to illegal Internet content.

If the directors of hosting and access providers are not comply with the blocking orders issued through a precautionary injunction by a Public Prosecutor, judge, or a court, they could be

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<sup>70</sup> Akdeniz & Altıparmak, 2008, p. 65.

<sup>71</sup> *Klass v. Federal Republic of Germany*, App. No. 5029/71, judgment of 18 November, 1977, Series A No. 28; Akdeniz & Altıparmak, 2008, p. 127.

<sup>72</sup> Article 8(1) of Act.

<sup>73</sup> Akdeniz & Altıparmak argues that such a restriction is irrelevant and disproportionate and against the fundamental rights and freedom. I disagree with this argument.. Though the right to carry on business is a fundamental right, ISPs have big databases which include mostly personal informations which can be used against the owners. These informations must be in "safe hands".

imprisoned between 6 months to 2 years.<sup>74</sup> This penalty will force the hosting and access providers to apply the rules very strictly.

## **7.6. RECOMMENDATIONS TO THE GOVERNMENT OF TURKEY**

While doing my research, I found that the Government has no statistic related to the real value added output by the Turkish cultural industries. Firstly, the importance of economic perspective of the creative industries, such as films, music and software, should be recognised as a developing country. According to a publication of the Department for Culture, Media and Sport of the UK, the economic output of the creative industries is at least £60 billion per annum, equivalent to over 7% of UK GDP in 2004.<sup>75</sup>

Secondly, the Government should make a plan like UK's "Digital Britain" report. This plan should include specific goals for a 'Digital Turkey' copyright framework. This report can be prepared by a committee of scholars, representatives of the industries, representatives of ISPs, lawyers, musicians, technology and internet experts.

Thirdly, effective digital copyright protection should be provided. The surveys conducted in developed countries indicated that the effective copyright protection and enforcement of rights reduces digital piracy and provide more economic benefits.<sup>76</sup> In order to achieve this, a Bill should be prepared as soon as possible. It is obvious that, technology is changing day by day. Therefore, while preparing the new Bill, copyright should be independent from the technology. This Bill should include more responsibilities to ISPs and Host Providers. The Digital Economy Act can be a good reference to the Turkish Government. This new legislation related to the ISPs and host providers' obligations must be compatible with the human rights, and EU law. Effective protection means more investment, progress and innovation. This will create new job opportunities and tax revenues for the State.

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<sup>74</sup> Article 8(10) of Act.

<sup>75</sup> [http://www.culture.gov.uk/reference\\_library/publications/3572.aspx](http://www.culture.gov.uk/reference_library/publications/3572.aspx). The calculations of GDP and/or GVA date from 2004.

<sup>76</sup> Europe Economics Report: The UK film, TV, music and software sectors: their importance to employment and output, 11 December 2008, <http://www.europe-economics.com>; BBC News, "Piracy Law Cuts Internet Traffic," April 2, 2009; CET, "Swedish Anti-piracy Law Keeps Downloaders on the Defensive", August 4, 2009, <http://www.thelocal.se/21092/20090804>; Sookman, B, 2010, p. 19.

This new law should enable copyright owners to obtain injunctions against ISPs and host provider companies with a quick and simple system. Bureaucracy and court's workload should not be an obstacle for this system.

Copyright owners use technological measures instead of legal system to prevent the copyright infringement. They do not use legal system because of slowness and difficulty to enforce the judgment. Therefore, the new law should provide protection against circumvention of technological measures which is not protected under the current law.

As a candidate for EU membership, the Brussels I Regulation should be implemented into Turkish law. Additionally, the Government should negotiate with the EU for the recognition and enforcement of judgments as soon as possible and sign an agreement related to the Brussels I Regulation as a part of Accession Negotiations.

The current 'notice and takedown' procedure seems problem-free in theory, however, in practice, this procedure does not work properly. Implementation of an effective 'notice and takedown' procedure is necessary.

The American Law and the Max-Planck Institutes' proposals related to jurisdiction, applicable law and enforcement of the copyright infringements which occur on the internet may be a reference to the new legislation.

## **7.7. CONCLUSION**

ISPs are potentially the most important actors in the fight against copyright infringements on the internet. All internet transactions occur through their services. Coordination of ISPs is crucial for copyright owners. They are however unlikely to be willing to lose customers by applying laws very strictly. The UK's Digital Economy Act 2010, which gave more obligations to ISPs, was taken to High Court for judicial review by the two largest ISPs. There is a fine balance between preventing copyright infringement and privacy and human rights. Accordingly, any law related to copyright infringements must be compatible with the privacy rights of internet users. This will be the main challenge for copyright holders in the fight against copyright infringement.

The new 'notice and takedown' procedure which was adopted into TCA seems wonderful in theory but it has not been working properly in practice. It is clear that websites offering copyrighted works are not regular e-commerce sites and it is extremely difficult to reach the content providers of these infringer websites. The main duty is therefore that of the prosecutors, but their considerable workload makes the process slower. Although the Additional Article 4 of TCA gives 3 days to the prosecutor for the investigation, the process cannot be completed in such a short time. In my opinion, this procedure might be more efficient if internet-specialized courts were established.

There is yet no provision about disclosure of user identities in Turkish law. Although there has not been any case relevant to disclosure of user identities, an Article could be added to the Law No 5651 to provide a fair balance between the various fundamental rights, including intellectual property and privacy.

The Act which implements the E-Commerce Directive into Turkish law provides immunities to Turkish ISPs. According to this Act, an ISP's responsibility will start with a notice through the Telecommunications Communication Presidency, or a court order. With this Act, the primary rule of E-Commerce Directive, which states that an ISP is not liable as long as it does not have actual knowledge of the illegal activity, was implemented into Turkish law.

Further to the notice, if an access provider fails to execute the administrative blocking order of the Telecommunications Communication Presidency within 24 hours of being issued an administrative fine, the Telecommunications Authority can revoke the access provider's official activity certificate. However, in my opinion, this can be only done by the power of prosecutor or judges. Article 9 of the Turkish Constitution provides that "judicial power shall be exercised by independent courts on behalf of the Turkish Nation." Therefore, this provision of the Act should be corrected.

Consequently, a law that creates obligations to ISPs is not the best way to tackle copyright infringements alone. ISPs must take more responsibility to prevent copyright infringements and the law must achieve a fair balance between the various human rights, including intellectual property rights and privacy on the other.



## CHAPTER 8 CONCLUSION

In January 2001, when I was a young lawyer, a famous Turkish Director came to my office to discuss copyright infringement problem. His movie, which was shown in cinemas at the time, was offered from different websites at the same time. After searching the name of the movie on Google, we found that there were about 250 websites offering the digital copy of the movie. He said it had been on 100 websites the day before. He wanted to sue all those websites and shut them down within a few weeks, since, as he said, the economic life of a movie is very short, approximately three years. After working on the case, we found that shutting down a website would take 2 to 3 years, if we could enforce the court decision in Turkey. If the client wanted to enforce the Turkish court's decision in the UK or Germany, another 1 to 2 years would be needed, at least. This process would mean substantial economic losses and legal costs for the copyright owner. This dramatic situation incited me to research further into Internet related copyright infringements.

In 2001, making a copyrighted work available to the public was not an infringement. ISPs did not have any immunity and were liable under Article 41 of the Turkish Obligation Act and *lex loci delicti* was the applicable law for copyright infringements. In 2001, there were 3.500.000 internet users in Turkey, whereas there were 19.800.000 in the UK and 26.000.000 in Germany.

I will not repeat the conclusions reached in Chapters 3, 4, 5 and 7 but will endeavour to present a short, overall summary in this chapter. Turkish copyright owners and the music industry still suffer from infringements of copyright through illegal websites in 2010, whereas the British Phonographic Industry focuses on P2P file sharing. Most of these illegal websites are hosted by foreign hosting companies, which makes matters worse and complex for Turkish copyright holders.

The problems created by recent technological developments are international. For that reason, they cannot be resolved by isolated decisions of individual countries to expand their copyright protection. In order to achieve certainty and uniformity, unification of laws and unification of choice of law provisions are needed. Therefore, supranational organizations such as WIPO and WTO should work collectively to achieve such certainty and uniformity, by harmonising

international private law (IPL) of Intellectual Property, possibly by an amendment to Berne Convention or a new international agreement, as soon as possible.

With the implementation of the WIPO Copyright Treaty (WCT) into the Turkish Copyright Act, the right of communication to the public was granted to authors in 2001. This right also covers the “making available to the public”. Accordingly, offering a copyrighted work from a website without the consent of the author became an infringement of this right. There are 88 Contracting Parties of the WCT. Uploading and downloading a copyrighted work is an infringement in all these 88 contracting States. The Contracting Parties of the Berne Convention are also protecting the copyright owner’s rights. This is abundant proof that the issue is not one of lack of legislation.

The economic life of a copyrighted work is much shorter than its legal life. A fast, effective and simple international judicial system should be set up by international organisations. The copyright holder should be able to obtain relief for actual or threatened infringement in the countries of transmission to the server site, of location of the server, or of the actual or potential reception point, in order to enforce the judgment quickly.

The application of domestic private international law rules to Internet disputes is uncertain and unpredictable because the location of activities is irrelevant for internet functionality. Therefore, the application of current IPL jurisdiction rules to internet related cases may have surprising effects and this uncertainty may enable parties to engage in ‘forum shopping’.

The harmonisation of choice of law rules was carried out in the EU to facilitate legal certainty. *Lex protectionis* is also implemented into Turkish law as an applicable law for IP infringements. Even if *lex protectionis* is the universally accepted rule and a good option for single infringements, specific difficulties may arise in two types of cases: those where a court considers that the content of the applicable law has not been satisfactorily established, and those involving multiple infringements in different countries, involving either one defendant or several.

With the implementation of the E-Commerce Directive into Turkish law, ISPs have had immunity in Turkey since 23 November 2007. However, ISPs must take more responsibility to prevent copyright infringements. The UK’s new Digital Economy Act 2010 could be a



good starting point for Turkish legislator, but the law must achieve a fair balance between the various human rights, including intellectual property rights and privacy rights.

As of June 2010, Turkey had 35.000.000 internet users, whereas there were 65.123.800 in Germany and 51.442.100 in the UK. User growth in Turkey between 2000 and 2010 was 1650%. There are thousands of illegal websites illegally offering Turkish copyright owners' copyrighted works. 95% of the downloaded copyrighted works are illegal in Turkey. The industry's loss is about 35% because of internet related copyright infringements. There has only been one reported case, the Digiturk case, against infringers. Copyright owners try to find solutions not in the law but in the technological measures.

As a conclusion, the problems that we are faced with on the Internet are international. In order to solve them, an international consensus on rules of conflict of laws in intellectual property matters occurring on the Internet must be achieved. Supranational organisations must therefore work together to that effect.

WTO and WIPO must collaborate in convening a new meeting of the Berne Convention. This collaboration is indispensable for several reasons. Firstly, WTO and WIPO have similar members. Secondly, these two organisations have a history of cooperation. Thirdly, and most importantly, the TRIPS Agreement incorporates part of the Berne Convention. Incorporation compels WTO members to comply with articles 1-21 of the Berne Convention. At the convention, member nations should work together in drafting new provisions for the Digital Age, which includes jurisdiction, applicable law, recognition and enforcement relating to Internet issues.

Word Count: 62.556



## APPENDIX 1: Sample of free Turkish mp3s and TV series websites

<http://www.kmp3indir.com/>  
<http://bizimmp3indir.com/>  
<http://www.mp3dunyasi.tk/>  
<http://www.hemenpaylasmp3.com/>  
<http://www.korsanmp3.com/>  
<http://www.mp3indire.com/>  
<http://www.muzikdinleyin.net/>  
<http://indirdoldur.com/>  
<http://www.mp3indir.net/>  
<http://www.mp3indirx.com/>  
<http://www.uslanmaz.com/>  
<http://www.karakterim.com/>  
<http://www.linkci.com/>  
<http://www.mp3bulun.com/>  
<http://www.for-mp3.info/>  
<http://www.mp3b.org/>  
<http://www.mp3turkiye.org/>  
<http://www.mavilim.net/>  
<http://www.yeniklip.com/>  
<http://www.mp3hanesi.com/>  
<http://www.sorgucu.com/>  
<http://www.ebruyasarfan.org/>  
<http://www.forumdetay.com/>  
<http://www.dinamik.org/>  
<http://www.mp3portali.net/>  
<http://www.netbahane.net/>  
<http://www.yesilmp3.net/>  
<http://www.takil.net/>  
<http://www.mp3budur.be>  
<http://www.mp3indirin.org/>  
<http://www.gelmp3indir.com/>  
<http://www.mp3bedava.com/>  
<http://www.mp3gel.com/>  
<http://www.bedavamp3indirtr.com/>  
<http://www.mp3yukle.co.uk>  
<http://www.2mlogics.com/>  
<http://www.bedava-mp3indir.org/>  
<http://www.trfdown.info/>  
<http://www.dreamtr.net/>  
<http://www.indirmp3.com/>  
<http://frm1.net/>  
<http://www.loadtr.org/>  
<http://www.bedavaonline.net/>  
<http://www.mp3bulucu.com/>

<http://www.mp3indirek.com/>  
<http://www.mp3frm.com/>  
<http://www.linkdunyasi.com/>  
<http://www.mp3indircem.net/>  
<http://www.canim.net/>  
<http://www.portalmerkezi.net/>  
<http://www.yazlikmp3.net/>  
<http://www.yonjada.com/>  
<http://www.muzikz.com/>  
<http://www.hitgonder.net/>  
<http://guzelim.org/>  
<http://www.haydibul.net/>  
<http://www.hizlicevap.com/>  
<http://www.mp3te.net/>  
<http://www.limitsizmuzik.com/>  
<http://www.sarkiindir.org/>  
<http://www.miskinler.net/>  
<http://www.diziizleyelim.com/>  
<http://www.dizi-izle.gen.tr/>  
<http://www.dizifrm.com/>  
<http://www.dizi-sitesi.com/>  
<http://www.diziport.com/>  
<http://www.diziturka.net/>  
<http://www.dizivefilm.com>  
<http://www.kraldizi.net/>  
<http://www.diziizle.net/>  
<http://www.diziskeyfi.in/>  
<http://www.dizi-izleyin.com/>  
<http://www.ddizi.com/>  
<http://www.fulldowntr.org/>  
<http://www.amasyablog.com/>

## APPENDIX 2

U.K. Law	German Law	Turkish Law
CDPA s. 96 and 97	S. 97 of German Copyright Law (UrhG)	Article 68 of Turkish Copyright Act
Damages (if the infringer knew or had reason to know)	Damages (if the infringer violated the copyright intentionally or as a result of negligence)	Treble damages based on the current value (if the infringer violated the copyright intentionally or as a result of negligence) or;
Account of profits derived by the infringer;	Surrender of the profits derived by the infringer or;	Surrender of the profits derived by the infringer or;
Lost profits or on a royalty basis or relief as respect of the infringement of any other property right (additional damages may be awarded).	Compensation for the actual suffered losses, including loss of profits or adequate licence fees.	Compensation according to tort law provisions
Within 6 years of the wrongful act (if the infringement was deliberately concealed, then the 6 year period starts to run from the time that infringement could reasonably have been uncovered)	Within three years after the time at which the entitled person gains knowledge of the infringement and of the identity of the infringer or 30 years after the infringement	Within 10 years of the wrongful act and within 1 year from the time that author gains knowledge of the infringement and of the identity of the infringer
The court can order the delivery up of infringing copies or items specifically designed or adapted for making copies.	The court can order seizure of all illegal copies and devices which are used or designed to make unlawful reproductions.	The claimant can claim destruction of the unauthorized reproduced copies and of devices or to be handed to him reproduced copies and the devices with a reasonable price.



## APPENDIX 2

U.K. Law	German Law	Turkish Law
CDPA s. 96 and 97	S. 97 of German Copyright Law (UrhG)	Article 68 of Turkish Copyright Act
Damages (if the infringer knew or had reason to know)	Damages (if the infringer violated the copyright intentionally or as a result of negligence)	Treble damages based on the current value (if the infringer violated the copyright intentionally or as a result of negligence) or;
Account of profits derived by the infringer;	Surrender of the profits derived by the infringer or;	Surrender of the profits derived by the infringer or;
Lost profits or on a royalty basis or relief as respect of the infringement of any other property right (additional damages may be awarded).	Compensation for the actual suffered losses, including loss of profits or adequate licence fees.	Compensation according to tort law provisions
Within 6 years of the wrongful act (if the infringement was deliberately concealed, then the 6 year period starts to run from the time that infringement could reasonably have been uncovered)	Within three years after the time at which the entitled person gains knowledge of the infringement and of the identity of the infringer or 30 years after the infringement	Within 10 years of the wrongful act and within 1 year from the time that author gains knowledge of the infringement and of the identity of the infringer
The court can order the delivery up of infringing copies or items specifically designed or adapted for making copies.	The court can order seizure of all illegal copies and devices which are used or designed to make unlawful reproductions.	The claimant can claim destruction of the unauthorized reproduced copies and of devices or to be handed to him reproduced copies and the devices with a reasonable price.





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