

## View results

Respondent

34 Anonymous

29:41

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### Contact details

Kindly submit your and your groups contact details below. Please also include the authors of the reports.

1. National/Regional Group or Independent Member **(in English): \***

Netherlands

2. Contributor's name: *(please note: name cannot be edited after the report submission) \**

Selmer Bergsma

3. Contributor's email: \*

secretariaat@aippi.nl

4. Other Contributors / Authors:

Noa Naaman, Margot Vergeest, Yiyi Song, Lauren Delleman, Laura Zanting, Hannah de Leeuw, Sientje Dam, Nienke Schutte

### I. Current law and practice

Please answer all questions in Part I on the basis of your Group's National Law and practice. Please take into consideration the Definitions in your answers. Please note that they are NOT mutually exclusive.

5. **1)** Does your current law / case law / practice contain International Private Law Provisions and geo-blocking provisions, specifically relating to online copyright infringement?

Yes

No

6. **1) (continued)** If YES, please specify and briefly describe these provisions.

There are no specific statutory provisions. The Court of Appeal in Amsterdam has ruled that, in principle, geo-blocking is sufficient to prevent communication to the public (even if circumventable), meaning no infringement exists, unless deliberately inadequate geo-blocking was used. This judgment was later appealed to the Dutch Supreme Court, which subsequently referred questions for a preliminary ruling to the ECJ. The matter is currently pending before the ECJ, where Advocate General Rantos has recently issued a conclusion to similar effect.

7. **Competent court / conflict-of-jurisdiction rules**

**2)** Which criteria based on Domicile-related connecting factors are applicable under your National Law to determine the jurisdiction/competence of your national courts to hear online international copyright infringement?

**2) a)** Claimant's Domicile, i.e. Domicile of the author/copyright holder (usually also the Place of Prejudice). Please explain.

Yes

No

8. **2) a. (continued)** Please explain

NO. Claimant's Domicile is not a relevant factor for determining the jurisdiction/competence of the Dutch court.

9. **2) a. (continued)** If the claimant's Domicile is a relevant connecting factor for determining jurisdiction, please indicate the territorial scope of the competence of your national court:

No answer provided.

10. **2) a.** Please explain, if needed

No answer provided.

11. **2) b.** Defendant's Domicile, i.e. Domicile(s) of the copyright infringer(s)

Yes

No

12. **2) b. (continued)** Please explain, if needed

YES. According to Article 2 of the Dutch Code of Civil Procedure (and Article 4 of Regulation (EU) No 1215/2012 and Article 2 of the Lugano Convention), Dutch courts have jurisdiction in cases where the defendant has his Domicile in the Netherlands. In addition, Article 8 of Regulation (EU) No 1215/2012, Article 6(1) of the Lugano Convention and Article 7(1) of the Dutch Code of Civil Procedure can also be relevant to copyright infringement proceedings. Briefly put, these provisions provide that, where there are multiple defendants, it is possible to summon one of the defendants before the court that has jurisdiction over another defendant, provided that the claims are closely connected and there is a risk of irreconcilable judgments if the cases are tried separately. To rely on this ground for jurisdiction, a certain degree of foreseeability is required (ECJ Eva Maria Painer). In addition, the same situation between the jurisdictions must exist both in fact and in law between the various defendants on the date on which the action is brought (see e.g. ECJ GMK-ZBM / SO). It should be noted that Regulation (EU) No 1215/2012 and the Lugano Convention only apply this rule where jurisdiction is founded on the domicile of one of the defendants; this competence rule has therefore been included under this study question

13. **2) b.** If YES, please specify:

Domicile of the Website Publisher, i.e. the principal/main infringer

Domicile of the Website Hosting Provider

Domicile of the Domain Name Hosting Provider

Other

14. **2) b. (continued)** Please explain, if needed

To be regarded as an infringing party, a party must itself carry out an infringing act, namely an act of reproduction or an act of making a work available to the public. In most cases, the Website Operator will be the principal party allegedly performing such acts. In some instances, a Website Hosting Provider may also be held liable for its own act of making a work available to the public and may be sued before the courts of the jurisdiction in which it is Domiciled (although in practice there may be instances where exceptions for intermediary services known as 'mere conduit', 'caching' and 'hosting' services allow providers to avoid liability, which exceptions are not addressed further for purposes of these study questions).  
We consider the Domain Name Hosting Provider to fall outside the scope of this question, on the assumption that the domain name itself does not constitute a work protected by copyright.

15. **2) b. (continued)** If the defendant's Domicile is a relevant connecting factor for determining jurisdiction, please indicate the territorial scope of the competence of your national court:

- All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.
- Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.
- Other

16. **2) b. (continued)** Please explain, if needed

The Dutch Supreme Court has held that, in principle, once a Dutch court has assumed jurisdiction on the basis that the defendant has Domicile in the Netherlands, it may grant an injunction as well as ancillary relief with extraterritorial effect, including with respect to acts committed outside the Netherlands. Where it concerns infringement in territories outside of the Netherlands, the Dutch court will have to apply the law governing each place where the alleged infringement occurs, in accordance with the principle of *lex loci protectionis* (the law of the country for which protection is claimed).

In copyright infringement cases, Dutch law generally distinguishes between three situations: (i) infringements occurring in the Netherlands; (ii) infringements occurring within (part of) the European Union; and (iii) infringements occurring in so called "third countries".

Situation (i) clearly falls within the territorial scope of the Dutch court's jurisdiction. With respect to situation (ii), lower Dutch courts (at the District Court level) have assumed that the concepts of a "work protected by copyright" and the copyright infringement test are harmonized under EU law and that copyright laws of other EU Member States (should) therefore correspond to Dutch national law. As a result, Dutch lower courts have issued EU wide injunctions for copyright law infringements on the notion that the facts at hand constituted a copyright infringement under Dutch national law, foregoing a detailed analysis of national copyright laws of all Member States to which the injunction extends on the assumption that these national laws should be identical to Dutch copyright law in the relevant aspects. This approach has not (yet) been explicitly confirmed in Dutch appellate case law or in case law by the European Court of Justice with regards to copyright. Finally, a Dutch court may extend the territorial scope of its competence to infringements occurring in a "third country", provided that it is established that an infringement has taken place under the applicable local law and that the remedies sought may be imposed under that law.

17. **3)** Which criteria based on Nationality-related connecting factors are applicable under your National Law to determine the jurisdiction/competence of your national courts to hear online international copyright infringement?

- Nationality of the claimant, i.e. Nationality of the author/copyright holder
- Nationality of the defendant, i.e. Nationality of the copyright infringer(s) (**specify a,b,c**)
- a.** Nationality of the Website Publisher, i.e. the principal/main infringer
- b.** Nationality of the Website Hosting Provider
- c.** Nationality of the Domain Name Hosting Provider
- Country of First Publication of the copyrighted work
- Other

18. **3) (continued)** Please explain , if needed

NO. Nationality-related factors are not a relevant factor to determine the jurisdiction/competence of the Dutch court.

19. **3) (continued)** If Nationality-related connecting factors are applicable, please indicate the territorial scope of the competence of the court:

No answer provided.

20. **3) (continued)** Please explain, if needed

NO. Nationality-related factors are not a relevant factor to determine the jurisdiction/competence of the Dutch court.

21. **4)** Which criteria based on Infringing acts-related connecting factors are applicable under your National Law to determine the jurisdiction/competence of your national courts to hear online international copyright infringement?

**4) a.** Place of Infringement

- 4) a.** Yes, please specify
- 4) a.** No
- a.** Place where the infringing content is uploaded on the Publisher Website (Country A / place of the principal act of copyright infringement)
- b.** Place where the Website/infringing contents are hosted/stored (Country B)
- c.** Place where the Domain Name is hosted (Country C)
- d.** Other

22. **4) (continued)** Please explain , if needed

Pursuant to Article 6(e) of the Dutch Code of Civil Procedure (Article 7(2) of Regulation (EU) No 1215/2012 and Article 5(3) of the Lugano Convention), a defendant may be sued before the court where a "harmful event" has occurred or may occur (including copyright infringement). The expression "place where the harmful event occurred or may occur" is intended to cover both (i) the place where the damage occurred and (ii) the place of the event giving rise to it, so that the defendant can be sued, at discretion of the claimant, in the courts for either of those places.

'Place of infringement' in the question is defined by AIPLI as the the "place where the initial/principal/direct/main acts that caused the copyright infringement occurred" this refers to point (ii) above, namely the place of the event giving rise to the damage (locus actus).

In cases of online copyright infringement, the locus actus refers to the place where the decision to infringe was made. This corresponds to the location from which the infringing content was uploaded to the Operator Website (as referred to in the question), provided that this is not taken too literally. For example, if someone uploads content whilst on holiday, that does not confer jurisdiction on that place; it is assumed that the place from which the infringing content was uploaded to the Operator Website corresponds to where the infringer is seated. Thus, in practice, jurisdictions based on the place of infringement comes down to the defendant's domicile. This approach has been confirmed both by the European Court of Justice and by lower Dutch courts.

Additionally, in certain situations, the location where the website or infringing content is hosted or stored can be considered a relevant "harmful event" (and thus, a place of infringement) for jurisdictional purposes. However, this is applicable only if the hosting service has actively participated in the infringement; otherwise, the hosting exception under the DSA applies. Thus, this also comes down to the defendant's domicile.

We consider the Domain Name Hosting Provider to fall outside this scope, on the assumption that the domain name itself does not constitute a work protected by copyright.

23. **4) (continued)** If Place of the Infringement is applicable, please indicate the territorial scope of the competence of your national court:

- All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.
- Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.
- Other

24. **4) (continued)** Please explain, if needed

The answer is not entirely clear, in part because this ground does not appear to be frequently invoked in practice to establish competence, meaning there is limited authority directly addressing the point. Where courts have considered it, Dutch courts and the CJEU in Hejduk follow the same pattern: after identifying the locus damni and locus actus as separate grounds of jurisdiction under Article 6(e) Dutch Code of Civil Procedure and/or Article 7(2) of Regulation (EU) No 1215/2012, they go on to expressly limit the territorial scope of jurisdiction based on the locus damni — but impose no equivalent limitation on the locus actus. We believe this may indicate that the territorial scope for courts that base their competent on place of infringement is therefore not limited and also extends to damages occurring in foreign countries.

The reason why this ground is not invoked often is because it practically comes down to competence of the court of the defendant's domicile (see under question 4a). Claimants will generally prefer to ground jurisdiction on domicile directly, as this provides greater certainty. As discussed under question 3, a Dutch court assuming jurisdiction on that basis may grant injunctive and ancillary relief with full extraterritorial effect, including in respect of acts committed outside the Netherlands.

25. **4) b. Place of Damage**

Yes

No

26. **4) b. (continued)** Please explain, if needed

Pursuant to Article 6(e) of the Dutch Code of Civil Procedure (Article 7(2) of Regulation (EU) No 1215/2012 and Article 5(3) of the Lugano Convention), in cases where the "harmful event" has occurred or may occur (including copyright infringement), the defendant may be summoned before the court where such harmful event has occurred or may occur. The expression "place where the harmful event occurred or may occur" is intended to cover both (i) the place where the damage occurred and (ii) the place of the event giving rise to it, so that the defendant can be sued, at discretion of the claimant, in the courts for either of those places.

"Place of Damage" in the question refers to point (i), namely the place where the damage occurred. In the context of online copyright infringement, EU case law has determined that accessibility of a website with the copyrighted work in a specific territory results in damage in that specific jurisdiction and for that reason qualifies as a ground for jurisdiction for the national court of that territory (CJEU 3 October 2013, Pinckney).

27. **4) b.** If YES, how would your national courts determine the Place of Damage

Accessibility (i.e. whether the public in your country can access the website or app)

Targeting (i.e. whether the website or app is directed or targeted at the public in your country or region)

Other

28. **4) b.** If Targeting factor is applicable, how would your national courts determine whether the relevant public is targeted?

Whether the copyrighted work is Accessible online in your country

Whether the server of the website or app with the copyrighted work is located in your country

Whether the website or app with the copyrighted work uses a local language of your country

Whether the website or app with the copyrighted work allows to pay in the local currency of your country

Whether there is any business facility of the user of the copyrighted work in your country

Whether there are any promotional activities Targeting public in your country or region by the user of copyrighted work

Other

29. **4) b.** If Place of the Damage is applicable, please indicate the territorial scope of the competence of your national court:

- All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.
- Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.
- Other

30. **4) b) (continued)** Please explain, if needed

Other relevant factors found in both Dutch case law and case law of the European Court of Justice are (i) whether the website domain extension of the website with the copyrighted work is specific to a relevant country (in case of The Netherlands: <.nl>), EU (<.eu>) or global, (ii) whether there is a privacy policy referring to processing of personal data of users located in the European Union, and (iii) whether content on the website specifically refers to specific countries or regions.

According to lower-court case law in the Netherlands, the territorial scope of the competence of the Dutch court is limited to the territory of the Netherlands in cases where Place of the Damage is the ground for jurisdiction. This Group has identified a single lower-court decision in which the Dutch court that had jurisdiction as the Place of Damage (on the basis on Article 7(2) Regulation (EU) No 1215/2012) granted cross-border injunctive relief for the territory of the European Union. However, in most national case law it is assumed that the territorial scope of competence based on Article 7(2) Regulation (EU) No 1215/2012 is limited to the territory of the Place of Damage. This also explicitly follows from case law of the European Court of Justice such as the cases ECJ Pinckney and ECJ Hejduk.

31. **4) c.** Place of Prejudice, i.e. usually Domicile of the author / copyright holder. Please explain

No answer provided.

32. **4) c) (continued)** Please explain, if needed

N/A – Place of Prejudice is not a relevant factor to determine the jurisdiction/competence of the Dutch court.

33. **4) c.** If Place of the Prejudice is applicable, please indicate the territorial scope of the competence of your national court:

No answer provided.

34. **4) c) (continued)** Please explain if needed

No answer provided.

35. **Applicable law / conflicts-of-laws rules**

When answering the following question, please assume that your national courts have jurisdiction.

**5)** Is applicable law determined in accordance with Article 5(2) of the Berne Convention? Please answer YES or NO. If YES, i.e. the Berne Convention applies to determine the applicable law, please answer to question 6. If NO, i.e. the Berne Convention does not apply, and other rules of private international law are applicable, please answer to question 7.

- Yes
- No

36. **5) (continued)** Please explain if needed.

The Berne Convention ("BC") has direct effect in the Netherlands. However, the law applicable to non-contractual obligations is governed in the Netherlands by Regulation No. 864/2007 ("Rome II"). The conflict-of-law rule in Article 5(2) BC is therefore not applied as a standard rule to determine the applicable law in intellectual property disputes. The standard rule in Dutch legal practice for determining the applicable law in IP disputes is Article 8 Rome II.

Article 8 Rome II provides as follows:

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

Article 8(2) Rome II thus contains a conflict rule comparable to Article 5(2) BC, namely the *lex loci protectionis*.

It is important to note that Article 8 Rome II governs the applicable law only for the matters listed in Article 15 Rome II:

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

These issues thus include questions concerning the scope and enforcement of copyright. For such issues, the applicable law is therefore, based on Article 8 Rome II, determined in accordance with Article 5(2) BC.

However, the *lex loci protectionis* rule of Article 8 Rome II does not cover questions concerning the object or subject of protection. Dutch literature and case law contain diverging views on these matters. This is further addressed in the response to the following question.

In conclusion, the answer to Question 5 is no. We will continue with answering Question 7.

37. **6)** Regarding "the law of the place where protection is sought" (Article 5(2) of the Berne Convention), how is this place determined in practice?

No answer provided.

38. **6) (continued)** Please explain, if needed

No answer provided.

39. 7) Which criteria are decisive for determining applicable law in online infringement cases?

- Law of the Forum
- Law of the Place of Infringement (please specify a,b,c,d)
- a. Place where the infringing content is uploaded on the Publisher Website (Country A / place of the principal act of copyright infringement)
- b. Place where the Website/infringing contents are hosted/stored (Country B)
- c. Place where the Domain Name is hosted (Country C)
- d. Other
- Law of the Place of the Damage (please specify a,b,c)
- a. Law of the country Targeted by the website
- b. Law of the country where the website is Accessible
- c. Other
- Law of the Place of the Prejudice
- Law of the claimant's Domicile
- Law of the defendant's Domicile (specify a,b,c,d)
- a. Law of the Website Publisher's Domicile
- b. Law of the Website Hosting Provider's Domicile
- c. Law of the Domain Name Hosting Provider's Domicile
- d. Other
- Law of the claimant's Nationality.
- Law of the defendant's Nationality.
- Law of the Country of First Publication of the copyrighted work
- Law of the place where protection is sought
- Other

40. **7)(continued)** Please explain, if needed

We note that under Dutch private international law, Article 10:159 of the Dutch Civil Code ("DCC") provides that, for non contractual obligations which fall outside the scope of the Rome II Regulation, the provisions of Rome II nevertheless apply by analogy, insofar as the obligation can be characterised as a tort. Rome II then applies irrespective of the domicile or nationality of the parties. Its conflict of law rules may therefore designate the law of a non EU country, even where one or both parties are established outside the European Union. Pursuant to Article 8(1) Rome II, the applicable law is "the law of the country for which protection is claimed." As explained above, the requirement of article 8(1) Rome II applies formally only to questions relating to the infringement. An infringement dispute generally involves three issues: (i) questions concerning the object of protection, (ii) the subject of protection, and (iii) the actual infringement question. The conflict rule in Article 8(1) Rome II designates as applicable the law of the country for which copyright protection is sought. This conflict rule therefore applies to the third component: the infringement question. Accordingly, when a claimant seeks an injunction before a Dutch court, the claimant must demonstrate, for each country for which protection is sought, that an infringement exists under the law of that country. It is further generally accepted that in cases concerning non-European works, Article 5 BC requires the application of the lex loci protectionis to determine which national legal framework applies to questions relating to the object of protection. Thus, for both the question whether a work is protected and the question of infringement, and therefore the content and scope of copyright, the Dutch court must apply the law of the country for which protection is invoked. This was confirmed by the Dutch Supreme Court in *Das Blaue Licht II*. However, there are diverging opinions in Dutch case law and literature on the question of which law governs issues concerning the subject of protection (i.e., the right holder) prior to infringement and enforcement questions. There is debate as to whether Article 8 Rome II or Article 5 BC governs this matter or whether a different rule should apply. Some argue that the question of who holds the copyright should be determined by the law of the country of origin of the author (or its successor), the *lex originis*. In other situations, it is argued that the *lex loci protectionis* should again apply, requiring an assessment per country for which protection is sought whether a party is in fact the rightful holder.

41. **Geoblocking**

**8)** According to your National Law, is geoblocking an appropriate and proportionate means of preserving the territoriality of copyright in the digital environment?

Yes

No

42. **8)(continued)** Please explain

There is case law in support of this position, also in the context of the effectiveness of blocking domain names and IP addresses. A further illustration is the *Anne Frank* case. Both the District Court and the Court of Appeal ruled that geoblocking is – as an instrument of digital rights management specifically designed to erect barriers in cases where territorial distinction is required – the most appropriate means of territorially restricting access to websites in the current state of technology. Geoblocking is a proportionate measure on the basis that it is sufficient to constitute having done what is reasonably possible to block – or at least sufficiently hinder and discourage – access to the website from the Netherlands. The opinion of Advocate-General Szpunar is particularly relevant in this regard: geoblocking is a sufficient security measure as long as it is not deliberately inadequate and that it can be circumvented, does not mean that the protected work is communicated to the public in the blocked country – since such a conclusion would render the territorial management of copyright on the internet effectively impossible.

It is worth noting that the Dutch Supreme Court referred preliminary questions to the European Court of Justice in the *Anne Frank* case, of which the most pertinent is whether the publication of content on a website constitutes a "communication to the public" within the meaning of Article 3(1) of the Copyright Directive, in a country where that content is protected by copyright and where the website is subject to state-of-the-art geoblocking – such that it can only be accessed by circumventing that blocking measure using a VPN or similar services. In early 2026, Advocate-General Rantos issued his opinion, broadly in line with Szpunar's earlier reasoning. A publishing party that implements effective technical measures to prevent access in Member States where a work remains protected – such as geoblocking, potentially combined with non-technical deterrents – does not commit a communication to the public in those blocked territories. The fact that individual users may bypass such measures using a VPN does not alter this conclusion, as any other approach would make territorial copyright management on the internet unworkable. Only where the measures are deliberately ineffective and easily circumvented could a different outcome be justified.

43. **9)** Are geoblocking measures sufficient to prevent online copyright infringement, even though such measures can be bypassed through the use of VPNs?

Yes

No

44. **9) (continued)** Please explain

As explained in response to question 8, Dutch courts have repeatedly held that geoblocking, in principle, is sufficient to prevent online copyright infringement even though such measures can be bypassed through the use of VPNs. This line of reasoning is also reflected in the Dutch Pirate Bay cases, in which courts ordered ISPs to block infringing websites and found that such blocking – though circumventable – could still effectively prevent or at least impede unauthorised access and significantly discourage users. Additionally, Dutch courts do not assume that Dutch users actually use VPNs to circumvent geoblocking. For example, in the Anne Frank case, the District Court of Amsterdam held that it had not been sufficiently demonstrated that internet users in the Netherlands actually use VPNs to circumvent the geoblocking on the website in question, let alone a large or indeterminate group of them. The court also emphasized that no technical protective measure is completely watertight.

45. **10)** Are there other measures in your current law / case law / practice, in addition to the geo-blocking measure, to ensure that access to the website by the public in the blocked country is prevented or discouraged?

Yes

No

46. **10)(continued)** Please explain

Additional measures are mentioned in case law as relevant factors – secondary to geoblocking – strengthening the territorial access protection. An example is a barrier in the form of a declaration to be completed by the user, when accessing the website, confirming that the user is not accessing the website from a blocked country. Tools for countering geoblocking circumventions, such as dynamic geoblocking, are also mentioned as relevant measures. This is a self-learning system that continuously adds new, circumvention IP addresses and domain names to the blocklist.

## II. Policy considerations and proposals for improvements of your Group's current law

47. **11)** Could your Group's current law or practice relating to online copyright infringement be improved?

Yes

No

48. **11) (continued)** If yes, please explain

YES. We refer to our answers below.

49. **12)** Could your Group's current law or practice relating to the determination of competent courts in online copyright infringement be improved?

Yes

No

50. **12) (continued)** If yes, please explain

YES. Our Group's current law and practice relating to the determination of competent courts is adequate, but we would appreciate more clarity from the ECJ on the territorial scope of the relief available depending on the type of jurisdictional basis. More specifically, we believe our system would benefit from more clarity on the possibility for cross-border injunctions (e.g., in which circumstances and on the basis of which competence rules does a national court have the authority to order a cross-border injunction; to what territories can this apply (e.g., only EU countries or also third party countries) etc.).

51. **13)** Could your Group's current law or practice relating to the determination of applicable law in online copyright infringement be improved?

Yes

No

52. **13)(continued)** If yes, please explain

As set out in the responses to Questions 6 and 7, the applicable law with respect to infringement questions is determined by Article 8(1) Rome II, which embodies the *lex loci protectionis*. However, as explained therein, considerable uncertainty persists as to which law governs questions falling outside the scope of the infringement analysis, in particular preliminary questions relating to the subject of protection (i.e., the identity of the right holder).

For example, the determination of ownership of copyright, including matters of copyright of employers and contractual transfers of rights, remains subject to divergent approaches in Dutch case law and legal doctrine. Certain authorities submit that such questions ought to be governed by the *lex originis*, i.e., the law of the country of origin of the author or the author's successor in title. Other authorities maintain that the *lex loci protectionis* should continue to apply, thereby necessitating a separate assessment under the law of each country for which protection is claimed.

Clarification and harmonisation of the applicable conflict-of-laws rules would accordingly constitute a material improvement to Dutch law and practice in this area. More broadly, harmonisation at the European level would be welcomed. Such harmonisation could be achieved through the establishment of a unitary copyright regime by way of regulation, which would carry the additional benefit of vesting final jurisdiction over questions of interpretation in a single court, thereby promoting legal certainty and uniformity across the Member States.

53. **14)** Could you explain, in your jurisdiction, the reasons that justify or reject geoblocking as an appropriate and proportionate means of preserving the territoriality of copyright in the digital environment? Please explain.

With reference to questions 8 and 9, Dutch courts consider geoblocking an appropriate and proportionate measure because it is currently the most effective and realistic tool for maintaining territorial copyright online. Dutch courts accept that no technical measure is entirely watertight, and geoblocking is sufficient where it amounts to having done what is reasonably possible to block – or at least sufficiently hinder and discourage – access.

Dutch courts, in line with the reasoning of Advocates General Szpunar and Rantos, regard the mere possibility that users could bypass geoblocking by using VPNs as insufficient to conclude that a communication to the public takes place in a blocked territory, as such a conclusion would make territorial copyright management practically impossible.

54. **15)** Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

Yes

No

55. **15 (continued)** If yes, please explain

NO – all our policy considerations within the scope of this Study Question are already included in our answers.

### III. Proposals for harmonisation

*Please consult with relevant in-house / industry members of your Group in responding to Part III.*

56. **16)** Do you believe that there should be harmonisation of International Private Law Provisions and geo-blocking in the context of copyright online infringement?

**If YES, please respond to the following questions without regard to your Group's current law or practice.** Even if NO, please address the following questions insofar as your Group considers your Group's current law or practice could be improved.

Yes

No

57. **Competent court / Conflict-of-jurisdiction rules** The aim of this section is to determine the criteria that should be relevant to determine the competent court in the case of online copyright infringement.

### 1.1. Domicile-related connecting factors

**17)** Which criteria based on Domicile-related connecting factors should be relevant to determine the jurisdiction/competence of a national court to hear online international copyright infringement?

**17) a. Claimant's Domicile**, i.e. Domicile of the author/copyright holder (usually also Place of Prejudice) **17) a.** If the claimant's Domicile should be a relevant connecting factor for determining jurisdiction, please indicate the territorial scope of the competence of the national court:

No answer provided.

58. **17) a.** Please explain, if needed

No answer provided.

59. **17) b) Defendant's Domicile**, i.e. Domicile of the copyright infringer. Please explain.

Yes

No

If Yes, please specify

Domicile of the Website Publisher, i.e. the principal/main infringer

Domicile of the Website Hosting Provider

Domicile of the Domain Name Hosting Provider

Other

60. **17) b) (continued)** Please explain, if needed

No answer provided.

61. **17) b)** If the defendant's Domicile should be a relevant connecting factor for determining jurisdiction, please indicate the territorial scope of the competence of the national court:

All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.

Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.

Other

62. **17) b. (continued)** Please explain, if needed

Connecting jurisdiction to the Domicile of the alleged infringer or the place of the infringing act, as currently provided for under Dutch law (including the Brussel I-bis Regulation and the Lugano Convention), provides for foreseeability and legal certainty for the defendant. We think this is an equitable point of departure – since the defendant is a passive party at that stage of the proceedings (i.e., the defendant is unable to influence the forum chosen by the claimant), ensuring a certain level of foreseeability is appropriate. Moreover, maintaining Domicile or the Place of Damage (as defined in the Study Question) as connecting factors is more likely to align the place of litigation with the place where the alleged infringer undertakes economic activity, which also has practical advantages for the claimant seeking to enforce a judgment.

63. **17) c)** Other. Please explain

No answer provided.

64. **1.2. Nationality-related connecting factors**

**18) a.** Which criteria based on **Nationality-related connecting factors** should be relevant to determine the jurisdiction/competence of a national court to hear online international copyright infringement?

- Nationality of the claimant, i.e. Nationality of the author/copyright holder
- Nationality of the defendant, i.e. Nationality of the copyright infringer (**if yes please specify a,b,c,d**)
- a.** Nationality of the Website Publisher, i.e. the principal/main infringer
- b.** Nationality of the Website Hosting Provider
- c.** Nationality of the Domain Name Hosting Provider
- d.** Other
- Country of First Publication of the copyrighted work
- Other

65. **18) b.** If Nationality-related connecting factors should be applicable, please indicate the territorial scope of the competence of the court: (**specify a,b,c**)

No answer provided.

66. **18) (continued)** Please explain, if needed

Under Dutch law, there are no Nationality-related connecting factors for jurisdiction. The main rule for jurisdiction under the Brussel I-bis Regulation and the Lugano Convention are explicitly applicable irrespective of nationality (see e.g., Article 4 Brussel I-bis Regulation, Article 2 Lugano Convention). We consider this to be correct, also in view of Article 18 TFEU (prohibition of discrimination on grounds of nationality). Maintaining Domicile as a connecting factor for jurisdiction, rather than Nationality, promotes the equal treatment of EU-nationals and non-EU nationals within the European Union.

67. **18) (continued)** Please explain and **if** Other, please specify

No answer provided.

68. **Infringing acts-related connecting factors**

19) Which criteria based on **Infringing acts-related connecting factors** should be relevant to determine the jurisdiction/competence of a national court to hear online international copyright infringement?

19) a. Place of Infringement, Yes or No. Please specify: **a,b,c,d**

19) a. Yes

19) a. No

a. Place where the infringing content is uploaded on the Publisher Website (Country A / place of the principal act of copyright infringement)

b. Place where the Website/infringing contents are hosted/stored (Country B)

c. Place where the Domain Name is hosted (Country C)

d. Other

69. 19) a. (continued) Please explain, if needed

Defendant's Domicile (see under question 4.a), which we would expect to coincide with the place where the infringing content is uploaded.

First, as discussed under Question 4.a, the Place of Infringement (as defined in the Study Question) can generally be determined by reference to the defendant's Domicile. In cases of online infringement, this typically corresponds to the place where the infringing content is uploaded to the Operator's website. As noted under Question 17, we consider this to be a desirable outcome on grounds of legal certainty.

A further relevant consideration is the place where the website is hosted. However, this would only be the case where the hosting provider is itself the alleged infringer by virtue of its active participation in the infringing activity. In such circumstances, the analysis returns, once again, to the defendant's domicile; an outcome we regard as beneficial for the reasons set out under Question 17.

70. 19) a. If Place of the Infringement should be applicable, please indicate the territorial scope of the competence of the national court:

All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.

Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.

Other (please specify)

71. 19) a. (continued) Please explain, if needed

As the place of infringement in practice refers to the defendant's domicile (see question 4.a), we believe it would be desirable that the territorial scope of the competence of the national court also extends beyond its own borders – as is the case for competence based on the defendant's domicile (see question 2.b). We believe this is also the practice in The Netherlands, however, as noted under question 4.a this is not entirely clear. Therefore, The Netherlands could clarify benefit from more clarification on this topic.

72. 19) b. Place of Damage

Yes

No

73. **19) b.** If YES, how should national courts determine the Place of Damage

- Accessibility (i.e. whether the public in a specific country can access the website or app)
- Targeting (i.e. whether the website or app is directed or targeted at the public in a specific country or region)
- Other

74. **19) b. (continued)** Please explain, if needed

No answer provided.

75. **19) b.** If Targeting factor is applicable, how should national courts determine whether the public is targeted?

- Whether the copyrighted work is Accessible online in a country
- Whether the server of the website or app with the copyrighted work is located in a country
- Whether the website or app with the copyrighted work allows to pay in the local currency of a country
- Whether the website or app with the copyrighted work allows to pay in the local currency of a country
- Whether there is any business facility of the user of the copyrighted work in a country
- Whether there are any promotional activities Targeting public in a country or region by the user of copyrighted work
- Other

76. **19) b. (continued)** Please explain, if needed

We consider the Place of Damage to be a relevant ground for the competence of a national court. As established by the ECJ in Pinckney v Mediatech, the place of damage is where the relevant copyright is protected and has been infringed. A court situated there is best placed to assess both the applicable copyright standards under its own national law and the harm suffered within its territory

Moreover, and especially in an online context, we favour the targeting criterion over mere accessibility. Accessibility alone is too broad a basis for jurisdiction, as it would expose defendants to suits in every country where the internet is accessible, undermining legal certainty and foreseeability. Targeting, by contrast, focuses on whether the website or application is genuinely directed at the public in a specific country.

77. **19) b.** If Place of the Damage should be applicable, please indicate the territorial scope of the competence of the national court:

- All acts of infringement, damages and prejudices occurring worldwide/regionally (in the process of copyright infringement). It means that your national court is competent for acts occurring in its jurisdiction, but also acts of infringement, damages and prejudices occurring in foreign jurisdictions.
- Only acts of infringement, damages and prejudices occurring within the territory of your national court, according to the principle of territoriality.
- Other

78. **19) b. (continued)** Please explain, if needed

Where a court has jurisdiction based on the Place of Damage, that jurisdiction is limited to the harm occurring within the territory of the Member State in which it is situated. This limitation follows directly from the basis upon which jurisdiction is established: the court derives its competence from the fact that the claimant's copyright was infringed within that specific country. It follows that, under this jurisdictional ground, under current law the court is entitled to render judgment only on the infringement that took place within its territory and the damages arising therefrom.

Therefore, where the jurisdiction of a Dutch court is based on the Place of Damage as connecting factor, the scope thereof is more limited than if jurisdiction were to be based on the Domicile of the defendant (see Question 2b above) or the Domicile of one of multiple defendants (see Question 2b above), as the latter two provide for extraterritorial jurisdiction.

To sum up, there are three scenarios in which the Dutch court can have jurisdiction in respect of copyright infringement:

- (i) the Dutch court has jurisdiction on the basis of the Domicile of the defendant, if the defendant is domiciled in the Netherlands - in this case, the jurisdiction of the Dutch court is extraterritorial;
- (ii) the Dutch court has jurisdiction on the basis of the Domicile of a co-defendant, if the co-defendants is domiciled in the Netherlands and the claims are closely connected – in this case, the jurisdiction of the Dutch court is extraterritorial;
- (iii) the Dutch court has jurisdiction on the basis of the Place of Damage, if damage occurred in the Netherlands – in this case, the jurisdiction of the Dutch court is limited to the territory of the Netherlands.

Therefore, there is a clear difference in the type of relief that can be obtained, depending on the basis of the court's jurisdiction.

This Group questions if this imbalance is (still) equitable in the current day and age, where a significant part of copyright infringements takes place on the internet and infringing content is typically accessible instantaneously across the globe (including across all EU member states). It can be argued that rules that were developed in an era where infringing acts were more readily localised (e.g. printed publications, the sale of physical products, tv or radio broadcasts) no longer fulfil the needs of the digital age, and that it may be appropriate to consider if any competent EU court (irrespective of the basis of its competence) should be able to grant cross-border relief in respect of the full extent of the harm in the entire European Union (similar to the UPC's jurisdiction in respect unitary patents and classic European patents).

79. **19) c. Place of Prejudice**, i.e. usually Domicile of the author / copyright holder. Please explain if Yes or NO. If Place of the Prejudice should be applicable, please indicate the territorial scope of the competence of the national court:

No answer provided.

80. **19) c. (continued)** Please explain, if needed

No answer provided.

81. **19) d. Other. Please explain**

No answer provided.

## 82. **2.Applicable law / conflicts-of-laws rules**

This section has two different and independent aims. The first is to determine, in general, the relevant and desirable criteria to determine the applicable law (question 20). The second is to propose a harmonised interpretation of Article 5(2) of the Berne Convention (question 21).

When answering the following question, please assume that the national courts are competent.

**20)** Which criteria should be relevant for determining applicable law in online infringement cases?

- Law of the Forum
- Law of the country of the Place of Infringement (please specify a - d)
  - a. Place where the infringing content is uploaded on the Publisher Website (Country A / place of the principal act of copyright infringement)
  - b. Place where the Website/infringing contents are hosted/stored (Country B)
  - c. Place where the Domain Name is hosted (Country)
  - d. Other
- Law of the country of the Place of the Damage (please specify a - b)
  - a. Law of the country where the website is Accessible
  - b. Law of the country Targeted by the website, If YES, how should national courts determine whether the public is targeted?
    - 1. Whether the copyrighted work is Accessible online in a country
    - 2. Whether the server of the website or app with the copyrighted work is located in a country
    - 3. Whether the website or app with the copyrighted work uses a local language of a country
    - 4. Whether the website or app with the copyrighted work allows to pay in the local currency of a country
    - 5. Whether there is any business facility of the user of the copyrighted work in a country
    - 6. Whether there are any promotional activities Targeting public in a country or region by the user of copyrighted work
    - 7. Other
- Law of the country of the Place of the Prejudice
- Law of the country of the claimant's Domicile
- Law of the country of the defendant's Domicile
- Law of the country of the Website Publisher's Domicile
- Law of the country of the Website Hosting Provider's Domicile
- Law of the country of the Domain Name Hosting Provider's Domicile
- Law of the country of the claimant's Nationality.
- Law of the country of the defendant's Nationality.

Law of the Country of First Publication of the copyrighted work

Law of the country of the place where protection is sought

Other

83. **20)** Other. Please explain if needed.

The lex loci protectionis of Article 8(1) Rome II offers a workable and legally certain basis for determining applicable law in online copyright infringement cases.

84. **2.2. Interpretation/revision of Article 5(2) of the Berne Convention**

**21)** How should the expression "the law of the place where protection is sought" in Article 5(2) of the Berne Convention be interpreted/construed, i.e. to which law should it refer?

- Law of the Forum
- Law of the country of the Place of Infringement (please specify a - d)
  - a.** Law of the country where the infringing content is uploaded on the Publisher Website (Country A / place of the principal act of copyright infringement)
  - b.** Law of the country where the Website/infringing contents are hosted/stored (Country B)
  - c.** Law of the country where the Domain Name is hosted (Country C)
  - d.** Other
- Law of the country of the Place of the Damage (please specify a - b)
  - a.** Law of the country where the website is Accessible
  - b.** Law of the country Targeted by the website. If YES, how should national courts determine whether the public is targeted? **(please specify 1 - 7)**
    - 1.** Whether the copyrighted work is Accessible online in a country
    - 2.** Whether the server of the website or app with the copyrighted work is located in a country
    - 3.** Whether the website or app with the copyrighted work uses a local language of a country
    - 4.** Whether the website or app with the copyrighted work allows to pay in the local currency of a country
    - 5.** Whether there is any business facility of the user of the copyrighted work in a country
    - 6.** Whether there are any promotional activities Targeting public in a country or region by the user of copyrighted work
    - 7.** Other
- Law of the country of the Place of the Prejudice
- Law of the Country of First Publication of the copyrighted work
- Law of the country of the author's Nationality or Domicile
- Law of the country of the defendant's Nationality or Domicile
- Other

85. **21) g. (continued)** Other, please specify

The expression should be interpreted as the law of the country for which protection is claimed (lex loci protectionis), consistent with Article 8(1) Rome II.

86. **21) (continued)** Please explain if needed.

No answer provided.

87. **22)** Should Article 5(2) of the Berne Convention be revised? If YES, please propose the drafting of a provision that could be adopted during a revision of the Berne Convention, and that would establish a harmonised rule on conflicts of jurisdiction on one hand, and conflicts of laws on the other hand.

Yes

No

88. **22)** If YES, please propose the drafting of a provision that could be adopted during a revision of the Berne Convention, and that would establish a harmonised rule on conflicts of jurisdiction on one hand, and conflicts of laws on the other hand.

NO. No revision of Article 5(2) of the Berne Convention is required.

89. **Geoblocking**

**23)** Should geoblocking be considered as an appropriate and proportionate means of preserving the territoriality of copyright in the digital environment?

Yes

No

90. **23) (continued)** Please explain, if needed

YES. Yes, insofar as no appropriate and proportionate alternative exists that can achieve a better (or similar) result. Geoblocking represents the current state of the art in digital rights management for preserving the territoriality of copyright in the digital environment. In the present state of technological development, it is the most effective and practically available instrument for achieving this purpose. State of the art geoblocking should include state of the art tools for countering circumventions, such as dynamic geoblocking. This is a self-learning system that continuously adds new, circumvention IP addresses and domain names to the blacklist.

91. **24)** Should geoblocking measures be sufficient to prevent online copyright infringement, even though such measures can be bypassed through the use of VPNs?

Yes

No

92. **24) (continued)** Please explain, if needed

Yes. No security measure is entirely circumvention-proof; the only variable is the effort required to bypass it. Geoblocking is no exception – tools like VPNs allow users to mask their location and access blocked content. Although countermeasures exist, they will likely never be fully effective, as circumvention techniques tend to outpace security solutions. However, this should not mean that a rights holder whose state-of-the-art geoblocking is bypassed thereby communicates the work to the public in the blocked country. Geoblocking makes websites inaccessible or significantly harder to reach for the average user, seriously hindering infringement. Currently, this should suffice, as long as its reliability and new circumvention risks are regularly assessed and where possible, addressed. Concluding otherwise would be undesirable, as it would effectively render territorial copyright management on the internet impossible, since any online communication would then have to be treated as global.

93. **25)** Should there be other measures, in addition to the geo-blocking measure, to ensure that access to the website by the public in the blocked country is prevented or discouraged?

Yes

No

94. **25)(continued)** Please explain

Yes. Additional measures aimed at hindering or discouraging access to the website in the blocked country should be relevant when assessing the overall deterrent effect on the public in a blocked country. However, such measures should only be supplementary and not determinative. An example of an appropriate and proportional additional measure is a barrier in the form of a declaration to be completed by the user, when accessing the website, confirming that the user is not accessing the website from a blocked country.

If geoblocking would prove wholly ineffective in the future due to technological development, without there being an appropriate and proportionate alternative, alternative solutions that would also cause limitation of freedom of information in public domain countries should be considered. Examples are access similar to that of library computer terminals, or offering subscriber-only access by means of a login protected by a username and password.

95. **26)** Please comment on any additional issues concerning any aspect of online copyright infringement you consider relevant to this Study Question.

n/a

96. **27)** Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

The questionnaire and its answers have been shared and discussed within the Dutch Group, which includes representatives from large and small/medium-sized companies.