CASE 1: COMPARATIVE REMARKS

A newspaper published an article accusing a well-known politician (called by name) of being corrupt. Does the politician have any claim against the journalist, the publisher or the chief editor of the newspaper? If the politician was informed beforehand about the forthcoming article, is he entitled by law to stop the publication? Please distinguish the following situations:

The journalist's statement is not supported by any facts.
The journalist alleged some facts related by a third person, which then turned out to be false.

This is a typical case of defamation by the press, concerning a classic conflict between the freedom of speech and freedom of press on the one hand, and the right to honour and reputation on the other hand. The hypotheses a) and b) reflect two major kinds of offensive statements made in writing: the expression of a mere opinion or value judgment in situation a), and the allegation of facts in situation b).
Three questions are raised in this case: Is there any liability? Which remedies are available? and: Who is liable? Before discussing these issues, the applicable law governing the protection of honour and reputation in the different law systems has to be mapped out.

I. Foundations of liability

A first distinction is to be made between the European continental civil law systems and the common law of the UK and Ireland.

1. In England, Ireland and Scotland, claims can be made under the tort of defamation developed by traditional common law. A distinction is drawn between a written (libel) and an oral form (slander) of defamation. The former applies to press publications. Liability for libel is strict. Reputation is protected by defamation law as is bodily integrity and property by the law of trespass. Libel does not require any fault or damage to be shown by the claimant but is actionable per se. The lowering of a person in the estimation of right-thinking members of society is both necessary and sufficient. This has to be assessed by a jury. In this regard, it does not make any difference whether the defamatory statement is an expression of opinions or an allegation of facts. This distinction plays a role, however, with regard to possible defences. In situation b), the journalist may escape liability when he/she proves the truth of the defamatory statements.
In situation b), in addition to defamation law the English tort of malicious falsehood and its correspondent Scots tort of verbal injury also apply, insofar as the alleged facts are untrue and the offender acted intentionally.

In England, Ireland and Scotland defamation is primarily a civil tort. Criminal law plays in this regard a minor role if at all. In the continental and Nordic systems, on the contrary, defamation is also (or even primarily) a criminal offence. In many countries such as France, Italy, Finland and Sweden the obligation of paying damages to the victim is a direct consequence of criminal responsibility.

2. As to the legal bases of protection of honour and reputation within the continental and Nordic legal systems two models are highlighted.

(i) In France and Sweden, the solution of the conflict between freedom of press and right to honour has been exclusively left to a special statute. The French Cour de Cassation has made clear that where the Freedom of the Press Act 1881 applies, a concurrent application of the general tort law provisions of the Civil Code is excluded.
Both the French Freedom of the Press Act 1881 and the Swedish Freedom of the Press Act 1949 (which is part of the Swedish Constitution) provide for a paramount position of freedom of press *vis à vis* personality interests. The balance between these conflicting values has been struck by legislation, not by judicial weighing of the constitutional rights. The Press Acts contain detailed criminal law provisions about the publication of defamatory statements. In Sweden, allegations of facts and opinions fall under the same crime of press libel, while in France two separate crimes of defamation by the press exist: *diffamation* applies to allegations of facts, *injure* to all other offensive statements.
In Sweden, the criminal liability for press libel is strict: an intention to offend does not need to be proven, and exculpations are excluded. In France, the criminal liability is less strict: malice is required, but presumed. Furthermore the journalists who made the defamatory statements can exculpate themselves by proving (i) that the alleged facts are true, or (ii) that they have made serious efforts to verify the facts ("*bonne foi*").
A serious obstacle to the protection of persons offended in their honour and reputation who sue under the French Freedom of the Press Act consists in the prescription period of 3 months, within which a detailed complaint must be filed before the criminal court.

(ii) In all the other countries the protection of honour and reputation against offensive press statements results from the combined and concurrent application of a plurality of legal bases by the courts: Constitutions, international conventions such as the ECHR, general tort law provisions enshrined in the national Civil Codes, special statutory provisions of civil and criminal responsibility, Press Acts etc.
In many countries such as Austria, Germany, Italy, the Netherlands, Portugal and Switzerland, the illegitimacy of defamatory publications from the viewpoint of tort law is assessed through a judicial balancing of conflicting fundamental rights: personality rights (honour and reputation) on the one hand, freedom of speech and freedom of press on the other. Whether the one or the other prevails depends on several circumstances, such as the truth of the alleged facts, the extent to which the journalists fulfilled their duty of professional care, and the necessity, proportionality and adequacy of the published statements with regard to the public interest in the subject matter (see II. below for further details).
In several countries such as Austria, Germany, Finland, Spain and Switzerland, to hold a tort/crime of defamation it is necessary to take the victim's notoriety and public function into account. Public figures, especially politicians, must tolerate much harsher criticism than ordinary people.

3. In many legal systems, both of common law and civil law, self-regulatory instruments such as Codes of conduct play a major role in determining the duties of care of press organs and therefore their civil liability. Sometimes self-regulatory instruments also provide for methods of alternative dispute resolution, which may precede, accompany or integrate the ordinary tort liability proceedings. This is e.g. the case of the Belgian *Raad van de Journalistiek,* the English Press Complaint Commission, the German *Presserat* and the Swiss Press Council.

II. Infringement of honour and reputation

1. Situation a)

The blunt affirmation that a politician is corrupt, without any factual reference, may be interpreted in two different ways: as a mere expression of opinion or value judgment, or as an unsubstantiated accusation. All legal systems considered agree on that the accusation of corruption - which is a criminal offence - cannot be made without any reliable factual support, not even in the political debate. The vast majority of countries acknowledge in situation a) an unlawful infringement of the politician's reputation.
In most legal systems, the distinction between opinions and value judgments on the one hand, and allegation of facts on the other, does not seem to be relevant for the solution of the present case. This distinction only plays a role in Germany and Switzerland. In both countries, the statement in question would be considered the expression of an opinion or a value judgment. However, in Germany this expression of opinion would deemed lawful, while in Switzerland the opposite is true.
According to German courts and scholars, in case of doubt whether a statement is an opinion or allegation of facts, it is presumed to be an opinion. Personality rights and media rights have in principle equal rank, but in a conflict of values concerning the expression of opinions there is a presumption that freedom of speech and freedom of press would prevail, at least as far as public figures are concerned. Opinions are deemed to violate personality rights only when they primarily aim at damaging the victim's reputation ("*Schmähkritik*"). This requirement seems not to be met in the instant case.
In Switzerland, opinions or value judgments are only permitted to the extent that they appear factually well-founded. Since the journalist's statement in this situation is not supported by fact, freedom of the press will not be sufficient to justify the infringement on the politician's reputation.

2. Situation b)

If a defamatory statement is supported by facts, the journalists' liability depends first on the proof of truth, secondly on compliance with their professional standards of care.
In every private law system – civil and common law – the defendant journalist is entitled to prove the truth of the statements. If evidence is shown, in most cases this will free him from liability. Stating false facts is not protected by freedom of speech. If evidence is missing, in the strict common law of defamation the journalist is liable. Under civil law fault regimes liability requires malice or negligence. The respective standard of professional care varies from country to country. In Austria and Spain, it is sufficient that a journalist fairly and accurately reproduces an allegation of a credible third party, which does not appear to be false. In all the other countries, a journalist who reports facts delivered by a third party without further investigation commits an wrongful act. Journalists are under a duty to verify their sources of information. In some countries such as Belgium and Germany, the stronger the accusation, the higher the standard of care. In most countries, alleged corruption of politicians is of high relevance for the public discussion.
In most countries, the burden of proof of compliance with the journalists' duties lies with the journalists themselves. They must prove at least to have made serious efforts to verify the facts.
In some countries such as Italy and Portugal, a third aspect plays a major role in the balancing, which is the adequacy of the publication from the point of view of correctness and politeness. Press statement should not contain more than what is strictly necessary to inform

the public, and should be formulated in a way which is the least harmful for the reputation of the persons involved.

III. Remedies

Three main types of remedies are envisaged: damages, injunction, and right of reply.

1. Damages

(i) In most countries, in both situations a) and b) a tort of infringement of the politician's reputation is given. The victim can claim both pecuniary and non-pecuniary damages.
In France, compensation is limited to non-pecuniary losses. The opposite is true in Greece, where compensation for non-pecuniary loss is only possible if the infringement was committed intentionally.
In England and Sweden it is a jury which determines the amount of damages to be awarded. In England, the Court of Appeal may reduce an excessive amount of damages awarded by the jury. Damages under English law can be nominal (symbolic award for the injury itself), general (compensation of non-economic loss), special (compensation for economic loss).
In the Netherlands, in assessing non-pecuniary damages the judge can take into account the profits gained by the wrongdoer in consequence of the publication. However, the victim can only claim either this kind of non-pecuniary damages, or pecuniary damages for loss of profits: a cumulation of the two is not possible.

(ii) In Austria and Spain, according to the majority opinion the journalist's behaviour in situation b) is deemed legally correct, therefore no damages can be claimed. With regard to situation a), however, also in Austria and Spain the protection of the victim's honour prevails, thus the politician can claim both pecuniary and non-pecuniary damages.
According to Spanish legislation, once an illegitimate interference in the right to honour is proven, damages are presumed. Compensation includes pain and suffering, which is to be quantified by taking into account the circumstances under which the statement was published, the circulation of the publication and the benefits obtained by the wrongdoer.
In Austria, a much discussed issue in academic literature concerns the amount of non-pecuniary damages to be awarded for privacy violations committed by the media. The Austrian Media Act sets a maximum limit of 14.535 Euro, which is arguably too small. Criticism is raised also towards the Austrian courts practice, which usually award damages in a notably smaller amount than the one allowed for by statute.

(iii) In Germany, damages can only be claimed in situation b). Both economic and non-economic losses are recoverable, however compensation for non-economic loss is only granted in cases of serious violations of personality rights.

(iv) Exemplary or punitive damages can be awarded in England, Ireland and Scotland. In Greece and Italy the victim of a defamatory publication is entitled by statute, besides pecuniary and non-pecuniary damages, to an additional sum of money, which serves indeed the function of a private penalty. In Greece, this monetary remedy can be claimed against the person responsible for any violation of personality rights under Art. 59 Civil Code, provided the violation was intentional. In Italy, this sanction is specifically foreseen in the Press Act in case of defamation by the press. The amount of the sum varies with the gravity of the offence and the circulation of the publication.

3. Injunction

In Belgium, France, Finland and Sweden, freedom of speech / freedom of press are considered so fundamental that it does not seem possible to impede the publication of defamatory statements by asking for preventive injunction. In Belgium, however, an injunction is possible after publication, to bar the further spreading of a defamatory article.
In all the other countries the victim can also ask for an preventive injunction. In England, a problem arises from the fact that interlocutory injunction is granted by a court, whilst defamation is decided upon by a jury. Therefore, interlocutory relief seems only to be possible in the clearest cases, where any jury would recognise a defamation.
In some countries such as Portugal and Greece, an injunction may be granted after publication as well, to mitigate the injury and prevent future harm. In the Netherlands, the victim who still has an interest to prevent the further spreading of the defamatory statement after publication, can claim for recalling the issues of the newspaper in question.

4. Right to reply

In cases of defamatory factual statements the majority of countries grant the victim of press defamation a right to reply, i.e. to have a rectification published in the same press organ. As a rule, this remedy is available regardless of the defamatory character of the publication. This is a special remedy provided for by the Press Acts.
No right to reply exist in England. A rectification can only be made by the press itself in case of an offer of amends.
In Austria, Finland and Spain, the person aggrieved by a false statement has the right to get it revoked or corrected by the press organ itself. In Spain, the press is obliged to do so within three days after the reception of the claim.
In Finland, Italy and Switzerland, the aggrieved person can also claim for publication of the defamation judgment.

IV. Addressees of liability

In all countries but for Sweden, liability for defamation by the press fall, often differently shaped, on both the journalist and the chief editor and publisher. In Sweden the journalist and chief editor are not liable at all. The only responsible persons, also from the viewpoint of criminal law, are – one after the other, in a chain – the publisher and their substitute, the owner of the newspaper, the printer and distributor. Their liability is strict. The owner can always be sued besides the publisher or their substitute.
Also the joint liability of the author, editor, publisher, printer, distributor and seller under English and Scots law is strict, but several defences are available. In particular, printers, distributors and sellers can escape liability by proving innocence in dissemination of the publication.
In Austria and Greece, liability of the owner of the newspaper is strict, while the one of the journalist is based on negligence. In Austria, the publisher's liability follows the one of the owner, while in Greece both the publisher's and the chief editor's liability is fault-based.
In Germany, injunction can be claimed against any person who objectively contributed to the offensive act (author, chief editor, publisher, distributor etc.), independently on fault, whilst

liability for damages always requires negligence. The publisher's negligence, however, is presumed.

The journalist, chief editor and publisher are jointly and severally liable in Finland, Germany, Italy, Portugal and Spain. In most countries their liability is fault-based. In Portugal, the owner of the newspaper is only liable if the article was published with the knowledge and without the opposition of the director or their substitute. The burden of proof of knowledge and lack of opposition lies with the plaintiff.

In Italy, only the chief editor and the publisher can be sued for injunction and rectification, while only the journalist is addressed by the punitive reparation mentioned under III. 2. (iv). For damages, however, all these persons are jointly and severally liable.

In France, liability is *en cascade* like in Sweden: the directors, editors, writers, printers, vendors and distributors are called one after the other, in function of their rank. A similar rule applies in Belgium, where the publisher, printer and distributor are not liable if the writer is known, and the distributor is not liable if the publisher is known. In Belgium, employed journalists enjoy a special protection: they are only liable in case of serious and deliberate offence or recurrent negligent conduct. Slight negligence is not sufficient. The employer's vicarious liability is quite controversial in Belgian scholarship.

CASE 2: COMPARATIVE REMARKS

A law professor was convicted by a court of having committed a crime. The day after the judgement, the case was published in a newspaper mentioning the professor's name. Is there any claim of the professor against the newspaper? Distinguish the two following situations:

The crime consists of causing the death of a person in a car accident due to drunken driving.

The crime consists of promising female students grades in exchange for sex.

The core question in this case is when and to what extent criminal offenders should be granted anonymity in press reports concerning their crimes. Here freedom of press, freedom of information and the public interest may clash with the offender's privacy rights.
The crimes contemplated by the hypotheses a) and b) significantly differ in context and gravity. In situation a), the crime is committed by negligence or recklessness, and is not related to the offender's profession. In situation b), the crime is committed intentionally and during the exercise of the offender's profession. From the viewpoint of social damage *tout court*, the crime under a) may be considered more serious than the one under b), because of the highest rank of human life in all European legal systems. From the viewpoint of the offender's social and professional reputation, however, the disclosure of the offender's identity in situation b) is likely to cause a greater scandal and therefore a greater damage to the offender than in situation a).
In most legal systems no claims would be available to the offender in neither situation a) nor b). In Greece, the offender has a claim in both situations. In Switzerland, the offender has only a claim in situation a).

I. Prevalent solution: no claim

In the UK, as a rule only the victim's anonymity is considered worth of protection. In rare and exceptional cases, also the offender could be granted anonymity in consideration of special circumstances, in particular his/her minor age. However, these exceptional circumstances are not given in the present case.
Within the civil law family, only few countries provide for a statutory regulation of the "right to anonymity" concerning media reports in criminal matters. A remarkable example is § 7 Austrian Media Act. This provision bars the disclosure of a criminal offender's identity in the media if such disclosure would cause him/her a durable prejudice, unless the public interest in the disclosure, considered the offender's position in public life, prevails. In the Austrian courts practice, the "position in public life" requirement is interpreted quite broadly, so that no right to anonymity is acknowledged for upper class adults such as university professors.
In most legal systems, the limits of good journalistic practice in reporting about crimes are to be defined by case-law or self-regulatory instruments. Remarkable examples of self-regulation are the guidelines of the Swiss Press Council and the Finnish Council for Mass Media. A directive of the Swiss Press Council makes an exception to the principle of anonymity and to the protection of the private sphere "where the individual exercises a political mandate or an important public function and he is pursued for having committed acts incompatible with such functions". According to the guidelines set by the Finnish Council for Mass Media for the disclosure of the personality of criminals, the publication of the offender's

name must be justified by a "considerable public interest". This requirement is usually met if the offender enjoys a high social position such the one of a university professor.
In many countries, the gravity of the crime and the social position of the offender may play a role in the judicial determination of the boundaries of lawfulness of press reports. This is true e.g. in Germany: the more serious the offence, and the higher the offender's position in society, the more intensively the press may report on the crime. Accordingly, in situation b) a broader report could be justified than in situation a). Even in situation a), however, the publication of the offender's name would probably be allowed in Germany.
In most countries, the press may mention the name of the offenders when reporting on crimes. Given the strong public concern in these facts, as a rule freedom of the press prevails when balanced against the offender's privacy and re-socialisation interests. The latter may only prevail if the report is published long time after the conclusion of a criminal trial (see case 3). This is not the situation of the present case, where the facts were reported the day after the offender was convicted in court. In this situation, as long as the only intrusion into the offender's private sphere consists in the publication of his/her name, the offender would not have any claim. Legal remedies may only be granted if the report discloses other, unnecessary details about the offender's private life, or otherwise exceeds the limits of a fair and accurate report (see case 1).

II. The Greek and Swiss model

A general right to anonymity of the offender, barring the disclosure of his or her identity in the mass media since the very moment of the perpetuation of the crime, seems to be acknowledged only in Greece and Switzerland. In both countries, the rule is that reports about crimes must be relates in an anonymous form. The publication of the offender's name in principle enables him/her to claim under the specific causes of action for injury to personality under Art. 57 Greek Civil Code and Art. 28 Swiss Civil Code.
In Greece, no justification on grounds of the public interest is acknowledged in this kind of cases. The publication of the offender's name is deemed in general not necessary in order to inform the public. Therefore, a claim for pecuniary and non-pecuniary damages would be allowed to the offender in both situation a) and b).
In Switzerland, the public interest in being informed may justify the personality infringement consisting in the publication of the offender's name. The public interest has to be balanced against the offender's privacy interests according to the principle of proportionality. In situation b), the mention of the professor's name may be in the public interest as it may prevent the professor from committing further similar offences, since all of his female students would be aware of his actions. On the contrary, in situation a) the public interest will be equally reached if, rather than publishing the professor's name, an impersonal reference such as "a professor of law" were used. Therefore in this situation the professor would have a claim for damages. He also may request a declaratory judgment holding that the publication is unlawful where the trouble caused by the infringement persists.

CASE 3: COMPARATIVE REMARKS

A detailed report containing names and photos of several paedophiles convicted by criminal courts is published in a high-circulation magazine. One of the paedophiles, Larry, was convicted three years ago. He was released from prison a week later after this publication.
Can Larry sue for damages?

In broad terms, this case concerns whether or not an individual with a spent conviction has a right to privacy in respect of information relating to that conviction. Specifically, the case considers the extent to which the press can (re-)publish information relating to the spent conviction on the grounds that it is in the public interest to do so. This is the conflict that lies at the very heart of this case – the balancing of the rights to freedom of press and freedom of information with the offender's so-called "right to be forgotten" in the context of his/her rehabilitation.

In one form or another, most countries recognise a "right to be forgotten" in respect of spent convictions. Interestingly, while a statutory version exists in the United Kingdom, most civil law systems have recognised this right at case law. In the UK, the Rehabilitation of Offenders Act 1974 sets out certain time limits after which it is not allowed to report on the spent conviction. In Belgium, Germany, Italy, the Netherlands and Switzerland the courts have, at different stages, recognised the rehabilitative interests of the offender not to have information about a spent conviction reproduced in public. In France, there is a dispute as to the exact nature of a "right to be forgotten" (*droit à l'oubli*). The *Cour de cassation* has clearly rejected such a right but it appears that legal scholarship and the lower courts favour a certain form of it. In Finland, reporting on spent convictions is probably not in accordance with good journalistic practices, as defined by the Council for Mass Media.

This right of the offender to be forgotten will invariably be balanced against the right to freedom of expression of the press to report issues that are in the public interest. Depending on the legal system, it appears that up to three factors will play a role in the assessing the public interest – the seriousness of the offence, the length of time since it was committed and whether or not current events necessitate the reporting of the past crime. As regards the first factor, in the United Kingdom it appears that many serious offenders will not enjoy the protection of the Rehabilitation of Offenders Act or the equitable doctrine of breach of confidence. Indeed it seems that this is particularly true in respect of paedophiles where there is "understandable public concern about their re-offending." This factor also seems to play an important role in Austria but not in the other legal systems. In the majority of countries considered, the factors most relevant in assessing the public interest are the length of time since the crime was committed and whether or not reporting the crime is relevant in the contemporary setting. Generally, the interests of the offender in being forgotten increase with the passing of time. However notwithstanding this general rule, French and German jurisprudence declare that certain current events may make it permissible to refer to crimes from the past.

Another factor which will be taken into account in the balancing process is the nature of the information itself. Generally, in those countries which conclude that the public

interest necessitates the reporting of Larry's spent conviction, the publishing of the offenders name is a natural result of this and cannot be complained of. However, in some countries, different rules will apply in regard to the publication of photographs. In France, the publication of Larry's photograph would have to be of genuine contemporary news. Similarly, under German law, criminal offenders are usually regarded as "relative persons of contemporary history". In this respect, three years after the conviction, Larry will no longer be regarded as a public figure and consent will be needed to publish his photograph. Similar considerations will apply in the Netherlands.

The results of this balancing process can be divided into two broad categories. In the first category of countries, as a rule, freedom of press and freedom of information will prevail and therefore the publication will be deemed lawful. These countries include Austria, Portugal and the UK. However, in the UK, the publication might be unlawful if there are special circumstances in the case e.g. if the publication of the information puts the offender's life in danger.

In the second group of countries, the legitimate public interest in the crime is considered to decrease in the course of time, so that after three years since the crime was committed Larry's right to be forgotten will probably prevail. Consequently the publication will be unlawful. These countries include Belgium, Finland, Germany, Italy, the Netherlands and Switzerland. But again, in consideration of special circumstances publication might be allowed. An example is in Germany, where publication might be lawful if current events give reasonable grounds to refer to crimes from the past.

In France, the situation is less clear cut. A "right to be forgotten" is acknowledged by academic literature and lower courts, but the *Cour de cassation* has not yet accepted this doctrine. Nevertheless, in balancing the public interest in the crime against the offender's right to be re-socialised after a spent conviction, a French court might consider the latter as prevailing and declare the publication unlawful. Even in cases where the public interest in the crime will prevail, the publication of Larry's photograph might be unlawful for being no longer a piece of genuine contemporary news.

Taking the above into account, we can look at the question of damages. As already stated, in Austria, Portugal and the UK, Larry will generally not be entitled to damages. On the contrary, in Belgium, Italy, the Netherlands and Switzerland, Larry can claim damages for both pecuniary and non-pecuniary loss. In Finland and Germany, Larry can claim compensation for pecuniary loss only. In France, Larry would probably have a claim for damages (non-pecuniary loss only) resulting from the unnecessary publication of his photograph.

CASE 4: COMPARATIVE REMARKS

A well known author published a successful novel. Its protagonist was a man, depicted as opportunistic, cynical and corrupt, with wicked sexual habits. The detailed description of his life, career etc. corresponded perfectly with a real person -the famous actor X. However, the essential negative features and actions attributed to the character in the novel did not tally with X, they were invented by the author. The novelist himself stressed at various occasions that he just wanted to create the perfect, typical figure of a deceitful intellectual. Moreover, on the last page of the novel he wrote: "All persons in this book represent types, not portraits".

Does the actor X have any claim against the author of the book?

Case 4 deals with the conflict between freedom of the arts and protection of personality. In most legal orders of continental Europe this is a conflict between constitutionally guaranteed fundamental freedoms (Austria, Belgium?, Germany, Italy, Netherlands, Portugal). What makes this case particularly difficult is that this type of key novel ("Schlüsselromane", "romans à clef") may be classified as a borderline case between biography and novel, a so-called "veiled biography".

In the case of a biography, most legal orders would probably follow the Italian model: A biography may only be published with the prior consent of the portrayed person. If we are talking about genuine novels with invented persons and plots, then the freedom of the arts takes priority. In borderline cases such as this one, continental European law orders weigh up the freedom of the arts against the protection of personality. Two criteria are of special relevance here:
Recognisability of the person portrayed. Is this merely a description of a particular type or character – or is it clearly a real person?
Grave invasion of personal privacy. Protection of personality takes precendence over freedom of the arts only if the portrayal of this recognisable person is tantamount to a significant injury to his or her reputation, private life, etc.

It is hard to determine whether in the present case both prerequisites are given. In Germany in the 1960s this was affirmed for the *Mephisto* case, which the present case was modelled on (The First Senate of the German Constitutional Court delivered a split vote). Today, a dismissal of action would be more likely, and the reporters for Austria, Italy and France lean towards the same outcome (based on the general tort law of the Cciv) for their respective countries.

If, however, an injury of personality rights is affirmed, continental European and Scandinavian legal orders provide the following remedies:

injunction barring publication (with the exception of Finland)
economic and non-economic damages in case of default. Negligence would be the avoidable assessment of author and publisher that the portrayal of the recognisable person is covered by the freedom of the arts.
forfeiture?

In England, Scotland and Ireland the case would be subsumed under “defamation law” (libel). The result would depend on the recognisability of X and the damage to his/her reputation by the portrayal in the novel. In England this decision would be taken by the jury. Since the Defamation Act of 1996, the author and publisher would be able to avoid payment of damages in this present case of unintentional defamation by making an offer of amends.

CASE 5: COMPARATIVE REMARKS

After a famous statesman's retreat from politics, his former secretary published a biography revealing many details of his family life. Can the statesman sue the author and the publisher for damages and injunction?

This case deals with the conflict between freedom of expression, freedom of information and privacy in a particular context: the publication of a famous politician's unauthorised biography including details about his private life. Unlike in case 4 (where, if there were a biography at all, it was a veiled one), neither artistic freedom nor defamation plays any role here. Case 5 is a pure privacy case: the core question is to what extent does the public interest in knowing all the truth about a former statesman justify intrusions into his human right to private and family life.

I. The right to privacy: legal bases

Besides its being enshrined in Art. 8 of the European Convention on Human Rights, the right to privacy is acknowledged in most or all national private laws. It finds express or implied recognition in the legislation of many countries. In the UK, the Human Rights Act has given express protection to "privacy interests" as defined by the ECHR. In continental Europe, a right to privacy is expressly laid down in the Greek, Dutch and Spanish Constitution and in the French and Portuguese Civil Code. Furthermore, a right to privacy is implicitly recognised by § 7(1) Austrian Media Act (tort liability for intrusion in someone's intimate sphere - "*höchstpersönlicher Lebensbereich*"), by Chapter 24 Sec. 8 Finnish Penal Code (harmful diffusion of information about someone's private life), and by the Italian and Swiss Data Protection Acts

In Belgium, Germany and Italy a right to privacy has been acknowledged by case law and academic writings. In Belgium, privacy is dealt with as a subjective right protected by the general tort liability clause of the Civil Code. This is true also for Germany and Italy, where, however, privacy has also a constitutional dimension as a specific application of the fundamental right to personality laid down in the Constitution.

II. Balancing privacy against freedom of expression and information

In all countries considered, everybody – including statespersons and other public figures – enjoys legal protection of his/her privacy interests. In principle, information concerning the private and family life of a public figure can only be published with his/her consent, unless there is an overriding public interest in the information. In this particular case, the publication seems *prima facie* unlawful, since it constitutes a break of the bond of trust and confidence between the secretary and the statesman, possibly also giving rise to contractual liability for violation of a professional duty.

Whether or not the justification of an overriding public interest applies, it will be assessed in a case-by-case balancing.

In the UK, this balancing takes place in the framework of the common law of confidence. In the present case, if the facts had not been made public before, the disclosure of private information acquired by the secretary on grounds of a relationship of trust and confidence constitutes *prima facie* a breach of confidence

which entitles the statesman to damages. An overriding public interest in this information could be only exceptionally affirmed. For example, if the statesman had sought publicity regarding his private life before, in order to present himself in the most favourable light, a publication of facts from his family life which puts him in a less favourable light would be allowed.
In continental Europe (including the Nordic countries) there seems to be a wide consensus on that disclosure of facts concerning a public figure's intimate sphere (body, health, sex, love, intimate feelings) only in rare, exceptional cases can be justified by an overriding public interest. There must be a significant connection between the private information and the public function exercised by the person concerned. If this person is a politician, the information must be politically relevant.
In Germany and Austria, freedom of expression and the public interest to information seem to justify a wider range of unauthorised publications of private matters than in other countries. In Austria, § 7(2) Media Act expressly allows publication of even intimate facts about public figures when they are true and "connected with public life". It is uncertain whether the statesman will be granted legal protection in the case at stake.
In Germany, the statesman would probably not have any claim either. In principle, the publication of true but private facts may constitute an infringement on the general personality right, entitling the statesman to claim in tort under the general clause of § 823 BGB. However, in this case the justification of an overriding public interest would apply, since the public has a legitimate interest in knowing about the behaviour of high-profile politicians. Only if most intimate details such as sexual relations are at stake, an overriding public interest in their disclosure can hardly be found.

Also in the Netherlands, public figures seem to enjoy less protection of their privacy than in other countries. According to Dutch case law, if a politician made facts from his family life public before, a renewed publication of the same facts as well as another publication concerning different facts from his family life would be allowed. In most legal systems, on the contrary, a public figure's consent to publish certain facts from his/her private life would never justify as such the publication of different facts. However, in the Netherlands, the publication of the biography in the case at stake would be deemed unlawful.
To summarise: In all countries considered, but for Germany and Austria, privacy interests prevail if balanced against freedom of expression and information in the present case.

III. Remedies

In all legal systems considered, but for Germany and Austria, the statesman would almost certainly be entitled to damages. In Belgium, France and Greece, he would only have a claim for non-pecuniary damages. In the other countries, pecuniary losses are recoverable as well. In some Member States such as Italy, pecuniary losses include a reasonable amount of royalties which the statesman would have been entitled to if he had commercialised his biography himself. In the Netherlands and in the UK, the profits gained by the secretary are to be accounted to the statesman as pecuniary losses. In Switzerland, the politician has a separate claim for restitution of the profits.

In the UK, non-pecuniary damages have also a preventive function. They can be awarded "in order to encourage respect for confidences". Otherwise, damages would be nominal.
In most countries where the statesman has a claim for damages, he is also entitled to injunction. Whether or not this is true for Belgium and France, it is uncertain. French and Belgian law tend to avoid injunctions limiting freedom of expression. For the same reason, no injunctive relief is available in Finland. Here, however, the statesman could claim forfeiture of the unsold copies of his unauthorised biography, if the requirement for the crime of dissemination of private information are met.
In Switzerland, the politician has also the right to request a declaratory judgment of the unlawful nature of the infringement.

CASE 6: COMPARATIVE REMARKS

In a satirical magazine the Prime Minister of the nation is caricatured in a cartoon as a pig copulating with another pig depicted as a judge. Is there any claim of the Prime Minister against the magazine?

In the present case, the right to freedom of expression - in its particular application as freedom of satire - comes into conflict with the personality rights of the Prime Minister, notably his/her honour and reputation.

These rights have to be balanced against each other. In this balancing two factors play an important role: the status of the person caricatured, and the boundaries of legitimate satire itself. As to the first factor, all countries recognise that the Prime Minister exercises a public function and therefore must be prepared to endure criticism, even if it is harsh.

As to the second factor, the core question is whether the criticism expressed in the satire remains at a reasonable level or does it go beyond this level and unjustifiably attack the honour and reputation of the Prime Minister. In the majority of legal systems considered, the criticism in the satirical cartoon in question will probably still be regarded as reasonable, as it relates directly to the Prime Minister's official functions. Therefore, the Prime Minister will not have a claim. However, if the caricature was published in malice and personally attacked the Prime Minister, then there might be a different outcome.

Interestingly, Italy is the only country where the Prime Minister seems to have a claim against the magazine. According to Italian jurisprudence, there is a limit of "formal correctness" which has to be observed even by satirical cartoons, in respect of the fundamental personal rights outlined in the Constitution. Arguably, in this case the satire is "completely impolite" and therefore does not fall under freedom of expression under Article 21 of the Italian Constitution. The cartoon would come under the crime of defamation and the Prime Minister would be able to sue for an injunction and damages for both pecuniary and non-pecuniary loss (see Case 1).

However, the opposite interpretation is also possible. According to the Italian Supreme Court, satirical cartoons are lawful when they express a message coherent with the "quality of the public dimension" of the person caricatured. In the present case, one may argue that the cartoon expresses a specific political criticism coherent with the public position of the Prime Minister, and therefore it is covered by freedom of expression. Consequently, the Prime Minister would not have any claim.

CASE 7: COMPARATIVE REMARKS

Sally took a snapshot of a person X on a market place without asking this person's permission. Is there any claim of X against Sally? Does it make a difference, if
a) X is famous / is not;
b) X is at work / is attending to his private affairs;
c) the picture is published / it is not.

This case raises the question of whether and to what extent individuals have the right to refuse to be photographed in a public place, and to take action against the use – in particular the publication – of those pictures. If a picture is published, the privacy and personality interests of the person portrayed come into conflict with freedom of expression and freedom of press. These interests are to be balanced against each other. The result of this balancing may lead to different results according to the notoriety of the person portrayed or the circumstance that he/she was photographed while attending a professional or a private activity.

I. Legal bases

Many countries deal with this case in terms of a "right to image". In the majority of the continental European legal systems considered, a right to image is expressly or implicitly regulated by statute and finds considerable attention in jurisprudence and academic literature. In France, an exclusive right to one's image was acknowledged by Courts and scholars in the absence of specific legislative provisions. (French Copyright Act?)
In Italy and Portugal, a subjective right to one's own image is expressly laid down in the Civil Codes. In Austria, Belgium, Germany, Italy and the Netherlands, a statutory regulation of the use of one's image is provided for in Copyright Acts. Unlike in the former countries, in the Netherlands courts and scholars seem to avoid to speak of a "right to image": they simply refer to privacy and personality rights.
In many countries, the right to image was born as a pre-constitutional subjective right, but then in the course of time it has gained a constitutional dimension. In Spain, both the Constitution (Art. 18) and a special statute (Ley Organica) of 1982 expressly protect the "fundamental right to honour, privacy and image". In Germany, Switzerland, Italy and Greece, the constitutional rank of the right to image has been deducted from its being embedded in the general constitutional provisions protecting one's personality.
A right to image is not acknowledged in the UK nor in Finland. In the UK, the present case is dealt with under the law of confidence/privacy. In Finland, protection against the taking or use of one's own image is granted only either within the narrow scope of the crimes of defamation and disclosure of private information under the Penal Code, or when a person's image has been commercially exploited. In the latter case, Finnish courts and scholars acknowledge the violation of a right existing without a separate provision of law, which entitles its holder to sue the wrongdoer in tort.
In Italy, Switzerland and the UK, a further legal base engaged in this case is data protection law. A person's image can be seen as a personal data, and its photographic reproduction as a processing thereof. In Italy and the UK, data protection law and

copyright law appear to be conflicting legal formants which lead to some uncertainty in the solution of this case, as it will be explained below.
To assess the lawfulness of Sally's conduct in the legal systems considered, a first distinction is to be made between the mere taking of a photograph and the dissemination thereof.

II. The mere taking of photographs

In most legal systems considered, there is no specific regulation on the mere taking of one's image. The boundaries of lawfulness of this conduct are to be deducted logically from the rules governing the use (in particular, the publication) of one's image, laid down e.g. in the Copyright Acts.

1. First model: No photographs without consent

In France, Germany, Greece, Spain and Switzerland, the taking of a picture specifically focussing on a person without his/her consent is considered a violation of his/her subjective right to image or general personality right. This makes Sally's act unlawful, unless a specific justification applies. Such justification may be based on the person's notoriety (see IV. below) or the public or professional nature of the activity attended by the person photographed (see V. below). Where these circumstances allow the unconsented publication of photographs (see III. below), they also allow the taking of the photographs.

2. Second model: Photographs in public places are in principle allowed

Under Austrian, Belgian, Dutch, Finnish, Italian, Portuguese and UK law, in principle a person may be photographed in a public place without his/her consent. No distinction is made in this regard between famous and non famous persons.
The principle according to which a person may be photographed in a public place without his/her consent may be subject to exceptions in consideration of the special circumstances under which the photo is taken. In Finland, Sally would only commit an unlawful act if the requirements of the crime of defamation are met. This would be for example the case if someone is photographed under "humiliating or awkward circumstances", e.g. being drunk and sleeping in the street. To a similar result would one probably come in the Netherlands and Portugal, but on a different legal path. In these countries, under exceptional circumstances the taking of a photograph could be considered a violation of personality rights.
In the UK, established case law regards the mere taking of a person's photograph in a public place as allowed. Photographs seem to be treated differently than films. In an English case where a person had secretly filmed another person, a breach of confidentiality was acknowledged on the ground that it was not open to those who were subject of the filming to take any action to prevent it.[1] However, it is difficult to understand why the same reasoning should not be extended to the taking of photographs. The traditional English approach to photographs taken in public places is probably not conform with the Human Rights Act. At least in cases of harassment by the photographer in the sense of the Code of Practice of the Press Complaint Commission (clause no. 4), the taking of the photograph could hardly be deemed

[1] *R. v. William Loveridge and Others* [2001] 2 Cr. App. R. 29, 591 at 599, per Lord Woolf.

lawful. Furthermore, according to the Data Protection Act 1998, the data subject has a right to be informed about which data is being processed. Exemption from the data protection rules are provided only for specific categories of journalism and library work. From the facts of this case, none of these exception applies, thus Sally could be considered in breach of statutory duty because she failed to process X's data properly.
Also in Italy, the Data Protection Act seems to bar the taking of photographs without the authorisation of the person portrayed. Processing of personal data always requires the person's consent. Exemptions are provided only for journalists, or for data gathered by a natural person in the course of a purely personal activity. The latter exemption may apply to Sally. However, in practice the Data Protection Act is hardly applied by Italian courts in cases of this kind. They continue to be dealt with under the Italian Copyright Act 1941. The latter Act only bars the dissemination, not the taking of the photograph as such.

To summarise: The mere taking of X's photograph under ordinary circumstances would be allowed in Austria, Belgium, Finland, Italy, the Netherlands, Portugal and under traditional UK law. In this regard it is irrelevant whether X is famous or not. On the contrary, in France, Germany, Greece, Spain, Switzerland (and possibly under the UK Data Protection Act), the taking of X's photograph is in principle unlawful. Exceptions are made in consideration of the circumstances of the case, such as X notoriety or the professional nature of the activity he is attending.

III. The publication of photographs

With regard to the publication of photographs of a person taken without his/her consent, a distinction can be made between three models: the European continental, the British and the Nordic model.

1. The European continental model

The European continental model focuses on the principle of consent. A person's image can only be published with his/her authorisation, unless a specific justification applies. A first question may be raised about what "a person's image" is. A distinction is commonly made between pictures actually focusing on a person, and topical portraits, i.e. pictures of places or events not focusing on the single persons who happen to be there. In general, the principle of necessary consent only applies to pictures focusing on a specific person. The case law in France has sometimes followed a stricter rule: when the persons occasionally photographed in topical portraits are identifiable, their consent will also be necessary. A similar rule seems to be followed in the Netherlands, where a person's photograph is considered a portrait in the sense of the Copyright Act if the facial features are recognisable.
As to the patterns of solution of the present case, the continental European countries may be divided in two main groups:
(1) In Belgium and France, neither personality rights nor specific statutory exemptions seem to be engaged in this case. The Belgian Copyright Act of 1994 simply bars the reproduction and publication of a person's image without his/her express authorisation. The absoluteness of this rule is softened by case law through presumptions. In particular, the consent of persons portrayed in public places will always be presumed.

In French case law, the "incidental position" of the portrayed person in the picture, his/her public function or notoriety, his/her being photographed in a public place, attending a professional activity etc., are circumstances which may justify a publication without the person's consent only if they occur cumulatively. None of these criteria alone will be sufficient.

(2) In Austria, Germany, Greece, Italy, the Netherlands, Portugal, Spain and Switzerland, personality rights and/or special statutory provisions play a decisive role in the solution of this case. Within this group of countries, a distinction can be made between three models:

In Germany, Italy, Portugal, Spain and Switzerland, specific statutory exemptions to the principle of necessary consent are provided in Civil Codes (Portugal), Copyright Acts (Germany and Italy), Data Protection Acts (Italy and Switzerland) or other special statutes (Spain). These provisions allow publication without the consent of the portrayed person in consideration of his/her notoriety and social position, his/her being in a public place, his/her being involved in facts of public interest, or other reasons e.g. of police, administration of justice, science, culture and education. However, if one of these exemptions applies, this does not automatically makes an unauthorised publication licit. Even if these requirements are met, a publication may be deemed unlawful on grounds of violation of personality rights, in particular the right to privacy. Thus a balancing between personality rights and the public interest will always be needed.

Also in Austria and in the Netherlands, this case will be solved by a personality rights-based balancing embedded in the interpretation of Copyrights Acts. However, the Austrian and Dutch Copyright Act follow a significantly different pattern than the German and Italian ones. They are based on general clauses considering the use of a person's portrait without his/her consent unlawful when it infringes his/her "reasonable" or "legitimate interests". In Austria, this requirement is met in case of violation of privacy and other personality interests, unless the latter are outweighed by conflicting interests such as free speech or the right to be informed. In the Netherlands, the scope of personality protection is narrower: photographs taken in public places may always be published unless they are indecent or harmful for the honour, reputation or safety of the person portrayed.

In Greece there is no detailed statutory regulation of the use of one's image. However, the Greek solution of this case very much resembles the common pattern outlined above: The publication of a person's photographs without his/her consent constitutes a violation of his/her personality right, which has to be balanced against freedom of press and the public interest, taking into account all circumstances of the case.

2. The common law model

According to the traditional British approach, there is no right to prevent the reproduction and publication of photographs in which one does not own the copyright. However, the Human Rights Act requires to protect privacy interests, and the UK case law has embedded this protection in the common law of confidence. The principle has been established that even in public places there may be a reasonable expectation of privacy. A balance is to be struck between privacy and freedom of expression taking into account all circumstances of the case, in particular the public interest in the photographic information. The more intimate the aspect of private life interfered with, the more serious must be the reason for interference before the latter can be legitimate.

3. The Nordic model

The Finnish perspective is strongly focussed on criminal law. In this case, tort liability only arises when the photographs and/or their publication meet the requirement of the crime of defamation. Otherwise, pictures taken in public places can always be published without the consent of the persons portrayed.

IV. The notoriety of the photographed person

In all legal systems considered, celebrities or other public persons enjoy lesser protection than ordinary citizens. This is due to the greater public interest in the information about the protagonists of public life.
In Germany, Italy, Portugal, Spain and Switzerland, the position in public life of the portrayed person finds express consideration in the above mentioned statutes regulating the use of one's image, as a cause of exemption from the consent requirement. In Germany, moving from the interpretation of the notion of "situations of contemporary history" (see Art. 23 Copyright Act), scholars and Courts have developed the concepts of "absolute" and "relative persons of contemporary history". This distinction was recently adopted by the Swiss Federal Court as well. "Relative persons of contemporary history" are individuals who, although not being celebrities nor exercising a public function, nevertheless become object of public interest for their being involved in events reported in the news. Their personality interests are considered worth of a more intensive protection than the one of absolute public figures.
All legal systems considered acknowledge that even the person most exposed to the public should be entitled to legal remedies against the publication of photographs which are harmful for their honour and reputation, unless there is an overriding public interest in such information. This is the absolute minimum of personality protection. In Finland, protection against photographs taken in public places stops here. The vast majority of countries go a step further and bar at least the publication of pictures which are embarassing, indecent or concern a person's most intimate sphere (e.g. naked photos). In the Netherlands and Portugal, personality protection in public places stops here. The other countries go a step further and include in the hard core of personality protection also a certain degree of privacy which goes beyond the decency and utmost intimacy. In the end, the common core probably coincides with the recent outcomes of the English case law on privacy: Even celebrities shall be protected in situations where there is a reasonable expectation of privacy, no matter whether their photographs are taken in private or public places.
The question most relevant in practice is to what extent the public interest in the information regarding public figures justifies the publication of photographs from their private and family life. In the light of the ECtHR judgment in the *von Hannover* case,[2] it should be questioned how far the traditional approaches of the legal systems considered are conform with the Human Rights Convention. Both issues will be dealt with in case 8.

V. Persons photographed at work or attending private affairs

[2] ECtHR, 24 June 2004, *von Hannover v Germany,* application no. 59320/00, full text available under http://cmiskp.echr.coe.int

In many countries, the outcome of this case may vary according to whether X is photographed at work or attending his/her private affairs. In general, less protection is accorded to the former situation. In most countries, the mere fact that X is photographed at work will not justify a photo publication alone. It is just one of the elements relevant for the balancing of conflicting interests.
Under Spanish law, while taking and publishing photos from X's private life is normally unlawful, photos of X at work will always be allowed. In Switzerland, on the contrary, photographing a person at his or her workplace will be considered an invasion in this person's private sphere, which is in principle unlawful.
In other countries the solution is less clear-cut. In Germany and Italy, if X exercises an official function connected with the public place where he/she is photographed (e.g. a palace guard), the taking and publication of photos may be allowed even when the pictures specifically focus on X. In Germany, this result is based on the assumption of the tacit consent of the person photographed. This tacit consent however will not legitimate a commercial publication of the photo. (The problems of commercial exploitation of one's image will be dealt with in case 10.)

VI. Remedies

If Sally's act is deemed unlawful, in all legal systems considered X will be able to claim both damages and injunction.
Damages will mostly include pecuniary and non-pecuniary losses. In Greece, only non-pecuniary losses are recoverable. In the Netherlands, the amount of pecuniary damages due coincide with the profits earned by Sally from the publication.
In the UK, X can claim damages both under the law of confidence and under the Data Protection Act: the awards will be cumulated. Injunction against publication will not be easily granted.
In Finland, an unusual system of remedies is foreseen in situations where X is photographed at work and the picture is used for commercial purposes. These cases are regulated by the Finnish Act on Unfair Business Practices. In such situations, X can claim injunction before the Finnish Market Court, but he/she can claim damages before the ordinary civil courts. Pure economic loss is only recoverable if there are "especially weighty reasons for compensation".

CASE 8: COMPARATIVE REMARKS

With a strong telephoto lens, a paparazzo took a photo of a famous princess, sitting in the garden of her private villa together with her new lover and her little son. The picture was published on the cover of a tabloid, under the heading: "The Princess' New Family".
a) Can the princess skim off the profits the magazine earned due to the publication of her photo? If yes, is the magazine under a duty to disclose the necessary information?
b) Would it make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant?

While case 7 deals with all possible claims of persons - both celebrities and ordinary citizens - photographed in public places without their consent, case 8 specifically focuses on damages claims of celebrities photographed in places which are clearly private, or on the borderline between public and private. Cases like this are frequently brought before court all over Europe. Two main questions arise: How is the conflict between privacy of celebrities and freedom of the (tabloid) press to be solved? If the former interest prevails and the celebrity has a claim for damages, how are the latter to be assessed?

I. Privacy protection inside one's home

In all countries considered it is unlawful to photograph people inside their homes with the help of a strong telephoto lens, even if these people are famous princesses. Continental European legal systems will acknowledge an unjustified violation of the right to privacy and/or image of the portrayed person. Under UK law, a breach of confidence will be affirmed. In many countries, the paparazzo will also be in breach of statutory or professional duties. Some self-regulatory instruments such as the British Code of conduct of the Press Complaint Commission expressly disallow the use of telephoto lens in private places. Finally, in some countries such as Finland and Belgium the paparazzo will also be criminally liable.
In most legal systems the unlawfulness will affect not only the paparazzo's conduct but also the publication of the photos by the magazine. This seems not to be the case in Austria, where probably only the paparazzo will be liable in tort. No claim under the Austrian Copyright Act is given against the publication of photographs of celebrities unless the publication amounts to a violation of their honour, dignity or utmost intimacy. This requirement is traditionally held not to be met when people are photographed while sitting in their garden with all their clothes on.

II. Privacy protection in semi-public places

Restaurants are in principle public places, but they can offer more or less privacy to their clients. People sitting in a terrace pizzeria in a crowded city square are of course more exposed to the public eye than people sitting in the back garden of a countryside restaurant. Most legal systems take account of such differences in balancing the privacy interests of celebrities against the freedom of the tabloid press. A "common core" seems to be the British rule, according to which private places may include public places where there is a reasonable expectation of privacy. Whether or not a certain place meets this requirement, it can only be assessed on a case-by-case basis

taking into account all circumstances. For example, in England it may play a role whether or not the princess was aware of courting publicity while going to the restaurant. If yes, the information in question will not be a confidential one.
Also the Dutch Civil Code makes use of the general notion of reasonableness to distinguish the privacy interests which are worth of legal protection from the ones which are not. However, the Courts practice in the Netherlands leads to different results than in the UK. In the Netherlands it seems to be always allowed to publish unauthorised photos of celebrities in public places, unless they are defamatory or indecent.
On the contrary, in most legal systems considered the publication of the photo of the princess sitting in the back garden of a country restaurant will be deemed unlawful. The publication gives rise in Finland to criminal liability and accessory tort liability; in the UK to liability for breach of confidence; in Belgium, France, Germany, Italy, Portugal and Switzerland to civil liability for violation of both image and privacy rights.
The pattern of solution of the present case in Italy, Germany and Switzerland is basically the same. However, Italian scholars and courts have relatively soon rejected privacy definition formulated in spatial terms, preferring to draw the borderline between public and private places only on the basis of value judgments. On the contrary, German and Swiss courts have followed a spatial criterion. Accordingly, it is unlawful to intrude into the privacy of celebrities in situations of "spatial isolation", in which it is obvious that the persons in question want to be alone and act as they would not do in public. In a famous German case, Princess Caroline was photographed while having a meal with her new lover in a dimly lit restaurant. The particular light conditions were considered decisive by the Supreme Court, which allowed the princess to recover damages from the magazine. This has sparked some criticism among scholars, who spoke of a "30 Watt case-law" to point out the vagueness and arbitrariness of this kind of distinctions between licit and illicit photo publications.
To summarise, in most legal systems considered the princess would enjoy the same privacy protection at home and in the back garden of a countryside restaurant. The opposite is true for Austria, the Netherlands and Spain. The last three countries base their result on the same grounds: the princess is a public person, the restaurant is a public place, and the act of sitting on a table having a meal has nothing strange, defamatory or indecent.

III. Privacy and image rights of celebrities after the von Hannover judgment

The traditional national approaches outlined above and in case 7 will have to be brought in conformity with the decision of the European Court of Human Rights in the *von Hannover* case. From the viewpoint of results, the ECtHR has followed the French and Belgian model: Photographs concerning a person's private life can only be published with the person's consent, even in case of celebrities portrayed in public places. From the viewpoint of legal bases, however, the ECtHR has obviously focused on the right to privacy and not on the right to image, because only the former is laid down in the ECHR.
The ECtHR has set clear rules on how to balance privacy against freedom of speech: The latter only prevails if the publication concern information relevant to the public debate e.g. political issues. The mere curiosity of a particolar readership is not a legitime ground for intrusion into the private life of celebrities.

To be brought in harmony with Art. 8 Human Rights Convention as interpreted by the ECtHR, the German and Swiss case law will have to abandon the above spatial conception of privacy, and interpret much more restrictively the justification of an overriding public interest in private information about celebrities. Dutch law will have to broaden the interpretation of the statutory notion of "reasonable interests" so as to include all situations from a person's private life not concerning issues of public debate. The same is true for Austrian and Spanish law with regard to the notions of privacy and intimacy.

IV. Damages and account of profits

In almost all countries considered, when the publication is deemed unlawful, the princess has a claim for damages against the magazine. In Austria she can probably only claim damages (and injunction) against the paparazzo.
As to the compensation to be granted by the magazine, in France and Greece it is limited to non-economic losses. In the other legal systems, both economic and non-economic damages are recoverable. In most countries the profits made by the magazine through the unconsented exploitation of the photograph will be taken into account in the assessment of damages.
A complete restitution of the profits seems to be possible in Belgium, Germany, Portugal, Spain, Switzerland and the UK. In the UK, a restitutionary remedy was developed in equity on the basis of the principle that the profits made by exploiting a confidential information belong to the owner of the information. A substantively similar rule applies in Belgium, where the princess can recover as economic losses the profits she would have made if she had commercially exploited her image herself.
In Germany, the princess can only claim restitution of the profits if the editors of the magazine knew or negligently did not know the publication was unlawful. If no fault can be attributed to the editors, the economic loss recoverable will be limited to a fictitious license fee the magazine would have had to pay for the use of the photographs. The German case-law solutions as to the skimming-off of profits have been followed also by Portuguese scholars.
In Spain, according to a specific statutory provision the benefits obtained by the tortfeasor are one of the criteria to be followed in assessing the damage for violation of one's right to honour, image and privacy. A similar rule is acknowledged in the Netherlands and in Italian case law. However, in Italy and in the Netherlands the application of this rule in the Courts practice does not seem to grant a complete restitution but only to a partial re-allocation of the profits.
In Germany, Spain and the UK, the magazine is under a duty to disclose information about the amount of profits made through the unlawful publication. In the other legal systems no duty of this kind is acknowledged, although in some countries such as Italy procedural mechanisms are provided which could be applied in order to reach this result.
In Finland, the princess cannot skim off the profits gained by the magazine. The latter, however, can be forfeited by the State as profits of crime.

CASE 9: COMPARATIVE REMARKS

Susan and Robert sold a photo of their four year old daughter Lily, running naked on the beach, to a sun cream manufacturer. The photo appeared in several magazines as an advertisement for the products of that firm. Kevin scanned the photo and put it on the Internet on a site called "naked.little.girl.com". Can Lily claim damages from Kevin? Is there a liability of the Internet provider.

This case revolves around the unconsented use of a minor's photo on an internet website. However, prior to this, the photo in question was published legally in several magazines as an advertisement for a suncream manufacturer. Therefore, the case concerns the right to one's image in the context of a photo which is already in the public domain. In particular, does prior lawful publication mean that a third party can subsequently make use of the photo for his/her own purposes without seeking consent? In this framework we consider two questions. Firstly, can Lily sue Kevin for damages for the unauthorised use of her photo? Secondly, is there liability on the part of the internet provider?

Lily enjoys protection of her right to image in most of the legal systems considered. The fact that she is a minor is irrelevant. However, from a procedural point of view, it is her parents who will take an action on her behalf. Almost all national reporters consider that the publication of Lily's photo, without consent, is an unlawful act on the part of Kevin and constitutes a civil wrong and/or a criminal offence. In this respect, in most legal systems, it does not appear to make a difference that the photo had already been published prior to Kevin's use of it. One exception is possibly the common law, where it appears that Lily would be in a more favourable position to claim breach of confidence if the photo had not already been in the public domain. For the legal bases of right to image claims, see cases 7 and 8. In this respect, depending on the legal system, Lily can successfully sue Kevin on the basis of general personality rights provisions (as set out in civil codes and/or case law), copyright law and/or common law torts and equitable doctrines.

In most countries, the damages awarded will be in the form of compensation for non-economic loss. Indeed, in order to claim damages for economic loss, it would have to be shown that Lily and her parents lost the opportunity to exploit the image themselves – which would seemingly not be possible under the facts of this case. In Germany, it is necessary to show a "serious infringement" of personality rights in order to claim compensation for non-economic loss. In this case, it appears that Kevin's publication would be regarded as such a "serious infringement" because it involves a naked photo and a "less than innocent" context. Therefore, Lily can claim for non-economic loss. Although, interestingly, she may receive less than an adult in the same situation because the facial features of a child will change over time and become less identifiable.

The only legal system in which Lily can probably not claim damages is Finland. There Lily could only sue Kevin if the publication was defamatory or was used for commercial purposes. Since the photo in question is not a pornographic picture (because it was published in an advertisement) and since Kevin's website does not appear to have a commercial purpose, then Lily does not have a claim. Interestingly,

even if there was other pornographic material on the website which made Kevin criminally accountable, this would not be grounds for civil liability.

The question of liability of the internet provider is a separate and distinct issue to that of Kevin's liability. The answer is similar across most legal systems due to the implementation of the E-Commerce directive. If the photograph in question is deemed to be unlawful and the provider has actual knowledge of its existence, then it can be sued for an injunction.

CASE 10 COMPARATIVE REMARKS

An electronics company used the photo of a famous tennis player, depicted in action during a tournament's match, for advertising. This photo was well-known, as it had appeared in the press some years earlier. In the advert, just three words ("Energy, "power", "Speed") and the name of the company were written underneath the photo.

Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?
Do the damages comprise skimming off the profits earned by the company through using the photo?
What would be the result if the famous tennis player was dead prior to the publication but had a surviving spouse and child?

This is the first case which deals exclusively with appropriation of personality for commercial purposes. In contrast to case 9, there is a shift in focus from privacy interests to publicity interests. Indeed, at first glance, there is no obvious damage to the honour or reputation of the tennis player as this photo was taken at a public event, had already appeared in the press and the advertisement consists of just three neutral words under his photo. In this case, we see a marked difference in approach between the civil law legal systems and the common law systems and Scotland. The tennis player has a claim in all of the civil law countries. However, the outcome is far from certain in the common law and Scotland.

I. The plaintiff's claim

The tennis player will be entitled to a preventative injunction and compensation in all of the civil law legal systems considered. This will be achieved through the use of general tort law and special copyright provisions. There are two deciding factors in ascertaining the unlawfulness of the defendant's conduct. Firstly, the photo was used for purely commercial purposes and this excludes the defence of freedom of expression or public interest. Secondly, the photo was published without the consent of the tennis player. In this sense, even though the picture was taken at a public event and was well-known, publication in such a manner will not be allowed.

In England and Scotland, the tennis player has less options in terms of causes of action. He can only proceed on the basis of defamation and/or passing off. Copyright does not play a role as it is the photographer who owns the copyright. Even though there is case law to support the use of defamation in such a scenario, it is unlikely that the plaintiff would be successful with this action, given that, on these facts, it is difficult to prove damage to reputation. Traditionally, the use of passing off has also proved somewhat troublesome. However, recent case law has suggested a less restrictive approach to pleading the tort. Nevertheless, in this case, the plaintiff would have to prove that he enjoyed significant goodwill at the time of publication and that the publication led a substantial proportion of the market to believe that the product had been endorsed by the plaintiff. In this particular case, the advertisement in question contained a well-known and unaltered photo of the plaintiff at a tournament match with three neutral words underneath. It might be difficult to conclusively prove

that a significant proportion of the market saw an endorsement link between the plaintiff and the company. Nonetheless, if successful with these torts, the plaintiff would be entitled to damages under defamation and an injunction and/or damages under passing off.

II. Damages awarded

The question of damages is of significance in this case because of the publicity interests involved. In this respect, the form of damages and the method of award should differ considerably from cases involving pure privacy interests. If these publicity interests are seen as having proprietary characteristics in the individual legal systems, then the damages awarded could conceivably be similar to damages awarded in breach of intellectual property cases i.e. compensation for the property owner's lost profits and disgorging the unjust enrichment on the part of the defendant.

In the first instance, it is clear that most legal systems appreciate a difference between privacy interests on the one hand and the commercial nature of this case on the other. Indeed, for the majority of countries, the loss in this case is solely economic. The only exception to this general observation is Greece where there does not seem to be a possibility to claim damages for economic loss. However, damages for non-economic loss appear to be recoverable, even in purely commercial cases. (Belgium??)

The majority of civil law legal systems consider that the plaintiff can claim for the lost opportunity of earnings resulting from the publication of his photograph. In France, while there might not be a distinct divide between economic and non-economic damages, in such cases, courts have implicitly awarded damages for the lost earning opportunity. In most countries, this award will usually be calculated on the basis of a hypothetical license fee. In the common law countries and Scotland, it is more difficult to assess how the damages will be gauged in an individual case. If the plaintiff is successful with the action in defamation, then restitutionary damages will not be available. With respect to passing off, the goodwill of the plaintiff will be treated as a property right. Therefore, he can claim damages for a lost opportunity of earnings. This is calculated either on the basis of what the plaintiff usually charges for such adverts or on the basis of a reasonable endorsement fee determined by the court.

Only some of the legal systems consider that the plaintiff will have a claim in respect of skimming off the profits made by the defendant. However, in some systems, there are certain requirements attached to the granting of this remedy. In Germany, it is only possible provided that the plaintiff does not resist the commercial use of his personality in general. The Dutch courts will allow a skimming of profits but it cannot be awarded in conjunction with damages for a lost earning opportunity. It also seems likely that this remedy would be granted in Austria, Belgium, Portugal, Spain and Switzerland. The possibility of seeking this remedy is categorically ruled out in Finland, France and Greece. In the case of England, Italy and Scotland, in principle, the remedy will not be entertained. However, the court may, on its own discretion, take the profits into account when assessing damages.

III. Post mortem appropriation of personality

As a matter of principle, personality rights are connected to the living individual and therefore cease to exist on the death of that person. It is for this reason that the issue of *post mortem* appropriation of personality is noteworthy in this case. If the publicity interests involved can be "inherited" by the surviving spouse and child, then this could be regarded as a further proprietary characteristic.

In countries which treat the interests in question as being puerly personal in nature, it seems that only injunctive relief is available (e.g. Switzerland). In contrast, it seems that both injuntive relief and damages for economic loss are available in the legal systems which have identified such interests as having proprietary characteristcs (e.g. Germany?). In other countries, the possibility of claiming damages for economic loss is an unsettled aspect of the law (e.g. France).

The surviving dependents will not have a claim in the common law legal systems and Scotland. Defamation is only actionable during the lifetime of the aggrieved person. In respect of passing off, it would not be possible to prove that a significant proportion of the market reasonably believes that the deceased endorsed the product in question.

CASE 11 COMPARATIVE REMARKS

A popular TV presenter with a very distinctive voice once spoke on some adverts for a coffee company. After he had made it clear that he did not want to do any more of these adverts, the company produced a radio commercial in which his voice had been imitated by that of another person. Can the TV presenter sue the company for injunction and compensation?

This case concerns the commercial appropriation of voice as an aspect of personality. In the majority of legal systems, the TV presenter will be successful in suing for both an injunction and compensation. However, as in case 10, there is a clear difference between the standard of protection offered by the civil law legal systems on the one hand and the common law systems and Scotland on the other.

The core consideration in this scenario is that of the distinctiveness of the voice in question. A person's voice may not be as easily identifiable as his/her image. Therefore, in order to have a successful claim, the imitation must be distinct and easily recognisable to the extent that a significant proportion of listeners will identify it with the plaintiff. Once this has been established, it appears that the plaintiff will be successful in suing for an injunction and damages, given that he did not consent to the reproduction. The fact that the TV presenter had once spoken on some adverts for the company will not be a defence. As a holder of personality rights, the presenter has a right to use his voice for commercial purposes and can decide how and when to do this. In this case, he no longer has a contract with the coffee company. Therefore, the company does not have any right to use or imitate his voice for commercial purposes. These are points of agreement in all of the legal systems considered. However, the legal vehicles used to reach this result and the remedies differ to a certain extent.

In the majority of the civil law legal systems, general tort law provisions will be sufficient to award the plaintiff an injunction and damages. In the common law legal systems and Scotland, it is less certain that traditional torts will offer the plaintiff adequate protection. Defamation is one possibility but it would have to be shown that the imitation some how damaged the reputation of the presenter in the eyes of right-minded members of society. A better possibility is the tort of passing off. However, this option is also not without its shortcomings. According to case law, there has to be a commercial interest involved, which means that if the presenter has retired from making adverts in general, he will not be able to sue on passing off. As in case 10, if the facts of the action fall outside the scope of these torts, then the plaintiff will not be successful.

If we assume that the plaintiff does have a claim in England and Scotland, then all legal systems will award the presenter an injunction to prevent against further appropriation of his voice. In respect of the awarding and calculation of damages see the comparative remarks to case 10.

CASE 12 COMPARATIVE REMARKS

The politicians Smith and Jones exchanged e-mails in which they discussed a planned tax increase and agreed that this plan should be kept secret until after the election. An unknown person at the internet company, which „delivered" the emails, copied them and sent the copies to a newspaper. The newspaper informs Smith that it plans to publish the emails.

Is Smith entitled to an injunction against the imminent publication of the emails? Would it make a difference if the conduct of the unknown person constitutes a criminal offence?

This case involves the privacy interests of politicians in having their private correspondence respected and the competing interests of freedom of press and the right of the public to receive information, which may be in its interest. For the purposes of this case, it is important to point out the difference in standing between the unknown person at the internet company who initially infringed the privacy interests of the politician and the third party who intends to publish the emails. The injunction is sought against the latter party. The legal consequences for the unknown person are not considered here.

The confidentiality of correspondence is a general legal principle recognised in all of the legal systems considered. Indeed, the right to respect for one's correspondence is expressly mentioned in Article 8 of the European Convention of Human Rights. It also finds expression in the constitutional texts of Italy, (the Netherlands), Portugal, (Spain) and Switzerland and in the civil law and/or criminal law of many other legal systems. The principle has been developed by case law in England, France (as part of the wider right to privacy) and Germany (as part of the general personality right). The legal vehicles used to protect the confidentiality of correspondence include criminal and general tort law provisions, copyright and data protection law and equitable doctrines in the case of the common law legal systems.

The question put forward in this case is whether or not Smith is entitled to an injunction to prevent publication of the emails. In the first instance, it is clear across the board that the unknown person at the internet company has unlawfully and, in some countries, illegally interfered with private correspondence. In ordinary circumstances, one would expect that this alone would result in an injunction in favour of the plaintiffs. However, we have to take into account that the correspondence in question was between politicians and, thus, the publication of the emails may be warranted if they contain information, which is in the public interest. In this particular case, the information details a planned tax increase and an arrangement that this increase should be kept secret until after the next election. Most national reporters agree that there is a public interest in respect of such information. As a consequence, the courts must attempt to strike a balance between the privacy interests of the politicians and the right of the public to receive this information.

While the approach to this question of balancing is similar across most of the legal systems considered, the outcome of the process varies considerably. The results can be divided under three broad headings.

I. Smith is entitled to an injunction

It seems that the politician would be most likely to obtain an injunction in Italy and Portugal. The combined effect of constitutional, criminal and civil protection means that confidentiality of correspondence has an extremely important status in Italian law. In this case, the privacy interests of the politicians should win out even if the defendant was acting in the public interest because the defendant's action will not be deemed lawful if the "proper procedural conditions" have not been met in the first instance. Indeed, the Data Protection Act and the Press Code of Self-Regulation state that data must be processed in accordance with good faith. The injury to the constitutional right of confidentiality of correspondence is a infringement of this principle. Interestingly, in such a scenario, the public interest in obtaining the information will not constitute a defence. Similarly, in Portugal, the politicians enjoy a very high level of protection. The starting and end point is that the exchange of emails is of a private nature and, therefore, unlawful to publish without consent. It seems that the issue of public interest in the content of the emails does not play a role in this constellation and the plaintiffs will consequently be entitled to an injunction under the civil code.

In England, case law has established that the law of confidence should protect private correspondence. Seemingly, courts will be more ready to grant an injunction in such cases than in defamation actions and it is thus likely that the plaintiff would be successful in seeking an injunction. In Switzerland, the fact that the politicians wanted to keep their planned tax increase secret denotes that the information belongs to the category of private information, the infringement of which is actionable under the civil code. Even though there is a public interest in the information, the protection of this private sphere should win out.

II. Smith is not entitled to an injunction

In Finland, the plaintiff will not be entitled to an injunction because such a remedy is practically non-existent in cases involving freedom of expression (see Case 1). Similarly, the Greek courts will not allow an injunction, as remedies in such cases should only be granted after publication. In the Netherlands, the public interest in the information means that freedom of press will outweigh the privacy interests of the plaintiffs, taking into account that the facts are not related to the private lives of the politicians. Likewise, in Scotland, there would be an overriding public interest in the information contained in the emails and the plaintiffs would not be successful with their action.

***III.* Smith will *probably not* be entitled to an injunction**

The result is less clear-cut in Belgium, France and Germany, although the consensus is that Smith will probably not be entitled to an injunction. In Belgium and France, while it is apparent that there is a violation of confidentiality of communication, it is not completely clear whether an injunction will be awarded as Belgian and French courts are wary of issuing injunctions in cases concerning freedom of expression, in particular when politicians are involved and the correspondence concerns issues of policy. In Germany, the publication of information, which is obtained illegally, will usually be considered unlawful. However, taking into account the importance

consistently placed by the Constitutional Court on freedom of expression, the information in question may be of such a political importance that it could perhaps be an exception to this rule and an injunction would probably not be available to the plaintiff.

Does it make a difference if the conduct of the unknown person constitutes a criminal offence?

In England and Germany, the criminal offence appears to have an impact on the outcome of the proceedings. In England, there is case law to suggest that an injunction will be more readily granted in such a scenario. As pointed out above, in Germany, if information is obtained illegally, then, in general, the subsequent publication is also deemed illegal.

Whether or not the conduct of the unknown person was a criminal offence appears to be of varying significance. In many countries, it will not make a difference to the civil action against the defendants. Indeed, under Dutch law, just because the information is initially obtained in an unlawful way, it does not necessarily follow that the newspaper acted unlawfully in publishing the information.

CASE 13: COMPARATIVE REMARKS

The house owner Jonathan found in his attic some diaries of Brigitte, who had been living there twenty years ago. Jonathan became the owner of the books and published the diaries. Does Brigitte have any claim against Jonathan? Would it make a difference if Jonathan made some effort to contact Brigitte before the publication?

Diaries usually contain most private and intimate information about the writer's person. In addition, they may be regarded as intellectual or artistic creation. When they are published without the writer's consent, a conflict may arise between the writer's interests to privacy and copyright on the one hand and the interest of the publisher and the public on the other. In the present case, Jonathan's ownership on Brigitte's diaries is out of question. The core issue is what Brigitte can claim from Jonathan for having neglected to ask for permission to publish her diaries. In this regard, attention should be paid to the question as to how much effort Jonathan was required to make in order to locate and contact Brigitte before publication.

I. Foundations of liability: privacy, copyright and media law

In most of the legal systems considered, both privacy and copyright law are engaged in this case. An exception is made by Spain, where copyright law only would apply if Brigitte had written her diaries with the intention to publish and commercially exploit them. Under Spanish law, the remedies against unconsented publication of documents written for purely private use are exclusively regulated by privacy law, i.e. the 1982 Act on the civil protection of honour, privacy and one's image.

1. Privacy law

In all countries considered, Jonathan's publication of the diaries without Brigitte's consent amounts to an unlawful violation of her privacy. Since from the facts of the case no justification based on an overriding public interest applies, Jonathan will be liable:
- in the UK for breach of confidence;
- in Finland, France, Belgium and Spain under the tort of intrusion into one's privacy;
- in Germany, Italy, the Netherlands, Greece and Portugal under the tort of violation of personality rights;
- in Italy also under data protection law.

The legal consequences are the same as in case 5.

2. Copyright law

As to the applicability of copyright law, a first question is to be addressed: Which requirements should a diary meet in order to become a "work" protected by copyright? Most legal systems, at least in theory, require from a piece of writing a certain degree of originality or intellectual or artistic pretense before considering it a "work". In practice however, this requirement is dealt with in the single countries in a more or less strict way. In Finland, France, Belgium, Greece, Portugal, Switzerland and the UK, also ordinary private diaries qualify for copyright. They can be published

only with the author's consent, no matter who is the owner of the papers. Jonathan will therefore be liable under copyright law.
On the contrary, Germany, Austria, Italy seem to move from a quite narrow definition of "work" which excludes ordinary diaries without intellectual or artistic pretense. In Germany, such pieces of writing fall completely out of the scope of copyright law. Protection against unconsented publication of these documents can only be granted by the law of privacy, i.e. the doctrine of the general personality right.
In Austria and Italy, the Copyright Acts provide for two different sets of rules: the ones applicable to "works" and the ones applicable to private documents which cannot be considered "works", such as diaries, letters, notes, memorials and other personal writings. According to these Acts, the unconsented publication of such documents is prohibited when it amounts to an unjustified intrusion in the writer's private sphere. Since no justification applies from the fact of the case, Jonathan will be liable under Austrian and Italian copyright law – not for breach of copyright in the strict sense, but for the unconsented publication of private writings regulated in the Copyright Acts. However, the remedies provided by these Acts for both kinds of violations are substantively the same (see "Remedies" below).

3. Media law

In Austria, Jonathan will be liable for the unconsented and unjustified publication of Brigitte's diaries also according to the Media Act of 1981, since this publication is to be considered a communication medium. For the consequences of this liability see "Remedies" below.

II. Due Care

In most of the legal systems considered, Jonathan will be liable for the unconsented publication regardless of his eventual efforts to locate and contact Brigitte beforehand. These efforts seem only to play a role in the Netherlands, Austria and Germany.
In the Netherlands, if Jonathan made some efforts to locate Brigitte but did not find her, the publication may be justified. However, if Brigitte shows up afterwards and opposes the publication, Jonathan might be under a duty to recall it. In this case, both Jonathan's freedom of expression and his commercial interest in the publication wil have to be balanced against Brigitte's rights.
In Austria, if Jonathan took due care in trying to locate Brigitte or her heirs before publishing the diaries, he will not liable under copyright and privacy law, since this liability is fault-based. A slight negligence will be sufficient in this regard. If not even the slightest negligence can be charged to Jonathan, he will nevertheless remain liable under the Media Act, which provides for a strict liability regime.
In Germany, Jonathan's efforts to locate Brigitte will not put in question liability as such but only the recoverability of non-economic losses. These losses are only recoverable in case of serious and grave violations of personality rights. If Jonathan did not even try to locate Brigitte, this recklessness would make the violation grave enough. Vice versa, if Jonathan acted with all due care regarding his efforts to contact Brigitte, he will have to compensate only her economic losses, unless the content of the publication was so intimate that this in itself should be considered a serious and grave violation of her personality rights.

III. Remedies

In all legal systems considered, Brigitte has a claim for damages against Jonathan. In most countries, both economic and non-economic losses are recoverable.
In Germany, non-economic loss can only be compensated in cases of serious and grave violations of personality rights (see case 1). This requirement would be met if, for example, intimate details contained in Brigitte's diaries were exploited for purely commercial reasons. Compensation for economic loss under the general tort provisions of the German Civil Code shall include, according to German courts, a fictitious licence fee for the publication in question.
In Finland, under copyright law appropriate compensation for the use of the work shall be paid regardless of fault, while compensation for pain and suffering and other kind of losses is only possible in cases of intentional or negligent violations of copyright.
In Austria, Germany and the UK Brigitte will also be able to skim-off the profits made by Jonathan.
As to the non-monetary remedies, Brigitte will be able to get an injunction in all countries but for Belgium and Finland, for the same reasons outlined in case 5. In the present case however, unlike in case 5, the Belgian and French solutions on this point diverge since in France a claim for injunction is given on the basis of copyright law. Additionally, in Switzerland, the plaintiff may seek a declaratory judgment holding the infringement unlawful.

CASE 14: COMPARATIVE REMARKS

During a committee meeting of a municipal administration, which concerned the widening of a public road and was open to the public, Maria, a woman among the public, secretly recorded the discussion. Maria was the tenant of a house along that road and was, like most of her neighbours, opposed to the widening project. At the end of the sitting, committee members noticed that Maria had recorded the discussion and they wanted her to hand over the tape. Maria refused. Is there any claim of the committee members against Maria?

This case deals with a particular kind of conflict between personality interests (in the own spoken words) and freedom of information on matters of public interest. The core question here is whether and to what extent the European legal systems protect a person's interest to decide about the recording and the use of his or her public speech. In the present case, speeches are delivered by a public actor in a public place during a meeting open to the public, on a topic which is in the public interest. However, Maria recorded the speeches *secretly*. This circumstance may be decisive in order to question the lawfulness of her conduct. The committee members might have a legitimate interest in knowing in advance whether or not their speeches are going be recorded. Indeed, people usually speak less freely if they know that each single word they say is being recorded and possibly reproduced at any time before any audience in the future.

I. Prevalent solution: no claim

In the majority of the legal systems considered, the committee members will not have any claim against Maria, since the meeting was open to the public. Everybody could hear the speeches, and no private information were at stake. A "right to one's own spoken words", or a correspondent personality interest, would only enjoy protection in the context of private or confidential speech, which may include meetings of administrative bodies only when they are not open to the public.
In some countries such as Belgium, the reproduction and publication without restraint of speeches given in meetings of representative assemblies is expressly allowed by statute. In other countries such as England, France, Finland, Greece, the Netherlands, Portugal, Spain and Switzerland, the lawfulness of Maria's recording emerges *a contrario*, being the requirements of privacy and confidentiality not met in the case at stake.

II. Possible claims of the committee members in single countries

In Austria, Germany, Italy and Scotland the committee members could possibly have claims against Maria. In this regard, three different models can be outlined. In Austria and Germany, injunction and damages would be granted on the basis of the general tort provisions of the Civil Codes applicable in case of violation of personality rights (see cases 1 and 5). In Italy, injunction and other specific claims of the committee members (but not damages) arise from data protection law. In Scotland, the equitable doctrine of breach of confidence applies (see case 5).
Austrian courts and scholars have acknowledged a "right to one's own spoken words" as a personality right enshrined in Art. 16 Civil Code. This right includes the power of deciding whether or not the own voice may be recorded. It is unclear to what extent

this right is touched in cases of speeches open to the public. Some scholars defend a broad scope of application of this right, which makes the secret recording also of public meetings unlawful. Several arguments are brought forward to support this interpretation. First, the meeting participants must be able to foresee whether or not their speeches are being recorded in all details, sounds of voice, imperfections, less polite expressions etc. Second, they have a right to decide to whom they want to speak to: that particular audience only, or everybody in the posterity. Third, a single speech could produce a different effect according to the time and context it is replayed. Fourth, under the Austrian Media Act a hearing which is open to the public not always implies that it may also be recorded: for example, the TV and radio recording of civil proceedings is forbidden.

According to these Austrian scholars, only in exceptional cases a secret recording may be justified. If unable to prove such an exceptional justification for her recording, Maria will be liable for unlawful intrusion in the personality right of the committee members. They could claim an injunction and – at least in theory – damages, although neither a pecuniary nor a non-pecuniary loss would be easy to be proved.

In Germany, a case very similar to this one was decided in 1979 by the Appellate Court of Cologne, which ordered the person who had secretly recorded a public committee meeting to hand over the tape. In the Court's view, no justification for the secret recording was given because the public interest in controlling the governmental activity would have been sufficiently satisfied by taking notes only. Some scholars have criticised this decision, arguing that in cases of this kind the citizen's interest in recording politically relevant information should prevail over the speakers' general personality right, as long as the recording does not impair the good proceeding of the meeting.

Under Italian law, Maria could never be ordered to hand over the tape, but the committee members could file other claims against her on the basis of the Data Protection Act. Indeed, being the voice a personal data, it has to be processed in good faith. The committee members have a right to access the records of their speeches, they can claim the erasure of unnecessary information, the modification of incorrect data, the integration of incomplete data etc. On justified grounds they can also object to the data processing as a whole, claiming a temporary or permanent interruption of the processing activities. In deciding whether or not to grant this remedy, the court will need to balance the conflicting interest of data protection and freedom of information against each other.

A balancing of interests also determines the solution of this case under Scots law. Since the information passed during administrative proceedings (even of open to the public) is prima facie confidential, a balance needs to be drawn between the public access to information and the need for maintenance of confidentiality insofar as it serves the purposes of good administration. The court is required to examine, in the terms of Sec. 12 HRA, the extent to which the material has or is about to become available to the public or it is or would be in the public interest for the material to be published.

CASE 15: COMPARATIVE REMARKS

In an advertisement for "light" cigarettes, the opinion of Dr. Smith was quoted: "Light cigarettes reduce cancer risk by up to 50%". The doctor's sentence was authentic, it had been uttered at a scientific conference. But Dr. Smith had always been a fierce opponent of smoking in general. Is there any claim of the doctor against the tobacco company?

Like case 14, also this case deals with the boundaries of self-determination regarding the use of one's own spoken words, but under a different perspective. Here, a public speech of a scientist is used for commercial purposes without the scientist's consent. The scientist's words are truly quoted, but taken out of their original context and made to serve an objective (selling cigarettes) which is completely extraneous from the scientist's objectives, opinions and believes.
In all countries considered, Dr. Smith's interest in not being presented in public against his will as a supporter of "light" cigarettes is held to be worth of legal protection. He will have at least a claim for damages against the tobacco company (see "Remedies" below).

I. Legal bases

The solutions of this case in the single legal systems could be roughly systematised according to four models, which may be called the defamation model, the personal identity model, the mixed model and the copyright model.

I. The defamation model

In England and Scotland, this case is dealt with in the framework of the common law torts of defamation (see case 1) and passing off (see case 10). However, the courts are reserved about conceding passing off actions where there is no clear economic reputation at stake. In this case, the advertisement may have injured Dr. Smith's professional reputation, but his interest in not being presented in public as a supporter of light cigarettes is not primarily commercial. Therefore, Dr. Smith's passing off claim will be less likely to succeed than his defamation claim. The defamation requirements are most probably met, since the advertisement created the false impression that the scientist had consented to it, or that he was in some way endorsing "light" cigarettes. This could have lowered him in the opinion of right thinking people, thus injuring his personal feelings and professional reputation.
Also in Spain the solution of this case is clearly focussed on the law of defamation. The publication of the advertisement will be considered an unlawful infringement of Dr. Smith's honour and reputation, giving rise to civil liability of the tobacco company under the 1982 Act on protection of one's honour, privacy and image (see case 1).

II. The personal identity model

In Italy, Germany and Switzerland, the main focus of this case lies on the scientist's personality being put into a false light, regardless of an eventual detriment to his honour and reputation. According to this approach, the mere fact that Dr. Smith's statement was taken out of its original context, losing its original meaning and giving

the false impression that the scientist was endorsing "light" cigarettes, amounts to a violation of his right to personality which makes the tobacco company liable under the general tort provision of the Civil Codes.
For cases of this kind, Italian scholars and courts have developed a specific doctrine: the "right to personal identity". This right is seen as embedded in the protection of personality under Art. 2 Italian Constitution. An infringement of this right occurs when acts, opinions, preferences, qualifications etc. are attributed to a person who has never committed, expressed or possessed them. In this regard, it is sufficient that a person is associated to something - a product, a political current, etc.- which in fact this person does not endorse or favour. If the right to personal identity is violated, its holder may rely on any cause of action protecting one's name, image and copyright: the corresponding legal provision are to be interpreted in the light of the Italian Constitution so as to cover this kind of cases as well.

III. The mixed model

A combined application of legal instruments protecting honour and reputation on the one hand, and self-determination about the use of one's name, words etc. on the other, characterises the approach of the Austrian, Dutch, Finnish, French, Greek and Portuguese legal systems. In particular, the Austrian, Dutch and French solutions seem remarkable.
In Austria, unlike Germany and Switzerland, the personal identity approach focussing on one's personality image being put in a false light has not yet played a big role. In cases like this, Austrian scholars invoke a plurality of personality rights such as the right to self-determination about the use of one's name, the right to one's spoken words, and the right to personal and professional reputation.
In the Netherlands, the liability of the tobacco company is based on the breach of a rule of unwritten law pertaining to proper social conduct, according to the general tort liability clause of the Civil Code (Art. 6:162). Dr. Smith may either rely on the violation of his reputation, which also constitutes an injury to his personality, or on the fact that his words were put in a context that is misleading for the public. Both grounds can support his claim.
French law neither acknowledges a general right to personality, nor a right to reputation going beyond the scope of the criminal law protection of honour (see case 1). Nevertheless, in this case the tobacco company will be liable in tort, since both the using of Dr. Smith's name and scientific reputation for commercial purposes, and the distortion of his personality caused by taking his statements out of their original context can be considered a culpable act under the general tort liability clause of Art. 1382 Civil Code.

IV. The copyright model

In Belgium the solution of this case focuses on copyright law. Oral expressions of thoughts, lectures and speeches such as Dr. Smith's statement will be considered a "work of literature" in the sense of Art. 8 Copyright Act. Since the tobacco company quoted Dr. Smith's words for purposes other than science, education or public debate, according to Art. 21 and 22 Copyright Act the author's consent would have been necessary. Furthermore, Dr. Smith can rely on his moral right not to be identified with a commercial product.

II. Remedies

In all legal systems, Dr. Smith will be able to claim damages. In the majority of countries, compensation covers both economic and non-economic loss. In Belgium, France and Greece only moral damages seem recoverable. In Finland, since no criminal law provision is engaged, damages for pure economic loss can be awarded under general tort law only when there are "especially weighty reasons for compensation" (see case 7).

In most legal systems Dr. Smith will also be granted an injunction against the present and future publication of the advertisement. This is not certainly true for France, where the courts are reluctant to award injunctive relief in this kind of cases.

In Finland it would make a difference whether or not Dr. Smith is acting in the course of his business or as a private person. In the first alternative he will have to claim injunction before the Market Court, in the second alternative before the local court.

Besides damages and injunction, in some countries Dr. Smith will be entitled to additional remedies. In Greece, Italy and the Netherlands he may claim a rectification, for example in the form of a press announcement clarifying that the statements contained in the tobacco advertisement do not represent his personal opinion. In Italy he also can claim the publication of the court judgment in one or more newspapers. In Switzerland he may request a declaratory judgment on the unlawfulness of the advertisement.

CASE 16 COMPARATIVE REMARKS

Agnes was employed as a secretary in a business firm. Soon after being hired she began to be envied by her female colleagues, as she was a very good-looking woman. In particular, one of the colleagues, Tina, did her best to make Agnes' work life more and more unpleasant, hoping she would finally leave the firm. Tina succeeded: Agnes reached the point where she could not stand being harassed any longer and left the job. Is there any claim of Agnes against Tina?

Supposed that Agnes decided to quit the job not because of Tina's behaviour, but because she could not stand the continuous sex-related remarks and provocations of a male colleague, Harold. Is there any claim of Agnes against Harold or against the employer?

This case concerns injury to an individual's psychological integrity and dignity as aspects of personality. Various solutions in civil and labour law are proposed by the individual legal systems.

I. Agnes' claim against Tina

Agnes has a claim against Tina for both economic and non-economic loss in the majority of legal systems considered. In most countries, labour law legislation is in place, which deals specifically with this situation and offers both civil and criminal remedies. It is apparent in such legislation that there is an onus on the employer to take appropriate steps to prevent mobbing and harassment.

Interestingly, in Dutch law, neither case law nor doctrine provides a specific legal framework. The extent of liability is based on a concept similar to the *allgemeine Lebensrisiko*. In this sense, events and risks that occur in the course of a "normal daily life" may not be subject to liability. Merely acting in an unpleasant manner could be construed as being a part of a normal daily life. However, Tina's act might be considered a breach of unwritten law in relation to proper social conduct. In this sense, the general tort liability clause will come into play. In order to assess the lawfulness of Tina's conduct, the severity of her actions, the foreseeability and the severity of the consequences of that conduct and Tina's intention to harm Agnes all need to be taken into account. These requisites are present in this particular case and Tina will be entitled to both compensation for economic and non-economic loss under the Civil Code.

In England and Scotland there is special legislation in the form of the Employment Rights Act 1996 and the Protection from Harassment Act 1997 which offer the possibility of civil remedies. In English common law, Agnes will be unsuccessful with a claim in trespass to the person and *Wilkinson v Downton*. By contrast, in Scotland, the common law actions of verbal injury and molestation appear to offer protection and Agnes will thus be entitled to compensation for economic and non-economic loss.

In German law, the question of economic loss is more difficult. In this case, the job loss is not directly caused by the mobbing but was a personal decision made by Agnes. Therefore, if economic loss is to be available, then a link will have to be

shown between the mobbing and leaving the job. The question of voluntary/involuntary job loss is also of central importance in Switzerland when deciding whether to award damages for economic loss. However, there is case law to suggest that a causal link might be shown between psychological harm and leaving a job. In this sense, economic damages could be awarded.

In Italy, neither legislation nor case law has identified mobbing as capable of giving rise to civil liability. However case law has shown that provisions of the civil code, interpreted in light of the Constitution, will result in the employer having a positive obligation to prevent mobbing. In this sense, not only will compensation for economic loss be available, but an injury to the constitutional right to freely develop one's own personality at the workplace will also result in compensation for non-economic loss. The horizontal effect of fundamental rights also plays a role in Spanish law. All types of harassment in a working environment are regulated by a legal framework developed in case law and based on the principle of equality in Article 9 of the Constitution.

II. Agnes' claim against Harold

In the majority of legal systems, Agnes' claim against Harold will be based on legislative provisions concerning sexual harassment. In this regard, most systems offer legal protection to Agnes. The exception to this general rule is French law, which has particular requirements in place regarding the determination of sexual harassment. Sexual harassment must fall within a hierarchical relationship in order to be deemed unlawful. In this sense, if the harassment comes from a colleague, at an equivalent level, then it is not unlawful. Furthermore, mere remarks or provocations with a sexual connotation will not amount to a tort.

III. Agnes' claim against her employer

The majority of legal systems also see liability on the part of the employer. This arises from the various legislative provisions concerning harassment, which place a positive obligation on the part of the employer to prevent such unlawful conduct. In the common law, employers are under a duty of care towards their employees to provide a safe work environment free from harassment. Agnes may be able to pursue a claim in negligence.

CASE 17: COMPARATIVE REMARKS

Bridget was pregnant. She was under the treatment of a doctor who did not inform her about a genetic anomaly of the foetus, which was likely to cause brain damage. A handicapped child was born. If Bridget had known about the anomaly, she would have preferred to undergo a (legal) abortion. Can Bridget sue the doctor for damages for non-economic loss, because he deprived her of the chance to decide to have or not to have the child?

Right from the outset it is important to properly define the problem of the case. Case 17 and Case 18 belong into the broader context of medical law. They deal with medical treatment undertaken in an doctor-patient-relationship. But the focus is on a narrow aspect of this medical law: *the right to self determination of the patient.*
Case 17 is embedded in the widely discussed subjects of wrongful conception (pregnancy), wrongful birth and wrongful life. All these problems have been taken up in most of the national reports. But this case does not cover these problems: It is *not* a wrongful conception case, i.e. parents claiming maintenance costs for the unwanted birth of a healthy child. For this case scenario also the terms "right not to have children" or "right to family planning" are used. It is *not* a wrongful birth case, i.e. parents claiming costs for raising a handicapped child which would have been aborted given the due information by the doctor. Some countries like Germany grant monetary compensation in both cases; most countries award some compensation to a different extent in the second case. Finally it is definitely *not* a wrongful life case, i.e. the handicapped child him/herself is suing special and general damages.
Case 17 raises the only question whether a pregnant woman has a legally protected right to determine to undergo a (legal) abortion or not; and whether the violation of this right to self determination by negligently not disclosing the due information (here: genetic anomaly of the foetus) to make such a decision demands a monetary compensation (general damages).

I. Prevalent solution: no claim

Most national legal systems do not identify the right to self determination of the pregnant woman as an independent issue in the wrongful birth case scenarios. The monetary costs of raising the handicapped child are put first; in addition pain & suffering payments for the unwanted birth of the child are awarded. That is the law in Austria, Belgium (?), England, Finland, Germany, Italy, Scotland and Spain.

II. Monetary compensation

There are at least three remarkable exceptions from this predominant rule of non-acknowledgement: France, the Netherlands and Portugal. The personality right aspect is precisely worked out in the famous Kelly-case of the Dutch Hooge Raad from 2005. The court ruled that both parents(!) have been infringed in their right to self-determination and therefore are entitled to general damages. In France the claim of the pregnant woman for perte d'une chance is based on breach of contract. It leads to regular contractual liability; questions of autonomy rights are not raised. She can sue for dommage moral. In Portugal the doctor's failure to disclose the information is conceived as a kind of moral injury (violation of honour, reputation and dignity). It's basis is in tort. - In Switzerland there is neither case law nor an established doctrine.

According to the reporter the case falls clearly under Art. 28 Swiss Civil Code (infringement of the personality).
In all three countries where the deprivation of the chance to determine is acknowledged as a cause of action for general damages, in addition the economic costs for raising the handicapped child are recoverable, provided Bridget can bring evidence that she would have decided for an abortion.

CASE 18: COMPARATIVE REMARKS

Abraham belongs to the religious sect of "Jehova's Wittnesses", which does not allow blood transfusions. He was heavily injured in a car accident. In Abraham's personal documents the doctor found a declaration that in case of emergency he wished no blood transfusion for religious reasons. Nevertheless the doctor performed a transfusion. Is there any claim of Abraham against the doctor? Please distinguish the following situations:
Abraham had no chance to survive without the transfusion.
Abraham had a chance of 70 % to survive even without the transfusion.

Case 18 again picks up a problem of medical law and raises the question whether there are boundaries to the patient's right to self-determination. It is a well established principle throughout all the EU member states (and Switzerland) that a patient has the right to refuse medical treatment on whatever grounds. This principle has its grounds either in constitutional law or in statutory law. But are doctors bound by law to comply with the explicit will of a patient to refuse blood transfusion even if this is the only way to save his life?

Hypothesis b)

Given the starting point of an acknowledged patient's right to self-determination, all analysed legal orders provide for a claim of Abraham when the blood transfusion is not necessary to save his life (Spain ?). Treating a patient against his will or without his consent is regarded in most private law systems in Europe as a battery or personal injury. In hypothesis b) there is no justification for the doctor at hand. So some sort of equitable compensation (dommage moral) for the bodily injury (or the violation of the autonomy right) will be awarded.

Hypothesis a)

This case scenario raises the critical questions. Unlike in hypothesis b) this time there is a broad spectrum of answers offered. We can state three classes of solutions: (1) no compensation, (2) compensation and (3) discretion of the court.

In France, Germany and Spain the doctors will not be liable in tort or contract. In all three countries there is an established case law that given the conflict of saving life versus protection of autonomy the doctor is entitled to save the life. In France, this seemed to be put into question by recent legislation (Loi Kouschner). But the plausible expectation is that the respective case law will not be affected by the statute.
On the other side in Belgium, Finland and Italy there seems to be no doubt that Abraham can claim compensation. The reason for this clear solution is statutory law in Belgium and Finland, constitutional law in Italy. Awarded will be general damages.
The third class comprises countries where the answer is not from the outset affirmative or negative. This is true for Austria, England, the Netherlands, Portugal, Scotland and Switzerland. In Austria there is no established case law. Therefore it is "unclear" whether a sort of offsetting of harms and benefits will be applied. In England and Scotland in principle every treatment against the patient's will is (unlawful) battery. But in hypothesis a) courts seem to avoid doctor's liability by referring to "fictional implied consent" or requiring a recent refusal in the concrete

situation. The last criterion seems also to be the decisive factor in Swiss law. In the Netherlands the contract law provisions of the WB on medical treatment apply. Art. 7:466 (3) grants some discretion to the doctor in final cases like hypothesis a). In Portugal can necessity be used to exonerate the doctor.

CASE 19: COMPARATIVE REMARKS

In an interview about environmental protection, Howard, president of a chemical company, accused the association "World Wildlife Fund" (WWF) of being a gang of incompetents who were taking advantage of people's credulity and using member contributions for mysterious purposes. Can the WWF sue Howard for damages?

The central consideration in this case is whether or not an organisation or corporation can hold personality rights. Traditionally, such rights were regarded as being inherent only in a human being. Nevertheless, some legal systems have witnessed a departure from this traditional viewpoint in certain circumstances. One example is where the reputation of an organisation is at stake. In many countries, the same legal principles that apply to the protection of a natural person's reputation also apply to a legal person's reputation. The approaches of the different legal systems can be divided under three broad headings.

I. Plaintiff is entitled to damages for both economic and non-economic loss

The plaintiff will be successful in suing for both economic and non-economic losses in Belgium, France, Greece, Italy, the Netherlands, (Portugal), (Spain) and Switzerland. In most of these countries the legal framework for protection of reputation is the same in respect of both natural and legal persons.

In France, a distinction is made between organisations which exercise a commercial activity and non-profit organisations. The injury suffered by the former will invariably be economic. In contrast, non-profit organisations can, in principle, sue for non-economic loss. Italian courts see a distinction between pain and suffering and the general category of non-pecuniary losses. In this sense, the plaintiff can sue for non-economic loss to reputation within the general category.
In Switzerland, the notion that a legal person can recover damages for pain and suffering is subject to much dispute amongst scholars, despite a ruling from the Federal Court affirming the principle.

II. Plaintiff is entitled to damages for economic loss only

In Finland, there are different provisions for the protection of the reputation of natural and legal persons. In the case of damage to an organisation's reputation, special legislation is available where the plaintiff can sue for economic loss but not non-economic loss. In Germany, although non-profit organisations can claim for both economic and non-economic loss, in this particular case, the WWF will not be successful with an action for the latter. Damages for non-economic loss are only awarded if the injury cannot be remedied in any other form. In this case, the award of an injunction will seemingly offer sufficient relief to the plaintiff. Therefore, the WWF will only have a claim in damages for economic loss and not non-economic loss.

III. Plaintiff does not have a claim

In the common law and Scotland, the organisation may take an action in defamation. However, actual reference must have been made to an individual or a class of persons, if the statement is to be deemed defamatory. In regard to a class of persons, the general rule is that the larger the class, the more difficult it is to show that the statement referred to the individual members of the class. In this case, the WWF is a large organisation and a successful action in defamation is thus unlikely.