Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 29 March 2011

Cases C-509/09 and C-161/10

eDate Advertising GmbH

v

X (C-509/09)

and

Olivier Martinez and

Robert Martinez

v

Société MGN Limited (C-161/10)

(References for a preliminary ruling from the Bundesgerichtshof, Germany, and the Tribunal de grande instance de Paris, France)

(Jurisdiction in civil and commercial matters – Regulation (EC) No 44/2001 – Jurisdiction for 'matters relating to tort, delict or quasi-delict' – Infringement of personality rights allegedly committed by means of the publication of information on the internet – Article 5(3) – Definition of 'the place where the harmful event occurred or may occur' – Force of the judgment of the Court of Justice in Shevill – Directive 2000/31/EC – Article 3(1) and (2) – Determination of the existence of a conflict-of-laws rule in relation to personality rights)

1. The present joined cases, which have been referred by the Bundesgerichtshof and the Tribunal de grande instance de Paris, raise above all a number of questions on the interpretation of Article 5(3) of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (2)

2. In particular, the referring courts ask the Court of Justice about the scope of the jurisdiction of national courts to hear disputes concerning infringements of personality rights committed via an internet site. It is common knowledge that the Court previously

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ruled on the application of Article 5(3) of Regulation No 44/2001 (a provision which, at the time, was included in the Brussels Convention of 27 September 1968) to cases of libel (3) by a newspaper article in the *Shevill* judgment, which was given in 1995. (4) The present two references for a preliminary ruling will allow the Court to determine the ability of that decision to adapt to a world subject to great changes, where the print media has yielded ground, at an increasing rate and irreversibly, to electronic media outlets published by means of the internet.

3. That draws attention to a matter which has undoubtedly always underlain the whole issue of infringements of personality rights committed in the course of a social communication activity, however that activity takes place. The legal protection of those rights cannot disregard the fact that they must be asserted in an environment which has become *tense* as a result of the freedoms of communication, (5) with which they must enter into a balancing exercise. It is necessary to be aware of the complexity of this situation in order to be able to give proper consideration to the central issue of the present joined cases, which is the determination of international jurisdiction in disputes arising from infringements of personality rights which have taken place in the sphere of 'the Net'.

4. Finally, the Bundesgerichtshof also asks whether European Union law, specifically Article 3 of Directive 2000/31/EC on electronic commerce on the internet, (6) is in the nature of a conflict-of-laws rule which determines the law applicable to non-contractual liability arising from acts contrary to personality rights occurring by means of a website.

I – **European Union legal framework**

5. Regulation No 44/2001 lays down a raft of rules on jurisdiction and the recognition of judgments, in order to unify the criteria for determination of the forum in civil and commercial matters. The aims of the regulation are set out in its recitals, of which, for the purposes of these proceedings, it is appropriate to draw attention to the following:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

6. Article 2 of the regulation's provisions on jurisdiction provides, as a general rule, for the forum of the defendant's domicile:

'Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

7. Article 3 of the regulation provides for an exception to the general forum where the conditions for the application of special jurisdiction, set out in Sections 2 to 7 of Chapter II, are satisfied. It is appropriate, for the present purposes, to refer to the rule on special jurisdiction set out in Article 5(3):

'Article 5

A person domiciled in a Member State may, in another Member State, be sued:

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;'

8. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, states in Article 1(4): 'This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.'

9. Article 3(1) and (2) of Directive 2000/31 lays down a rule on mutual recognition which is worded as follows:

'Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'

II – **Facts**

A – *In the eDate case (C-509/09)*

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Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

10. In 1993, Mr X, of German nationality and resident in the Federal Republic of Germany, was sentenced by a German court to life imprisonment for the murder of a well-known German actor. Mr X has been free on parole since January 2008.

11. eDate Advertising GmbH ('eDate') is an Austrian company which operates an internet portal, and its website is described as a 'liberal and politically independent medium' aimed at 'homosexual, bisexual and transgender' groups. Since 23 August 1999, eDate has disseminated to its readers information about Mr X, identifying him by his full name and stating that both he and his brother (who was convicted of the same crime) had lodged appeals against their convictions with the German Constitutional Court.

12. On 5 June 2007, Mr X gave the defendant formal notice to desist from all dissemination of information about him, a request which did not receive a written reply although, several days later, on 18 June, the information in question was removed from the defendant's internet site.

13. Mr X brought an action before the German courts seeking an injunction against eDate, to apply throughout the territory of the Federal Republic of Germany, ordering it to refrain from publishing any information about him. The Landgericht Hamburg, which was seised of the case at first instance, ruled in favour of the applicant, as did the Hanseatisches Oberlandesgericht on appeal.

14. eDate contested the action in both of the lower courts by calling into question the international jurisdiction of the German civil courts. eDate lodged an appeal on a point of law with the Bundesgerichtshof against the judgment of the Hanseatisches Oberlandesgericht, arguing once again that the German courts lacked jurisdiction, the issue which is the focus of the three questions referred for a preliminary ruling by that court.

B – *In the Martinez and Martinez case (C-161/10)*

15. On 3 February 2008, the British newspaper the *Sunday Mirror* published in its internet edition a number of photographs accompanied by a text, entitled 'Kylie Minogue back with Olivier Martinez'. The article described how the couple had met in Paris, referring to the fact that they had 'separated last year' and that the '23-hour romantic trip' confirmed the renewal of their relationship. The article also attributed a number of remarks to Robert Martinez, Olivier Martinez's father.

16. Olivier and Robert Martinez, both of French nationality, brought an action before the Tribunal de grande instance de Paris against the owner of the *Sunday Mirror*, MGN Limited, a company governed by English law. They both considered the information published by that media outlet to be an infringement of their right to privacy and of the right of Olivier Martinez to his own image. The defendant, which was served with the writ on 28 August 2008, objected to the international jurisdiction of the French court,

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arguing that international jurisdiction lay with the United Kingdom courts, more specifically the High Court of Justice.

17. After hearing the parties and after making a reference for a preliminary ruling to the Court of Justice (which was ruled inadmissible on the grounds of a manifest lack of jurisdiction), the Tribunal de grande instance sought a further ruling from the Court in order to confirm the scope of the jurisdiction of the French courts.

III – **The first and second questions in *eDate* (C-509/09) and the single question in *Martinez and Martínez* (C-161/10)**

18. On 9 December 2009, the reference for a preliminary ruling from the Bundesgerichtshof in Case C-509/09 was received at the Registry of the Court; the questions referred are the following:

'1. Is the phrase "the place where the harmful event ... may occur" in Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation No 44/2001") to be interpreted as meaning, in the event of (possible) infringements of the right to protection of personality by means of content on an internet website,

that the person concerned may also bring an action for an injunction against the operator of the website, irrespective of the Member State in which the operator is established, in the courts of any Member State in which the website may be accessed,

or

does the jurisdiction of the courts of a Member State in which the operator of the website is not established require that there be a special connection between the contested content or the website and the State of the court seised (domestic connecting factor) going beyond technically possible accessibility?

2. If such a special domestic connecting factor is necessary:

What are the criteria which determine that connection?

Does it depend on whether the intention of the operator is that the contested website is specifically (also) targeted at the internet users in the State of the court seised or is it sufficient for the information which may be accessed on the website to have an objective connection to the State of the court seised, in the sense that in the circumstances of the individual case, in particular on the basis of the content of the website to which the applicant objects, a collision of conflicting interests – the applicant's interest in respect for his right to protection of personality and the operator's interest in the design of his website and in news reporting – may actually have occurred or may occur in the State of the court seised?

Does the determination of the special domestic connecting factor depend upon the number of times the website to which the applicant objects has been accessed from the State of the court seised?

3. If no special domestic connecting factor is required in order to make a positive finding on jurisdiction, or if it is sufficient for the presumption of such a special domestic connecting factor that the information to which the applicant objects has an objective connection to the State of the court seised, in the sense that in the circumstances of the individual case, in particular on the basis of the content of the website to which the applicant objects, a collision of conflicting interests may actually have occurred or may occur in the State of the court seised and the existence of a special domestic connecting factor may be presumed without requiring a finding as to a minimum number of times the website to which the applicant objects has been accessed from the State of the court seised:

Must Article 3(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") be interpreted as meaning:

that those provisions should be attributed with a conflict-of-laws character in the sense that for the field of private law they also require the exclusive application of the law applicable in the country of origin, to the exclusion of national conflict-of-laws rules,

or

do those provisions operate as a corrective at a substantive law level, by means of which the substantive law outcome under the law declared to be applicable pursuant to the national conflict-of-laws rules is altered and reduced to the requirements of the country of origin?

In the event that Article 3(1) and (2) of the Directive on electronic commerce have a conflict-of-laws character:

Do those provisions merely require the exclusive application of the substantive law applicable in the country of origin or also the application of the conflict-of-laws rules applicable there, with the consequence that a renvoi under the law of the country of origin to the law of the target State remains possible?'

19. On 6 April 2010, the reference for a preliminary ruling from the Tribunal de grande instance de Paris was received at the Registry of the Court; the question referred is worded as follows:

'Must Articles 2 and 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and

commercial matters be interpreted to mean that a court or tribunal of a Member State has jurisdiction to hear an action brought in respect of an infringement of personality rights allegedly committed by the placing online of information and/or photographs on an internet site published in another Member State by a company domiciled in that second State – or in a third Member State, but in any event a State other than the first Member State:

– on the sole condition that the internet site can be accessed from the first Member State,

– on the sole condition that there is, between the harmful act and the territory of the first Member State, a link which is sufficient, substantial or significant and, in that case, whether that link can be created by:

– the number of hits on the page at issue made from the first Member State, as an absolute figure or as a proportion of all hits on that page,

– the residence, or nationality, of the person who complains of the infringement of his or her personality rights or, more generally, of the persons concerned,

– the language in which the information at issue is broadcast or any other factor which may demonstrate the site publisher's intention to address specifically the public of the first Member State,

– the place where the events described occurred and/or where the photographic-images put on line were taken,

– other criteria?'

20. In *eDate* (C-509/09), written observations were lodged by the representatives of eDate Advertising and Mr X, the Danish, German, Greek, Italian, Luxemburg, Austrian and United Kingdom governments and the Commission.

21. In Martinez and Martinez (C-161/10), written observations were lodged by MGN Limited, the Danish, French and Austrian governments and the Commission.

22. By order of 29 October 2010, the President of the Court ordered that Cases C-509/09 and C-161/10 be joined, in accordance with Article 43 of the Rules of Procedure.

23. On 22 November 2010, Mr X applied to the Court for legal aid; that application was refused by order of 10 December 2010.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

24. The hearing was held on 14 December 2010 and oral argument was presented by the representatives of MGN Limited and eDate Advertising and the agents for the Danish and Greek governments and the Commission.

IV – The admissibility of the reference for a preliminary ruling in *eDate* (C-509/09)

25. The Italian Republic takes the view that the questions referred in *eDate* should be ruled inadmissible because eDate withdrew the information at issue following the applicant's request. Thus, in the opinion of the Italian Government, the action for an injunction brought by Mr X is not connected with the questions of interpretation submitted to the Court.

26. It is settled case-law that, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical. (7)

27. Having regard to the factual and procedural context of the eDate case, I believe that the reference is admissible. The fact that the information was withdrawn does not deprive the applicant of his right to bring an action for an injunction prospectively, or an action for damages, whether in the course of the present proceedings or in subsequent proceedings. The Court has repeatedly held that Article 5(3) of Regulation (EC) No 44/2001 establishes jurisdiction both where the dispute concerns compensation for damage which has already occurred or relates to an action, for both compensation and an injunction, seeking to prevent the occurrence of damage. (8) That second alternative occurs in the main proceedings, the aim of which is to prevent future damage and, more specifically in the case of Mr X, to prevent the publication of information which had already been disseminated for a long period. Accordingly, the reply given by the Court may be of assistance to the referring court and is, therefore, admissible in the light of the criteria set out in the case-law of the Court.

V – The reasons for joinder: the degree of similarity between the questions and the method of dealing with the reply

28. As I indicated in point 22 of this Opinion, the President of the Court decided to join the two instant cases because of the objective connection between them. Ultimately, both cases raise the question of whether or not it is possible to apply the *Shevill* case-law relating to Article 5(3) of Regulation (EC) No 44/2001 to a situation in which the information which allegedly infringes personality rights was disseminated via the internet.

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Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

29. It cannot be denied that there are a number of not wholly insignificant differences between the two cases. First, in *eDate* the applicant brought an action for an injunction, whereas *Martinez and Martínez* is an action for damages. Second, *eDate* concerns allegedly defamatory information, whereas *Martínez and Martinez* concerns information which allegedly infringes the right to privacy. In *eDate*, the defendant is a company which owns an internet news portal, whereas, in *Martínez and Martinez*, the defendant is the publisher of a media outlet in the strictest sense of the term, the *Sunday Mirror*, which is available in both printed and electronic form.

30. Despite their differences, the two cases are linked by a common explicit or underlying concern: the scope of the *Shevill* case-law. As I pointed out in point 27 of this Opinion, Article 5(3) of Regulation (EC) No 44/2001 and the case-law which interprets it are relevant in cases such as the present ones. Further, in so far as the rule in *Shevill* does not directly place conditions on the international jurisdiction of the German and French courts, the reply which the Court gives may be framed jointly. Accordingly, I will address the issue of jurisdiction as a whole and only after that will I examine the third question referred by the Bundesgerichtshof in *eDate*, which concerns the issue of the applicable law.

VI – **The first and second questions referred in *eDate* (-509/09) and the single question referred in *Martinez and Martinez* (C-161/09)**

31. The emergence and development of the internet and particularly of the World Wide Web during the final decade of the last century caused a profound change in the methods and technologies for distributing and receiving information. As a result of that phenomenon, there are currently many legal categories the conception and scope of which require a reconsideration where they affect social and commercial relationships occurring on the Net. Further, in the present proceedings, those uncertainties arise in the sphere of international jurisdiction, since the replies furnished by the Court's case-law to date may not be adapted to the universal and free nature of the information disseminated on the internet without some qualification, or possibly rather more.

32. I shall now briefly recapitulate the subject-matter of the *Shevill* case-law and the way it has been assessed, and then go on to analyse the specific nature of infringements of personality rights occurring on the internet, paying special attention to the differences between the publication of information distributed on physical media and information disseminated by media outlets on the internet. Finally, I will offer my view on the way in which the solution provided in the *Shevill* judgment should be adapted to the circumstances of the present cases, by proposing an additional connecting factor based on the location of the 'centre of gravity of the dispute' among the rights and interests at issue.

A – *The* Shevill *case-law: analysis and assessment*

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Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

33. In *Mines de Potasse d'Alsace*, (9) the Court held that where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in what is now Article 5(3) of Regulation No 44/2001 must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.

34. The importance of the *Mines de Potasse d'Alsace* judgment cannot be overlooked. To prevent the special forum for liability in tort, delict or quasi-delict in such cases being the same as the general forum of the defendant's domicile, the Court interpreted Article 5(3) as meaning that it permits two alternative jurisdictions, at the applicant's choice: one in the place of the event giving rise to the damage and the other in the place where the damage actually occurred.

35. The approach in that judgment, which concerned the occurrence of material damage, was extended in *Shevill* to cases of non-material damage. It is well known that, in that case, the Court accepted that the approach described above was also applicable to cases of infringement of personality rights. (10) The Court explained on that occasion that, in the case of an 'international libel' through the press (which is exactly what occurred in *Shevill*), 'the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, *when the victim is known in those places*.' (11) In those circumstances, however, the holder of personality rights concerned would be entitled to bring a claim in that jurisdiction only in respect of damage suffered in that State.

36. In accepting the place where the victim is known as a connecting factor, the Court, following the proposal of Advocates General Darmon and Léger, (12) held that the courts of the States in which the defamatory publication was distributed and in which the holder of personality rights claims to have suffered injury to his reputation are competent to assess the damage caused in that State to the victim's reputation. (13) In order to prevent the disadvantages which may be created by that rule of jurisdiction, the Court went on to state that the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established. (14)

37. Thus, based on Article 5(3) of Regulation No 44/2001 and in cases where personality rights are prejudiced by the media, the *Shevill* judgment allowed two alternative jurisdictions from which the applicant may choose: one, in the State of domicile of the defendant or State of establishment of the publisher, where the victim may bring a claim in respect of the whole of the damage suffered, and the other, in the State in which the victim is known, where a claim may be brought only in respect of damage caused in that State, a restriction which some legal writers call the 'mosaic principle'. (15)

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38. The *Shevill* judgment strikes a reasonable balance, which is generally well received in academic circles. (16) On the one hand, the solution addresses the need to centralise in a single State – that of the publisher or the defendant – actions concerning the whole of the damage claimed, while, on the other, it enables the victim to bring proceedings, albeit subject to restrictions, in the place where damage to an intangible right, like the right to one's own image, has occurred. Viewed in that way, the *Shevill* solution prevents the special jurisdiction in Article 5(3) of Regulation No 44/2001 from becoming equivalent to general jurisdiction, which takes precedence over the jurisdiction of the defendant's domicile, but it also avoids the *forum actoris*, a criterion which the regulation openly rejected by having as its basis, like its predecessor the Brussels Convention, the general jurisdictional rule *actor sequitur forum rei*. (17)

39. As is clear, the *Shevill* case-law covers infringements of personality rights where there is a tension between freedom of information and the right to privacy or to one's own image. It has a wide scope and is not confined exclusively to the print media, since its scope also encompasses other means of communication such as information broadcast via television or radio. It also covers a wide range of infringements of personality rights, be they defamation in the sense usually attributed to this type of harm in continental legal systems, or the defamation typical of common law systems. (18)

40. The aspect which sets the present two joined cases apart from the case disposed of in that judgment is the information medium. The damage created by the infringement of personality rights by means of printed publications, television or radio traditionally occurred in a markedly national context. There were isolated cases of such disputes having international repercussions for national legal systems, largely because of the territorial scope which characterised the media. By restricting its activity to a single territory, the natural tendency of a media outlet is to provide information of interest to potential users in that geographical area. Accordingly, the media outlet which commits a breach of personality rights and the victim of the breach are, in most cases, located in the same territorial area.

41. Therefore, in order to determine whether it is possible to adapt the *Shevill* judgment, it is now appropriate to consider, albeit briefly, the changes in communication technologies and methods introduced by the internet.

B – *The internet, the press and the dissemination of information*

42. Without it being necessary to go back to the time when the spoken word and, to a lesser extent, the written word were the vehicle *par excellence* for social communication, the origin of the freedoms of opinion and communication, as we know them, may be traced very specifically to the time when it became possible to disseminate them in print. Since that time, both written communication and, in general, visual communication (19) have been distributed in paper form. It is these technological innovations which allowed those freedoms, whose model is readily applicable to sound and image broadcasting media, to be claimed and enshrined.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

43. The invention and establishment of the internet, and of the World Wide Web, (20) put an end to that tendency towards territorial fragmentation of the media. In fact, it reversed it so that the dissemination of information became a global rather than a national phenomenon. (21) Using an intangible, technological medium which allows the mass storage of information and its immediate distribution anywhere on the planet, the internet provides an unprecedented platform in the sphere of social communication techniques. Thus, on the one hand, the internet has transformed our spatial/territorial conception of communication by globalising social relationships and minimising the importance of the regional or State dimension, to the point of creating an intangible and ungraspable space – 'cyberspace' – which has no frontiers or limits. On the other hand, the internet has transformed the temporal conception of those relationships because of the immediacy with which their content may be accessed and because of their potential for permanency on the Net. Once content is circulated on the Net, it is, in principle, available via the Net forever.

44. As a result of the foregoing, a media outlet which decides to publish its content on the internet adopts a method of 'distribution' which is radically different from that required by conventional media. Unlike the press, a website does not require a prior business decision about the number of copies to distribute or, much less, to print, because distribution is global and instantaneous: it is common knowledge that a website may be accessed anywhere in the world where there is internet access. Access to the media outlet is also different, as are the advertising methods which surround the product. The Net, as I have just explained, enables permanent, universal access, which individuals may distribute immediately to one another. Even media outlets on the internet which must be paid for are different from other forms of media because generally the purchase is made on a worldwide basis.

45. Further, the internet, unlike traditional media, is characterised by a significant lack of political power. Its global nature hinders intervention by the public authorities in activities which take place on the Net, leading to a material deregulation which is criticised in many circles. (22) In addition to that material deregulation, there is also a conflict-of-laws fragmentation, a dispersed amalgam of national legal systems with their respective provisions of private international law which often overlap and hinder any approximation of the rules which govern a particular dispute.

46. The features described above have an unquestionable impact on the legal sphere. As has been stated, the global and immediate distribution of news content on the internet makes a publisher subject to numerous local, regional, State and international legal provisions. Moreover, the absence of a global regulatory framework for information activities on the internet, together with the range of provisions of private international law laid down by States, exposes the media to a fragmented, but also potentially contradictory, legal framework, since that which is prohibited in one State may, in turn, be permitted in another. (23) Accordingly, the need to provide the media with legal certainty, by preventing situations which discourage the lawful exercise of

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freedom of information (the so-called chilling effect*),* acquires the character of an objective which the Court must also take into consideration. (24)

47. Further, the control exerted by a media outlet over distribution of and access to its medium becomes blurred and, on occasions, unattainable. When information content is uploaded to the Net, individuals immediately become – voluntarily or involuntarily – distributors of the information, by means of social networks, electronic communications, links, blogs or any other methods which the internet provides. (25) Even the restriction of content by means of paying access, which is occasionally subject to territorial limitations, faces serious difficulties when it comes to preventing the mass distribution of information. Accordingly, monitoring and measuring the impact of information, or entering it in the accounts, for which there were highly reliable methods in traditional media, becomes a task which is impossible to complete when the information concerned circulates on the Net. (26)

48. In addition, the possible victims of publications which are harmful to personality rights are in a particularly vulnerable position when the medium is provided by the internet. The universal scope of the information contributes to the harm being potentially more acute than that suffered, for example, by means of a conventional medium. (27) The serious nature of the harm must contend with a wide variety of applicable bodies of rules, since territorial dispersion means that the right is covered by different national systems and, therefore, a number of national legal systems have jurisdiction to hear the case. Accordingly, the holder of personality rights concerned may be the victim of potentially more serious infringements, while his legal protection is reduced because he is affected by fragmentation and a lack of legal certainty.

C – *The opportunity to adapt or confirm the* Shevill *case-law*

49. I should point out that, in *Shevill*, the Court provided a reply which reconciled the interests of the media with the need to safeguard the legal position of the holder of personality rights. The statement of the law in *Shevill* enables the clear and accurate identification of 'the place where the harmful event occurred or may occur' for the purposes of determining one or more jurisdictions. That case-law is of obvious relevance to cases of infringement of personality rights in which the media outlet sued has, to a greater or lesser extent, a regionalised distribution system. Since the method of disseminating information reflects a business strategy which measures the advisability, in economic and information terms, of establishing oneself in other States, a solution of the kind provided in *Shevill*, which also regionalises the extent of the harm is, in fact, a reasonable reply.

50. The *Shevill* judgment was given in the years immediately preceding the expansion of the internet. The circumstances in which the instant cases have arisen are clearly different from what occurred in the case of Fiona Shevill, which impedes the practical application of the solution reached by the Court in 1995. For example, the court identified as having jurisdiction by reference to the place where the holder of

personality rights is known may hear an action only in relation to damage which actually occurred in that State. The practical application of this rule was viable at the time when the *Shevill* judgment was given, having regard, for example, to the number of copies distributed in each Member State, information which was easy to verify because it was part of the commercial policy of the media outlet and was the result of voluntary business decisions. However, as those who participated in the hearing in these proceedings acknowledged, there are no reliable criteria for measuring the degree of distribution of a media outlet as such (or of its content) on the internet. While it is true that the number and origin of 'hits' on a website may be indicative of a particular territorial impact, they are, in any event, sources which do not provide sufficient guarantees for the purposes establishing conclusively and definitively that unlawful damage has occurred. (28)

51. Further, the *Shevill* judgment is based on the need to safeguard the sound administration of justice, an objective explicitly referred to in the preamble to Regulation No 44/2001. (29) The application of that case-law to the context of media outlets on the internet may, in certain cases, be incompatible with that objective. Take, for example, the case of someone like Olivier Martínez, who appears to be popular (he is 'known') in more than one Member State. The excessive fragmentation of jurisdictions and, possibly, of applicable laws, is difficult to reconcile with the sound administration of justice. (30) Similarly, the mere fact that information about this public figure is directly accessible in every Member State would expose the publisher of the media outlet concerned to a situation which is difficult to manage, since any Member State would potentially have jurisdiction if proceedings were brought. Nor can it be said that such an outcome promotes predictability in the definition of the rules, for either the applicant or the defendant. (31)

52. On a more general level, it is also important to note that, since 1995, the year when the *Shevill* judgment was published, there have been a number of significant changes in the legal framework of the Union. The entry into force of the Charter of Fundamental Rights of the European Union confirmed the importance of the fundamental right to privacy and freedom of information. Articles 7 and 11 of the Charter refer to the special protection which information warrants in a democratic society, in addition to emphasising the importance of privacy, which also encompasses the right to one's own image. The Court had occasion to rule on both those rights before the entry into force of the Charter, (32) while, for its part, the European Court of Human Rights specified the content of those rights. (33) However, the entry into force of the Charter has a specific value for the present purposes, in that it openly reflects the need for all spheres of action of the Union, including those relating to judicial cooperation in civil matters, to be subject to the definitions of the rights provided for therein. (34) Expressed in those terms, the overexposure to which the media is subject against a background of excessive litigation, in addition to the serious nature of possible infringements of personality rights and the lack of legal certainty afforded by the protection of that right, require that the tension underlying the *Shevill* case law be approached in a way which prevents that outcome.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

53. In addition, any approach which entails altering the *Shevill* case-law must of necessity take into account the requirement of technological neutrality. In other words, the replies which the Court provides to difficulties of interpretation caused by the emergence of the internet must not focus excessively on this medium at the risk of being invalidated by technological progress or of creating differences in treatment based on a criterion which may be arbitrary, such as the use of a particular technology. (35) Although, admittedly, the nature of the conflict between freedom of information and the right to one's own image is very specific where the internet is concerned, the solution provided by the Court must, as far as possible, be applicable to all media outlets, regardless of the form in which they appear. (36) That conclusion is bolstered further by the observation that, at the moment, particularly with regard to the daily press of a certain standing, there are virtually no media outlets which do not have an electronic edition published on the Net. Information content is fungible and its formats are interchangeable. Accordingly, the determination of the relevant jurisdiction must be based on criteria which take into account simultaneously the damage caused, for example, by a print medium and by a website. (37)

54. At this juncture, I believe that it is possible to provide a reply which alters the *Shevill* case-law and, at the same time, is technologically neutral. In my opinion, the reply is not found in a radical reconsideration of that case-law. On the contrary, I believe that the reply given by the Court in 1995 retains its force today in cases of 'international libel' where the information is carried on a print medium. It will be sufficient to add an additional connecting factor to the ones already laid down, without it being necessary, furthermore, to specifically restrict the criterion to damage caused by means of the internet.

D – *The 'centre of gravity of the dispute' as an additional connecting factor with the competent jurisdiction*

55. As I have stressed, the *Shevill* case-law establishes dual jurisdiction at the choice of the holder of personality rights, allowing him to choose between the jurisdiction of the publisher or defendant and the jurisdiction of the place or places where the victim is known. As I have pointed out, that approach is appropriate in a significant number of cases, which have been described above. That is why the connecting factors provided by that case-law are not incorrect as such but they do enable, and even call for, the addition of a supplementary factor. Specifically, I believe that it is appropriate to formally establish and include an additional connecting factor, in accordance with which 'the place where the harmful event occurred or may occur', in the sense of Article 5(3) of Regulation (EC) No 44/2001, also includes the place where the 'centre of gravity of the dispute', among the rights and interests at issue, is located.

56. The infringement of personality rights by media outlets on the Net gives rise to a tension which has been described in points 42 to 44 of this Opinion. The added difficulty is the transnational, or even simply global, nature of that tension, which requires the identification of jurisdictions which balance the rights and interests at issue,

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in other words, those of the media outlet and those of the individuals concerned. Accordingly, in principle, a possible connecting factor might be based on the *accessibility* of the information, which would justify an automatic connection with all the Member States, since, in practice, the allegedly harmful information is accessible in all of them. However, as all those who have participated in these proceedings have pointed out, that option would immediately give rise to a phenomenon known as forum shopping, which is untenable for any media outlet operating on the Net. (38) In the same way, the serious nature of the harm which may be suffered by the holder of the fundamental right to privacy, who observes how the information injurious to his reputation is available anywhere on the planet, must contend with a solution which fragments his right in each Member State where he is known. (39)

57. To my mind, a solution which adequately supplements the connecting factors in the *Shevill* judgment is one which, in addition to including the criteria originally laid down, also enables the identification of the jurisdiction where a court is best placed to analyse the tension between the interests involved and is therefore able to hear an action concerning all the damage suffered. It would, therefore, be a situation halfway between the two already in existence, since it would enable a holder of personality rights to bring proceedings in the jurisdiction where his centre of interests is located, it would create predictability for media outlets, and it would allow the harm suffered to be considered in its entirety. (40) I believe that the criterion of the place where the 'centre of gravity of the dispute' is evident takes proper account of that range of objectives.

58. To put it as succinctly as possible, the place of the 'centre of gravity of the dispute' is the one where a court is able to adjudicate on a dispute between freedom of information and the right to one's own image under the most favourable conditions. That situation occurs in the State where the potential for an infringement of the right to one's own reputation or the right to privacy *and* the value inherent in the dissemination of certain information or a particular opinion, as the case may be, may be visualised or are more evident. That is the State where the holder of personality rights will suffer the most extensive and serious harm. Further, and this is undoubtedly important from the point of view of legal certainty, it is the territory where the media outlet could have foreseen that that harm might have occurred and, accordingly, that there was the risk of being sued there. In those terms, the centre of gravity will be the place where a court is best placed to understand fully the conflict between the interests involved.

59. In determining the place of the 'centre of gravity of the dispute', it is therefore necessary to identify two elements. The first concerns the individual whose personality rights have allegedly been infringed and requires that the place of the 'centre of gravity of the dispute' be located where that individual has his 'centre of interests'. That criterion is, to a certain extent, similar to the one laid down in the *Shevill* judgment, in that it requires that 'the victim is known'. However, in determining the place where the 'centre of gravity of the dispute' is located, it is not sufficient for the victim merely to be known. On the contrary, it is necessary to identify the place (and, therefore, the

Member State) where the individual concerned, in the enjoyment of his personality rights, essentially carries out his life plan, if this exists.

60. The second element concerns the nature of the information. In order to determine the place where the 'centre of gravity of the dispute' is located, the information at issue must be expressed in such a way that it may reasonably be predicted that that information is objectively relevant in a particular territorial area. In other words, the information giving rise to the dispute must be expressed in such a way that, in the light of the circumstances surrounding the news item, it constitutes information which arouses interest in a particular territory and, consequently, actively encourages readers in that territory to access it. (41)

61. The particular feature of the traditional tension which may arise in relation to the two rights – I believe that this may be argued without excessive risk – is that the centre of gravity of the potential infringement of personality rights tends to be the same as the centre of gravity or interest of the news item or opinion in question. In short, *because* the news item or opinion may be of particular interest in one place, that is also the place where any infringement of personality rights may inflict the highest level of damage – and vice-versa. It is only possible to refer, in the singular, to a 'centre of gravity of the dispute' where that assertion may in principle be made.

62. Having said that, it is important not to confuse the second of those elements with a criterion of intent on the part of the media outlet. The information is not objectively relevant because the publisher voluntarily directs it to a particular Member State. A criterion based on intent is contrary to the wording of Article 5(3) of Regulation No 44/2001, which is confirmed by a comparison of that provision with Article 15(1)(c) of the regulation, which provides for special jurisdiction for consumer contracts in cases where the provider of the service 'directs such activities to that Member State or to several States'. (42) Nothing of that kind may be found in Article 5(3) and, therefore, it is not appropriate to determine international jurisdiction on the basis of a criterion of intent. (43) Further, a criterion based on the subjective intent of the publisher of the information gives rise to wide-ranging evidential difficulties, as is clear in practice where it is applied. (44)

63. In proposing that the information must be objectively relevant, I refer to situations in which a media outlet may reasonably foresee that the information published in its electronic edition is 'newsworthy' in a specific territory, thereby encouraging readers in that territory to access it. That criterion of objective relevance may be applied through the use of various items of evidence, which, I will say now, it is for the national court to analyse.

64. Above all, it may be inferred from the reasoning in this Opinion that the first element which it is necessary to examine is the subject-matter of the information at issue. Certain information may be of interest in one territory but be completely devoid of interest in another. News about allegedly criminal activities carried out in Austria by

an Austrian citizen who resides in Austria is clearly 'newsworthy' in the territory of that State, even though the information may be published in an online newspaper whose publisher resides in the United Kingdom. When a media outlet uploads to the Net certain content which, by its nature, will have an unquestionable impact, in an information sense, in another Member State, the publisher may reasonably foresee that, where he has published information prejudicial to personality rights, he may possibly be sued in that State. Thus, the more newsworthy a particular news item is in one national territory, the greater the likelihood that infringements of rights committed there will, in principle, have a connection with the courts of that territory.

65. The national court may also take into account other items of evidence which contribute to the identification of the territory where the information is objectively relevant. It should be noted that such evidence may indicate subjective intent on the part of the publisher to direct the information to a particular State. However, for the present purposes, such evidence is aimed solely at establishing a connection with a particular territory rather than intent on the part of the publisher of the information. Thus, the list of possible evidence to examine must take into consideration the fact that the information may be distributed on a website with a top-level domain name which is different from that of the Member State where the publisher is established, thereby demonstrating the existence of a particular territorial area in which the information is likely to be followed with particular interest. (45) Likewise, the language of a website helps to delimit the sphere of influence of the information published. Any advertising which may be on the website may also indicate the territorial area where the information is intended to be read. (46) The section of the website in which the information is published is also relevant for the purposes of achieving an impact in a particular territory. One example might be an online newspaper in which the news sections are divided by country. The publication of information under the heading 'Germany' will be an indication that news made available in that section has a particularly significant impact in that State. The keywords supplied to search engines to identify the media outlet's site are also capable of providing clues as to the place in which the information is objectively relevant. Finally, and without intending this to be an exhaustive list, the website access log, despite its lack of reliability, may be a purely illustrative source for the purposes of confirming whether or not certain information has had an impact in a particular territory. (47)

66. The criteria set out above enable a court to determine whether the information at issue is objectively relevant in a particular territorial area. If the information is objectively relevant in scope in a particular Member State and that State is, in turn, the one where the holder of personality rights has his 'centre of interests', I believe that the courts of that State have jurisdiction to hear an action for compensation in respect of all the damage caused by the unlawful act. The Member State where both those criteria are satisfied is clearly the place where a court will be best placed to adjudicate on the facts and to hear the entire case. That jurisdiction is, in short, the one where the 'centre of gravity of the dispute' is located.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

67. By way of conclusion, I propose to the Court that the phrase 'the place where the harmful event occurred or may occur', in the sense of Article 5(3) of Regulation No 44/2001, must be interpreted as meaning, in the event of an infringement of personality rights by means of information disseminated in a number of Member States via the internet, that the holder of those rights may bring an action for compensation,

- either before the courts of the Member State of establishment of the publisher of the information infringing personality rights, which have jurisdiction with regard to compensation for all of the damage arising from the infringement of those rights,

- or before the courts of each Member State in which the information was published and in which the holder of personality rights claims to have been the victim of an attack against his reputation, which have jurisdiction to hear an action concerning only the damage caused in their respective States,

- or before the courts of the Member State where the 'centre of gravity of the dispute', among the rights and interests involved, is located; those courts have jurisdiction with regard to compensation for all of the damage arising from an infringement of personality rights. The Member State where the 'centre of gravity of the dispute' is located is taken to be the State in whose territory the information at issue is objectively and particularly relevant and where, at the same time, the holder of personality rights has his 'centre of interests'.

VII – **The third question in *eDate* (C-509/09)**

68. By its third question, the Bundesgerichtshof asks the Court about the scope of Article 3(2) of Directive 2000/31 on electronic commerce on the internet when applied to a case like the instant one. In short, the Bundesgerichtshof asks whether, in providing that Member States 'may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State', that provision lays down, in its own terms, an applicable rule of law or, failing that, a mere corrective to the subject-matter of the national law applicable to the dispute.

69. The reply to that question calls for a number of general preliminary observations.

70. The Bundesgerichtshof refers this third question, and refers it in these terms, because it is uncertain as to the law applicable to a dispute such as the one in the instant case. In short, the question could be construed as follows: Has Directive 2000/31 harmonised private international law at national level by laying down a conflict-of-laws rule which refers the competent court to the substantive law of the Member State of establishment of the publisher? If the reply is negative and the Court holds that there is no such harmonisation, the Bundesgerichtshof directs its question next to the scope and effect ('corrective effect at a substantive law level') which Directive 2000/31 has on German private international law, which would then be the law applicable to a case like the one in *eDate*.

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Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

71. If that assessment on my part is correct, I believe that, above all, it is necessary to point out the functional and systematic position of the article of Directive 2000/31 to which the question specifically refers. Under the heading 'Internal market', Article 3 of the directive embodies a requirement which reflects the traditional content of the freedom to provide services. The article expresses in an instrument of secondary law a safeguard already provided for in primary law by Article 56 TFEU, and adapts it to the specific features required by the harmonisation of legislation on electronic commerce. The first paragraph of the article confirms the applicability of the provisions of the Member State where the service is provided, while the second points to the need to take into consideration the legal requirements which the service provider has already complied with in his Member State of origin. That paragraph quite clearly imposes a further requirement of mutual recognition, in line with the case-law of the Court. (48) Next, the concrete expression of the freedom to provide services is completed in Article 3(4) of the directive, which sets out the reasons which Member States may rely on to derogate from that freedom.

72. In the light of the foregoing, it is possible to detect in the formulation of the question under consideration a certain distance from what Article 3 of Directive 2000/31 as a whole states, or, at least, appears to state. In short, as has been observed, the article defines the conditions under which Member States must regulate an economic sector which is part of the internal market, and reflects in its provisions the content of the freedom to provide services, which comprises – as is well known – a requirement of mutual recognition. However, the article does not lay down an applicable rule of law requiring the Member State in which the service is provided to apply the national law of the State of establishment of the service provider. Article 3 of Directive 2000/31 merely gives concrete expression to the content of the freedom to provide services and with it the conditions in which the technique of mutual recognition must be applied.

73. I believe that that assessment is bolstered further by Article 1 of Directive 2000/31, paragraph 4 of which provides: 'This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.' In other words, the provision neither lays down directly nor harmonises applicable rules of law or rules governing international jurisdiction in the field concerned. (49) In short, in terms of private international law, the directive provides for neutral regulation which neither alters nor adds to the criteria for determining jurisdiction, the applicable law, or the recognition of judicial decisions from other Member States. (50)

74. The requirement of conflict-of-laws neutrality laid down in Directive 2000/31 must also inform the interpretation of Article 3 of the directive because, in the system of the directive, that requirement is in Article 1. There is nothing to indicate that Article 3 acts as a derogation from Article 1.

75. Another conclusive indicator that Directive 2000/31 does not predetermine a reply under private international law may be found in national legal systems,

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specifically in the domestic provisions transposing the directive. It is clear from the case-file that the Member States transposed Article 3 of Directive 2000/31 in different ways. While some laid down applicable rules of law, (51) other Member States opted for transposition expressly in terms of mutual recognition. (52) In the second case, it can be seen that a number of legal systems transposed Article 3 by reproducing its exact wording. (53)

76. In addition, an interpretation of Directive 2000/31 which revealed an applicable rule of law would be invalidated by the current state of secondary law on judicial cooperation in civil matters. It is well-known that Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II), excludes from its scope 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.' (54) The travaux préparatoires for the regulation make clear the strikingly different views put forward by the Member States on that subject, which led to an exemption from the regulation for which a solution is currently being sought in a new legislative initiative led by the Commission. (55) To my mind, it is at the very least doubtful that Regulation No 864/2007 had to apply an exemption of that kind, since Directive 2000/31 had already laid down a rule harmonising the applicable national provisions in the field.

77. Accordingly, in the light of the arguments set out, I am inclined to propose that the Court reply, first of all, that Article 3 does not effect a harmonisation which imposes on Member States a conflict-of-laws rule.

78. Finally, the Bundesgerichtshof concludes its third question by asking whether, in the alternative, Article 3(2) of Directive 2000/31 operates as 'a corrective at a substantive law level, by means of which the substantive law outcome under the law declared to be applicable pursuant to the national conflict-of-law rules is altered and adjusted to the requirements of the country of origin'.

79. As I pointed out above, that question conceals a conception of Article 3 of Directive 2000/31 as a rule of private international law. Admittedly, once the conflict-of-laws character of the article has been ruled out, it is clear that the provision does not harmonise the rules on the determination of the law applicable to a case such as the instant one. However, nor does that mean that Article 3 acts per se as a corrective rule in relation to an applicable provision of national law. As I stated in points 71 to 73 of this Opinion, the article merely lays down rules on the harmonisation of the free movement of services in the sphere of electronic commerce. A court which applies the technique of mutual recognition in a dispute with an international connection does not apply the law of the State of origin of the service provider and instead, in the absence of reasons to justify otherwise, must confine itself to confirming compliance with the provisions governing the service in that State. (56) That does not preclude, by means of a derogation, the State of jurisdiction from having laid down additional measures aimed at protecting certain rights worthy of special protection (see Article 3(4)). However, under no circumstances, is the law of the Member State of origin applied, nor is the State of

the court with jurisdiction required under the directive to provide specifically for a corrective to private international law when laying down measures offering greater protection.

80. Accordingly, in my view, it is not appropriate either to assert that the aim of Article 3 of Directive 2000/31 is to harmonise a substantive corrective to the applicable substantive law. Article 3 empowers Member States, within the margin of discretion granted to them by the directive and by Article 56 TFEU, to lay down measures for the protection of rights which warrant special safeguards, by way of a derogation from the freedom to provide services. Consequently, the German legislature has the power to lay down such derogations either by means of substantive measures or also, where appropriate, by means of provisions acting as correctives to the applicable law. However, that does not mean that Directive 2000/31 predetermines a conflict-of-laws solution to the problem.

81. In short, I believe that Article 3 of Directive 2000/31 must be interpreted as meaning that it does not impose a conflict-of-laws rule or a 'corrective at a substantive law level'. The article gives concrete legislative expression, in terms of harmonisation, to the freedom to provide services as applied to electronic commerce, while also empowering the Member States, within the margin of discretion granted to them by the directive and by Article 56 TFEU, to lay down measures for the protection of rights which warrant special safeguards, by way of a derogation from the freedom to provide services.

VIII – **Conclusion**

82. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred by the Bundesgerichtshof and the Tribunal de grande instance de Paris:

(1) The phrase 'the place where the harmful event occurred or may occur', used in Article 5(3) of Regulation No 44/2001, must be interpreted as meaning, in the event of an infringement of personality rights by means of information disseminated in a number of Member States via the internet, that the holder of those rights may bring an action for compensation,

– either before the courts of the Member State of establishment of the publisher of the information infringing personality rights, which have jurisdiction with regard to compensation for all of the damage arising from the infringement of those rights,

– or before the courts of each Member State in which the information was published and in which the holder of personality rights claims to have been the victim of an attack against his reputation, which have jurisdiction to hear an action concerning only the damage caused in their respective States,

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

– or before the courts of the Member State where the 'centre of gravity of the dispute', among the rights and interests involved, is located; those courts have jurisdiction with regard to compensation for all of the damage arising from an infringement of personality rights. The Member State where the 'centre of gravity of the dispute' is located is taken to be the State in whose territory the information at issue is objectively and particularly relevant and where, at the same time, the holder of personality rights has his 'centre of interests'.

(2) Article 3 of Directive 2000/31 must be interpreted as meaning that it does not impose a conflict-of-laws rule or a 'corrective at a substantive law level'. The article gives concrete legislative expression, in terms of harmonisation, to the freedom to provide services as applied to electronic commerce, while also empowering the Member States, within the margin of discretion granted to them by the directive and by Article 56 TFEU, to lay down measures for the protection of rights which warrant special safeguards, by way of a derogation from the freedom to provide services.

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1 – Original language: Spanish.

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2 – Council Regulation **of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters** (OJ 2001 L 12, p. 1).

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3 – I should point out at this juncture that the terms 'defamation' and 'libel', used by the Court in *Shevill*, have been used throughout these proceedings in a general way and as a synonym of the expression 'personality rights'. In this Opinion, I shall opt for use of the latter expression, except when referring to *Shevill* when I shall use the words 'defamation' or 'libel' which were originally used by the Court in that judgment.

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4 – Case C-68/93 [1995] ECR I-415.

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5 – Articles 7 and 11 of the Charter of Fundamental Rights of the European Union.

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6 – **Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic**

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commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

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7 – In that connection, see, inter alia, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; and Case C-544/07 *Rüffler* [2009] ECR I-0000, paragraph 37.

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8 – Case C-167/00 *Henkel* [2002] ECR I-8111, paragraphs 46 and 48, and Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraphs 26 and 27.

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9 – Case 21/76 *Bier* 'Mines de potasse d'Alsace' [1976] ECR 1735.

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10 – *Shevill*, paragraph 23.

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11 – *Shevill*, paragraph 29, emphasis added.

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12 – Opinions of Advocate General Darmon, delivered on 14 July 1994, and of Advocate General Léger, delivered on 10 January 1995. The rather unusual occurrence of two Advocates General delivering Opinions in the same case is due to the fact that the Court decided to reopen the oral stage of the proceedings after the delivery of the Opinion of Advocate General Darmon, whose term of office as a member of the Court had expired a few days before the decision to reopen.

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13 – *Shevill*, paragraph 31.

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14 – *Shevill*, paragraph 32.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

15 – See Magnus, U. and Mankowski, P., *Brussels I Regulation,* Sellier. European Law Publishers, 2007, Munich, pp. 192 and 193.

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16 – See, inter alia, the comments of Crespo, A., 'Precisión del forum locus delicti commissi en los supuestos de daños contra la persona causados a través de prensa', *La Ley – Comunidades Europeas*, 1995, No 96, p. 1 et seq.; Gardella, A., 'Diffamazione a mezzo stampa e Convenzione di Bruxelles del 27 settembre 1968', *Revista di diritto internazionale privato e processuale*, 1997, p. 657 et seq.; Hogan, G., 'The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem', *European Law Review,* 1995, p. 471 et seq.; Huber, P., 'Persönlichkeitsschutz gegenüber Massenmedien im Rahmen des Europäischen Zivilprozessrechts', *Zeitschrift für europäisches Recht*, 1996, p 300 et seq.; Idot, L., 'L'application de la Convention de Bruxelles en matière de diffamation. Des précisions importantes sur l'interpretation de l'article 5.3', *Europe*, 1995, Juin, pp. 1 and 2;

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17 – See the Opinion of Advocate General Léger in *Shevill*, points 39 and 40.

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18 – See Sánchez Santiago, J. and Izquierdo Peris, J.J., 'Difamar en Europa: las implicaciones del asunto *Shevill'*, *Revista de Instituciones Europeas*, 1996, No 1, p. 168.

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19 – See Ivins Jr., W. M., *Prints and Visual Communication,* The M.I.T. Press, Cambridge-London, 1969.

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20 – On the concept and legal definition of the internet and the World Wide Web, see, inter alia, Lloyd, I.J., *Information Technology Law,* 4th ed., 2004.

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21 – See, inter alia, Castells, M., *La Era de la Informacion. Economia, Sociedad y Cultura. La Sociedad Red,* Siglo XXI, 2002.

Source: http://eur-lex.europa.eu

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

22 – See, inter alia, Gigante, A., 'Blackhole in Cyberspace: the Legal Void in the internet', *Journal of Computer & Information Technology*, vol. XV, 1997; Gould, M., 'Rules in the Virtual Society', *International Review of Computers & Technology,* vol. 10, 1996; Reidenberg, J.R., 'Governing Networks and Rule-Making in Cyberspace', *Emory Law Review,* vol. 45, 1996; and Strömer, T.H., *Online-Recht: Juristische Probleme der internet-Praxis erkennen und vermeiden,* 4th ed., Dpunkt, Heidelberg, 2006.

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23 – See, inter alia, Hoeren, T., 'internet und Recht – Neue Paradigmen des Informationsrechts', *Neue Juristische Wochenschrift,* vol. 51, 1998, pp. 2852 to 2854; Katsch, M.E., *Law in a Digital World,* Oxford University Press, Oxford – New York, 1995, p. 240 et seq.; Levine, N., 'Establishing Legal Accountability for Anonymous Communications in Cyberspace', Columbia Law Review, vol. 96, 1996, pp. 1540 to 1564; Susskind, R., *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace,* Oxford University Press, Oxford – New York, 2000, p. 143 et seq.

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24 – In particular, see Determann, L., *Kommunikationsfreiheit im internet. Freiheitsrechte und gesetzliche Beschränkungen,* Nomos, Baden–Baden, 1999, p. 304 et seq.

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25 – As the Bundesgerichtshof points out in its order for reference in Case C-509/0[9], the internet does not *distribute* information, it simply makes it *accessible*. It is internet users who become, voluntarily or involuntarily, distributors.

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26 – Pichler, R., in Hoeren, T. and Sieber, U. (eds.), *Handbuch Multimedia-Recht. Rechtsfragen des elektronischen Geschäftsverkehrs,* Beck, Münich, 2009, chapter 25, paragraph 224.

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27 – See the different forms in which that tension occurs in Fernández Esteban, M.L., *Nuevas tecnologías, internet y derechos fundamentales,* McGraw Hill, Madrid, 1999; Banisar, D. and Davies, S. 'Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Law and Developments', *Journal of Computer and Information Law,* vol. XVIII, 1999; Fleischmann, A., 'Personal Data Security: Divergent Standards in the European Union and the United States', *Fordham International Law Journal,* vol. 19, 1995; Geis, I. 'Internet und Datenschutzrecht', *Neue*

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Juristische Wochenschrift, vol. 50, 1997; and Morón Lerma, E., *Internet y Derecho penal: hacking y otras conductas ilícitas en la Red,* Aranzadi, Navarra, 1999.

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28 – See Jerker, D. and Svantesson, B., *Private International Law and the internet,* Kluwer Law International, 2007, p. 324 et seq., and Roth, I., *Die internationale Zuständigkeit deutsche Gerichte bei Persönlichkeitsrechtsverletzungen im internet,* Peter Lang, 2006, p. 283.

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29 – *Shevill*, paragraph 31.

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30 – Advocate General Darmon pointed out that objection in his Opinion in *Shevill*, at point 72.

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31 – Roth, I., *Die internationale Zuständigkeit…,* op. cit., p. 310 et seq.

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32 – On Article 11 of the Charter and the application of the right to freedom of information before the Charter, see, inter alia, Case 155/73 *Sacchi* [1974] ECR 409; Case C-260/89 *ERT* [1991] ECR I-2925; Case C-100/88 *Oyowe and Traore* v *Commission* [1989] ECR 4285; Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419; Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611. In connection with Article 7 of the Charter and the case-law which preceded it, see, inter alia, Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 17

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33 – On freedom of information or, to use the terminology of Article 10 of the European Convention on Human Rights, 'freedom ... to receive and impart information and ideas', see, inter alia, the judgments of the European Court of Human Rights in Handyside v. United Kingdom, 7 December 1976; Leander v. Sweden, 26 March 1987; Bladet Tromso and Stensaas v. Norway, 29 May 1999; Feldek v. Slovakia, 27 February 2001; and McVicar v. United Kingdom, 7 May 2002. As concerns the fundamental right to privacy, included in Article 8 of the Convention, concerning the right to respect for

family and private life, see, inter alia, the judgments in X and Y v. Netherlands, 26 March 1985; Niemetz v. Germany, 16 December 1992; Stjerna v. Finland, 25 November 1994; Vertiere v. Switzerland, 28 June 2001; and Von Hannover v. Germany, 24 June 2004.

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34 – On the effect of the Charter in informing on all the spheres of legislative action of the Union, see Lenaerts, K. and Gutiérrez-Fons, J., 'The Constitutional Allocation of Powers and General Principles of EU Law', *Common Market Law Review,* vol. 47, 2010. In relation to private international law, see Requejo Isidro, M., *Violaciones Graves de Derechos Humanos y Responsabilidad Civil,* Thomson-Aranzadi, 2009.

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35 – See Knutsen, E. S., 'Techno-Neutrality of Freedom of Expression in New Media Beyond the internet', *UCLA Entertainment Law Review,* No 8, 2001, p. 95; Koops, B.-J., 'Should ICT Regulation be Technology-Neutral?', in Koops B.-J., Lips, M., Prins, C. & Schellekens, M., *Starting Points for ICT Regulation: deconstructing prevalent policy one-liners,* TMC Asser Press, The Hague, 2006, pp. 77 to 79; Escudero-Pascual, A. and Hosein, I., 'The Hazards of Technology-Neutral Policy: Questioning Lawful Access to Traffic Data', *Communications of the Association for Computing Machinery*, No 47, 2004, p. 77.

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36 – The European Commission has repeatedly proposed a definition of the concept of 'technological neutrality' as a requirement of non-discrimination based on the media used. As it stated in its **Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and guidelines for the Community's audiovisual policy in the digital age** (COM(1999) 657 final, p. 11), '[t]echnological convergence means that services that were previously carried over a limited number of communication networks can now be carried over several competing ones. This implies a need for technological neutrality in regulation: identical services should in principle be regulated in the same way, regardless of their means of transmission'. In that connection, see also the **Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the EU Regulatory Framework for electronic communications networks and services** (COM(2006) 334, p. 8), and the Ministerial Declaration of the Ministerial Conference on Global Information Networks, held in Bonn from 6 to 8 July 1997,

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37 – See, in that connection, Virgós Soriano, M. and Garcimartín Alférez, F. J., *Derecho Procesal Civil Internacional. Litigación Internacional,* 2nd ed., Civitas, Madrid, 2007, p. 194.

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38 – In that connection, see the judgment of the Bundesgerichtshof in case Vl ZR 23/09, 2 March 2010, at paragraph 17; Roth, I., *Die internationale Zuständigkeit …,* op. cit., p. 310 et seq.; Dessemontet, F., 'Internet, la propriété intellectuelle et le droit internacional privé', in Boele-Woelki, K. and Kessedjan, C. (eds.), *Internet: Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s'applique?,* Kluwer, The Hague, 1998, p. 63; and De Miguel Asensio, P., *Derecho Privado de internet,* 2nd ed., 2001, pp. 295 and 296. In the context of international consumer and transport contracts, the Court also rejected the criterion of accessibility alone in Joined Cases C-585/08 and C-144/09 *Pammer and Alpenhof* [2010] ECR I-0000, paragraph 94.

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39 – The lack of protection of victims created by the so-called mosaic principle was a cause for concern in academic circles before *Shevill* (see, for example, Gaudemet-Tallon, H., *Revue critique de droit international privé,* 1983, p. 674; Heinrichs, J., *Die Bestimmung der gerichtlichen Zuständigkeit nach dem Begehungsort im nationalen und internationalen Zivilprozessrecht,* Diss., Freiburg, 1984, pp. 188 to 201; and Schwiegel-Klein, E., *Persönlichkeitsrechtverletzungen durch Massenmedien im internationalen Privatrecht. Zur Anwendung der lex loci delicti commissi auf Pressedelikte unter besonderer Berücksichtigung der amerikanischen Rechtsprechung,* Münster, 1983, pp. 68 to 82). Following the *Shevill* judgment, the lack of protection for holders of personality rights continued to be the subject of criticism. See, inter alia, Fernández Rozas, J.C. and Sánchez Lorenzo, S., *Derecho Internacional Privado,* 3rd ed., Civitas, Madrid, p. 501.

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40 – Pichler, R., in Hoeren, T. and Sieber, U. (eds.), *Handbuch Multimedia-Recht,* op. cit., chapter 25, paragraph 211 et seq., in particular, paragraph 268; Lutcke, J., *Persönlichkeitsrechtsverletzungen im internet. Eine rechtsvergleichende Untersuchung zum deutschen und amerikanischen Recht,* Herbert Utz, Münich, 2000, p. 135.

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41 – In that connection see the judgment of the Bundesgerichtshof of 2 March 2010, cited above, at paragraph 20; the judgment of the High Court of England and Wales in Harrods v Dow Jones, 22 May 2003, at paragraph 32 et seq.; the judgment of the Scottish Court of Session in Bonner Media Limited, 1 July 2002, at paragraph 19; and

the judgment of the High Court of Australia in Dow Jones & Company Inc, 10 December 2002, at paragraph 154.

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42 – The Court ruled on the specific scope of that special jurisdiction in relation to transport and consumer contracts concluded over the internet in *Pammer and Alpenhof*. In that connection, the Court observed in that judgment that: 'Among the evidence establishing whether an activity is "directed to" the Member State of the consumer's domicile are all *clear expressions of the intention to solicit the custom of that State's consumers*' (emphasis added). The Opinion of Advocate General Trstenjak in those cases is particularly illuminating, since she took the view, as did the Court, that the 'directing' of content on the internet is not simply a question of accessibility or objective interest in a particular territory (see point 78 et seq.).

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43 – See the judgment of the Bundesgerichtshof of 2 March 2010, paragraph 18.

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44 – See the example of the United States, where the single publication rule, laid down in the Uniform Single Publication Act and in the Restatement (Second) of Torts § 577A (1977), gives rise to significant problems in relation to the internet. In that connection, see the judgment of the United States Court of Appeals for the Fourth Circuit in Stanley Young v. New Haven Advocate, et al., (No. 01-2340, 13 December 2002), which required a clear intention on the part of the media outlet to direct information towards a particular State in order for the courts of that State to have jurisdiction. See also, Borchers, P.J., 'internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction', *Northwestern University Law Review*, 98, 2004, and the monographic article 'Cyberspace Regulation and the Discourse of State Sovereignty', *Harvard Law Review,* 1999, p. 1697 et seq.

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45 – See *Pammer and Alpenhof*, where, in relation to the special jurisdiction in Article 15(1)(c), the Court applied the criterion of the top-level domain name (paragraph 83).

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46 – See again *Pammer and Alpenhof*, paragraph 84.

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47 – Pichler, R., in Hoeren, T. and Sieber, U. (eds.), *Handbuch Multimedia-Recht …*, op. cit., chapter 25, paragraph 224, and Roth, I., *Die internationale Zuständigkeit …*, op. cit., p. 283.

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48 – See, inter alia, Case 120/78 *Rewe-Zentral* 'Cassis de Dijon' [1979] ECR 649; Case 261/81 *Rau Lebensmittelwerke* [1982] ECR 3961; Case 407/85 *Glocken and others* [1988] ECR 4233; and Case 90/86 *Zoni* [1988] ECR 4285. Specifically in the field of freedom of establishment and freedom to provide services, see, inter alia, Case 279/80 *Webb* [1981] ECR 3305; Case 205/84 *Commission* v *Germany* [1986] ECR 3755; and Case C-76/90 *Säger* [1991] ECR I-4221.

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49 – In that connection, see Martiny, D., in *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* vol. 10, TMG § 3 Herkunftslandprinzip, 5th ed., Beck, Munich, 2010, paragraph 36.

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50 – Recital 23 in the preamble to Directive 2000/31 reiterates that view by stating that: 'This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.'

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51 – Such as Austria, France, Luxemburg, the Czech Republic, Poland, Portugal and Slovakia.

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52 – Like Germany, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Spain, Sweden, Romania and the United Kingdom.

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53 – Notably Germany.

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54 – Article 1(2)([g]) of Regulation (EC) No 864/2007.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- http://www.uaipit.com.

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55 – Juan José Álvarez Rubio (dir.), *Difamación y Protección de los Derechos de la Personalidad: Ley Aplicable en Europa,* Aranzadi, 2009.

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56 – See Sánchez Lorenzo, S., *Derecho Privado Europeo,* Comares, Granada, 2002, pp. 137 and 138, and Sonnenberger, H.J., 'Europearecht und Internacionales Privatrechts', *Zeitschrift für Rechtsvergleichung, Internacionales Privatrecht und Europarecht*, 1996, p. 3 et seq.

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