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# Privacy and the Press: The Convergence of British and French Law in Accordance With the European Convention of Human Rights

Kathryn F. Deringer\*

## I. Introduction

The death of Great Britain's Princess Diana in a Paris tunnel in 1997 focused the world on British and French laws regarding the paparazzi, freedom of the press, and a celebrity's right to privacy. In particular, Great Britain responded by formally adopting The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention"), specifically Articles Eight and Ten, which provide for a right to privacy and freedom of expression.<sup>1</sup> The European Convention was signed by Great Britain in 1953, but Britain did not codify the rights embraced in the European Convention until it enacted the Human Rights Act of 1998.<sup>2</sup> France, which had long recognized a strong right to privacy both domestically in its case law and through the European Convention, to which France was a signatory in 1953 but did not incorporate formally until 1970, also responded by amending its laws and jurisprudence regarding privacy and freedom of the press to a more balanced approach.<sup>3</sup>

By comparing British and French jurisprudence regarding a right to privacy, especially for celebrities, and freedom of the press, it is possible to see the recent convergence of two extremely different legal approaches. Each country's incorporation of the European Convention, although highly different, has heavily impacted the way each country deals

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1. See discussion *infra* Part III.D.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11, *entered into force* Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, Nov. 1, 1998, art. 8, 213 U.N.T.S. 221 [hereinafter the European Convention].

3. See discussion *infra* Parts II.A-B, III.C.

with issues regarding celebrities and the paparazzi.<sup>4</sup>

While France began with a strong right to privacy, formed through its case law and legislation, the incorporation of the European Convention has caused France to lessen the severity of that right and afford more protection to the freedom of expression. Great Britain went through a similar evolution, albeit much more quickly, when it adopted the European Convention. Great Britain went from not even recognizing a right to privacy, especially when dealing with situations where individuals sought to protect themselves from the press, to balancing the freedom of the press against one's right to privacy, in large part due to the incorporation of the European Convention.

In order to best understand these recent developments, it is necessary to look at each country's history regarding the right to privacy. Next, the discussion must turn to the European Convention and how each country adopted its provisions regarding the right to privacy and freedom of expression.<sup>5</sup> By comparing those respective histories and incorporations, one can see how two countries with very different legal traditions regarding privacy and the press have come together, following the lead of the European Court of Human Rights (hereinafter the "ECHR") under the European Convention, to balance the right to privacy and freedom of the press in a similar way.

## II. Right to Privacy

### A. *Origin of the Right to Privacy in France*

France has had a long history with the concept of a right to privacy. France first recognized such a right in its 1868 press law, coining the phrase "la vie priver," or the "right to privacy."<sup>6</sup> In actuality, French judges created the right in an attempt to oppose the publication of private facts.<sup>7</sup> Although France is a civil law country, whereby all law is derived from statutes and not the courts, the development of privacy rights did not follow such a scheme.<sup>8</sup> Because there was no legislative guidance as

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4. See discussion *infra* Part III.

5. *Id.*

6. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In this scholarly article, which first introduced the idea of recognizing a "right to be let alone" in America, Warren and Brandeis noted that France had long recognized a right to privacy, as evidenced by the 1868 press law.

7. See Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1228 (1994).

8. *Id.* In noting that France deviated from the civil law system, Hauch stated: The development of privacy rights in France was a remarkably "uncivil" process in the sense that, without benefit of any legislative guidance on the subject, French judges essentially created the right to oppose the publication of private

to how the courts could oppose publication of private material, the courts essentially used duty-based tort principles to create the right to oppose publication of private matters.<sup>9</sup>

The right to privacy in France is recognized as one of a bundle of rights included in what many scholars label "personality rights."<sup>10</sup> These rights include the right to privacy, the right to protect one's honor and reputation, and the right to control the use of one's image.<sup>11</sup>

As noted before, these personality rights, the most important of which being the right to privacy, were initially determined through judicial interpretations of French law, although they are now codified in French legislation.<sup>12</sup> Many of the early cases that dealt with a right to privacy focused on the damage to one's honor or reputation.<sup>13</sup> In deciding these early cases, the courts applied tort liability principles from Article 1382 of the French Civil Code.<sup>14</sup>

The first case that applied duty-based tort principles to protect privacy interests was "the Rachel affair," decided in 1858.<sup>15</sup> An artist drew a picture of a famous actress, Rachel, on her deathbed and sold the drawing despite her family's objections.<sup>16</sup> The Tribunal de Premiere de la Seine ordered that the drawing and any photographs of the drawing be confiscated.<sup>17</sup> The issue in the case revolved around whether the family's right to privacy had been invaded. This Court held that "[n]o one may, without the explicit consent of the family, reproduce and bring to the public eye the image of an individual on her deathbed, whatever the celebrity of the person involved."<sup>18</sup> The decision rested on the idea that the family had a right to privacy that must be protected and compensated

facts.

9. *Id.* At 1232, citing Roger Nerson, *La protection de la vie privée en droit positif français*, 23 *Revue INTERNATIONALE DE DROIT COMPARE* [R.I.D.C.] 737, 757 n.28 (1971) ("[B]y the consistency and regularity of their judgments, the courts have fashioned the contours of a real right to the secrecy of private life.").

10. *Id.* at 1228.

11. *Id.*

12. See *infra* notes 40 and 41. The amount of case law from the mid 1950s to early 1970s regarding the right to privacy was so much that it caused the Cour de cassation to request legislative intervention. See Hauch, *supra* note 7, at 1237.

For those unfamiliar with the French legal system, there are three levels of general courts: the tribunaux de grande instance (trial courts); the cours d'appel (the courts of appeals); and the Cour de cassation (High Court). The Cour de cassation's power is limited to setting aside judgments for errors of law. *Id.* at note 82.

13. *Id.* at 1237.

14. Code civil [C. CIV.] art. 1382 (Fr.). Any person who performs an act that harms another person must compensate the other for the harm caused by that act (*translated in* Hauch, *supra* note 7, at 1231-32).

15. T.P.I. Seine, June 16, 1858, D.P. III 1858, 52 [hereinafter *The Rachel affair*].

16. *Id.*

17. *Id.*

18. *Id.*, *translated in* Hauch, *supra* note 7, at 1233.

for when invaded.<sup>19</sup>

The court has extracted four basic principles from Article 1382 through that protect against the reproduction and publication of one's image.<sup>20</sup> First, it is irrelevant what medium is used to portray a person's image.<sup>21</sup> Second, courts have disallowed the unauthorized use of a performing artist's fictitious name.<sup>22</sup> Third, the person must be recognizable when his or her image is reproduced.<sup>23</sup> Fourth, and finally, consent must be clearly expressed for the taking, reproduction and use of one's image.<sup>24</sup> Although the courts still use these principles in protecting privacy interests, its decisions beginning in the mid 1950s expanded the right to privacy beyond these general tort requirements.<sup>25</sup>

The first case many scholars believe recognized a right to privacy

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19. See Hauch, *supra* note 7, at 1235. Another early case recognizing a right to privacy involved a photographer who hung a picture of a child in his window with the consent of the father but without the consent of the child's mother. See T.P.I. Portiers, Oct. 21, 1935, D.H. 1936, 45. Although the Court found that the photographer had the proper authorization to hang the photo because the father was vested with parental authority over the minor child, the Court nevertheless held that a right to privacy over one's image must be recognized. "Only the photographed person may allow or deny the public exhibition of his or her image. . . for it may prejudice the freedom granted to each individual with respect to his or her persona."

20. See Elisabeth Logeais and Jean-Baptiste Schroder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L. REV. 511, 519 (1998). This article articulates some of the key cases that the French courts have used in the area of image reproduction, which is vital in the study of the history of the right to privacy in France. The following delineation of the interpretation of the French Civil Code as to the right to privacy through the unauthorized use of one's image is in large part disseminated from this leading article.

21. *Id.* Photographs, video game replications, and cartoon characters are all possible subjects of court action. In one instance a court held that even the reproduction of one's image in the form of a figurine invaded an individual's privacy. See CA Versailles, June 30, 1994, D. 1995, 645, note Ravanas.

22. It must meet certain requirements to be condemned as unusable without consent. It must reflect his or her personality, and usually it must be unique and chosen by the person, rather than a nickname given to him or her by others. See Cass. 1e civ., Feb. 19, 1975, Ann. 1977, 153 [hereinafter *WS v. Jourdain*].

In the case, a cabaret artist known as "Lova Moor" was allowed to prevent the use of her fictitious name as the name of a women's clothing store. The court also held that it did not matter if the name was only well known in the circle where the artist conducts his or her activities.

23. It must be possible to identify the person whose image is being reproduced, and if the person is an unknown, the image must be clear enough to establish undeniable identification. This concept was recognized in a notable suit against Robert Doisneau for his famous photograph, "Kiss of the Hotel de Ville." T.G.I. Paris, 1e ch., June 2, 1993, Gaz. Pal. 1994, 16 [hereinafter *Epoux Lavergne v. R. Doisneau; and Françoise Bornet v. R. Doisneau*]. Two different women sued him, claiming to be the woman in the picture, and requesting profits from the sale of the picture. The French court held that neither claim was valid because neither woman's facial features were recognizable in the photograph.

24. See Logeais & Schroder, *supra* note 20, at n. 57. It is then within the court's discretion to decide whether consent was given and to evaluate the scope of the consent.

25. See Hauch, *supra* note 7, at 1237.

without relying on tort principles was the Dietrich affair, decided in 1954.<sup>26</sup> In the case, a weekly magazine, *France-Dimanche*, similar to current American tabloids, published a series of articles entitled "My Life, by Marlene Dietrich."<sup>27</sup> The articles were touted as Dietrich's unpublished memoirs as told to a German journalist.<sup>28</sup> Although some of the anecdotes involving Dietrich's personal life were true, the actress had not authorized publication nor discussed such stories with any German journalist.<sup>29</sup> In affirming a judgment for Dietrich awarding damages for unauthorized publication of private recollections, the *Cour d'appel de Paris* held that no one may publish one's private recollections without his or her consent.<sup>30</sup>

The damages awarded to Dietrich were not limited to emotional distress based on tort principles, as they had been in the *Rachel* affair.<sup>31</sup> The court included pecuniary damages as well, and awarded one of the biggest damage awards ever given in a privacy case.<sup>32</sup> The shift of the court in awarding pecuniary damages for violations of privacy rights began the movement toward the creation of legislation protecting privacy interests.<sup>33</sup>

These decisions are of particular importance when focusing on the development of the right to privacy versus the freedom of the press.<sup>34</sup> The *Rachel* affair exemplified the disparity between the privacy right of an individual and the right of the artist to freely express him or herself.<sup>35</sup> Although the right of authors to reproduce an image of an individual is also one of the privileged "privacy rights," the cases following the *Rachel* affair show that until recently, the French right to privacy often trumped expressional and informational interests.<sup>36</sup> Additionally, the Dietrich affair is a perfect example of how the French courts put the privacy interests of an individual, in fact a celebrity, ahead of the interests

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26. Judgment of Mar. 16, 1955, *Cour d'appel de Paris*, 1955 D.S.Jur. 295 (Fr.) [hereinafter *The Dietrich Affair*].

27. See Hauch, *supra* note 7, at 1237.

28. *Id.*

29. *Id.*

30. 1955 D.S.Jur. at 295 (translated in Hauch, *supra* note 7, at 1237-38). "[T]he recollections of each individual concerning her private life are part of her moral property; . . . no one may publish them, even without malicious intent, without the express and unequivocal authorization of the person whose life is recounted."

31. See Hauch, *supra* note 7, at 1238.

32. *Id.* The court awarded damages of 1,200,000 francs, heavily relying on the fact that Dietrich was in the process of preparing her own memoirs for publication.

33. See *supra*, note 12.

34. See Hauch, *supra* note 7, at 1235. In the development of the right to privacy by the judiciary in France, the courts consistently put privacy interests ahead of the rights of the press and artists to free expression.

35. *Id.*

36. *Id.*

of free expression of the press.<sup>37</sup> The affinity of the courts to hold privacy interests over those of the press helped create the strong anti-paparazzi tradition that was so notable in France prior to the recent developments created by international documents such as the European Convention.<sup>38</sup>

### B. *French Legislation and Adoption of International Standards*

1. *French Legislation.* – Following the flood of case law in the 1950s and 1960s, the French legislature finally recognized a specific right to privacy in their statutory law.<sup>39</sup> In the Law of July 17, 1970 the French legislature gave the right to privacy specific protection by introducing Article Nine into the French Civil Code and by providing for offenses in the Penal Code.<sup>40</sup>

Article Nine of the Civil Code gives the courts the power to order drastic preliminary injunctions to prevent intrusions into one's private life.<sup>41</sup> It states that "everyone is entitled to respect of private life" and gives judges the power to protect an individual's right to privacy with a number of legal remedies.<sup>42</sup>

The French Criminal Code, in Article 226(1), punishes anyone who purportedly invades one's private life by "fixing, recording or transmitting, through any device, the image of a person in a private place, without their consent" with a sentence of imprisonment of one year and a fine.<sup>43</sup> Under French law, both individuals and corporations may be found guilty of violating this Article.<sup>44</sup>

The French Criminal Code also provides for the protection against the publication of false stories or manipulated images of a person without the person's consent.<sup>45</sup> Article L 226-8 criminalizes the printing of knowingly false stories or manipulated images published without consent whenever the false nature is not obvious or clearly indicated in the publi-

37. This is especially significant considering the fact that the information printed was truthful.

38. See discussion *infra*, Part III.C.

39. See Hauch, *supra* note 7, at 1233-36.

40. Law. No. 70-643 of July 17, 1970, J.O., July 19, 1970, p.6751 (codified in C. civ. Art. 9 (Fr.)).

41. C. CIV. art. 9(1)-(2) (Fr.).

42. *Id.* Article 9(2) states:

"Judges can, without prejudice to the later reparation of any damages suffered, prescribe all measures such as sequester, seizure and others, capable of avoiding or ending a violation of the intimacy of private life [and] these measures can given urgency, be ordered by one judge sitting in chambers."

43. Code penal (C. PEN.) art. 226(1) (Fr.).

44. *Id.*

45. C. PEN. art. 226(8).

cation.<sup>46</sup> A plaintiff is required to establish two elements in order to pursue a criminal action against someone under this article. A plaintiff must show: (1) an intent to take or to disseminate the image, although a showing of willful indiscretion is not required; and (2) that the image was taken on private property.<sup>47</sup>

2. *International Rules and Standards.* – Since these early cases, the French common law regarding privacy has been enhanced through the addition of a variety of laws and treaties, and through the adoption of many of the international standards and rules that have been established to protect individuals' privacy and dignity. For example, the 1948 Universal Declaration of the Rights of the Human Being and the Citizen states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>48</sup> Additionally, Article Eight of the European Convention states that "everyone has the right to have their private and family life, home and mail respected."<sup>49</sup>

The death of Princess Diana in a Paris tunnel in 1997 also prompted a variety of legislation intended to curb the press and protect the privacy of individuals.<sup>50</sup> Due to the increased public support of new restrictions on the press, the European Parliament scheduled an "emergency debate" on strengthening privacy laws.<sup>51</sup> In addition, the European Parliament's Culture and Media Committee sought to develop an international "code of conduct" for the news media by asking the European Commission to do a comparative study of existing legislation.<sup>52</sup>

French privacy law, created most "uncivily" in the courts, incorporated through the European Convention, and codified in legislation, is quite extensive. The French courts' forceful promotion of individual privacy interests versus the freedom of the press has been plainly evident in

46. *Id.*

47. C. PEN. art. 266(8).

48. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 at 71, art. 12 (1948) ("Nul ne sera l'objet d'immixtions arbitraires dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes à son honneur ou à sa réputation. Toute personne a droit à la protection de la loi contre de telles immixtions ou de telles atteintes.").

49. See European Convention, *supra* note 2.

50. See Leayla Linton, *Diana's Death to Spur Media Curbs?*, NAT'L L.J., Sept. 22, 1997, at A18.

51. *Id.*

52. *Id.* This most recent attempt to quell the press is also probably due to the fact that France has begun to recognize the rights of the press more in recent years. This shift is in large part a result of the dictates of the European community, found in Article Ten of the European Convention and the jurisprudence of the ECHR regarding the issue. See discussion *infra*, Part III.C.



in its history. It is only recently, through the weight of decisions by the ECHR regarding privacy and the press, that French law has begun to shift to a more balanced approach.

### C. *Origin of the Right to Privacy in Great Britain*

The existence of a right to privacy in Great Britain is much more diluted than it is in France. In fact, prior to the integration of the European Convention and the adoption of the Human Rights Act of 1998, Great Britain did not recognize a right to privacy.<sup>53</sup> During that time, plaintiffs, often famous public figures, had to rely on alternative methods for a legal remedy.<sup>54</sup> It was through this string of English case law that Justices Warren and Brandeis formulated and extrapolated the "right to privacy" in their famous law review article.<sup>55</sup>

However, the attempts of public figures to secure any right to privacy through these causes of action have proved largely futile. The legal remedies found through such torts are not only difficult to prove,<sup>56</sup> they often do not provide a remedy adequate enough to merit suit.<sup>57</sup> They do demonstrate, however, the common law background of the eventual recognition of a right to privacy that took place in the late 1990s.

One of the most influential causes of action, heralded as the most conducive to upholding privacy interests, is breach of confidence.<sup>58</sup> The

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53. See *Kaye v. Robertson and Another*, 1991 E.S.R. 62 (C.A. 1990) (Only an act of parliament can recognize the right of privacy because the English courts have denied it for so long). Additionally, Parliament rejected recognizing an actual right to privacy in British legislation up until the death of Princess Diana, when it decided to adopt the Convention and also enact the Human Rights Act of 1998.

54. These causes of action include breach of confidence, passing off, trespass to land, nuisance, and defamation. See discussion *infra* Part II.C. Although Warren and Brandeis initially carved out the idea of a right to privacy from English case law dealing primarily with these issues, these cases do not fully recognize a right to privacy. They merely show the way plaintiffs attempted to seek a remedy for a breach of their privacy, even though the right itself was not recognized by the courts.

55. See, Warren and Brandeis, *supra* note 6, at 204-10.

56. For example, the tort of trespass to land is extremely difficult to prove because of zoom lenses and other technological devices that allow photographers to invade a celebrity's privacy without setting foot on his or her land. Thus, the celebrity can not prove any damage or interference with his or her land, because the photographer must be on the land of the plaintiff for the plaintiff's claim to succeed. See *Lord Bernstein of Leigh v. Skyviews & General Ltd.*, 2 All E.R. 902, 1978 Q.B. 479 (1977) (photographs of plaintiff's property, taken from an airplane, did not meet the required showing for trespass).

57. In trespass, the remedy is typically only nominal damages, depending on the difference in the value of the land before and after the trespass. Such a remedy hardly warrants suit, especially considering how inadequate such a remedy is in comparison to the breach that occurred. See Peter Kaye, AN EXPLANATORY GUIDE TO ENGLISH LAW OF TORTS, 590-91 (1996).

58. See Kaye, *supra* note 57. Breach of confidence is not necessarily a tort, as the law of confidence incorporates doctrines from contract and equity. However, it has proven to be one of the best areas to protect privacy interests.

courts suggested, primarily in dicta, that it was possible to limit and possibly punish the acts of the paparazzi through a breach of confidence claim.<sup>59</sup> A claim for a breach of confidence requires a showing of three elements: (1) the information is confidential, usually shown when the property is not public property or public knowledge; (2) the information was disclosed in a confidential relationship, or under circumstances implying such a relationship; and (3) the information was used by one member of the confidential relationship without authority.<sup>60</sup> In the case of *Duchess of Argyll v. Duke of Argyll*,<sup>61</sup> breach of confidence was used to protect privacy interests.<sup>62</sup> The court granted an injunction prohibiting the Duke of Argyll and a newspaper from printing information the Duchess had shared with the Duke while they were married.<sup>63</sup>

Although the case seemingly allowed for the protection of private information under this cause of action, subsequent decisions sharply focused the holding, protecting only information shared in a confidential relationship versus within the public domain.<sup>64</sup> Thus, the requirement of breaching a confidential relationship is very difficult to satisfy when dealing with the paparazzi. It is especially difficult considering that most of the time such actions are done with telephoto lenses, and the photographers seldom have any type of confidential relationship with the celebrities they are shooting.<sup>65</sup>

A second cause of action historically used to protect privacy interests was the common law tort of passing off. Passing off is a remedy for the invasion of a property right in a business or goodwill.<sup>66</sup> Thus, when a newspaper or some other media outlet uses the goodwill of a certain celebrity's name or likeness to improve upon its business, that entity is

59. See *Hellewell v. Chief Constable of Derbyshire*, 1 W.L.R. 804 (Q.B.D. 1994). The court stated in dicta that "if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclose of the photograph would. . . amount to a breach of confidence." *Id.* at 807.

60. Raymond Whacks, *PERSONAL INFORMATION: PRIVACY AND THE LAW* 31, 51-52 (1989).

61. *Duchess of Argyll v. Duke of Argyll*, 1967 Ch. 302 (1967).

62. *Id.* at 304-07.

63. *Id.* at 304-05.

64. The *Argyll* case can be better understood by looking at *Woodward v. Hutchins* 2 All E.R. 751 (Eng. C.A. 1997), which held that the information of certain public entertainers that had been disclosed by a former employee was in the public domain, and thus barring the granting of an injunction under breach of confidence. *Id.* at 756. It is possible that the discrepancy can be explained by the fact that marital intimacy is protected by breach of confidence. See Francis Gibb, *Princess Has Good Chance of Victory*, *Carter-Ruck Says*, *TIMES* (London), Nov. 9, 1993.

65. See Whacks, *supra* note 60, at 33. See also Patrick Milmo, *Confidence and Privacy*, *NEW L.J.*, Nov. 19, 1993, at 1629.

66. *Warnink v. Townend & Sons (Hull)*, 1 App. Cas. 731, 752 (1979). The Court then defined "goodwill" as "the benefit and advantage of the good name, reputation, and connection of a business, the attractive force which brings in custom." *Id.* at 741.

possibly invading a property right of the celebrity.<sup>67</sup> A plaintiff must show: 1) that a trader has made a misrepresentation to customers; 2) that the misrepresentation is reasonably likely to injure the business or goodwill of another trader; and 3) that the misrepresentation does injure or will injure that trader.<sup>68</sup>

The biggest problem celebrities faced in using this cause of action was the element of actual damage to goodwill. The courts held that a common field of activity between the parties is very important in proving the claim.<sup>69</sup> In other words, if the parties were not competitors in the same field of business, and confusion was unlikely, it was very difficult to meet the elements of passing off.<sup>70</sup> Additionally, it is also difficult for celebrities to prove that they were traders, as required. In *Kaye v. Robertson*,<sup>71</sup> Mr. Kaye, who was an actor, suffered a severe injury and was in the hospital.<sup>72</sup> While he was there, a reporter entered and interviewed him and a photographer took pictures.<sup>73</sup> The court held that he was not a trader because he did not usually sell stories about himself and his recovery.<sup>74</sup> The trader requirement makes passing off a very difficult claim to prove for a celebrity.

Another possible common law alternative for the right to privacy is trespass to land. Again, trespass to land is very difficult in a paparazzi situation because the celebrity must show that his or her land was invaded and then damaged.<sup>75</sup>

Similarly, private nuisance is a difficult tort to use because it also requires that a celebrity show an interest in the property that has been invaded, and usually, a celebrity is photographed either in a public area or from a distance outside of his or her land.<sup>76</sup> It is also unlikely that a court will sympathize with a celebrity's private nuisance claim if the circumstances show that he or she was in a public place.<sup>77</sup>

Finally, defamation is a common law tort that was used in an attempt to protect the right to privacy. It, however, has also proven diffi-

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67. See *Kaye v. Robertson*, *supra* note 53.

68. *Warnink*, *supra* note 66, at 742.

69. *Harrods Ltd. V. Harrodian School Ltd.*, 1996 R.P.C. 697 (C.A. 1996).

70. *Id.*

71. *Kaye v. Robertson*, *supra* note 53.

72. *Id.*

73. *Id.*

74. *Id.*

75. See *supra* notes 56, 57.

76. *Hunter and Others v. Canary Wharf Ltd.*, 2 All E.R. 426 (H.L. 1997). Private nuisance basically requires that the plaintiff own the land because the tort is directed against the land or the enjoyment over the land. *Id.* at 435. If a celebrity does not have a right to the land, which one seldom does, he or she cannot sue. *Id.* at 436.

77. *St. Helen's Smelting Company v. Tipping*, 11 H.L. Cas. 642, 649-51 (1865).

cult to use, as illustrated in *Kaye v. Robertson*.<sup>78</sup> In that case, the Court denied Mr. Kaye's claim, stating that because it was not inevitable that a jury would find libel, they could not grant an injunction.<sup>79</sup>

#### D. *British Legislation and Adoption of International Standards*

1. **Statutory Legislation.** – Although the right to privacy was not actually recognized until the adoption of the European Convention and the enactment of the Human Rights Act of 1998, Parliament made some statutory attempts to afford protection to those whose privacy was being invaded.<sup>80</sup> In fact, several times over the last fifty years, Parliament contemplated creating a right to privacy through statute.<sup>81</sup> These proposed bills never managed to create such a right, possibly due to Parliament's fear of inhibiting the rights and freedoms of the press and also the public's right to information.<sup>82</sup> These proposals, however, did lay the foundation for the adoption of such a right through the incorporation of international standards and the Human Rights Act of 1998.<sup>83</sup>

One statute that attempted to provide some relief for those whose privacy was being invaded was the Protection from Harassment Act of

78. *Kaye v. Robertson*, *supra* note 53.

79. *Id.* at 67.

80. Although Parliament failed to create a statutory remedy for most public figures dealing with the paparazzi, the Royal Family has made use of the 1956 Copyright Act. Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74 (Eng.). This Act, in Section 39, is a narrow statute that pertains only to the sovereign and the protection of her original work through the granting of an intellectual property right over that work. However, this section still only provides a limited remedy for invasions by the press.

81. See Patrick Wintour, *Politics: Can Do, Will Do*, OBSERVER (London), May 18, 1997, at 21.

82. See Alan Rusbridger & Gerald Kaufman, *The Privacy Challenge*, EVENING STANDARD (London), July 30, 1997, at 51.

83. Parliament first introduced a bill regarding a right to privacy in 1969. The bill addressed privacy invasions through "spying, prying, watching or besetting" and "unauthorized overhearing or recording." Wintour, *supra* note 81, at 21. It was denied for being over-broad, giving the courts too much latitude and the public too much of an outlet for litigation.

Parliament then created a Committee on Privacy in 1970 to determine whether a right to privacy was needed. John Wadham, *Convention Dictates*, GUARDIAN (London), July 1, 1997, at 17. Although the Committee found that a right to privacy was "essential" it still rejected endorsing the creation of such a right through legislation, fearing as Parliament did that it would be too broad.

In 1987 and 1988, more bills were proposed and rejected by Parliament regarding the right to privacy. *Id.* Parliament at this time was worried about the competition between such a right and the rights of the press. *Id.* In reaction to these denials, Parliament created another committee to deal with the right to privacy, the Calcutt Committee. *Id.* This committee also did not endorse legislation, but instead focused on improving press self-regulation. *Id.* It was not until after the death of Princess Diana that Parliament finally decided to adopt the European Convention of Human Rights and Fundamental Freedoms and recognize a right to privacy.

1997.<sup>84</sup> This act was designed to prohibit stalking, but it also has served to protect those who are being harassed by intrusive reporters and other such press.<sup>85</sup> The Harassment Act provides that one "must not pursue a course of conduct. . .if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."<sup>86</sup> The statute also provides that harassment, or "conduct," includes speech.<sup>87</sup> There are both civil and criminal remedies within the Act, including civil damages, injunctions, restraining orders, and criminal sanctions for breaching such orders.<sup>88</sup> However, the difficulty in using this Act as a method of protecting one's privacy interest is in the requirement that conduct must be proven on two separate occasions.<sup>89</sup> Obviously, the ability of the paparazzi to photograph celebrities at a distance makes it highly unlikely that a celebrity could prove a certain reporter or photographer twice breached the Act through such conduct.<sup>90</sup>

2. Adoption of International Standards and The Human Rights Act of 1998. – At long last, after the tragedy of Princess Diana, and the public barrage of animosity toward the press, England did decide to incorporate the European Convention, specifically Article Eight, which provides for a right to privacy.<sup>91</sup> It did so through the Human Rights Act of 1998, which made the European Convention law in Great Britain.<sup>92</sup>

84. Protection from Harassment Act, 1997, c. 40 (Eng.).

85. See Neil Addison & Tim Lawson-Crudden, *How Can Victims Fight Back?*, TIMES (London), Sept. 9, 1997, at 33.

86. Protection from Harassment Act, *supra* note 84, at §§ 1(1), 1(2).

87. *Id.* at § 7(2).

88. Section two (§ 2) states: "A person who pursues a course of conduct in breach of section 1 is guilty of a[n] [criminal] offense." *Id.* at § 2. Section three (§ 3) provides: "an actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question." *Id.* at § 3.

89. Section four (§ 4) states that "a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions." *Id.* at § 4(1).

90. See Marc P. Misthal, *Reigning in the Paparazzi: The Human Rights Act, The European Convention on Human Rights and Fundamental Freedoms, and the Rights of Privacy and Publicity in England*, 10-Fall INT'L LEGAL PERSP. 287, 305 (1999).

91. European Convention, *supra* note 2, at art. 8. Article Eight, entitled the "right to respect for private and family life," provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of the rights and freedoms of others.

92. Human Rights Act, 1998, c. 42, § 1.(1) (Eng.). The Human Rights Act makes Articles 2 through 12 and 14 of the Convention part of domestic English Law. Article Eight, the Right to Respect for Private and Family Life, and Article Ten, The Freedom of

The adoption of the Human Rights Act was the first true declaration of a right to privacy in Great Britain, even though the doctrine had in some ways been developing through the common law and Parliament for over fifty years.<sup>93</sup>

The British tradition and history regarding a right to privacy is completely reversed from France's history regarding the right to privacy. Where France had established the right to privacy early in its history and developed the right through the incorporation of International Standards, including the European Convention, Great Britain has only recently done both. Thus, by looking at the European Convention and the impact it has had on British and French law regarding privacy and freedom of the press, one can see the convergence of two very differing legal traditions in a specific area of law.

### III. The European Convention for the Protection of Human Rights and Fundamental Freedoms

#### A. Background

The European Convention sets forth a number of fundamental rights and freedoms that must be protected by all contracting States.<sup>94</sup> The goal of the European Convention is "to protect, on an international level, human rights from violations by a State and to provide collective international enforcement of these rights."<sup>95</sup> The European Convention, which was signed in Rome on November 4, 1950,<sup>96</sup> was a reaction to the lack of protection of human rights during World War II.<sup>97</sup> Each Member State under the European Convention must secure these rights and freedoms to everyone who comes within its jurisdiction.<sup>98</sup>

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Expression, are the most influential in the area of paparazzi control. The Act took effect in January of 2000.

93. See *supra* Part II.C-D.

94. All 25 Member States of the Council of Europe are parties to The Convention. These states include: Austria, Belgium, Cyprus, Czech & Slovak F.R., Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See A.H. Robertson & J.G. Merrills, *HUMAN RIGHTS IN EUROPE* 413 (1993).

95. Sara Haenggi, *The Right to Privacy is Coming to the United Kingdom: Balancing the Individual's Right to Privacy from the Press and the Media's Right to Freedom of Expression*, 21 *HOUS. J. INT'L L.* 531, 536 (1999) (citing P. van Dijk & G.J.H. van Hoof, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1-2 (1984)).

96. European Convention, *supra* note 2.

97. See van Dijk & van Hoof, *supra* note 95, at 1.

98. The Convention, *supra* note 16, at art. 1. Unlike many international treaties, the ECHR deals with the relationship between a state and an individual's rights within the jurisdiction of that state. It is not a contract between states, but rather an agreement to

The European Convention enforces the observance of the European Convention through the ECHR.<sup>99</sup> The ECHR is split into committees of three judges, Chambers of seven judges, and a Grand Chamber of seventeen judges.<sup>100</sup> When a case is brought to The ECHR, it first goes to a committee, which determines whether the case is admissible. A committee may, through a unanimous vote, strike out a case if a decision can be taken without further examination.<sup>101</sup> If such a decision is not made, the case goes to a Chamber of seven judges, which also considers the admissibility and merits of the case.<sup>102</sup> Finally, in exceptional cases,<sup>103</sup> the Chamber may relinquish jurisdiction to the Grand Chamber.<sup>104</sup> The Committee of Ministers, though not established by The European Convention but rather by the Statute of the Council of Europe,<sup>105</sup> supervises the execution of judgments<sup>106</sup> and may request that the ECHR give advisory opinions concerning the interpretation of the European Convention and its protocols.<sup>107</sup>

### *B. Article Eight and Article Ten of the European Convention*

The two articles that are most pertinent when discussing celebrities and the paparazzi are Articles Eight and Ten of the European Convention. Article Eight specifically addresses the protection of an individual's private life.<sup>108</sup> The concept of private life has been interpreted broadly by the ECHR.<sup>109</sup> The ECHR, through a variety of decisions, has held that Article Eight encompasses business or professional activities,<sup>110</sup>

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protect and individual's rights within a state, regardless of the individual's nationality. See van Dijk & van Hoof, *supra* note 95, at 3.

99. European Convention, *supra* note 2, at art. 19.

100. *Id.* at art. 27.

101. *Id.* at art. 28.

102. *Id.* at art. 29.

103. An exceptional case "raises a serious question affecting the interpretation of the Convention of protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court." *Id.* at art. 30.

104. *Id.*

105. van Dijk & van Hoof, *supra* note 95, at 27.

106. European Convention, *supra* note 2, at art. 20-57.

107. *Id.* at art. 47.

108. *Id.* at art. 8. See text accompanying note 77.

109. See *Friedl v. Austria*, 21 Eur. H.R. Rep. 83 (1995), which held that private life is not "limited to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within this circle. Respect for human life must also comprise to a certain degree the right to establish and develop relationships with other human beings and the outside world." *Id.* at 87.

110. See *Niemietz v. Germany*, 16 Eur. H.R. Rep. 97, 111 (1992). The Court held that because individuals can develop personal relationships while working, such activities should be included within the right to privacy.

the right to elect medical treatment,<sup>111</sup> and phone tapping.<sup>112</sup> However, the rights under Article Eight do have some limitations, especially when viewed in connection with other rights encompassed in the European Convention.<sup>113</sup> In particular, when looking at the right to privacy when celebrities are dealing with the paparazzi, it is vital that Article Eight be considered in conjunction with Article Ten, which establishes freedom of expression.

Article Ten of the ECHR protects an individual's right to express himself or herself.<sup>114</sup> In particular, it prohibits interference with an individual's freedom to impart information without interference by a public authority.<sup>115</sup> The right includes, although not categorically, court orders demanding that an individual not impart information he possesses,<sup>116</sup> court orders finding that the expression is defamatory,<sup>117</sup> and possibly court orders finding that the expression unlawfully interferes with a person's right to privacy. However, such situations are subject to the exceptions set forth in Article Ten, section two.<sup>118</sup>

111. See *Herczegfalvy v. Austria*, 15 Eur. H.R. Rep. 437, 471 (1992).

112. See *Malone v. United Kingdom*, 7 Eur. H.R. Rep. 14 (1984) (notion of private life in Article Eight includes telephone conversations); see also, e.g.: *A v. France*, 17 Eur. H.R. Rep. 462 (1993) (Article Eight prohibits the recording of telephone conversations when one or both parties has no knowledge of the recording); *Kruslin v. France*, 12 Eur. H.R. Rep. 547 (1990) (telephone taps interfere with protected right under Article Eight); *Huvig v. France*, 12 Eur. H.R. Rep. 528 (1990) (same).

113. A number of cases have limited the reach of the rights protected by Article Eight. In *Friedl v. Austria*, 21 Eur. H.R. Rep. 83 (1995) the Court held that government photographs taken in a public place are not an interference. *Id.* at 88. Additionally, the Court reiterated that an interference may be justified if it is in accordance with the law, has a legitimate aim, and is necessary in a democratic society. *Id.* at 89-91.

114. Article Ten of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention, *supra* note 16, at art. 10.

115. *Id.*

116. See *Vereniging Weekblad Bluf! v. The Netherlands*, 20 Eur. H.R. Rep. 189 (1995); *Jacobowski v. Germany*, 19 Eur. H.R. Rep. 64 (1994).

117. *Tolstoy Miloslavsky v. United Kingdom*, 20 Eur. H.R. Rep. 442 (1995); *Prager and Oberschlick v. Austria*, 21 Eur. H.R. Rep. 1 (1995).

118. See European Convention, *supra* note 2, at art. 10(2).



The exceptions to the freedom of expression protected by Article Ten must be construed narrowly.<sup>119</sup> Article Ten, section two sets out the guidelines that the Court must use to determine whether a restriction on an individual's freedom of expression is justified under the exceptions. These guidelines are: 1) the restriction is necessary in a democratic society;<sup>120</sup> 2) the restriction is prescribed by law;<sup>121</sup> and 3) the restriction meets one or more of the interests listed in Article Ten, section two, including protecting "the reputation or rights of others" and "preventing the disclosure of information received in confidence."<sup>122</sup> Thus, in order for a celebrity to justify a restriction on the freedom of the press, he or she must meet these guidelines so that the rights protected under Article Ten are not unduly burdened.

C. *French Incorporation of The European Convention for the Protection of Human Rights and Fundamental Freedoms*

The impact of the European Convention in France has been significant in changing the way French courts balance privacy rights against the freedom of the press.<sup>123</sup> French adoption of the European Convention has been influential in establishing both significant case law and legislation supporting the right to privacy.<sup>124</sup> Although France, at the time of the European Convention's formation, already recognized a right to privacy through its case law,<sup>125</sup> the European Convention, signed in 1953, and the 1948 Universal Declaration of the Rights of the Human Being and the Citizen were the first documents to which France was a signatory to and adopted, respectively, that asserted such a right.<sup>126</sup> It was not until 1970 that France codified the right to privacy in its own criminal and civil codes.<sup>127</sup> This specific domestic incorporation of the right to privacy from French common law and the international treaties gave French citizens specific statutory protection from invasion of their privacy.<sup>128</sup>

The incorporation of the European Convention, although influential in reaffirming "la vie privée,"<sup>129</sup> has had even more impact in protecting

119. *Jersild v Denmark*, 19 Eur. H.R. Rep. 1, 14 (1994).

120. *Id.* "Necessary" means there must be a pressing social need for the restriction.

121. To be prescribed by law, the consequences of the restriction must be foreseeable to the individual, although it is not required that there be any degree of certainty in foreseeing the consequences. *The Sunday Times v. The United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (1979).

122. See European Convention, *supra* note 2, at art. 10(2).

123. See Hauch, *supra* note 7, at 1284.

124. Logeais and Schroeder, *supra* note 20, at 513.

125. See discussion *supra* Part II.A.

126. Logeais and Schroeder, *supra* note 20, at 513.

127. C. CIV. art. 9 (Fr.), C. PEN. art. 226 (Fr.).

128. *Id.*

129. See *Huvig v. France; A v. France*, *supra* note 112. In this case, the court held

the freedom of the press. In recent years, there has been an increase in the use of the ECHR as an additional and useful forum for those seeking to protect their freedom of expression.<sup>130</sup> France's domestic law regarding the press is quite stringent in comparison to the more broad and forgiving law of the ECHR.<sup>131</sup> Thus, as a result of the European Convention, individuals who feel that the French courts have allowed an interference with their freedom in expression that did not meet the requisite justifications pursuant to Article Ten can take their claim to The ECHR.

Three of the most recent and influential decisions of the ECHR regarding Article Ten in the past three years have, in fact, been from France.<sup>132</sup> This prolific use of the ECHR, considering the severely slowed pace of the court and the low number of Article Ten cases it decides each year, is indicative of the influence the European Convention has had on French law in regard to the press.

Additionally, recent cases within France are suggesting that French courts, even under the current legislation, are shifting the balance from protecting privacy to protecting the press.<sup>133</sup> In the affair of *The Bones of Dionysis*,<sup>134</sup> decided in 1989, the Cour de cassation implicitly recognized the limits Article Ten may put on protecting privacy interests.<sup>135</sup> The court held that an injunction banning a novel that allegedly harmed the reputation of certain individuals was an unjustified restriction under Article Ten.<sup>136</sup> The court relied only on the dictates of the European

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that phone tapping was an impermissible interference with one's right to privacy. The court's determination grew out of French cases that were taken to the ECHR and argued via Article Eight of the European Convention.

130. See, e.g.; *Lehideux & Isorni v. France*, 30 Eur. H. R. Rep. 665 (2000); *Fressoz & Roire v. France*, 31 Eur. H. R. Rep. 2 (2001); *Du Roy & Malaurie v. France*, (2000), available at [www.echr.coe.int/eng](http://www.echr.coe.int/eng).

131. As stated in Section II(A) of this article, the law regarding the right to privacy in France is quite developed. Although pictures taken in public and public knowledge is printable by the press, French citizens do have a variety of options, through common law torts, the criminal code and the civil code, in protecting their privacy. See *supra* Part II.A.

132. *Lehideux*, *supra* note 130 (finding that the conviction of journalists who published an advertisement about Marshal Petain was a violation of Article 10); *Fressoz*, *supra* note 130 (conviction of journalists for publishing extracts from tax-assessment forms was a violation of Article Ten); *Du Roy*, *supra* note 130.

133. See Hauch, *supra* note 7, at 1284.

134. Judgment of Jan. 31, 1989, Cass. Civ. Ire, LEXIS Pourvoi No. 87-15.139.

135. See Hauch, *supra* note 7, at 1284.

136. *Id.* at 1286. The Cour de cassation found that, under Article Ten, the lower court judges were bound to apply the standards of the rule of law for such seizures and, "in extending to all French territory a preliminary seizure designed to protect some individuals living in the Hautes-Pyrenees [a sparsely populated area north of the Spanish border], without explaining how this measure was necessary to redress the violation, the court of appeals violated Article Ten."

Convention in deciding the case, dramatically changing the way French courts balance the right to privacy and freedom of expression.<sup>137</sup>

The impact of the European Convention has been significant in France, especially in the expansion of the law regarding freedom of expression. This is the opposite from the situation in England, where the European Convention has made drastic changes in promoting privacy law. The incorporation of the European Convention in Great Britain has caused the courts to shift to a more balanced approach in regard to privacy interests versus freedom of the press.

*D. British Incorporation of The European Convention for the Protection of Human Rights and Fundamental Freedoms*

English law was dramatically altered by the formal adoption of the European Convention through the Human Rights Act of 1998.<sup>138</sup> Prior to 1998, the only outlet a British citizen had to protect his or her privacy right was through the European Convention itself, by applying to the ECHR to have his or her case heard.<sup>139</sup> Unlike France, England's lack of any common law right to privacy forced citizens to use international treaties as an enforcement mechanism rather than their own domestic courts.<sup>140</sup>

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137. Although it was once thought that the court's reliance on Article Ten of the European Convention would not continue, the case law that followed has not been as staunchly in favor of privacy rights over those of the press. See T.G.I. Paris, 17e ch., Mar. 6, 1997, Correct. At 133 (*Prince Ranier III v. Voici*). The court held that the actions of the managers of Voici, a popular French tabloid, were acceptable because "the contentious photograph displayed in an obvious manner the features of a fabricated editing and that the layman reader of Voici magazine would not be mistaken with the use of such a device."

138. The pertinent parts of Section 12 of the Human Rights Act of 1998 are as follows:

- (1) This section applies if the court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
  - (a) the extent to which—
    - (i) the material has, or is about to, become available to the public; or
    - (ii) it is, or would be, in the public interest for the material to be published;
  - (b) any relevant privacy code."

Human Rights Act, *supra* note 92, at art. 12.

139. Haenggi, *supra* note 95, at 534.

140. Attempts to incorporate the European Convention into domestic law were made for over thirty years, unsuccessfully, until the Human Rights Act of 1998. the success of

Since the adoption of the Human Rights Act, there has been a significant amount of British case law regarding the right to privacy and freedom of expression, respectively.<sup>141</sup> The courts have, through these cases, established a theory that attempts to balance both rights in situations where, allegedly, an individual's privacy is being interfered with by a press publication.<sup>142</sup> The common law elements showing a breach of confidence have been extended to encompass Articles Eight and Ten of the European Convention pursuant to the Human Rights Act,<sup>143</sup> and in so doing, celebrities have had a more forgiving theory of relief than they had prior to 1998.<sup>144</sup>

Although most courts still tip the scales toward protecting freedom of expression, some recent decisions of English domestic courts have

incorporation came with the Labour government headed by Tony Blair, who actively worked to adopt the European Convention as part of his constitutional program. *Id.* The Conservative Party administrations under Thatcher and Major felt that incorporation would give judges too much power. See Frances Gibb, *Peer's Efforts Bear Fruit After 30 Years*, *TIMES* (London), July 5, 1997, at 7.

141. "Since the coming into force of the Human Rights Act 1998. . .there has been an increase in the number of actions in which injunctions are being sought to protect the claimants from the publication of articles in newspapers on the grounds that the articles contain confidential information concerning the claimants, the publication of which, it is alleged, would infringe their privacy."

*B & C v. A* 2 All E.R. 545 (C.A. 2002). See, also, e.g.; *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd.* 2001 H.C.A. 63 (2001); *Douglas v. Hello! Ltd.* 2001 Q.B. 967 (2001); *Venables v. Newsgroup Newspapers Ltd.* [2001] Fam 430 (2001); *Imutran Ltd. v. Uncaged Campaigns Ltd.* 2002 F.S.R. 20 (2002); *Theakston v. MGM Ltd.* 2002 EWHC 137 (Q.B.D. 2002).

142. *B & C v. A*, *supra* note 141. This case involved a premier footballer who was attempting to get an injunction to stop publication of his infidelities, as told by the woman with whom he had an affair. In this recent decision, the Court went through the history of the "breach of confidence" claim, the changes in the law since the adoption of the Human Rights Act, and the guidelines that English domestic courts should follow in making determinations in similar situations under the Human Rights Act.

143. *Id.* at 707-08. However, the courts have refused to create a new privacy tort in response to the Human Rights Act. *Theakston v. MGN Limited*, *supra* note 141, at 414.

144. An example of this expansion of "breach of confidence" is described in *B & C v. A*, *supra* note 141.

"The applications for interim injunctions have now to be considered in the context of Articles 8 and 10 of the European Convention of Human Rights. These Articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because under section 6 of the 1998 Act, the court, as a public authority, is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those Articles."

*Id.* at 708.

given more weight to the right to privacy when balancing that right against the freedom of the press.<sup>145</sup> Because Article Ten, section two allows only for a narrow justification to an interference with freedom of expression, England has in large part been able to maintain the traditional British notion of protecting the freedom of the press, especially when dealing with celebrities.<sup>146</sup> However, the importance of the European Convention in Great Britain cannot be overstated, for without its incorporation, England would not even recognize a right to privacy at all.

The recognition of a right to privacy in Britain has significantly changed the nature of litigation regarding acts of the paparazzi and allowed for celebrities to have a more defined justification against such invasions into their personal lives. Although the English courts have skillfully adapted this recognition into the basic and well-developed common law tort, breach of confidence, the Human Rights Act has still had a tremendous impact. The incorporation of the European Convention forces British courts to balance freedom of the press against the right to privacy, thus changing how British courts must decide cases involving celebrities and the press.<sup>147</sup>

#### IV. Conclusion

The European Convention for the Protection of Human Rights and Fundamental Freedoms was a significant document in the evolution of privacy law in both France and Great Britain.<sup>148</sup> Its incorporation put forth two rights that, while both being equally fundamental and vital in the recognition of human rights, are often at odds with each other.<sup>149</sup> This dichotomy is never more clear than in situations dealing with the freedom of the press and the privacy rights of individuals, especially celebrities.

In France, the recognition of these rights, especially the right to privacy, was not a new occurrence.<sup>150</sup> In fact, both rights were well established through the French common law tradition, as well as codified in its legislation.<sup>151</sup> However, the incorporation of Article Ten changed the

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145. See generally, *Douglas v. Hello! Ltd.*, *supra* note 141; *B & C v. A.*, *supra* note 141; *Venables v. News Group Newspapers Ltd.*, *supra* note 141.

146. See *Sunday Times v. United Kingdom*, *supra* note 121, in which the ECHR said that the Court in deciding whether a given interference with free expression was necessary in a democratic society "is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted". *Id.* at ¶ 65.

147. See *Douglas*, *supra* note 141; *B & C v. A.*, *supra* note 141, *Venables*, *supra* note 141.

148. See *supra* Parts III.C., III.D.

149. See European Convention, *supra* note 2, at art. 8, 10.

150. See *supra* Part II.A.

151. See *supra* Part II.A-C.

way the French courts balance the two rights. As a result, the French courts are giving more weight to freedom of expression in deciding claims based on privacy and press laws.<sup>152</sup>

Additionally, the European Convention has given French citizens another outlet by which to take their claims, either under Article Eight or Article Ten. Because France has traditionally had a very stringent policy against the press and paparazzi, the ECHR, which tends to give a more lenient view toward freedom of expression, serves as an additional mechanism through which the press may find relief.<sup>153</sup>

The story in England was and is very different. The recent developments in privacy law following the 1998 incorporation of the European Convention through the Human Rights Act have been significant.<sup>154</sup> Celebrities especially, who traditionally did not have a strong common law basis on which to rely in fighting interference with their privacy by the press, now have the strength of Article Eight to back up their claims.<sup>155</sup> Although the traditional leniency toward protecting the press in England still pervades, it is a much more difficult task now that Article Eight of the European Convention must be recognized by the courts.

The influence of The European Convention is obvious and significant in both England and France, although each country's development of privacy law, especially in relation to freedom of expression, has been quite different. However, even though each country came from opposite ends of the spectrum regarding privacy and freedom of the press, the end result in regard to this area of the law is relatively similar. Through the incorporation of the European Convention, both countries have grown closer in the way they balance the right to privacy against freedom of expression. While France has become more lenient toward the press in recent years, primarily through decisions of the ECHR, England has taken dramatic steps toward recognizing a right to privacy and cutting back in their protection of the press. Thus, through the long and steady development of the law in France and the recent rapid changes and adaptations of the law in England, both countries are surprisingly nearing a consensus.

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152. *See supra* Part III.C.

153. *Id.*

154. *See supra* Part III.D.

155. *Id.*

