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19 The Definition of the Right to Privacy in the United States of America and Europe

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19.1 Introduction

Privacy as a legal concept has boundaries which cannot be drawn clearly but which most certainly encompasses a number of rights pertaining to the human personality. A common feature of the various concepts of privacy seems to be that it denotes a certain [physical and spiritual] area that is controlled by the individual without any outside interference.[1] However, recent developments in technology once again underline the need for protecting one's privacy and for establishing new forms of guarantees in order to overcome the new forms of potential infringement. In addition to one's personal and individual privacy (including, among others, the protection of undisturbed private and family life, physical and psychological integrity, honour and reputation, correspondence and verbal communication and the 'freedom from the disclosure' of private facts, as well the freedom from surveillance), a number of new layers of privacy have been identified. The expression *data privacy* or *information(al) privacy* came into use in the context of the protection of personal data. Distinction is also made between the privacy one enjoys at home and at work, through the introduction of the notion of *workplace privacy*, indicating that one's privacy is more limited at work than at home. The increasing separation between real and virtual spaces and the changes in the concept of personality made *e-privacy* – i.e. electronic privacy – and *internet privacy* rather fashionable topics. These draw the line, in the context of the individual's right to participate or refrain from participating in the information society, which the government cannot cross in the course of and the means used in accessing our personal data.[2] More and more layers emerge continuously and the responses given to the recent challenges to privacy differ on each continent. This paper seeks to reveal the grounds for such different forms of regulation. The protection of the right to privacy has evolved

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1 László Sólyom, *A személyiségi jogok elmélete*, Budapest, Közgazdasági és Jogi Kiadó, 1983, p. 315.

2 Judit Tóth and Márton Sulyok, A személyes adatok és a személyiség védelme – adatvédelem és privacy. www.juris.u-szeged.hu/download.php?docID=28459, p. 6.

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in the United States and in Europe along quite different lines. When considering the fundamental differences and similarities between the American and European legal culture, one must also take into account that the legal systems in Europe and the United States are not homogeneous. In the United States, there is not one but fifty-one different legal systems – each state has its own laws, and there are the federal laws as well. It is therefore not much of a surprise that the various state courts follow different approaches regarding similar matters in the United States. The situation is similar in Europe. While the European Court of Human Rights (ECtHR) plays a significant role in developing the legal systems of the signatory parties of the European Convention on Human Rights (ECHR), the States Parties have developed different legal cultures and jurisprudence, and follow different approaches regarding the protection of privacy. However, despite such fragmentation, there are fundamental and apparent differences between the American and European approach toward the right to privacy. This paper aims to present these differences and offers an analysis of the grounds for protection, the notion of privacy as embedded into its cultural context, and the current and ever-evolving understanding of the right to privacy.

19.2 The Right to Privacy in a Cultural Context

19.2.1 *The Emergence of the Right to Privacy in the United States and Europe*

In the beginning, private autonomy was guaranteed by private property.[3] In parallel with the emergence of capitalism, property assumed an increasingly significant role in guaranteeing private autonomy. As such, the protection of privacy was tied to trespass lawsuits and attacks against physical integrity. The separation of such protection from ownership, as well as the recognition of a right to privacy, was linked to the publication of a paper in the United States. 'The Right to Privacy', an essay by Samuel D. Warren and Louis Brandeis, was published in the *Harvard Law Review* on 15 December 1890. The authors of that paper made an attempt to provide a definition of the notion of the right to privacy, recognising that an injured person may suffer even non-material damages arising from the publication of his private information. The authors deducted the right to privacy from the inviolability of personality. In their view, the right to privacy consists of the right of the individual to be let alone. They describe the protection of privacy as a requisite for the equality of the human dignity of each individual and for the human condition in general.[4] The article written by Warren and Brandeis is also important because the authors believed that the

3 Sólyom, *above* n. 1, p. 80.
4 Máté Dániel Szabó: Az alapjogok információs jogi rétege. In Nagy Marianna (ed.), *Jogi tanulmányok 2010. Ünnepi Konferencia az Eötvös Loránd Tudományegyetem megalakulásának 375. évfordulója alkalmából*, ELTE ÁJK, 2010, p. 5.

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psychological suffering caused can serve as basis for a tort, and the basis for legal remedy is not the judgement of society (as is the case in the context of defamation or libel), but the emotional suffering caused by the publication of information pertaining to the individual's private life. Thus, the right to privacy is not based on any contract. In addition to many other aspects, the article presents the continuous development of the concept of privacy and notes that political, social and economic changes usually lead to the recognition of new rights, thereby extending the scope of *common law* – and making it always young – to meet the new needs of society.[5] Warren and Brandeis justify the need for recognising the right to privacy by recalling the spread and impacts of new inventions and novel 'business methods' that appeared in those days. Such inventions included the contemporary developments in photography, while an example of the latter was the increasing influence of the press.[6] The publication of this paper extended the notion of privacy from the mere protection of property to cover the more general notion of autonomy. The first court cases pertaining to the protection of privacy appeared around the turn of the century, and numerous states protected the general right to privacy by the '30s. The general protection of privacy – i.e. the *invasion of privacy* – was first recognised at federal level in the 1965 decision of the Supreme Court of Washington in *Griswold v. Connecticut*.[7] The general recognition of a more general right to undisturbed private life was a product of developments of the American legal system at the end of the 19th century. The legal systems of Europe began to deal with that right in the wake of the United States and had established various systems to protect privacy – that were more efficient than those of the United States – by the end of the 20th century.[8] The Declaration of the Rights of Man and of the Citizen adopted in France on 26 August 1789 was a milestone in the development of fundamental rights in continental Europe. It granted rights that protected their privacy to all men. Starting from the second part of the 19th century, modern constitutions included catalogues of fundamental rights that guaranteed private autonomy, limited government power to certain specific functions, and – between these two spheres – covered the rights of citizens who acted in groups and communicated the needs of civil society toward the government.[9] However, the right to privacy developed in different directions in Europe. Nevertheless, Article 8 of the ECHR on the protection of private and family life and the related case law of the ECtHR serves as a common standard regarding the protection of

5 Samuel D. Warren – Louis D. Brandeis, The Right to Privacy. *Harvard Law Review*, Vol. 4. No. 5, 1890, p. 193.

6 Ibid., 76.

7 *Griswold v. Connecticut* 381 US 479 (1965). Citation, Koltay András, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban* (The Basic Aspects of the Freedom of Speech in Hungarian, British, American and European Comparison), Századvég, 2009, p. 281.

8 Máté Dániel Szabó: Kísérlet a privacy meghatározására a magyar jogrendszer fogalmaival, *Információs Társadalom*, 2005, Vol 44, No. 2.

9 Jürgen Habermas, A társadalmi nyilvánosság szerkezetváltozása. Századvég Gondolat Budapest, 1993, p. 12.

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privacy for the United Kingdom applying *common law* and other states in continental Europe. While the Court plays a significant role in the harmonisation of various legal cultures, the jurisprudence of the ECtHR does not have the same impact on the case law of each and every state. The relevance of the rulings of the ECtHR is not limited to the States Parties. However, the enforcement of the ECtHR rulings is up to the states, as the Court does not have enforcement powers – it merely establishes the violation and determines the legal sanction. In the absence of voluntary compliance, the Court cannot enforce its rulings. It is up to the infringing state to enforce the legal sanction against the person responsible for the violation.[10]

19.2.2 The Protection of Privacy in Different Legal Families

The United States and, in Europe, the United Kingdom apply the principles of *common law*. English law initially rejected the reception of Roman law – it remained mostly uncodified, with most of the rules not being laid down in a statute, and precedent is the most important sources of law in England. English law is primarily judge made law, meaning that its rules are not abstract concepts prescribed by law – as is the case in the continental legal systems. However, recently an increasing number of statutes have appeared that override the rules of legal development through the judiciary. In England, the horizontal structure of the legal system is not based on the distinction between legal branches or even public or private law, but on the layers of *common law*, *equity law and statute law*. Procedural laws are much more important that material norms, the reason for which is that the function of the law is considered to be to restore the disturbed social order and balance, whereas the law is used in continental Europe to lay down the norms of social life for the future. According to the traditions of the English *common law*, the protection of privacy is shaped by judicial case law and privacy is not granted general protection – *privacy* does not have a specific *tort*. The torts of *trespass* and *nuisance* provide protection against harassment; the name, voice, and image of a person are protected by the tort of *appropriation of personality*, while the *tort of breach of confidence* offers protection against the publication of confidential information. In addition to the judicial case law, there are also statutes in England that offer protection against certain special forms of privacy violation (the British Data Protection Act 1998, the Post Office Act 1969 protecting private correspondence, and the Interception of Communications Act 1985 providing protection against illegal wiretapping).[11] The United States of America applies *common law* as well and uses

10 Ferenc Kondorosi and Katalin Ligeti, *Az európai büntetőjog kézikönyve*. Magyar Közlöny Kiadó, 2008, pp. 238-239.

11 András Koltay, 'A magánszféra és a sajtó – magyar, angol és európai pillanatkép' *Magyar Jog*, October 2007, p. 617.

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the *invasion of privacy tort* to provide general protection for privacy. According to this *tort* developed by the US Supreme Court, the violation of privacy includes, among others, the various forms of *intrusion of solitude or intrusion upon seclusion*, the *public disclosure of private facts*, the presentation of a person in a *false light*, and the abuse of the name or image of a person (*appropriation*).[12] This is a rather general category and may cover all issues relating to private autonomy. On the other hand, the *breach of confidence* tort used in English law may not provide general protection – as discussed above – but, recently, it has been guaranteeing a more extensive space for privacy than its US counterpart. This is confirmed by numerous cases. In *Campbell v. MGN*, the court held that there was no public interest in the publication of photographs of Naomi Campbell leaving a drug rehabilitation facility and ruled that reporting on her treatment may had been lawful, but the publication of the photographs constituted a violation of privacy.[13] Hence, the court acknowledged that not all pieces of private information in which the public may be interested are actually of general interest and, through this acknowledgement, reaffirmed a wide protection for privacy. It is apparent in cases that are similar to *Campbell v. MGN* that the courts draw a clear line between the right to privacy and the right of the press and the media to publish information.[14] The extensive protection afforded to privacy is apparent in a recent ruling of the High Court of Justice, when it reaffirmed the need to protect privacy by imposing a considerable fine on *Mirror Group* company for hacking the telephones of celebrities.[15] The enquiry launched by Lord Leveson after the phone hacking scandal also drew attention to the need for protecting privacy.[16]

With the exception of the United Kingdom, all other European countries follow the Romano-Germanic (i.e. continental) legal tradition. In contrast to the US-UK *common law* system, the continental legal tradition is based on the supremacy of written laws, the separation of legislation and enforcement, and an abstract and closed system of legal norms. In continental legal systems, the constitution and statutes protect privacy in a general manner or through individual rights, and – while judicial legal development has a significant role – the protection of privacy is primarily implemented through statues, and judicial case law is restricted by statutory provisions. For example, Article 9 of the French Code Civil provides for the general protection of privacy, and the courts have elaborated the limits of the right to privacy based on the statutory provisions. According to French case law, the privacy of an individual extends to their love life, friendships, family circumstances, spare time activities, political views, trade union and religious affiliations and health.

12 William Prosser, 'Privacy' 48 *California Law Review*, August 1960, p. 389.
13 [2004] 2 AC 457, HL.
14 Gavin Phillipson, Press freedom, public interest and privacy. Forthcoming in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law*, CIP, 2016, p. 2.
15 *Gulati v. MGN Ltd* [2015] EWHC 1482 (Ch).
16 Paul Wragg, 'Time to end the Tyranny: Leveson and the Failure of the Fourth Estate', *Communications Law*, Vol. 18, No. 1, 2013, pp. 11-20.

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Altogether, the foundations of the protection of privacy are shaped by the courts in *common law* countries, while the abstract norms on the protection of privacy are the starting point in European countries. However, this does not mean that statutes would be irrelevant in *common law* countries or that court rulings would not play a rather prominent role in legal development in continental countries. Various statues on the protection of privacy have been adopted and taken into account by the courts, both in the USA and the United Kingdom. On the other hand, it is the jurisprudence of the courts that provides the meaning of legislative texts pertaining to the protection of privacy in European countries, following the Romano-Germanic legal tradition. Still, it is not the legal tradition of a country, but the different value choices that have the most fundamental impact on the limits of privacy and the activities of the courts, as the role of legal traditions is more important in the context of the means of affording and enforcing protection.

19.2.3 Different Value Choices Regarding the Protection of Privacy

In addition to the peculiar features of the different legal families, the nature of the protection of the right to privacy is also influenced by the constitutional value choices of each state. It is a common belief that American society is fundamentally individualist, and this is why the political morality governing its institutions holds individual freedom dearest – individual freedom often prevails, even in the face of competing values that Europeans tend to find more precious.[17] A possible reason for this situation is that the freedom of speech protected by the First Amendment of the US Constitution is considered to be a symbol of human freedom and, because of its distinguished position in the Constitution, it is afforded special consideration when competing with the right to privacy.[18] In this way, the First Amendment opens the door wider for criticism pertaining to the private life of individuals under the aegis of the freedom of speech. The USA follows a *hands-off-role* regarding the protection of privacy and gives priority to freedom of speech over privacy, so that individuals whose privacy is violated may seek legal remedy against the violation in court only.[19] While the right to privacy is granted by the Constitution, it can be deduced from certain constitutional provisions that the Supreme Court relied primarily on the provisions laid down in the Fourth Amendment prohibiting unlawful searches and seizures in developing the guarantee of privacy. In contrast to the US approach, most European governments play a more active role in the protection of privacy and have developed statutory and constitutional provisions

17 Tamás Győrfi, Az amerikai alkotmányjog szabadság-fogalma, *Jogelméleti Szemle*, 2000, p. 1.

18 According to the First Amendment to the US Constitution, 'Congress shall make no law … abridging the freedom of speech, or of the press ….' The rationale behind this provision is that society gains significant benefits if it allows individuals to share and discuss their ideas freely and openly within a democratic community.

19 Roberta Rosenthal Kwall: Fame, *Indiana Law Journal*, Vol. 73, No. 1.

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to lay down the guarantees of privacy.[20] While the generalisation implies an excessively simplified legal, cultural, and moral interpretation of the situation, it remains true that European courts tend to place a greater emphasis on the protection of privacy than do the courts of the United States.[21]

The European approach is based on the value choice that every person has a right to the protection of their dignity and privacy. These ideas are fundamental to German and French law, for example, while the United States does not grant legal recognition to any *mandatory civility norms*.[22] Hence, it is not much of a surprise that privacy is not afforded enhanced protection when competing with the freedom of speech. In European legislation, the dignity and the right to privacy of individuals is given more consideration.[23] According to James Q. Whitman, the European approach and legal protection levels everyone up, while US law levels everyone down.[24] From an American perspective, Whitman found that Americans would be shocked by the disregard that several doctrines of German law show toward the freedom of speech. The different constitutional value choice makes *human dignity* the corner-stone of the European approach toward privacy, while the most important constitutional value for the American legal system is *human freedom*, as embodied in the freedom of speech. Notwithstanding the above differences, James Q. Whitman believed that the American notion of *privacy* is not weaker than its European counterpart, but it is based on a different concept of fundamental rights: for the Americans, who are devoted to the idea of the market economy, the greatest threat to freedom is the government itself, while, in Europe, individuals' greatest concern is not the government but about the loss of control over the public perception of their individuality, meaning that the privacy of individuals needs to be protected primarily against violations committed by other individuals, not against the limitation of individual freedom by the government.[25] Continental European legal systems thus approach the protection of privacy on the basis of protecting human dignity, while the approach followed by the American legal system focuses much more on the individual freedom (of choice) of the person.

20 Scott J. Shackelford, 'Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures', *American Business Law Journal*, Vol. 49, No. 1 2012, p. 10.

21 Ronald J. Krotoszynski, 'Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal analysis', *William & Mary Law Review* Vol. 56, p. 1279.

22 *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1219-20 (2011).

23 *Campbell v. MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. (H.L.) 457.

24 James Q. Whitman, 'Enforcing Civility and Respect: Three Societies', *Yale Law Journal*, Vol. 109, 2000, p. 1279.

25 Ronald J. Krotoszynski, 'Polysemy of Privacy', *Indiana Law Journal*, Vol. 88, 2013, p. 886.

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19.2.4 *Different Standards for Competing with Freedom of Speech*

For the purpose of comparing the various standards applied when the right to privacy and the freedom of speech are in conflict, the grounds on which apiece of private information may be published by the press and how exactly the judges of the United States and Europe understand the meaning of public interest must be clarified. It should be noted that, while the free press is working for the 'public interest', the range of information the public has an interest in and the range of information that is 'interesting to the public' are not identical. Today, the category of public interest information goes beyond the provision of information in which the public has an interest and also covers the provision of information pertaining to celebrities. It is the task of national courts to decide legal matters and not to make moral decisions or shape the tastes or opinions of the public.[26] Using the notion of public interest as a legal term without an accurate definition makes the interpretation of the law an endless task and makes the task of the entities applying the law and weighing competing interests in individual cases impossible.[27] However, it is true, regardless of the current interpretation, that the law applies different approaches toward the privacy of public figures and of private persons. Nevertheless, it is a clear trend in both the United States and Europe that the prominent role played by the status of the person concerned in deciding on the public interest nature of a private event is being replaced by the particular circumstances of any event, as a possible justification for publishing the event. According to the approach of the United States, the private life of public figures cannot be completely secret; according to the standard of Sullivan,[28] the limits of the freedom of the press are to be construed in a more lenient way in the context of conflicts between the freedom of speech and the personality rights of public figures than those of private persons.[29] American case law focuses on the notion of public affairs, which includes events and information pertaining to politics (politicians), and government entities and persons, as well as any other information that in some way – deliberately or accidentally – is connected to public life.[30] In the United States, the court noted in the context of the requirement of a *legitimate public concern* applied in the Sidis case[31] that the public has a right to know about the private life of public figures.[32] However, some authors note that the notion of legitimate public concern as

26 Alexander Halban, 'Should people in the public eye have a right to privacy?', *The Times*, April 2, 2009, p. 1.

27 Katalin Szamel, Közérdek és Közigazgatás, *MTA Jogtudományi Intézet*, Budapest, 2008.

28 According to Sullivan, elected public officials may sue successfully regarding the publication of a statement that is related to their office and harms their reputation, if they show that the publisher acted in bad faith, i.e. he knew the statement to be false or did not know of its falsehood because he proceeded with gross negligence in the course of verifying the statement.

29 Frederick Schauer, 'Public Figures', *William and Mary Law Review* Vol. 25, 1984, p. 907.

30 Ibid., p. 908.

31 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

32 *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976); Virgil v. Time, Inc, 527 F.2d 1122, 1131 (9th Cir. 1975).

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applied in the United States is in fact nothing other than public morals,[33] i.e. what the majority of people accept as moral actions. *Brents v. Morgan*[34] was the first case where the fundamental question as to what items of news are considered legitimate public concern arose. The court explained there that it was up to the plaintiff to show that the actions of the defendant did not constitute a legitimate public concern.[35] Shortly after Brents, in the *Dun and Bradstreet Inc. v. Greenmoss Builders* case,[36] the form, content, and context of the publication was placed under scrutiny in the context of the meaning of legitimate public concern, as the court examined the impact of the report on the public.[37] These cases show that the lower courts, without the guidance of the Supreme Court, would apply fundamentally different approaches in the course of defining the notion of public interest.[38] In contrast to the American approach, the case law of the ECtHR places a more significant emphasis on the protection of the privacy of public figures in the context of the freedom of speech. Previous case law of the Court offered precedents for the European human rights body, according to which, in the event of a conflict between Article 8 on the protection of privacy and Article 10 on the freedom of speech, the latter was deemed to have priority – at least in the context of criticism regarding public figures.[39] More recently, a more complex set of criteria – elaborated by the ECtHR in the von Hannover case[40] regarding the factors to be taken into account in the event of conflicts between privacy and freedom of speech – is used by the Court to determine if a limitation of the right to privacy is lawful. Similarly to the American approach, the decision is not based solely on the public figure status of the person concerned, as the line between the right to privacy and the freedom of speech is drawn in each case after considering whether the public has an interest in the publication of the given matter or not. In such cases, the ECtHR attempts to determine if and to what extent the information at hand contributes to a discourse that is of public interest. This approach has been emphasised in numerous judgements, such as the *Editions*

33 Restatement (Second) of Torts § 652D cmt. g (1976). Maria Sguera, The Competing Doctrines of Privacy and Free Speech Take Center Stage After Princess Diana's Death, *Journal of Human Rights New York Law School Journal of Human Rights*, Vol. 15, 1998, p. 54.

34 *Brents v. Morgan*, 299 S.W. 867 (Ky. 1927).

35 Robert C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort', *California Law Review*, Vol. 77, 1989, p. 996.

36 472 U.S. 749 (1985).

37 Ibid., 763.

38 Note that the case-law of the Supreme Court does not consider freedom of speech to be an absolute right that cannot be limited, especially in the context of private individuals. Not all speech is granted protection against any possibly harmful impact, and the protection of privacy may be considered a competing right, and so confidential and private information pertaining to a person might not be published, even if it were true, if, however, its publication would result in irreparable damages to the private life of the person. concerned.

39 Perry Keller, *Európai és nemzetközi médiajog. Liberális demokrácia, kereskedelem és az új média*, Wolters Kluwer, 2014, pp. 396-397.

40 *Von Hannover v. Germany (no. 1)* (No. 59320/00), judgement of 24 June 2004.

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Plon v. France[41] and *Dupius v. France*[42] cases). After further improvements in the case law of the ECtHR, the court found it necessary to clarify other issues as well with regard to the notion of public interest. In *Biriuk v. Lithuania*,[43] for example, the ECtHR underlined the fundamental difference between statements that are capable of contributing to a democratic discourse and distasteful statements concerning the private life of a person, and refused to accept the interest shown by the audience (regarding positive HIV tests and sexual habits) as valid grounds for publication.[44] The ECtHR emphasised in numerous judgements that public figures have a lawful expectation regarding the protection of their privacy, especially in cases where there is no public interest in publishing details of their private life.[45] If the private life of a public figure becomes relevant to the public, the right to privacy of the concerned person will be overridden by the freedom of speech.[46] (In addition to the public interest of the matter and the public figure status of the person concerned, the Court also took the context of the published content, the method of publishing, and the consent or lack of consent of the concerned person into account). The expanding scope of Article 8 created mixed legal fields, where respect for privacy and freedom of speech do not simply intertwine but are to be applied jointly. On these fields, Articles 8 and 10 are of the same importance according to the Convention, and both need to be considered reasonably if they are mentioned in a petition filed under the ECHR.[47] In other words, the ECtHR is moving further and further from US constitutional law in this respect, as the protection of privacy is not a distinct right or a specific duty of government in the United States. However, the American and European models are moving into the same direction in a sense, as both use the principles developed to determine the purpose and extent of freedom of speech to create a methodology and define the notion of privacy. For example, the public interest test is used by the ECtHR to limit the protection of the rights in Article 8 in cases where the democratic interest in the freedom of speech and communication overrides the need to protect the identity and integrity of a person.[48] This ECtHR standard has influenced the case law of numerous countries. It expanded the definition of the above-mentioned English *breach of confidence* tort, while the case law of the ECtHR had an impact on the case law of Germany as well. The standard of the ECtHR made German courts

41 *Editions Plon v. France*, Appl. No. 58148/00, judgement of 18 May 2004.
42 *Dupius and Others v. France*, Appl. No. 1914/02, judgement of 7 June 2007.
43 *Biriuk v. Lithuania*, Appl. No. 233373/03. judgement of 25 November 2008.
44 Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court', *Iustum Aequum Salutare*, VI. 2010/3, p. 67.
45 S. Müller and C. Gusy (2011), Does media policy promote media freedom and independence? The case of Germany. Case study report for the Mediadem project, www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Germany.pdf. Last accessed 20 April 2014.
46 *Von Hannover v. Germany (no. 1)* (No. 59320/00) judgement of 24 June 2004; *Leempoel and S.A. Ciné Revue v. Belgium* (No. 64772/01), 9 November 2006.
47 Res. 1165 (1998) on the Right to Privacy, Council of Europe, Parliamentary Assembly.
48 Sólyom, *above* n. 1, p. 403.

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abandon the previously applied principles and – in line with the expectations of the ECtHR – to decide only after comprehensive consideration of whether the right to privacy of a public figure or the freedom of speech should prevail in a given case. As such, the previous classification of public figures and the limitation of the privacy of unquestionably public figures no longer applies.[49]

19.2.5 The Right of Publicity

The right to privacy has been transforming over the last decades. In particular, the *invasion of privacy* is basically a commercial right in the USA, which seeks to make sure that the name or image of a person is not used without the subject's permissions.[50] In the United States, the *right of publicity* was originally used to limit and require permission for the use of the attributes of a person through the protection of privacy, but, after a hundred years of development, it became a transferable right that is similar to intellectual property rights. The protection of privacy has actually turned into a property right, so the *right of publicity* can be used by a person to prevent the use of their personality for commercial purposes without their consent and to grant exclusive licence to other people regarding the commercial exploitation of his or her personality, and so that the holder can enforce the acquired exclusive licence, even against third parties.[51] The publication of any part of one's personality may thus constitute commercial exploitation in a sense,[52] while, in other countries, it works as the power by which such exploitation of one's personality can be controlled.[53] There are also countries where the right of publicity in fact constitutes a kind of damage caused by an attack by the media against privacy.[54] While the notions of *right of publicity* and *right of privacy* are used in a uniform manner, their meaning is somewhat different. The *right of privacy* reflects a more restrictive and the *right of publicity* indicates a more permissive approach toward the publication of private details. According to J McCarthy, US law uses the right of privacy to remedy harms to the psyche and the right of publicity

49 Boronkay Miklós, A képmás és a hangfelvételhez fűződő jog. In Csehi Zoltán – Koltay András – Navratyil Zoltán (eds.), *A személyiség és a média a polgári és büntetőjogban. Az új Polgári Törvénykönyvre és az új Büntető Törvénykönyvre tekintettel*, Wolters Kluwer, 2014, p. 52.

50 Lawrence M. Friedman and Name Robbers, 'Privacy, Blackmail and Assorted Matters in Legal History', *Hofstra Law Review*, Vol. 30, No. 4, p. 1126.

51 Huw Beverley and Smith and Ansgar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality – Civil Law Perspectives on Commercial Appropriatio*n, Cambridge University Press, 2005, p. 65.

52 Jan Klink, '50 years of Publicity in the US and the Never-Ending Hassle in Europe', *Intellectual Property Quarterly*, No. 4, 2003, pp. 363, 364.

53 MC Carthy, *The Rights of Publicity and Privacy* (2nd edn), West Group, 2001) Para. 1.

54 J. Morgan, Privacy, Confidence and Horizontal Effect: 'Hello' Trouble (2003) 62 CLJ 444.

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to remedy harms to the wallet.[55] A comparison of European countries and the American approach reveals three basic categories:

- *right of publicity* as property,
- *right of publicity* as part of the personality rights, or
- *right of publicity*, as an attack by the media against parts of one's personality.[56]

The approach mentioned in the first category is mostly followed in the United States. It places an emphasis on the commercial value and exploitability of the personality by regarding it as a property right, and also protects the personality through the right of privacy.[57] The commercial value of parts of the personality (such as the image of the person) is determined by level of recognition of the person. These marketable expressions of the personality become actual marketable goods, if the law monopolises their use by making it unlawful without the permission of the person concerned.[58] The application of this right is not limited to the image or name of famous people, as each and every person has the right to decide who and to what extent is allowed the use of their image or name for commercial purposes. This American (or at least Arizonian) approach to the protection of privacy poses rather demanding challenges to advertisers, as they need to make sure that the people appearing in advertisements have agreed to the use of their appearance for the given purpose, including the increasingly popular street and hidden camera campaigns.[59]

The second approach is more typical of continental legal systems, which regard personality rights separately from property rights as a distinct category. In this approach, personality rights are fundamental rights of each and every person. The group of personality rights includes several individual rights, such as the right to life, physical integrity, physical freedom, reputation, dignity, privacy, and personality. However, this approach includes two sub-categories, i.e. the dualist and the monist approach. In the dualist approach (mostly used in France), the right to one's image is in fact twofold and encompasses a negative and a positive right. The negative right means that the right to one's image, as part of the right of privacy, is in fact a passive right that allows the person concerned to prevent others from distributing their image, while the positive right (*right to 'over or on' image*) enables the person concerned to exploit their image in the market.[60] For example, the Cour de

55 Hans Arno Magold, *Personenmerchandising er Schutz der Persona im Recht der USA und Deutschlands, Peter Lang Gmbh*. Europäischer Verlag der Wissenschafter, Frankfurt am Main, 1994, p. 29; Michael C. Donaldson, *Clearance & Copyright*. 3rd ed., Silman James Press 2008, p. 239.

56 Gillian Black, Publicity Rights and Image. Exploitation and Legal Control. Hart Publishing, p. 12.

57 Ibid., p. 13.

58 Menyhárd Attila, A magánélethez való jog a szólás- és médiaszabadság körében. In Csehi Zoltán and Koltay András and Navratyil Zoltán (eds.) *A személyiség és a média a polgári és büntetőjogban. Az új Polgári Törvénykönyvre és az új Büntető Törvénykönyvre tekintettel*, Wolters Kluwer, 2014.

59 *Reynolds v. Reynolds*, 1 CA-CV 13-0274 (Ariz. Ct. App. 2014).

60 Eric H. Reiter, 'Personality and Patrimony: Comparative Perspectives on the Right to One's image. Tulane Law Review', Vol. 76, 2001-2002, p. 685.

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Cassation relied on these considerations in the Alain Delon case, when it referred to the damage caused to the 'commercial value' and career of the actor in the context of his right to his image regarding the published photographs.[61] The monist approach is used primarily in the German legal system;[62] this believes that there is only a single right (i.e. a general personality right) that protects economic interests and the other interests originating from the individual's dignity simultaneously.

The third approach – mostly followed by the United Kingdom – uses the *right to publicity* to rectify attacks by the media against the personality. It should be noted here that personality has a different meaning under British law than in the previously reviewed Romano-Germanic legal systems. In this approach, the term personality is not a comprehensive and single category but a reference to personality traits that can be used to identify a person (e.g. image, name, voice). Furthermore, another distinctive feature of this approach is that personality is equated with the particular attributes of a given person, and it focuses on the commercial exploitation of the personality. It is also important that in this system – as explained earlier – a *tort* is the most suitable means of legal remedy, which is not the same as the property right approach taken by American law. The starting presumption of this approach is that the exploitation of such personality traits is prohibited. It does not focus on the situations that could make the publication of such attributes possible, but on the possible means of rectifying the damages caused by such publication.

19.3 Closing Thoughts

It is a rather difficult task to provide remedy for the contemporary attacks against privacy by legal means, considering that the limits of protection keep changing due to technological development, and also because the basis and method of such legal protection is different in each legal system. This paper aimed to provide an overview of such traditions and of the differences between the American and European approaches. As for the basis of protection, a significant *difference* between the foundation of the US and European approach seems to be the different meaning of *private* on the two continents. In the USA, the freedom of speech is regarded as a key value in comparison to other social values, such as the right to privacy, and this value choice makes it practically impossible to provide a European-style protection for privacy. Needless to say, this choice is not without justification. For historical reasons, government action is regarded with a significant level of distrust in the United States, and this is why the courts are willing to limit the freedom of speech either directly or through any *tort* in exceptional situations only. From a European perspective, freedom of speech is not regarded as a more important value than the right to privacy.

61 Cass. le civ, Nov. 17, 1987, Bull. Civ. 1987.

62 J. Neethling, Personality Rights: A Comparative Overview (2005), XXXVIII CILSA 210 535.

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While this does not mean that the USA does not protect privacy, it should however be emphasised that the right to privacy is approached from a different perspective and, as a consequence, its limits and relationship with the freedom of speech is rather different than in European countries. The real question is not related to the existence of a right to privacy, but to the possible legal methods of deciding in situations where the right to privacy is competing with freedom of speech. The method used may be different between cultures and ages. It is true for every state that the meaning behind the notion of privacy is in motion and cannot be defined for eternity. According to László Sólyom, the notion of privacy is handled with 'alarming generalisations', 'pomposity', and 'philosophical inaccuracy.'[63] Nevertheless, the importance of privacy is apparent, as it has become the central category of the protection of the personality rights, and most certainly not by accident: in the modern era, only this narrow field is left under the control of the individual and all efforts are made to protect it against external influences.[64]

63 Sólyom, *above* n. 1, p. 215.
64 Júlia Sziklay, 'Az információs jogok gyökerei a köz- és magánélet dichotómiájában', Jog, állam, politika. Vol. 2, No. 2, 2010, p. 50.