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Privacy & the media. Traditional and emerging protections in an online world.

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National Report of Italy

Carlo Eligio Mezzetti

Ughi e Nunziante Studio Legale
Via Visconti di Modrone, 11
20122 Milan, Italy
+39 02 762171
cmezzetti@unlaw.it

General Reporters:
Jerome Debras, Woog & Associés, Paris, France
jdebras@woogassocies.com

Cristina Hernandez-Marti Perez, Hernandez Marti Abogados, Barcelona, Spain
cristina@hernandez-marti.com

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1. Privacy rights

Privacy right, we understand the right not to have information about a person to be disclosed to other persons without consent of the person the which the information refers to.

1.1. Are privacy rights statutory rights or are these case-law based ?

In Italy, privacy rights were firstly designed by case law (the leading case was the Supreme Court's ruling no. 2129 of 27 May 1975) and then combined with (and often overlapping with) data protection, given the broad notion of "data" presently provided for by Art. 4 of the Personal Data Protection Code (Legislative Decree no. 196 of 30 June 2003).
Actually, since European data protection rules were implemented in Italy in the 90s, privacy was no longer regarded merely as the "right to be left alone", but also as the right to be in control of how one's personal information is used and moved about.
Both privacy and data protection rights are considered as directly related to the protection of human dignity, as also enshrined in the Italian Constitution, in the ECHR and in the Charter of Fundamental Rights of the EU.

1.2. What type of information (including pictures, sounds, etc.) would be covered by the concept of "privacy rights" in the legal system of your country ?

In principle, any type of information, including pictures, sounds, etc. may be covered. Actually, the above mentioned leading case was just about pictures.

1.2.1. Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly.

This is mostly regarded as a matter of balance between freedom of speech and right to information, on the one side, and the right to privacy, on the other (see below).

1.2.2. Would privacy rights also apply in relation to legal persons (vs. physical persons) ?

Under Italian law, privacy rights pertain only to natural persons, while information relative to legal entities is granted protection within the framework of specific

regulations (for instance, rules protecting know how and trade secrets, for the prevention of insider trading, limiting the duty to provide information to the company's shareholders, etc.)
As to data protection, initially the Italian rules implementing EC Directive 96/9 expanded the definition of "data subject" also to encompass legal entities. More recently, Decree no. 6/2011 amended the Italian Privacy Code to exclude legal entities from the definition of "data subject", which now refers only to natural persons.

1.2.3. Would privacy rights encompass private information made available only to some chosen persons (authorized recipients). So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.)

Yes: as mentioned above privacy rights encompass the right to be in control of how one's personal information is used and disseminated.

1.3. Is there a specific status for "fictional use" of information related to an individual? And are disclaimers sufficient to allow such use?

Italian law does not provide for any specific provision on the fictional use of information related to an individual. General principles relating to the balance between freedom of speech or of artistic expression and rights of personality thus apply (see below), and namely that, even if authors enjoy the liberty to be "inspired by true events and facts and manipulate them for artistic purposes, by linking invented facts to them, [nevertheless] in doing so [they are] obliged not to violate, by the distortion of the truth of the facts, the right to reputation and honor of the depicted persons"(C. App. Rome, November 8, 2004 – see also Trib. Rome, 5 July 2001).

2. Freedom of speech

2.1. Is there a on the one hand a statutory/ treaty based freedom or constitutional recognition of "Freedom of speech" or on the other hand is that freedom based on case-law.

2.2. If it is a statutory/treaty/ constitution based freedom is it based on domestic or supranational law?

Freedom of speech is both recognized by Art. 21 of the Italian Constitution, and by EU law and the international treaties applicable to Italy (e.g. ECHR).

2.3. Describe the main characteristics of the "freedom of speech" as recognized in your jurisdiction:

2.3.1. beneficiaries;

"Anyone", according to Art. 21 of the Italian Constitution.

2.3.2. extent of the freedom of speech;

In priciple, freedom of speech encompasses the right to convey any information or opinion (even a totally personal view of facts) and to express criticism.
However, if specific facts are reported as true facts and referred to identifiable natural persons or organizations, Italian Courts usually apply a threefold test to asses if constitutional recognition of freedom of speech applies:

a. "truth of statements" (including "putative truth", meaning that a serious work of research and verification of sources has been carried out);
b. "temperance of expression" (meaning that expressions which are gratuitously offensive, as well as innuendos, are not covered by freedom of speech);
c. "public interest of the matter" (meaning that it is, at least potentially, of genuine interest for public opinion)

see *ex multis*: Supreme Court, 18.10.1984, n. 5259; Id. 15.12.2004, n. 23366.

Guidance on the definition of "identifiable person" was recently provided by the Supreme Court, with ruling n. 1608 of 27 January 2014, which established the principle that mentioning the name of a certain person is not a condition for the violation of their privacy, as it is sufficient for such person to be identified via a deductive method of exclusion within a certain category of people.
In addition to the limits reported above, a specific provision of the Data Protection Code (Art. 137.3) governs the disclosure or dissemination of personal information for journalistic purposes, establishing the limit of the

"essentiality of the information with regard to facts of public interest". Artt. 5, 6 and 11 of the Ethical Code for the Processing of Personal Information in Journalism specify such limit, by allowing the disclosure of detailed personal information only when it is "indispensable" vis a vis the originality of the facts, or the description of the particular ways in which they occurred, or to the quality of the individuals involved (for a recent application of such principles, see the case of Amanda Knox diaries - Court of Milan, 21 march 2014)

2.3.3. exceptions;

As well as the general limit of public morality, and specific exceptions provided for by the law, freedom of speech shall be balanced against the personality rights of the persons who are mentioned, including:

- reputation, harm to which may amount to both a criminal offence under Art. 595 of the Criminal Code and a private tort under the general rule of Art. 2043 of the Civil Code;
- an individual's "personal identity": this is a civil right that has been laid down by case law as the right to oppose the attribution of behaviour never performed, or opinions never asserted, even if such attribution is not *per se* defamatory. While the first rulings on this right date back to the 1970s (Pretura di Roma, 6.5.1974 and Pretura di Torino, 30.5.1976) the leading case was the one ruled on by the Supreme Court (Corte di Cassazione, sez. I, 22.6.1985) in a claim brought by a respected oncologist to whom the press attributed a permissive attitude towards low tar cigarettes. The Italian Supreme Court further clarified, in subsequent rulings, that such right is not aimed at granting an individual a sort of monopoly over their public image, nor it is aimed at preventing any inaccurate or questionable attribution of deeds or opinions, but solely prevents attributions capable of "distorting the personality" of an individual or an organization (Corte di Cassazione, sez. I, 7.2.1996 n. 978; see also Tribunale di Milano, 7.10.1993). More recently, the right to personal identity was recalled by the Italian Supreme Court to grant protection to the right to be forgotten (see below).

2.3.4. specific status for press (including online press)?

Art. 21 of the Italian Constitution bans any form of censorship, and strictly limits the cases when journals or other press media can be seized.
Seizure is permitted only if it is ordered by a judicial authority and within the limits set forth by the law governing the press. In case of absolute urgency and when timely intervention of the judicial authority is not possible, periodical publications may be seized also by officers of the judicial police, who must promptly, and in any case within twenty-four hours, report the matter to the judicial authority. If the latter does not confirm the seizure order within the following twenty-four hours, the seizure is understood to be withdrawn and null and void.
Those requirements for seizure were not considered applicable to webpages, but only to "paper" journals. Until now, therefore, webpages have been subject to seizure following the general rules set forth by the Italian Criminal Code; however, there are currently in course developments on the point (see below under 4.7).

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

    3.1. Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?

    No, it is a matter of balance among fundamental rights.

    3.2. What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument) ?

    See above under 2.3.2: in principle, if the mentioned criteria are met, then freedom of speech would prevail.

4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy

    4.1. Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs? Describe briefly the main remedies available.

An injunction preventing the disclosure of information, granted by a Court as an interim measure, would be the most straightforward remedy. To obtain such an interim injunction, the plaintiff must be able to show that the disclosure is highly likely (full evidence is not required at this stage) to seriously harm his rights, namely his reputation, or personal identity, or privacy; that such disclosure fails to comply with the above mentioned threefold test; and that the plaintiff's rights would be irreparably harmed if he has to wait until the case is adjudicated on the merits.
A proceedings for interim measures often takes some weeks and the ruling is usually immediately enforceable; the losing party may apply for revision by a panel of three judges within a short term.
Ex parte orders may be granted in case of exceptional urgency.

4.2. Are "gagging orders"[1] or "super injunctions"[2] as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

No.

4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right of answer. Describe shortly

Interim relief may also be granted after the information has already been disclosed, ordering the removal of such information or preventing the disclosing party from further disseminating it, while damages can be claimed only by a civil action on the full merits.
As to data protection, and especially sensitive data, further remedies may be granted by the Italian Data Protection Authority.
Moreover, the law on the press (Law no. 47 of 1948) provides for a right of rectification and of answer. In particular, pursuant to Art. 8, publications must publish statements or rectifications of the subjects of which images have been published or to which acts or thoughts or statements have been attributed, that they deem violate their honor or are contrary to the truth, upon condition that such statements or rectifications do not have a

[1]See for details : http://en.wikipedia.org/wiki/Gag_order#United_Kingdom
[2] See for details: http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions

content susceptible to criminal prosecution. For newspapers, the statements or the rectifications must be published no later than two days from the request and must be placed at the top of the same page of the newspaper that reported the news to which they relate. For periodicals, statements or rectifications must be published no later than the second issue following the week in which the request has been submitted, on the same page that reported the news to which they refer. Case-law has clarified that rectifications must be published without any comment or any other expedient that can frustrate their effect.
If the rectification has not been published correctly or within the mentioned terms, the applicant may ask the court to grant an interim measure ordering the publication. Actually, practice reveals that quite often rectifications are made only when ordered by a Court.

4.4. In the case of damages, how are they calculated ?

Usually, damages are liquidated on an equitable basis, as it is quite difficult for the offended person to give evidence of an economic damage. The dissemination of the information and the social standing of the person involved are often taken into account in this respect.

4.5. In case of disclosure of private information, who can be held liable for damages, especially online?

Generally speaking under Italian law liability could be ascribed only to the author of the damaging statements. However, in case of disclosure of information by the media (press, internet etc.) different rules would apply.
Pursuant to the law on the press (Law no. 47 of 1948) for torts committed by means of the press the owner of the publication and the publisher are civilly liable, jointly and severally with the author.
Criminal penalties may also be imposed: without prejudice to the responsibility of the author of the publication, an editor or deputy editor responsible, who fails to exercise control over the content of the publication edited by him, necessary to prevent criminal offences being committed by means of the same publication, shall be punished, for negligence, if a crime is committed, with the punishment provided for the offense reduced by not more than one-third. In case of non-periodic

press the same treatment shall apply to the publisher, if the author of the publication is unknown or not prosecutable, or to the printer, if the publisher is not indicated or is not prosecutable.
The same rules apply to the on-line version of a publication, but the use of the internet may entail the liability of further subjects.
Artt. 16 and 17 of Legislative Decree no. 70/2003, which implemented the e-commerce directive (2000/31/CE), mostly mimic the EU rules on the liability of service providers. Moreover, since the ECJ ruling of March 23, 2010 (joined proceedings C-236/08, C-237/08 e C-238/08), a distinction has been drawn also by Italian courts between active and passive hosting providers. On one hand, passive hosting providers retain those characteristics of neutrality and impartiality with respect to content that the same Court of Justice has identified as conditions for the operation of exemptions from liability (*i.e.* they will be held liable only in case of non-compliance with the order of the authority or if they did not inform the authority, as mentioned above). On the other hand, active hosting providers approach the figure of content manager, sharing, in this way, the fate in terms of liability. Although the distinction between active and passive service providers is almost well established in Italian case-law, the requirement of identifying a service provider as an active provider is not commonly shared by the courts.

4.6. Are there special defences to a cause of action for information disclosed by the press/ media?

The right of information and freedom of speech is the most common defence, and the defendant would struggle to show that the requirements mentioned above at 2.3.2 have been complied with. Moreover, by a ruling of February 7th, 1996, the Supreme Court clarified that such assessment must be carried out on an "objective" (or neutral) basis, without taking in to consideration the subjective sentiments or self-esteem of the persons involved; even if that case pertained to the right to personal identity, such principle may be considered of general application while balancing individual's rights and freedom of speech.

4.6.1. As part of your answer please explain what is range of news information orgnasations is covered by the definitions press/ media?

Article 1 of Law no. 47/1948 states that the press must be construed as all reproductions, typographical or

otherwise , obtained by mechanical or physical-chemical means, in any way intended for publication.
According to the Italian Supreme Court (ruling n. 44126/2011) online publications do not meet the definition of press, namely as to the liability of the editor.

4.6.2. Is there a specific protection offered to informants/sources?

Yes. According to Art. 200 of the Italian Code of Criminal Procedure journalists enrolled in the relevant professional association cannot be compelled to reveal the name of their sources. Even if it is contained in the Code of Criminal Procedure this rule is considered applicable as a general principle

4.7. Are the principles described in your answers above also applicable to the online world? Is there any specific case-law in your country relating to social media, and if so please summarise this?

This is still questionable. Very recently (on January 29, 2015) the 1st Chamber of the Italian Supreme Court referred to the Grand Chamber the question of whether it would be possible to extend the protection granted by Art. 21(3) of the Constitution to the press also to web magazines and if, in this respect, a further distinction has to be made between websites enrolled as publications in the press register and websites having journalistic content but not enrolled in the press register.

The order issued by the Court of Turin on 7 July 2011 represents an important and specific precedent dealing with the world of social media. By this order the Court of Turin established that the Facebook group of a company is worthy of legal protection. The case was specifically for unfair competition, but the Court analyzed the legal aspects of the nature and availability of a group on Facebook in general.

4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel) ? Describe these remedies briefly.

As well as general civil law remedies, specifically Art. 595 of the Italian Criminal Code (crime of defamation) punishes whoever, addressing several people, offends the reputation of others, with imprisonment up to one year or a fine of up to EUR 1,032. If the offence consists in attributing a certain fact, the punishment is imprisonment up to two years, or a fine of up to EUR 2,065. If the offence is committed by the press or any other media, the punishment is imprisonment from six months to three years or a fine of not less than EUR 516.
A defamation reform bill is currently under discussion in the Parliament.

4.9. Forum and applicable law

4.9.1. Describe shortly what rules are exist in your jurisdiction for the determination of the forum and the applicable law.
4.9.2. Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions)?

According to article 63 of Law 218/95 (private international law), in case of tort the liability is governed by the law of the State in which the event occurred. However, the injured party may request the application of the law of the State in which the behavior that caused the damage was committed. If the offense involves only citizens of the same State residing in it, the law of that State will apply.
According to art. 3 and 4 of Law n. 218/95 Italian jurisdiction exists when:
1. the defendant has his residence or domicile in Italy or has appointed a representative authorized to appear in Court pursuant to article 77 of the Code of Civil Procedure (i.e. a representative who is empowered to take care of the business of the principal and is granted the specific powers to appear in court) ;
2. there is jurisdiction pursuant to of the criteria established by Title 2, Sections 2, 3 or 4, of the Brussels Convention;

3. the defendant has accepted Italian jurisdiction either in writing or by appearing before a Court without challenging its jurisdiction.

When interim measures are sought, according to Art. 10 of Law no. 218/1995 the jurisdiction of Italian Courts also exists when the relevant measure is to be enforced in Italy.

As concerns the forum, art. 18 of the Italian Code of Civil Procedure states (as a general criterion) that the competent court is that of the place where the defendant has his residence or domicile, and, if these are unknown, the place where the defendant lives. If the defendant has no residence, domicile or place of abode in the country or if his abode is unknown, the competent court is the place of residence of the plaintiff.
According to Art. 20 of the Italian Code of Civil Procedure the applicable forum for damages is not the Court of the place where the unlawful interference with the right is committed, but it is the Court of the place where the harmful effects occur. This is because the obligation to compensate does not arise when an act is committed which is potentially liable to cause damage but only at the time ,and in the place, where the recoverable loss actually occurs.
In connection with defamation committed electronically this forum is that of the domicile of the injured party at the time of release of the defamatory news, since the harm caused by damage to reputation is strictly connected to the economic and social context in which the injured party lives and works. Ruling no. 6591/2002 of the Italian Civil Supreme Court, confirms that, in relation to disputes caused by harm to the rights of a person (i.e. image, honor, dignity, reputation), the applicable forum is that of the place where the injured party has his center of interests, which coincides with his domicile or residence or registered office if it is a legal entity.

If this criterion has been confirmed (Italian Supreme Court, United Sections, order no. 21661/2009) with respect to cases for civil damages as a result of defamation, the Criminal Chamber of the Supreme Court, in its ruling no.16307 of 26 April 2011, held that the competent forum must be found in favor of the court of the place where the defendant has his domicile.

The Supreme Court stated that "with respect to offenses to reputation committed on the Internet, the identification of territorial competence, which can be difficult or impossible, cannot be based on objective criteria, such as, for example, the first publication, the input of the news into the Internet, access of the first visitor. For all these reasons the place in which the server is located cannot even be used(which can be anywhere in the world). "
Therefore the only criterion which can be used in criminal matters is, according to the Court, the residence or domicile of the defendant, according to art. 9, paragraph 1, of the Code of Criminal Procedure.

5. Interplay between data protection rules and privacy rights

5.1. Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media?

5.2. Is there an effective a right of opposition to collection of data?

Even if it was not specifically designed for the protection of data on the internet, the Italian Data Protection Code provides for a rather high level of privacy protection, including an effective right of opposition, and the Italia Data Protection Authority (DPA) is quite active in this respect.
As an example, on February 20th, 2020, the Italian DPA announced that Google, for the first time in Europe, will be subject to regular checks to monitor the progress of the actions to bring its platform into line with Italian data protection legislation. The verification protocol approved by the Italian DPA envisages quarterly updates on progress status and empowers the DPA to carry out on-the-spot checks at Google's US headquarters to verify whether the measures being implemented are in compliance with Italian law. The protocol also enables the DPA to continuously monitor the changes Google is required to make to the processing of personal data relating to users of its services, including its search engine, emailing, YouTube and social networking services.
The key measures Google is to implement in the course of 2015 are the following:

- Google will have to improve its privacy policy by making it unambiguous and easily accessible and tailoring it to the specific service (such as Gmail, Google Wallet, Chrome, etc.). The notice will have to detail the purposes of and mechanisms for the processing of users' data including

profiling as performed by combining data across multiple services, the use of cookies and other identifiers such as fingerprinting (i.e., the collection of information on the use of terminal equipment or devices by users and the storage of this information directly in the company's servers). Google will have to set up an archive including previous versions of its privacy notices to allow users to keep track of the changes made over time.

- In order to profile users of its services, Google will have to first obtain their informed consent. This requirement will have to be implemented, though via different mechanisms, both for new accounts and for existing Google accounts. Google will also have to fully implement the measures set forth in the decision adopted by the Italian DPA in May 2014 regarding use of cookies and other identifiers – including unregistered users.
- All data subjects will have to be afforded in any case the right to object to the processing of their data for profiling purposes.
- Google will have to further improve its data storage and deletion mechanisms as for users' personal information. In particular, a specific timeframe will have to be in place regarding data deletion from both online and back-up systems.
- Internal rules on anonymization will have to be revised to ensure that the relevant procedures are fully effective and compliant with the guidance already provided by European DPAs.

6. Right to be forgotten

6.1. Is there a statutory or case-law based "right to be forgotten" in your jurisdiction (whether under domestic or supranational law)? Describe it briefly.

6.2. Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under domestic or supranational legal procedure) for a successful claim under the "right to be forgotten".

6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?

Legal literature and the decisional practice of the Italian DPA used to recognize a right to be forgotten – or "right to oblivion", as it is usually named in Italy – when a persistent public interest in learning certain information related to an individual was lacking, and the same individual was unwilling to be permanently associated with past events or old allegations which are inconsistent with his current "personal identity" (as defined above). Protection was often granted by ordering the owner of the on-line archive where such information was stored to prevent the indexing of the relevant pages by internet search engines.

By its ruling no. 5525/2012 on 5 April 2012 the Italian Supreme Court took a different stance which, interestingly enough, somehow anticipated the Conclusions of the Advocate General in the Google Spain case, and therefore is not completely consistent with the final ECJ ruling in the same case.

In the view of the Court of Cassation, search engine providers have no responsibility vis a vis the right to be forgotten, while it is up to the source web page's publisher (in the case in question, the on-line historical archive of the main Italian newspaper) to devise a method to update and contextualize old articles, or even delete them if the news reported lately proved to be untrue. The case argued before the Court was quite similar to the one lately adjudicated by the ECJ: an individual was complaining about an old article reporting his indictment for bribery, made available on the on-line archive of *Il Corriere della Sera*, and which was prominently displayed in searches made in Google using the name of the same claimant. The plaintiff complained about the fact that the news was not updated so that, by simply reading the original article, the public would have not be informed that he had been subsequently acquitted on all charges.

This line of reasoning, imposing a newspaper's publishers the duty to annotate old articles stored in their historical archives with follow-ups to the news reported at the time, was subsequently adopted by the Italian DPA in its decisional practice.

The Court of Milan, in a judgment of 26 April 2013, was even stricter: quoting the Supreme Court's 2012 ruling, and considering the time which had elapsed from the facts reported and the lack of a significant public role of the claimant, ordered the newspaper's publisher to remove the article from its on-line archive, allowing it to keep only a hard copy for

documentary purposes, and sentenced it to pay compensation for moral damages.

After the ECJ Google Spain ruling, the decisional practice of the Italian DPA changed again, apparently making answerable both the search engines providers and the content providers. In particular, while in a case decided on 27 November 2014, it was the source web page's publisher who was ordered to de-index the relevant URL, in a different case decided on 11December 2014 it was Google which was ordered to de-index. Interesting enough, almost all the complaints brought to the DPA have been dismissed by the same, on the ground that there was a prevailing public interest in the continued access to the relevant news.