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Italy: The use of a person's image.

By Avv. Felix Hofer¹

1. The general principle is that the use of a person's image without his/her consent is basically prohibited (this even more if such use is performed for marketing or – in general - commercial purposes). In Italy the right on a person's image is governed both by the Civil Code and the Intellectual Property Act (Law no. 633 dated April 22nd, 1941, amended and integrated in the following).

(i) According to Section 10 of the Italian Civil Code the image of a person, or of his/her parent, spouse, or child can be exhibited or published only if such use is explicitly permitted by law and provided that the use does not cause prejudice to the dignity or reputation of the person represented.

Should abuse occur (save for the cases in which the use performed results in a criminal offense), a local (civil) Court can order termination of the abuse and award damages.

(ii) The local Intellectual Property Act contains additional provisions on the use of a person's image.

(ii.a.) A person's image MAY NOT be exhibited, reproduced or put on sale without his/her consent (so Section 96 of Law n°633 dated April 22nd, 1941).

(ii.b.) Exceptions to this basic provision (i. e. use without consent) are allowed if the reproduction of a person's image is justified by his/her notoriety (see Section 97) and by a public interest (e. g. for purposes of information to the general public).

(ii.c.) Finally, a person's image may not be exhibited or put on sale if such use causes prejudice to the represented person's honour, dignity or reputation (Section 97 of the Intellectual Property Act).

2. In short, there is a general ban on using another person's image without having obtained proper consent, while the law indicates specifically the exceptions to the principle, which are set in the view of a – superior – general interest. Such exceptions do not cover cases in which the use of the image is performed for commercial purposes or results detrimental to a person's dignity or reputation.

The principle is widely confirmed by case-law of local courts, according to which:

- *“Consent for using (reproducing) a famous person's image is not necessary when a 'public interest' of delivering information to the general public (...) may be found; such interest doesn't occur when the use is performed for marketing purposes”* (First Instance Court: Tribunale Roma, decision of 23.07.2003; identical conclusions may be found in the following decisions: Tribunale Tortona, 24.11.2003, Tribunale Modena, 25.11.2002, Tribunale Milano, 23.12.1999; recently Last Instance Court – Corte di Cassazione – Third Civil Chamber, decision no. 8838 of April 13th, 2007).

- It's not necessary to seek for explicit – written – permission, being sufficient that consent results by implication or through the right holder's unambiguous behaviour (so the Last Instance Court – Corte di Cassazione – First Civil Chamber, decision no. 11491 of May 16th, 2006).

- If consent was obtained, then the terms, conditions, purposes and context for permitted use are to be strictly respected (so the Last Instance Court – Corte di Cassazione – First Civil Chamber, decision no.

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3014 of February 17th, 2004; in identical terms: decision no. 21995 September 1st, 2008).

Such principles appear to be of particular relevance especially with respect to the use of a person's image in the context of the so-called 'New Media', as local Courts have set that:

- *"Consent for using an image on the Internet is to be intended as strictly limited to (and conditional on) time period, location and purposes agreed on and may be revoked"* (First Instance Civil Court – Tribunale – in Bari, First Chamber, decision June 13th, 2006),
- Should not authorized use of a person's image on the Internet occur, there will be given joint liability of both, *"the author of the illegal use for promotional purposes as well as the owner of the website used for such illicit diffusion"* (First Instance Court – Tribunale – in Rome, decision September 15th, 2007).

3. The idea behind the local courts' position is that the law does both, protecting an individual's sphere of private intimacy as well as assigning economic value to a person's name and image (especially if the person is famous and for that is used to derive revenues from popularity). Therefore *"unauthorized use of a person's image (i. e. use without his/her consent) for marketing purposes results in prejudice and damaging effects because the represented person is deprived (at least) of the remuneration obtainable by giving consent to the image's use"* (Court of Appeals – Corte di Appello - Torino, decision 03.08.2002: also: First Instance Court: Tribunale Modena, 25.11.2002 and Tribunale Milano, 22.03.1999).

A First Instance Court in Turin has recently held that the purchase of a picture from a photo library/agency does not automatically imply that consent for further diffusion and for additional commercial purposes was also transferred (First Instance Court – Tribunale - in Torino, order July 9th, 2008); consent for such further and additional uses has therefore to be sought - and substantiated - on request.

It's also to be taken into proper account that 'parody' does not necessarily grant a safe escape for avoiding achievement of permission for using a person's image.

A Court of Appeals in Rome has stated (Corte di Appello di Roma, First Chamber, decision April 11th, 2005) that 'funny representations' even if associated with stereotypes of widely diffused common – but questionable – habits, can result in an offence to person's dignity or reputation and may therefore fall afoul of the 'information to the general public' exemption.

4. A person offended by the improper use of his/her image has a course of action before a local civil court. According to a First Instance Court in Brescia (First Chamber, decision October 2nd, 2003) the local legal system grants 'double protection', by allowing both, to seek for a cease and desist injunction as well as to ask for damage compensation.

When a claim is filed, it's up to the defendant to prove that the use occurred with proper consent.

If improper use refers to a famous person, the claimant has to provide evidence of the fact that the use was not performed within the context of information to the general public, but exclusively or mainly for marketing purposes.

On the other hand it's to be borne in mind that according to the Italian legal system the burden of proof with respect to the amount of the alleged damages lies with the claimant (no punitive damages can be achieved). Such burden of proof (on the amount of the damages claimed) will usually refer to licensing fees. Should the claimant not derive revenues from commercial use of his image, damage substantiation may easily result in a critical issue; in such cases the claimant will have to ask for 'just compensation' and have to rely on the Court's (discretionary) evaluation, which generally doesn't result in awarding of huge amounts (on these criteria see recently Last Instance Court – Corte di Cassazione – Third Civil Chamber, decision no. 12433 of May 16th, 2008).

5. In certain cases a claim for damage compensation may actually not be the most delicate aspect of the problem: what has to be properly assessed is the risk of being hit by a temporary injunction (obtainable on very short notice), halting the unauthorized use of the claimant's image. In fact, a withdrawal of a promotional campaign would clearly result in significant, indirectly negative effects for the defendant.

Finally there is another side aspect, which requires proper attention. Unauthorized use of a person's

image may easily result in an additional violation of the local provisions governing the processing of personal data. Non-compliance with these provisions may imply – together with other unpleasant effects as fines and even criminal charges – an obligation to damage compensation for breach of a person's privacy (so Last Instance Court – Corte di Cassazione – Third Chamber, decision no. 12433 of May 16th, 2008).