STUDIO LEGALE
FUBINI, JORIO, CAVALLI e ASSOCIATI

avv. prof. ALBERTO JORIO
avv. PAOLO FUBINI
avv. prof. GINO CAVALLI
avv. LUIGI NUZZO
avv. PAOLO JORIO
avv. AMEDEO ROSBOCH
avv. MASSIMILIANO BIANCHI
avv. PAOLO FABRIS
avv. MASSIMO JORIO
avv. TOMMASO CAPPA
avv. GIADA EMANUELA DE LEO
avv. MICHELE FRAGASSI
avv. MATTEO CROSETTI
avv. CARLO AMEDEO TABELLINI

10128 TORINO
Corso Vittorio Emanuele II n. 71
Tel. 011.562.39.71 (r.a)
Fax 011.53.55.31 – 011.53.16.65

20122 MILANO
Via Francesco Sforza n. 15
Tel.02.36.51.83.00
Fax 02.76.00.17.20

00187 ROMA
Via in Arcione, n. 71
Tel. 06.68.400.41
Fax 06.68.648.00

40124 BOLOGNA
Via Alfonso Rubbiani n.10
Tel. 051.644.80.68
Fax 051.644.04.76

e-mail: fujoca@fujoca.it

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Esteemed
Right of Reply Ltd
Great Britain

to the kind attention of Mr Alfredo Villa
email: avlugano@gmail.com

I have been requested to express a second opinion, following the one dated 9th December 2016, about the potentialities of implementation of the instrument named "*Right of reply*", and more specifically about the following questions:

- legal responsibilities, economic and reputational risks of the subjects writing a content (journalist, blogger, etc.), publishing it (newspapers, websites, social networks, etc.) and reporting it in search results or rankings (search engines);
- legitimacy of the services offered by Right of Reply on the Italian territory and eventual authorizations required;
- efficacy of the services offered by Right of Reply, in terms of proper application and accessibility to individuals and to the public, of the legal protections to right of free expression and personal data treatment, with balance between authors / intermediaries and cited subjects;
- benefits and protections – under a legal point of view – for the publishers (newspapers, websites, social networks) and who reports in lists or rankings (search engines) a specific content, in case it offers to the cited subjects the

possibility to express themselves, or to respond through the instruments offered by Right of Reply.

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In order to answer the questions, it is worth to move once again from the accurate statements expressed about the constitutional and civil protection granted to the personal rights to expression and to protection / disposal of personal reputation and, more generally, of personality, according to the new opinion by Mrs Francesca Paruzzo; the latter, after having retraced the fundaments and the protection instruments of the right to personal identity, remarks that Right of Reply represents a suitable solution to protect such right without limiting other people's freedom of expression and information, so obviating to the slowness of the existing instruments of jurisdictional and administrative protection.

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To the purposes of this opinion, it will be assumed as already effective the discipline, officially applicable since 25th May 2018, brought by EU regulation n. 2016/679 ("Regulation"), which is going to replace, repeating in most part, the personal data protection rules of directive CE 95/46 ("Directive"); the Regulation also incorporates the guidelines developed in practice[1]. It is worthy to clarify that the Regulation is applicable only to data treatments related to the territory of the European Union (art. 3, commas 1 and 2)[2].

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[1] As already clarified, the fundamental feature of European regulations is the direct applicability, which makes the difference from the directive: the latter needs transposition within the national system, while regulations are binding and directly applicable in all its parts within the national order. Within the Italian hierarchy of sources of law, regulations are posed as sources of higher-ranking than the law and the eventual contrast between a law and a regulation leads to the so-called "disapplication" of the first in favor of the second. Regulation n. 679/2016, in force since 24th May 2016, but applicable since 25th May 2018, is part of the so-called "data protection package", which represents the new common framework in personal data protection for all EU member States (together with Directive 27th April 2016, n. 2016/680 related to the protection of physical persons' data by the competent authorities for prevention, investigation and prosecution of crimes or execution of criminal penalties, and free circulation of such data, repealing the decision 2008/977 by the Council).

[2] In particular: "*this Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.*"; and "*to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is*

First of all, the new definition of "processing" according to art. 4 of the Regulation is "*any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction*": practically, all the main activities carried out by search engines, which therefore are fully subject to the framework of the Regulation.

The idea that search engines' activity is subject to personal data processing rules, clearly expressed within the sentence so called "Google Spain"[3], has been confirmed, *inter alia*, by some recent measures by the data protection Authority (so-called "Guarantor")[4].

Art. 5, comma 1 of the Regulation provides that personal data must be "*(a) treated lawfully* [and be] *(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay*".

As regards the rights of the data subject (access, erasure, rectification), which pose the issue of the so-called "right to be forgotten", sentence Google Spain has inaugurated (or better, has sensibly accelerated) an evolutionary path aimed to grant such right, and crowned, as we will see, with its codification within the Regulation.

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required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union." (Regulation, art. 3).

[3] Sentence by the Court of Court of Justice of the European Union (CJEU) of 13th May 2014, relating to the case *Google Spain SL, Google Inc. vs Agencia Española de Protección de Datos, Mario Costeja González* (case C−131/12), whose contents have been deepened withi our opinion dating 9th December 2016, and within the opinion by Mrs Paruzzo dating 3rd October 2016. For the enactment of the right of erasure stated by sentence Google Spain, an independent consulting body has been established under Art. 29 of the Directive ("*Article 29 data protection Working Party*", or "WP29"), which has issued specific guidelines for the implementation of right to erasure of personal data by search engines, on 26th November 2014; the paper is available at *http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.*

[4] The Guarantor for personal data protection is an administrative independent authority established by the so-called "privacy law" (law 31st December 1996, n. 675) - which has transposed in Italian law the Directive - today regulated by the "Privacy Code" (decree 30th June 2003, n. 196).

Google itself, showing a serious commitment for complying to sentence Google Spain, has activated in Italy as well and in Europe a specific service dedicated to requests of removal ("*delinking*"), specifying that "*In evaluating your request, we will look at whether the results include outdated information about your private life. We'll also look at whether there's a public interest in the information remaining in our search results – for example, if it relates to financial scams, professional malpractice, criminal convictions or your public conduct as a government official (elected or unelected). These are difficult judgements and as a private organisation, we may not be in a good position to decide on your case. If you disagree with our decision you can contact your local DPA* [Data Protection Authority]"[5].

To this extent it has been estimated that, among all *delinking* requests, coming (by 95%) from citizens not exposed from a political or criminal point of view, the acceptance rate of such requests is about 43% worldwide and 32,6% in Italy[6].

In Italy, it seems not superfluous to recall again chapter II of the legislative decree 196/2003, dedicated to the "Rights of the data subject", which at art. 7, comma 3 provides the right to obtain "*(a) the data update, rectification or, when interested, integration; (b) the erasure, conversion in anonymous format or block of data treated unlawfully, including those whose storage is not necessary to the purposes for which data had been collected or subsequently treated; (c) attestation that the aforesaid operations have been communicated, even in their content, to people who the data had been previously communicated or spread to, save the case where such performance is impossible or clearly disproportionate to the protected right*".

Among the most recent enforcements of these rights in case law of Italian courts, it is worth to recall a sentence by the Court of cassation stating that "*the persistent publication and diffusion, on an online newspaper, of a dating news (regarding a trial for a fact happened about two years and a half before the judgement under art. 152 of decree n. 196 del 2003) falls outside the lawful treatment of online storage of news for journalistic purposes, for its objective and prevailing popular component, appearing as*

[5] So the dedicated Google page of United Kingdom, at *https://www.google.com/intl/en-GB/policies/faq/*.

[6] See M. Tampieri, *Il diritto all'oblio e la tutela dei dati personali*, in *Resp. civ. e prev.*, 1st March 2017, 03.

a violation of right to privacy when, considering the time elapsed, the public interest to the news itself is ceased"[7].

With specific reference to the search engines's activity, an authoritative pronunciation recognizes "*the right of the data subject to call on the search engine manager for obtaining the removal of the results given under the name of the subject, in particular when such information is inadequate not pertinent (or no more pertinent) or disproportionate relating to the purposes for which it has been treated and the time elapsed, holding into account all circumstances*"[8]. This is properly the field of the "right to be forgotten".

The Guarantor for the protection of personal data has been naturally one of the most active players of this path, not only with the pronouncements already cited within the previous opinion, to which reference is made, but also with a very recent decision dating 21st December 2017[9]. This is a very significant resolution, because, acknowledging the substantial globalization of the information flow, the erasure of search results has been ordered "*both in European and extra European versions*" of the search services. Moreover, as relieved by the Guarantor within the measure itself, the question of "global delinking" is currently examined by the European Court of Justice, as a consequence of a referral of 21st August 2017 by the French State Council, requested to decide on the appeal by Google against a decision of the French data protection authority (CNIL).

A significant evolution of law in this field has been made with the Regulation, which entitles the whole chapter III to the "*Right of data subject*": in this part it is evident the attempt to encode the case law, introducing important innovations and in particular the first codification of the "right to be forgotten" (naturally in terms of right to data erasure - art. 17)[10].

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[7] Cass., 24th June 2016, n. 13161, in *Giust. Civ. Mass.*, 2016, rv 640218.

[8] Tribunal of Milan, 4th January 2017, n. 12623, in *Diritto dell'Informazione e dell'Informatica*, 2016, 6, 959; see also Tribunal of Milan, 28th September 2016, n. 10374, in *Foro it.*, 2016, 11, 3594.

[9] Measure n. 557 of 21st December 2017, available on *www.garanteprivacy.it.*

[10] Art. 17 del Regulation: "*The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; b) the data subject withdraws consent on which the processing is based* [...]*; c) the data*

So outlined the frame of the right to delinking and to be forgotten, the most relevant news to our purposes are probably within the right to rectification, which in effect is the most closely related to the scope and functioning of Right of Reply. Indeed, art. 16 of the Regulation states that the "*The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement*". This provision seems connectable with art. 12, comma 2, according to which "*the controller shall facilitate the exercise of data subject rights under Articles 15 to 22*".

Finally, art. 19 seems relevant, providing that "*the controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it.*".

Probably the most significant feature of all these solutions is the transnationality of data protection[11]: assuming the worldwide diffusion of the contents published online, which transcend national state borders, the protection offered by regulations, ad *in primis* by EU law, specifically aimed to face problems with supranational dimensions, aim to a adopt a universal perspective, exactly like Right of Reply intends to do. Nonetheless, it must not be forgotten that the Regulation rules are expressly limited to data treatments linked to the territory of the European Union, as specified above.

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subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing [...]; *d) the personal data have been unlawfully processed; e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;* [...] *2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data*".

[11] See, widely, L. Valle, L. Greco, *Transnazionalità del trattamento dei dati personali e tutela degli interessati, tra strumenti di diritto internazionale privato e la prospettiva di principi di diritto privato di formazione internazionale*, in *Diritto dell'Informazione e dell'Informatica*, fasc. 2, 1st April 2017, 168.

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Applying the said principles to the questions brought to my attention, on the premise that the extreme innovativeness of the instrument makes it very hard to foresee the reaction of the competent Authorities, the underlying problem remains, as already pointed out and shared, the possibility to legally obligate search engines and websites to adopt instruments such as those offered by Right of Reply.

So, attempting to answer the single questions formulated, we must consider, at first, the legal responsibilities, economic and reputational risks of the subjects writing a content (journalist, blogger, etc.), publishing it (newspapers, websites, social networks, etc.) and reporting it in search results or rankings (search engines). Following the clear statements by Mrs Paruzzo about the limits to the right of chronicle (truth, continence and relevance), the law sources and case law mentioned above demarcate two separate areas of responsibility:

a. civil and criminal responsibility from possible violation perpetrated through publication (production and/or provision) of certain news or contents bears only onto authors and editors who publish (journalists, bloggers, newspapers, websites, etc.) and not onto search engines, being pacific that they simply facilitate the finding of information produced and made available by other subjects;

b. a different scenery concerns the right to be forgotten, and then to the removal of contents no more relevant, actual, etc., which bears on all the players involved in the process of information diffusion, and therefore also on search engines, whose role is undoubtedly relevant. For the latter, as stated above, responsibility is to be intended as duty to remove some URL links from the lists of search results, both at a local level and, increasingly, on a world scale.

With the widespread use of Right of Reply, these respective responsibilities would not be eliminated, naturally, but certainly they would be very attenuated, since many problems and demand for protection grounding the "right to be forgotten" would be faced in a more smart and effective manner, thanks to the contextuality between potentially harmful news / content and reply by the data subject.

As regards the legitimacy of the services offered by Right of Reply on the Italian territory, I do not see reasons of possible illegitimacy, since the scope of the services is

to enhance the data of persons who decide to trust Right of Reply for guarding their identity and make others know "their truth". More complex is the issue of eventual authorizations required: under public law it does not exist a discipline of information services imposing the release of enabling titles by the public authority, while specific authorizations (to be inserted within the private agreements) shall be required by the users/clients, whose data will be treated (through collection, storage, publication, etc.) by Right of Reply. A separate problem, as already adverted, regards the relationship with the information diffusers: websites and search engines, with who shall be necessary to find an agreement and, missing an agreement, it is uncertain the possibility to impose to the "web giants" the use of Right of Reply.

The efficacy of the services offered by Right of Reply, in terms of proper application and accessibility to individuals and to the public, of the legal protections to right of free expression and personal data treatment, with balance between authors / intermediaries and cited subjects seems innate in the instrument itself which, as a peculiar mean of information, is theoretically apt to allow the widest protection of personal identity, counteracting effectively eventual news, publications and, in general, contents which may appear detrimental to others' identity. But also to this extent it is worthy to repeat that efficacy of protection is strictly bond to the legal possibility to impose to all players the use of information instruments of this type; problem already faced within the previous opinion, to which reference is made.

Benefits and protections – under a legal point of view – for the publishers (newspapers, websites, social networks) and who reports in lists or rankings (search engines) a specific content, in case it offers to the cited subjects the possibility to express themselves, or to respond through the instruments offered by Right of Reply could be summarized in the elision (or relevant reduction) of the harmful impact of an eventual inaccurate news or of a content detrimental for the image / identity of the cited person. Obviously, this does not mean, that the use of Right of Reply is likely to exclude *a priori* possible moral or reputational damages (with the inherent responsibilities) from defamatory or anyhow harmful publications; simply, it is plausible to suppose that a real-time reply through Right of Reply, in the great majority of cases, would reduce a lot the noxious effects of such publications. Therefore, in that case the authors / editors responsible for the publication could incur in less serious responsibilities, at least under the compensatory profile. Moreover, they would be much less exposed to the risk of possible orders for removal, correction or updating of the news / contents, since the possibility of the subject's reply visible on the website itself,

with adequate prominence, could satisfy the instances of rectification / update / removal typical of a unilateral message.

As regards the responsibility, more circumscribed, of search engines – that, as said, are often called to remove some URLs from the lists of search results – the use of Right of Reply could radically eliminate, in several cases, the need for delinking, since in this context the instrument allows to juxtapose to the eventual defamatory content proper recalls to a different and more complete, or however "personalized", version of the same facts.

The aforesaid benefits are naturally abstract forecasts, being pacific that the eventual harmfulness / offensiveness / (un)correctness of an information and the inherent responsibilities, and the possible effects of a contextual reply can be evaluated only on a case by case basis.

In this perspective, it cannot be excluded that online newspapers and search engines deem it convenient to adopt instruments such as those offered by Right of Reply, in order to reduce the risk of claims for damages and/or maybe avoid the obligation to remove results or to update news.

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I hope that this further contribution could be helpful and adequate in this intricate matter, and I remain available for any further need or clarification.

Best regards.

avv. Amedeo Rosboch