

N. R.G. 25415/2017



REPUBBLICA ITALIANA  
IN NAME OF THE PEOPLE  
ITALIANO THE TRIBUNALE of  
ROMA  
I civil section

In the person of Judge Cecilia Pratesi in a monocratic capacity, pronounced the following

SENTENZA

In the civil case in the First Degree registered under No. r.g. 25415/2017 brought by:  
Rosario Barone, Franck Nelson, Lindsay Foster, with advocacy by attorneys Michele  
Giarratano and Cathy La Torre;

ATTORS.

versus

Illegale political association Fratelli d'Italia - Alleanza  
l.r.p.t., with the  
advocacy by attorney Roberto De Chiara

Nazionale in the person of the

CONVENUTO

Held for decision at the hearing of 28-3-2023 on the CONCLUSIONS made in the written  
handling briefs

In fact and in law

Lindsay Foster, Rosario Barone and Franck Nelson, plaintiffs in the present judgment, during  
2014 took part (the first as author, the other two as effigy) in the making of an artistic  
photograph depicting the first moments of life of a newborn baby, held in the arms of a  
young man in turn surrounded in an embrace by his partner, while on the left is glimpsed  
the face of the woman who has just given birth.

The plaintiffs report that they learned that the same image (limited to the figures of the two fathers and the newborn child) had been spread online, accompanied by the slogan "he can never say mom - the rights to be defended are those of the child," with the logo of the Fratelli D' Italia party and that of its youth fraction at the bottom.

They have therefore decided to bring the present suit, in which the author of the photograph Lindsay Foster complains of the infringement of her copyright, and the two effigies complain of the abusive use of their image, all the more so since it was used to convey a message even opposite to the one in the name of which the photograph was taken and its dissemination permitted.

The defendant political association entered an appearance contesting primarily the authorship of the advertising poster, and in the alternative, the recurrence and extent of the damages complained of.

The plaintiffs requested the admission of evidence by witnesses and interpellation, which the previous holder of the role did not consider giving entry, and which were not re-proposed in the statement of closing arguments on March 17, 2023. The case therefore comes to decision on the basis of purely documentary evidence.

The defendant therefore focuses its defense primarily on contesting the authorship of the entire advertising operation; it therefore denies having improperly acquired and then disseminated the photograph through its media channels; the plaintiffs respond to this exception by arguing that the traceability of the image to the Fratelli d' Italia - Alleanza Nazionale party can be considered proven through the use of presumptive evidence.

It is necessary to start from the premise that the actual dissemination of the advertising campaign under consideration, implemented through the reproduction of the image portraying the two plaintiffs, constitutes an undisputed historical fact, and thus the first "certain" element that can be placed as the basis of the presumptive reasoning; the plaintiffs then provide documentary evidence (which is also not disputed) of the circumstance that numerous of media organs, some of which are also of considerable circulation and notoriety in the national sphere, have given wide echo to the affair, propagating the news that Fratelli di Italia had used the photos of the two fathers to initiate a campaign against surrogacy, and that the interested parties were planning to take legal action to obtain compensation for damages (it is documented in particular the filming of the

news on: Il fatto Quotidiano, Vanity Fair, Repubblica, Huffington Post, as well as lesser-known sites such as Dire.it.; Letteradonna.it; Siamogeek.com; Gayburg.blogspot.ca).

And such a media echo of the incident does not appear to have been followed by any denial on the part of the defendant association; the circumstance can be said to be procedurally certain, because it was specifically affirmed by the plaintiffs and not disputed by FDI in its defense briefs; in other words, the first known externalization in which the party denied authorship of the advertising campaign and poster packaging appears to be the response appearance filed in this judgment.

The circumstance appears to be of decisive importance in order to integrate the logical proof of the disputed fact. In fact, it is completely implausible to assume that the party remained silent and waited for the establishment of the dispute without communicating any denial even after being aware that numerous media outlets had spread the news that the advertising campaign had been carried out by abusively using a private image without the consent of the interested parties, and that the latter intended to sue FDI in court.

And an element of indirect evidence of undoubted relevance, FDI counters an overall generic "disavowal," pointing out that the advertising campaign was not to be found on its website, and limiting itself to hypothesizing that **an image might "have circulated, probably through the internet, unduly branded with the Fratelli d'Italia logo."** if the first argument is not diriment (since there is no reason to assume that any initiative traceable to the party must find space within its website), the second is not convincing, since it must rather be assumed that the party, once it learned of the appearance of a poster abusively bearing its name and logo, where actually unrelated to the initiative, would have taken steps to contest its origin; nor is it tenable that FDI was unaware of such an occurrence, since the news appeared to have been disseminated-as we have already seen-also by nationally prominent media outlets. An appreciation of these logical elements leads (at the very least) to an inversion of the burden of proof with regard to the defense assumption that unknown third parties misappropriated the distinctive signs of FDI and National Youth (as well as the image of the plaintiffs) in order to package an advertising product to which the party is totally unrelated. In the absence of positive proof of such an occurrence therefore, the traceability to the defendant of the historical fact on account of which the claim for damages is made must be deemed proven.

We are therefore faced with an unauthorized use of an author's snapshot and the image of private individuals; it is true that the latter had already allowed in the past the dissemination (through the photographer's blog) of a representation of an intimate and familiar character, and yet from the tenor of the poster it emerges that in this case their effigy was used in order to stigmatize their life condition and their choices, a message completely opposite in content to that disseminated by the photographer, who had instead qualified as an act of love the path through which Barone and Nelson had become parents.

It is good at this point to clarify to the parties that any considerations of a value nature on the content of the campaign (of which there is a trace in the plaintiffs' writings) do not explain any relevance to the decision, as well as it should be clarified that from an objective point of view, the message conveyed by the poster undoubtedly falls within the perimeter of the right of criticism that pertains to any entity or individual, all the more so if it is a subject that carries out political activity, which intervenes by taking a position on issues of social relevance and ethically sensitive as that of surrogacy.

The investigation should therefore be restricted to the issue of the acquisition of an author's photo reproducing the likenesses of two individuals, and its dissemination for propaganda/advertising purposes carried out without the consent of the effigies and the author.

Any other considerations must therefore be kept out of the decision-making path.

Art. 96 of the Author's Right Law (No. 633/1941, as amended) addresses the issue of displaying, reproducing and marketing the portrait (image) of people, generally posing the rule of the consent of the persons concerned as a condition for the legitimacy of its use.

The subsequent Article 97 then states that the consent of the person portrayed is not required, and thus reproduction or use of the image that is justified (1) by the notoriety or public office covered by the person portrayed, (2) by the necessity of justice or police, (3) by scientific, educational or cultural purposes, or (4) when the reproduction is related to facts, events, ceremonies of public interest or held in public may be considered "free" (from consent).

The same Article 97-in recalling the provisions of Article 10 of the Civil Code-poses an additional general limitation to protect the honor, reputation and decorum of the person portrayed.

Further safeguard to protect the personal image is then found in the legislation on privacy: the Legislative Decree No. 196/2003 (Privacy Code), as amended by Legislative Decree 10/2018, in application of EU Reg. No. 679/2016 (so-called GDPR).

Art. art. 4 of the Regulation in defining personal data states, among other things : **(...any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, by reference in particular to an identifier such as a name, an identification number, location data, an online identifier or to one or more characteristic elements of his or her physical, physiological, genetic, mental, economic, cultural or social identity[...]"**

The sources cited all converge on the need for the use (except for the cases of exemption mentioned above) to be preceded by conscious and unambiguous consent even if (at least with reference to I.D.Ā.) it can also be inferred implicitly from the behavior of the person concerned.

In the case of the plaintiffs Nelson - Barone, it is to be ruled out that consent can be inferred from the circumstance that the effigies had previously consented to the publication of the photograph on the author's blog: this image had in fact been accompanied by a commentary aimed at supporting the cause of homogenitoriality, while the poster in dispute, disseminated moreover indiscriminately, propagates a specularly contrary thesis, and expresses a decisive criticism of the life choices of the two plaintiffs, presented as prejudicial to the rights of minors.

There has thus been a violation of the set of provisions set up to protect the right to image, as well as undue interference in the personal sphere of others (the image, moreover, is particularly intimate and also portrays an infant, not recognizable but potentially identifiable as the child of the two effigies).

The plaintiffs Nelson and Barone were therefore the recipients of an unlawful intrusion into their personal sphere, which violated their right to the protection of their image and privacy, by exposing - without their consent - to public view a moment of family intimacy accompanied by the formulation of a negative judgment (albeit abstractly responding to the exercise of the right of criticism, and formulated without the use of derogatory expressions); they are therefore entitled to be compensated for the non-pecuniary damage suffered as a result of the affair, to be liquidated equitably through a presumptive procedure, on the basis of what they themselves attached as a reason for damage: discomfort at the dissemination of a revealing image of their intimacy, the disapproval expressed publicly with regard to the

their lifestyle and family condition, the fear of being the object of unwanted attention should they travel to Italy; these are moral sufferings that can well be presumptively juxtaposed to the events described thus far; on the other hand, it should be considered that the publicity campaign in question has presumably had an echo only in Italy, where the defendant political party is active (so much so that the plaintiffs claim to have heard about it casually, through a cousin of Barone's residing in Italy) and therefore, since the plaintiffs reside permanently in Canada, it can be assumed (in the absence of evidence to the contrary) that in their context of life the affair has had little or no resonance.

∆In light of these considerations, it is deemed equitable to award each of the plaintiffs Nelson and Barone the sum of €10,000.00 each, to be understood as including damages for delay and interest accrued thus far, to which will be added further interest from the present ruling to the balance;

Different is the position of the author of the snapshot, who in turn asks to be compensated for the non-pecuniary damage suffered, apparently without distinguishing it from that complained of by the other plaintiffs (while making no claim related to the right of economic exploitation of the image (as well as the same Barone and Nelson nothing required by reason of the so-called "price of consent").

The position of the photographer, however, does not overlap with that of the two effigies; the photographer Lindsay Foster is not mentioned in the advertising poster, and does not appear in it; she rather complains that one of her photographic works, partially manipulated, with the deletion of the portion in which her signature appeared and the image of the parturient, was improperly used, and that furthermore the photograph was intended for a use distorted from the purpose of the work, which in the author's intentions was supposed to support, and not disqualify, the experience of surrogacy.

What the plaintiff (implicitly) complains of, therefore, is a violation of her moral right to author, a

Compromise of its artistic identity, through unauthorized use and manipulation

Of his photographic work.

As an object of copyright, photography finds protection in Art. 2 No. 7 of the Copyright Law: **"photographic works and those expressed by a process similar to photography as long as they are not mere photographs..."** (meaning that which is defined by the subsequent Art. 87, referring to images without creative value).

In the present case, there is a creative work, intended to convey a message, and not simply to provide a reproduction of an aspect of real life; the image is then published by the author on her personal blog and is accompanied by her signature and logo; we are therefore within the perimeter of Article 7 mentioned above;

In this judgment, the claims explained are merely compensatory in nature, and thus Article 20 l. D. & (which contemplates the author's right to claim authorship of the work and oppose any alteration of it); rather, what is relevant is the subsequent art. 168, according to which in judgments **concerning the exercise of the moral right the rules of the previous section (i.e., relating to the infringement of the right of economic exploitation) apply mutatis mutandis; these rules provide (art. 158) the possibility of compensation for non-pecuniary damage in accordance with Art. 2059 of the Civil Code.** the reference to Art. 2059 makes it clear that non-pecuniary damage cannot be recognized automatically but only where the prerequisites indicated by the rule in question are met (=only in the cases provided for by law). According to the now unanimous reading of Art. 2059 of the Civil Code, in the absence of an express provision of law, non-pecuniary damage becomes compensable in the presence of a serious violation of inviolable rights of the person, as such subject to constitutional protection.

This is not the case for actress Lindsay Foster, whose discomfort at having her own photographic work altered does not rise to a level of seriousness that would justify the payment of a compensatory sum.

The costs of the litigation follow suit.

P.q.m.

-Condemns the defendant association to compensate the plaintiffs Barone and Nelson for the damage caused to them, liquidated at the rate of €10,000.00 each, plus interest from this ruling to the balance;

-Adjudicate the compensatory claim made by Lindsay Foster;

-Condemns the defendant to pay the plaintiffs Barone and Nelson's litigation costs, assessed-in the absence of a notation-at €4,189.00 for professional fees, plus vat cpa and general expenses;

-Condemns Lindsay Foster to pay the defendant association the costs of litigation, assessed - in the absence of notes - in € 3,809.00, plus vat cpa and general expenses.

Rome, May 19, 2023

Judge  
Cecilia Pratesi