

国际民法论坛  
International Forum of Civil Law

人格权法律保护——历史基础、现代发展和挑战  
Legal protection of Personality Rights:  
Historical Foundation, Contemporary Development and Challenges

论文集  
Collection of Papers

中国·苏州·上海  
Suzhou/Shanghai, China

2010年10月14-16日  
October 14<sup>th</sup> - 16<sup>th</sup>, 2010

## 国际民法论坛

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“人格权法律保护——历史基础、当代发展和挑战”

Legal Protection of Personality Rights---Historical Foundation, Contemporary Development and Challenges

主办单位：全国人大常委会法制工作委员会民法室

Organized by : Civil Law Office of the Legislative Affairs Commission , National People's Congress Standing Committee

中国人民大学民商事法律科学研究中心、国际学院（苏州研究院）

Research Center of Civil and Commercial Jurisprudence , International College (Suzhou Research Institute), Renmin University of China

华东政法大学民法和知识产权学科组，民法研究中心，罗马法和欧洲法研究中心

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French Embassy in China

地 点：中国·苏州·上海

Location: Suzhou/Shanghai, China

时 间：2010年10月14-16日

Date: October 14<sup>th</sup> - 16<sup>th</sup>, 2010

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# The protection of personality rights after death

Mauro Tesaro

Contents: - 1. Introduction. - 2. Potential interest in a *post-mortem* protection of personality rights. - 3. The lack of a reference system. - 4. Looking for a legal justification. - 5. Individuals entitled to safeguard the rights of the dead and the continuation of the person of the deceased - 6. Means of protection. - 7. Conclusion.

## 1. INTRODUCTION.

Firstly, I would like to extend my heartfelt thanks to the organizers of this Conference, and in particular to Prof. Zhang Lihong, for allowing me to participate. As a matter of fact, the invitation was addressed to my mentor, Professor Alessio Zaccaria, who unfortunately was unable to attend. He asked me to substitute him and I obviously accepted with enthusiasm.

This Conference addresses the protection of personality rights in general and, as can be gathered from its title, focuses on related current issues without ignoring, however, its Roman law origins. In my opinion, the topic of my speech, namely "The protection of personality rights after death", falls perfectly within the scope of this Conference, because, on the one hand, this topic has emerged in the main Western legal systems only in recent decades, thus heralding interesting future developments, while, on the other hand, as I will illustrate later in my speech, the subject could be contemplated in terms of a concept of ancient Roman law: the successor *mortis causa* is the individual who continues the person of the deceased.

## 2. POTENTIAL INTEREST IN A POST-MORTEM PROTECTION OF PERSONALITY RIGHTS.

One has to wonder, in practical terms, what interest could there be in a *post-mortem* protection of personality rights?

For sake of clarity, it may be useful to consider two cases.

First case: a deceased person is seriously insulted by an article published in a newspaper. If the insult had been addressed to a living being, this person both in Italy and more generally in Western legal systems would have various means of protection, both criminal and civil. By way of example, it may be pointed out that, as regards the latter, a claim for damages or a claim for rectification by the newspaper may be brought. But what happens if the offense concerns a deceased person?

Second case: the image of a famous actor of the past, now deceased, is used in an advertising campaign for a certain product. If the image used regarded a living person, the producer would first have to obtain prior authorization of the celebrity, in order to lawfully use it in an advertising campaign. Otherwise, the use of the aforesaid image would be illegal and damages could therefore be claimed. But

what happens if the image of a deceased is used for commercial purposes?

These two examples bring to light two important practical issues concerning the protection of personality rights after death: what happens if a personality right, such as the right to a good name and to a good reputation, is harmed with regard to its *intellectual or moral component* following the death of its owner? And what happens if the *patrimonial component* of a personality right, for example the right to the public image, is used without obtaining prior authorization after the death of the person involved?

### 3. THE LACK OF A REFERENCE SYSTEM.

One might answer, quite simply, that the personality rights of a living person cease to exist when that person dies and, therefore, cannot logically be afforded any protection after death.

Nevertheless, both in Italy and in many other Western legal systems such an interpretation is inconceivable. A theory based on the necessary protection of *post-mortem* personality rights has emerged or is emerging, albeit in different ways depending on the country of reference.

This is an area, as I said earlier, which has its origins in recent times and is in constant evolution. Nevertheless, in most cases – as in the case of Italy – no organic law exists, while *post-mortem* protection is contemplated in several different laws, each relating to an individual case but not clearly coordinated among each other. And it is obvious that, in this context, doctrine and case law are of the essence in view of the foundation of a future reference system.

Going into the details of the various provisions of law which could be mentioned, however, would take us too far. In the limited time available, an attempt can be made to address broader issues, the solution of which could provide the foundations for the creation of the aforementioned system.

### 4. LOOKING FOR A LEGAL JUSTIFICATION.

First of all, how can the protection of a deceased's personality rights be justified in opposition to the theory that personality rights should cease to exist at the moment of death?

Various theories of a particularly refined nature have been proposed, but seem to be very difficult to support. For example, the theory according to which the deceased, despite the death, retains limited legal capacity concerning only his personality rights, while only living people are entitled to safeguard those rights on behalf of the dead.

This phenomenon is similar to that which involves the rights of future persons (*i.e.* the unborn) who are not yet persons but, nevertheless, possess limited legal capacity. But the doubt remains regarding the possibility to accept this comparison considering that the conceived child, unlike the deceased person, is a living being.

Another theory difficult to accept is that according to which the personality rights of a deceased could still be considered as existing rights even in the absence of a living owner. Even in this case, the aforementioned rights can be safeguarded by individuals who are merely entitled to do so. What is puzzling, however, is the fact that the theory of rights in the absence of a living owner was developed in

order to ensure the continuation of rights, at one point lacking a holder, in the interest of individuals who, subsequently, are entitled to become the qualified bearers. On the contrary, the case in discussion is completely different, because no person is entitled to become the future holder of personality rights of the deceased.

Therefore, one has to discard the theories just referred to and focus on two other points of view.

According to the first theory, personality rights can also be subject to succession similar to that regarding patrimonial rights. The mechanism of transferring rights from the legal predecessor (the deceased) to a successor in title (the successor designated by the deceased or by law), already acknowledged in terms of patrimonial rights, could also apply with respect to personality rights, at least for those subject to *post-mortem* protection.

This theory certainly has the merit of unifying the scheme governing the transfer *mortis causa* of all kinds of rights. Nevertheless, it is a minority opinion, at least in Italy. The prevalent opinion, in fact, rejects the foregoing view, arguing that it goes against the traditional principle of succession to property, according to which succession relates only to patrimonial rights.

On the contrary, the dominant opinion in Italy embraces another theory known as "acquisition *iure proprio*", whereby those who are qualified to act in protection of the personality rights of a deceased actually fail to do so, because the rights of the latter ceased to exist upon the death of their legitimate owner, but instead safeguard new rights, which they acquired and that have nothing to do with the rights to which the deceased was entitled when he was alive.

Without going into details, I would like to stress that the last theory in discussion, despite the support it enjoys, is not subject to less criticism than the others. As a matter of fact, it appears somewhat artificial: it is quite curious to imagine the acknowledgement of "new" rights in order to protect "old" rights pertaining to a person who is no longer alive.

In fact, the theory of "acquisition *iure proprio*" was created in order to bypass the underlying difficulty based on the need to justify the continuation of personality rights after death without resorting to succession, which, as previously said, should be confined to the ambit of patrimonial rights. This idea, however, appears to be simply the result of a tradition which was not thoroughly contemplated, and, in any case, is no longer in line with the times. Without taking into consideration that it is very difficult to draw a clear boundary between patrimonial rights and personality rights.

##### 5. INDIVIDUALS ENTITLED TO SAFEGUARD THE RIGHTS OF THE DEAD AND THE CONTINUATION OF THE PERSON OF THE DECEASED.

Now the next question that we need to answer is this: who are the individuals qualified to protect the personality rights of a deceased?

In light of the various specific provisions of law in force, for example, in Italy, one can say that the individuals qualified to protect the personality rights of a deceased should firstly be those chosen by him when he was alive. This statement is easily understandable and even acceptable: who better than the person in question is able to choose the best qualified individuals to protect his personality rights once he

has passed away?

Moreover, it is clearly preferable and maybe necessary, at least for sake of certainty and in order to avoid family conflicts, that the choice be made in writing by the deceased, and possibly further discussion should concern whether it should be finalized by a will or if any other written form is sufficient.

If the deceased fails to make a choice in this regard, the provisions of Italian law concerning specific cases of *post-mortem* protection of personality rights generally indicate the members of the deceased person's family, usually the closest relatives, and therefore the spouse, children and parents as the individuals entitled to safeguard the aforementioned rights. And this regardless of the fact that they are also successors to the patrimonial rights.

This choice is based on the notion of the family as a community where a person primarily develops and therefore as a community where the values of that individual are better safeguarded and defended.

This is a primary concept characterizing *post-mortem* protection of personality rights: the property belonging to an individual may be diversified, but his non-monetary assets, which represent his personality, must be defended, in principle, by his family, unless the deceased had provided for otherwise.

Furthermore, thanks to the lingering feelings of affection and solidarity characterizing the family, it could possibly be asserted that also the personality of the deceased may continue after death.

In this regard it could also be possible, after adapting it to our times, to revive a theory grounded in ancient Roman law, namely, that the successor *mortis causa* should be, in all respects, both from a patrimonial standpoint and not, the individual who continues the person of the deceased.

This idea was developed at the time of the Twelve Tables, when the heir (*heres*) was the recipient of property rights, but above all had the task to perpetuate family values and religion: *heres nominis, sacrorum, familiae*.

This fascinating idea of the continuation of the deceased person (the conservation and not just the evolution of the family) soon lost significance in the subsequent development of Roman law, where succession had become a strictly patrimonial phenomenon. Nevertheless, the idea of the continuation of the deceased person, probably due to its "romantic" aspect, has often been revived in modern times, even in the absence of specific legal grounds.

Today, this idea could be revived, bestowing it with new meanings, particularly in view of the need to give a credible response to a need felt in society at large to safeguard personality rights after death.

## 6. THE MEANS OF PROTECTION.

The third and final general profile to be dealt with concerns the means of protection regarding the personality rights of the deceased.

It is possible to distinguish between *negative* means of protection, suitable in cases where the personality of the deceased must be safeguarded from external aggressions (for example, an insult to



honor) and *positive* means of protection, suitable in cases where no aggression has occurred, but the necessity to do something to bring out the positive side of the deceased's personality has arisen (for example, when authorization to use the deceased's image has been requested).

In case of negative protection, where the individuals entitled to safeguard the personality rights of the deceased are more than one, it is preferable to acknowledge *separate* powers, since this increases the possibilities that at least one of the individuals will actually take action. However, in case of positive protection, where the individuals entitled to safeguard the above-mentioned rights are more than one, it is preferable to acknowledge *joint* powers, meaning that action can be taken provided that every individual mutually agrees, so that the decision taken is most likely to correspond to the personality of the deceased. The possible intervention of the courts seems appropriate, in the presence of separate powers, with reference to cases in which the action of only one qualified individual appears, in the opinion of the others, to contradict the personality of the deceased, and also appropriate, in the presence of joint powers, with regard to cases where the disagreement of one individual appears unjustified to the others.

Having stated the above, and now focusing, more in depth, on the available remedies, it is possible to distinguish those of pecuniary nature and those that are non-pecuniary. *Non-pecuniary* remedies are intended to prevent or stop an attack on the deceased's personality or, if I may say, to reinstate, in non-pecuniary terms, the personality of the deceased which has been harmed. In this context, the main remedy in Italy is an injunction, *i.e.* a remedy with which the court orders a person to refrain from keeping a certain behavior, for example from using an unauthorized image of a deceased.

But non-pecuniary remedies may also be others: for example, a court order to disclose, at the offender's expense, the details of a judgment which had ascertained that the allegations of an individual violated the honor of a deceased, and, thus, allowing the entire community to be informed of the fact that those allegations were defamatory.

Furthermore, *pecuniary* remedies are also available, in order to obtain money as compensation for damages or compensation for unjust enrichment.

In particular, compensatory damages could ensure the recovery of pecuniary damages, when aspects of the personality, such as the image of a deceased, have been commercially exploited without prior authorization either by the deceased or by the individuals entitled to continue the person of the deceased. Regarding these cases, there has been a tendency in Italy to equalize the compensation with respect to the "price of consent", *i.e.* the price that would have been paid to obtain authorization. This conclusion can be easily justified if the idea of a succession to the personality rights of the deceased is the starting point, while it seems difficult to justify if the qualified individuals are considered owners of new rights differing from those of the deceased.

On the contrary, the recoverability of non-pecuniary damages is doubtful. From the negative standpoint, there exists the risk that the protection of personality rights of the deceased could determine an unjustifiable source of income for others.

In any case, compensation for non-pecuniary damages appears more easily awardable when based on the theory that the qualified individuals are enforcing a new right. On the contrary, the theory of succession to the personality rights could more easily cause doubts regarding compensation for

non-pecuniary damages, because it could be asserted that this form of compensation does not fulfill its normal function of satisfaction, since the individual involved has passed away. Even though these doubts could dissipate when one observes how the idea of family solidarity, previously mentioned as being the foundation of *post-mortem* protection of personality rights, can justify the function of satisfaction even in favor of the surviving family members. Moreover, this does not take into consideration that *post-mortem* compensation of non-pecuniary damages may not only have a function of satisfaction, but may also represent a general-preventive function, which could encourage the community to respect the personality rights of the deceased, thus avoiding to pay compensation for damages.

## 7. CONCLUSIONS.

During this presentation, I attempted to treat the pecuniary and non-pecuniary aspects of the personality of a deceased in the same way. In my opinion, this seems to be preferable, because, amongst the various reasons, it allows us to avoid facing the significant and aforementioned difficulty of drawing a clear boundary between what is pecuniary and what is non-pecuniary. Although I cannot ignore the fact that there are legal systems where, on the contrary, the pecuniary and non-pecuniary aspects are treated differently, as they assign, in particular, the right to protect the former to the family members (not necessarily heirs and unless otherwise specified by the deceased) and the right to protect the latter to the heirs.

This being said, it is a common fact in Western legal systems that some kind of protection should be provided for from the pecuniary standpoint. While many different opinions emerge concerning the possibility of recognizing *post-mortem* protection related to non-pecuniary aspects of personality rights: some Western countries radically deny that this be allowed, by underlining that "*the Dead do not hear*" and consequently, that the deceased may be offended by anyone without consequences.

It seems to me, on the contrary, that the two components, *i.e.* pecuniary and non-pecuniary, are closely related, and that, indeed, if one really wanted to make a distinction, the *post-mortem* protection of the latter should be stronger than that of the former. As a matter of fact, *post-mortem* protection of non-pecuniary aspects of personality rights, related as it is to the continuation of the person of the deceased, as previously referred to, may well serve to strengthen the bonds of solidarity between members of the same family, and, thus, improve a society, like ours, whose primary values are strictly connected to the family. The family which could represent not only a core structure and center of aggregation, the elementary cell of society, but also a symbol of preservation and storage of memories of its members, thus enhancing the personality not only of current members, but also of those who previously belonged to it. And this not just for the benefit of its members, but also for the benefit of the individuals not belonging to the structure, increasingly numerous in relation to the "public" role played by the deceased during his life, in whatever field, political, artistic and so forth. Thus, the role of the family extends from the private to the collective level, expanding its boundaries, at least in this context, to embrace, until achieving an ideal limit, those of society as a whole. Consequently, when an individual who left an undeniable and indelible mark during his lifetime passes away, any member of society can consider itself entitled to preserve and protect his memory and can consider itself entitled to express, on behalf of everyone, and interpreting the thought of all, those same words that Italo Calvino said a few days after the assassination of Che Guevara "in front of such consistency and courage in bringing to the ultimate consequences a thought and a life, let us first show modesty and sincerity".