

Costa Concordia documentary: media issues surrounding investigations

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On January 13 2012 the cruise ship Costa Concordia struck a rock and ran aground near the western coast of Italy. The circumstances of the grounding and the subsequent rescue operation attracted intense media interest in Italy and abroad.

Several legal issues have arisen in connection with the broadcast of a television documentary about the Costa Concordia incident. The documentary makes extensive use of video footage filmed by those onboard, including images of minors. It also includes an original audio recording of a telephone call between Francesco Schettino, the ship's captain, and Gregorio De Falco, the captain of the Livorno coastguard. More generally, the documentary concerns an event that is the subject of a criminal investigation and legal actions by many of the survivors.

Without prejudging the legal positions in this case, it is possible to consider some of the issues that arise from real-life documentaries and the use of user-generated content.

In addition to the customary clearance by the owners of audio or video recordings, Italian copyright law states that the use of images of people in a television programme without their prior consent is subject to certain conditions. Such footage must relate to facts or events that are in the public interest, such as the Costa Concordia disaster. This includes facts or events that occurred in a private place to which there is no general right of access (eg, the Costa Concordia itself). Moreover, the use and economic exploitation of the footage may not be detrimental to the honour, reputation and decency of the subjects.

A stricter approach applies to the privacy rights of minors. Article 7 of the Code of Conduct on Personal Data Processing for Journalistic Purposes - which is annexed to the Data Protection Code - states that a minor's right to privacy "must always take precedence over both freedom of expression and freedom of the press". Pursuant to Article 7, should a journalist decide to publish images of, or reports relating to, children for reasons of substantial public interest, he or she is responsible for evaluating whether such publication serves the child's objective interests in pursuance of the principles and limitations laid down in the Treviso Charter, a code of practice first issued by the Order of Journalists in 1990.

As also clarified by the Data Protection Authority in its decision of November 15 2001, the consent of the parents to the use of their children's images for the purpose of a television programme relating to a matter of public interest does not exclude the application of Article 7 of the Code of Conduct above. Moreover, the charter - to which Article 7 refers - states that:

"[T]he absolute anonymity of minors involved in facts of reportage must be guaranteed, notwithstanding that [the facts being reported] are not criminal offences, when such facts are detrimental to the minor as author, victim or witness... The publication of any elements that may easily lead to the identification of minors must be avoided, including... undisguised television images or online textual content and images that may contribute to their identification."

As a consequence, insofar as the publication of a child's face cannot be deemed essential to the interests of the child (as it might be in the case of abducted or missing children), minors must be anonymised in such programmes.

The use of an original audio recording of the communication between the ship's captain and the captain of the coastguard also raises media privacy issues. Sections 136, 137 and 139 of the Data Protection Code provide that a captioned recording can be included in a programme or documentary film for journalistic purposes without the consent of the data subjects, provided that such inclusion complies with the code of conduct for journalists. Section 6 of the code of conduct states that in order to prevent infringement of the subject's right to personal data protection, the disclosure of information of public or social interest must be "essential" to the description of the relevant facts - it may not appear superfluous or excessive in the context of the film or programme. This provision stresses that the media may provide only essential information and must refrain from excessive or gratuitous coverage.

According to the Data Protection Authority, if the publication of audio recordings is essential to the description of present-day events concerning people, places or things that are of public interest, such publication is permissible under the principle of freedom of the press. However, if such a recording remains available to the public "for an indefinite period of time" (eg, many years after its initial publication), this may be deemed an:

"unrestricted dissemination of recorded calls that may exceed the justified need for information on the relevant matter and thus have an impact on the... data subjects, and result in an excessive forfeiture of the data subjects' rights."

However, producers and providers of media content still face a difficult question: on what grounds may use be said to amount to "unrestricted dissemination" of personal data? Such an assessment must be made on a case-by-case basis and, among other things, should take into account:

- Section 99 of the Data Protection Code, which states that the processing of personal data "for historical, scientific or statistical purposes shall be considered... compatible with the different purposes for which the data had been previously collected or processed"; and
- the Data Protection Authority's decision of June 24 2010, applying the Section 99 principle, in which the authority clarified that personal data processed for journalistic purposes in a newspaper article can continue to be processed for historical purposes some years after the initial publication, without obtaining the data subject's consent.

The broadcasting of television programmes relating to legally sensitive information is obviously conditional on the information being truthful and in the public interest and being reported in appropriate terms.

In addition, the Data Protection Code and the Data Protection Authority's resolutions give guidance on personal data processing for journalistic purposes. In particular, a television documentary must be careful to safeguard the presumption of innocence until judgment becomes final; thus, the programme must avoid any apparent attribution of guilt if an individual has not been found guilty. Moreover, the representation of cross-examinations must be balanced and complete, and information on the status of proceedings must be clear.

Furthermore, the main Italian broadcasters and their associations adopted the Self-Regulatory Code on the Representation of Trials in Television Programmes on May 21 2009. It binds television broadcasters to provide objective, complete and impartial information and to respect the honour, dignity, reputation and privacy of people involved in investigations and prosecutions. This obligation would require the makers and broadcaster of a documentary about the Costa Concordia to take account of the standpoint of the captain and the cruise company, among others.

The Self-Regulatory Code on the Representation of Trials in Television Programmes provides that if programmes represent events that are relevant to ongoing investigations or trials, they must guarantee that the information provided is objective, complete and impartial. Broadcasters must:

"adopt forms of expression and communication techniques which allow the viewer an adequate understanding of the relevant facts, through the representation and illustration of the different positions of the parties. In so doing, [broadcasters] should giving full consideration to the way in which television, as a medium, presents and explains information and which, while emphasising the dialectic element of the legal process between the parties, may lead to a risk of altering the perception of the facts... [Broadcasters must] respect the adversarial principle... ensuring the representation and equal opportunities in the dialectic [between those supporting the different

positions]... and respecting the principle of good faith and fidelity to a true reconstruction of events."

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