

Digital Data and Privacy Between Partners: A Critical Approach to a Technological Family Law Issue

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Abstract

The author reflects upon the possibility to read the rules of the Italian Civil Code in a way which gives them new effectiveness in function of the specific requests for protection connected with the use of technologies. The main theme is represented by the right to privacy between spouses and the need of a balance between the aforementioned personal right and the matrimonial duties. A reconstruction of the spouse's right to privacy is provided, especially considering the spread of technology and digitalization and the involvement of them in family life. The third section is dedicated to the interpretation of the matrimonial duty of fidelity in accordance with the social developments and regarding the so called 'digital adultery'. The civil procedure rules regarding the collection of digital evidence are also considered.

I. Introduction

The spread of technology and digitalisation has deeply changed many aspects of our lives: not only at a practical level, but also determining new habits. The technological progress has increased the potentiality linked to many of human actions. Nowadays, it is possible to reach results that were not assessable in nature¹ or through the medium of the instruments that has been commonly used when the digital era was yet to come.² This brings to jurists the problem to analyse how those results can find a place in our legal system, according to the general principles which govern it.

As we stated at the beginning of the article, the use of technology has also determined new habits, among which there are different ways to start and live relationships, to communicate thoughts and feelings and to express many intimate aspects of each personality.

As Glossators taught us '*ex facto oritur ius*',³ which means that the legal practitioner cannot escape the continuous confrontation with reality and its

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¹ As in the field of medical assisted reproduction.

² As for the invention of near-instant photography or of wiretapping software which makes (even highly sensitive) personal information be accessed easily.

³ C.M. Bianca, '*Ex facto oritur ius*' *Rivista di diritto civile*, 786 (1995).

evolution in customs, values and social feeling.

This is especially true in the area of family law, as issues related to the use of technologies require a verification of the adequacy of each domestic legal system, in terms of its ability to provide answers to new juridical questions that rise from the interaction between the spread of digitalization and family life. Among other things, one of the situations in which family relationships are challenged the more by the digital context is the family crisis.⁴ Therefore, jurists cannot escape but to analyse the legal consequences of the new behaviours that the use of technology brings within family dynamics.⁵

More specifically, it is important to understand whether an effort must be made to innovate, necessarily with the intervention of the legislator, or whether it is possible to identify effective legal instruments to be used in the already existing rules, the contents of which can be enhanced through interpretation⁶ to make them suitable to cover new conducts linked with the use of digital devices. In sum, we think the latter option appears to be practicable, at least to a broad extent and without prejudice to the work of normative implementation which is appropriate when dealing with specific topics connected to the subject under discussion.⁷

As to the new questions that rise from the interaction between the spread of digitalization and family life and that are related to the family crisis, we will mainly consider whether the online conduct of a spouse, in spite of its virtual nature, may be legally qualified as a breach of the matrimonial duties with the consequent personal and patrimonial effects in civil proceedings; whether the evidences of this conduct may be freely collected by the other spouse even through an access, eventually unauthorized, to the digital devices and accounts of its partner or whether this activity may violate a right to privacy, if it exists,

⁴ B. McDaniel and S. Coyne, 'Technoference: The Interference of Technology in Couple Relationships and Implications for Women's Personal and Relational Well-Being' *5 Psychology of Popular Media Culture*, 85 (2014).

⁵ The sociological outcomes of the role of technology in family dynamics has been the object of many recent studies. The studies that provided the background of the present paper are the following ones: J. Lin et al, 'Am I Overwhelmed with this Information?' A Diary Study of Couples' Everyday Account Sharing' *Conference Companion Publication of the 2020 on Computer Supported Cooperative Work and Social Computing* (2020); C.Y. Park et al, 'Share and Share Alike: An Exploration of Secure Behaviors in Romantic Relationships' *Fourteenth Symposium on Usable Privacy and Security*, 83 (2018); Kaspersky Lab, *Connected Love: Privacy in Relationships and the Boundaries of Personal Space* (2018), available at <https://tinyurl.com/c42sxu39> (last visited 31 December 2021).

⁶ In accordance with Art 12 of the Disposizioni preliminari al Codice Civile if an issue cannot be decided recalling an express provision, the judge shall look at the dispositions that provide a discipline for the similar issues; if the issue remains dubious, it shall be decided in accordance with the general principles of the legal system.

⁷ The Italian Legislator has taken into consideration the role of the technology in numerous reforms in all the legal fields, both adapting the pre-existent provisions and introducing new cases and types of offences (eg, the Digital Administration Code, Decreto legislativo 7 March 2005 no 82; the Cyberbullying Act, Legge 29 May 2017 no 71).

between spouses; and, finally, whether the evidences thus collected, when actually violating the spouse's right to privacy, are assumed to be judicially admissible in family proceedings.

II. Marriage in the Digital Era: What About the Content and the Meaning of the Traditional Matrimonial Duties?

In order to pursue our attempt to find out an answer to those questions, we have to analyse the nature of marriage and, consequently, the content and the meaning of the rights and duties which derive from it in light of the new perspectives introduced by the spread of technologies.

The Italian civil code provides for a series of rights and duties which pertains to the *status* of spouse:⁸ as stated in Art 143, spouses have both a duty of loyalty to each other and a duty of collaboration to pursue the family interests. On the other hand, according to Art 2 of the Italian Constitution every person, as an individual, is entitled to a series of inviolable rights (as, among the others, the right to dignity and to privacy) that the Republic recognises and guarantees even in the social groups (as family is) where human personality is expressed.⁹

From a theoretical perspective, this means that each spouse is assumed to have the duty to respect and support the partner in the exercise of its own inviolable and fundamental rights because those rights pertain to it as an individual even within a matrimonial bond. This is true because marriage represents a context where each spouse realizes its personality, talents and aspirations in a higher level than it could do without the partner.

Furthermore, this duty to respect and support the spouse while exercising its inviolable rights and freedoms can be seen as a matrimonial duty, not as an additional duty with reference to the ones expressly mentioned under Art 143 of the Italian civil code (that, for a doctrine, represent only a minimum content in order to shape the spiritual and material *communio*¹⁰ without complete it) but as a direct consequence of the fulfilment of the above-mentioned duties of loyalty and collaboration.

Nevertheless, the concrete exercise of those rights and freedoms is compatible with the nature of marriage itself and the specific matrimonial duties established by the law. In case of conflict, even if the spouse is abstractly entitled to a personal right, this one has to be balanced with the fulfilment of the matrimonial duties

⁸ In accordance with Art 143 Civil Code, from the marriage come the mutual duties of fidelity, moral and material assistance, collaboration in the family's interest and cohabitation. Both the spouses have the duty to contribute to the family's needs, in accordance with their wealth and their professional and domestic capacities.

⁹ In accordance with Art 29 Constitution, the Italian Republic expressly recognizes the family as a natural society built on the marriage.

¹⁰ P. Zatti, 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi', in P. Rescigno ed, *Trattato di Diritto Privato* (Torino: UTET giuridica, 1982), II, 22.

that lay upon the spouse itself;¹¹ and there could be cases where the duties that derive from marriage shall be considered as legally prevalent and, consequently, the exercise of the personal right as limited.

This happens frequently with specific reference to each spouse's right to privacy. Marriage is one type of relationship where the expectation of privacy within the couple is low and has to be low not only from a practical perspective, linked with the circumstance that the spouses share many intimate spaces, especially at home, but above all due to the intrinsic nature of the bond they have established. According to our legal system, marriage creates a '*consortium omnis vitae*',¹² a special reciprocal relationship – which is spiritual, material and legal – that in the Italian civil law context still represents a *unicum*: in fact, even if the legislator introduced the Civil Unions between same sex partners and the legal relevance of Cohabitation (legge no 76/2016), the latter legal institutes still present differentiations from marriage and are able to create a bond between partners which is less tight.¹³

Therefore, as for the preliminary question about the existence (or not) between spouses of the same right to privacy that occurs with reference to non-related people, according to our opinion, it is indubitably that each spouse is entitled to this right, as an individual and within the family (according to Art 2 Italian Constitution). However, when the right to privacy concerns information and circumstances (even in the form of data) that have significance, in an objective and relevant way, for the family interests and life, the concrete exercise of it shall be limited due to the prevalence of an opposite and specific right to know that must be recognized in favour of its partner.

III. The Spouse's Right to Privacy and the Partner's Duty to Respect It

In order to choose the discipline that is suitable to be applied in governing the situations connected with the use of technology and given the peculiarity of the marital nexus, it shall be recognised the right of each spouse to know even highly sensitive personal information of the partner who is burdened with the correspondent duty to disclosure.¹⁴

¹¹ P. Zatti, *Trattato di diritto di famiglia: Famiglia e matrimonio* (Milano: Giuffrè, 2011), I, 733; T.A. Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffrè, 1978), 190; M.F. Tommasini, 'Riservatezza e Controllo nei Rapporti tra Coniugi. L'acquisizione "Interna" di Dati Riservati' *Comparazione e Diritto Civile*, available at <https://tinyurl.com/4s9nwym4> (last visited 31 December 2021).

¹² 23.2.1. Modestino in S. Schipani et al, *Iustiniani Augusti Digesta Seu Pandectae* (Milano: Giuffrè, 2014), I, 161.

¹³ *Ex multis*, G. De Cristofaro, 'Le "Unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°-34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2017, n. 5' *Nuove leggi civili commentate*, I, 101 (2017).

¹⁴ M.F. Tommasini, n 11 above.

A duty of disclosure of everything would be relevant in order to determine a free and fully informed matrimonial consent is legally established before marriage. Any right to privacy cannot be exercised with reference to facts and circumstances even connected with sensitive personal information of the spouse: the partner has the right to know whether the former is impotent or unable to consummate the marriage or incapable of entering into and sustaining a proper or normal marriage relationship due to a physical or psychiatric illness or personality disorder or due to its sexual orientation.¹⁵ The deliberate violation of this duty of disclosure about some personal quality that can objectively and gravely perturb conjugal life causes both personal and patrimonial effects.

As for the personal effects, we can mention the right to ask, depending on the circumstances, the Civil Court to declare the annulment of the marriage, under Art 122, para 3, Italian Civil Code,¹⁶ or the Ecclesiastical Court to declare the marriage is null and void, under canon 1098 Code of Canon Law,¹⁷ or to opt for a separation and then a divorce proceeding; those rights can be also linked with the one to free itself in order to marry another person with whom share a new family.

As for the patrimonial consequences, they are linked with the end of the marriage which frees the spouse from the fulfilment of the matrimonial duties to pay for the support of the partner, or from any limitation of its power to dispose of its wealth by will.

The same duty of disclosure can be considered as current also during marriage and, as a consequence of this, the exercise of the partner's right to privacy as limited.

Given the aforementioned premises, we shall interrogate ourself in order to determine if the consideration of privacy within matrimony take a distinction when considering shared devices and accounts or personal ones.

In fact, there may be different scenarios which may lead to the valorisation of multiple elements: each spouse may have their own devices; on a shared device there may be multiple accounts protected or not by different passwords; a spouse may access a personal account from the partner's device etc. Therefore, if the device and the account are shared,¹⁸ both spouses have equal rights to access them,¹⁹ and no invasion of privacy may occur. However, this

¹⁵ Corte di Cassazione 07 March 2006 no 4876, available at www.leggiditalia.it; Corte di Cassazione 11 October 2001 no 12423, *Famiglia e Diritto*, 580 (2001).

¹⁶ Corte di Cassazione 10 May 2005 no 9801, *Famiglia e Diritto*, 365 (2005).

¹⁷ A. Stankiewicz, 'La fattispecie di errore doloso prevista dal can. 1098', in P.A. Bonnet et al eds, *Diritto matrimoniale canonico* (Città del Vaticano: Libreria Editrice Vaticana, 2003) II, 187.

¹⁸ The issue of technological devices and accounts falling under the community property regime has arisen also on the other side of the Atlantic. See S.B. Richardson, 'Privacy and Community Property' 95 *The North Carolina Law Review*, 729 (2017).

¹⁹ This is in accordance with the provisions regarding the use of the shared property in accordance with Art 1102 Civil Code. In the case of the device or the account falling under the matrimonial property provisions (Art 177 Civil Code), we shall recall the dictum of Corte di

scenario may seem more related to the recent past times, when desktop computers were the only ones available for domestic environments and, therefore, shared between all the components.

Nevertheless, some local courts²⁰ pointed out that the mere circumstance that the device is shared does not always justify the access by a spouse: in fact, a full, voluntary, and aware availability (*messa a disposizione*) by the owner of the data is required.

A common eventuality in domestic environments is represented by the presence of a personal device in which the data are not protected by password. When this circumstance occurs, the outcome is to be found interpreting the nature of marriage and the legal consequences that derive from it.

Thus, even if the device itself is not shared, shared is the environment where the couple lives. According to this approach, the Civil Court of Roma²¹ stated that it is the nature itself of marriage that implies a weakening of the privacy of each spouse and the creation of a shared environment governed by a rule of implicit consent to let the partner know the personal data and correspondence of the other. This is true except when there is an express and 'specific activity' to avoid that. However, in that case, as we will notice later, we have to face another problem: does this sort of activity be compatible with the nature of the matrimonial bond or represent a breach of the legal duties that derive from it?

The theory of the implicit consent is applied to solve our problem in various circumstances. The Court of Torino²² stated that if the digital device is left in a shared space without a password, the spouse can access it because it does not appear any violation of the partner's privacy. The same outcome has been reached by the Appellate Court of Trento²³ that stated that privacy is not violated when the spouse secretly accesses the partner's smartphone looking for adultery evidence, as the cohabitation lessen the privacy between spouses.

Finally, there is the case in which the data are protected by password and the spouse accesses the device unbeknown to the owner or against its will: is there or not a violation of its privacy?

As we have already noticed, in such a context, we shall verify if the complete seclusion of one another from such important spheres of daily life, as online activities are nowadays together with personal data created and stored in digital devices and published in various accounts, has to be intended as the mere exercise of the right to privacy that pertains to each spouse individually considered or may represent a breach of matrimonial duties.

Cassazione 07 March 2006 no 4890 that, confirming the 1998 Corte Costituzionale's principle (17 March 1988 no 311) stated that the matrimonial property does not provide quotas and the spouses are owners *in solido* of the goods.

²⁰ Tribunale di Larino 09 August 2017, available at www.leggiditalia.it.

²¹ Tribunale di Roma 30 March 2016 no 6432, available at www.dejure.it.

²² Tribunale di Torino 08 May 2013, *Giurisprudenza Italiana*, 2480 (2014).

²³ Corte d'Appello di Trento 09 March 2015 no 249, available at www.osservatoriofamiglia.it.

In order to correctly balance the subjective and personal dimension of the right to privacy with the matrimonial duties which legally shape the relationship between the spouses, we have to distinguish on the basis of the nature and the content of the information. Thus, each spouse has a full right to privacy, but it is up to them, in order to preserve the family cohesion and to respect the family duties, to share all the personal data and information that are related to the family interests and life.

IV. The Duty of Fidelity and the Legal Relevance of the Digital Adultery

The considerations provided in the sections above lead us to focus on the duty of fidelity and the consequences that the technological progress may infer to it. In fact, we must interrogate whether the digital devices are relevant just in order to uncover adultery or whether an adultery perpetrated solely through them has the same juridical relevance of a physical relation. In order to reach a scientific justifiable outcome, we shall consider the evolution that has characterised the concept of 'fidelity' as a matrimonial duty under the law.

When the Italian Civil Code entered into force,²⁴ the duty of fidelity laid on the spouses to guarantee that the children born during the marriage were biological descendants of the husband. Fidelity could be summarised up as the exclusivity of the sexual relationship and the infidelity that betrayed the matrimonial duty was essentially the physical one.²⁵

Since the seventies of the last century, the notion of a different type of infidelity, more sentimental, rose up in doctrine,²⁶ linked to the value of trust and devotion: each spouse has the duty to be loyal and the legal relevance of this duty has to be intended in a broader sense, including – both in doctrine and in case law²⁷ – any kind of platonic relationship.

In 2008, the Italian Supreme Court²⁸ expressly described the duty of fidelity not as a mere abstention from any extramarital sexual relationship but as a commitment not to betray each other's trust, not to fail the spiritual dedication to the spouse. Furthermore, case law considered a breach of duty of loyalty also the attempts made by a spouse to organise an intercourse, even when the plan does not reach the purpose due to the lack of interest from the

²⁴ The Civil Code entered into force on 16 April 1942.

²⁵ Corte Costituzionale 18 April 1974 no 99, *Il Foro Italiano*, 1574 (1974). See also C. Gangi, *Il matrimonio* (Milano: Giuffrè, 1953), 257.

²⁶ *Ex multis* F. Santoro-Passarelli, 'Dei doveri e dei diritti che nascono dal matrimonio. Note introduttive agli articoli 143-146', in G. Cian et al eds, *Commentario al Diritto italiano della famiglia* (Padova: CEDAM, 1992), II, 507.

²⁷ Corte di Cassazione 13 July 1998 no 6834, *Corriere Giuridico*, 1015 (1998); Corte di Cassazione 14 April 1994 no 3510.

²⁸ Corte di Cassazione 11 June 2008 no 15557, *Nuova giurisprudenza civile commentata*, 1286 (2008).

other person.²⁹

In this scenario, it is evident that a platonic relationship may also take place online and also the case law pointed this out. Therefore, it happens clear to us that technology can play two different roles in adultery: on one side, it can represent a vehicle to find a person with whom a relationship may find explication in the physical world;³⁰ on the other, it can be the instrument to commit adultery, when the relationship remains purely virtual even though anyway legally relevant.³¹

V. Digital Evidence Collected by a Spouse Violating the Partner's Right to Privacy and Their Admissibility in Family Proceedings

The relevance of the digital instruments and the right to privacy between spouses needs to be considered not only at a substantial level but also on the procedural one. In fact, having us pointed out that technology may both represent a vehicle to find a person with whom having an intercourse but also the dimension where the adultery takes places, we have to investigate if the evidences collected accessing the spouse's devices and accounts unbeknown to the owner or against its will may be judicially acquired in family proceedings.

Based on substantial law, we have already noticed³² that this conduct does not represent a violation of the spouse's right to privacy. This conclusion deserves now a more detailed justification. First, there are cases where no right to privacy is concerned. In fact, we have already mentioned,³³ if the evidence is collected from a shared device or from a personal device, password-unprotected and located in a shared environment (as the theory of the implicit consent prescribes),³⁴ the spouse cannot hold against its will the admission of it any right to privacy. Moreover, a third case may be added to the aforementioned category: the right to privacy neither concerns shared data, such as posts, pictures and data shared on Facebook or anyway published by the spouse on the Internet. These data represent information deliberately shared with everyone (if the social profile is public) or, however, with a group of people (if there is any kind of access restriction).³⁵

Secondly, and more important for our purposes, there are cases in which it would be possible, abstractly, to argue of a right to privacy upon the spouse whose device is accessed by the other one. In these circumstances, we can note that a person, by contracting marriage, does not lose its right to privacy as an individual and the constitutional, civil, administrative and criminal protection

²⁹ Corte di Cassazione 16 April 2018 no 9384, *Famiglia e Diritto*, 637 (2018).

³⁰ See note 27.

³¹ Tribunale di Milano 22 June 2012, available at www.leggiditalia.it.

³² See *supra* paragraph 3.

³³ See *supra* paragraph 3.

³⁴ Tribunale di Roma 30 March 2016 no 6432, available at www.leggiditalia.it.

³⁵ Tribunale di Santa Maria Capua Vetere 13 June 2013, as recalled by M. Gradi, 'Diritto alla prova e tutela della privacy nel processo civile' *Rivista di Diritto Processuale*, 1101 (2019).

of this right is ever available. As for the criminal liability, it is connected with the activity of the person who wiretaps or hidden any type of video or recording device without the victim's knowledge or permission or installs any type of software on the victim's computer or telephone or spies on the victim by logging into its email accounts. The conduct is covered not under Art 616 Italian Criminal Code that punishes the violation of correspondence (that protects the communication considered in a static perspective, as materially represented) but under Art 617-*quarter* Italian Criminal Code that punishes wiretapping (that protects the communication considered in a dynamic perspective, as a flow).³⁶

When the concrete case concerns the conduct of a spouse, however, the Court may rule for a dismissal of the case and for the exclusion of the unlawfulness of the behaviour according to Art 51 Italian of the Criminal Code.³⁷ This points out the link between the legal relevance of an act of invasion of privacy with the objective characteristics of the concrete conduct.

This is the solution adopted also under the Canadian Privacy Law. According to a recent decision of the Ontario Court of Appeal,³⁸ the new common law tort 'intrusion upon seclusion' is a subset of the broader invasion of privacy category, which includes other recognized and potential causes of action. It is committed by the one who intentionally (or recklessly) intrudes, physically or otherwise, upon the seclusion of another or his (or her) private affairs or concerns. But the author of the conduct is subject to liability only if the invasion of the other's privacy would be highly offensive to a reasonable person.

An act which represents an invasion of a third party's privacy is illegal not *per se*, but only if the activity shown to be 'highly offensive' to a 'reasonable person',³⁹ and that there is room in the Canadian legal system to appreciate the nature, incidence and occasion of the wrongful act; any relationship, whether domestic or otherwise, between the parties; and the conduct of the parties, both before and after the wrong.

According to some Italian case law, when the invasion of the spouse's privacy is committed by its partner, the conduct of that partner could not deserve punishment. As we have already noticed, this is not because there is anything in Italian law which suggests that the right to privacy is limited to unmarried

³⁶ Corte di Cassazione 22 January 2019 no 2905, available at www.leggiditalia.it; Corte di Cassazione 22 January 2019 no 2942, available at www.leggiditalia.it.

³⁷ Art 51 Criminal Code states that it cannot be considered unlawful the conduct of a subject that acts to exercise a right: therefore, the author suggests that, if one of the spouses does not share with the other the information that can be considered relevant for the family life (in accordance with the duty of loyalty under Art 143 Italian Civil Code), the latter shall be considered allowed to reach the information by itself.

³⁸ *Jones v Tsige*, 32 ONCA (2012); K. Cooligan and D. Hohnstein, 'Intruding Upon the Seclusion of Personal Email - What the Common Law Tort for the Invasion of Privacy Might Mean for Snooping Spouses and the Electronic Evidence that they Obtain' 34 *Child and Family Law Quarterly*, 135 (2014).

³⁹ *Jones v Tsige*, *ibid*, para 19.

individuals,⁴⁰ but because this conclusion is a logical and axiological consequence of the intrinsic nature of the institution of marriage, which is a very peculiar bond even before being an institution.

As Justice William O. Douglas of the US Supreme Court argued ‘Marriage is an association that promotes a bilateral loyalty, not commercial or social projects’; it is ‘intimate to the degree of being sacred’.⁴¹ The concept of sacred recalls the one of sacrifice. And quoting Justice Anthony Kennedy of the US Supreme Court ‘No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family’.⁴²

Following the same perspective, the Italian Supreme Court stated in 2008⁴³ that marriage implies for each spouse the duty to sacrifice every personal interest which conflicts with the commitments made to and the perspective shared with the other in respect of a life in common. Thus, the spouse does owe an individual right to privacy, but the exercise of this right knows the limits that derive from the intrinsic essence of that *consortium* with the other spouse where the former has chosen to live.

Every activity, even an online activity, which is incompatible with the very nature of the matrimonial bond represents a breach of the legal duties that derive from it. The specific activity made by the spouse to avoid the partner knowing the former’s personal data and correspondence, seems not to be compatible with the marital duties when the content of the information is relevant for the family life and the balance between the spouses.

The breach of matrimonial duties represents the basis to our reflections to the processual perspective. The evaluation upon the admissibility of the evidence collected by a spouse violating the partner’s right to privacy is remitted to the Judge.⁴⁴ The right to privacy that pertains to every individual (even married, as we have noticed) shall be balanced with the right of defence which the other spouse is entitled to.

This right becomes relevant when the plaintiff starts a separation or divorce proceeding, or is involved in it, and asks the Judge to consider the online activity of the defendant which violates the matrimonial duty in order to establish the legal conditions and patrimonial consequences linked with marital separation or divorce. Or when, apart from a matrimonial proceeding, the plaintiff sues the spouse seeking an order of non-contractual damages, as a legal remedy linked with the violation of Art 2043 of the Italian Civil Code.

⁴⁰ This is the perspective mainly followed in the Common Law systems in order to state that the conduct of the spouse is inadmissible and illegal.

⁴¹ *Griswold v Connecticut*, 381 US (1965), para 18.

⁴² *Obergefell v Hodges*, 576 US (2015).

⁴³ Corte di Cassazione 11 June 2008 no 15557, *Nuova giurisprudenza civile commentata*, 1286 (2008).

⁴⁴ Autorità Garante per la Protezione dei dati personali, 13 December 2005, available at www.garanteprivacy.it.

VI. Conclusions

It is quite possible to read the rules of the Italian Civil Code in a way which gives them new meaning in function of the specific requests for protection connected with the use of technologies. There are provisions which can today find a new scope of application and prove to be effective means in a double sense: in a protective perspective and in a repressive one.

In a protective perspective, because of their suitability to safeguard both interests which are new (due to their derivation from the use of technologies, *eg* the interest of accessing the data that the other spouse has publishes on the Net or stored in its device) and interests which were already previously recognized (*eg* duty of fidelity within matrimony), but that find at present new ways of expressing themselves in connection with the digital context (*eg* the commitment not to betray the entire sphere of the other spouse's trust).

The repressive perspective is linked with their usefulness to ensure an *effective enforcement* of sanctions with respect to new harmful conducts linked to online activities (*eg* digital adultery).

The aforementioned reflections bring up more questions, more legal challenges that require to further the hermeneutical approach in order to categorise the new digital phenomena and to investigate the necessity of a legislative intervention.

Regarding the theme of the regulation of digital goods, such as social accounts, we shall ask ourselves if and how the matrimonial property regime may find an application. This seems to deserve an accurate investigation, especially when the social account switches from a mean of personal representation in the digital world to a platform used to influence consumers and, consequently, a source of income for the family.

If the patrimony of the spouses is regulated by the community property regime, Art 178 Italian Civil Code⁴⁵ may find application: in fact, even if the social media account of a spouse has been created for a personal scope and has acquired a business relevance at a later time, the increase of the followers may be considered a goodwill.

On the procedural side, some authors are not fully convinced by the appropriateness to leave to the discretion of the civil judge the decision upon the admissibility of every evidence and consider the necessity of a legislative intervention regarding the (in)admissibility of illegally acquired evidence in civil proceedings, in consideration of the absence of an explicit provision in the

⁴⁵ In accordance with Art 178 Civil Code, the goods functional for the exercise of the business created by one of spouses after the marriage and the growths of the business, even created prior to the marriage, shall fall under the *comunione de residuo* (shared property that still exist after the dissolution of the community property) if they still exist. The fulfillment of the provision requires a comprehensive evaluation that consider the rights of the spouse that on one hand may have not directly participated in the management but, on the other, may have cooperate to the growth of the business.

Italian Code of Civil Procedure. We still believe that the concrete evaluation of the judicial authority represents the best balance between the rights of the parties involved.

In conclusion, it may be relevant to note that the case law and the legal doctrine is concerned to argue about limits, about duties, about sacrifice while the field of Family Law finds itself exposed to multiple instances coming from the society, which are in general directed to the recognition of new rights and freedoms: nevertheless, we shall underline that these rights and freedoms often prove to be not only conflicting among themselves, but also not always oriented to the protection of the weaker subject.