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# Freedom of Expression v. Social Responsibility on the Internet: *Vivi Down Association v. Google*<sup>†</sup>

*Raphael Cohen-Almagor*<sup>††</sup> and *Natalina Stamile*<sup>†††</sup>

*With great power comes great responsibility.*  
~Voltaire

## I. INTRODUCTION

Technology enables efficient global communication. People from all over the world use the Internet to share and distribute information with a click of a button. The Internet brings people together and bridges over great geographical distances. It enables global business collaboration, provides online education platforms, and circulates instant news online. Thanks to the Internet, people are able to support many important causes—social, humanitarian, legal, and environmental, among others—around the world, and they are also able to support one another. An important aspect of the Internet is socialization. Nowadays, people spend much of their life virtually: they meet people; make virtual friends; play games; watch movies and sporting events online; exchange personal news, including photos and videos; flirt; fall in love; and establish life connections. Recently, due to the COVID-19 epidemic, people were forced to make the Internet their life gravitas. Many people have been spending most of their days in front

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<sup>†</sup> The authors are grateful to Luigi Cornacchia and Massimo La Torre for their constructive comments.

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of the computer, using the Internet to conduct their lives without leaving their home.

One of the world's largest companies is Google.<sup>1</sup> Founded in 1996 by Sergey Brin and Larry Page, Google was first an online search engine but slowly developed into an empire of digital technology. Its mission is to organize the world's information and make it universally accessible and useful.<sup>2</sup> The technology giant made its name as the most efficient search engine; consequently, the vast majority of its income comes from advertising.<sup>3</sup> Still, the company branched out into several areas such as cloud computing and storage; artificial intelligence (AI) and machine learning; security; software; and hardware.<sup>4</sup> Google's services include Google Ads, Google Marketing Platform,<sup>5</sup> Google Display Network,<sup>6</sup> and Google Consumer Surveys.<sup>7</sup> Its products are numerous, including Google Fit, Earth, Drive, Chat, Cloud Print, Flights, Meet, Play, Voice, and Scholar.<sup>8</sup> Google employs more than 100,000 people in dozens of countries.<sup>9</sup> It is one of the major players in communication technology. In 2020, Alphabet, Google's parent company, entered a very exclusive club of tech companies whose worth is \$1 trillion.<sup>10</sup> The two other companies in this small, elite club are Apple and Microsoft.<sup>11</sup>

This article relates to one of Google's most notable failed ventures, Google Video. This free video hosting service was established in January 2005 and faced fierce competition with YouTube, which launched

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<sup>1</sup> Jon Swartz, *Google becomes third U.S. tech company worth \$1 trillion*, MARKET WATCH (Jan. 16, 2020), <https://www.marketwatch.com/story/google-parent-alphabet-joins-1-trillion-in-market-value-for-first-time-2020-01-16> [<https://perma.cc/5R7S-6WQ2>].

<sup>2</sup> See *About*, GOOGLE, <https://about.google/> [<https://perma.cc/UF2S-94DX>] (last visited Mar. 13, 2021).

<sup>3</sup> Trefis Team, *Is Google Advertising Revenue 70%, 80%, Or 90% Of Alphabet's Total Revenue?*, FORBES (Dec. 24, 2019), <https://www.forbes.com/sites/greatspeculations/2019/12/24/is-google-advertising-revenue-70-80-or-90-of-alphabets-total-revenue/?sh=1d93e4b74a01> [<https://perma.cc/NG8S-YENA>].

<sup>4</sup> *Google Cloud Platform Services Summary*, GOOGLE CLOUD, <https://cloud.google.com/terms/services> [<https://perma.cc/7JJ7-5B93>] (last updated Mar. 2, 2021).

<sup>5</sup> *Google Marketing Platform*, GOOGLE MARKETING PLATFORM, [https://marketingplatform.google.com/intl/en\\_uk/about/](https://marketingplatform.google.com/intl/en_uk/about/) [<https://perma.cc/X7GU-AJUY>] (last visited Mar. 13, 2021).

<sup>6</sup> *ABOUT DISPLAY ADS AND THE GOOGLE DISPLAY NETWORK*, GOOGLE ADS [HTTPS://SUPPORT.GOOGLE.COM/GOOGLE-ADS/ANSWER/2404190?HL=EN-GB](https://support.google.com/google-ads/answer/2404190?hl=en-gb) [[HTTPS://PERMA.CC/Y7HG-NLPP](https://perma.cc/Y7HG-NLPP)] (LAST VISITED MAR. 13, 2021).

<sup>7</sup> *Google Surveys*, GOOGLE SURVEYS, <https://surveys.withgoogle.com/> [<https://perma.cc/8J26-HLSP>] (last visited Mar. 13, 2021).

<sup>8</sup> See *Products*, GOOGLE, <https://about.google/products/> [<https://perma.cc/39ZF-GRAZ>] (last visited Mar. 13, 2021).

<sup>9</sup> Seth Fiegerman, *Google's parent company now has more than 100,000 employees*, CNN (Apr. 29, 2019), <https://edition.cnn.com/2019/04/29/tech/alphabet-q1-earnings/index.html> [<https://perma.cc/X6QZ-664F>].

<sup>10</sup> Swartz, *supra* note 1.

<sup>11</sup> Jessica Bursztynsky, *The four biggest tech companies are each worth more than \$1 trillion, a landmark last reached before Covid-19*, CNBC (July 6, 2020), <https://www.cnbc.com/2020/07/06/maga-tech-stocks-worth-more-than-1-trillion-googl-aapl-amzn-msft.html> [<https://perma.cc/2TRV-JWFM>].

about the same year.<sup>12</sup> YouTube is an American online video-sharing platform, established by Chad Hurley, Steve Chen, and Jawed Karim in February 2005.<sup>13</sup> It is one of the most successful online platforms. The Google Video service was geared towards providing a large archive of freely searchable videos. Initially, the service was limited to high-quality and professional videos, such as video ads, movie trailers, commercial professional media, televised content, and movies.<sup>14</sup>

In Italy, the service allowed the uploading of amateur videos.<sup>15</sup> As Google Video was unable to generate anything close to the same number of uploads and viewers on YouTube, Google acquired YouTube in 2006 for \$1.65 billion in stock.<sup>16</sup> In 2012, Google shut down Google Video and transferred its video services to YouTube.<sup>17</sup> While this article focuses on Google Video, the proposed principles are also applicable to YouTube and, indeed, to any video sharing platform.

The Internet contains the best products of humanity. Unfortunately, it also contains the worst products. People upload controversial footage onto Google Video and YouTube. Google hides behind the claim that it is not a publisher but rather a virtual platform, with no liability for content on its servers. Google describes itself as an enabler of communications rather than a publisher of content in order to relieve itself of any responsibility.<sup>18</sup> As a mere digital platform, Google is not liable for trolling or abuse. Of relevance is paragraph 19 of The Electronic Commerce (EC Directive) Regulations 2002.<sup>19</sup>

<sup>12</sup> *Google Video and YouTube*, BRITANNICA, <https://www.britannica.com/technology/e-mail> [<https://perma.cc/8HCU-K4UH>].

<sup>13</sup> Kit Smith, *57 Fascinating and Incredible YouTube Statistics*, BRANDWATCH (2020), <https://www.brandwatch.com/blog/youtube-stats/> [<https://perma.cc/ZLK2-9V96>].

<sup>14</sup> *Google Frames a Video Search Engine*, GOOGLE SYSTEM (June 13, 2007), <http://googlesystem.blogspot.com/2007/06/google-videos-new-frame.html> [<https://perma.cc/XV32-XQAT>].

<sup>15</sup> For the results of investigations and inspections at the Google Italy s.r.l in Tribunal of Milan, see Trib. Milano, 24 February 2010, n. 1972 [hereinafter “Vivi Down Assoc. v. Google (Tribunal)”].

<sup>16</sup> Andrew Ross Sorkin and Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, NY TIMES (October 9, 2006), <https://www.nytimes.com/2006/10/09/business/09cnd-deal.html#:~:text=Google%20announced%20this%20afternoon%20that,Ya-hoo%20and%20the%20News%20Corporation> [<https://perma.cc/D3YF-UH6Z>].

<sup>17</sup> See Jacob Clifton, *10 Failed Google Projects*, HOWSTUFFWORKS (2010), <https://computer.howstuffworks.com/10-failed-google-projects9.htm> [<https://perma.cc/W59B-A75R>]; see also *Google Video and YouTube*, ENCYCLOPAEDIA BRITANNICA, *Google Video and YouTube*, <https://www.britannica.com/topic/Google-Inc/Other-services> [<https://perma.cc/K6JY-H8EU>] (last visited Mar. 13, 2021).

<sup>18</sup> Adam Candeub & Mark Epstein, *Platform, or Publisher?*, CITY JOURNAL (May 7, 2018), <https://www.city-journal.org/html/platform-or-publisher-15888.html> [<https://perma.cc/N5WR-RD7L>].

<sup>19</sup> See *The Electronic Commerce (EC Directive) Regulations, 2002*, UK STATUTORY INSTRUMENTS, <https://www.legislation.gov.uk/ukSI/2002/2013/contents/made> [<https://perma.cc/ZW3P-DNST>].

**Hosting** 19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise

The aim of the article is to reflect on Google's social responsibility by analyzing a legal milestone that took place in Italy. It was a landmark decision because it refuted the assertion that the Internet knows no boundaries, that it transcends national laws due to its international nature, and that Internet companies, such as Google, are above national laws.<sup>20</sup> The *Vivi Down* case shows that when the legal authorities of a given country decide to assert their jurisdiction, Internet companies need to abide by national laws if and when they wish to operate in that country.

It is of importance to say a few words about the Italian legal system. This system is comprised of a plurality of sources, arranged in a hierarchical order.<sup>21</sup> It takes the form of continental civil law.<sup>22</sup> The Constitution, promulgated by the provisional Head of State and came into force on January 1, 1948, is the main source of the law of the Italian Republic.<sup>23</sup> The Constitution consists of 139 Articles and 18 Transitional and Final Provisions.<sup>24</sup> Most of it can be amended only by a special proceeding (*procedimento aggravato*).<sup>25</sup> The legal system is required to also comply with international and communitarian rules, both customary and written rules. The law is open to interpretation and jurisprudence. It can influence subsequent decisions, but only positive and written law are binding for interpreters. These include European Union (EU) legislation (EU Directives

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would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—(a) the service provider—(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and (b) the recipient of the service was not acting under the authority or the control of the service provider.

<sup>20</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>21</sup> See, e.g. ANTONINO SPADARO & ANTONIO RUGGERI, *LINEAMENTI DI GIUSTIZIA COSTITUZIONALE (CHARACTERISTICS OF CONSTITUTIONAL JUSTICE)* (Giappichelli 6th ed. 2019); TEMISTOCLE MARTINES, *DIRITTO COSTITUZIONALE (CONSTITUTIONAL LAW)* (Giuffrè ed. 14th ed. 2017); GIUSEPPE MORBIDELLI ET AL., *DIRITTO PUBBLICO COMPARATO (COMPARATIVE PUBLIC LAW)* (Giappichelli 2016); RICCARDO GUASTINI, *INTERPRETARE E ARGOMENTARE (ON INTERPRETATION AND ARGUMENTATION)* (Giuffrè 2011); RICCARDO GUASTINI, *L'INTERPRETAZIONE DEI DOCUMENTI NORMATIVI (INTERPRETATION OF NORMATIVE DOCUMENTS)* (Giuffrè 2004).

<sup>22</sup> For more details, see MARIO LOSANO, *SISTEMA E STRUTTURA NEL DIRITTO (SYSTEM AND STRUCTURE IN LAW)*, vol. 1, 2, 3 (Giuffrè 2017); see also MORBIDELLI ET AL., *supra* note 21.

<sup>23</sup> See COSTITUZIONE [COST.] (It.). For the Italian Constitution, translated and published in English by the Italian Parliamentary Information, see *Constitution of the Italian Republic*, ARCHIVES & PUBLICATIONS OFF. SENATE SERV. FOR OFFICIAL REPS. & COMMUN., [https://www.senato.it/applicazione/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST\\_INGLESE.pdf](https://www.senato.it/applicazione/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf) [<https://perma.cc/5YJC-ACKP>] (last visited Mar. 14, 2021).

<sup>24</sup> *Id.*

<sup>25</sup> See Art. 138 COSTITUZIONE [COST.] (It.). It is important to highlight that ordinary law cannot amend the Italian Constitution.

and Regulations); ordinary law; law decrees and legislative decree; *referendum abrogativo* (a referendum can be a source of law if it abrogates an earlier law); regional law; government regulations; and, finally, habit or custom.<sup>26</sup> However, all the legal sources must conform to the Italian Constitution.<sup>27</sup>

As a member state in the European Union, Italy is subjected to sources of law that derive from the EU.<sup>28</sup> The most important are EU treaties, which are binding on all the member countries. They set out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU, and subjects of European Law (its member countries, citizens and legal entities).<sup>29</sup> Italy also needs to follow EU regulations and directives. A “regulation” is a binding legislative act. A regulation must be applied in its entirety across the EU.<sup>30</sup> Regulations require direct application by the judges. The EU directives relate to various legal areas. In turn, a “directive” is a legislative act that sets out a goal that all EU countries must achieve.<sup>31</sup> In addition, Italy is a signatory to *international* treaties and conventions.

The two most important courts are the Italian Constitutional Court (*Corte costituzionale*) and the Italian Supreme Court of Cassation. The Italian Constitutional Court is the only Italian court on matters of constitutional law.<sup>32</sup> It was established by the Italian Constitution in 1948, but it became operative only in 1955 after the enactment of the Constitutional

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<sup>26</sup> See MARTINES, *supra* note 21; see also MARIA FIERRO, ET AL. I DIRITTI FONDAMENTALI NELL'ORDINAMENTO GIURIDICO COMUNITARIO E NEGLI ORDINAMENTI NAZIONALI. QUADERNO PREDISPOSTO IN OCCASIONE DELL'INCONTRO QUADRILATERALE TRA CORTE COSTITUZIONALE ITALIANA, TRIBUNALE COSTITUZIONALE SPAGNOLO, TRIBUNALE COSTITUZIONALE PORTOGHESE E CONSIGLIO COSTITUZIONALE FRANCESE (THE FUNDAMENTAL RIGHTS IN THE COMMUNITY LEGAL ORDER AND IN THE NATIONAL ORDERS. NOTEBOOK ON THE OCCASION OF THE QUADRILATERAL MEETING BETWEEN THE ITALIAN CONSTITUTIONAL COURT, THE SPANISH CONSTITUTIONAL COURT, THE PORTUGUESE CONSTITUTIONAL COURT AND THE FRENCH CONSTITUTIONAL COUNCIL) (Madrid 2017).

<sup>27</sup> *Id.* For more details about the solution of the antinomies, see GUASTINI (2011), *supra* note 21.

<sup>28</sup> See MARTINES, *supra* note 21; see also FIERRO ET AL., *supra* note 26.

<sup>29</sup> EU Treaties, EUROPEAN UNION, [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en) [<https://perma.cc/RD42-N7HJ>] (last visited Mar. 14, 2021).

<sup>30</sup> Regulations, Directives and other acts, EUROPEAN UNION, [https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en) [<https://perma.cc/UM5U-UMTY>].

<sup>31</sup> *Id.*

<sup>32</sup> See SPADARO & RUGGERI (2019), *supra* note 21; MARTINES (2017), *supra* note 21; Natalina Stamile, *Alguns aspectos de ordem geral sobre o conceito de Constituição, interpretação constitucional e justiça constitucional italiana*, (Some General Aspects on the Concept of the Constitution, Constitutional Interpretation and Italian Constitutional Justice), IDCC (REVISTA DO INSTITUTO DE DIREITO CONSTITUCIONAL E CIDADANIA) (Londrina, Brazil), 1, 71-91 (Jan/Jul, 2020); NATALINA STAMILE, I LIMITI DELLA (IR)RAGIONEVOLEZZA NELLA GIUSTIZIA COSTITUZIONALE (THE LIMITS OF (UN)REASONABLENESS IN CONSTITUTIONAL JUSTICE (forthcoming)).

Law n. 1 of 1953<sup>33</sup> and the Law n. 87 of 1953.<sup>34</sup> According to Article 134 of the Italian Constitution, this court shall pass judgment on:

controversies on the constitutional legitimacy of laws and measures having force of law issued by the State and Regions;  
conflicts of authority between central institutions, between State and Regions, and between Regions;  
charges brought against the President of the Republic, according to the provisions of the Constitution.<sup>35</sup>

The Constitutional Court is called on to exercise the functions generally associated with guaranteeing the observance of constitutional rules, such as resolving controversies between the central State and territorial communities (e.g. the Regions). It maintains a balance between the center and periphery and is called to resolve conflicts between different branches of the central State. The Constitutional Court also intervenes in cases where there is a need for an impartial organ to resolve questions for which ordinary courts are deemed insufficiently authoritative to pass judgment.<sup>36</sup> The Constitutional Court (as “the judge of the laws”) rules on disputes concerning the constitutionality of laws and not the merit of cases.<sup>37</sup>

The Supreme Court of Cassation (*Corte di Cassazione*) mainly reviews judgments from the courts of appeal.<sup>38</sup> The review only concerns the correct application of the law and not the facts of the dispute.<sup>39</sup> It has overall competence and constitutes the final instance of appeal.<sup>40</sup> The courts of appeal (*Corte d'Appello*) review the judgments made by the courts of first instance.<sup>41</sup> The courts of first instance and appeal are local courts, and they have jurisdiction over disputes in accordance with the relevant legal provisions determining the appropriate venue for litigation and for jurisdiction.<sup>42</sup> The courts (*tribunali*) sit as monocratic courts for matters of minor complexity and as collegiate courts for more serious cases.<sup>43</sup>

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<sup>33</sup> See Legge costituzionale, 11 March 1953, n. 1, available at <https://www.gazzettaufficiale.it/eli/id/1953/03/14/053C0001/sg> [<https://perma.cc/R5NY-8CKV>] (last visited Mar. 14, 2021).

<sup>34</sup> See Legge 11 March 1953, n. 87., available at <https://www.gazzettaufficiale.it/eli/id/1953/03/14/053U0087/sg> [<https://perma.cc/AMW5-ZGYX>] (last visited Mar. 14, 2021).

<sup>35</sup> See Art. 134 COSTITUZIONE [COST.] (It.). In addition, the Italian Constitutional Court could decide on the constitutionality of the *referendum abrogativo*.

<sup>36</sup> SPADARO & RUGGERI, *supra* note 21; MARTINES, *supra* note 21; STAMILE, *supra* note 32.

<sup>37</sup> *Id.*

<sup>38</sup> FRANCESCO PAOLO LUISO, DIRITTO PROCESSUALE CIVILE (CIVIL PROCEDURE LAW) VOL. 1, 2 (Giuffrè ed. 2020); ALBERTO CAMON ET AL., FONDAMENTI DI PROCEDURA PENALE (FUNDAMENTALS OF CRIMINAL PROCEDURE) (CEDAM ed. 2020).

<sup>39</sup> CAMON ET AL., *supra* note 38.

<sup>40</sup> *Id.*; LUISO, *supra* note 38.

<sup>41</sup> LUISO, *supra* note 38; *see also* MARTINES, *supra* note 21.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* For further discussion, *see Jurisdiction – Italy*, EUROPEAN UNION [https://e-justice.europa.eu/content\\_jurisdiction-85-it-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_jurisdiction-85-it-maximizeMS_EJN-en.do?member=1) [<https://perma.cc/AN27-VZQ9>] (last visited Apr. 19, 2021).

The following section of this article (Section II) discusses the concept of Corporate Social Responsibility (CSR), which formulates ethical guidelines for companies and attempts to convince managers that responsibility is good for their business. Section III presents the concepts of the dignity of the person and privacy in Italian law. Human dignity and privacy are values that relate to a shared project of the good life. Section IV explains the law of defamation. Section V highlights the facts in the court cases brought against Google in Italy, while Section VI discusses and analyses the court's judgment in light of pertinent considerations, including CSR, the dignity of the person, privacy, and defamation. We call on corporations to comply with other countries' laws and regulations and to create a compliance regime around CSR.

## II. CORPORATE SOCIAL RESPONSIBILITY (CSR)

Corporate Social Responsibility (CSR) is one of the main tenets of a field of studies that emerged during the 1980s: business ethics. This field is rooted in moral philosophy, combining philosophical principles with the study of business and corporations in an attempt to elucidate their duties and obligations. Business ethics describes managerial activities as they became more visible thanks to the expansion of technology and media. Archie Carroll contends: "It is concerned with the rightness or fairness of business, manager and employee actions, behaviors and policies taking place in a commercial context."<sup>44</sup>

The main principles of CSR dictate integrated, sustainable decision-making, which takes into consideration the positive and negative potential consequences of decisions; obligations on the part of corporations not only to consider different stakeholders and interests but also to incorporate them into the decision-making processes; transparency that is vital for ensuring accountability to stakeholders; liability for decisions; and enactment of remedial measures to redress harm inflicted as a result of conduct.<sup>45</sup> Archie Carroll articulated in his seminal works that beyond the obvious economic and legal obligations that a firm has, the social responsi-

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<sup>44</sup> Archie Carroll, *Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks*, 44 *ORGANIZATIONAL DYNAMICS* 87-96 (2015); see also Victor Mortreu, *The Complementarity of Corporate Sustainability and Innovation: Evidence from the Pharmaceutical Industry*, LOUVAIN SCHOOL OF MANAGEMENT, UNIVERSITÉ CATHOLIQUE DE LOUVAIN (2019), available at <http://hdl.handle.net/2078.1/thesis:19360> [<https://perma.cc/W2AS-8ZSK>].

<sup>45</sup> Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, MARKHAM, ONTARIO: LEXISNEXIS (2009), available at [https://www.mcgill.ca/mjsdl/files/mjsdl/5\\_1\\_5\\_stec.pdf](https://www.mcgill.ca/mjsdl/files/mjsdl/5_1_5_stec.pdf) [<https://perma.cc/5CDX-496G>].

bility of businesses also encompasses ethical and discretionary responsibilities.<sup>46</sup> Business is expected, by definition, to make a profit. Society expects businesses to obey the law.<sup>47</sup> In addition, ethical responsibilities include adherence to ethical norms. By *ethical norms*, Carroll means adherence to fairness, justice, and due process. By *discretionary responsibilities*, Carroll refers to philanthropic contributions and non-profit social welfare activities.<sup>48</sup> Carroll's pyramid of CSR depicted the economic category at the base and then built upward through legal, ethical, and philanthropic categories.<sup>49</sup> In Carroll's view, a company with good CSR practices should strive to make a profit while obeying the law, and it should behave ethically as a good corporate citizen.<sup>50</sup> CSR refers to the general belief that modern businesses have a responsibility to society that extends beyond the law and beyond the obvious motivation to make profits.<sup>51</sup> The CSR concept speaks of business's responsibilities to societal stakeholders, who typically include consumers, employees, the community at large, government, and the natural environment.<sup>52</sup> The CSR concept applies to organizations of all sizes, but discussions tend to focus on large organizations because they tend to be more visible and have more power.

A related concept is that of Corporate Social Performance (CSP). CSP is an extension of the concept of CSR that focuses on actual results achieved rather than the general notion of business's accountability or responsibility to society.<sup>53</sup> Thus, CSP is a natural consequence or follow-on to CSR. People who advocate CSR assume that an assumption of responsibility will lead to positive results. The general assumption is that CSP is a vital and logical consequence of CSR.<sup>54</sup>

Social responsibility carries a special meaning in the context of professions. A member of a profession is trained to practice a core skill, requiring autonomous judgment as well as expertise. Professionals have an inviolable duty to serve the interest of their clients and often some wider

<sup>46</sup> Archie Carroll, *A Three-dimensional Conceptual Model of Corporate Social Performance*, 4 ACAD. MGMT. REV. 497-505 (1979).

<sup>47</sup> ARCHIE B. CARROLL, *CARROLL'S PYRAMID OF CSR: TAKING ANOTHER LOOK*, 1 INT'L J. CORP. SOC. RESP. (2016), AVAILABLE AT [HTTPS://JCSR.SPRINGEROPEN.COM/ARTICLES/10.1186/S40991-016-0004-6](https://jcsr.springeropen.com/articles/10.1186/s40991-016-0004-6) [[HTTPS://PERMA.CC/YJ4E-ZZHQ](https://perma.cc/YJ4E-ZZHQ)].

<sup>48</sup> Archie Carroll, *Corporate Social Responsibility*, 38 BUS. & SOC'Y, 3, 268-95 (1999); ARCHIE CARROLL & ANN BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT*, ch. 2, 6 (South-Western College Publishing ed. 2011).

<sup>49</sup> A.B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral management of Organizational Stakeholders*, 34 BUS. HORIZONS 39-48 (1991).

<sup>50</sup> Carroll, *supra* note 48; CARROLL & BUCHHOLTZ, *supra* note 48.

<sup>51</sup> THE OXFORD HANDBOOK OF BUSINESS ETHICS (George G. Brenkert & Tom L. Beauchamp eds. 2010).

<sup>52</sup> *Id.*; see also MOLLIE PAINTER-MORLAND, *BUSINESS ETHICS AS PRACTICE* (Cambridge University Press ed. 2011).

<sup>53</sup> Archie Carroll, *Corporate Social Responsibility (CSR) and Corporate Social Performance (CSP)*, in THE SAGE ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY (Robert W. Kolb ed. 2018).

<sup>54</sup> *Id.*

social and public responsibility is attributed and accepted. The work of professionals is governed by a set of appropriate ethics based on knowledge and skill.<sup>55</sup> Standards of professionalism are maintained and monitored, and companies should accept wider responsibilities to clients and society.<sup>56</sup>

In many parts of the world, these principles have legal implications in addition to social implications. In Italy, the Constitution also relates to the relationships between economic enterprise, social progress, and the dignity of the person.<sup>57</sup> Articles 1-12 present the Fundamental Principles (*Principi Fondamentali*); among them, Article 4 states that the Republic recognizes the right of all citizens to work.<sup>58</sup> The Republic promotes those conditions which render this right effective, maintaining that every citizen has the duty “to perform an activity or a function that contributes to the material or spiritual progress of society.”<sup>59</sup>

Part I of the Constitution (Articles 13 to 54) concerns the Rights and Duties of Citizens (*Diritti e Doveri dei cittadini*). In particular, Article 41 reads:

Private economic enterprise is free.

It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.

The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.<sup>60</sup>

These elements should be taken as fundamental parameters within the Corporate Social Responsibility.<sup>61</sup>

CSR was defined for the first time by the Italian Legislator with the Legislative Decree on April 9, 2008, no. 81, “Implementation of Article 1 of Law no. 123, concerning the protection of health and safety in the

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<sup>55</sup> DENIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 191 (Oxford University Press ed. 2003).

<sup>56</sup> *Id.*

<sup>57</sup> See COSTITUZIONE [COST.] (It.); see also Roberto Pessi, *La responsabilità sociale dell'impresa (Corporate Social Responsibility)*, 10 RIVISTA DEL DIRITTO E DELLA SICUREZZA SOCIALE, 1, 1-20 (2011); Vincenzo Buonocore, *Etica degli affari e impresa etica (Business Ethics and Ethical Enterprise)*, 31 GIURISPRUDENZA COMMERCIALE 2, 181-99 (2004).

<sup>58</sup> See Art. 4 COSTITUZIONE [COST.] (It.) (“The Republic recognizes the right of all citizens to work and shall promote such conditions as will make this right effective.”)

<sup>59</sup> See Art. 4 COSTITUZIONE [COST.] (It.).

<sup>60</sup> Art. 41 COSTITUZIONE [COST.] (It.).

<sup>61</sup> Buonocore, *supra* note 57.

workplace.”<sup>62</sup> Italy’s first attempt to define CSR is in line with the Green Paper (*Libro verde*)<sup>63</sup> released by the European Commission in 2001.<sup>64</sup>

### III. THE CONCEPTS OF THE DIGNITY OF THE PERSON AND PRIVACY IN ITALIAN LAW

The concept of dignity in Italian law is complex and the debate on what this concept means often presents opposing views.<sup>65</sup> After World War II and the Nazi horrors, the dignity of the person assumed a central role in European jurisprudence and conventions.<sup>66</sup> Signatories expressed a legal commitment to abide by certain standards of behavior and to protect the basic rights and freedoms of ordinary people.<sup>67</sup> References to human dignity are made in various international documents, including the Universal Declaration of Human Rights (UDHR) (1948),<sup>68</sup> the European Convention on Human Rights (ECHR) (1950),<sup>69</sup> the Convention for the Protection of Human Rights, and Dignity of the Human Being with Regard to

<sup>62</sup> See D.Lgs. 9 April 2008, n. 81, available at <https://www.gazzettaufficiale.it/eli/id/2008/04/30/008G0104/sg> [<https://perma.cc/J46Q-276L>]. Especially see article 2 of the Legislative Decree, April 9, 2008, no. 81 that holds: “Corporate social responsibility’ means voluntary integration of social and ecological concerns of companies and organizations in their business activities and their relationships with stakeholders.” The discipline of the CRS was reviewed by the legislative decree, July 3 2017, no. 112.

<sup>63</sup> Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers. See *Glossary of Summaries: Green Papers*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW, [https://eur-lex.europa.eu/summary/glossary/green\\_paper.html?locale=en](https://eur-lex.europa.eu/summary/glossary/green_paper.html?locale=en) [<https://perma.cc/84NF-3W9U>] (last visited Mar. 13, 2021); see also *Documents of Individual Institutions: Green Papers*, EUROPEAN UNION, [https://web.archive.org/web/20090202184708/http://europa.eu/documents/comm/green\\_papers/index\\_en.htm](https://web.archive.org/web/20090202184708/http://europa.eu/documents/comm/green_papers/index_en.htm) [<https://perma.cc/27A3-UAUJ?type=image>] (last visited Mar. 13, 2021).

<sup>64</sup> *Register of Documents of the Commission*, EUROPEAN COMM’N, <https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=1&year=2001&number=366&language=it#> [<https://perma.cc/AD3V-25AX>] (last visited Mar. 13, 2021); see also ALESSIA DI PASQUALE, *LA RESPONSABILITÀ SOCIALE DELL’IMPRESA NEL DIRITTO DELL’UNIONE EUROPEA (CORPORATE SOCIAL RESPONSIBILITY IN EUROPEAN UNION LAW)* (Giuffrè ed. 2011); Roberto Pessi, *supra* note 57, at 1-20.

<sup>65</sup> Lorenzo d’Avack, *Il paradigma dignità: usi etici e giuridici (The Dignity Paradigm: Ethical and Legal Uses)*, 1 RIVISTA DI FILOSOFIA DEL DIRITTO 13 (2019).

<sup>66</sup> See UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed. 2008); AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 361-80 (Christopher McCrudden ed. 2015); J-P COSTA, HUMAN DIGNITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS, 393-402 (Christopher McCrudden ed. 2015); DIETER GRIMM, DIGNITY IN LEGAL CONTEXT: DIGNITY AS AN ABSOLUTE RIGHT 381-91 (Christopher McCrudden ed. 2015).

<sup>67</sup> Italy signed the U.N. Charter Dec. 14, 1955.

<sup>68</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Preamble, art. 1, 22, 23, available at <https://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/FM9A-L527>] (last visited Mar. 13, 2021).

<sup>69</sup> See European Convention on Human Rights, Protocol 13, available at <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c&c=> [<https://perma.cc/TKP2-X43V>] (last visited Mar. 13, 2021).

the Application of Biology and Medicine (1997),<sup>70</sup> and the Treaty of Lisbon (2007).<sup>71</sup>

In addition, the concept of the dignity of the person is accentuated in national constitutions. Prime examples can be found in the Italian Constitution of 1948, the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) (1949), and the Constitution of the French Republic of 1946. Paolo Ridola argues that these are the “key texts of European post-war constitutionalism.”<sup>72</sup> They all exhibit firm rejection of totalitarianism. They all emphasize the centrality of the fundamental rights of individuals in the overall constitutional framework.<sup>73</sup>

In the Italian Constitution, the dignity of the person is recognized and accentuated in numerous articles (e.g. Articles 2, 3, 13, 15, 24, 32 and 41). Human dignity is said to be a fundamental, absolute, and inviolable right—not comparable with other principles or values.<sup>74</sup> It is the “ideal synthesis of the fundamental values of the constitutional system.”<sup>75</sup> Article 2 of the Italian Constitution states:

The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.<sup>76</sup>

In turn, Article 3, paragraph 1 of the Italian Constitution holds: “All citizens have equal social dignity and are equal before the law, without dis-

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<sup>70</sup> See Convention for the Protection of Human Rights and Dignity of the Human Being, Preamble and art. 1, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> [https://perma.cc/Y9NH-J3AW] (last visited Mar. 13, 2021).

<sup>71</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C306) 1, art. 1a, 10a [hereinafter “Treaty of Lisbon”].

<sup>72</sup> Paola Ridola, *Le suggestioni del Grundgesetz nella dottrina costituzionalistica italiana. Sessant'anni di rapporti tra le “culture” costituzionali tedesca e italiana (The Suggestions of Grundgesetz in Italian Constitutional Doctrine. Sixty Years of Relations between German and Italian Constitutional “Cultures”)*, 4 RIVISTA AIC. 13 (2011).

<sup>73</sup> *Id.*

<sup>74</sup> See Giorgio Resta, ‘How to Do Things with Words’. *Three Uses of Human Dignity*, RIVISTA DI FILOSOFIA DEL DIRITTO 67-80 (2019); Luigi Ferrajoli, *Dignità e libertà (Dignity and Freedom)*, 1 RIVISTA DI FILOSOFIA DEL DIRITTO 23-32 (2019).

<sup>75</sup> GAETANO SILVESTRI, *DAL POTERE AI PRINCIPI. LIBERTÀ ED EGUAGLIANZA NEL COSTITUZIONALISMO CONTEMPORANEO (FROM POWER TO PRINCIPLES. FREEDOM AND EQUALITY IN CONTEMPORARY CONSTITUTIONALISM)* 85 (Laterza ed. 2009).

<sup>76</sup> Art. 2 COSTITUZIONE [COST.] (It.).

inction of sex, race, language, religion, political opinion, personal and social conditions.”<sup>77</sup> It expresses the principle of formal equality.<sup>78</sup> By the interpretation of the aforementioned articles, the Italian legal doctrine perceives the dignity of persons as the “founding” value of the legal system.<sup>79</sup> Recently, human dignity has acquired the status of a binding legal norm, being frequently referred to as the cornerstone of the edifice of human rights.<sup>80</sup> Courts have increasingly referred to this principle for resolving cases while legal scholars elaborate on human dignity, bringing forward more sophisticated theses with the aim of giving legal basis to the interpretation of human dignity.<sup>81</sup> Thus, Luigi Ferrajoli suggested that respect for the dignity of the person means equality and anti-discrimination.<sup>82</sup> Stefano Rodotà argued that dignity means freedom, autonomy, self-determination, informed consent, privacy, and personal data.<sup>83</sup> The semantic content of human dignity is varied and has implications as a normative concept as well as a legal concept.<sup>84</sup> The concept of human dignity assumes “the value of interpretative canon of the entire system,”<sup>85</sup> and for this same reason, the corresponding principle of equality is often used in relation to the principle of reasonableness.<sup>86</sup>

As for privacy in Italian law, the concept started to develop with the study of Massimo Ferrara Santamaria, published in 1937.<sup>87</sup> In this study, the author highlighted the growing conflict between the interests of private life and of public life. He defined privacy as “the right to intact

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<sup>77</sup> See Art. 3 COSTITUZIONE [COST.] (It.) (“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal, and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic, and social organisation of the country.”).

<sup>78</sup> See MARTINES, *supra* note 21.

<sup>79</sup> Ferrajoli, *supra* note 74, at 23-32.

<sup>80</sup> Giorgio Resta, *The Dignity*, in TRATTATO DI BIODIRITTO (TREATY OF BIO-RIGHT) 259-96 (Stefano Rodotà & Paola Zatti eds. 1st ed. 2010).

<sup>81</sup> See e.g. d’Avack, *supra* note 65; Resta, *supra* note 74, at 67-80.

<sup>82</sup> See Ferrajoli, *supra* note 74; see also LUIGI FERRAJOLI, MANIFESTO PER L’UGUAGLIANZA (MANIFESTO FOR EQUALITY) (Laterza 2018).

<sup>83</sup> See STEFANO RODOTÀ, IL DIRITTO DI AVERE DIRITTI (THE RIGHT TO HAVE RIGHTS) (Laterza ed. 2012); see also Stefano Rodotà, *Privacy, libertà, dignità - Privacy, Freedom, Dignity* (Sept. 9, 2004), available at <https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1049293> [<https://perma.cc/6TLR-UN4G>].

<sup>84</sup> See Ferrajoli *supra* note 74; see also Massimo Reichlin, *La discussione sulla dignità nella bioetica contemporanea (The Discussion on Dignity in Contemporary Bioethics)*, 4 *BIO L. J.* 2, 93-101 (2017).

<sup>85</sup> See SILVESTRI, *supra* note 75.

<sup>86</sup> See ANDREA MORRONE, IL CUSTODE DELLA RAGIONEVOLEZZA (THE GUARDIAN OF REASONABLENESS) (Giuffrè ed. 2001); GINO SCACCIA, GLI “STRUMENTI” DELLA RAGIONEVOLEZZA NEL GIUDIZIO COSTITUZIONALE (THE “INSTRUMENTS” OF REASONABLENESS IN CONSTITUTIONAL JUDGMENT) (Giuffrè ed. 2000); NATALINA STAMILE, I LIMITI DELLA (IR)RAGIONEVOLEZZA NELLA GIUSTIZIA COSTITUZIONALE (THE LIMITS OF (UN)REASONABLENESS IN CONSTITUTIONAL JUSTICE) (forthcoming).

<sup>87</sup> Massimo Ferrara Santamaria, *Il diritto alla illesa intimità privata (The Right to Intact Private Intimacy)*, 1 *RIVISTA DI DIRITTO PRIVATO* 168-91 (1937).

private intimacy” (“*il diritto alla illesa intimità privata*”) and argued for protecting the “intimacy” of the person against indiscretion and human curiosity.<sup>88</sup>

In 1942, the Italian Civil Code was enacted. The right to privacy was defined as the “right to personal affairs”<sup>89</sup> or “right to private life.”<sup>90</sup> Article 10 of the Italian Civil Code states:

If the image of a person or its parents, spouse or children has been exposed or published besides cases where the exposure or publication is permitted by law, or by injury to the dignity or reputation of the person or of said relatives, at the request of the interested party the Judicial Authority may order the end of the abuse and compensatory damages.<sup>91</sup>

The Italian copyright law (*Diritto d'autore*) (1941) also protects various attributes of one's persona that, when used for commercial purposes without authorization, would constitute a publicity violation.<sup>92</sup> Specifically, Article 96 of the copyright law states: “The portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person.”<sup>93</sup>

In 1956, Italy's highest court, the Italian Supreme Court of Cassation (*Corte di Cassazione*) (“Italian Supreme Court”) decided on the question of the existence and the limits of the right to privacy and denied the presence of such right.<sup>94</sup> This decision was opposed to the prevailing Italian legal thought that invoked an interpretative effort in favor of the protection of private life and the right to personality. In 1963, the Italian Supreme Court of Cassation established the right to individual self-determination that prohibits the circulation of information and publicity on private matters when the concerned individuals did not give their consent and there was no public interest in knowing that particular personal information.<sup>95</sup> Further development took place in 1975 when the Supreme Court reversed its 1956 position and decided that the right to privacy is

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<sup>88</sup> *Id.*

<sup>89</sup> Franco Ligi, *Il diritto alle vicende e la sfera della personalità, nota a App. Milano 21 gennaio 1955* (*The Right to Events and The Sphere of Personality, Note to the App. Milano* Jan. 21, 1955), *Foro.it* I: 386-98.

<sup>90</sup> FRANCESCO CARNELUTTI, *IL DIRITTO ALLA VITA PRIVATA: CONTRIBUTO ALLA TEORIA DELLA LIBERTÀ DI STAMPA* (*THE RIGHT TO PRIVATE LIFE: CONTRIBUTION TO THE THEORY OF PRESS FREEDOM*) (Giuffrè ed. 1955).

<sup>91</sup> Art. 10 c.c. (It.).

<sup>92</sup> Copyright Law 22 April 1941, n. 633 (amended lastly in 2019), available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22;633!vig=> [<https://perma.cc/A24G-2LX5>] (last visited Mar. 14, 2021).

<sup>93</sup> *Id.*

<sup>94</sup> This case concerned the famous tenor Caruso. *Cass., Civil Section I*, 22 December 1956, n. 4487.

<sup>95</sup> *See Cass., Civil Section I*, 20 April 1963, n. 990, *Foro it. I* (It.).

recognized and protected by the legal system, in harmony with the constitutional principles and the international conventions.<sup>96</sup> In this case, the Supreme Court argued that the right to privacy consists of the protection of strictly personal and family situations and events in which there is not a “socially appreciable interest” in their knowledge for third parties.<sup>97</sup> Thus, the public interest does not justify privacy violations even when those are carried out with lawful means.<sup>98</sup>

On December 31, 1996, Law no. 675 (Protection of individuals and other subjects with regard to the processing of personal data) was enacted.<sup>99</sup> The law implemented the EU Directive 95/46 on Data Protection.<sup>100</sup> Given the increased cross-border flow of personal data, Member States were called upon to collaborate and exchange information vital for performing their tasks and duties.<sup>101</sup> Law 675 established, for the first time, an independent administrative authority, the Data Protection Authority (*Garante per la protezione dei dati personali*), which is now responsible for monitoring application of the General Data Protection Regulation (Articles 51 of Regulation no. 679 of 2016).<sup>102</sup> This Authority is said to protect fundamental rights and freedoms in connection with the processing of personal data, and to ensure respect for individuals’ dignity.<sup>103</sup>

In 2003, the 1996 law was repealed and replaced with Legislative Decree no. 196 which implements both EU Directive 95/46 on Data Protection<sup>104</sup> and Directive 2002/58 on Privacy and Electronic Communications.<sup>105</sup> Legislative Decree 196 is known also as the Italian Personal Data Protection Code (2003) or Privacy Code.<sup>106</sup> This change means that the

<sup>96</sup> Cass., Civil Section I, 27 May 1975, n. 2129, available at <https://www.cortedicassazione.it> [<https://perma.cc/JR8S-YYPM>]. This case concerned Soraya Esfandiari, the Queen Consort of Iran as the second wife of Shah Mohammad Reza Pahlavi, whom she married in 1951.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see also Corte cost., 1970, n. 122, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) [<https://perma.cc/SHRJ-U26U>] (last visited Apr. 10, 2021). For more details about the Italian Constitutional Justice, see SPADARO & RUGGERI, *supra* note 21.

<sup>99</sup> L. 31 December 1996, n. 675, available at <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/28335> [<https://perma.cc/2CVG-KZBD>] (last visited Apr. 10, 2021).

<sup>100</sup> 1995 O.J. (L 95/46/EC) [hereinafter “Directive 95/46/EC”].

<sup>101</sup> *Id.* ¶ 5; see also *id.* ¶ 6 (“Whereas, furthermore, the increase in scientific and technical cooperation and the coordinated introduction of new telecommunications networks in the Community necessitate and facilitate cross-border flows of personal data”).

<sup>102</sup> This authority was afterwards regulated by the Personal Data Protection Code (Legislative Decree of June 30, 2003 no. 196) and was amended by Legislative Decree of August 10, 2008 no. 101 that amended also the Personal Data Protection Code.

<sup>103</sup> *The Italian Data Protection Authority: Who We Are*, [https://www.garanteprivacy.it/web/guest/home\\_en/who\\_we\\_are](https://www.garanteprivacy.it/web/guest/home_en/who_we_are) [<https://perma.cc/BDH7-RASA>] (last visited Mar. 13, 2021).

<sup>104</sup> See Directive 95/46/EC; *supra* note 99.

<sup>105</sup> 2002 O.J. (02/58/EC).

<sup>106</sup> D.Lgs. 30 June 2003, n. 196, available at [https://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2003-07-29&atto.codiceRedazionale=003G0218](https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2003-07-29&atto.codiceRedazionale=003G0218) [<https://perma.cc/8UWD-KX53>] (last visited Apr. 10, 2021) [hereinafter “Personal Data Protection Code”].

right to personal data protection is expressly recognized in Italian law.<sup>107</sup> Strong correlation is drawn between freedom, dignity, and privacy—including the right to be let alone.<sup>108</sup>

The essential elements of the offense of violating the personal data protection, for purposes of our conversation, are: (a) the processing of someone's sensitive data; (b) the lack of consent from the data subject; (c) detriment to the victim; and (d) specific intent on the part of the agent.<sup>109</sup> Thus, privacy is violated when personal data is processed unfairly and unlawfully. Of particular concern, and pertinent to this discussion, are sensitive data concerning health issues disclosed without consent and without laying down appropriate measures and precautions.

#### IV. DEFAMATION IN ITALIAN LAW

Defamation is the act of damaging a person's reputation by saying or writing bad or suggestive (not necessarily false) things about them. The crime of defamation is committed when the victim is not present or, at least, that victim has not been able to perceive the offense.<sup>110</sup> The law aims to protect the honor and the decorum the victim has within the community. Defamation is defined as damage to the reputation of a person through communication with several persons. Defamation is aggravated when it is conducted through the press or any other means of advertising, publicity, or through a public deed.<sup>111</sup> Thus, the three constituent requirements for the objective element of defamation can be generalized as follows: (1) offense to the reputation of others; (2) the victim is absent; and (3) communication to multiple people.

Democracies should not tolerate smear campaigns that allow a person's reputation to be tarnished by defamation.<sup>112</sup> The Italian Criminal Code, known as "*Codice Rocco*" (after Alfredo Rocco, the Minister of Justice who signed the decree), is the result of a legislative process that lasted five years.<sup>113</sup> *Codice Rocco* was enacted in 1930 under the Fascist regime.<sup>114</sup> *Codice Rocco* is still enforced today, although it has undergone

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<sup>107</sup> *Id.*

<sup>108</sup> See Rodotà, *supra* note 83.

<sup>109</sup> These essential elements for the offense of violating personal data protection emerge by the accurate reading of Codice in materia di protezione dei dati personali, *see* Personal Data Protection Code, *supra* note 106.

<sup>110</sup> One of the main distinctions between defamation and injury in Italian law is the victim's presence in the act. For more details, *see* FERRANDO MANTOVANI, DIRITTO PENALE – PARTE SPECIALE: DELITTI CONTRO LA PERSONA (CRIMINAL LAW – SPECIAL PART: CRIMES AGAINST PERSON) (CEDAM, 2019).

<sup>111</sup> For more details, *see* Art. 595 ¶ 3 c.p. (It.); *see also* Gaetano Stea, *La diffamazione a mezzo Internet* (The Defamation by Internet mean) 134 *LATRIBUNA.IT, RIVISTAPENALE* 12, 1247-64 (2018).

<sup>112</sup> RAYMOND E. BROWN, *THE LAW OF DEFAMATION IN CANADA* (Carswell Legal Pubs ed. 2nd ed. 1994).

<sup>113</sup> Antonio Fiorella, *La codificazione penale in Italia e le sue prospettive di riforma* (*The Criminal Codification in Italy and Its Perspectives of Reform*) 2 *ARCHIVIO PENALE* 1-21 (2019).

<sup>114</sup> The fascist regime, also known as "*ventennio fascista*," existed from 1922 to 1943.

many modifications and interventions over the course of its history, both by the legislature and Constitutional Court (*Corte costituzionale*).<sup>115</sup> The legislature aimed to redefine the system as a whole in a way that would represent “the faithful mirror in which the society of our time can recognize its own values.”<sup>116</sup>

The Italian Criminal Code is composed of three books. The first contains the general part of the Code and defines “Crimes in general” (*Dei reati in generale*). The second and the third respectively relate to the “Types of Crimes” (*Dei delitti in particolare*) and the “Types of Misdemeanours” (*Delle contravvenzioni in particolare*). The crime of defamation is included in the second book, under the heading “Crimes against the person” (*Titolo XIII: Dei delitti contro la persona*) and under the subheading “Crimes against the honor” (*Capo II: Dei delitti contro l’onore*). In particular, Article 595 of the Criminal Code reads:

The person that communicates with two or more people an injury to the reputation of another people, shall be punished with imprisonment up to one year or a fine of up to € 1,032.

If the offense is the allocation (“attribuzione”) of a detailed fact, the punishment shall be imprisonment of up to two years or a fine of up to € 2,065.

If the offense is done through the press or any other means of advertising... the penalty shall be imprisonment of six months to three years or a fine of no less than EUR 516.

If the offense is directed to a political, administrative or judicial authority, the penalties will be increased.<sup>117</sup>

The prosecution of this offense requires the complaint of the victim.<sup>118</sup> The Code does not define all the ways by which the defamation can be committed as there are infinite ways to offend the honor or the decorum of a person. What matters is that a person’s reputation is offended by any means of communication with other people without the victim’s presence (*soggetto passivo del reato*).<sup>119</sup>

As for the intent, the perpetrator is considered responsible when

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<sup>115</sup> See Fiorella *supra* note 113.

<sup>116</sup> *Id.*

<sup>117</sup> See Art. 595 c.p. (It.) (“The person that communicates with two or more people, injures the reputation of another people, shall be punished with imprisonment up to one year or a fine of up to € 1,032. If the offense is the allocation of a detailed fact, the punishment shall be imprisonment of up to two years, or a fine of up to € 2,065. ... If the offense is done through the press or any other means of advertising, or with public act, the penalty shall be imprisonment from six months to three years or a fine of not less than EUR 516.

If the offense is directed to a political, administrative or judicial authority, the penalties will be increased.”).

<sup>118</sup> *Id.*; see also Mantovani, *supra* note 110.

<sup>119</sup> Art. 595 c.p. (It.).

s/he is aware of the offensive expressions used and communicated to others (*dolo generico*).<sup>120</sup> The specific intent to offend (*dolo specifico*) is not required.<sup>121</sup>

Technological developments have been known to facilitate criminal conduct through electronic means.<sup>122</sup> Article 595, paragraph 3 of the Italian Criminal Code acknowledges that the Internet can be abused to commit the crime of defamation.<sup>123</sup> The flow of information by text, images, videos, audio, or video via the Internet's extensive networks might have a long-lasting, overwhelming impression.<sup>124</sup> Technology enables quick, easy, and widespread defamatory content that is damaging to the dignity and reputation of others without their authorization. Recorded cases of cyberbullying and threats are of growing concern, with devastating effects on the victims.<sup>125</sup> *Vivi Down* is a case in point. In particular, we are interested in analyzing the critical aspects of the case, including the dignity of the person, CSR, duty of care, privacy, and defamation. Let us start our analysis by shedding light on the *Vivi Down* case.

## V. THE VIVI DOWN CASE

In May 2006, a group of teenagers, all under the age of majority (18), bullied a schoolmate with Autism in the Technical High School in Turin (Italy).<sup>126</sup> They wrongly assumed that the minor had Down Syndrome. Thus, they taunted the *Vivi Down* Association, a non-profit organization that represents people with Down Syndrome. A girl in the group recorded the bullying.<sup>127</sup> For some time, she kept the recording for herself, but on September 8, 2006, she posted it on Google Video.<sup>128</sup> The 3.5-minute cellphone clip was titled "*In classe con 'sensibilizziamo i culi diversi' l'anticappato a cagato*" ("In the classroom with 'sensitize the different asses' the handicapped shited [sic]" in English). It showed acts of physical violence against the minor.<sup>129</sup> He was pushed and insulted by the group.<sup>130</sup> The video clip was chosen to appear, quite crudely, among the "funniest

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; see also Stea, *supra* note 111.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> RAPHAEL COHEN-ALMAGOR, *CONFRONTING THE INTERNET'S DARK SIDE: MORAL AND SOCIAL RESPONSIBILITY ON THE FREE HIGHWAY* (Cambridge University Press ed. 2015); Raphael Cohen-Almagor, *Social Responsibility on the Internet: Addressing the Challenge of Cyberbullying*, 39 *AGGRESSION & VIOLENT BEHAVIOR*, 42-52 (2018).

<sup>126</sup> See Trib. Milan, 24 February 2010, n. 1972; App. Milan, 21 December 2012 n. 8611; Cass., Criminal Section III, 3 February 2014, n. 3672; see also ERNESTO APA & ORESTE POLLICINO, *MODELLING THE LIABILITY OF INTERNET SERVICE PROVIDERS: GOOGLE VS. VIVI DOWN* (Egea ed. 2013).

<sup>127</sup> *Id.*

<sup>128</sup> For more details, see APA & POLLICINO, *supra* note 126.

<sup>129</sup> See Trib. Milan, 24 February 2010, n. 1972; 21 December 2012 n. 8611; Cass., Criminal Section III, 3 February 2014, n. 3672 [hereinafter "*Vivi Down Assoc. v. Google*"].

<sup>130</sup> *Id.*

videos.”<sup>131</sup> For some time, the clip was at the top of that category.<sup>132</sup> It was also one of the most downloaded videos, ranking 29 out of the 100 most popular videos in the funniest videos category.<sup>133</sup> By the time the clip was removed two months later on November 7, 2006, it had 5,500 views.<sup>134</sup>

Because the students ridiculed the Vivi Down Association, someone informed the secretary of the association about the offensive video clip. In turn, the secretary of Vivi Down complained to Google about the abusive, obscene, and defamatory video clip.<sup>135</sup> A second video was found showing the group of bullies violently attacking the same helpless minor in the presence of a teacher in the Turin school.<sup>136</sup> On November 6, 2006, a request to remove this video was sent to the Google Help Center. One day later, the police made a similar request. The clip was removed that day.

On November 9, 2006, the Vivi Down Association and the father of the minor lodged a complaint to the Prosecutor’s Office of Milan (*Procura della Repubblica di Milano*), asking the prosecution to investigate the outrageous content of the video that was uploaded onto Google’s servers.<sup>137</sup> In addition, the complainants argued that Google executives were criminally liable for the video clip, which not only circulated via Google Video but was also posted on other popular websites due to it being considered the “funniest video” for a period of time.<sup>138</sup>

The Prosecutor’s Office pressed charges against the perpetrators;<sup>139</sup> against the teacher in charge of the class, alleging that she failed to prevent the abuse; and also against Google.<sup>140</sup> This article focuses on the

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15, at 16 (“3. *Esiti dell’attività di indagine presso la sede di Google Italy. 3.1 dichiarazione del personale di Google Italy s.r.l. nell’immediatezza dei fatti e successive ritrattazioni*”).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 14.

<sup>137</sup> The father chose to withdraw the complaint on February 18, 2009, when the trial was already in motion. The Court of Appeal of Milan wrote: “Before going on to deal with the position of each individual defendant, the judgment now being appealed acknowledges the fact that, at the hearing of 18.02.2009, F.G. and E.D.L. lodged notice that the private prosecution against all the defendants for the offence referred to at charge (A) was to be withdrawn, and that such withdrawal had been accepted by the defendants. The trial judge specified that the withdrawal by the D.Ls of their private prosecution only meant that the matter of any liability on the part of the defendants towards that particular injured party could be excluded. It had no effect on the constituent elements of the offence of defamation and, in particular, on the reconstruction of that offence as put forward, i.e., the duty in law to prevent the harmful event that caused damage, first and foremost, to the disabled child and, in addition, and as a result of that, to the Vivi Down Association.”

<sup>138</sup> *See* *Vivi Down Assoc. v. Google* *supra* note 129; *see also* *APA & POLLICINO*, *supra* note 126.

<sup>139</sup> The four bullies, including the girl who used her cell phone to make the video clip. They faced trial before the Juvenile Court (“*Tribunale dei Minori*”) of Turin.

<sup>140</sup> *Id.*

latter. The public prosecutor argued that Google breached the Italian Personal Data Protection Code (2003).<sup>141</sup> In addition, the prosecution argued Google did not comply with the duty of care grounded in Article 40 [Second Clause] of the Italian Criminal Code, which says:

No one shall be punished for an act designated by law as an offense if the harmful or dangerous event on which the existence of the offense depends was not a consequence of his own act or omission. Failing to prevent an event which one has a legal obligation to prevent shall be equivalent to causing it.<sup>142</sup>

The prosecution further alleged that Google provided a platform for the bullies to defame the victim.<sup>143</sup> In addition, Google failed to seek the minor's consent.<sup>144</sup> Specifically, four senior executives of Google were charged: David Carl Drummond, then-Chairman of the Board of Directors of Google Italy s.r.l and subsequently Chief Executive Officer of the company; Peter Andrew Fleischer, Global Policy Counsel for Google in Europe; George De Los Reyes, who was a member of the Board of Directors of Google Italy and subsequently Chief Executive Officer of the same company; and Desikan Arvind, Project Manager of Google Video for Europe.<sup>145</sup> The prosecution brought two criminal charges against the executives: defamation (involving all the four Google executives)<sup>146</sup> and unlawful processing of personal data (involving three of the executives).<sup>147</sup> It was quite unusual to bring charges not only against the company but also against its senior managers, who were deemed to be personally liable for this regrettable video clip.<sup>148</sup>

The crime of defamation was in relation to both the reputation of the Vivi Down Association and the bullied minor. The prosecutor argued that the defendants allowed the dissemination of the video by Google Video without the preventive control of the content of such videos.<sup>149</sup> In addition, they failed to legally and lawfully process the data as established by the Personal Data Protection Code (2003).<sup>150</sup> Article 13 of the Code

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<sup>141</sup> See Personal Data Protection Code *supra* note 106; see also *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>142</sup> Art. 40 c.p. (It.) (“*Causal Relationship*: No one shall be punished for an act designated by law as an offense if the harmful or dangerous event on which the existence of the offense depends was not a consequence of his own act or omission. .... Failing to prevent an event which one has a legal obligation to prevent shall be equivalent to causing it.”).

<sup>143</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Art. 110 c.p. (It.); art. 40, 2 c.p. (It.); art. 595, comma 1, 3 c.p. (It.).

<sup>147</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>148</sup> *Google bosses convicted in Italy*, BBC (Feb. 24, 2010), <http://news.bbc.co.uk/1/hi/technology/8533695.stm>. [<https://perma.cc/4UME-LP6C>].

<sup>149</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>150</sup> See Personal Data Protection Code; *supra* note 106.

(*Information to data Subject*)<sup>151</sup> requires Italian translation, while Article 23 of the Code postulates the rules of consent.<sup>152</sup> The charge of unlawful processing of personal data was also based on Article 167 (*Unlawful Data Processing*) of the Code.<sup>153</sup>

Furthermore, as alleged, the defendants processed personal sensitive data of the bullied minor.<sup>154</sup> Specifically, that the defendants unlawfully disclosed health issues, in breach of Article 26 of the Personal Data Protection Code (*Safeguards Applying to Sensitive Data*);<sup>155</sup> and without laying down appropriate and adequate measures and precautions, in breach of Article 17 of the same code (*Processing Operations Carrying Specific Risks*) which pertains to processing personal data when there are specific risks involving fundamental rights, freedoms, and dignity.<sup>156</sup> Finally, the prosecution stressed that Google deliberately launched Google Video in Italy without having control over content and with the only aim of increasing profits, and that the procedure that permitted the users to report inappropriate videos was not efficient because the investments in technology and human resources were inadequate.<sup>157</sup>

The trial began on February 3, 2009. The Tribunal issued its decision on February 24, 2010. The Prosecutor's Office of Milan asserted that the offensive video had been viewed thousands of times over a pe-

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<sup>151</sup> *Id.* art. 13. Article 13 (1) of the Personal Data Protection Code (2003) (*Information to Data Subjects*) instructs that the data subject as well as any entity from whom personal data are collected shall be preliminarily informed, either orally or in writing, as to:

- a) the purposes and modalities of the processing for which the data are intended;
- b) the obligatory or voluntary nature of providing the requested data;
- c) the consequences if (s)he fails to reply;
- d) the entities or categories of entity to whom the data may be communicated, or who/which may get to know the data in their capacity as data processors or persons in charge of the processing, and the scope of dissemination of said data;
- f) the identification data concerning the data controller and, where designated, the data controller's representative in the State's territory pursuant to Section 5 and the data processor.

<sup>152</sup> *Id.* art. 23 (*Consent*) ("3. The data subject's consent shall only be deemed to be effective if it is given freely and specifically with regard to a clearly identified processing operation, if it is documented in writing, and if the data subject has been provided with the information" referred to in the law.").

<sup>153</sup> *Id.* art. 167 (*Unlawful Data Processing*) ("Any person who, with a view to gain for himself or another or with intent to cause harm to another, processes personal data in breach of [the law] ... or else of the provision made further to Article 129 shall be punished, if harm is caused, by imprisonment for between six and eighteen months or, if the offence consists in data communication or dissemination, by imprisonment for between six and twenty-four months, unless the offence is more serious.").

<sup>154</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>155</sup> Personal Data Protection Code, *supra* note 106, art. 26 ¶ 1 (*Safeguards Applying to Sensitive Data*) ("Sensitive data may only be processed with the data subject's written consent"); *id.* ¶ 5 ("Data disclosing health may not be disseminated.").

<sup>156</sup> *Id.* art. 17 (*Processing Operations Carrying Specific Risks*) ("1. Processing of data other than sensitive and judicial data shall be allowed in accordance with such measures and precautions as are laid down to safeguard data subjects, if the processing is likely to present specific risks to data subjects' fundamental rights and freedoms and dignity on account of the nature of the data.").

<sup>157</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15, at 25-26.

riod of two months. It reached the top of Google's Italy "most entertaining" video list, and the company ignored appeals to remove it.<sup>158</sup> Only after it was notified by the authorities did Google take active steps.<sup>159</sup>

In Google's defense, the company argued that it was technically impossible to check all content on its server. Google maintained that the data was processed in the United States, that Google Video was merely a hosting service, and as such was not responsible for content uploaded by third parties. Furthermore, Google contended it had no duty to control information on Google Video nor an obligation to search for videos that carried offensive content. It also noted in its defense that the service was free and therefore there was no aim of gaining a profit.<sup>160</sup>

The State prosecutors were not convinced, saying it was a question of will, not of ability.<sup>161</sup> Google did not wish to take responsibility and its managers were interested only in revenues from advertisement.<sup>162</sup> Google could have easily found ways to monitor its content. The company should not profit from advertising revenue generated from content that violated privacy laws. The prosecution argued that Google could create filters for Italy to protect human dignity as required by the Italian Constitution, just as they had done in China to monitor political content for the Chinese authorities.<sup>163</sup>

Judge Oscar Magi wrote the court verdict. He dismissed the Prosecutor's claim that Google had the legal liability to control the content of the video uploaded by users since the law did not provide this obligation.<sup>164</sup> While the law did not require Google to scrutinize content, Judge Magi contended that Google failed to provide users with clear guidance regarding these legal obligations in accordance with the Italian Personal Data Protection Code (2003). Judge Magi assigned personal responsibility to the Google managers. He convicted the executives not because Google Video processed the data of the victim without his consent but because Google failed to inform its users that the law required them to obtain the consent of people who featured in video clips before uploading the

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<sup>158</sup> *Id.* at 12 n. 3, 102.

<sup>159</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See Stephen Shankland, *Execs convicted in Google Video case in Italy*, CNET NEWS (Feb. 24, 2010), <https://www.cnet.com/news/execs-convicted-in-google-video-case-in-italy-20000092/> [<https://perma.cc/4CN8-P7DF>]; Rachel Donadio, *Larger Threat Is Seen in Google Case*, N.Y. TIMES (Feb. 24, 2010), [http://www.nytimes.com/2010/02/25/technology/companies/25google.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2010/02/25/technology/companies/25google.html?pagewanted=1&_r=1) [<https://perma.cc/A27T-U3KW>]; Lionel Barber and Maija Palmer, *Google chief prizes creativity*, FT.COM (June 3, 2010) <https://www.ft.com/content/bdec0ee8-6f4f-11df-9f43-00144feabdc0> [<https://perma.cc/J8K3-7PDW>]; Massimo Mucchetti, *Il pm, la privacy e Google: lo-rovoglionoil Far West*, CORRIERE DELLA SERA (June 6, 2010), [http://www.corriere.it/cronache/10\\_giugno\\_06/mucchetti-privacy-google\\_ec489b1c-713e-11df-82e2-00144f02aabe.shtml](http://www.corriere.it/cronache/10_giugno_06/mucchetti-privacy-google_ec489b1c-713e-11df-82e2-00144f02aabe.shtml) Mucchetti 2010 [<https://perma.cc/ZD3U-3R4H>].

<sup>164</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

video.<sup>165</sup> The judge noted that Google omitted information only for the purpose of making profits using AdWords, its paid referencing service.<sup>166</sup> Importantly, Judge Magi rejected Google's claim that Google Italy was only a marketing company that did not have the power or the possibility of processing the data controlled by Google Inc.<sup>167</sup> The Court accepted that the active host or the content provider is subject to more onerous duties than those that a host provider, service provider, or access provider is subject to.<sup>168</sup> In this case, the Court held that the complex manner in which the AdWords service works, which affected the streaming of data in Google Video, led to the procession of data. Therefore, it was impossible to describe Google Italy or Google Video as merely a passive host provider acting on the request of users.<sup>169</sup> In other words, the Court did not consider Google Italy or Google Video as only a host provider but, additionally, as a content provider. The Tribunal of Milan sentenced them *in absentia* to six-month suspended sentences.<sup>170</sup> As for the defamation charge, Judge Magi specified that the decision of the minor's father to withdraw this charge only meant that the defendants' liability towards the bullied victim could be excluded.<sup>171</sup> However, this affected neither the defamation offense's constituent elements nor the legal duty to prevent the incident that caused harm to the victim and the Vivi Down Association.<sup>172</sup> Still, the four defendants were found to be innocent of the defamation charge because of the principle of *ad impossibilia nemo tenetur* (i.e., no one is duty-bound to do something which is impossible). In other words, the Google executives did not have the legal liability to control video content on their servers, and, in addition, no specific legal provision required providers to monitor content.<sup>173</sup> As for the second charge, the judge suspended the sentences because the three Google executives were first-time offenders who had committed a minor crime. The judge also ordered the publication of the verdict in three important national newspapers: *Corriere della Sera*, *la Repubblica*, and *la Stampa*.<sup>174</sup>

On June 29, 2010, the Milan public prosecutor appealed to the Court of Appeal to reverse Magi's acquittal of the defamation charge and to affirm the conviction for unlawful processing of personal data. The public

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 35, 63-65.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; see also Adrian Shaw & Paul Allen, Google bosses convicted over YouTube bully video, MIRROR.CO.UK (Feb. 25, 2010), [http://www.mirror.co.uk/news/top-stories/2010/02/25/google-bosses-convicted-over-youtube-bully-video-115875-22068321/\[https://perma.cc/2L7Z-JZCD\]](http://www.mirror.co.uk/news/top-stories/2010/02/25/google-bosses-convicted-over-youtube-bully-video-115875-22068321/[https://perma.cc/2L7Z-JZCD]).

<sup>171</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Decreto Legge 6 July 2011, n. 98 (converting with amendments by Legge 15 July 2011, n. 111 and modified Article 36 of the Italian Criminal Code).

prosecutor argued that the video clip included disparaging remarks contravening the Italian Criminal Code.<sup>175</sup> The public prosecutor further maintained that Google did not act to prevent the defamation, and thereby it neglected its duty of care.<sup>176</sup> On July 7, 2010, the Vivi Down Association decided to withdraw the complaint of defamation.<sup>177</sup>

Additionally, Google appealed against the conviction, arguing *inter alia* that the judgment be amended, with the defendant being acquitted on the following grounds: (1) that there was no case to answer; (2) that the defendant did not commit the act; and (3) that the act does not constitute an offense. Google further argued that the Italian Courts had no jurisdiction to hear the matter and that the conditions to be satisfied in order for the prosecution to proceed had not been met.<sup>178</sup>

On December 21, 2012, the Court of Appeal acquitted all of the Google managers.<sup>179</sup> The Appeal Court ruled that current legislation does not set forth an obligation on the part of Internet service providers to prevent defamation, adding that such an obligation cannot be derived from data protection legislation as the prosecutors purported to do.<sup>180</sup> Google is not the controller of data pertaining to subjects appearing on videos. The controller of such data is the user who uploads the video on the Google platform.<sup>181</sup> Through this, the user also assumes the obligation to obtain any necessary consent and liability in connection with the processing of such data.<sup>182</sup> In particular, there is no specific obligation of Internet providers to inform users on the rules of the Italian law about the process of personal data to third parties. Considering this, only the person who uploads videos must secure consent. The data processor is not under an obligation to seek such consent.<sup>183</sup> The Milan Court of Appeal said none of the legal provisions placed the Internet provider under a duty to make the user aware of the existence and the content of the privacy law.<sup>184</sup> The Milan Appeal Court maintained that “even though the opinion expressed in the judgment may well appear to be founded on pure common sense, it is not one with which this Court can agree.”<sup>185</sup>

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<sup>175</sup> App. Milan, 21 December 2012, n. 8611 [hereinafter “Vivi Down Assoc. v. Google (Appeal)”].

<sup>176</sup> *Id.* at 22.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 23; see also Flavio Monfrini, *Court of appeals overturns conviction of Google Italy executives, redefines liability of hosting providers under privacy legislation*, ITALY LEGAL FOCUS - STUDIO LEGALE BERNASCONE & SOCI (Mar. 26, 2013), <http://www.lexology.com/library/detail.aspx?g=b36ffdc4-ee2b-4dfb-ae83-01bcb15ff5f7> [https://perma.cc/2FYB-QRP3].

<sup>181</sup> See *Vivi Down Assoc. v. Google (Appeal)*, *supra* note 175.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 29.

<sup>185</sup> *Id.*

The Milan Appeal Court established that the defendants had not previously known the video's content. Their conduct lacked the subjective element of the crime: the so-called '*dolo specifico*,' which could not be confused with the aim of making profits.<sup>186</sup> Lastly, the Milan Appeal Court held that Google cannot be required to monitor all content uploaded by users' prior posting. It is not only because this task is "effectively impossible"<sup>187</sup> but because placing such an obligation on Google would alter the nature of the service itself, thereafter affecting the functioning of the platform and ultimately conflicting with other protected rights (e.g. freedom of speech).<sup>188</sup> For these reasons, the Appeal Court acquitted the three executives of Google from the unlawful data processing charge.<sup>189</sup> Google's policy manager in Italy, Giorgia Abeltino, hailed the verdict while expressing sympathies for the family of the victim.<sup>190</sup>

The Prosecutor's Office appealed against the decision of the Appeal Court to the Italian Supreme Court of Cassation (*Corte di Cassazione*), challenging the logic of the decision (*manifesta illogicità della motivazione*).<sup>191</sup> On February 3, 2014, the Italian Supreme Court of Cassation dismissed the appeal and decisively brought the Italian case *Vivi Down* to a close.<sup>192</sup> The Italian Supreme Court of Cassation said that Google was not liable for the illicit treatment of personal data committed by its users. Accepting the Court of Appeal's reasoning, the Supreme Court ruled that Google Video was a host provider merely storing content posted by users. As such, the company had no control over the data stored and no contribution to the videos' selection or management. Therefore, the Google executives had committed no criminal offense. The executives had no prior knowledge of the illicit nature of the video in question, and the law does not impose any obligation on them to inform users about their data protection obligations.<sup>193</sup> Furthermore, there was no general obligation on Google Video to monitor data provided by third parties. The company was not a personal data controller in this case, as a personal data controller has the power to determine the objectives of the treatment of personal data and

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<sup>186</sup> *Id.* The Court underlined that the defendants' aim was to make profits. Only this could be considered as specific intent ("*dolo specifico*"). For the different classification of the intent within the national legislation, see MANTOVANI *supra* note 110.

<sup>187</sup> See *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175, at 30.

<sup>188</sup> See Monfrini, *supra* note 180.

<sup>189</sup> See *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175, at 10.

<sup>190</sup> Jon Brodtkin, *Italy finally acquits Google execs convicted over user-uploaded video*, ARSTECHNICA (Dec. 21, 2012), [http://arstechnica.com/tech-policy/2012/12/italy-finally-acquits-google-execs-convicted-over-user-uploaded-video/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+arstechnica/index+%28Ars+Technica+-+All+content%29](http://arstechnica.com/tech-policy/2012/12/italy-finally-acquits-google-execs-convicted-over-user-uploaded-video/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+arstechnica/index+%28Ars+Technica+-+All+content%29) [https://perma.cc/GPG9-Q4MV].

<sup>191</sup> Cass., Criminal Section III, 3 February 2014, n. 3672 [hereinafter "*Vivi Down Assoc. v. Google* (Cassation)"].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

the means through which it is done.<sup>194</sup> Therefore, it is required to manage the risks associated with such treatment and obtain the consent required from interested parties.<sup>195</sup>

## VI. LEGAL AND ETHICAL PRINCIPLES

### A. Dignity

The dignity of the person is enshrined in the Italian Constitution (1948). The subject of the video in question was a minor with a disability. Thus, the video was personal and sensitive. It should be subject to the regulation of the Italian Personal Data Protection Code (2003). According to the public prosecutor, Google processed sensitive data without taking care of the person's fundamental rights and dignity.<sup>196</sup> Google did not implement any form of precaution to prevent such risks. According to the Italian Personal Data Protection Code, it did not submit any request to the Italian Personal Data Protection Authority, especially regarding its Article 17.<sup>197</sup> Legally speaking, the Court of Appeals and the Italian Supreme Court of Cassation concluded that Google's conduct lacked the subjective element of a crime. However, from a *moral* perspective, a socially responsible company should ensure that videos like this should not be on Google servers. Google's managers should perceive the preservation of the dignity of the person as a high priority.

### B. Responsibility

A relevant distinction is between moral responsibility and legal responsibility. Google strives to adhere to the latter. Its goal is to make maximum profit. When considerations of profit come into conflict with moral responsibility, profit enjoys precedence.

After the Vivi Down Association and the minor's father complained about the offensive video, the Postal Police of Milan conducted an inspection of the computers at the Milan operations headquarters of Google Italy.<sup>198</sup> The Postal Office found a vast amount of material,<sup>199</sup> including a file describing the marketing strategy of Google Italy.<sup>200</sup> The data reading clearly showed that through the AdWords system, Google Italy linked the videos posted on Google Video to advertising messages.<sup>201</sup> Google Italy also managed, indexed, and organized the information stored

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>197</sup> Personal Data Protection Code, *supra* note 106.

<sup>198</sup> See *Vivi Down Assoc. v. Google (Tribunal)*, *supra* note 15.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

in Google Video. Data on Google Video was processed for profits by using AdWords.<sup>202</sup> One of the consequences was that Google Italy consciously accepted the risk of processing unlawfully sensitive personal data.

Furthermore, Google noted that it removed the video on the same day after it was notified of it by the legal authorities.<sup>203</sup> For Google, it did not matter that the video was allowed to exist on its servers for two months, during which it became well-known and had come, or should have come, to the company's attention. The crucial point for Google was not morality, responsibility, or the dignity of the person; the essential point was to abide by the law. Google was prompted to act only upon the intervention of the legal authorities. The company managers did not wish to adopt the values of CSR.

Google tried to evade responsibility. Its *modus operandi* followed Section 230 of the *Communications Decency Act* (CDA) of the *United States*, which concerns the protection for private blocking and screening of offensive material. Section 230 of the CDA holds:

**(1) Treatment of Publisher or Speaker** No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

**(2) Civil liability** No provider or user of an interactive computer service shall be held liable on account of—

**(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. . . .<sup>204</sup>

Google managers presented Google Video as a hosting service not responsible for the content uploaded by third parties. They argued that Google had no duty to control the information transmitted and stored by Google Video, nor does it have an obligation to search for videos with objectionable or offensive content. As a large corporation with much power, instead of striving to be a model to follow, its guiding principle was making money with little or no accountability. Google's managers thought it was absurd to take them to court.<sup>205</sup> As far as they were concerned, they had done nothing wrong.<sup>206</sup> The issue was not their responsibility.<sup>207</sup> Peter

<sup>202</sup> *Id.*; APA & POLLICINO, *supra* note 126.

<sup>203</sup> *See* *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15, at 103 (the Court deemed Google's take down of the video within 24 hours to have occurred in a "reasonably rapid manner").

<sup>204</sup> *Communications Decency Act*, 47 U.S.C. § 230 (c).

<sup>205</sup> Peter Fleischer, *Private Lives*, 40 INDEX ON CENSORSHIP 2, 78-89 (2011).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

Fleischer, one of the Google executives, said that they had nothing to do with the video and did not know about it until after the case had been launched.<sup>208</sup>

### C. Duty of Care

Does Google have a duty of care (*posizione di garanzia*), to screen its server to prevent privacy violation? A responsible company should be more curious about the content that it hosts and disseminates to avoid instances in which it facilitates wrongdoing.

The prosecution perceived the child as a vulnerable party who deserved protection. The public prosecutor argued that Google breached the Italian Personal Data Protection Code (2003) and that Google also did not comply with the duty of care grounded in Article 40 of the criminal code (causal relationship) that holds that no one shall be punished for an offense if the act was not a consequence of his own act or omission. However, failure to avoid an event which one has a legal obligation to prevent shall be regarded as an offence. Article 25 of the Italian Constitution implies the statutory reserve principle (*riserva di legge*), meaning that all the constituent elements must have a legal source or a firm normative reference. This also implies a legal obligation of duty of care. The rule of law assigns a commitment to protect against danger and to prevent specific dangerous events. The obligation is provided in punctual terms, expecting subjects to foresee the consequences of their omissions in criminal matters. According to Article 27, paragraph 1 of the Italian Constitution, “Criminal responsibility is personal.”<sup>209</sup> In this context, one may suggest distinguishing<sup>209</sup> surveillance obligations. The duty of care for the purposes of omitting criminal liability would be transformed into an obligation of surveillance.<sup>210</sup> It could have relevance only in terms of contractual liability. With reference to the Internet provider’s criminal liability, a relevant question is the extent to which Google can exercise constant control over the lawfulness of all subjects operating on the Internet.

While Google cared first and foremost about maintaining an expanding dynamic business, the prosecution emphasized a duty of care in addition to principles of privacy and human dignity. The prosecution assigned the consideration of duty of care great weight beyond what the law

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<sup>208</sup> *Id.*

<sup>209</sup> See Art. 25 COSTITUZIONE [COST.] (It.) (“No one may be removed from the jurisdiction of the natural judge pre-established by law. No one may be punished except on the basis of a law in force at the time the offence was committed . . . No one may be subjected to restrictive measures except as provided by law.”).

<sup>210</sup> Art. 27 COSTITUZIONE [COST.] (It.) (“Criminal responsibility is personal. A defendant shall be considered not guilty until a final sentence has been passed. Punishments may not be inhuman and shall aim at re-educating the convicted. Death penalty is prohibited.”).

prescribes. The prosecutors seemed to think that duty of care is also about morality and decency. Duty of care is about one's understanding that one's role includes support for individuals' well-being, people's welfare, and good practices to support others. Companies have legal and moral obligations to ensure that everyone associated with the company does not suffer hardship as a result of the company's business model.

Duty of care is of special necessity when vulnerable populations are concerned. The victim in this unfortunate affair was a minor with a medical condition that made him even more vulnerable than the average person of his age. The prosecution was correct in thinking that children deserve more protection than adults. It is the duty of a liberal democracy and of Internet intermediaries that benefit from the freedoms and rights granted by a liberal democracy to protect vulnerable third parties. Google needs to do more to ensure that such incidents do not reoccur.

The European Data Protection Regulation (GDPR), a regulation in EU law (2016/279), recognizes the duty of care for the controller and processor and also for the data protection officer.<sup>211</sup> The data protection officer is expected to have professional qualities and expert knowledge of data protection law and the practices and the ability to fulfill the required tasks.<sup>212</sup> The position of the data protection officer is described in Article 38 of the GDPR: "The controller and the processor shall ensure that the Data Protection Officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data."<sup>213</sup> The tasks of the data protection officer are numerous.<sup>214</sup>

The controller and the processor are exempt from criminal liability only if they demonstrate that they have correctly fulfilled their duties and have done everything in their power to prevent the occurrence of a harmful or dangerous event.

It should also be noted that Chapter IV of the current Italian Personal Data Protection Code (as recently amended in 2019) provisions on

<sup>211</sup> *Commission Regulation* 2016/679, 2016 O.J. (L 119) (EU), art. 37 [hereinafter "GDPR"].

<sup>212</sup> *Id.* art. 39 ¶ 5.

<sup>213</sup> *Id.* art. 38.

<sup>214</sup> *Id.* art. 39 "(a) to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions; (b) to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits; (c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35; (d) to cooperate with the supervisory authority; (e) to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, any other matter").

2. The data protection officer shall in the performance of his or her tasks have due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing."

controllers and processors introduces Article 2-o concerning the “allocation of tasks and functions to designated entities.”<sup>215</sup> This Article establishes that:

1. The controller or processor may provide under their own responsibility and within the framework of the respective organisation that specific tasks and functions relating to the processing of personal data be allocated to expressly designated natural persons acting under the controller’s or processor’s authority.
2. The controller or processor shall set out the most appropriate arrangements to authorise the persons acting under their authority to process personal data.<sup>216</sup>

In turn, Article 2-p is concerned with the processing of information entailing a high risk for a task’s performance in the public interest. Therefore, the Authority may lay down measures and arrangements to protect data subjects, which the controller shall be required to implement.<sup>217</sup>

#### D. Privacy

Articles 167-172 of the Personal Data Protection Code (2003) regulate the criminal violation of privacy.<sup>218</sup> While Google’s “launch first, correct later” approach was protected by the American First Amendment, which provides a very broad scope for freedom of expression,<sup>219</sup> the prosecution in Italy deemed this approach problematic.<sup>220</sup> It wished to strike a balance between freedom of expression and the right to privacy.<sup>221</sup> While Article 21 of the Italian Constitution (1948) states that “[e]veryone has the right to express freely their ideas by speech, in writing, and by any other means of communication,” it also maintains that “[p]rinted publications, public performances and any other events contrary to public morality are forbidden. The law shall provide for appropriate measures for the prevention and repression of all violations.”<sup>222</sup>

<sup>215</sup> See D.Lgs. 10 August 2018, n.101, that it was amended by Law n. 160 of 27 November 2019 [hereinafter “Legislative Decree n. 101 (Aug. 10, 2018)”].

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> See D.Lgs. 30 June 2003, n.196.

<sup>219</sup> For a more details about a comparative analysis of the relationship between the American First Amendment and the European approach, see GIOVANNI ZICCARDI, L’ODIO ONLINE: VIOLENZA VERBALE E OSSESSIONI IN RETA (ONLINE HATE: VERBAL VIOLENCE AND OBSESSIONS ON THE NET) (Raffaello Cortina ed. 2015).

<sup>220</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>221</sup> *Id.*

<sup>222</sup> Art. 21 COSTITUZIONE [COST.] (It.) (“Everyone has the right to freely express their thoughts in speech, writing, or any other form of communication.

The press may not be subjected to any authorisation or censorship.

Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences.

Because Google handled user data and used content to generate advertising revenue, it was deemed by the prosecution a content provider, not a service provider, and therefore it broke Italian privacy law.<sup>223</sup> However, from a strictly legal perspective, the Court of Appeals and the Italian Supreme Court of Cassation thought that the prosecution and the Tribunal of First Instance (Judge Magi) were too creative in their interpretations of the law.<sup>224</sup> The law simply did not provide grounds for such an interpretation.<sup>225</sup> Similarly, the content of the video was undoubtedly libelous, but Google had no legal obligation to control video content.<sup>226</sup> Morally speaking, however, the case should have been a wake-up call for Google that it needs to invest more in protecting users and prevent abuse.

As noted at the beginning of the article, Google and its executives are not liable because Google is an intermediary provider exempted from liability under the e-Commerce Directive language or definition. Furthermore, Google argued it had no duty to control information on its servers nor an obligation to search for videos that carried offensive content.<sup>227</sup> Google Video provided information without formatting or editing any user-provided videos.<sup>228</sup> In this case, Google Video did not have factual knowledge about the illegality of the said video content.<sup>229</sup>

An important development took place after the case was concluded on April 27, 2016, when the European Parliament and Council passed Regulation (EU) 2016/679.<sup>230</sup> The European General Data Protection Regulation (GDPR) is applicable as of May 25, 2018 in all member states to harmonize data privacy laws across Europe.<sup>231</sup> Then, Legislative Decree August 10, 2018 no. 101 (*privacy decree*) formally transposed the GDPR into Italian law.<sup>232</sup> This Legislative Decree is defined as “new privacy” because it profoundly changed the Italian Personal Protection Code

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In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void.

The law may introduce general provisions for the disclosure of financial sources of periodical publications.

Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law.”)

<sup>223</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15.

<sup>224</sup> See *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175; *Vivi Down Assoc. v. Google* (Cassation), *supra* note 191.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> GDPR, *supra* note 211.

<sup>231</sup> See Legislative Decree n. 101 (Aug. 10, 2018), *supra* note 215.

<sup>232</sup> *Id.*

no. 196 of 2003, which is in force for the specific articles that are not explicitly repealed by the aforementioned decree and further integrates the provisions of the GDPR that were left to the autonomy of the Member States.<sup>233</sup>

The Legislative Decree introduces limitations on the processing of particular categories of data.<sup>234</sup> It also establishes the age of consent for children in relation to information society services and describes the functions of the Data Protection Authority and the remedies available to Italian data subjects.<sup>235</sup>

Regulation (EU) 2016/679 holds that processing personal data should respect people's fundamental rights and freedoms. In paragraph 2, it seeks to establish "an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons."<sup>236</sup> Paragraph 6 of the EU 2016/679 Regulation acknowledges that technology allows private companies and public authorities to make use of personal data on an unprecedented scale.<sup>237</sup> Therefore, a strong and more coherent data protection framework is required, backed by strong enforcement.<sup>238</sup> It says

Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects and the obligations of those who process and determine the processing of personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for infringements in the Member States.<sup>239</sup>

Paragraph 51 holds that sensitive personal data in relation to fundamental rights and freedoms merit specific protection "as the context of their processing could create significant risks to the fundamental rights and freedoms."<sup>240</sup> The principles of fair and transparent processing that are required by the Regulation dictate that the data subject be informed of the existence of the processing operation and its purposes: "[t]he controller should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed."<sup>241</sup>

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<sup>233</sup> *Id.*; see also Personal Data Protection Code, *supra* note 106.

<sup>234</sup> *Id.*

<sup>235</sup> See Legislative Decree n. 101 (Aug. 10, 2018), *supra* note 215.

<sup>236</sup> GDPR, *supra* note 211, ¶ 2.

<sup>237</sup> *Id.* ¶ 6.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* ¶ 11.

<sup>240</sup> *Id.* ¶ 51.

<sup>241</sup> *Id.* ¶ 60.

Regulation (EU) 2016/679 further stipulates that the principles of data protection apply to any information concerning an identified or identifiable persons, and that in order for processing to be lawful, subjects' consent is required.<sup>242</sup> Paragraph 42 of the Regulation clarifies that “[c]onsent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.”<sup>243</sup> The regulation says that responsibility and liability of the controller for processing of personal data should be established.<sup>244</sup> The controller:

should be obliged to implement appropriate and effective measures and be able to demonstrate the compliance of processing activities with this Regulation, including the effectiveness of the measures. Those measures should take into account the nature, scope, context and purposes of the processing and the risk to the rights and freedoms of natural persons.<sup>245</sup>

Article 24 elucidates the responsibility of the controller, saying that adherence to approved codes of conduct may be used as an element by which to demonstrate compliance with the obligations of the controller.<sup>246</sup> The code of conduct includes provisions concerning fair and transparent processing, the protection of children, and monitoring.<sup>247</sup>

It should also be noted that the current Italian Personal Data Protection Code (2018) equips the Data Protection Authority with powers to commence legal proceedings against a controller or processor in case of infringement of personal data protection provisions.<sup>248</sup> Furthermore, Article 167-a (titled *Unlawful communication and dissemination of personal data that are processed on a large scale*) states:

Any person who, with a view to gain for themselves or another or with intent to cause harm, communicates or disseminates an automated filing system or a substantial part thereof containing personal data that are processed on a large scale, in breach of the provisions ... shall be punished by imprisonment for one to six years unless the offence is more serious,<sup>249</sup>

and

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.* ¶ 42.

<sup>244</sup> *Id.* ¶ 74.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* art. 24.

<sup>247</sup> *Id.*

<sup>248</sup> See Legislative Decree n. 101 (Aug. 10, 2018), *supra* note 215.

<sup>249</sup> *Id.*

Any person who, with a view to gain for themselves or another or with intent to cause harm, communicates or disseminates an automated filing system or a substantial part thereof containing personal data that are processed on a large scale shall be punished by imprisonment for one to six years if the data subject's consent is required with a view to any communication or dissemination and such consent has not been obtained.<sup>250</sup>

In light of the new national and European legislation, we think that if a similar case would happen today in Italy, the conclusions would probably be different. Subjects could lodge a complaint with the Data Protection Authority or bring a proceeding before a judicial authority. In the previous legislation, the ability to lodge a complaint with the Data Protection Authority did not exist.<sup>251</sup>

A dedicated provision is reserved to children as they “merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.”<sup>252</sup> Article 8(1) of the Regulation clarifies the issue of consent when children are concerned. It says:

the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.<sup>253</sup>

The GDPR provisions provide some important protections.<sup>254</sup> The GDPR mandates a baseline set of standards for companies that handle EU citizens' data to better safeguard the processing and movement of citizens' personal data.<sup>255</sup> Article 17 and Article 18 of the GDPR give data subjects more control over personal data that is processed automatically.<sup>256</sup> The data subjects may direct a controller to erase their personal data under certain circumstances (also called the “right to erasure”); Article 23 and Article 30 require companies to implement reasonable data protection measures to protect consumers' personal data and privacy against loss or exposure.<sup>257</sup>

The articles also require the data controllers to notify data subjects as quickly as possible of breaches when the breaches place their rights and

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<sup>250</sup> *Id.*

<sup>251</sup> *Cf.* D.Lgs. 27 December 2019, n.101(as amended by Law n. 160 of December 27, 2019), with D.Lgs. 30 June 2003, n. 196.

<sup>252</sup> GDPR, *supra* note 211.

<sup>253</sup> *Id.* art 8(1).

<sup>254</sup> GDPR, *supra* note 211.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* art. 17-18, 23, 30.

<sup>257</sup> *Id.*

freedoms at high risk.<sup>258</sup> Furthermore, Article 9 instructs any company that processes data revealing a subject's genetic data, health, racial or ethnic origin, religious beliefs, etc. must designate a data protection officer.<sup>259</sup> These officers serve to advise companies about compliance with the regulation and act as a point of contact with Supervisory Authority.<sup>260</sup> With regard to privacy and data protection, the GDPR requires the consent of subjects for data processing; anonymizing collected data to protect privacy; providing data breach notifications; safely handling the transfer of data across borders; and requiring certain companies to appoint a data protection officer to oversee GDPR compliance.<sup>261</sup>

In light of the GDPR provisions, one hopes that children (and adults) receive better protection today than the child in the *Vivi Down* case. Now privacy rules are more rigorous and stricter, and the legal means that are available to prevent abuse seem to be more effective.

### *E. Defamation*

As explained, defamation is the act of damaging people's reputation by saying or writing something to offend the reputation or the decorum of a person. The crime of defamation is committed when the victim is not present or, at least, that s/he has not been able to perceive the offense. Here, the crime of defamation was both in relation to the bullied minor and the reputation of the *Vivi Down* Association. Article 595 of the Italian Criminal Code does not require that the information be false or inaccurate for the offense of defamation to occur.<sup>262</sup> What is important is that the suggestive and defamatory statements damage the reputation of a person and the association. Both the minor and the association made a complaint on the grounds of defamation.<sup>263</sup> They argued that Google offended the honor of a person by hosting and promoting the offensive video.<sup>264</sup> Google said it was unaware of that specific video and that it did not intend to harm the reputation of the bullied minor or of the *Vivi Down* Association.<sup>265</sup> Certainly, Google aided in facilitating the offensive conduct.

Legally, Google was not duty-bound to monitor or control video content. From CSR perspective, Google should have the will to do this in order to ensure a safe environment for users. The video was offensive,

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* art. 9

<sup>260</sup> See *Supervisory Authority, Art. 51, GENERAL DATA PROTECTION REGULATION (GDPR)*, <https://gdpr.eu/article-51-supervisory-authority-monitoring-application-of-regulation/> [<https://perma.cc/SFT7-E7MQ>] (last visited Mar. 13, 2021) [hereinafter "GDPR Supervisory Authority"].

<sup>261</sup> GDPR, *supra* note 211.

<sup>262</sup> Art. 595 c.p. (It.).

<sup>263</sup> See *Vivi Down Assoc. v. Google (Tribunal)*, *supra* note 15.

<sup>264</sup> *Id.*

<sup>265</sup> See *Vivi Down Assoc. v. Google*, *supra* note 129.

undermining, and defamed the minor's dignity even though the data was incorrect as the minor was not afflicted with Down Syndrome. For the defamation charge, this issue is not relevant. Importantly, the victim did not consent to the recording and to the posting of the video, and Google facilitated the offense.

A more recent development took place in 2016 when Regulation (EU) 2016/679 of the European Parliament and the Council came into force. The same year, the Italian Personal Data Protection Code was enacted.<sup>266</sup> It amended but also repealed and modified some articles of the 2003 Act. Chapter II of the Italian Personal Data Protection Code (2018), Article 2-b states:

(a) 'Communication' shall mean disclosing personal data in whatever manner, including by making available, interrogating or creating links to such data, to one or more identified entities other than the data subject, the controller's representative in the EU, the processor or the latter's representative in the EU, and the persons authorised to process personal data under the controller's or processor's authority in pursuance of Section 2-m;

(b) 'Dissemination' shall mean disclosing personal data in whatever manner, including by making available or interrogating such data, to unidentified entities.<sup>267</sup>

Regulation (EU) 2016/679 of the European Parliament and of the Council strongly emphasizes the "accountability" of the owners and managers, that is, the adoption of proactive behaviors and the concrete adoption of measures aimed at ensuring the application of the Regulation.<sup>268</sup> The data controllers are entrusted with the task of autonomously deciding on the methods, guaranteeing, and limiting of the processing of personal data in compliance with the regulatory provisions.<sup>269</sup> Article 45 of GDPR extends data protection requirements to international companies that collect or process EU citizens' personal data, subjecting them to the same requirements and penalties as EU-based companies.<sup>270</sup> Article 83 outlines the penalties for GDPR non-compliance, which can be up to 4% of the violating company's global annual revenue.<sup>271</sup> Regulation 2016/679

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<sup>266</sup> See Legislative Decree n. 101 (Aug. 10, 2018), *supra* note 215.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.* art. 23-25, and the entire Chapter IV of the Regulation.

<sup>269</sup> It should be noted that the Legislative Decree of August 10, 2018, no. 101, later amended by Law no. 160 (Dec. 27, 2019), adjusts the Italian Personal Data Protection Code (Legislative Decree no. 196 of 30th June 2003) to the provisions of EU Regulation 2016/679. It regulates some aspects left to the national legislative power including the provision of some types of criminal offenses, alongside the penalties already provided for by the European General Data Protection Regulation (GDPR) (2018).

<sup>270</sup> GDPR, *supra* note 211, art. 45.

<sup>271</sup> *Id.* art. 83.

acknowledges that technological developments and the growing globalization of data flows have significantly increased risks to individual privacy, and it imposes wide responsibilities on data controller, requiring them to handle personal data with due care.<sup>272</sup>

#### F. *Ability v. Will*

The distinction between ability and will is relevant. Google argued that it was technically impossible to check all content on its server.<sup>273</sup> The prosecutor rightly noted that Google was able to scrutinize its servers as required by the Chinese authorities to enable its continued operation in China. Obviously, the Chinese market is very important for the company. Furthermore, Google has been manipulating the results of its search engine to gain profit.<sup>274</sup> The Google algorithm is said to produce the most relevant search results to a given search word or phrase, but in addition to this regular service Google operates “AdWords,” a paid referencing service.<sup>275</sup> That service enables companies to obtain top placing in search results.<sup>276</sup> The links appear under the heading “sponsored links” above the most relevant results. Advertisers pay Google a fee for each click on the advertising link.<sup>277</sup> That fee is calculated on the basis of the “maximum price per click” which the advertiser agreed to pay when concluding with Google the contract for the referencing service, and on the basis of the number of times that link is clicked on by Internet users.<sup>278</sup> Advertisers are able to improve their ranking by fixing a higher maximum price per click or by trying to improve the quality of its ad.<sup>279</sup> Given the sophistication of the algorithm, Google *has* the ability to flag violent clips similar to the one described in this article. The issue of technical ability is a mere red herring because Google has such ability, and also because Google had not *attempted* to scrutinize content at all. The Google managers did not acknowledge that the company has a duty of care that includes scrutiny of servers.<sup>280</sup>

#### G. *Location*

It did not matter that the data was processed in Denver, United

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<sup>272</sup> See GDPR, *supra* note 211.

<sup>273</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15; *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> See *Maximum CPC bid: Definition*, GOOGLE ADS, <https://support.google.com/google-ads/answer/6326?hl=en-GB> [<https://perma.cc/F6PQ-CY2A>].

<sup>279</sup> See *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA2010*, 2010 E.C.R. 648.

<sup>280</sup> *Id.*

States.<sup>281</sup> The important issue for the courts was where the offense took place. The video clip was recorded in Italy and was uploaded onto a Google Video server in Italy.<sup>282</sup> Google Italy was a legal entity established in Italy and therefore it had the duty to comply with the Italian Personal Data Protection Code (2003), especially Article 5 (*Subject-Matter and Scope of Application*). Of importance was where the injured subject exercises his/her rights.<sup>283</sup>

National constitutions are important because they are expressions of people with a common idea of what makes up a good society. Laws, especially constitutional laws, are confined within geographic boundaries that identify a playground, a scope of action, and influence. This tragic ordeal showed that Google must abide by national laws if its directors wish to operate in certain countries. A fundamental principle of the Italian legal system is the principle of legality (*principio di legalità*).<sup>284</sup> This principle is affirmed in Article 1 of the Italian Criminal Code, stating that “no one can be punished for an act that is not expressly considered an offense by law, nor can sanctions be imposed that are not established by the law,”<sup>285</sup> and also in Article 25 of the Italian Constitution.<sup>286</sup> The prosecution stressed that Google cannot continue to ignore Italian laws if it wished to operate in the country.<sup>287</sup> The logic of a transnational company that transcends boundaries and therefore transcend law is a fiction; companies are not above laws. We have seen this in the 2000 Yahoo! case<sup>288</sup> and this conclusion is also evident in this case.

The Yahoo! saga took place in France in 2000 when Yahoo! re-

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<sup>281</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15; *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175.

<sup>282</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15; *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175.

<sup>283</sup> Personal Data Protection Code *supra* note 106; see also COSTITUZIONE [COST.] (It.); see also MARTINES, *supra* note 21; see also MANTOVANI, *supra* note 110.

<sup>284</sup> COSTITUZIONE [COST.] (It.); see also MARTINES, *supra* note 21; see also MANTOVANI, *supra* note 110.

<sup>285</sup> Art. 1 c.p. (It.).

<sup>286</sup> See Art. 25 COST. (It.) (“No case may be removed from the court seized with it as established by law.

No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.

No restriction may be placed on a person's liberty save for as provided by law.”); see also MARTINES, *supra* note 21.

<sup>287</sup> See *Vivi Down Assoc. v. Google* (Tribunal), *supra* note 15; see also *Vivi Down Assoc. v. Google* (Appeal), *supra* note 175.

<sup>288</sup> RAPHAEL COHEN-ALMAGOR, *Freedom of Expression, Internet Responsibility and Business Ethics: The Yahoo! Saga and its Implications*, 106 J. BUS. ETHICS 353-65 (2012); RAPHAEL COHEN-ALMAGOR, *Internet Responsibility, Geographic Boundaries and Business Ethics* 185-208, in *CYBERSPACE LAW: CENSORSHIP AND REGULATION OF THE INTERNET* (Hannibal Travis ed. 1st ed. 2013).

ceived a complaint about selling Nazi artifacts on its auction site, in violation of French Criminal Code that prohibits the display of Nazi symbols.<sup>289</sup> The Paris court found that Yahoo! had committed “a manifestly illegal disturbance” under the French New Code of Civil Procedure.<sup>290</sup> Judge Jean-Jacques Gomez ruled that though the unintentional character of Yahoo!’s fault is evident, the sales were nonetheless “an offense to the collective memory of a nation profoundly wounded by the atrocities committed in the name of the Nazi criminal enterprise.”<sup>291</sup> Yahoo! was ordered to remove all Nazi memorabilia off its auction sites, and after a long legal battle, it was forced to abide by the French ruling.<sup>292</sup>

As in the Yahoo! saga, while the Internet intermediary perceived the case as an attack on the principles of free expression on which the Internet is built, the court emphasized that the Internet is not a borderless entity where everything is allowed.<sup>293</sup> The Yahoo! ruling meant, in essence, that hosting platforms are criminally responsible for illegal content that Internet users upload. Internet intermediaries are required to abide by the laws of the countries in which they operate. This ruling proved that Google needs to abide by Italian laws; otherwise, it might find itself in court again.

Peter Fleischer, Google’s chief privacy counsel, explained that because the architecture of the Internet is such that data does not start and stop at national borders, and because Google operates globally and wishes to avoid addressing specific national laws, they have been advocating for global privacy standards.<sup>294</sup> Fleischer said that this is the right way forward in Europe: “I think it’s widely understood that we need to have harmonised data protection law across all of Europe – that individual country laws just won’t work anymore.”<sup>295</sup> The abovementioned EU Regulation 2016/679 and the *European Data Protection Regulation (GDPR)* (2018) attempt to unify data protection laws across Europe.<sup>296</sup>

## VII. CONCLUSIONS

In 2010, Google faced legal proceedings yet again for a privacy violation, this time in Canada. On October 19, 2010, a court ruled that Google violated citizens’ privacy when it introduced Street View without

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<sup>289</sup> *Id.*

<sup>290</sup> C.P.C. art. 808, 809 (Fr.).

<sup>291</sup> LICRA v. Yahoo!, Inc., Tribunal de Grande Instance de Paris [TGI] Paris, May 22, 2000 (Fr.), *aff’d* LICRA v. Yahoo, Inc. Tribunal de Grande Instance de Paris [TGI] Paris, Nov. 20, 2000 (Fr.).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> See Fleischer, *supra* note 205, at 78-89.

<sup>295</sup> *Id.*

<sup>296</sup> See GDPR Supervisory Authority, *supra* note 260.

their consent. The court ordered Google to delete all confidential data.<sup>297</sup>

In 2011, Google was ordered in Spain to delete links to websites that contained personal information. The Spanish regulator found that the Google search engine invaded personal privacy. Two months later in France, the privacy watchdog fined the company for accidentally collecting and storing data through its Street View cars. This was the first time the company has been fined for a privacy violation. Until then, Google escaped fines in the UK, Spain, Italy, Australia, Hong Kong, and the U.S. for the same breach.<sup>298</sup>

A balance needs to be struck between freedom of speech and social responsibility. Being powerful does not give companies license to act callously with impunity; quite the opposite. Having such power should compel Internet companies to strive to conduct their business responsibly, legally, and ethically. Instead of investing in making the Internet a safe place, Internet intermediaries resist taking active measures designed to scrutinize content and ensure that anti-social elements do not abuse the Internet to inflict harm on people.

Notably, in 2017 Google announced that it intended to recruit some 10,000 reviewers to reduce the amount of “problematic content” on its video platform. This may signal a change for the industry. YouTube CEO Susan Wojcicki said: “Some bad actors are exploiting our openness to mislead, manipulate, harass or even harm.”<sup>299</sup> YouTube’s violent or graphic content policies state that “[v]iolent or gory content intended to shock or disgust viewers, or content encouraging others to commit violent acts are not allowed on YouTube.”<sup>300</sup> Policies instruct users not to post content that is, *inter alia*, “[i]nciting others to commit violent acts against individuals or a defined group of people;” “[f]ights involving minors;” and “[f]ootage, audio, or imagery involving... street fights, physical attacks, sexual assaults, immolation, torture ... or other such scenarios with the intent to shock or disgust viewers.”<sup>301</sup> Examples of prohibited content include “[a]ctual schoolyard fights between minors [but Google] may allow content if minors are only play fighting and that is evident to viewers;”<sup>302</sup> “[b]eatings or brawls outside the context of professional or professionally

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<sup>297</sup> See *Google contravened Canadian privacy law*, OFF. PRIV. COMM’R CAN. (Oct. 19, 2020), [https://www.priv.gc.ca/en/opc-news/news-and-announcements/2010/nr-c\\_101019/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2010/nr-c_101019/) [<https://perma.cc/39H3-7MF>]; Josh Halliday, *Google Street View broke Canada’s privacy law with Wi-Fi capture*, GUARDIAN (Oct. 20, 2010), <http://www.guardian.co.uk/technology/2010/oct/19/google-street-view-privacy-canada> [<https://perma.cc/43MG-VLSN>].

<sup>298</sup> See Fleischer, *supra* note 205, at 78-89.

<sup>299</sup> Rishi Lyengar, *Google is hiring 10,000 people to clean up YouTube*, CNN BUSINESS (Dec. 6, 2017, 4:12 AM), <https://money.cnn.com/2017/12/05/technology/google-youtube-hiring-reviewers-offensive-videos/index.html> [<https://perma.cc/EC5K-AVH4>].

<sup>300</sup> See *Violent or graphic content policies*, YOUTUBE (2020), <https://support.google.com/youtube/answer/2802008?hl=en> [<https://perma.cc/5KR6-CQEN>] (last visited Mar. 14, 2021).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

supervised sporting events,”<sup>303</sup> and “[o]ne-sided assaults with titles like ‘Watch this guy get beat-up!’”<sup>304</sup> These policies are certainly steps in the right direction, although installed relatively late in YouTube’s corporate life. Hopefully, Google will not entertain any forms of bullying on YouTube and will be especially sensitive to vulnerable populations who require more protections than other people.

While Google relies on users to follow its guidelines for posting content, it removes content that violates its guidelines. Google can apply filters to flag out controversial content before it is posted. Google has shown the ability to do this in situations where child pornography is concerned. For some reason, cyberbullying and harassment that might result in loss of human life wrongly seem like less significant problems. However, it is not. Ample data show that people, especially young people, might resolve the problem of cyberbullying by committing suicide.<sup>305</sup> Morally and ethically, this stance is questionable. Google can and should do more to ensure users’ safety.

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See Bianca Lallitto, *Shocking Cases of Cyberbullying that Led to Suicide*, CLEVER (Aug. 15, 2017), <https://www.theclever.com/15-shocking-cases-of-cyberbullying-that-led-to-suicide/> [<https://perma.cc/CN66-7GGD>]; see also Christo Petrov, *Cyberbullying Statistics 2019*, TECH JURY (Feb. 28, 2019), <https://techjury.net/stats-about/cyberbullying/#gref> [<https://perma.cc/UJY9-FU3L>].