

# Introduction

Why consider a case that occurred in 2006 as an emblematic expression of the always more challenging constitutional earthquakes in the even more changeable digital environment?

A reasonable question, and surely it would be not entirely convincing to answer that, because of the pathological length of the judicial proceedings in Italy, Google Vivi Down is definitely not settled yet (the decision of the Italian Supreme Court (Corte di Cassazione) is expected in the first half of 2014). The answer would appear more convincing by asserting that the idea behind this book is not retrospective but forward-looking in nature.

More precisely, the Google Vivi Down saga is, in our opinion, “only” a perfect starting point to elaborate on the increasingly more complex relationship between the rapid changes in the technological scenario at the heart of the digital dimension, on one hand, and the much less dynamic relevant legislative framework, on the other hand. It is an emblematic case study (in the “strategic” area of the different models of Internet Service Provider liability) of the issues related to the balance between the fundamental rights inherent in internet use, and of the hard (if not sometimes “tragic”<sup>1</sup>) choices that the courts must make when the margins of the game move from the atoms to the bits.<sup>2</sup>

Hard choices obviously imply hard decisions. As explored in depth, by focusing on the first and second acts of the Google Vivi Down saga, the reasoning could be more or less convincing but nevertheless have huge constitutional implications.<sup>3</sup>

Against this background, this book is divided into two parts. The first focuses on the Google Vivi Down case and provides a critical analysis of the

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<sup>1</sup> Calabresi, G., Bobbitt, P., *Tragic Choices* (W. W. Norton & Company, New York 1978).

<sup>2</sup> Negroponte, N., *Being digitals* (Alfred A. Knopf, New York 1995).

<sup>3</sup> Costanzo, P., «Internet (diritto pubblico),» *Digesto Quarta Edizione (Discipline pubblicistiche)*, Appendice (Utet, Torino 2000).

arguments of the parties and of the decisions of the First Instance Court (Tribunale di Milano) and of the Appeals Court (Corte d'Appello di Milano).

The second part attempts to go beyond the case: we chose to focus on three main challenges related to the next chapter of internet law, namely: jurisdiction and applicable law, the liability of Internet Service Providers and the evolution of the data protection legislation.

All the above mentioned issues are characterized by a common starting point: since the adoption of the E-commerce Directive 2000/31/EC, the internet has continued to evolve with new digital services being progressively introduced into the market. This technological evolution requires a reevaluation and adaptation of the roles and responsibilities of Internet Service Providers, which have led courts to recognize different forms of liability in connection with activities performed by hosting providers. Nevertheless, the relevant legislation has not changed since 2000, when the E-commerce Directive was adopted.

With this in mind, the second part of the book attempts to answer the following questions: 1) Is it possible to enforce the relevant legislative framework related to the ISPs' (exemption from) liability in light of the transnational character of the internet? 2) How are the models of an ISP liability regime evolving (or regressing), with particular regard to the very creative judicial interpretations? 3) And finally, what about the impact of the European Commission's proposal to reform and modernize the existing EU data protection framework on data processing operations carried out via the internet?

On the last question, it should be added that the privacy legislative framework, whose application is at the heart of the Google Vivi Down case, is set to be exacerbated in the near future by the European Commission's ambitious data protection reform as envisaged by the EU Data Protection Regulation (Draft Regulation) released by the European Commission on 25 January 2012.

**While the Draft Regulation is currently under scrutiny at the EU level and will not likely come into force for two years, examining the key provisions of the Draft Regulation yields important insights into the logic applied by the EU regulators on the revision of the EU privacy framework and the implications for internet operators.**

**What about if a case similar to Google Vivi Down is brought before courts once the Draft Regulation is in force?**

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**Oreste Pollicino is author of Chapter 2; Chapters 3, paragraphs 1 and 2; Chapter 4, paragraphs 1, 2, and 4.**

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