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THE INTERNET IS NOT A LAWLESS PRAIRIE: DATA PROTECTION AND PRIVACY IN ITALY

NOAH C.N. HAMPSON*

Abstract: As the Internet has become more pervasive, so too have concerns about the security of personal data online. The rapid evolution of Internet technology has outpaced the legislative process, leaving courts to resolve complex and important questions of policy. Their answers to these questions can have dramatic implications for the future of the Internet as a platform for global communication. The judicial decisions in this area are frequently issued ad hoc by judges who may be unfamiliar with the technology at issue and unaware of the potential ramifications of their rulings. The February 2010 conviction in Italy of three Google executives for violations of data protection laws sparked widespread controversy and criticism on this basis. This Comment argues that the Italian court's decision is a prominent example of the broader trend of inexpert judicial regulation of the Internet.

INTRODUCTION

On February 24, 2010, Italian Judge Oscar Magi convicted three Google executives for violations of Italian data protection laws after a video was uploaded to Google Video showing an autistic student being bullied by classmates.¹ Although the substance of the court's decision was not released until April 12, the announcement immediately ignited controversy and debate over the decision's ramifications for Internet regulation and freedom of expression.² Some commentators assailed

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¹ See Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at 108, available at http://speciali.espresso.repubblica.it//pdf/Motivazioni_sentenza_Google.pdf.

² See, e.g., Rachel Donadio, *Larger Threat Is Seen in Google Case*, N.Y. TIMES, Feb. 24, 2010, at A1, available at <https://www.nytimes.com/2010/02/25/technology/companies/25google.html?pagewanted=1&r=1>; Thomas Claburn, *Google Execs Convicted in Italy*, INFORMATIONWEEK (Feb. 24, 2010), http://www.informationweek.com/news/hardware/utility_ondemand/showArticle.jhtml?articleID=223100601; Paul McNamara, *Conviction of Google*

the verdict as a threat to commercial Internet companies and to the freedom of the World Wide Web.³ Others welcomed it as a vindication of an individual's right to privacy.⁴

Prosecutors originally charged four Google executives with defamation, and three with violating Italy's Personal Data Protection Code.⁵ When the decision was finally released, it revealed that the court had convicted the executives charged with violation of data protection law but had acquitted them all of the defamation charge.⁶ Surprisingly, the court imposed liability despite Italian regulations,⁷ European Union directives,⁸ and a contemporaneous judgment by the European Court of Justice,⁹ all of which exempted certain categories of information society service providers (ISSPs) from liability for user-generated content.¹⁰ The court's decision substantiates concerns that advances in technology vastly exceed the pace of formal Internet regulation.¹¹ The

Execs in Italy Sheer Madness, NETWORK WORLD (Feb. 24, 2010), <https://www.networkworld.com/news/2010/022410-buzzblog-google-execs-convicted.html>.

³ See, e.g., Charles Arthur, *Google Italy Ruling Threatens YouTube Pursuit of Profitability*, GUARDIAN (London) (Feb. 24, 2010), <http://www.guardian.co.uk/technology/2010/feb/24/google-italy-youtube-video-analysis>; Mike Melanson, *Italy Attacks Web Democracy with Google Convictions*, READWRITEWEB (Feb. 24, 2010), http://www.readwriteweb.com/archives/italy_at-tacks_basis_of_web_20_with_google_convicti.php.

⁴ See Marc Rotenberg, *Brandeis in Italy: The Privacy Issues in the Google Video Case*, HUFFINGTON POST (Mar. 1, 2010), http://www.huffingtonpost.com/marc-rotenberg/brandeis-in-italy-the-pri_b_481115.html.

⁵ Sentenza n. 1972/2010, at I-II; Giovanni Sartor & Mario Viola de Azevedo Cunha, *The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Contents*, 18 INT'L J.L. & INFO. TECH. 356, 357 (2010).

⁶ Sentenza n. 1972/2010, at I-II, 108; Sartor & Viola, *supra* note 5, at 358.

⁷ See Decreto Legislativo, 30 Giugno 2003, n. 196, in G.U. 29 Luglio 2003, n. 174 (It.) [Legislative Decree, June 30, 2003, n. 196, in G.U. July 29 2003]; Decreto Legislativo, 9 Aprile 2003, n. 70, in G.U. 14 Aprile 2003, n. 87 (It.) [Legislative Decree, Apr. 9, 2003, n. 70, in G.U. Apr. 14 2003, n. 87], art. 16.

⁸ See Council Directive 2000/31, art. 15, 2000 O.J. (L 178) 1 (EC).

⁹ See Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, para. 109 (2010) available at <http://eur-lex.europa.eu/en/index.htm>, (follow "Case-law" hyperlink under "Collections"; search "2010" under "Access by Year"; follow "March" hyperlink; select Case "C-236/08").

¹⁰ See Sartor & Viola, *supra* note 5, at 360-61; Philip Willan, *Milan Judge: The Internet Is Not a Lawless Prairie*, NETWORK WORLD (Apr. 12, 2010), <http://www.networkworld.com/news/2010/041210-milan-judge-the-internet-is.html>. "Information society service" is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." Council Directive 98/48, art. 1(1)-(2)(a), 1998 O.J. (L 217) 18 (EC).

¹¹ See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (arguing that the Internet undermines the link between geographical location and government power to regulate online behavior); Paul Krugman, *Facing the Music*, N.Y. TIMES, July 30, 2000, at WK15 (suggesting that technology

decision also raises serious questions about the data protection responsibilities of ISSPs and the viability of a truly “free” Internet in the international marketplace.¹²

Part I of this Comment provides background on the trial and the case against Google. Part II discusses existing European Union and Italian law pertaining to data protection and Internet privacy. It also explains a recent judgment by the European Court of Justice interpreting the responsibilities of ISSPs with regard to personal privacy. Part III analyzes the reasoning by which the court reconciled its decision to impose liability with seemingly contradictory precedent. This section also interprets the Google decision in the context of the broader international debate over Internet regulation; specifically, it focuses on the increasingly prominent role of courts in regulating the Internet. Finally, this Comment concludes that because the rate of technological advances far outpaces efforts at formal rulemaking, Internet regulation is occurring in courts around the world on an ad hoc basis, with significant ramifications for privacy rights, freedom of expression, and the future of the Internet itself.

I. BACKGROUND

On September 8, 2006, an Internet user named Giulia Lisa uploaded a three-minute video to Google Video depicting an autistic boy named Francesco Giovanni De Leon being harassed and insulted by a group of schoolmates in Turin, Italy.¹³ Over the next two months, the video was viewed more than five thousand times and became one of the most popular videos in Google Video’s “Funny” category.¹⁴ During that

is eliminating national boundaries and hindering government’s ability to collect tax revenue); Peter H. Lewis, *Limiting a Medium Without Boundaries*, N.Y. TIMES, Jan. 15, 1996, at D1 (noting that the “Internet has evolved faster than the laws and technical structures of the countries it touches”).

¹² See Adam Liptak, *When American and European Ideas of Privacy Collide*, N.Y. TIMES, Feb. 27, 2010, at WK1, available at <https://www.nytimes.com/2010/02/28/weekinreview/28liptak.html>; Danny O’Brien, *The Google Three: Italy’s Personal Attack on Intermediary Liability*, ELEC. FRONTIER FOUND. (Feb. 27, 2010), <https://www EFF.org/deeplinks/2010/02/google-three-italys-personal-attack-intermediary-0>; *Reflecting on Google in Italy (and Beyond): Implications for Online Privacy and Freedom of Expression in the Internet Age*, GLOBAL NETWORK INITIATIVE (Mar. 10, 2010), http://www.globalnetworkinitiative.org/issues/Google_Italy.php.

¹³ Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at II, 102, available at http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf; see Sartor & Viola, *supra* note 5, at 356–57. Lisa, the uploader, was not charged in this action. Sentenza, at 102.

¹⁴ Sartor & Viola, *supra* note 5, at 357.

time, users commented on the video and some may even have flagged it for inappropriate content.¹⁵ On November 6, 2006 Google received an email from a user complaining about the video and requesting its removal.¹⁶ Although there is evidence that Google employees undertook to remove it within twenty-four hours,¹⁷ the video was not actually removed until Italian police contacted Google and demanded that the video be taken down.¹⁸ A two-year investigation ensued, and in early November 2008 four Google executives—David Drummond, senior vice-president and chief legal officer; Peter Fleischer, global privacy counsel; Arvind Desikan, senior product marketing manager; and George Reyes, former chief financial officer—were charged in Italian court with defamation and violation of Italy’s Personal Data Protection Code.¹⁹

The defamation charge alleged that Google and its executives had contributed to the defamation of the student depicted in the video.²⁰ Prosecutors argued that by failing to exercise any positive control to prevent defamatory content from appearing on Google Video, Google had violated Article 40 of the Italian Criminal Code.²¹ The data protection charge alleged that Google illegally processed sensitive personal data for the purpose of obtaining a gain in violation of Section 167 of Italy’s Personal Data Protection Code.²² After a bench trial presided over by Judge Magi, all four executives were ultimately acquitted of the defamation charge, but three were convicted of violating provisions of the Personal Data Protection Code and sentenced to six-month suspended prison terms.²³

¹⁵ *Id.*

¹⁶ Sentenza n. 1972/2010, at 102; *Caso Google, Com’è Andata* [*The Google Case, What Happened*], *IL REPUBBLICA* (Mar. 1, 2010), <http://espresso.repubblica.it/dettaglio//2121920>.

¹⁷ See *Caso Google, Com’è Andata*, *supra* note 16.

¹⁸ See Sartor & Viola, *supra* note 5, at 357; *Caso Google, Com’è Andata*, *supra* note 16.

¹⁹ See Sartor & Viola, *supra* note 5, at 357.

²⁰ *Id.*

²¹ See *id.* at 359 (explaining that Article 40 imposes criminal liability for “failing to prevent an event which one has the legal obligation to prevent,” and that such failure “amounts to causing” that event).

²² *Id.* at 361–62.

²³ Sentenza n. 1972/2010 at 108; Sartor & Viola, *supra* note 5, at 358. Arvind Desikan was acquitted of all charges. Sentenza n. 1972/2010, at 108.

II. DISCUSSION

A. *The European Union Directives*

In the past fifteen years, the European Parliament has issued several Directives to member states of the European Union concerning Internet regulations. In particular, Directive 2000/31 (Liability Directive) promulgates regulations intended to ensure “a high level of Community legal integration in order to establish a real area without internal borders for information society services.”²⁴ Although the Directive provides that “the protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council . . . and Directive 97/66/EC of the European Parliament and of the Council,”²⁵ Articles 12–14 establish certain liability exemptions for information society services.²⁶ These Articles specifically exempt services that are limited to a “mere conduit” of data,²⁷ “caching,”²⁸ or “hosting.”²⁹ In addition, Article 15 prevents member states from imposing a general obligation on providers of these services to monitor information they transmit or store.³⁰ It also prevents member states from imposing a general obligation to actively investigate illegal activity.³¹

With regard to personal data, Directive 95/46 (Privacy Directive) articulates principles for the protection of “fundamental rights and freedoms” of natural persons—in particular the right to privacy—in the processing of personal data.³² The Privacy Directive also prohibits interference with the free flow of personal data between member states

²⁴ Council Directive 2000/31, para. 3, 2000 O.J. (L 178) 1 (EC).

²⁵ *Id.* para. 14.

²⁶ *See id.* arts. 12–14.

²⁷ *Id.* art. 12.

²⁸ *Id.* art. 13.

²⁹ *Id.* art. 14.

³⁰ Directive 2000/31, art. 15.

³¹ *Id.*

³² Council Directive 95/46, art. 1(1), 1995 O.J. (L 281) 31 (EC). “Personal data” is defined as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” *Id.* art. 2(a). “Processing” is defined as “any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.” *Id.* art. 2(b).

except under certain circumstances.³³ The overarching purpose is to coordinate regulation across member states, thereby ensuring uniform protection of individual rights, removing impediments to economic activity and law enforcement, and still leaving some latitude for states to tailor national data protection laws within a limited margin.³⁴

B. Italian Law

Italian Legislative Decree no. 196 of 30 June 2003, known as the Personal Data Protection Code (PDPC), regulates all personal data processing in Italy.³⁵ Unlike the Privacy Directive, which addresses concerns relating both to protection of personal data and to preserving the free flow of information between EU member states,³⁶ the purpose of the PDPC is to “ensure that personal data are processed by respecting data subjects’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity, and the right to personal data protection.”³⁷ Pursuant to the Privacy Directive, Section 153 establishes the Italian personal data protection supervisory authority charged with enforcing data protection rules: the Garante Per La Protezione Dei Dati Personali (Garante).³⁸ The PDPC requires the consent of the data subject before personal data may be processed.³⁹ Additionally, when the data consist of “sensitive” information, the written consent of the data subject is required, as well as written permission from the Garante.⁴⁰

³³ *Id.* art. 1(2).

³⁴ *See id.* paras.7–9.

³⁵ Sartor & Viola, *supra* note 5, at 362 n.15; *see* Decreto Legislativo, 30 Giugno 2003, n. 196, in G.U. 29 Luglio 2003, n. 174 (It.) [Legislative Decree, June 30, 2003, n. 196, in G.U. July 29 2003] § 2.

³⁶ Directive 95/46, art. 1.

³⁷ D.Lgs. n. 196/2003, § 2. Paragraph 2 of Section 2 notes that “[t]he processing of personal data shall be regulated by affording a high level of protection for the rights and protections referred to in paragraph 1 in compliance with the principles . . . by which data subjects can exercise such rights and data controllers can fulfill the relevant obligations.” *Id.* § 1(2).

³⁸ *Id.* §§ 153–154.

³⁹ *Id.* § 23. “Processing” and “personal data” are both defined in the PDPC largely the same as they are defined in Article 2 of Directive 95/46. *Compare id.* § 4(1)(a)–(b), *with* Directive 95/46, art. 2(a)–(b).

⁴⁰ D.Lgs. n. 196/2003, § 26(1). “Sensitive data” is defined in the PDPC as “personal data allowing the disclosure of racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership of parties, trade unions, associations or organizations of a religious, philosophical, political or trade-unionist character, as well as personal data disclosing health and sex life.” *Id.* § 4(1)(d). Moreover, Section 26(5) explicitly forbids the dissemination of health data. *Id.* § 26(5).

Section 167 of the PDPC—the provision under which the Google executives were sentenced—provides that persons who process personal data “with a view to gain for himself or another or with intent to cause harm to another”⁴¹ in breach of certain other provisions of the PDPC shall be punished by imprisonment for six to thirty-six months, depending on the nature of the violation.⁴² Thus, the Google executives were convicted of participating in the processing of De Leon’s sensitive personal data without his consent or that of his guardians, without the permission of the Garante, and with a view to profit.⁴³

Legislative Decree no. 70 of 9 April 2003 implemented the Liability Directive in Italy and governs certain aspects of electronic commerce.⁴⁴ Article 16 of the Decree exempts ISSPs from liability for user-generated content, provided they have no actual knowledge of illegal content or activity, and that upon learning of illegal content or activity the provider acts “immediately to remove or to disable access” to the content.⁴⁵ For ISSPs whose activities are limited to that of a “mere conduit,” “hosting,” or “caching,” Article 17 provides that there is no general duty to monitor content.⁴⁶

C. *The European Court of Justice*

Not long after the convictions were announced, but before the court’s decision was released, the European Court of Justice (ECJ) issued a judgment in a trademark infringement case in which it interpreted the exemption provisions of the Liability Directive as applied to Google’s AdWords marketing system.⁴⁷ The plaintiffs, purveyors of luxury goods, sued Google for contributory trademark infringement after AdWords advertisements for counterfeits of the plaintiffs’ products appeared online.⁴⁸ AdWords is a paid information referencing service which displays “sponsored links” alongside the natural search results of a user’s query in Google’s search engine.⁴⁹ AdWords was also used to

⁴¹ *Id.* § 167(1).

⁴² *See id.* § 167(1)–(2).

⁴³ Sartor & Viola, *supra* note 5, at 362.

⁴⁴ D.Lgs. n. 70/2003, art. 16; Sartor & Viola, *supra* note 5, at 360.

⁴⁵ *See* D.Lgs. n. 70/2003, art. 16; Sartor & Viola, *supra* note 5, at 360.

⁴⁶ D.Lgs. n. 70/2003, art. 17.

⁴⁷ Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, paras. 1, 29 (2010) available at <http://eur-lex.europa.eu/en/index.htm>, (follow “Case-law” hyperlink under “Collections”; search “2010” under “Access by Year”; follow “March” hyperlink; select Case “C-236/08”).

⁴⁸ *Id.* paras. 28–30.

⁴⁹ *Id.* paras. 23–24.

place advertising on Google Video.⁵⁰ Advertisers are able to reserve one or more keywords, and when a search is entered containing those keywords a link to the advertised website appears accompanied by a short commercial message.⁵¹ The process of choosing and reserving keywords, drafting the commercial message, and attaching a link, is performed exclusively by the advertiser; the advertisements are generated automatically by AdWords.⁵² Google charges a fee for this service based, among other factors, on the number of clicks the link receives and a maximum price per click selected by the advertiser.⁵³

The ECJ ruled that Article 14 of the Directive must be interpreted to mean that the exemption from liability applies to a service like AdWords if that service “has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.”⁵⁴ If it has not, the service “cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.”⁵⁵ The ECJ did not rule on whether Google played a sufficiently active role, nor if it failed to act expeditiously upon receiving information concerning the alleged infringement.⁵⁶ The ECJ did note, however, that it was necessary to determine whether Google was a neutral participant, and to examine Google’s role in selecting keywords and drafting the commercial message that accompanied the sponsored links.⁵⁷ The court also noted that the mere fact that Google charges a fee for AdWords, and that a relationship may exist between the appearance of an advertiser’s keyword and the terms in a user’s query, does not deprive Google of the exemption from liability provided for in the Liability Directive.⁵⁸

The ECJ’s judgment reflects the principle embodied in the Liability Directive that the free flow of information over the Internet should be protected.⁵⁹ Because of the risk to free expression and electronic commerce, the Liability Directive suggests—and the ECJ confirmed—

⁵⁰ Sentenza n. 1972/2010, at 17–18 n.30; see Sartor & Viola, *supra* note 5, at 363, 372–73.

⁵¹ Joined Cases C-236/08 to C-238/08, paras. 23–24.

⁵² *See id.* para. 27.

⁵³ *Id.* para. 25.

⁵⁴ *Id.* para. 120.

⁵⁵ *Id.*

⁵⁶ *See id.* para. 119.

⁵⁷ Joined Cases C-236/08 to C-238/08, paras. 114, 118.

⁵⁸ *Id.* paras. 116–117.

⁵⁹ *See* Directive 2000/31, paras. 1–3.

that liability for user-generated content should be limited to instances in which the ISSP has either participated in illegal activity, or failed to prevent or mitigate the damage caused by it.⁶⁰

III. ANALYSIS

Given the level of statutory protection afforded to ISSPs under both EU and Italian law, the conviction of the Google executives is surprising for several reasons. First, the court acknowledges that requiring ISSPs to monitor all user-generated content in order to prevent the upload of personal data would be impossible; indeed, the court states that ISSPs have no legal obligation to do so.⁶¹ Because the prohibition on legally required monitoring is derived from Article 15 of the Liability Directive, it is noteworthy that the court did not discuss the Directive or the corresponding Italian Legislative Decree that implemented the Liability Directive in Italy.⁶² This omission may be partially explained by the court's conclusion that Google Video is not a "mere conduit," a "host," or limited to "caching" services, but is instead an "active" content provider and as such is ineligible for the exemption.⁶³ Nevertheless, if it is impossible for Google to monitor all content, then imposing liability for failing to prevent uploading of illegal content would severely burden Google's operations in Italy.⁶⁴ After all, the decision implies that Italian law requires Google to do something that the court itself acknowledges is impossible.⁶⁵

Second, several aspects of the court's decision contradict the ECJ's judgment concerning Google's AdWords platform.⁶⁶ The judgment suggests that to lose the liability exemption provided in the Liability Directive, an ISSP's activity must cross a certain threshold of active par-

⁶⁰ See *id.* paras. 1–3, 5, 8–10; Joined Cases C-236/08 to C-238/08, para. 120.

⁶¹ Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at 103, available at http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf; see Sartor & Viola, *supra* note 5, at 360.

⁶² See Sentenza n. 1972/2010, at 105; Sartor & Viola, *supra* note 5, at 360.

⁶³ See Sentenza n. 1972/2010, at 103; Sartor & Viola, *supra* note 5, at 370.

⁶⁴ Cf. Sartor & Viola, *supra* note 5, at 360, 370 (noting that court's approach "would have a broad impact on providers of platforms for user-generated contents," and that "they would be in principle liable for all content").

⁶⁵ See Sentenza n. 1972/2010, at 104; Sartor & Viola, *supra* note 5, at 360. *But see* Milton Mueller, *There's More to the Google-Italy Case Than Meets the Eye*, INTERNET GOVERNANCE PROJECT (Feb. 25, 2004, 4:31 PM), http://blog.internetgovernance.org/blog/_archives/2010/2/25/4466212.html (noting that Google has implemented monitoring for copyright violations through an automated recognition system).

⁶⁶ See Sartor & Viola, *supra* note 5, at 370–71.

ticipation in the processing of data.⁶⁷ That is, the ECJ construes the Article 14 exemption broadly, requiring that the ISSP's participation give it actual knowledge of or control over the content.⁶⁸ By contrast, the Italian court implicitly endorses the view that any activity that is more than mere storage and the simple facilitation of access is de facto active participation, regardless of whether there is knowledge or control.⁶⁹ Such a narrow construction of the liability exemption may reflect the court's failure to appreciate the complexity of current technology and modern web hosting models.⁷⁰ Although the ECJ's judgment preceded the release of the opinion by the Italian court, the ECJ case was decided after the conviction had been announced.⁷¹ Consequently, it is difficult to know whether, and to what extent, the ECJ's judgment played a role in Judge Magi's decision.

Nevertheless, the Italian court's decision also contradicts other aspects of the ECJ's ruling on ISSP exemption from liability.⁷² In classifying Google as an active content provider, the Italian court pointed to advertising revenues and actions taken by Google to encourage users to upload video, and reasoned that Google promoted the absence of content control as an inducement to attract users.⁷³ This reasoning conflicts with the ECJ's determination that liability depends on the relationship of the ISSP to the content, not on the commercial nature of the service, or even whether there is a clear link between keyword advertising and user queries.⁷⁴ By construing the liability exemption so

⁶⁷ See Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, para. 120 (2010), available at <http://eur-lex.europa.eu/en/index.htm>, (follow "Case-law" hyperlink under "Collections"; search "2010" under "Access by Year"; follow "March" hyperlink; select Case "C-236/08").

⁶⁸ See *id.*

⁶⁹ See Sartor & Viola, *supra* note 5, at 369–71.

⁷⁰ See *id.* at 369–70. When the liability exemptions were drafted, web hosting was a far simpler enterprise than it is today with the advent of Web 2.0 and the proliferation of user-generated content. *Id.* at 369–70, 374–75; see also TIM O'REILLY & JOHN BATTELLE, *WEB SQUARED: WEB 2.0 FIVE YEARS ON 2*, available at http://assets.en.oreilly.com/1/event/28/web2009_websquared-whitepaper.pdf [hereinafter *Web 2.0 White Paper*] ("The Web is no longer a collection of static pages of HTML that describe something in the world. Increasingly, the Web is the world—everything and everyone in the world casts an 'information shadow,' an aura of data which . . . offers extraordinary opportunity and mind-bending implications.")

⁷¹ See Joined Cases C-236/08 to C-238/08 *passim*; Sentenza n. 1972/2010, at I.

⁷² See Sartor & Viola, *supra* note 5, at 371.

⁷³ See *id.* at 370–71.

⁷⁴ See Joined Cases C-236/08 to C-238/08, paras. 109, 116–117; Sartor & Viola, *supra* note 5, at 371. The ECJ explicitly provided that the "mere fact" that a service provided by the ISSP was in exchange for payment does not deprive the ISSP of the liability exemptions under the Directive. Joined Cases C-236/08 to C-238/08, para. 116.

narrowly, the Italian court excludes ISSPs like Google, YouTube, and Facebook, such that operating sites featuring user-generated content may be far more difficult or even impossible.⁷⁵

The Italian decision is emblematic of a broader trend in which courts have emerged as a source of Internet regulation.⁷⁶ Given the novel, transnational, and ever-evolving nature of the Web, questions of Internet governance are difficult and controversial; indeed, a major theme in the ongoing debate is whether it ought to be formally regulated at all.⁷⁷ Additionally, despite the Internet's growing ubiquity, questions of Internet governance are still embryonic in the popular consciousness.⁷⁸ Although many people have cultivated Second Lives online,⁷⁹ far fewer are likely to have considered what rules should govern the Internet "world."⁸⁰ Courts likely reflect this pattern: judges almost certainly use the Internet for personal purposes, and some even cite Internet sources in judicial opinions.⁸¹ But ordinary or even regular use of a thing does not an expert make.⁸²

Beyond the question of judicial familiarity with technology, however, the potential impact of governments or private interests seeking to

⁷⁵ See Donadio, *supra* note 2; Arthur, *supra* note 3; Claburn, *supra* note 2.

⁷⁶ See, e.g., *Reno v. ACLU*, 521 U.S. 844 *passim* (1997) (striking down Communications Decency Act on overbreadth challenge); *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617 *passim* (4th Cir. 2003) (resolving dispute over domain name ownership); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, *La Ligue Contre le Racisme et L'Antisemitisme (L.I.C.R.A.) & L'Union des Etudiants Juifs de France (U.E.J.F.) v. Yahoo! Inc. & Yahoo France*, available at http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20001221_yahoo_us_complaint.pdf *passim* (enjoining Yahoo from permitting sale of Nazi merchandise in France).

⁷⁷ See e.g., JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 179–81 (2006) (noting that despite its transformative potential as a global communication tool, the Internet cannot function effectively without underlying law and territorial government); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 127–30 (2008) (describing the merits of a standard-based approach to internet governance as compared to a rule-based approach).

⁷⁸ See *The Consensus Machine*, ECONOMIST, June 8, 2000, available at <http://www.economist.com/node/335281>.

⁷⁹ See Nelson Linden, *Second Life Economy Stable in Q2 2010*, SECOND LIFE BLOGS, (Sept. 10, 2010, 9:28 AM), <http://blogs.secondlife.com/community/features/blog/2010/09/10/second-life-economy-stable-in-q2-2010> (showing an average of 805,000 monthly repeat logins in the second quarter of 2010).

⁸⁰ See *The Consensus Machine*, *supra* note 78.

⁸¹ See Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 418 n. 3, 428, 448–49 (2002).

⁸² See, e.g., Babbage, *Yes, The Justices Are Old*, ECONOMIST: SCI. & TECH. BLOG (Apr. 23, 2010, 13:26), http://www.economist.com/blogs/babbage/2010/04/judges_and_technology; Nadya Labi, *UK Terrorism-Trial Judge Gets Lesson on Internet*, WIRED (Aug. 21, 2007), http://www.wired.com/politics/onlinerights/magazine/15-09/ps_luddite.

control or limit the flow of information is another major area of concern.⁸³ Some commentators have suggested that the Italian decision may be an example of such influence; rumors abound that efforts to control new media enterprises like Google and YouTube are motivated by a desire to protect the business interests of media magnate and Italian Prime Minister Silvio Berlusconi.⁸⁴

The upshot is that this scenario results in inapt decisions, and it permits important questions of policy to be decided on an ad hoc basis by inexpert and possibly even biased judges.⁸⁵ Inevitably, this pattern makes the rule of law unpredictable, and as ISSPs are forced to bear the burden of this uncertainty, many will attempt to limit the risk of liability by avoiding certain markets.⁸⁶ Indeed, some Internet companies have declined to operate in up to half of the world's fifty largest economies out of concern for legal uncertainty.⁸⁷ If, as some say, the promise of the Internet lies in its ability to empower people by democratizing access to information and eliminating barriers to communication,⁸⁸ a legal environment that inhibits Internet development through unpredictability threatens to retard the realization of that promise.⁸⁹

CONCLUSION

The conviction of the Google executives is a recent example of a ruling that contradicts existing laws and precedent governing ISSPs and the Internet generally. It reveals serious limitations in the ability of the existing regulatory edifice to address the complex and novel questions presented by the evolution of the Internet. Given the dynamic

⁸³ See, e.g., GOLDSMITH & WU, *supra* note 77, at 184 (noting that the influence of the Chinese government is changing the nature of the Internet); ZITTRAIN, *supra* note 77, at 112–13 (describing the potential benefits non-democratic regimes might derive from exercising control over technology); Bruce Einhorn, *How China Controls the Internet*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2006), http://www.businessweek.com/bwdaily/dnflash/jan2006/nf20060113_6735_db053.htm (arguing that by acceding to Chinese censorship requirements Internet companies facilitate political suppression).

⁸⁴ See, e.g., Donadio, *supra* note 2; Colleen Barry, *Berlusconi Moves to Impose Internet Regulation*, BUSINESS INSIDER (Jan. 22, 2010, 1:45 PM), <http://www.businessinsider.com/berlusconi-moves-to-impose-internet-regulation-2010-1>; Jeff Israely, *Berlusconi vs. Google: Will Italy Censor YouTube?*, TIME (Jan. 22, 2010), <http://www.time.com/time/world/article/0,8599,1955569,00.html>; Mueller, *supra* note 65.

⁸⁵ Cf. GOLDSMITH & WU, *supra* note 77, at 142 (noting that the judiciary can be “corrupt or incompetent, and can fail to follow the law or reflect the wishes of the people”).

⁸⁶ See *id.* at 144–45.

⁸⁷ See *id.*

⁸⁸ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 1–2, 10 (2006).

⁸⁹ See GOLDSMITH & WU, *supra* note 77, at 144–45.

and rapid nature of technological development, and the comparatively static pace of legislation, it is nearly certain that courts will continue to have a central role in regulating the Internet for the foreseeable future. The likelihood of similarly dissonant rulings from other courts threatens innovation and technological development, which, in turn, limits the fundamental promise of the Internet as a force for good.