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**Sustainability as a Legal Principle**  
**UNIVERSITY OF RIJEKA**

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# Sustainability and control of personal information and images on the Net to protect the fundamental rights of the individual

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## **Abstract**

The dissemination and sharing of images and multimedia content can degenerate into real forms of oppression, abuse and violence. The essay aims to analyze the case and the response of the Italian legislator to revenge porn.

## **Keywords**

Cyberspace. Information sustainability. Digital pollution. Dissemination of sexually content. Revenge Porn.

## **1. Premise: about digital pollution and personal information sustainability**

Nowadays, jurists have been called upon to deal with a new and alarming form of pollution. This latter affects the virtual ecosystem, instead of affecting the real environment (nature and its balances). It is a pollution that has to do with the information (personal and otherwise) that circulates on the network and that – thanks to the casual and not very responsible continuous sharing – spreads on platforms and social network.

Hence, a whole series of dysfunctional situations (paradigmatic what happens with fake news and, in the most serious cases of attack on the person, with hate speech or with revenge porn) that threaten the rights of the individual (among all: the right to information, the right to confidentiality and, last but not least, the right to reputation), urging the adoption of ad hoc regulatory measures and the introduction of appropriate preventive and corrective tools.

The paper will focus, first on the socio-legal and philosophical-legal framework of the issues and, subsequently, on the contrast strategies already adopted and/or in adoption, not only to protect the rights of the person but also to preserve what everyone the effects can be called the current ecosystem of cyberspace.

## **2. Any introductory notes**

For some years now, the Net, with its many social platforms, has nevertheless become the main theater of communicative disorders (this is the case of *fake news*) and – to say the effective expression of Ziccardi – of real attacks *ad personam* (emblematic of what happens with *hate speech*). Sadly, known and decidedly paradigmatic for the theme that we want to

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address here, are the events that have seen protagonists Anna Mayer<sup>2</sup>, Marianna Taschinger<sup>3</sup>, Tessa Komer<sup>4</sup> and, last but not least, looking at the Italian landscape, Tiziana Cantone<sup>5</sup>.

Cases of chronicle that – despite the variety of contexts and the specificity of the different vicissitudes – have helped to highlight the need and urgency of identifying legal instruments that were suitable to try to prevent and to counter all those details conducts (such as, for example: *flaming*<sup>6</sup>, *harassment*<sup>7</sup>, *put down*<sup>8</sup>, *trickery*<sup>9</sup>, *exposure*<sup>10</sup>, *happy slapping*<sup>11</sup>, but also *cyberbullying*<sup>12</sup> or the *cyberstalking*<sup>13</sup>), that – in various ways and at different levels – they can be substantiated in mockery, derision, denigration, oppression, violence and, even, in revenge.

Dysfunctional behaviors that are certainly not unprecedented, but that today – when they are realized in the current *society of the infosphere*<sup>14</sup> (within the current society dominated by a singular desire for sharing<sup>15</sup>) – Unlike in the past, they are much more difficult to prevent

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<sup>2</sup> The young university girl whose case, in 2008, was at the center of the world's news and debates. In particular, Anna – who in her spare time ran a blog in which she spoke of her weight problems and her difficulty in accepting her own body – at first became the object of insults and vulgar comments and, later, He was forced to implement a series of strategies and remedies (including the closure of the old blog), to try to stem the intense media attack (triggered without reason) aimed at his person. An attack, destined to undermine not only his online reputation, but also to affect his offline life (CITRON 2016).

<sup>3</sup> Young Texan, among the most famous victims of an act of *revenge porn* operated by her boyfriend, who, after their relationship, made public some of his intimate photos (cf. GOODE 2013)

<sup>4</sup> A student at the University of Georgia, whose ex-boyfriend – Jared Wolny – after having illegally introduced himself on his Facebook page, has published a series of inappropriate images (cf. CASATI 2008).

<sup>5</sup> On the sad story that involved the young Neapolitan girl, cfr. CALETTI, 2018, pp. 5-41.

<sup>6</sup> Behavior identified essentially by the dissemination on the Net of offensive comments that are intended to irritate and provoke victims, so as to unleash a real *querelle online*.

<sup>7</sup> A very wide macro-category, which includes all verbal harassment that, sometimes, can also have a sexual background. Often, such conduct is accompanied by *cyberstalking* (cfr., among others, ALBERICO 2011; MAUGERI 2010).

<sup>8</sup> Behavior that is aimed at denigrating and debasement of the victim. Conduct that, from a practical point of view, can be substantiated in the sending of emails, text messages or in the publication of blog posts, chats and message boards.

<sup>9</sup> Unlike the other situations mentioned, in this case, we are faced with a real deception, which is aimed primarily to gain the trust of a subject, so as to collect personal information and intimate confidences. Information and confidences that will then be made public, thus exposing the victim to public mockery.

<sup>10</sup> This is the publication of personal and intimate information concerning another subject. Unlike what happens with the *trickery*, In this case, however, the information is not “artfully retrieved”, but is entirely invented.

<sup>11</sup> Cfr. COSOLIN 2012, pp. 129-132.

<sup>12</sup> Vd., among others, PENNETTA 2019; ALOVISIO, GALLUS, MICOZZI 2017.

<sup>13</sup> Cfr., among others, CIPRI 2015; MAIURO 2015.

<sup>14</sup> With regard to the concept of *infosphere*, it is mandatory to refer to the reconstructions of FLORIDI 2017; FLORIDI 2020.

<sup>15</sup> with regard to the increasing tendency to share everything on the Internet and on social media, the words of HARARI deserve to be mentioned here, which, in this way, states: “Humanism believes that experiences

and, above all, to stem and combat<sup>16</sup>. In fact, as soon as the information and the contents (in the form of images, messages, videos, or audio) are introduced into the Net they acquire, almost immediately, a capacity of permanence and a volatility quite special. Not only does the *relief of forgetfulness*<sup>17</sup> fail (because in the World Wide Web everything is omnipresent and everything is here and now<sup>18</sup>), but, due to *itineracy*, any digitized data can transfer and migrate autonomously – and in an almost unpredictable way – from platform to platform, landing in contexts that are also very different from the initial and original ones, and re-emerging continuously even after a long time<sup>19</sup>. Which, as is evident, can generate a whole series of relapses and effects that – especially in the long term – are absolutely incalculable.

### 3. Techno-fluid habitats and images of oneself. Digital information sustainability and dissemination of sexually content

A few years ago, Tonino Cantelmi (one of the first Italians to study techno-addictions and to analyze the impact that the use of digital technology would have on the human mind, on interpersonal relationships and, last but not least, on the sexual sphere)<sup>20</sup> noted that within the new Cartesian diagram, in which the axis of the *ordinates* was represented by the liquid society described by Bauman<sup>21</sup>, while, the one of the *abscissa* was identified by the technological revolution led by Steve Jobs and his many followers<sup>22</sup>, the intersection between the two lines would soon lead to the appearance of an unprecedented and completely unexpected anthropological model: *l'homo tecno-digitalicus*<sup>23</sup>. That is to say, a

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happen within us, and that right there we should find the meaning of everything that happens [...]. Datists [instead] believe that experiences are worthless if they are not shared [...]. We [...] need to record and connect our experiences [...]. Twenty years ago, Japanese tourists were the laughingstock of the global village because they always went around armed with cameras and photographed any subject in their sights. Now everyone is like this [...] The new motto says: "If you experience something – record it. If you record something – upload it. If you load something – share it" (HARARI 2018, p. 472).

<sup>16</sup> With regard to the many difficulties encountered in the repression of certain dysfunctional behaviours on the Net and, in general, in the fight against cybercrime Cfr. FLOR 2012 (<https://www.penalecontemporaneo.it/upload/1348049846flor%20corretto.pdf>); DE VIVI, RICCI 2012, pp. 25-112; AMATO MANGIAMELI 2019, pp. 1-56.

<sup>17</sup> Cfr. A.C. AMATO MANGIAMELI 2020, p. 119.

<sup>18</sup> On the fusion and confusion between past and present, the observations of VIRILIO 2000, in part. p. 118.

<sup>19</sup> Vd. GARDAGLIONE, GAL, ALVEZ, MARTINEZ 2015, p. 13 ss.

<sup>20</sup> Extensive and significant studies can be remembered: CANTELM I, D'ANDREA 1998; CANTELM I, TALLI, 1998, pp. 4-11; CANTELM I, TALLI, A. D'ANDREA, DEL MIGLIO 2000; CANTELM I 2000, pp. 121-134; CANTELM I, LAMBIASE 2001, pp. 38-43; CANTELM I, GRIFO GIARDINA 2001, pp. 81-88; CANTELM I, PUGGIONI, TRUZZI, 2002.

<sup>21</sup> Impossible, do not remember, the reconstructions and paths proposed by the famous sociologist BAUMAN 2002; ID. 2006; ID. 2008; ID. 2018.

<sup>22</sup> Cfr. CANTELM I 2013, in part. pp. 6 e 13 ss.

<sup>23</sup> Whose advent the Author has reflected at length and on several occasions (cfr., among all, CANTELM I 2004, pp. 35-45; CANTELM I 2, 2007). Reflections that, recently, the author has developed into a new work (cfr. CANTELM I, CARPINO 2021).

man who would be distinguished by “a new and fascinating mind model” and, above all, by “new ways of being”<sup>24</sup>.

An individual, whose salient features would have been:

- the *abandonment of the relationship* in favor of the *connection*<sup>25</sup>, which, as is clear to see, is essentially solitary<sup>26</sup> and, at times, even solipsist and individualist<sup>27</sup>;
- the *bewilderment* (and that particular sense of anguish and powerlessness)<sup>28</sup> generated by the lack of access to the network (*ITSO – Inability to Switch Off*);
- the so-called *digital narcissism*<sup>29</sup> added to the tendency to use social networks, not only as a kind of diary and *mirror of self and of one’s own thoughts*<sup>30</sup>, but also – and above all – as a kind of *thermometer* of consensus and popularity that have been reached<sup>31</sup>.

After just under ten years, as well as having to recognize that these predictions were correct, you cannot help but notice that – in many respects – they have also been overcome by the reality in which we are now immersed and with which, at every moment, more or less consciously, we are called to confront each other. As proof of this, it is enough to think that today the expression that – in a transversal way – runs through and dominates the entire Web and the different social platforms is: *Broadcast yourself!*<sup>32</sup>. A decidedly peremptory formula, which – in a concise but undoubtedly incisive and eloquent way – describes the context within which we find ourselves. A context, of which YouTube (as well as Facebook, WhatsApp, Instagram, Telegram, Pinterest or the discussed Tik Tok) are the effigy:

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<sup>24</sup> CANTELM I 2013, p. 15.

<sup>25</sup> Phenomenon - that of the progressive shift and the passage from the vis-à-vis relationship to the connection - on which Bauman has repeatedly returned. Particularly, vd. Z. BAUMAN, “*Communitas’ on sale*”, in Id., *Liquid love. On the fragility of emotional ties*, cit., pp. 81-87, where the famous sociologist states: “The advent of virtual proximity makes human connections at the same time more frequent and more superficial, more intense and shorter. [...] It seems that the most fruitful consequence of virtual proximity is the separation between communication and relationship. [...] Being connected is less expensive than being emotionally engaged, but also much less productive in terms of building and preserving ties” (*ivi*, p. 87).

<sup>26</sup> It is essential, on this point, to refer to TURKLE 2019.

<sup>27</sup> In this respect, the words of CASTELLS, according to which: “New technological developments seem to increase the possibility that individualism in the network becomes the new dominant form of sociality” (CASTELLS 2010, pp. 130-131). Furthermore, according to the concepts of *network individualism* and *ego-centred-network*, are particularly significant and interesting, the reconstructions of WELLEMAN 2004, pp. 123-129; WELLEMAN, HAYTHORNTWAITE (eds.) 2002; WELLEMAN, RAINE 2012.

<sup>28</sup> In this regard, it is impossible not to remember the comments of SPITZER, according to which at the time we happen not to have access to the Internet “[...] we feel like an insect turned on our back, shaking helplessly [and completely unnecessarily] the legs” (SPITZER 2017, p. 15.).

<sup>29</sup> Regarding the theme of “digital narcissism”, cfr. CANTELM I, ORLANDO 2005. In this regard please also see COLOMBO 2013, p. 138 ss.; RIVA 2016.

<sup>30</sup> CANTELM I 2013, p. 15.

<sup>31</sup> Hence, also that particular eagerness to the hoarding of “Likes” that – with a singular but extremely effective neologism – goes under the name of *mipiicismo* (cfr., SCRIMA 2018, p. 8; CAMPAGNOLI, 2020, p. 261).

<sup>32</sup> Cfr. LOVINK 2012.

“Youtube [in fact] offers a hospitality service, providing us with the energy to express what we have inside and the warm feeling of existence, the attestation that someone notices us”<sup>33</sup>.

Otherwise said, the one in which we move is a *techno-fluid habitat*<sup>34</sup>, that is often dominated by appearance at the expense of the essence, and in which to command are mostly fleeting and ephemeral forms of relationality based on images<sup>35</sup>. Forms of relationality, in which *analogic identity* (real, “stable”, “fixed” and, above all, “already given”) can be frequently supplanted by *digital identity* (ideal, changeable and, most importantly, “moldable” and continuously “re-moldable” at will and according to the needs of the individual moment)<sup>36</sup>. And it is precisely in this context that, as it were, all those behaviours that are not always lawful and all those potentially dangerous inclinations, which, not infrequently, can degenerate, are inscribed and find food, unintentionally giving rise to improper conduct or particularly pernicious crimes.

In fact, what, at first, could be seen as a trivial *tweet*, a *post*, slightly provocative than usual, a *private chat* designed for a limited diffusion, or a *screenshot* all in all harmless, through a simple *clik* (sending and/or sharing) can, in the blink of an eye, give life to what, in meteorological jargon, is defined as the *perfect storm*. That is to say, a very strong hurricane (in our case, of course, of a media type), which, like what happens in nature, overwhelms and is especially relentless on the most fragile points (users).

Obviously, within this perspective – as Ziccardi clearly underlines – the new media and the many digital equipment (*devices*, platforms and *apps*), which populate and accompany our daily life, can also arrive (implicitly completely unintentionally) to favor “a damage, to the person, who has no equal”<sup>37</sup>.

The reason is soon told and, if we want, it is intuitive. As in a vicious circle, in fact, when the offensive messages, or the images and/or videos, become “trendy”, are immediately shared and re-shared, thus gaining ever greater visibility, which further nourishes and extends their *doppler effect* within the Net<sup>38</sup>.

A perverse dynamic, which is also found in the possible – and very frequent – shift from *sexting* (based mainly on the limited and circumscribed sharing and voluntary exchange of images and erotic content)<sup>39</sup> to *revenge porn* (which is underpinned by an unexpected, uncontrolled and uncontrollable dissemination of pornographic content)<sup>40</sup>.

### 3.1. From sexting...

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<sup>33</sup> *Ibidem*.

<sup>34</sup> Vd. CANTELM I 2013, p. 147 ss.

<sup>35</sup> Not surprisingly, the present society is defined as the “society of images” (*ivi*, p. 155).

<sup>36</sup> “Man is no longer focused on building and understanding who he is, or what he really wants, but he uses his energies to try to be, to convince others, to believe that he really is, who he pretends to be” (*ivi*, p. 22).

<sup>37</sup> Cfr. ZICCARDI 2020, pp. V-VII.

<sup>38</sup> *Ivi*, p. VI.

<sup>39</sup> Cfr. among others, SALTER, CROFTS, LEE 2013, pp. 301-316. Furthermore, with regards to distinction between sexting and child pornography, cfr. CROFTS, LEE 2013, pp. 85-106.

<sup>40</sup> Vd. MUSCIALINI 2020, pp. 215-237.

We know, inside the *electronic cocooning* everything can be cloaked by the magic of what – for Geert Lovink – is a sort of *playful masking*: an attractive possibility to which, On the other hand, Cyberspace owes a large part of the *appeal* it exerts on its users.

Disembodied and bodiless from the physical dimension, in fact, within the Net, the *Netsurfers* – just as Sherry Turkle notes – are nothing more than what they want to appear on the screen or, better, what, in certain circumstances, they choose to let it leak, while, in other circumstances, they decide to create and re-invent in an absolutely new way and totally freed from offline reality.

Similar to the *ring of Gige* described by Plato<sup>41</sup> (the magical jewel capable of giving invisibility to whoever wore it). The digital environment, however, compared to the prodigious jewel of which the Greek philosopher speaks, also gives users something further. In fact, if it is true that, at least to some extent, on the Internet no one knows who is really beyond the monitor and the many graphical interfaces (just as, several years ago, recited the famous comic strip of Steiner according to which “*On the net nobody knows you’re a dog!*”<sup>42</sup>), it is also true that the digital environment does not merely conceal our true identities, but allows us – at any time and continuously – to reconfigure them (and to reconfigure ourselves) to our liking, to transform ourselves into everything that, from time to time, we wish to be, man or woman, young or old, beautiful, healthy, rich, established, sporty...<sup>43</sup>.

In this way – and within a few moments – the limits and defects of corporeity<sup>44</sup> and/or the problems related to the contingent dimension can be, if not completely overcome, however easily and quickly circumvented.

It goes without saying that, in such a context – where the contours are sometimes so rarefied as to appear almost dreamlike<sup>45</sup> – even all those hesitations and inhibitory brakes that, as a rule, orient our actions and stem our drives, can easily be reduced, until they almost disappear completely.

What results is a widespread tendency to de-accountability towards the behaviors and actions carried out on the Net. A subtle mechanism, which, in some ways, seems to remember – *but a-contrary* – those dynamics that have been well highlighted by Stanley Milgram<sup>46</sup>.

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<sup>41</sup> PLATONE, *Repubblica*, Libro II, 360c8-d5.

<sup>42</sup> Published string on *New Yorker* 5th July 1993.

<sup>43</sup> With regard to the possibility of showing and re-creating a digital identity that conforms and is shaped to our will, cfr., among others: FRAIA 2007; TOSONI 2008; BOCCIA ARTIERI 2009; IANNELLI 2011; PAPACHARRISSI 2011; BOCCIA ARTIERI 2012.

<sup>44</sup> On the body (and on the dimension of corporeity) perceived as a brake on our possibilities, our ambitions and our desires (possibilities, ambitions and desires to be other than what we are), decidedly suggestive and always very current, the analysis of AMATO MANGIAMELI 2007.

<sup>45</sup> In the dream world – the one in which we dream but which is also the world 'of our dreams' – it is precisely the sense of the limit itself that is lacking, as well as that of the imputability and responsibility of our actions. What follows is that, often, in Cyberspace, we have the impression that our action is immersed in a sort of *Law Wild West*: free from borders and rules (cfr. ZICCARDI 2017, pp. 7-12).

<sup>46</sup> Cfr. MILGRAM 2003.

Indeed, unlike what happened during the experiments of the well-known American psychologist – during which anonymity guaranteed and strengthened obedience to authority – the exact opposite happens within Cyberspace. On the Net, in fact, the illusion of not being seen is often accompanied by a captivating temptation to overcome any limit (moral or legal).

Hence, the possible and subtle incentive to carry out behaviors, which, if, in some cases, may be simply improper and / or prove inconvenient, in other cases, however, may even constitute offenses<sup>47</sup>.

And it is in the areas of this singular and kaleidoscopic stage – a personalized and continuously customizable stage, in which each of us feels (and believes) free to choose which scenes and which characters he wants to interpret – that the practice of *sexting* is realized. That is to say, that particular type of *cybersexual addiction* (produced by the combination of *internet addiction* and *sexual addiction*), which, usually, involves two or more subjects, and which consists in the sending (and/or receiving) of e-mails, messages or any other kind of electronic communication, which, within it, contains content and/or reproductions with a sexual background (texts, images, audio, video).

A practice (that of *sexting* and/or the so-called *domestic pornography*)<sup>48</sup>, which is widespread, both among adolescents and among adults, and which – despite having a consensual nature<sup>49</sup> – it can easily give rise to subsequent and very dangerous violations of the rights of the persons portrayed, who do not risk seeing only their right to privacy threatened<sup>50</sup>, but they can also see their fundamental rights to image, reputation, freedom and, last but not least, self-determination compromised.

What, precisely, happens whenever the materials made and/or acquired through a *sexting* – initially playful and voluntary, – are subsequently used and disclosed without their dissemination having first obtained the consent of the person concerned. That is why,

“[...] if [it is true that] *sexting* in its ordinary form (understood precisely as virtual and consensual correspondence between two or more subjects, of an erotic nature) – and more generally domestic pornography – can be considered a lawful social phenomenon, or in any case not deserving of a sanctioning treatment [...] [the same thing] cannot be said for *revenge porn*, which represents a degenerative moment of sexual correspondence and which is certainly outside the perimeter of lawfulness [...]”<sup>51</sup>.

### 3.2. ...To *revenge porn*

*Il Balcone* is the title – sadly premonitory – of an agile but very dense story by Antonio Ferrara<sup>52</sup>. At the center of the story there is Viola, a teenager who, after leaving Marco, her equally young boyfriend, finds herself literally seeing all those intimate photos flaunted on Facebook, which – in the previous months and overcoming her natural reluctance and her

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<sup>47</sup> On the different possible consequences of actions carried out online, cfr. ZICCARDI 2017, pp. 131-150.

<sup>48</sup> Cfr., among others, COTELLI 2019, pp. 1-17.

<sup>49</sup> Vd. SORGATO 2020; SHARIFF 2016.

<sup>50</sup> For an agile approach, AMORE 2020, pp. 1-38.

<sup>51</sup> COTELLI 2019, p. 14.

<sup>52</sup> Story, published in FERRARA, MATTINO 2013.



many reticences – the boy had convinced her to get done. Quite uninhibited shots, in which the young man had immortalized her when they were left alone at the lake and that he had sworn he would keep only for himself. Promise, which, however, Marco does not struggle to break as soon as Viola leaves him.

When the emotional bond between the two is broken, in fact, the transition from what, until then, had been a naïve form of *sexting* to a much more pernicious *media porn-revenge* is really fast. And it is a passage, so rapid and uncontrollable, that the girl – helpless in the face of an unthinkable and rampant over-exposure of her intimate sphere – in the end is determined to carry out an extreme gesture<sup>53</sup>.

“[...] he started, he put my photos on Facebook and the others went after him. And not only the males, not only the males went after him, no, even the females, my friends. They started writing insults, on Facebook, saying that I was just like that, as he said, one who goes with everyone. And all for photos.

[...] He swears you don't show them to anyone, I told him, swear, and he replied be quiet, love, be quiet.

[...] Marco seemed like the right one. What did I know, I, what I knew [...]. That then the photos put them on Facebook just because I left him, because I didn't want him anymore. But can she do something if she is no longer in love? Does it have to be together? [...].

[...] now I don't have a friend anymore, and this thing has been going on here for a month already. Already for a month, that I no longer sleep there at night [...].

It's cold, the air on the balcony, tonight, and, if you touch it, the railing is cold as well. One moment, you jump it and fall down.

[...] Lying here on the ground now I'm sleepy, behold, now I'm sleepy, now yes. And I feel the sleep that comes slowly and already takes me, and I look at the black black sky, and all those stars”.

The tight passages around which Ferrara's narrative is articulated re-propose – and to some extent condense – some elements that can be traced in all cases of *revenge porn* that, over the last few years, have leapt forcefully to the top of the news. Dramatic events, all, almost always united by the presence of the same and recurring behavioral *cliché*, punctuated by two different moments and/or phases.

The first phase – which implies the consensual creation of images and/or videos with a sexual background – is the one that is recorded in times to say so “not suspicious”, that is, within a couple context in which the relationship between the two subjects involved is in place and when there are not yet, nor elements of friction, nor warning signs, which can in some way prelude to the worst.

Unlike the first, the second phase – unknown, non-consensual and aimed at the publication and dissemination of compromising material – is implemented in general, by those who intend to carry out the harmful conduct.

A second phase, which – it is good to underline it right away – can be, yes, aimed at taking revenge for the rupture of a relationship (the so-called *revenge porn in the strict sense*), but which can also be, more generally, aimed at causing harm to the victim, discrediting him in the eyes of others and damaging his public image, regardless of whether or not an affective relationship has previously occurred (the so-called *extensive revenge porn*).

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<sup>53</sup> Regarding the possible heinous consequences of *revenge porn*, cfr., fra gli altri, MATTIA 2019, pp. 1-71.

It is no coincidence, especially in recent times, precisely by virtue of this second and much broader meaning, *revenge-porn* has often turned into a sort of *umbrella case*.<sup>54</sup>, to which the majority of behaviors characterized by the non-consensual and viral spread of sexual content have been traced<sup>55</sup>.

Burning and inconvenient content – which is good to reiterate – because of that incessant chatter<sup>56</sup> and that continuous word of mouth (which are typical of the Internet and, even more particularly, of social platforms), once uploaded and shared on the Net they become extremely difficult to delete and to completely eradicate.

It is no coincidence, it is worth emphasizing right now, that the protection granted to the victim is not substantiated in the complete and definitive removal of the content that has been reported, but – in accordance with what is also provided for by art. 17 of the GDPR regarding the *right to cancellation* (or, also, the right to be forgotten)<sup>57</sup> – in the so-called *de-indexing*<sup>58</sup>.

That is to say, in a remedy of a predominantly technical-IT nature that – while not involving in the proper sense the elimination of the material reported by the Web – nevertheless determines its obscuring towards users.

This obscuring translates into the unreachability and invisibility of de-indexed content, which, however, – it should be noted – are not definitively excluded from the Net, but, more simply, are available only to those who know *ex ante the reference url*.

Find, thus, application that same procedure of *Notice and put down* – which was introduced by art. 2 of Law no. 71 of 29 May 2017 (containing “*Provisions for the protection of minors for the prevention and contrast of the phenomenon of cyberbullying*”)<sup>59</sup> – by virtue of which, by

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<sup>54</sup> On the trend towards its extensive application, see, among others, also LOMETTI 2020, pp. 228-243.

<sup>55</sup> Content to which, among other things, the new devices (which allow us, at any time and wherever we are, to always have access to the Net) are contributing, to a certain extent, to “normalize”. Regarding the current “normalization of pornography”, cfr. ADAMO 2004; MENICOCCI 2014; VERZA 2015 (online at following address: [https://archiviodpc.dirittopenaleuomo.org/upload/1429694136VERZA\\_2015a.pdf](https://archiviodpc.dirittopenaleuomo.org/upload/1429694136VERZA_2015a.pdf)).

<sup>56</sup> On the so-called computer chatter, reference to the extensive analysis of AMATO MANGIAMELI 2020, in part. p. 39.

<sup>57</sup> Thus art. 17 of Regulation (EU) No 679 of 2016: “1. The interested party has the right to obtain from the data controller the cancellation of personal data concerning him without undue delay and the data controller has the obligation to delete personal data without undue delay, if one of the following reasons exists: a) the personal data are no longer necessary with respect to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws the consent on which the processing is based in accordance with point (a) of Article 6(1) or point (a) of Article 9(2) and if there is no other legal basis for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or objects to the processing pursuant to Article 21(2); d) the personal data have been processed unlawfully; (e) the personal data must be erased in order to comply with a legal obligation under Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). [...]”.

<sup>58</sup> Note, in this regard, SORGATO: “at European level the (difficult) effort to recognize forms of direct responsibility on the part of the large web environments, where information circulates without prior controls [...]. The protection that is granted is not the removal of the reported content, which in fact remains on the net [...] but only its de-indexing” (SORGATO 2020, pp. 3-38, in part. p. 9).

<sup>59</sup> For a Comment, cfr. ALOVISIO, GALLUS, MICOZZI 2017.

means of a mere keyword search, it is no longer possible to find harmful content that has been obscured.

It should then be added further, that in practice (exactly as can already be read in the order from the Court of Naples North with reference to the case that saw victim Tiziana Cantone)<sup>60</sup>, the *provider* is not required to carry out any prior check against the published contents<sup>61</sup>. The responsibility of the provider, in fact, is subsequent and arises only after the report by the interested party. This approach, to a certain extent, is inspired by the need to find a way of mediation

“between the interest of the individual not to be defamed, vilified and damaged by illegal content, and the public interest superior to that the provider, perhaps precisely to avoid being considered (co)responsible for those damages, acts as Cato and mutilates the freedom of communication and expression on the net, and for it also the right to report and criticize, pursuant to art. 21 Cost., and the right of satire and free artistic creation referred to in art. 33 Cost. [...]”<sup>62</sup>.

#### 4. Crime and legal protections

The spread of social pages, blogs and/or sites<sup>63</sup> that host sexually explicit content created and/or used for the precise purpose of harming the fundamental rights of a person (such as that to image, reputation, honor, confidentiality, intimacy, self-determination and, in general, freedom), added to the increasing difficulties and the different limits encountered in the subsumption of the various forms of *revenge porn* within the framework of the previous cases<sup>64</sup> (such as *defamation* [art. 595 c.p.], *persecutory acts* [art. 612-bis c.p.], *private violence* [art. 610 c.p.], the *dissemination of fraudulent footage and recordings* [art. 617-septies, paragraph 1, c.p.], the *dissemination of child pornography material* [art. 600-ter c.p.], *illicit interference in the private sphere* [art. 615-bis c.p.] and, not least, also *abusive access to the computer system* [art. 615-ter c.p.]), has led our legislator to the recent provision of a new *ad hoc* criminal case.

This happened with Law no. 69 of 19 July 2019 – containing “*Amendments to the Criminal Code, the Code of Criminal Procedure and other provisions on the protection of victims of domestic and gender-based violence*” (better known as the *Red Code*) – which, in introducing

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<sup>60</sup> See Tribunale di Napoli Nord, 03.11.2016. In comment, vd. BOCCHINI 2017, pp. 629 ss.

<sup>61</sup> In this sense also the recent ruling of the Supreme Court no. 12546 of 20.03.2019 ([www.italgiure.giustizia.it](http://www.italgiure.giustizia.it)).

<sup>62</sup> Thus, SORGATO 2020, p. 13. On the subject, among others, see also the observations of: LOTTA 2019, pp. 330-335; MEZZANOTTE 2020, pp. 1-11.

<sup>63</sup> Just think, by way of example, of *The Bible 5.0* – well-known Telegram channel – whose administrators have recently been unmasked and denounced thanks to the complicity of *Anonymous Italia e Lulz-Sec Italia* (cfr. *Revenge porn on Telegram channels:denounced the three directors*, in *Corriere.it*, 30.04.2020)

<sup>64</sup> On the situation prior to the reform and with regard to the previous jurisprudential and doctrinal guidelines, mostly oriented towards the extensive application of some pre-existing cases, particularly clear and – even in the summary – exhaustive, the reconstruction of LOMETTI, cit., p. 228-233.

a whole series of amendments to the Criminal Code<sup>65</sup> and the Code of Criminal Procedure, has also provided for the new crime of *illicit dissemination of sexually explicit images or videos* (art. 612-ter c.p.).

In general, the new criminal case is intended to be applied to anyone who, after the termination of a relationship (an element that, however, does not represent a *conditio sine qua non*) disseminates materials with sexually explicit content (originally intended to remain private), without the consent (and sometimes without even awareness) of the interested party. Thus, art. 612-ter, first paragraph:

“Unless the fact constitutes a more serious crime, anyone who, after having made or stolen them, sends, delivers, assigns, publishes or disseminates images or videos with sexually explicit content, intended to remain private, without the consent of the persons represented, is punished with imprisonment from one to six years and with a fine from € 5.000 to € 15.000”.

In the first instance, it must be said that we are faced with a crime of *abstract danger*, and not, instead, of *concrete danger*. In fact, in order for the present case to take shape, it is not necessary to produce a concrete harm to the victim, but it appears sufficient to carry out conduct of a diffusive nature abstractly capable of being harmful. An interpretation, this, which, however, at least for the moment, is still the subject of comparison and debate<sup>66</sup>.

Further problems of a hermeneutic nature are then aroused by the concept – decidedly vague and elusive – of “sexually explicit content”. This concept that, according to what has been observed by the Union of Criminal Chambers, could easily come into conflict with the so-called *principle of precision*<sup>67</sup>.

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<sup>65</sup> It is worth remembering, albeit briefly, that, in addition to the crime in question, three other specific criminal cases have been introduced, namely, the crimes of: a) *deformation of the person's appearance by permanent injuries to the face* (art. 583-quinquies c.p.); b) *coercion or induction to marriage* (art. 558-bis c.p.); c) *violation of the measures of removal from the family home and the prohibition of approaching the places frequented by the offended person* (art. 387-bis c.p.).

<sup>66</sup> In particular, it would not seem “[...] It is considered that the jurisprudential practice will face the problem concerning possible supplies of material that do not in themselves constitute a real danger of diffusion of the same material. Think of the case of the mere online upload, on a reserved area and accessible exclusively to the user in question, certainly materially configurable as a transfer, but completely devoid of both the suitability and the intent of dissemination. [...] possibility [...] far from remote [...] [since] it is increasingly common to use in-cloud services that allow the upload of material over the internet for the sole purpose of holding them privately [but] in an online storage space [...]” (LOMETTI, cit., p. 235).

<sup>67</sup> In the Hearing at the Justice Commission of 03.07.2019, indeed, the following can be read: “It is – once again – the semantic expression that connotes the images or videos object of protection. The reference to a 'sexually explicit' content is destined – as already pointed out – to generate many misunderstandings, whose solution, as can be guessed, is destined to be resolved by the jurisprudential interpretation, in disregard of the principle of reservation of law and exhaustiveness, enshrined in art. 25, paragraph II, Cost. On the other hand, it seems that the same formulators have grasped the aforementioned risks with the introduction of a special paragraph, indicated with the number 2, which also repeats, without adding anything, the generic and indeterminate concept referred to in paragraph 1, or that of 'explicit sexual activities'.

It is therefore considered more respectful of the principles highlighted above a specific reference to 'sexual acts' in the strict sense or to intimate parts of the person's body” ([http://www.senato.it/application/xmanager/projects/leg18/attachments/documento\\_evento\\_procedura\\_commissione/files/000/015/601/UNIONE\\_CAMERE\\_PENALI.pdf](http://www.senato.it/application/xmanager/projects/leg18/attachments/documento_evento_procedura_commissione/files/000/015/601/UNIONE_CAMERE_PENALI.pdf)).

Still with regard to the first subparagraph, a significant gap may also be noted. In fact, the standard mentions, yes, images and videos, but does not make any kind of reference, neither to virtual images, nor to acoustic recordings alone<sup>68</sup>. Aspect, which, in the future, could give rise to many difficulties of application order (except to resort to the *escamotage* of including the notion of “audio” within the broader category of “video” and flattening the much more specific notion of “virtual images” on the very general and generic one of “images”)<sup>69</sup>. Definitely important and significant – even more so if considered in the light of the particular methods of transmission/sharing<sup>70</sup> made possible by the virtual environment – is the second paragraph.

From this point of view, in fact, the new type of crime has the great merit of reserving important attention also to the conduct carried out by the so-called *second distributors*<sup>71</sup>, that is, by those who – despite not having realized or uploaded the contents published online first – still contribute to their subsequent dissemination. This, in detail, is the formula of art. 612-ter in the second paragraph:

“The same penalty applies to those who, having received or otherwise acquired the images or videos referred to in the first paragraph, send, deliver, assign, publish or disseminate them without the consent of the persons represented in order to harm them”.

Compared to the first two paragraphs – which illustrate the dual conduct envisaged by the case (that is, that of those who create the contents and / or place them on the Net, and that of those who, instead, more or less consciously, cooperate in sharing them) – the following paragraphs focus, instead, on the provision of aggravating factors and on the procedure regime.

In particular, the third paragraph provides for common aggravating factors (that is, aggravating factors that, pursuant to Article 64, paragraph 1, of the Criminal Code, involve the increase of the penalty up to a third), stating that:

“The penalty is increased if the acts are committed by the spouse, even separated or divorced, or by a person who is or has been linked by an affective relationship to the offended person or if the acts are committed through informatic or telematic tools”.

Instead, the fourth paragraph introduces two special aggravating factors, which imply an increase in punishment from one third to one half, clarifying that:

“The penalty is increased from one third to half if the acts are committed to the detriment of a person in a condition of physical or mental inferiority or to the detriment of a pregnant woman”.

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<sup>68</sup> Cfr. LOMETTI, cit., p. 237.

<sup>69</sup> *Ibidem*.

<sup>70</sup> Vd. SALTER, CROFTS 2015, p. 239.

<sup>71</sup> Figures that – often in a completely unaware and unconscious way – contribute to creating a sort of “cascade” sharing chain, cfr. MATTIA, cit., p. 3.

Obviously, in this case, the fact that our legislator has chosen to include the use of IT and telematic tools among the aggravating factors referred to in the third paragraph can immediately arouse a certain perplexity.

As is intuitive, in fact, in this case the obvious critical issues arise from the fact that – since the crime in question is almost always carried out through the use of ICT and through the dissemination of images and / or videos on the Internet or on social media – almost all forms of *revenge porn* (according to the literal reading of art. 612-ter c.p.) would always be – in *re ipsa* – already aggravated.

But that's not all, because, precisely with regard to aggravating factors, one cannot fail to underline also a further and evident limit of the case in question, that is, the absence of a specific aggravating factor in the event that the subject whose images and / or videos are disseminated is a minor.

This gap, however, can still be bypassed by resorting to the application of articles 600-ter c.p. (*child pornography*)<sup>72</sup> and 600-*quater* c.p. (*possession of child pornography*)<sup>73</sup>, or by including the minor within the macro-category of “persons in mental inferiority”, that is to say, applying the more general and generic aggravating circumstance provided for in the fourth paragraph of the article in question.

Finally, one cannot fail to mention the fifth paragraph, which reads as follows:

“The crime is punished on complaint of the offended person. The deadline for filing a complaint is six months. The remission of the complaint can only be procedural. However, proceeding shall be taken *ex officio* in the cases referred to in the fourth subparagraph and where the act is connected with another offence for which it is necessary to proceed *ex officio*”.

Paragraph dedicated to the admissibility, which was – from the beginning – the subject of perplexity and criticism, especially because of the short term (of only six months) that was provided for the proposition of the lawsuit. Term of which the excessive brevity highlighted by the doctrine<sup>74</sup> must be “reduced” because – in line with what has been underlined by the jurisprudence – the six months in question would start from the moment in which the victim has had knowledge of the sharing (and not from the moment in which the criminal conduct takes place)<sup>75</sup>.

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<sup>72</sup> Thus, the provision referred to in art. 600-ter: “It is punishable with imprisonment from six to twelve years and with a fine from € 24.000 to € 240.000 anyone: 1) using children under the age of eighteen, makes pornographic performances or shows or produces pornographic material; 2) recruits or induces children under the age of eighteen to participate in pornographic performances or shows or otherwise profits from the aforementioned shows”.

<sup>73</sup> This, in detail, the provision of art. 600-*quater*: “Anyone who, outside the hypotheses provided for in Article 600-ter, knowingly procures or holds pornographic material made using minors under the age of eighteen is punished with imprisonment of up to three years or with a fine of not less than € 1,549. The sentence is increased not to an extent exceeding two-thirds where the material held is of a large quantity”.

<sup>74</sup> Cfr., in this sense, LOMETTI, *cit.*, p. 240.

<sup>75</sup> With regard to the start of the term in question, it is worth recalling the maxim of the Court of Cassation, according to which, in similar cases, the deadline for the proposition of the lawsuit: “starts from the moment in which the holder of the relative right has certain knowledge of the fact of crime in its objective and subjective dimension, that is, from the date of the perfect offense in all its constituent elements” (Cass. Pen., Sec. IV, 21.01.2015, n. 21527).

Beyond the shortcomings and criticalities, which transpire from the reading and a first examination of the new provision of crime, there is no doubt that the new case introduced following the entry into force of the Red Code, is only one of the most recent demonstrations of how the technological society, in its incessant progress needs to be always accompanied by an attentive jurist and – what is more important – engagé. A jurist, that is, who – according to the evocative and never surpassed words of Sergio Cotta – knows how to move between the built (*jus conditum*) and the constructible (*jus condendum*), “elaborating [...] suitable regulatory instruments, continuously testing their effective operational functionality, adapting them and using them according to justice”<sup>76</sup>.

And in this sense, the recent new legislation has certainly represented an important and significant step forward towards the effective protection of rights on the Net and in the fight against a particularly pernicious form of virtual violence. A violence that it is realized through *porno-revenge*, which, not surprisingly, according to certain reconstructions – precisely because of the particular harm to the victim, as well as the many negative repercussions that are recorded in offline life – could even be considered as a variant of *cyber-rape*<sup>77</sup>.

## 5. Reflections on protection of personal data, for a sustainable use of digital and for the defense of individual rights

In terms of contrast and prevention of *revenge porn*, it should be noted that – in addition to the introduction 612-ter c.p. – recently there has been another decisive intervention by the Italian legislator with the adoption of the Decree Law of 8 October 2021, n. 139 – *Urgent provisions for access to cultural, sports and recreational activities, as well as for the organization of public administrations and in the field of protection of personal data*.

In detail, with Article 9 – “Provisions on the protection of personal data” – the legislator intervened in amendment of Legislative Decree 30 June 2003, n. 196, establishing that:

“(e) the following shall be inserted after Article 144: 'Art. 144-bis (Revenge porn). – 1. Anyone, including minors over fourteen years of age, has reasonable grounds to believe that images or videos with sexually explicit content concerning him, intended to remain private, may be sent, delivered, transferred, published or disseminated without his consent in violation of art. 612-ter of the Criminal Code, you can contact, by means of a report or complaint, the Guarantor, who, within forty-eight hours of receipt of the request, provides pursuant to Article 58 of Regulation (EU) 2016/679 and Articles 143 and 144. – 2. When the images or videos concern minors, the request to the Guarantor can also be made by parents or by the operators of parental responsibility or guardianship. – 3. For the purposes referred to in paragraph 1, the sending to the Guarantor of images or videos with sexually explicit content concerning third parties, carried out by the interested party, does not integrate the offense referred to in Article 612-ter of the Criminal Code”.

As is evident, this is a significant novelty, also because the right to report to the Guarantor is not only granted to the people directly involved (including minors over fourteen years old), or to those who exercise parental responsibility or guardianship, but is also extended to third parties.

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<sup>76</sup> Cfr. COTTA 1968, p. 192.

<sup>77</sup> In this sense, see, among others, STRIANO 2018, pp. 92-106.

The latter, in fact, are entitled to send to the guarantor images or videos with sexually explicit content (without this transmission – made for preventive purposes and protection of the interested party – falling within the case provided for by Article 612-ter in the second paragraph).

Parallel to these regulatory interventions, we must also point out the very recent activation (starting from 8 March 2021) of an emergency channel for potential victims of *revenge porn*, which was established thanks to the collaboration between the Guarantor for the Protection of Personal Data (GPDP) and Facebook.

In practice, it is a channel that allows anyone who accesses the GPDP site to report – in a secure and absolutely confidential way – to Facebook the possible violation and to block the dissemination of those videos, photos or materials that are potentially harmful.

## 5. Concluding suggestions

“*Narciso incorrigibile*” is the evocative formula to which Geert Lovink resorts to describe – and admirably condense into very few words – the elements that distinguish our approach to the world of the Internet and, in particular, of social networks.

*Habitats*, decidedly easy-going and attractive, within which each of us has free access to the so-called art of *self-design*. An art, thanks to which – as the famous scholar of new media points out – everyone is in a position to draw and re-draw at will and infinitely his image on the Net<sup>78</sup>. Hence, two fundamental consequences.

The first is that, precisely by virtue of this possibility, the virtual dimension risks being, not only chosen over the real one, but also, so to speak, absolutized. This is why – as Lovink explains – you can have the impression that, in the absence of connection and outside the smartphone and social media, no more self is given. Almost as if, the moment we emerge from the virtual context, we put an end to our own social existence<sup>79</sup>.

“The selfie incorporates the desperate attempt by the ‘failed individual’ to show that he is still able to compete. [...] [Almost if, through it, you wanted to say:] ‘I am alive, do not forget me, look at me and think of me [...]’”<sup>80</sup>.

The second consequence – specular and directly connected to the first – is given by the fact that, when our image and / or our digital reputation are affected, we accuse a sense of loss and widespread and absolute disorientation, which spreads far beyond the virtual environment and whose consequences also reverberate in the real dimension.

This situation touches the height of negativity precisely in *revenge porn*, where the intimacy of sexuality – a symbol of free, spontaneous, and gratuitous gift of self to the other – is transformed into an act of prevarication, violence and domination over the other<sup>81</sup>, and in

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<sup>78</sup> Cfr. ELER 2013.

<sup>79</sup> LOVINK 2019, pp. 119-131, in part., p. 120.

<sup>80</sup> *Ivi*, p. 121.

<sup>81</sup> On the dual value of sexuality: positive – as a gift of self to the other – and negative – as domination over the other – reference to the refined and fascinating analysis di F. D’AGOSTINO, *Sessualità. Premesse teoriche di una riflessione giuridica*, Torino, Giappichelli, 2014, in part. X-XI.



which pornographic nudity, exposed to the sight of anyone and without any filter or mystery<sup>82</sup>, it is transformed – as Byung-Chul Han observes – into an authentic act of desecration, not only of eroticism, but also, and above all, of the relationship itself.

A relationship of which, however, the aftermath can echo on the Web, just as, according to the myth, the voice of *Eco*, the unfortunate nymph madly in love with *Narciso*.

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<sup>82</sup> With regard to pornography as an act of desecration and degradation, the reflections of BYUNG-CHUL HAN, *Porno*, in *Id.*, *Eros in agonia*, trad. it., Milano, Nottetempo, 2019 (Kindle).

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