



INVESTIGATING EMPLOYERS' CIVIL LIABILITY IN CYBERSPACE

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ABSTRACT

As a global phenomenon, the internet has caused various legal issues to come about in various countries around the globe, including our country. There are many efforts made by the jurists and legislators of some of the countries for the resolving of the issues but the internet law is yet to be sufficiently sophisticated and it is currently in a state of formation. According to article 1 of the civil liability law, hurting the life or property or prestige of individual(s) and causing them to incur losses is also possible in cyberspace. Civil liability regulations do not consider a certain type of loss and they generally aim at provisioning and compensating all of the imposed losses, including the losses caused to the body or fame or property of a victim. The present article deals with one of the most important and most prevalent legal issues of internet, to wit civil liability of internet operators and it also considers one of its sub-branches in the area of transportation (for example, software, snap, TEPSI and so forth). Transportation has always been an important issue and it has not become twice as much important for the internet system's entry of the arena and, considering the uncertainties and gaps in the current regulations in this regard, the elaboration of the issue is undeniably necessary.

Keywords: civil liability, virtual space, transportation, internet systems, transportation software, private law

INTRODUCTION

The civil liability of the internet service-providers, in its general sense, can be divided into two types of extra-contractual liabilities and contractual ones with the explanation being that it is occasionally the case that the internet service-providers per se cause the imposition of loss on the others and it seems that this type of service-providers' liabilities are well clear. The same way that all individuals are responsible for what they do, the internet service-providers should also remain accountable to the damages they cause.

Foundations of Civil Liability in Cyberspace:

Although fault-based civil liability is deeply rooted in Iran's legal system in such a way that some jurists know fault as the most important premise of civil liability actualization (Katouziyan and Naser, 2003a) that has also been supported by this intellectual principle that everybody is responsible for what s/he does, the mindset has been growing since a decade ago that the mere relying on fault as the necessary pillar of civil liability actualization is not always sufficient (Katouziyan and Naser, 2003b). Of course, no tangible trace of obligatio ex delicto satisfying the fault theory as the single and unique basis of civil liability can be found in jurisprudence except for certain cases, including the liabilities of the owners of wall and animals or fire starters or, generally, in conversion of a trustee to a guarantor.

Article 307 of the civil law exclusively specifies the resources and causes of liability actualization. Therefore, the action subject of civil liability is mostly an example of cases mentioned in the article except in case of usurpation that, as believed by jurists, differs from civil liability in terms of basis and realm of verdicts. The question is that whether these resources can be generalized and matched to cyberspace or not and whether the actions perpetrated on cyberspace can be elucidated within the format of resources cited in the aforesaid article or not? The ideas are different in this regard:

Wastage:

Article 328 of civil law stipulates that “should anyone cause the wastage of a property, s/he is held liable and should provide the owner with the exact example or price thereof, including intentional or unintentional wastage and also including it being an objective property or interests thereof; and, if the property is defected or rendered imperfect, the person is held liable to the correction of deflection”. Property is a broad concept and includes superstructures, interests, rights and definite expectancy damages, as well. Rights are also divided into certain types incorporating an individual’s right over the physical integrity, familial prestige or business fame or individual freedom as well as the other relevant rights. In wastage, the direct, or as termed by jurisprudents “in active complicity”, destruction of property is intended whereas the cyberspace is essentially a type of space wherein the direct and immediate relationship, as commonly considered, cannot be actualized. However, it has to be figured out that whether the civil liability actualization is essentially possible in terms of wastage in cyberspace or not? The discussion becomes useful when it is noticed that wastage and causation are two independent sources of civil liability in Iran’s laws and the regulations and conditions of these two origins have been different for the civil liability actualization from the past. For instance, in respect to causation fault, as opined by some jurists, is the pillar of liability actualization and, without it, civil liability cannot be seminally actualized in terms of causation, while in regard of wastage, fault of loss cause is not needed for the civil liability actualization (Katouziyan and Naser, 2003c). It seems that some of the harmful actions can be realized as examples of wastage in cyberspace, including copyright and trademark violations (Malakouti and Rasoul, 2016).

Causation:

In regard of causation, the loss cause is the factor directly associated with loss incurrance. In cases that a user causes the destruction of the security or information system of a third party via, saying, dispersion of a virus, the latter is to be regarded as the factor linking the hacker to the imposed loss and, resultantly, the hacker is to be considered as the cause not the agent whose actions are encompassed by article 331 of civil law.

Foundation of Intermediary’s Liability:

Internet mediators can perform two sets of harmful actions: they are either per se agents causing the loss or their service-providing causes the imposition of loss to a third party by other agents, users. Some believe that fault should be considered as the ruling construct in cyberspace, in general and similar to the real world, in respect to the intermediary internet liabilities, including the ISPs because they play the sole intermediary role and our legal system considers trustees the intermediaries, such as brokers, middlemen and transportation operators who mediate an action and they are to be held liable only based on fault (Sadeghi and Hussein 2010). Of course, more than being a result of comparing the roles of ISPs and real world



intermediaries like brokers and middlemen, such a perception has come about in consideration of the secondary role and ancillary causation originally assigned to the brokers in perpetration of harmful actions. That is because the ISPs cause the loss imposition and they are not deemed as accomplice and, corresponding to a well-known theory in causation, the existence of fault is the factor giving rise to the liability actualization. So, their liabilities are generally based on fault theory. Moreover, article 78 of electronic commerce law, passed in 2003, stipulates that “should losses be caused to individuals in electronic exchange grounds as a result of the defectiveness or weakness of the private and state institutions’ system, in any case other than physical disconnection of the electronic communication, the aforesaid institutions are responsible for the compensation of the imposed losses unless they are found stemming from the personal actions of the individuals in which case these individuals are responsible for the loss compensation”. It is understood from the appearance of the article and its first part that fault is the necessary element for the liability of internet intermediaries that are per se of the electronic intermediators (institutions) type and, of course, it differs depending on the intermediary’s type of activities. As an example, a fault might be proved via justifying the defection and weakness of the security system of an ISP that has led to the leaking of the users’ confidential information or the infiltration of a third party thereto. In common law system, as well, especially following the enactment of the millennium digital law, the dominant procedure considers the exemption of internet intermediaries in regard of damages caused by users to third parties. Disregarding the result, the notion is to be given a second thought in both regards, i.e. comparison of the internet intermediaries and ISPs’ functions to those of the brokers and middlemen and also the role of ISPs in terms of mere causation.

However, it can be stated in regard of the role of ISPs in imposition of loss in cyberspace that they should not be not only considered as the indirect cause of loss but also as the ones paving the way for loss imposition and the ISPs’ role can be clarified as predisposing factor in jurisprudential terms not the cause (Allameh Helli, 1999). It means that the ISPs are the entry point and prelude to the others’ stepping into the cyberspace and the cyberspace, with all its characteristics and expediencies, is made available when ISPs provide the users with access thereto. On the other hand, ISPs are the unique way of entering the cyber world. Therefore, the role and performance nature of the ISPs cannot be compared with “cause” in law world in this respect. Assuming the consideration of ISPs’ role in cyberspace as a cause, it cannot be stated that it is the very meaning assigned to cause in the real world. In real law world, cause is the thing the absence of which provides for definite nonexistence of a causer but its presence renders its existence likely (Katouziyan and Naser, 2003) whereas the ISPs’ actions, to wit their performance or, better said, offering of internet access, naturally neither cancels the civil liability nor makes it likely rather it only sets the ground for the entry of others to a space that is full of variegated transactions hence it is to be envisaged as a predisposing factor that, in itself, has no role in the actualization or prevention of loss.

Liability Foundation of the Content Producers and Providers

The foundation of the civil liability of content producers and providers is somewhat different (Malakouti, Rasoul and Savara’ei, 2016). It has to be noted in regard of the liability of this set of cyberspace players that whether the nature of the legal actions by the content uploaders in cyberspace in such a way that it can per se cause the imposition of loss hence needless of another appending pillar or the users’ referring to the uploaded content and information is the



completing pillar of loss imposition? As a specimen, can it be an example of loss when a work, such as a piece of music or film or a book, is supported by a person and it is placed on a website or weblog without authorization in such a manner that any visitor can download the work upon referring to the website while no user has yet visited the site and has not seen the breached work? Or, in case that an individual places the private photos of another on a website, can it be stated that the mere uploading of the photos has caused the imposition of intellectual property loss?

The doubt lies in the idea that cyberspace is silent and passive and it does not automatically display anything as long as no user has entered it and clicked on a certain item to request its receipt and watch it on a computer. In fact, the loss cause exposes a law-supported work to violation or discloses the secrets of others' lives. In regard of the actions by this set of cyberspace players, it has to be stated that the mere performing of such an action, whether visited or not by the others, actualizes civil liability for them and their civil liability is not suspended on the demonstration of the work by the third parties the same way that the mere exposing of a law-protected work to violation causes absolute liability of the doer in England and US laws even if it is done unknowingly (Malakouti and Savara'ei, 2009). From another perspective, it might be said that the content providers solely provide the other users with access to the information and they predominantly play no role in the offering and promulgation thereof and the information is voluntarily made available to the users, so the information providers are not to be held liable (Afzali, 2009). But, the idea is not true in that although the illegal contents, like pornographies, are not transferred to the users without being requested by them and, in this process, the users' wants and actions are even the primary factor of their access to them, this cannot be a defensive shield for those who have provided accessibility of these contents to be used by the users. For example, the subscriber to the services of a host who owns a website or weblog offering children pornographies to be watched and even stored by the users cannot be exonerated from liability by claiming that s/he has had no role in the dispersion of them because his or her primary intention has been providing access so s/he cannot be exonerated from liability by stating that s/he has only provided the users with access to the content and secondly the request to watch such content and information by the final users and, in another sense, their actions do not cause the cessation of causality relationship between the actions of the website owner and the output, i.e. others' access to this information, because based on a cause and effect relationship, the users could have not had access to these contents if s/he had not offered them and if s/he had not authorized access to them.

ISP firms and institutions and users are responsible and held accountable to the contents they themselves offer on a network¹. In this statutory provision, the mere offering has been realized as the cause of liability of the content providers and the separation between such expressions as "exposed to violation" or "offering or access" have not been taken into account².

Liability of Internet Service Operators in General:

¹ The procedures of units offering information-provisioning services and internet, approved in 2001 by Supreme Council of Cultural Revolution

² Article 74 of the electronic commerce law, as well, has considered the effect of two actions of "offering and promulgation" of others' works in cyberspace identical in actualization of the material element.



Internet is considered as one of the most important innovations of mankind in 20th century. The communications are supplied in this virtual highway by a great many of the intermediaries. These mediators provide the users with access to the network and/or provide them with access to many facilities after connection and it is by means of these same facilities that the users can send their information to anywhere and anyone. In the jargon of computer terms, these intermediaries are called internet service providers or ISPs in short and/or generally service providers. In sum, these service providers enable the users to access the internet or internet-based services. The topic discussed herein, to wit civil liability, is, of course, pertinent to this general meaning of the intermediaries.

Internet Service Providers:

The individuals who seek access to internet and make use of the facilities existent therein should find ways for accessing this world wide virtual web and using its facilities. Some individuals, especially commercial companies, can directly connect to the internet. However, due to the expensiveness of such a type of access as well as its monopoly by the government³ and/or large commercial companies, many of the small firms are incumbently forced to make subscriptions to the providers of commercial internet services⁴ for accessing the internet and making use of their services. The internet service providers receive certain sums in exchange for subscriptions to the internet and other internet services like having an electronic mail account, hosting and so on.

From the perspective of the regulations related to the internet service providers, two procedures have been so far enacted by Supreme Council of Cultural Revolution in 2001 in Iran's laws, namely "the procedures of the method of offering information-provisioning services and internet" and "the procedures of the units offering information-provisioning services and internet". The interesting point here is that, due to the diversity of the decision-making authorities and ambiguousness when enacting these two procedures, we have repeatedly inflicted with confusion and amazement and it was so until the formal website of the radio communication and regulation arrangement organization divulged the secret because it vividly pointed to this first procedure as "prior procedure"

Based on the new procedure that presents an exact repetition of a part of the prior procedure's introduction and states that "ISPs provide the connection to information-provisioning network and internet and are necessary component of access and connection of individuals to internet network", the offering of such services as preparation, production, distribution or offering of information and provisioning of access possibility as well as the preparation and processing of contents for the users are enumerated amongst the most important activities of the ISPs.

³ Procedures of the method of acquiring international contact point license grants a monopoly to the government for creating international contact point. Article 3 of the procedures on the supply, distribution and offering of internet services and national internet also knows the government as the supplier of internet and states in the definition of supplier that "the supplier of bandwidth for establishing communication with internet network via international gateways" and, according to article 1 of the procedure, the supplier of communication can only be provincial telecommunication companies or infrastructural communication firms and/or any other agent company being licensed with the establishment of communication.

⁴ Of course, governmental organizations and academic and educational institutions, as well, are connected to the internet with the difference being that they do not offer services identical to the commercial internet service providers.



It is clear from the first part of the procedure in defining the ISPs that this part embraces offering of internet access and connection services and the second part deals with defining the providers of the other services, whether by the ISPs themselves within the format of content provider or distribution, transferring and storing of information for the user.

The formal definition of content has been offered by paragraph “a” of article 1 of “the procedures of organizing and developing digital media and cultural activities”. According to the paragraph, content includes “visual and auditory materials and/or a combination of them in any shape and format”. Furthermore, the procedure calls “publication of content (data)” on the internet as digital publication and defines it as stated below:

“Exposing data to the sight of the general public via digital media that is classified as digital carrier publication and online publication” (paragraph D of article 1). “Digital publisher”, as well, is any real or legal person who is authorized to get involved in digital propagation as deemed qualified by the ministry of Islamic culture and promotion or as ruled in the related laws”.

The former procedure, as well, stipulates in paragraph 1 of article 1 that “internet service provider and information service provider or ISP, in short, includes the companies and/or institutions and centers offering information and internet services”. It also deals in paragraphs 2 to 7 of the same article with the definition of some internet service providers as well as some specialized terms. The procedure explains in its article 5 the sample of the duties and services of the internet service providers⁵. All in all, it seems that both of these procedures are superior to one another in certain regards though none of them appears fruitful in respect to subject investigated herein⁶.

From the perspective of foreign regulations, based on “the law on the author’s right as stipulated in the digital millennium copyright act passed in 1998 by the US”, service providers “include the institutions and/or companies offering services for the transferring of information and/or deliverers of access and connection services for digital online communication between the users based on their subscriptions and/or the institutions and companies offering information selected by the users without making any edition in the content of the information and sending and receiving information exactly as they are sent and/or received and/or the companies or institutions offering online services and/or access to the network and/or delivering services existent therein”. It has been intended that the definitions be so vast that they can incorporate the universities and the other educational institutions offering internet services to the students, researchers and the others.

⁵ Article 5: the example duties of ISPs are as explained below:

5-1) offering the set of value added offline and online services to the users

5-2) providing access as well as preparing and processing of content for their users

5-3) performing various kinds of activities for making users acquainted with the optimum use of information and internet networks

5-4) providing services, preparation and production and distribution or offering of information to their customers

5-5) assisting and offering ways for solving the software and hardware problems of the ISP applicants

⁶ It is worth mentioning that the law on computer crimes passed in 2009, as well, in a part thereof points to the liabilities of service providers. However, it is more related to the duties of the ISPs for filtering and legal mandates originating from non-performance.

Concept and Kinds of Civil Liability of Internet Service Providers:

Overall, civil liability of ISPs, in its general meaning, can be divided into two parts of extra-contractual and contractual liabilities with the explanation being that it is sometimes the case that ISPs themselves cause the imposition of loss to the others and it seems that the meaning of this type of liability of the service-providers is well-clear. The same way that every individual is responsible for what s/he does, ISPs are also to be held liable for the losses they themselves cause. As it was mentioned before, ISPs can create and distribute contents on the network and, in other words, they may content providers or creators. Part 230 of the US's communication health law has the following statement in defining "information content providers": "any individual or any company who is responsible for creating or spreading information on the internet and/or in any other computer service is called information content provider". Based thereon, ISPs are liable to any violation or loss that is caused by the offering of the content, whether be it desecration or defamation or dispersion of computer viruses, unauthorized access, wastage and usurpation (which is an example of ISPs' extra-contractual liabilities for their harmful actions). Alongside with such a type of liability, there is another liability that can be defined with this introduction that "as it is known, any harmful action by one (or several) factors has one (or several) victims and it does not differ if it occurs on the internet or in the outside world. But, on the internet, the establishment of an internet communication is made possible when there is a third person, separate from the communication establisher and receiver and this third party is the very ISP. Therefore, performing of a harmful action on the internet cannot take place without the involvement of ISP that renders communication feasible and it does not matter if it is aware or unaware of the harmful action. Thus, it has to be noted, unlike the view held by some legal authors⁷, which the majority of the losses caused on the internet are not caused by ISPs but through their intermediation by users. Based thereon, the investigation of the ISPs' liabilities in this state (i.e. performing of harmful action by the users) is of a great importance because the role of ISPs, quite contrary to the abovementioned type encompassing the content providing and content creating, in this state, is offering services more as a gateway for the users' information (liability of ISPs for the harmful actions by others). Of course, it is possible that the service provider in some cases of content providing and also in some other cases serves only the transferring of the users' information. Another type of liability that can be posited regarding the ISPs is their contractual obligations. It has to be firstly noted that the realm of this type of liability is more limited in comparison to contractual liabilities because it comes about as a result of breach of contractual obligations in the course of offering services between service providers and subscribers. However, the justification of the existence of contract for the verification of the pillars of contractual liabilities on the internet space would not be easy in all stances.



CONCLUSION

The most important gap in the cyberspace is the absence of law and statutory provisions in this regard. Considering the existence of civil laws, jurisprudential histories and the works that have been done regarding adjusting them to the foreign laws, the civil liability area is rich in terms of theory but appropriate rules and regulations matching the needs and expediencies of

⁷ Ansari, (2007), p.253

virtual space are required. The legislator should first of all enter the arena and, meanwhile paying attention to its expediencies, makes it clear in separate that who are the virtual space users and on what basis, axiom and theory can their civil liabilities be specified depending on their functions.

SUGGESTIONS

The cyberspace rules and regulations are missing in developing countries; the legislators' ideas about the operators' contracts are well clear in regard of civil liability; it is now time for enacting novel regulations in regard of cyberspace as a newly emergent phenomenon that is growing day in day out.

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