

Civil liability in Cyberspace

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Abstract

Today, there have been enormous changes in technology and we have witnessed great revolutions in the field of information technology during recent decades so that they influenced human life in many aspects and among them internet is a connecting factor and a world phenomenon which leads to information transfer in the shortest possible time in contemporary era. It is clear that law should be transformed according to development of technology. The modern technology requires dynamism and new law. There have been lots of attempts by legal professionals and legislators of developed and developing countries to remove existing problems but these laws have not been enough matured yet and it is forming. Therefore this study, deals with legal rules in developed countries and Iran about civil liability in cyberspace, harmful act and liability including from harmful act and causative relation between harmful act and the created loss.

Keywords: Cyberspace, Civil liabilities, Harmful act

Introduction

Cyberspace is a word prevailed during a few recent years. It represents spaces of computer networks. The most symbolic network is internet. Spaces which these international networks create are virtual and intangible spaces known as cyberspace. Civil liability sustained through act of each person to communicate through internet and enter in cyberspace with different titles and purposes, if others right or benefits are lost, which person or persons on what basis must be required to redress. There are lots of questions which strike minds: If ownership relation arise between human and what is in cyberspace? If data and information related to a person are per se considered as property? Who is responsible when information is robbed? If the responsibility is individual or partnership? If the responsibility is based on fault, risk or right justification? These are questions which judgments related to civil liability including from internet communication shall be responsive and particular identity of this liability is separated from other kinds of reliabilities through these responses.

1. Concept of Loss & its entrance to Cyberspace

Loss is defect on property or losing certain benefit or damaging on individual health, honor and emotions. Generally they are divided in two categories of material and spiritual groups (Katoozian, P. 219). The goal of rules in civil liability is always to offset losses on loser whether he/she have loss of honor, physical or property. But loss which is imposed on cyberspace is which kind of these losses. Statistical studies show that most cases related to civil liability in cyberspace are related to intellectual property violations and the least internet losses is leaded to physical harms. Imposing spiritual losses on individuals is also common in cyberspace (Michael.Rustad Thomas, P. 356). Insults toward individuals in websites, weblogs and imposing damage on business reputation and privacy violation are through spiritual losses in cyberspace. In civil responsibility, presence of loss is a pillar of civil reliability so a loss shall be created until its reliability is considered. It should be mentioned that property in cyberspace is not intangible but what existed are electronic data belonging by individuals. The origin of doubt is that cyberspace is a passive space so that if there is not any user to click on a specific profile to ask something, nothing is shown automatically. In other words, those who impose loss, subject something protected by law to violence. In England law, subjecting a case protected by law to violence, impose certain liability for the subject even he/she has not been aware of the issue (Graham. P. 45). This view also is seen in judicial decisions issued by law of USA and its rules which is based on certain protection toward authors. Therefore, it could be said that entering harmful content in internet creates liability per se and its act ascertains loss entry.

2. Harmful Act in Cyberspace

According to civil liability law, a person is sentenced to offset a loss when he/she commits a violation so that loss is imposed on someone. By virtue of the theory based on fault of respondent, a claim has civil liability of loss offset when he/she commit a violation in his/her action it means that, if he/she causes loss when doing reasonable act, he/she is not sentence to compensate. However according to the theory based on risk, harmful act create civil liability and fault is not required. Some behavior in cyberspace is intentional and some is unintentional. In the following we deal with some example about harmful act in cyberspace:

2-1. Destruction and Disruption in Data & Computer Program

One of the ways to harm others in cyberspace is destructing and disrupting data or computer system. For example destruction of data is occurred when a person design a program to destroy data existed in others computers. On the other words, a subversive program disassembles logical order of data so that make them useless without removing them. Disruption of computer system is so that exploitation and proper and desirable application is taken from computer. For example importing virus to personal computer causes automatic start or shut down of computer or harms hardware (Fazli, P. 172, 168). Destruction and disruption of data and systems are majorly through computer virus and worms' attack.

With regard to civil law, civil liability law and Islamic punishment law in Iran legal system, civil liability of hackers can be presented by documented and substantiated reasons.

1. In article 328 of civil law, others property loss is forbidden and it is cause of liability; certainly as data are valuable, they can be considered as property and loss can be occurred in all rights of beneficiaries without regarding their subject. Sometimes hacker imports virus into internet network which harms software data of individuals; in this case hacker is actor. Sometimes virus is medium between hacker and imposed loss. Therefore, hacker is causative. In this case article 331 of civil law can be used. The difference between causation and lose rules is important in our discussion as in loss, fault is not a condition for liability but in causation, the act of causative shall be criminal. Also in loss, a person impose loss directly on others property while in causation, situation is prepared for loss so it is likely that this preparation leads to weather loss or ineffective result (Katoozian, P. 217).

2. About the activity of hackers, with regard to article 1 of civil liability law, it could be said that if we cannot conclude their act toward destroying, distortion and disordering computer data and information in article 328 civil law, with referring to this law we can conclude hackers' actions in loss of property, honor or business reputation or other rights which is created by law for individuals.

2.2. Evidences of Authors' Violation of Law in Internet

A) Internet Service Providers

Violation of law toward an author in internet occurs when exclusive right of a creator is violated during internet connections. Among these rights, prevention from reproducing or copying a work can be mentioned. In addition, the major issue is copyright violation by internet service providers. Internet service providers are institutes which provide the possibility for users to access and connect with internet (Aplin, P. 2). They provide internet services in return for payments by clients. Internet service providers' responsibility on their activities toward their clients is usually based on their awareness about clients' activities. If they are not aware of activities by their clients, many foreign courts tend to know them responsible for their behavior. Therefore, activities of internet service providers are based on two theories: Participatory or relative violation and responsibility included from others activities. They are responsible even if they do not participate in copyright violation (Maitre Cahen P. 3 of 10).

B) Peer to Peer System

Authors' violation of law in cyberspace has been more modern and complicated. For example users violate authors' right through peer to peer system. Peer to peer system is an internet activity which users connect with each other without using Intermediary server (Computer anatomical culture, P. 582). This technology permits users to share data and files and access different audio and text files. In fact, each user has files in their pc which provide the possibility to connect with internet. What is important is that "who is responsible?" The solution is that service providers are responsible of imposed loss. In USA, there are cases of copyright violation through peer to peer system and verdict has issued on them. Napster case which is a peer to peer network has been responsible based on others act and participatory reliability as court. The court argued that Napster could create limitations for users so that they had less access to things protected by law, in addition, Napster obtained financial benefit from this violation. Therefore, it is responsible for its users and clients' activity (Graham J. H. Smith P. 46).

About violation in author's right in Customary legal system, a work is violated when its basic part is copied or attributed to someone else but if basic part of a work is not violated then it could not be said that author's right is violated (Ibid. P. 27).

There is not any doubt to accept responsibility including from fault as a rule in Iran legal system according to article 1 of civil responsibility law; therefore the necessary element for responsibility of agents is fault. Also in article 78 of e-commerce law, violation or weakness of privacy or public institutes systems is considered as fault; therefore, if it is established that loss is included due to weakness of internet service provider system in data security or their privacy or weakness of system to prevent publication of unauthorized work or violation of others copyright, then the agent which is customary, religiously and logically expected to provide a system to prevent loss or its exacerbation is guilty and responsible by virtue of article 78 of mentioned law and article 1 of civil liability law. Violation of author's right includes some exceptions which are discussed in related claims known as fair application and as complete defense (Iance-Ballon P. 738).

2.3. Violation of Right including from Trademarks

Registering trademark by a person creates exclusive right for him/her which right of sign application on offered goods and services by him is the most important of them. But when does trademark violation happen?

1. When a certain person apply another commercial-sign on his/her good and services and know him/her as its owner, then the issue is subjected with dispute resolution rules related to trademark which is different in countries. In Iran, at the time of Sign Registration & Patent Law in 1931, the one who registered trademark was its owner even if someone else had previously used it (Article 2). In Some countries the one who uses trademark for the first time is the owner (Graham.J.H.Smith, P. 73).

2. In another situation a person does not use the exact trademark on goods and services but uses a sign which is seductive so that it can be imagined by people that it is the product of that famous company. To prove seduction in USA law, courts consider some cases including: General similarity of two trademarks, homogeneity of products and services which trademarks are applied on them with goods and services of the major producer, degree of reputation of complainant, real seduction of users while using seductive trademarks. Here, it does not mean that using trademark by complainant shall seduce users but just using trademark so that seduces users is matter whether other factors exist or not. Probability of loss in production development: this factor is considers with regard to the amount of loss imposed on complainant in order of using trademark by respondent. It should be mentioned that some writers have complained about mentioned cases as they are similar to each other and in most cases overlap each other (Julietal. Lerner P. 235). In violation of trademark, at first, complainant shall prove that he/she is the owner of a sign and use it. Secondly, he/she shall prove that respondent has used the same trademark while distributing or selling good or offered it for sell or for his/her good or services' advertising so that seduce users (Ibid, P. 235). In state law in e-commerce, trademark violation has been predicted and punishment has been considered for it.

2-4- Violation of Law including from Domain Names

Names of domain are simply internet address which website owners choose and register it as their own address. These names can be generally divided as domain with public postfix and national postfix. The last part of domain name may have another part which is placed at the right side of site's name so that direct client toward web pages (Luke A. Walker P. 292). Internet domain names are very similar with trademark. They are internet address and their major role is directing toward a website. Therefore, address of a site identifies that site and they are not separated from each other in people view. While commercial institutes choose an address for a website, the address enjoy another role in addition of having the former function which is very important as clients gradually know a commercial institute with that internet address and not just by company's name. Therefore, domain names like trademarks are for a commercial company or institute and their goods and services (Graham J. H. Smith P.83). For this reason, writers mention domain names as a new type of trademark and they try to solve related issues such as their violation through laws related to commercial sign (Kneeeth Sutherland Due er P. 483 & Julietal P.84).

It may that domain names are misused like trademarks and impose loss for its owners such as fraudulent actions "Cyber usurped" in domain names (Graham J.H. Smith P. 156). Therefore, cyber usurped are responsible against loser.

2-5. Civil Liability including from Unauthorized Links or Connections

A) Definition of Link

Link is just included connection between content of two different file or between different parts of a single file. There are at least three kind of connection in the internet: 1. HREF, 2. IMG, 3. It is created through key words. For example it may that designer of a website use from the expression "Stars war" to connect with a site (Mark Sableman P. 1278).

B) Evidences of Unauthorized Links

1. Selling goods by others name: Sometimes a company or a businessman introduces and sells his good with the name of his competitor's name. with regard to the daily increase of e-commerce, offenders can misuse technology and sell their goods by the name of other companies. This actions are illegal and the will receive liability including from it)Ibid, P. 128).

2. Violation of trademark: Explanations related to violation of trademark has been mentioned previously. Here, we add that any kind of linking which direct users to think that creator of an internet page is depended with the owner of a trademark or is certified or protected by it will be lead to the claim of violation of trademark (Ibid).

3. Lie advertisement: Good and service advertisement through public medias, are one of the factors of success in business. Many of commercial advertisements are not real. This kinds of advertisings have many consequences. This action in trademark law of America is known as "Lanaham" which is severely forbidden and creates liability for advertiser (Ibid, P. 1281).

4. Violation of writers' right: Connecting to other site also can lead to violation of writer's right. This violation is

occurred when website owner connect its visitors to a site which have protected works by law. Sometimes website owners connect visitors with sites which distribute protected works by law illegally which they are liable for violation of writers right (Graham J. H. Smith, P. 45)

2-6. Violation of Privacy in Cyberspace

A) Definition of Privacy: one of the other area of liability in internet connection is violation of individuals privacy. The purpose of privacy is a domain of individual life which they are not willing that other enter or aware of them without permission. On the other words, that part of individual's life which is owned by them regarding quality and quantity is called privacy (Karel Housman, P. 42 onward). Privacy of information is the first right of individuals to keep their personal information private and prevention from illegal process and publication of them (Hasani, P. 18). Personal information are divided in two categories:

1. Sensitive Personal Information, 2. Public Personal Indormation

Sensitive personal information states completely private and individual aspects of life. Public personal information are other no sensitive information (Aslani, P. 124).

B) Privacy in Internet connections: Individual Privacy in internet connections is violated especially through releasing personal information in internet. Also others illegal access to personal information by internet connections is other evidence of violation of privacy in mentioned networks. The Law Reform Commission of Hong Kong say that with regard to this matter that post electronic provides republication and redistribution of personal information in large group of people, the loss imposed by information publication in internet is very high in compare with their publication in a local newspaper or magazine (The Law Reform Commission of Hong Kong P. 2-59).

2-7. Desecration

Desecration is a content which includes evidences such as defamation, insult and roorback. In other words desecration is unreal expression about a natural and legal person which imposes loss on reputation of that person in society (Web Site Legal Issues P. 4 of 6). In local law, insult, by virtue of articles 609 & 608, defamation, by virtue of article 97, and roorback, by virtue of article 698 of Islamic punishment law are crime. In such cases, more loss is imposed on the addressee and the loser can claim about his loss following criminal issue in criminal law or separately in legal court. About the insult and defamation toward others, in addition of offensive contents writers' liability, liability of publisher is a matter too. In customary legal system about publication of offensive contents, all those who participate in publication or issue its license are responsible in terms of criminal and civil.

Publishers are divided to major & secondary: the major publisher is absolutely responsible. Secondary publisher is distributors which can prove that they were not aware of content in books or newspaper and if they prove, they are not responsible (Graham J.H. Smith P. 172-174).

However, internet service providers cannot even have enough supervising on their clients' action or being aware of published contents by them due to exuberance of their users. Due to this reason, there is not a decisive view in judicial process of England & America. In England, in Godfrey claim, court execute this rule about internet service providers and made it responsible. But in America, in Loni claim, court did not made internet service provider responsible and did not considered it as publisher (Ibid P. 173).

Conclusion

In general, it could be concluded that in addition of many advantages of technology of internet, it provides ways for misuse and loss for others so rules and law in civil liability shall provide many compensation for predicted and unpredicted losses which is the greatest problem of courts to determine basic of reliability. As it was mentioned, different theories such as theory of reliability based on fault, theory of absolute responsibility, theory of participatory and relative violation and theory based on risk and ... could be all base of responsibility. But what is the most important base of responsibility in present local legal system in this relation, is fault theory. Even new approved rules such as Digital Millennium Copyright and Instruction of Europe Council about e-commerce are intended toward it. With this description, fault is the only unique and exclusive base for reliability. Therefore, always there was also a trend to reliability without fault and its main reason is to protect loser. In civil liability issues in cyberspace, as it was mentioned, different individuals have responsibility which responsibility of internet service providers are more considered with regard their job description. With regard to their role in network such as applications to purify or omit contents, they can prevent from loss. On the other hand identifying many offenders is not possible without their cooperation. Of course, law says that extra rigidity is not proper so it attempts to offer a logical and reasonable solution. It considers that in local law, various issues related to cyberspace is not seriously surveyed so comparative survey and study of international rules and law and experiences of other developed countries in this regard can solve many problems.

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