

THE LIABILITY OF INTERNET SERVICE PROVIDERS IN PALESTINE

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ABSTRACT

The most important feature that distinguishes an electronic transaction from other transactions is that it is done via electronic means, such as the Internet. There are many parties involved in concluding the contract between the merchant and the buyer. The merchant and buyer need an Internet service provider to allow the parties to communicate via the Internet, and also enable them to use the Internet and browse websites. This paper will examine the liability of the Internet service provider in an electronic transaction. In addition, this paper seeks to clarify the nature of the liability for any harm caused to the user during transaction, and also in the case of an incomplete electronic contract or disconnection of the communication, that leads to harm/damage to the users. In fact, the current laws in Palestine are inadequate to regulate the issues of Internet service provider liability in e-transactions. This study is a doctrinal research using both analytical and library research to examine the main issues of service providers liability in e-transaction. The laws of Palestine, Bahrain and Directive 2000/31/EC are used in this study to clarify the legal positions on the relevant issues above. The materials for this research are collected from the primary sources including statutes, rules, regulations and case laws; besides secondary sources such as books and manuscripts, academic journals, parliamentary reports, newspaper articles and other periodicals. It is found from this study that, the Palestinian presidential decree No. 15/2017 relating to e-transactions does not examine the liability the Internet service providers. In addition, Palestinian presidential decree No. 10/2018, relating to cybercrimes does not examine the liability of the ISP relating the content of information in a special issue. In general, the liability of the ISPs depends on their role and duties in controlling the content of information in general; they would be liable if they are aware of the illegal content in information, and they do not take any procedures to remove it. In addition, ISPs would be liable under the condition of contractual liability if they fail in fulfilling their obligation according to a valid contract. In other words, the contract clarifies the obligations and the duties of the ISP in controlling the content of information, and he is obliged to check the content to know about any illegal information and remove it, because the terms of the contract obligate him to control the information. The benefit of this paper is to propose some recommendations to develop the Palestinian laws in order to address the issues of internet service provider liability which will contribute in the development of e-commerce in Palestine.

Keywords: ISP, Content of Information, Liability, Service Failure, exemption clause

Introduction

Internet Services Provider is any natural or legal person who provides the public with Internet services by entering into a contract with them. He provides the public with the technical means, which will enable them to access the Internet and other sites, along with the service providers. An Internet service provider offers Internet communication services to the public via the Internet computer communication. Internet service provider is an intermediary between the Internet users and the supplier of services.¹

The role of the Internet service providers is mainly technical, and they enable the people or institution to access the Internet. They act as an intermediary between the Internet users and the content provider, and they enable the user from communicating with websites, and intermediary between the merchants and online buyers²

In general, there are many legal issues which may arise relating to Liability of Internet Service Provider (ISP) in e-transaction such as liability of internet service provider on the content of information and liability of internet service provider on service failure/ downtime. In addition, unfair contract terms face the users when they conclude the contract with the internet service provider. Therefore, the researcher will discuss all these important issues and examine the liability of internet service provider if he fails in fulfilling his obligations in e-transactions.

In fact, the Palestinian laws do not have a clear provision about this important issue as the European Directive on Electronic Commerce (2000). Therefore, referring to other laws especially the European Directive is important to clarify the liability of Internet intermediaries, and find the methods for development of the Palestinian laws to cover the liability of the Internet intermediary in e-transactions. The problem is an ISP plays different roles in e-transaction whether a content provider or access provider and there are many problems that face the users during of e-transaction such as failure in concluding the contract because of service downtime, and the users do not know how to claim the compensation of damages or harms. All these problems require for legal solutions to protect the users in e-transactions and clarifying the liability of ISP because he plays an essential role in e-transaction. Therefore, studying the liability of ISP in e-transaction is an essential issue.

Concept and Role of the Internet Service Provider (ISP)

¹Al-Khalayleh, A. (2009). Al-Masa'el al-Taqieryah al-Eliktronah. Amman: Dir al-Thaqifah lel-Nashrwa al-Tawze'. 312.

²Ibid., 321.

Internet Service Provider (ISP) is defined as: “a company that provides access to the Internet. For a monthly fee, the service provider gives a software package, username, password and access phone number. In addition to serving individuals, this also serves companies, providing a direct connection from the company’s networks to the Internet.”³

On the other hand, the Palestinian presidential decree No. 15/2009 relating to the Palestinian Authority on organizing communication stipulates: The communication provider is the person who provides the communication services to anyone in any device according to specified terms from the authority.⁴

This decree does not specify any type of the provider or the methods of providing the communications, and it goes by the general terms of service provider. The Internet service provider is one type of communication provider who provides the Internet communication services to the public via Internet computer communication.

In addition, the Palestinian presidential decree No. 10/2018 relating to cybercrimes defines the service provider as: any person provides his service users, the ability of connection by the way of information technology; or any other person who processing, storing or hosting the computer’s data on behalf of any electronic service or the users of this service.⁵

This decree defines the internet service provider by identifying his services which including; communication, processing, storing or hosting the data. Therefore, this decree focuses on the services of the internet service providers, but it does not touch the definition of ISP as an independent issue.

Furthermore, the Palestinian Consumer Protection Law No. 21/2005, article 18: obliges the service provider to obtain the necessary license from the competent official authorities before providing the public with their services. This license information should be accessible to public, so the public can properly decide before engaging their services. The Palestinian Consumer Protection Law stipulates: “Any provider of service should show his legal capacity of providing this service by showing the proper license of services received from the official authorities”⁶

This law does not indicate the specific provisions of the ISP; it clarifies the obligation of any service provider in showing the proper license of services. Nevertheless, this article can apply on the ISP as a service provider that is obliged to show the proper license of services. In fact, this license protects consumers because it monitors the provider and ensure that the provider complies with the consumer protection rules. In addition, the license should be available to the public, which will enable them to confirm its information, and any consumer should be able to ask the authorities for this license. Furthermore, the provider is obliged to follow the terms of the license that protect consumers from any infringement of these terms, failure of which will lead to the revocation of their license, preventing them from working as providers.

On the other hand, the Palestinian presidential decree No. 15/2017 relating to e-transactions⁷ does not indicate the liability of the Internet service providers as they play essential role in transmitting the information through their equipment whether they have a role in controlling the information or not.

The role of Internet service provider is mainly technical, and they enable people or institution to get on the Internet. They act as an intermediary between the Internet users and the content provider, and they enable the user from communicating with websites, and intermediary between merchants and online buyers.⁸ ISP allows the users access the Internet, and he plays an essential role in e-transactions by enabling the users to access the Internet to conclude the electronic contracts.⁹

The ISP does not have the technical capacity to control the quality of information that transferred by their tools. They do not have the legal capacity to control this information or prevent the user from broadcasting the information. They are unaware of the content of information or messages through their tools, which makes them not liable for the content of the information.¹⁰

For example, the role of an Internet service provider is to deliver and send emails without any ability to know about the contents. Interception and control of emails is beyond the remit of an ISP, with the notable exception of the fact that it is mandated by

³ Kang, H. (No date). *Internet Connections*. The University of Texas - Austin.

<http://www.edb.utexas.edu/minliu/multimedia/PDFfolder/InternetConnections.pdf>. Accessed on: 11/5/2016.

⁴ The Presidential Decree, No. 15/2009 relating to the Palestinian Authority on organizing communication. Published on: 4/6/2009.

⁵ The Palestinian Presidential Decree No. 10/2018 Relating to the Cybercrimes. Article: 1. This decree was published in the Official Gazette No.16, on 3/5/2018, page: 8.

⁶ The Palestinian Consumer Protection Law, No. 21/2005. Article: 18

⁷ The Palestinian presidential decree No. 15/2017 relating to e-transactions. This decree was published in the Official Gazette No.14, on 9/7/2017, page: 1.

⁸ Al-Khalayleh, A. 321

⁹ Popoola, O. (2012). *Statutory Limitation of Liability of Internet Service Providers In Decentralized Peer To Peer File Sharing*. (Unpublished Master’s Theses). University South Africa. 10

¹⁰ Polčák, R. (2010). *The Legal Classification of ISPs*. Proceedings of *Commons, Users, Service Providers – Internet (Self-) Regulation and Copyright*. Hannover: Germany. <https://www.jipitec.eu/issues/jipitec-1-3-2010/2795/polcakisp.pdf>. Accessed on: 11/12/2018.

law.¹¹ However, the ISP would be held liable for the content of information if they play a controlling role in the dissemination of information.

UK court decided that the ISP is liable if he is notified about the content of information. For example, the case of *Godfrey v. Demon Internet Service*¹² involves an unidentified person claiming to be Dr. Laurance Godfrey posting a defamatory comment on the server of Demon's news. The customers of Demon were able to access this posting. Therefore, Mr. Godfrey demanded that Demon remove the posted information, but Demon failed to do so. The court ruled that Demon is liable, as they published the posted comment, and failed to delete the posted information after being notified by Mr. Godfrey, which makes them the publisher of this information.¹³ The court, in this case, decided that the liability lies with the Internet Service Provider, because they were aware of the content of the information, which was defamatory, but failed to take any action to stop the publication of the defamatory information.

Liability of Internet Service Provider as a Content Provider

An ISP provides the individuals and firms with a various service such as, designing, hosting, accessing to the Internet. Therefore, the liability of ISP arises if he violates his obligations in providing the users with the agreed services.¹⁴ An ISP would be liable for breach of contract if they breach their contractual obligation, for example when there are technical defects that the users failed to point out in the Internet.¹⁵

The liability of ISP contains many issues such as defamation, illegal content, child pornography, terrorism content, intellectual property violation, privacy and security issues and fraudulent advertisement.¹⁶ All of these issues are essential in identifying the liability of ISP as he plays an essential role in transmitting the information through Internet by his tools.

If the ISP plays an important role in preparing and processing information prior to broadcasting and publication, they will be held liable for the information and content, as they have open access to the information and are required to go through it before it is broadcasted or published.¹⁷

In the case of *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*,¹⁸ the United States Court of Appeals clarified the liability of Internet Service Provider: Roommates.com is a website that connects people who are looking to rent rooms and people who are renting out rooms. The users need to create a profile by answering questions provided by Roommates.com prior to their usage of this website, such as the name of users, gender, email address, whether they would live with the children in the household. Fair Housing Council of San Fernando Valley sued Roommates.com for violating the Federal Fair Housing Act, and the California Housing Discrimination Laws. The court decided that Roommates.com discriminating against the users based on their answers to the questionnaire it became an information content provider as they ask the questions on their websites, and obliged the user obliged to answer these questions. The court decided that the users are the content provider, and Roommates.com is also information content provider, and thus became the developer of information, which makes them liable for the information shared.¹⁹

The court, in its decision, relied on the role of the Internet service provider to clarify its liabilities. Roommates.com has the ability to edit and organize the information. In this case, he can be an Internet content provider and liable for the content of the information. Therefore, an ISP would be liable if they are aware of the content of information that contradicts the law and would harm others if access to it was not restricted. Their liability would extend to the date of awareness and failure to take action regarding this matter.²⁰

The United States Court of Appeals decided in another case that a service provider or user is not liable if the information is created by the third party.²¹ The court decided that discussion should depend on a reasonable understanding of information by the

¹¹ Bayer, J. *Liability of Internet Service Providers for Third Party Content*. Academia, edu. http://www.academia.edu/3072206/Liability_of_Internet_Service_Providers_for_Third_Party_Content. Accessed on: 24/1/2014.

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¹² Godfrey v. Demon Internet Service [1999] 4 All ER 342, [2001] QB 201 (QBD).

¹³ Ibid

¹⁴ Adeyemi, A. (2018). Liability and Exemptions of Internet Service Providers (ISPs): Assessing the EU Electronic Commerce Legal Regime. *SSRN Electronic Journal*. <https://www.researchgate.net/publication/321838066>. Accessed on: 28/12/2018.

¹⁵ Mansur, M. H. (2007). *Al-Masa'Ëly'Ëah al-EliktronËyah*. Mi'Ër: D'Ër al-J'Ëmi'ah al-Jad'Ëdah. 176.

¹⁶ Edwards, L. Regimes of Legal Liability for Online Intermediaries: An Overview. *OECD Workshop: The role of Internet intermediaries in advancing public policy objectives*. <https://www.oecd.org/sti/ieconomy/45509050.pdf>. Accessed on: 28/12/2018.

¹⁷ Al-Khalayleh, A. 322.

¹⁸ *Fair Housing Council of San Fernando Valley v. Roommates. com LLC*. No. 04-56916, No. 04-57173. 521 F.3d 1157; 2008 U.S. App

¹⁹ Ibid.

²⁰ Ghannam, Sh. M. (2008). *Al-TanËm al-Q'ËnËnË Lil-I'lanËt al-TijËrËyah Abr Shabakat al-Internet*. Mi'Ër: D'Ër al-J'Ëmi'ah al-Jad'Ëdah. 150

²¹ *Ellen L. Batzel v. Robert Smith*. No. 01-56380, No. 01-56556. 333 F.3d 1018. 2003 U.S. App.

service provider or the user when they send the content. Clarifying the liability of service provider does not depend on the intentions or knowledge of the information provider when transmitting the content. The court used the understanding of an average person when dealing with these sets of circumstances in order to determine the level of understanding of information by the provider or the user.²² The court confirmed that the ISPs would be liable if they were aware and understood the content of information when they sent the content. In addition, the court decided depending on the actual knowledge of the ISP of the content of information, and on doubt of knowledge. Furthermore, the court clarified the degree of knowledge based on an ordinary person in the same circumstances. This issue is important to reduce the disputes between the parties about the degree of knowledge especially if there is any wrongdoing by the ISP when following the procedures in removing the illegal content, especially if he has knowledge about the content, but there is negligence from the ISP in his duties which causes ignorance about the illegal content.

The ISP would also be liable if the subscription contract contains a clause that obliges the ISP to control the content of the provided information through his technical tools. This clause obliges the ISP to provide all the technical means to control the content of the information via his techniques. The provider would be liable if there is any illegal or harmed information that cause injury to the subscriber.²³

In fact, the liability of the ISPs depends on their role and duties in controlling the content of information in general; they would be liable if they are aware of the illegal content in information, and they do not take any procedures to remove it. In addition, ISPs would be liable for breach of contract towards the subscribers if they fail in fulfilling their obligation according to a valid contract. In other words, the contract clarifies the obligations and the duties of the ISP in controlling the content of information, and he is obliged to check the content to know about any illegal information and remove it.

In addition, an Internet service provider would be liable if they violate the right of others in cases where they are aware of the fact that the data or information causes harms to others. Internet Service providers would also be liable for data or information if they were responsible in controlling it. Under these circumstances, they will be liable whether they are aware of the content or not.²⁴

The case of *Kenneth M. Zeran*²⁵ in the United States Court of Appeals serves as a good example. The case involves a message being posted on a bulletin board of American online (AOL). The content of the message was the advertisement of a t-shirt that contains offensive slogans regarding to the Alfred P. Murrah Federal Building bombing, 1995 in Oklahoma City. There were many people who were interested in purchasing this t-shirt, who were then instructed to contact a telephone number belonging to Kenneth Zeran. Subsequently, Mr. Zeran received death threats. Due to this occurrence, Zeran got in touch with AOL and requested that the message on the bulletin be deleted. Mr. Zeran filed a case against AOL, as they did not delete the message in an appropriate time. The courts decided that an Internet service provider is not liable for information created and posted by others, in accordance with section 230 of United States Communications Decency Act of 1996 (CDA) stipulates "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"

The court clarified the liability of the ISPs based on their role in creating the information, according to the United States Communications Decency Act. In general, the ISP would be liable for the content of information if he creates this information. However, the ISP is not liable about the information if the information is created by others such as a third-party content provider. In fact, this section reduces the disputes in the liability of ISPs regarding of published information as it clarifies their role and liability regarding the creation of information. In addition, section 230 of United States Communications Decency Act of 1996 (CDA) is important to induce the Palestinian legislator to regulate the role and responsibility of the ISPs in e-transactions in Palestine.

An ISP is also not liable if the information provided is used to help other users get connected to the Internet. An exception applies if the ISP functions in the role of a content provider.

In a case of *John Green v. America Online (AOL); John Does 1 & 2*²⁶ from the United States Court of Appeals, Third Circuit: Green sue AOL and John Does 1 and 2, it was alleged that the ISP failed to fulfil its contractual obligations, and fail to do of substantial procedures against John Does 1 and 2, who broadcasted harmful messages online against Green and others. The court decided that American Online, Inc. (AOL), a provider of interactive computer services, is statutorily immune from liability from causes of action that arise from third party content.²⁷

The court in this case confirmed that the liability of the ISPs depends on their role regarding information's content. In this case, the ISP is not liable for a posted message, because this message was posted by a third-party content provider. In general, ISPs would be liable for the content of information if they created it, because their role had become as that of content providers who create and develop information. In this role, the ISP is obliged to remove any illegal information and stop its dissemination. In

²² Ibid.

²³ Al-Jamal, S. H. (2006). *Al-T'Équd 'Abr TaqnyÉt al-EtteÉal al-HadeethÉ*. Al-QÉhirah: DÉR al-NahÉah al-'ArabÉyah. 301.

²⁴ Baistrocchi, P. (2003). Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce. *Computer & High Technology Law Journal*. Vol. 19.2015 Issue, 1. Pp, 111-130.

²⁵ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

²⁶ *John Green Appellant v. America Online (AOL); John Does 1&2*. No. 01-1120. 2003.

²⁷ Ibid.

short, the Green can only sue John Does 1 and 2, because they created the online messages which were harmful to him. On the other hand, the Green can sue the AOL, John Does 1 and 2 if they collaborated in creating and developed the illegal message, and the AOL had not taken the necessary procedures in removing this message and its dissemination.

The Palestinian presidential decree No. 10/2018 relating to cybercrimes clarifies the liability of the Internet service provider by obligates him in providing the Public Prosecution in the information relating the investigations about the cybercrimes. Furthermore, this law obliges the Internet service provider in blocking the link, content or the application on the Internet depending on the court decisions. In addition, this law obliges the ISP in storing the information three years at least and corporation with the authority in investigation in collecting the information.²⁸ It can be concluded from the provisions of this law, that it does not examine the liability of the ISP relating the content of information in a special issue. This law, just obliges the ISP in storing the information about the users, and blocking the websites depending on the decision of court. The researcher was hopeful that the Palestinian presidential decree No. 10/2018 relating to cybercrimes examines and identifies the liability of ISP in e-transaction in Palestine, especially if the information is transmitted in its tools and contains any defamatory or illegally content. Although the Palestinian presidential decree No. 15/2017 relating to e-transactions is new law, it does not examine the liability of ISP in e-transactions.

In this respect, the Palestinian, Jordanian and Egyptian laws do not have clear provisions about the liability of ISPs in e-transactions. In fact, the Jordanian e-transaction law, No. 15/2015²⁹ does not examine the liability of ISP in e-transaction, and it does not also indicate any provisions about ISP. According to this issue, the liability of ISP depends on the civil law and the general rules in civil liability whether this liability is contractual or tort. In addition, the liability of ISP would be criminal if he acts any crime according to the criminal law.

Therefore, we can learn more about this important issue from the Bahraini law on electronic transactions since it has discrete provisions regarding the liability of Internet intermediaries including ISPs.

Bahraini law on electronic transactions No. 28/2002, exempts the Internet intermediaries from the liability regarding the creation, broadcasting and distribution of others' information provided in electronic records if they are not the source of this information, and their role is merely providing access to it.³⁰ This law clarifies the liability of ISPs based on their role in controlling this information. The ISPs become Internet content providers if they have the ability to create or broadcast the information; they would also be liable for the content of illegal information.

In addition, the Bahraini law for electronic transactions examines the terms of denying liability of an Internet service provider regarding illegal information. These terms address the case when the Internet intermediary does not have actual knowledge that the information contains illegal activities. In addition, the intermediary is immune from liability if he does not know about any facts or circumstances that led to civil or criminal liability in ordinary circumstances. Furthermore, the intermediary can deny his liability if he has removed the illegal information from his system and stopped access to such information.³¹

In general, ISPs are not liable if its role is only to help users access the Internet. This also depends on whether the ISP is aware of the content of the information, and if it is, removed it. However, an ISP would be liable if he is aware that the information leads to legal liability and he failed to take action to remove or block access to that information. He would be liable even if his role is merely providing access to the Internet.

In fact, this article contains similar provisions to the European Directives on Electronic Commerce (2000) which clarifies the terms of exemption of Internet intermediaries from liability if they do not have actual knowledge about the content of any illegal information and they remove this illegal information when they know about its illegal content. In fact, it is important to clarify this issue in the Palestinian laws especially the presidential decree No. 15/2017 relating to e-transactions, and there is no problem to take some provisions from the laws of other countries if these provisions are suitable for the Palestinian situations.

In addition, the Bahraini law for electronic transactions does not oblige the Internet intermediary to control or monitor the information of others to know about the legality of the information, as the role of the Internet intermediary is merely enabling access to this information.³² Therefore, ISPs are not obligated to control information shared by others, and are only responsible for connecting users to the Internet and accessing this information.

On the other hand, the ISP is obliged to monitor the content of illegal information if the subscription contract obliges him to monitor the information or if the enforceable law or judgments obligate the ISP in removing the illegal information or forbidding access to it.³³ In general, the contract clarifies the obligations of the contractual parties, and the parties can agree about any condition that achieves their interest as long as this condition is legal. Therefore, the ISP is obliged to monitor the content of information and remove the illegal content if the contract includes the clause that obliges the ISP to monitor the information.

In this important issue, the Palestinian Presidential Decree No. 10/2018 Relating to the Cybercrimes obliges the Internet service provider in blocking the link, content or the application on the Internet depending on the judgments, but this decree examines the

²⁸ The Palestinian Presidential Decree No. 10/2018 Relating to Cybercrimes. Article: 31

²⁹ The Jordanian E-Transaction Law, No. 15/2015. This law was published in the Official Gazette, on 19 / 5 / 2015, page: 5292.

³⁰ See Bahraini Law on Electronic Transaction, No. 28/2002. Article: 19/1

³¹ See Bahraini law for Electronic Transaction, No. 28/2002. Article: 19/2

³² See Bahraini law for electronic transaction, number: 28/2002. Article: 19/3

³³ See Bahraini law for electronic transaction, No. 28/2002. Article: 19/4

cybercrimes and the criminal liability through the Internet. Therefore, the researcher was hopeful from the Palestinian Presidential Decree No. 16/2017 Relating to the e-transaction to discuss the civil liability of the Internet service provider relating the content of information that is transmitted through its tools.

On the other hand, the merchant has a contractual relationship with his ISP, and this contract clarifies the obligations and the liability of ISP as a content provider. In addition, the ISP creates the content of information in electronic contracts, as they are a content provider. Therefore, they would be liable for breach of contract towards the merchant if this information is illegal and harms the merchant. For example, if this information is misleading, it will encourage the purchaser to purchase the goods based on this information, and the purchaser will pursue action against the merchant due to misleading information resulting in harm to them. In this situation, the ISP is held liable under the law of tort towards the purchaser.

On the other hand, there are many users do not have actual knowledge about the threats of security on their computer such as viruses. The users access to the Internet and believe that the Internet service provider provides them with the security. Permitting in access to the Internet by the users without have knowledge about these threats cause harm to them. Therefore, writing the elements of security in the contract between the user and Internet service provider is important.³⁴In fact, the Internet service providers in Palestine such as *Hadara* offers the contracts which contain the provisions that oblige the provider in blocking unethical content from reaching to the users, and the users are obliged to pay additional fees if they wish benefit from this service.³⁵It can be argued that, ISP blocks unethical content which is transmitted by its tools, and this offer is important to protect the society through the Internet. On the other hand, protecting the users from security threats is essential issue especially in e-transactions. Therefore, the Internet service provider is obliged to provide the users with the security if there is a clause in the contract. As such, he would be liable for breach of contract about any threats that result from access to the Internet. The problem is the service providers in Palestine do not offer this service in their contracts, and the Palestinian laws do not oblige them in protecting the users from the security threats. The researcher recommends that the Internet service providers must offer the security protection services as there are many threats which facing the users through Internet such as viruses and Malware. It can be concluded that, protecting the users from the security threats needs for cooperation between the government, Internet service providers and the users.

As a result of this discussion, Palestine requires new legislations that clarify the role of Internet service provider and its liability vis-à-vis information. The liability of the Internet service provider depends on its control over the content of the information. Therefore, there is a need for new legislations that define the liability of Internet service provider, especially if this information is capable of causing harm to others or are involved with illegal activities.

Liability of Internet Service Provider as a Mere Conduit

ISPs are obliged to provide the users with the technical means to access the Internet. They lacks control over information, which renders them not liable for the contents.

As the current Palestinian laws do not have clear provisions that regulate the liability of Internet service providers about the information that is transmitted through their tools. Therefore, it is important to learn about this issue from other laws such as the European Directives on Electronic Commerce. The European Directives on Electronic Commerce (2000) exempts ISPs from liability on the content of transferred information if their role is just transferring information. Article 12/1 of European directives on electronic commerce (2000) provides:

“When an information society service is provided, made up of the transmission in a communication network of information that is provided by a recipient of a service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information being transmitted, on the condition that the provider:

- a) does not initiate the transmission;
- b) does not select the receiver of the transmission; and
- c) does not select or modify the information contained in the transmission.”³⁶

This article remedies the issues of network access services or network transmission services. Internet access providers provide users with possibility of connecting to the Internet by using dial-up modems, xDSL modems, cable connections, or fixed lines. Backbone operators allow users to connect to various parts of the Internet.³⁷

³⁴ Purcell, T. (2002). *User Security and the Internet Service Provider*” SANS Institute, *Global Information Assurance Certification Paper*. GIAC directory of certified professionals. <https://www.giac.org/paper/gsec/1950/user-security-internet-service-provider/103393>. Accessed on: 11/12/2018.

³⁵ <https://www.hadara.ps/internet-services/internet-control-filtration>. Accessed on: 18/11/2018.

³⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Official Journal of the European Communities. L178. 17/07/2000. P. 0001 – 0016. Article:12/1

³⁷ European Commission's Information Society and Media Directorate-General. (2009). *EU study on the Legal analysis of a Single Market for the Information Society, New rules for a new age: Liability of online intermediaries*. <https://publications.europa.eu/en/publication-detail/-/publication/a856513e-ddd9-45e2-b3f1-6c9a0ea6c722>. 7. Accessed on: 11/12/2018.

This article exempts the ISPs from liability if their role is just to transfer information. This basically means that the provider is not the source of the information, and there is no wrongdoing from them. The ISPs do not select or disseminate the information, and they are not the source of it either.

Article 12/2 of European directives on electronic commerce (2002) requires: “The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.”³⁸

ISPs are not liable in cases of mere conduit according to article 12, and also not liable for the automatic store of information in a limited period in case of transferring, as they are not in control of these information.

Article 12/3 of European Directives on Electronic Commerce (2002) provides: “This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.”

Despite the fact that, ISPs cannot control the content of information in the case of merely being a conduit, states and courts can compel them to prevent the dissemination of illegal contents. Being a mere conduit is not grounds for liability, but not preventing the distribution is.

The researcher recommends that the Palestinian legislator must regulate the liability of the Internet service provider about the content of information that is transmitted through their tools depending on its role in controlling the content. There is no problem for the legislator to take some provisions from other laws when he legislates the law if these provisions are applicable in Palestine in its current situation.

Liability for Service Failure

In general, the Internet service provider provides the public with the technical means which enable them to access the Internet. For this reason, he plays an essential role in e-transactions as they depend on the Internet, and the ISP provides the contractual parties with the means that enable them to communicate with the Internet. In other words, every party in an e-transaction has a contract with the ISP to provide access to the Internet. In addition, this role of the ISPs in e-transactions determines their liability regarding the failure in fulfilling their contractual obligations. Therefore, the researcher will explain the liability of the ISP regarding the failure in providing the service which causes harm to any party in e-transactions.

In short, the ISP offers many types of Internet connection with different specifications and fees. The user can choose any type of service for specific monthly fees and sign the service contract with the ISP. Therefore, the contract determines the duties and the obligations of every party. The ISPs are obliged to fulfill their contractual obligations and provide the users with the agreed services. ISP would be liable if he causes any harm to the users in case of failure in fulfill his contractual obligations such as failure in connection services.³⁹

Based on the above discussions, the Internet user may face Internet disconnection and slow connection. The ISP would be liable for breach of contract if there is any failure in the Internet connection services which leads to failure in concluding the electronic contract and causes loss to the users such as financial loss. Moreover, an ISP is liable if he provides the user with a different type of agreed Internet services such as weak of Internet connection. Weakness in the Internet connection may lead to a delay in concluding the electronic contract and can cause loss to the users. An example, if the user tries to sign an electronic contract to purchase the offered goods during limited time from a website, and he can receive the goods after payment, but the Internet is very weak; this leads to a delay in signing the contract and failure in payment before the offer expires.

Furthermore, the subscriber has the right to sue ISPs for breach of contract if they did not provide him with constant Internet connection. This problem may lead to loss or damage to the user during the conclusion of the electronic contract. For instance, if the subject matter of the electronic contract is a computer program, and consumer fails to download this program because the Internet is disconnected, leading to a failure in downloading this program.

However, it can be argued from the role of ISP that some Internet disconnection lead to loss to the user who does not have a contractual relationship with the ISP. An example is the merchant and the purchaser having Internet services with different ISPs, and the purchaser tries to sign the electronic contract with the merchant, but the Internet is disconnected on the side of the purchaser and leads to a loss to the merchant such as loss in money or delay in concluding the electronic contract. In this scenario, the ISP is held liable under the law of tort, for the losses sustained by the merchant.

³⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’). Article: 12/2

³⁹ Kang, H.

The ISP plays an essential role in e-transactions; especially in enabling the users to connect to the Internet. This important issue needs legal certainty on the liability of ISPs in case of a failure in the Internet services, especially in e-transactions. The Palestinian presidential decree No. 15/2017 relating to e-transactions does not clarify the role and the liability of the ISP in an e-transaction which represents a gap in this law relating to the issues of ISP liability regarding Internet connection. Therefore, the researcher recommends giving more protection to the consumer in e-transactions by clarifying the liability of ISPs in the failure of services during the conclusion of the electronic contract to avoid any loss or damage that may occur to the consumer as a result of failure in Internet connection.

Issues of exemption clause

The ISP offers the services of Internet connection, and any user can enter the contract for these services. In general, an ISP organizes the contract, and clarifies the obligations and duties of the parties. On the other hand, the user does not have any chance in negotiating his obligations and duties as he is a weak party. Moreover, an ISP protects his interest in this contract as he has more experience than the user and tries to protect himself from any liability for any harm or damage that may occur to the user in the case of a failure in fulfilling the obligations and duties according to the electronic contract. Therefore, the researcher will examine the legality of these exemption terms in the contract between the ISP and the user.

There are many terms in the contract between the users and ISP which exempt the liability of the ISP from any loss or harm that may occur to the users during the access to the Internet. An example, are the terms and provisions of *Mada* for providing the Internet services in Palestine.

“Mada is exempt from the legal responsibilities that result from any loss in your data whatever the reason, including and not limited to interruption, downtime, termination or failure to provide services. Mada does not accept any liability for any harm that you may face as a result of loss of confidentiality in the data you input or send to Mada or third party during the use of the services.”⁴⁰

In fact, *Mada* as an ISP offers Internet services with monthly fees, and any user can subscribe to these services by choosing the type of services and signing a standard contract. The problem is that the subscriber does not have the right in negotiating the terms and conditions of the contract, as he is obliged to agree to all the terms and sign the contract. *Mada* has the experience in protecting itself from the liability for any harm occurring to the user because of interruption or downtime during the use of the Internet services. Therefore, the consumer is obliged to bear the liability and the result of loss of his data. In fact, interruption or downtime of the Internet sometime leads to loss or harm to the users; especially, especially, during of signing the electronic contract or making online payments. Therefore, protecting the right of the user as a weak party is important in such contractual terms; especially, if the interruption or downtime of the Internet is during the conclusion of electronic contracts and the fault is from the ISP.

As a rule, excluding tortious liability in the contract between the parties is void, and the terms of excluding this liability do not result in any effect. Therefore, the parties cannot agree to exclude tortious liability before it happens, because it is a contrary to public order.

In this case, the Palestinian Civil Draft Law No. 4/2012 provides: “Every term exempts or mitigates of liability that arising from tort is invalid.”⁴¹ In addition, article 270 of the Jordanian Civil Law No. 43/1976 also have forbidden any agreement that exempts the liability that arises from tort: “Every term that exempts the liability that arising from tort is invalid.”⁴² Therefore, the terms in the contract that exclude the liability of tort is void according to these laws, and the ISPs cannot exempt themselves from liability of tort for any harm that happens to the user, and they are liable for loss and harm.

On the other hand, the Palestinian Civil Draft Law No. 4/2012 allows parties to exclude the contractual liability, because the parties can agree on their terms within the limits of public order. Article 238 of the Palestinian Civil Draft Law No. 4/2012 provides: agreement on excluding the compensation of damage that resulted from failure in the fulfilment of the contractual obligation completely or partly, except if there is a fraud or serious mistakes committed by the responsible party. The responsible party can exclude his liability about fraud or serious mistakes that might occur from people employed in the implementation of his obligations.”⁴³

In general, the parties can agree on excluding the contractual liability because its provisions result from their agreement when it is not contrary to the public order. Therefore, the ISP and the users can agree on the exclusion of liability in their contractual relation if there is no fraud or serious mistake by the ISP. In brief, the ISP cannot exclude his liability in case of fraud or serious mistake, and the ISP is obliged in compensating the user for any harm that may result. An example would be if the user used the Internet to conclude an electronic contract, and the ISP interrupted or caused the downtime of the Internet during the signature of the electronic contract and payment, which led the user to lose money, or was unable to download the subject matter. In this case, the ISP would be liable if the Internet service interrupted without any legal reason, and ISP intentionally caused the user injury.

⁴⁰ <https://mada.ps/mada/userfiles/file/%D8%B4%D8%B1%D9%88%D8%B7%20%D8%A7%D9%84%D8%A7%D8%B4%D8%AA%D8%B1%D8%A7%D9%83.pdf>. Accessed on:12/12/2018.

⁴¹ The Palestinian Civil Draft Law, No.4/2012. Article: 190.

⁴² The Jordanian Civil Law, No. 43/1976. Article: 270

⁴³ The Palestinian Civil Draft Law, No. 4/2012. Article: 238

On the other hand, the ISP is not liable for normal interruption for equipment maintenance after informing the users, or if the reason of interruption is the fault of a third party or force majeure.

As an example, Hadara shared hosting service agreement provides:

“Notwithstanding the aforementioned, Hadara shall have the absolute right to terminate this agreement and/or terminate any or all the services according to its own and sole discretion at any time without any right of objection to such termination by the customer and with no liability whatsoever to be borne by Hadara due to such termination.”⁴⁴

This agreement is drafted by Hadara for Internet services and the subscriber is obliged to agree and sign this standard contract if he wishes to subscribe with Hadara. This term gives Hadara the right to terminate the contract at any time without giving the subscriber any right for objection, and Hadara exempts its liability for any harm or damage that may occur to the customer because of termination. This term fulfils the interest of Hadara over the interest of the customer, especially, if Hadara terminates the contract suddenly without informing the customer. Therefore, it is important to protect the right of the customer and inform him before terminating the contract to avoid any damage that might occur.

Article 150 of the Palestinian Civil Draft Law No. 4/2012 provides: “If the contract is concluded by way of adhesion⁴⁵, and contains unfair terms, the court can modify these terms or exempts the weaker party from it according to justice. Any agreement which provides otherwise is void.”⁴⁶

As a rule, the court has the authority to modify the adhesion contract to protect the weaker party. The law allows the court to modify or cancel unfair terms from the contract, and the right of court derives from public order, and the parties cannot agree on excluding or cancelling this right. In fact, the merchant writes these terms to protect himself in these contracts as is experienced in maintaining his rights. Therefore, the court is the correct channel to change unfair terms as it solves disputes between the parties regarding contractual disputes in a fair way.

On the other hand, the Palestinian Consumer Protection Law, No. 21/2005 provides: “The council can review the logic and justice of the terms in the consumer and standard contracts, and recommends to the minister or the party who issues these contracts to remove unfair terms on the rights of consumer, or reconsider these terms. The Council of Ministers sets up the system that defines the standards for estimating the terms that can be considered unfair in the consumer contracts.”⁴⁷

The Consumer Protection Council has the right to review the contracts, and the law allow him to impose the removal of unfair terms from these contracts. In addition, the Council of Ministers determines the fairness of the terms in the contract between the supplier and consumer. In short, we can reduce the disputes regarding the terms of a contract by laying the regulations that define unfair terms in Internet service contracts as it is an important issue.

Conclusion

In general, the role of ISPs clarifies their liability about the information transferred by their tools. They are not liable for the content of information if their role is limited to enabling users to access the Internet. However, they would be liable if they are aware of the illegal content in information, and they do not take any procedures to remove it or stop the dissemination of this information. In addition, the liability of ISP arises if he violates his obligations in providing the users with the agreed services. ISPs would be liable for breach of contract towards the subscribers if they fail in fulfilling their obligation according to a valid contract. In other words, the contract clarifies the obligations and the duties of the ISP in controlling the content of information, and he is obliged to check the content to know about any illegal information and remove it.

In addition, an ISP would be liable for breach of contract if there is any failure in the Internet connection services which leads to the failure in concluding the electronic contract and causes loss to the user such as financial loss. Moreover, the ISP is liable if he provides the user with a different type to the agreed Internet services such as a weak Internet connection. The Internet service provider would also be liable under the provisions of contractual liability if they breached their obligations to their subscribers. These include failure of hardware, Internet disconnection and providing the user with illegal and misleading information. Moreover, the liability scope of an ISP would be tort if they did anything to cause injury to others unrelated to them via contracts. An example if they are disseminating illegal or erroneous information on other people.

The ISP and the users can agree on the exclusion of liability in their contractual relation if there is no fraud or serious mistake by the ISP. In brief, the ISP cannot exclude his liability in case of fraud or serious mistake, and the ISP is obliged in compensating the user for any harm that may result.

The Palestinian presidential decree No. 15/2017 relating to e-transactions does not examine the liability the Internet service providers. In addition, Palestinian presidential decree No. 10/2018, relating to cybercrimes does not examine the liability of the

⁴⁴ https://www.hadara.ps/data_site_files/file/shared_terms_website_en.pdf. Accessed on: 10/7/2015

⁴⁵ Adhesion contract: A standard form contract prepared by one party, to be signed by another party in a weaker position, usu. A consumer, who adheres to the contract with little choice about the terms.” Garner, B. A. (2009). *Black's Law Dictionary*. (9th edn.). St. Paul, Minn. West Publishing Co. 366.

⁴⁶ The Palestinian Civil Draft Law, No. 4/2012. Article: 150. This article is in parimateria with article 204 of the Jordanian Civil Law, No. 43 of 1976.

⁴⁷ The Palestinian Consumer Protection Law, No. 21/2005. Article: 23

ISP relating the content of information in a special issue. It can be concluded that, the Palestinian, Jordanian and Egyptian laws do not have clear provisions about the liability of ISPs in e-transactions. However, Bahraini law on e-transaction, contains the similar provisions to the European Directives on Electronic Commerce (2000) which clarifies the terms of exemption of Internet intermediaries from liability if they do not have actual knowledge about the content of any illegal information and they remove this illegal information when they know about its illegal content.

The researcher recommends that the Palestinian legislator must regulate the liability of the Internet service provider about the content of information that is transmitted through their tools depending on its role in controlling the content. There is no problem for the legislator to take some provisions from other laws when he legislates the law if these provisions are applicable in Palestine in its current situation.

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