THE ELECTRONIC COMMERCE BILL, 2008: PURPOSES AND PRINCIPLES

TAMAR CALAHORA

The Electronic Commerce Bill, 2008, is the fruit of the work of an inter-ministerial governmental committee that operated between 1999-2003. The bill, which was debated in the Knesset in 2008 but was not yet enacted, deals mainly with two issues that were, for many years, viewed as fundamental in the field of e-commerce legal literature and legislation around the world: First, the existence and validity of requisite written law of contracts (and legal action in general) and the justification for its continued existence in the world of e-commerce. Second, the civil liability of Internet Service Providers. These seemingly unrelated issues are part of a wider discussion on the question of whether the innovations of this new world, the result of the use of new technology and media, require changes in existing law, or whether we may continue applying, through interpretation, the existing rules and principles of the law that is a product of the old world, that of paper and print, without creating new rules. These questions, as well as sending and receiving of electronic messages and its legal consequences, are the main issues answered in the Bill. The purpose of this article is to describe the principles and goals of the E-commerce Bill in comparison with other legal systems, and with reference to the work of the E-Commerce Committee and the considerations it made when structuring the Bill.

I

HUKIM 2, 2010

UNMASKING ANONYMOUS INTERNET USERS

MICHAEL BIRNHACK

What should be the legal rule regarding the unmasking of anonymous users? Under which circumstances may a court order an Internet Service Provider (ISP) to reveal the identity of a user who chose not to identify himself or herself? The article discusses these questions within three frameworks. First, the article explores the normative basis of anonymity and anchors it in both free speech principles and the right to privacy. Second, the discussion is framed within a free speech principle. The internet offers a unique platform for public discourse. Accordingly, we should identify in advance the potential consequences of various rules as to the speech opportunities. Third, the article locates the discussion of online anonymity in the broader framework of the relationship between law and technology. The latter framework also illustrates the contingency of privacy on social norms and technology.

The article discusses the proposed Electronic Commerce Bill, 2008, the various courses applied by courts, and the setting of interests and rights. Other than the rights of the offended plaintiff and the anonymous user, I will argue that we should pay close attention to the role of the ISPs in this setting. I will discuss various anonymizing technologies and will conclude by offering a model in which the ISP serves as a first intermediary, and if necessary, the court serves as a second intermediary.

TRANSPARENCY IN CONTENT FILTERING – A PLAN OF ATTACK

TAL ZARSKY

Online content providers are enriching the public sphere with a large quantity of information that is mostly generated by users. These private entities play an essential role in shaping the public discourse. It is thus only natural that regulators have quickly turned their attention to them. The overall regulatory attitude towards these entitles is lenient, assuming that stringent regulation might stifle the rich and relatively-balanced discourse these entities facilitate. Thus, regulators offered online content providers varying degrees of immunity against claims pertaining to their right and ability to decide which contents are to be distributed and which should be denied.

This article introduces an additional and novel dimension to the discussion of optimal strategies for regulating online content providers: the transparency requirement. This strategy requires that relevant websites clearly articulate the rules they follow while filtering content. It further requires that the websites abide by the rules they presented, as well as additional ancillary means that should help effectively enforce these requirements.

The article examines the transparency strategy on two levels – theoretical and practical. On the theoretical level, it examines the benefits of and justifications for the transparency requirement, while addressing the free speech interests of various types of users, as well as additional interests. This should be balanced against the property and speech rights of the content providers, which might be curtailed by the proposed regulatory strategy. Subsequently, on the practical level, the article examines whether mandating this form of transparency is even feasible while addressing the fear that such regulatory frameworks might quickly be rendered irrelevant, easily bypassed, proven unenforceable, or perhaps overburden some

content providers (thus forcing them out of the market). It will also examine how regulators can deal with content providers who introduce vague and overreaching filtering criteria. This segment ends with concrete recommendations for establishing transparency, which further introduce ancillary rules to assure that users clearly understand the ways in which filtering is done.

Finally, the article examines an additional perspective: the possibility that online content providers might be considered, at times, state actors (under the public forum doctrine and similar analyses), and thus be subject to the norms of public law. The article concludes by arguing that content providers will only rarely be subject to these norms, yet this in itself can partially justify a transparency requirement in a broader set of cases.

IV

PROTEST OR THREATENING PRESSURE: SETTING BOUNDS TO RESIDENTIAL PICKETING (FOLLOWING THE PROPOSED AMENDMENT TO THE POLICE ORDINANCE (NO. 26) (LICENSING DEMONSTRATIONS), 2009)

BARAK MEDINA & DROR WAGSHAL

Residential picketing is not only an effective means of protest but also a way to exert pressure. Recently, the Israeli Government initiated a proposed legislation to regulate residential picketing. According to the proposed amendment, residential picketing that aims at protesting against the act of the person who lives in the relevant residential region will be subject to a license requirement, and such a license will not be granted unless it is shown that there is no appropriate alternative place for the demonstration. This paper evaluates the proposal, as well as the current Israeli law in this matter, by addressing three main aspects. First, we argue that the licensing requirement, which applies under the current law to many demonstrations, is unjustified and is, in fact, unconstitutional. Second, we question the legitimacy of granting the police wide discretion powers in deciding whether to grant a license, and suggest that this power should be narrowed substantially. Third, we argue that it is justified to prohibit residential picketing whose chief aim is not moral confrontation but pressuring position holders. We thus suggest that the legislation require the licensing authority, preferably the courts, to distinguish between residential picketing that primarily aims at moral confrontation, which should be permitted, and vigils that mainly aim at threatening and pressuring office holders, which should be banned.