Chapter 3

Strict Liability of Family Leader's Rule vs. Internet Safety Regulations for Content-Related Risks Created by Minors via New Media Applications:
The Case of Turkey

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ABSTRACT

Optimal mode of risk control must be chosen for each case using comparative analysis. This chapter compares the strict liability and regulatory safety standards for controlling content-related risk of harm provided by family leader's minor. The model in this chapter is based on Miceli et al. (2013)'s model regarding product-related risks adapted into content-related risks of harm through new media tools by family leader's minor. Under certain assumptions, when end users perceive the risk accurately, strict liability and optimal regulatory safety standard achieve the first-best outcome. On the other hand, when end users perceive the risk inaccurately, strict liability is preferred over regulation. Therefore, strict liability of family leader's rule (art.369 of Turkish Civil Code No. 4721) is efficient, because it achieves socially optimal outcome (first-best outcome) independent from the end users' perception of risk under the assumption of susceptibility to the same harm.

INTRODUCTION

Unlike old-fashioned moral-based approaches, economic efficiency-based approach defines the role of law in the society that law is an implicit price mechanism to eliminate illegal behaviors (Miceli, 2004, p. 1). In the role of price mechanism, law, as an external inducement[1], imposes costs or conferring ben-

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efits on actors (Ogus, 2006, p. 102; Becker, 1976). It is also an incentive mechanism for the creation of productive effort and wealth and reduction of costs (Ogus, 2006, 14 and 47). Law facilitates exchange and organizes human behavior with respect to scarce resources (Cole & Grossman, 2005, p. 25 and 44). It reduces coordination and transaction costs[2] in the society as formal rules of the game governing social interactions according to new institutional scholars (North, 1990; Pejovich, 2008; Cole & Grossman, 2005, p. 26).

In addition to these definitions, law also can be defined as risk control mechanism. However, different legal rules or institutions (i.e., contract law, unjust enrichment, tort law (negligence, strict liability), administrative (safety) regulations, criminal penalties and so forth) have different modes of risk control. Thus, optimal mode of risk control must be chosen for each case using comparative analysis. In this context, liability rules in some cases may be optimal mode of risk control or preferred over safety regulation, sometimes vice versa. It is also possible that both liability and safety regulations can also be equally optimal modes of risk control. Liability rules and safety regulations are state-based alternative risk control mechanisms. In other words, they are tools of state intervention to correct market failures. Additionally, market forces can play a role of risk control mechanism through private insurance market.

Every time an end user[3] consumes contents via new media applications, there is a risk of harmful action. So, the risks should be controlled in order to avoid negative externality[4]. When the costs arising from the content-related risks cannot be internalized by family leader's minor (as content provider[5] and tortfeasor) and borne by end user (victim), it is time to effectuate legal and alternative risk controlling mechanisms. The impact of negative externality arising from content-related risks of harm is that it "impedes allocative efficiency by sending inaccurate price signals" (Cole & Grossman, 2005, p. 15) and family leader's minor overproduces content that includes risk of harm.

Actually, it should be noted that market forces can be regarded as an alternative risk control mechanism in addition to state intervention with legal rules. In the history, for example product-related risks of harm were controlled by market forces under the doctrine of "caveat emptor" (Miceli et al., 2013, p. 54). However, using market forces to control the risks become more costly than legal rules if content providers and end users are risk lovers[6], insurance market fails in terms of moral hazard and adverse selection problems (Cooter & Ulen, 2014, p. 48-49; Miceli, 2004, p. 34-37), insurance firms avoid to insure content-related risks via new media applications, or they insure, but charge higher premiums than regular. In this case, content-related risks should be controlled by legal modes of risk control mechanisms which are liability rules and/or safety regulations. In this paper, author focuses on the content-related risks of harm created by family leader's minor. In the European Continental Law, including Turkey, family leader's liability is categorized under strict liability. Therefore, alternative legal mechanisms for controlling the content-related risks that arises from using new media applications are strict liability of family leader's rule (TCC art.369) and internet safety regulations (Internet Legislation).

An alternative to negligence, strict liability is a private remedy for victims who file a claim against tortfeasor to compensate damages independent from the tortfeasor's fault[7]. In addition to strict liability, negligence (Art. 49 of Turkish Code of Obligations (No. 6098)) can also be referred for damages arising from minor's content. However, as far as this paper is concerned, strict liability is preferred to negligence for the purposes of drawing a comparison with the safety regulation. Since content-related risks arising from famil leader's minor via new media applications are the cases where strict liability is preferred, "plaintiffs" levels of care and activity make little or no contribution to the overall probability or magnitude of harm" (Cole & Grossman, 2005, p. 240).

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