

The Regulation of Pop-up ads with Obscene Content

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Abstract. The Internet has improved people's life by providing quick and easy access to huge amount of information that continuously updates. However, this powerfully immersive environment also creates new problems. Specifically, 97.8% of the dissemination of obscenity now happens on the Internet. Moreover, the pop-up ads suddenly appearing at any websites and cluttering the computer screen has become a great bugbear of the Internet. Pop-up ads remain a dynamic and influential tool for marketers due to their low cost and push interactions. Based on the surveys, 80% of the pop-up ads have obscene content which causes the antipathy of most people. In China, Advertising Law establishes limits to the pop-up ads which are a close mark shall be conspicuously indicated, and closing the advertisement by only one click shall be ensured. However, this regulation does not have an significant effect on pop-up ads as it is supposed to because of some defects, including the lack of deterrence by serious punishment, the dislocation of the subject of responsibility, the failure of social forces to play an auxiliary role, and the high cost of litigation. Therefore, in order to explore the effective regulation of pop-up ads with obscene content, this essay uses the methods of normative analysis and case analysis. It analyzes the shortcomings of existing Chinese laws on pop-up ads with obscene content and learns from the experience of other countries and finally proposes to regulate pop-up ads with obscene content by the joint efforts of Criminal Law and Advertising Law.

Keywords: Pop-up ads, Advertising Law, Obscenity.

1. Introduction

Have you ever been in such a scenario? You are browsing a website to look for particular information and suddenly pop-up ads clutter your desktop. Some of them present sexually suggestive pictures and some even display sexual behaviour repeatedly in GIF. You want to close these ads and you take time to find the close mark which nearly blends in with the background of the ads. To prevent from clicking on the ad and being taken to another site, you carefully click on the close mark but still fail to close it and jump to another site. Why? That is because the ad actually have two close mark. The one that is bigger and accompanied with the word "close" is actually a fake closing mark. Thus, even if you click on it, it will take you to another site. The true close mark is simply a small cross at the corner which is almost impossible to notice. Based on surveys, 87.69% of the Internet users have meet pop-up ads with obscene content and most of people are annoyed by them [1]. However, the only law putting limits on such ads is the Advertising Law. It establishes that publishing or sending ads over the Internet shall not affect users' normal use of the Internet. In an advertisement published on the Internet in the pop-up and other forms, a close mark shall be conspicuously indicated, and closing the advertisement by only one click shall be ensured. This regulation is called "one-click closing" system. However, this system fails to play its role for its designing loopholes. Therefore, in order to improve the regulation of pop-up ads, emphasis should be put on the characteristics of pop-up ads with obscene content which are the features of both pop-up ads and obscenity. The essay proposes to regulate pop-up ads with the joint efforts of advertising law and criminal law and discusses the reasons for it through case analysis and normative analysis.

2. Legal Rights Being Infringed

First, obscene pop-up ads infringe the order of social administration protected by criminal law. The cost of pop-up ads is low. According to the survey, the pop-up ads appear 1 million times only cost 20,000 yuan, which makes them a popular choice for advertisers [2]. Not only marketers run websites particularly providing obscenity including obscene movies and pictures, but also marketers run websites not including any obscene information use pop-up ads with obscenity content. For the owners of websites providing obscenity, after attracting visitors to their websites through pop-up ads, they can make profits by charging people who want to watch obscene movies they provide for membership fees. They can also display pop-up ads of other marketers and collect advertisement insertion fees which creates a vicious cycle boosting the growth of pop-up ads. For advertisers of legitimate products without obscenity content, for example, video games and comedy movies, they use obscene materials to get people's attention as much as possible in a short time because nowadays people habitually close the pop-ups without seeing its content [3]. Moreover, obscene pop-up ads are common cover for Internet crimes. A lot of criminals use obscene pop-up ads to indicate that they provide prostitution service to attract more people but actually deceive them into online gambling, click farming, nude chat on the Internet and other frauds. Obscene pop-up ads are widely spread so they will reach people who are tempted to obscenity more easily, such as sex addict and minors. Criminals take advantage of their vulnerability and make them become the victims of crimes. Thus, obscene pop-up ads infringe the order of social administration protected by criminal law. Secondly, obscene pop-up ads infringe customers' autonomy of consumption protected by Advertisement Law. Compared with ordinary advertisements, pop-up ads force people to receive them as most of them have a inconspicuous closing mark or fake closing mark which cannot actually close the ad even if people click on them.

3. Advertising Law

3.1. The Justifications of Regulating Pop-up Advertisements

Although pop-up advertisements have a lot of downsides, for example, affecting people's normal use of web pages and disseminating negative information such as obscenity and violence, a complete ban on them is detrimental to the development of the advertising industry and the freemium business model [4]. There are two reasons for this. First, the freemium model has become a prevalent business model in the Internet age [4]. That is Internet firms offer their service to users at no cost to get their attention and make profits by displaying all kinds of ads to them. Users can enjoy a free service as long as they put up with the ads. In this way, both users and the Internet firms get what they want. Secondly, advertising is an important part of freedom of commercial speech [5]. The only limit to commercial speech is not infringing on the legal rights of people, which means ads can still disturb people to a certain degree [6]. As long as the ads are not highly offensive and extremely disturbing to a reasonable man, they do not infringe on legal right to life tranquility. Thus, regulating pop-up ads by requiring them to be closed by only one click is to balance between the freedom of speech and the right to life tranquility. Thus, based on these reasons, regulating pop-up ads through "one click closing" system is justified and improvement should be made on existing Advertising Law to make the system fully play its role.

3.2. The Current Situation of the Regulation of Pop-up Ads and Improvement Can be Made

The Advertising Law and Measures for the Administration of Internet Advertising establishes the "one-click closing" system which requires a close mark shall be conspicuously indicated, and closing the advertisement by only one click shall be ensured. However, in practice, pop-up ads which need time and efforts to close are still rampant. The following circumstances still appear frequently. There is no closing sign, or the advertisement can be closed only if its countdown ends; The closing sign is false, is not clearly identifiable, or is difficult to locate, among others, or there is an obstacle to closing the advertisement; Not less than two clicks are required to close the advertisement; When the same

page or the same document is viewed, advertisements continue to pop up after being closed, affecting the normal use of the network by users. There are four main reasons for the failure of the “one-click closing” system. First, the penalties are too mild as the highest fine for publishing ads that cannot be closed with one click is only 30,000 yuan. It is shown that in 2020, China's Internet advertising revenue for the whole year has reached 4971.6100 million and the revenue of pop-up ads appear when users open the apps can be as high as 80% of the total advertising revenue. Compared with the large profits can be made through pop-up ads, the cost of violating the law is negligible [7]. Thus, the penalties do not serve as a deterrent. Secondly, people being punished by Advertising Law are marketers who want to promote their products through advertising rather than the designer and publisher of the pop-up ads. The marketers only choose the form of ads, confirm the content of the ads and pay for their fees. It is the publishers of ads who decide the size of the pop-up ads, the frequency of popping up and whether the ads can be closed with one click [4]. Thus, the actual controller of pop-up ads will not be punished by law which greatly promotes them to publish pop-ups violating the law for making profits. Thirdly, there is a big contradiction between limited executive arm and countless pop-up ads violating the law so a comprehensive regulation to pop-up ads is almost impossible [4]. Moreover, as pop-up ads can appear at any place and any time, it is hard for the executive arm to precisely capture every case of violating “one-click closing” system in time. Lack of information to pop-up ads makes the cost of investigation extremely high. Specifically, a lot of time, efforts and techniques are needed to collect evidence of violating “the one click closing” system. Consequently, the possibility of finding the violation is low, leading to the low possibility of punishing such a violation. Finally, the litigation as a way to restrict illegal pop-up ads is idled [4]. Although pop-up ads disturb the tranquility of people's private lives, they will not directly infringe on substantive rights, such as life, health, and property. Moreover, civil proceedings are both time-consuming and expensive. Thus, most of the people choose to put up with these illegal pop-up ads, which boosts their growth.

The Advertising Law should change some of the regulations to solve the problems above. First, the penalties of violating the one-click closing system should be more serious. Specifically, the highest fine should be raised and the illegal gains of criminals should be confiscated. Secondly, the publishers of the ads who actually control and design the ads should be the one being punished. Thirdly, as the executive arm is so limited that the pop-up ads cannot be fully regulated, social force should play an accessory role. For example, urging Advertisers Association and Internet Association to investigate violations of “one-click closing” system and instruct advertisers to publish legitimate ads through regulatory talks or exhortation. Additionally, the feedback mechanism between associations and executive branch shall be improved. When executive branch deals with individual cases or conduct investigations on key issues, associations shall be encouraged to provide information and convenience as much as possible to reduce the cost and pressure of the executive branch in enforcing the law.

4. Criminal Law

4.1. The Justification of Regulating Obscene Pop-up Ads

Criminal Law and Measures for the Public Security Administration which is an administrative law both regulate the dissemination of obscene publications. To make sure what kind of act is punished by law, it is important to first figure out the meaning of “dissemination” and “obscene publications”. The “dissemination” mainly refers to three types. The first one is interpersonal communication which is information exchange between individuals. The second one is group communication which means information dissemination behavior between group members. The third one is mass communication which is information exchange through mass media [1]. Here, spreading pop-up ads in the Internet belongs to mass communication. Due to the fact that mass communication targets an unspecified majority of people, their dissemination is harder to control, resulting in greater influence and infringement of legal rights and interests. Therefore, it needs stricter control. As scholars in US propose, unlike a dial-a-porn provider, a pornographer cannot limit the geographical distribution of

material over the Internet [8]. Thus, in order to satisfy the most conservative community, material that would be protected in some jurisdictions would be restricted nationally under internet obscenity statutes [8].

Obscene matter have a negative impact on social norms and sexual morality because they can arouse people's sexual desire. This characteristic comes from its content instead of its physicality. In all the judgment disclosed to the public in China, over 97% of "obscene matter" are electronic information [1]. Thus, interpreting that obscene electronic information as one of obscene articles reflects the responsiveness of the criminal law. In other words, it meets the practical need of fighting against the pornography on the Internet. To fully protect the legal right and interest of social management order, the regulation should focus on both the media and the obscene information itself. As distributing cards printed with pornographic pictures is the crime of disseminating obscene materials, disseminating obscene materials through pop-up ads on the Internet which will reach more people should also be regulated by law.

4.2. Existing Regulation

The Criminal Law of the People's Republic of China does not distinguish the degree of obscenity of obscene materials. Under the Criminal Law, there are four circumstances that will be regarded as serious circumstances which will receive more punishment. First, disseminating more than 40 video files of obscene movies, performances, animations, etc; Secondly, establish chatting groups on the Internet mainly used to disseminate obscene electronic information, with more than 30 members or causing serious consequences; Thirdly, obscene electronic information being disseminated has actually been clicked on more than 20000 times; Fourthly, spreading more than 400 obscene electronic publications, images, articles, short messages, etc. It can be seen that the criteria for determining whether the circumstances of crime of disseminating obscene materials is serious is quantity-based [1]. However, the rapid development of Internet technology has provided great convenience for information dissemination. Thus, the quantitative standard established in judicial interpretation is easy to be reached. Continuing to follow this standard will lead to disproportionate punishment.

Establishing the responsibility for the dissemination of obscene materials should not only consider quantity, but also the degree of obscenity of the content. Many countries have classified obscene information based on their obscenity degree and take different regulatory measures to each classification. For example, the obscene materials can be divided into three levels. Class I obscene information includes obscene videos that seriously violate social customs such as incest, mass promiscuous activities in public places, and sexual intercourse with minors under the age of 14, or obscene videos more than 30 minutes. Class II obscene information includes obscene videos, audio, images, and images that seriously violate social customs such as group sex, minors over the age of 14 and under the age of 18, or obscene videos between 5 and 30 minutes. Class III obscene information includes obscene videos, audio, images, text, and other forms that violate social customs such as exposing sexual organs and sexual intercourse. The threshold quantity standard for obscene material in Class 1 to be punished should be lower than Class 2. Similarly, the threshold quantity standard for obscene material in Class 2 to be punished should be lower than Class 3.

For pop-up ads containing obscene content, the obscenity degree of their content should be considered primarily. If their content is not offensive to a reasonable person, for example simply displaying some sexually suggestive pictures, they should be regulated by Measures for the Public Security Administration and Advertising Law. However, if the content of pop-up ads meets the criteria of obscene materials established by the Criminal Law, they should be regulated by the Criminal Law. The Criminal Law will take particular regulatory measure based in the content of pop-up ads and the extent of their spread.

4.3. Regulatory Experience in US

In the Electronic Age, our way of accessing information has been revolutionized by the convergence of media. Mobile phones feature logging into the Internet, texting and taking photos. Thus, the legal model which relies on neat classifications by medium is no longer capable of deciding what kind of speech should be given the protection of freedom of speech [9]. The scholar in US proposes a content-based test consisting of three tiers for media speech restrictions [10]. The first tier focuses on the initiation and authorized scope of communication; It asks whether the speaker or the listener is the initiator of the contact. Greater protection will be granted to communication initiated by the listener. However, if the speaker exceeds the scope of authorization granted by the listener, the speech will be less protected. The second tier of analysis examines the scope of the audience. If the communication is targeted to a wide range of audience, less protection will be granted to it. The third tier examines the level of interactivity between the speaker and the listener. When the listener has little input into the direction of the content, the speech is granted reduced protection.

Common forms for pop-up ads are windows appearing on the screen without users' consent when they are searching the Internet. In this situation, the advertiser is the speaker and the computer user is the listener. In the first tier analysis, pop-up ads are clearly a push communication which is initiated by the speaker because the pop-up appears unbidden on the listener's screen. Additionally, it goes beyond the users' scope of authorization because particular information rather than pop-up ads is what the computer users searching for. In the second tier analysis, the scholar proposes that if the message in a pop-up is customized for the specific user, then it is better defined as a one-to-one communication which should receive more protection than one-to-many protection. However, in fact, pop-up ads do not target at a user based on their interest. Once the advertisers and the owner of websites make a deal, the ads designed by the advertisers will repeatedly pop up on the websites. Thus, all the visitors of the website see the same pop-up ads and the communication type is one to many which should receive reduced protection. In the third tier analysis test, pop-up ads appear to be similar to spam messages. The majority of pop-up ads will simply direct the user to the advertiser's website if the user clicks on the ad. These ads have a single endstate and are not interactive. Under this three-tiered test, pop-up advertisement with obscene content is not within the protection of freedom of speech and therefore should be regulated by law.

5. Conclusion

Currently, the regulation of pop-up ads with obscene content simply relies on "one-click closing" system established by the Advertising Law. However, this system does not play its role due to the lack of deterrence by serious punishment, the dislocation of the subject of responsibility, the failure of social forces to play an auxiliary role, and the high cost of litigation. The legitimacy of one-click closing system is confirmed as it balances between the freedom of commercial speech and people's right to tranquility of life and promotes the freemium business model by not completely banning the pop-up ads. Pop-up ads should also be regulated by Criminal Law as long as the content of pop-up ads is obscene. In this Internet age, more and more crimes happen in the cyberspace, especially the dissemination of obscene materials. Thus, to fully protect the legal interest of social management order, the electronic obscene message also should be regulated. Then, the essay proposes a new way of regulating obscene materials which is classifying obscene materials into different types based on their obscenity degree and take different regulatory measures to them. To further justify regulating pop-up ads through Criminal Law, it uses a three-tiered content-based test for media speech restrictions. In conclusion, through the joint efforts of Advertising Law and Criminal law, the pop-up ads taking time and efforts to close might be eliminated in the future.

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