

## **[Internet posting takedown system]**

Constitutional Court en banc Decision 2010Hun-Ma88, decided May 31, 2012

Regarding the constitutionality of the temporary measures subject to Article 44-2 of the Network Act

### Facts

In this case, the so-called takedown system under Article 44-2 of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc. (hereinafter referred to as the “Network Act”) are at issue.

When a user demands the deletion of the information made public via the information and communications network by claiming it has violated the privacy or legitimate rights of the claimant, what should the Internet service provider do?

Surely the publisher of the information in violation of privacy or likely to cause defamation would resist to take down his/her posting by insisting that it belongs to the freedom of expression.

### Provisions at issue

Article 44-2 (Request for Deletion of Information) of the Network Act (As amended by Act No. 9119 on June 13, 2008)

(2) A provider of information and communications services shall, upon receiving a request for deletion or rebuttal of the information under paragraph

(1), delete the information, take a temporary measure, or any other necessary measure, and shall notify the applicant and the publisher of the information immediately. In such cases, the provider of information and communications services shall make it known to users that it has taken necessary measures by posting a public notice on the relevant open message board or in any other way.

(4) A provider of information and communications services may, if it is difficult to judge whether information violates any right or it is anticipated that there will probably be a dispute between interested parties, take a measure to block access to the information temporarily (hereinafter referred to as "temporary measures"), irrespective of a request for deletion of the information under paragraph (1). In such cases, the period of time for the temporary measure shall not exceed 30 days.

#### Reasoning

The above provisions at issue in this case have been inserted to let the Internet service provider take temporary measures up to 30 days subject to applicant's request to delete the information concerned and publisher's vindication of such infringement on privacy or reputation of other persons. Its legislative purpose is to prevent temporarily unlawful information from being distributed and diffused and its policy means seem to be appropriate.

Privacy is too fragile to be made public, reputation could be violated when information leading to other person's defamation is placed to be recognized by many and unspecified persons. Consequently, texts, photographs, videos and

other information related with other's privacy and reputation used to spread quickly in the cyberspace, and cannot be sufficiently explained through arguments and debates. And it is ex post facto useless and repairable to compensate the victims suffering character destruction with damages and criminal punishment. The most efficient way is to block the diffusion of unlawful information temporarily.

The requirements for temporary measures call for ISP's review in a reasonable manner of the vindication of victims; short-period of take-down up to 30 days; ISP's fair and self-regulatory settlement of disputes between the publisher and the victim after the take-down period, lest the freedom of expression of the publisher should be restricted in a narrow and necessary way.

In view of the purports of Article 21(4) of the Constitution, the public interest protected by an ex ante prevention of unlawful information from spreading indiscreetly to damage other person's character and rights irreparably seems to be bigger than the loss of private interest suffered by the publisher of such information.

## Conclusion

Consequently, the provisions of the Network Act at issue do not amount to excess prohibition nor infringe upon the freedom of expression under Article 21 of the Constitution. It is because the public interest protected by taking down unlawful information prevails even though the same provisions have the danger of abating lawful information by requiring ISP to take some actions on all takedown requests.