

## **[Internet real name system case]**

Constitutional Court Decision 2010Hun-Ma47 · 252 decided August 23, 2012

Regarding the unconstitutionality of Article 44-5(1) ii of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc.

### Facts

On August 23, 2012, the eight Justices of the Constitutional Court unanimously held that the real name requirement imposed on large-scale portal service providers (the "ISPs") under the relevant statute is unconstitutional, citing such statutes are in violation of the principle of less restrictive alternative and freedom of speech of both users as well as ISPs in the cyberspace, and the self-determination of personal information.

### Case 2010Hun-Ma47

When Claimants X et al. intended to post their messages on the bulletin board under anonymity or pseudonym, the operator of the bulletin board demanded the verification process under the real name system pursuant to Article 44-5 (1) i of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc., Articles 29 and 30(1) of the Enforcement Decree of the same Act (collectively referred to as the "provisions of relevant statutes in this Case") and blocked their posting messages. Claimants X et al. filed a constitutional complaint of this Case citing the provisions of relevant statutes in this Case infringe upon their freedom of expression, etc.

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Claimant Y, publisher of the Internet Media Today, filed a constitutional complaint of this Case citing the provisions of relevant statutes in this Case infringe upon their freedom of speech, etc. as Y was required to verify the real name of their users as from April 1, 2010 by the notification of the Korea Communications Commission that Y is designated as one of the operators of the Internet media required to verify the real name of their users for the year 2010.

Provisions at issue

The following provisions of statutes are at issue:

Article 44-5 (Authentication of On-line Bulletin Board User) of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc. (As amended by Act No. 9119 on June 13, 2008, hereinafter referred to the "Network Act")

(1) Any person who falls under any of the following subparagraphs shall take such necessary measures as provided for by the Presidential Decree regarding the user authentication method and process (hereinafter referred to as "Authentication Measures) so as to operate on-line bulletin boards.

1. Omitted

2. Information Communication Service Providers whose typical service are regularly used by more than 100 thousand persons daily on average, and who satisfy the standards as specified by the Presidential Decree.

Article 29 (Authentication Measures) of the Enforcement Decree of the Network Act (As amended by Presidential Decree No. 21278 on January 28, 2009)

The "necessary measures as provided for by the Presidential Decree" in other parts than each subparagraphs of Article 44-5 (1) shall mean all of the following subparagraphs:

1. To secure any method to authenticate the user of the bulletin board by requesting Certified Authentication Agencies pursuant to Article 2 x of the Digital Signature Act and other third party or administrative agencies who provide authentication services, or by using facsimile or face-to-face confirmation;

2. To secure technologies to prevent the authentication data from being leaked or hacked when employing the authentication procedure and maintaining such authentication data; and

3. To maintain the authentication data for the period from the date of posting messages on the bulletin board to the date when six months passed from the closing of such posting.

Article 30 (Scope of ISPs required to take Authentication Measures) of the Enforcement Decree of the Network Act

- (1) "Any person who satisfies the standards as specified by the Presidential Decree" as stated in Article 44-5 (1) ii of the Act shall mean the Information Communication Service Provider whose services are regularly used by more than 100 thousand persons daily on average during the preceding three months as of the previous year.

- (2) Omitted

In Consequence, Article 44-5(1) ii of the Network Act, which was declared unconstitutional by the Constitutional Court was abolished by Act No. 12681, effective November 28, 2014.

On the same day, Articles 29 and 30 of the Enforcement Decree of the Network Act also were abolished.

### Reasoning

The Internet real name system is legitimate for the purpose and appropriate as a means insofar as it contributes to a sound Internet culture by preventing users from posting illegal or defamatory messages on Internet bulletin boards, and collecting data to identify who did so.

However, the Internet real name system requiring the operator of the Internet bulletin board to verify the real name of its users and block their posting of any message on the Internet bulletin board in case their names fail to be verified is deemed over-restrictive beyond the extent necessary to attain the said purpose, and accordingly in violation of the principle of less restrictive alternative and freedom of speech for the following reasons:

Where incidents of posting illegal messages occur, the illegal posters may be identified by investigating the IP addresses, and the victims may be sufficiently remedied by deleting, and blocking the dissemination of, illegal messages, and/or by means of ex post damages or criminal punishment.

As the users of the bulletin board include not only the person who intends to post messages but also the person who merely accesses the board and is

unlikely to do wrongful posting, and the scope of application of the real name system depends on the calculation of the number of users which is not so clear nor correct enough to convince the public, the said system in disregard of the characteristics of the Internet seems to allow the enforcement authority to act in an arbitrary manner.

The period for the ISPs to retain the real name verification data is six months from the closing of the posting of messages. So such data may be maintained indefinitely until such messages are deleted and the posting has been closed.

In addition, the real name system is in breach of the proportionality required between protective legal interests, in that the disadvantages imposed on the users of the board and ISPs are by no means smaller than the public interest achieved by the real name system on the following accounts:

Because freedom of expression, the backbone of democracy, is of utmost importance in the Constitution, the effect of public interest achieved by restricting such freedom should be so overwhelmingly clear that such restrictive measures can be justified. But the real name system would not bring out any evidentiary fact that wrongful posting of messages like defamation significantly decreased.

Instead, it has caused the mass-flight of local users to overseas websites, adverse discrimination against domestic ISPs and enforcement difficulties from arbitrary law enforcement. As a result, it is not effective to attain the public interest as anticipated.

Also it should be taken into consideration that new kinds of communication media such as mobile bulletin boards, social networking services, etc. are so widely used that the original real name system is being implemented for the

public interest within a limited scope of cyberspace.

On the contrary, the real name system has produced the following adverse effects:

The Internet users are most likely discouraged from expressing themselves for fear of any regulation or punishment arising from their identity disclosure;

Aliens and ethnic Koreans living overseas without the resident registration number are prevented from participating in the Internet bulletin boards;

The operators of the bulletin boards who find themselves in competition with the above-mentioned new kinds of communication media are treated increasingly in a disadvantageous way; and

The obligatory maintenance of real name verification data has increased the possibility that such data of the bulletin board users could be leaked or misused improperly.

## Conclusion

Therefore, the provisions of relevant statutes in this Case which provide for the real name system is ruled in violation of the principle of less restrictive alternatives and the fundamental rights of the Constitution, including the freedom of expression and the self-determination of personal information of Claimants X et al. and the freedom of speech of Claimant Y.