

An Analysis of Korean Legislative Development in Relation with Economic Growth

– Information Technology Policy and Law –

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Abstract

I . Background and Purposes of Research

- Korea has rapidly emerged as a powerful IT country with a strong will to enhance its information systems and has begun to prepare legislation that can respond to the ever-changing IT environment. In other words, the brilliant growth of IT services and continuously changing environment required development of comparable policies and legislations. This will apply to other countries that may be seeking economic growth using the rapid IT development in Korea as a model. Therefore, it would be highly significant to present the Korean experience in IT legislation development, problems, and countermeasures to those countries.

- This research reviews the progress and changes in the policies and legislations concerning the Internet along with its development among the wide IT services. The government has continued efforts to include both the functions and dysfunctions of the steadily developing Internet in the legislation. Yet, there had to be inevitable gaps between the growth of the Internet along with its rapidly progressing technologies and the existing statutes. As there are limits to a perfect statutory regulation of all of the constantly developing Internet technologies, the respective legislation should be reviewed very carefully.

- Therefore, this paper will review development processes of the laws and systems Korea has prepared to address the development of the Internet and various incidental problems. It will examine them in a legislative perspective. In so doing, we intend to present a legislation model based on the processes of the laws and institutions to address the growth of IT and Internet Korea, which can be used as stepping stones for economic growth and overcoming economic crises.

II. Research Content

- This research examines the changes in policies and legislation concerning the Internet along with its development. The Internet-related statutes have repeatedly changed and progressed to address the changing environment. Even these days, the related statutes have key controversies concerning freedom of expression, protection of private information, copyright, and regulation of Internet services based on a grand premise of the openness and neutrality of the Internet.
- Chapter 2 will examine the significance of Internet legislation in connection with economic growth. In particular, it will examine the functions the Internet legislation has performed or will perform in connection with economic growth.

- Chapter 3 will examine the specific development processes of Korean Internet legislation. It will further analyze the chronological characteristics of the development processes of the Korean Internet legislation. Next, it will attempt to assess the key issues related to the development processes of the Internet legislation. Specifically, it will examine privacy protection, freedom of expression and copyright on the Internet.
- Chapter 4 will present the implications of the development processes of the Korean Internet legislation. The research contents presented under Chapters 2 through 4 will provide basic information that could be utilized for policy development and legislation by countries that plan to achieve economic growth based on information technologies.

III. Suggestions of Research and Utilization Methods

- This research has examined and assessed the changes in policies and legislation concerning the Internet along with its development. In so doing, this paper intends to present a legislation model based on the processes of laws and institutions to address the growth of IT and Internet Korea, which can be used as stepping stones for economic growth and overcoming economic crises. This research will provide basic information that could be utilized for policy development and legislation by countries that

plan to achieve economic growth based on the Internet and related information technologies

- The principal suggestion we can extract from our review of the Korean Internet legislation is that it tends to minimize or prevent dysfunctions of the Internet. Therefore, excessive Internet legislation should be avoided. The legislation should drive the development of the nation and society at a macroscopic level.

- The issue of privacy protection on the Internet is extremely significant as it can reasonably harmonize the functions and dysfunctions of the Internet. Therefore, the legislation should not be excessively inclined to avoid or prevent the dysfunctions. Rather, it should achieve a statutory regulation that can safeguard the desirable functions of the Internet. In other words, the legislation should protect the legitimate service relations as much as the statutes that regulate the protection of privacy. In other words, the legislation should not only protect individuals from the misuse or abuse of personal information but also ensure statutory protection and regulation concerning the collection of minimum-required personal information within its original purposes, the prohibition of its use in violation of the purpose of its collection, appropriate handling after collection purposes are achieved, and the right to be forgotten.

- The current legislation for regulating freedom of expression on the Internet tends to minimize its dysfunction. It is necessary to assess the legislation faithfully based on the original constitutional values. However, if the regulation on the freedom of expression cannot be compromised by the dysfunctions of the Internet, the legislation needs to protect the procedural rights of those who upload their expressions [on the Internet] and a new institution-based autonomous regulation should be introduced as an efficient, reasonable alternative.

- The objective of Internet-related legislation on copyright should be to maintain a balance between the protection of civil rights and fair use of copyrighted materials. Therefore, the protection and reinvigoration of Internet services should also be considered as elements that need be considered for legislation concerning Internet copyright in addition to the protection of copyrighted materials and the protection of the users' rights. From such a prospective, it is necessary to reconsider the scope and contents of the responsibility the current copyright law imposes on online service providers.

➤ Key Words : legal collaboration, economic growth, legislative development, Korean IT law, IT Policy and Law

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Chapter 1. Preface

Section 1. Significance and Purpose of Research

It is well known that information technology (IT) in the current society is a core means to actively address uncertainties and crises in the future in addition to being a driving force that can fundamentally reform national or social systems by creating values while leading overall political, economic and social megatrends. Korea has rapidly emerged as a powerful IT country with a strong will to enhance its information systems and has strived to prepare policies and legislation that can respond to the ever-changing IT environment.

The Internet was introduced to Korea 30 years ago. There have been many changes in the Internet environment and relevant legislation. Though efforts have been made so far to have the law cover both the functions and dysfunctions of the Internet along with its development, there was an inevitable gap between the propagation of the Internet or the progress of Internet technologies and the existing statutes. As there are limitations in regulating the development of the Internet technologies, relevant legislation is an issue that should be carefully examined.

Policies and legislation should be prepared to address the speedy growth of IT and its ever-changing environment. This is applicable not only to Korea but also to the other countries that pursue economic growth through IT development. Therefore, it would be highly meaningful to present to those countries the Korean experience in IT legislation development, related problems, and countermeasures. Further, it is the right time to review how Korea should respond to the continuous changes in the IT environment. It

would be highly meaningful for us to review the development processes of the legislation.

This research will review the development processes of laws and systems Korea has prepared to address the various problems related to the development of Internet services. It will examine them in a legislative perspective. In doing so, this paper intends to present a legislation model based on the processes of Korean laws and institutions as introduced to address the growth of IT and the Internet as a foundation for economic growth and overcoming economic crises.

Section 2. Scope and Methods of Research

This research mainly addresses the changes in policies and legislation concerning the development of the Internet among the extensive IT sectors. Korea had to prepare legislation to address the changes in environment, which was attributable to the rapid growth of Internet technologies. Internet related laws have undergone changes to respond to an ever-changing environment in connection with approaches related to protection of personal information, e-commerce and copyright. Even these days, the related statutes have key controversies concerning freedom of expression, protection of private information, copyright, and regulation of Internet services based on a grand premise of openness and neutrality of the Internet.

Further, it will examine the outline of changes in legislation according to the stages of the introduction of the Internet and its growth and development in relation to the political and economic conditions in Korea. It will review the evolution of changes based on key controversies related to Internet policies and legislation in examining the development processes of

the Internet and related legislation. In addition, in examining the development of legislation according to key issues related to the Internet, it will inclusively systemize and assess Internet-related policies and legislation based on the two essential natures of the Internet, openness and neutrality.

Following Chapter 1 Preface, Chapter 2 will examine the significance of Internet legislation in connection with economic growth. In particular, it will examine the functions the Internet legislation has performed or will perform in connection with economic growth. Chapter 3 will examine the specific processes of development of Korean Internet legislation. First, it will divide the chronological development of Korean Internet legislation based on its characteristics. Then it will examine the development of Internet legislation based on key issues. Chapter 4 will present the implications of the development of Korean Internet legislation. It will provide basic data that can be utilized for the development of policies and legislation by the other countries that pursue economic growth through IT or the Internet.

Chapter 2. Economic Growth and Development of Internet Legislation in Korea

Section 1. IT Industry and Economic Growth in Korea

IT investment was reduced by the 1997 financial or foreign currency crisis in Asian countries such as Korea, Thailand, Malaysia and Indonesia. The ‘citizens’ government’ in Korea switched its attention to ICT for a new national strategy to overcome the first economic crisis it faced in its history. The IT sector emerged as a core industry in Korea following the citizens’ government that focused on the development of IT industries by intensively supporting the development of technologies that have greater growth potential and the ‘participatory government’ that aggressively invested in nine new IT growth engines by developing strategies for their development.¹⁾ A cornerstone was provided for Korea to become an IT power thanks to the deployment of an IT infrastructure and the active development of the IT industries by the citizens’ government. The Internet distribution ratio and IT industries in Korea grew remarkably in five years under the citizens’ government, occupying a substantial percentage of the country’s GDP, which grew rapidly in the early 2000s. Korea, which had invested actively in IT industries, could relatively smoothly overcome the financial foreign currency crisis and it achieved a relatively higher growth over the other Asian countries that experienced the same crisis. Thailand, Indonesia and other Asian countries that were relatively slow in IT investment had a slow growth trend in contrast.²⁾

1) Oh Cheol-ho, *Korean Economy and IT*, Regional Information Services Vol. 56, 2009, p. 2.

2) Kang Han-gyun and Jeong Sang-guk, *Characteristics of ICT investment and economic*

Many of the past research projects revealed that a positive correlation exists between IT/ICT investment and economic growth. Dholakia and Harlam asserted that IT has a greater influence on economic development than the variables of education, energy, and physical infrastructure based on a multiple regression analysis of data collected throughout the 50 US states. Wang asserted that IT investment has a significant influence on economic growth, based on his empirical analysis of the case of Taiwan.³⁾ Other research reveals that though IT industries have affirmative influences, such as enhanced productivity, job creation, enhanced market efficiency, provision of high quality goods and services, and inducement of product and service innovation, they also have negative influences, including risk of privacy intrusion, and job reduction by IT-based reform.⁴⁾ Therefore, policy makers should realize the importance of IT related policies and actively promote digital reform and changes in economic sectors. On the other hand, it is necessary to amend the legal system concerning regulation of IT technologies.

Some asserts that in the case of Korea as well, a two-way causality exists between ICT investment and economic growth.⁵⁾ As the importance of the IT sector is mentioned in the economic and industrial forecast each year,⁶⁾

growth in East Asian countries, Internet e-commerce research Vol. 2, No. 2, 2002, p. 2.

3) Dholakia R. R. and Harlam B., Telecommunications and economic development : econometric analysis of the US experience, Telecommunications Policy, 18(6), 1995; Wang E. H., ICT and economic development in Taiwan : analysis of the evidence, Telecommunications Policy, 23 (3/4), 1999. Quoted in Yu Seung-hun, Analysis of relations between IT investment and economic growth, Collection of theses presented at Spring Academic Conference, Korea Foreign Trade Society, 2001, recitation p. 303.

4) National Information Society Agency, Roles of IT in digital age - Influence IT has on economic growth -, (Apr. 2007) pp. 4-10.

5) Yu Seung-hun, *Ibid.*

6) Korea Photonics Industry Association, "4.8% economic growth forecast under leadership of IT industries", Optical World 125, 2010, pp. 24-27; Korea Photonics Industry Association, "Economic growth slowed down to 4% range, Overall growth is led by IT related manufacturing", Optical World 131, 2011, pp. 14-17.

it is evident that IT industries have played a critical role in the Korean economy.

On the other hand, a substantial change has resulted from the growth of the IT infrastructure represented by the distribution of Internet services in government administration, i.e. beginning of e-government services, as well as in industries overall. IT development has enabled computerized services, substantially reduced social costs in both the private and public sectors, and created new values.

The ‘participation’ government developed in the ‘IT 839 Strategy’ in 2004 as the IT industries started to be highlighted as future growth engines during the citizens’ government. The IT 839 Strategy was designed to achieve a GNP of USD 20,000 by intensively developing eight major new services, three advanced technology infrastructures, and nine IT related new growth engines.⁷⁾ As the result of the IT 839 Strategy, the technology gap with the USA narrowed from 2.6 years in 2003 to 1.6 in 2006. The diverse IT policies of the citizens’ and participatory governments are summarized as follows.

7) The eight new services refer to WiBro (Wireless Broadband Internet), digital multimedia broadcasting, home network, telematics, wireless recognition technology, 3G mobile communication, terrestrial digital television, and Internet phone service. The three advanced technology infrastructure refers to wide-area integrated network, U-sensor network, and next-generation Internet protocol while the nine new growth engines refer to next-generation mobile communication, digital broadcasting, home network, IT infrastructure, next-generation PCs, embedded software, digital contents, telematics (remote diagnosis, location information etc.), and intelligent robots.

<Table 1> Korean IT Policies (1999-2007)

Classification	Development of information services/systems				Development of IT industries	
	Cyber Korea 21	e-Korea Vision	Broadband IT Korea	u-Korea	IT 839	u-IT 839
Period	1999-2002	2002-2006	2003-2007	2006-2007	2004-2006	2006-2007
Characteristics	<ul style="list-style-type: none"> - Parallel development of information services and IT industries - Focusing on capital investment - Led by government 				<ul style="list-style-type: none"> - IT industry policies inclusively linking services - infrastructure - appliances 	
Achievements of Policies	<ul style="list-style-type: none"> - Deployment of world- best IT infrastructure - Promotion of information services 				<ul style="list-style-type: none"> -Securing or globalization of advanced IT technologies - Adoption of international standards : T-DMB EU standards ('05.07), WiBro ITU 3G standards ('07.10) - New services, such as DMB, WiBro 	
Limits	<ul style="list-style-type: none"> - Insufficient diffusion of benefits of information services - IT technologies were utilized mainly for amusement, games, etc. - Weakened policy consistency due to frequent plan changes 				<ul style="list-style-type: none"> - Limited response to convergence between IT and main industries - Supply-oriented (technology development), insufficient reflection of market demand - Policy setback due to conflicts among government departments 	

The Lee Myung-bak government that was inaugurated in 2008 disclosed the Basic Plans of National Informatization based on IT services and creative software, and also proposed Green IT by applying 'Green Growth' to information services, which it adopted as a strategy for overcoming the economic crisis. The Lee Myung-bak government selected five areas in its

major five IT strategies - convergence IT, software, backbone IT appliances, broadcasting and communication, and the Internet. Further, as for new IT policies, it proposed that IT industries converge with all industries, resolve economic and social issues, and IT industries be upgraded. It is believed that the Lee Myung-bak government switched the infrastructure-or equipment-oriented IT policies of the two preceding governments to the world IT trend of computing-or service-oriented IT. However, some criticize Lee Myung-bak government by claiming the IT policies did not review the links between various strategies and down- or upstream effects of core industries as the individual strategies were planned separately due to lack of a control power. The New IT Policies are described in further detail.

<Table 2> New IT Policies (2008-2012)

IT industries that converge with all other industries (Convergence IT)	<ul style="list-style-type: none"> - Convergence between IT and products - Convergence between IT and processes - Grafting IT with service industries - Embedded software
IT industries that resolve economic and social issues (Problem Solver IT)	<ul style="list-style-type: none"> - Green IT (environment friendly, energy) - LED business - Health, Bio + IT - Life + IT
IT industries that are upgraded (Advancing IT)	<ul style="list-style-type: none"> - Semiconductor, display - Network, mobile communication - IT parts and software industries

In the case of the Park Geun-hye government that was inaugurated in 2013, apparently it has not yet named or compiled any specific IT or ICT policies as it is still in its early stages. But, it has presented a policy

direction featuring the ‘realization of creative economy and citizens’ happiness with science and technology and ICT’ by newly organizing the Ministry of Science, ICT and Future Planning. This ministry is designed to create new industries and jobs, and realize a creative economy by developing the country’s science and technology and ICT to a world-best level. The ICT here includes projects the government has so far supported and technologies that have been highlighted in the market, including cloud computing, big data, Internet of things, NT-BT convergence, and development of software.

Section 2. Korean Economic Growth and Internet Legislation

IT technologies based on the Internet have functioned as the economic growth engine in Korea since the mid-1990s thanks to government policies. So, we should first research what aspects we should illuminate in regard to Korea’s economic growth and Internet legislation and how the research should be performed. It would be a very simple approach if we focus on how the Internet legislation promoted or supported the IT industries in Korea to study the correlation between the country’s economic growth and Internet legislation. Cyberspace features diverse new possibilities that are differentiated from the real world, such as possible access to enormous amounts of information, anonymity, and real-time interaction. On the other hand, all the social relations and problems that arise in the real world may also arise in cyberspace. In other words, all of the real world problems may arise in cyberspace, including those related to contracts, breach of basic human rights, and democracy. Therefore, we should assess if the diverse problems

in cyberspace are faithfully and reasonably regulated considering the medium characteristics of the Internet in order to have Internet legislation function as a legal basis for developing a true Internet power while driving Korea's economic growth in a desirable direction.

Government IT policies also understand that IT is a foundation stone of all industries including in the private and public sectors rather than an isolated industry that leads the overall mega trends of politics, economy and society; it is a driving force that can reform fundamental national and social systems and a core means that can actively respond to uncertainties and crises in the future.

The history of changes attributable to the diffusion of the Internet and growth of Internet industries in Korea may be divided into periods as follows. The first period is from 1980, when the Internet first appeared, to 1992, when the Internet underwent an embryonic growth in Korea. The second period is from 1993 to 2002, when the Internet grew in Korea. This period has an important milestone in which Korea entered a portal community era as infrastructure facilities were deployed for the Internet along with emergence of a broadband Internet service and wide supply of Internet and personal computers. The third period is from 2003 to the present, which may be called the development era of the Internet in Korea. This period may be said to feature the arrival of a personal media era when SNS became ubiquitous with the development of portal communities and smart phones, which started to propagate from 2009.

During the period, Internet legislation advanced information services in Korea. Many statutes were enacted or amended to prevent dysfunctions of the Internet. The statutes that were newly enacted or amended to promote information services in Korea include the Framework Act on National Infor-

matization, the Act on the Protection of Information and Communications Infrastructure, the Internet Address Resources Act, the Digital Signature Act, the Framework Act on Electronic Commerce, the Electronic Government Act, the Contents Industry Promotion Act, the Game Industry Promotion Act, and the Act on Development of e-Learning Industry and Promotion of Utilization of e-Learning.

The openness and neutrality of the Internet is an inherent mechanism. The openness of the Internet may be said to be a technical nature or principle that no one can manage or control, but it also generates incidental dysfunctions. Therefore, a clear reasonable limit should be set on citizens' free access to information and freedom of expression, though they should be simultaneously safeguarded or recognized. These issues belong to the critical mission of the government for which the changes and development of the concerned legislation should be examined. The statutes that are designed to minimize the dysfunctions of the Internet include the Personal Information Protection Act that covers problems related to the protection of personal information, the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. and the Act on the Protection, Use, etc. of Location Information. In addition, the Public Official Election Act includes provisions related to the regulation of the expression of freedom on the Internet and the Copyright Act regulates copyright related to the Internet, though these are not the direct Internet legislation.

The neutrality of the Internet is a principle that the free access right of Internet users should not be damaged by market monopoly and technology. As for neutrality, so-called neutrality concerning networking and technology is under discussion. The neutrality of the Internet is closely related to the regulation on Internet services under the Telecommunications Business Act.

Chapter 3. Review and Assessment of Development Processes of Korean Internet Legislation

Section 1. Development Processes of Korean Internet Legislation

As mentioned above, the development period of the Internet in Korea can be divided into periods of Internet emergence, growth and development. The first period is from the 1980s, when the Internet first appeared, to 1992, when the Internet underwent an embryonic growth in Korea. The second period of Internet growth is from 1993 to 2002. This period has an important milestone in which Korea entered a portal community era as infrastructure facilities were deployed for the Internet along with emergence of a broadband Internet service and wide supply of Internet and personal computers. The third period is from 2003 to the present which may be called the development era of the Internet in Korea. This period may be said to feature the arrival of a personal media era when SNS became ubiquitous with the development of portal communities and smart phones, which started to propagate from 2009.⁸⁾

1. Internet Emergence Period (1982-1992)

Korea pioneered the research and development of computer networks based on TCP/IC in the early 1980s. Korea was one of the countries that deployed a world-first TCP/IP based research network in the spring of

8) This period division is based on the division of Internet development period in Korea by Korea Internet Security Agency (*30 Years Internet by Photos*), KISA, http://i-museum.kisa.or.kr/sub02/08/internet_30.jsp.

1982. From this period on, the word ‘first’ was granted to historical events related to the Internet in Korea, including the first connection to the Internet and the first interoperation with overseas networks. The history of the Internet in Korea started with the connection between computers at Seoul National University and Korea Institute of Electronic Technology (currently Electronics and Telecommunications Research Institute, ETRI) in May 1982. Korea became the second country that successfully connected computers based on TCP/IP, which constitutes the backbone of the present Internet, just after the USA, which was the only country with Internet in the world at the time. In May 1983, Korean Internet was interoperated with the Internet overseas for the first time and KIST computers were connected with EUNET. In October 1983, they were connected to UUCPNET. In May 1984, Dacom started a Korean-language e-mail service. In 1986 and 1988, Cheollian and Hitel PC communication services appeared, respectively. In the latter half of the 1980s, international-scale Internet services started to develop. In the early 1990s, research-oriented Internet services increased. In 1992, Korea Network Information Center was founded under the Academic Network Council in order to provide integrated Internet network information management services.

During this period, Internet was not widely known to the general public. As its users were limited to very few researchers, nearly no legislation was introduced for the promotion of its use or regulation. Noteworthy statutes that emerged in this period are the Act on Promotion of Extension and Utilization of Computer Network (the current Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.) and the Act on Protection of Computer Program (abolished in 2009) on copyright of Internet articles. On 12 May 1986, the Act on Promotion of

Extension and Utilization of Computer Network was enacted to regulate matters concerning the extension of computer networks. In December of the same year, the Computer Program Protection Act was enacted, which was the first regulatory statute that emerged in the growth-oriented IT environment. In other words, it was the first step to becoming a true IT power : establishing the copyright concept of software and other computer programs and limiting their reckless or illegal duplication or use. At the time the Act was enacted, personal computers had been released by Sambo Computer, Samsung Electronics and Daewoo Electronics following the 8-bit computer launched by Apple. The local software industry was nothing but a desolate wilderness as the extension of IT infrastructure started, including the deployment of the national backbone computer network. The existing Copyright Act did not have any provisions on the protection of software programs that were a strange target of regulation. In such circumstances, it was extensively feared that the growth of local software developers would possibly be obstructed by the newly enacted Computer Program Protection Act which warranted the rights of foreign software developers or vendors. In fact, the US demanded the protection of rights concerning software by continuing its request for protection of copyrights belonging to US software. In July 1986, Korea drafted an agreement concerning Article 301 of the US Trade Act on the insurance market and protection of intellectual property rights by extensively accommodating a US proposal at a working-level trade negotiation between Korea and the USA. The protection of software was included in the agreement. Under such a background, the Computer Program Protection Act was enacted in December 1986 and enforced in July 1987.

Unlike many other countries including the USA and Japan that protected software by including it under their Copyright Act, Korea enacted a

separate statute called the Computer Program Protection Act. This was the outcome of considerations concerning the technical nature of software and future legal development while accommodating the worldwide trend of copyright protection and the US's request. Further, the Act was also designed to protect local businesses and industries. It is assessed to be a legislation designed to provide room for the growth of local software industries while protecting local businesses that had used illegal programs unconsciously by specifically providing the types of computer programs subject to the separate statute rather than the Copyright Act and punishment of related violations. In 1986 when this Act was enacted, its legislation was designed for the protection of rights of the authors by recognizing software programs as a type of copyrighted material and to contribute to the development of the industry and technologies by promoting fair use (Article 1). The Computer Program Protection Act performed desirable functions such as those of developing the local software industries by inducing fair use while encouraging program developers. It also contributed to the evasion of trade conflicts while protecting foreign software programs based on the principle of reciprocity.

2. Internet Growth Period (1993-2002)

The broadband backbone network deployed and the extensive distribution of Internet services may be indicated as the greatest changes that took place in Korea in connection with Internet from the mid-1990s to the early 2000s. The deployment of the Korea Information Infrastructure (KII) started in 1995 as the greatest national project in the history of the Korean government. The Internet service that had been limited to research agencies started to be

provided to businesses and homes in the mid-1990s and the Internet was widely distributed from the late 1990s.⁹⁾ In 2001, the households connected to broadband Internet exceeded 7.8 million or 50%.¹⁰⁾ Internet users increased to 10 million in 1999 and 26 million, exceeding a half of the total population, in 2002.¹¹⁾ Not only desirable functions but also dysfunctions of the Internet started to appear from this period owing to the wide distribution of Internet services. Again, legislation was required to respond to such dysfunctions.

First, we review the changes in the legislation that appeared at that time and were designed to protect personal information on the Internet. As mentioned in connection with the section on the Internet emergence period, the Act on Promotion of Extension and Utilization of Computer Network was enacted on 12 May 1986 to regulate matters concerning the extension of computer networks. The projects for extending computer networks were promoted as an information service project under the Framework Act on Promotion of Informatization (the current Framework Act on National Informatization). The Act was renamed the Act on Promotion of Information and Communications Network Utilization, etc. in February 1999 as a new system was introduced for the protection of personal information of the users of information network services. Extensive provisions were introduced for the protection of personal information. The Act was renamed again into the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (“Information and Communications Network Act” hereinafter) in 2001. Through another amendment in 2001, the Act

9) Korea Association for Informedia Law, *Internet, its way questioned*, 2012, pp. 81-84.

10) NIA, *Korea Internet White Paper*, 2002.

11) NIA, *Footprint of National Broadband Network Project*, 2006.

provided restrictions on the collection of personal information (Article 23), grounds for entrusted handling of the collection, treatment and administration of personal information, responsibility of the IT service providers in connection with such entrustment (Article 25 and 58 of the Act), the right to claim compensation of damages by users caused by a violation of the IT service providers of their obligations for protecting personal information (Article 32), and the installation, composition and authority of Personal Information Dispute Mediation Committee to easily and speedily mediate disputes related to personal information (Article 33 through 40 of the Act).

Through the 2002 amendment, a punishment provision was also introduced against those who have been provided with personal information illegally. In other words, in addition to a provision that was introduced to punish those who illegally provided personal information for purposes other than those notified at the time of the collection of personal information or those for which personal information is provided, another provision was introduced to punish those who have intentionally obtained personal information for commercial or illegal purposes knowing that it was illegal (Article 62 of the Act). In addition, a provision was added to prohibit the acts of collecting, selling, circulating or using e-mail addresses of others using programs or other means that automatically extract e-mail addresses on a website that clearly indicates refusal of the collection of e-mail addresses (Article 50-2 of the Act).

The provision of the Computer Program Protection Act that provided guidance level protection of copyright while protecting the software industry switched to an enhanced regulation from the late 1990s in the domain of the Internet copyright legislation. The evolution into the digital or Internet age proceeded rapidly, far beyond what was hardly anticipated at the time

of the Act's enactment. To address such changes, the worldwide trend was reflected on Korean legislation, including enhancement of intellectual property rights, especially, protection of copyright. Through the 1998 amendment, the Computer Program Protection Act defined the transmission or right administration information and recognized transmission right by program copyright holders, and treated removal of right administration information as acts of infringing copyright. Further, through an extensive amendment in 2000, the Act introduced a provision on technical protection measures and prohibited acts nullifying such technical protection measures.

Through an amendment in January 2000, the Copyright Act also started protection and regulation of copyright on the Internet, admitting the authors' right to transmit. The amendment defined the concept of transmission (Article 2 Subparagraph 9-2) and added the transmission right to the author's copyright or property right by requiring the transmission of articles on computer networks to use the copyright of the author (Article 18-2).

3. Internet Development Period (2003 to present)

During this period, diverse broadcasting-communication convergence services like IPTV appeared with the deployment of the Broadband convergence Network (BcN), and WiBro and other Korean Internet technologies were exported. In so doing, Korea became an advanced Internet power leading Internet culture. This period also included a portal community and one-person media era where SNS was active with the supply of smart phones in 2009. As the Internet environment in the IT power exposed many dysfunctions, many statutes were actively enacted to regulate the Internet.

First, the regulation under the Information and Communications Network Act was strengthened to protect personal information. In 2011, the Personal

Information Protection Act was enacted. To briefly review the changes of the Information and Communications Network Act, its 2004 amendment provided that the information network service providers should specify in their service terms and conditions the matters concerning the installation and operation of devices that automatically collect personal information, including files of information concerning access to the Internet, and refusal to such devices when the service providers intended to obtain consent for the collection of personal information of the service users. (Subparagraph 5, Paragraph 2 of Article 22). Further, the IT service users may request that service providers provide particulars concerning the use or provision of their personal information to any third parties, in which case the service providers are required to take necessary action without delay (Paragraph 2 of Article 30). An amendment in November 2004 prohibited the collection of e-mail addresses without advance consent (Article 50-2).

An amendment in 2007 strengthened the procedure for the collection, use or provision of personal information (Paragraph 1 of Article 22, Article 24-2). An amendment in 2008 imposed penalties on IT service providers who violated the provision concerning protection of personal information (Article 64-3) and changed the punishment of some violations from penalty to criminal indictment while raising the penalty amount (Article 71 and 73). In addition, a new provision was inserted into user subscription methods as alternative to using a resident registration number since personal information is more likely to be infringed when only the resident registration number is used for user subscriptions on the information network (Article 23-2).

In 2012, to prevent any large-scale leakage of personal information, reckless collection and use, the resident registration number was restricted unless it is permitted under a statute (Paragraph 1 of Article 23-2). Any

leak of personal information was also required to be notified to the users and reported to the Korea Communications Committee (Article 27-3). When a statute concerning protection of personal information is seriously violated, the Korea Communications Committee may report the relevant information service provider to a law-enforcement agency (Article 69-2). In so doing, the overall system was strengthened to protect personal information.

In 2011, the Personal Information Protection Act was enacted to enable a consistent regulation of both public and private sectors by improving the legal regulations for the protection of personal information since inclusive systematic protection was insufficient as it was handled by many different individual statutes, including the Act on the Protection of Personal Information Maintained by Public Institutions, the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., and the Use and Protection of Credit Information Act. The Act introduced diverse new measures related to the protection of personal information, including installation of the Personal Information Protection Commission, which belonged to the Presidential Office (Article 7 and 8), restriction of treatment of personal information (restriction on treatment of sensitive information or unique identification information, restriction of installation of image data processing equipment (Article 23 to 25), safe management of personal information, including registration or disclosure of personal information files, and assessment of impact of personal information (Article 33), Personal Information Dispute Mediation Committee (Article 40 to 50), collective lawsuits on personal information (Article 51 to 57), and notification or reporting of personal information leakage (Article 34).

Many statutes were enacted in this period to regulate the freedom of expression which did not appear till the Internet growth period. As a rule,

the freedom of expression was regulated under the Information and Communications Network Act. The freedom of political expression or speech related to election campaigns on the Internet was regulated by the Public Official Election Act. An amendment to the Information and Communications Network Act in 2007 introduced provisions to extensively restrict the freedom of expression. It newly introduced provisions on the prohibition on circulation of unlawful information (Article 44-7), defamation on the Internet (Article 44), temporary measures (Paragraph 2 of Article 44-2, Paragraph 1 of Article 44-3), and a limited identification system (Article 44-5). In 2004, the Public Official Election Act introduced provisions restricting election campaigns on the Internet. Those provisions included the regulation on Internet newspaper companies by the Internet Election News Deliberation Commission (Article 8-5, Article 8-6), a regulation of election campaigns on information networks (Article 82-4, 82-5), and a system for verifying real names on the Internet (Article 82-6).

A legal ground for highly enhanced regulations was provided for the protection of copyright in this period. As copyright was seriously infringed in Korea, legislation was introduced that could hardly be found in other countries. The Computer Program Protection Act amended in 2006 provided that the Computer Program Protection Association may recommend or order corrections, including deletion of a relevant program by the online service provider, in order to promptly block the distribution of illegal copies on the information network (Article 34-2). Further, as for actions preceding the correction order, the Computer Program Protection Association may also issue a warning to the online service provider and recommend the service provider to delete the relevant program or information, or those who transmit such a program or information to stop or terminate their use (Article 34-3).

An amendment in 2006 enhanced the punishment of acts infringing program copyright considering the equity with the Copyright Act and other statutes (Article 46 and Article 47). Through an amendment to the Copyright Act in 2009, the Computer Program Protection Act merged with the Copyright Act.

Important matters related to the copyright on the Internet could be included in the Copyright Act as its amendment in 2003 newly introduced provisions on technical protective actions, right management information, and online service providers (Subparagraph 12-4, 20 through 22 of Article 2). The amendment also introduced provisions on database protection. Legislation was also introduced to provide an institutional foundation so that online service providers may ensure stable business activities by clearly specifying the scope of their responsibilities, including a provision that they could be exempted from an infringement of third-party copyright on the Internet if they satisfied certain requirements. An amendment in 2004 clearly specified the right to use performance or music discs on the Internet by granting the performers or music disc producers with a right to transmit their performance or music (Article 64-2, 67-3).

The legislation reflected actions for ensuring the protection of copyright and fair use of copyrighted materials in 2006 when a serious problem emerged in connection with the infringement of copyright. It is a provision that imposed the online service providers of special types with a duty to take technical actions (Article 104 of the Act).

Through an amendment to the Copyright Act in 2009, the Computer Program Protection Act merged with the Copyright Act while the Computer Program Protection Association and Copyright Committee merged into Korea Copyright Commission (Article 112). The amendment also included provisions

on the Minister of Culture and Sports correction order to the online service provider (Article 133-2) and the correction recommendation by Korea Copyright Commission (Article 133-3).

In 2011, two amendments were included in the Free Trade Agreement (FTA) with the EU and USA. The June 2011 amendment further segmented the scope of exemption of the online service providers (Paragraph 1 of Article 102). The amendment is significant in connection with copyright on the Internet as it also prohibited acts of incapacitating technical protection actions and specifically provided their exceptions (Article 104-2).

The December 2011 amendment that was included in the agreements under the ROK-USA Free Trade Agreement and exchange of letters concerning the FTA admitted temporary saving as duplication (Subparagraph 22 of Article 2, Article 35-2, Paragraph 2 of Article 101-3) and introduced exclusive rights to issue (Article 57) and a system for fair use of copyrighted materials (Article 35-3).

Section 2. Evaluation of Development Processes of Korean Internet Legislation

In developing Internet related legislation, Korea, a strong IT power, introduced statutory regulations more advanced than the other countries since dysfunctions of Internet appeared earlier. These included legislation on enhanced protection of personal information, restriction of freedom of expression, and enhanced protection of copyright. The general assessment is that they should not be excessive legislation. Korean legislation on the Internet includes substantially excessive provisions. In other words, it is assessed that there are portions that need be reconsidered to set up a reasonable scope

and level of legislation so that the desirable functions of the Internet may be protected to the maximum extent possible while any dysfunctions may be prevented. So, the key issues related to Internet legislation are examined in detail below :

1. Evaluation of Legislation on Use and Protection of Personal Information

Thanks to efforts for over 10 years from the Information and Communications Network Act which introduced regulation for the protection of personal information in 2001 to the enactment of the Personal Information Protection Act in 2011, Korea was equipped with legislation for the protection of personal information that is comparable to the strong IT power position of Korea. However, the issue of privacy protection on the Internet is extremely significant as it can reasonably harmonize the functions and dysfunctions of the Internet. How to regulate the problems related to the protection of information will continue to remain an important issue that needs be discussed to warrant the desirable functions of the Internet while minimizing its dysfunctions. What is important is how to warrant the legitimate use of personal information, which should also be considered along with a protective viewpoint. We have already reviewed that Korea's legislation for the protection of personal information has enforced a stringent regulation, paying attention to the aspect of protection. However, it is more important to focus on legislation to provide a social system that enables individuals to safeguard their rights for themselves rather than a policy aligned with strong regulation in connection with protection of personal information on the Internet. In other words, attention should be paid to prevent

the regulation for the protection of personal information from becoming excessive legislation.¹²⁾

Yet, this does not mean that the targets to be regulated by law should be minimized. Protection of personal information represents humanitarian values as well as the core element of democratic governance¹³⁾; therefore, an overall understanding is definitely necessary to matters that need be guaranteed or restricted under the law. In other words, the legislation should not only protect individuals from the misuse or abuse of personal information but also ensure statutory protection and regulations concerning the collection of minimum-required personal information within its original purposes, the prohibition of its use in violation of the purpose of collection, appropriate handling after the collection purposes are achieved, and the right to get forgotten.¹⁴⁾

Further, problems that arise between other constitutional values and the legal system should be reasonably examined for providing the legal grounds of protection of personal information. In particular, they should be re-examined in a balanced perspective so that the legislation for protection of personal information may function as a system that enhances business activities and national competitiveness. Entry barriers are imposed on startup businesses by the fact that legislation for the protection of personal information imposes a stringent criminal punishment against violators and a substantial

12) Kwon Hun-yeong, *A Critical Review on the Personal Information Protection Law*, Public Land Law Review, Vol. 43, No 3, 2009, pp. 822-823.

13) Hong Jun-hyeong, *e-Government and Protection of Personal Information*, Information Science Journal Vol. 22, No. 11, 2004, p. 71; Jeong Jun-hyeon, Necessity for and direction of Personal Information Protection Act, Sungkyunkwan University Law School Journal Vol. 22, No. 3, 2010, p. 579.

14) Jeong Jun-hyeon, *Ibid.* p. 579.

financial investment is required to perform technical actions required under the law.¹⁵⁾ A reasonable scope and extension of regulation should be set up so that advanced IT technologies may continue to drive economic growth in Korea.

Many have criticized the licensing or reporting system of location information services and location-based service businesses under the Act on the Protection, Use, etc. of Location Information. Some problems have been indicated concerning this Act, including that the licensing or reporting system cannot block the appearance of service providers that do not faithfully protect personal information and that the Act may apply a criminal punishment to service providers of applications that properly protect personal information for failing to report. Further, some complain that the licensing or reporting takes time may cause a critical delay in competition against foreign businesses when time is so valuable in the Internet age.¹⁶⁾ Smart phones were not yet introduced in 2005 when the Location Information Act was enacted. The regulation model at the time the Location Information Act was enacted was that businesses that provided services based on location information provided their customers with location information of people or articles that were provided by mobile communication service operators. Therefore, the Act on the Protection, Use, etc. of Location Information needs be amended properly to address the changed situation through a careful review of the systems for licensing or reporting location information service businesses if the Act is designed to regulate the use of location information as well as protection.¹⁷⁾

15) Korea Association for Informedia Law, *Ibid*, p. 617.

16) Korea Association for Informedia Law, *Ibid*, p. 640.

17) Korea Association for Informedia Law, *Ibid*, p. 607.

2. Evaluation of Legislation Concerning Protection and Restriction of Freedom of Expression

(1) Assessment of Defamation on Internet

In connection with the provision prohibiting circulation of information that infringes the privacy of others or damages the honor of others, the discussion on the temporary action by IT service provider remains a key point concerning the freedom of expression. The Constitutional Court has declared that the provision on the temporary action under the Information and Communications Network Act is constitutional.¹⁸⁾

The number of cases involving temporary action has been increasing each year as the service providers that are requested to delete information often take temporary action, such as blocking access to the relevant information and citing difficulties of judgment, after the temporary action system was introduced. In 2010, temporary action was taken for over 100,000 articles and several thousand defamation cases were reviewed by the Korea Communication Standards Commission but only 2,883 criminal cases were indicted for defamation (including contempt),¹⁹⁾ meaning only limited defamation victims resort to ex-post remedies through a law court. Of course, it would not be desirable to neglect defamation of a degree for which a judicial remedy should be pursued. However, it should an attitude contrary to the freedom of expression that is guaranteed under the Constitution to neglect the deletion of constitutional Internet articles by a temporary action. Therefore, it would be desirable to introduce a system for speedy dispute by a statutory

18) The Constitutional Court, 2012.05.31, Sentence 2010 Heonma 88 Decision.

19) 2010 Justice Yearbook.

institution that is vested with authority for compulsory mediation by the current temporary action system that imposes excessive burden on or grants excessive authority to the IT service provider.²⁰⁾

Further, as the current Information and Communications Network Act does not specify procedures following the lapse of the temporary action period in regard to inconsistencies in the handling of information after the period is or even how legitimate articles are deleted.²¹⁾ Moreover, as the Constitutional Court declared the limited user authentication system is unconstitutional in 2012,²²⁾ the government disclosed its intention to address damages caused by malicious comments with the temporary action system.²³⁾ However, the law should be amended to enable speedy settlement by a statutory institution vested with authority for compulsory authority, as mentioned earlier, as excessive application of the temporary action system may infringe the users' freedom of expression. In addition, it is believed an autonomous review organ belonging to an alliance of the IT service providers would be a damage remedy procedure that is more reasonable than the current regulation.²⁴⁾

(2) Evaluation of Protection and Restriction of Freedom of Political Expression

In human history, success of constitutional principles of democracy that have undergone incessant change and progress depends on the ability of the

20) Korea Association for Informedia Law, *Ibid*, pp. 366-367.

21) Korea Association for Informedia Law, *Ibid*, pp. 361-362.

22) The Constitutional Court, 2012.08.23, Sentence 2010 Heonma 47-252 Merged Case Decision.

23) Korea Communications Committee press release, *Follow-up measures disclosed for user authentication system*, 2012.09.28.

24) Korea Association for Informedia Law, *Ibid*, p. 367.

constituents who can determine truth in public discussion processes where diverse opinions and information exist. In other words, democracy is a form of government, which is based on public opinion, and this can be formed on the premise that the citizens' freedom of expression is fully guaranteed. In particular, the core domain that needs be protected by the freedom of expression, which has been continuously discussed in history, is the freedom of political expression. Therefore, any legislation that is designed to regulate the freedom of political expression is required to prove its own constitutionality based on stringent review criteria.²⁵⁾

Fair election is often mentioned as grounds for justifying regulations on the freedom of election based on the freedom of expression. However, freedom and fairness of election should be understood to be concepts that complement each other rather than as conflicting concepts. In other words, our inclusive review of the provisions under the current Constitution and statutes like the Public Official Election Act tells us that fairness of election means fair political competition in election processes. It means that the diverse opinions of the voters are properly reflected ultimately when fair political competition is secured in election processes. Therefore, election fairness is secured based on freedom of election and that freedom should be guaranteed for all voters equally.²⁶⁾ Despite the legislative efforts for improvement, however, election-related statutes and decisions by the Constitution Court have been criticized to excessively limit citizens' freedom of political

25) Jo So-yeong, A Study for Review of Legislation on Internet Campaign for Public Office Election and New Legislation under the Constitutional Category - Focusing on the Mandatory Identity Disclosure on the Internet, *Public Law Journal*, Vol. 9, No. 4, 2008, p. 253.

26) Eum Seon-pil, *European local election systems and policies for securing fair election*, 14th International Academic Conference by European Constitution Law Association keynote speech, 2010, p. 109.

expression as they focused on prevention of election fraud rather than enhancement of the citizens' freedom of expression.

The core point in legislation for regulating the freedom of election based on the fairness of election should be to achieve a reasonable legislation under the constitutional principle based on the understanding of that the political reality has changed. In particular, the new election environment over the Internet is a domain that requires reasonable legislation. The Internet that has brought significant changes to the existing political environment will continue to function as a more political and democratic means (enhancing participation) because of its medium characteristics. Legislation should maintain an appropriate regulation within the constitutional framework so that the Internet may become a device that complements the limits of parliamentary democracy. However, the current Public Official Election Act and the decisions by the Constitutional Court are believed to have permitted excessive restriction of the freedom of political election, excessively inclining on the purpose of preventing election fraud rather than contributing to the enhanced freedom of expression considering the medium characteristics of the Internet.

The formation of public opinion and delivery of political information on the Internet are highly important in the contemporary political process. The constitutional assessment of legislative regulations should be performed based on stringent criteria. The problems that may arise in the Internet election space are practical elements that have already been sufficiently perceived by all constituents. Essential values that need to be truly protected in weighing its affirmative and negative aspects should not be denied or nullified. To be more specific, problems that are mainly discussed include provisions on Internet newspaper companies and a review of their reports and punishments

under the current Public Official Election Act in addition to problems related to user identity verification on the Internet.

First, it is indicated in the provisions of the Public Official Election Act that Internet newspaper companies have excessively unclear targets and an excessively extensive scope. Article 8-5 of the Public Official Election Act defines Internet press as “Internet newspaper operators or those who manage or administer Internet websites that report, provide or relay on the Internet articles collected, edited or written with a purpose to propagate reports, comments, public opinion or information concerning politics, economy, society, culture and current issues, or those who run or manage Internet websites that perform functions similar to the press.” In other words, this may raise a problem of excessive regulation by defining an excessively wide range of targets even though the scope is very unclear as to if it includes individual or personal website operators who provide news by simple outlinks.²⁷⁾ On the other hand, it may also raise a problem of allowing excessive freedom of election campaigning by abusing interviews that are permitted to Internet newspaper companies.²⁸⁾

A problem area may be indicated as the unclear wide targets may punish certain acts by Internet press agencies. Article 8-5 of the Public Official Election Act provides that Internet Election News Deliberation Commission should be organized and operated to maintain fairness of election reports (editorials, comments, photos, broadcasting, video and other articles related to an election) uploaded on a website by an Internet press agency. In other words, the Act excessively restricts the freedom of expression by including

27) Kim Jong-cheol, *A Critical Review on Regulation of Internet News Media in Public Official Election Act*, Journal of Media Law, Ethics and Policy Research, Vol. 8, No. 2, 2009, p. 16.

28) Jo So-yeong, A constitutional review of Internet related regulation under Public Official Election Act, World Constitution Research Vol. 13, No. 1, 2007, pp. 49-53.

comments as well as reports in targets subject to a fairness review. Further, as the Act provides that ‘fairness’ or ‘distortion’ of reports are a requirement for correction or confutative reporting and criminal punishment, it raises another problem that it may impose criminal penalty on abstract, not present risks, in addition to the problem of ambiguous provisions.²⁹⁾

A constitutional review of the user identity authentication on the Internet is necessary as to whether the compulsory or mandatory identity verification will deprive citizens of opportunities for expression or restrict their freedom of expression of content. In particular, despite various critical discussions of user identity verification on the Internet, many continue to argue the system needs be strengthened. The current legislation concerning this system should be assessed again.

The preparation of means harmonizing the freedom and fairness of elections should be based on the classic premise of democracy; better opinions are likely to be selected in democracy when we have confidence in the aptitude of judgment and selection by the basic right entities and when more diverse thoughts are circulated.³⁰⁾ In addition, a fair election means that the voters are equally provided with sufficient freedom of such political expression.

3. Evaluation of Legislation on the Protection of Copyright

Korean legislation on the Internet has strived to enhance the protection of the rights of the copyright holders through the former Computer Program

29) Kim Jong-cheol, *Ibid*, Journal of Media Law, Ethics and Policy Research, Vol. 8, No. 2, 2009, pp. 17-18.

30) Jo So-yeong, *A Study for Review of Legislation on Internet Campaign for Public Office Election and New Legislation under the Constitutional Category - Focusing on the Mandatory Identity Disclosure on the Internet*, Public Law Journal, Vol. 9, No. 4, 2008, p. 254.

Protection Act in 1990s to the current Copyright Act. The Copyright Act alone has expanded the scope and protection targets of copyright, including the introduction of transmission rights in 2000 and technical protective action in 2003, protection of database or information concerning right management, and admission of transmission right for performance and music discs in 2004. The Act has continued to strengthen protection of rights on the Internet by reducing offenses subject to complaint in 2006 and improving the right remedy system through expansion of administrative regulations, including correction order by the Minister of Culture, Sports and Tourism and recommendation of correction by Korea Copyright Commission in 2009.

As the Internet copyright legislation also belongs to the Copyright Act, the legislation is also designed to protect holders of rights, pursue fair use, and ultimately help improve or develop the related culture and industries as defined under Article 1 of the Copyright Act. In achieving such purposes, it is essential to secure a balance between the copyright holders and users. The legislation trend that has been so inclined to protect the rights of copyright holders, as examined above, may be said to be a legitimate attitude considering that copyright is more likely to be infringed on the Internet as copyrighted materials and can be duplicated on the Internet more easily as well as circulated worldwide. However, Internet copyright legislation should pursue a balanced legislation, guaranteeing both the protection of right holders and fair use of copyrighted materials as indicated in the legislation purpose of the Copyright Act.³¹⁾

The protection and reinvigoration of Internet industries should also be considered for legislation concerning Internet copyright in addition to the

31) Lee Dae-hui, Korea Legislation on the Copyright and Internet, Copyright No. 100, 2012, pp. 177-178.

protection of copyright holders and users' rights. From that aspect, it is necessary to reconsider the scope and contents of the responsibility that the current copyright law imposes on online service providers. The Copyright Act has only an incomplete exemption provision for Internet industries that have contributed to the distribution of and access to copyrighted materials while providing thorough protection for the copyright holders. The government should specify regulation contents considering the aspect of the overall industrial development with Internet services as well the coordination of the interests of the parties.³²⁾ We will discuss this in further detail, later in connection with the responsibility of online service providers.

4. Responsibility of Online Service Providers and IT Service Providers

(1) Responsibility of Online Service Providers under the Copyright Act

1) Responsibility of online service providers

The Copyright Act does not have any provisions on what legal principles the online service providers should bear responsibility for in regard to illegal acts a user commits to the copyright holder directly. The Copyright Act has only a provision that abates what is already constituted as responsibility under certain conditions (Article 102 and 103).³³⁾ The appellate court decision on the case of injunction on Sori Bada specified the legal ground for responsibilities as the online service providers, for the first time in Korea.³⁴⁾ In

32) Yun Jong-su, *Legal Restrictions and Activation Plan on the Internet Industry*, The Justice, Vol. 121, The Korean Legal Center, 2010, pp. 22-23.

33) Korea Association for Informedia Law, *Ibid*, p. 439.

34) Sentence 2003 Na 21140 Decision : "Assistance" under Article 760 paragraph 3 of the

the decision, the court ruled that Sori Bada is responsible for assistance based on Paragraph 3 of Article 760 of the Civil Act. The ensuing Supreme Court decision on the civil and criminal lawsuits filed against Sori Bada took the position that the responsibility of an online service provider can be determined based on the provision on assistance responsibility under the Civil Act.³⁵⁾

However, even though the online service providers may be held responsible based on the assistance responsibility under the Civil Act, a question remains unanswered as to whether a prohibition or restraint order may be claimed against an online service provider in addition to a claim for compensation of damages. The Korean Civil Act provides only claims for compensation of damages as legal remedy of illegal acts but does not grants claims for prohibition or restraint, as a rule. The Copyright Act also provides that rights

Civil Act refers to all acts that facilitate illegal acts directly or indirectly. Unlike the Criminal Act, assistance by negligence is treated to be possible in interpretation of the Civil Act that equally treats negligence and intention as a rule for the purpose of reparation of damages. The negligence in this case refers to violation of the duty to pay attention based on the premise one is liable not to assist illegal acts. Generally, unauthorized circulation by users of digital copies of copyrighted materials is likely on P2P-based file sharing systems. Yet, we should not conclude that all types of P2P system operators should be uniformly held responsible for assisting infringement by users of neighboring copyrights. They should be held responsible for assistance only when it is believed they have assisted the infringement of neighboring copyrights by sharing of files though they had a willful knowledge or have violated the duty to take caution not to aid the infringement by examining the specific circumstances, including the degree the operators involve in the users' acts of sharing or exchanging files through the servers while operating them; whether the users can share files for themselves with the operator's intervention; whether the operator can restrict the use of the service by a user who has been discovered by the operator while infringing a neighboring copyright; whether the P2P system offers other functions that facilitate the infringement of a neighboring copyright in addition to the file sharing ; and the degree of likelihood the operator intends to or can obtain profits in the future from the infringement of the neighboring copyright."

35) Supreme Court 2007.01.25.Sentence 2005 Da 11626 decision, Supreme Court 2007.12.24, Sentence 2005 Do 872 decision.

holder may claim injunction or suspension of infringement against those who infringe their rights (Article 123). The court has consistently ruled that the online service provider becomes a target party of the claim for prohibition or restraint under Article 123 of the Copyright Act. This decision is apparently designed to ensure the valid protection of copyright holders. This is evidenced by the position taken by the Supreme Court³⁶⁾, “In this case, it is believed that the suspension of assistance by Sori Bada’s operation of its servers can achieve a more effective suspension rather than the stopping of infringement by individual users of the neighboring copyright while their access to the Sori Bada servers is indispensable to commit infringement of the neighboring copyright ...”.³⁷⁾

Further, the Korean Copyright Act dispenses certain special responsibilities of the online service providers that is hard to find in the legislation of other countries. This includes the duty of the online service operators of a special type to take technical action (Paragraph 1 of Article 104) or take corrective action based on the correction order by the Minister of Culture and Sports (Article 133-2). However, it should be reconsidered whether it is desirable to impose duties on the online service provider that are heavier than those in other countries, though such provisions are attributable to the severe degree of copyright infringement in Korea, which is known as a strong IT power.

2) Exemption of Online Service Providers

The Copyright Act provides exemption of the online service providers from responsibilities constituted based on the responsibility for assistance under the Civil Act as examined earlier. This exemption provision was

36) Korea Association for Informedia Law, *Ibid*, pp. 442-443.

37) Seoul Appellate Court, 2005.01.12. Sentence 2003 Na 21140 decision.

introduced into the former Computer Program Protection Act in 2002 and the Copyright Act in 2003. The Computer Program Protection Act provided that the responsibility of the online service providers may be abated or exempted when they have prevented or suspended the infringement of rights belonging to the program authors or exclusive producers discovering their rights are infringed by the duplication or transmission of programs by others (Paragraph 1 of Article 34-3). It also provided that the online service providers are exempted from responsibility when it is technically impossible even if they attempted to take action under paragraph 1 of the Article (Paragraph 2 of the same Article). The current Copyright Act Article 102 provides types of causes that exempt the online service providers. The Copyright Act introduced a provision on exempting the online service providers in 2003 and specified the types of acts that are exempted through an amendment in 2011. Further, the Copyright Act Article 103 provides that online service providers are exempted from responsibility when they take action to stop the illegal duplication of transmission of copyrighted materials.

These exemption provisions were introduced to clearly define cases where the responsibility of Internet service providers was reduced so that they can operate their services in a stable manner and be relieved from uncertainty that they may be sued because of acts by third parties. Paragraph 1 of Article 102 and Paragraph 5 of Article 103 of the Copyright Act specify the causes by which the service providers are exempted. However, it is necessary to determine cases where it is technically impossible for them to take actions by which they are exempted from responsibility as provided under Paragraph 2, Article 102.

The appellate court ruled in the Sori Bada injunction case that the passive filtering-based measures by Sori Bada failed to satisfy the technical action

for preventing infringement of the neighboring copyright and that it is not technically impossible to prevent or stop further infringement of the neighboring copyright. This attitude of the court raised a controversy. As demanding, even positive filtering, requires a highly enhanced action, it was taken as a demand that would shake the foundation of the Internet industry.³⁸⁾ When the uncertainty of risk, an inherent nature of the Internet industry, causes a risk of uncertainty to the service operators, it may shrink the Internet industry and make it difficult for new businesses to appear. So, it is crucial to discover a balance point. The provision on exemption of the online service providers functions as such a balance point. Legislation is required that considers such an intention.³⁹⁾

(2) Responsibility of IT Service Providers under the Information and Communications Network Act

1) Responsibility of IT Service Providers

Just like the cases under the Copyright Act, there exists a question of whether IT service providers should be held responsible for defaming expression by users. Defamation on the Internet can be reduced as IT service providers will voluntarily take necessary actions by discovering articles that are feared to infringe rights [of others] if the service providers are held responsible for such infringement. On the other hand, any excessive intervention may infringe the freedom of expression.⁴⁰⁾ In this aspect, the responsibility of the IT service providers should also be carefully examined.

As examined earlier, the Supreme Court took the stance that the IT service providers' responsibility for illegal acts related to defamation on the

38) Yun Jong-su, *Ibid.* p. 25.

39) Yun Jong-su, *Ibid.* p. 23.

40) Korea Association for Informedia Law, *Ibid.*, p. 364.

Internet can be accepted under certain requirements through its grand bench decision on the responsibility of IT service providers.⁴¹⁾ As the criteria for accepting responsibility, the Supreme Court presented cases where ‘illegality is obvious’, ‘ability to discover the existence of an article was evident’, and ‘it is possible to manage or control the article technically and financially’. In other words, the criteria are based on the illegality of an article, the ‘obviousness’ of possibility of the IT service providers to discover the article, and ‘technical expectancy’. The ambiguity of the criteria, such as the illegality of articles and the possibility of the IT service providers discovering them, leaves room for further controversy.⁴²⁾

2) Exemption of IT Service Providers

The Information and Communications Network Act also provides a provision on exempting the IT service providers. In other words the Information and Communications Network Act Article 44-2, when privacy, reputation or other rights of a third party are infringed by information provided for disclosing to the general public, the victim may request the IT service provider to delete the information or display refuting contents by explaining the fact of infringement. The Act provides that the IT service provider’s responsibility for damages is abated if the service provider takes necessary action, including those of deletion or temporary action, and notifies the applicant and the person who uploaded the information, without delay.

However, such exemption provision is feared to cause possible abuse of temporary actions. In other words, though the legislative legitimacy of temporary actions may be accepted at a first glance, a problem remains in the

41) Supreme Court, 2007.04.16.Sentence 2008 Da 53812 Grand Bench Decision.

42) Korea Association for Informedia Law, *Ibid*, pp. 364-366.

reality that it may result in the excessive burden or addition of power of the IT service providers to abuse such actions. The provision on temporary actions under the Information and Communications Network Act does not provide a guarantee for the person who uploads an article to clarify legitimacy or for follow-up procedures of the temporary actions. In this respect, it is feared that the freedom of expression by the uploading person could be excessively limited or the neutrality of the service provider may be compromised.⁴³⁾

43) Yun Jong-su, *Ibid.* p. 26.

Chapter 4. Implications of Korean Internet Legislation

We have so far assessed the development processes of the Korean Internet legislation by examining them by period and area. We have assessed the Internet legislation by dividing it into the areas of privacy or personal information protection, limitation of freedom of expression, and copyright. The common point of discussion is that the Korean Internet legislation is highly inclined toward the prevention or minimization of the dysfunctions of the Internet. Therefore, the most principal implication that can be derived from Korean Internet legislation is that excessive legislation should be avoided and legislation should be introduced that can drive development of the country and society at a macroscopic level. The implications of Korean Internet legislation are described below :

Section 1. Setup of Scope and Degree of Reasonable Regulation : Avoidance of Excessive Regulation

1. Protection of Personal Information

Privacy protection on the Internet is critical as it can reasonably harmonize the functions and dysfunctions of the Internet. In other words, legislation should not be excessively inclined to prevent dysfunctions. Rather, it should achieve a discipline that can safeguard the desirable functions of the Internet. Therefore, legislation should protect legitimate services as much as the statutes that regulate the protection of privacy. In other words, legislation should not only protect individuals from the misuse or abuse of personal information

but also ensure the statutory protection and regulation concerning the collection of minimum-required personal information within its original purposes, the prohibition of its use in violation of the purpose of collection, appropriate handling after collection purposes are achieved, and the right to get forgotten.

Further, problems that arise between the other constitutional values and the legal system should be reasonably examined for providing the legal grounds of protection of personal information. In particular, they should be re-examined in a balanced perspective so that the legislation for the protection of personal information may function as a system that enhances business activities and national competitiveness. A reasonable scope and extent of regulation should be set up so that the IT technologies may continue to drive economic growth in Korea.

2. Guaranty and Limitation of Freedom of Expression : Guaranty of Procedural Rights of Expressers

The discussion concerning the guaranty and limitation of the freedom of expression on the Internet has steadily been raised as a critical issue. The human history, the success of the constitutional principle of democracy, which has undergone incessant changes and progress, depends on the ability of the constituents who can determine truth in public discussion processes where diverse opinions and information exist. Therefore, legislation designed to regulate the freedom of expression is responsible for proving its own constitutionality based on a strict review standard. Freedom of expression on the Internet cannot be an exception. Therefore, various systems that restrict freedom of expression on the Internet have been continuously under review as to their constitutionality or have been declared as unconstitutional, including regulation of seditious or illegal communication, and illegal information,

temporary action system, systems for identity verification on the Internet, or regulation of Internet press.

The current legislation on the freedom of expression on the Internet is inclined to minimize its dysfunctions as Korea has been advanced in IT technologies. Now, it is necessary to assess the legislation based on its original constitutional value. If we cannot renounce the regulations on the freedom of expression despite their suspected constitutionality because of the dysfunctions of Internet, it would be necessary to pursue an autonomous regulation as an alternative, as discussed in Section 2 below.

Further, the current regulations on freedom of expression do not guarantee the procedural rights of those who upload articles on the Internet. Their freedom of expression should be guaranteed to the minimum by granting them with opportunities to defend themselves when their so-called illegal or right-infringing information is deleted or a temporary action is taken against such information.

Section 2. Autonomous Regulation : Alternative for Reasonable Efficient Regulation

Defamation on the Internet constitutes a conflicting relationship with freedom of expression, and it should be settled as a private dispute between the expresser and the victim since it is infringement of a private right, as a rule. However, systems for temporary action or others are provided to settle the problem expeditiously and efficiently. The problem areas of the temporary action system were examined in detail earlier. And, it was asserted that the system needs be abolished or complemented. As measures for complementing the system, a statutory institution with expertise is required so that the

dispute can be settled speedily rather than continuously relying on the temporary action system that imposes an excessive burden or power on the IT service provider. It was also mentioned those who upload articles should be guaranteed with a procedural right.

In addition, autonomous regulation can be examined as a reasonable and efficient alternative. In fact, Korea Internet Self-Governance Organization (KISO) has already been operated as an autonomous review organ. KISO is an autonomous regulation organ that was organized among Internet portal service providers in March 2009. It is designed to implement autonomous regulation by reviewing, reporting and handling articles uploaded on portals while its policy committee prepares protocols and guidelines for policy making. In a policy decision in July 2009, KISO excluded the central and local government agencies from the entities that can request temporary action against defamation and also declared that acts related to public services are excluded from targets subject to request temporary action against defamation unless they are clearly false in the case that those who request temporary action are a politically appointed government official. Further, a policy decision made in June 2010 was noteworthy. When a KISO member company requests for the review of an article whose correction has been demanded by the Korea Communication Standards Commission, it was decided that KISO may review it independently despite such demand unless such an article is considered illegal information under Paragraph 1 of Article 44-7 of the Information and Communications Network Act or harmful to youth or children under the Juvenile Protection Act.

In view of such policy decisions or review details, KISO is affirmative based on the predictability or stability of review or meaningful as an autonomous regulation organ since it develops policies and performs decisions on

behalf of the individual service operators over the individual decisions of individual cases.⁴⁴⁾

Autonomous regulation cannot be said to be a perfect system. However, autonomous regulation can be expected to be a solution to improve the problem of excessive regulation, as it is continuously under discussion in connection with freedom of expression, while autonomous regulation is designed to achieve a reasonably efficient and practical regulation. Further, it can be assessed that agreement and mediation are more likely in settlements through autonomous regulation.⁴⁵⁾ However, legal ground is required for autonomous regulation to successfully settle as a joint regulation system. As mentioned in Chapter 3 above, the Information and Communications Network Act Article 44-4 provides for autonomous regulation. But, the current provision is insufficient. A minimum ground provision should be provided for the organization and services of the autonomous regulation organ. A clear legal ground should be provided for the authority of the autonomous regulation organization that would perform on behalf of the government and the validity of and legal guarantee for its service. In particular, what is important to obtain a viable autonomous regulation is to make the limits of legal responsibility of the service providers based on the decision by the autonomous regulation organ. In other words, it would be essential in preparing a foundation for the autonomous regulation to coexist with the public regulation to clearly provide for a specific incentive that the service providers may be exempted from legal responsibility if they perform actions imposed by the autonomous regulation organ.⁴⁶⁾

44) Yun Jong-su, *Ibid.* p. 20.

45) Yun Jong-su, *Ibid.* pp. 19-20.

46) Yun Jong-su, *Ibid.* p. 20.

Section 3. Regulation Equipped with Neutrality

1. Protection of Copyright and Guarantee of Fair Use of Copyrighted Materials

The legislation on Internet copyright has been made mainly to protect or enhance the copyright holders' right, from the former Computer Program Protection Act in the late 1990s to the current Copyright Act, as examined earlier. This would be a natural attitude considering copyright infringement is likely as copyrighted materials can be easily duplicated or distributed throughout the world on the Internet. Internet copyright legislation should pursue a balanced legislation guaranteeing both the protection of right holders and fair use of copyrighted materials as indicated in the legislation purpose of the Copyright Act.

Therefore, the protection and reinvigoration of Internet services should also be considered as elements that need be considered for legislation concerning Internet copyright in addition to the protection of copyrighted materials and the protection of the users' rights. From that aspect, it is necessary to reconsider the scope and contents of the responsibility the current copyright law imposes on the online service providers. The Copyright Act has only an incomplete exemption provision for the Internet industries that have contributed to the distribution of and access to copyrighted materials while providing thorough protection for the copyright holders. The government should specify regulation contents considering the aspect of the overall industrial development with Internet services as well the coordination of interests of the parties.

2. Responsibility of Online Service Providers and IT Service Providers

Being a platform industry, the Internet industry is inherently exposed to hard-to-anticipate risks. As it does not control everything for itself and services are operated while allowing free participation by third parties, the likelihood to bear responsibility for the services can arise anytime irrespective of its own will.⁴⁷⁾ Though such uncertainty should not be an excuse for the service providers to evade their responsibility, the Copyright Act and the Information and Communications Network Act impose excessive responsibilities on the service providers. The service providers are held responsible for assisting those who infringe rights under the Copyright Act, without a clear legal ground. The precedent needs be reconsidered as the responsibility for assistance includes claims for prohibition or restraint as well as damages.

Further, the Korean Copyright Act provides special responsibilities to the online service providers that is hard to find in the legislation of other countries. This includes the duty of the online service operators of a special type to take technical actions (Paragraph 1 of Article 104) or take corrective actions based on the correction order by the Minister of Culture and Sports (Article 133-2). However, it should be reconsidered whether it is desirable to impose duties on the online service providers that are heavier than those in other countries, though such provisions are attributable to the severe degree of copyright infringement in Korea, which is known as a strong IT power. And, there still remains the problem of unclear requirements of

47) Yun Jong-su, *Ibid.* p. 23.

‘cases in which is it technically impossible’ for the online service providers to be exempted.

Further, just like the cases under the Copyright Act, there exists a question whether the IT service providers should be held responsible for defaming expression by users. Defamation on the Internet can be reduced as the IT service providers will voluntarily take necessary action by discovering articles that are feared to infringe rights [of others] if the service providers are held responsible for such infringement. On the contrary, it is still feared that freedom of expression may be infringed by excessive intervention. In this aspect, the responsibility of the IT service providers needs be reviewed carefully.

Further, the criteria presented by the Supreme Court for accepting responsibility of the IT service providers also have the problem of uncertainty - ‘cases where illegality is clear’, ‘cases where the service provider’s ability to discover the article is evident’, and ‘cases where the service provider can manage or control the article technically and financially’.

Chapter 5. Conclusion

Internet in Korea started in the early 1980s and actively developed in the mid-1990s. Internet legislation was introduced in the late 1990s when it was necessary to minimize the dysfunctions of the Internet as its service became widely available. This research assessed Internet legislation in Korea by examining three areas : protection of personal information, limitation of the freedom of expression, and copyright. The common assessment of various related legislation in Korea is that they are highly inclined to highlight the prevention and minimization of the dysfunctions of Internet. Therefore, the most principal implication that can be derived from Korean Internet legislation is that excessive legislation should be avoided by setting up a reasonable scope and degree of regulation. In so doing, the legislation should derive the development of the country and society at a macroscopic level.

Privacy protection on the Internet is critical as it can reasonably harmonize the functions and dysfunctions of the Internet. Therefore, legislation should protect legitimate services as much as the statutes that regulate the protection of privacy. In other words, legislation should not only protect individuals from the misuse or abuse of personal information but also ensure statutory protection and regulation concerning the collection of minimum-required personal information within its original purposes, the prohibition of its use in violation of the purpose of collection, appropriate handling after collection purposes are achieved, and the right to get forgotten.

The discussion concerning the guaranty and limitation of the freedom of expression on the Internet has steadily been raised as a critical issue. In human history, the success of the constitutional principle of democracy, which has undergone incessant change and progress, depends on the ability of the

constituents who can determine truth in public discussion processes where diverse opinions and information exist. Therefore, legislation designed to regulate freedom of expression should prove its own constitutionality based on strict review criteria. The freedom of expression on the Internet is not to be an exception to that strict review. Freedom of expression on the Internet cannot be an exception. Therefore, various systems that restrict freedom of expression on the Internet have been continuously under review as to their constitutionality or have been declared as unconstitutional, including regulation of seditious or illegal communication, and illegal information, temporary action system, system for identity verification on the Internet, or regulation of Internet press. Though it would be desirable to abolish any system that is suspected to be unconstitutional, autonomous regulation should be pursued if the regulation on the freedom of expression cannot be renounced despite such suspected unconstitutionality. Autonomous regulation can be expected to be a solution to improve the problem of excessive regulation, which is continuously under discussion in connection with the freedom of expression, while the autonomous regulation is designed to achieve a reasonable efficient and practical regulation. Further, current regulations on the freedom of expression do not guarantee the procedural rights of those who upload articles on the Internet. Their freedom of expression should be guaranteed at a minimum by granting them opportunities to defend themselves when their so-called illegal or right-infringing information is deleted or a temporary action is taken against such information.

Korea has also made legislation on copyright on the Internet in order to mainly protect or enhance the rights of the copyright holders. This would be a natural attitude considering copyright infringement is highly likely as copyrighted materials can be easily duplicated or distributed throughout the

world on the Internet. Internet copyright legislation should pursue a balanced legislation guaranteeing both the protection of copyright holders and fair use of copyrighted materials as indicated in the legislation purpose of the Copyright Act. Therefore, the protection and reinvigoration of Internet services should also be considered as elements that need be considered for legislation concerning Internet copyright in addition to the protection of copyrighted materials and the protection of users' rights. From that aspect, it is necessary to reconsider the scope and contents of the responsibility the current copyright law imposes on online service providers. The Copyright Act has only an incomplete exemption provision for Internet industries that have contributed to the distribution of and access to copyrighted materials while providing thorough protection for the copyright holders. The government should specify regulation contents considering the overall industrial development with Internet services as well the coordination of interests of the parties. In this respect, an overall review should be made on the attitude of the current statutes concerning the responsibility and exemption of the Internet service providers.

This research includes some critical assessment of the Internet legislation in Korea along with its developmental history. This was performed to let countries that plan to deploy Internet legislation using the Korean model to develop legal grounds to become a mature and true IT power by minimizing trial and errors. In this connection, the author wants to indicate that this research does not include all discussions concerning the Internet. In particular, this research could not include such issues as those related to cloud computing and big data. The current Korean Internet laws include a considerable contradiction in these areas but the local discussion on them is not yet mature. The author intends to attempt approaches to the diverse perspectives in this regard in his next research.

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