

Legal Structure and Improvement Measures of Police Responsibility for Unlawful Information in the Cyberspace

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Abstract

Circulating various pieces of unlawful information that violate the law by leaking personal information or circulating violent/sexual materials or malignant programs in the cyberspace is unlawful, and blocking this beforehand is an important duty of the state. Preceding discussions on the legal restriction of unlawful information in the cyberspace have mostly been focused on the criminal responsibilities and civil responsibilities of information communications service providers, but this study has approached it with emphasis on the issue of police responsibility for the exercise of police authority to block unlawful information. It is because the principles of police responsibility to determine the target of police authority to block unlawful information provide the standards for the interpretation of existing laws and regulations and function as legislative principles for the enactment of new laws and regulations to prevent risks in the cyberspace.

▶ Keyword : Unlawful information, Police responsibility, Information societies, AICN, Cyberspace

I. Introduction

The emergence of knowledge information societies due to today's rapid development of information communications technology has brought changes to the lives of mankind to a level that was not even imagined in the past.

With the birth of a new cyberspace called the Internet, public access to various kinds of information has become easier and the characteristics of cyberspace represented by openness and variety have maximized information sharing and affected the relationships of social members to a great extent for the cyberspace to continue evolving as a living space essential for any member of the knowledge information societies.

Despite the vital functions, however, there have been various adverse effects, including the circulation of

various kinds of unlawful information that violate the law in the cyberspace such as violent/sexual materials, bad-mouthing materials, unauthorized personal information, and malignant programs.

The act of circulating unlawful information is illegal and it is an important duty of the state to block it beforehand.

This was closely related to the expansion of risk prevention in regards to the traditional police law confined to spatial/physical spaces, but the legal discussions pertaining to blocking unlawful information in the cyberspace have mainly been focused on the criminal responsibilities and civil responsibilities of information communications service providers related to the unlawful information.

However, the legal discussion to block unlawful information is subject to the police authority to block the

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unlawful information that is essentially different from the criminal responsibilities and civil responsibilities of information communications service providers and needs to be approached in regards to the issue of police responsibility.

It is because the principles of police responsibility to determine the target of police authority to block unlawful information provide the standards for the interpretation of existing laws and regulations and function as legislative principles for the enactment of new laws and regulations to prevent risks in the cyberspace.

Therefore, this study discusses the theoretical aspect of police responsibility in regards to the unlawful information in the cyberspace under the current legal systems and suggests the directions of police responsibility to block the unlawful information in the cyberspace.

II. Unlawful Information in the Cyberspace

1. Concept

It is difficult to clearly define the concept of unlawful information in the cyberspace. Generally, it refers to any information that should not be circulated or disclosed on the information communications networks as its contents violate the current law including sexual materials, bad-mouthing materials, instructions on how to make explosives.

Here, unlawful refers to the cases that satisfy all conditions of crime from a subjective aspect and responsibility should be added in order for them to be condemned from an objective aspect; the issue of legal responsibility is unrelated to the objective conditions of certain acts.

Even if it is unlawful information circulated by a nonresponsible person on the information communications network, the property of that information is illegal[1].

Therefore, unlawful information is information subject to unlawful acts, or all kinds of relevant information that are legally restricted as crime.

2. Regulation of Object

The types of unlawful information in the cyberspace, or how to select the target of unlawful information in the information communications network, vary according to

each state's legislations.

In case of Korea, they are discussed by many individual acts, but the most definitive one is Article 44-7-(1) of the 「Act on promotion of Information and Communications Network utilization and information protection, etc(hereinafter referred to as AICN). The significance of Article 44-7-(1) of the AICN lies the fact that it lists the types of information subject to the criminal acts that occur in the information communications network. As the contents of information defined in each item under Article 44-7-(1) of the current AICN are unlawful information with the purpose of crime, their circulation in the cyberspace is prohibited.

Some argue that the restriction of unlawful information in the cyberspace in Korea is rather atypical under a broad-ranged and inclusive system that includes information related to bad-mouthing, when most advanced countries focus on restricting information that breach copyrights[2].

3. Characteristics of Circulation of Unlawful Information

With the emergence of new information communications media, circulation is not bound by time or space, the initial circulator is anonymous, and the damage can be broad in scope due to the expansive reproduction of contents of unlawful information. Therefore, it is significantly different from the traditional crimes[3].

First, the circulation of unlawful information in the cyberspace is anonymous and unconfidential as circulators and victims connect to each other through information communications media without any physical contact. Moreover, it is difficult to identify the suspect when circulators have stolen others' names[4].

Second, the victimization of unlawful information users is broad in range as it is not bound by time and space.

Third, it is easy for many people to access unlawful information at the same time and the speed of circulation is fast.

Fourth, the circulation of unlawful information in the cyberspace can be a simple crime that can be committed with a simple technology, but the number of cases that require advanced specialized skills is increasing. It is because of these characteristics that the circulation of unlawful information in the cyberspace has become a big risk factor in the world today.

III. Police Responsibility in the Cyberspace

1. General Theory of Police Responsibility

1.1 Concept

Police responsibility is the responsibility for the occurrence of harm. In other words, everyone has the responsibility not to interfere with public wellbeing and order and remove the cause and effect of harm in case of harm, and it is referred to as police responsibility today[5].

Therefore, all members of a national community are obliged to ensure that their acts or belongings do not cause danger for or interference with public wellbeing and order, and the breach of this obligation is subject to the exercise of police authority. Police responsibility refers to the position where police authority should be triggered and anyone in that position is called the police responsibility holder. In principle, police authority should be exercised against those with police responsibility[6].

1.2 Classification of Civil and Criminal Responsibilities

Considering that the police authority can only be exercised against those with responsibilities, police responsibility is not different from enforcement under the Civil Code or a sentence of punishment that is executed against those with civil or criminal responsibilities.

However, police responsibility is different from the concept of responsibilities discussed in the traditional studies of civil/criminal codes. These responsibilities have different purposes and apply different standards to determine the responsibility holders.

Civil responsibility protects individuals in the relationships between individuals, while criminal responsibility indirectly defends individuals from the society through retributive restrictions in the relationships between societies and individuals.

On the other hand, police responsibility aims at maintaining the public order of societies and eliminating the subsequent harm for direct protection of individuals from the society.

When it comes to police responsibility, therefore, the individuals who destroy social order are, unlike criminal

responsibility, not identified as independent ethical beings to give judgment based on the ethical value of their internal intent, but as social members of a social community to treat them as those responsible for the prevention of harm based on the objective occurrence of social harm according to the external effect.

1.3 Types and Legal Qualities

Police responsibility is largely classified into three types:

First, it is the responsibility for acts which is police responsibility imposed when public wellbeing and order are harmed by one's act or the act of someone under one's protection/supervision. Responsibility for acts is applied to one's own acts as well as the acts of those under one's protection/supervision.

Also, the acts that cause responsibility for acts under the Police Law include both feaseance and nonfeaseance.

Nonfeaseance does not simply mean not doing anything, but it means not complying with or performing the acts required by law. In other words, responsibility for acts occurs only when there is a special legal duty of feaseance for public wellbeing and order, and such a duty of feaseance is derived from the public legal norms that state the directional norms[7].

Second, it is the responsibility for conditions which is police responsibility to prevent and remove any harm to public wellbeing and order caused by the condition of an object, not the act of a person. Here, objects include both movable and fixed assets along with electricity and other natural forces that can be controlled. The responsibility of anyone responsible for a condition is solely determined by the condition of object regardless of whether who has caused the condition or whether harm has been caused deliberately or by mistake[8].

Third, there is police responsibility that combines responsibility for acts and responsibility for conditions. In other words, there can be cases where police harm is not construed by an individual act or condition, but social harm is caused by the combination of an act and a condition. Here, it is important against whom police authority will be exercised to prevent and eliminate the harm[9].

Police responsibility is different from the legal principle of traditional responsibilities and first focuses on the external aspect. Police responsibility is subjective and does not consider the internal aspect of responsible

person, which is the psychological or ethical aspect, as it puts importance on the reality. It even excludes the financial aspect, in principle.

In sum, police responsibility is not related to the doer's intention, ability to act, ability to act illegally, and ability of criminal responsibility and also unrelated to whether police responsibility holder has committed an act deliberately or by mistake (under civil code or criminal code).

2. Legal Structure of Police Responsibility

2.1 Enactment

Police responsibility for the circulation of unlawful information in the cyberspace should be largely divided into and discussed in terms of police responsibility of unlawful information circulators and police responsibility of information communications service providers that operate the media systems that are used to circulate the unlawful information[10].

As an information communications network is not possessed by an individual but used by individuals and it is impossible for information communications users to circulate unlawful information through an independent network that is not connected to an existing information communications platform, unlawful information is generally circulated through an information communications network built by an information communications service provider.

2.2 Police Responsibility of Unlawful Information Circulators

In case of police harm such as a breach of benefit and protection of society by law due to the circulation of unlawful information in the cyberspace, the person who transmits or posts unlawful information to circulate it has the police responsibility, or is responsible for the act.

The responsibility for acts does not consider whether the doer is an adult or a minor. The doer's intention is not required in case of police harm by feasant, nor an ability to act under the civil code when determining who is responsible for an act.

Also, whether or not the responsible doer was deliberate or had a mistake to cause police harm is not asked, but it is based on the fact that the act has caused harm against public wellbeing and order [11].

The responsibility for an act should identify causality

between the responsible doer's act and the police harm; there are various theories in regards to the standards to apply to the causality between acts and harms, but the most general opinion that is supported by many hypotheses and precedents is the theory of direct cause.

According to this theory, only the person who has provided a direct cause of harm against public wellbeing and order is the responsible doer, in principle.

2.3 Police Responsibility of Information Communications Service Providers

If a person who circulates unlawful information by transmitting or posting it is the one responsible under police responsibility, owners or managers of information communications media that circulate unlawful information, or the information communications service providers, have the responsibility for conditions, considering the circumstances where unlawful information is circulated through cyberspace created by information communications service providers.

Here, information communications service providers work with electrical communications businesses to provide or mediate information using electrical communications businesses' electrical communications services for profit (Article 2-1-3 of the AICN). The responsibility for conditions of information communications service providers refers to the police responsibility to prevent and eliminate it if public wellbeing and order have been harmed by a certain object's condition[12].

3. Contention of Police Responsibilities

In case police harm occurs due to the circulation of unlawful information in the cyberspace, a police order or enforcement may be exercised against the unlawful information circulator who is the responsible doer or the information communications service provider that is responsible for the condition where unlawful information has been posted or circulated to block the unlawful information.

Against whom police authority shall be exercised between the two is based on the discretion of police, but the dominating opinion today is that police authority should be exercised against the responsible doer if there is contention between responsibility for conditions and responsibility for acts[13].

However, the following are mentioned as the reasons

why it is necessary to exercise police authority first against the information communications service providers who are responsible for the condition, not the responsible doers who circulate unlawful information:

First, it is easy to circulate information that breaches the benefits and protection by law as circulation of information anonymously or with a nickname is generalized in the cyberspace.

Next, the consequence of breach by a piece of information can be critical as many people can access and search it at the same time to spread it fast and broadly at an instance.

It is particularly necessary to secure others' benefits and protection by law as a greater number of users is exposed to the risk if the information is posted on an online bulletin board provided by an online portal service that comprehensively provides various services.

As it is difficult to identify the responsible doer for various reasons such as the anonymity of cyberspace, the breadth of network, and the rapidness of transmission, it is inevitable for the service providers to be responsible for primary police responsibility (responsibility for conditions) over any risk in their domain for the purpose of police administration[14].

4. Problems with Article 44-7-(2) of the AICN

Article 44-7-(2) of the current AICN, which authorizes Korea Communications Commission to order information communications service providers or their managers/administrators to decline, stop, or limit the handling of unlawful information in the cyberspace to block it, has information communications service providers to have police responsibility, or the responsibility for conditions.

It has adopted indirect regulation of information communications service providers that are responsible for the condition, rather than direct regulation of responsible doers, to swiftly block unlawful information in the cyberspace. However, various problems have been pointed out to argue that the current regulation cannot be justified just because it swiftly eliminates the risk of police acts [15].

First, when information communications service providers is subject to police authority to prevent the risk of police acts, the service providers who have deleted the relevant information can be the new judicial authority. Moreover, the service providers are assigned to the role

of censorship as they regulate the information under the terms and conditions and the users have to censor their contents.

Second, when responsible doers are positioned as third parties, not the receivers of restrictive measures, there are problems with their rights to participate in administrative procedures, file administrative lawsuits, and so on.

Third, the current indirect restriction of information communications service providers has been considered inevitable as it has been impossible to identify the responsible doers who circulate unlawful information on an information communications network, but it has become possible to technically track the doers using IP tracking, Cache, Cookies, and other investigative techniques.

In order to solve these problems, it is necessary to change the existing norms of police responsibility to execute indirect restriction against those responsible for conditions.

5. Legislative Improvement

As mentioned above, the acts that generate the responsibility for acts under the Police Law are a concept inclusive of both feasant and nonfeasant. In case of active feasant duty to eliminate the risk of breach of benefits and protection by law, therefore, it can be said that the responsibility for nonfeasant of such an active feasant duty is applied.

If so, information communications service providers may be converted into responsible doers instead of being held responsible for the condition of circulation of unlawful information in the cyberspace.

In other words, information communications service providers' responsibility is converted from responsibility for conditions to responsibility for acts if they have the active feasant duty to block unlawful information, not just the responsibility for conditions to provide the responsible doers with the information communications media to circulate unlawful information in.

In order to convert the responsibility of information communications service providers from responsibility for conditions to responsibility for acts with active feasant duty, first, it should be clear that the losses assumed by the illegality of information and the breach of major benefit and protection by law are significant.

Second, it should be acknowledged that it is possible to

recognize the unlawful information under the technical control of information communications service providers.

Third, we can consider the conditions where information communications service providers enjoy commercial profits through the information communications media that circulate unlawful information.

When these conditions are met, Article 44-7-(2) of the current AICN can be converted into a norm that holds information communications service providers responsible for acts instead of conditions.

In sum, it is necessary to make legislative corrections to convert information communications service providers' police responsibility for conditions into responsibility for acts under strict conditions instead of holding information communications service providers solely responsible for conditions as it is difficult to identify the responsible doers when the exercise of police authority to block unlawful information in the cyberspace should primarily be against the responsible doers who circulate unlawful information.

IV. Results

Today's cyberspace that functions as media where knowledge information is ceaselessly created and circulated is a living space essential for any member of knowledge information societies.

However, it is also true that unlawful information is indiscreetly circulated in the cyberspace to breach the social benefits and protection by law.

Preceding discussions of legal restriction of unlawful information in the cyberspace have mostly focused on the criminal responsibilities and civil responsibilities of information communications service providers, but this study has approached it as an issue of police responsibility to exercise police authority to block unlawful information.

Based on this understanding, Article 44-7-(2) of the current AICN that functions as an ordinary law to restrict unlawful information on the information communications network imposes police responsibility on information communications service providers, or holds them responsible for the condition of unlawful information provided by others.

As mentioned above, however, Article 44-7-(2) of the

current AICN, which adopts indirect restriction of information communications service providers, rather than direct restriction of responsible doers, solely for swift blocking of unlawful information, imposes excess police responsibility on information communications service providers and may cause various problems as a consequence.

Therefore, the system should be corrected to convert information communications service providers' responsibility for conditions into responsibility for acts under strict conditions to hold them responsible when the target of police restriction to block unlawful information on the information communications network should be the responsible doers who circulate unlawful information.

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