

Study on the Civil Legal Remedies against Cyber Defamation

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Abstract

Cyber defamation is the act of damaging the reputation of the other person on the Internet, and the act of attacking by the commenting the article through a word or blog. The reason why punishment is stronger than general contempt is that the nature of crime about defamation is worse than contempt. Also, punishment intensity is higher than defamation because the nature of cyber information spreads widely. Honor is not only a question of self-esteem or identity, but also a function that economically reduces the cost of seeking information or socially trustworthy. Through these two functions, it has been developed as a legal system to protect the honor as well as asking the legal sanction for defamation. However, although honor is used in various meanings in everyday life, the honor of legal level is understood in a more limited sense. It is because the law cannot actively lead and protect all honor feelings for one's feelings or mood occurred by hurt. However, if the social evaluation of a group or individual is undermined through a certain distortion of the truth, the law will actively intervene. However, due to the ambiguity of the legal sanctions standards and the identification of the parties involved in the defamation of cyberspace, it was difficult to solve the problems related to defamation in fact. Therefore, this paper will try to find out the problems of civil legal remedy due to the cyber defamation, and seek a solution for civil legal remedy.

▶ Keyword: Cyber Defamation, Cyberspace, Claim for Damages, Monetary Compensation, Punitive Damages System

I . Introduction

For those of us who live in the present age, honor must be preserved and it is true that it is worthy of protection by law. However, with the advent of the Internet, sudden changes in the environment of science and technology occurred, and have made it possible that individual honor is often exposed to the general public and is highly likely to be seriously damaged in unexpected places, in addition, it is a reality that is emerging as a new legal issue.

In this way, Korea has become the world's best Internet power as it continues to develop the Internet. However, illegal side effects such as cyber defamation or cyber

violence, which violate the honor and rights of others, continue to increase in the rapidly developing process without sufficient preparation in advance. In such a reality, if we leave these parts intact, it is a cause of serious social problems, so we need a viable alternative to solve them.

In addition, because the nature of the internet which has the real-time, openness, and explosive expansion, the expression of defamation is rapidly spread reproduced continuously, the cyber defamation has the limitation that the damage by cyber defamation cannot be easily recovered. Also, the damage is more serious than general think.

Therefore, at the time when Internet development and

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the act of defamation in cyberspace are expected to expand, this study examines the general theory of cyber defamation, and through this, finding a way to remedy civil legal problems that can be improved substantially is the purpose of this study.

II. General theory about Cyber Defamation

1. Concept of Cyber Defamation

1.1 Cyber Defamation

The cyber defamation can be regarded as a term of criminal policy to identify the crime related to honor that occurs in the Internet space, which is a virtual space, differently from defamation in the real space. In other words, it can be regarded as a new legal term in consideration of its spatial characteristics as the crime which has mainly been done in the real space expands to cyberspace. Generally, cyber defamation means defamation of an unspecified number of cyberspace[1]. This refers to the act of placing a person in a position to cause a person to be blamed or slandered, or to spread a false fact by using an information communication network such as a bulletin board, email, chat.

Due to the openness of the Internet, cyberspace is not an enclosed space but an open space where anyone can easily view or comment. Thus, cyber defamation may lead to the mass production of unnecessary perpetrators, in the sense that it may unintentionally undermine the honor of someone in a situation where they do not know the honor of others. In other words, the messages that cause defamation are constantly repetitively based on the spatial characteristics of the Internet, causing serious damage. However, there is a limit to the excessive restriction of defamation in cyberspace in that it undermines the freedom of expression and the pure function of the public sphere.

1.2 Defamation

Defamation means a case of illegally degrading a external social evaluation of person intentionally or negligently. In addition, it is a general view that violation of subjective honor is not considered defamation[2]. Therefore, defamation can be regarded as a function of honor protection only when the honor of the individual formed through social standards or evaluation is

undermined. In this respect, the honor of a particular individual has a strong connection with society. In other words, society is maintained through the interests of various individuals and groups. In this society, honor is a criterion of important value judgment, so protecting the honor of an individual and restoring it when it is damaged is an important issue related to the survival of society[3].

The Korean Constitution stipulates that freedom of expression is an important core value and that everyone has the right to freedom of expression. In addition, the guarantee of moral rights related to honor is defined as the core content of human dignity in Article 10 of the Constitution. Regarding this, at the Article 21, Paragraph 4 of the Constitution, regards "media publishing should not infringe the honor or rights of others, public morals or social ethics." and at the Article 307 of Criminal Law also provides protection for honor.

1.3 Honor

Usually honor is a moral right that has been protected with a long tradition. In a broad sense, honor encompasses both internal honor which are subjective honorary emotions acquired by oneself and socially gained external honor. However, honor is formed by external honor which is formed by objective criteria or judgment of social aspect such as personality, virtue, credit, etc.. However, subjective honor, which is a subjective assessment of one's personality, is considered emotion. Therefore, this is not an object that can be infringed by others. Therefore, internal honor does not seem to require legal protection.

2. Types of Cyber Defamation

2.1 Defamation by Electronic Bulletin Board

The electronic bulletin board is an integrated service provided in the form of text, and supports virtual bulletin boards and discussion rooms freely available to all users. In other words, the electronic bulletin board is a cyber-plaza[4] where it is possible to exchange news and materials about specific clearing and exchange of opinions, and the discussion among users is active.

2.2 Defamation by Electronic Messenger

Chat is a conversation on cyberspace through a computer, and it can be said to be a communication method in which a message is inputted by a keyboard and is used to communicate in real time. Such a chatting

method can be created by directly creating or selecting a chatting room through an Internet chatting site, and a plurality of people entering the chatting room can chat at the same time, so that defamatory expressions may appear in the chatting process or may be distributed through chatting.

2.3 Defamation by Video

Cyber defamation by photographs and videos is closely related to the development of modern science and technology. In the case of photographs, composing several photographs and editing them in the form of putting together the necessary parts is often used as a means of disseminating false facts and damaging the honor of the other person by depicting the other. It is often produced and distributed in the form of synthetic nude photographs mainly for entertainers.

2.4 Defamation by E-mail

E-mail is the exchange of information and opinions with users using a personal computer. This means to send the contents to be sent using the mailing list displayed on the display device or to send the contents written in Korean in the form of a file. And letter or manuscript can be sent quickly by typing the recipient's ID and subject, then pressing the computer keyboard in the selected sequence[6]. Online e-mail includes personal information that only two users are free to check, as well as a list of recipients and a batch of e-mails sent to multiple users. If a list of recipients is created and sent to multiple users, the possibility of defamation is very high, and personal writings are not entirely safe from defamation.

2.5 Defamation by Malicious Comments

Malicious comments mean malicious gossip about writings or photos posted by others in cyberspace. Especially, malicious comments act as a kind of psychological weapon compared to general comments, and they leave big scars on people's minds. Such malicious comments can lead to suicide if the subject is severe. In this regard, malicious comments may also be directly related to human life. Moreover, if a large number of people attack a witch-hunt through a malicious comment on a specific object, the victim will be forced to do helpless action. Thus, it can be considered a type of very serious crime[7].

III. Civil Legal Remedy for Cyber Defamation

1. Introduction

In general, it is very difficult to calculate the amount of damages for defamation. It is also difficult to prove the result, and there is no case that is actually considered to be reliable. Therefore, most victims only claim compensation due to mental suffering[8]. In addition, victims of cyber defamation tend to claim a high amount of compensation, in order to compensate for the lack of it, in view of the fact that claims of property damages are actually difficult. Also, from the perpetrator's point of view, a high amount of compensation is an economic burden. Therefore, it is true that the court responds sensitively to the recognition of compensation for damages caused by the cyber defamation.

2. Claim for Damages

Damage compensation can be a appropriate civil remedy for cyber defamation damage[9]. The cyber defamation, which is an illegal act, causes the claim for damages pursuant to Article 751 Paragraph 1 of the Civil Law. And in claiming compensation for mental suffering and unlawful damages to the victim, the requirement is not as strict as the criminal justice constitution[10].

2.1 Requirements for the Establishment of Illegal Activities

In accordance with the requirements for establishment under Article 750 of the Civil Law, the victim must be specified as a claimant for damages as a condition for establishing cyber defamation. The individual's identity to the victim includes certain names, including the victim's real name in cyberspace. And, for the purpose of establishing infringement by unlawful act of Article 750 of Civil Law, there should be act to inflict harm to other person by illegal act. Defamation is the act of degrading the honor of others. The type of defamation includes publicly pointing out what has actually happened and the opinions or criticisms resulting therefrom.

In order for the illegal act referred to in Article 750 of the Civil Law to be established, it is necessary to have the illegality of depriving the right. Illegality means that an activity is a violation of the law and the legitimacy of the activity is not recognized[11]. Therefore, cyber defamation is an illegal act that belongs to violating the right as an activity that undermines the honor of

others[12]. At this time, the level of illegality may be judged differently depending on the concept of defamation.

The meaning of deliberation at the cyber defamation is to recognize the fact that the personal value of others, a social assessment, is reduced by stating facts or expressing opinions[13].

2.2 Principles and Methods of Monetary Compensation

In modern society, most of the damage can be evaluated as money, and the victim can use the money as a recovery measure of damage according to his / her intention. From this point of view, our legal perceptions and practices tend to ensure that we choose to repay money for the functionality and convenience of money reparations. Based on the tendency of the Japanese Civil Law, the Article 394 of the current Korean Civil Law is follow the principle of repayment in cash. In addition, depending on the content and type of the infringement benefit, the method of repayment with money may not be sufficient to compensate the victim, and the method of recovering the original may be more appropriate. In such cases, Article 764 of the Korean Civil Law recognizes the claim for restoration, On the other hand, Germany Civil Law is based on the principle of claim for restoration[14].

2.3 Scope and Amount of Damages

The scope of damages arising from illegal acts can be divided into 'special damages' and 'normal damages'. Special damages are damages caused by unspecified damages, And assumes responsibility for compensation when there is a possibility of guessing. The Normal damage is the damage that the state of the damage act is recognized to be universally caused by the general public's thoughts. However, damage caused by unforeseen circumstances is excluded. In other words, compensation for damages caused by illegal acts shall be made to a certain degree of ordinary damages, and damages of unreasonable circumstances shall be liable for damages only when the damages are known or understood.

The property damage can be divided into 'positive damage' which causes loss of existing property and 'passive damage' which is loss of profit. Property damage can be estimated more economically than mental damage. However, it is not easy to prove the amount of sales lost due to defamation or the amount of damage to future profits[15].

2.4 Compensation

The damage of the cyber defamation which is the property damage is considered as the compensation of the damages like other circumstances, and the mental damages can solve the problem of the compensation by the Article 751 of the Civil Law[16]. In general, the calculation of the compensation fee should be concretely determined in consideration of all the circumstances considered and the facts of the mental damages. The critical factor in this case is the type and degree of infringement, the strength of the illegality, and so on.

3. Civil Liability of Online Service Providers

3.1 Introduction

In general, the responsibilities of online service providers are those who produce and deliver content. This is because it is difficult to identify the direct perpetrator because of the anonymity of cyberspace, so rather than asking the perpetrator to find the perpetrator, it is beneficial to have the service provider take responsibility for protecting the victim.

3.2 Civil Liability Structure of Online Service Providers

In particular, joint tort of illegal acts of online service providers cannot be directly responsible for online service providers because they are not directly involved in defamation. However, it is fact that online service providers provided the cause of defamation by mediating the connection so that the online service provider can defecate, managing the space in which the infringement occurs. These reasons can be considered to have substantially related jointers. In other words, the online service provider shall be liable for joint tort, as defendant of intent or negligence, together with defamatory actors[17]. For the recognition of the online service provider's liability for such joint tort, the online service provider should review whether there is a right or obligation to prevent defamation and whether there is an obligation to pay attention. However, in the end, it leads to whether illegal acts are caused by omissions[18].

3.3 Enhancing Civil Liability of Online Service Providers

In general, acknowledging civil liability of an online service provider is not the only acknowledgment of any condition except for the removal request of the victim.

The online service provider is on the table that able to directly and quickly regulate the posting while providing a convenient notification space provided by the computer network. Accordingly, in the case where the obligation to perform a certain act on this can be permitted, the online service provider must specifically determine that there is a request through the clear call of the victim and the act of marking the illegal defamation clearly in the cyberspace provided by the online service provider. And when an online service provider does not impose appropriate controls on the post, and it is determined that there is a clear and present risk that the creation or expansion of the damage cannot be avoided, as a regulatory measure for that post for the victim, removal or disconnection, and if the online service provider disregard it, they should be able to ask for legal liability[19].

4. Appropriate Behavior for Honor Recovery

In general, the principle of damages under the Civil Law to reparation of money, but defamation is difficult to assess the financial value of the damages, and even if money is reimbursed reputation of damaged honor cannot be recovered again. Therefore, in this respect, the claim for restitution is granted. Therefore, the following remedy methods can be used together such as cancellation or modification of published content, upload the contents of trial result of assailant in the same media.

On the other hand, of these additional legal remedies, the advertisement of apology is determined by the Constitutional Court to be unconstitutional[20], it cannot be an appropriate act to restore honor in Article 764 of the Civil Law.

IV. Improvements of Civil Legal Remedies for Cyber Defamation

1. Introduction

The introduction of the punitive damages system of Anglo-American law is continuously being discussed because of the fact that the recovery of the property or the mental damage suffered by the victim is not properly performed by the damages recognized only by the court. The nature of compensation for damages is intended to

compensate for the actual damage of the victim due to illegal acts. On the other hand, the punitive damages system, when judged by the court that the acts of the perpetrator were accompanied by violent, oppressive, malicious, intentional, It is a system that orders the payment of compensation by adding the amount of compensation. In other words, punitive damages have the function of restraining illegal activities[21].

2. Changes in awareness of law enforcer

At the part where the punitive damages system is introduced in the Civil Law, the punishment pay with the nature of punishment in Korea seems predominantly unconstitutional due to double punishment. The positive view of the introduction is that the punitive sanctions are needed not only to compensate the victims but also to prevent malicious and deliberate illegal activities. Unlike in the United States, where arbitrary jurors are determined to pay damages, in Korea, where the compensation is calculated by a judge, it is not a situation that occurs the negative effect same like USA. And it is argued that the punitive damages requirement and the compensation procedure are strictly enforced, and if the upper limit of the compensation is limited to a reasonable extent, it will solve the problems such as excessive compensation which is brought against the introduction.[22].

On the other hand, the introduction of punitive damages is divided into the following points of view[23] : First, the view that it is desirable to accept the punitive damages system as a whole in Civil Law. Second, the view that to introduce the special laws in limited areas such as consumer litigation, fair trade, and product liability or to introduce the punitive damages rules in the applicable law as a new method (revision). Third, the view that to enact the law as tentatively named 'punitive damages compensation law'. In addition, regarding the limit of the compensation amount, it is divided into the claim that there is no need to limit the amount of compensation for claiming punitive damages within the range of two to three times of the actual damages with the provision in the scope[24].

3. Discussion of Punitive Damages Legislation

In Korea, the introduction of punitive damages system in the Civil Law has been actively introduced through some issues such as the Volkswagen emission control

system in Germany, the humidifier disinfectant in Oxy Korea, and the case of the 3M antibacterial filter in Korea. The illegal activities of multinational corporations such as the humidifier disinfectant incident have caused massive damage to consumers. However, victims did not receive proper post-compensation, and there was a low probability that the problem would be solved by future laws[25].

The Oxy Korea that caused the humidifier disinfectant case sold a humidifier disinfectant containing toxic harmful substances only in Korea, and in the United States, where there is a punitive damages system, Volkswagen voluntarily recalled and repaid damages. It is argued that the fact that they did not actively recall and reparate in Korea, unlike the US, stemmed from the lack of legal system in Korea, which did not introduce a punitive damages system.

However, rather than introducing a full-scale punitive damages system under the Civil Law, the punitive damages compensation is included as a method to newly establish (amend) the punitive damages rule in the applicable law. In the direction of such legislation, it was proposed and enacted as 'amendment bill for product liability law' including the contents of damages system[26].

4. Introduction of Punitive Damages System under Information Network Act

With the development of information and communication technology, cases of cyber libel damage have been increasing rapidly, and it has been difficult to relieve the aftermath of damage by conventional means such as damages system or prohibition claim right away. Therefore, the punitive damages system has been introduced to prevent defamation. In addition, in order to impose punitive damages for cyber defamation, it is desirable to introduce a punitive damages system as individual legislation, and it is possible to obtain excessive damages (Double or Triple) There has been a need to protect the victims of defamation by stipulating the Information and Communications Network Act to limit compensation.

As a result of this necessity, the content of punitive damages was newly amended in Article 32 Paragraph 2 of the Information Network Act on March 22, 2016 [27]. However, it is considered that this is a weighted factor of criminal law sanctions, not a function of restraining illegal

acts, as it introduces a punitive damages provision in the relevant law, rather than introducing a full punitive damages system in the Civil Law. Accordingly, punitive damages must be introduced into Civil Law.

5. Right to Prohibit

The defamation and of the cyberspace and illegal infringement of the moral rights about this, and spread to the public and it is difficult to return to its original condition, then it may be become an object of the right to prohibit. In this case, it may be appropriate to allow the victim to exercise a regulatory method that can prevent the infringement of the social interests of the perpetrator in advance, rather than claiming compensation for damages until the victim completes the perpetrator action. As regards the pre-emptive measures against infringement of social interests, the Civil Law, as protecting the ownership, only recognizes the right of prevention and the exclusion of interference in the individual state. In addition, the special law other than the present Civil Law provides for the prevention of social infringement. However, the present case in Korea, many discussions are underway to solve this problem in the situation where there is not sufficient provision of preventive or proactive remedies for illegal acts of infringement, in order to ensure that the Civil Law and other statutory laws are satisfied and effective for victims. In addition, the court has generally accepted the right to prohibit the infringement of moral rights, because it is difficult to recover infringed moral rights only by post-relief such as compensation for damages referred to as the specificity of infringement of moral rights[28].

6. Right to Prohibit

Regarding the right to prohibit, the US Supreme Court ruled that it violated the Constitution, while the Supreme Court of Japan ruled it constitutional. The Constitutional Court of Korea ruled that it is in accordance with the purpose of the Constitution because it is not subject to prior review[29]. In this regard, the courts in Korea have recently increased the number of preliminary injunctions in broadcasting.

Therefore, it can be reasonable to argue that the right to claim for prohibition should be denied when considering the legal system in Korea, where the right to claim for damages and the right of reply are recognized. In contrast, the right to prohibit has the effect of basically

blocking the article itself unlike other relief systems. However, since the arbitrary interpretation of the court is highly likely to intervene and there is a high possibility that an unreasonable judgment will be made, it is necessary for the wrong articles to be rescued through the right of claim for damages and right of reply, it is the opinion that it interferes at least with freedom[30].

V. Conclusion

So far, this paper has examined the requirements for the illegal acts of cyber defamation, which is the target of cyber defamation damage, in order to examine the civil legal relief measures. Also, it has examined the principle and scope of damages, the nature and calculation method of compensation, the civil responsibility of the online service provider, and the appropriate disposition for honor recovery. As a result, the damages of cyber defamation shall be paid in principle, and the scope of damages shall be the range of compensation for ordinary damages and special damages based on judgment of fairness based on possibility of foreseeability. In this regard, the compensation for property damage shall be: even if the establishment of Article 202-2 of Civil Procedure Act does not strictly and surely proved the concrete damages, if a victim of defamation proves that property damage has been caused by illegal activities, there is a possibility that property damage may be compensated for, instead of considering it as compensation. The compensation of mental damages has been raised too low, necessitating realization, and from this point of view, the court recently set out a method to calculate the compensation. Therefore, it is expected that the effectiveness of damages relief due to defamation including cyber defamation will be enhanced. The Supreme Court has set clear standards for the liability of civil servants of online service providers for illegal acts, but it is difficult for online service providers to recognize the possibility of foresight. Even if it is difficult to judge illegality, it is necessary to agree on the responsibility of the online service provider. Also, for the appropriate disposition for the recovery of honor, the claim is restitution is given by the supplementary money repayment. In the case of a defamation of cyber defamation, it is possible to request a revised report or

claim for ex post facto report.

Recently, the claim of introducing the punitive damages system and the legislative efforts have been strongly promoted by the individual law, and the punitive damages system has been introduced in the Information and Communication Network Act although it is not responsible for the defamation act. ◦The right to pre-prohibit was not subject to prior censorship due to legislative movements, so it was judged constitutional in Korea. However, even if legislation is made in the future, it will be reasonable to interpret it as narrowly as possible, in the sense that afterwards, relief infringes at least the freedom of the press.

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