# University of New South Wales

University of New South Wales Faculty of Law Research Series 2012

*Year* 2012 *Paper* 56

# Korea rolls back 'real name' and ID number surveillance

Whon-il Park\* Graham Greenleaf<sup>†</sup>

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps12/56

Copyright ©2012 by the authors.

<sup>\*</sup>Kyung-Hee University

<sup>†</sup>University of New South Wales

# Korea rolls back 'real name' and ID number surveillance

Whon-il Park and Graham Greenleaf

#### **Abstract**

South Korea's online 'real name' statute - Article 44-5 of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc. (the "ICN Act") was enacted in 2007 in response to such things as posted Internet comments describing fictitious sex scandals and plastic surgery operations concerning celebrities, and a number of suicides of celebrities. It required large-scale portal sites with more than 100,000 visitors on average a day to record the real name identities of visitors posting comments, usually via the poster's resident registration number (RRN). One result was that many South Koreans Internet commentators started to use overseas websites which allowed anonymous posting, such as Google and Twitter, and some therefore argued the law discriminated against domestic Internet services. A series of security breaches resulting in leaks of of personal data concerning millions of South Koreans from those websites that were required to adopt real-name policy also occurred over the last couple of years.

In August 2012 South Korea's Constitutional Court unanimously held that the 'real name' statute is unconstitutional because the public gains achieved had not been substantial enough to justify restrictions on individuals' rights to free speech. The two cases decided by the Court were brought by individuals who were required to provide their real names in order to make postings, and also by an online Internet publisher required by the law to verify the names of those posting. This article analyses the Court's reasoning, in the context of other decisions concerning freedom of speech, and the overall relaxation of South Korea's previously very restrictive Internet environment.

Legislative reform has occurred in parallel. The RRN was previously compulsory in almost all dealings with government and many organisations in the private sector. Abuse of the RRN accounted for over 20% of all complaints about misuse of personal information. Under Korea's new *Personal Information Protection Act* of 2011, unique identifiers the including RRN may not be processed without consent and explicit legislative approval. Alternative means of identification other than the RRN must now be provided by processors where individuals are subscribing to web-based services.

The article concludes with parallels between developments in Korean and European data protection.

## Korea rolls back 'real name' and ID number surveillance

Whon-il Park and Graham Greenleaf\*

Privacy Laws & Business International Report, Issue 119: 20-1, October 2012

South Korea's Constitutional Court rules on anonymous Internet postings, and new legislation prevents the collection of ID numbers.

South Korea's online 'real name' statute - Article 44-5 of the Act on Promotion of Information and Communications Network Utilization and Data Protection, etc. (called the "ICN Act") - was enacted in 2007 with bipartisan support. It was in response to such things as posted Internet comments describing fictitious sex scandals and plastic surgery operations concerning celebrities, and a number of suicides of celebrities including top star Choi Jin-sil allegedly linked to such disclosures.

The legislation stipulated that large-scale portal sites with more than 100,000 visitors on average a day had to record the real name identities of visitors posting comments. The poster's resident registration number was usually used to verify whether the name given by an Internet poster was his/her real name. One justification for the law was that the poster's details could be disclosed if a victim then wanted to take legal action for defamation or privacy breaches.

One result was that many South Koreans Internet commentators started to use overseas websites which allowed anonymous posting, such as Google and Twitter, and some therefore argued the law discriminated against domestic Internet services. A series of security breaches resulting in leaks of of personal data concerning millions of South Koreans from those websites that were required to adopt real-name policy also occurred over the last couple of years. Observers of the Court are reported to have said that both of these considerations factored in the Court's decision (Lee, Y 2012).

#### Constitutional Court strikes down 'real name' law

In August 2012 the eight Justices of South Korea's Constitutional Court unanimously held that the 'real name' statute is unconstitutional because the public gains achieved had not been substantial enough to justify restrictions on individuals' rights to free speech (Constitutional Court Decision 2010Hun-Ma47, 23 August 2012 – see references below). The combined two cases decided by the Court were brought by individuals who were required to provide their real names in order to make postings, and also by an online Internet publisher required by the law to verify the names of those posting.

The Court considered that the purpose of Internet real name system was legitimate insofar as it aims to contribute to a sound Internet culture by preventing users from posting illegal or defamatory messages on Internet bulletin boards, and collecting data to identify who did so. However, the system requiring the operator of the Internet bulletin board to verify the real name of its users and block their posting if their names fail to be verified was held by the Court to be over-restrictive beyond the extent necessary to attain the said purpose, and accordingly in violation of the principle of less restrictive alternatives, and in violation of freedom of speech<sup>1</sup>, for the following reasons:

<sup>1</sup> The Constitution of South Korea provides that neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics [and] claims may be made

<sup>\*</sup> Whon-il Park is Professor of Law, Kyung-Hee University, Seoul, South Korea. Graham Greenleaf is Professor of Law & Information Systems, University of New South Wales, Australia, and JSPS Visiting Fellow, Center for Business Information Ethics, Meiju University, Tokyo.

- (i) Where incidents of posting illegal messages occur, the illegal posters may be identified by investigating the IP addresses, and the victims may be sufficiently remedied by deleting, and blocking the dissemination of, illegal messages, and/or by means of ex post damages or criminal punishment.
- (ii) As the users of the bulletin board include not only the person who intends to post messages but also the person who merely accesses the board and is unlikely to do wrongful posting, and the scope of application of the real name system depends on the calculation of the number of users, the system is in disregard of the characteristics of the Internet and seems to allow the enforcement authority to act in an arbitrary manner.
- (iii) The period for the information and communications service providers to retain the real name verification data is six months from the closing of the posting of messages. So such data may be maintained indefinitely until such messages are deleted and the posting has been closed.

In addition, the real name system is in breach of the proportionality required between protected legal interests, in that the disadvantages imposed on the users of the board and information and communications service providers are by no means smaller than the public interest achieved by the real name system. The reasons why the public interest benefits are limited are:

- (i) Because freedom of expression, the backbone of democracy, is of utmost importance in the Constitution, the effect of public interest achieved by restricting such freedom should be so overwhelmingly clear that restrictive measures can be justified. However, there is no evidence that the real name system has significantly reduced the defamatory or otherwise wrongful posting of messages.
- (ii) Instead, it has caused the mass-flight of local users to overseas websites, adverse discrimination against domestic information and communications service providers, and enforcement difficulties from arbitrary law enforcement. As a result, it is not effective to attain the public interest as anticipated.
- (iii) New kinds of communication media such as mobile bulletin boards, social networking services, etc. are so widely used that the original real name system is being implemented only within a limited scope of cyberspace, with the public benefit thus reduced.

On the contrary, the Court held, the real name system has produced various adverse effects. Internet users are likely to be discouraged from expressing themselves for fear of punishment arising from their identity disclosure. Aliens and ethnic Koreans living overseas without the resident registration number are prevented from participating in the Internet bulletin boards. The operators of the bulletin boards who find themselves in competition with the above-mentioned new kinds of communication media are treated increasingly in a disadvantageous way. The obligatory maintenance of real name verification data has increased the possibility that such data of the bulletin board users could be leaked or misused improperly.

The Court concluded that the statute at issue was in violation of the principle of less restrictive alternatives, and in violation of the freedom of speech of both users as well as information and

for the damage resulting therefrom (A 21(4)). It also stipulates that the freedoms and rights of citizens may be restricted by legislation only when necessary for national security, the maintenance of law and order or for public welfare, but, no essential aspect of the freedom or right shall be violated (A 37(2)). Therefore, any legal measures imposed to attain public interests should be the less restrictive alternative with regard to freedom of speech (A 21 (1), (2)).

communications service providers in cyberspace, and also the self-determination of personal information of the users.

### **Court relaxations of Internet restrictictions**

Recent Constitutional Court decisions have declared unconstitutional other restrictions on use of the Internet.

Until December 2010, South Koreans could be criminally punished for leaving false information online. For example, in the *Minerva Case*, a blogger with an ID, Minerva, criticized the government economic policy and predicted the collapse of Lehman Brothers with precision in 2008. In early 2009 he was arrested by the public prosecutors under suspicion that he communicated false messages in public to damage the public interest via the Internet. Later he was acquitted by the Seoul Central District Court because the accused did not intend to make false communications nor had any intention to damage the public interest. In December 2010, the same statutory provision, under which the Minerva blogger was accused was declared unconstitutional by the Constitutional Court, because such vague and abstract provisions cannot choke up the freedom of expression on the Internet (2009Hun-Ba88).

Until 2011, South Koreans were also prohibited from any form of online electioneering: 'distributing or posting, with the intention to influence the election, of documents and pictures the content of which support, recommend or oppose a political party or candidate, or refer to the name of a political party or candidate, during the period of 180 days before the election day', but the Constitutional Court overturned this (2007Hun-Ma1001, see PL&B Int Feb 2010, p.24).

In short, Korea previously had a very restrictive Internet environment, but this has now been considerably reduced.

### **Legislation stops use of ID numbers**

The most controversial personal information in Korea is the resident registration (RR) number which was previously compulsory in almost all dealings with government and many organisations in the private sector. Abuse of the RR number, even after some initial limitations on its use, still accounted for over 20% of all complaints received by the Korean Internet Security Agency (KISA) (over 7,000 complaints per year), with abuse of all other identification information only about one third of that (KISA/DMC 2007 Annual Report: 22).

Under Korea's new *Personal Information Protection Act* of 2011, unique identifiers, including RR number, passport number, driver's license number and alien registration number specified by Presidential Decree, may not be processed unless (i) the same consent is obtained as for sensitive data processing or (ii) there is explicit legislative approval (A 24(1)). Alternative means of identification other than the RR number must now be provided by processors where individuals are subscribing to web-based services (A 24(2)). Thus, the new Act now has even tighter requirements on data processors in both public and private sectors, who shall be prohibited from collecting RR numbers except in very narrow circumstances. It applies to ICSPs except where the ICN Act exempts it.

Further, the newly amended ICN Act, which only applies to ICSPs, which came into effect on 18 August 2012, allows the use of RRs only by (i) the authentication agencies, designated by the government for the purpose of provision of alternative ID numbers, (ii) qualified information and communications service providers permitted by the relevant laws, or (iii) information and communications service providers, publicly notified by the Korea Communications Commission, which rely on the collection and use of RR numbers on business (A 23-2(1)). This amendment was caused by a series of massive scale data breach incidents in which RR numbers became a prey to hackers and phishing scammers (see Park, W for information on these incidents).

#### **Conclusions**

All of the Constitutional Court's decisions demonstrate the strong role that South Korea's constitutional protections of both privacy and freedom of speech are playing in supplementing and strengthening Korea's data protection legislation. In particular, the Court's use, in the 'real names' decision, of such principles as proportionality and 'less restrictive alternatives' would not be out of place in the approach taken by European courts in the interpretation of the privacy Directive or European human rights laws. When Korea's new *Personal Information Protection Act* eventually comes before the courts for interpretation, this decision suggests that it may be given a strong interpretation because of the constitutional context within which it is placed.

#### References

Constitutional Court Decision 2010Hun-Ma47 ('Real names' decision), 23 August 2012. An official summary of the Court's decision is available on the Court's website at <a href="http://www.ccourt.go.kr/home/bpm/sentence01\_list.jsp">http://www.ccourt.go.kr/home/bpm/sentence01\_list.jsp</a> only in Korean as yet. An English summary by Park, W, including details of the relevant provisions struck down, is available at KoreanLII <a href="http://koreanlii.or.kr/w/index.php/2010Hun-Ma47">http://koreanlii.or.kr/w/index.php/2010Hun-Ma47</a>)

Lee, Y 'Real names online' law struck down in South Korea' Seoul, Associated Press, 23/08/2012, at <a href="http://www.theglobeandmail.com/technology/digital-culture/social-web/real-names-online-law-struck-down-in-south-korea/article4495259/">http://www.theglobeandmail.com/technology/digital-culture/social-web/real-names-online-law-struck-down-in-south-korea/article4495259/></a>

Park, W, 'Data breach incidents' at *KoreanLII website* <a href="http://koreanlii.or.kr/w/index.php/Data\_breach\_incidents">http://koreanlii.or.kr/w/index.php/Data\_breach\_incidents</a>

South Korean Constitutional Court 'Prohibition of Internet Use for Political Expression and Election Campaign' (decision) 2007Hun-Ma1001 etc. (consolidated) decided on 29 December 2011.

