Tortious Liability of Internet Service Providers for Defamation: A Korean Perspective

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Abstract

The paper deals with the thorny issue of tortuous liability of internet service providers from a Korean perspective. The Internet is the most participatory media that widens the scope of free speech, both quantitatively and qualitatively. At the same time, it is difficult to deny that there is a dark side of the Internet as well, such as on-line defamations, invasion of privacy and obscenity.

The present paper attempts to establish a modified standard for determining liability of ISPs for defamation. The main argument is that neither complete immunity nor broad liability is desirable. Actual knowledge and obviousness of defamation are two factors that give rise to the duty of care for ISPs. This may add clarity and predictability to the ISP liability standard without causing too much of a chilling effect on the Internet.

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I. Introduction

The advent of the Internet has the potential to dramatically change legislation and policies on freedom of expression. The Internet is the most participatory media that widens the scope of free speech, both quantitatively and qualitatively. Anyone can share their views and thoughts with the public regardless of time and place, once they have access to the network. Since speeches made on the Internet are not limited by borders, this marketplace of ideas is truly worldwide. However, there is a dark side of the Internet as well. Cyber-violence is found everywhere. A great number of people are abusing this enhanced freedom without considering its fatal consequences. Defamations, invasion of privacy, obscenity and other forms of wrongdoings are prevalent. Damages incurred by these torts are exacerbated due to the unique nature of the Internet.

Specifically in Korea, this contrast seems even more dramatic. Freedom of expression in Korea was somewhat curbed under authoritarian governments in the past, although a notable change has taken place in the last two decades. Yet, the growth of the Internet essentially changed the free speech regime in this nation. Online democracy has reached its pinnacle, due mainly to two factors: a remarkably high broadband penetration rate and a great number of electronic bulletin boards. However, Korea is not free from the adverse effects of the Internet, either. A so-called citizen journalism, in which swarms of surfers mobilize to gather information on what the traditional media is not covering, often goes too far to dig up and post every detail of the targeted person in a defamatory way. People irresponsibly express extreme opinions from behind a cloak of anonymity.

As we witness a clash between freedom of expression and freedom from defamation, balancing these two conflicting interests has become a very difficult, yet significant issue. In an effort to balance these societal interests, liability of Internet Service Provider (hereinafter abbreviated as “ISP”) is being discussed. ISPs are performing unique functions in cyberspace, such as providing access to the Internet, and transmitting or storing information. In a highly decentralized cyberspace, they have great control over the content once it comes under their domain, just like a government or publishing companies do off-line. Thus, broader liability on ISPs will force them to involve themselves with the regulation of the content, which will possibly protect a great number of potential victims from cyber-violence. However, it is likely to have a chilling effect on free speech. In contrast, completely exempting

ISPs from legal liability might be helpful in fostering freedom of expression on the Internet, but it seems to be unduly leaning toward the side of free speech. Hence, determining the scope of ISP liability will greatly influence the delicate balance between free speech and personal reputation.

This brief paper discusses the optimum scope of ISP liability for defamations on the Internet, mainly from a Korean perspective. ISPs are subject to both civil and criminal liability. In terms of civil liability, ISPs can be subject to compensatory liability as well as injunctions. However, discussion in this paper will center around compensatory liability, since most cases in Korea have been dealt with in terms of this type of liability.

Part II of the paper discusses the current approach to ISP liability taken by legislators and courts in Korea, in comparison with the U.S. approach. Part III suggests that neither the complete immunity model as shown in the U.S. approach, nor the relatively broad liability model as shown in the current Korean approach is desirable, and proceeds to propose stricter requirements. Part IV concludes this paper with a brief summary of preceding discussions, and touches on the alternative measures, other than placing *ex post* liabilities on ISPs, that are currently discussed in Korea to achieve an adequate balance between the two values.

II. ISP Liability for Defamation - Different Approaches in the U.S. and Korea

A. The U.S. Approach

1. Common Law Approach taken by Pre-CDA courts

Traditionally, the common law tort of defamation protects individuals against published statements that are false and harmful to their reputation.[1] Concerning defamation liability related to third-party contents, the traditional defamation law categorized information disseminators into three groups to which very different legal standards are applied: publishers, distributors, and common carriers. Publishers, such

1) Restatement (Second) of Torts § § 558-59, 577 (1977).

as newspapers, which traditionally exercise considerable editorial control over content, are subject to strict liability. Distributors, such as booksellers or newsstands, merely distribute content, and they are therefore subject to liability only upon a showing of knowledge or negligence. Finally, common carriers, such as telephone companies, transmit information with no control over content, and therefore they are not liable at all.[2] To sum it up, the extent of editorial control over content will determine the extent of liability.

In judicial decisions prior to the passage of the Communications Decency Act of 1996 (hereinafter abbreviated as "CDA"), the U.S. courts attempted to fit ISPs into one of those three traditional categories. There are two notable cases to be examined.

In 1991, the Southern District Court of New York deliberated the liability of Compuserve, an ISP, for a defamatory message posted on its journalism forum.[3] Cubby, the plaintiff, alleged that Compuserve was a publisher, whereas Compuserve contended that it was merely a distributor. The court found that Compuserve had little or no control over that publication's contents,[4] and consequently stated that Compuserve was a distributor of information.[5] Compuserve was not held liable since it did not know or have reason to know of the defamation.[6]

Four years later, the New York Supreme Court reached an opposite conclusion on the same issue. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[7] the court distinguished this case from Cubby and held that Prodigy, who maintained an electronic bulletin board and exercised considerable editorial control over the content, was liable since it could be deemed a "publisher".[8] According to the Court, "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to greater liability than Compuserve and other computer networks that make no such choice".[9] This conclusion was likely to discourage ISPs from monitoring activities against illegal expressions, since they would confront risks of liability for that very reason.

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2) Paul Ehrlich, Note, *Communications Decency Act § 230*, 17 Berkeley Tech. L. J. 401, 403 (2002).

3) *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D.N.Y.1991).

4) The forum was maintained by a separate company, Don Fitzpatrick Associates, and Compuserve had minimal editorial control over the publication process.

5) *See* Id at 140.

6) *See* Id at 140-142.

7) 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

8) *See* Id at 4.

9) *See* Id at 12.

2. The enactment of CDA and subsequent judicial decisions

The enactment of CDA was a significant turning point with regard to ISP liability. Congress found that the radical expansion of Internet access provided individuals greater opportunities to access educational and informational resources.[10] This enabled a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.[11] Against this backdrop, in order to enhance the Internet as well as its related technologies and its free market, Congress has adopted the vehicle by which service providers can implement their own policies as to "good Samaritan" blocking and screening of offensive materials.[12]

According to § 230(c) of CDA, an ISP shall not be considered a publisher or speaker of any information provided by another information content provider. This provision also made it clear that no ISP shall be held liable for any action voluntarily taken in good faith to restrict access to obscene or otherwise objectionable material.[13] This was in comparison with Digital Millenium Copyright Act(DMCA),[14] where service providers were immunized from liability, in case of copyright infringements by third parties, only when they met specific conditions set forth by the statute.

The intention of the above provision in CDA was quite clear; to overrule the *Stratton Oakmont* decision and grant a broader protection to ISPs from legal liability in order to foster free speech on the Internet. However, CDA did not specifically refer to "distributor liability", and the issue of whether or not ISPs could still be subject to this liability was left to judicial interpretation.

In *Zeran v. American Online, Inc.*,[15] the distributor liability of AOL was disputed

10) *See* 47 U.S.C. § 230(a)(1).

11) *See* 47 U.S.C. § 230(a)(3).

12) *See* 47 U.S.C. § 230(b) &(c).

13) Yet, § 230(d) of the U.S.C. imposes obligations on ISPs; to notify customers that parental control protections are available that may assist the customer in limiting access to material that is harmful to minors, at the time of entering an agreement with a customer for the service.

14) The title II of the DMCA, the "Online Copyright Infringement Liability Limitation Act", was codified in 17 U.S.C. § 512. This section limits the liability of service providers in four common situations; which are 1) transitory digital network communications, 2) system Caching, 3) hosting services, and 4) information location tools.

15) 129 F.3d 327 (4th Cir. 1997).

by both parties. *Zeran* argued that CDA immunity only applied to "publishers", not to "distributors". AOL could be held liable because it received a notification from Zeran but failed to remove the postings in a timely manner. However, the court interpreted the term "publishers" in CDA as a concept encompassing "distributor", and refused to hold AOL liable.[16] Under this interpretation, the court reached the conclusion that ISPs are exempt from distributor's liability as well.

The *Zeran* court's broad conceptualization of "publisher" has been accepted in several cases afterward. In a series of subsequent decisions, the U.S. courts have firmly established the "complete immunity theory" for ISPs in Internet defamation claims.[17] Although a recent ruling by a California Court of Appeals rejected this strong trend created by the court in *Zeran*, by stating that the term "publisher" in CDA was meant to exclude "distributor", considering the well-established distinction between primary publishers and distributors,[18] one might justifiably assert that the U.S. courts are on the side of granting full immunity to ISPs.

B. The Korean Approach

1. Relevant legislation and legal doctrines

a) The basic approach to free speech

Article 21 of the Constitution of Korea states that all citizens shall enjoy freedom of speech and the press. Thanks to the advance of democracy in the modern history of Korea, the notion of freedom of expression as a constitutional right has been broadened. Moreover, this freedom is literally booming with technological changes that enable mass participation by way of digital media.

However, the same Article 21 that provides the ground for free speech also sets limits to this fundamental constitutional right, by stating that neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. This constitutional limitation, quite different from the first

16) *See* Id at 332, 334.

17) *See* Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998); Lunney v. Prodigy Services Co., 723 N. E. 2d 539 (N.Y. 1999); Ben Ezra, Weinstein, & Co. v. American Online, Inc., 206 F.3d. 980 (10TH Cir. 2000).

18) Barrett v. Rosenthal, 5 Cal. Rptr. 3d 142 (Cal.Ct.App. 2004).

amendment of the U.S. constitution,[19] implies that Korea is prone to grant relatively narrower protection on free speech than the U.S., by considering personal reputation or other public moral values as important as free speech. In that regard, defamation laws in Korea are more pro-plaintiff in that it is easier for plaintiffs to recover for defamation, while those in the U.S. are more pro-defendant.

The positions taken by the two countries on the injunctive relief for defamation clearly show the different perspectives on free speech. In the U.S., defamations are not subject to injunctive relief, whereas an injunction is a frequently used remedy for defamations in Korea. Although there are some skeptical views on the availability of injunctions, the decisions of the Supreme Court of Korea seem to be based on the premise that injunctions for defamations are not prior restraints[20] that are prohibited by the Constitution.[21] Moreover, the Act on the Mediation and Recovery of Media-Related Disputes, that was in effect as of Jun. 27. 2005, evidently states in Article 30 that injunctive relief is available when a personal right has been unlawfully infringed by the media. Underlying this, there seems to be the precept that one's reputation cannot be easily recovered once it is impaired.

b) Principles of the Korean Civil Code on the Issue

The tortious liability of ISPs will be basically determined by Articles 750 through 766 of the Korean Civil Code. Article 750 of the Code states that any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom. Meanwhile, Article 760 deals with liability of "joint tort-feasors," stating that joint unlawful acts will lead to joint liability. According to paragraph 3 of the Article, "accessories" shall be deemed to act jointly. An accessory, which is also a widely used term in the realm of criminal law, is someone who aids or contributes to the tortious act of another tortfeasor. This type of joint liability is important when it

19) The first amendment states "Congress shall make no law...prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...".

20) Article 21 of the Constitution states that licensing or censorship of speech and the press shall not be recognized.

21) *See* Korean Supreme Court, 89Daka29, decided on Oct. 11. 1988. *Also See* Korean Supreme Court, 93Da40614,40621, decided on Apr. 12. 1996, and 96Da17851, decided on Oct 24. 1997.

comes to the ISP liability issue.

Most of the time ISPs are sued for contributing to defamations by not taking necessary measures to prevent or stop them. However, to hold ISPs liable, duty of care on the side of ISPs should be presupposed. This duty usually stems from legal provisions or contracts, but it can also be derived from "sound reasoning", under Korean legal doctrines. Whether or not ISPs have such a duty will be the focal issue in the litigations against ISPs.

There seem to be very few statutory provisions that impose this type of duty on ISPs. The only legislation that refers to ISP's duty in this regard is the "Act on Promotion of Utilization of Information and Communications Network and on Protection of Personal Information"(hereinafter abbreviated as "The Information and Communication Act").[22] According to Article 44 of the Act, a person whose legal interest is infringed by information on the Internet may ask the ISP to delete the information or publish his or her refutal in response to such information, and ISPs have a duty to take necessary measures upon receiving this request.[23] This provision makes it clear that ISPs have a duty to take necessary actions when they have been requested to do so by the aggrieved person. Yet, it is still not obvious what duties ISPs have when they have not been notified of the defamation.

The following two notable Supreme Court cases touched on the issue of whether or not ISPs have a duty to take needed measures before they actually recognize the defamation at issue.

2. Judicial Decisions on the Issue

The first Supreme Court decision[24] imposing liability on an ISP for defamation shows that the Korean judiciary is taking quite a different approach from that of the

22) With respect to copyright infringement, Korean Copyright Law details the guidelines on the duty of ISPs, quite similar to Digital Millenium Copyright Act in the U.S.

23) Article 44 goes as follows. "(1) Any person whose legal interest is infringed on by the information which is provided for the public utilizing information and communications network may ask the provider of information and communications services handling the relevant information to delete the information or run his refutal in such information. (2) The provider or information and communications services shall, upon receiving the request for deleting the relevant information, etc, under paragraph (1), forthwith take necessary measures and promptly serve a notice thereon on the requester".

24) Korean Supreme Court, 2001da36801, decided on Sep.7. 2001.

U.S. courts on this issue.

In this case, the plaintiff brought a suit claiming compensation for the negligence of the ISP, who failed to remove the defamatory message for more than 5 months, even upon repeated requests by the plaintiff. In affirming the decision by the lower court, the Supreme Court proposed a guideline as to when ISPs could be held liable for the defamatory remark posted by a third party.

According to the ruling, a telecommunications business operator has a duty to take suitable measures, including deletion of a defamatory message on its electronic bulletin board, when the operator knew or could have known that the defamatory message had been posted. Since the ISP in this case knew or could have known of the existence of a defamatory message upon the notification by the plaintiff and the Information Communication Ethics Committee,[25] it was held liable for failing to fulfill a duty to take suitable measures. This decision suggests that ISPs have a duty of care once they have actual or constructive knowledge of the defamation. This position taken by the Supreme Court of Korea is clearly differentiated from the U.S. approach, which grants ISPs an absolute exemption from liability concerning online defamations.

However, the second Supreme Court case[26] seems to back down a little from its initial stance on the liability of the ISP.

The plaintiff was a former local government employee. Some online remarks alleging his sexual harassment and bribery were posted sporadically on the bulletin board on the websites of the local government. These messages remained undeleted for approximately 50 days, and were finally deleted by the local government immediately after the request was placed by the plaintiff. The plaintiff sought compensation from the local government, claiming that the defendant had a duty to take necessary measures once it knew or could have known the existence of the defamatory statements.

The lower court, relying on the previous Supreme Court decision mentioned above, held the defendant liable. However, the decision was overturned by the Supreme Court. This time, the court stated that the ISP is not always liable merely for the reason that it knew or could have known the fact that the defamatory content

25) The Information Communication Ethics Committee is a committee under the Ministry of Information and Communication. The Committee, composed of 14 individual committee members, evaluates major policies aimed at both controlling the distribution of harmful information, and promotes a more ethical cyber culture, prior to decision-making. For more details, *see* http://www.icec.or.kr.

26) Korean Supreme Court, 2002da72194, decided on Jun.27. 2003.

had been posted by a third party on the bulletin board. Stating that the duty to remove the speech should be a precondition to holding the ISP liable, the Supreme Court claimed that various factors, including the purpose and contents of the posted message, the period it was posted, the way it was posted, the extent of the damage, the relationship between the plaintiff and the defendant, the actions and responses of both parties after uploading the contents, the size and characteristic of the website and so forth, should be considered in determining whether an ISP has a duty to take necessary measures on the defamatory message.

These seemingly opposite conclusions stem from the different facts of the cases. The former case was about a commercial ISP who failed to remove the derogatory statement even after the request was placed, and the latter was about a non-commercial entity that immediately removed the statement upon the request. The different outcomes imply that ISP liability in Korea is determined on an ad hoc basis, taking various factors into consideration. However, it might be possible to summarize the position taken by the Korean courts as follows.

1) The liability of ISPs arises if they failed to take suitable measures when they had a duty to do so.
2) This duty arises when they knew or could have known that a defamatory message existed, but not always. Whether or not this duty arises is determined after considering the various factors mentioned above.

III. Proposing a More Desirable Liability Standard in Korea

A. The Applicability of a Complete Immunity Model to Korea

The applicability of a complete immunity model to Korea is the first issue to be addressed in this part.

ISP liability is predicated on the legislation of the respective jurisdictions. In the U.S., CDA § 230 clearly states that ISPs are immunized from the liability of being a speaker or a publisher. In Korea, there is no legislation that states so. Rather, the Information and Communication Act in Korea clarifies that ISPs have a duty of care once they are notified of the defamation. With this difference in mind, the U.S. model cannot be directly applied to Korea given the absence of a special legislation like CDA.

Putting aside this legislative aspect, the U.S. approach that lets ISPs off the hook

all the time is inappropriate from a policy perspective. Granting absolute immunity from liability virtually nullifies Internet defamation cases and frustrates a plaintiff from receiving compensation for any harm suffered as a result of the defamation. For this very reason, a number of articles claim that it is unlikely that the real intent of Congress in promulgating CDA was to give complete exemption to ISPs.[27] We also need to note that most countries, including England, Japan, Australia, France, and Germany, tend to hold ISPs liable under certain conditions instead of completely insulating ISPs from liability, in an effort to balance free speech and personal reputations.[28] Considering different perspectives on the weight of free speech as opposed to personal reputations, adopting a complete immunity model is not feasible from a policy point of view.[29]

B. Need for a Stricter Standard than the Current Korean Approach

The current approach to this matter shown by the Korean Supreme Court is also problematic. I argue that the standard needs to be modified as follows.

1. Actual Knowledge Required

According to the position taken by the Supreme Court, ISPs can be held liable even without actual knowledge of a defamatory message if they could have known it. The constructive knowledge part of the standard implies that there is a duty to monitor the content on the websites or bulletin boards that are under ISP's control.

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27) *See* Sewali K. Patel, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims : How Far Should Courts Go?*, 55 Vand. L. Rev. 647 (2002); Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 Suffolk U. L. Rev. 647 (2001); Robert T. Langdon, *The Communication Decency Act § 230 : Make Sense? Or Nonsense? - A Private Person's Inability to Recover If Defamed in Cyberspace*, 73 St. John's L. Rev. 829 (1999).

28) *See* Elissa A. Okoniewski, *Yahoo!, Inc. v. Licra : The French Challenge to Free Expression on the Internet*, 18 Am. U. Int'l L. Rev. 295 (2002) ; Scott Sterling, *International Law of Mystery : Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 Loy. L.A. Ent. L. Rev. 327 (2001) ; John F. McGuire, *When Speech is Heard Around the World : Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. Rev. 750 (1999).

29) This brings up the issue of weaknesses of the current country-by-country basis. Internet publications are not limited by boundaries, but its legal implications are different from one jurisdiction to another. This can chill ISPs, since they are subject to multiple jurisdictions.

Constantly monitoring the content in order to escape from liability might be possible, but it would be troublesome and costly. ISPs that are targets of litigations are likely to be considerably large-sized service providers. Given a tremendous amount of information that is being transmitted or stored through these major ISPs, it would be overly burdensome to require ISPs to monitor contents.

Even when the content can be effectively monitored, it could have disastrous consequences for free speech. Excessive content regulation is something we need to avoid to protect free speech. As the *Reno* Court has adequately addressed, "the Internet is a far more speech-enhancing medium than print, the village green, or the mails", and "as the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion".[30] Yet, constructive knowledge requirements can force ISPs into excessive content monitoring, consequently causing chilling effects.

In the meantime, broader monitoring can lead to broader liability, as shown in the Stratton *Oakmont* case. In this respect, ISPs might take a hands-off approach concerning seemingly illegal materials, doing nothing even when they ought to do something. This circumstance can put ISPs into a more complicated dilemma, making it troublesome for them to decide whether or not they should be monitoring, and how much they should be monitoring to avoid liability.

With this in mind, requiring actual knowledge seems more clear and proper. Proving actual knowledge can still be troublesome for plaintiffs, but the evidence of notification can serve as *prima facie* evidence of the actual knowledge. This means that ISPs no longer have obligations to monitor. They still can voluntarily monitor and remove illegal contents for their own benefits; however, it is fundamentally different from being legally obligated to do so in order to avoid liability. Requiring actual knowledge to hold ISPs liable might seem unfavorable to plaintiffs, but victims of defamations can easily overcome this threshold by notifying ISPs immediately after they are aware of the message.

This can be explained under legal theories in Korea as well. As previously described, the duty of care stems from legislation, contracts, or sound reasoning. Let us put aside contract for a moment, since it is not relevant in the context of this paper. Under the Information and Communication Act, responsibility to take

30) ALCU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) at 882-883.

necessary measures arises only upon receiving the request. Sound reasoning is another word for value judgment. As previously discussed, there is no appropriate policy need to hold ISPs liable in the case of having constructive knowledge. Rather, imposing the liability on ISPs only if they failed to take reasonable measures when they actually knew the circumstance seems more feasible from a policy perspective.

2. Clearness and Obviousness of the Defamation Required

When ISPs become aware of allegedly defamatory messages, determining whether or not the material at issue constitutes defamation can be a highly sophisticated decision. Defamation is punishable under Article 307 through 309 of the Criminal Code. But Article 310 prescribes that if the facts alleged are true and solely for the public interest, the act shall not be punishable. This logic is also applied to civil law.

However, finding out if the alleged facts are true, or figuring out whether or not the statement is solely for the public interest, can become quite a complicated and time-consuming task. ISPs are not capable of distinguishing the truth from falsity in such a short span, nor are they capable of judging whether the message serves compelling public interest. If what ISPs have regarded as legitimate speech turns out to be unlawful after a long period of judicial procedures, is it really pertinent to hold ISPs liable regardless of the nature of the statement? It seems that passing on the responsibility of determining legality of the statement to ISPs is too severe considering the amount of speeches made online and lack of specialty on the part of ISPs to make informed decisions.

Therefore, ISPs have a duty to act only when the statement at issue falls clearly and obviously on the side of defamation, even from the standpoint of an ordinary person. Statements that leave non-legal experts in vagueness should not give rise to the legal obligation on ISPs. Making decisions on the legality of those statements is the responsibility of the judiciary.

IV. Conclusion

My argument above will lead to a narrower scope of liability on ISPs. This conclusion might not be pleasing to the plaintiff in a defamation suit. Most of the

time, ISPs have deeper pockets than defamers who may be judgment-proof. Putting less liability on ISPs means there is less possibility to be compensated for the damages. Moreover, it is true that protecting potential or actual victims of illegal speeches has some value that needs to be cherished as well. However, ISP liability is only one of the vehicles by which we can balance competing interests on the Internet. This paper asserts that broadening ISP liability is not an adequate solution to protect personal reputations. Some alternative ways can be considered. These measures should focus on preventing defamations in advance rather than providing recovery of damages afterward. Promoting ethics among the Internet users, self-regulation measures voluntarily led by ISPs, by virtue of contractual relationships with their subscribers, are some soft measures that can contribute to accomplishing a pertinent balance.[31] Criminal sanctions against individual defamers might be one of these alternative measures, while it remains to be seen whether or not this can be an optimal implementation in balancing two conflicting values.[32]

This paper has attempted to establish a modified standard for determining liability of ISPs for defamation from the Korean perspective. Summing up all of the preceding reasoning and returning to the question posed at the outset of this paper, it seems appropriate to state that neither complete immunity nor broad liability is desirable. Actual knowledge and obviousness of defamation are two factors that give rise to the duty of care for ISPs. This may add clarity and predictability to the ISP liability standard without causing too much of a chilling effect on the Internet. With regard to reducing online defamations, it is more appropriate to take some alternative measures than to impose excessive liability on ISPs.

KEYWORDS : internet service provider, defamation, Communications Decency Act, free speech, liability standard, torts

31) Recently, Korean policy makers have been considering measures such as adopting personal identification system in major websites, providing a process in which ISPs can temporarily block access to the statement at issue for a certain period of time when it is difficult for ISPs to determine the legality of the statement. Although controversies on these measures are still ongoing, these plans are likely to be legislated in the near future.

32) In January 2006, criminal charges were filed on individuals who posted malicious and nasty online comments relating to the death of the 8-year-old son of a former pro-North Korean activist. They were fined by a local court shortly afterward. It was the first time that Internet users were punished for posting insulting comments. It seems that these measures are likely to have some deterrence impact on these sorts of wrongdoings. However, criminal liability should only be imposed in a very extreme circumstance in a very strict manner.