

# Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals

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## Abstract

*In 2007, Korea implemented the world's only mandatory real name verification system for individuals wishing to post content on popular Korean internet portals. This system, which expanded in 2009 to include additional portals, has so far been relatively ineffective at its stated purpose of reducing instances of online libel. Together with Korea's censorship of certain internet sites, the real name verification system distinguishes Korea as regulating internet use more heavily than other democratic societies.*

*I argue that the real name verification system is unlikely to successfully deter future acts of cyber libel, but will rather hinder socially useful online activities, such as free expression on matters of social and political significance. Possible means for strengthening enforcement of the real name verification system would provide little promise of preventing defamation while further interfering with freedom of expression and personal privacy.*

*I propose that Korean law can more effectively balance protection of private reputations with individual liberty interests by changing the real name verification system from a mandatory requirement to an internet portal opt-in system. Korea might also consider an emphasis on civil remedies as a means for minimizing the occurrence and consequences of cyber libel while simultaneously preserving a free and collaborative internet.*

## I. Introduction

The widespread proliferation of internet access throughout many societies worldwide has facilitated not only socially positive practices, but also detrimental ones. The internet is a vehicle for access to vast stores of

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information, but also facilitates the circulation of misinformation.<sup>1)</sup> While the internet provides unprecedented opportunities for physically disparate individuals to interact, collaborate, and express themselves,<sup>2)</sup> it has also introduced opportunities for abusive self-expression, notably through online defamation (“Cyber Libel”).<sup>3)</sup> As the national population with the highest rate of high-speed internet access in the world,<sup>4)</sup> the Republic of Korea (“Korea”) has experienced both the blessings and curses of online social networking in an unusually large measure. In Korea, the debate over how to balance free online expression and the prevention and punishment of cyber-crime is intense and has thus far resulted in a legal regime for internet regulation that is more restrictive than that of many other democratic nations.<sup>5)</sup>

Amongst Korea’s most recent internet regulation measures, and arguably its most unique and controversial, is a mandatory procedure for real name verification (the “Real Name Verification System” or the “System”). The System, created by an amendment to the Act on Promotion of Information and Communications Network Utilization and Information Protection [Jeongbo tongsinmang iyong chokjin mit jeongbo boho deunge kwanhan beopryul] (the “Information and Communications Act”),<sup>6)</sup> requires heavily

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1) Significant in the case of Korean society were online rumors linking imported American beef with mad cow disease. See Jin-seo Cho, *Portals Turning Into Rumor Mills?*, KOREA TIMES, May 14, 2008, available at [http://www.koreatimes.co.kr/www/news/biz/2008/05/123\\_24189.html](http://www.koreatimes.co.kr/www/news/biz/2008/05/123_24189.html).

2) See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6-9 (2004) (arguing that “[t]he digital revolution changes the factual assumptions underlying the social organization and social practices of freedom of speech ...”).

3) This phrase is apt because defamatory material presented online takes fixed form, such as text or recorded media.

4) See OpenNet Initiative: South Korea, <http://opennet.net/research/profiles/south-korea> (May 10, 2007). In recent years, Korea has consistently led the world in societal broadband internet access. See S. Korea Tops OECD in Internet Penetration, KOREA TIMES, June 17, 2008, available at [http://www.koreatimes.co.kr/www/news/biz/2008/06/123\\_26007.html](http://www.koreatimes.co.kr/www/news/biz/2008/06/123_26007.html); Rob Frieden, *Lessons from Broadband Development in Canada, Japan, Korea and the United States*, 29 TELECOMM. POL’Y 595, 597 (2005).

5) For instance, Korea engages in some internet censorship. See OpenNet Initiative: South Korea, *supra* note 4. This issue is more fully discussed *infra* Section IV, “Comparison with Other Nations.”

6) This law has the purpose of combating legal violations occurring on the internet and addresses collection and management of personal information of internet users.

trafficked internet portals<sup>7)</sup> to direct users to verify their identities on a public institution website using their national identification numbers before the users are allowed to post content on the site.<sup>8)</sup> This information is then retained for potential use in criminal investigations.<sup>9)</sup> With two years of experience with the Real Name Verification System, reasonable concerns and criticism exist over the law's effectiveness at serving a legitimate social function within a democratic society.

This article examines the Real Name Verification System and argues that it has been and will continue to be not only ineffective at its stated purpose of preventing and punishing Cyber Libel, but also an unwarranted incursion on the liberties of Korean individuals. The System threatens to chill legitimate political and social activities in the online space, thus frustrating legitimate and socially generative<sup>10)</sup> uses of the internet without achieving meaningful progress to prevent Cyber Libel.<sup>11)</sup>

This article will first describe defamation law in Korea, especially as it relates to Cyber Libel,<sup>12)</sup> and the law regarding the Real Name Verification

7) Under the law as it is presently enforced, internet portals with more than 100,000 users per day must comply with the Real Name Verification System. JEONGBO TONGSINMANG IYONG CHOKJIN MIT JEONGBO BOHO DEUNGE KWANHAN BEOPRYUL [ACT ON PROMOTION OF INFORMATION AND COMMUNICATIONS NETWORK UTILIZATION AND INFORMATION PROTECTION] Act No. 9637, Apr. 22, 2009, art. 44-5(1)2 [hereinafter INFORMATION AND COMMUNICATIONS NETWORK ACT]; JEONGBO TONGSINMANG IYONG CHOKJIN MIT JEONGBO BOHO DEUNGE KWANHAN BEOPRYUL SIHAENGRYEONG [Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT] Presidential Decree No. 21719, Sept. 9, 2009, art. 30.

8) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 29.

9) *Id.*

10) The term "generativity" was applied by Professor Jonathan Zittrain to describe the power of the internet to facilitate creativity and collaboration through the unique degrees of interconnectivity that are possible on an open worldwide network. See Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1981-96 (2006). Zittrain himself defines generativity as "a system's capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences." JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET — AND HOW TO STOP IT* 70 (2008).

11) See Jisuk Woo et al., *Internet kesipan silmyeongjaeui hyokwae daehan siljeung yeongu: Jaehanjeokboninhwakinjae sihaenge ttareun kesipan nae keulsseuki haengwi mit bibangkwa yokseolui byeonhwareul jungsimeuro* [An Empirical Analysis of the Effect of Real-name System on Internet Bulletin Boards: Focusing on How the Real-name System and Users' Characteristics Influence the Use of Slanderous Comments and Swear Words] 48 KOREAN J. OF PUB. ADMIN. (forthcoming 2010) (Korean).

12) Cyber Libel is specifically addressed in the INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70.

System. The social background and context that helped propel a recent expansion of the Real Name Verification System will then be provided. In particular, the protests against Korea's importation of United States beef during the summer of 2008 and the suicide of popular Korean actress Jin-sil Choi merit description. I will briefly compare the Real Name Verification System with the internet regulation policies of other nations before analyzing the initial results and controversies that have stemmed from the implementation of the law and recent criminal prosecutions of internet activities. Two particular issues of note are the decision by Google Inc. ("Google") to prevent users of YouTube<sup>13)</sup> in Korea from being prompted to register their personal identity information and the prosecution of "Minerva," a Korean economics blogger.

I will then pose several specific problems with the Real Name Verification System from a legal and social perspective.<sup>14)</sup> In particular, the Real Name

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13) YouTube is a streaming media website ([www.youtube.com](http://www.youtube.com)), owned by Google, that permits registered users to upload videos, which can then be searched and streamed by all those who access the site. Registered users can also post comments pertaining to particular uploaded videos.

14) I do not address possible constitutional law objections that might be made to the Real Name Verification System. The Korean Constitutional Court has grappled in the past with the issue of balancing internet freedom with efforts to regulate online activities. The Constitutional Court has stated, "If communication in the internet, which has now established itself as the largest and most important medium of expression, is regulated by order-centric notions, it will create a big impediment to the evolution of freedom of expression." 14(1) PANRYEJIP 616, 632 (99 Heonma 480) (Constitutional Court, June 27, 2002). For further discussion of this issue, see Kyu Ho Youm, *Defamation Law and the Internet in South Korea*, 9 MEDIA & ARTS L. REV. 141, 149-151 (2004) (citing Hae-won Lee, *Bulontongsin Kyujewa Pyohyeonui Jayu - Heonjae99Heonma480 Jeonkitongsinsaeopbeop Je53jo deung Wiheonhwakinkyoljeong Sogo* [The Government Regulations on "Improper Communication" and the Right to Free Speech], 1 EONRONKWA BEOP [J. OF MEDIA L., ETHICS, AND POLY.] 33, 52-65 (2002) (Korean)).

It has already been argued that, in fact, the Real Name Verification System has serious constitutional problems under Korean law, including interfering with anonymous free speech, free political speech, and the protection of personal data. Sung Gi Hwang, *Internet Silmyeongjee kwanhan Heonbeophakjeok Yeongu* [A Constitutional Study on the Mandatory Personal Identification on the Internet], 25 BEOPHAK NONCHONG [HANYANG L. REV.] 7, 36 (2008) (Korean). See also Yong-suk Hwang, *Internet Kesipan Silmyeongjee daehan Bipanjeok Yeongu* [Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet], 15 EONRONKWA SAHWE [PRESS AND SOC'Y] 97, 129 (2007) (Korean). While these issues are important to my analysis, I do not analyze constitutionality as it might be assessed by the Korean Constitutional Court, but evaluate the Real Name Verification System on the basis of its efficacy and consequences.

Verification System has thus far proven ineffective at deterring Cyber Libel,<sup>15)</sup> and the only mechanisms for improving effectiveness are too extreme to merit serious consideration. Furthermore, the Real Name Verification System interferes with the significant benefits of personal liberty and social and political dialogue achieved through widespread internet use. The law is overbroad and purports to defend “privacy”<sup>16)</sup> by interfering with privacy in a different but also legitimate sense: the privacy of accessing and engaging in the exchange of information online, potentially of a legal but controversial nature, without fear of repercussion.<sup>17)</sup> I then propose the possibility of changing the Real Name Verification System from a requirement to an internet portal opt-in program. I conclude with a short reflection on the benefits of emphasizing existing civil law for the redress of Cyber Libel and the avoidance of excessive government entanglement with online

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15) Several studies have cast doubt on the effectiveness of the Real Name Verification System at preventing Cyber Libel. See Woo et al., *supra* note 11, at 20-21; Yong-suk Hwang, *supra* note 14, at 110-11.

16) It may be useful to briefly distinguish a number of meanings that may be attached to the term “privacy,” each relating to the ability of the individual to control the revelation of information relating to her person. Used as the rationale for the Real Name Verification System, “privacy” refers to the interest in one’s reputation and privacy of personal affairs that may reflect upon reputation. “Information privacy” is a subject that Korean courts have addressed in the realm of tort suits alleging psychological damages relating to the leaking of personal information. See Seong-Wook Heo, *Bulbeophaengwibeoplie Uihan Internetsangui Jeongbo Privacy Bohomunjee kwanhan Ilgo – Lineage II Game ID · Bimilbeonho Nochulsageoneul jungsimuro – [Critical Thought on the Protection of Information Privacy on the Internet through the Legal Principles of Tort: In Relation to the Case Concerning the Disclosure of IDs and Passwords of Online Game Lineage II (Seoul Central District Court 2005Gadan240057)]*, 30 MINSAPANRYEONGU [J. OF PRIVATE CASE LAW STUD.] 753, 756-61 (2008) (Korean). We should also distinguish “identity privacy,” one’s interest in controlling the expression and sharing of one’s identity. See Jisuk Woo and Jae-Hyup Lee, *The Limitations of “Information Privacy” in the Network Environment*, 7 U. PITT. J. TECH. L. & POLY 2, 23-31 (2006) (arguing for “identity privacy” as a means of promoting social equality and more fully realized social and political freedoms).

17) The point has been made that while the detriments of anonymity in the online environment are much discussed (and prominently include Cyber Libel and copyright piracy), the benefits of anonymity, such as facilitating free speech and the avoidance of personal information profiling, are often ignored. See Jisuk Woo, *The Right Not to be Identified: Privacy and Anonymity in the Interactive Media Environment*, 8 NEW MEDIA & SOC’Y 949, 962-64 (2006) (citing A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash and Distributed Databases*, 15 J. OF L. AND COM. 395 (1996)). See also Woo and Lee, *supra* note 16, at 23-31.

communications.

## II. Relevant Defamation Law

### 1. Korean Constitution

The most fundamental basis for Korean defamation law is arguably found not in statute, but in the Constitution of Korea (the “Constitution”). Under the Constitution, “Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.”<sup>18)</sup> Protection of personal reputation is thus promoted by the language of the Constitution as well as expressly protected by statute (redressable by criminal penalty<sup>19)</sup> and/or civil recovery<sup>20)</sup>). The Constitution further provides that constitutional rights may be abridged as necessary “for national security, the maintenance of law and order, or for public welfare.”<sup>21)</sup>

While limitation on expression that violates the rights of others is hardly unique,<sup>22)</sup> its inclusion in the language of a national constitution speaks to the sensitivity of issues such as defamation in Korean society.<sup>23)</sup> Faced with difficult decisions and compromises between competing values, Korea has a substantial body of jurisprudence seeking to balance freedom of expression

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18) DAEHANMINGUK HEONBEOP [CONSTITUTION OF KOREA], art. 21(4) (1987), translated at <http://english.court.go.kr/home/english/welcome/republic.jsp> (last visited Nov. 13, 2009).

19) HYEONGBEOP [CRIMINAL CODE], arts. 307 and 309.

20) MINBEOP [CIVIL CODE], art. 751.

21) CONSTITUTION OF KOREA, art. 37(2). National security-related cases have been distinguished as being an area of freedom of expression-related jurisprudence where the Constitutional Court hesitates to interfere with legislative pronouncements. See Kyu Ho Youm, *The Constitutional Court and Freedom of Expression*, 1 J. KOREAN L. 37, 70 (2001).

22) For instance, the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, Europ. T.S. No. 005, art. 10(2), states, “The exercise of [the freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or the rights of others ...”

23) The language has been contrasted with the United States Constitution’s First Amendment language, which protects freedom of speech without explicit qualification. See, e.g., Youngjoon Kwon, *Tortious Liability of Internet Service Providers for Defamation: A Korean Perspective*, 5 J. KOREAN L. 121, 127 (2006).

against effective enforcement of laws.<sup>24)</sup>

## 2. Korean Criminal Code

The Korean Criminal Code addresses defamation in Article 307<sup>25)</sup>:

1) A person who defames another by publicly alleging facts shall be punished by imprisonment with or without prison labor for not more than 2 years or by a fine not exceeding 5 million won;

2) A person who defames another by publicly alleging false<sup>26)</sup> facts shall be punished by imprisonment with prison labor for not more than 5 years, suspension of professional qualification for not more than 10 years, or a fine not exceeding 10 million won.

Cyber Libel is specifically addressed under the Information and Communications Act<sup>27)</sup>:

1) Any person who has defamed any other person by publicly alleging facts through information and communications networks with the purpose of defaming him shall be punished by imprisonment with or without prison labor for not more than 3 years or by a fine not exceeding 20 million won;

2) Any person who has defamed any other person by publicly alleging false facts through information and communications networks

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24) Though the Constitution defines freedom of expression as limited, this right is a particularly sensitive issue in Korea because of its recent history with an authoritarian government. "Demands for freedom of expression ... were displayed more than anything else when Korea moved from an authoritarian rule to democracy. The Constitutional Court took an active attitude while drawing the boundaries for the constitutional guarantee of freedom of expression." Jong-Sup Chong, *Hangukui Minjuhwaee Isseoseo Heonbeopjaepansowa Kibonkwonui Silhyeon [The Constitutional Court and the Attainment of Fundamental Rights in the Democratization of Korea: 1988-1998]*, 40 SEUL DAEHAKGYO BEOPHAK [SEOUL L. J.] 226, 241 (1999) (Korean).

25) CRIMINAL CODE, art. 307.

26) Under Korean law, the crime of defamation can be committed even where the underlying facts are true; falsity of the defamatory statement is not an essential element of the offense, but rather increases the maximum penalties.

27) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70.

with the purpose of defaming him shall be punished by imprisonment with prison labor for not more than 7 years, the suspension of professional qualification for not more than 10 years, or by a fine not exceeding 50 million won ...

Cyber Libel is therefore punished with stronger penalties than libel expressed through other channels,<sup>28)</sup> providing that the evidence establishes the perpetrator's intent to defame the victim.<sup>29)</sup>

### 3. *The Real Name Verification Requirement*

In 2007, Korea became the first (and so far only) nation in the world to implement a national name verification requirement for online postings.<sup>30)</sup> The measure was introduced as an amendment of the Information and Communications Act and passed on January 26, 2007.<sup>31)</sup> The language of the statute provides that internet portals with more than 100,000 users per day must direct their users to a public institution-managed registration site where they confirm their identities using Korean national identification numbers;<sup>32)</sup> the identifying data is preserved and can be matched in the future with particular posts.<sup>33)</sup> However, the details of implementation were left to enforcement decrees.<sup>34)</sup> Under the original enforcement decree, internet portals with more than 300,000 users per day and news sites with more than

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28) Libel in general is distinguished from slander in article 309 of the CRIMINAL CODE, which provides for the same elements of the offense but includes higher maximum penalties for libel.

29) Note that articles 307 and 309 of the CRIMINAL CODE do not include intent to defame as an element of the defamation offense.

30) The only other locality with a comprehensive real name verification system is the city of Hangzhou, China. See Qiu Li Hua and Yue De Liang, "Wang Luo shi ming zhi" wei he nan? – Hang zhou shi shi "wang luo an bao tiao li" diao cha [Internet real-name registration system: Why so difficult to implement? An Investigation into the implementation of the Hangzhou Regulations for Network Security Protection], XINHUA NEWS AGENCY, May 19, 2009, available at [http://news.xinhuanet.com/newscenter/2009-05/19/content\\_11399392.htm](http://news.xinhuanet.com/newscenter/2009-05/19/content_11399392.htm) (Chinese).

31) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-5.

32) *Id.* See also Hyung-eun Kim, *Do new Internet regulations curb free speech?*, JOONGANG DAILY, Aug. 13, 2008, available at <http://joongangdaily.joins.com/article/view.asp?aid=2893577>.

33) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 29.

34) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-5(1), (2).



200,000 viewers per day were required to comply with the Real Name Verification System.<sup>35)</sup> In early 2009, the enforcement decree was changed to expand the Real Name Verification System to include all internet portals with more than 100,000 users per day.<sup>36)</sup> The Information and Communications Act provides that internet portals are to respond to complaints of allegedly defamatory content<sup>37)</sup> by following certain takedown procedures.<sup>38)</sup> Korean internet portals generally describe their responsive steps in online terms of use.<sup>39)</sup>

### III. Social Catalysts for Strengthening the Real Name Verification System

Understanding the impetus for the expansion of the Real Name Verification System<sup>40)</sup> requires a brief explanation of several events which occurred in 2008. Cultural context is critical in understanding the appeal of this law, but the key cultural characteristics in question are issues of current events and the present condition of Korean society.<sup>41)</sup>

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35) Enforcement Decree on INFORMATION AND COMMUNICATIONS NETWORK ACT, Presidential Decree No. 20668, Feb. 29, 2008, art. 30.

Initially, the Real Name Verification System requirement applied to 37 internet portals and news sites. Tong-hyung Kim, *More Limits Planned on Internet Anonymity*, KOREA TIMES, Oct. 3, 2008, available at [http://www.koreatimes.co.kr/www/news/biz/2008/10/123\\_32121.html](http://www.koreatimes.co.kr/www/news/biz/2008/10/123_32121.html).

36) Enforcement Decree of the INFORMATION AND COMMUNICATIONS NETWORK ACT, Presidential Decree No. 21278, Jan. 28, 2009, art. 30.

37) The scope of defamatory materials to be taken down is established in the INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-7(1), (2).

38) The INFORMATION AND COMMUNICATIONS NETWORK ACT prescribes that internet portals delete obviously offensive posts, while taking down posts of ambiguous legality for 30 days during a review period. INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-2(4).

39) See, e.g., Naver Connect Center, [http://help.naver.com/claim\\_main.asp](http://help.naver.com/claim_main.asp) (last visited Nov. 13, 2009) (Korean).

40) As discussed *supra* note 36, the law presently applies to all internet portals with more than 100,000 viewers per day.

41) Korean cultural attitudes, such as high regard for the importance of personal reputations and the protection of intellectual property interests, are often said to be shaped by Korea's Confucian tradition. See, e.g., Sun-Je Sung, *Law of Defamation in Korea*, 30 KOREAN J. INT'L & COMP. L. 1, 6-7 (2002); YOUNG KIM, BACKGROUND READING MATERIAL ON THE INTELLECTUAL PROPERTY SYSTEM OF THE REPUBLIC OF KOREA 161 (1996); Sang-Hyun Song and Seong-Ki Kim, *The Impact of*

## 1. Beef Protests

Modern Korean society has included recurring instances of widespread public protests, which have often utilized the internet for disseminating information and organizing. For instance, in 2002, OhmyNews<sup>42)</sup> reported on an accident in which two Korean girls were killed by an American army tractor.<sup>43)</sup> Alerted to the incident, Koreans organized protests online and within one week, the largest anti-U.S. demonstrations in Korean history were staged in Seoul.<sup>44)</sup>

A more recent illustration of Korean internet organization and populist efforts were the U.S. beef protests held against President Myung-bak Lee's administration. President Lee agreed to lift Korea's five-year ban on importation of American beef in 2008.<sup>45)</sup> Online coalescence of people opposed to the decision facilitated forty days of growing protests in the streets of Seoul.<sup>46)</sup> Fueled by health concerns, as well as broader issues of sovereignty

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*Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118, 120 (1994); ARTHUR WINEBURG, INTELLECTUAL PROPERTY PROTECTION IN ASIA §1.03, at 1-9 to 1-15 (Arthur Wineburg ed., 2d ed. 1999); Yong-sik Song, *Hyunjaejojak kwan beopui munjaejum* [Problems with the Current Copyright Law (I)], 19 PYŒNHOSA: SEULJIBANG PYONHOSAHWE [LAWYER: BAR ASSOCIATION OF THE SEOUL DISTRICT] 181, 182 (1989); SANG-HAN HAN, CHOJAKKWON UI POPJE WA SILMU [COPYRIGHT LAW AND PRACTICE] 25 (1988); Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BALT. INTELL. PROP. L.J. 25, 26 (1997). I do not argue the validity of such asserted influences here, but note that current cultural environment and events provide an elegantly direct explanation for the Real Name Verification System without reference to Korea's historical connection with Confucianism. For a more detailed treatment of the "Confucian Argument" as an explanation for common Korean attitudes regarding file-sharing, see John Leitner, *A Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation*, 22 COLUM. J. ASIAN L. 1, 38-42 (2008).

42) OhmyNews is an internet-based news source that utilizes information gathered by users to provide a popular alternative news source in Korea. See DAN GILLMOR, *WE THE MEDIA* 110-135 (2006).

43) Jonathan Watts, *World's First Internet President Logs On*, THE GUARDIAN, Feb. 24, 2003, available at <http://www.guardian.co.uk/technology/2003/feb/24/newmedia.koreanews>.

44) *Id.*

45) See Sang-hun Choe, *South Koreans Press Anti-Government Protests*, N.Y. TIMES, June 20, 2008, available at <http://www.nytimes.com/2008/06/20/world/asia/20korea.html>.

46) Sang-hun Choe, *S. Korean Cabinet Offers to Quit After Beef Protests*, N.Y. TIMES, June 10, 2008, available at <http://www.nytimes.com/2008/06/10/world/asia/10korea.html>.

and self-determination,<sup>47)</sup> the protests continued even after all the members of President Lee's cabinet offered to resign.<sup>48)</sup>

Much concern over the social unrest exemplified by the beef protests focused on the view that online organization and the dissemination of misinformation were responsible for the magnitude of the protests, particularly the rumor that American beef could infect consumers with mad cow disease.<sup>49)</sup> This, in turn, provided a powerful initial catalyst to further amend the law and broaden the scope of the Real Name Verification System.<sup>50)</sup> In defending the need for further measures, President Lee said that Korea must counteract "a phenomenon in which inaccurate, false information is disseminated; prompting social unrest that spreads like an epidemic."<sup>51)</sup> Before the Real Name Verification System was expanded, a major Korean current event impacted public opinion in favor of the measure.

## 2. *Jin-sil Choi Suicide*

Jin-sil Choi was a prolific Korean television and film actress whose popularity earned her the nickname "the Nation's Actress."<sup>52)</sup> After Ms. Choi committed suicide in October of 2008, speculation grew that her suicidal feelings were shaped to a significant degree by online rumors of financial entanglements with another actor, as well as other online criticisms of her as a divorced single mother.<sup>53)</sup> Cyber Libel is considered a widespread problem in

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47) See Sang-hun Choe, *An Anger in Korea over More Than Beef*, N.Y. TIMES, June 12, 2008, available at <http://www.nytimes.com/2008/06/12/world/asia/12seoul.html>.

48) See Choe, *supra* note 46.

49) See Cho, *supra* note 1.

50) See Michael Fitzpatrick, *South Korean government looks to rein in the Net*, N.Y. TIMES, Sept. 5, 2008, available at <http://www.nytimes.com/2008/09/05/business/worldbusiness/05iht-sknet.html>.

51) *Id.*

52) Jean H. Lee, *S. Korean actress found dead in apparent suicide*, ASSOCIATED PRESS, Oct. 2, 2008, available at [http://www.usatoday.com/news/world/2008-10-02-3818550031\\_x.htm](http://www.usatoday.com/news/world/2008-10-02-3818550031_x.htm).

53) See, e.g., Sang-hun Choe, *Web Rumors Tied to Korean Actress's Suicide*, N.Y. TIMES, Oct. 2, 2008, available at <http://www.nytimes.com/2008/10/03/world/asia/03actress.html?em>; *Jin-sil Choi, Akpeuli Jukyeotda Dongryeo · Netizen Kongbun [Negative replies kill Choi]*, SPORTSKHAN, Oct. 2, 2008, available at [http://sports.khan.co.kr/news/sk\\_index.html?cat=view&art\\_id=200810022225376&sec\\_id=562901](http://sports.khan.co.kr/news/sk_index.html?cat=view&art_id=200810022225376&sec_id=562901) (Korean).

Korea,<sup>54)</sup> and those who consider themselves to be victims of defamation are hardly confined to the ranks of celebrities. However, it is telling that the expansion of the Real Name Verification System was expedited following the suicide.<sup>55)</sup> The public will in favor of expanding the Real Name Verification System was significantly influenced by the death of Ms. Choi.<sup>56)</sup>

## IV. Comparison with Other Nations

### 1. Internet Censorship

Some degree of internet censorship occurs in about 25 of 41 countries surveyed, including Korea,<sup>57)</sup> according to a recent study<sup>58)</sup> by the OpenNet Initiative.<sup>59)</sup> Censorship is pervasive and government-orchestrated in approximately a dozen countries with an authoritarian form of government,

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54) The Korean police reported 10,028 cases of online libel in 2007, a substantial increase from the 3,667 cases reported in 2004. Sang-hun Choe, *Korean Star's Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 12, 2008, available at <http://www.nytimes.com/2008/10/13/technology/internet/13suicide.html>.

55) See Tee Jong Lee, *Seoul Rushes Internet Bill*, THE STRAITS TIMES, Oct. 13, 2008, available at [http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory\\_289173.html](http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory_289173.html); Kim, *supra* note 35. Officially, the expansion of the Real Name Verification System was achieved by a new Presidential Decree, but the amount of political and social pressure for the issuance of the decree following the death of Ms. Choi was substantial.

56) Examples of editorials and other news outlets arguing in favor of the expanded law in light of Ms. Choi's death are numerous. See, e.g., *A Law for Choi Jin-sil*, JOONGANG DAILY, Oct. 4, 2008, available at <http://joongangdaily.joins.com/article/view.asp?aid=2895644>; Kim, *supra* note 35 (stating that Agora, a popular Korean discussion site, was "overflowing with articles supporting the expansion of real-name use on the Internet").

57) See OpenNet Initiative: South Korea, *supra* note 4.

58) Survey of Government Internet Filtering Practices Indicates Increasing Internet Censorship, [http://cyber.law.harvard.edu/newsroom/first\\_global\\_filtering\\_survey\\_released](http://cyber.law.harvard.edu/newsroom/first_global_filtering_survey_released) (last updated Mar. 10, 2008).

59) The OpenNet Initiative is a partnership amongst four non-profit educational organizations, the University of Toronto Citizen Lab, the Harvard University Berkman Center for Internet & Society, the University of Cambridge Advanced Network Research Group, and the Oxford University Oxford Internet Institute. The OpenNet Initiative tests and analyzes internet censorship and surveillance worldwide. See About ONI, <http://opennet.net/about-oni> (last visited Nov. 13, 2009).

including China,<sup>60</sup> Saudi Arabia,<sup>61</sup> North Korea,<sup>62</sup> and Myanmar,<sup>63</sup> which have internet regulation regimes far more restrictive than those in other nations.<sup>64</sup> Korean censorship is considerably less comprehensive and is principally based on the National Security Act [Gukgaboanbeop],<sup>65</sup> which criminalizes anti-state activities and generally targets pro-North Korean sympathizers.<sup>66</sup> In 2004, the Ministry of Information and Communication used the National Security Law as authority while instructing internet service providers (“ISPs”) to block access to 31 internet sites it judged to be purveying pro-North Korean propaganda,<sup>67</sup> a measure that blocked access to several thousand unrelated websites in the process.<sup>68</sup>

While the legal basis and actual instances of internet censorship are more targeted and limited in Korea than in certain other nations, Korea’s censorship exceeds that of other democratic nations for which data on the subject is

60) See OpenNet Initiative: China, <http://opennet.net/research/profiles/china> (June 15, 2009).

61) See OpenNet Initiative: Saudi Arabia, <http://opennet.net/research/profiles/saudi-arabia> (Aug. 6, 2009).

62) See OpenNet Initiative: North Korea, <http://opennet.net/research/profiles/north-korea> (May 10, 2007).

63) See OpenNet Initiative: Burma, <http://opennet.net/research/profiles/burma> (May 10, 2007).

64) The non-governmental organization Reporters without Borders, which advocates for freedom of the press worldwide, identifies the following countries as applying a particularly active censorship regime: Burma, China, Cuba, Egypt, Iran, North Korea, Saudi Arabia, Syria, Tunisia, Turkmenistan, Uzbekistan and Vietnam. See Reporters without Borders, *Internet Enemies*, Mar. 12, 2009, available at [http://www.rsf.org/IMG/pdf/Internet\\_enemies\\_2009\\_2\\_3.pdf](http://www.rsf.org/IMG/pdf/Internet_enemies_2009_2_3.pdf). See also OpenNet Initiative, <http://opennet.net>.

65) GUKGABOANBEOP [NATIONAL SECURITY ACT], Act No. 5454, Dec. 13, 1997.

66) The NATIONAL SECURITY ACT has been the subject of legal challenges in the past; in 2004, the Supreme Court of Korea upheld convictions under article 7, which criminalizes the act of publicly praising and supporting North Korea, as a constitutionally permissible restriction on speech. 209 PANRYEGONGBO 1476 (2002Do539) (Supreme Court, July 22, 2004). See also *A nation-splitting law*, KOREA HERALD, Sept. 8, 2004, available at <http://www.asiamedia.ucla.edu/article.asp?parentid=14429>; *South Korea’s National Security Law*, ECONOMIST, Nov. 4, 2004.

67) OpenNet Initiative: Bulletin 009, available at <http://opennet.net/bulletins/009/> (last updated Jan. 31, 2005).

68) According to OpenNet testing as of January 31, 2005, 3,167 additional websites unrelated to North Korea were also blocked because they were hosted on the same servers as the 31 blocked sites. *Id.* See also Seung Hun Lee, *Block on North Korean Web Site Foils Net Users*, OHMYNEWS, Nov. 17, 2004, available at [http://english.ohmynews.com/articleview/article\\_view.asp?menu=c10400&no=197117&rel\\_no=1](http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=197117&rel_no=1).

available. The freedom of the press advocacy organization Reporters without Borders identifies Korea and Australia as nations with concerning government positions on censorship.<sup>69)</sup> In the case of Australia, however, the source of concern is a proposed law that would introduce nationwide censorship, rather than a presently implemented censorship regime.<sup>70)</sup> Of nations studied by the OpenNet Initiative, the only democracy besides Korea to engage in some form of internet censorship is India.<sup>71)</sup>

## 2. Real Name Verification

The Real Name Verification System is a step in the direction of limiting free speech that goes beyond the policies of other democratic nations and is made potentially more powerful by Korea's existing internet censorship laws and policies. Amongst democratic nations, even those (like Israel<sup>72)</sup> and Ukraine<sup>73)</sup>) that one might expect, as a matter of conjecture, to introduce internet censorship to protect national security and other vital national concerns do not censor or take steps to systematically identify internet users.

Comparison with China warrants specific consideration because China is the only nation besides Korea to have internet name verification.<sup>74)</sup> China's system is not mandatory for any particular group of internet portals. A program for the city of Hangzhou<sup>75)</sup> to require real name verification has

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69) See Reporters without Borders, *supra* note 64.

70) *Id.*

71) See OpenNet Initiative: India, <http://opennet.net/research/profiles/india> (May 9, 2007). India's censorship focuses on national security-related sites, and has been applied inconsistently and sporadically.

72) See OpenNet Initiative: Israel, <http://opennet.net/research/profiles/israel> (Aug. 6, 2009). I make particular note of Israel because of its persistent internal and external conflicts and violence relating to matters of national security.

73) See OpenNet Initiative: Ukraine, <http://opennet.net/research/profiles/ukraine> (May 9, 2007). I make note of Ukraine because some recent elections have involved potential vote fraud, and destabilizing events in its political sphere include the apparent near-lethal poisoning of its president, Viktor Yushchenko.

74) Hua and Liang, *supra* note 30; David Bandurski, *Xinhua: Hangzhou's "real-name Web registration system" is "on the shelf,"* CHINA MEDIA PROJECT, May 20, 2009, available at <http://cmp.hku.hk/2009/05/20/1632/>.

75) Hangzhou includes eight administrative regions and has a population of approximately 6.43 million people. See Hangzhou China: Administrative Districts and Population, <http://www.>

officially been put into effect as of May 1, 2009, though progress in its technical implementation is not clear.<sup>76)</sup> China's approach has involved agreements with major internet portals in which the portals individually implement real name verification.<sup>77)</sup> However, China has imposed a mandatory real name verification system for certain portals used by university students, a decision evidently targeting political speech.<sup>78)</sup> It is not clear what sort of pressure the Chinese government may have applied in securing ISP compliance with the real name verification program.<sup>79)</sup> However, it is clear that, at the present time, China does not have a nationwide mechanism for collecting and maintaining information on the identities of internet users and contributors, as does Korea.

It should be noted that the presence of a name verification system does not mean that the two countries will utilize identity information in the same way or restrict the same kinds of online activities. However, in terms of the verification system itself, Korea's current model is more comprehensive than the Chinese system.

## V. Initial Results and Controversies

### 1. Deterrence of Cyber Libel

Initial research has shown that in the first two years of Korea's experience with the Real Name Verification System, defamatory comments have not become notably less common. A study examined comments and replies on a popular internet portal's bulletin boards and found that the number of total comments decreased after the introduction of the Real Name Verification

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hangzhou.gov.cn/main/zpd/English/statistic/abriefsurvey/briefsurvey/T197434.shtml (last visited Nov. 13, 2009).

76) Hua and Liang, *supra* note 30; Bandurski, *supra* note 74.

77) See *Self-discipline for China blog providers*, CCTV.COM, Aug. 22, 2007, available at <http://www.cctv.com/program/bizchina/20070822/105950.shtml>; Anita Chang, *China: Bloggers should use real names*, USA TODAY, Aug. 22, 2007, available at [http://www.usatoday.com/money/topstories/2007-08-22-1543352646\\_x.htm](http://www.usatoday.com/money/topstories/2007-08-22-1543352646_x.htm).

78) Philip Pan, *Chinese Crack Down On Student Web Sites*, WASH. POST, Mar. 24, 2005, available at <http://www.washingtonpost.com/ac2/wp-dyn/A61334-2005Mar23>.

79) One might wonder whether Chinese ISPs that are requested to implement name verification of users are able, as a practical matter, to decline to do so. See Chang, *supra* note 77.

System, but the number of defamatory comments did not decrease.<sup>80)</sup> A more general survey of online user behaviors has found that, contrary to common assumption, the rate at which netizen behavior deviates from a particular social norm is not impacted by anonymity.<sup>81)</sup>

A Korea Communications Commission study<sup>82)</sup> of the first phase of real-name verification (for web portals with 300,000 or more users per day) found that there was a decrease in the rate of malign internet posts<sup>83)</sup> from 15.8% to 13.9%.<sup>84)</sup> This is not necessarily inconsistent with other research, which showed a small decrease in defamatory replies.<sup>85)</sup> However, the decline is hardly precipitous. As a best-case evaluation of the Real Name Verification System's effectiveness, this study indicates that the System has produced little improved protection of private reputation.<sup>86)</sup>

## 2. Google

Google owns the popular international site YouTube, which permits

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80) Woo et al., *supra* note 11, at 20-21. This study found that the number of defamatory replies to comments did decrease, along with the number of replies in general, and this reduction appeared to be the result of a change in replying patterns based on the level of use of the commenter. In general, the issue explaining rates of Cyber Libel on the bulletin boards was one of user behavior, not systematically reduced or otherwise affected by the Real Name Verification System.

81) Yong-suk Hwang, *supra* note 14, at 108.

82) This study evaluated the rate of malign reply; sought to gauge the "chilling effect" of the law, or the degree, if any, to which it discouraged use of the internet; and also attempted to measure the "balloon effect," or the degree, if any, to which the law caused netizens to switch from using large internet portals subject to the Real Name Verification System to smaller ones not subject to the requirement. Bangsongtongsinwiwonhoe [Korea Communications Commission], *Jaehanjeok boninhwakinjae hyogwabunseokeul wihan josa bogoseo* [*Analysis of the Effect of Limited Real Name Verification*], Oct. 2007, at 1-2 (Korean). The study asserted that the number of internet posts and the popularity of large internet portals demonstrated a lack of chilling effect or balloon effect. *Id.* at 18-20.

83) The term used to describe these messages in the study is "Akseongdaetgeul," which I describe in English as "malign." The study defines the term to include libel, sexual harassment, invasion of privacy, and contempt. *Id.* at 9.

84) *Id.*

85) See Woo et al., *supra* note 11, at 20-21.

86) Thorough studies of the expanded Real Name Verification System are not yet available, so it is not yet possible to account for any effect brought about by inclusion of additional internet portals.



registered users<sup>87)</sup> to upload videos that can then be streamed by anyone who accesses the website. Registered users can also post comments about a particular video, which are displayed below the video box on the computer screen. Google objected to the Real Name Verification System as compromising the anonymity and therefore the freedoms of its users.<sup>88)</sup> Google interpreted the law to only apply to the Korean version of the YouTube site, and so Google deactivated all uploads and commenting by individuals whose country preference is set to “Korea” in order to avoid a legal obligation to participate in the Real Name Verification System. However, the youtube.com site links to a page<sup>89)</sup> that provides simple instructions for changing the country preference to another country besides Korea,<sup>90)</sup> at which point the user is free to upload and comment without verifying her real name.<sup>91)</sup>

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87) While registering, users are asked to provide certain personal information, but the only piece of information that is verified is that they have access to the email address that is provided.

88) Google has a generally protective privacy policy, but its policy states that it will share information when “[w]e have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request.” Google Privacy Center: Privacy Policy, <http://www.google.com/privacypolicy.html> (last updated Oct. 19, 2009).

89) YouTube Korea Blog, [http://youtubekrblog.blogspot.com/2009/04/blog-post\\_08.html](http://youtubekrblog.blogspot.com/2009/04/blog-post_08.html) (last updated Apr. 8, 2009).

90) The ease by which Koreans can dodge the Real Name Verification System requirements illustrates one of the problems with this law: given Korea’s unique approach to this problem, there is not, and likely will not be in the foreseeable future, a harmonized international approach that can aid in enforcement by effectively “closing the loophole” of Korean users selecting a different jurisdiction’s legal standards for Google or other ISPs to effectively apply.

91) Translation from Stephen Shankland, *YouTube Korea squelches uploads, comments*, CNET NEWS, Apr. 13, 2009, available at [http://news.cnet.com/8301-1023\\_3-10218419-93.html](http://news.cnet.com/8301-1023_3-10218419-93.html):

We have a bias in favor of people’s right to free expression in everything we do. We are driven by a belief that more information generally means more choice, more freedom, and ultimately more power for the individual. We believe that it is important for free expression that people have the right to remain anonymous, if they choose.

Because of Real Name Verification System in Korea, we have voluntarily disabled comments and video uploads when using YouTube in Korea with the Korea country setting, so you will not be required to verify your identity.

You will still be able to enjoy watching and sharing videos on YouTube. You may still upload videos and comments without proving your identity by choosing a non-Korean country setting from the top of any YouTube page.

### 3. *Park (Minerva) Prosecution*

Dae-sung Park was a widely read blogger on financial issues who posted his writings under the internet alias “Minerva.”<sup>92)</sup> Mr. Park was arrested on January 7, 2009<sup>93)</sup> after he was accused of spreading online rumors asserting that the Korean government compelled Korean banks not to buy U.S. dollars in late 2008 in order to combat the falling value of the Korean currency, the won, against the U.S. dollar.<sup>94)</sup> The prosecution alleged that this assertion was false and that Mr. Park spread the rumor with the intent to damage public interest, in violation of the Electronic Communication Fundamental Law [Jeonki tongsin kibonbeop].<sup>95)</sup> He was acquitted by the Seoul Central District Court on April 20, 2009.<sup>96)</sup> Judge Young-hyun Yoo stated that “when considering all the circumstances, it is hard to conclude that Park was aware that the information was misleading when he wrote the postings” and also did not conclude that Park intended to damage public interest.<sup>97)</sup>

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We understand that this may affect your experience on YouTube. Thank you in advance for your understanding. We hope that you continue to enjoy and participate in the YouTube community.

92) Minerva is the goddess of wisdom in Roman mythology (known in Greek mythology as Athena).

93) See Christian Oliver, *Financial Blogger Arrested in South Korea*, FIN. TIMES, Jan. 8, 2009, available at [http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?ncklick\\_check=1](http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?ncklick_check=1); see also Jane Han, *Foreigners Puzzled over Park's Arrest*, KOREA TIMES, Jan. 11, 2009, available at [http://www.koreatimes.co.kr/www/news/biz/2009/01/123\\_37648.html](http://www.koreatimes.co.kr/www/news/biz/2009/01/123_37648.html).

94) See Ju-min Park and John M. Glionna, *Case of Internet Economic Pundit Minerva Roils South Korea*, L.A. TIMES, Jan. 16, 2009, available at <http://articles.latimes.com/2009/jan/16/world/fg-korea-minerva16>.

95) JEONKI KONGSIN KIBONBEOP [ELECTRONIC COMMUNICATION FUNDAMENTAL ACT], Act No. 9780, art. 47(1) states:

A person spreading a false rumor maliciously intending to damage the public interest by using an electronic machine can be sentenced to imprisonment for under five years or given a fine of under 50,000,000 won.

96) *S. Korean Court Finds “Minerva” Not Guilty*, KOREA TIMES, Apr. 20, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/04/113\\_43467.html](http://www.koreatimes.co.kr/www/news/nation/2009/04/113_43467.html).

97) *Id.*; see also Sang-hun Choe, *Economic Blogger Who Angered Seoul is Acquitted*, N. Y. TIMES, Apr. 20, 2009, available at <http://www.nytimes.com/2009/04/21/business/global/21blogger.html>.

## VI. Critical Analysis of the Real Name Verification System

### 1. Effectiveness

Empirical evidence indicates that rates of Cyber Libel have not been significantly reduced by the introduction of the System.<sup>98)</sup> Further, the Real Name Verification System is easily circumvented by premeditating defamers and will thus fail to prevent the most dangerous and blameworthy defamatory statements, those that are actually false and made with an intent to defame the subject.<sup>99)</sup> Google's response to the law as it applies to YouTube, complete with posting a link to a web page with simple instructions for the law's circumvention posted in Korean,<sup>100)</sup> demonstrates one means by which internet contributors can effectively avoid the requirement. Migration to the use of Google products, not just for posting online videos but also for blogging<sup>101)</sup> and other methods of creating online content, has become an increasingly popular method for individuals in Korea to remain anonymous.<sup>102)</sup> Given the means available to a party who intends to defame another online, including the use of someone else's identification number,<sup>103)</sup> it seems that the Real Name Verification System is particularly unlikely to prevent the most premeditated and egregious acts of defamation.<sup>104)</sup>

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98) See *supra* Section V. 1., "Deterrence of Cyber Libel."

99) Under Korean law, defamation does not require a showing that the allegedly defamatory statement is false or that the accused had intent to defame, but these two factors trigger heightened potential punishments. See CRIMINAL CODE, art. 309; INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 70. See also *supra* Section II, "Relevant Defamation Law."

100) See YouTube Korea Blog, *supra* note 89.

101) Google provides its "Blogger" service ([www.blogger.com](http://www.blogger.com)) to Korean users. So far, it has not qualified for the Real Name Verification System due to the number of daily users, but the site could be the source of future conflict with the Korean government if its popularity continues to grow.

102) See Tong-hyun Kim, *Google Avoids Regulations, Korean Portals Not so Lucky*, KOREA TIMES, Apr. 27, 2009, available at [http://www.koreatimes.co.kr/www/news/tech/tech\\_view.asp?newsIdx=43939&categoryCode=129](http://www.koreatimes.co.kr/www/news/tech/tech_view.asp?newsIdx=43939&categoryCode=129).

103) A google.com search conducted by the Korean Information Security Agency produced well over a hundred thousand usable Korean ID numbers that could be obtained for free online. *Google Exposing Thousands of Korean ID Numbers*, CHOSUNILBO, Sept. 22, 2008, available at <http://english.chosun.com/w21data/html/news/200809/200809220010.html>.

How could the Korean government boost the effectiveness of the law? One option might be to further strengthen the law, such as by increasing penalties. However, to target those who can currently evade identification, the only options for truly preventing the posting of defamatory statements might be to require heavily trafficked sites to not permit any postings or commentary at all, or to sharply confine user contributions and assign heightened ISP liability for postings and contributions that are permitted.<sup>105</sup> Regardless of whether this would be constitutional in Korea, such legal modifications seem too draconian and likely to chill internet freedoms to be seriously considered.

The government might also consider a change in the law or the enforcement of the law to elicit a more cooperative stance by Google and to deter other major ISPs who would permit Korean users to effectively select another jurisdiction's laws when utilizing a service.<sup>106</sup> This measure could force the issue that Google has sought to avoid: a choice between on the one hand, complying with the letter (and spirit) of the law and compromising a stated objective of promoting "privacy" for internet users,<sup>107</sup> or on the other hand, more fully limiting Korean access to the site, thereby reducing the reach and market share of internet properties while preserving user anonymity. However, the Korean government first faces the awkward and difficult choice of either accepting Google's current position or initiating an open conflict with the company.

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104) Provocative research already exists suggesting that instances of Cyber Libel have not been curbed by the introduction of the Real Name Verification System. See Woo et al., *supra* note 11, at 20-21.

105) Scholars have called into question whether current legal requirements for Korean ISPs may already be too onerous. See Kwon, *supra* note 23, at 131-134.

106) Many available internet portals do not have a legal presence in Korea and could operate outside of Korea's Real Name Verification System with no obligation or legal consequence for doing so. The greatest impact of the law may ultimately be to cause individuals to switch to non-Korean portals that might be less likely to be frequently viewed by a large Korean audience. In that case, compelling removal of the offending content would be made more difficult or even impossible. In the process, Korea could make itself a less attractive jurisdiction for major ISPs to maintain an employment-generating, tax-paying physical presence.

107) See Google Privacy Center, *supra* note 88.

## 2. *Interference with Free Expression and Privacy*

Free expression is critical to a politically free society, and free expression on the internet is particularly critical to Korean democratic culture. As Professor Youngjoon Kwon states, "Online democracy [in Korea] has reached its pinnacle, due mainly to two factors: a remarkably high broadband penetration rate and a great number of electronic bulletin boards."<sup>108)</sup> To this I would add a more abstract consideration, the youth and vigor of Korea's less-than-20-year-old democracy, which has largely taken shape in the internet age.

In the case of Korea, the same generations of individuals who utilize the internet as part of everyday life witnessed and participated in the birth of the present Korean democracy.<sup>109)</sup> The potential of cyberspace to facilitate many forms of democratic activity, together with the fact that these activities have taken place online for about as long as civilian democracy has existed in Korea, establish a meaningful social link between internet freedom and democracy.

Cyberspace has already facilitated South Korean democratic participation, as illustrated by the crucial role of online political activism in the election of former President Moo-hyun Roh. Mr. Roh ran against the favored Grand National Party candidate Hoi-chang Lee in the 2002 election with a political strategy that made extensive use of online campaigning and used e-mail and text messages to communicate with supporters. One online point of coalescence for Roh supporters was the popular online news site OhmyNews.<sup>110)</sup> On the day of the elections, Roh supporters furiously blogged and encouraged others to vote.<sup>111)</sup> Roh narrowly won the presidency.<sup>112)</sup> Online political activities

108) Kwon, *supra* note 23, at 122.

109) The transition from authoritarian government to democracy was at least partially driven by mostly peaceful protests in Korea.

110) Woo-Young Chang, *Online Civic Participation, and Political Empowerment: Online Media and Public Opinion Formation in Korea*, 27 MEDIA, CULTURE & SOC'Y, 925, 931 (2005).

111) *Id.*

112) See Sang Yin Lee, *Rohmoohyun 16dae daetongryung dangseon* [Roh Moo Hyun elected as the 16<sup>th</sup> president], CHOSUNILBO, Dec. 19, 2002, available at [http://news.chosun.com/svc/content\\_view/content\\_view.html?contid=2002121970408](http://news.chosun.com/svc/content_view/content_view.html?contid=2002121970408) (Korean).

intersected with traditional political organization and arguably helped to determine a critical election outcome and created new roles for citizen participation in politics.<sup>113)</sup>

In light of the social value of free expression, the concept of “privacy” in the online space becomes more complicated. Proponents of the Real Name Verification System correctly assert that individuals have an interest in the protection of their private “personal rights,” such as reputation and freedom from libel.<sup>114)</sup> However, individuals also have an interest in privacy in a different sense, that is, in maintaining an anonymous profile online for the purposes of utilizing legitimate expressive and associative opportunities while being insulated from the possibility of stigma or suppression.<sup>115)</sup> While some have questioned the value of anonymous expression,<sup>116)</sup> examples of the value of anonymity include the sharing of sensitive information regarding personal health issues, matters of personal and sexual identity,<sup>117)</sup> and politically controversial topics.<sup>118)</sup> The Constitution explicitly protects the reputation of Korean individuals,<sup>119)</sup> but reputation should be understood to include

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113) See Ihlwan Moon, *Have Computers, Will Fight for Reform*, BUS. WK., Feb. 16, 2004, available at [http://www.businessweek.com/magazine/content/04\\_07/b3870077.htm](http://www.businessweek.com/magazine/content/04_07/b3870077.htm).

114) See Wan Choung, *Cyberpokryeokui Pihaesiltaewa Daeunghangan* [A Legal Study of Cyber Violence], 13 PIHAEJAHAKYEONGU [KOREAN J. OF VICTIMOLOGY] 329, 347-48 (2005). Professor Choung describes “in-gyeok kwon,” translated here as “personal rights,” as requiring the protection provided by such policies as the Real Name Verification System.

115) As Justice Hugo Black insightfully wrote in *Talley v. California*, a case in which the U.S. Supreme Court invalidated a Los Angeles city ordinance illegalizing handbills unless they were printed with the names and addresses of their authors, “Persecuted groups and sects from time to time throughout history have been able to criticize the oppressive practices and laws either anonymously or not at all... It is plain that anonymity has sometimes been assumed for the most constructive purposes.” *Talley v. California*, 362 U.S. 60, 65-66 (1960).

116) This debate also rages in American society. See, e.g., Randy Cohen, *Is It O.K. to Blog About This Woman Anonymously?*, N.Y. TIMES, Aug. 24, 2009, available at <http://ethicist.blogs.nytimes.com/2009/08/24/is-it-ok-to-blog-about-this-woman-anonymously/?emc=eta1>.

117) See Woo and Lee, *supra* note 16, at 28-29 (citing David J. Phillips, *Negotiating the Digital Closet: Online Pseudonyms and the Politics of Sexual Identity*, 5 INFO. COMM. & SOC'Y 406 (2002)).

118) Although this discussion principally focuses on opportunities for overtly political expression online, the concept of “democratic culture” that is embodied and advanced by online expression can be much more inclusive, including topics from all facets of popular culture. According to Professor Jack Balkin, “Freedom of speech means giving everyone ... the chance to use technology to participate in their culture, to interact, to create, to build ... whether it be [about] politics, public issues, or popular culture.” Balkin, *supra* note 2, at 45.

119) See CONSTITUTION OF KOREA, art. 21(4).

personal control over reputation, and integral to that control is power over the public identity that the individual creates for herself.

Initial Korean government analysis suggested that the Real Name Verification System had not had a “chilling effect” on Korean expression through the internet due to a consistent or increasing number of posts after the System was introduced.<sup>120)</sup> However, this fact alone does not establish a lack of chilling effect, as the introduction of Real Name Verification may have slowed the rate of increase in posting that may have otherwise occurred. Furthermore, statistics alone cannot reveal the kind of expression that is made (or not made) through the internet, and it is possible that speech on particularly sensitive but socially important subjects has been reduced.

At best, the Real Name Verification System invites misapplication. Heightened online restrictions and punishments have been defended as a way to prevent or at least more swiftly punish “a second and third ‘Minerva’ situation,”<sup>121)</sup> but Mr. Park was not guilty of a crime. The prevention of the second and third Minervas, then, would not appear to be an act of crime prevention, but rather a restriction of the free exchange of information and ideas regarding topics of the utmost social importance.

### *3. A Proposal for Mitigating Individual Freedom Concerns*

Since the most troubling (and internationally distinctive) aspect of the Real Name Verification System is that it is mandatory, it may be effective to convert the System to a voluntary program where ISPs may “opt-in.” This would permit posters to seek the System’s protections while also respecting others’ preferences for privacy and open expression. Assuming that some major ISPs would opt into the Real Name Verification System while others would not, bloggers and other authors could choose between preserving their own anonymity and accepting that commenters would also be anonymous, or

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120) Korea Communications Commission, *supra* note 82, at 18.

121) At Assembly hearings in January 2009, See-joong Choi, chairman of the Korea Communications Commission, said, “If there were a cyber defamation law, we would be able to avoid a second and third ‘Minerva’ situation.” Tong-hyung Kim, *Cyber Defamation Law May Be Softened*, KOREA TIMES, Apr. 21, 2009, available at [http://www.koreatimes.co.kr/www/news/biz/2009/04/123\\_43565.html](http://www.koreatimes.co.kr/www/news/biz/2009/04/123_43565.html).

registering for the Real Name Verification System, foregoing full anonymity for the comfort that those posting responses would also have completed the registration process. While this proposal does not solve the problem of original defamatory posts (as such posters would be likely to avoid portals opting into the System), it would preserve a major purported benefit of the Real Name Verification System while providing channels for fully free expression.

## VII. Conclusion

Korea, as a society, sets a relatively restrictive set of parameters for free speech in an attempt to balance this liberty with reputational protection. A critical assessment of the Real Name Verification System reveals that the measure has thus far been of little help in combating Cyber Libel, while its consequences for freedom of expression cannot be dismissed. It may be most propitious to seek an alternative legal approach to address Cyber Libel without interfering to such a degree with freedom of expression and personal privacy. As the Constitutional Court has counseled, “[T]he regulatory modes for this ever changing sphere of communication [the internet] also should be explored within the framework of the Constitution in a diverse and innovative way.”<sup>122)</sup> Can we unbundle private defamation from valued personal expression and political speech in a meaningful way to effectively isolate and target Cyber Libel?

The threat of criminal prosecution deeply entangles the state with online expression and may operate as a blunt instrument for the deterrence of truly wrongful internet postings. To deter defamation without stifling internet expression, civil remedies provide an efficient and minimally intrusive means.<sup>123)</sup> Korean law already permits purported victims of Cyber Libel to

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122) Constitutional Court, *supra* note 14, at 632.

123) As discussed *supra* Section II. 2., Korea provides for criminal punishment of defamation. While prosecutors are generally obliged to investigate complaints they receive from purported victims, the Seoul Prosecutor’s Office has, in the past, established certain policies and parameters for the enforcement of particular laws. *See, e.g., Ah-young Chung, Commercial Online Music File Swappers Face Criminal Charges*, KOREA TIMES, Jan. 16, 2006, available at <http://www.koreatimes.com>.



object to offensive content, which is then removed by the ISP hosting the content while it is reviewed.<sup>124)</sup> This measure provides a powerful initial protection against the continued presence of the allegedly defamatory content after it has been discovered by the victim. To address compensation for potential damages, and to provide a legal channel for alleged victims to pursue public justice, should they so desire, the Korean Civil Code<sup>125)</sup> provides for remedies for defamation.<sup>126)</sup>

No doubt an objection to such a reliance on civil law would be that civil remedies are often costly for an alleged victim to pursue. However, the infrastructure and delegated resources for removing Cyber Libel are already in place, so the matter of preventing future harm to the victim is addressed, while only the matter of compensation and other restorative measures<sup>127)</sup> assessed against the poster personally is left to a civil dispute amongst the parties.<sup>128)</sup> Furthermore, resource barriers to seeking justice through the Korean civil court may not be particularly great, given the ability of Korean

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asiamedia.ucla.edu/article.asp?parentid=37126 (describing a Seoul Prosecutor's Office policy that only those who infringe copyrights through online file-sharing for commercial gain would be criminally prosecuted, while non-commercial file-sharers would not be). Complaints of at least certain kinds of Cyber Libel may be best directed away from criminal prosecution and towards a civil court remedy.

124) INFORMATION AND COMMUNICATIONS NETWORK ACT, art. 44-2(4).

125) This arrangement better aligns the legal intervention against most cases of potential defamation with the purposes of the Korean codes. Commentary has distinguished the Criminal Code defamation provisions, intended to be used for maintaining "public peace and order," with the Civil Code defamation provisions, intended for "safeguarding ... reputations." Youm, *supra* note 14, at 144.

126) CIVIL CODE, art. 751, monetary compensation may be awarded for damages as follows:

- 1) A person who had injured another person, his liberty or reputation ... shall make compensation for any other damage arising therefrom as well as damage in the property;
- 2) The court may order the compensation under the preceding paragraph paid by periodical payments and may order a reasonable security furnished in order to ensure the performance of such obligation.

127) CIVIL CODE, article 764 permits the court, pursuant to the request of the injured party, "to take suitable measures to restore the injured party's reputation, either in lieu of or together with compensation for damages."

128) For a discussion of civil remedies related to the invasion of private data, see Sang Jo Jong and Youngjoon Kwon, *Kaerin Jungboui Bohowa Minsajeok Kujaesudan* [Protection of Personal Data and its Civil Remedy], 630 BEOPJO [KOREA LAWYERS ASSOCIATION JOURNAL] 5 (2009) (Korean).

litigants to represent themselves and preserve a reasonable opportunity for a favorable outcome. In this way, a victim who believes that the wrong against them was not satisfactorily ameliorated by the removal of a particular message or post could capably seek relief in civil court.<sup>129)</sup>

The uniquely transformative power of the internet is a linchpin on both sides of the Real Name Verification System debate, as both the effects of defamation and misinformation on one hand, and the value of free expression on the other, are enhanced by an unregulated and widely accessed internet. In Korea in particular, the damage of Cyber Libel to reputation has the potential to be great, but the positive effects of a broad body of shared online political and social information and opinions are also much magnified. The legal system should work to protect victims of Cyber Libel, but the Real Name Verification System is, on balance, not an effective instrument for mitigating Cyber Libel while preserving social freedoms.

KEY WORDS: defamation, cyber libel, real name verification, internet, privacy, free speech, Google, anonymity, identification, Korea

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129) Under Korean law, there is not a mechanism by which a poster of content who believes her content was wrongly removed from the internet can seek to have the content restored. Introducing such a cause of action may provide a more balanced means by which civil proceedings can resolve lingering grievances of both parties in cases of purported Cyber Libel.