



国立大学法人

熊本大学



Keynote Speech

Constitutionality of Blocking Pirate Sites

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- Constitutionality of Site Blocking -

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1. Introduction

(1) Origins of the Issues

[1] Rights holder losses due to pirate sites is becoming a problem in society

[2] The government has proposed emergency measures (April 2018)

[3] Strong criticism from constitutional and information law academics and practitioners

(2) Locating the legal issues

[1] Does detecting access destinations violate secrecy of communications (Constitution of Japan Article 21, Paragraph 2 latter part, Telecommunications Business Law Article 4, Paragraph 1)?

[2] Does blocking violate the freedom of expression (Constitution of Japan Article 21, Paragraph 1)?

(3) Perspective of the reporter

▶ Because access destination detection is a means of blocking, the focus is on whether blocking violates freedom of expression. If it does not violate, secrecy of communications depends on a balancing of benefits.

→ This way of thinking also applies to child pornography.





Does blocking illegal or harmful sites violate the freedom of expression guaranteed by Article 21, Paragraph 1 of the Constitution of Japan?





2. Does blocking violate freedom of expression?

(1) Freedoms of the managers of the pirate sites (freedom of expression)

[1] We cannot consider the freedom of illegal expression (obscenity, defamation, privacy violation, child pornography, etc.).

[2] Pirated materials are illegal expressions violating the Copyright Act.

[3] We cannot consider freedoms for pirated materials → the freedom of expression of site managers is not violated.

(2) Freedom of site users (freedom to “know” receipt) → Is there a reason to reject the illegality of uploading pirated materials?

- ▶ We cannot consider even the freedom to view illegal expressions.
- ▶ This is similar to being unable to consider the freedom to download illegally uploaded copyrighted works.





Does access destination detection performed by the ISP to implement blocking violate the secrecy of communications (Article 21, Paragraph 2 of the Constitution of Japan, Article 4, Paragraph 1 of the Telecommunications Business Law)?





3. Does access destination detection violate the secrecy of communications?

(1) Non-violation theory

[1] Open communication theory [2] constituent requirement non-applicability theory, [3] Mechanical detection non-applicability theory

(2) Justification by balancing benefits

[1] The secrecy of communications is also not an absolutely unrestricted constitutional value.

[2] The illegality of the infringement is rejected if it is established that the benefits gained are greater than the benefits lost based on measures to protect legally protected interests.

[3] Blocking child pornography is based on this legal principle.

▶ Rejecting illegality under the Telecommunications Business Law due to emergency evacuation.

[4] Copyright protection can also contravene the illegality of secrecy of communications due to the importance of rights (government intellectual property strategy) and the seriousness of damage (legislative facts).





Does identifying pirated material fall under the censorship prohibited by Article 21, Paragraph 2 of the Constitution of Japan and Article 3 of the Telecommunications Business Law?





4. Conclusion Some discussion points

4-1 Censorability of Identifying Pirated Materials

(1) Is it censorship (prohibited in the first paragraph of Article 21, Paragraph 2 of the Constitution of Japan) for the government to identify sites with pirated material?

[1] Definition of precedent (Supreme Court Decision of 1984 Customs Inspection Case)

[2] Judgment regarding being subject to blocking does not fall under censorship in precedents because it (i) judges by individual request based on the right holder's copyright, and it (ii) judges sameness of the form of expression, not the content of the thought.

(2) Is detecting the ISP access destination censoring communication (prohibited under Article 3 of the Telecommunications Business Law)?

▶ The traditional understanding of constitutional law is that viewing communications (opening envelopes, eavesdropping on telephone communications) is censorship of communications.

→ Acts of ISPs are not censorship of communication.





If blocking of pirated material is permitted, wouldn't that enable blocking of defamation, violations of secrecy and violations of rights to publicity?





4-2 Slippery Slope Theory Concerns

(1) The slippery slope theory was apparently originally used for issues concerning bioethics.

(2) Is admitting blocking of pirated materials a first step in allowing blocking of illegal and harmful expression on the internet?

(3) That is a groundless concern.

[1] Defaming expressions, expressions violating privacy, and expressions violating rights to publicity have artistic value because they criticize public figures, and have countering benefits such as serving as a brake on promoting competition.

→ This falls under tort speech (Article 709 of the Civil Code), but it merits protection under freedom of expression (Article 21 of the Constitution of Japan).

[2] 2 states that this cannot be considered for pirate materials.





Can ISPs be obligated to perform blocking?





4-3 Restructuring the Role of ISPs

(1) The interpretation and management of secrecy of communications in Japan should be drastically revised for the internet age.

- ▶ Revision of the interpretation and management of Article 4, Paragraph 1 (secrecy of communications) and Article 6 (fairness of use) of the Telecommunications Business Act.
- ▶ Revision of the hands off principle based on telecommunications operators being considered common carriers.
- ▶ The Provider Liability Limitation Act (2001) partially achieves this.

(2) Now that the internet is a platform of expression, ISPs are required to play a role in maintaining the public order of the expression there.

→ It is the basis for the mandatory blocking of pirated material under the law.



Thank you for your attention.



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