



国立大学法人

熊本大学



Privacy Rights and Secrecy of Communication in Relation to Legislation of Site Blocking

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1. Introduction – Topic of the Session

(1) (Premise) If a law is established to implement pirate site blocking.

(2) We discussed how such a law would not infringe on the freedom of expression of pirate site operators or viewers in the MPA seminar last year (11/04/2020).

→ References: (1) Horitsu Jiho Vol. 93 No. 2 (February 2021),
(2) Copyright No. 721 (May 2021)

(3) Does this law violate the rights to secrecy of communication and privacy of viewers?

→ This is the theme of this year's MPA seminar (11/04/2021).





2. Relationship Between Secrecy of Communication and Privacy

(1) The paragraph following Item 2, Article 21 of the Constitution stipulates that “nor shall the secrecy of any means of communication be violated”.

→ Privacy is the legal interest protected under “secrecy of communication (the accepted and prevailing theory).

(2) Significance of Item 2, Article 21 of the Constitution (Stipulation of Secrecy of Communication)

[1] As the Constitution addresses the state, Item 2, Article 21 prohibits the state from violating secrecy of communication → Article 3 (Prohibition of Censorship) of the Telecommunications Business Act.

[2] The state was required to establish a legal system to prevent infringement of telecommunications secrecy by business operators including the state → Article 4 (Protection of Secrecy), Paragraph 2 of the Telecommunications Business Act.

▶ So, what is “privacy”?

3. What is Privacy? (1)

(1) Privacy as a personal right (moral interest)

[1] Proposed in a paper by Warren & Brandeis in 1890.

→ “The right to be left alone”

[2] Recognized in the “After-Banquet” case (Tokyo District Court Decision S39).

→ Three requirements of privacy (privateness, requiring confidentiality, and non-public nature). Violations qualify as torts under Article 709 of the Civil Code.

[3] It is also assured under Article 13 of the Constitution under the moral interest theory.

→ Encompassed in the stipulation of right to life, liberty, and the pursuit of happiness.

(Court Decisions) Non-Fiction “Reverse” Case (1994 Supreme Court Decision),
“A Fish Swimming in Stone” Case (2002 Supreme Court Decision),
Nagaragawa Speculative Reporting Lawsuit (2003 Supreme Court Decision),
Google Search Result Deletion Request Case (2017 Supreme Court Decision).

- ▶ Facts (information) belonging to privacy are protected as a moral interest.





3. What is Privacy? (2)

(2) Privacy as a liberty in private life

[1] In addition to a moral interest, privacy prevents careless collection and use of set information regarding individuals.

[2] Applies to not only specific private information but also extended private information under the theory that privacy under the Constitution is a right to control of personal information.

→ There is a risk of inference of specific information from extended information.

(Court Decisions) Kyoto Prefectural Students' Self-Governing Association case (1969 Supreme Court decision), Fingerprinting Refusal case (1995 Supreme Court decision), Juki Net lawsuit (2008 Supreme Court decision).

[3] Visible use of phrasing in decision that “freedom from careless XX merits legal protection.”





3. What is Privacy? (3)

(3) “Privacy” as a call for appropriate management of data

[1] “Reasonable expectations” and “trust” concerning management of data provided voluntarily are legally-protected interests.

→ The recipient of information has a “fiduciary duty” to the provider of information, and failure in this duty is a tort.

(Decisions) Waseda University Lecture case (2003 Supreme Court Decision), Benesse case (2017 Supreme Court decision).

[2] The expression “information pertaining to privacy” is used in decisions instead of “facts (information) belonging to privacy”.

→ The appropriate management or lack thereof for “information pertaining to privacy” is the criteria for determination of privacy violations.



4. What is Privacy as a Protection for Secrecy of Communication?



(1) The legally-protected interests of secrecy of communication seem to extend to three types of privacy.

(2) However, note that if one considers the legally-protected interest of secrecy of communication only in the context of **access destination detection for site blocking**, it seems to fall under privacy type (3).

→ ISPs have a “fiduciary duty” to appropriately manage and use information provided by users for use of the internet.

(3) It seems best to understand that a **“reasonable expectation”** of appropriate management and use by telecommunications business operators, of information provided by users, is a legally-protected interest per Article 4, Paragraph 2 (Prohibition of Access, Unauthorized Use, and Leakage) of the Telecommunications Business Act.

→ **Design (construction)** of a system to uphold these “reasonable expectations” may be required for the site blocking law.





(Conclusion thus far)

(1) Privacy is a legally-protected interest of secrecy of communication.

(2) Access destination detection for site blocking is actually a “reasonable expectation” regarding personal information handling, within the scope of privacy.

(3) The site blocking law could not be called a violation of secrecy of communication if it stipulated a mechanism to ensure this “reasonable expectation”.



5. Q&A



(Q1) Can constitutional rights (secrecy of communication, privacy) be restricted by laws (the site blocking law)?

(1) Assuming that no actions involved in site blocking violate Article 4, paragraph 2 of the Telecommunications Business Act, Article 21, paragraph 2 of the Constitution would not be violated, as the law obligating business operators to conduct site blocking does not infringe on the legally-protected interest (privacy) of Article 4, paragraph 2.

(2) Even if the law did violate Article 4, paragraph 2 of the Telecommunications Business Act,

[1] Privacy is generally not considered an absolutely unrestricted value. E.g. The Communication Interception case (1999 Supreme Court Decision), Nagaragawa Speculative Reporting Lawsuit (2003 Supreme Court Decision).

[2] Secrecy of communication is also generally not considered an absolutely unrestricted value.

E.g. Code of Criminal Procedure Articles 100 and 222 (seizure of postal items), Bankruptcy Act Article 82 (opening of postal items by bankruptcy trustees), Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders Article 4, paragraph 1 (disclosure of sender information), etc.





5. Q&A

(Q2) How will site blocking law be reviewed for constitutionality as a law that does not infringe on secrecy of communication and privacy?

(1) Is it in accord with laws and ordinances? (Democratic legitimacy)

(2) Is the objective legitimate? (Legislative fact)

(3) Are the subjects of blocking limited?

(4) Is there a restriction of personal information to the scope required?

(5) Is usage outside the objective prohibited? Are there penalties?

> Prohibitions on data accumulation or use in profiling, etc.

This seems to refer to comprehensive consideration of such matters.



Thank you for your attention

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