



**OWNERSHIP OF SOCIAL MEDIA ACCOUNT AND ITS
CONTENTS IN LIGHT OF THAI LAWS**

BY

MRS. SINEENAT WANNURAK

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF
LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)**

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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THESIS

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ENTITLED

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OF THAI LAWS

was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

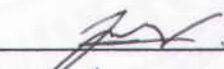
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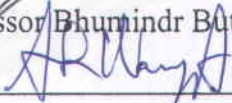
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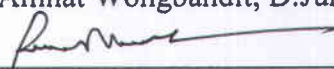
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ABSTRACT

As general comprehension, the intellectual property is one type of properties as it falls into the definition of “property” pursuant to Section 138 of Civil and Commercial Code B.E. 2535, property laws of other foreign countries, court judgments, as well as legal experts’ opinions. Even though the copyright law is basically stipulated for the purpose of protection of intangible things, those intangible things have value and can be appropriated. As similar with the intellectual property law, we can consider that the social media account and the digital contents are intellectual property and also property, resulting in that they can be owned. When the social media account and contents are properties and become valuable, the disputes over the ownership of the account and contents can ordinarily be expected as found in some foreign cases. When it comes to either transactions or disputes involving social media account and contents, as aforementioned that social media account and the digital contents are intellectual property and also property, therefore copyright law as well as Civil and Commercial Code B.E. 2535 govern those transactions and disputes.

It is known that Instagram and Facebook endorse the terms and conditions to allow their users to have their own ownership in the account and any contents uploaded to their websites, however, they claim their authority to access, disseminate or even allow the privilege to third individual to access on users' digital copyrighted

contents without asking for the user's authorization. These acts seem to appear that the social media sites exercise the exclusive rights as joint copyright owners with user or as licensees. Even though the current Terms of Use employed by most social media sites do not evidently claim that the ownership in the contents belong to social media sites, (however Instagram ambiguously states in its current Terms of Use that service contents are owned by Instagram),¹ the practice and exercise by social media sites nowadays, by allowing the contents of one user to be distributed or exploited by other users, by availing users' profile and postings through search engine websites, by interchanging the contents between the two social media sites belonging to one entrepreneur, are considered that those social media sites are exercising the exclusive rights as joint copyright owners or as a licensees.

The objective of this research is to examine whether there are any valid legal principles that the social media sites could employ to exercise copyright owner's exclusive rights with the user on social media sites. The author investigated two approaches which could constitute the rights for social media site to exercise the exclusive rights as a joint copyright owner or as a licensee, namely

1) approaches relating with contract. The Terms of Use which force the users to transfer or assign all rights in the contents to the social media site are studied to determine whether they are valid and enforceable according to contract laws, with the reason that the social media sites employ these Terms of Use as excuse to exercise the exclusive rights as licensees.

2) approaches relating with copyright laws. Thai copyright legislation which is relevant to the acquisition of copyrighted contents is studied with the supplement of US copyright laws to be compared with to determine whether the social media sites could claim any provisions of copyright law to exercise the exclusive rights as joint copyright owners or as licensees. The Terms of Use which force the users to transfer or assign all rights in the contents to the social media site are also studied in terms of copyright law to see whether such Terms of Use could fall into assignment of copyright ownership or copyright license agreement.

¹ Instagram, *Terms of Use* [Online], 1 March 2013. available at <http://instagram.com/about/legal/terms/>.

From the study, there are no provisions in copyright laws of both Thailand and U.S. which the social media sites are entitled to exercise the exclusive rights as joint copyright owners. Furthermore, exceptions for copyright infringement as provided by Thai copyright law requires the determination on whether the act conflicts with a normal exploitation of the copyright work by the owner of copyright or unreasonably prejudices the legitimate right of the owner of copyright or not. According to U.S. Copyright law, the four factors are taken into consideration to decide whether such act deems a fair use, mainly the act must not affect the copyright owner's potential market and not involve commercial benefits.

The author also found out that terms and conditions in social media sites' Terms of use are enforceable according to Thai contract laws. However, Terms of Use are considered to be unreasonably unfair to the users.

On the other hand, in terms of copyright law, could such Terms of Use be considered as an assignment of copyright ownership?" If such Terms of Use are considered as an assignment of copyright ownership, when those Terms of Use do not comply with the format specified by Section 17 of Copyright Act B.E. 2537, they are null and void pursuant to Section 152 of Civil and Commercial Code B.E. 2535. If such Terms of Use are considered as copyright license agreements, as the Terms of Use are standard form contracts and are therefore governed by Unfair Contract Terms Act B.E. 2540, accordingly such Terms of Use are enforceable as reasonably and equitably as considerations are given under different circumstances.

The author analyzes further that for those users who do not employ Privacy Settings upon initiating their account, such act could be considered as implicit attempt on those users' part to license their copyrighted work.

The research was mainly based on domestic approach of Thai law. United States' law was supplemented merely for better understanding and comparison of approaches relating to copyright law. Chapter 2 was supplemented with foreign laws in order to provide different perspective and insights of ownership in social media account and its contents.

Keywords: Copyright, Social networking, Online social network, Social media site, Copyright Ownership, implied license



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Hopefully, this Thesis will benefit the readers to some extent. If it has some usefulness, I will give it to my supervisor and my family. However, if it disadvantages, has drawbacks or any mistakes, I will be the only one who accept it.

Mrs. Sineenat Wannurak

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CHAPTER 1 INTRODUCTION

1.1 Background and Problems

1.1.1 Emerging of Social Media Sites and Digital Contents

The previous decade has seen the quick advancement and spreading of social networking sites over the globe. Individuals can unite with one another with only a single click wherever on the planet within a moment.² Social Network Sites are characterized or defined by Donah Boyd and Nicole Ellison as:

“[Social Network Sites are] web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system’.³ From this definition, one should infer that social networking reflected three fundamental viewpoints. At first, social media sites, for example, Facebook and MySpace show and mirror an identity of that user showing up on a profile or favorite activities. Secondly, they set up a relationship associating users who want to be in contact. Ultimately, they add to assembling individuals who have the same objectives as community.”⁴

It is assumed that social media sites create another strategy for correspondence and communication. Furthermore social media sites bring about copyrighted work as digital contents that are dynamic and easier to access.⁵ Social media sites were criticized for maintaining the freedom of expression for internet users.⁶

² Rainer Oesch, *Copyright Liability and the Internet from the Finnish Law Point of View*, 42 **STOCKHOLM INST. SCANDIANVIAN L.** 113, 118 (2002).

³ James Grimmelman, *Saving Facebook*, 94 **IOWA L. REV.** 1137, 1142 (2009).

⁴ *Id.* at 1143.

⁵ JESSICA LITMAN, **DIGITAL COPYRIGHT** (1st ed. Prometheus Books 2002).

⁶ LITMAN, *supra* note 5, at 12.

1.1.2 Importance of Copyright Ownership in Social Media Account and Digital Contents

Because of the exponential development of online revelation of data, it is essential to bring issues to light of the issue of copyright ownership on social media contents.⁷ The ambiguity of the online ownership results in the vulnerability of legitimate limits and obligations. Further, it sways on the privilege of security of an owner⁸ as well as on Personal Data rights according to Section 35 of Thai Constitution B.E. 2550 or Section 4 of Thai Interim Constitution B.E. 2557. For instance, on account of Twitter, it was asserted that the data put away for Twitter was spilled to hackers. In this way, a user can see nonpublic user data, access direct messages and secured tweets, plus reset any user's password and send tweets from any user account.⁹ In such manner, U.S. Federal Trade Commission or FTC proposed Twitter to construct the extraordinary security program with a specific goal to examine the culprit for 10 years.¹⁰ The situation was the same with Facebook, the user understands that his record or profile can be looked for or followed by connecting to Google, Yahoo, Bing without user's endorsement or any prior notification. Nonetheless, because of absence of historical proof, the ownership of intangible rights remains for the most part basing on interpretation.¹¹

Obviously, the presence of ownership is additionally important as far as infringement is concerned.¹² Social media account encourages and is advantageous for the users in comparison with taking after or following such offenders who register with unidentified usernames or pseudonym, namely MySpace.¹³ It means that it is easy to use a social media account to conduct crimes but it is not easy to find the person who uses social media account to conduct crimes. Accordingly, a social media

⁷ Ira P. Robbins, *Writing on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13:1 **MINN. J. L. SCI. & TECH.** 31 (2012).

⁸ Grimmelmann, *supra* note 3, at 1182.

⁹ K. Sangani, *Who owns your personal data?*, 5 **ENG'R TECH.** 28–29 (2010).

¹⁰ *Id.*

¹¹ JESSICA LITMAN, **DIGITAL COPYRIGHT** (1st ed. Prometheus Books 2006) (2002).

¹² Andre' Adelsbach et al., *Proving Ownership of Digital Content*, 2000 **SPRINGER-VERLAG** 117.

¹³ Robbins, *supra* note 7, at 6.

account is utilized as a technique to direct criminal exercises or abuses by ways of hacking, threatening, disturbing normal life, accessing the classified data, for example. The problem of ownership in the social media accounts is raised as the essential issue.

1.1.3 Problem of Copyright Ownership Associated with Social Media Sites and Digital Contents

Different copyrighted contents circulated on social media sites are all protected under Copyright Act B.E. 2537 as literary work or artistic work, etc. Problems arise from the Terms of Use/Service¹⁴ imposed by different social media sites by forcing their users to transfer or grant rights in contents to the social media sites. Some social media sites, such as Instagram, ambiguously imposes in its current Terms of Use that all service contents are owned by Instagram.¹⁵ The social media sites are obviously exercising the exclusive rights of the copyright owners in the user's uploaded contents. Users of the social media sites are allowed to copy or record the copyrighted contents circulated on the social media sites of one another freely, and then utilize for their own benefits. Facebook and Instagram contents are interchangeably, as Facebook's user can see the contents when being shared from a user of Instagram site. Our profile can be searched by public through search engine websites. All of these practices of social media sites are claimed to be based on Terms of use accepted by the users.

¹⁴ Terms of service (also known as terms of use and terms and conditions, commonly abbreviated as ToS or TOS and TOU) are rules, that one must agree to abide by in order to use a service. Terms of service can also be merely a disclaimer, especially regarding the use of websites. A terms-of-service agreement typically contains sections pertaining to one or more of the following topics:

- Disambiguation/definition of key words and phrases
- User rights and responsibilities
 - Proper or expected usage; potential misuse
 - Accountability for online actions, behavior, and conduct
 - Privacy policy outlining the use of personal data
 - Payment details such as membership or subscription fees, etc.
 - Opt-out policy describing procedure for account termination, if available
- Disclaimer/Limitation of Liability clarifying the site's legal liability for damages incurred by users
- User notification upon modification of terms, if offered.

¹⁵ Instagram, *Terms of Use* [Online]. available at <http://instagram.com/about/legal/terms/>. (accesses July 15, 2016)

The copyright owner's exclusive rights are almost out of the control of the user who is the copyright owner. The user cannot reserve their profile and postings for only their friends if they have not set the privacy at the beginning. The users cannot limit the extent how their copyrighted work are disseminated and exploited.

From the above scenario, the problem arises involving the copyright ownership of the user's disseminated contents through the social media sites. Ordinarily, the copyrighted contents posted on social media sites should belong to the author of the work, who is the user. Even the user employs the space and tools provided by the social media site to share copyrighted contents, the act does not establish that the social media site can be the joint copyright owner in the contents with the user and can then exercise the exclusive rights with the user. The copyrighted contents still belong to the user who is the author of work because the work is created with the user's creativity and labor. Additionally, the user must accept the social media sites' Terms of Use before using their services. Do the Terms of Use bind the user who is forced to accept because he/she merely would like to use social media sites' services? Only some of the users accept the Terms of Use after reading through and completely understand such Terms of Use.¹⁶ Do the Terms of Use enable the social media site to exercise copyright owner's exclusive rights over the contents with the user?

European Copyright Directive underscores the 'right of reproduction', distribution or communication to public of the copyright owner by means of wire and wireless communication.¹⁷ The expression 'communication to public' should be extended to right to display publicly, publicly perform or broadcast over the internet.¹⁸ In the same manner, WIPO gives the exclusive right of the copyright owner to

¹⁶ อุษณา คุณเอกอนันต์. “เงื่อนไขการให้บริการ”[Online], ม.ป.ป. แหล่งที่มา (Utnasa Kun-anakeanan. “*Terms of Service*”), (Mar. 17, 2016), available at http://www.etda.or.th/file_storage/uploaded/Etda_Website/file/article_law_4.pdf.

¹⁷ Council Directive 2001/29/EC of 22 May 2001 on harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J, art. 2-4.

¹⁸ Hannibal Travis, *Opt Out of the Internet in the United States and the European Union: Copyright, Safe Harbours, and International Law*, 84:1 **NOTRE DAME L. REV.** 331 (2008).

incorporate the 'right of making available work online'.¹⁹ It is clear that this Treaty ensures the privilege of the copyright owner in all forms which make copyrighted materials accessible on the web, not only the peer-to-peer file sharing but moreover uploading onto the websites.²⁰ Thailand also denotes that the communication to public rights of the copyright holder is protected by any other means.²¹

On the contrary, copyright law was provided with the objective of permitting the public to take part in intellectual property knowledge and further develop. Thus, copyright law ought to keep up the standard of the freedom of expression and information for the purpose of open public enthusiasm and freedom of competition. After all, it is important that the privileges of copyright holder are satisfied.

1.2 Hypothesis

In reality (in practice), the social media sites are obviously exercising the exclusive rights of the copyright owners in reproduction and communication to public of the user's work, and also in licensing the user's contents. The social media sites set up techniques provided for all users to reproduce and communicate the copyrighted works of other persons further. The social media sites make user's profiles and postings available through search engine websites. Facebook and Instagram's users' contents are interchangeable. Although a user is a member to only one social media site, but one can see the contents of both sites as being shared by the user of another site. Can the social media site exercise the copyright owner's exclusive rights, either as a joint copyright owner or as a licensee? Through which legal principles are social media sites entitled to exercise the copyright owner's exclusive rights, whether approaches relating with contract or approaches relating with copyright law?

¹⁹ World Intellectual Property Organization Copyright Treaty (WCT) 1996, art. 8.

²⁰ P. Bernt Hugenholtz, *Codes of Conduct and Copyright Enforcement in Cyberspace*, in **COPYRIGHT ENFORCEMENT AND THE INTERNET** 303, 311 (Irina A. Stamatoudi, ed., Kluwer L. Int'l 2010).

²¹ Thai Copyright Act B.E. 2537 sec. 4.

Could an implied copyright license be claimed by social media site that it could enable them to exercise the copyright owner's exclusive rights? Upon considering the nature of social media sites, it is developed to share news and information in the society. The users originally intend to distribute or communicate their own copyrighted works to public through the sharing technology, such as social media sites. Do the users who do not employ privacy setting with their account seem to authorize implicitly for other persons, including social media site, to communicate their copyrighted contents to public?

1.3 Objectives of Study

1.3.1 To study the role of social media sites and copyright problem associated with the social media sites.

1.3.2 To study Thailand's contract laws as applied with social media sites' Terms of Use.

1.3.3 To study the characteristics and validity of social media sites' Terms of Use which demand users to transfer or assign all rights in the contents to the social media site, or which states that all contents are owned by the social media site.

1.3.4 To study United States and Thailand's current copyright laws to determine whether the social media site is entitled to exercise the copyright owner's exclusive rights over the user's contents.

1.3.5 To study the concept of implied copyright license whether it could entitle the social media site to exercise the copyright owner's exclusive rights over the user's contents.

1.4 Scope of Study

This thesis focuses on the Thailand's Copyright Act B.E. 2537 and the amendment regarding digital copyright in 2015 in comparison with Copyright Act 1976 of United States of America.

Different laws of contract are studied, namely Civil and Commercial Code B.E. 2535, Title IV. Juristic Acts, Unfair Contract Terms Act B.E. 2540, and Clickwrap license agreement.

Implied copyright license concept are also studied together with the court cases.

The research was mainly based on domestic approach of Thai law. United States' law was supplemented merely for better understanding of the approach relating to copyright law.

1.5 Methodology

All information were used in this thesis based on documentary research which included documents, textbooks, constitutions, statutes, law articles, law journals, law reviews, newspapers, reports, foreign and Thai Court decisions and other related sources in order to have a better understanding of the issues.

1.6 Expected Results

1.6.1 To deeply understand the role of social media sites and copyright problem associated with the social media sites.

1.6.2 To deeply understand Thailand's contract laws as applied with social media site's Terms of Use.

1.6.3 To deeply understand the characteristics and validity of social media sites' Terms of Use which demand users to transfer or assign all rights in the contents to the social media site, or which states that all contents are owned by the social media site.

1.6.4 To deeply understand United States and Thailand's current copyright laws to determine whether the social media site is entitled to exercise the copyright owner's exclusive rights over the user's contents.

1.6.5 To understand the concept of implied license whether it could entitle

the social media site to exercise the copyright owner's exclusive rights over the user's contents.



CHAPTER 2

DIFFERENT PERSPECTIVES AND THE IMPORTANCE OF OWNERSHIP IN SOCIAL MEDIA ACCOUNT AND ITS CONTENTS

As earlier mentioned, the issue of ownership in social media account is important as it will dictate the responsible person for copyright infringement crimes and other crimes caused from social media account. Additionally, the social media account and contents are used in terms of generating business or economic values, it is compulsory to assign the ownership so that we will know exactly who can claim benefits out of the social media account and contents. Furthermore, social media account and content is also considered as personal data profile, only the actual owner should have privilege rights over his own personal data.

Perspective in terms of property law is provided below because the author would like to point out that contents circulated on social media sites are valuable and could be regarded as properties and some persons utilize them for economic purposes. When they become valuable things, people would like to possess them and corrupt for their own benefits, even the social media sites themselves. The author would like to point out further that as social media accounts and contents are properties, Civil and Commercial Code B.E. 2535 as property law of Thailand as well as Copyright Act B.E. 2537 are supplemented each other involving the transactions and disputes over the social media accounts and contents.

2.1 Ownership in perspective of property Law

In order to answer the question “Can social media accounts and contents be owned and, if so, who has the ownership?”, it is important to first comprehend what is implied by the meaning of "property" in respect to whether a social media account can be viewed as "property".

Conveyancing Act 1888, British property law, gives the definition of property in Section 2 which provides that:

Section 2 (i) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest.

It is explained by J.W. Harris that property consists of the ownership of things which are tangible and ideational.²²

Moreover, F.H. Lawson and Bernard Rudden classified types of properties as the followings:²³

- 1) Land;
- 2) Living creatures;
- 3) Goods, such as tangible movables;
- 4) Documentary tangibles, such as cheque;
- 5) Documented intangibles, namely shares and other investment securities;
- 6) Undocumented intangibles, such as credit balances;
- 7) Intellectual property;
- 8) Money;
- 9) Funds;
- 10) Capital and income

According to British law, “property” implies tangible things as well as intangible things in light of the fact that it embraces an interest or a right in a property, although it might be something which can't be owned in physical form. Notwithstanding, intellectual property ought to be translated as property in light of the

²² J.W. HARRIS, **PROPERTY AND JUSTICE** 139 (Clarendon Press 1996).

²³ F.H. LAWSON & B. RUDDEN, **THE LAW OF PROPERTY** 22 (3rd ed., Oxford Univ. Press 2002).

fact that it falls into the descriptors of the expression "property". This is on the grounds that it has value in itself and could be exploited like different sorts of property. For instance, some social media accounts, i.e. Facebook, Instagram, are utilized for directing business benefits, as well as advertisement, distribution, trading of user's goods or even exploiting friends/followers to promote itself with the objective of procuring business interests. Therefore, it has the potential to yield income. In addition, comparing with corporate shares which are ensured by the share certificate, a social media account, however, has no official proof to demonstrate its presence. However, neither social media accounts nor corporate shares have a fixed form. The author considers that the certificate or proof ought not to be principally viewed as a variable/component of property if that thing itself can produce financial earnings.

Moreover, in view of appropriation, regardless of the fact that the digital material can't be physically possessed, a social media account can be possessed by method for constraining access to only the enrolled user. It is assumed that only the user of a particular account can have the username and password to access his/her own account. This infers the space has a place only for the account owner and that nobody can hold that space unless he has the username and password. Also, despite the fact that the space on social media account is unlimited or boundless in correlation with the proprietor of the land or the corporate shares, the intention to own can be appeared by method for the requirement of access by particular username and password. These conditions are adequate to demonstrate that the user can limit others from aggravating his possession.

Once the social media account is considered to fall within these two primary components, therefore, the author contends that social media account can be viewed as one type of "property". The accompanying discussion addresses the questionable issue in the matter of whether the social media account and digital materials can be possessed or owned.

Interestingly, California Civil Code 1872 acknowledges that intangible things can be owned and also any obligations. Exceptionally, the Code clearly refers to an intellectual property such as good will or a trademark.²⁴ In this way, it is likely that the social media account might conceivably be possessed.

Also, from the point of view of Common law, it is ordinarily to be expected that an incorporeal object can be owned similar to tangible things.²⁵

From the author's research, it is shown that some legal expertise have given particular definitions to ownership.

Panesar remarked that the boundary of ownership was extensive as regards to its nature because it did not convey merely 'a thing', furthermore, it implied 'a right' with the connections between persons and persons rather than as a rights or objects²⁶ and existed in either tangible or intangible objects.²⁷ Moreover, Honore affirmed that an ownership was "the greatest possible interest in a thing which a mature system of law recognizes".²⁸ Additionally, the meaning of property was explained by Ziff by reference to those things an individual can own and associated bundle of rights which can be claimed among persons.²⁹

Along these lines, it is irrelevant whether the subject matter of protection is tangible or intangible, regardless of what the ownership relationship is between an

²⁴ California Civil Code 1872, s 655 'There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trademarks and signs, and of rights created or granted by statute.'

²⁵ SUKHNINDER PANESAR, **GENERAL PRINCIPLES OF PROPERTY LAW** 129 (1st ed. Pearson EDUC. Ltd. 2001).

²⁶ PANESSAR, *supra* note 25, at 117.

²⁷ *Id.* at 118.

²⁸ A.M. Honore, *Ownership*, in **OXFORD ESSAYS IN JURISPRUDENCE : A COLLABORATIVE WORK** 129 (Anthony Gordon Guest ed., Oxford Univ. Press 1961).

²⁹ B.H. ZIFF, **PRINCIPLES OF PROPERTY LAW** (5th ed. Thomson Carswell 2010).

individual and individual or individual and an object since once it falls into the meaning of property, it might be owned. Interestingly even an interest which a person can hope to pick up later on is viewed as something which can be owned. It is conceivable to summarize that a social media account can be owned with the reason that a social media account is one kind of property. Above all, property does not refer only to things in a physical form but also underlines the issues of rights and obligation. Once the user is able to utilize, possess and restrict others from getting into his account, it is considered that such user is an owner of that account.

The ownership issue between foreign countries and Thailand with regard to both property law and intellectual property law is not far different. As there is no precedent judgment from Thai court deciding over this issue, the research was performed mainly on legal scholars' opinions.

According to Thai Civil and Commercial Code B.E. 2468, it defines the property as

Section 137 Things are corporeal objects.

Section 138 Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.”

Upon considering the above definition, it can be concluded that the social media account and contents can fall into the definition of property in Section 138 as Thai law also includes the incorporeal objects as one kind of properties.

Professor Pramool Suwannasorn opines that the property has value in itself and can be appropriated. He explains that “value in itself” means that the thing is desirable by human with the hope that it can generate some benefits for them. He further explains the meaning of “being appropriated” that it means a person can show

the act of concern or restriction others from interfering with his own property.³⁰ As the author mentioned previously regarding the characteristics of social media account and contents that it has value because it has potential to generate income. With respect to appropriation, only the user of specific account can have a user name and password to access and manage his own account and at the same time he can restrict others from disturbing his possession. This confirms that the social media account and contents can be regarded as property.

Once it is property, social media account and contents can be owned.

Professor Pramool further opines that all other rights, except personal rights, are properties. Personal rights are, for example, rights in life, body, freedom, fame, etc.³¹ This denotes that types of properties are various and include intangible things.

Professor Senee Pramote, famous Thai scholar, opines that the natural form of property is not actually important, it matters only that the property must have value in itself and can be appropriated.³² He also has the same opinion with Professor Pramool that rights are intangible thing which are categorized as properties.³³

In the course handouts of Sukhothai Thammathirat Open University for properties law class, it reads that:

³⁰ ประมูด สุวรรณสร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 ว่าด้วยทรัพย์สิน หน้า 8 (พิมพ์ครั้งที่ 4, สำนักพิมพ์นิติบรรณาการ ปีที่พิมพ์ พ.ศ. 2511) (PRAMOOOL SUWANNASORN, **EXPLANATION OF CIVIL AND COMMERCIAL CODE BOOK 1 PROPERTIES** 8 (4th ed., Nitibannakarn Press 1968)).

³¹ *Id.* at 9.

³² เสนีย์ ปราโมช, ศ. ม.ร.ว., อธิบายประมวลกฎหมายแพ่งและพาณิชย์ กฎหมายลักษณะทรัพย์สิน, หน้า 13 (พิมพ์ครั้งที่ 4, โรงพิมพ์อักษรสาสน์ ปีที่พิมพ์ พ.ศ. 2521) (พ.ศ. 2479) (SENEE PRAMOTE, **EXPLANATION OF CIVIL AND COMMERCIAL CODE, PROPERTIES** 13 (4th ed., Aksornsas Press 1978) (1936)).

³³ *Id.* at 20.

“There is another kind of property which has no form, It is regarded as a property because the law dictates it to be. The law recognizes it as a meaningful and important rights or benefits for human, for example, copyright, patent, rights in fame, business rights, etc.”³⁴

In perspective of Thai criminal law, Thai Penal Code B.E. 2499 recognizes the three types of objects in the offences against properties, which are things, intangible properties, and interests in the forms of properties. Section 341 concerning fraud is an example of offense against an intangible property.³⁵

With all the above legal scholars’ opinions, we can conclude that social media account and contents can be regarded as intangible properties.

2.2 Ownership in perspective of the Intellectual Property Law

Ordinarily, it is evident that copyright laws are principally involved with the right of property³⁶ and provide the holder of copyrighted works with exclusive rights.³⁷

The scholar Michael Spence³⁸ observed ‘intellectual property as a right ‘(i) that can be treated as property;; (ii) to control specific uses;; (iii) of a particular kind of intangible asset.’³⁹ Evidently, intellectual property is regarded as a property.⁴⁰

³⁴ มหาวิทยาลัยสุโขทัยธรรมาธิราช สาขาวิชานิติศาสตร์, เอกสารการสอนชุดวิชากฎหมายว่าด้วยทรัพย์สิน, หน้า 16 (สำนักพิมพ์มหาวิทยาลัยสุโขทัยธรรมาธิราช พ.ศ. 2540) (SUKHOTHAI THAMMATHIRAT OPEN UNIVERSITY, **COURSE HANDOUTS FOR PROPERTIES LAW CLASS 16** (Sukhothai Thammathirat Open Univ. Press 1997).

³⁵ สุรศักดิ์ ลิขสิทธิ์วัฒนกุล, รศ. ดร., **คำอธิบายความผิดเกี่ยวกับทรัพย์สินตามประมวลกฎหมายอาญา** หน้า 25-26 (พิมพ์ครั้งที่ 4, สำนักพิมพ์วิญญูชน ปีที่พิมพ์ พ.ศ. 2548) (SURASAK LIKKASITWATTANAKUL, **EXPLANATION OF OFFENCES AGAINST PROPERTIES ACCORDING TO PENAL CODE 25-26** (4th ed., Winyuchon Press 2005).

³⁶ LITMAN, *supra* note 5, at 81.

³⁷ Copyright Act of 1976 sec. 106, CDP, art. 16, Copyright Act B.E. 2537 sec. 15.

³⁸ Michael Spence is the Head of the Social Sciences Division of the University of Oxford, Fellow and Tutor in Law at St Catherine's College Oxford, and CUF Lecturer

Despite this fact, intellectual property law should be recognized as '*choses in action*', that means, an interested individual can receive his/her compensation because his/her intellectual property is viewed as one kind of property but it cannot be treated as "chose in possession" since it cannot be demonstrated in the physical form.⁴¹ Hence, it is important to have document to ensure the legitimacy of this rights.⁴²

It is regularly anticipated that because the intellectual property laws globally employ the term 'property' succeeding the term 'intellectual' that this means the presence of property. On the other hand, it remains a matter of contention concerning the status of intellectual property in the matter of whether it is property or not. With respect to the qualities of intellectual property, a possession of this sort of property can't be seen by perceptibility or touch, in this manner, it generally brings up the issue that it is something which can't be possessed. Furthermore, it does not fit alongside all of the principles of property law, for example prescription or an absolute right resulting that this kind of property cannot be possessed in law. Yet, the author believes that intellectual property and, specially, a social media account is one form of property and can be owned due to possessing the quality to earn commercial benefits, be appropriated and be enjoyed freely in the similar way as the other types of property. To demonstrate this, the user can upload or share his contents, check- in his places, express his thoughts, click 'like' or add comments on the other persons' contents, continue to share the other persons' materials or even block a hatred person. In these ways, these present the capacity to block or obstruct others from interceding in his property.

at the University of Oxford. He is also a Consultant to the London law firm Olswang Solicitors, and a Panelist of the WIPO Arbitration and Mediation Centre.)

³⁹ MICHAEL SPENCE, *INTELLECTUAL PROPERTY* 13 (1st ed., Oxford Univ. Press 2007).

⁴⁰ CDPA 1988 sec. 90, Patent Act 1977 sec. 30, Copyright and Rights in Databases Regulations 1997 (Databases Regulations) sec. 13.

⁴¹ PANESAR, *supra* note 25, at 57-59.

⁴² *Id.* at 95.

In particular, there have been some court decisions made in a manner which held that the social media accounts, such as Twitter accounts, could be possessed and be owned.⁴³

Similarly, the court viewed the domain name as property in the form of an immaterial thing.

In *Tucows.com*,⁴⁴ Tucows purchased and registered the domain name designated as *www.Renner.com*. Tucows got earnings from being the proprietor of this domain name. This brought about Tucows having the exclusive right to utilize and keep others from meddling with or utilizing the identical name as *Renner.com*. Despite the fact that the domain name had a characteristic of contractual permit from the Registrar, however, it created the business's value. Thus, the Canadian court affirmed that the domain name was a type of property pursuant to rule 17.02(a) of the Rules of Civil Procedure, R.R.O. 1990 and that it was possible for it to be stolen by dishonest person.

The comment was made by Lord Wilberforce in respect to this judgment that the three core characteristics of property are: 'it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and possess some degree of permanence or stability.' can be proved.⁴⁵ A domain name satisfies such requirements in that the domain name, which was *renner.com*, was demonstrated by Renner. Additionally, the domain name was found in 2006 fulfilling the requirement for a degree of permanence. Furthermore, the domain name had rights.

⁴³ *PhoneDog v. Kravitz*, No. 11-03474, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011), *Eagle v. Sandi Morgan*, No. 2:11-CV-04303-RB (E.D. Pa. filed Dec. 22, 2011), *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011).

⁴⁴ *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (CanLII), <http://canlii.ca/t/fmjtv> retrieved on 2015-08-25.

⁴⁵ *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175 (H.L.) (U.K.).

The similar opinion was found in the case of *Hoath*, the Australian court held that a domain name was an intangible form of property.⁴⁶

In *Kremen v. Cohen*, United States court ruled that a domain name was acknowledged as an intangible form of property similar with other forms of intellectual properties.⁴⁷ The main reason was that the basic characteristic of property right, that was, it could be solely possessed or controlled, could be demonstrated. In addition, an owner can prosecute the accused on the ground of exclusive right. For this reason, a domain name can be claimed on the basis of conversion.⁴⁸

In *OBG Ltd.*,⁴⁹ the British House of Lord Court ruled with respect to copyright or trademark that it was not burdensome to regard a domain name as an intangible property.

In *Satyam Infoway Ltd.*,⁵⁰ the Supreme Court of India held that the domain name was protected under Trade Marks Act 1999. The court judged that the domain name was not mere an entry connecting to the internet's destination. In particular, it directly pointed to the specific goods or services. As a result, the financial misfortune and goodwill of the domain name's proprietor were conceivably undermined by passing off.

It is agreeable to infer that most of international judicial rulings support the concept that a domain name is a property in the form of an intangible material. This is comparable to a social media account in that the domain name shares the same feature as the social media account in terms of individuality. To demonstrate this, the domain name cannot be designated as identical to prior existing domain name. When

⁴⁶ *Hoath v. Connect Internet Services Pty. Ltd.* (2006) 229 A.L.R. 566 (N.S.W.S.C).

⁴⁷ *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

⁴⁸ *Office Depot Inc. v. Zuccarini*, 596 F.3d 696 (9th Cir. 2010), *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138 (9th Cir. 2010).

⁴⁹ *OBG Ltd. v. Allan*, [2008] 1 A.C. 1 (H.L.) (U.K.).

⁵⁰ *Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd.*, 3 AWC 2366 (Supreme Court of India 6 May 2004).

attributing to your domain name, you can have only one title/name in the world such as www.sanook.com, www.ais.co.th, or www.law.tu.ac.th. Once any user seeks for the domain name of sanook, it will directly connect to www.sanook.com. Accordingly, this is analogous to a social media account in the sense that the user has his/her own unique account which is the single one in the world. Apart from this, both of them are digital names which afford free indefinite space on the internet and were accessible from other users who specially intend to browse them.

Howsoever, some Canadian courts have ever governed that even though the domain name was observed as an intangible property, it was not a property since a property denoted exclusively to things which could be physically possessed.⁵¹

Aside from the civil law point of view, it is prudent to study the criminal law principle. Likewise, British Theft Act 1968 embraces intangible property as one of the items listed in its definition of property.⁵² As a result, an infringer could possibly be prosecuted on the ground of ‘Conversion’.⁵³

However it is found that some judges have kept up the perspective that intangible things couldn't be changed over on the premise of “conversion”. In the case of *Northcraft v. Edward*,⁵⁴ the court dictated that any tangible properties could be lost and found, but ‘intangible rights of all kinds couldn't be lost and found, and the unique rule was that there could be no conversion of intangible property.’

It appears that, theoretically, the intangible thing could be appropriated in the same manner as the tangible thing. Consequently, it signifies that, with respect to criminal approach, the intellectual property is considered as one type of property

⁵¹ Easthaven Ltd. v. Nutrisystem.com Inc., [2001] 55 O.R. 3d 334 (S.C.J.) (Can.).

⁵² Theft Act 1968 sec. 4(1) “Property” includes money and all other property, real or personal, including things in action and other intangible property.

⁵³ Eagle v. Sandi Morgan, No. 2:11-CV-04303-RB (E.D. Pa. filed Dec. 22, 2011).

⁵⁴ Northcraft v. Edward C. Michener Assoc., 319 PA Super. 432 (1983), Apparel Bus. Sys., LLC v. Tom James Co., No. 2:06-cv-01092-MAM, 2008 U.S. Dist. LEXIS 26313, at *54 (E.D. Pa. Mar. 28, 2008)

which can be misappropriated. With the aforesaid reasons, the author is convinced that the social media account is a property and therefore it can have ownership.

Intellectual property law of Thailand was stemmed from the same principles as most other countries in the world, due to Thailand is a member of Berne Convention, TRIPs (Agreement on Trade – Related Aspects of Intellectual Property Rights), and World Trade Organization. The concept of copyright to protect an intangible asset is not different from other countries. Therefore, social media account and contents can be regarded as one form of intellectual properties, i.e. copyright, such as writing, pictures, sounds, paintings, posting, photos, videos, etc.⁵⁵ Only copyright owner can have exclusive rights over their work.⁵⁶

In March 2015, there was a case in the central IP & IT Court, which the plaintiff sued the defendant for copyright infringement for exploiting her posted photo in her Facebook without her permission. The Court ruled that the photo in her Facebook is an artistic work, therefore it is protected as a copyrighted work.⁵⁷

Although Thailand has no judgments deciding over the issue of ownership in the social media account and contents, Thailand is inclined to imitate the concept and legal principles from foreign courts, which used to determine that social media account could be possessed and owned.⁵⁸

⁵⁵ Thai Copyright Act B.E. 2537 sec. 6.

⁵⁶ Thai Copyright Act B.E. 2537 sec. 15.

⁵⁷ Benjamaporn Kuniz v. Saint Louis Foundation, Red Case No. Mor. 26/2558 (IP & IT Court, Mar. 23, 2015), available at IP & IT Court's library.

⁵⁸ PhoneDog v. Kravitz, No. 11-03474, r WL 5415612 (N.D. Cal. Nov. 8, 2011), Eagle v. Sandi Morgan, No. 2:11-CV-04303-RB (E.D. Pa. filed Dec. 22, 2011), Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013 (NRB), 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011).

2.3 Ownership of contents, profiles, tweets, photos, mentions, postings

James Grimmelmann opined that providing an ownership for Facebook account to a user is not advisable on the grounds that it urged the user to meddle with other individuals' privacy.⁵⁹

In fact, the social media sites currently allow the registered user to own the digital contents. In any case, they reserve their rights to use, avail or even transfer to a third person digital contents without requesting the user's authorization. In this sense, Joseph Smarr opined that the ownership was one of the basic rights. Users left Facebook due to the endeavor of possessing the data from Facebook.⁶⁰

Apparently, any contents shown up on Facebook, Instagram, YouTube, and Twitter, are not owned by Facebook,⁶¹ Instagram,⁶² YouTube,⁶³ and Twitter⁶⁴ on

⁵⁹ Grimmelmann, *supra* note 3, at 1141.

⁶⁰ *Id.* at 1193.

⁶¹ You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it. <https://www.facebook.com/legal/terms> (last visited July 15, 2014).

⁶² Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy' <http://instagram.com/legal/terms/#> (last visited July 15, 2014).

⁶³ 7.2 You retain all of your ownership rights in your Content, but you are required to grant limited licence rights to YouTube and other users of the Service. These are described in paragraph 8 of these Terms.

8.1 When you upload or post Content to YouTube, you grant:

A. to YouTube, a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business,

the basis that the user himself/herself uploads the material. Notwithstanding, such social media sites still preserve the right to disseminate, exploit, reproduce or even sub-license to a third person. These rights are expected to be relentless and unchangeable. To put it another way, the use of user's material is almost out of the control of the user.⁶⁵ Furthermore, as per Instagram⁶⁶ and Facebook⁶⁷ although the user's account is terminated, any uploaded contents will become available online within a period of time. In this manner, Jamie commented on what is a 'a period of time' and seemed to implicate that the information may be an endless accumulation.⁶⁸

including without limitation for promoting and redistributing' part or all of the Service (and derivative works thereof) in any media formats and through any media channels;

B. to each user of the Service, a worldwide, non-exclusive, royalty-free licence to access your Content through the Service, and to use, reproduce, distribute, prepare derivative works of, display and perform such Content to the extent permitted by the functionality of the Service and under these Terms.

8.2 The above licenses granted by you in Content terminate when you remove or delete your Content from the Website. The above licenses granted by you in textual comments you submit as <http://www.youtube.com/t/terms> (9 June, 2010) (last visited July 14, 2014).

⁶⁴ 5. 'You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).' <https://twitter.com/tos> (last visited July 14, 2014).

⁶⁵ Jamie Bianco, "Skype" *Social Networking and Cloud Computing: Precarious Affordances for the "Prosumer"*, 37 **WOMEN'S STUD.** Q 303 (2009).

⁶⁶ 'If we terminate your access to the Service or you use the form detailed above to deactivate your account, your photos, comments, likes, friendships, and all other data will no longer be accessible through your account (e.g., users will not be able to navigate to your username and view your photos), but those materials and data may persist and appear within the Service' from <http://instagram.com/legal/terms/#> (last visited Jan. 19, 2014).

⁶⁷ 'When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).' <https://www.facebook.com/legal/terms> (June 8, 2012) (last visited July 15, 2014).

⁶⁸ Bianco, *supra* note 65, at 303.

Likewise, LinkedIn⁶⁹ furnishes its user with the space to own the shared information. Obviously, LinkedIn is consequently granted the right from its user to use, disseminate, share, be allowed to sub-license to a third person⁷⁰ in the same manner as other social media sites.

This is opposed to Flickr, a social media site owned by Yahoo, offering facility for registered user to share blogs, photographs, videos and it was asserted to have more than 6 billion pictures circulating on its site.⁷¹ Nonetheless, it endorses the two particular terms of Yahoo. Firstly, the user's data will be erased and is non-transferable. All data will be evacuated once the user passes away or terminates his/her account.⁷² Secondly, Flickr gives unrestricted cancellation of an account prompting there being no content any more installed on Flickr's system.⁷³

It is viewed that the registered user is truly ineligible in privilege of ownership. He loses the right to control and access in his property notwithstanding that he completely has as to the copyright law. The problem is raised that can the social media sites be the joint owner with user? The author opines that the joint owner

⁶⁹ The mission of LinkedIn is to connect the world's professionals to enable them to be more productive and successful. To achieve our mission, we make services available through our website, mobile applications, and developer platform, to help you, your connections, and millions of other professionals meet, exchange ideas, learn, make deals, find opportunities or employees, work, and make decisions in a network of trusted relationships and groups.

⁷⁰ 'You own the information you provide LinkedIn under this Agreement, and may request its deletion at any time, unless you have shared information or content with others and they have not deleted it, or it was copied or stored by other users. Additionally, you grant LinkedIn a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to us to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn,' (13 May 2014) <http://www.linkedin.com/legal/useragreement> (last visited July 15, 2014).

⁷¹ Lucian Parfeni. "Flickr Boasts 6 Billion Photo Uploads". Softpedia (5 August 2011) <http://news.softpedia.com/news/Flickr-Boasts-6-Billion-Photo-Uploads-215380.html> (last visited July 14, 2014).

⁷² Bianco, *supra* note 65.

⁷³ <http://info.yahoo.com/privacy/us/yahoo/flickr/details.html> (last visited July 14, 2014).

of copyrighted work must be the individual who takes an interest or helps in some way in the creation⁷⁴ such as the employer.⁷⁵ (For another scenario, the social media site may sign a contract with the copyright creator to have joint ownership in a work with the copyright creator. However, this is a different scenario of joint ownership in the social media account and the contents in the account because joint ownership arising from signed contract assigns rights to only specific work in the contract, not the whole user's account and content.) In this manner, it appears that in theory the social media sites are unable to be the joint owner. Furthermore, the joint owner must demand the consent from another owner to allow the outsider to take benefits out of copyright owner's exclusive right, otherwise, they are unable to reproduce or grant permission to the third person. If they do, the social media sites are probably considered as an infringer arising from 'making a reproduction'⁷⁶ without authorization or infringement of exclusive rights, for example right to grant a license.⁷⁷ Moreover, it could be held as breach of user's privacy rights stemming from disclosure or observance by social media sites.⁷⁸

With respect to privacy, Sandra Petronio remarked that 'the feeling that a person has the right to own private information, either personally or collectively.' Moreover, an owner should have their own control whether he might want to reveal or uncover and when he would like to disclose. All of these were regarded as the right of the owner.⁷⁹

On separate remark, James Grimmelmann viewed that the interference in user's desire of privacy may likely be considered as an unfair trade practice.⁸⁰ Daneil

⁷⁴ Copyright Act of 1976 sec. 201(a), CDPa art. 10(1).

⁷⁵ CDPa art. 11(2).

⁷⁶ Copyright Act of 1976 sec. 106, 501, CDPa art. 16(1)(A)(B), Copyright Act B.E. 2537 sec. 27.

⁷⁷ CDPa art. 16(2).

⁷⁸ Grimmelmann, *supra* note 3, at 1164.

⁷⁹ SANDRA PETRONIO, **BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE** 6 (State University of New York Press 2002).

⁸⁰ Grimmelmann, *supra* note 3, at 1142.

Solove and Neil Richards introduced the principle of 'Tort of confidence' to cope with some problems of violating of privacy rights.⁸¹

Although there are terms stipulated in the manner that the user has already waived his rights, such terms should be viewed as 'unfair contract term' since social media sites reserve the right to alter the terms and conditions of the contract on their own.⁸² This means that user is ineligible to negotiate with the other party of the contract which is social media site. Therefore, user is not obliged and will be able to sue the social media sites on the basis of violating either privacy right or moral right.⁸³

As it is social media sites' worldwide practice to force its users to grant license to the social media sites for accessing, disseminating, or sub-licensing to other third parties the contents in users' account, this action can be regarded as unfair trade practice, unfair contract, breach of privacy rights and even copyright infringement as previously mentioned under Thai law.

Breach of user's the right of privacy caused by disclosure or surveillance by social media sites is prevented under Section 35 of Thai Constitution B.E. 2550 or Section 4 of Thai Interim Constitution B.E. 2557. Further, Thailand has currently a draft of Personal Data Protection Act B.E. 25..., proposed by Ministry of Information and Communication Technology. The bill recognizes and gives importance to various personal data and then assigns a special Committee an authorization to regulate the forms of acceptance and Code of Conduct. It clearly states that the acceptance from the data owner must be obtained clearly and not misleading before disclosing the personal data. The Committed has authority to specify the content to be included in the Request for Approval to Disclose Data from data owner.⁸⁴

⁸¹ Daniel J. Solove & Neil M. Richards, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 **GEO. L.J.** 123 (2007).

⁸² Natali Helbergert & Bernt Hugenholtz, *No Place Like Home For Making a Copy: Private Copying in European Copyright Law and Consumer Law*, 22 **BERKELEY TECH. L.J.** 1061 (2007).

⁸³ Copyright Act of 1976 sec. 106A, CDPA art. 85, Copyright Act B.E. 2537 sec. 18.

⁸⁴ Personal Data Protection Draft Act B.E. 25...

In terms of copyright infringement, the act of availing and disseminating to the public users' contents can be considered as infringement of reproduction and communication to public rights of copyright owner under Section 4 and 15 of Thai Copyright Act B.E. 2537.

2.4 Rights and Limitations of Joint Owner according to Thai Property law

The joint ownership in a property is recognized and each joint owner has rights and limitations regarding such jointly owned property. Exercising the rights of one joint owner over the property may create conflict against another joint owner. Pursuant to Civil and Commercial Code B.E. 2535, it provides the rights and limitations of joint owners so that the mutual management and deriving benefits among the joint owners can be clearly defined. Three types of rights and limitations of joint owners are recognized as followings:

2.4.1 General Rights and Limitations of Joint Owners

1) Right to use the property not to be in conflict with rights of the other joint owners according to Section 1360 paragraph 1 of Civil and Commercial Code B.E. 2535. Examples of exploiting the property in conflict with rights of the other joint owners are:

- One joint owner uses the property alone and does not give the other joint owner an opportunity to use that property.
- One joint owner of land chooses to build a house on a favorable location without the consent of the other joint owner.⁸⁵

2) Right to derive proportionate interests out of the jointly owned property according to Section 1360 paragraph 2 of Civil and Commercial Code B.E. 2535.

⁸⁵ พิระรณ คงเจริญ. “การแบ่งกรรมสิทธิ์ร่วม”. วิทยานิพนธ์ปริญญาโทบริหารธุรกิจ, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, พ.ศ. 2556. (Peeraron Kongjaroen. “Partition of joint ownership”. Master of Law’s Thesis. Thammasat University, 2013)

3) Right to distribute, give for mortgage, or incur obligation on their part according to Section 1361 paragraph 1 of Civil and Commercial Code B.E. 2535.

2.4.2 Rights and Limitations among Joint Owners

1) Unless otherwise agreed, the right to handle the jointly owned property according to Section 1358 of Civil and Commercial Code B.E. 2535 are as follows:

- Ordinary handlings require simple majority votes of all joint owners. However, each joint owner can always do necessary things to maintain the property

- Material handlings require majority votes of joint owners whose values amount to not less than half the price of property.

- Changing the objective of using the property requires all consents of all joint owners.

2) Each joint owner must be responsible for proportionate contributions to handling fees, duty fees, maintenance fees, and fees incurred from using the jointly owned property pursuant to Section 1362 of Civil and Commercial Code B.E. 2535.

3) Each joint owner can request the partition of the jointly owned property under restrictions of Section 1363 of Civil and Commercial Code B.E. 2535.

4) If a joint owner is liable to another joint owner for an obligation arising out of joint ownership or for another obligation incurred for the purpose of fulfilling such obligation, the latter may, at the time of partition, require that performance be made out of the share of the jointly owned property allotted to his debtor or secured therefrom according to of Section 1365 paragraph 2 of Civil and Commercial Code B.E. 2535.

5) Each joint-owner has, in proportion to his share, the same liabilities as a seller in respect of the property which the other joint owners have received under the partition according to of Section 1366 of Civil and Commercial Code B.E. 2535.

2.4.3 Rights and Limitations of Joint Owners toward the Third Party

1) According to Section 1366 of Civil and Commercial Code B.E. 2535, each joint owner may exercise, as against third persons, any right arising from

ownership in respect of the whole property, subject however, in case of a claim for the recovery of the property, to the conditions specified in Section 302 of this Code. For example, one joint owner can file a suit against the person who trespasses in the jointly owned property without obtaining permission of other joint owners. One joint owner may file a motion to the court requesting the withdrawal of the jointly owned property from being seized.

2) According to Section 1365 paragraph 1 of Civil and Commercial Code B.E. 2535, If the joint owners are jointly liable to a third person for an obligation in respect of the jointly owned property, or for another obligation incurred for the purpose of fulfilling such obligation, each may, at the time of partition, require that performance be made out of the common property or secured therefrom.⁸⁶

Upon considering general rights and limitation of the joint owners, right to use the property not to be in conflict with rights of the other joint owners according to Section 1360 paragraph 1 of Civil and Commercial Code B.E. 2535 are specified. The author opines that the determination, with regards to whether social media sites disseminate the user's contents further to be in conflict with the user's right or not, requires specific surrounding facts in each circumstance. If the social media sites, somehow considered as joint owners, disseminate the user's contents for commercial benefits and have affected the user's potential market, then the act would conflict with the user's rights.

2.5 Summary

1 In Property law's perspective of several countries and from judicial rulings, social media account can be regarded as property because property is defined to include intangible things, rights and obligations. If the social media account is considered in terms of its characteristics (or even with respect to Thai property law), social media account possesses characteristics of property, i.e. it has value because it has potential to generate income. With respect to appropriation, only the user of specific account can have a user name and password to access and manage his own

⁸⁶ *Id.*, at 36-38.

account and at the same time he can restrict others from disturbing his possession. If a share in a company is regarded as property, so the same consideration should be given to social media account.

Social media account can be owned because laws and court judgments of several countries state that intangible things can be owned and due to the definition of “ownership” given by some legal scholars that ownership is wide and includes rights with the connections between persons. Anyhow, whichever thing which falls into the meaning of “property” can be owned. Therefore, we can conclude that social media account can have ownership and related authority should encourage its people to register the account with the actual ID.

2. In Intellectual Property law’s perspective of several countries and from judicial rulings, social media account can be regarded as an intellectual property. Intellectual property is stemmed from property and as mentioned above, property includes tangible and intangible property. The IP owner is yet guaranteed to have economic rights towards his/her creation. It means that IP owners can yield benefit from their intellectual property.

Domain name is compared with social media account due to they both have individuality and are digital names. Judicial ruling in many countries regard domain name as property in the form of an intangible thing. India court ruled that domain name is protected as an intellectual property. The same consideration should be given to social media account.

3. In theory, the user is the rightful owner of information shared or posted through his/her account. However, in practice, user has no choice but being forced to accept the terms and conditions unilaterally imposed by social media site so that social media site can access, avail or sub-license to third parties the information in user’s account. This action is considered as an unfair trade practice, unfair contract term, breach of privacy rights of user, and copyright infringement.

4. The joint ownership in a property is recognized by Civil and Commercial Code B.E. 2535 and each joint owner has rights and limitations regarding such jointly owned property. Exercising the rights of one joint owner over the property may create conflict against other joint owner. If the social media sites, somehow considered as joint owners, disseminate the user's contents for commercial benefits and have affected the user's potential market, then the act would conflict with the user's rights.



CHAPTER 3

ACQUISITION AND DEMONSTRATION OF COPYRIGHT OWNERSHIP IN SOCIAL MEDIA ACCOUNT AND CONTENTS

The current situation is that many social media sites have exercised the exclusive right of copyright owners together with the internet users. Their intention is expressed through the way of forcing its users to grant the social media sites the rights to access, use and receive benefits out of the users' contents, and even sub-license the user's contents to the third party. For example, the social media sites set up the technique for users to reproduce and communicate other user's content to public by clicking "Like" or "Share". In case of clicking "Like" feature, we can see that the user merely would like to express their satisfaction in the content only and have no intention to reproduce and disseminate the content further. For the case of clicking "Share" feature, this feature or technique is provided to the users by social media sites based upon the Terms of Use which the users were forced to grant rights to the social media sites earlier. Other practices by social media sites include availing users' profile and postings through search engine websites, interchanging the contents between the two social media sites belonging to one entrepreneur. The social media sites could claim for the Terms of Use that users already explicitly authorized them to use and exploit benefits out of the users' contents. The author opines that these rights should be vested to only actual copyright owner as confirmed by the copyright law due to their inventiveness and labor.

In order to research deeply regarding the copyright ownership in social media account and contents, we must explore to determine whether social media site could employ the Terms of Use to exercise the copyright owner's exclusive rights together with the user. Is the Terms of Use valid and enforceable in light of Thai laws? This approach by social media sites involve the contract laws and the intention expressed by both parties.

3.1 Approaches Relating with Contract Laws

We need to determine whether social media site could employ the Terms of Use to exercise the copyright owner's exclusive rights with the user. Is the Terms of Use valid and enforceable in light of Thai laws? For social media sites to be able to exercise copyright owner's exclusive rights through Terms of Use, the following agreements and laws in Thailand will be taken into consideration, namely (1) Clickwrap License Agreement, (2) Civil and Commercial Code, Title IV. Juristic Acts, (3) Unfair Contract Terms Act B.E. 2540.

3.1.1 Clickwrap License Agreement

3.1.1.1 The characteristics of Clickwrap License Agreement

Clickwrap License Agreement is widely used as software program license agreement employed by the software developer on the internet and it is well-known to us before we could install any software program for our use.⁸⁷ The process is that the internet user must perform an act according to the software developer's criterion to express that the user agrees to the terms and conditions of the license agreement. The act of consent required from the user could be a click at "I accept" or a click at whatever button to express that the user agrees with the terms imposed by the software developer. The software developers always put the "I accept" at the end of the license agreement and the user could scroll up and down to read thoroughly the entire agreement before clicking "I accept". The main consideration is that the user is not forced to scroll down to click "I accept" first before reading or understanding the license agreement. The user may chose not to read the entire license agreement themselves due to annoyance or not detail-oriented behavior and then click to accept without realizing the content of license agreement.

Another main characteristic of Clickwrap License Agreement is that most agreement will specify that if the user does not agree with or refuse the terms in the agreement, the user cannot install or use that software program. This situation leaves no choice for the person who would like to install or use the software

⁸⁷ Hoye, J. C., "*Click-Do WE Have a Deal?*" 2001 (Mar. 17, 2016), available at www.lexix.com.

program but to click “I accept” the terms and condition in the agreement only. Most users do not read the contents in the license agreement before clicking “I accept”.

The familiar terms used in Clickwrap License Agreement are:

- Click accept if you accept the terms of the preceding license agreement. If No is clicked, setup will quit.

- Do you accept all the terms of the preceding License Agreement? If you choose No, the setup will close. To install PartitionMagic, you must accept this agreement.

- Please read the following license agreement. You must accept the agreement to continue the update.

- Please read the following license agreement. Press the PAGE DOWN key to see the rest of the agreement. Do you accept the terms of the pending License Agreement? If you choose Don't Accept, installment will close. To install, you must accept this agreement.

3.1.1.2 Principles of Adhesion Contract (Standard Form Contract)

3.1.1.2.1 Background of Adhesion Contract

The adhesion contract is not just emerging only nowadays, but can be traced back long time ago since Middle Age according to the present evidence from manuals of officers who are in charge of registration of contracts and testaments in Middle Age. Additionally, in twelve and thirteen centuries, the adhesion contracts were used in transporting the pilgrims to the Holy Land (Palestine).⁸⁸ Although the adhesion contract was initiated since long time, it was not widely and commonly used as compared with present times. The factors of increasingly use of the adhesion contract nowadays are economic growth and technology development. The products and services in the market are various and the productivity is high and these products and services are supplied to the larger population. Due to these wider arrays of products and larger markets, the traditional form of contract (namely, negotiation between two parties, or obtaining an agreement

⁸⁸ A. V. MEHREN, **INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW** 15 (n.p.: N.P. 1982). *cited* in Wichai Jittapalakul, Standard form contract: Comparative Study for Solution of Unfair Contract Terms. (Thesis, Faculty of Law, Thammasat University 1988), 8.

individually) are just not adequate and yet time-consuming. Therefore, standard form contract was adopted for convenience and time-saving purposes. Afterwards, the use of adhesion contract continues to grow up in response with wider ranges of products and services and larger consumer targets.⁸⁹

3.1.1.2.2 Meaning of Adhesion Contract

Several legal scholars give the similar meanings of the adhesion contract.

Sinai Deutch explains the characteristics of standard contract as printed form which is drawn up in advance and encompasses all commonly used standard contracts. The terms of contract will enforce all related parties in the transaction and most terms are non-negotiable. Only some terms in the contract are open for negotiation, such as amount, qualities, and prices of the products or services. The terms beyond the foregoing would be specified in advance by the seller of products and services. Furthermore, the adhesion contract used in some business enterprise does not allow the negotiation for even one single clause of contract.⁹⁰

Surasak Vajasit explains the meaning of adhesion contract as the contract of which most contents are already typed up and most contents of the contract with several other parties are the same. The parties may only add up few details for each time entering into an agreement and it will then complete the contract.⁹¹

Guenter Treitel explains that the adhesion contract is the contract typed up in standard form and used for every transaction with the same characteristics. Such a contract is always drafted by Trade Association to be used in

⁸⁹ A. Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, **ANGLO-AMERICAN L. REV.** 255 (1986). cited in Wichai Jittapalakul, *Standard form contract: Comparative Study for Solution of Unfair Contract Terms*. (Thesis, Faculty of Law, Thammasat University 1988), 9.

⁹⁰ S. DEUTCH, **UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY** 1-2 (Massachusetts, D.C.: Heath and Company 1977).

⁹¹ สุรศักดิ์ วาจาสิทธิ์, สัญญาสำเร็จรูปของอังกฤษ, *วารสารนิติศาสตร์* 15, 1 (มีนาคม 2528): หน้า 20. (Surasak Vajasit, *England's Standard Form Contract*, 15, 1 **LAW JOURNAL** 20 (March 2015)).

transactions either between Association's members themselves or between Association's member and the outsider.⁹²

David Yate explains that the adhesion contract is the contract of which the content is specified by business firm to be used with every transactions with the same products and services and to be used with all consumers or customers without specific consideration to each party.⁹³

Professor Dr. Jid Settabutr explains that the adhesion contract is the contract which one party requests to join while the other party has already drafted all details of the contract. The party who wishes to join into transaction then expresses his/her intention to join the contract without an opportunity to negotiate for the terms of the contract. Therefore, the party who drafts the contract is in an advantageous status because he/she specifies the terms of the contract and therefore he/she could draft in a way to earn the most benefits for himself/herself. The other party has two options, namely taking it or leaving it.⁹⁴

Unfair Contract Terms Act B.E. 2540, Section 3 states that:

"Standard form contract" means written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation"

French legal scholar remarks the characteristics of the adhesion contract as followings:⁹⁵

⁹² H. T. GUENTER, **THE LAW OF CONTRACT** 196 (13th ed. Sweet & Maxwell 2011).

⁹³ D. YATE, **EXCLUSION CLAUSES IN CONTRACTS** 1-2 (2nd ed. Sweet & Maxwell 1982).

⁹⁴ จี๊ด เศรษฐบุตร, **หลักกฎหมายแพ่งลักษณะนิติกรรมและหนี้**, พิมพ์ครั้งที่ 2(กรุงเทพฯ: เอราวิณการ พิมพ์, 2522), 271– 272. (JID SETTABUTR, **CIVIL LAW PRINCIPLES: JURISTIC ACTS AND DEBTS** 271-272 (2nd ed. Erawan Publishing 1979)

⁹⁵ PLANIOL AND RIPERT, **TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS** 136– 137 (2nd ed. Paul Esmein 1952). cited in Bolgar, V., *The Contract of Adhesion: A Comparison of theory and Practice*, 20, 1 **THE AMERICAN J. of COMPARATIVE L.** 54 (1972).

1. The pre-worded form of the contract always presents an offer to general public.

2. The proponent is always in the prevailing position or his/her financial and economic status is more prominent than the other party.

3. The products or services offered are needed by general public.

4. The pre-worded form of contract creates burden for the other party to understand the terms of the contract on his/her own.

In conclusion, the adhesion contract is the contract which:

1. is pre-worded and a format is already prepared,

2. only addition of small details is needed,

3. the contents are the same and are specified by the entrepreneur in the most favorable terms for him/her,

4. is used for every person. No classification of party is conducted and is used in an unlimited scope,

5. the other party has no opportunity to negotiate, except for some details, such as amount, qualities, price, and some related services,

6. the other party has only two options, namely joining or not joining in the contract,

7. however, if the other party is a big organization or customer, the negotiation for some terms of contract may be possible and it may lead to some revisions of contract. The amicable solution will be reached and will balance the interests between two parties.

Therefore, we cannot say that the adhesion contract is completely unfair, because the other party could join in the contract after he/she satisfies with the whole contract with considerations that the terms do not burden him/her too unduly, the contract is only used as an instrument of juristic act, and it does not make either party to be more advantageous than the other party.

In conclusion, to determine whether the adhesion contract is fair or not, the author thinks that we need to mainly focus on the content of the contract. So the same consideration should be given to the social media sites'

Terms of Use, to determine whether the Terms of Use is fair or not, the content of the Terms of Use should be considered. The Terms of Use which force the users to transfer or assign all rights to social media site are unfair.

3.1.1.3 Related Judgements Involving Clickwrap License

Agreement

In *CompuServe v. Patterson*,⁹⁶ CompuServe is an internet service provider who provides online content and computer data. Its members could use the service through CompuServe's website. Patterson was one of members of CompuServe and he resided in Texas State. He distributed many versions of sharewares, one type of software programs, for general public. Patterson entered into Shareware Registration Agreement (SRA) which was online contract offered by CompuServe. Patterson could store, transmit, and advertise shareware files through CompuServe. Other CompuServe subscribers could purchase Patterson's software through CompuServe, and CompuServe would collect a 15% fee and pay Patterson the remaining balance. This SRA has another two annexed contracts which stated that Ohio state law would be applied in case of any rising disputes. In 1993, CompuServe started marketing a software product similar to that of Patterson's with similar markings and names. In December 1993, Patterson informed CompuServe that he believed CompuServe's marketing of their product infringed his common law trademarks. Patterson claimed that he resided in Texas State and therefore the SRA did not bind him. The court ruled that Patterson agreed to the terms of SRA by typing "AGREE" found in many places in the agreement. SRA is valid and enforceable under Ohio State's law.

In *Hotmail v. Van \$ Money Pie*,⁹⁷ Hotmail is an internet service provider of online email services for free of charge. Over ten-millions Hotmail subscribers all over the world can send emails to each other through internet. To become a Hotmail subscriber, a person must accept the terms of service which clearly states that Hotmail prohibits any subscriber to transmit spam messages or pornographic images/messages. Hotmail reserves the rights to cancel its service for

⁹⁶ *CompuServe, Inc. v. Patterson* 89 F.3d 1257 (6th Cir. 1996).

⁹⁷ *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 1998 WL 388389, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998).

any subscribers who breach the terms of service or agreement. In 1997, Hotmail found that Van \$ Money Pie subscribed to use Hotmail service to distribute spam emails to thousands of people. Hotmail then took an action against Van \$ Money Pie alleging that he breached the agreement and defamed Hotmail. Court ordered that Van \$ Money Pie ceased from sending spam emails through Hotmail service.

Although the court did not determine whether the terms of service was valid or not, the judgment demonstrated that the court opined that such an agreement was enforceable like other typical contracts.

In *Caspi v. The Microsoft Network, L.L.C.*,⁹⁸ The Microsoft Network, L.L.C. or MSN is an internet service provider and was sued by its subscriber and demanded damages on the allegation that MSN changed its service plan into more expensive service plan and claiming that MSN's terms of service was not enforceable. The procedures of subscribing into MSN service are as followings (a) MSN Membership Agreement appears into the computer screen (b) user can scroll down to see two buttons, namely "I AGREE" and "I DON'T AGREE", which the user can choose either one of them. (c) the complete subscription would occur only after the user reads the content and chooses "I AGREE". The whole procedure would be free of charge. The court viewed that the MSN Membership Agreement was valid, enforceable and not against the public policy because the user had a chance to read the terms of the agreement before agreeing with it.

Upon considering the above three court judgments, the social media sites' Terms of Use are similar to Clickwrap license agreement and is valid and enforceable as agreed by the court's judgments.

3.1.2 Civil and Commercial Code B.E. 2535, Book I, Title IV. Juristic Acts

The internet users may argue that they do not intend to be bound with the Terms of Use and may raise concealed intention or expression of intention by mistake in the essential element of contract as their arguments. We will explore here whether their arguments are valid.

⁹⁸ *Caspi v. The Microsoft Network*, 323 N.J. Super. 118, 732 A.2d 528 (1999).

3.1.2.1 Concealed Intention

Section 154 states that

*“A declaration of intention is not void on the ground that the declarant in the recesses of his mind does not intend to be bound by his expressed intention, unless this hidden intention was known to the other party.”*⁹⁹

The concealed intention would happen when an individual willfully expresses his/her intention different than his/her actual need or actual intention without the prior consent with the receiver. The receiver does not realize the difference in these intentions associated with the sender. In this manner, we can see that the actual intention is kept in the mind of the sender only, therefore the actual intention fails to produce any effect because nobody could perceive it. Thai law tends to protect trust and confidence on the receiver's part, therefore the law dictates that expressed intention is valid. On the contrary, in a case that the receiver is aware of the actual intention of the sender, the expressed intention is void because the receiver knows the difference between the expressed intention and concealed intention. The law would not protect the receiver any longer because his trust or confidence is not undermined.

Therefore, the user cannot raise concealed intention to void the Terms of Use as the social media site is not aware of the user's actual intention.

3.1.2.2 Expression of Intention by Mistake in the Essential Element of Contract

Mistake is misunderstanding the facts, that is, the fact is one thing but the person thinks of another different thing. This kind of mistake happens during the expression of intention. The process of internal creation of intention is valid and correct according to actual need. It means that the understanding of facts before the expression of intention is correct. The mistake happens only during the time of expression of intention. Therefore the expression of intention by mistake which creates conflict between the actual need and expressed intention is void.

⁹⁹ Civil and Commercial Code B.E. 2535, sec. 154.

The factors of mistake are comprised of two things:

1. knowledge and idea of human, a person know the facts wrongly.
2. actions or activities of human, a person acts differently than what he/she thinks.¹⁰⁰

Section 156 provides that

“A declaration of intention is void if made under a mistake as to an essential element of the juristic act.

The mistake as to an essential element of the juristic act under paragraph one are for instance a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act and a mistake as to a property being an object of the juristic act.”¹⁰¹

The consideration should be given in that which mistake would constitute the mistake in the essential element of the contract. The simple idea is that party of the contract, the object of the contract, and the character of contract are all the essential elements of any contracts. Moreover, in some specific juristic acts, there are other specific important issues of such juristic acts. If the mistake is made regarding those issues, then it deems that the mistake is made in the essential element of such contract. For example, the essential element of a rent agreement, according to Civil and Commercial Code B.E. 2535 Section 537, is the benefits or interests obtained out of the rented property in exchange for rental fee. If the mistake is made regarding these two issues, then it deems that the mistake is made in the essential element of the contract. Another example is mistake regarding the essential element of debt according to Section 349.

The expression of intention by mistake pursuant to Section 156 results in the juristic act to become:

1. void because the expressed intention is not corresponding to the actual intention.

¹⁰⁰ ศนันท์กรณ โสตกิพันธ์, *คำอธิบายนิติกรรม-สัญญา*, พิมพ์ครั้งที่ 12 (กรุงเทพฯ: วิญญูชน, 2550), 112. (SANANKORN SOTTIPAN, **EXPLANATIONS OF JURISTIC ACTS - CONTRACTS** 112 (12th ed. Winyuchon Press 2007)

¹⁰¹ Civil and Commercial Code B.E. 2535, sec. 156.

2. and the sender could not raise the invalidity of the contract as his/her defense if the expression of intention by mistake in the essential element of the contract is conducted by the sender with gross negligence.¹⁰² The mistake with gross negligence equals with willful mistake. Law cannot excuse the sender with gross negligence.

Gross negligence means the sender does not employ even a little of care before expression of intention, for example, does not even read the contract, etc. The user cannot raise an argument that he/she expresses intention by mistake in the essential element of Terms of Use, because the user is given an opportunity to read the Terms of use before clicking “I accept”.

3.1.3 Unfair Contract Terms Act B.E. 2540

As the user has no opportunity to impose or draft the Terms of Use and must only accept it before using the social media sites’ service. Such Terms of Use is unilaterally specified by the social media sites and the content is rather transferring all benefits or rights to the social media sites. The Terms of Use may be considered as unfair according to the Unfair Contract Terms Act B.E. 2540.

3.1.3.1 Scope of Unfair Contract Terms Act B.E. 2540

Unfair Contract Terms Act B.E. 2540 was enacted to govern the contracts which are considered to be unfair, and are made either between private party and private party or between government authority and private party. The contracts governed by this Act must possess some specific characteristics as stipulated only in Section 4 to Section 9. With this characteristic, the Act is classified as a special written law.

The draft Unfair Contract Terms Act B.E.....was not initially aimed to govern the contract of which a party is a government authority as we can see from Section 3 of the draft Act, it provided that ‘this Act will not be enforceable with

(1) the contracts made either among ministries, bureaus, and departments, or between ministries, bureaus, and departments and private party, by virtue of laws aimed at protecting country’s interests and public interests.¹⁰³

¹⁰² Civil and Commercial Code B.E. 2535, sec. 158.

¹⁰³ Draft Unfair Contract Terms Act B.E..., sec. 3.

When the Act was announced, Section 3 was deleted. Therefore it appears that eight types of contracts which are under Court's authority under this Act include the contracts made between private party themselves and between government authority and private party.¹⁰⁴

3.1.3.2 Characteristics of Contracts Governed by Unfair Contract Terms Act B.E. 2540

Eight types of contracts which are governed by Unfair Contract Terms Act B.E. 2540 are the followings:

- (1) the contracts made between consumers and business persons according to Section 4
- (2) adhesion contracts or standard form contracts according to Section 4
- (3) Sale with right of redemption contracts according to Section 4
- (4) Disclaimer agreements regarding occupation and work, and agreement limiting the freedom of entering into a juristic act involving trade, business, or occupation according to Section 5
- (5) Contracts made between consumers and business persons which exempt or limit liabilities of business persons for any products or services' defects, or disturbances of products delivered to the consumers according to Section 6.
- (6) Contracts with earnest according to Section 7.
- (7) Terms, announcements, or notices made in advance to exempt or limit liabilities for any torts or breach of contract according to Section 8.
- (8) Consents or agreements of the injured persons in wrongful act based cases according to Section 9.

Regarding adhesion contract or standard form contract, Section 4 of Unfair Contract Terms Act B.E. 2540 reads:

¹⁰⁴ จริญญา กักศิรนากุล, *สรุปสาระสำคัญของพระราชบัญญัติว่าด้วยข้อสัญญาไม่เป็นธรรม พ.ศ.2540*, *ดุลพินิจ* 45,1 (ม.ค.-มิ.ย. 2541): 83. (Jaran Pakdeetanakul, *Summary of Unfair Contract Terms Act B.E. 2540*, 45, 1 **Dulapaha** 83 (1998)).

“The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.”

The adhesion contract is the contract of which the party who has more economic power such as business person unilaterally specifies the contents of the contract in written format in advance. The consumers or any interested parties can immediately express their intentions of entering into the pre-worded contracts. Time would not be wasted for any negotiations. Upon considering the current economic situation which requires the rapidness and expedition, this type of contract is necessary and responds to the demands of many persons. It also creates the equality among other parties entering into such contracts. The weak point of the adhesion contract is that the party with more economic power always has the terms of contract considered to be unfair to the other party. The other party has limited freedom, namely whether to enter into the contract or to leave it. If he/she enters into the contract, he/she must comply with the pre-worded form of contract. The party agreeing to enter into contract is said to have virtual freedom. Therefore the terms specified in the adhesion contract and taking advantages over the other party are unfair contract terms. Unfair Contract Terms Act B.E. 2540 entitles judges to use discretion to adjust the unfair contract terms to be enforceable within reasonable and equitable extents with consideration given in each situation. The criterion of unfair contract terms are stated in Section 4 paragraph 3.

3.1.3.3 The Validity of the Contract Governed by Unfair Contract Terms Act B.E. 2540

The contract governed by Unfair Contract Terms Act B.E. 2540 is valid although it is considered unfair, except for below contracts:

3.1.3.3.1 Agreements made between consumers and business persons which exempt or limit liabilities of business persons for any products or services' defects, or evictions of products delivered to the consumers, provided that

the consumer is not aware of such defects or evictions during the time of entering into an agreement pursuant to Section 6

3.1.3.3.2 Agreements, announcements, or advertisements done in advance to exempt or limit liabilities for any damages to life, body, or sanitary of other persons, caused from willful or negligent acts of the persons who made agreements, announcements, or advertisements or of the other person whom they must be jointly liable for pursuant to Section 8 paragraph 1.

3.1.3.3.3 Consents or agreements of the injured persons in wrongful act based cases which are clearly prohibited by the law, and such consents are contrary to public order or good morals according to Section 9.

The above three types of contracts are invalid or void since the time of entering into the contracts because the contracts are made against the provisions relating to public order pursuant to Section 151 of Civil and Commercial Code B.E. 2535 and Section 11 of Unfair Contract Terms Act B.E. 2540. When the contract is void, the contract is not effective since the beginning. Unlike with other types of contracts, any interested party could always claim for nullity of the contract, and the discretion of judge is not needed for these three types of contracts.

Actually, Unfair Contract Terms Act B.E. 2540 is a legislation relating to public order and good morals, any agreements made against this Act should be invalid and void according to Section 151 of Civil and Commercial Code B.E. 2535. However, the provisions of Unfair Contract Terms Act itself state that it is enforceable within reasonable and equitable extents, with consideration given in each situation. Such provision is exemption of general provision of Civil and Commercial Code B.E. 2535. Therefore, other five types of contracts are valid and enforceable within reasonable and equitable extents, with consideration given in each situation.

The author opines that according to Unfair Contract Terms Act B.E. 2540, if the social media sites' Terms of Use are enforceable, they should be enforceable within reasonable and equitable extents.

3.2 Approaches Relating with Copyright Laws

Different contents circulated on the social media sites are mostly protected under Copyright Act B.E. 2537. Copyright laws entitle the copyright owner with the exclusive rights in reproduction and communication of their work to public, license and assignment. The author is studying Thai and U.S. copyright laws to explore whether the social media sites could claim to exercise copyright owner's exclusive rights with the user. This approach is involving copyright laws.

3.2.1 Thai Copyright Act B.E. 2537

3.2.1.1 Types of Works Protected under Copyright Act B.E. 2537

Copyright Act B.E. 2537 provides that the protected works must be works specified in Section 6

“The Copyright work by virtue of this Act means a work of authorship in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain whatever may be the mode or form of its expression...”

Nine types of copyrighted works pursuant to Section 6 are literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain.

Section 4 of Copyright Act B.E. 2537 gives clear definition of literary work and artistic works as same provided in Copyright Act B.E. 2521 as followings:

"literary work" means any kind of literary work such as books, pamphlets, writings, printed matters, lectures, sermons, addresses, speeches, including computer programs.

"Artistic work" means a work of any one or more of the following characters:

(1) work of painting and drawing which means a creation of configuration consisting of lines, lights, colors or any other things or the composition

thereof upon one or more materials. The paintings or drawings may be made with something else other than colors as authorized by the law.

(2) work of sculpture which means a creation of configuration with tangible volume. These types of works mean three-dimensional artistic works, such as carvings, moldings, castings etc.

(3) work of lithography which means a creation of picture by printing process and includes a printing block or plate used in the printing. This kind of work is two-dimensional work same as painting or drawing but the process of creating work of lithography involves printing with ink.¹⁰⁵

(4) work of architecture which means a design of building or construction, a design of interior or exterior decoration as well as a landscape design or a creation of a model of building or construction. Although Copyright Act B.E. 2537 does not define the term building or construction, the interpretation should also include parts of building or construction. For the protection of this kind of copyrighted work, the design of only some parts of building or construction should also be considered as work of architecture.

(5) photographic work which means a creation of picture with the use of image recording apparatus which allows the light to pass through a lens to a film or glass and developed with liquid chemical of specific formula or with any process that creates a picture or an image-recording with any other apparatus or method. The object in the photo may be human, scenery, any events or taking photo for any purposes.¹⁰⁶

Apart from the traditional method of taking photo, the law also includes new technique of taking photo, such as taking photo with polaroid camera with attached inner photo paper which needs no ordinary developing process. The new method is considered as image-recording method with any other apparatus or method.

¹⁰⁵ ไชยยศ เหมะรัชตะ, *ลักษณะของกฎหมายทรัพย์สินทางปัญญา*, (กรุงเทพฯ: นิติธรรม, 2539), 41.
(CHAIYOT HEMMARATCHATA, **CHARACTERISTICS OF INTELLECTUAL PROPERTY LAW** 41 (Nititam 1996)

¹⁰⁶ *Id.*

(6) work of illustration, map, structure, sketch or three-dimensional work with respect to geography, topography or science.

(7) work of applied art which means a work which takes each or a composition of the works mentioned in (1) to (6) for utility apart from the appreciation in the merit of the work such as for practical use of such work, decorating materials or appliances or using for commercial benefit. Provided that, whether or not the work in (1) to (7) has an artistic merit and it shall include photographs and plans of such work.

Supreme Court judgement number (Dika Court judgement number) 5259/2549 Plaintiff created a book called Fruits Set Number 1 himself with his knowledge and skill as a publisher. The plaintiff dedicated for this book his knowledge, attentiveness, capability, and labor. The process of taking photos of fruits began from selecting good fruits from Rayong province and Chantaburi province, cleaning them, positioning them, and then a team of photographers will take photos using films and scan photos with computer system. There were also illustration with details associated with the pictures of fruits. Therefore, the plaintiff used his labor and diligence for creating the book called Fruits Set Number 1. The pictures of fruits are artistic work, typed photographic work and the associated details with the photo are literary work under Section 6 of Copyright Act B.E. 2537. The plaintiff was an injured party and authorized to take an action in this case. The second defendant was a provider and designer of photos of fruits without an involvement or instruction from the first defendant in reproduction or adaptation of photos of fruits from the plaintiff's book, therefore the first defendant did not infringe on the plaintiff's copyrighted works. The photos of fruits appearing in the second defendant's calendar between January and October 2002 were reproduction and adaptation of photos in the book called Fruits Set Number 1, therefore the second defendant's act was an infringement of the plaintiff's artistic work, typed photographic work. Associated details with photos in the book, which are the plaintiff's literary work, are different than the details appearing in the second defendant's calendar, therefore second defendant's act was not an infringement of the plaintiff's literary work. The plaintiff published the book called Fruits Set Number 1 and calendar of fruits for foreign clients. The adaptation of second defendant made the plaintiff lose income. The distribution from

the second defendant to his customers free of charge damaged the plaintiff. The act could not be considered as a use for personal benefit or for the benefit of himself and other family members or close relatives under Section 32 paragraph 2 of Copyright Act B.E. 2537 and the act was a conflict with a normal exploitation of the copyright work by the owner of copyright under Section 32 paragraph 1 of Copyright Act B.E. 2537. The second defendant's act was an infringement of copyright under Section 27 paragraph 1 of Copyright Act B.E. 2537.

In March 2015, there was a case in the central IP & IT Court, which the plaintiff sued the defendant for copyright infringement for exploiting her posted photo in her Facebook without her permission. The Court ruled that the photo in her Facebook is an artistic work, therefore it is protected as a copyrighted work.¹⁰⁷

In *Goldstein v California*,¹⁰⁸ the court held that 'writing' included any activities requiring creative work or artistic labor. It is possible to interpret the writing of a status on Facebook should be protected under the copyright law.

3.2.1.2 Acquisition of Copyright

The creation of work would immediately bring about the copyright protection, that is the copyright protection would immediately exist when any types of copyrighted work according to Copyright Act B.E. 2537 is created without any registration or any acts with government authorities.

Generally, a person who creates the work would immediately receive copyright protection pursuant to the copyright law without any publication or any announcement of the created work to the general public and it does not require any type of registration with any officials. However, the acquisition of copyright in foreign jurisdiction may be differently obtained. A person who acquires the copyright or becomes the owner of copyrighted work may be or may be not the first author. In other words, the creation of the copyrighted work will dictate the acquirer or owner of such copyrighted work. The status of the author of copyrighted work during the

¹⁰⁷ *Benjamaporn Kuniz v. Saint Louis Foundation*, Red Case No. Mor. 26/2558 (IP & IT Court, Mar. 23, 2015), available at IP & IT Court's library.

¹⁰⁸ *Goldstein v California*, 412 U.S. 546 (1973).

creation of the work will be taken into account to decide the owner of such copyrighted work, which could be divided as below

3.2.1.2.1 Acquiring of copyright as the first author

The copyright owner is the author himself/herself who contributes to create the work without the employment or any supervision by any person. Therefore, the copyright law would like to give benefit to the author of the work by assigning the status of the first copyright owner to him/her.¹⁰⁹ Although the two or more created works are accidentally similar to one another, but all the works are created originally without copying to each other, all works are entitled for the copyright protection.

3.2.1.2.2 Acquiring of copyright as the staff or employee

In this case, the author is an employee or staff pursuant to employment contract, either hired daily, monthly or yearly or permanent employee, but the work must not be created by the hire for specific work. The copyright law states that copyright in the work created by the author in the course of employment vests upon the author unless it has been otherwise agreed in writing provided that the employer is entitled to communicate such work to public in accordance with the purpose of the employment.¹¹⁰

3.2.1.2.3 Acquiring of copyright through the hire of work

In this case, the created work is made through hire of work between the employer and author within the allotted timeframe with the wages to be rewarded to the author. The author is not the employee or staff of the employer. The copyright law states that copyright in the work created in the course of commission vests upon the employer unless the author and the employer have agreed otherwise.¹¹¹ The agreement may be made verbally or implicitly. For example, Mr. A is hired by Mr. B to design a suit for Mr. B. After Mr. A completed the design of the suit for Mr. B, the copyright of the design of that suit will belong to Mr. B, the employer, if Mr. A and Mr. B have not agreed differently.

¹⁰⁹ Copyright Act B.E. 2537, sec. 8.

¹¹⁰ Copyright Act B.E. 2537, sec. 9.

¹¹¹ Copyright Act B.E. 2537, sec. 10.

3.2.1.2.4 Acquiring of copyright through the adaptation of other person's work with consent

With an authorization of the owner of copyrighted work, a person who adapts the other person's copyrighted work with inventiveness, knowledge, intelligence, talent, he/she could be the owner of the adapted copyrighted work, separately from the original work, without prejudice to the owner of copyright in the work created by the original author that is adapted.¹¹² The different characteristics of adaptation are defined in Section 4 of Copyright Act B.E. 2537, which are reproduction by conversion, modification or emulation of the original work for the substantial part without a character of creating a new work whether of the whole or in part.

3.2.1.2.5 Acquiring of copyright through the compilation or a composition of other person's copyrighted work with consent

Copyright law provides protection to the compiled or composed work if the compiler or composer creates the new work with consent from the original owners of copyrighted works. The person may compile or compose data or other materials as provided by the law by means of selection or arrangement in the manner which is not an imitation of the work of another person, without prejudice to the owners of copyright in the works or data or other materials created by the original authors which are compiled or composed.¹¹³ The reason the law provides protection to this type of compilation or composition of works is because the law accepts that the creation of such work is done with diligence.

3.2.1.2.6 Acquiring of copyright through the employment, order or control under the Ministries, Departments or other government or local units

In case a government officer, employee of state enterprise, or other types of employees under governmental units creates the copyrighted work under their duties, the law dictates that that copyright of the work belongs to the organization that creator is under the command of. However, the

¹¹² Copyright Act B.E. 2537, sec. 11.

¹¹³ Copyright Act B.E. 2537, sec. 12.

agreement may be made differently in writing.¹¹⁴ If that government officer, employee of state enterprise, or other types of employees under governmental units creates the copyrighted work outside of their duties, the copyright in that work will fall to the creator themselves.

3.2.1.2.7 Acquiring of copyright through the assignment

Copyright is a property right (jus in rem) and therefore it is assignable. The assignment may be made in whole or in part of copyright and may be assigned for a limited duration or for the entire term of copyright protection.¹¹⁵ Apart from the above acquisition of copyright, the copyright may be obtained by assignment through juristic act and inheritance.

Terms of Use do not contain signatures of both parties, Terms of Use may not be considered as assignment of copyright ownership. Even though Electronic Transactions Act provides that Terms of Use may be deemed valid as the agreement is already made in writing electronically, the author opines that lack of the assignor's signature on the user's part would invalidate the assignment. The ownership still belongs to the user and is not transferred to the social media sites.

Upon considering the above methods of copyright acquisitions, the author does not think that the social media sites could by all means exercise the copyright owner's exclusive rights with the user. Moreover, the social media sites could not claim that the users employ their space and tools to create the work and therefore the act would entitle the social media sites to acquire the joint copyright ownership with the user. There are no such provisions which could support the social media sites' claim.

3.2.1.3 Copyright Protection

Copyright is one kind of properties because it has value and can be appropriated pursuant to Section 138 of Thai Civil and Commercial Code B.E. 2535 which provides that

“Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.”

¹¹⁴ Copyright Act B.E. 2537, sec. 14.

¹¹⁵ Copyright Act B.E. 2537, sec. 17.

The copyright owner can receive benefits out of the copyrighted work himself/herself or can allow the other persons to take benefits out of the copyrighted work. The copyright is one kind of properties, therefore Civil and Commercial Code B.E. 2535 also governs the transactions related to the copyright, such as juristic acts, contracts, or inheritance. The copyright owner can transfer, change, reserve, suspend the rights or allow the other person to receive benefits out of their copyright.¹¹⁶ The copyright owner is the only person who has absolute rights, either economic rights or moral rights, over his/her copyrighted work. This right is known as exclusive rights.

According to Anglo-Saxon concept, copyright is a negative rights, that means the copyright owner is not supposed to do whatever act with his/her copyright, but instead the copyright owner is supposed to prohibit other persons to do certain kinds of acts with his/her copyright. According to Droit d' Auteur or author's right, copyright, which is particularly originated from wisdom and cleverness of the author, is a personal rights of the author, therefore only the author has rights to decide when the created work should be communicated to general public and in what form of communication. These rights are basic rights and must be always accepted.¹¹⁷

Section 4 of Copyright Act B.E. 2537 provides that:

"copyright" means the exclusive right to do any act according to this Act with respect to the work created by the author."

The copyright owner's exclusive rights are stated in Section 15 of Copyright Act B.E. 2537 as:

"Subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights of :-

- (1) reproduction or adaptation,*
- (2) communication to public,*

¹¹⁶ ไชยยศ เหมะรัชตะ, คำอธิบายกฎหมายลิขสิทธิ์, พิมพ์ครั้งที่ 3 (กรุงเทพฯ: นิติธรรม, 2545), 121. (CHAIYOT HEMMARATCHATA, **EXPLANATIONS OF COPYRIGHT LAW** 121 (3rd ed. Nititam 2002)

¹¹⁷ คณิง ฤๅไชย, กฎหมายทรัพย์สินทางปัญญา, (กรุงเทพฯ: บริการส่งเสริมงานตุลาการ, 2532), 235-236. (Kanueng Luechai, *Intellectual Properties Law*, **JUDICIAL SUPPORT SERVICE** 235-236 (1989).

(3) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings,

(4) giving benefits accruing from the copyright to other persons,

(5) licensing the rights mentioned in (1), (2) or (3) with or without conditions

provided that the said conditions shall not unfairly restrict the competition. Whether the conditions as mentioned in sub-section (5) of the paragraph one are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.”

Aside from Sections 9, 10, and 14 which the parties may agree differently from this provision or in the case that employer is entitled to communicate employee’s work to public in accordance with the purpose of the employment, only the copyright owner has the exclusive rights according to Section 15.

In the case of social media, only the account owner/user or copyright owner of the content has the following exclusive rights.

3.2.1.3.1 Reproduction or Adaptation

Section 4 of Copyright Act B.E. 2537 gives the definition of reproduction and adaptation as follows:

"reproduction" includes any method of copying, imitation, duplication, blockmaking, sound recording, video recording or sound and video recording for the material part from the original, copy or publication whether of the whole or in part and, as for computer program, means duplication or making copies of the program from any medium for the substantial part with any method without a character of creating a new work whether of the whole or in part.”

"adaptation" means a reproduction by conversion, modification or emulation of the original work for the substantial part without a character of creating a new work whether of the whole or in part.

(1) with regard to literary work, it shall include a translation, a transformation or a collection by means of selection and arrangement,

(2) with regard to computer program, it shall include a reproduction by means of transformation, modification of the program for the substantial part without a character of creating a new work,

(3) with regard to dramatic work, it shall include the transformation of a nondramatic work to a dramatic work or a dramatic work to a non-dramatic work, whether in the original language or a different language,

(4) with regard to artistic work, it shall include the transformation of a two dimensional work or a three-dimensional work to a three-dimensional work or a two dimensional work or the making of a model from the original work,

(5) with regard to musical work, it shall include an arrangement of tunes or an alteration of lyrics or rhythm.”

3.2.1.3.2 Communication to Public

Section 4 of Copyright Act B.E. 2537 gives the definition of communication to public as:

"communication to public" means making the work available to public by means of performing, lecturing, preaching, playing music, causing the perception by sound or image, constructing, distributing or by any other means"

Therefore literally any other user who disseminates the copyrighted contents further to public, whether by clicking “Like” or “Share” at one user’s content, is considered as committing copyright infringement because only the copyright owner of the content has the exclusive rights of reproduction and communication of the copyrighted work to public.

3.2.1.3.3 Giving Benefits Accruing from the Copyright to Other Persons

The example of giving benefits accruing from the copyright to other persons is the assignment. The owner of copyright may assign the copyright of the whole or in part and may assign it for a limited duration or for the entire term of copyright protection. The assignment of copyright by other means

except by inheritance must be made in writing with the signatures of the assignor and the assignee.¹¹⁸

The social media sites' Terms of Use may fall into this category of assignment of copyright ownership. Therefore, if the users merely click to accept such Terms of Use and the assignment do not contain signatures of both parties, Terms of Use may not bind the users. Even though Electronic Transactions Act provides that such act may deem valid as the assignment is already made in writing electronically, the author opines that lack of the assignor's signature on the user's part would invalidate the assignment.

3.2.1.3.4 Licensing the Rights Mentioned in (1), (2) or (3)

The right to authorize other person for the above three rights is called licensing right which is divided into three licensing:

- (1) reproduction or adaptation,
- (2) communication to public,
- (3) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings

The law is silent on the format of licensing, therefore licensor and licensee do not need to do licensing in writing or have evidence in writing. The parties can agree verbally. The licensing can be made with or without conditions, such as conditions regarding duration of license, royalty, scope of license, or territory of license, etc. However, the conditions cannot be specified in the manner to limit the fair competition. Whether the conditions are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.

Even though the social media sites' Terms of Use is a valid license agreement and can be enforced according to contract laws as above mentioned in previous sub-topic, it is enforceable only to some limitations as reasonably and equitably as the case may be as governed by Unfair Contract Terms Act B.E. 2540. Apart from this, if somehow such Terms of Use is considered as an

¹¹⁸ Copyright Act B.E. 2537, sec. 17.

assignment of copyright ownership, it is invalidated due to non-compliance with the format specified by Section 17 of Copyright Act B.E. 2537.

3.2.1.4 Exceptions of Copyright Infringement

Thai copyright law states some exceptions of copyright infringement in Section 32 of Copyright Act B.E. 2537.

“An act against a copyright work by virtue of this Act of another person which does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright.

Subject to the provision of paragraph one, any act against the copyright work in paragraph one shall not be deemed an infringement of copyright provided that the act is each of the followings:

- (1) research or study of the work which is not for profit;*
- (2) use for personal benefit or for the benefit of himself and other family members or close relatives;*
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work;*
- (4) reporting of the news through mass-media with an acknowledgement of the ownership of copyright in such work;*
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or for reporting the result of such proceedings;*
- (6) reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit;*
- (7) reproduction, adaptation in part of a work or abridgement or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit;*
- (8) use of the work as part of questions and answers in an examination.*
- (9) reproduction or adaptation for benefits of those disabled persons who are not capable of accessing the copyrighted works due to their*

inefficiency of sight, hearing, intelligence, learning, or other inefficiencies as prescribed in the Ministerial Regulations, provided that such act does not involve commercial benefits. The formats of necessary reproduction or adaptation of disabled persons and their organizations, including criteria and procedures of reproduction or adaptation, will be published pursuant to Minister's announcement in Government Gazette."

In conclusion, general principles of exception of copyright infringement of Thai law has two issues, that are, that act does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright. These fair uses do not provide exceptions for copyright infringement in the case of social media sites which share or exploit the user's copyrighted contents. Section 32 paragraph 2 (2) allows the use for personal benefits and only among family members and close relatives, exclusive of friends. The social media sites' acts unreasonably prejudice the legitimate right of the owner of copyright. Although Section 32/3 regarding liability exemption of ISP was introduced by Copyright Act. B.E. 2537 as amended by Copyright Act. (No. 2) B.E. 2558, the exemption tends to be applied with those ISPS who do not control, initiate, or instruct the copyright infringement.

3.2.2 US Copyright Laws

3.2.2.1 Acquisition of Copyright

The acquisition of copyright in U.S. is subject to Copyright Act 1976 Article 102 bis which provides that

"Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression..."

There are two concepts to consider regarding protected work according to this provision.¹¹⁹

¹¹⁹ วิศิษฐ์ ศรีพิบูลย์, รวมคำอธิบายพร้อมตัวบท: กฎหมายทรัพย์สินทางปัญญา, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: นิติธรรม, 2546), 41-42. (WISIT SEEPIBOOL, **EXPLANATIONS AND PROVISIONS: INTELLECTUAL PROPERTIES LAW 41-42** (2nd ed. Nititam 2003)

3.2.2.1.1 Originality

The created work must be original and not copy any person's work. There is later developed concept that the protected work must have modest quantum of creativity. The work is not required to be elegant or has much artistic value.

3.2.2.1.2 Fixation

The created work must have physical form of fixing evidence. The protected work pursuant to US copyright law must be fixed in material or has material evidence. The existence of the work can be traced or referenced by material, such as recording disc, paper, video tape, film, computer, or any other materials. If the fixing is not present, then the copyright protection does not exist. For example, a song writer composes a very beautiful song. He always sings his composed song until the public can recognize his song and it is widely known that this song belongs to him. However, this song writer never records this song in any material form, therefore he could not receive copyright protection of this song.

In the context of social media sites, the disseminated contents may be traced back in the computer server and it deems that it is fixed in the material form. The copyright exists as long as the user creates the posted contents themselves.

3.2.2.2 Copyright Protection

US copyright law protects different types of work which an author creates, namely

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

The copyright protection also extends to performers' rights, rights of broadcasting organizations which are neighboring rights.

Different contents circulated on social media sites are protected under Copyright Act 1976. Copyright Act 1976 provides the exclusive rights of the copyright owner in Section 106 that only the copyright owner has the exclusive rights to act, authorize other persons to act, or prohibit other persons to act against the following exclusive rights of the owner.¹²⁰

3.2.2.2.1 Reproduction Right of the Copyrighted Work in Copies or Phonorecords.

This right is the most important right of the copyright owner. Only the copyright owner has this reproduction rights and is the only person who can authorize other person to reproduce his/her copyrighted work. However, Copyright Act 1976 does not clearly define the term “reproduction”, it only specifies that the copyright owner has exclusive right of reproduction of the copyrighted work in copies or phonorecords. Section 101 gives definition of copies as following:

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.”

3.2.2.2.2 Right to Prepare Derivative Works Based upon the Copyrighted Work

Section 101 of Copyright Act 1988 defines the term “derivative work” as

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations,

¹²⁰ อริศรา สันสนีย์วิทย์กุล. “ปัญหากฎหมายที่เกี่ยวข้องกับเทคโนโลยี Bit Torrent”. วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, พ.ศ. 2550, หน้า 74-82. (Arisra Sansaneewittayakul. “Legal Problems Regarding Bit Torrent Technology”. Master of law’s Thesis. Chulalongkorn University, 2007, 74-82.

elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

3.2.2.2.3 Right to Distribute Copies or Phonorecords of the Copyrighted Work to the Public by Sale or Other Transfer of Ownership, or by Rental, Lease, or Lending

After the copyright owner sells his/her copyrighted work, the right to sell the copyrighted work is exhausted and it results that the new owner of the sold copyrighted work has rights to sell or rent that copyrighted work instead. For example, we purchase a book which is a literary work, we can then sell, give away, or destroy that book. Our act does not prejudice the exclusive rights of the distribution of the copyright owner.

3.2.2.2.4 Public Performance Right

Section 101 of Copyright Act 1988 defines the term “to perform” as

“To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”

Section 101 of Copyright Act 1988 defines the term “to perform or display a work publicly” as

“(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

3.2.2.2.5 Public Display Right

Section 101 of Copyright Act 1988 defines the term “to display” as

“To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images non-sequentially.”

US copyright law also dictates that different exclusive rights belong to the copyright owner (the user), especially reproduction right and public display right. The act that user disseminates other user’s contents by clicking “LIKE” or “SHARE” is considered as copyright infringement of reproduction and public display right of the copyright owner.

3.2.2.3 Exceptions of Copyright Infringement

Fair Use concept under Section 107 of US Copyright Act 1976 is the concept used to limit on the copyright owner’s exclusive rights. Public, or social media site, can exploit the copyrighted work without first obtaining permission of the copyright owner. It is to balance the benefits between the copyright owner’s exclusive rights and public interests. The factors to consider whether the act is considered as fair use are as followings.

3.2.2.3.1 Purpose and Character of the Use

The consideration includes whether such use is of a commercial nature or is for nonprofit educational purposes; such as for criticism, comment, review, news reporting, teachings, study, and research, etc.

3.2.2.3.2 Nature of the Copyrighted Work

The copyrighted work must generate knowledge or advancement to society, such as news, books, textbooks, etc.

3.2.2.3.3 Amount and Substantiality of the Portion Used

The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

3.2.2.3.4 Effect of the Use

The effect of the use is upon the potential market or on the value of the copyrighted work. The consideration is whether the copyright

owner's interests are damaged or decreased or not, if the use does affect with the copyright owner's interests, then it is not a fair use.¹²¹

3.2.2.4 U.S. Court Judgments Relating to Fair Use

In *Los Angeles Times*,¹²² the plaintiff sued in order to shut down the defendant's website due to the fact that the defendant's website encouraged the member to comment and criticize news. However, it ignored the reposting of news stories which belong to copyright's owner without permission. The defendant raised 'Fair Use' as its defense. Interestingly, the court held that although the defendant had not acted for business purposes and was able to present that its users used its services to comment or criticize. Notwithstanding, such activities impacted on the copyright owner's digital market and chance for receiving licensing's fee.

In *AP v Meltwater Case*,¹²³ the defendant served as online news was charged with unfair advantage and direct copyright infringement from news clipping by way of sending news through e-mail without referencing the AP original source leading to significantly detriment of commercial interest for AP.

Besides, Meltwater was accused of contributory infringement from the fact that encouraging users to reproduce the material contents together with users independently eliminated or deleting the reference to AP's original source from the news articles leading to the violation of section 1202 (b) of DMCA. More importantly, Meltwater benefited from the user's infringement.

Fair use was raised in this case. Specifically, AP insisted that Fair Use could be adopted in case of comparison or critique, however, focusing on the Meltwater business intentionally using AP's materials by not adding any commentary, analysis or context.

¹²¹ สิริพร พินิจมงคล. “ปัญหาทางกฎหมายในการให้ความคุ้มครองงานลิขสิทธิ์บนเครือข่ายอินเทอร์เน็ต: ศึกษาเฉพาะกรณีการใช้เทคโนโลยีการแลกเปลี่ยนข้อมูล”. วิทยานิพนธ์นิติศาสตรมหาบัณฑิต สาขาวิชานิติศาสตร์ คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, พ.ศ. 2546, หน้า 42. (Siriporn Pinijsongkol. “Legal Problems of Copyright Protection of Works on Internets in case of data transferring technology”. Master of Law's Thesis, Chulalongkorn University, 2003, 42).

¹²² *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2D (BNA) 1453 (C.D. Cal.2000)

¹²³ *Associated Press v. Meltwater U.S. Holdings, Inc.*, 2013 WL 1153979 (S.D.N.Y. Mar. 21, 2013).

The New York District Court, Judge Perise L. Cote held that the core of Meltwater's business imitated copyrighted news in order to directly earn income.

Interestingly, the reputable case against Google is *Agence France- Presse (AFP) v Google*,¹²⁴ AFP provides news reporting and publishes news by granting licensing to news provider such as local newspaper. Such a local newspaper would upload the AFP's news on its own website and it was found that Google News used the copyrighted material on its homepage. Hence, AFP sued Google on the grounds of copyright infringement. In this case, there were two main points raised. Firstly, were a news headline and photos copyrightable?

Secondly, Google also raised *Fair Use* as its defense. AFP responded that the use of Google was reproduction of its material rather than the transformative use. More than that, even though the use of headlines and photos was small in quantity, it was the gist of news service, because it would attract the reader's attention. As a consequence, AFP lost substantial profits from its operation. In this sense, the court held that Fair Use could be applied to the fact that the use of copyrighted materials did not involve a commercial purpose and did not impact on the exploitation of the copyright owner in the market. The Court held that where the copyrighted work was transformed into digital form, it could be regarded as "transformative fair use".¹²⁵ Nevertheless, Google violated the AFP's exclusive right to publicly display its photos. This case ended when Google had to pay for the 'right to post' on Google service and Google News to AFP.

The court judgments of the above three cases reflected that the consideration was given on the effect of the use upon the potential market, and whether the act involves a commercial purpose. If the act impacts on the exploitation of the copyright owner in the potential market, or involve the commercial benefits, the fair use cannot be adopted in those circumstances. The author opines that if the user posts some valuable copyrighted materials through social media sites and they were

¹²⁴ Caroline McCarthy. "Agence France-Presse, Google settle copyright dispute". CNET News(6 April 2007) http://news.cnet.com/2100-1030_3-6174008.html (accessed July 15, 2016).

¹²⁵ The Copyright Act of 1976,s 107.

exploited by some other users or by social media site without authorization, such act of copyright infringement cannot be compromised with fair use, if it is proved that the act affects with the exploitation of the copyright owner in the potential market or the infringer receives commercial benefits out of the user's contents. Additionally, social media sites receive advertising remuneration from operating their services, indirectly gain the commercial benefits out of the user's contents.¹²⁶

However, the court also gives importance to the public interests as found in the below cases.

In *Kelly v. Arriba Soft Corp.*,¹²⁷ the court held that the internet company classified and categorized information that was considered as *Fair Use* because it enhanced the quality of information access and the copyright owner was able to opt out of its information by informing to the internet companies. The court concluded that Arriba's use of Kelly's images as thumbnails in its search engine is a fair use.

However, if the act increases the commercial benefits for the user, the fair use can be adopted in those circumstances as per below case.

In *McGraw-Hill Cos., Inc. v. Google*,¹²⁸ the court held that Google did not detriment the author's market in the course of displaying. Conversely, the figure of author's income dramatically increased in comparison to those of 2007.

It is possible to assume that author would give the licensing to Google for the purpose of publishing. More importantly, Google may raise the *Fair Use* as its excuse for the fact that it made the copyrighted work available for the public for access. This resulted in the expansion of copyrighted works and probably will be further developed.¹²⁹

¹²⁶ Bluemoon. "What are different sources of revenues derived for Facebook?". available at <http://faceblog.in.th/2011/01/infographic-business-behind-facebook/>. (accessed July 15, 2016)

¹²⁷ *Kelly v. Arriba Soft Corporation*, 280 F.3d 934 (9th Cir. 2002) *withdrawn*, re-filed at 336 F.3d 811 (9th Cir. 2003).

¹²⁸ *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005).

¹²⁹ *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 & n.14 (N.D. Cal. 2004)

3.3 Implied copyright license

An implied license is an unwritten license which permits a party (the licensee) to do something that would normally require the express permission of another party (the licensor). Implied licenses may arise by operation of law from actions by the licensor which lead the licensee to believe that it has the necessary permission. Implied licenses often arise where the licensee has purchased a physical product of some intellectual property belonging to the licensor, or has paid for its creation, but has not obtained permission to use the intellectual property.

Example is like a person who purchases a record album does not explicitly purchase a right to perform that album by playing it on a record player, but this right is implied.¹³⁰

In *Effects Associates, Inc. v. Cohen*¹³¹ Cohen wrote, directed, and produced a horror movie. He hired Effects to film some special effects to be edited into the movie. The deal was made orally, and there was no discussion of who would retain the copyright on the special effects footage. Cohen was unhappy with Effect's work and paid them only half the amount he'd agreed to, although he used the footage in his movie anyway. When the movie was released, Effects sued for copyright infringement. Effects argued that there was no written agreement, and no assignment of rights. Copyright Act 1976 Section 204(a) requires that all assignments of copyright must be in writing. Cohen argued that regardless of what the copyright law says, the industry standard in the movie business was to have oral agreements. The Appellate Court found that Section 204(a) only applies to an exclusive license (where Effects assigns all interest in the footage to Cohen). The Court found that

¹³⁰ An incident to the purchase of any article, whether patented or unpatented, is the right to use and sell it...." *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964) ("[I]t is fundamental that sale of a patented article by the patentee or under his authority carries with it an 'implied license to use.'" (quoting *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 456 (1873))).

¹³¹ *Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

a nonexclusive license to use the footage doesn't require a written agreement because it doesn't fall within Section 204(a).

From the above decision, it deems that the acceptance on the user's part to communicate the copyrighted work further on social media site needs not to be in writing as stated in most social media sites' Terms of Use that users grant them non-exclusive licenses.

The opt-out mechanism is a concept aimed to allow activities involving large numbers of copyrighted works which would require obtaining multiple individual permits in advance.¹³² This practical approach, the opt-out mechanism, shifts the burden to copyright owners, requiring them to inform the user of their refusal to the use of their work. In the absence of such notification, copyright owners are deemed to have permitted such use.¹³³

In *Field v. Google, Inc.*,¹³⁴ it is a case where Google Inc. successfully defended a lawsuit for copyright infringement. Field argued that Google infringed his exclusive right to reproduce his copyrighted works when it "cached" his website and made a copy of it available on its search engine. Google raised multiple defenses: fair use implied license, estoppel, and Digital Millennium Copyright Act safe harbor protection. The court granted Google's motion for summary judgment and denied Field's motion for summary judgment. Courts usually do not require a copyright holder to affirmatively take steps to prevent infringement. In this case, however, the court found that the plaintiff had granted Google an implied, nonexclusive license to display the work because of Field's failure in using meta tags to prevent his site from being cached by Google. This could reasonably be interpreted as a grant of a license for that use and so the courts held that a license for Google to cache the site was implied because Field failed to take the necessary steps when setting up his website.

¹³² Michael R. Mattioli, *Opting Out: Procedural Fair Use*, 12 VA. J. L. & TECH. 3, 23-24, 29 (2007).

¹³³ *Id.* at 4.

¹³⁴ *Field v. Google, Inc.*, 412 F.Supp. 2d 1106 (D. Nev. 2006).

From the act that users do not employ Privacy Setting with their account, (comparing as above case that Field's failure in using meta tags to prevent his site from being cached by Google) and also in the context of sharing technology of social media sites, which the users should realize that their works would be disseminated further, it could constitute an implied license on the user's part for other persons, including social media site, to disseminate/use their works. Also, Copyright Act B.E. 2537 does not state the form of licensing agreement to be in written format. This poses the threat to the copyright owner that their contents could be exploited as far as public perceive the objective of employing the social media site in their daily life.

3.4 Jurisdiction of Disputes Regarding Social Media Sites and Its Contents

The social media sites operate through internet. People must connect to the internet before employing social media sites' services. Due to boundless nature of communication made through internet, the disputes may arise in any places of the world. The competent court which can preside over the case, or the court which has jurisdiction over the case is another issue to take into consideration.

According to Section 2 of Civil Procedural Code B.E. 2558, it reads that

“No plaint may be submitted to a Court, unless:

(1) Having regard to the nature of the plaint and the grade of the Court, it appears that such Court is competent to try and adjudicate the case under the provisions of law governing the organization of Courts of Justice, and;

(2) Having regard to the plaint, it appears that the case is within the territorial jurisdiction of such Court under the provisions of this Code governing venue and also under the provisions of law fixing the limits of the territorial jurisdiction of Courts.”

According to Section 4 of Civil Procedural Code B.E. 2558, it reads that

“Unless otherwise provided by law.

(1) The plaints shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled or to the Court within the territorial jurisdiction of which the cause of action arose, whether the defendant shall have domicile within the Kingdom or not.

(2) The request shall be submitted to the Court within the territorial jurisdiction of which the cause of action arose or to the Court within the territorial jurisdiction of which the applicant is domiciled.”

The law governing the organization of Courts of Justice, different Acts establishing Specialized Courts, and Civil Procedural Code must be taken into account upon deciding over the court of jurisdiction. Section 4 of Civil Procedural Code B.E. 2558 stipulates that a plaintiff can submit a case to the Court within the territorial jurisdiction of which the defendant is domiciled or to the Court within the territorial jurisdiction of which the cause of action arose, regardless of whether the defendant shall have domicile within Thailand.

Involving the court of which defendant is domiciled, Section 37 of Civil and Commercial Code B.E. 2535 is considered if the defendant is a natural person. It dictates that

“The domicile of a natural person is the place where he has his principal residence.”

If the defendant is a juristic person, Section 68 of Civil and Commercial Code B.E. 2535 dictates that

“The domicile of a juristic person is the place where it has its principal office or establishment, or which has been selected as a special domicile in its regulation or constitutive act.”

Apart from this, Section 3 (2) (a) (b) of Civil Procedural Code B.E. 2558 dictate that

“For the purpose in submission of the plaint :-

(1)...

(2) In case of the defendant is not domiciled within the Kingdom,

(a) if the defendant is ever domiciled at any place of the Kingdom within the prescription of two years before the date of submitting the plaint, it shall be deemed that such place is domicile of the defendant,

(b) if the defendant carries on or ever carried on the whole or some part of transaction within the Kingdom, irrespective of himself or agent or by having any person for being in continuance with such transaction within the Kingdom, it shall be deemed that the place used or ever used to carry on such transaction or continuance, or the place which is residence of the agent or continuous person in the date of submitting the plaint or before such prescription of two years, is domicile of the defendant.”

The court of which the cause of action arose means the court of which the origin of dispute arose and entitled the plaintiff to file a suit. If a tort action is being pursued, the cause of action arises where the tort is taken place. If breach of contract action is being pursued, the cause of action arises where the contract is made and breached.

According to Section 4 ter of Civil Procedural Code B.E. 2558 states that

“The other plaint as provided other than the Section 4 bis, which the defendant is not domiciled within the Kingdom and the cause of action is not arisen

within the Kingdom, if the plaintiff has Thai national or is domiciled within the Kingdom, it shall be submitted to the Civil Court or to the Court within the territorial jurisdiction of which the plaintiff is domiciled....”

Upon considering the jurisdiction as stated in Civil Procedural Code B.E. 2558, the author opines that if an action is pursued against the social media sites which are ordinarily in the form of juristic person, Section 68 of Civil and Commercial Code B.E. 2535 must be taken into consideration. That means the user can file a suit to the Court within the territorial jurisdiction of which the social media site has its principal office or establishment, or of which the social media site has selected as a special domicile in its regulation or constitutive act.

On the alternative, the user can file a suit to the Court within the territorial jurisdiction of which cause of action arose. According to Supreme court’s judgments, the cause of action arose where the computer screen is turned on and the disputed contents are found.

Aside from this, if the social media site is not domiciled within the Kingdom or the cause of action is not arisen within the Kingdom, Section 4 ter or Section 3 of Civil Procedural Code B.E. 2558 should be considered before filing an action against the social media site.

CHAPTER 4

ANALYSIS OF LEGAL APPROACHES APPLIED WITH COPYRIGHT OWNERSHIP IN SOCIAL MEDIA ACCOUNT AND ITS CONTENTS

Nowadays, social media sites become very famous, such as Facebook, Instagram, Twitter. etc. These social media sites disseminate users' copyrighted contents in many forms, such as messages, data, photos, etc. These disseminated copyrighted contents of the social media users are protected under Copyright Act B.E. 2537. The problem arises from the implicit attempt on the social media sites' part to become joint copyright owners or licensees of the user's contents. These attempts can be seen from their Terms of Services forcing users to grant license or transfer rights in copyrighted contents to social media sites. The author then analyzes whether the social media sites can obtain copyright ownership or licensee through their Terms of Services or not. If not, the author then analyzes further whether there are any other possible approaches to enable the social media sites to obtain copyright ownership or license in the users' contents, whether by approaches relating with contract laws or approaches relating with copyright laws.

4.1 Terms of Use of Social Media Sites

When the social media sites stipulate their Terms of Use to force their users to transfer or grant rights in contents to the social media sites, this act seems to be the attempts of the social media sites to become joint copyright owners of the contents with their users, although the user is actually and normally the copyright owner. The user is the person who creates the contents on his/her own labor and therefore he/she should be the copyright owner. Although the users receive the benefit from the digital space and tools of the social media site, the space and tools provided by the social media site are not the factor of acquisition of copyright ownership in users' contents. Social media sites are merely the space and tool provider for users to share digital copyrighted contents and do not by all means assist the users to create

the copyrighted work, therefore the social media sites cannot be the joint creators or owners of the copyrighted work with the users. The author must be the person who dedicates to the copyrighted work his/her knowledge, skills, capabilities, intelligence and the modest quantum of creativity.

The author is analyzing in the next part whether the social media sites can obtain copyright ownership or some rights through their Terms of Use or not. Clicking “I accept” on social media sites’ Terms of Use forcing their users to transfer or grant rights in contents to the social media sites is considered as **acceptance on the users’ part to transfer/ assign ownership** in copyrighted contents to the social media sites **or acceptance on the users’ part to license the copyright** to the social media sites or not. The Terms of Use is one type of contracts, therefore the author is analyzing the issues of formation of contract and validity of contract as followings.

4.1.1 Issue of Formation of Contract

A contract is a multilateral juristic act which is formed by two or more parties’ expression of their intentions. One party expresses his/her own intention as an offer to the other party. In the offer, the party will include information or details as he/she desires in hope for the other party to agree. The other party will then express his/her intention whether to accept the offer or not. If the offer and the acceptance are corresponding in all details, then the contract is formed.

When social media sites impose their Terms of Use, it is compared as social media sites are offering their users to agree or not to agree with the details in their Terms of Use. If the users click “I agree” and proceed to use social media sites’ service, then it deems that the users accept implicitly with the offer in their Terms of Use. Finally, the contract is formed between the social media sites and their users as their offer and acceptance are corresponding without further request from the users to amend the Terms of Use.

4.1.2 Issue of Validity of Contract

The acceptance by users in the Terms of Use offered by social media sites is considered as forming a contract between the social media sites and users. Both parties have expressed their intentions towards each other. The intentions

expressed to accept this Terms of Use are identical with intentions expressed to accept the Clickwrap License Agreement. If the users click “I agree” and proceed to use social media sites’ service or services provided by the other party of Clickwrap License Agreement, then it deems that the users accept implicitly with the offers in the social media sites’ Terms of Use or terms in the Clickwrap License Agreement respectively. The only option available to refuse the Terms of Use or terms in the Clickwrap License Agreement is not to use their services. The users have opportunity to read and understand the entire Terms of Use or Clickwrap License Agreement before clicking “I accept”. After clicking “I accept” and using their services, the contract is already formed between the social media site and the user. The validity of contract is another factor to consider and analyze.

With the situation that the users cannot argue with/negotiate the offers the social media sites made, they can merely agree/accept the Terms of Use. If the users do not agree/accept the Terms of Use, the users cannot use the social media sites’ services. This is similar with the situation of Clickwrap License Agreement. Therefore, the intentions expressed by both parties of the contract should be taken into consideration to determine the validity of contract. However, the intention is inside the mind of the parties. Nobody can tell the intention of the user who expresses in order to use the social media sites’ services whether the user’s intention would like to actually bind with the Terms of Use. This intention can be considered as a “concealed intention” pursuant to Section 154 of Civil and Commercial Code B.E. 2535. Even if the sender’s intention is not to bind according to what the sender expresses, the sender’s expressed intention cannot be void. Therefore, the user expresses the intention to accept the Terms of Use, even if the user does not want to bind with such Terms of Use, the user’s expressed intention is valid. The actual intention is kept in the mind of the sender or user only and nobody can realize that actual intention. Actual intention does not ruin the validity of the expressed intention. Except that the social media site (the receiver of the intention) comes to know the actual intention of the user, then the user’s expressed intention is null and void. In this case it is not possible that the social media site comes to know the actual intention of the user, the expressed intention of the user to accept the Terms of Use is valid.

For the issue of expression of intention by mistake in the essential element of juristic act or contract, we can see that the user's expression of intention is a juristic act. The essential element of this juristic act is the terms and conditions imposed in the Terms of Use of social media site which the user must understand thoroughly before expressing the intention to accept them. If the user expresses the intention by mistake in the essential element of the Terms of Use, then that intention is null and void pursuant to Section 156 of Civil and Commercial Code B.E. 2535.

The possible mistake may cause from that the user misunderstands the Terms of Use or the user may not understand the Terms of Use at all due to the different language. The mistake in the essential element of the contract to void the contract must be to the extent that if that mistake is not present, the sender will not express intention to accept that juristic act or contract. The user must make mistake in the details of the Terms of Use of social media site to the extent that if that mistake is not present, the user will not accept such Terms of Use.

Supreme Court Judgment Number (Deka Court Judgment Number) 5007/2542, a buyer made a Land Sale-and-Purchase Agreement with a seller with the mistake that the plot of land is a public property which can have a title-deed later. During the execution of the agreement, the seller lives in that plot of land in a permanent residence with a legal House Registration Certificate. Supreme Court ruled that the contract is void due to the mistake of the buyer in the essential element of the contract.

If the user expresses the intention with mistake in the Terms of Use, the acceptance in the Terms of Use is void because the actual intention is different than the expressed intention. It results that the social media site's Terms of use does not bind the user. However, if the user expresses the intention with mistake in essential element of the Terms of Use with gross negligence, the user cannot raise the mistake as an excuse to void the Terms of Use. The mistake with gross negligence equals to wilfull mistake and the law does not protect a person who expresses the intention with mistake with gross negligence.

Such gross negligence is due to that fact that the user does not exercise even a little care before accepting the Terms of Use. The user accepts the Terms of Use without reading or attempting to understand the details of Terms of Use

at all. Therefore, before expressing the intention to accept the Terms of Use, the user should employ care and pay attention to the details of Terms of Use specified by the social media site. The user cannot claim later that he/she does not agree with the Terms of Use so the Terms of Use does not bind him/her.

With the aforementioned reasons, after the user accepts the Terms of Use, the user must be binding with the agreed Terms of Use, although most of the users accept the Terms of Use without the intention to be binding or without paying attention to the details of Terms of Use. They would merely like to use the social media site's service, however, such is the internal intention of the user only, the social media site does not realize it. The user cannot raise this as excuse so that the user does not bind with the agreed Terms of Use. As we can see from many court judgments which ruled that this type of agreement/contract is valid and be enforceable same with other ordinary types of agreement/contract. In the case that the user can agree without reading the details of Terms of Use, it means that the user has already had the opportunity to read the details of Terms of Use before accepting the Terms of Use.

This type of agreement/contract is enforceable, however it does not always mean that the parties must be binding with the entire Terms of Use because all the terms and conditions are set forth only by the social media site. The user cannot argue or amend the Terms of Use. To be fair for the disadvantageous user, the author will analyze the Terms of Use in the aspect of Unfair Contract Terms.

4.1.3 Issue of Unfair Contract Terms Act B.E. 2540

Social media site's Terms of Use is a written contract with the pre-specified terms and conditions. The party who desires to enter into the contract cannot change or amend all the details of the contract. The party may only take or leave the offer in the contract. This type of contract is called an adhesion contract (standard form contract) pursuant to Section 4 of Unfair Contract Terms Act B.E. 2540.

In the adhesion contract, the drafting party will always have the terms and conditions to be unreasonably favorable to oneself than the other party of the contract. Most of the social media sites have more bargaining power, and they exploit this opportunity to enter into contract with the user who has always less bargaining power. The social media sites would specify the written Terms of Use in advance on their own and aim to use it with the user without further bargain or negotiations. The

users may realize well that they are disadvantageous, however they must agree to enter into contract if they would like to use social media sites' service. Finally, the injustice may exist in this situation.

When it deems that the social media site's Terms of Use is an adhesion contract and the drafting party takes advantage over the other party of the contract too unreasonably, the court may use discretion to adjust unfair contract terms to be enforceable only as reasonably and equitably as the case may be. The Terms of Use which force the user to transfer or assign all rights in the contents to the social media site are considered as unfair contract terms and the social media site takes advantage over the user too unreasonably. The user is the author of the copyrighted contents who employs own labor to create the contents, therefore the user should have exclusive rights over own contents. Even the user exploits the space and tools provided by the social media site to share the contents, this factor does not constitute the social media site to have ownership in the copyrighted contents with the user. It cannot be deemed that the social media site jointly creates the copyrighted contents with the user. Some of copyrighted contents are not merely used to share by the social media site with the other users, but some other users exploit commercial benefits out of the shared copyrighted contents. The Terms of Use is therefore considered to be used to take advantage over the user too unreasonably.

Social media sites issue this Terms of Use so that their operation does not cause a copyright infringement of the user's contents. We can see that the social media sites are employing the approaches relating with contract law for their benefits. However, Section 17 of Copyright Act B.E. 2537 specifies that the assignment of copyright by other means except by inheritance must be made in writing with the signatures of the assignor and the assignee. The social media sites' Terms of Use do not comply with the format specified by Copyright Act B.E. 2537, even if we can consider that the assignment is already made in writing according to Electronic Transactions Act, it lacks signature of the user. The Terms of Use is not considered as assignment of copyright ownership.

4.2 U.S. and Thai Copyright Laws

4.2.1 Copyright Acquisition and Copyright Protection

Different contents circulated on the social media sites, whether writing, pictures, sounds, paintings, photos, videos, etc, are mostly protected under Section 6 of Copyright Act B.E. 2537 and Section 102 of US Copyright Act 1976. Copyright ownership is derived in many ways, either as the first author¹³⁵ or as other statuses.¹³⁶ The author must be the person who originally creates the work with his/her own labor and creativity. The protection of two similar copyrighted works may be possible as long as those two works are created independently. There is later developed concept that the protected work must have modest quantum of creativity. However, the work is not required to be elegant or has much artistic value. The photos of the movie stars or the products images circulated on Instagram are deemed valuable.

The protection of copyright is automatic and the registration is not required for the protection. However, the acquisition of copyright between Thailand and US. is different in that the protected work pursuant to US copyright law must be fixed in material or has material evidence. The contents on social media sites can be traced back in the server and therefore it deems that the contents are fixed in the material or has material evidence.

In terms of Copyright Act B.E. 2537, Terms of Use do not contain signatures of both parties, Terms of Use may not be considered as assignment of copyright ownership.¹³⁷ Even though Electronic Transactions Act provides that Terms of Use may deem valid as the agreement is already made in writing electronically, the author opines that lack of the assignor's signature on the user's part would invalidate the assignment.

Also the same principle applies with US copyright law, Section 204 of US Copyright Act 1976 dictates that transfer of copyright ownership, other than by

¹³⁵ Copyright Act B.E. 2537 sec. 8, US Copyright Act 1976 sec. 102 (a)

¹³⁶ Copyright Act B.E. 2537 sec. 9-14.

¹³⁷ Copyright Act B.E. 2537 sec. 17, US Copyright Act 1976 sec. 204

operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Upon the above situation, the ownership still belongs to the user and is not transferred to the social media sites.

Upon considering the above methods of copyright acquisitions, the author does not agree that the social media sites could by all means exercise the copyright owner's exclusive rights with the user. Moreover, the social media sites could not claim that the users employ their space and tools to create the work and therefore the act would entitle the social media sites to acquire the joint copyright ownership with the user. There are no such provisions which could support the social media sites' claim.

Copyright Act B.E. 2537 entitles the copyright owner/user with the exclusive rights in reproduction and communication of their work to public, license and assignment of his work.¹³⁸ Copyright Act 1976 entitles the copyright owner/user with the exclusive rights.¹³⁹ Only the copyright owner has the exclusive rights to act, authorize other persons to act, or prohibit other persons to act against the following exclusive rights of the owner.

The act of social media site in exploiting or availing the user's contents deems copyright infringement of licensing right of the copyright owner.¹⁴⁰ The act that user disseminates other user's contents by clicking "LIKE" or "SHARE" is considered as copyright infringement of reproduction as well as communication to public or public display rights of the copyright owner under Thai and US copyright laws.

4.2.2 Exception of Copyright Infringement

Fair use in Thai Copyright law is based on two prerequisite principles, that the act does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright. These fair uses do not provide exceptions for copyright infringement in the case of social media sites which share or exploit the

¹³⁸ Copyright Act B.E. 2537 sec. 15.

¹³⁹ Copyright Act 1976 sec. 106.

¹⁴⁰ Copyright Act B.E. 2537 sec. 15 (5).

user's copyrighted contents. Section 32 paragraph 2 (2) allows the use for personal benefits and only among family members and close relatives, exclusive of friends. The social media sites' acts unreasonably prejudice the legitimate right of the owner of copyright. Although Section 32/3 regarding liability exemption of ISP was introduced by Copyright Act. B.E. 2537 as amended by Copyright Act. (No. 2) B.E. 2558, the exemption tends to be applied with those ISPS who do not control, initiate, or instruct the copyright infringement.

According to US Copyright Act 1976,¹⁴¹ there are four factors to analyze whether such use is a fair use or not: 1) Purpose and Character of the Use 2) Nature of the Copyrighted Work 3) Amount and Substantiality of the Portion Used and 4) Effect of the Use.

The U.S. court judgments reflected that the judge's consideration was given on the effect of the use upon the potential market, and whether the act involves a commercial purpose. If the act impacts on the exploitation of the copyright owner in the potential market, or involves the commercial benefits, the fair use cannot be adopted in those circumstances. The author opines that if the user posts some valuable copyrighted materials through social media sites and they were exploited by some other users or by social media sites without authorization, such act of copyright infringement cannot be compromised with fair use, if it is proved that the act affects with the exploitation of the copyright owner in the potential market or the infringer receives commercial benefits out of the user's contents. Additionally, social media sites receive advertising remuneration from operating their services, indirectly gain the commercial benefits out of the user's contents.¹⁴²

¹⁴¹ US Copyright Act 1976 sec. 107.

¹⁴² Bluemoon. "What are different sources of revenues derived for Facebook?". available at <http://faceblog.in.th/2011/01/infographic-business-behind-facebook/>. (accessed July 15, 2016)

4.3 Implied copyright License

The law is silent on the format of licensing, therefore licensor and licensee do not need to do licensing in writing or have evidence in writing.¹⁴³

Implied copyright license is a concept of voluntary license¹⁴⁴ and is valid on the copyright license. US Court ruled that where the copyright owner employs to opt-out any mechanism provided to reserve their exclusive rights, it deems that copyright owner waive such exclusive rights.

From the act that users do not employ or opt-out Privacy Setting with their account, and also in the context of sharing technology of social media sites, which the users should realize that their works would be disseminated further, it could constitute an implied license on the user's part for other persons, including social media site, to disseminate/use their works further.

The communication of copyrighted contents to public through techniques set up by the social media site as aforementioned is not a copyright infringement because, according to court judgements, it deems that the user authorizes implicitly for the social media site to communicate the copyrighted work to public by not setting up the privacy. However, if this interpretation is applicable in all situations and for all the copyrighted contents, the rights of the copyright owner in the copyrighted contents are very much affected. If the implicit authorization is perceived by all the users that they can perform whatever act with the shared copyrighted contents on the social media sites, any persons can exploit benefits out of the shared copyrighted contents freely as if there is no copyright ownership in that work. This situation poses an important problem because the author's rights are not protected. This problem can be cured by the amendment of copyright license agreement clause as

¹⁴³ Copyright Act B.E. 2537 sec. 15(5).

¹⁴⁴ Newman Christopher, *What exactly are you implying?: The Elusive Nature of the Implied Copyright License*, 32 **CARDOZO ARTS & ENTERTAINMENT L. J.** 501-559 (2014).

“The copyright license agreement must be made in writing with the signatures of the licensor and the licensee.”

4.4 The Enterprise and Regulatory Reform Act 2013

For the unidentified works or orphan works, it poses an important problem which requires a solution because Thai copyright law does not have clear provision protecting this type of the unidentified work. US attempted to enact the law protecting the unidentified work, however its attempt has failed. Later, England has been successful in enacting such law, known as The Enterprise and Regulatory Reform Act 2013.

The Act was enacted to protect the unidentified work because many copyrighted contents disseminated through many websites, either Facebook or Instagram, etc. are exploited commercially without permission from the copyright owner. The problem arises because those copyrighted contents do not have the information of copyright owner attached. The websites always delete this information, therefore public is not informed of who owns those copyrighted contents.¹⁴⁵ The Act was enforced so that the outsiders will not exploit the created work without authorization of the copyright owner. The Act stipulates that the authorization of the copyright owner must be obtained for the use of the copyrighted work. This Act provides more protection for copyrighted work than those stated in Berne Convention. The reason English government enacted this law was that Instagram amended the Terms of Use regarding the copyright ownership of photos uploaded into Instagram by the user. Instagram’s Terms of Use imposed that copyright ownership of those uploaded photos belong to Instagram. The oppositions from many users are against

¹⁴⁵ Cox, D. J. “*UK Gov Passes Instagram Act: All your pics belong to everyone now!*”, 2013. available at <http://www.naturalexposures.com/corkboard/uk-gov-passes-instagram-act-all-your-pics-belong-to-everyone-now/>.

this amended Terms of Use, therefore Instagram's attempt to employ this amended Terms of Use was not successful.¹⁴⁶

The Enterprise and Regulatory Reform Act 2013 or Instagram Act was enacted to cope with this problem resulting of Instagram's amendment of Terms of Use. The Act demands that independent governmental entity is established to search for the copyright owner of the orphan work. The entity must coordinate between the copyright owner and a person desiring to use the copyrighted work so that the authorization is duly obtained before using of such copyrighted work. The Act stipulates the procedures and details of licensing, such as procedure of searching the copyright owner, royalty fees, etc.¹⁴⁷ However, the copyright protection is still automatic, there is no need for any registration nor notification with the government authorities. The protection according to Enterprise and Regulatory Reform Act 2013 may give too much burden to the government in establishing the independent entity searching for the copyright owner. The Act may also deem to protect the private party too unreasonably because it should be the copyright owner's duty to maintain the protection of his/her copyrighted work with the changing technology.

The Act may give better protection to the copyrighted work disseminated through online social networks because the outsiders can know the actual ownership, obtain authorization from the copyright owner and can then use the work accordingly. It means that any person who desires to disseminate or share the orphan work must always obtain the authorization from the copyright owner. The Act would totally conflict with the nature of online social networks which are developed for the quick dissemination or sharing of news and information. When authorization of the copyright owner must always be obtained before sharing any work, such online social

¹⁴⁶ *Id.*

¹⁴⁷ The Enterprise and Regulatory Reform Act 2013 Section 77 Licensing of copyright and performer's rights.

networks are useless and therefore the Act is not effective for the social media sites' or online social networks' operations.



CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Social media site's Term of Use is an approach related with contract laws. Although it is enforceable according to contract laws, the Terms of Use is considered to be unfair for the users. The Term of Use favors on social media site too unreasonably over the users. According to Unfair Contract Terms Act B.E. 2540, the Terms of Use is enforceable as reasonably and equitably as the case may be. The Terms of Use which force the user to transfer or assign all rights in the contents to the social media site are considered very unfair as the social media sites do not jointly create the contents nor invest any labor to create the work. However, if such Terms of Use is considered as an assignment of copyright ownership, it does not comply with the format specified by Section 17 of Copyright Act B.E. 2537 and therefore Terms of Use is null and void pursuant to Section 152 of Civil and Commercial Code B.E. 2535.

The copyrighted contents posted on the social media sites belong to the user, the right of communication of such copyrighted contents to public should also belong to the user, except that the user authorizes for the communication of the works to public implicitly. Upon considering the operations of social media sites, the techniques of clicking "Like" and "Share" by our friends is considered as "communication of copyrighted work to public" because those techniques make the work available to public. However, it deems that the user authorizes implicitly for other persons to disseminate the work further as all the users of online social networks should realize that everything released to social media sites is ordinarily forwarded further and further as if the user donates the work to public domain. The way that users do not employ Privacy Setting with their account can be considered as opt-out technique as recognized in US court case. The users who do not employ Privacy

Setting deem to allow the social media sites to communicate their work further and the act constitutes implied license for social media sites.

However, if it deems that all copyrighted contents circulated on social media sites are of the public domain which any persons can exploit or receive commercial value, the act would completely undermine the rights of the user (the copyright owner), although most users do not have intention to obstruct other persons to exploit their work. Some users exploit other persons' copyrighted works in a commercial manner and receive income/profit out of other persons' works. If those copyrighted contents are not well protected, the copyright owner will lose the rights he/she deserves.

The Enterprise and Regulatory Reform Act 2013 was enacted in England to resolve the problem arising from Instagram's amended Terms of Use which imposed that all copyright in the users' uploaded photos using its filtering functions belong to Instagram. The author opines that the Act is not suitable with Thailand as the government must establish the independent entity to search for copyright owner. More obligations and costs must be borne by our nation, and the process of licensing will be more unnecessarily complex. Although the online disseminated contents are automatically protected by copyright laws, some users do not like to reserve their rights according to copyright law or they would like their copyrighted contents to be disseminated further. Accordingly, the Enterprise and Regulatory Reform Act 2013 is deemed to provide more protection to copyrighted work than necessary. Once a user opts the technology spreading his/her own copyrighted work, he/she should be aware of the consequences of copyright protection towards the disseminated copyrighted work. A solution should be the one which the protection pursuant to copyright law is not missing and at the same time it must be appropriate with the modern sharing technology, such as social media sites. Moreover, it should be the duty of private party to maintain the copyright protection of their copyrighted work with the advancement of changing technology, and the government should merely guarantee the rights and actions of the private party.

5.2 Recommendations

The communication of copyrighted contents to public through techniques set up by the social media site as aforementioned is not a copyright infringement because, according to court judgements, it deems that the user authorizes implicitly for the social media site to communicate the copyrighted work to public by not setting up the privacy. The Privacy Setting is considered as a mechanism to communicate that the copyright owner waives their exclusive rights in the work or not. If the user does not employ Privacy Setting, it means that the user already waives exclusive rights in the work. Therefore the act of sharing or exploiting the work by other persons including the social media site would not constitute copyright infringement. The social media site can exercise the copyright owner's exclusive rights in the content of the users who do not employ Privacy Setting.

For the clear understanding and avoiding the implied license claimed by the social media sites to exercise the copyright owner's exclusive rights over the user's contents, the author recommends that

To propose to amend the Copyright Act B.E. 2537, Section 15 to be

“...

(1)

...

(5) licensing the rights mentioned in (1), (2) or (3) with or without conditions provided that the said conditions shall not unfairly restrict the competition. Whether the conditions as mentioned in sub-section (5) of the paragraph one are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.

The copyright license agreement must be made in writing with the signatures of the licensor and the licensee”

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