

THE LEGAL MEASURES FOR PROTECTING THE RIGHT TO PRIVACY IN CASE OF
UNSOLICITED ADVERTISEMENT VIA SOCIAL MEDIA : A COMPARATIVE STUDY OF
THE US, UK AND THAI LAWS

มาตรการทางกฎหมายในการคุ้มครองสิทธิในความเป็นส่วนตัวจากการโฆษณา
โดยมิได้เรียกร้องทางสื่อสังคมออนไลน์ : ศึกษาเปรียบเทียบกฎหมาย
สหรัฐอเมริกา สหราชอาณาจักร และ ไทย

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Abstract

Apart from using media websites as medium of personal communication by individuals, business entities also use social media websites as a tool for advertising their products and services. Such advertising which comprises of several form including text, images and graphic can directly reach to an individual, especially a consumer who uses Smartphone. However, such advertisement can lead to the invasion of privacy for the recipient who does not consent to receive such advertisement. Hence, this research aims to study the application of related Thai law to the case of violation of privacy by initiating advertisement through social network websites without consent or “unsolicited advertisement”. Thus, this research is qualitative and information is collected by analysis of documents. The comparative analysis of Thai laws and US laws is applied as part of content analysis. The findings of this research indicate that there are no specific laws in recent Thai legal system to protect the right of privacy in case of unsolicited advertisement through social network websites. By contrast, there are related specific laws in the US which can be applied to protect the privacy from unsolicited advertisement. Although there are currently various laws which can be applied to protect such right, this research indicates that the problems of content, element, and scope of such laws make them inappropriate to be applied to protect the right to privacy in case of unsolicited advertisement. Consequently, this research

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proposes suggestions such as enacting a specific laws and amending the existing laws in order to protect the right of privacy in case of unsolicited advertisement through social network websites.

Keywords : Unsolicited advertisement, Right to privacy, Spam, Social media

บทคัดย่อ

ในปัจจุบันการใช้สื่อสังคมออนไลน์ (Social Media) ในลักษณะของการสื่อสารส่วนบุคคลระหว่างบุคคลทั่วไปเกิดขึ้นอย่างแพร่หลาย นอกจากนี้ภาคธุรกิจก็มีการนำสื่อดังกล่าวมาใช้ในการประกอบธุรกิจ เช่น การโฆษณาขายสินค้าหรือบริการต่าง ๆ ในการโฆษณานั้นอาจประกอบด้วยรูปแบบหลากหลายเช่น ตัวอักษร ภาพถ่าย ภาพกราฟิก ซึ่งข้อมูลดังกล่าวสามารถส่งไปยังผู้บริโภคได้อย่างง่ายดายและรวดเร็วทางสื่อสังคมออนไลน์ที่สามารถเข้าถึงได้จากโทรศัพท์เคลื่อนที่ของผู้บริโภค อย่างไรก็ตาม ในอีกแง่หนึ่งการโฆษณาดังกล่าวส่งผลกระทบต่อสิทธิส่วนบุคคลของผู้รับการโฆษณาซึ่งอาจมิได้มีความประสงค์และความยินยอมที่จะรับโฆษณาดังกล่าว ดังนั้น บทความวิจัยนี้จึงมุ่งศึกษาการปรับใช้กฎหมายไทยที่เกี่ยวข้องกับการรบกวนความเป็นส่วนตัวของผู้ใช้งานสื่อสังคมออนไลน์จากการโฆษณาที่เกิดขึ้นโดยผู้รับการติดต่อมิได้เรียกร้อง (Unsolicited Advertisement) สำหรับวิธีการศึกษาวิจัยนั้นใช้วิธีการวิจัยเชิงคุณภาพโดยการวิเคราะห์เนื้อหาข้อมูลอันประกอบด้วยกฎหมายที่เกี่ยวข้องทั้งของสหรัฐอเมริกา สหราชอาณาจักร และไทย โดยมีการวิเคราะห์เปรียบเทียบกฎหมายของประเทศดังกล่าว ผลการศึกษาชี้ให้เห็นว่าในปัจจุบันไทยยังไม่มีกฎหมายเฉพาะในการคุ้มครองสิทธิของผู้ถูกรบกวนจากการติดต่อโฆษณาทางสื่อสังคมออนไลน์ อย่างไรก็ตาม มีกฎหมายหลายฉบับที่อาจนำมาปรับใช้ได้ แต่จากการศึกษาพบว่ากฎหมายดังกล่าวนั้นยังมีปัญหาและข้อจำกัดอีกหลายประการ ทำให้ไม่สามารถนำมาปรับใช้คุ้มครองสิทธิในความเป็นส่วนตัวจากการโฆษณาโดยมิได้เรียกร้องทางสื่อสังคมออนไลน์ดังกล่าวได้อย่างเหมาะสม ดังนั้น ผู้เขียนจึงได้นำเสนอข้อเสนอแนะ เช่น การปรับปรุงแก้ไขกฎหมายเดิมที่มีอยู่ และการตรากฎหมายใหม่เพื่อคุ้มครองสิทธิส่วนบุคคลของผู้ถูกรบกวนต่อไป

คำสำคัญ : การโฆษณาที่มิได้เรียกร้อง สิทธิส่วนบุคคล สเปน สื่อสังคมออนไลน์

Introduction

Instead of using traditional mass media as a channel for advertising products and services, business entities increasingly use personal communication such as telephone, mobile phone, and electronic mail, to advertise. The making of personal contact by advertisement without consent from a recipient can be referred to as “unsolicited advertisement”. In the context of social network websites, the unsolicited advertisement can be found in several social network websites. The advertisement comes in many forms including images, text, graphic, video clips, etc. From legal perspective, the initiation of unexpected communication to other person without consent could lead to an issue of privacy invasion.

According to international law perspective, the right to privacy is recognized as basic human rights. For example, Article 12 of the Universal Declaration of Human Rights provides that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...”. The similar principle can also be found in article 17 of the International Covenant on Civil and Political Rights which provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..”. Regarding laws at regional level, European Convention on Human Rights (ECHR) also provides in article 8 that “Everyone has the right to respect his private and family life, his home and his correspondence...” Although the recipient can ignore or delete such advertisement, the sending of unsolicited advertisement by itself is deemed as interference to the right of privacy. This is because, according to the fundamental concept of privacy, an individual has the right not to be contacted without his or her invitation.

With regards to Thai legal system, the privacy protection is generally stipulated in the Thai constitution. However, there is no specific law relating to the protection of privacy in case of unsolicited advertisement. By contrast, some countries have enacted specific law for protecting privacy which is threatened by unsolicited advertisement. This paper will focus on the related laws of the US and the UK

According to the development of US laws, unsolicited advertisement through email was recognized as an increasing problem by several states which enacted specific laws to regulate unsolicited email or “spam”. Apart from state law, federal government

also took action in 2003 when congress passed the “Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003” or “CAN-SPAM Act”. Similar to the anti-spam laws at state level, the CAN-SPAM, attempts to address deceptive marketing practices and impose header and content requirements on unsolicited email. (Moorefield, 1999) The regulatory approaches presently used in the laws of United States, both in federal and state level, can be classified in three categories; opt-out, filtering and blocking, and opt-in. (Sorkin, 2003)

Regarding the UK, the unsolicited contact via electronic method or “Spam” is regulated by specific law called “Data Protection Act” which reflects the data protection principles of the Directive 95/46/EC of the European Union. (Poullet, 2006; Birnhack, 2008). According to “fair and lawful principles of processing personal data” stipulated in this Act, the collection of personal data including personal contact details could only be done in compliance with the conditions required by this Act. Thus, the legal protection of personal data from unlawful collection could be deemed as a preventive approach to the unsolicited advertisement. Furthermore, the Privacy and Electronic Communications Regulations 2003 has also been enacted to regulate the unsolicited contact via electronic channel. This law generally prohibits the “transmitting or instigating unsolicited communications for the purposes of direct marketing”. Hence, specific laws regulating unsolicited advertisement via electronic channel can be found in both the US and UK.

Consequently, this research aims to study the application of US and UK laws relating to “spam” in order to conduct a comparative analysis to Thai laws. This could lead to the proposal of suggestions for Thai government in amending related laws and enacting new specific laws for protecting the right to privacy in case of unsolicited advertisement through social network websites.

Literature Review

The literature review includes the two main groups. Firstly, literatures relating to the right to privacy will be reviewed. Secondly, literatures relating to the legal protection of right to privacy in case of unsolicited advertisement will be generally

examined. Specifically, the literatures and legal principles of US and UK relating to unsolicited advertisement will also be reviewed.

The concept of right to privacy. First of all, the conceptual framework used for legal analysis of unsolicited advertisement in this paper is the right to privacy which can be considered from different perspective and context. As for the legal philosophy, the right to privacy derived from the idea of nature that described the property of the universe. (Minogue, 1978) As a result, individual's right is related to "natural right". In Roman era, there was a concept that each person has his own territory which can exclude other from any interference. (Wacks, 1989) With regards to religious perspective, right to privacy was developed from fundamental right associating to physical body to other aspects of social life. (Decew, 1997) Regarding political perspective, right to privacy in the initial stage is connected to the concept of human dignity which was claimed against the ruler of state. The proponent of right to privacy argued that power and authority of government were derived from people. (Orwin & Pangle, 1984) In addition, due to the fact that right to privacy is associated with an individual since a person was born, such right can also be considered as part of human right which is fundamental to human being. There is no requirement or condition for such right. (Donnelly, 1982)The right to privacy can be viewed from several dimensions e.g. right to self determination, right to communicate, right to life, right to create family, right to religion and political view.

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There are several dimensions of the right to privacy. Gavison (1980) introduced three aspects of privacy, i.e., secrecy, anonymity and solitude. Hendricks, Hayden and Novick (1990) found that right to privacy can be classified into several subcategories such as right to self-determination, right to communicate, right to family, right to life. Posner (1998) explained that there are two main aspects of privacy. The first one is the right to be left alone. The second one is the concealment of information. Basically, the collection of personal data without consent could be regarded as an invasion of privacy (Kanathip Thongreewong, 2014). Apart from the collection of information, there are several other methods relating to modern advertising practices which could also be regarded as invasion of the right to privacy, e.g. the tracking consumer by using technologies such as “cookies”, the initiating of unsolicited contact such as spam. (Hatcher & Edwards, 2009) Furthermore, right to privacy has dynamic character which can evolve according to other factors such as social, technological and cultural factor. Thus, the changing trend of human communication by using social media websites as a channel leads to the new claim of right to privacy (Kanathip Thongreewong, 2012)

As a result, the right to privacy could be considered as a legal basis for an individual to claim for the exclusion of unsolicited contact which is deemed as interference or invasion. The method of initiating unsolicited communication has been developed and changed due to the changing of technology. In the past, the unsolicited communication was mostly related to the use of telephone which can be called “cold calling”. However, the advancement of personal portable device which can connect to the internet has enabled other forms of unsolicited contact such as the use of social network websites to initiate advertisement to an individual.

Legal protection of right to privacy in case of unsolicited advertisement.

As for the literatures relating to the legal protection of right to privacy in case of unsolicited contact, there are several papers focused on the use of traditional method of communication ranging from the physical contact by person. (Ramsay, 1989) With regards to the use of medium for advertising, the telephone was one of

the most controversial issues in the context of unsolicited call. In the US, there were several debates in parliament in order to propose law relating to unsolicited phone call. Hollings (1991) argued that the unsolicited call interrupts people in any aspects of life such as waking them up, interrupting their dinner, forcing the sick and elderly out of bed. Pressler (1991) argued that, by comparing the unsolicited telephone call to advertisement on television, the people who watched television can turn to other channels but a phone call need immediate response. Consequently, unsolicited advertisement by telephone was considered as more privacy-threatened than mass media communication such as television and radio. Apart from unsolicited phone call, there were papers discussing the unsolicited facsimile (Broecker, 1990) In the context of information technology, scholars tended to focus on the unsolicited contact through electronic mail which is generally called "Spam". The unsolicited email which was sent for the main purpose of advertising product or service was considered as a threat to privacy and online communication. (Hinde, 2000) The "spam email" or un-requested commercial email could be regarded as international problems due to the fact that the origin of sending spam can be in different country from the place of receiving such email. Some countries have enacted laws to regulate spam email such as EU. (Edwards, 2005) In the context of social network websites, spam can be generally found in the form of advertising message and direct selling practices. (Kanathip Thongreewewong, 2010) Apart from the privacy invasion, spamming is also argued as a major threat to the formation of public trust in the internet (Wall, 2005)

In addition, literatures relating to the law of US and UK will be examined.

The relevant laws of the US. Regarding the US, several papers have demonstrated that the spam email can cause several other problems such as loss of bandwidth usage, increase cost of developing and maintaining filtering software. For example, ISPs spend significant resources implementing filtering mechanisms in their e-mail programs as a way to block spam (Rice, 2002) As Unsolicited email can cause problems in several aspects, some authors have developed an economic argument for regulating the sending of unsolicited email. (Khong, 2004) Unsolicited email could also be viewed as a kind of computer crimes. (Wallace, Lusthaus, & Kim, 2005) This is because unsolicited message or "spam" not only causes annoyance to receiver but it can

also be used to spread malicious software that can harm computer system. In addition, criminals could use spam for committing other computer crimes such as identity theft, fraud and scamming. The legal attempts of regulating unsolicited contact is evident by several laws. Initially, the law was enacted to regulate unsolicited telephone call, i.e., The Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227). This law was enacted in response to abuses by telemarketers, prohibits the sending of unsolicited advertisements to telephone facsimile machines. (Sorkin, 1997) Then, specific laws regulating electronic spam was enacted, i.e., the federal law (the CAN-SPAM Act) which can be interpreted to cover unsolicited advertisement through social network websites. Though the US enacted specific laws relating to unsolicited email in both federal and state level, there are still arguments concerning the problems in applying and interpreting such laws. Several scholars argued that such laws are still weak given the situation and technology of spamming. (Alongi, 2004). Some pointed out that the federal law is weaker than state laws. (Ford, 2005) In addition, some court cases relating to the interpretation of spam laws were argued to be an obstruction for the application of spam laws to protect the privacy of recipient. For example, Wong (2007) argued that court decision in “Omega World Travel, Inc. v. Mummagraphics” could substantially undermine regulatory uniformity by interpreting the preemption provision more narrowly and by enforcing the Act's content requirements more strictly. Some author also questioned the constitutionality of “Spam laws” (Samoriski, 1999). This is because the protection of privacy could affect other right recognized by constitution such as freedom of expression (Simon, 2004) Apart from specific law, both federal and state laws, there are other legal doctrine that can be applied to the case of unsolicited advertising. For example, Mossoff (2004) argued that Internet Service Provider (ISP) and other businesses could use nuisance law as a legal doctrine to sue spammers.

The relevant laws of the UK. With regards to the UK, the unsolicited contact via electronic method or “Spam” is regulated by specific law called “*Data Protection Act*” which is regarded as general law for protecting personal data in the UK. This law reflects the data protection principles of the Directive 95/46/EC of the European Union. (Poullet, 2006; Birnhack, 2008) The main principles of data protection

in this directive are, for example, personal data may be “processed” only if the data subject has unambiguously given his consent (Article 7). The “processing” of personal data is defined to include “collection, adaptation, alteration, use, disclosure...” (Article 2). Thus, the collection of contact details and uses them for sending unsolicited advertisement can be regarded as processing personal data which is basically prohibited without consent of data subject. According to “fair and lawful principles of processing personal data” stipulated in the Data Protection Act of the UK, the collection of personal data including personal contact details could only be done in compliance with the conditions required by this Act, for example, the consent of data subject is needed before collecting personal data. (Carey, 2009) Such principles are critical to the protection of privacy in case of unsolicited advertisement because the collection of personal data such as contact details like email address could be regarded as the first step of such advertisement. Some researches indicated that unsolicited commercial emails received by customers are caused by the registering and submitting of personal data to websites. (Borghini, Ferretti, & Karapapa, 2013) Thus, the legal protection of personal data from unlawful collection could be deemed as a preventive approach to the unsolicited advertisement. Apart from the laws relating to the collection of contact information, the *Privacy and Electronic Communications Regulations 2003* has also been enacted to regulate the unsolicited contact via electronic channel. This law stipulates that “*a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender*” (Section 22, Privacy and Electronic Communications Regulations) Hence, the UK laws cover both stages relating to unsolicited advertisement i.e. collecting of contact details and sending the advertisement.

To sum up, literatures indicate the application and interpretation of US specific laws in case of unsolicited advertisement through email and social network websites. As for the UK, there is also specific law regulating the collection and use of personal data for the purpose of using such data to initiate contact or make an

advertisement. In contrast, there are no specific laws in Thai legal system to regulate UK “unsolicited advertisement”. Consequently, more research could be conducted to address the legal problems of regulating unsolicited advertisement through social network websites in the context of Thai legal system. Thus, this research aims to study these problems in Thailand by comparing to the regulations of US and UK.

Methodology

This research is conducted with the aim to study the application and interpretation of laws in case of invasion of privacy by the unsolicited advertisement. Thus, this is qualitative research which examines related documents including laws, court cases, and opinion of legal scholars. Such documents are analyzed by content analysis method. In addition, the comparative analysis is done by comparing the content of Thai to US and UK laws.

Results and Discussion

1. The comparative analysis of Thai laws and the U.S laws indicates that in the US, there are both federal and state laws relating to “spam” which can be applied to the case of invasion of privacy by initiating unsolicited advertisement through social network websites. The CAN-SPAM Act which is the federal law to regulate unsolicited email has a scope to cover “Commercial electronic mail message” that is defined in article 3 (2) (A) as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service”. The court has interpreted the “electronic mail message” broadly to include electronic data transmitted through social media websites. Hence, the unsolicited advertising through social network websites is directly regulated by “spam law”. On the contrary, as for the existing Thai laws, there are no specific laws which can be directly applied to protect the privacy of person who is affected by unsolicited advertisement. Although there are several laws, e.g., the direct sell and direct marketing Act B.E. 2545, consumer protection Act B.E. 2522 and the computer related offence Act B.E. 2550, which are relevant and could be

applied to regulate spamming, this research found problems and limitations that will be discussed as follows.

2. Thai constitution does generally recognize the right to privacy but there are no subordinate laws enacted to protect the specific privacy invasion.

3. There are certain provisions in criminal code which can be applied to protect the privacy in case of unsolicited contact but there are several limitations in the application. For example, if the unsolicited advertisement via social media, which is considered as communication to the public, is made by fraud, the offense of fraud can be applied, especially section 343 relating to the fraud to the public. However, the unsolicited advertisement which is not fraud but affects privacy is beyond the scope of such offense.

4. As for the civil and commercial code, the contract law provisions cannot be applied because the initiation of advertisement is not regarded merely as invitation to contract. Then, there legal relationship of buyer and seller has not yet been formed. As for tort law, the research found that section 420 is relevant but there are limitations in term of elements and interpretation to the case of unsolicited advertisement. For example, it is difficult to prove damage caused by the unsolicited advertisement which can be considered as emotional damage. In contrast to the US law, Thai civil code does not provide liquidated damage and punitive damage.

5. The direct sell and direct marketing Act B.E. 2545 does not provide sufficient protection in case of unsolicited advertisement through social network websites. This is because most of the provisions in this act are dealt with the protection of consumer in term of rights and duties arising from contract of sell, for example, the termination of contract, the return of product. This law does not have specific section to control the act of advertising that affects privacy.

6. There are certain provisions in the consumer protection Act B.E. 2522 which is related to the control of advertisement but this research found some limitations to apply. For example, although section 23 of this act prohibits the advertisement done in a manner that could “cause an annoyance to a consumer”, there is no specific criteria for determining such “annoyance” especially in case of

unsolicited advertisement via social media. Thus, the subordinate laws are still needed to supplement this section.

7. The computer related offence Act B.E. 2550 can be applied to unsolicited advertisement through social network websites. Specifically, section 11 which is enacted to regulate “spam” can be generally applied to protect privacy in case of unsolicited advertisement. In addition, the scope of article 11 is not restricted to “spam email” because it regulates “computer data” which, like the CAN-SPAM act of the US, can be interpreted to include unsolicited advertisement transmitted through social network websites. However, there are problems of interpretation and several limitations in the application, especially problem in interpreting whether such unsolicited advertisement is considered as “causing interference to normal use of computer system”. Furthermore, there is limitation in main element of section 11 which is narrowly limited to the transmission of computer data that is concealed the origin of such transmission. Consequently, section 11 could not be applied in case of unsolicited advertisement that does not conceal the origin of transmission, though such advertisement causes interference to privacy of recipient.

Regarding the amendment of computer related offence Act, the draft law which was introduced to National Legislative Assembly in July 2016 has amended section 11 in several key elements as follows;

1. First paragraph of section 11 remains unchanged
2. Second paragraph is added to provide exception for the offence of transmitting electronic spam. The draft section stipulates that “a person who transmits computer data or electronic mail to any person by not giving an opportunity for the receiver to unsubscribe or notify the intention not to receive such computer data or electronic mail which cause interference to normal use of computer system of any person, shall be subject to a fine not exceeding 200,000 bath”
3. Third paragraph is added to empower Minister to enact subordinate laws identifying conditions for a transmission of electronic mail that will not be deemed as “interference to normal use of computer system”.

However, Kanathip Thongraweewong (2016) argued that the new draft of section 11 is not sufficient and appropriate to protect the right to privacy for following reasons. With regards to second paragraph, the “Opt-out” principles is added as an exception to the offence of spamming which could be compared to laws of US and UK. Basically, such principle is consistent to the right to privacy because a person who receives electronic mail could decide whether to receive such message or not. However, the opt-out principle in second paragraph could be argued as insufficient for several reasons. First of all, the law does not cover a case where the transmission of spam continues despite the fact that an unsubscribed request has been notified. The violation of opt-out rules should be regulated by specific principles. Secondly, several states in the US provide that the opt-out process should be user-friendly and without cost for a receiver. However, the second paragraph of section 11 does not provide details of such process. Thirdly, in case where a receiver chooses to opt-out, section 11 does not provide that the contact details of the receiver should be taken out of mailing list maintained by a sender of such message or electronic mail.

Furthermore, the draft of third paragraph has empowered the Minister with broad authority to stipulate conditions, e.g., frequency, quantity and the nature of spamming that are not deemed as “interference to the system”. Thus, a spammer who acts in accordance with such conditions could be exempted from the offence. This could be argued as giving broad authority to administrative branch to identify elements of criminal offence which should be an authority of legislative branch. (Kanathip Thongraweewong, 2016). On the contrary, federal and several state laws of the US have provided specific conditions relating to frequency, quantity and the nature of spamming as part of elements in an offence. (Kanathip Thongraweewong, 2010).

Moreover, the draft law regulating the transmission of “computer data or electronic mail” which is a broad term covering both commercial and non-commercial messages. Comparing to the US laws, Virginia Supreme Court ruled that the anti-spam law of Virginia infringed on the protection of free speech and was unconstitutional. The Court explained that such law, which targeted all spamming

without any evidence that the control of non-commercial spam was a compelling state interest, was not narrowly tailored. (Meyerowitz, 2008) Hence, the draft section 11 could be argued as “not narrowly tailored and could be infringe on other rights protected by the constitution.

8. The comparative analysis of Thai laws and the UK laws indicates that in the UK., the unsolicited contact via electronic method or “Spam” is regulated by specific law which is Data Protection Act. Unlike the U.S where there is no general law relating to the data protection in all sectors, the Data Protection Act is regarded as general law for protecting personal data in the UK. One of the most important principles in the Act is “fair and lawful principles of processing personal data” which prohibits that data controller to collect personal data without obtaining consent from data subject. This is called the conditions for processing of personal data according to schedule 2 and 3 of the Act.

Regarding the unsolicited advertisement via social media, such advertisement is typically caused by the collection of personal contact without consent from data subject. Thus, if the collection of personal data is protected at the outset, the unsolicited contact will be limited. In addition, the Data Protection Act specifically regulates “Direct marketing” which includes not only the selling of products or services but also the promotion of any campaigns. These contacts can be regarded as carrying out direct marketing and is subject to the provisions of this Act such as the compliance with a written notice to stop the unsolicited contact. However, as of March 2016, Data Protection Bill of Thailand has not yet been enacted. Thus, there is no specific law for regulating the collection of personal data to be used for the purpose of making unsolicited advertisement.

Conclusion and Recommendations

There are no specific laws in recent Thai legal system that can be applied directly to protect the right of privacy in case of unsolicited advertisement through social network websites. By contrast, there are related specific laws in the US which can be applied to protect the privacy from unsolicited advertisement. Although there are currently various laws which can be applied to protect such right, this research

indicates that the problems of content, element, and scope of such laws make them in appropriate or in sufficient to be applied to protect the privacy in case of unsolicited advertisement. As a result, this research proposes as follows;

1. Enacting new specific law in order to protect the right to privacy in case of unsolicited advertisement. The spam laws of the US could be used as a model to draft such law.

2. Amend Criminal Code by adding offense against privacy as a new offence. The offense of unsolicited contact is added as a sub-offense.

3. Amend Civil Code by adding privacy tort as separated chapter in addition to the general tort which has already existed.

4. Amend the direct sell and direct marketing Act B.E. 2545 to cover the behavior of advertising through electronic media including social network websites.

5. Enacting subordinate law under the consumer protection Act B.E. 2522 in order to regulate unsolicited advertisement.

6. Amending the computer related offence Act B.E. 2550 and draft law on section 11 to cover unsolicited advertisement regardless of the concealment or declaration of origin. In addition, certain elements should be added to the opt-out principle, for example, the law should cover a case where the transmission of spam continues despite the fact that an unsubscribed request has been notified. In addition, the opt-out process should be user-friendly and without cost for a receiver. Furthermore, section 11 should provide that, in case of a person who receives unsolicited contact choose to opt-out, the contact details of the receiver must be taken out of mailing list in order to protect risk of further contact. Regarding draft of third paragraph, the specific conditions relating to frequency, quantity and the nature of spamming should be explicitly stated as part of elements in an offence instead of giving broad authority to a Minister.

7. Enacting Data Protection Act in order to regulate the collecting of personal data including personal contact details which can be used for the purpose of unsolicited advertisement. In this regards, the Data Protection Act of the UK could be used as a model law for drafting this principle.

References

- Alongi, Elizabeth A. (2004). Has the US canned spam?. *Arizona Law Review*, 46(2), 263-290.
- Birnhack, Michael. (2008). The EU data protection directive: An engine of a global regime. *Computer Law & Security Report*, 24(6), 508-520.
- Borghi, Maurizio., Ferretti, Federico., and Karapapa, Stavroula. (2013). Online data processing consent under EU law: A theoretical framework and empirical evidence from the UK. *International Journal of Law and Information Technology*, 21(2), 109-153.
- Broecker, Edwin J. (1990). FAX unto others...: A constitutional analysis of unsolicited facsimile statutes. *Indiana Law Review*, 23(3), 703-730.
- Carey, Peter. (2009). *Data protection: A practical guide to UK and EU law*. New York: Oxford University Press.
- Decew, Judith Wagner. (1997). *In pursuit of privacy: Law ethics and the rise of technology*. US: Cornell University Press.
- Donnelly, Jack. (1982). Human rights and human dignity. *The American Law Review*, 76(2), 303-316.
- Edwards, Lillian. (2005). Canning the spam and cutting the cookies: Consumer privacy online and EU regulation. In Lillian Edwards (Ed.), *The New Legal Framework for E-Commerce in Europe* (pp.31-66). North America: Hart publishing.
- Ford, Roger A. (2005). Preemption of state spam laws by the federal can-spam act. *The University of Chicago Law Review*, 355-384.
- Gavison, Ruth. (1980). Privacy and the limits of law. *The Yale Law Journal*, 89(3), 421-471.
- Hatcher, Jordan S., and Edwards, Lillian. (2009). Consumer privacy law 2: Data collection, Profiling and targeting. In Lillian Edwards and Charlotte Waelde (Eds.), *Law and the Internet*. North America: Hart publishing.
- Hendricks, Evan., Hayden, T., and Novick, J. D. (1990). *Your right to privacy: A basic guide to legal rights in an information society*. US: Southern Illinois University Press.
- Hinde, Stephen. (2000). Smurfing, Swamping, Spamming, Spoofing, Squatting, Slandering, Surfing, Scamming, and other mischiefs of the world wide web. *Journal Computers and Security*, 19(4), 312-320.

- Hollings, Ernest. (1991). *Congressional record, Proceedings and debates of the 102nd congress, First session, November, 1991*. Retrieved September 9, 2015, from [http:// memory.loc.gov/ammem/amlaw/lwcrlink.html](http://memory.loc.gov/ammem/amlaw/lwcrlink.html)
- Kanathip Thongraweewong. (2010). Legal measures for protecting the right to privacy : A study of invasion of privacy by direct sale business. *Botbandit Law Journal*, 66(4), 46-80.
- Kanathip Thongraweewong. (2012). Legal measures for protecting the right to privacy: A study of invasion of privacy through the use of social network websites. *APHEIT Journal*, 18(1).
- Kanathip Thongraweewong. (2014, July). The legal protection of right to privacy in case of “google street view”: A comparative study of Thai and US laws, Conference proceedings. *International Conference 2014 (BUU2014)*. Burapha University, Thailand.
- Kanathip Thongraweewong. (2014, May). State telecommunication surveillance : A comparative study of the US and Thai telecommunication privacy laws. *Conference proceedings of the forth international conference on digital information and communication technology and its applications (DICTAP 2014)*. University of the Thai Chamber of Commerce, Thailand.
- Kanathip Thongraweewong. (2016, June). Comment addressed. In *Forum for opinion on draft computer crime act B.E. 2559*. National human rights commission, The Government Complex Commemorating His Majesty.
- Khong, Dennis. (2004). An economic analysis of spam law. *Erasmus Law & Economics Review*, (1), 23-45.
- Meyerowitz, Steven. (2008). Virginia supreme court rejects state’s anti-spam law on first amendment grounds. *Privacy & Data Security Law Journal*, 1024-1039.
- Minogue Kenneth. (1978). The history of the Idea of human right. In Walter Laqueur and Barry Rubin (Eds.), *The Human Rights Reader* (p.3-16). Philadelphia: Temple University Press.
- Moorefield, Gary. (1999). spam-It’s not Just for breakfast anymore: Federal legislation and the fight to free the internet from unsolicited commercial e-mail. *Boston University Journal of Science and Technology Law*, (10), 10.

- Mossoff, Adam. (2004). Spam-Oy, What a nuisance!. *Berkley Technology Law Journal*, 19(2), 1-42.
- Orwin, Chifford., and Pangle, Thomas. (1984). The philosophical foundation of human rights. In M. F. Platter (Ed.), *Human Rights in Our Time: Essays in Memory of Victor Baras*. Boulder, CO: Westview Press.
- Posner, Richard. (1998). *Economic analysis of law* (5th ed.). New York: Aspen Law & Business.
- Poulet, Yves. (2006). EU data protection policy. The directive 95/46/EC: Ten years after. *Computer Law & Security Review*, 22(3), 206–217.
- Pressler, Larry. (1991). *Congressional record, Proceedings and debates of the 102nd Congress, First session, November, 1991*. Retrieved September 9, 2015, from <http://memory.loc.gov /ammem/ amlaw/lwcrlink.html>
- Ramsay, Iain. (1989). *Consumer protection text and materials*. London: Weidenfeld and Nicolson.
- Rice, Cindy M. (2002). The TCPA: A justification for the prohibition of spam in 2002? unsolicited commercial e-mail: Why is it such a problem?. *North Carolina Journal of Law & Technology*, (3), 375-382.
- Samoriski, H. (1999). Unsolicited commercial e-mail, The internet and the first amendment: Another free speech showdown in cyberspace?. *Journal of Broadcasting & Electronic Media*, 43(4), 670-689.
- Simon, Marc. (2004). The can-spam act of 2003: Is congressional regulation of unsolicited commercial e-mail constitutional. *Journal of High Technology Law*, 4(85), 85-115.
- Sorkin, David. (1997). Unsolicited commercial e-mail and the telephone consumer protection act of 1991. *Buffalo Law Review*, (45), 1001-1032.
- Sorkin, David. (2003). Spam legislation in the United States, John Marshall. *Journal of Computer & Information Law*, 22(1), 3-12.
- Wacks, Raymond. (1989). *Personal information: Privacy and the law*. Oxford: Clarendon Press.
- Wall, David S. (2005). Digital realism and the governance of spam as cybercrime. *European Journal on Criminal Policy and Research*, 10(4), 309-335.
- Wallace, Ryan P., Lusthaus, Adam M., and Kim, Jong Hwan. (2005). Computer crimes. *American Criminal Law Review*, 42(2), 223-276.
- Wong, Katherine L. (2007). The future of spam litigation after omega world travel v. mummagraphics. *Harvard Journal of Law and Technology*, 20(2), 459-476.