

# THE RIGHTS OVER WORKS ON SOCIAL NETWORKS AND UNFAIR LICENSING PRACTICES\*

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## ABSTRACT

The exclusive right over the works of a creator under Thai Law has been specified in Section 15 of the Copyright Act. However, the problem of unfairness in licensing agreements impacts the creators of such works on social networks under the terms and conditions of Facebook and Instagram containing unfair terms and conditions for two issues.

- (1) Licensing agreements
- (2) Conditions after the termination of the agreement.

For a creator of works in Thailand, the problem of unfairness in a licensing agreement extremely affects creators who did not know the terms and conditions before. After reviewing all the relevant Thai laws, there is no Thai law which sufficiently contains the substantive provisions to deal with the unfair licensing agreement issue. The definition of 'customers' under Section 3 of the Unfair Contract Terms Act does not cover customers who do not pay the remuneration to the service provider. Even in the Customer Protection Act, the definition of the word 'customers' and 'service' do not include a service agreement without remuneration.

Thus, there are certain unsolved legal and practical problems relating to the unfair licensing agreement which can affect users. The amendment of such laws are required to resolve the problems and establish a committee to govern and control licensing agreements provided by service providers to be fair for both parties.

The new and amended sections should be included in the (i) Copyright Act, (ii) the Consumer Protection Act, and (iii) the Unfair Contract Terms Act which are not able to properly protect the creators' rights of their works. Since claims against the service provider take a long time in court, the government needs to amend the sections in the mentioned Acts to be able to cope with this problem. Therefore, the Thai Government should enact an explicit legislation to

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control the terms and conditions in licensing agreements and to protect users by increasing the bargaining power of the creators of works.

**Keywords:** Exclusive Rights, Social Networks, Unfair Licensing, Unfair Contract Terms

#### บทคัดย่อ

ธรรมสิทธิ์เห็นอันมีลิขสิทธิ์กำหนดในมาตรา 15 ของพระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537

อย่างไรก็ตาม ปัญหาเกี่ยวกับความไม่เป็นธรรมของสัญญาอนุญาตให้ใช้สิทธิ์มีผลกระทบต่อผู้สร้างสรรค์ผลงานในสื่อโซเชียล เมื่อเวิร์ค ข้อตกลงและเงื่อนไขของเฟสบุ๊ค และอินสตราแกรมมีข้อสัญญาซึ่งไม่เป็นธรรมต่อผู้สร้างสรรค์ใน 2 ประเด็น กล่าวคือ

- (1) สัญญาอนุญาตให้ใช้สิทธิ และ
- (2) เงื่อนไขภายหลังเดิกสัญญา

ประเด็นปัญหาความไม่เป็นธรรมจากสัญญาอนุญาตให้ใช้สิทธิของผู้สร้างสรรค์งานในประเทศไทยสั่งผลกระทบอย่างรุนแรงแก่ผู้สร้างสรรค์ซึ่งไม่เคยทราบถึงเงื่อนไขและข้อตกลงก่อนใช้งาน จากการศึกษากฎหมายไทยที่เกี่ยวข้องนั้นพบว่าประเทศไทยไม่มีมาตรการทางกฎหมายที่เพียงพอในการแก้ปัญหาความไม่เป็นธรรมของสัญญาอนุญาตให้ใช้สิทธิ อย่างไรก็ตาม บทนิยามของคำว่าผู้บริโภคภายในกฎหมายคือผู้ซื้อสิ่งของ แต่ในมาตรา 3 ของพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม มิได้รวมถึงผู้บริโภคที่มิได้เสียค่าตอบแทนให้แก่ผู้ให้บริการภายใต้มาตรา 3 แห่งพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม รวมไปถึงความหมายของผู้บริโภคและการบริการก็มิได้รวมถึงสัญญาที่ไม่มีค่าตอบแทน

ดังนั้น ปัญหากฎหมายซึ่งเกี่ยวข้องกับสัญญาอนุญาตให้ใช้สิทธิจึงกระทบผู้ซื้อบริการ จึงต้องมีการแก้ไขกฎหมายและแต่งตั้งคณะกรรมการเฉพาะเพื่อกำหนดหลักเกณฑ์และควบคุมสัญญาอนุญาตให้ใช้สิทธิซึ่งร่วงโคลงผู้ให้บริการเพื่อความเป็นธรรมของสัญญาทั้งสองฝ่าย

มาตรการที่นำเสนอใหม่และมาตรการที่เสนอแก้ไขการกำหนดไว้ใน (ก) พระราชบัญญัติลิขสิทธิ์ (ข) พระราชบัญญัติคุ้มครองผู้บริโภค และ (ค) พระราชบัญญัติว่าด้วยข้อสัญญาไม่เป็นธรรม ซึ่งยังไม่ได้คุ้มครองธรรมสิทธิ์ของผู้สร้างสรรค์ผลงาน อีกทั้งการโถด้วยสิทธิผู้ให้บริการในห้องคัดมีระยะเวลานาน หากรัฐบาลแก้ไขมาตราที่เกี่ยวข้องในกฎหมายที่เกี่ยวข้องเพื่อแก้ไขปัญหาดังกล่าว รัฐบาลควรกำหนดมาตรการทางกฎหมายเพื่อควบคุมเงื่อนไขและข้อตกลงซึ่งเกี่ยวข้องกับสัญญาอนุญาตให้ใช้สิทธิเพื่อป้องกันสิ่งธรรมสิทธิและเพิ่มอำนาจต่อรองให้ผู้สร้างสรรค์ผลงานต่อไป

**คำสำคัญ:** ธรรมสิทธิ์, โซเชียล เมื่อเวิร์ค, สัญญาใช้สิทธิอันไม่เป็นธรรม, ข้อสัญญาอันไม่เป็นธรรม

## Introduction

In the age of prompt communication, communication between people has become more convenient and cheaper. In this article, we will confer the attractive methods of communication, namely, social networks such as Instagram and Facebook.

Facebook was the number one ranking social network in March 2015, as determined by the number of active accounts according to statistic of Statista Inc<sup>2</sup>. Users can share their photos, self-videos, feelings, quotes and experiences on their own timeline. As such, there are complicated issues occurring after users share their own works and grant partial or whole exclusive rights in respect to the works created by themselves to service providers like Facebook in-line with the agreement between themselves and the service providers. Definitely, a balance of interest must be made to ensure that the rights of a creator over works that have not been infringed upon. Retention of works in a server of service providers should be removed after termination of the agreement. This issue relates to intellectual property law, the electronic commerce agreement and unfair contract terms.

As of 30 January 2015, Statement of Rights and Responsibilities of the Facebook site has been adopted thereof:

“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. 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)***....”<sup>3</sup>

Lets have a look through some parts of terms and conditions for using Instagram as of 19 January 2013 stated below.

“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 (e.g. if your Content has been re-shared by others).

Upon termination, all licenses and other rights granted to you in these Terms of Use will immediately cease.”<sup>4</sup>

We refer to the above mentioned problems. There is a governing law regarding works on social networks stipulated by the European Commission, namely, “EU General Data Protection Regulation” which broadens protection on some parts of copyright works to be processed in third countries, i.e. pictures which have copyright. This law is stipulated to protect users who

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<sup>2</sup>Statista, *the Statistic Portal*, <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Aug. 4, 2015).

<sup>3</sup>Statement of Rights and Responsibilities Facebook, <https://www.facebook.com/legal/terms/update> (last visited Aug. 4, 2015).

<sup>4</sup> Terms and conditions for using Instagram, [https://help.instagram.com/478745\\_558852511](https://help.instagram.com/478745_558852511) (last visited Aug. 4, 2015).

produce any copyrighted works and then post their works on variety of social networks, but have limited their rights on their works since they had entered into the licensing agreement after applying for social network services and they most likely overlooked what they have agreed upon. In the United States of America (the “*USA*”), the law tends to support big companies operating their businesses in USA. As well, Facebook applies USA laws and Canadian laws for ‘website’ terms and conditions which are more relaxed for the company compared to the laws of Europe. In Europe, its laws have started to protect the creator of works’ right and help to deal with unfair licensing terms. We will study laws of other countries and choose interested principals which are proper with Thai users which are further suggested in the last chapter.

## **1. Definitions of Social Networks**

Social network means (i) a platform for connecting people across different places to connect and share their interests between each other through computers, mobile phones, tablets or other means of electronic communication, (ii) the way to learn about a different culture, ideas, and inspiration of others and adapt ourselves to living, or realize a new journey or way of thinking, and (iii) a place to share or promote our works, collect feedback from other users, and sell respective works (picture, video, music, and collection of journal) or get a new job.

By this, there are a lot of steps before we apply as a user on Facebook or Instagram. They request us to share our personal data, which we provide to them during the registration process including private data and works on our timeline without any bargaining power<sup>5</sup> on our part to refuse or delete some choices. Otherwise, we could not use certain applications. Therefore, we still allow them to do so.

## **2. European Law**

According to the European Commission, “personal data under the EU General Data Protection Regulation, is any information relating to an individual, whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address, bank details, posts on social networking websites, medical information, or a computer’s IP address.”<sup>6</sup> We cannot refuse photos, which service providers have collected, that have no copyrights. Therefore, works by creators are also protected under the EU General Data Protection Regulation.

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<sup>5</sup> Bargaining power is the relative ability of parties in a situation to exert influence over each other. If both parties are on an equal footing in a debate, then they will have equal bargaining power, such as in a perfectly competitive market, or between an evenly matched monopoly and monophony.

<sup>6</sup> Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses, [http://europa.eu/rapid/press-release\\_IP-12-46\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en) (last visited Aug. 10, 2015).

The author further analyzes the definitions with the terms and conditions of Facebook, summarized below:

(1) “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use.”

Under the concept of exclusive rights, every creator of works has an economic interest over the works. Even if the service provider allows a user to use its system for free, it does not mean that its terms and conditions are acceptable as fair use to seek an interest over the works by the creators without paying any royalty fee.

(2) “you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others)....”<sup>7</sup>

According to the definition of unfair terms, it is not fair for the creator of works who uses his endeavor to create the works; but, could not protect his interest after deletion of an account with the service provider. It is not clear how long service providers take to delete works on backup servers. It mentions in the terms and conditions that it cannot be used for others only. The service provider probably approaches that data without any inspection of the creator of works. It seems like the service provider performs its rights over the agreement for an unlimited period of time. The creators cannot estimate how long their works will be kept in the backup server after terminating the agreement.

In addition, amendments of Data Protection Law, recital 51 and 55, propose that any person should have the right of access data which has been collected concerning them, and to exercise this right easily, in order to be aware and verify the lawfulness of the processing. Every data subject should therefore have the right to know and obtain communication in particular for what purpose the data is processed, and for how long a period, which recipients will receive the data, what is the general logic of the data that is undergoing the processing and what might be the consequences of such processing. Recital 55 further stated that to further strengthen control over their own data and right of access, data subjects should have the right, where personal data is processed by electronic means and in a structured and commonly used format, to obtain a copy of the data concerning them commonly used in an electronic format. The data subject should also be allowed to transmit data, which they have provided, from one automated application, such as a social network, onto another. ***Data controllers should be encouraged to develop interoperable formats that enable data portability.*** This should apply where the data subject provided the data to the automated processing system, based on their consent or in the performance of a contract. ***Providers of information society services should not make the transfer of those data mandatory for the provision of their services.***<sup>8</sup>

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<sup>7</sup>Terms and conditions of Facebook, <https://www.facebook.com/legal/terms> (last visited Aug. 4, 2015).

<sup>8</sup>European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-20140212+0+DOC+XML+V0//EN> (last visited Aug. 4, 2015).

According to the terms of Facebook, they are allowed to collect the data including any posts of the users under its standard terms and conditions. If they collect the following works in their server in the USA, the Directive<sup>9</sup> clearly states that the third country must ensure acceptable protection. European Member States would be obliged to prevent any personal data from being placed on the internet.

In the case of Europe v. Facebook is on review of a higher court, we understand that a group of Europeans are trying to take action against the service provider. Programme known as PRISM is one technology of the service provider utilized to recognize faces of people from their photo. The photo is one kind of copyright works which has been posted on a social network. The photos taken by a creator have been transferred to a third country to process without permission from the active creator of works (single permission). Since the terms and conditions have been specified that a service provider is allowed to use the copyright works, this action remains unacceptable and unfair to the creators of works who have collected his work in a server and processed his works without his permission. He does not know where the works have been processed, how long it takes and how the service provider processes or applies his works.

Moreover, in case of termination of agreement, the creator of work cannot ensure that his works have been completely deleted. The reasons are as follows:-

- (1) Recycle bin system works as back-up server. We could not be assured whether the service provider will definitely retrieve a work back up to the server or not.
- (2) There is no inspection channel for the creator of works to check on the deletion of works with the service provider.
- (3) The service provider does not provide the creator of works with any specific period of time.

### **3. Copyright Act B.E. 2537**

Under section 15 (5), “The owner of the exclusive rights can license 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 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 Act is not up-to-date to handle the current situation, due to the dynamic technology of the internet nowadays. Due to the digital economy, the law should be amended to fit current situations. If not, the exclusive right of the creator’s work will not be protected by law. The service provider, as the licensee, does not make any payment to the creator of work. Section 15

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<sup>9</sup> “Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data”

Copyright Act should be applied to the licensing agreement which has a royalty fee. Normally, a substantial licensing agreement must specify how the licensee uses a copyrighted work and the duration of the agreement with a royalty fee. Unlike the licensing agreement between the creator of works and the service provider, that provides an agreement which has no duration, non-transferable and no royalty fee, the service provider does not require any permission from the creator of work. The service provider can process the works of creator as they feel appropriate. The Copyright Act must be amended to protect the creator of works in digital age.

Authorities of the Copyright Committee under section 60 of the Copyright Act B.E. 2537, are imposed to:

- (1) to give advice or consultation to the Minister for the issuance of Ministerial Regulations under Copyright Act B.E. 2537;
- (2) to decide appeals against orders of the Director General according to Section 45 and Section 55;
- (3) to support or facilitate the association or organization of authors or performers with respect to the collection of royalties from users of the copyright work or the performer's rights and the protection or safeguard of the rights or any other benefits under Copyright Act B.E. 2537;
- (4) to consider other matters as assigned by the Minister.

Therefore, if we compare the authority of the Copyright Committee under Copyright Act B.E. 2537 and the European Commission, the Copyright Committee has less power than the European Commission since the specific law of Thailand does not mention rights over works on social networks which are more complicated than other infringements. It would be better if the Copyright Committee had more power to assist the creators of works who post their works on social networks.

#### **4. The Unfair Contract Term Act B.E. 2540**

The agreement breaches Section 150 of the Civil and Commercial Code. Since the Act was issued to protect customers from unfair terms and conditions, the court will consider each of the terms, conditions and orders, and void some of the clauses to maintain fairness in society.

Under Section 3, the word "customer" means a person who enters the agreement to use a service provided by the service provider with payment of service. However, the creator of works who posts his work on social networks is not protected under this Copyright Act because the creator of works does not make any payment to the service provider in accordance with Section 3 of the Act.

There are various reasons why the terms and conditions of Facebook and Instagram are unfair, as follows:-

- (1) The creator of works has no opportunity to adjust the standard service agreement and licensing agreement prepared by a service provider before entering the agreement.

(2) The agreement does not specify the liability to the service provider clearly and there is a clause for the service provider to amend its terms and conditions without prior consent of users.

(3) Thai law has no power to protect users in Thailand who agree with the choice of law clause without knowing that the service provider has more advantages when choosing the American law.

(4) If the users wish to file a case with the court claiming unfair treatment under this agreement, the user would have the burden of proof. Therefore, the user is entitled to prove that an agreement is a standard form contract which was prepared by the service provider and unfair for the users. The users would then have rights according to the Unfair Contract Terms Act.

The creator of works is not in the scope of the meaning of ‘customer’ under this Act, since there is no remuneration paid to the service provider. However, the terms and conditions of Facebook are considered unfair contract terms according to the criteria of the Act. Therefore, we could not apply Section 4 (1)<sup>10</sup> of Consumer Case Procedure Act B.E. 2551 to solve the problem between creator of works and the service provider.

## **5. Consumer Protection Act B.E. 2522 (2nd revision, B.E. 2541)**

The meaning of ‘service’ and ‘customers’, under Section 3 of this Act does not cover service without compensation. The creators of works who use social networks are not under the meaning of consumer pursuant to Section 3 of the Act. The creator of works is the direct party who enters the service agreement with the service provider without any compensation. Therefore, we could not apply this Act to solve the problem between the creator of works and the service provider.

## **6. Personal Data Protection Act**

Personal Data, under Section 5 of this Act, means “any data pertaining to a person, who enables the identification of such person, whether directly or indirectly.”

This law was imposed to protect personal information. All personal information can no longer be collected without consent of the owner and the holder of personal data is forbidden from using or disclosing it to a third party. Transferring data abroad is not allowed except for limited circumstances. The Personal data Protection Commission will subsequently be established for the purpose of implementing and enforcing the law.

However, this law does not include the intellectual property works like European laws in which the photo of the creator’s works is also protected and is not allowed to be processed in third party countries. Therefore, we could not apply this law to the unfair licensing agreement between the creator of works and service provider.

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## 7. Analysis

After considering Thai laws, there is the Copyright Act, the Unfair Contract Terms Act, Consumer Protection Act and the Personal Data Protection Act. Compared with European Laws, there are new regulations and some interesting laws that deal with unfair licensing agreements of a service provider. The provisions to control unfair licensing of social networking in Thailand are explicitly insufficient since they are stipulated to cover the case of unfair contract terms and conditions related to the exclusive rights over the works posted on social networks. The meaning specified by law does cover the creator of works who does not pay any remuneration to the service provider. Thai laws have just enacted the liability to a service provider for the infringement of third parties only, not the infringement by the service provider. Moreover, Section 15 (5) of the Copyright Act should apply to the licensing agreements with remuneration only. For the terms and conditions of Facebook, there is no remuneration to use the service. It does not mean that the service provider can use the copyright work with unlimited time without an inspection channel for the creators of works who own the exclusive right.

The Thai government can empower a sub-committee to cope with this issue and control service providers in the long term using the same practices as the European Committee. For example, the law should broaden the definition of customers and services in the Unfair Contract Term Act and the Consumer Protection Act to cope with the creator of works who has not paid remuneration to the service provider.

Last but not least, the creators of works should be aware of their exclusive rights and the law should allow the creators of works to file a complaint to the Copyright Committee or any other designated Committee by law concerning the unfairness of agreement provided by the service provider, or claim against the service provider directly. When violations are discovered, the Committee or the court should have the authority to order the service providers to settle and to pay for damages to the creator of works.

## Conclusions

For the creator of works in Thailand, the problem of unfairness in licensing agreements affects creators who do not know the terms and conditions. Not many creators in Thailand know their basic exclusive rights of their works under Section 15 of the Copyright Act.

## Recommendations

The new sections should provide details as shown in the following topics:

### (1) Definitions

(i) The terms of customer and service of Section 3 of the Consumer Protection Act should include the customer and service which have no remuneration.

(ii) The term of licensing agreement using in social networks is not defined explicitly by any law. It should be indicated as meaning of licensing agreement in Section 4 of the Unfair Contract Term Act so that the creator of works' exclusive rights will be protected by the law.

(iii) In Europe, a new law was developed focusing on social networks and cloud service providers. ***They define intellectual property works on social networks in a broader way as “posts on social networking website”.*** As we mentioned earlier, problems occurred since the data subject were produced by creators of works and have been kept at the server of service provider in third countries such as the United States of America. Even if the European Commission has enacted this protection in the New Data Protection Regulation, the writer is of the opinion that for Thai laws, it should be added to a new section in the Copyright Act. Therefore, the definition of intellectual property in Section 4 shall include posts on social networking websites or other applications which contain any works granted copyright under Thai law.

(iv) In case it is not clear what service should be social networks, the new law must define the meaning of social networks as well. Social networks may have a development in the near future. The definition should be broadened to cover all related services in the internet which the users post their works on. For example, the social networks means:

“a platform connecting people across from different places to connect and share their connection and interesting things through computer, mobile phone, tablet or other means of electronic communication”

## **(2) Amendments to the laws**

In order to amend the section related to licensing agreement directly, we should consider adding paragraph 2 of Section 15(5) as follows:-

**“Any lessee is not allowed to restrict exclusive rights of lessor in the licensing agreement, even though the remuneration has not been paid to the lessor.”**

## **(3) Implementation of the in practice:**

The implementation of the new sections will require comprehensive changes of a service provider that does not implement comparable levels of intellectual property until now. It should have a period before the effectiveness of implementation of 1-2 years. As we have seen in the amendment of terms and conditions of Facebook for German users, which has limited the terms and conditions to an acceptable level starting in early 2015.

## **(4) Sanction**

Based on the sanction of Data Protection of the European Union, the following sanctions can be imposed or adjusted as deemed appropriate:

If the service provider remains breaching the law, the following actions must be taken, respectively.

- (i) Regular periodic data protection audits; and
- (ii) a fine up to 1,000,000 Baht or up to 2% of the annual worldwide turnover in case of an enterprise, whichever is greater

Other liabilities may be applied depending on the damages occurring to the users in this case if there is no any other specific law. The principle of the wrongful act will be applied to this case by case.

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