

# **THE RIGHT OF THE EMPLOYER OVER ELECTRONIC INFORMATION CREATED IN THE COURSE OF EMPLOYMENT<sup>1</sup>**

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## **ABSTRACT**

In recent decades, most workplaces have been using computers to do business and the computers have become an important business tool to operate business. However, the employer, who employed the employee to create the work in electronic information, still has insufficient laws to protect his right over such electronic information under Thai laws. Despite, the employer invests in the economy but he cannot protect the electronic information created during the employment.

An electronic information created by employee in the course of employment during the employment period is admittedly belonging to the employer as same as the corporeal work. Nevertheless, some electronic information can be the copyright work, which the copyright law in the United States of America provide the right over the copyright work, which made for hire, to the employer. As well as, the United Kingdom and German also specify some copyright works belong to the employer. However, the copyright law of Thailand provides the protection of copyright work in the course of employment to the author, not the employer.

Furthermore, the electronic information is not the things under the definition of the Criminal Code, thus it's not object of theft offence. The Computer-Related Crime Act B.E.2550 may not protect the electronic information of employer if employee has an authorization to access the computer. Moreover, the protection by trade secret law is not applicable to protect the electronic information in the digital age as it is easy to access and distribute.

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<sup>1</sup> This article is summarized and arranged from the thesis "The Right of the Employer over Electronic Information Created in the Course of Employment" Master of laws in Business law (English Program), Faculty of Law Thammasat University, 2015.

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This thesis will study and analyze the existing applicable laws in Thailand need to amend in order to protect right of the employer over electronic information created under the employment based on the concept of German copyright law to balance the right of employee as the author of works and seek a criminal measure to protect the right of employer over electronic information from the bad faith action of employee

**Keywords :** Electronic Information, Copyright, Work made for Hire and Trade Secret.

#### บทคัดย่อ

ในทศวรรษล่าสุดที่ผ่านมา สถานประกอบการส่วนใหญ่ได้นำคอมพิวเตอร์เข้ามาช่วยในการประกอบธุรกิจ และคอมพิวเตอร์ได้กลายเป็นเครื่องมือส่วนสำคัญในการดำเนินธุรกิจ อย่างไรก็ตาม นายจ้างซึ่งว่าได้ว่าจ้างลูกจ้างทำงานอันมีลักษณะเป็นข้อมูลอิเล็กทรอนิกส์ ยังไม่มีกฎหมายให้ความคุ้มครองสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์อย่างเพียงพอภายใต้กฎหมายไทย ทั้งนี้ นายจ้างเป็นผู้ลงทุนทางด้านเศรษฐกิจแต่ไม่สามารถปกป้องสิทธิในข้อมูลอิเล็กทรอนิกส์ที่จะสร้างขึ้นในระหว่างการจ้างงาน

ข้อมูลอิเล็กทรอนิกส์ที่สร้างขึ้น โดยลูกจ้างในการทางที่จ้างระหว่างการจ้างงาน เป็นที่ยอมรับโดยทั่วกันว่าเป็นของนายจ้าง เช่นเดียวกับการสร้างงานที่เป็นวัตถุที่มีรูปร่าง อย่างไรก็ตาม ข้อมูลอิเล็กทรอนิกส์บางงานสามารถเป็นงานอันมีลิขสิทธิ์ได้ ซึ่งงานอันมีลิขสิทธิ์ในประเทศสหรัฐอเมริกา กำหนดให้งานที่สร้างขึ้นจากการว่าจ้างตกเป็นของนายจ้าง เช่นเดียวกับกฎหมายประเทศอังกฤษ และเยอรมันที่ได้กำหนดให้งานอันมีลิขสิทธิ์บางงานตกเป็นของนายจ้าง อย่างไรก็ตาม กฎหมายลิขสิทธิ์ของประเทศไทยได้ให้ความคุ้มครองงานที่สร้างขึ้นในฐานะพนักงานให้งานนั้นเป็นของผู้สร้างสรรค์ ไม่ใช่ของนายจ้าง

ยิ่งไปกว่านั้น ข้อมูลอิเล็กทรอนิกส์ไม่ถือว่าเป็นทรัพย์สินภายใต้ประมวลกฎหมายอาญานั้นจึงไม่อาจเป็นวัตถุในความผิดฐานลักทรัพย์ได้ พระราชบัญญัติว่าด้วยการกระทำความผิดทางคอมพิวเตอร์ พ.ศ. 2550 ก็ไม่ได้คุ้มครองข้อมูลอิเล็กทรอนิกส์ของนายจ้างหากว่าลูกจ้างได้รับอนุญาตให้ใช้และเข้าถึงคอมพิวเตอร์นั้น ๆ นอกจากนี้ ความคุ้มครองตามกฎหมายความลับทางการค้า ไม่สามารถนำมาใช้ปฏิบัติเพื่อปกป้องข้อมูลอิเล็กทรอนิกส์ในยุคดิจิทัลได้ เนื่องจากข้อมูลอิเล็กทรอนิกส์สามารถเข้าถึงและเผยแพร่ได้โดยง่าย

วิทยานิพนธ์ฉบับนี้มุ่งที่จะศึกษาและวิเคราะห์กฎหมายที่ใช้บังคับอยู่ในปัจจุบันของประเทศไทย ว่าสมควรที่จะมีการแก้ไข เพื่อปกป้องสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์ซึ่งสร้างขึ้นภายใต้การจ้างงานโดยศึกษาจากกฎหมายลิขสิทธิ์ของประเทศเยอรมัน โดยเพื่อที่จะยังคงรักษาสิทธิของ

ลูกจ้างในฐานะผู้สร้างสรรคงาน และปกป้องสิทธิของนายจ้างในข้อมูลอิเล็กทรอนิกส์ ทั้งมาตรการทาง  
อาญาในกรณีที่ลูกจ้างกระทำการโดยมีเจตนาไม่บริสุทธิ์

**คำสำคัญ:** ข้อมูลอิเล็กทรอนิกส์ ลิขสิทธิ์ งานอันมีลิขสิทธิ์ที่เกิดขึ้นจากการว่าจ้าง ความลับทางการค้า

## 1. INTRODUCTION

In recent decades, most workplaces have been using computers to do business and the computers have become an important business tool to operate business. The works are mostly created in electronic form and stored it in the computer, the physical papers are less to use.

However, the employer, who employed the employee to create the work in electronic information<sup>1</sup>, still has insufficient laws to protect his right over such electronic information under Thai laws. Despite, the employer invests in the economy but he cannot protect the electronic information created during the employment.

If electronic information is a copyrighted work created by employee in the course of employment under the copyright law<sup>2</sup>, the owner of such copyright work shall vest in the author, herein means employee. Unlike in German<sup>3</sup>, the United States of America<sup>4</sup>, and the United Kingdom, the works made for hire in employment shall vest of the ownership in an employer.

On the other hand, if electronic information is not a copyrighted work, it also cannot be protected by the other laws. In trade Secret law, it is not easy to apply the trade secret law to the electronic information, which employee possesses it for work, it is hard to proof whether, especially in this modern age, information can

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<sup>1</sup> In this Thesis if there is the word referred to “Electronic Information”, “Electronic Data” or “Electronic File” herein are the same meaning by meant that any information or data generated by computer and kept, stored, saved in computer in form of electronic file.

<sup>2</sup> See Section 9 of the Copyright Act B.E. 2537,

<sup>3</sup> See Article 69b of Act on German Copyright and Related Rights (Copyright Act), 1965

<sup>4</sup> See § 201 - Ownership of copyright of U.S. Code, Title 17.

be easily accessed from anywhere by remote access into employer's server via visual private network (VPN)<sup>5</sup> or employee is allowed to bring company laptop to work outside company. The essential elements of trade secret law the information must be kept in secret with the proper measures in maintaining its secrecy<sup>6</sup>, but some electronic information is opened for every employee to access and use as information base, thus the trade secret law shall not apply for some electronic information. However, if electronic information can be protected by the Trade Secret law, but the previous cases in Thai Court, the owner of information have rarely won the cases because the employer did not have enough evidence to support his own claims to meet the elements of trade secret.

In the view of the Computer-Related Crime Act B.E.2550 (CRCA), if employee has been provided computer to use for working, he also has the right to access into his own working computer, therefore when employee copies an employer's electronic information from his own working computer is not committed the illegally accesses computer data.<sup>7</sup>

Especially, stealing the employer's electronic information is not protected by the Criminal Code of Thailand, as the Supreme Court had the final decision on the case no. 5161/2547<sup>8</sup> that the employee took away the employer's information by copying into the diskettes, the Court viewed that the employee's action did not commit the theft offense, because information could not be stolen because information is not "things"<sup>9</sup> by referred to the meaning of "things" in Civil and Commercial Code.

## **2. OWNERSHIP OF COPYRIGHTED WORKS IN FOREIGN COUNTRIES**

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<sup>5</sup> King Mongkut's University of Technology Thonburi, "ระบบเครือข่ายส่วนตัวเสมือน (Virtual Private Network)",

[http://www2.kmutt.ac.th/thai/CUR\\_STU/cur\\_vpn.html](http://www2.kmutt.ac.th/thai/CUR_STU/cur_vpn.html)

<sup>6</sup> Sitta Kunapatarawong, "Trade secrets between employer and employee", Master of Law Thesis of Thammasat University (2013), 75

<sup>7</sup> See Section 7 of the Computer-Related Crime Act B.E.2550.

<sup>8</sup> Supreme Court Decision no. 5161/2547,

"[www.deka2007.supremecourt.or.th/](http://www.deka2007.supremecourt.or.th/)"

<sup>9</sup> Section 137 of Thai CCC B.E. 2535, "Things are corporeal objects."

For the purpose of thoroughly analyzing the right of employer over electronic information in Thailand, it is necessary to comparatively study the laws of other countries.. Focusing on the ownership of electronic information, which is classified as the copyright work and made in the course of employment or called “work made for hire” in German law, US law and UK law.

German also specifies the initial owner of copyright in a work is always the natural person, who creates the copyright works as same as other civil law countries. In Article 43 of UrhG. Even though, Article 43 maintain the ownership in the original author, who create the work regardless of contract status, the final provision as operate to permit German court to imply the transfer in term of nature shall be made in writing, ownership of completed work may transfer<sup>10</sup>. Under German law, the transfer of copyright, whether express or implied, shall be limited to the exploitation rights, which can transferable, whether there is the scope in the agreement or absence of specific agreement pursuant of Art. 31, and 34 of UrhG<sup>11</sup>. However German law specifies the cimenatographic and audiovisual works and computer software are subject to the exception of the principle rule, which the work shall be vested in the employer as Section 69b

In the United States, the works made for hire is an exception to this principle of initial ownership, which are two separated ways that a work made for hire can occur. The Copyright Act of 1976, 17 U.S.C. §101<sup>12</sup> defines a work made for hire as either:

(1) A work prepared be an employee within the scope of his or her employment; or

(2) A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as

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<sup>10</sup> “*Analysis of International Work-for -Hire Laws*”, 2004 Sutherland Asbill & Brennan LLP, at <http://www.sutherland.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuS3Dr0!/fileUpload.name=/WorkforHireLaws.pdf>

<sup>11</sup> See Article 34 of UrhG

<sup>12</sup> Copyright Act of 1976, 17 U.S.C. Section 101

a compilation, as an instructional text, as a test, as an answer material for a test, or as an atlas, if the party expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Two parties cannot enter into a work-made-for-hire agreement to create a commissioned work that is not in one of above categories. For example, a work-made-for-hire agreement for a commissioned painting (not used as a part of collective work) would not be valid. From the first method of creating the work made for hire, the work must be created within the scope of employment. Therefore, if a programmer creates a software program before beginning employment at a computer company that software will not be a work made for hire. If the work is created as a work made for hire, the hiring party shall be named as the author when registration can be an organization, a company, or an individual.

In the United Kingdom, the work made for hire specifying the primary works as literary, dramatic, musical and artistic to be vested in the employer, not the author if such works are created in the course of employment. For the type of sound recordings, broadcasts, and cable programs will vest initially in creator of works, herein means the employee under the Copyright, Designs and Patents Act 1988, Section 9 (2)<sup>13</sup>.

### **3. OWNERSHIP OF COPYRIGHTED WORK IN THAILAND**

The electronic information itself does not exist, it has to store in some of "physical object" for example, in CD ROM, hard disk, thumb drive, server or computer. As it is always embedded in the physical object, can it be constituted a physical object or not because it is shown in a physical form. It also argued that it should be possible to state someone is in possession of something if they have physical control over that something and intends and is able to exclude others from accessing it. Furthermore, it is claimed that a database should be treated as a document that is physical in nature and can therefore be possessed.

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<sup>13</sup> See Section 9 (2) of Copyright, Designs and Patents Act 1988

The author of work is usually being the owner of copyright as specified in Section 8 of the Copyright Act B.E. 2537<sup>14</sup>, except the work, which created under the employment relation, unless it is agreed in writing between the author and employer to specify that employer will be the owner of such copyrighted work as specified in Section 9 of the Copyright Act B.E. 2537. Or in case of a work created under the course of commission or hire of work, the employer will be the owner of such work as specified in Section 10 of the Copyright Act B.E. 2537<sup>15</sup>.

In general, the author of works shall be the owner of the copyrighted work as defined in Section 4 of the Copyright Act. Only the owner of a copyrighted work can have the exclusive right to use his works as he wishes and preventing the others from using the work without his prior permission. The right under copyright can be classified into two types; the “Economic Rights”, which the owner can take the financial reward from the other who use the works and “Moral Rights”, which allow the owner to take the certain actions as specified by laws to preserve the personal link between himself and the work.<sup>16</sup>

Unlike, the work made in the course of commission under Section 10, the copyright shall vest in the employer as well as the work made in the course of employment by order or control of Government under Section 14 to be protected under the Copyright Act B.E. 2537.

#### **4. PROBLEM OF PROTECTION OF THE RIGHT OF EMPLOYER OVER ELECTRONIC INFORMATION IN THAILAND**

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<sup>14</sup> Thai Copyright Act B.E. 2537, Section 8.

<sup>15</sup> Thai Copyright Act B.E. 2537, Section 10.

<sup>16</sup> *Id.* at 13.

In the relation of employment, there are no law in Thailand to identify, who will be the owner of works generated in the employment period, except the works, which is the copyright works shall be protected under the Copyright law, and the copyright law has specified for certainly that the owner of such works will be employee, except stipulated otherwise in writing. Even though the hire of services contract is not required the contract to confirm the relationship of employer and employee but nowadays mostly of the employers will ask the employees to sign on the employment contract to specify the duties, salary, welfare, starting date, rule and regulation to be complied, including the protection clause of the result of work are belonging to the employer or the confidential information of the employer, not allow the employee to disclose, reveal to the third party, or even among the employee, who does not need to know, in order to protect the confidential information of employer. There is no specific law to define the property created under the employment period belong to the employer but it is in the principle of law, who vested in should harvest such work to its own proprietary.

Generally, under the Trade Secrets Act, B.E. 2545 (2002) there are two types of trade secrets to be protected, which are information and data or test results. "Information" includes formulary, technical procedures, designs, compiled or assembled works, or business operation methods. The owner of secret information will normally wish to prevent it from being disclosed to a third party. The information must have commercial value and must not yet be widely known or known by people related in the trade only. From the past cases of trade secret. Thailand, the employers have rarely won the cases because the basic principle of trade secret itself that the secret electronic information; (i) not yet publicly known, or (ii) not yet accessible by person who normally connected with such information, (iii) use the appropriate measures to maintain the secret, and (iv) having commercial value from the secrecy. Therefore, Trade Secret Act is not sufficiency to protect the right of employer.

In the criminal law protection, the Supreme Court case no. 5161/2547<sup>17</sup> had judged on the case of stealing the employer's information that the plaintiff that an information could not be stolen because it cannot be "things" to be taken away in the theft offence.

In the view of Section 7 of The Computer-Related Crime Act, if employee has been provided computer to use for working, he also has the right to access into his own working computer, therefore when employee copies an employer's electronic information from his own working computer is not committed the illegally accesses computer data.

However, some employer has the policy to use employee devices at work instead of using employer's device and employer will compensate employee of using his own devices for work by allowance paid per month or year, for example bring his own car, phone or computer, laptop. The policy is called Bring Your Own Device (BYOD) or BYOC (Bring Your Own Computer) policies. If employee brings his own computer to work, the electronic files stored in the employee computer, which is belonging to employer, will be under controlled and possessed by employee, which of course he has the right to access his own computer. Therefore, the Section 7 of The Computer-Related Crime Act cannot protect the employer's electronic information when the employment relationship is terminated.

## 5. PROPOSED SOLUTIONS

From the different result of the ownership over an electronic information generated by the employee during the employment, which accept that it's valuable property to the economy but it's there are no laws to determine those valuable properties are belong to which parties, except the copyrighted work under the Copyright Act, therefore the suggestions to amend the following law would be proposed as follows;

It should be amended the Copyright Act Section 9, to be the employer to be the owner in order to eliminate the confusion of

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<sup>17</sup> Supra note **Error! Bookmark not defined.**

the ownership of work between the copyrighted work and non-copyrighted work, all of them shall be treated as the property of the employer with the justified reason that the employer, who is paying for employee to work for him and created the work under the scope of work should be the owner of such works and all above of reason the employer invests the money and the most of information relating to employer's business should be valuable to the employer more than employee. Therefore, Section 9 of Copyright Act B.E. 2537, suggest to be amended as follows;

*“Copyright in a copyrighted works created by an author in the course of employment shall vest in the “employer”, the employer shall be entitled to exercise all economic rights unless otherwise agreed in writing, provided that the author shall be entitled to communicate and identify such work to the public in accordance with the purpose of the employment”*

Thereafter, it should have the criminal punishment when employee bad faith intends to delete, copy, obtain the information when he has an authorization to access the computer data or while under his possession in second paragraph of Section 7;

*“Section 7 If any person illegally accesses computer data, for which there is a specific access prevention measure not intended for their own use available, then he or she shall be subject to imprisonment for no longer than two years or a fine of not more than forty thousand baht or both.*

*If any person intentionally accesses a computer and thereby deletes, transmits, obtains confidential information of other person shall be subject to imprisonment for no longer than two years or a fine of not more than forty thousand baht or both.”*

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