

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

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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, approaches relating with contract, and approaches relating with copyright laws.

บทคัดย่อ

ตามที่เรารู้จักกันโดยทั่วไปว่า ทรัพย์สินทางปัญญาเป็นทรัพย์สินชนิดหนึ่ง เพราะตกอยู่ภายใต้คำจำกัดความคำว่า “ทรัพย์สิน” ตามมาตรา 138 แห่งประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 และตามกฎหมายทรัพย์สินของต่างประเทศ คำพิพากษาต่างๆ และตามความคิดเห็นผู้เชี่ยวชาญด้านกฎหมายหลายๆท่าน ถึงแม้ว่ากฎหมายลิขสิทธิ์ได้ถูกตราขึ้นเพื่อคุ้มครองทรัพย์สินที่ไม่มีรูปร่าง หากแต่ทรัพย์สินที่ไม่มีรูปร่างนั้นก็มีความสามารถและสามารถถือเอาได้ดังเช่นทรัพย์สินประเภทอื่นๆ ในทางพิจารณาเช่นเดียวกับกฎหมายทรัพย์สินทางปัญญา เราสามารถถือได้ว่าบัญชีโซเชียลมีเดียต่างๆ และเนื้อหาดิจิทัลต่างๆ ในบัญชีเหล่านั้นที่เป็นทรัพย์สินทางปัญญาก็เป็นทรัพย์สินประเภทหนึ่ง ดังนั้นบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นสิ่งที่มีเจ้าของ เมื่อบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นทรัพย์สิน และหากมีค่าขึ้นมาแล้ว ผู้คนต่างก็แย่งชิงและต้องการที่จะเป็นเจ้าของขึ้นมา เป็นเรื่องไม่น่าแปลกใจที่มีข้อโต้แย้งในเรื่องความเป็นเจ้าของในบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลอย่างที่เราพบได้ในคดีที่เกิดขึ้นที่ต่างประเทศ เมื่อถือว่าบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ เป็นทั้งทรัพย์สินในแง่กฎหมายทรัพย์สินและเป็นทั้งทรัพย์สินทางปัญญา เมื่อมีธุรกรรมหรือข้อโต้แย้งเกี่ยวกับบัญชีโซเชียลมีเดียและเนื้อหาดิจิทัลต่างๆ จึงต้อง

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

ใช้ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 และกฎหมายลิขสิทธิ์ มาบังคับกับธุรกรรมหรือข้อโต้แย้งเหล่านั้นร่วมกัน

สำหรับผู้เล่นเกมเฟสบุ๊กหรืออินสตาแกรม อาจทราบได้ว่าโซเชียลมีเดียเหล่านี้อนุญาตให้ผู้ให้บริการเป็นเจ้าของบัญชีและเนื้อหาต่างๆของคนทัพอัฟโหลดเข้าไปในเว็บไซด์ อย่างไรก็ตามโซเชียลมีเดียเหล่านี้ขอสงวนสิทธิ์ที่จะเข้าถึง แจกจ่าย หรือแม้แต่อนุญาตให้บุคคลภายนอกเข้าไปดูและเผยแพร่ต่อเนื้อหาอันมีลิขสิทธิ์ โดยไม่จำเป็นต้องมาขออนุญาตจากเจ้าของเนื้อหา ก่อน การกระทำเช่นนี้ถือได้ว่าโซเชียลมีเดียกำลังใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ ซึ่งผู้ที่ได้รับอนุญาตให้ใช้สิทธิ์นี้ได้ นอกจากเจ้าของลิขสิทธิ์แล้ว ก็คือเจ้าของลิขสิทธิ์ร่วมหรือผู้ได้รับอนุญาต (licensee) ถึงแม้ว่าในปัจจุบันโซเชียลมีเดียส่วนมากจะระบุเงื่อนไขที่ไม่ได้แสดงออกอย่างโจ่งแจ้งว่าเนื้อหาในบัญชีเป็นของโซเชียลมีเดีย (หากว่าปัจจุบันอินสตาแกรมก็ยังคงระบุเงื่อนไขที่ออกแน่วไม่ชัดเจนว่า เนื้อหาที่ปรากฏในการบริการของอินสตาแกรมเป็นของอินสตาแกรม) แต่ว่าในทางปฏิบัติและข้อเท็จจริงที่เกิดขึ้น ได้แก่การที่โซเชียลมีเดียสร้างเทคนิคที่ทำให้ผู้ให้บริการสามารถแจกจ่ายหรือใช้ประโยชน์ในเนื้อหาของผู้บริการรายอื่นได้ สาธารณชนทั่วไปสามารถเรียกดูโปรไฟล์หรือโพสต์ของผู้ให้บริการได้ทางเว็บไซต์หรือแอปพลิเคชันต่างๆ การอนุญาตให้เนื้อหาของผู้ให้บริการแลกเปลี่ยนไปมาได้ระหว่างสองโซเชียลมีเดียที่มีเจ้าของโซเชียลมีเดียเป็นรายเดียวกัน การกระทำต่างๆนี้ ถือได้ว่าโซเชียลมีเดียกำลังใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ ดังเช่นเจ้าของลิขสิทธิ์ร่วมหรือผู้ได้รับอนุญาต (licensee)

ผู้เขียนทิวาจักรครั้งนี้มีจุดประสงค์เพื่อค้นหามีหลักการทางกฎหมายใดที่อนุญาตให้โซเชียลมีเดียใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ได้ ไม่ว่าจะเป็นในฐานะเจ้าของลิขสิทธิ์ร่วมหรือในฐานะผู้รับอนุญาต ผู้เขียนแบ่งเนื้อหาการวิจัยออกเป็น 2 วิธี ซึ่งแต่ละวิธีสามารถทำให้โซเชียลมีเดียใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ได้ ได้แก่ วิธีการทางสัญญา และ วิธีการทางกฎหมายลิขสิทธิ์

จากการศึกษาพบว่า ไม่มีบทบัญญัติใดตามกฎหมายลิขสิทธิ์ทั้งของประเทศไทยและสหรัฐอเมริกาที่โซเชียลมีเดียสามารถใช้เป็นข้ออ้างสิทธิในการใช้สิทธิ์แต่เพียงผู้เดียวของเจ้าของลิขสิทธิ์ในฐานะเจ้าของลิขสิทธิ์ร่วม และเมื่อพิจารณาตามข้อยกเว้นการละเมิดลิขสิทธิ์ตามกฎหมายลิขสิทธิ์ของไทย การกระทำของโซเชียลมีเดียไม่เข้าข้อยกเว้นการละเมิดลิขสิทธิ์ในเนื้อหาของผู้ให้บริการ และข้อยกเว้นการละเมิดลิขสิทธิ์ของประเทศสหรัฐอเมริกาต้องพิจารณาข้อเท็จจริงเป็นรายคดีไปว่าการกระทำของผู้ละเมิดกระทบต่อตลาดอันมีศักยภาพของเจ้าของลิขสิทธิ์หรือไม่ หรือเกี่ยวข้องกับการหาทำไรทางการค้าหรือไม่

เมื่อศึกษาแล้วได้ผลสรุปว่า เงื่อนไขการใช้บริการ (Terms of Use) ที่โซเชียลมีเดียนำมาใช้มีผลสมบูรณ์บังคับใช้ได้ตามกฎหมายสัญญาของประเทศไทย แต่ก็ถือว่าเงื่อนไขดังกล่าวเอาเปรียบผู้บริการอยู่เกินสมควร ในทางกฎหมายลิขสิทธิ์ เงื่อนไขการใช้บริการ (Terms of Use) จะถือว่าเป็นการโอนไปซึ่งความเป็นเจ้าของลิขสิทธิ์หรือไม่ หากเห็นว่า เงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าวเข้าข่ายเป็นการโอนไปซึ่งความเป็นเจ้าของลิขสิทธิ์ การที่ เงื่อนไขการใช้บริการ

(Terms of Use) ไม่ได้ทำตามรูปแบบที่กำหนดไว้ในมาตรา 17 ของ พ.ร.บ. ลิขสิทธิ์ พ.ศ. 2537 ที่กำหนดให้สัญญาต้องทำเป็นหนังสือลงลายมือชื่อคู่สัญญาทั้งสองฝ่าย ถือว่าสัญญาเป็นโมฆะ ตาม มาตรา 152 ของประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. 2535 หากจะถือว่า เงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าวเป็นสัญญาอนุญาโตให้ใช้ลิขสิทธิ์ เนื่องจากตามลักษณะของ เงื่อนไขการใช้บริการ (Terms of Use) เป็นสัญญาสำเร็จรูปอย่างหนึ่ง จึงตกอยู่ภายใต้บังคับของ พ.ร.บ. ข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540 ดังนั้น เงื่อนไขการใช้บริการ (Terms of Use) ดังกล่าว จึงบังคับได้เท่าที่เป็นธรรมและพอสมควรแก่กรณี

ในเมื่อ เงื่อนไขการใช้บริการ (Terms of Use) ใช้บังคับได้เท่าที่เป็นธรรมและพอสมควรแก่กรณี จึงเกิดเป็นปัญหาอีกว่าและจะบังคับได้ในขอบเขตเพียงใด เพื่อหลีกเลี่ยงปัญหาการตีความดังกล่าว และเพื่อหลีกเลี่ยงสถานการณ์ที่อาจเกิดขึ้นในกรณีที่ผู้ใช้บริการไม่ได้เลือกใช้ Privacy Setting ซึ่งถือเป็นการที่ผู้ใช้บริการเลือกที่จะไม่เข้าร่วม (opt-out) ในกลไกที่มีไว้เพื่อสงวนสิทธิของตน จึงถือว่า ผู้ใช้บริการสละสิทธิของตนเองแล้ว หรือมีเจตนาโดยปริยาย (implied) ที่จะสละสิทธิของตน การที่ โฆษณามีเดียแนะนำเนื้อหาของผู้ใช้บริการไปใช้ จึงไม่ถือเป็นการละเมิดลิขสิทธิ์ ผู้เขียนจึงเสนอแนวทางแก้ไขให้แก่ มาตรา 15 (5) ของ พ.ร.บ. ลิขสิทธิ์ พ.ศ. 2537 ให้สัญญาอนุญาโตต้องทำเป็น หนังสือ ลงลายมือชื่อของทั้งสองคู่สัญญาและผู้รับอนุญาต

1. Introduction

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 Uses forcing users to grant license or transfer rights in copyrighted contents to social media sites, for examples Terms of Use imposed by Facebook,² Instagram,³ YouTube,⁴ and Twitter.⁵ Even though the

² 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

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)⁶, the practice and exercise by social media sites nowadays, by allowing the

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. From <<https://www.facebook.com/legal/terms>> (last visited July 15, 2014).

³ 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' from <<http://instagram.com/legal/terms/#>> (last visited July 15, 2014).

⁴ 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, 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).

⁵ 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)

⁶ Instagram, **Terms of Use** [Online], 1 March 2013. Available from <http://instagram.com/about/legal/terms/>.

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.

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.

2. In property law's perspective

In property law's perspective of several countries and from judicial rulings, social media account and contents 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),⁷ 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 account and at the same time he can restrict others from disturbing his possession. Once we consider that social media account and its contents are property, Civil and Commercial Code B.E. 2535 governs the transactions and disputes regarding the social media account and contents.

3. In intellectual property law's perspective

In Intellectual Property law's perspective of several countries and from judicial rulings, social media account can be regarded as an

⁷ Civil and Commercial Code B.E. 2535 sec. 138.

intellectual property. Intellectual property is one kind of property⁸ and as mentioned above, property includes tangible and intangible property. The IP owner is yet guaranteed to have exclusive rights towards his/her creation. The copyright laws are enforced together with Civil and Commercial Code B.E. 2535 to determine whether Terms of Use are valid and enforceable.

4. Social Media Sites' Terms of Use

Social media site's Terms of Use is an approach related with contract laws. It is enforceable according to contract laws, due to the contract was already formed between the user and social media site. The user cannot raise concealed intention⁹ to void Terms of Use as the social media sites are not aware of the actual intention of the user. Moreover the user cannot raise the expression of intention by mistake in the essential element of the Terms of Use,¹⁰ as the user is already given an opportunity to read and understand the Terms of Use before clicking "I ACCEPT".

Upon considering that Terms of Use possess same characteristics as Clickwrap License Agreement,¹¹ many foreign court judgments¹² regarded the Clickwrap License Agreement to be valid and enforceable, so the same consideration should be given to the social media sites' Terms of Use. 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. The author opines that Clickwrap License Agreement is not completely unfair to

⁸ CDPA 1988 sec. 90, Patent Act 1977 sec. 30.

⁹ Civil and Commercial Code B.E. 2535 sec. 154.

¹⁰ Civil and Commercial Code B.E. 2535 sec. 156.

¹¹ Hoyer, J. C., Click-Do WE Have a Deal? [Online], 2001 (Mar. 17, 2016), Available from www.lexis.com.

¹² CompuServe, Inc. v. Patterson 89 F.3d 1257 (6th Cir. 1996), Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL 388389, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998), Caspi v. The Microsoft Network, 323 N.J. Super. 118, 732 A.2d 528 (1999).

the internet user as the user has an opportunity to read the agreement before clicking “I ACCEPT”. The determination of the issue of unfairness depends on the contents of the agreement.

However, in terms of Unfair Contract Terms Act B.E. 2540, the Terms of Use falls into the definition of standard form contract,¹³ therefore the Terms of Use are governed by Unfair Contract Terms Act B.E. 2540. Upon considering the contents of the Terms of Use which force the users to transfer or assign rights in the contents to social media sites, Terms of Use are considered to be unfair for the users. The Term of Use favors on social media site too unreasonably over the users and users cannot negotiate with the social media sites. According to Unfair Contract Terms Act B.E. 2540, the Terms of Use is enforceable as reasonably and equitably as the case may be.

5. U.S. and Thai Copyright Laws

5.1 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 author¹⁴ or as other statuses.¹⁵ 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

¹³ Unfair Contract Terms Act B.E. 2540 sec. 4.

¹⁴ Copyright Act B.E. 2537 sec. 8, US Copyright Act 1976 sec. 102 (a)

¹⁵ Copyright Act B.E. 2537 sec. 9-14.

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.¹⁶ 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 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.¹⁷ Copyright Act 1976 entitles the copyright owner/user with the exclusive rights.¹⁸ 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.

¹⁶ Copyright Act B.E. 2537 sec. 17, US Copyright Act 1976 sec. 204

¹⁷ Copyright Act B.E. 2537 sec. 15.

¹⁸ Copyright Act 1976 sec. 106.

The act of social media site in exploiting or availing the user's contents deems copyright infringement of licensing right of the copyright owner.¹⁹ 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.

5.2 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 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 1976,²⁰ 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

¹⁹ Copyright Act B.E. 2537 sec. 15 (5).

²⁰ US Copyright Act 1976 sec. 107.

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.²¹

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.²²

Implied copyright license is a concept of voluntary license²³ 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

²¹ Bluemoon, (Infographic) What are different sources of revenues derived for Facebook? [Online] available at <http://faceblog.in.th/2011/01/infographic-business-behind-facebook/>. (accessed July 15, 2016)

²² Copyright Act B.E. 2537 sec. 15(5).

²³ Newman Christopher, *What exactly are you implying?": The Elusive Nature of the Implied Copyright License*, 32 Cardozo Arts & Entertainment L. J. 501-559 (2014).

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

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

6. UK Enterprise and Regulatory Reform Act 2013: Act enacted to cope with orphan works and Instagram's previously amended Terms of Use; Is it suitable?

The Enterprise and Regulatory Reform Act 2013 or Instagram Act was enacted to solve with orphan works and the problem resulted from Instagram's previously amended Terms of Use stating the copyright in user's contents belong to Instagram. 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.²⁴ 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

²⁴ The Enterprise and Regulatory Reform Act 2013 Section 77 Licensing of copyright and performer's rights.

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

7. 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. According to Unfair Contract Terms Act B.E. 2540, the Terms of Use is enforceable as reasonably and equitably as the case may be. 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.

From the study, there are no provisions in copyright laws of both Thailand and U.S. which entitled the social media sites to exercise the exclusive rights as joint copyright owners. Additionally, exceptions of copyright infringement as stated in Copyright Act B.E.

2537²⁵ are not provided in the case of the social media sites disseminate further or exploit the user's contents. Exception of copyright infringement as stated in US Copyright Act 1976 depends on the consideration whether the social media site's use affects on the user's potential market or involve commercial benefit.²⁶

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, 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 cases. 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. In order to avoid the problem of interpretation on scope of implied license, the author recommends to amend Section 15 (5) of Copyright Act B.E. 2537 to be

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

²⁵ Copyright Act B.E. 2537 sec. 32.

²⁶ US Copyright Act 1976 sec. 107.

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