

การวิเคราะห์การใช้งานอันมีลิขสิทธิ์บนสื่ออิเล็กทรอนิกส์ภายใต้กฎหมาย
ลิขสิทธิ์ไทยศึกษาเฉพาะกรณีที่ไม่ใช่เพื่อเชิงพาณิชย์

Legal Analysis of Non-Commercial Posting of Copyrighted Works
on Social Media under Thai Copyright Law *

ปภัศรา รังสิโรจน์

Papasara Ransirochana**

ดร. ปถวี สุขกิจ

Dr. Pattawee Sookhakich**

บทคัดย่อ

งานวิจัยฉบับนี้ศึกษาสถานะทางกฎหมายของการเผยแพร่ผลงานที่มีลิขสิทธิ์บนสื่อสังคมออนไลน์โดยไม่มีวัตถุประสงค์ทางการค้าภายใต้พระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537 ของประเทศไทย โดยทำการศึกษาเปรียบเทียบพระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537 ของกฎหมายไทยกับมาตรฐานสากลและหลัก “การใช้งานโดยชอบธรรม” (fair use) ตามกฎหมายของสหรัฐอเมริกา จากการศึกษาค้นพบว่า ปัจจัยตามกฎหมายของสหรัฐอเมริกาที่ใช้พิจารณาการใช้งานโดยชอบธรรมให้แนวทางที่ชัดเจนกว่าทั้งต่อศาลและผู้ใช้งาน ในขณะที่ข้อยกเว้นตามมาตรา 32 ของพระราชบัญญัติลิขสิทธิ์ยังมีถ้อยคำที่กว้างและไม่ชัดเจน นอกจากนี้กฎหมายไทยยังขาดหลักเกณฑ์ที่เฉพาะเจาะจงจึงส่งผลให้เกิดการตีความที่ไม่สอดคล้องกันในทางปฏิบัติของศาล และความไม่ชัดเจนในบทบัญญัติของกฎหมายนี้ได้สร้างปัญหาความไม่แน่นอนทางกฎหมายให้แก่ผู้สร้างสรรค์ผลงาน ดังนั้น เพื่อที่จะแก้ไขปัญหาดังกล่าว จึงมีข้อเสนอให้มีการแก้ไขมาตรา 32 ของพระราชบัญญัติลิขสิทธิ์ เช่น การกำหนด

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** Thomas Aquinas School of Law, Assumption University E-mail: papasara.r@gmail.com

** Thomas Aquinas School of Law, Assumption University. E-mail: pattaweeshk@au.edu (corresponding Author)

หลักเกณฑ์หลายปัจจัยเช่นเดียวกับกฎหมายสหรัฐฯ และการปรับปรุงโครงสร้างกฎหมายให้ชัดเจนขึ้น ซึ่งการแก้ไขกฎหมายในลักษณะนี้จะทำให้กฎหมายลิขสิทธิ์ของไทย สอดคล้องกับพันธกรณีระหว่างประเทศและสามารถถ่วงดุลสิทธิของเจ้าของลิขสิทธิ์กับ ประโยชน์สาธารณะในยุคดิจิทัลได้ดียิ่งขึ้น

คำสำคัญ: กฎหมายลิขสิทธิ์, สื่อสังคมออนไลน์, การใช้งานโดยชอบธรรม, พระราชบัญญัติลิขสิทธิ์, การใช้งานที่ไม่ใช่เชิงพาณิชย์

Abstract

This research investigates the legal status of posting copyrighted works on social media for non-commercial purposes under Thai Copyright Act B.E. 2537 (1994), comparing it with international standards and the U.S. fair use doctrine. The study addresses the growing issue of unauthorized use of copyrighted works online, particularly in the absence of clear legal criteria in Thai law. The analysis finds that the U.S. statutory fair use factors offer clearer guidance to courts and users, whereas the Thai exception in Section 32 remains broadly phrased and the Thai legal framework lacks specific criteria, leading to inconsistent court interpretations. This vagueness has led to inconsistent judicial outcomes and uncertainty for content creators. To address these problems, the paper suggests that Thailand should reform Section 32 – for example by codifying a multi-factor test similar to U.S. fair use and otherwise clarify its statutory framework. Such reforms would align Thai law with its international obligations and better balance creators’ rights with public interests in the digital era.

Keywords: copyright, social media, fair use, Thai Copyright Act, non-commercial use

1. Introduction

Nowadays, information and communication technology, especially internet-based systems, has developed rapidly and plays an increasingly significant role in daily life. As a result of technological advancement, the internet has become an indispensable part of people's lives, accessible anywhere and at any time. According to the social media statistics for Thailand in 2025, there are 51 million active social media users, accounting for 71.1% of the total population.² Social media³ allows users follow news, share pictures, videos, and articles, which are based on Web 2.0 technologies such as Facebook, TikTok, Instagram, YouTube, Twitter, and Line.⁴ With their ability

² datareportal.com, 'DIGITAL 2025: THAILAND,' <<https://datareportal.com/reports/digital-2025-thailand>> accessed 14 May 2025.

³ The Committee for the Dictionary of Computer and Information Technology Terminology under the Royal Society of Thailand defines "social media as a form of media that enables users to participate in content creation and express opinions through internet-based platforms. Social media refers to a category of applications developed on the foundation of Web 2.0 technologies, including widely used platforms such as Facebook, TikTok, Instagram, YouTube, Twitter, Line and others. All social media platforms share four fundamental elements that shape their functionality and user experience, namely connectivity, conversations, content creation, and collaboration. See more at Office of the Royal Society, 'Social Media' <<http://legacy.orst.go.th/?knowledges=สื่อสังคม-๔-ตุลาคม-๒๕๕๖>> accessed 14 May 2025. and Digimustketeers.co.th, 'Top 5 Social Media Platforms' <<https://digimustketeers.co.th/blogs/5-อันดับ-social-media-platforms-ยอดนิยมในประเทศไทย>> accessed 14 May 2025, Andreas M. Kaplan and Michael Haenlein, 'Social media: Back to the Roots and Back to the Future' (2012): 14, 2 Journal of Systems and Information Technology 101 and John Pavik and Shawn McIntosh, *Converging Media*, (4th ed, Oxford University Press 2015).

⁴ Digimustketeers.co.th, 'Top 5 Social Media Platforms' <<https://digimustketeers.co.th/blogs/5-อันดับ-social-media-platforms-ยอดนิยมในประเทศไทย>> accessed 12 May 2025.

to rapidly spread information, these platforms have become more popular and have a profound impact on daily life.

The rise of social media has made copyright infringement a common issue in Thailand, mainly regarding the unauthorized sharing of creative works for non-commercial use. To make a balance between granting authors economic and moral rights and allowing society certain freedoms to access and use creative works, Thai Copyright Act B.E. 2537 (1994) grants authors exclusive rights. Especially many social media users who post or share copyrighted content without permission, they often believing such use falls under “fair use”⁵ or legal exceptions. The current Thai copyright law faces two major problems regarding non-commercial use of copyrighted works on social media. The first issue is the absence of a consistent framework or factors to guide the courts in determining whether a particular act qualifies fair use or an exception under Section 32 of the Thai Copyright Act⁶ because Section 32 indicates exceptions to infringement such as for research, education,

⁵ “Fair Use” is recognized under Section 32 to Section 43 of the Copyright Act B.E. 2537 (1994), which provides limitations on copyright protection to allow certain uses without the authorization of the copyright owner. This provision permits the reproduction or adaptation of copyrighted work for personal benefit, research, critique, commentary, news reporting, judicial proceedings, and teaching, provided that such use does not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interest of the copyright owner. See more details, Chaiyos Hemarachta, *Explanation of Copyright Law* (4th ed, Bangkok: Nititham Press, 2006) 4.

⁶ The Copyright Act B.E. 2537 (1994) Section 32, paragraph one, states "An act against a copyrighted work by virtue of this Act of another person which does not conflict with the normal exploitation of the copyrighted work by the owner of the copyright and does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright".

commentary, or personal use⁷. But the language of this provision is quite broad and lacks detailed criteria. Consequently, social media users will interpret this clause to justify non-commercial use on social media platforms, claiming it to be lawful. However, such use may prejudice the legitimate rights of the copyright owner⁸, and lead to the loss of benefits from the copyrighted works

⁷ The examples of posting copyrighted works for non-commercial purposes can be found in the Copyright Act B.E. 2537 (1994) Section 32, paragraph two, states

“(1) research or study of the work provided that such act is not for profit;

(2) use for personal benefit or for the benefit of the user and his family members or close relatives;

(3) criticism, review or recommendation of the work, accompanied by an acknowledgement of the ownership of copyright in such work;

(4) news reporting through mass communication, accompanied by an acknowledgement of the ownership of copyright in such work;

(5) reproduction, adaptation, exhibition or presentation for the benefit of judicial proceedings or proceedings by authorized officials, or reporting the result of such proceedings;

(6) reproduction, adaptation, exhibition or presentation by a teacher for the benefit of his teaching provided that such act is not for profit;

(7) reproduction, adaptation of part of the work or abridgement or making a summary by a teacher or an educational institution for distributing or selling to students in class or in an educational institution provided that such act is not for profit;

(8) use of the work as part of questions and answers in an examination.

(9) (repealed)”

⁸ The term "*legitimate right of the owner of copyright*" as referenced in Section 32 of the Thai Copyright Act B.E. 2537 (1994) encompasses both economic rights and moral rights of the copyright holder. Economic rights include the exclusive authority to reproduce, adapt, distribute, publicly perform, and communicate the work to the public, as outlined in Section 15 of the Act. Moral rights refer to the author's entitlement to be recognized as the creator and to object to any distortion, mutilation, or modification of the work that could harm their reputation or dignity, as specified in Section 18. The phrase "*legitimate right*" serves as a safeguard, ensuring that exceptions to infringement, such as fair dealing for purposes like research or education, do not unreasonably prejudice these rights. This aligns with the "three-step test" under international

which may be deemed copyright infringement. The legal ambiguity becomes more pronounced when compared with the United States Copyright Act, especially Section 107.⁹ This section indicates a structured four-factor test for fair use, which includes an evaluation of the purpose of the use, the nature of the work, the amount and the substantiality of the portion used, and the effect of the use on the market. Unlike the Thai copyright framework, the U.S. approach provides courts and users of copyrighted works with clearer guidance.¹⁰ While the Thai legal system lacks such analytical tools which result in inconsistent interpretations and uncertainty for both users and creators. In practice, some Thai courts have informally applied the U.S. four-factor fair use test, including (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used and

agreements like the Berne Convention and the TRIPS Agreement, which Thailand adheres to.

⁹ 17 U.S.C. Section 107 of U.S. Copyright Act of 1976 states: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

¹⁰ Gorman, R., & Ginsburg, J., *Copyright: Cases and Material* (7th ed., Foundation Press, 2006) 13.

(4) the effect of the use upon the potential market for or value of the copyrighted work, to consider the cases, while others have relied solely on the wording of Section 32, paragraph one¹¹ that focuses on whether such use conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. This inconsistency of interpretation also undermines legal predictability for the public. Furthermore, the Thai Copyright Act section 32 was drafted in a pre-digital era and lacks the precision required to address the complexities of social media usage. Its vague terms provide insufficient guidance to determine when posting copyrighted material without permission may be justified. There are so many cases happen; for example, a case occurred in 2017, when Thai photographer found that over ten of his copyrighted images had been submitted without authorization to an international photography contest. The infringer claimed that the images were obtained from a royalty-free website. However, the photographer had never granted permission for contest use. Although the user did not gain any commercial benefit, using the work without giving credit affected the author's reputation and could have resulted in lost opportunities to license the work.¹² Other cases include a Thai photographer's image of Phra Pathom Chedi was submitted without his consent to a corporate photo contest and won an award. The same individual later used another of his images to win second

¹¹ The Copyright Act B.E. 2537 (1994) Section 32, paragraph one, states "An act against a copyrighted work by virtue of this Act of another person which does not conflict with the normal exploitation of the copyrighted work by the owner of the copyright and does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright".

¹² Mgronline.com, 'ช่างภาพไทยโวย ถูกฝรั่งฉกภาพใน Pixabay ไปประกวดได้รางวัลที่รัสเซีย' <<https://mgronline.com/onlinesection/detail/9600000088016>> สืบค้นวันที่ 1 พฤษภาคม 2568.

prize.¹³ These examples highlight the challenges faced by copyright owners in controlling their works in a digital environment, particularly when institutions fail to verify ownership. Therefore, these cases illustrate that non-commercial does not mean non-damaging. According to these issues, the Thai copyright framework is evident in real-life situations, where the vague and outdated provisions have failed to effectively protect copyright owners from unauthorized and non-commercial use, leading to reputational damage and the loss of potential economic opportunities.

2. Research Methods

In this research, the researcher employed two types of methods as;

1) Documentary research: This paper is a qualitative analysis based on legal comparative methodology by conducting studies from documents and textbooks such as legal explanations, provisions of relevant laws, academic articles, court judgments, and data from the internet technology in Thailand and abroad, including information from both Thai and international online media. The collected documents were systematically analyzed to identify legal gaps and compare Thai provisions with international practices.

2) Interviews: In-depth interviews were used using a semi-structured interviews to study problems and solutions by dividing the questions into 12 open-ended interview questions. The questions are about content production, economic impact, infringement experience, and legal challenges.

¹³ Mgronline.com, ‘หนุ่มถูกขโมยภาพไปประกวดจนได้รับรางวัลถึง 2 ครั้ง แจ้งผู้จัดกลับขอภาพต้นฉบับจากผู้ถ่าย’ <<https://mgronline.com/onlinesection/detail/9680000045050>> สืบค้นวันที่ 1 พฤษภาคม 2568.

3. Research question

To what extent does the ambiguity of Section 32 of the Thai Copyright Act B.E. 2537 (1994) necessitate revision to provide clear guidance for non-commercial use on social media?

4. Research finding

There are four findings such as;

(1) Problems Arising from Real-World Practices on Social Media:

Interviews and Case Studies¹⁴

¹⁴ To ground the legal analysis in real-world effects, this study conducted in-depth interviews with five well-known Thai online content creators (influencers who produce and post original copyrighted works on platforms such as Facebook, Instagram, YouTube, and TikTok). All interviewees have substantial following qualifications:

1. Being an influencer and a content creator with a minimum of 300,000 followers.

2. Has over 5 years of experience in online content creator.

3. Being a creator who produces copyrighted works such as literary works, artistic works and audiovisual works on social media and has significant exposure to issues of content creation and unauthorized copying. For this qualitative research, the author used a semi-structured interview to study problems and solutions by dividing the questions into 12 open-ended interview questions. The questions are about how content production works, production costs, how they earn income from content production, piracy, impact and damage from copyright infringement, the obstacles to exercise the right and litigation, and the suggestions or additional opinions in the view of content creator. The questions asked during the interview are listed such as: 1. What is your full name?, 2. Which social media platforms do you own or manage? How many followers do you have, and how long have you been active on these platforms?, 3. What types of content do you produce on your social media (e.g., photos, videos, articles)? What is the main theme or subject matter of your content?, 4. What is the purpose of creating your social media account(s)? (e.g., hobby, career, generating income), 5. Please briefly describe your workflow or the methods you use in creating media/content, 6. What are the typical production costs per project or piece of content? Please describe the types of expenses and estimate their amounts, 7. What are your sources of income from social media, and how do you generate this income? (e.g., sponsorships, clients, direct

Firstly, the language is vague and unclear Application of the Law to real-world practices on social media leads to Vague statutory criteria. Section 32 lacks clear standards, especially regarding the terms “normal exploitation” and “unreasonable prejudice.” Section 32 conditions are inherently subjective. Similarly, “unreasonable prejudice” to the owner’s interests is not quantified. To illustrate how the legal principles and comparative standards apply to real scenarios, this section examines several hypothetical (but realistic) case models of social media use of copyrighted works.

Model 1. A Facebook user infringed copyrighted works of the influencer who have 950,000 followers by copying images and posting on his own Facebook Page in public access. This social media does not run business or gain any profit. This means that he does not use copyrighted works for commercial purposes. However, the content that he posted, which contains the influencer’s works, was going viral and got a lot of engagement from users. An engagement on Facebook is an action someone takes on post. The most common examples are reactions including likes, comments and shares.¹⁵

If applying Section 32, paragraph one, of Thai Copyright Act with this case, there might be unclear whether the act conflicts with a normal exploitation of the copyright work and unreasonably prejudices the legitimate interests of the copyright owner or not. This provision is too broad. So, if this

monetization from platforms), 8. Have you ever experienced copyright infringement of your content or creative works?, 9. In what ways was your copyrighted work used without permission? (e.g., reposted on someone else’s social media, used commercially such as in product sales, or used non-commercially such as posted on nonprofit pages), 10. If your copyrighted work was used without permission—even if not for commercial purposes—how were you affected? Please describe the impact in detail, 11. Have you encountered any obstacles or challenges in seeking compensation, legal action, or remedies for copyright infringement on social media? Please explain, 12. Any additional suggestions or comments from your perspective as a content creator and online influencer (if any)?

¹⁵ Post Engagement in Facebook Ads, <<https://www.facebook.com/business/help/735720159834389>> accessed January 4, 2023.

case is considered with the 4 factors of Section 107 of the United States Copyright Law, there will be a clear answer that it is an infringement, and it does not meet the criteria of an exception to copyright infringement. The portion that the infringer uses is substantial. The widespread conduct by the infringer results in a substantially impact on the potential market of the copyright owner.

Model 2. Use of Online Brochure Images on a Non-Commercial Community Page. Ms. D is a volunteer administrator of a small Facebook Page for a local community group that shares food ideas, recipes, and baking inspiration. She downloads a professionally styled image of a chocolate cake from an online brochure published by a well-known food magazine and posts it to the page with the caption “Weekend baking inspiration – who wants to try this?” The post receives moderate engagement through likes and shares. Ms. D does not sell anything, promote any products, or gain financial benefit from the post, and the page is non-commercial in nature.

Despite the absence of a commercial motive, Ms. D’s action may still amount to unauthorized reproduction and communication to the public under Section 27 (1) and (2)¹⁶ of the Thai Copyright Act B.E.2537 (1994). While she does not directly profit, the act of reposting a copyrighted image without permission still interferes with the copyright owner’s ability to control the use of the work in a potential licensing market.

Under Section 32, the key question would be whether her use “conflicts with normal exploitation” or “unreasonably prejudices” the rights holder. Given that the image is professionally produced and used to attract

¹⁶The Copyright Act B.E. 2537 (1994) Section 27 addresses that “Any of the following acts against a copyright work by virtue of this Act without authorization in accordance with section 15 (5) shall be deemed an infringement of copyright: (1) reproduction or adaptation; (2) communication to the public”.

engagement, even without profit, it may still reduce the exclusivity or licensing value of the original work.

If analyzed under the U.S. fair use framework (Section 107), her use may initially appear more defensible: it is non-commercial (Factor 1), but it uses the entire image without transformation (Factor 3) and may substitute for viewing the original magazine or brochure (Factor 4). The lack of commentary, parody, or educational context weakens any fair use claim. Therefore, while the intent is non-commercial, the act could still be deemed infringement due to public use and potential market interference. That means courts must infer meaning on a case-by-case basis. As one commentator observed, Section 32's wording is so broad that applying it as a stand-alone exemption effectively inserts the three-step test into domestic law without clarifying any boundary but do not define key terms like “normal exploitation.” This lack of detail grants judges' broad discretion. Critics argue that Section 32 was drafted in a pre-digital era and fails to address the realities of online sharing. In other words, without statutory detail, courts must “borrow” the three-step test from international law and interpret it internally – a task for which they have no explicit guidance or criteria. This creates uncertainty.

(2) The Issue Concerning the Lack of Clear Criteria for Determining Whether Use with Non-Commercial Purpose Qualifies as Fair Use

The boundary between commercial and non-commercial use remains ambiguous in practice. Content creators fear that permissive sharing may undermine their ability to monetize or control their work. For example, if a photograph by a Thai artist is reposted on social media without credit or license, even without sale, it may harm the artist's potential market. In the leading Thai Supreme Court case (Judgment No. 1908/2546, 2003), a defendant argued his copying of a textbook was for a non-profit educational

purpose. The court held that because he had printed copies for distribution (even at a nominal price), this act conflicted with the book's normal market and prejudiced the owner. In other words, the Court looked beyond the purpose claimed by the defendant to the actual market effect. This suggests that non-profit intent alone cannot guarantee protection. While many users assume that sharing music, photos, or videos for personal expression without profit is legal, the Thai Copyright Act B.E. 2537 does not consider the absence of commercial intent as a definitive factor in determining legality. Section 32 provides an exception if the use does not conflict with normal exploitation or unreasonably harm the copyright owner's rights. However, it does not define what counts as "non-commercial," leaving courts with broad discretion. This leads to inconsistent interpretations across four key areas as;

- (a) **User Identity:** A post by a private individual may seem non-commercial, but the same post by an influencer with many followers could be seen as brand promotion, blurring the line between personal and commercial use.
- (b) **Type of Posted Works:** The nature of the work affects the impact of reposting. A professional photo may lose licensing value if widely circulated, while casual memes may not. Thai law treats both the same, creating disproportionate outcomes.
- (c) **Purpose and Benefit:** Even without profit, users may gain visibility or brand recognition from reposting. Thai law lacks the structured analysis seen in U.S. fair use, which considers purpose and character of use, causing legal uncertainty.
- (d) **Public vs Private Use:** The scope of "communication to the public" remains unclear in private or semi-private platforms. For example, it is not settled whether sharing a copyrighted image in a closed LINE group or small private circle constitutes public communication under Section 27 (2), leading to difficulty in enforcing the law consistently. Thai courts have affirmed that acts

can be considered public when the copyrighted content is made accessible to an undefined or broad group of people. There are some judgments from the Supreme Court regarding this issue. In Supreme Court Judgment No. 876/2548¹⁷, the court ruled that playing copyrighted music in a commercial space open to customers was a form of public communication. Similarly, Supreme Court Judgment No. 10377/2555¹⁸ found that broadcasting copyrighted musical works without permission via media channels also constituted communication to the public. These cases confirm that "public" does not necessarily mean the entire general public, it can include any group where the audience is not clearly defined or limited. However, this interpretation poses challenges in the context of social media. Sharing content in a "private" LINE group or through accounts with limited access settings may still result in broad dissemination, especially when reposts or shares occur. The term "public" is not clearly defined in Thai law. Supreme Court rulings have found that making content accessible to undefined audiences—even in private groups—can be "public." This creates confusion in social media contexts where content is often reshared beyond intended recipients.

¹⁷ Supreme Court Judgment No. 876/2548: The Court ruled that playing copyrighted music in a place accessible to the general public, such as a restaurant, constituted unauthorized communication to the public, thereby infringing the copyright holder's exclusive rights.

¹⁸ Supreme Court Judgment No. 10377/2555: The Court confirmed that the unauthorized dissemination of copyrighted musical works on platforms with public access amounts to copyright infringement under the provision concerning communication to the public.

(3) The Issue Regarding Whether Section 32 of the Copyright Act can still Function Effectively as a Legal Basis for Exceptions

A key issue lies in the overly general wording of Section 32. While the language echoes the three-step test from the Berne Convention and TRIPs Agreement, it fails to provide judges with structured legal criteria, leading to a high degree of judicial discretion. This results in inconsistent judgments that reduce legal certainty. Moreover, courts rarely articulate detailed reasoning when applying this exception, making it difficult for users to understand what behaviors are permissible. This problem becomes more serious in the digital environment, where content is easily reproduced and disseminated. The line between private and public use is blurred, and many users unknowingly engage in acts that could be infringing. For example, a user sharing a copyrighted video clip “just for fun” may not realize that their act still impacts the market for the original work, particularly when the post goes viral. Despite the non-commercial intention, the user may still be liable under Thai law. However, Section 32 provides no clear framework to assess such conduct.

In contrast, the United States Copyright Act provides a more concrete legal model under Section 107, which outlines a four-factor fair use test. These factors, purpose and character of use, nature of the work, amount and substantiality used, and effect on the market, allow courts to evaluate each case systematically. While still subject to interpretation, this structure promotes greater consistency and transparency in judicial decisions. Social media use can also be evaluated more fairly through this lens, particularly when distinguishing between transformative uses and exploitative ones. Furthermore, Thai courts have occasionally demonstrated reluctance to apply Section 32 broadly. In Supreme Court Decision No. 1908/2546, the defendant reproduced part of a literary work and claimed it was for educational

purposes. However, the Court rejected this defense, indicating that even educational or socially beneficial uses are not automatically exempt if they affect the market for the original.

Associate Professor Dr. Pisawat Sukontapan has pointed out that Section 32 of Thai Copyright Act is written in a very broad and unclear way, which makes it open to different interpretations. This can create problems because it might allow people to misuse the exception and harm the rights of copyright owners. She suggests that Thai copyright law should provide more specific legal guidelines or clearer directions from the courts to prevent abuse and to better protect authors.¹⁹

Section 32, paragraph one of the Thai Copyright Act mirrors the internationally accepted “three-step test”, first articulated in Article 9(2) of the Berne Convention (1971)²⁰ and echoed in Article 13 of the TRIPS Agreement²¹. The three-step test permits member countries to create exceptions to exclusive rights only if the use is confined to certain special cases, does not conflict with the normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the rights holder.

¹⁹ Pisawat Sukontapan, ‘Does Thai Copyright Law Allow the Courts to Create New Exception to Copyright Infringement?’ (2021) 1(1) MFU Law Journal <<https://so08.tci-thaijo.org/index.php/MFULJ/article/view/23>> accessed May 14, 2025.

²⁰ It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

²¹ Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Even though the overall principle of Thai copyright law is similar to international standards, the lack of specific details in the law means that much depends on how individual judges interpret it.

Issues	Thailand – Section 32 of Copyright Act B.E. 2537	United States – Section 107 of U.S. Copyright Act
Legal Doctrine	General Exception Clause (based on the three-step test)	Fair Use Doctrine (case-by-case statutory balancing test)
Core Criteria	Use must not conflict with normal exploitation of the work and must not unreasonably prejudice the legitimate rights of the owner ²²	Not explicitly based on Berne but interpreted as consistent with the three-step test ²³
Legal Aspects	Unclear and highly discretionary; lacks detailed criteria for online use	More developed through case law; some guidance available

Figure 1: Comparative study between Section 32 of Copyright Act B.E. 2537 and Section 107 of U.S. Copyright Act

According to figure above, the U.S. does not explicitly write the three-step test into its statute, but its fair use doctrine (17 U.S.C. § 107) and various specific exceptions inherently strive to meet those standards by balancing the interests of users and rights holders.

²² See Section 32 (1) of Thai Copyright Act B.E. 2537 (1994)

²³ See Berne Convention (Paris Act 1971), Article 9 (2); TRIPs Agreement, Article 13.

In practice, Thai courts used to rule on such problems in two ways: The first approach that the Intellectual Property Court used to adapt in the Red Case No. Tor Por 35/2544 by taking factors from the principles of fair use under Section 107 of the United States Copyright Law to make a decision which the author sees as an interesting approach.

The second approach is for the court to determine whether the defendant's actions constitute a market share or have an unreasonable impact on sales of the plaintiff's work. If the action is the plaintiff's market share or has an unreasonable impact on sales in the plaintiff's work. It is considered that such action is contrary to the ordinary exploitation of the copyright work by the copyright owner and unreasonably affects the legitimate rights of the copyright owner which makes the act deemed an infringement of copyright.

The use according to the purpose of Section 32, paragraph two, may be divided into 4 major categories: educational use, personal use, use for news reporting in mass media and use for the benefit of court proceedings. In most cases, these specific exceptions pose little controversy, for example, using a portion of a work for classroom teaching or in a news program is often clearly accepted as fair because the law outlines those instances and any conditions (such as non-commercial intent and proper acknowledgment of the source) that apply. However, the advent of social media has blurred the lines of these categories. Users often claim that reposting someone's photo or artwork on a personal social media page is "personal use" or that sharing a video clip is "for comment" or "for news" on a current event. The problem is that Section 32, paragraph one must still be satisfied even if the use nominally fits one of the listed purposes: the use must not conflict with the normal exploitation of the work and not prejudice the owner's legitimate rights.

Professor Nandana Indananda, a legal expert of Thai intellectual property field, has pointed out a crucial gap in Thailand's copyright law regarding fair use. During a recent roundtable on copyright issues, he pointed out that Thai copyright law does not have a clear list of factors for courts to follow when deciding fair use cases. Unlike U.S. law, which sets out four specific factors under Section 107 of the U.S. Copyright Act, Thai courts do not have the same kind of detailed guidance. He explained that in the U.S., judges typically rely on these listed factors when making fair use rulings, which is consistent with how the common law system works. The author also totally agrees with the discussion. In contrast, Thailand's Copyright Act Section 32 provides only general conditions in its first paragraph and enumerates "certain special cases" in its second paragraph without any guiding factors. According to Professor Nandana, having these conditions and a fixed list of specific exceptions in Section 32 is not sufficient for courts to fairly decide complex cases. The law needs to evolve by developing a set of fair use factors similar to those in U.S. law.

Professor Nandana also pointed out that the lack of clearly defined fair use factors under Thai copyright law discourages people from testing whether their use would be considered lawful. Since copyright infringement in Thailand carries both civil and criminal penalties, most individuals are understandably cautious and avoid taking the risk. He added that Thailand does not have a system for getting a court's opinion in advance, such as a declaratory judgment, so users can only find out whether their act is considered infringement after being sued, where they would have to defend

themselves by claiming fair use. This legal uncertainty, he noted, makes it harder for people to rely on fair use in practice, even if it exists in theory.²⁴

(4) The issue regarding Insufficient enforcement mechanisms

Enforcement is weak in practice, as anonymity and high legal costs deter creators from acting. Insufficient enforcement mechanisms: The law permits remedies under Section 64²⁵, but in practice, anonymous infringers and high litigation costs prevent most creators from acting. As a result, infringers often go unpunished. Many infringers used anonymous accounts, making legal action difficult. Most creators did not pursue legal remedies due to high costs, time, and the low likelihood of meaningful compensation. This lack of enforcement discourages creators from asserting their rights and weakens the deterrent effect of copyright law.

5. Conclusion and Recommendations

In conclusion this paper shows the legality of posting copyrighted content on social media for non-commercial purposes under Thailand's Copyright Act B.E. 2537 (1994) and identified three main issues: (1) unclear application of the law to real-world practices on social media; (2) the absence

²⁴ This summary is based on Professor Nandana Indananda's commentary on the Topic: "Exceptions to Copyright Infringement: fair use" at The Roundtable Seminar in the Collaboration of Faculty of Law and Copyright Coalition Thailand (CCT) conducted online on 12 June 2023.

²⁵ In the case of infringement of copyright or performer's rights, the court has the authority to order the infringer to compensate the owner of copyright or performer's rights with damages the amount which the court considers appropriate by taking into account the gravity of injury, including the loss of benefits and the expenses necessary for the enforcement of the right of the owner of copyright or performer's rights. paragraph 2 In case there is explicit evidence that an infringement of copyright or performer's rights has been willfully or intentionally committed, causing a copyright work or performer's rights to be widely accessed by the public, the court shall have the authority to order the infringer to pay more damages, but not exceeding twice as much for the damages specified in paragraph one

of clear criteria for determining fair use in non-commercial contexts; and (3) the lack of clarity and effectiveness in Section 32 as a legal exception. These problems have caused legal uncertainty, inconsistent court rulings, and confusion for both creators and users.

The analysis finds that the U.S. statutory fair use factors offer clearer guidance to courts and users, whereas the Thai exception in Section 32 remains broadly phrased and open-ended (failing to define terms like “normal exploitation” or “reasonable prejudice”). This indistinctness has led to inconsistent judicial outcomes and uncertainty for content creators.

In response to these challenges, the Department of Intellectual Property (DIP) has introduced a guideline referring to the four-factor fair use test under U.S. law (Section 107). Although this guideline is not legally binding, it reflects a positive step towards clearer interpretation and better alignment with international standards. However, because courts are not obligated to follow non-binding guidelines, the four-factor test will only apply if raised by the parties in court.

Codifying this test into Thai law, possibly as a new provision such as Section 32, paragraph three or Section 32/5, would help standardize judicial reasoning, reduce inconsistency, and improve legal predictability. It would also modernize Thai copyright law to meet global standards in enforcement and dispute resolution.

For recommendations, this research proposes four key reforms:

1. As mentioned above, The U.S. Copyright Act explicitly defines “fair use” with four statutory factors (purpose of use, nature of the work, amount used, and market effect) This structured test provides users and courts with clearer guidance. Legislate the four-factor test into the Thai Copyright Act to provide clear guidance on fair use. Thai copyright law would offer more structured guidance to judges, legal practitioners, and users when evaluating fair use claims. This reform could be implemented through legislative amendment, contingent upon stakeholder consensus and political will. The next step would require political will and stakeholder consensus to integrate

this legal framework into a new section, such as Section 32, paragraph three or Section 32/5.

2. Clarify the scope of Section 32 through legal amendments, ministerial regulations, or consistent court rulings.

3. Promote factor-based analysis in judicial decision-making to ensure fairness and consistency to balance users' rights with strong protections for copyright owners. This includes ensuring that copyright owners have accessible legal channels to enforce their rights, with adequate evidentiary procedures, timely adjudication, and fair remedies.

4. Ensure fair trial procedures that balance the rights of users with strong protection for copyright owners.