

The legal protection of personal data in the case of “Google street view”: A comparative study of US, EU, and Thai laws

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ABSTRACT

“Google street view” was released in 2007 as part of “Google maps which enables users to view real panoramic street-level imagery. The images are recorded by vehicles equipped with advanced imaging technology, driving down the road. In the initial stage, the scope of images was restricted to the cities in the U.S. However, the scope has expanded to cover other countries. In Thailand, the Google map application is currently available and major cities such as Bangkok can be viewed in virtual street scenes. The images of real places including the details of individuals can be found which affects the right to privacy of the individual. Thus, this research aims to study the application of Thailand’s existing laws which are relevant and could be applied to protect the right to privacy of a person who is affected by Google street view. The qualitative study by content analysis is introduced with the comparison to the application of the U.S., EU, and Thai related laws. The results indicate that, the U.S. and Thai laws share similarities in a sense that privacy law relating to the collection of personal data of both jurisdictions is not united but piecemeal, consisting of various laws. In addition, the related laws have several limitations in applying them to protect the right of privacy in the case of Google street view. For instance, the U.S. constitution’s scope is limited to government action. In addition, statutes and common laws at state level have limitations, especially in regard to the protection of privacy in public places. With relation to Thai laws, this research also found limitations and problems in applying these laws to protect personal data in the case of Google street view. By contrast, the results indicated that in Europe, the “European Privacy Directive 95/46/EC” provides data protection principles which can be applied in the case of Google street view. Thus, this research proposes the amending of Thai laws in order to protect personal data from being collected without consent.

Keywords. Google street view, Data protection law, privacy law, personal data.

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INTRODUCTION

Google provides an internet search service for internet users. The popularity of Google in the U.S. is so evident that the word “Google” has been added to dictionaries to mean “search”. (Scott,2006) Apart from the search engine, Google also introduced a geospatial imaging service called “Google Maps” which enables users to search for places online from satellite images. “Google street view” was released in 2007 as part of “Google maps. (Google Maps Help, 2013) This street view application enables users to view real panoramic street-level imagery. The user can navigate Google Maps first in order to select a location where the street view feature is available. Then, a street view button will appear. If the user clicks, a human icon will appear in order for that user to place such icon on any street. The street view will then display a photograph of the street which the user can zoom in on or rotate to a full 360 degrees. In other words, Google street view enables users to see a map in the form of images where the human icon is placed as if the user has stood there. Google states that the images used in Street view were collected by “vehicles equipped with advanced imaging technology, driving down places of public interest (Google Maps Help, 2013) In the initial stage, the scope of Google street view was limited to some cities in the U.S. as the Google press center pointed out that the Google street view’s users can “view and navigate within 360 degree street level imagery of various cities in the U.S.” (Google Press Center, 2007) Thus, users could view a landscape, building, place, or scenery. They could also zoom in on the details of a place located on the street view. However, Google street view has now expanded to several cities around the world.

The collection of such images which are finally broadcasted on Google street view as part of the virtual landscape of street scenes, leads to legal problems relating to the invasion of the right to privacy of people who are recorded due to the fact that this application captures candid moments of people and posts it for the entire world to see. (Michael 2007) In addition, the images captured can include personal details such as people’s face. (Jesse Leavenworth, 2007) Although Google claims that the street view application only records public places similar to what people can see if they drive down the street, there are people whose privacy is affected by the application. For example, some claimed that her living room window can be zoomed into on Google street view. (Miguel, 2007) These concrete examples show privacy-related problems from Google street view including photographs that show people engaging in activities which they do not wish to be photographed and have published online (MacDonald, 2007) , for example, a photograph of a man exiting a sex shop , a photograph of a man being sick on the pavement outside a pub, (The Telegraph,2009), a photograph of a nude man in the boot of a car which is parked on the driveway of a house (The Telegraph,2010), and a photograph of a woman in her underwear when she was in her car with the door open (Martha,2013)

This being the case, tensions therefore arise between individuals who maintain their right to privacy and Google who refers to its freedom of expression recognized by the constitution. In addition, Google has also claimed that any person who objects to an image displayed on street view can report the inappropriate image to Google. (Google Maps Help, 2013)

The practice of collecting images by Google street view is legally controversial. In addition, the legal liability of Google and the legal protection of the right to privacy are

different depending on the laws of each jurisdiction that the collection was done in. In some jurisdictions, such as the U.S. where the Google Company was first developed, the practice is unlikely to be liable according to existing privacy laws. Nevertheless, in other jurisdictions, such as EU where the protection of privacy is strong as part of human rights, the European Privacy Directive 95/46/EC is specifically enacted at EU level with the main objective of protecting personal data. EU member states are obliged to enact or amend their domestic laws in order to conform to the requirements relating to personal information in this directive. In contrast to the U.S.' privacy laws, the principles stipulated in the EU directive have a strong effect on protecting individuals in cases where they are recorded by Google street view. The difference in protection between the US and E.U. laws relating to Google street view reflects the different attitudes toward privacy, as Jacob Kohnstamm, chairman of the Dutch Data Protection Authority commented, "In the United States, privacy is a consumer business. In Europe, it is a fundamental rights issue." (The New York Times, 2012)

In Thailand, the Google map application is available online which can be accessed by a personal computer, or smartphone (<https://maps.google.co.th>). Some major cities in Thailand, such as Bangkok, can be viewed as part of a virtual street scene which allows users to see photographic images of real places, including the details such as the body and face of people. Although people faces are now obscured by pixels, they could still be recognizable to someone who is familiar with that person's appearance in the photograph. However, there is still no legal research relating to the legal protection of the right to privacy of people who are recorded and included in the imagery of Google street view. Thus, this research aims to study the legal protection of such rights by comparing relevant laws of the US, the EU, and Thailand in order to propose suggestions to the Thai Government to protect the right to privacy of Thai people from the collection of personal images.

Research Methodology

This research was conducted with the aim of studying the application and interpreting the laws in case of invasion of privacy by Google street view". Thus, this is a qualitative research which examines related laws, court cases, law journals, and law reviews which illustrate the opinion of legal scholars. In addition, electronic documents from websites have also been collected, especially factual data relating to the problems of Google street view. Related documents were analyzed by a content analysis method. In addition, a comparative analysis was conducted by comparing the content of U.S., EU. and Thai laws.

RESULTS

1. Although the legal definition of personal data can be different among countries, this research found common elements to such a definition e.g. the "identifiable element" and "natural person element". Thus, the research indicates that images of a natural person captured by Google can be regarded as "personal data" under the definition of data protection laws.

2. Regarding the classification of personal data, images captured by Google street view can be classified as "sensitive data" or "non-sensitive data" depending on a particular circumstance.

3. The research found that the invasion of the right to privacy by Google street view can be considered in several aspects, especially the lack of consent and notice.

4. As for specific laws relating to the protection of personal data, the results indicated that the U.S. and Thai laws do not have a single privacy law regulating the collection and use of personal identifiable data. The related laws are fragmented, addressing specific sectors such as banking and finance. Therefore, such laws cannot be applied to cases of collecting personal data by Google, which is not a regulated sector. However, the results do indicate that a major source of personal data protection principles can be found at EU level, the “European Privacy Directive 95/46/EC”. When focusing on the EU, in general the practice of Google collecting people’s images is inconsistent with the data protection principle, and this is also reflected in domestic laws of EU members.

5. With regard to the U.S. Constitution, the results found that the Fourth amendment stipulates the right of people to be secure from “unreasonable searches and seizures”. However, it cannot be applied to protect the right of privacy in the case of Google street view which is conducted by the private sector. Comparing this to the Thai constitution, the right to privacy is also recognized. However, the similar limitation was found.

6. Regarding the study of U.S. tort law, the results demonstrated that the tort claim for privacy is protected by common law which has been in force since 1890 according to the concept proposed by Samuel D. Warren and Louis D. Brandeis (1890). This concept was further developed by the work of William Prosser (1960) whose 4 types of privacy invasion were reflected in the second restatement of torts (1977) which is the backbone of modern privacy laws in the U.S. The 4 types of privacy tort are; (1) intrusion upon one’s seclusion (2) misappropriation of one’s name and likeness (3) publicity that places a person in a false light (4) public disclosure of private facts. At state level, the 4 types of privacy tort are adopted as part of either common law or statutes in many states. (Andrew, 2006.). In the case of Google street view, the relevant privacy tort could be type (1) or type (4). However, the results indicate that there are some limitations in applying such torts to protect privacy in the case of Google street view. Unlike in the U.S., the results showed that Thai tort law does not specifically stipulate the right to privacy as separated by tort claim. The general principle of tort could be applied, but with several limitations.

7. The research found, by analyzing the first law suit relating to Google street view in the U.S., there is a limitation of applying the U.S. tort law relating to invasion of privacy to protect a person who was photographed by Google street view. Aside from a privacy tort, trespass law is also relevant and can be applied as evident in “Boring v. Google, Inc”. However, there are still limitations in applying trespass law to protect the right to privacy of a person.

DISCUSSION

1. This research indicates that there are different definitions for personal data. At international level, the Organisation for Economic Co-operation and Development (*OECD*) has defined “personal data” broadly as “any information relating to an identified or identifiable individual” (*OECD*, 1980). At the EU level, “personal data” is defined as “...any information relating to an identified or identifiable natural person... an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic,

cultural or social identity...” (Article 2, Directive 95/46/EC). Regarding domestic laws, the UK law (Data Protection Act 1998), defines “personal data” as “data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”. Comparing this to the U.S., “Personal Identifiable Information or PII” is legally protected and The Office of Management and Budget (OMB) defines PII as: “information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother’s maiden name, etc.” Although legal definition of personal data can be different among countries, this research found common elements of such definitions, such as the “identifiable element”. In addition, personal data covers only data of natural person. In the case of Google street view, photographs of a natural person captured is within the scope of “personal data”. Thus, the collection and processing of such data is generally regulated by personal data protection laws.

2. With regards to the classification of personal data, there are several criteria to classify such data, for example, EU Directive and UK law distinguishes two categories of personal data, i.e., (1) information processed wholly or partly by automatic means (e.g. on computer); and (2) information processed otherwise than by automatic means (i.e. manual information in a filing system). Thus, personal data can be classified by considering the form of presentation or storage. Moreover, personal data can also be classified by considering the “sensitivity” of such data. For example, EU Directive provides strict levels of protection for “sensitive data” which includes “... racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, data concerning health or data concerning a natural person's sex life or sexual orientation...” (Article 10, Directive 95/46/EC). The UK law also classifies “sensitive personal data” in accordance with the EU directive (Section 2, Data Protection Act 1998). As for the U.S., there are several laws protecting personal data in particular areas. Thus, personal data can be classified by protected areas, e.g., personal data related to health or medical information which is protected by The Health Insurance Portability and Accountability Act or HIPAA, personal data related to financial information which is protected by The Financial Services Modernization Act or Gramm-Leach-Bliley Act. In the case of Google street view, photographs of a natural person captured can be classified as “sensitive data” or “non-sensitive data” depending on the particular circumstance. In general, a photograph of a person walking down a street could be “non-sensitive” personal data. However, in some situations the same photograph could be classified as “sensitive” e.g., the photograph of the person is related to a political demonstration or the person is engaging in a religious activity. Therefore, this could be classed as sensitive personal data. In addition, it could also be argued that the photograph of the man entering a “sex shop” could also be related to his “sex life”.

3. The invasion of the right to privacy by Google street view can be considered in several aspects. First of all, a person who is recorded has not given their consent. So, regardless of the situation or location, the recording of their personal image without consent could affect their right to privacy in terms of the right to control personal data. (Solove,2006). In addition, most people may be completely unaware of the fact that they are being recorded.

The affected people could be recorded in a situation or location that they have not intended to announce publicly.

4. As for the general aspect, the U.S. privacy laws are not unified, but consist of various laws from different levels. (Dorothy, 2000). Thus, the U.S. and Thai privacy laws share similarities in a sense that privacy laws relating to the collection of personal data in both jurisdictions is piecemeal, spanning constitutional protection and statutes protection. Concerning specific laws relating to the protection of personal data, the U.S. does not have a single privacy law regulating the collection and use of personal identifiable data. The related laws are fragmented, addressing specific sectors such as the collection, use and disclosure of personal information in banking and the financial sector. (Jonathan, 1999). Similarly, Thai laws relating to the protection of personal data include constitutional, civil, commercial, and criminal codes, and specific Acts such as the computer crime Act (Thongraweewong, 2014, 2013.). Although the “Official Information Act, B.E. 2540 (1997) includes several principles relating to the protection of personal data which include pictures or images, the research found a critical limitation of this Act in relation to the Google street view case. This is because the scope of this Act merely covers personal information in possession or control of a State agency. Thus, this Act excludes information in possession of private companies, including Google. In addition, the data protection principles which appeared in the draft of the Personal Data Protection Bill that was adopted by the Government in 2015 could be applied in the case of Google street view. However, according to the draft bill, there are some limitations; for example, consent from the data subject is not required at the collection stage (Thongraweewong, 2015).

Comparing this to the EU, the research found that the main EU regulation relating to the protection of personal data is the “European Privacy Directive 95/46/EC” which was passed in 1995 and came into force in 1998. This directive is commended as being the most comprehensive international instrument of data protection laws (Swire & Litan, 1998; Bennett & Raab, 2006). The basic objectives of this directive consist of supporting the free flow of information in the EU and protecting privacy. Both objectives which could be viewed as conflicting to each other, have been harmonized by this Directive. Some commentators argue that the goal of achieving an internal European market was elevated to the same level of fundamental human rights, and more so, “The concern about privacy is totally subordinate to the market prerogatives.” (Gutwirth, 2002) As for the objective to protect privacy, the personal data protection is regarded in the EU as a human right which should be protected. (Graham, 1999) Therefore, it is evident that the Directive explicitly refers to the right to privacy (recitals 2, 9-11, 68, art. 1(1))

The Directive 95/46/EC has the scope of protecting “personal data” which is defined as “any information relating to an identified or identifiable natural person...an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, or social identity” (Art. 2(a)) The image is regarded as “personal data” because it can represent information on a person. Recital 14 of the Privacy Directive also states that the Directive should apply to processing of data involving the capture, transmission, recording, storing, or communicating of sound and image data relating to natural persons. Consequently, a person’s image recorded by Google street view can be considered as a violation of Article 8 which prohibits the “processing of personal data

revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life". Images in Google street view illustrating people in certain situations can violate Article 8, for instance, an image of a person coming in or out of church, temple, mosque, abortion clinic, or hospital. In addition, the mere fact that the person's image can also be considered as a revelation of their racial or ethnic origin.

Consent is a core principle under the notion of "privacy as control". (Westin, 1967) Only the data subject can decide if, when, and to what extent to open his or her virtual private sphere to other entities. Privacy Directive 95/46/EC (Article 7) stipulates this core principle. However, the Directive also provides exceptions to the principle of consent such as when the collection of personal data is necessary in order to protect the vital interests of the data subject (art. 26(1)(e)). This Directive allows member states to prohibit the processing of special categories of data despite one's consent (art. 8(2)), by requiring prior notification of the data subject (art. 10), and by defining consent (art. 2). Then, in general, Google has to obtain "consent" of the data subject before collecting and disseminating the person's image through the Google street view application, except where it can be justified under exceptions depending on domestic laws of each member state. However, some scholars argue that consent is a highly volatile concept and subject to manipulation (Froomkin, 2000). Some have abandoned the notion of consent as a central pillar of privacy law and data protection (Nissenbaum, 2004).

As a result, the U.S. and Thailand provide no specific laws for protecting the privacy of people from the practice of private operators like Google relating to the collection of personal data. By contrast, in Europe, there is the specific law of the EU which is implemented by domestic laws of member states that can be directly applied to the case of Google street view.

The research found that Google has changed its practice by blurring the face of the person captured in Google street view. Thus, the image can no longer be deemed as "personal data" according to the Directive 95/46/EC because it is not "identifiable". However, the changing of Google's practice by incorporating personal data protection into the operation is mainly influenced by data protection laws in Europe.

5. According to the lack of specific law in Thailand and the US. as discussed above, the relevant laws should be applied, e.g., constitution and tort law. However, this research also found that there are limitations in applying such laws. As for the Constitution, by comparing the U.S. Constitution with the Thai constitution, the results indicate that although the right to privacy is recognized by both constitutions, there are some limitations. With regards to the U.S. Constitution, the Fourth amendment stipulates the right of people to be secure from "unreasonable searches and seizures". Thus, a "search" without warrant is prohibited. It also prohibits the issuing of search warrants on less than "probable cause". The Supreme court has interpreted the "search" in a limited sense, namely, only a physical intrusion can be deemed as a search. Communication surveillance such as a wiretap which is not involved in physical intrusion is not prohibited. However, the interpretation has developed as time has passed. The term "search" was previously interpreted to include several activities relating to the collection of person's data such as wiretapping which intrudes upon a person's communication. The Supreme Court (Katz v. United States, 1967; Berger v. New York, 1967) interpreted that wiretapping constituted a "search" according to the fourth amendment. Thus, a warrant was required. Later, congress passed a specific law regulating wiretaps called the "Omnibus Crime Control and Safe Streets Act of 1968". This law was later amended to expand the scope covering "electronic surveillance". (Electronic Communications Privacy

Act of 1986) Hence, a government agent who conducts surveillance by physical means or by using electronic devices can be subject to prohibition under the constitution. In determining whether an action is search or not, the “expectation of privacy” doctrine was developed. In general, a person cannot expect privacy in a public place. Thus, the surveillance of a person’s activities that can be visible to the naked eye outside of a person’s private place is not prohibited due to the fact that an ordinary person cannot have the expectation of privacy in that situation. (United States v. Knott,1983) Thus, the expectation of privacy is viewed as a limitation in applying constitutional protection to the case of Google street view because the surveillance is conducted in public places, namely, streets. The most significant obstacles in applying the constitution to protect privacy in the case of Google street view is that it cannot be applied to protect the right of privacy as Google street view is conducted by a private company. This is because the constitution only dictates the right of individuals against government actions. (Ayner and Mary, 2005). Comparing this again to the Thai constitution, the right to privacy in body and place are protected. As for communication aspects, the right to privacy is also recognized. Hence, government surveillance without warrant or without exception authorized by specific laws is prohibited. (Kanathip,2013) However, the main limitation is that the Thai constitution only protects individuals against government actions. Thus, a direct claim based on the constitution against a private sector company such as Google is limited.

6. With regards to the U.S. privacy tort, the image recording by Google street view can be regulated by “intrusion upon one’s seclusion” or “public disclosure of private facts”. Thus, Google street view can be held liable under privacy tort if Google’s car physically enters into a person’s private property. However, the critical limitation in applying such tort is that, according to court cases, the privacy protection is limited in public places where there is generally no “reasonable expectation of privacy”. (Hartman v. Meredith Corp, 1986; Fogel v. Forbes, Inc.,1980; Int’l Union v. Garner,1985). In addition, some cases have demonstrated that a person who is in public has already waived their right to privacy. (Dor v. Frontline Video, 1993; Frazier v. Southeastern Pa. Transp. 1995). Hence, driving Google’s cam-car down the public street to take image does not constitute a privacy tort. Nevertheless, courts do recognize privacy in public places for limited situations such as surveillance which can frighten or torment a person. (Summers v. Bailey, 1995) And some public situations that a person could wish to keep private such as attending a social function relating to a fertilization program. (Y.G. v. Jewish Hosp. of St. Louis, 1990) However, recording of images by Google street view involves daily life activities which are unlikely to fall within the limited situation of privacy in public. Unlike in the U.S., Thai tort law does not specifically stipulate the “privacy” tort. General principle of section 420 could be applied in recording a person’s image without consent. However, it is difficult for the plaintiff to prove damage occurred from such recording. In addition, Thai tort law compensation is based on actual damage and does not have “nominal damage” as granted by the U.S. court.

7. According to the first law suit against Google over street view in the U.S. (Boring v. Google, Inc), the Plaintiff sued Google for invasion of privacy due to the fact that street view reveals image of their home. The judge ruled in favor of Google. (Kiss, 2009). The Court dismissed the invasion of privacy claim because the Borings were unable to show that Google’s conduct was highly offensive to a person of ordinary sensibilities. (Boring v. Google,2009) In addition, the court also dismissed the trespass claim by ruling that the plaintiff failed to allege “facts sufficient to establish that they suffered any damages caused by the alleged trespass.” As a result, it is difficult for a plaintiff to prove that the recording of images by Google can be “highly offensive”. Although the appellate court ruled that Google

had entered the plaintiff's property without permission and that was sufficient for a finding of trespass, Google was only ordered to pay nominal damage. (Boring v. Google,2010) Hence, it is burdensome for the plaintiff, who has to prove actual damages arising from the recording of images by Google street view. If the plaintiff cannot prove such, the only damage that could be delivered is nominal damage. Furthermore, the critical limitation of applying trespass law to protect the right to privacy in the case of street view is that it can be applied merely when Google's car enters into private territory such as entering onto private land. Thus, if Google's car is driven down a Public Street, the trespass laws cannot be applied. By comparison of the Thai criminal code, a similar limitation is found. According to the elements of trespass in section 362, the offender is required to enter into the property of others. This could not be applied in case of Google's car roaming around the public street.

Conclusion and Recommendations

The practice of Google street view has affected the right to privacy of people whose images are recorded and appear on Google maps because a person who is recorded does not give their consent. This causes critical impact on the right to control personal data. As for the legal aspects, the results of this research indicate that, the U.S. and Thai privacy laws share similarities in a sense that privacy law relating to the collection of personal data of both jurisdictions is not united but piecemeal consisting of various laws. In addition, the related laws such as the constitution, tort law, and trespass law, have several limitations when applied to protect the right of privacy in the case of Google street view. For instance, the U.S. and Thai constitutions' scope is limited to government action only. As for tort law, it is difficult for the plaintiff to prove damage has occurred from such recording of images. In addition, trespass law can only be applied when Google's car enters onto private land. By contrast, the results indicated that in Europe, there is specific law of the EU which is implemented by domestic laws of member states that can be directly applied to the case of Google street view. Although Google has changed its practice by blurring the face of a person captured in Google street view, this research argues that the changing of Google's practice has been mainly influenced by the data protection laws in Europe. Thus, it is vital to include data protection principles into specific law in order to protect the personal data of people. Recommendations are then proposed to adapt relevant laws, especially the Data protection Bill, to include data protection principles. In particular, consent of the data subject should be required as an initial condition for personal data collection. In this regard, the European data protection laws could be used as a model for the enacting and amending relevant Thai law.

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