RIGA GRADUATE SCHOOL OF LAW

MASTER THESIS

Copyright issues on social media

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) ....

RIGA

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ABSTRACT

The purpose of the thesis is to determine how social media portals treat their users' copyright, and whether such actions are compliant with the national and EU law. In order to conduct this research, Terms of Service of four popular social media – Facebook, Instagram, TikTok and Twitter, were reviewed. As a result, it was concluded that users are agreeing to license agreements that are concluded between them and social media providers and by doing that, users agree to license all their copyright protected works to the social media providers under non-exclusive licenses. The author concludes that such licensing is not compliant with the national law and therefore Terms of Service copyright clauses are void. In addition, it is also concluded that social media actions in regard of users’ copyright are not compliant with fundamental human rights to the property and private life.

Keywords: copyright; social media; users; Terms of Service; human rights.

SUMMARY

The purpose of this thesis "Copyright issues on social media" is to research how social media providers treat their users' copyright and whether such actions are compliant with the EU and Law of the Republic of Latvia. In order to achieve the goal of this research, Terms of Service of four popular social media portal – Facebook, Instagram, TikTok and Twitter, is reviewed and then the compliance with the law is determined. Terms of Service do include the copyright clauses that set out that users are issuing licenses to their copyright protected works shared on social media. Therefore, Terms of Service is the main source on which the research is formed, as it is an agreement concluded between social media providers and social media users, that is accepted by the users by clicking on "I agree" button. Hence, users have agreed to license their copyright protected works to social media without even noticing it. The thesis is consisting of 3 chapters and sub-chapters, Introduction and Conclusions.

The first chapter is dedicated to determine what is social media and how they are regulated by the law. The chapter covers the research also on what legal relationships do exist between social media providers and users, in order to understand the applicable law to the Terms of Services, as the Terms of Services also include the "Governing law clause".

In this chapter during the research, it is discovered that social media is internet portals that are based on content, which is created by the users, not the portal provider, as well the content must be publicly available and created as a result of the unprofessional activities of users. Social media do not have a specific regulation therefore, it can be regulated by many sources of law, depending on the matter. In regard of the legal relationships between the social media and the users, it was concluded that users should be considered as consumers, but social media providers as traders, therefore it was concluded that when the Governing law clause set out the jurisdiction and applicable law unfavourable to the users, such Governing law clauses are not binding to users and can be considered as incompliant with the EU law.

In the second chapter, Terms of Service copyright clauses have been reviewed and further, the analysis of such clauses compliance with the national law has been reviewed. Firstly, it is researched whether Terms of Service copyright clauses can be recognised as licenses or license agreements from a national law point of view, further, the compliance with the law requirements to the specific licensing documents has been reviewed in order to determine the compliance with the law. And at the last sub-chapter, is researched how users can protect their copyright against social media providers and what legal tools they can use in order to do so.

During the research, it was concluded that by Terms of Service copyright clauses users agree to issue non-exclusive, royalty-free licenses to social media providers. Licenses allow social media providers to use the works of their users almost without any limitations and in addition, they have also the right to sublicense the works. Further, it was concluded that the Terms of Service copyright clauses should be considered as license agreements, not licenses and that the national law requires such agreements to be concluded in writing. The fact that the agreement should be concluded in writing, also means that it should be signed either by hand or by secure electronic signature, but as the Terms of Services is a clickwrap type of agreement which is not signed but accepted by clicking on "I agree" button, Terms of Service copyright clauses cannot be recognised as valid from national law point of view. In addition, it was concluded that users have the rights to

bring claims in front of the court against the social media providers in regard to declare the Terms of Service copyright clauses as void, as well as to ask the court to issue an injunction against the social media providers or to ask to make a request to the competent state authority in order to ask social media providers to remove unlicensed content from their portals.

The third chapter is dedicated to Terms of Service compatibility with human rights principles, such as rights to property and rights to private life. It is concluded that the Terms of Service copyright clauses are not considered to be compatible with the human rights principles, as they are interfering with users' rights to use their property. As well, they are infringing users' rights to decide on the use of their own pictures, which is considered to be a part of personal life.

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LIST OF ABBREVIATIONS

Consumer protection directive -	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
CJEU -	Court of Justice of the European Union
Directive 2001/29 -	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
Digital Services Directive -	Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services
E-commerce Directive -	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").
EU -	European Union
EU Human Rights Charter -	Charter of Fundamental Rights of the European Union
ECHR -	European Convention on Human Rights
ECtHR -	European Court of Human Rights
eIDAS Regulation -	Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC
ISS -	Information Society Service
ISS Directive -	Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services
MS -	Member States
OECD-	The Organisation for Economic Co-operation and Development

Regulation of Roma I -	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
TS -	Terms of Services
UDHR -	The Universal Declaration of Human Rights

INTRODUCTION

Nowadays is barely impossible to meet someone who is not using at least one social media portal. People use social media portals in order to communicate with friends, family and other social groups,[1] in addition, people use social media to share their pictures, videos, thoughts, and other content which is created in a result of users' creativity and intellectual activities. In addition, people use social media in order to receive information from other users and commercial service providers using social media as platforms to share information relative to their activities and news that is also shared on social media, by news media. Research shows that there are four main motivational needs that people wish to satisfy by using social media – information; entertainment; social interaction, and personal identity.[2]

In order to be able to use the social media portals, users create their personal accounts and agree to the Terms of Service of the social media portal, and agreement to those Terms of Service is a precondition to use the portals. For the purpose of these theses, Terms of Service of four popular social media portals – Facebook, Instagram, TikTok and Twitter, was reviewed in order to research how social media portals treat their user's copyright and whether users have rights to disagree with the terms related to copyright set out in Terms of Service.

All four social media providers, which Terms of service would be reviewed for the purposes of this research, have included a copyright clause on their Terms of Service. By the copyright clause users license to social media providers, all their copyright protected works shared on social media and give them rights to use their works under a non-exclusive, royalty-free licenses. Licenses include rights to such use of the works as broadcast, copy, communicate with the public, translate, etc., they also have rights to issue the sub-licenses to third persons.

Research conducted by Deloitte in 2017 shows that between the age of 18 to 34, 97% of the consumers do not read the legal terms and conditions before accepting them, but in general, 91% of consumers do not read the legal terms and conditions.[3] Therefore it can be concluded that around 90% of social media users are not aware of the Terms of Service conditions and they are most likely not aware of the fact that they have licensed all their copyright protected works to social media providers whose services they are using.

Therefore, the topic of copyright on social media is important as it is relevant to all who use at least one social media portal and do share any content there. By agreeing to Terms of Service, users do give social media providers rights to use their personal pictures and other content for nearly unlimited purposes without any remuneration and without any rights to object to the use of theirs works. In addition, it can be concluded that by such practice, social media providers, by limiting users rights to use their copyright protected works, receive licenses to countless copyright

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[1] *See* Smith, A. Why Americans use social media, available on: https://www.pewresearch.org/internet/2011/11/15/why-americans-use-social-media/. Accessed May 1, 2021., *and* Petter Bae Brandtzæg and Jan Heim, "Why People Use Social Networking Sites," *Conference Paper* (July 2009), accessed May 1, 2021, doi: 10.1007/978-3-642-02774-1_16.

[2] Petter Bae Brandtzæg and Jan Heim, "Why People Use Social Networking Sites," *Conference Paper* (July 2009), accessed May 1, 2021, doi: 10.1007/978-3-642-02774-1_16.

[3] Deloitte. 2017 Global Mobile Consumer Survey: US edition, available on: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf Accessed: May 4, 2021.

protected works that they can use to gain profit, as the use of the works is almost unlimited. This is also an important matter as social media platforms diminish the distinction between the amateur and the professional content creator,[4] which means that some of the works that have been licensed to social media providers can have a great value, even if the user who are created such valuable content are not to be recognised as professional content creator.

The legal issue of this research is whether practices used by social media providers in order to receive licenses for all users created copyright protected works, by including copyright clauses on their Terms of Services is lawful from EU law and Republic of Latvia law, further referred to as national law, point of view. This issue arises from the fact that the copyright clauses are included in Terms of Services which are accepted by clicking on “I agree” button, while the national law, sets out a particular requirement for licenses and license agreements in order for them to be valid from the national law point of view. If Terms of Service copyrights clauses are not compliant with the law, it would be further analysed, what legal tools users can use in order to protect their copyrights against the social media providers, and how users can achieve that social media providers stop using content without valid rightholders consent.

In addition, the legal problem of the research is whether such copyright clauses are compliant with the human right principles – rights to the property and rights to the personal life. Copyright is recognised as a property[5] which means that rights to the copyright is protected under human rights principles. Also, users are sharing and, therefore, licensing to social media a content which includes information on users’, and third persons, private life, for example, pictures and videos where users and other persons can be seen.

The author has defined the following research question - what is social media and how it is regulated by the law. During the research of this question, it should be in addition reviewed what legal relationships are between social media providers and their users and what law can be applied to Terms of Service. The next research questions are - how social media users’ copyrights are treated on social media Terms and Conditions and do Terms of Services, in regard to the copyright of users, do comply with the national law. The last research question is whether social media portal Terms of Service copyright clauses do comply with the fundamental human rights principles – rights to the property and rights to the personal life.

In thesis the empirical and theoretical research methods will be used. More precisely – The doctrinal research method will be used to research the doctrine of research questions, as well as to analyse the legal regulation in regard to the research questions. The legal analysis method will be used in order to determine the legal regulation of the subjects of legal questions and to determine legal tools applicable to research questions. And lastly, in order to understand the legal practice in regard to the legal regulation of the research questions, jurisprudential analysis will be used during the research for the thesis.

These research methods have been determined as most suitable methods for research that aim to discover the legal regulation of the subject of the thesis, as well in order to analyse the research questions from the doctrinal and legal perspective. The most important questions of the

[4] Tan, Corine. Regulating Content on Social Media: Copyright, Terms of Service and Technological Features. London: UCL Press, 2018. Accessed February 21, 2021. http://library.oapen.org/handle/20.500.12657/30493.
[5] *See*, *Anheuser-Busch Inc.* v *Portugal* [*GC],* no. 73049/01, ECHR 2007-I. Para. 72., and *Neij and Sunde Kolmisoppi* v *Sweden,* no 40397/12, ECHR 2013.

thesis are whether the Terms of Service of social media do comply with the law and whether they comply with the human rights principles. In order to answer those questions, the analysis and doctrinal research of legal doctrine and case law, along with the determination of the law regulating the particular questions, is necessary to be conducted.

The aim of this research is to understand how social media treat their users' copyright and whether such an approach can be recognised as lawful from the EU and national law point of view, and from human rights perspective as well. If the actions of social media in regard to user's copyrights would be found to be incompliant with the law, the aim is to research what legal tools users can use in order to protect their copyright against social media providers. The research is focused only to EU and national regulation, therefore, it will not cover the third countries, for example, United States of America, legislation on the matter. This research will also review only the Terms of Service copyright clause compliance with the law, not all Terms of Service compliance to the national and EU law in general, as the focus of this research is copyright related matters.

This thesis consists of 3 main chapters. The first chapter is dedicated to discover what is social media and how it is regulated by the law. In addition, in this chapter, it is researched what legal relationships are between social media providers and their users, as well as the applicable law to Terms of Services is determined. The second chapter is dedicated to research Terms of Service copyright clauses and to research what those clauses are from a law point of view. More precisely, whether they should be recognised as licenses or license agreements from a national law perspective, and further, to research whether the copyright clauses comply with the requirements to the license or license agreement set out in national law. As well in this chapter, the legal tools that users can use in order to protect their copyright against social media providers have been reviewed. In the third chapter, the Terms of Service copyright clauses are reviewed from a human rights perspective and it is determined whether such clauses are compatible with the human right principles – rights to property and rights to private life.

1. SOCIAL MEDIA AND APPLICABLE LAW

Social media is a term often used to talk about internet sites, but the questions is whether the term is always used correctly, as not all of internet sites that users can freely use, can be called a social media. Therefore, it is important to determine what is social media and what is not social media. As well for the purpose of these theses, it should be determined how social media is regulated by the law. In order to determine how the law, regulate social media and its providers, in this chapter it will be determined in what legal terms, used in EU law, social media can be called, and in that way it will be determined how social media providers is regulated by the law. In addition, the legal relationships between the social media providers and their users should be reviewed in order to understand what law is applicable to the TS of social media. Without determining the applicable law to the TS, this research cannot move forward, as it would be useless to review TS from EU and national law perspective, if such law could not be applied to TS for any legal reasons.

1.1 What is social media and how it is regulated

To understand copyright issues on social media, first of all, what is meant by social media must be determined. There are many different definitions of the term "social media", and they vary from very simple one to more complex that needs to be explained further, in order to understand the meaning of the term.

For example, social media is defined as online social networking websites[6], or as a technology that facilitates interactive information, user created content and collaboration[7]. As well as it is defined as computer-based technology that facilitates ideas, thoughts, and information through the building of virtual networks and communities.[8] But the most precise definition seems to be created by A.Kaplan. He has defined the social media as:

> […] a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.[9]

In order to understand A.Kaplan's definition of social media and to understand why it could be seen as the most precise definition, terms – "Web 2.0" and user created content should be determined.

It should be understood that Web 2.0 is not a technical term, and it is not used to describe the technology. Instead, it is a term that has been used to describe online services that demand user's participation in content creation. It is the opposite of Web 1.0, which is the type of online

[6] Jason Gainous and Kevin M. Wagner, "Tweeting to Power: The Social Media Revolution in American Politics", *Oxford Scholarship Online* (January 2014), available on: Oxford Scholarship Online. Accessed: March 29, 2021.
[7] Elefant, Carolyn, "The Power of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media," *Energy Law Journal*, vol. 32, no. 1 (2011), available on: HeinOnline. Accessed September 16, 2020.
[8] Investopedia. Online dictionary, available on: https://www.investopedia.com/terms/s/social-media.asp#citation-2. Accessed March 28, 2021.
[9] Andreas Kaplan, "Users of the World, Unite! The Challenges and Opportunities of Social Media," *Business Horizons,* (February 2010), pp. 59-68, accessed March 29, 2021. doi: 10.1016/j.bushor.2009.09.003.

service where content is created by the service provider. For example, Britannica.com vs Wikipedia.com.[10]

Further, the term "user created content" should be determined in order to fully understand A.Kaplan's definition. OECD has defined the user created content as content which i) is made publicly available over the Internet, ii) reflects a certain amount of creative effort, and iii) is created outside of professional routines and practices.[11] This means that user created content can be explained as content that is publicly available online, created by the end-user, not the service provider, and that it has some amount of user's creativity, but it is not connected to professional matters of its creator.

By taking into account all the above mentioned, it can be concluded that in order to recognise an internet portal as social media portal, the portal should be created on Web 2.0 principles and it should include publicly available information, created or generated by the users of the particular platform. This means that portals providing, for example, e-mail services or private chat rooms, such as Google mail or Skype, cannot be seen as social media portals, even that the content is user created, yet is not public, therefore it does not comply with the "user created content" definitions and therefore with the social media definition itself. Also, it can be understood that social media is not news portals, online shopping portals, other portals providing information that is not created by the end-user. Yet, we can recognise that such portals as Twitter, Facebook, Instagram, and TikTok are social media portals as they perfectly conform to social media definition.

Now that is clear what is social media, and what social media is not, it should be determined how social media is regulated by the law. As it is clear that the law, nor national, nor international, in its wording do not use the social media term, in order to understand how the law regulates social media providers, it should be determined under what definitions the social media can be found in the law.

One of the terms used frequently, when talked about the online environment, is the term "Internet Intermediaries". According to the OECD, Internet Intermediaries:

> (..) bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.[12]

According to the OECD, such social media platforms as Facebook, Linkedin, Youtube, etc., called a Participative Network Platforms, are recognised as Internet Intermediaries. [13] OECD further explains:

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[10] *See* Tim O'Reilly, *What is Web 2.0* (O'Reilly Media, Inc, 2009), accessed April 25, 2021, https://play.google.com/books/reader?id=NpEk_WFCMdIC&hl=lv&lr=&printsec=frontcover&pg=GBS.PT3.w.8.0.15., *and* Patrick Van Eecke, "Online service providers and liability: A plea for a balanced approach", *Common Market Law Review* 48, Issue 5, (2011), pp. 1455-1502, available on Kluwer Law Online.

[11] The Organisation for Economic Co-operation and Development. *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking*. *2007.* Available on: https://www.oecd.org/sti/38393115.pdf. Accessed March 29, 2021.

[12] The Organisation for Economic Co-operation and Development. *The Economic and social role on Internet Intermediaries. 2010.* Available on: http://www.oecd.org/digital/ieconomy/44949023.pdf. Accessed March 30, 2021.

[13] *Ibid.*

> Participative networked platforms facilitate social communication and information exchange. They are services based on new technologies such as the web, instant messaging, or mobile technologies that enable users to contribute to developing, rating, collaborating and distributing Internet content and developing and customising Internet applications, or to conduct social networking.
>
> This category is intended to include social networking sites, video content sites, online gaming websites and virtual worlds. (…) Participative networked platforms are often based on community models whereby users have a high investment in time on these platforms.[14]

The photo-sharing platforms, such as Instagram, and social network platforms, like Facebook, Twitter, or video content platforms, like Youtube or TikTok, are recognized as Participative network platforms,[15] which means that they are recognised as Internet Intermediaries. Therefore, it can be concluded that when the scope of the law is in regard to the Internet Intermediaries, it can be assumed that the law is applicable to social media portal providers as well.

There is also a term - Information Society Service Provider, but to understand what is meant by the term, it should be determined what should be understood with a term - Information Society Service.

By term Information Society Service should be understood any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.[16] According to Article 2 (a) of the E-Commerce Directive, by the term ISS the definition of ISS included in the Directive (EU) 2015/1535 should be understood.

What can be further concluded, judging by the CJEU case law, the E-Commerce Directive can be applied to social media providers, thus, the term of ISS provider can be attributed to social media providers. For example, CJEU has applied an E-commerce Directive as relative to Facebook on its judgment in Case C-18/18 (*Eva Glawischnig-Piesczek v Facebook Ireland Limited*). Also, the European Commission Directorate-General for Justice and Consumers have stated that social media providers are ISS providers.[17] Hence, with no doubt, it can be concluded that when in the scope of the law, the regulation of ISS providers is included, the law can also be applied to social media.

So far at least two legal terms used in the law, that can be applied to social media and its providers, have been determined. ISS providers and Internet Intermediary are terms that are more used in connection with the digital services, but there is also one term that can be applied to social media providers and that is used in order to describe any person who provides someone with services – a trader, also called a service provider.

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[14] *Supra*, note 11.
[15] *Supra*, note 12.
[16] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance). OJ L 241, 17.9.2015, p. 1–15. Available on: http://data.europa.eu/eli/dir/2015/1535/oj. Accessed March 29, 2021. Art.1 (2).
[17] European Commission Directorate-General for Justice and Consumers. *Common position of national authorities within the CPC Network concerning the protection of consumers on social networks.* Available on: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiM19jPjOLvAhVPxosKHRs8DVoQFjABegQIBBAD&url=http%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D43713&usg=AOvVaw3_xEpe-iNEdpM7XKjcPh5i. Accessed April 3, 2021.

Social media is a service provider, a legal entity, that gains profit from provided services, which means that they also can be recognised as regular merchants. Therefore, social media providers can be regulated by any national and international law, that regulate any field commercial and uncommercial matter that can be related to social media activity. This means that such national laws as Copyright Law, Civil Law, etc., can be applied to social media provider activities and legal relationships between social media providers and their users.

Regarding copyright on social media, there is no specific national law that would regulate copyright in social media directly. Instead, Copyright Law, which is the main law that regulate copyright related matters in Latvia, is created environment neutral therefore it can be applied in all necessary situations, which means, also in matters related to social media portals. And as Latvia is a member of the EU, the EU legislation, that regulates copyright, is also in force in Latvia, as well as several international treaties and conventions which Latvia has ratified, for example, TRIPS, Berne Convention, etc.

As the scope of this paper is copyright on social media and in particular the copyright of social media users, further, the legal relationships between social media providers and their users will be reviewed. Such determination is necessary because by determining the legal relationships between both parties it will be possible to also determine the applicable law to the TS and therefore, the TS compliance to the law.

1.2 Legal relationships between social media and its users

Now that it is determined what is social media, and by what legal terms it can be described in the law, to determine the particular law that can be applied to social media providers in regard to their TS, the legal relationships between the social media providers and their users should be reviewed. Legal relationships between social media providers and their users will determine the applicable law in regard to copyrights, as well it will help to understand whether the TS of social media can be recognized as valid from the law point of view.

TS is not only a set of rules to the users set out by the social media providers, but they are actually an agreement, concluded between the social media providers and their users. Therefore, it can be concluded, that TS can be recognised as agreements for services that are provided in a digital environment.

Digital Services Directive is a directive, that should be applied where the trader supplies or undertakes to supply digital content or digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader. By digital services, a service that allows the consumer to create, process, store or access data in digital form, or a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service, should be understood.[18]

According to Article 2 (5) and (6) of the Digital Services Directive, trader means any natural or legal person, that is acting, for purposes relating to trade, business, craft, or profession, in relation to contracts covered by the Digital Services Directive, but a consumer means any natural person

[18] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) OJ L 136, 22.5.2019, p. 1–27. http://data.europa.eu/eli/dir/2019/770/oj. Accessed April 3, 2021. Art. 2 (5) and (6).

who, in relation to contracts covered by Digital Service Directive, is acting for purposes which are outside its trade, business, craft, or profession.[19] As mentioned above, the contracts covered by Digital Services Directive are any contracts where the trader supplies digital content or a digital service to the consumer in exchange for payment or sharing of personal data to a trader.

By taking into account the regulation set out in the Digital Services Directive, it can be concluded that TS is a service agreement between user, as a consumer, and social media provider, as a trader, because with TS, one party commits to provide a digital service, but the other party, in exchange for the provided service, provides the first party with its personal data, from which the first party further can gain profit in different ways. It means that not only the Digital Services Directive but also other laws regulating consumer and trader legal relationships and consumer protection could be applied to TS and social media and its users' legal relationships.

For example, with Article 4 of the Directive 2019/2161, the Consumer Protection Directive has been amended and now the digital services and digital content, are included in the scope of the Consumer Protection Directive, therefore, there is no doubt that social media and its users' relationships are regulated by the laws that regulate consumer protection and consumer agreements. This also can be concluded form the fact that, as mentioned before, to social media service providers the ISS provider term can be applied, thus the ISS Directive can be applied. And the ISS Directive also has implemented the "consumer" term by describing it as a user of ISS.[20]

In summary, it must be concluded that the legal relationships between social media providers and their users should be recognised as relationships between consumer and a trader. But it should be bear in mind that only natural persons can be recognised as consumers, so these conclusions are valid only by reviewing legal relationships between the social media and users who are natural persons. The legal relationships between social media and users which are legal persons will not be analysed in this paper as it is outside the scope of it.

As the formulation of legal relationships between social media providers and their users have been determined, further, the TS or the agreements and their compliance with the law should be reviewed. But first of all, it should be understood what law can be applied to TS.

1.3 Law applicable to Terms of Services

As mentioned before, the TS should be recognised as agreements concluded between social media providers and their users[21]. But what can get the user confused and disrupt to understand that TS is actually an agreement which the user is signed by clicking, for example, "I agree" field or something similar, is the fact that usually agreements are concluded on paper, signed by ink and before signing, they have been negotiated between the parties. These actions do not happen when the TS agreement, as it can be called, is concluded. And the reason for it is that the TS should be recognised as inkless agreements, and more precisely, as "clickwraps".

Clickwraps are a type of inkless agreement, which are used as non-negotiable standard agreements, prepared by the service provider, in electronic form and usually presented to the user

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[19] *Supra,* note 18. Art. 2 (2).
[20] *Ibid.* Art.2 (e).
[21] Thomas J. Maronick, "Do Consumers Read Terms of Service Agreements When Installing Software? A Two-Study Empirical Analysi", *The Journal of Business* (June 2014): pp.137- 145.

before the user starts to use the services. Usually, the user cannot start to use the services before the user has not agreed to the provided agreement terms, by clicking in or on something, as already mentioned, like "I agree", etc.[22]

Just like any other agreement, TS also includes the "Governing law clause" which sets out the law that is applicable to the TS and to any disputes between the social media provider and the user. As social media providers provide their services to the users worldwide, usually the applicable TS differs depending on the residing country or region of the user, for example, TS is different for users residing in the EU and United States of America, Asia, India. This can be explained by the fact that there are certain laws, that must be applied for certain region users even despite the fact, that parties have agreed on specific applicable law with the agreement. For example, even if the parties have agreed, that the applicable law to all disputes will be the law of the United States of America, the social media provider, must provide the safety of users' personal data in compliance with the GDPR, if the users are residing in the EU. Therefore, for the purpose of this paper, only TS that are applicable to EU residents have been reviewed.

In order to determine the applicable law, at the beginning the "Governing law clause" of each TS, which is reviewed for the purpose of this paper, will be further reviewed and then compared with the EU legislation in order to determine whether the particular clause should be considered as valid from the EU law point of view.

And so, according to the TS of the Twitter, Twitter TS is governed by laws of the State of California and all disputes arising from TS must be brought upon the courts of state courts located in San Francisco County, California, United States. [23] TS of Facebook sets out that all claims that arises from or is related to TS, should be brought open the curt of particular user's habitual residence in EU and the governing law of such claims should be the law of the user's residence.[24] According to TS of Instagram, if a claim or dispute arises from or relates to use of the Service as a consumer, the applicable law will be the law of the MS in which the user resides, and the court of jurisdiction will be the court of the MS in which the user resides.[25] TikTok TS sets out that the applicable law to the TS and any dispute arising from the TS is Irish law, with an exception, if the law of the MS in which the user reside, is applicable to such claim's mandatory. The same refer to court jurisdiction for claims related to TS.[26]

As it can be seen, according to the Governing law clauses, two of the social media providers have created the clause in a way that it is favorable to the users when the matter is related to the governing law and court jurisdiction. One of the social media providers have chosen a specific EU MS law and jurisdiction, but have left the derogation form it, if the particular MS national law sets out differently. And one of the social media providers have chosen completely uncomfortable applicable law and jurisdiction to the EU users, by setting out that the applicable law and jurisdiction is the USA. The USA is uncomfortable to EU users not only because it is not a EU

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[22] Tollen, David. W., *The Tech Contracts HANDBOOK. Second Edition* (American Bar Association, 2016), pp. 254.-255.

[23] Twitter. Terms of Service. Available on: https://twitter.com/en/tos. Accessed April 2, 2021.

[24] Facebook. Terms of Service. Available on: https://www.facebook.com/terms.php. Accessed April 2, 2021.

[25] Instagram. Updated Terms of Use. Available on: https://help.instagram.com/581066165581870. Accessed April 2, 2021.

[26] TikTok. Terms of Service. Available on: https://www.tiktok.com/legal/terms-of-service?lang=en#terms-eea. Accessed April 2, 2021.

member state, but it also has a different legal system than in the most of EU countries and the legal expenses are much higher than in most of the EU countries, which makes the disputes very inaccessible to regular users – consumers.

But, as all of the social media providers that has been researched on this paper, providing the services to EU users from the EU - TikTok services in EU is provided by TikTok Ireland, registered in Ireland, Dublin, [27] Facebook and Instagram for EU is also provided by Facebook Ireland Limited, registered in Dublin, Ireland,[28] and Twitter services is provided by Twitter International Company, also registered in Dublin, Ireland,[29] all agreement (TS) parties should be considered as EU residents, which means that law binding to EU residents can be applied. And in this situation, the agreements with consumers have a specific regulation in regard of applicable law and cases when the Governing law clause have been included in the agreements concluded with the consumers.

According to Article 6 (1) of Regulation of Roma I, the consumer contracts should be regulated by the laws of the country where consumer has a habitual residence. But in accordance with the Article 6 (2) of Regulation of Roma I, parties can choose the applicable law to the contract, but such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of Article 6 (1).

This means that in cases when the law of the country in which the user resides is more favourable to the user than the law of the chosen country, the law of the country in which the user resides must be applied to the contract. As well the law of the country in which the user resides will be applicable to the contract, despite the fact that the other applicable law is chosen by the agreement, in cases when those contract law rules specifically aimed at protecting consumers and cannot be derogated from by agreement.[30] This means that when the TS is concluded between EU citizens and these social media providers, with no doubt, EU legislation, and also the law of the users residing country, must be applied to TS, as the exception of the applicable law set out in Regulation of Roma I is applicable to TS as TS agreements fall under the scope of Regulation of Roma I.

Regarding the applicable law to TS agreement, it should be considered that for the consumer more favourable law will be in the residence country, as bringing claim upon the court in its own state will be cheaper, easier and the court in the residing country will be more accessible to the user, then, for example, court in Ireland or USA. Therefore, it can be considered, that despite the fact, that with the TS, at least in Twitter and TikTok case, the applicable law is the Irish law or United States of America law, it can be argued, that the exception of Article 6 of the Regulation of Roma I should be applied, and TS should be reviewed from Latvian, and, of course, EU law when the matter is related to the users residing in Latvia.

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[27] *Supra,* note 26.

[28] *See* Vat Lookup. Available on: http://www.vat-lookup.co.uk/verify/vat_check.php/VATNumber/IE9692928F/CompanyName/FACEBOOK+IRELAND+LIMITED. *and Supra*, note 25.

[29] *Supra*, note 23.

[30] Publication Office of the European Union. *Practice guide. Jurisdiction and applicable law in international consumer contracts*. Available on: https://op.europa.eu/en/publication-detail/-/publication/44b4d0e9-62ea-11e8-ab9c-01aa75ed71a1/language-en/format-PDF/source-71667534. Accessed April 1, 2021.

2. SOCIAL MEDIA AND COPYRIGHTS OF ITS USERS

When it is determined what is social media and what legal regulation can be applied to them, and, also, when the legal relationships between users, natural persons, and social media, is determined, as well as the applicable law to such relationships, further, the copyrights in social media should be reviewed.

In order to understand the user copyright, the TS of social media should be reviewed as TS include copyright clauses, which sets out the rules that regulate the legal relationships between the users and social media regarding the content that is created by the users and can be considered as copyright-protected content. Therefore, further, the TS copyright clauses and their compliance with the law, as well as the consequences and legal tools that users can use in regard to protect their copyright, will be reviewed in this chapter.

2.1 How do the Terms of Service of social media providers treat their user copyright?

In this subchapter, the clauses of TS, related to users' copyright, further called – TS copyright clauses, will be reviewed, in order to be analysed further from the law point of view. But to understand what type of content is covered by copyright and why copyright is an important matter in TS, copyright and works protected by copyright will be explained very briefly.

And so, by copyright an exclusive right of creators, such as authors, composers, artists, performers - musicians and singers, and entrepreneurs, such as publishers, record producers, should be understood.[31] Usually, when talking about copyrights, the rights of professional artists, performers, and other creative persons are discussed, but the fact is that when a person, for example, takes a photo or draws something that that person becomes an author within the meaning of copyright law, and that photo or drawing become a copyright-protected work.

According to the point 2) of Article 1 of the Copyright Law, work is the result of an author's creative activities in the literary, scientific or artistic domain, irrespective of the mode or form of its expression and its value. But according to the point 1) of Article 1 of the Copyright Law, the author is a natural person as a result of whose creative activities a concrete work has been created.

Taking into account mentioned, it can be concluded that when a person creates a photo or video, or write a poem, etc., and post it on social media, the person has shared a copyright protected work on this social media. And the copyright is owned by the author - the person who has created and shared the work on social media. For example, when a woman takes a picture of her child and shares it on Facebook, she has not only shared a picture of her child but also a copyright protected work. Most likely, that the woman has no idea about the copyright factor in this particular situation, as the woman, most likely, consider this activity as an action for household and her private purposes, but do not think about legal aspects of the picture and the publication activity.

In 2011, research conducted in the USA showed that 67% of respondents used social media in order to stay in touch with friends, 64% of respondents used social media mainly in order to stay

[31] David T.Keelig, *Intellectual Property Rights in EU. Volume I. Free Movement and Competition Law.* (Oxford University Press, 2003), p. 263.

in touch with family, and 50% of respondents - in order to connect and stay in touch with old friends.[32] The research conducted in 2009 in the EU showed that the most important reason for people to use social media is to get in contact with new people (31%), second most popular reason was to keep in touch with their friends (21%), whereas the third most popular reason was general socializing (14%).[33] From these results can be concluded the fact, that most of the users of social media, use social media for private purposes. And the fact that most of the users consider social media as something they use for their "private" purposes, it is important to understand how the copyright of the users is treated in TS.

According to the TS of Twitter:

> 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 (for clarity, these rights include, for example, curating, transforming, and translating). This license authorizes us to make your Content available to the rest of the world and to let others do the same.[34]

Facebook TS sets out the following:

> […] when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content [...].[35]

The Instagram TS is very similar to Facebook, which is understandable, as they are owned by the same owners[36]:

> When you share, post, or upload content that is covered by intellectual property rights (such as photos or videos) on or in connection with our Service, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content [...].[37]

As it can be seen, the TS of Twitter, Facebook and Instagram is very similar and the idea of them is the same – users give to the social media non-exclusive, royalty-free, world-wide licence to all their intellectual property shared on the media. TikTok uses the same approach, but the difference is that TikTok is taking it much further. According to the TikTok TS:

> […] by submitting User Content via the Services, you hereby grant (i) to us and our affiliates, agents, services providers, partners and other connected third parties an unconditional irrevocable, non-exclusive, royalty-free, fully transferable (including sub-licensable), perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce,

[32] Smith, A. Why Americans use social media, available on: https://www.pewresearch.org/internet/2011/11/15/why-americans-use-social-media/. Accessed May 1, 2021.
[33] Petter Bae Brandtzæg and Jan Heim, "Why People Use Social Networking Sites", (July 2009), accessed April 15, 2021, doi: 10.1007/978-3-642-02774-1_16.
[34] *Supra*, note 23.
[35] *Supra*, note 24.
[36] BBC News. Facebook owns the four most downloaded apps of the decade, available on: https://www.bbc.com/news/technology-50838013. Accessed, February 21, 2021.
[37] *Supra*, note 21.

> make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented; […]
>
> You further grant us and our affiliates, agents, services providers, partners and other connected third parties a royalty-free license to use your user name, image, voice, and likeness to identify you as the source of any of your User Content.
>
> For the avoidance of doubt, the rights granted in the preceding paragraphs of this Section include, but are not limited to, the right to reproduce sound recordings (and make mechanical reproductions of the musical works embodied in such sound recordings), and publicly perform and communicate to the public sound recordings (and the musical works embodied therein), all on a royalty-free basis; […].[38]

According to TS of TikTok, users not only license their works but also their own appearance, as can be understood from the fact that image and likeness are being licensed, and voice, along with the usernames and other information, that cannot be an object of copyright or intellectual property in general, thus, they cannot be licensed in a sense of copyright.

First of all, all of the mentioned TS set out that the licenses provided to the social media providers are non-exclusive and royalty-free. According to Article 42 (2) of the Copyright Law, a non-exclusive license gives the recipient of the license the right to undertake activities indicated in the license concurrently with the author or other persons who have received or will receive a relevant license.[39] It means, that despite the fact that users have given the licenses to the social media providers, they still have the rights to give licenses to other licensees to use the same works that are licensed to social media providers and, despite the fact that social media providers do not pay for the use of works (royalty-free license), the users have rights to gain profit from the same works by licensing them to other licensees. The only problem is that this non-exclusive license means, that author (the user) cannot give someone else an exclusive license to the same content which already has been licensed to social media provider.

But there are also differences in the TS copyright clauses, that make an impression that the copyright clauses of the TS are quite different between the social media providers. For example, above cited TS's make the first impression that Facebook, Twitter and Instagram TS copyright clauses are simpler, and the scope of licenses is much narrower than, for example, the TikTok license. But to understand whether it is really true, an analysis of the copyright clauses should be conducted. The analysis will also give an understanding of the true scope of all the licenses and what can really be done with the user content under such license terms.

So, the Facebook and Instagram TS copyright clauses set out that license gives them the right to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of the users' content.[40] Facebook, in addition, has explained this licensing as rights to store, copy and share the content with others. Instagram has not given any additional explanation on the scope of the license. Twitter has in addition explained that the license gives the media rights to curate, transform, and translate the content, make the content available to the world, and lets other people do the same, to promote the services and to improve them and allow the

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[38] *Supr*a, note 26.

[39] Autortiesību likums (Copyright Law) (11 May 2000). Available on: https://likumi.lv/ta/en/en/id/5138. Accessed April 14, 2021.

[40] *Supra*, note 25, 26.

content to be submitted to or through services available to other service providers, to retweet broadcast, distribute the content.[41]

The copyright clause on TikTok TS seems to be much broader and describes the scope of the license more specifically. First, it can be noted, that TikTok is the only of four social media providers, which has clearly indicated, that the license also gives other users to use the content. Twitter has only given an indication to such fact, by including the rights to retweet the content. "Retweeting" is a content-sharing activity, usually performed by other users who, for some reason, feel the need to share the content. It means that by such license, also other user rights to use the content have been granted. But as the copyrights clauses clearly state that the licenses are issued to the social media providers, not also to other users, it means that it should be considered that social media providers are issuing sublicenses to users to use the works of other users, as licenses give the rights to use to works to the licensees and not to third persons.

Yet, TS of TikTok not only set out that the license is given to the service provider itself but also to its affiliates, agents, services providers, partners, and other connected third parties, which is much broader licensing than, for example, in Facebook and Instagram cases. On TikTok situation, it can be concluded, that by using TikTok, users are not issuing only one license to TikTok, but many licenses without knowing to whom and how much in total, which makes the licensing fact very untransparent and confusing.

Though, the other service providers have included the statement, that the licenses are sub-licensable, which means, that they have the right to give sublicenses to the content to any third parties they wish, including, to other users, as mentioned above. It means, that at this point, there is no large difference between all four social media provider TS copyright clauses, as they all are creating a possibility to license and/or sublicense the user works for countless licensees or sublicensees.

TikTok has included an explanation on what rights precisely the license gives them. They have stated that the license gives them rights to reproduce sound recordings, also to make mechanical reproductions of the works, publicly perform and communicate to the public the sound recordings.[42] But such rights also have to other social media providers, as they have included the rights to broadcasts, publicly perform or display, etc. the content.

It can be concluded that even though at the first moment TS copyright clause of TikTok seems much broader and the scope of the license is much wider compared to other social media providers, the fact is, that in the core, they are very similar and basically give the same rights to all social media providers. The difference is only in the wording of the copyright clauses.

Further, as already stated, social media TS are agreements, which are non-negotiable in the usual manner, and they are inkless and can be determined as so-called clickwraps. Users have no possibility to object to TS rules or to negotiate some clauses at the TS. TS is more like a "take it or leave it" type of agreement, which means that whether the user agrees to TS in a way they are, or whether they do not use the particular social media at all. Taking into account the mentioned, the question is, whether such agreements can be recognized as in force from a law perspective, as the law sets out requirements for licenses and license agreements. Licenses and license agreements are

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[41] Petter Bae Brandtzæg and Jan Heim. *Supra*, note 2.
[42] *Supra*, note 26.

one more matter that should be reviewed. Because to determine whether the TS copyright clauses can be recognised as lawful, the first thing that should be understood is whether the copyright clause of the TS is a license or a license agreement, as those two things has a different regulation in national law.

2.2 Terms of Service compliance to the law

As previously the content of TS copyright clauses has been reviewed and analysed, the TS copyright clause content and form compliance with the law should be reviewed further. As already mentioned, one of the factors that should be determined in order to understand the lawfulness of the TS copyright clauses is to understand whether the TS copyright clauses should be recognised as licenses or license agreements, as national law has a different requirement for them in order to be recognises as lawful and, thus, in force.

2.2.1 Licenses and license agreements

According to Article 40 (3) of Copyright law, before using a work, the user of the work must enter into a licensing agreement or obtain a license for the use of the work.[43] It can be concluded, that in national law two types of copyright protected work licencing is distinguished – licenses and license agreements. This means that in order to allow someone to use the work, author can issue a license or conclude a license agreement with a licensee. So, in order to understand what type of document the TS is, the differences between the licenses and licensing agreements should be reviewed.

According to Article 41 (1) of the Copyright Law, a licensing agreement is an agreement by means of which one party - the rightholder - gives permission to the other party - the user of the work - to use a work and specifies the type of use of the work, thereby agreeing on the provisions for the use, the amount of remuneration, the procedures and the term for the payment of remuneration.[44] But, according to the Article 42 (1) of the Copyright Law, a license is a document that constitutes permission to use the particular work in such a way and in accordance with such provisions as are indicated in the license. A license may be non-exclusive, exclusive or compulsory.[45]

All TS copyright clauses, reviewed for the purposes of this paper, set out that the users are giving a non-exclusive license to the licensee. Non-exclusive license is a document that gives the licensee the right to undertake activities indicated in the license concurrently with the author or other persons who have received or will receive a relevant license.[46]

Basically, the definitions of licenses and license agreements do not much differ one form another. The difference is that in the definition of the license agreement is included the fact, that it is a document concluded between two parties, when in the definition of the license, nothing about the parties have been mentioned.

[43] *Supra*, note 39.
[44] *Ibid*
[45] *Ibid*.
[46] *Ibid.*

The difference can also be determined by concluding what should be understood by the term – agreement. And agreement, according to the Article 1511 of the Civil Law, within the widest meaning of the word is any mutual agreement between two or more persons on entering into, altering, or ending lawful relations. An agreement in the narrower sense applied here is a mutual expression of intent made by two or more persons based on an agreement with the purpose of establishing obligation rights.[47]

What can be concluded is that a license agreement is concluded when two parties have negotiated and agreed to the terms of the use of the work, when the license is something that have been issued without discussing the terms of the use of the work. License can be used, for example, in a way that it is added to the product protected by copyright and sold widely, for example, software's to which the licenses have been putted in the box, in which the data carrier is in, or sent electronically along with the purchase, if the purchase is made online and product have been received in electronic form.

As the TS itself have been defined as a type of an agreement, and the copyright clause are included in a document that should be recognised as an agreement, the copyright clause, most likely should be recognized as a license agreement, concluded between the social media provider and the user. It is an agreement by which the user have given the rights to the social media provider, to use the works, created by the user, under terms that is relevant to non-exclusive licenses and other terms set out in the agreement, in this case, in TS copyright clause.

2.2.2 Terms of Service compliance to the license agreement regulation

As it has been concluded above, TS copyright clause should be recognised as license agreement. National law specifically regulates not only a form of the license agreement, but also the terms that should be included on the agreement, so that agreement could be recognised as valid and compliant to the national law.

First of all, the form of the agreement should be reviewed as the TS is clickwrap agreement, which is not regular agreement form. According to Article 43 (2) of the Copyright Law, licensing agreement should be concluded orally or in writing, but the agreements for communicating to the public of a work, and in other cases not relevant to this paper, must be concluded only in writing.[48]

It is clear that in this case the agreement has not been concluded, and even cannot be concluded orally, thus, this type of agreement will not be reviewed. In addition, the TS copyright clauses include the permit to communicate works with the public, thus, the law clearly states, that the agreement should be in writing.

Communication to the public is a term used in Article 3(1) of Directive 2001/29, which sets out that MS shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

[47] Civillikums. (Civil Law) (1 September 1992). Available on: https://likumi.lv/ta/en/en/id/225418. Accessed April 14, 2021.
[48] *Supra*, note 39.

CJEU has analysed the term in several decisions. For example, ITV Broadcasting and Others (2013) decision. On the decision, the court has stated that the author's right of communication to the public covers any transmission or retransmission of a work to the public are not present at the place where the communication originates.[49] It also has stated that to be categorised as a "communication to the public" the protected works must also in fact be communicated to a "public". The term "public" refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. And what is meant by large numbers of persons will depend on the specific situation thus, it should be determined in each specific situation.[50]

As TS copyright clauses include such wording as "transmit" or "display and distribute", it can be considered, that such actions can be recognised as "communication to the public" and this means that social media portals have only one option, and that is to conclude the license agreement in writing.

With that said, it should be determined what is understood by an agreement concluded in writing and whether the TS can be recognised as an agreement that is concluded in writing. It is important to be determined, because, according to Article 1429 of the Civil Law, if the law prescribes a certain form for the expression of intent, then an implied expression of intent, even though it may be absolutely clear, shall not be sufficient.[51] As well the Article 1475 of the Civil Law sets out that in cases where the form for a transaction is required by law, failure to comply with the form shall render such transaction invalid.[52] And that means, that if the TS does not comply with the written agreement form, then they cannot be recognised as valid and in force.

It is already determined, that according to the Copyright Law, the license agreement must be concluded in writing. According to Civil Law, the written deeds of a transaction may be drawn up in whatever form the participants chooses. It means that no templates or other specific forms are mandatory to be used. But, for a deed to be in effect, the signatures of all participants or their representatives shall be required.[53] It means that the form of the written agreement is free to be chosen by the parties concluding the agreement, the only requirement, according to the law, is that the agreement concluded in writing must be signed by both parties or their representatives.

It can be assumed that the TS is in written form, i.e., it is written and available to be read online, to be printed, etc., but what is not yet clear is the fact whether the agreement can be recognised as concluded in writing, as the law requires the signatures of both parties on the agreement that is concluded in writing.

According to the Law on Legal Force of Documents, for a document to be in force, it has to contain a signature of all persons concerned.[54] This is consistent with the requirements set out in Civil Law and mentioned above. And in this case, it would mean that a signature of the representative of the social media provider and the signature of the user would be necessary to be

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[49] Court of Justice: Judgement in *ITV Broadcasting Ltd and Others* v *TVCatchup Ltd,* C-607/11, ECLI:EU:C:2013:147, para.23
[50] *Ibid.* Paras.31,32.
[51] *Supra*, note 47.
[52] *Ibid*.
[53] *Ibid.* Art. 1492., 1493.
[54] Dokumentu juridiskā spēka likums (Law on Legal Force of Documents) (1 July 2010). Available on: https://likumi.lv/ta/en/en/id/210205. Accessed April 15, 2021. Art. 4 (4).

placed on the agreement. Furthermore, the signature should be placed by one's hand, as according to the law, a personal signature reproduced in a paper document using technical means do not ensure the legal force of the document.[55]

Yet, it can be argued, that the TS are not reproduced on paper and thus, not signed by hand, because they are concluded electronically, thus the fact, that the user has accepted the TS, should be recognised as a signing fact. But electronic documents have a specific regulation, and it also sets out the electronical signing of the documents.

According to the Article 3 (1) and (2) of the Electronic Documents Law, the requirement for a document in written form in relation to an electronic document shall be fulfilled if the electronic document has an electronic signature and the electronic document conforms to the requirements of other laws and regulations. An electronic document shall be considered to have been signed by hand if it has a secure electronic signature. As well the electronic document shall be considered to have been signed by hand also in such cases where it has an electronic signature and the parties have agreed in writing regarding the signing of electronic documents with an electronic signature. In such case, the written agreement shall be drawn up and signed on paper or electronically with a secure electronic signature.[56]

What can be concluded from the above mentioned, is that to recognise the electronic agreement concluded in a way, that it can be also recognised as concluded in writing and signed by hand, the agreement must be signed by secure electronic signature. Or, it can be signed with an electronic signature, but then, the parties should have been concluded a separate agreement and that additional agreement must be signed by hand or with secure electronic signature.

Secure electronical signature, according to the Electronic Document law and eIDAS Regulation is an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.[57] And as it is clear that TS has not been signed with a secure electronic signature by the users and social media provider representatives, nor that the additional agreement regarding the use of other electronic signature, has been concluded between the users and social media providers, it can be concluded, that the TS has not been signed in a way, that can be considered signed by hand from the law point of view.

By taking into account the above mentioned it can be concluded that the TS copyright clauses do not comply with the Copyright Law requirements for license agreements i.e., they are not concluded in written form, thus, the TS in regard to licenses is not in force.

Further, as already mentioned, national law, very briefly but yet does regulates the content of license agreements. According to Article 41 (1) of the Copyright law, the license agreement should specify the type of use of the work, provisions for the use, the amount of remuneration, the

[55] *Supra,* note 54. Art. 5 (1).

[56] Elektronisko dokumentu likums (Electronic Documents Law) (1 January 2003). Available on: https://likumi.lv/ta/en/en/id/68521. Accessed April 15, 2021.

[57] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. OJ L 257, 28.8.2014, p. 73–114. Available on: http://data.europa.eu/eli/reg/2014/910/oj. Accessed April 15, 2021. Art. 3 (12).

procedures, and the term for the payment of remuneration.[58] In addition, according to Article 41 (2) In a licensing agreement, the right to grant a license to third parties (sub-license) should be indicated in the agreement.[59] But Article 44 (1) of the Copyright law sets out that the term for which a licensing agreement is entered into or for which a license is issued shall be determined by the agreement of the parties.[60]

According to the decision of the Supreme court of the Republic of Latvia, the essential components of a license agreement are the grant of a work use permit (right to use the work) to the licensee and the licensee's obligation to pay the licensor a fee for the grant of such a permit. However, the agreement can be seen as one that is not lacking the essential component, if the agreement is missing the agreement on remuneration. Such a conclusion corresponds to the grammatical translation of Article 41 (3) of the Copyright Law and further follows from its systemic and teleological translation.[61] Article 41 (3) sets out that if the remuneration is not specified, in case of a dispute it shall be determined by the court.[62]

Therefore, it can be concluded, that the following matters should be included in the TS in regard to the licensing:

- type of use of the work;
- provisions for the use;
- remuneration (not mandatory, but preferably);
- rights to grant sub-licenses;
- the term of the license.

All four TS copyright clauses, reviewed in this paper, did incorporate the information of the remuneration - more precisely, the fact, that the licenses are royalty-free, and that the licensees have the right to issue sub-licenses to the content. Also, all four TS copyright clauses include the information on the type of use of the works, for example, to modify, adapt, reproduce, make derivative works of, publish, transmit, etc., the works. In regard to the provisions for the use of the works, the statements, for example, "By submitting, posting or displaying Content on or through the Services […]" [63] could be considered as provisions for the use of the works. This means that the provision for the use of the works is included as the statement, that by making the work available to the social media provider, the license is granted.

Taking into account the mentioned, so far, the content of TS copyright clauses, comply with the requirements of license agreement content, set out in Copyright Law, except the requirements on the term of the license.

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[58] *Supra*, note 39. Art. 41 (1).
[59] *Ibid.* Art. 41 (2).
[60] *Ibid*. Art. 44 (1).
[61] Latvijas Republikas Augstākās tiesas Civillietu departamenta (Republic of Latvia Supreme Court Department of Civil cases) 2017.gada 29.novembra Spriedums lietā Nr.C29422807, SKC-136/2017. Available (in Latvian) on: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj4zszG4rDwAhXLz4UKHd0pBc0QFjAAegQIAhAD&url=http%3A%2F%2Fat.gov.lv%2Fdownloadlawfile%2F5311&usg=AOvVaw1xnsgfhcm8y_Hf19ET6vvX. Accessed April 16, 2021.
[62] *Supra*, note 39. Art. 41 (3).
[63] *Supra*, note 23.

TS copyright clause of Facebook set out that the term of the license is the term of how long the particular work is in the system of Facebook. The license ends when the user deletes the specific work from Facebook. With the exception that the work will not be considered as deleted if the user will delete it, but other users will have had used the specific work, and they will not have deleted it. Also, the exception is that the content is necessary for some legal reasons or the deletion is not possible due to technical reasons, but in such cases, Facebook guarantees that the content will be deleted within 90 days.[64] Instagram has set out the same terms for the license – the license is terminated when the user deletes the work[65], but no exceptions have been indicated. The TS copyright clause of Twitter has no references to the term of the license, but TikTok has set out that the license is perpetual, and the terms do not indicate any license termination preconditions.[66]

According to Article 44 (2) and (3) of the Copyright Law, if a licensing agreement is not restricted as to time, the author may terminate the licensing agreement by giving a notice six months in advance. A provision in a licensing agreement according to which the author relinquishes the rights to terminate the agreement is void.[67]

It is possible to consider that Twitter and TikTok in their TS copyright clauses have not restricted the time limit to the license agreement, which means that users have the right to terminate the agreements by giving a six-month notice to the social media providers. And the social media providers have no right to deny the termination fact, as according to Article 44 (3) of the Copyright Law, the rights are irrevocable.

From the above mentioned, it can be concluded that the content of TS copyright clauses of Facebook and Instagram fully comply with the national law, but TS copyright clauses of Twitter and TikTok comply only partially. But it must be noted that in general, TS copyright clauses of all four social media providers, cannot be considered as in force, according to the national law, as the form of the agreement requested by the national law has not been observed.

But the fact is that even if the agreement does not comply with the law and technically it should be considered invalid, as long as one of the parties have not raised any objections about the forcibility of the agreement, and both or one party is undisturbedly fulfilling the agreement, there is no reason to consider the agreement as void. It has been concluded that, according to the law, the TS copyright clauses cannot be considered as valid in regard to users residing in Latvia, thus, further, it will be researched how users can protect their copyrights and how they can opt-out from TS copyright clauses.

2.3 How users can protect their copyright in regard to Terms of Services

As it was concluded in previous subsection, the TS copyright clauses of Facebook and Instagram set out that the license is in force as long as the user have not deleted the work from the particular social media portal. Twitter have not included information about the term of license, but TikTok have set out that the license is perpetual. Also, it was already mentioned, that according to the Article 44 of the Copyright law, Instagram and TikTok approach are not compliant to the law,

[64] *Supra*, note 24.
[65] *Supra*, note 25.
[66] *Supra*, note 26.
[67] *Supra*, note 39. Art. 44 (1).

as the license period should have been set out or licensor have rights to terminate the license agreement by informing the licensee on the fact 6 months in advance.

Article 44 of the Copyright Law is very strict and precise, it does not leave any possibilities to parties conclude the agreement in a way, that the licenser have no rights to terminate the agreement. The Article is designed in a way, that even if the parties agree on such terms that forbid the licensor to terminate the license agreement, such agreement clauses are void. The second issue is the fact that the license agreements concluded between users and social media providers cannot be considered as valid in the first place, as they do not comply with the Copyright Law requirements for license agreements.

Therefore, it can be concluded that the users have several possibilities in regard to copyright protection, and the first of the possibilities is the right to bring the claim upon the court in order to declare the license agreement as void.

It would mean that the court would decide that the agreement is void due to the fact that the agreement does not comply with the requirements set out in Copyright law – the form of the agreement is not considered to be "in writing". And therefore, the court would pronounce the decision by which the agreement would be declared as void.

Though, it should be bear in mind that, according to Article 1 (2) of the Law on Legal Force of Documents, the legal force of a document allows to use the respective document for exercising rights or defending lawful interests. A document that has no legal force is not binding to other organisations and natural persons. And as previously mentioned, the TS copyright clauses cannot be recognised as in force, as they do not have signatures of the parties, which is an essential precondition in order to recognise the documents to be in legal force, in accordance with Article 4 (4) of the Law on Legal Force of Documents.

It could be concluded, that as the TS copyright clause are not concluded in writing and it does not have a legal force, the license agreement is not binding to users or third parties, thus, there is no reason to bring the claim to the court in regard to declare the license agreement as void. But the issue is that most likely social media portals will not recognise their TS as invalid without a court decision that will force them to admit that the license agreements are not valid and thus, they have no rights to use the works in a way the copyright clauses allow them to use.

The result of such a claim and a court decision favourable to the user is unpredictable. It could vary from the situation that the social media portal changes the TS copyright clauses and the way that they conclude the respective clauses, or even the social media provider could block the rights to use the portal for users in the specific country, using as an argument the fact, that they cannot comply with the national law of the particular state, thus, they cannot provide people residing in the specific country with their services.

This approach can be used with all four social media providers that are reviewed in this paper, as the situation with the form of license agreement has the same for all of them.

Further, in case of the Facebook and Instagram, users can protect their copyrights to their works by deleting the works, as according to the TS, if the work is deleted, the license agreement is considered to be terminated and the Facebook and Instagram will not continue to use the work if they would have used it till then. The issue in this situation, at least in the case of Facebook, is whether the license, in accordance with the TS, will be considered as valid for the specific work, if

the work will be republished or used in other ways by other users, even if the author will delete the specific work as can be considered that other users have sub-licenses issued by the social media providers to use the works of other users.

It is not clear though whether such an approach can be recognised as lawful. The national law does not regulate the sub-licensing also there is no case law in regard of sub-licensing in Latvia. Thus, it is not clear whether the sub-license should be recognised as terminated when the general license is revoked, or as in this situation, when the licensing agreement, under which the sub-license was issued, is terminated.

In legal doctrine the opinion, that sub-licence ends along with the general licence, because of the *Nemo Dat* principle, can be found. *Nemo Dat Quod Non Habet* or *Nemo Dat* principle is common in common law countries and it translates as "no one can give what he has not". The idea of the principle is that no one can sell or give to others something that one do not own.[68] But there are also exceptions when the court has not applied the principle for sub-licenses because of the fact that in a particular case it could be considered that sub-license was issued under agency principles – the general licenser gave the permit to grant the specific license to the sub-licensee, therefore it was considered that the license came not only from the licensee but also from licensor itself.[69] This decision made clear that the *Nemo Dat* principle cannot always be applied to sub-licenses and that the form and context of the sub-license are important and should be well pondered when concluded.[70]

Latvia is not a common law state, yet it is possible that this principle would also be applied in such cases in national courts because this principle is indirectly also found in national law, and the origin of this principle is not common law states, but it was known on Roman law. Therefore, it is possible, that the court would hold in the decision that sub-license ends along with the general license.

And so, Article 2389 of the Civil Law sets out that if a person, without any basis, therefore, is in possession of some item of another person's property, it may be reclaimed from the first-mentioned person. It shall not matter whether there did not from the beginning exist any basis for the acquisition of such item or the basis initially existing later ceased.[71] This article can be applied to sub-license matters, as the sub-license could be seen as rights to use the other party's intangible property. The intangible property consists of various personal rights, property rights, and rights regarding obligations, insofar as such rights are constituent parts of the property.[72] Therefore, it can be considered, that when the general license ends, the sub-license ends as well, as the person using the works on the basis of sub-license has lost the rights to use the properties and thus, if the use of works is continued after the end of general license, the owner of the property – the author of

[68] Elham Balavar, "The Doctrine of Nemo Dat Quod Non Habet and Its Exceptions", *Journal of Applied Environmental and Biological Sciences* 4(5), (2014), available on: https://www.textroad.com/pdf/JAEBS/J.%20Appl.%20Environ.%20Biol.%20Sci.,%204(5)7-14,%202014.pdf. Accessed: April 19, 2021.

[69] *VLM Holdings Ltd* v *Ravensworth Digital Services Ltd*, No. HC11C02, 2013 High Court of Justice Chancery Division, [2013] EWHC 228 (Ch), 2013 WL 425732, February 13, 2013. Available on: Westlaw Edge UK database.

[70] Ed Baden-Powell, "Finding nemo - a sub-licence capable of surviving the head licence", *Entertainment Law Review*. no. 24(5) (2013), available on: Westlaw UK. Accessed April 19, 2021.

[71] *Supra*, note 47.

[72] *Ibid.* Art. 841.

the work, has rights to reclaim the work form the sub-licensee, or in this case, to reclaim the rights to use the work.

The Supreme court of the Republic of Latvia has held that one of the bases to apply Article 2389 of the Civil law is if the fact that the reclaimed item has come into the possession of the person not by the permission of the claimant, but in another way.[73] In the case of the social media providers and sub-licenses issued by them to other users, it can be considered, that the property of the users has come into possession of other users without first user knowledge and direct permission, thus, the rightholders has rights to reclaim the rights to use the works.

As Twitter and TikTok have not let any indications that the license agreements could be somehow terminated (licenses would be revoked) or they would end in some foreseeable period, the users have the rights to act in accordance with Article 44 (2) of the Copyright law and to inform the social media providers about the termination of the license agreement within 6 months from the termination notification. Yet, it is not clear how would social media providers react to such demands, but most likely they would not accept such termination notices and refuse to consider the license agreements between them, and specific users as terminated. In such a case, the only solution to the user would be to submit the claim to the court and the request to declare the license agreement as void.

2.4 Social media obligation to fulfil the court decisions

It is clear that in most of the cases, if the user will wish to achieve that the TS copyright clause will not be in force, thus, the license of the user-created content would not be considered as valid, the user will have to bring the claim in front of the court. When the court will come to a decision that is favourable to the user, what the user will be able to do further with the decision to make sure that the social media provider will fulfil the decision, will be further researched.

If the court will hold that that the license agreement is void, or that the sub-license to the works should be considered as revoked, or invalid, the further use of the works, will be considered unlawful and performed without the rightholder consent. Thereof, the rightolders has the right to request the court to issue the injunction by which, the social media provider will be forced to prevent the copyright infringement and to remove the unauthorized content from its platform. Such request can be made separately or along with the claim in regard of the declaration of the license agreement as void.

The Recital 59 of the Directive 2001/29 set out that without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network.[74] According to Article 8 (2) each MS shall take the measures necessary

[73] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta (Republic of Latvia Supreme Court Department of Civil cases) 2013.gada 5.aprīļa Spriedums lietā Nr. SKC-121/2013. Available (in Latvian) on: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwis6rqr5bDwAhVz9OAKHRg5DIEQFjAAegQIAhAD&url=http%3A%2F%2Fwww.at.gov.lv%2Fdownloadlawfile%2F2992&usg=AOvVaw1tcGYdq7Ft7NPy633yrbVT. Accessed April 19, 2021.

[74] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167, 22.6.2001. Available on: http://data.europa.eu/eli/dir/2001/29/oj. Accessed February 18, 2021.

to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material, as well as of devices, products or components which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.[75]

In addition, the article 8 (3) sets out that MS shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

As it was discussed on sub-chapter 1.1. of this paper, the term "Internet intermediary" can be referred also to the social media portals, therefore, the Directive 2001/29 can be applied also to social media portals. In addition, the fact, that Directive 2001/29 can be applied also to social media portals is that CJEU has stated:

> (…) it follows from Recital 59 in the preamble to Directive 2001/29 that the term 'intermediary' used in Article 8(3) of that directive covers any person who carries a third party's infringement of a protected work or other subject-matter in a network.[76]

In regard to requirements set out in Directive 2001/29, the national law has implemented the injunction request rights. Point 7) of Article 69 (1) of the Copyright Law sets out that rightholders have the rights to require that intermediaries the services provided by whom are used in order to infringe the rights of the rightholders, or who make such infringement possible, shall perform relevant measures for the purpose of preventing the users from being able to perform such infringements. If the intermediary does not perform relevant measures, the rightholder has the right to bring an action against the intermediary.[77] But in accordance with Article 69.[1] (1) of the Copyright law, if copyright protected works have been illegally used due to the fault of a person, the rightholders are entitled to require compensation for the incurred losses and moral damage.[78]

According to point 7 of Article 69 (1) and Article 69.[1] (1) of the Copyright Law and in accordance with Article 8 of the Directive 2001/29, if the intermediary does not remove the content which is made available without the consent of the rightholder, or in this case, are published without the license agreement in force, the rightholder has rights to submit the claim to the court and court must issue the injunction in order to remove the content in question and also to request to compensate the incurred losses and moral damage to the rightholder.

As mentioned in sub-chapter 1.1., the ISS provider term can also be applied to the social media providers. Thus, the E-commerce Directive can be applied. Article 14 (1) of the E-commerce Directive set out that, where an ISS is provided that consists of the storage of information provided by a recipient of the service, MS shall ensure that the service provider is not liable for the

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[75] *Supra,* note 74. Art. 8 (2) and 6 (2).
[76] Court of Justice: Judgement in Case *UPC Telekabel Wien GmbH* v *Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH,* C-314/12, ECLI:EU:C:2014:192 27, para.30.
[77] *Supra*, note 39. Art. 69 (1) 7).
[78] *Ibid.* Art. 69.[1] (1)

information stored at the request of a recipient of the service, with condition that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.[79]

In regard of Article 14 of the E-commerce Directive, the CJEU has stated:

> In that respect, it should be recalled that Article 14(1) of that directive is intended to exempt the host provider from liability where it satisfies one of the two conditions listed in that provision, that is to say, not having knowledge of the illegal activity or information, or acting expeditiously to remove or to disable access to that information as soon as it becomes aware of it.
>
> In addition, it is apparent from Article 14(3) of Directive 2000/31, read in conjunction with recital 45, that that exemption is without prejudice to the power of the national courts or administrative authorities to require the host provider concerned to terminate or prevent an infringement, including by removing the illegal information or by disabling access to it.[80]

For clarity, Article 8 (3) of the E-commerce Directive sets out that this Article shall not affect the possibility for local authorities requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for the MS of establishing procedures governing the removal or disabling of access to information.[81] But the Recital 45 of the Directive sets out that, the limitations of the liability of intermediary service do not affect the possibility of injunctions of different kinds. Such injunctions can in particular consist of orders by authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.[82]

From the mentioned, it can be concluded, that the Directive has designed a safe harbour for intermediaries, but it has not limited MS to act on behalf of their residents, in order to protect them from infringement of their rights. This means, that when the social media portal has knowledge that it is hosting illegal content, and copyright protected works that do not have a license to be posted on the social media portals are such content, they have an obligation to remove the content. It means that when the court would make a decision in regard to TS copyright clause and the fact that it is not in force, the social media portals would become aware of the fact that they are hosting illegal content in some situation, thus, they have had an obligation to remove the content or made it unavailable to be accessed by the public.

In accordance with Article 12 of the Law on Information Society Services, in Latvia, the authority responsible for the supervision of ISS providers is the Consumer Rights Protection Centre, State Data Inspectorate, and other competent authorities, to which, the persons whose rights are infringed have rights to submit the claims. In accordance with point 2) of Article 13 (1) of the law, the competent authority has the rights to request the ISS provider to stop the violation of the

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[79] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, p. 1–16. Available on: http://data.europa.eu/eli/dir/2000/31/oj. Accessed April 20, 2021. Art.14 (1).

[80] Court of Justice: Judgement in *Eva Glawischnig-Piesczek* v *Facebook Ireland Limited,* C-18/18, ECLI:EU:C:2019:821, paras. 23., 24.

[81] *Supra*, note 79. Art.14 (3).

[82] *Ibid*. Rec. 45.

Law or to perform particular activities for the elimination thereof, as well as to specify the time period for the execution of these activities.[83]

With Article 10 (5) of the Law on Information Society Services, the Article 14 (1) of the E-commerce Directive has fully implemented in national law, which means, that knowingly hosting illegal content can be recognised as an infringement of the Law on Information Society Services and that the national authorities have rights to request the service providers, in this case, social media providers, to stop the law infringement.

Therefore, it can be concluded, that users have rights, along with the claim on declaration of license agreement as void, to also request to issue an injunction in accordance with the Copyright law and Directive 2001/29. It means that when the TS license agreement would be recognised as invalid by the court, and the social media providers would not act accordingly and remove the content that is displayed without the license or to use the content in any other ways, without the rightolder consent, the user would have at least two legal option how to force the social media providers to act lawfully.

And those two options are to submit a claim at the court and request the court to issue an injunction under Copyright law and Directive 2001/29. Or to submit a claim to the competent authority and to request to act in accordance with the Law on Information Society Services and E-commerce Directive. In both cases, the social media providers will be forced to remove the content or stop using the content which is protected by copyrights.

3. Terms of Service compliance with human rights principles

As it has been concluded previously, copyright protected works must be recognised as property. Also, it has been concluded, that most social media users, use social media for their personal needs, such as, communicate and be in touch with friends, family, etc.[84], which means that they are making also available content, that is reflecting their private life. For example, pictures from private events, pictures with relatives and friends, spouses, etc. But in human rights, two principles, such as rights to property and rights to private life, have been consolidated.

But before any further research on TS copyright clauses compliance to the human rights principles, it would be necessary to determine what is human rights. And so, United Nations Human Rights Office of the High Commissioner has defined human rights as follows:

> Human rights are rights we have simply because we exist as human beings - they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.[85]

Despite the fact that it is mentioned that human rights are not granted by any state, most of the states do acknowledge human rights of their residents and do protect human rights off all human beings residing in their state.

[83] Informācijas sabiedrības pakalpojumu likums (Law on Information Society Services) (1 December 2004). Available on: https://likumi.lv/ta/en/en/id/96619. Accessed April 22, 2021. Point 2) of the Art.13 (1).
[84] *Supra*, note 1.
[85] United Nations Human Rights Office of the High Commissioner. Available on: https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. Accessed May 9, 20201.

As mentioned, one of the human rights principles are rights to the property and rights to the personal life. These two human rights principles are recognised as one of the fundamental human rights not only in Latvia, but worldwide, and they are protected by such international law acts as UDHR, which is considered to be one of the most important documents in the history of human rights[86], EU Human Rights Charter, ECHR, etc.

Human rights in general, are considered to be the core of freedom, justice and peace in the world. Disregard of human rights can lead to barbarous acts.[87] In the EU the main human rights law source is the ECHR, and it is the document in accordance with which the ECtHR are making their decisions. In Latvia, human rights principles, including rights to property and private life, are consolidated in the Constitution.

As TS is a mandatory agreement for users in order to be able to use the particular social media, and users do not have the opportunity to negotiate the terms of the TS, including copyright clauses, it should be reviewed whether TS copyright clauses do not infringe their users' human rights.

To determine whether the TS copyright clauses do not intervene with social media user human right, ECtHR case law in regard to the rights to the property and private life will be reviewed in order to determine TS copyright clause compliance with the ECHR and also with the Constitution of the Republic of Latvia, to understand whether such clause would be recognised as compliant with the human rights not only in international but also national level.

3.1 Rights to the property

Article 17 of the EU Human rights Charter sets out that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. Intellectual property shall be protected.[88] Very similar wording of the rights to the property is also included in Article 1 of the ECHR Protocol 1 and in Article 17 of the UDHR, without reservation on intellectual property. Article 105 of the Constitution sets out that everyone has the right to own property. Property rights may be restricted only in accordance with law.[89]

Concerning Article 1 of the ECHR Protocol 1 application to intellectual property as well, ECHR in several decisions[90] has stated that Article 1 of the ECHR Protocol 1 also guarantees the rights to the protection of intellectual property. It means that rights to the copyrights is protected by the ECHR as one of the fundamental human rights.

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[86] United Nations. Universal Declaration of Human Rights, 10.12.1948. Available on: https://www.un.org/en/about-us/universal-declaration-of-human-rights. Accessed April 29, 2021. Preamble.
[87] *Ibid.*
[88]Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012. Available on: http://data.europa.eu/eli/treaty/char_2012/oj. Accessed April 27, 2021. Art.17.
[89] Latvijas Republikas Satversme (The Constitution of the Republic of Latvia) (November 7, 1992). Available on: https://likumi.lv/ta/en/en/id/57980. Accessed April 28, 2021.
[90] See, *Anheuser-Busch Inc.* v *Portugal* [*GC],* no. 73049/01, ECHR 2007-I. Para. 72., and *Neij and Sunde Kolmisoppi* v *Sweden,* no 40397/12, ECHR 2013.

In regard to the protection of the property, on *Anheuser-Busch Inc. v. Portugal* judgement, ECtHR have stated the following:

> Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, (…), is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, (…), covers deprivation of possessions and subjects it to certain conditions; the third rule, (…), recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (…) The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (…).
>
> The concept of "possessions" (…) has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.[91]

What can be concluded from the above mentioned is that, not only the rights to own a property is protected under Article 1 of the ECHR Protocol 1, but also the peaceful enjoyment of it and rights to rely on that the property will not be deprived, except, if it will be necessary for the general interests of society, but in such case, a fair remuneration will be received.

The next concept that should be reviewed in regard to the rights to the property is the "possession" concept. ECtHR has stated that licenses to use the property,[92] intellectual property and copyright, in general,[93] constitute the "possession" of the property. And that in cases when the matter regards intangible property, it must be considered whether the legal position has an economic value and give financial rights or interests to the person in which possession the legal position is.[94] It means that by possession of the property, in regard to copyright, the fact of being a rightholder of copyright protected work, means possession of the property from ECHR point of view.

It might seem that TS copyright clauses are not depriving the property of users, as the licenses, under which the works are licensed, is non-exclusive ones. It means that users have rights to use the works further as they see fit, including, to issue licenses or conclude license agreements with other persons in regard to the same works. Yet, because of the mandatory non-exclusive licensing, the users do not have the right to issue exclusive licenses to the works to other rightholders. And in addition, even if the users do not lose full control over their works, they have been forced to give someone rights to use their property and to use it without any remuneration.

The reason why the argument that TS copyright clause does not deprive the property of their users is not correct is the ECtHT case law, according to which the limitation of rights is an

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[91] *Anheuser-Busch Inc.* v *Portugal [GC]*, no. 73049/01, ECHR 2007-I. Paras. 61., 62.

[92] *See Tre Traktörer Aktiebolag* v *Sweden*, No. 11899/85, ECHR 1985. Para 53., *Alatulkkila and Others* v *Finland*, No. 33538/96, ECHR 2005. Para 66., *O'Sullivan McCarthy Mussel Development Ltd* v. *Ireland*, No. 44460/16, ECHR 2018. Para. 89.

[93] *See Melnychuk* v *Ukraine,* No. 28743/03, ECHR 2005., and *Anheuser-Busch Inc.* v *Portugal* [*GC],* no. 73049/01, ECHR 2007-I. Paras. 72., 76., 78.

[94] European Court of Human Rights. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Available on: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. Accessed April 27, 2021.

interference to the property rights. And unlawful interference with the rights should also be recognised as a human right infringement from the ECTH point of view.[95] So when the user issues the non-exclusive license to a social media portal, the user loses the rights to issue an exclusive license to someone, and it is a limitation of the user's rights to act with its property. In addition, social media providers are receiving a financial right to receive financial benefits from such licenses, which means, that the licenses have an economic value, therefore it can be recognised, that social media portals are possessing the property of the users. Therefore, it can be concluded, that by forcing users into a license agreement that provides social media providers with non-exclusive licenses to user works, the social media portals have interfered with user's rights to the property and thus, interfered with the fundamental human rights of their users.

3.2 Rights to the private life

Article 96 of the Constitution sets out that everyone has the right to inviolability of his or her private life, home and correspondence.[96] Article 8 (1) of the ECHR set out that everyone has the right to respect for his private and family life, his home and his correspondence.[97]

The matter of user's rights to private life should be reviewed as in most cases works, that have been licensed to social media providers, contain information on user's private life. For example, a picture of a family on vacation contains information on the user's personal life – how many children the user has, that he has a spouse or a partner, they are spending vacation on a specific place, etc. Social media providers, according to the TS copyrights clauses, do have the right to use the picture in many different ways, including, make it available to the public or reproduce the pictures. These rights social media providers have also in cases when the particular picture or whole profile of the user has limited access of other users, e.g., private profile or picture made available only to the users who are included, for example, in "close friends" list.

If the social media provider, makes such a picture available to the public, it has made public also information on a specific user's private life. In accordance with the issued license, there are no limitations to make such a picture available to the public, even if the picture has been made available to a limited number of persons by the user itself. Therefore, it is important to understand, whether such action would not be recognisable as interference with users' rights to private life and therefore is not infringing the fundamental human rights of social media portals.

Fact that the pictures are considered to fall under the private life concept is affirmed by the ECtHR case law. ECtHR in its judgment in case *Dupate v. Latvia* has stated the following:

> The Court reiterates that the concept of "private life" extends to aspects relating to personal identity, such as person's image. A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right of each person to the protection of his or her image presupposes the right to control the use of that image. Whilst in most cases it entails the

[95] *Alatulkkila and Others* v *Finland*, No. 33538/96, ECHR 2005. Paras. 66., 67.
[96] *Supra*, note 89.
[97] European Convention on Human Rights (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16), 01.06.2010. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed April 28, 2021.

> possibility to refuse publication of the image, it also covers the individual's right to object to the recording, conservation and reproduction of the image.[98]

In regard of personal life concept, ECtHR in different judgment has also stated the following:

> The concept of private life is not limited to an "inner circle" in which the individual may live his or her own personal life without outside interference, but also encompasses the right to lead a "private social life", that is, the possibility of establishing and developing relationships with others and the outside world […]. It does not exclude professional activities in that connection […] or activities taking place in a public context […]. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" […].[99]

As it can be concluded from the ECtHR case law, the concept of "private life" is very broad and can also be applied to the use of the pictures of the particular person, moreover, to the rights to control the use of a person's images. It can also be concluded that a person does not lose the rights to control the use of its image, even if the person has made it public on social media, as according to the above-mentioned case law, persons have the right to lead a private social life, by communicating to the outside world, including, being involved on public activities. From this can be concluded, that even if the social media user has shared its picture on social media, what can be recognised as communication to the outside world, it does not lose the rights for that picture to be protected under the concept of "private life" in regard of Article 8 of the ECHR.

And what should be mentioned, is that users to social media providers issue licenses to use works, including pictures, in which also other persons, not only users themselves, can be seen. But those other people also have rights to private life, which include the right to control the use of their image. It means that the use of user pictures is not only interference with the user rights to private life but also interference with the rights to the private life of the third person, who maybe do not even use the particular social media.

According to Article 8 (2) of the ECHR, the interference to the private life concept can be made only in accordance with the law and if it is necessary for a democratic society in the interests of national security, public safety, or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[100] As well as Article 116 of the Constitution, sets out that the rights to private life may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals and on the basis of the conditions mentioned, restrictions may also be imposed on the expression of religious beliefs.[101] None of these exceptions, according to which the rights to private life could be interfered with or restricted, fall under the TS copyright clauses.

As it is clear that the interference with user's and even third person, private life, that arises from TS copyright clause do not fall under the exceptions laid in Article 8 (2), the TS copyright clauses can be recognised as interference to the user's private life's and, thus, to their essential and fundamental human rights. Also, the TS copyright clauses do not fall under the exceptions set out

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[98] *Dupate* v *Latvia*, No. 18068/11, ECHR 2020. Para. 40

[99] *López Ribalda and Others* v *Spain*, Nos. 1874/13 and 8567/13, ECHR 2019. Para.88

[100] *Supra*, note 97.

[101] *Supra*, note 89.

in Constitution in order to interference with human rights to be recognised as lawful, therefore, TS copyright clauses are not compliant with the Constitution.

The only issue with the noncompliance with the human rights principles is the fact that in general that usually states not private persons are held reliable for human rights infringements against natural persons, therefore social media portals would not be held responsible for such infringements based on ECHR. Yet, the tools for the protection of human rights principles are included in national laws, for example, Copyright law which protects author rights to their works in general. Therefore, if users would want to raise any claims against human rights infringements from social media providers, such claims would be necessary to be based on national or EU laws, which aim is to protect the principles of human rights through regulation of specific matters.

CONCLUSIONS

The purpose of the thesis was to identify how popular social media portals, in this case – Facebook, Instagram, Twitter and TikTok, treat their users' copyright, and to identify whether TS copyright clauses are in compliance with the national and EU law and how social media users can protect their copyright from social media providers. In addition, the aim of the thesis was to understand, whether actions of social media portals in regard to their users' copyright are compliant with the human right principles - rights to property and private life.

At the beginning of the research, author made an assumption that social media giants, such as Facebook, TikTok, Twitter and Instagram, use their TS in order to receive licenses to copyright-protected works, owned by their users, without users even knowing it. In addition, the assumption was that the TS copyright clauses do not comply with terms set out for license agreements in national law.

But in order to understand the focus of the thesis, the author did research what exactly should be understood by the term – social media. During the research, the author determined, that by term- social media, an internet platform in which the content is created by the users, not service, providers, should be understood. In addition, the precondition for a platform to be recognised as social media is that the user-created content should be publicly available, and it should not be created for a commercial purpose or in regard to professional activities of the users. For example, email service platforms, or private chat service platforms, such as Google Mail or Skype, are not social media platforms, because even though the users create the content on them, the content is not publicly available to third persons, but only to those who have created the specific content. Yet, Facebook, Instagram, Twitter and TikTok should be recognised as social media platforms, as they only provide the place online where users can create and share their content. The platforms are not meant to be used for professional activities, but more for users' social interactions with each other.

It was determined that legal regulation of such platforms is very broad, as, to social media providers, terms - Internet Intermediary, can be applied, as well social media providers should be recognised as Information Society Service providers. Thus, such EU law as Directive 2001/29, along with E-commerce Directive, and many others, can be applied to social media providers. Also, social media providers can be recognised as traders, also called service providers, therefore, any law that regulates matters related to activities of social media providers could be applied to social media providers even if the law does not specifically set out that it is in the scope of the law.

In regard to TS, the author determined that TS, in general, is recognisable as inkless agreements, called – clickwraps. It means, they are agreements which are used as non-negotiable standard agreements, in electronic form and usually presented to the user before the user starts to use the services and user cannot start to use the services before it has agreed to agreement, by clicking on "I agree" button. [102]

Further, during the research, it was concluded that TS includes "Governing law clauses" which set out the governing law to the TS and court in which potential disputes, between social media providers and users, should be reviewed. While Facebook and Instagram "Governing law clauses" were favourable to users by setting out that disputes will be reviewed in front of the court

[102] Tollen, David. W. *Supra*, note 22.

of the state the user is residing, and in accordance to the law of the country in which the particular user resides, Twitter "Governing law clause" set out the jurisdiction of the claims in the USA and the applicable law is the law of USA. While TikTok TS "Governing law clause" set out that the governing law is the Irish law and the jurisdiction of the court in Ireland.

But during the research it was concluded that "Governing law clauses" of TikTok and Twitter TS are not in force as they are incompliant with Article 6 of the Regulation of Roma I, which regulates the applicable law for consumer agreements. As during the research, it was determined that users of social media should be recognised as consumers from Digital Services Directive and Consumer protection Directive point of view.

As during the research, it was determined that users of social media should be recognized as consumers from the Digital Services Directive and the Consumer Protection Directive point of view, it was further concluded that the "Governing law clauses" of TikTok and Twitter TS are not in force as they are incompatible with Article 6 of the Regulation of Rome I, which regulates the applicable law for consumers agreements.

It was concluded during the research that social media providers, indeed, have included a copyright clause on their TS. Whit TS copyright clauses, social media providers do receive non-exclusive, remuneration-free licenses to all user copyright protected works that are uploaded on social media. The use of the works is basically unlimited, as social media portals can issue sub-licenses to the works, broadcast, transmit, make works available to the public, translate, copy, etc., the works without any limitations, and also receive remuneration from the use of the works.

The fact that users are considered to be consumers, and therefore, the national laws of the residing state the users, should be applied to agreements between consumers and traders, in this situation – users and social media providers, led to the necessity to determine whether TS copyright clauses comply to national law and more specific, to the Copyright Law. It was further concluded that Copyright Law includes two types of copyright protected work licensing documents – licenses and license agreements, in accordance with Article 40 (3) of Copyright law. Therefore, during the research, it was concluded that TS copyright clauses should be recognised as license agreements, not licenses, even if all reviewed TS copyright clauses used the wording "issue a license" not, for example, "conclude a license agreement". The reason that the TS copyright clauses should be recognised as license agreement arises from the fact, that according to the national law[103], by a term "agreement" a document that is concluded and negotiated between the parties, should be understood. When as a license can be understood a document that is issued to rightholder without any negotiations and is more applicable to situations when one has bought a product, protected under copyright, and with the product one has received a license in order to be able to lawfully use the product, for example, software.

It was further determined that according to Article 43 (2) of the Copyright Law, licensing agreement should be concluded orally or in writing, but the agreements which include communicating to the public of work as the use of the work must be concluded only in writing.[104] As it was concluded, that all reviewed TS copyright clauses included also communication to the public as one of the types of use of the works, it was determined, that TS copyright clauses as

[103] *Supra*, note 47. Art.1511.
[104] *Supra*, note 39.

license agreements should be concluded in writing in order to be recognisable as compliant to the law and, therefore, in force.

During the analysis of agreements concluded in writing, it was determined that according to the national law, in order to recognise the agreement as concluded in writing, it must be signed by all party representative by hand in person, or it can be signed with a secure electronic signature, or with an electronic signature, if parties have previously concluded an additional agreement by which they have agreed that the agreement will be signed by electronic signature. In such a case, the additional agreement should be signed by hand or with a secure electronic signature.

Hence, the author's opinion is that the TS copyright clauses should be recognised as license agreements and that they are not concluded in accordance with the requirements in national law that is requiring the license agreement to be concluded in writing. The author's opinion is that license agreements cannot be concluded by user clicking to "I agree" button, and they cannot be formed on clickwrap form, as such form and signing method do not meet the requirements set out by the Copyright Law. According to the national law, if the agreement is not concluded in a form requested by the law, such agreement is not in force, and if the agreement is not signed in accordance with the law, the agreement is binding only to the author of the agreement, in this case, only to social media providers, not users.

As it was concluded that TS copyright clauses are not in compliance with the law, it was reviewed how users of social media can protect their copyright and what legal tools they have in order to declare TS copyright clauses as void and to achieve that social media providers recognise their TS as void in regard of users residing in Latvia.

During the research, it was concluded that users have the right to bring claims against social media providers in national courts and request the court to declare TS copyright clauses as void. Further, users have the rights to request the court to issue an injunction under Copyright law and Directive 2001/29 along with the claim on license agreement declaration as void, or to submit a claim to the competent authority and to request to act in accordance with the Law on Information Society Services and E-commerce Directive. In both cases, the social media providers will be forced to remove the content or stop using the content which is protected by copyrights.

In the end, it was reviewed whether TS copyright clauses do not infringe human rights, particularly, users' rights to property and private life. During the research, it was concluded that copyright protected works should be recognised as property. As well it was concluded that most of the users use social media for personal needs, which means, they do share content containing information on their private life. During the research of ECtHR case law[105], it was concluded that even if the property is not deprived of the owner, but there has been an interference with the rights to use the property, such interference should be recognised as an infringement of human rights and Article 1 of the ECHR Protocol 1. As the social media providers force their users to license their copyright protected works, it should be concluded, that social media providers interfere with users' rights to the property and therefore, TS copyright clauses are considered to infringe users' fundamental rights to the property.

In regard to the rights to private life, it was determined that in accordance with the ECtHR case law, the picture of a natural person should be considered as a part of private life, and the

[105] *Supra,* note 95. Paras. 66., 67.

concept of private life includes also persons right to decide of the use of the picture. It was concluded that users do have the rights to rely on the protection of their private life even when they engage in social private life and even in public events, therefore, it could be concluded that even if persons do make the pictures available on social media, they do not lose the protection of their private life under Article 8 (1) of ECHR. As the rights to personal life can interfere only under exceptions laid down in Article 8 (2) of the ECHR and Article 116 of the Constitution, it is concluded that the TS copyright clauses do interfere with the users' rights to private life. Also, it was concluded, that as users do share also content in which third persons can be seen, also the rights to the private life of third persons are infringed with the terms of the TS copyright clauses.

Therefore, the main conclusions that could be made from the research are that TS copyright clauses are not compliant with the national law, as the TS copyright clauses are not concluded in a written form and signed by hand or with a secure electronic signature. Therefore, TS copyright clauses cannot be considered to be in force in regard to users residing in Latvia. Yet, Facebook and Instagram TS copyright clause content fully comply with the license agreement content requirements set out in Copyright law, while Twitter lacked the information on the term of the license, but TikTok TS copyright clause stated that the license is perpetual, which, according to the Copyright law[106] are to be considered void. Yet, the compliance with the content requirements does not change the fact, that TS copyright clauses are void because of incompliance with the form and signing requirements of such agreements.

National and EU law have provided rightholders with several legal tools to achieve that the TS copyright clauses are declared as void by the court and as well to request the social media providers to stop use the copyright protected works without rightholder consent by injunction issued by the national court or by request by the competent national authority.

In addition, TS copyright clauses should be considered as incompliant with the fundamental human rights to the property and right to private life, as TS clauses do interfere with the users' rights to use their property and interfere with the users, and even third persons, rights to decide of the use of their pictures.

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