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The 6th International Conference on Research in Behavioral and Social Sciences

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and presented the paper

“Repressive Legal Protection of Copyrights Holder in Indonesia”



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Notification of Paper Acceptance

Dear Chryssantus Kastowo,

Congratulations! We are pleased to inform you that your abstract entitled “*Repressive Legal Protection of Copyrights Holder in Indonesia*” has been accepted after double blind peer review by the Scientific Committee of the 6th International Conference on Research in Behavioral and Social Sciences (ICRBS), in London, United Kingdom during July 26–28, 2019, for **Oral** presentation. All papers have publication opportunity in various indexed international journal: SCOPUS, ISI/THOMSON REUTERS, DOAJ, EBSCO, GOOGLE SCHOLAR, COPERNICUS, and many more.

Confirmation of your enrollment on the final schedule is contingent upon full payment of fees before 17th July 2019.

Early registration is available until 10 May 2019, late registration is open until 17 July 2019.

You can complete your registration process by paying the required fees to confirm your attendance at the conference.

The payment can be done through the Website: <http://www.icrbs.org/registration/>

The conference fee covers all the lunches, program, city tour, conference proceedings and certificate. If you need a Visa for attending the conference, we can provide official invitation letter from conference side. Acceptance/Invitation letters are send only after registration.

For any inquiries, please do not hesitate to contact us.

We are looking forward to meeting you at the exciting event in London, United Kingdom.

With Warmest Regards,

On behalf of the organization committee

Gintare Chakherlouy





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Repressive Legal Protection of Copyrights Holder in Indonesia

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ABSTRACT

This article intends to analyze the implementation of copyright law protection at the practical level through both court and mechanism outside the court. The nature of the complaint offense of copyright infringement places the creator in the central position whether there is law enforcement when infringement happens. The aspect of Copyright economic benefit is a major consideration in the presence or absence of lawsuits. The method used in this study is normative legal research. In this study the data is secondary data complemented by the result of interview with parties related to the problems under study. The result shows that the evil stigma of copyright infringement contributes to the high level of infringement and economic consideration is more important in determining whether there are complaints or at least or the beginning of the repressive law enforcement process.

Keywords: Copyright, Law Enforcement, Repressive Legal Protection

1. Introduction

Basically humans have the ability to be creative. Creativity is expressed in the forms of works as a response to natural or artificial stimuli appearing outside of oneself. The forms of human creative works are very diverse in types and shapes. It is very dependent on the knowledge and imagination of different people. The statue of the Asmat tribe which is very distinctive, as an example, is one form of expressions of the tribe's imagination in living life in its environment. Works in the form of boats can only be found on people whose environment has water and require modes of transportation on water.



These diverse human works contribute to the development of the life of society as a whole. There are various kinds of human works, like the works of art and literature, works about designs, and works about technology solving human problems. The development of previously existing works accumulatively shows that human works have become very numerous and the complexity of problems in society can be overcome.

Historically it can be argued that the creative works of humans are then classified into various types of intellectual property rights. Recognition of creative subjects is personally manifested in the form of protection through intellectual property rights law. Intellectual property rights are basically the kind of appreciation for human creativity in a personal or group given by the state. There are laws regulating Copyright, Trademark, Patent, Industrial Design, Integrated Circuit Layout Design, Trade Secrets as the branches of intellectual property. Through the intellectual property law, the state gives personally recognition to the subjects on their creative works in a very unique way in the form of moral rights. Beside the right of moral rights, creative subjects are also given exclusive rights to obtain economic benefits from the works they have made, which is then known as economic rights. Reward theory provides arguments for the economic rights of the subjects who have struggled to carry out activities consistently to produce works. Creators are given exclusive rights to carry out activities having an impact on the economic benefit gain.

As intellectual property rights in general, Copyright is a clear form of recognition by the state on creative subjects creating art works in the field of literature and science. Personal recognition on creative subjects personally is manifested in the form of moral rights. The consequence of this recognition is that moral rights are recognized and attached to the creators without any time restrictions. In addition, creators have economic rights, which are exclusively for activities having the impacts on the economic benefit gain. In line with this, the creator can give permission for other parties to carry out activities that have economic consequences by obtaining royalties.

Indonesia as a WTO member consistently strives to provide protection for rights arising from intellectual property. This is proven by the fact that Indonesia has repeatedly revised laws and regulations on intellectual property, including changes to copyright laws. Indonesia last revised the copyright law in 2016 namely Act No. 28 of 2014.

Indonesian copyright law provides protection to creators and copyright holders are in line with the provision applied internationally as contained in TRIPs, so that creators are normatively protected. Ironically until 2019 Indonesia has not been able to succeed in providing legal protection of intellectual property rights in general including providing legal protection to creators. This is evidenced by the inclusion of Indonesia as one of the countries in the Priority Watch List category by the United States trade ministry.



Based on the juridical and empirical facts above, the legal problem is how the law enforcement of copyright provisions can provide legal protection to the creators. The purpose of this study is to find legal protection efforts consistent between the law and when there is copyright infringement.

2. Methods of Research

The research used to obtain data analyzed in this article is normative law research. The subject matter of the study is a law conceptualized in the form of norms applied in society and becoming a guideline for behavior. The approach used in this study is the conceptual and Statute Approaches. (Mahmud MZ, 2005) The legislative approach is carried out by studying legislation, policy regulations or judicial institution decisions relevant to the legal issues that become the subject of the study. Furthermore, this study also uses secondary legal materials in the form of principles, doctrines, legal opinions published in journals or textbooks.

3. Result and Discussion

3.1 Copyright As A Personal Right

There are various kinds of justifications for the concept of copyright as property rights, one of which is given by John Locke. According to *John Locke*, (Wattimena, 2007) the state of nature is a harmonious state characterized by the equality of rights and freedoms of all humans. Every human being lives under the rule of natural law. The natural law forbids to damage, let alone eliminates life, freedom, and the rights of others because these three rights are gifts from God. Therefore, in this natural state humans cannot threaten each other. The works of the body and hands in the real sense are personal possession. Men with his works combine what has been provided by nature with their own. In this way they are personal possession. Whatever they take from nature, maintain and unite it with their work and combine with their own and thus make it their own. It is this work determining the occurrence of the property separation from the position of shared property into private property, thereby removing the joint rights of an object which previously belonged together. (Macpherson. C.B. 1989). The point is that human beings have whatever in themselves including their minds, thoughts or ideas and sensitivities, then processed by integrating, separating, reducing or adding to what already exists in nature and declaring responsibly that it is them who have the idea. The right is granted by the state and legalized as their own because the ideas / thoughts or products have commercial value and can be used as personal assets and used for the benefit and progress as well as welfare of humans.(Wattimena, 2007)

It has been stated in advance that Copyright is the object of ownership rights in the form of rights. There is a separation between the material embodying the ideas and the rights



protected by copyright. The character of copyright as an object is unique. It is because rights are usually attached to objects, but in copyright the moral rights are one of the contents of copyright always attached to the creators.

For the existence of material in the form of Copyright, certain conditions are needed so that the subjects of the work creators are recognized to have the right of Copyright. The definition of Creator and Creation in Act No.28 of 2014 expressly requires the elements that must be fulfilled, namely: 1. Fixation; 2. Creativity and 3. Originality.

Earl W Kinner and Jeck Lahr as quoted by Rahmi Jened (2007) stated that the standard of copyright's ability is as follows:

1. Originality. The word "originality" ... or the test of "originality", is not that the work to be novel or unique. Even a work based upon something already in public domain may well be original;
2. Creativity. Creativity as a standard of copyrightability is to great degree simply measure of originality. Although a work that merely copies exactly a prior work may be held not to be original, if the copy entails the independent creative judgment of the author in its production, that creativity will render the work original;
3. Fixation. A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord by or under the authority of author, is sufficiently permanent or stable to permit to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. A work consisting of sound imager or both, that are being transmitted is fixed for purpose of this title is a fixation of the work is being made simultaneously with its transmissision.

Berne Convention in the article 2 on Protected Work states:

- (1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
- (2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.



- (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

Article 2 Berne Convention stated the same thing, that the main element for the protection of rights must be fulfilled. The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, . . . It shows that copyright is the pouring of ideas or thoughts previously existing in the mind, but not physical (intangible). The expression refers to pouring ideas, thoughts or concepts into certain tangible forms. Further in paragraph 2 it is affirmed ‘. . . *not be protected unless they have been fixed in some material form*’ that it becomes more evident that the shape or form is a very important element for legal protection.

Based on this concept, creative works in the fields of art, literature and science can only be given the recognition of rights if the three elements are accumulatively fulfilled. In other words, works that do not fulfill the three elements cannot be given protection. On the contrary, the potential for imitation or violation of others’ works becomes very high.

3.2. Forms of Legal Protection

Legal protection is all efforts to protect human dignity in law. The principle of legal protection for Indonesians is based on Pancasila and the concept of Legal State, both of which source prioritize recognition and respect for human dignity.

Philipus M.Hadjon (1987) distinguishes two types of legal protection facilities consisting of preventive and repressive legal protections.

- a) Preventive legal protection is a legal protection given to legal subjects contained in the regulations. It is given to the subject explicitly in the form of article formulation. Preventive legal protection (Muchsin, 2003) provided by the government for the purpose of preventing conflict or infringement of rights before happening. It is in statutory regulations intending to prevent an infringement and provide signs or limitations in carrying out an obligation.

Normatively a rule is made and promulgated with certainty because it regulates clearly and logically. Legal rules are clearly formulated in the sense that they do not cause doubts (multi interpretations) so that they can be easily understood by the people. The rule of law in its formation is also formulated logically through legal harmonization mechanism so that conflict potentials with other norms can be eliminated. Such formulation provides an easy understanding for the community for the legal compliance can be realized.

Legal compliance in copyright means that for the creators are the subjects given the right can clearly understand the content, nature, form and limitation of his rights. With this



understanding, the creators can easily use his rights and know the existing restrictions so they will not cause harm to others.

For the community in general, the formulation of norms explicitly and logically expects the community to know what can be done on a copyright-protected work and how if it will utilize materials protected by copyright. Likewise, public can find out the reparations qualified as acts prohibited in copyright. This understanding expects the community to be able to respect others' copyright.

- b) Repressive legal protection is a legal protection mechanism against the subject in the event of an infringement of the rights stipulated in the law. Thus, this repressive legal protection aims to provide protection through a dispute resolution mechanism. The handling by a court or other dispute resolution institutions is included in the category of legal protection.

Copyright is the exclusive right of the creators arising automatically based on the declarative principle after a Creation is manifested in a tangible form without reducing restrictions in accordance with the provisions of the legislation. Copyright is a personal right expressly protected. However, factually infringements can be easily found. This infringement is a form of copyright protection that has been normatively established by Act No. 28 of 2014 concerning Copyright. The existence of a legal infringement of copyright does not mean that the creators have lost the rights already owned under the rules of law. In the event of a infringement, the Creator is still allowed to seek protection for his rights through the judiciary. Judicial institutions or dispute resolution institutions are as repressive legal protection mechanisms for creators' copyright.

Repressive legal protection for copyright infringements can be conducted through alternative dispute resolutions, the District Court for criminal acts of copyright, the commercial court for its civil disputes. The law provides a way for the effort to protect this law in the event of copyright infringement. The role of the government and the court in maintaining legal certainty for the creators' copyright is very important.

3.3. Moral rights and economic rights

The history of copyright illustrates that copyright basically has two rights, moral and economic rights. Both rights are jointly regulated in copyright law in Indonesia.

If traced deeper, moral rights emerge earlier and are more known. This is based on the concept of appreciation for a work. It rises respect and recognition to the creators. There are historical differences regarding the concept of creators' rights and copyright. The creators' rights emphasis more on the subject matter of the creators to be recognized and valued. While copyright develops since the invention of printing machines in the 15th century. With the invention of the printing machine, it has been easier to copy a paper because people do not have to copy again



using a pen or other writing instruments. Moral rights are given based on the idea that a copyrighted work cannot be separated from its creator. (Elizabeth Schéré, 2018) Therefore the name of the creator must always be attached to his creation (doctrine of patternity). A creation must also not be changed without the doctrine of integrity. (Sardjono, 2010)

Article 6 of Bern Convention in 1928 regarding moral rights states independently the creators' economic rights. Even after the transfer of said rights, the creators have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other action in relation to, the said work, which would have been prejudicial to his honor or reputation. Provisions in Bern Convention include the right to claim creation and the right to refuse – distortion of creation, mutilation, modification or derogation in which the whole is intended to honor the creators.

Article 4 of the Act No. 28 of 2014 on Indonesian copyright explicitly states that copyright is an exclusive right consisting of moral and economic rights.

Moral rights are arranged in detail in Article 5 which essentially regulates the nature, content and possibility of a very limited transition. The creators in moral rights plays a full role in their creation to change everything in their creation, as well as about the inclusion of his name in the creation. This right can only be owned by the Creators. This right will provide an opportunity for anyone who wants to develop their creativity in creating works because of this legal protection.

Economic rights are the rights of the creators to take economic advantage from the copyrighted work. Act No. 28 of 2014 provides a separate understanding for Copyright, namely the exclusive rights of the creators arising automatically based on the declarative principle after a Creation is manifested in a tangible form without reducing restrictions in accordance with the provisions of the legislation. "Exclusive rights" themselves have the meaning outlined in the law explanatory section as the right only for the Creators, so no other party can utilize this right without the permission of the Creators. Copyright holders, not only creators, only have a portion of exclusive rights in the form of economic rights.

Economic rights in the Copyright law in Indonesia are regulated in Article 9 stating the Creators or Copyright Holders has the economic rights to do the publication of Creation, doubling of Creation in all forms, translation of Creation, adaptation, arrangement, transformation of Creation, or Distribution of Creation or copies, Performance of Creation, Announcement of Creation, Communication of Creation, and the rental of Creation. These rights attach in the creators so any parties wanting to utilize the copyrighted work for economic purposes, they must obtain the permission of the Creators or the Copyright Holders. The protection of economic rights is regulated variously according to the time, in which the longest is the lifetime of the creators added by 70 years after the creators die. In this period of time the creators can take economic benefits from their own works or give permission to others to make royalty payments.



The law provides a threat to anyone conducting copyright infringement. Civil sanctions and criminal sanctions are established as a form of threat to those committing copyright infringement. As it is known that Indonesia has made a revision of the very phenomenal copyright law concerning the qualifications of criminal acts. Consequently, it can be argued that the Copyright Act of 1928 stated that copyright infringement was a complaint offense (Act No.6 of 1982). The nature of this offense in 1987 was amended and it was stated that copyright infringement was an ordinary offense (Act No.7 of 1987) and on the nature of this offense, an ordinary offense was maintained even though the copyright law underwent two changes, namely Act No.12 of 1997 and Act No.19 of 2002. When the Act on Copyright was changed in 2014, the nature of the offense was changed again into a complaint offense.

The nature change of this offense can be attributed to a paradigm shift towards copyright and increasingly emphasizes that copyright is personal right. Thus it becomes very appropriate if the rights are personal. If there is an infringement, there must be complaints from the aggrieved party. The emerging problem by the change of the offense is whether the amendment from ordinary offense to complaint offense is able to weaken legal protection for the creators or copyright holders. The question arises because when Indonesia still used ordinary offenses, in which law enforcement officials can actively take action, many infringements of copyright happened. It is compared to today's condition in which law enforcement officials cannot actively act against copyright infringements.

The stipulation of ordinary offenses in Act No.19 of 2002, later referred to as the 2002 Copyright Law, was intended to guarantee better protection than before. Ordinary offenses at the time of Copyright Act 2002 was applied were considered better in providing protection because copyright infringements could be filed in court quickly and did not need to wait for complaints from the creators or the copyright holders. Ordinary offense gave authority to law enforcement officials to directly take action against copyright infringements, without waiting for complaints from the creator or the copyright holder. Creators or copyright holders felt more helped by the active act of law enforcement officers. This active act was also expected to reduce copyright infringements, so that the creators or copyright holders were more protected. The Copyright Act 2014 no longer maintains ordinary offenses, related to copyright infringement. Complaint offenses used in the Copyright Act 2014 limit the movement of law enforcement officers to follow up on copyright infringements. It is because the complaint offenses do not give authority to law enforcement officials to immediately take legal action against perpetrators of copyright infringements. Complaint offenses are very likely to increase copyright infringements, because copyright infringement can only be followed up after a complaint from the creators or copyright holders. Waiting for a complaint from the creators or the copyright holders, of course, will only provide an opportunity for copyright infringements not complained to continue.



3.4. Factors Influencing the Copyright Law Enforcement

Law enforcement is a process which in the end can be a benchmark of whether the purpose of legal formation can be achieved. In addition to the role of law enforcers, the role of the community is also important in law enforcement manifested in the form of obedience. According to Soerjono Soekanto (2004), the factors influencing the law enforcement process are:

1. *The factor of law.* It materially means written regulations, namely copyright law and implementing regulations. Indonesia has changed the copyright law four times. It is sufficiently in providing confirmation of the rights for the creators in substantially and procedurally.
2. *The factor in law enforcers.* It includes those who directly or indirectly engage in law enforcement. Copyright as a part of intellectual property has been very much socialized to law enforcement officials periodically and consistently. This activity certainly has provided an understanding of intellectual property in general to law enforcement officials. As the result, they are ready to carry out the law enforcement tasks which become their responsibility.
3. *The factor of medium or facilities supporting law enforcement.* It covers qualified and skilled human resources, adequate equipment and sufficient finance.
4. *The factor of community.* It is the environment in which the law is applied. Public understanding and acceptance of copyright law values are believed to be one of the keys to the copyright law enforcement.
5. *The factor of culture.* It is as a result of work, creation, and taste based on human intention in life. The culture for respecting copyright and the awareness for creating is not only a form of self-actualization but also as a form of economically motivated works that guides people to consider the economic aspects of the conducted creative work.

The determination of copyright as a personal right should be followed with awareness to protect the rights it has. The Copyright dispute settlement at the Commercial Court can be conducted through two legal processes, namely Civil Disputes and Infringement Criminal Charge Settlements. Civil law efforts can be taken by the Creators if there is a copyright infringement., including conducting mediation (a process of negotiating a problem in which the neutral and disputing parties try to seek mutual agreement). In addition, the creators can file a claim on the loss through the commercial court. Through the civil dispute settlement, the creators' rights can hopefully be upheld.

Concerning the complaint offense nature of the copyright currently applied, the factor of community and culture are more influential in the enforcement process of copyright law. A complaint offense in copyright will place the creators or the copyright holders as a determinant whether the legal process will exist. (Kimberlee Weatherall, 2018)



The change to copyright offense becomes complaint offense should be followed by the awareness of creators to personally protect the rights they have, namely complaining only for copyright infringements. There is no enough reason for the creators not to make a complaint for the existence of repressive law enforcement on their violated rights.

The omission of copyright crimes by creators or copyright holders on a macro basis will worsen the legal image of law in general. The omission by the reason of small amount of loss becomes contra-productive towards copyright protection in general. This situation describes that whether creators' copyright is protected depends on the personal will of the creators themselves. This situation is different from the time when the nature of offense was an ordinary offense. The result of law enforcement very depends on the state officials.

4. Conclusion

Based on already carried out normative discussions, it can be concluded that normatively Indonesian copyright protection has accommodated and placed the creators to have strong legal rights from the aspect of substantive rights and period of protection. The rise of copyright infringements in Indonesia can be suspected that the awareness of personal rights is not fully realized by the creators.

The availability of legal enforcement infrastructure provided by the state through mediation, Commercial Court and General Court ultimately very depends on the creators' presence whether there will be legal enforcement or the omission of copyright law infringements.

The change in the nature of offense from ordinary offenses to complaint offense places the creators' position as a determinant of repressive legal protection under the copyright protection. Although copyright centers on economic gains, the economic benefit aspect of Copyright should not be a primary consideration in determining if the prosecution should be carried out so as the overall performance of copyright law enforcement is for the better.

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