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COPYRIGHT LAW IN PROTECTING CREATORS' EXCLUSIVE RIGHTS IN THE CREATIVE INDUSTRY: A COMPARATIVE STUDY

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ABSTRACT

The concerning numbers of copyright infringement in Indonesia's creative industries raises a question on whether there is an obstacle in enforcing the law or whether there are loopholes in its regulatory framework. Comparatively, the United States as one of the developed countries, is rather firm and strict when it comes to protecting its intellectual property rights against other countries. While the ever-growing business sectors may play a significant role in contributing to the strict protection of copyright law for its economic growth, the United States' legal framework regarding copyright must also play a predominant role in safeguarding its copyright protection. Therefore, the main goal of this article is to analyze the differences between the provisions stipulated in the copyright regulation in Indonesia and the copyright regulation in the United States. In addition, by conducting a comparison with the United States' legal framework, this article seeks to reflect on what improvements shall be made towards the legal framework in Indonesia, in order to accommodate the protection of creators' exclusive rights in creative industries more effectively.

Keywords: copyright, creative industry, creators, exclusive rights

INTISARI

Angka yang mengkhawatirkan terkait pelanggaran hak cipta di industri kreatif Indonesia menuai pertanyaan mengenai apakah ada suatu tantangan besar dalam menegakkan hukum terkait hak cipta, atau adanya celah di dalam kerangka regulasi hak cipta itu sendiri. Sebagai perbandingannya, Amerika Serikat sebagai salah satu negara maju cenderung lebih tegas dan ketat dalam melindungi hukum kekayaan intelektualnya terhadap potensi pelanggaran yang dilakukan oleh negara lain. Terlepas dari pengaruh perkembangan sektor-sektor bisnis yang pesat dalam bermain peran yang signifikan terhadap ketatnya perlindungan hak cipta demi perkembangan ekonomi, kerangka hukum di Amerika Serikat terkait hak cipta juga pasti merupakan salah satu faktor yang utama yang turut berkontribusi dalam menjaga dan mempertahankan perlindungan hak ciptanya. Oleh karena itu, tujuan utama dari makalah ini adalah untuk menganalisis perbedaan antara pasal-pasal yang tercantum dalam peraturan perundang-undangan hak cipta Indonesia dengan Amerika Serikat. Selain itu, dengan melakukan perbandingan terhadap kerangka hukum Amerika Serikat, makalah ini juga bertujuan untuk melakukan refleksi mengenai apa saja yang

dapat diperbaiki di dalam kerangka hukum hak cipta Indonesia, untuk dapat mengakomodasi perlindungan hak-hak eksklusif pencipta di industri kreatif dengan lebih efektif.
Kata kunci: hak cipta, industri kreatif, pencipta, hak eksklusif

INTRODUCTION

Creative industries are a series of economic activities which are primarily generated by creative innovations. Howkins (2001) refers to creative industries as 'the creative economy', which encompasses all aspects of delivering creativity into various forms of creations, such as music, art, fashion, film, architecture, performing arts, games, advertising, design, and many more.[1] Not only does the creative industry take a big part in boosting economic growth in many countries, but it also contributes to sustainable development.[2] Notwithstanding the significance it holds in improving the economy, creators as the main 'characters' in operating the maneuvers of creative industries, still have to experience the unpleasantness of irresponsible parties "pickpocketing" their creations, and thus violating their exclusive rights enshrined in those creations.

The right to be protected morally and materially resulting from any scientific, literary, or artistic productions in which the person is its own creator (author) is established in Article 27 under the United Nations' Universal Declaration of Human Rights.[3] The value within the aforementioned provision, exudes from the existence of the exclusive rights that automatically vest to creators of authorship works, namely copyright. As one of many branches of intellectual property rights, copyright principally means that a person who creates original works of authorship, has the right to do anything with regard to their creation, such as making copies of, promoting, distributing, commercializing, or selling it for financial gain. Creators also have the right to be recognized or opt to not be recognized for their works. Nevertheless, copyright only protects the tangible form of creations, meaning that ideas, procedural methods, concepts, or anything that is intangible or has not been expressed in any manner, are not subject to copyright. The United States legal doctrine regarding copyright recognizes this as the idea–expression dichotomy, whereas the distinction between "idea" and "expression" is fundamental to copyright law.

The abundance of creativity that a person possesses shall be appreciated, as the creations that come after may be potent for the economy. Therefore, copyright exists as a form of appreciation towards various forms of creations, as well as to safeguard the expressions of creativity from unpermitted

1 John Howkins, *The Creative Economy: How People Make Money From Ideas* (Penguin UK, 2001) 10.

2 Erni Lestariningsih, Karmila Maharani, and Titi Kanti Lestari, 'Measuring Creative Economy in Indonesia: Issues and Challenges in Data Collection' (2018) *Asia Pacific Sustainable Development Journal, vol. 25 No. 2.* <https://www.unescap.org/sites/default/d8files/APSDJ%20Vol.25%20No.2_pp99-114.pdf> accessed 22 June 2021.

3 Universal Declaration of Human Rights- United Nations, Article 27. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed 22 June 2021.

and irresponsible usage. People who steal, copy, distribute, or make financial gain of a creation without the permission of its original creator are considered to be infringing copyright.

Unfortunately, copyright infringement is still one of the most protruding issues that creative industries around the world will have to deal with every day, albeit regulated by considerably sufficient laws. This becomes a reason as to why regulations regarding copyright must be adjusted with the development of technology and inventions from time to time, in order to accommodate better copyright protection towards creators. In Indonesia, the awareness on copyright is still low due to the high numbers of copyright piracy, according to a statement made by Ari Juliano Gema, a Senior Advisor in Indonesia's Ministry of Tourism & Creative Economy (formerly Deputy of Copyright Facilitator in Badan Ekonomi Kreatif (Bekraf))[4]. In addition, according to a survey conducted by Universitas Indonesia's Economy & Business Faculty regarding Copyright Piracy on Films in 2019, DVD piracy and illegal downloading of films in the four (4) cities that were surveyed, resulted in a damage of up to 1,4 trillion Rupiah specifically in the film industries.[5] The high numbers of copyright piracy may also result from the lack of socialization regarding the importance of copyright protection in Indonesia's society, and the government and lawmakers not prioritizing intellectual property rights enough.

Comparatively, countries with more advanced economies, in this case the United States, ranks one of the highest places in terms of its intellectual property rights protection. This has also been proven in statistical research conducted by Property Rights Alliance (PRA), a United States based organization advocating for the protection of intellectual property rights and innovation around the world.[6] Property Rights Alliance's research on the measurement of property rights protection itself, namely the International Property Rights Index (IPRI), covers many aspects encircling types of property rights, particularly intellectual property rights. According to PRA, on a scale of 0-10, the United States scores up to 8.693 regarding its intellectual property rights protection in 2020 and ranks thirteenth (13^{th}) out of 129 countries surveyed. Meanwhile in the same field, Indonesia only scores 4.389 which makes it rank the sixty eighth (68^{th}) globally.[7] The PRA also conducted research on copyright piracy scores of countries around the world. In this case, on a scale of 0-10, lower scores show a more inadequate protection against copyright piracy, meaning that countries with higher scores are better in that aspect. In 2020, with regard to the protection of copyright

4 Bayu Anggoro, 'Pembajakan Hak Cipta di Indonesia Masih Tinggi' (*Media Indonesia*, 2019) <https://mediaindonesia.com/nusantara/258462/pembajakan-hak-cipta-di-indonesia-masih-tinggi> accessed 22 June 2021.

5 *Ibid.*

6 Property Rights Alliance official website; about. https://www.propertyrightsalliance.org/about/> accessed 22 June 2021.

7 Property Rights Alliance, International Property Rights Index (IPRI) | 2020; United States and Indonesia International Property Rights Index Comparison <https://www.internationalpropertyrightsindex.org/compare/country?id=80,110> accessed 22 June 2021.

against piracy, the United States scores 8.5 while Indonesia scores 1.7,[8] leaving a massive gap between the two compared.

The massive gap between the United States and Indonesia shows the lack of efficiency in implementing copyright protection under the Indonesian Law. Additionally, the high numbers of copyright infringement alongside the considerably poor copyright protection in Indonesia are the driving factors as to why Indonesia is included in the nine (9) countries of the USTR's (United States Trade Representative) Priority Watch List in 2021, along with Argentina, Chile, China, India, and others.[9] The Priority Watch List itself is a list of countries with insufficient intellectual property protection or enforcement, thus needing to be closely supervised by the United States, and will be the subject of particularly intense bilateral engagement.

In the era where even the tiniest aspects of everyday life are beginning to be digitized, copyright protection law shall be fine-tuned with the occurrence of technological advancements. Better copyright protection in the United States, particularly in the digital era, may be more advanced as a result of its developed economy, and primarily with the help of business sectors contributing to the strict protection of copyright law for its economic growth.[10] However, it is undeniable the United States' legal framework regarding copyright must also play a predominant role in securing its copyright protection. This article will explore the depths of what's implied within the copyright laws of both Indonesia and the United States and how they differ from each other. The main target is for the Indonesian copyright law to reflect on the United States copyright law and take notes on what improvements can be made for a better copyright protection in creative industries.

METHODS

The formulation of this article relies on a qualitative method throughout its process, predominantly by conducting bibliographic studies relying on legal documents and non-numerical data. Furthermore, this article seeks to find adequate solutions for the issues raised in the following chapters, therefore it is specifically utilizing a normative method by comparing two legal frameworks (*comparative approach*) and conducting a comprehensive analysis on laws and regulations (*statutory approach*). This method will be based upon primary and secondary data sources. Primary data sources comprise relevant laws and regulations, while secondary data sources include relevant literature regarding copyright law, relying on books, journals and articles, and cases. The results of this comparative study will be packed in conclusive statements implying answers to the arising questions regarding copyright law.

8 *Ibid.*

9 Office of the United States Trade Representative, 'USTR Releases Annual Special 301 Report on Intellectual Property Protection' (2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2> accessed 23 June 2021.

10 Ahmad M. Ramli, 'Hak Cipta, Disrupsi Digital Ekonomi Kreatif' (1st edn, Penerbit PT. Alumni, 2018), 70.

RESULTS AND DISCUSSION

Copyright in Indonesia is governed under Law No. 28 of 2014 about Copyright (Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta). It is established in its preamble that copyright is a form of intellectual property which covers scientific, artistic and literary creations which possesses a strategic role in supporting the nation's development alongside promoting the welfare of society, as mandated under the 1945 Constitution of the Republic of Indonesia. This regulation has established several improvements from the previous copyright regulation, namely Law No. 19 of 2002. Several key points of the improved aspects include extended period of copyright, more detailed and effective dispute settlement options, license, royalties, and marketplace management, while Law No. 19 of 2002 mainly focuses on the general stipulations on copyright, such as the scope of copyright, creations protected by copyright, and the provisions of dispute settlements in general.[11]

In the United States, the concept of copyright is embodied in a provision under The Constitution of the United States, Article 1, Section 8, Clause 8 which states that "*the Congress shall have Power To… promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".* The basic framework that governs the copyright law in the United States today is the United States Copyright Act of 1976, which is codified in the Title 17 of the US Code. Title 17 of the US Code constitutes the basic rights of copyright owners, the concept of 'fair use', and other relevant stipulations regarding copyright protection.

In order for Indonesia's copyright law to be more effective in terms of its implementation and enforcement, it is necessary to make a comparison with the copyright laws of other countries whose implementation is more effective, in this case the United States, that will later become substance for revisions to the Indonesian copyright law. Therefore, the following aspects are to be compared between the Indonesian copyright law and the United States copyright law.

1. The Differences Implied in Copyright Legal Frameworks in General

1.1 Definition of Copyright

Indonesia's Law No. 28 of 2014 in Article 1 point 1 defines copyright as the exclusive rights automatically attached to the creator of authorship works, based on the principle of declaratory after the works are expressed in tangible forms, without reducing by virtue of restrictions in accordance with the provisions of laws and regulations.[12] If examined thoroughly, there are four

[11] BP Lawyers, 'Indonesia's New Copyright Law, a Great Way to Deal with Copyright Infringement' (2019) BP Lawyers, Counselors at Law <https://bplawyers.co.id/en/2018/01/30/indonesias-new-copyright-law-great-way-deal-copyright-infringement/> accessed 25 June 2021.

[12] Indonesia's Law No. 28 of 2014 on Copyright, Article 1 paragraph 1.

(4) important aspects in the provision that defines 'copyright' under the Indonesian law: creator, authorship works (creations), the declaratory principle, and tangibility. Creator is a person who delivers their ideas, embodying it into a creation in which it can be perceived by touch and vision, meaning that the creation is tangible. Under the Indonesian law, copyright protection applies to creators whose works have been publicly declared and registered. To achieve a better understanding of the declaratory principle, the following scenario depicts how it applies in real life:

Assume that 'A' is a person whose interest lingers in musical activities. At one point of time, he expresses his ideas and emotions into lyrics, in which he adjusts with various melodies turning it into a song. Finally, the song is successfully created after recording it in a studio and giving it the title '*Heavenly Blush*'. However, he resists making it public considering how much of a private person he is, so he proceeds to post it on a music-sharing platform only to activate the 'private' setting where the only person who can listen to '*Heavenly Blush'* is 'A' himself, merely for personal entertainment. Subsequently, although in the scenario; the creator, creation, and tangibility aspects are fulfilled, copyright may not be acknowledged towards '*Heavenly Blush*' under the jurisdiction of Indonesia, because the declaratory principle has yet to be accomplished. Nevertheless, this scenario may apply differently in other jurisdictions, such as the United States.

In comparison, the Copyright Law of the United States' definition of copyright is quite similar to what's regulated under the Indonesian law, only omitting the declaratory principle. Under Section 102 (a), copyright protection subsists in original works of authorship fixed in any tangible medium of expression.[13] In conclusion, the three key points of what defines copyright under the United States law are: originality, works of authorship (creations), and tangibility. Under the Indonesian Law, the 'originality' aspect is not explicitly stated, rather implied in the definition of 'creator', stating that a creator is a person whose works are 'unique' and 'personal'. Meanwhile, the United States does not apply the declaratory principle as embodied under the Indonesian law, due to the fact that not only does the United States protect works that have been publicly declared (published works) but it also protects works that have not been declared nor distributed in any manner (unpublished works).

1.2 The Protection of Unpublished Works

Suppose that an author of literary works, writes a series of poetries and decides to keep the manuscript under her desk, remaining unknown to the public. Under the jurisdiction of Indonesia, the existence of declaratory principle means that as long as the creation has been made in a tangible form, the protection prevails. According to Article 40 paragraph 3 of the Copyright Law No. 28 of 2014, works that have not been announced are also protected. However, the constitutive system requires the creation to be registered to constitute copyright protection. Therefore, the unpublished poems as mentioned before are not secured by sufficient protection because they have yet to be

[13] Title 17 of the United States Code, Section 102(a).

published and registered. In this case, the United States recognizes that copyright protection still exists. The United States Copyright Law under Section 104 regarding the subject matter of copyright with regard to its national origin, constitutes those creations that are unpublished are subject to copyright protection without regard to the nationality or the domicile of the creator. The question that often arises with regard to copyright protection on unpublished works is concerning the purpose in recognizing copyright to such works, where they are not made available to the public and therefore are not beneficial to society.

Principally, the exclusive rights attached in unpublished works are protected in the United States by the common law, which continues perpetually as long as the work remains unpublished, unless for particular types of unpublished works, the owner voluntarily opts to safeguard statutory copyright by registration in the Copyright Office.[14] The rationale behind the concept of protecting unpublished works is to show appreciation towards an individual's creative endeavors and to protect their works from copyright perpetrators misappropriating their work through illegal means. Nonetheless, the availability of protection towards unpublished works brings both positive and negative effects.

Creators shall be appreciated when it comes to expressing their creativity, even if their creation is not available to the public. The United States provides the protection towards unpublished works to prevent it from being infringed unlawfully by a third party. In that case, similar sanction with the case of published works would be imposed on the perpetrator of copyright infringement towards unpublished works, as a form of copyright protection towards creators.[15] However in this case, if the work remains idle by being unpublished, it becomes difficult to prove it in court if there is an infringement. Moreover, the Copyright Law of the United States lacks clarity in defining the term 'unpublished', which leads to different interpretations. It is often interpreted by courts as 'creations that have not been distributed to any individual', by sale or other transfer of ownership. Generally, works will be identified as unpublished if it only generates very limited copies.[16]

1.3 Works Protected and Not Protected by Copyright

Article 40 of Indonesia's Law No. 28 of 2014 governs the type of authorship works protected by copyright. In general, United States Copyright Law covers the same types of authorship, including literary works, dramatic works, musical works, pictorial works, architecture, choreography, and more. The only difference between the two copyright subject matter provisions is the delivery of the clauses; in which the Law No. 28 of 2014 uses more detailed examples of authorship works such as visual equipment made for educational purposes, puppet shows, pantomimes, and Batik as

[14] William Strauss, 'Protection of Unpublished Works'; Study No. 29 [1957, 1].
[15] Society of American Archivists, 'Copyright and Unpublished Material' <https://www2.archivists.org/publications/brochures/copyright-and-unpublished-material> accessed 29 June 2021.
[16] *Ibid.*

a traditional pattern originated from Indonesia. Meanwhile, the US Copyright Law provisions regarding the subject matter of copyright are rather inclusive.

The United States also elaborates on the works that are not protected by copyright as implied in Section 102 (b) that copyright protection does not apply to, ideas, method, discovery, or procedure, and will extend only to the original expression in that work, thus omitting the underlying concept or ideas behind it. This has also been stated clearly under the definition of copyright itself according to the US Copyright Law which comprises the tangibility aspect. In this case, the Indonesian law also does not protect works that are intangible, ideas, and/or thought processes as embodied under Article 41. Another scenario is provided as the following in order to achieve a better understanding:

Assume 'X' is a person who masters in painting. Over the time, X has been planning to paint an illustration that's been depicted in her mind, which to her is a very rare idea; a picture of aliens playing in a fishpond on an abstract planet. Nevertheless, she still has not gotten the chance to paint it because she still needs more inspiration regarding her planned work. Seeking inspiration, she decided to visit an art exhibition near her. After examining several paintings, to her surprise, one painting that caught her attention depicts the exact illustration with the not-yet-expressed work she's been planning about; aliens playing in a fishpond on an abstract planet, painted by 'Y'. In that case, X, either under the jurisdiction of the United States or the jurisdiction of Indonesia, cannot sue Y's painting for stealing X's idea that has not even been expressed in any tangible form.

In addition, Indonesia's copyright law does not protect procedures or findings incorporated in a work; or equipment that are merely used to fix technical problems. Article 42 of Law No. 28 of 2014 constitutes works that have no copyright, such as results of State institutions' meetings, legislation, speech of the government officials, court decisions, and religious books and symbolism. In Indonesia, a case where a small business submits a logo of their business for copyright registration, namely '*Nata Paint*' , and the submission of an academic department logo of a major in a university, '*Radiologi*', unfortunately have to be granted the 'unable to be registered' status.[17] Article 65 of Law No. 28 of 2014 implies that a drawing in the form of a logo used as a trademark or used as a symbol of an organization cannot be registered as a copyright. The point is that the painting in a business logo cannot be copyrighted, but as a trademark it is possible. Comparatively, The United States also does not recognize copyright protection on logos, short phrases, fonts and lettering, and blank forms. [18]

[17] Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan HAM RI, 'Modul Kekayaan Intelektual Tingkat Dasar Bidang Hak Cipta', [2020], 44.

[18] U.S. Copyright Office, Circular 33: *Works Not Protected by Copyright*, US copyright gov official website <https://www.copyright.gov/circs/circ33.pdf> accessed 29 June 2021.

1.4 Moral Rights and Economic Rights

The exclusive rights embodied in copyright comprise the right for creators to be recognized or not be recognized for their works (moral rights/ some countries refer to it as right of attribution) and the right to cultivate and enjoy financial or material gain resulting from the commercialization of their works (economic rights). Indonesia's Law No. 28 of 2014 recognizes both moral rights, and economic rights. Its version of the concept of moral rights is enshrined in Article 5, in which creators have the right to have their names written, or unwritten upon their creations, the right to publish their works in pseudonymity (fictitious name), the right to make changes towards their creations in compliance with the values adhered by the society, the right to change the title or subtitle of their creations, and the right to preserve their creations in case their creations experience distortion, mutilation, modification, or any actions that are detrimental to their honor or reputation. Comparatively, the United States Copyright Law only acknowledges moral rights on visual artworks. This aligns with the stipulation provided under Visual Artists Rights Acts (VARA), Section 106(a) of the Title 17 of the US Code, namely the rights of attribution and integrity. The reasoning behind it only limiting the moral rights to only the creators of visual arts is when the United States approved to participate in the Berne Convention in 1998, the protections of the Berne Convention far exceed the minimum protection that the United States initially approved of. [19] The Berne Convention's version on the granting of moral rights covers various types of works, while in contrast, the United States under VARA does not include literary works, and any other types of creations other than visual arts.[20] Visual arts itself according to the US Copyright Law comprises a wide variety of pictorial, graphic, and sculptural works, as well as architectural works. Examples of visual arts works include paintings, sculptures, photographs, and other types of works. Moral rights in the United States expire upon the death of the creator, while moral rights under the Indonesian law are attached eternally to the creator, but transferable through a will or upon other circumstances constituted by the legislation after the death of the creator.[21]

Both copyright law under Indonesian and the United States law recognizes economic rights on creations that are subject to copyright. Economic rights allow creators to make copies of, distribute, or sell their creations. In Indonesia, the duration of economic rights varies according to the types of authorship a creation is. Protection of economic rights lasts for twenty (20) years for broadcast works, twenty five years (25) for applied works, fifty (50) years for pictorial, audiovisual, and modified traditional works, seventy (70) years for literary works, musical works, dramatical works, and choreography in which the copyright owner is an individual, and fifty (50) years in which it is

[19] Marley C Nelson, 'Moral Rights in the United States' (2017) The Ohio State University Library, <https://library.osu.edu/site/copyright/2017/07/21/moral-rights-in-the-united-states/> accessed 6 July 2021.

[20] *Ibid.*

[21] Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan HAM RI, 'Modul Kekayaan Intelektual Tingkat Dasar Bidang Hak Cipta', [2020], 47.

held by juridical person.[22] The United States copyright protection generally lasts for the life of the author, with additional extension of seventy (70) years.

In Indonesia, for example, the violation of a creator's economic rights is illustrated in Dodo Zakaria v. Telkomsel (2007) case under the decision number 24/Hak Cipta/2007/PN.Niaga.Jkt.Pst. Dodo was a musician who produced a song titled '*Di Dadaku Ada Kamu*', sued Telkomsel for cutting a part of the song and commercializing it as a dial ringtone (known as *nada sambung pribadi* / NSP) for its users, without asking Dodo's permission as the creator.[23] Principally, receiving any form of financial gain for unlawfully using copyrighted works is considered a violation of economic rights.

2. Copyright Regulatory Framework in the Scope of Digital Landscape

The endless digitalization of creations, inventions, and technology is a sign that the world is stepping forward to upgrade its economical and innovative game. However, it will be an even bigger challenge for creators to publish their creations digitally, as digital works are more prone to be violated, stolen, and/or plagiarized considering how vast and borderless the digital environment is, and the *modus operandi* of copyright infringement may also increase in variation. This is also a sign for countries to persistently keep fine-tuning their laws and regulations, specifically in the field of copyright, in order to adapt to the 'whole new world' where almost everything is digital based.

Digitalization is undeniably effective in improving most aspects of everyday life. For example, with the availability of digitalization, people will not have to waste so much paper or other relevant materials when creating literary works, such as novels, since *e-books* coexist with conventional books. Although it is a matter of preference, many people enjoy digital productions as much as the traditional ones. Regarding this matter, conventional forms of creations that are transferred into digital forms are still identifiable as the subject of copyright protection. For example, handwritten poetries on a piece of paper, if transferred into a digital script, will not lose its essence of copyright. As mentioned previously, digitalization can mean a more challenging issue for creators in creative industries. Even though Indonesia already has its own regulatory framework regarding copyright in general, particularly in Law No. 28 of 2014 as explicated in the previous subsections, it still results in vague implementations and enforcement, especially in the digital era. Provisions under the Law No. 8 of 2014 are not sufficient enough in accommodating copyright protection in digitalized creative industries. The general provisions regarding the term 'publication' in Law No. 28 of 2014 recognizes the internet as one of the medias with regard to the publication of a creation, but it does not elaborate enough on the specific types of creations that are distributed, nor the the specific actions of 'publishing' on the internet itself. The lack of clarity implied in the provision

[22] *Ibid.*

[23] Evelyn Angelita P. Manurung, 'Perlindungan Hukum Terhadap Hak Cipta atas Karya Digital di Indonesia' (2013) Premise Law Journal <https://media.neliti.com/media/publications/160369-ID-none.pdf> accessed 7 July 2021.

can result in a difficult dispute settlement process in case there is a copyright infringement in the digital scope. Indonesia's Law governing aspects of the transfer of electronic information, namely Law No. 11 of 2008 on Electronic Information and Transactions (Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik / UU ITE) constitutes various forms of cybercrime prohibited by the law, but it does not provide a sufficient clarification on the protection of copyright in terms of digital copyright violation. Article 25 of Law No. 11 of 2008 establishes that electronic information or documents that are constructed into intellectual creations shall be protected as Intellectual Property Rights.[24] However, that's about it; no further mechanism is explained in the stipulations regarding copyright protection under Law No. 11 of 2008. Meanwhile, in the United States, copyright protection in the digital context is aided with the existence of Digital Millennium Copyright Act of 1998 (DMCA).

The United States' Digital Millennium Copyright Act is the United States copyright law that effectuates two 1996 treaties of the World Intellectual Property Organization (WIPO). The DMCA was established by the US Congress and signed by President Bill Clinton in 1998, in which one of the main purposes of the DMCA itself is implied in his DMCA inaugural speech, stating that "*...the legislation shall expand the protection of copyright in the digital era, and maintain the implementation of fair use and the limitations of liability of internet service providers"*.[25] Nowadays, the DMCA is utilized as the legal basis of copyright protection towards digital creations, that is also implemented upon intermediaries, such as social media digital platforms. In its practice, *Internet Service Providers* (ISPs) must terminate contents that contain the infringement of copyright, as long as there is a notification and sufficient evidence from the original creator whose work has been violated.[26] This means that ISPs liability is limited as a result of certain circumstances. In conclusion, DMCA primarily covers the protection of digital creations and the criminalization of the action of producing and distributing technology, devices, or tools intended to circumvent measures that control access to copyrighted works (known as the digital rights management / DRM).[27]

Digital rights management is a series of mechanisms as a way to secure copyrighted digital works. One of the most important aspects in managing digital rights is the measures taken to control technology, namely technological protection measures (TPM).[28] The primary function of TPM

[24] Indonesia's Law No. 11 of 2008 on Electronic Information and Transactions, Article 25.

[25] A Quotation of President Bill Clinton's statements, Office of the President's Press Secretary, The White House, October 12,1998 <ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/h2281- res.txt> in Robert N. Diotalevi, 'The Digital Millennium Copyright Act', (Online Journal of Distance Learning Administration, Volume I, Number IV, Winter 1998 State University of West Georgia, Distance Education), 22.

[26] US Digital Millennium Copyright Act 1998 (DMCA).

[27] Wikipedia, 'Digital Millennium Copyright Act', (2021) https://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act> accessed 6 July 2021.

[28] Moch Zairul Alam, 'Perbandingan Perlindungan Sarana Kontrol Teknologi Atas Ciptaan Menurut Ketentuan Hak Cipta di Indonesia dan Amerika Serikat' [2018], 109.

itself is to manage the use of protected contents. For example, one of the various types of protection in generating DRM is by watermarking copyrighted works.[29] It is a technique in the realm of *steganography*, the science of concealing a secret data within a non-secret file.[30] Therefore, a person who constructs a form of technology or service aided to outmaneuver DRM, for example in order for it to eliminate the watermark upon works, is one of the key targets of the establishment of DMCA. With regard to the actions intended to circumvent digital rights management, both DCMA of the United States and Law No. 28 of 2014 of Indonesia constitute the prohibitions of it. Under Law No. 28 of 2014, technological protection measures (TPM) are governed under Chapter VII Article 52, whereas it is established that it is prohibited for a person to damage TPM used to protect digital works. However, the regulation towards technological protection measures in Law No. 28 of 2014 is way less detailed than that governed under the DCMA of the United States, thus still leaving loopholes. Under Section 1201 b.1 in the DCMA, the United States strictly and firmly prohibit the importation, production, dissemination of tools or services that are utilized to cause damage to, or make disable of TPM, alongside the anti-circumvention clause. Meanwhile, Law No. 28 of 2014 does not specify the actions, nor the anti-circumvention device used. This aspect shall be subject to supervision and reflection in order for Indonesia's copyright law, in the scope of digital landscape, to avoid perpetrators of digital copyright infringement penetrating the loopholes of the provision.

3. The Concept of 'Fair Use' Principle

Principally, there are exceptions in the prohibited unlicensed usage of a creation, in which those exceptions are permissible by law without asking for the creator's permission in advance. This concept is well-known as the 'fair use', a legal doctrine that generally allows the unlicensed use of works protected by copyright under certain circumstances.[31] Indonesia has integrated this legal doctrine into its legislation and is available in Law No. 28 of 2014. However, the problem arising from this legal doctrine in Indonesia is it is not elaborated enough in the legislation as to what extent the exceptions apply. The copyright law in Indonesia does not involve a clear parameter on what kind of exceptions under Article 44 in Law No. 28 of 2014.[32] In accordance with the original nature of a work, Article 43 only provides that distribution and reproduction of State emblems and

[29] Suhono H. Supangkat, Kuspriyanto, Juanda, 'Watermarking sebagai Teknik Penyembunyian Label Hak Cipta pada Data Digital', Jurnal Teknik Elektro (2000) Vol.6, No.3, 1-2.

[30] Margie Semilof, 'What is Steganography?', (2021) Tech Target, <https://searchsecurity.techtarget.com/definition/steganography#:~:text=Steganography%20is%20the%20technique%20of,then%20extracted%20at%20its%20destination.&text=The%20word%20steganography%20is%20derived,graph%20(meaning%20to%20write)> accessed 7 July 2021.

[31] Eddy Damian, Hukum Hak Cipta (3rd edn, Penerbit PT. Alumni, 2004), 267.

[32] Bambang Pratama, 'Fair Use vs Penggunaan yang Wajar Dalam Hak Cipta', (2015) *Binus University, Business Law Research and Publication* <https://business-law.binus.ac.id/2015/01/31/fair-use-vs-penggunaan-yang-wajar-dalam-hak-cipta/> accessed 8 July 2021.

national anthem is not considered as copyright infringement in accordance with their original nature, thus permitted by law. Contrary to it, Section 107 of the Title 17 of the US Code provides a rather adequate parameter in measuring how far the exceptions apply, governing four (4) key points of parameters, such as: purpose or character of the use, nature of work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and effect of the use upon the potential market for or value of the copyrighted work. Firstly, the purpose or character of the use means, for example, whether the use is for commercialization or for nonprofit educational purposes. Secondly, the nature of work means that whether or not the use will result in a change of nature of the work. Thirdly, amount and substantiality mean whether the use is done in a large portion. Lastly, the use shall not impact upon the potential market of or value of the work. The determination of what use is considered fair use is depicted in the Sony Corp. of America v. Universal City Studios, Inc. known as the "Betamax" case.[33] The Supreme Court of the United States in the decision ruled that the making of individual copies of complete television shows for purposes of time shifting does not constitute copyright infringement, but is a fair use,[34] after adjusting it and determining it with the four parameters of the 'fair use' doctrine.

In Indonesia, one of the points embodied in Article 44 of Law No. 28 of 2014 provides that exceptions of the prohibition of unlicensed usage towards creations comprise uses having the purpose for education, research, or a critique. It is critical to borderline how far these exceptions apply, considering that the insufficient amount of interpretation on those exceptions and purposes could result in violation of a creator's economic rights. For example, making copies of a literary work for a library collection in a university merely because the faculty members do not want to buy original books, or having the students in an institution utilize computers for studying in which its software is a result of piracy may be interpreted as "educational purpose" for some, if the fair use clause under Indonesia's copyright law remains penetrable.

4. What Must Be Improved Regarding Copyright Legal Framework in Indonesia

After various discussions elaborated in the previous chapters, it is safe to say that copyright law in Indonesia needs more advancement with regard to what could happen if the provisions are still containing loopholes. Firstly, in terms of defining copyright, Indonesia under Law No. 28 of 2014, reflecting on Title 17 of the US Code, shall firmly clarify that the authorship works or creations subject to that regulation are original works and derivative works. Nevertheless, Indonesia's current Copyright Law is remarkable for still recognizing the moral rights of creators. Both moral rights and economic rights of creators shall be protected at all costs as an appreciation of their contribution to innovation.

Secondly, as mentioned multiple times throughout this article, showing how important this aspect is, countries need to persistently adjust their laws and regulations with the fast-changing development of technologies and inventions, especially in this digital era. Indonesia's copyright

[33] Sony Corp. of America v. Universal City Studios, Inc., [1984] 464 U.S. 417.
[34] *Ibid.*

legal framework cannot completely rely on Law No. 11 of 2008 regarding Electronic Information and Transactions (UU ITE), especially by the insufficient provisions regarding copyright protection under it. If Indonesia desires to boost its copyright protection, it shall renew the current copyright regulation; or construct a new regulation that completely focuses specifically on the protection of copyrighted digital works, digital rights management (DRM), and technological protection measures (TPM), reflecting on the United States' Digital Millennium Copyright Act 1998 (DCMA). Later on, the provisions in the digitally-focused copyright regulation shall contain detailed stipulations on what acts that intersect with the protection of digital creations that are prohibited, such as implementing the anti-circumvention clause regarding digital access control, and criminalizing the acts of making and distributing technology, tools, or services that are intended to destroy, eliminate or damage technological protection measures (TPM), along with the imposition of sanctions towards whoever violating the provisions. Moreover, in the context of implementing the 'fair use' doctrine, Law No. 28 of 2014 must constitute a comprehensible parameter in borderlining the exceptions of prohibited unlicensed use, in order to prevent violation towards a creator's economic rights. Reflecting on Title17 of the US Code, further revisions of Law No. 28 of 2014 shall provide a clear measurement in determining whether or not an unlicensed use is considered as 'fair use', rather than relying on "educational, research, and critique purposes" that are vaguely elaborated and having the chance of being misinterpreted by different parties.

CONCLUSION

The exclusive rights automatically vested to creators for their expression of creativity is a way to value the infinite human intellect. The existence of copyright protection grants creators the right to be attributed to their work and to enjoy the financial benefits that come after, namely moral and economic rights. However, protecting creators' exclusive rights from any form of violation is a challenging task, whereas the *modus operandi* of infringement keeps on increasing in variation, especially in the digital era. The limitless digital sphere makes it even easier for perpetrators to violate the creative endeavors of creators. Therefore, copyright regulatory frameworks must keep on making improvements in order to accommodate the copyright protection better.

Indonesia is one of the many countries that is considered weak regarding its intellectual property rights protection. The society's behaviour illustrating the lack of education and socialization on copyright may contribute to the weak protection. However, copyright protection also seems to not be the priority for government and lawmakers in Indonesia. As a result, Indonesia must reflect on the leading countries in terms of it. The United States is one of the best countries when it comes to safeguarding the exclusive rights of its creators. It has been proven that business sectors and a highly developed economy are not the only factors that play a significant role in the copyright protection of creators, but the United States is also aided with a considerably sufficient and adequate regulatory framework regarding copyright, at least for now.

After conducting a series of discussions regarding the two legal frameworks, this article comes up with something that emerges from the comparison of the Indonesian and United States copyright

legal framework. In order to strive for a more effective protection on creators' exclusive rights, Indonesia must make an improvement regarding its legal framework. Some of the aspects under Law No. 28 of 2014 on Copyright shall be revised and/or expanded in terms of its scope. The regulatory framework regarding copyright in Indonesia shall include the 'originality' aspect in determining works subject to copyright in order to secure original works from unwanted usage. Moreover, further revision of the copyright law must comprise a clear elaboration and parameter in determining use to be considered a 'fair use'. Most importantly, in this digital era, copyright law in Indonesia must construct a new regulation that is primarily focused on the protection of copyrighted digital works, along with the specific prohibitions on circumvention and the technicalities of digital rights management (DRM) and technological protection measures (TPM).

To conclude, Indonesia's copyright legal framework must not be stagnant in the middle of the fast-changing environment surrounding it. It must be open to new ways and innovations that can improve copyright protection. As long as Indonesia's copyright law keeps making improvements, there is hope for creators to thrive in their field of interest to maneuver the gears of creative industries for a better economic growth for Indonesia.

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