

Reconstruction of Copyright Crime Regulation Based on Justice Value

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Abstract

The regulation of copyright crimes in its development is regulated strictly and clearly in Law Number 28 of 2014, but in its application it causes a lot of injustice for creators/copyright holders in utilizing economic rights and moral rights to their creations. The purpose of this research is to analyze and describe the regulation of copyright crimes committed by law enforcement; to analyze, describe and explain Regulatory Obstacles or Problems related to Copyright Crimes Experienced by Law Enforcers; to analyze and reconstruct a Justice-Based Model of Law Enforcement of Copyright Law Enforcement. Based on the results of the research, it was found that the existence of Article 120 of the Law of the Republic of Indonesia Number 19 of 2002 Concerning Copyright has changed copyright criminal offenses into complaint offenses, thus making copyright criminal offenses detrimental to copyright owners cannot be directly acted upon by law enforcers. Law without any prior complaint from the copyright owner. The issue of regulation of criminal copyright offenses has not been fair due to weaknesses in legal substance in the form of Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright which changes copyright criminal offenses to complaint offenses, then structural weaknesses in the form of the inability of law enforcers to take action against perpetrators of criminal rights copyright without any complaints by the copyright owner beforehand, cultural weaknesses in the form of not all people being aware of the importance of copyright registration and the existence of copyrights, so that not many copyright owners really protect their rights through law. Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 Concerning Copyrights needs to be abolished. Bearing in mind that copyright offenses as complaint offenses can hinder law enforcement related to copyright crimes because they depend on complaints from the public who do not fully understand the importance of copyright.

Keywords: Copyright, Criminal, Regulation, Reconstruction

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A. INTRODUCTION

Intellectual Property Rights (IPR)¹ has an important position in human development and human civilization because it is with IPR that human creations can be properly appreciated. This is in accordance with the objectives of the socialist economy and the Pancasila economy which want justice for all people in the economic sector. The economic system in Indonesia has basically lost its identity as a Pancasilaist state, this is due to the presence of globalization² and neo-liberalism which want a free market that is free from state interference as a party that can fairly regulate the course of the economy in Indonesia, this fact is also strengthened by the presence The Asean Economic Community which wants economic competition to no longer be partitioned by the existence of national boundaries.³

An economic system that wants freedom in the market sector results in the formation of an economic culture that is also free and often neglects Pancasila, especially the precepts of Social Justice for All Indonesian People. facilities and infrastructure to the concept aspect with traditional markets that still maintain the pattern of a conventional market system. This has resulted in the vulnerability of violations in the field of IPR as well as due to the lack of oversight and eradication of IPR violations in the business world, this can be seen in cases of copyright piracy. able to receive income of up to 70 (seventy) billion rupiah⁴. This problem also occurred in Semarang, Central Java regional police.⁵

There is only one report handled by the Central Java Regional Office PPNS and has not been completed. Only 3 were handled by the Central Java Regional Police who presented testimony from the Ministry of Law and

¹ Anis Mashdurohatun, *Mengembangkan Fungsi Sosial Hak Cipta Indonesia* (Suatu Studi Pada Karya. Cipta Buku), UNS Press, 2016, Surakarta.pp.33, see too Anis Mashdurohatun, *Hak Kekayaan Intelektual (HKI) dalam perspektif Sejarah Indonesia*, Madina.Semarang.2013.pp.23. see too Anis Mashdurohatun, *Hukum Hak Cipta: Model Fair Use/Fair Dealing Hak Cipta Atas Buku Dalam Pengembangan Ipteks pada Pendidikan Tinggi*, Depok: Rajawali Pers, 2018,pp.1. see too Anis Mashdurohatun, M Ali Mansyur, *Identifikasi Fair Use/Fair Dealing Hak Cipta Atas Buku Dalam Pengembangan Iptek Pada Pendidikan Tinggi Di Jawa Tengah*, Yustisia Jurnal Hukum, Volume.4 Issue. 3 .pp.522-540.

² Jamal Wiwoho, et al. *Hukum Kontrak, Ekonomi Syariah dan Etika Bisnis*, Undip Press, Semarang, 2017.

³ Donald Black, *Sociological Justice*, Oxford University Press, New York, 1989, p. 19

⁴ Entitas Hukum Indonesia, *Pembajakan HAKI TEeoris Ekonomi Gaya Baru*, Entitas-Hukum-Indonesia.blog, diunduh pada 21 Januari 2020.

⁵ Detiknews, *Polda Jateng Sita 50 Ribu Keping CD Bajakan Di Semarang*, m.detik.com, diunduh pada 21 Januari 2020

Human Rights, only two were handled by the Polres at the Blora and Jepara Police and even then they were only pirated vcd sellers. For karaoke places, many do not extend royalty payments.

The results of the survey in the districts of Banyumas, Blora, Grobogan and the Bandungan tourism area have not yet been found to have paid royalties. Data on fiduciary violations that presented testimony from the Central Java Ministry of Law and Human Rights were only 20, which were acquitted or not proven in 2 cases in Wonosobo and Kendal districts. 3 of which were not followed up (there were doubts from investigators). The court decision for Article 36 was only under 1 year. And only one for article 35 terminated 2 years.¹ These problems will result in huge losses for the state, especially in the field of economic growth and can also create problems for artists whose works are pirated by irresponsible parties in this country. This has explicitly violated the principle of socialist economy and Pancasila which prioritizes welfare in a social context by realizing justice for all Indonesian people. Based on the criminal law perspective, IPR is seen as an object that has economic value and can be owned by someone, so it is clear that IPR is the property of the creator which cannot be tampered with, changed and confiscated by any party.²

In it's development, offenses against IPR are strictly and clearly regulated in Law Number 28 of 2014, however, there is a major weakness related to the regulation of IPR offenses in Law Number 28 of 2014, namely: 1. In terms of the substance of IPR offenses in the Law Number 28 of 2014 which is a complaint offense, resulting in cases of violators of Law Number 28 of 2014 being very difficult to ensnare due to the need for complaints beforehand from the creator of a product being pirated, this can clearly be seen if there is a trade in pirated goods between two different countries namely Indonesia and other countries; 2. As a result of making the IPR offense into a complaint offense in each article in Law Number 28 of 2014, it has resulted in the movement of law enforcement authorities, namely the Police and Civil Servant Investigators so that cases of IPR violations are growing rapidly; 3. The culture of buying pirated products in the community due to affordable prices has resulted in eradicating IPR which has become a complaint offense which is very difficult to eradicate, besides that the creators often lack knowledge regarding the importance of IPR registration causing problems in stages 1 and 2 to grow rapidly in society .

Based on the explanation regarding IPR offenses regulated in Law Number 28 of 2014, it can be seen that the implementation of law enforcement in the field of IPR violations is not effective in creating justice for creators of works that are able to change human culture and civilization for the better.

Regarding the issue of injustice, Abdul Halim Baraktullah stated that the implementation of copyright protection should also fulfill several principles, namely the principles of benefit, fairness, balance, security, consumer safety, and legal certainty.³ This is very difficult, considering the problem of law enforcement coordination which is still fragile. In this regard, Sri Endah Wahyuningsih stated that there needs to be good coordination between existing law enforcement agencies regarding an issue of existing law violations or crimes.⁴

B. RESEARCH METHOD

In this study, the discussion is only limited to the discipline inquiry paradigm, which is a basic belief that is used by various groups to search for the truth of reality into a particular science or discipline.⁵ The paradigm in this study is constructivism, in this study the law is seen as a plural and diverse reality.⁶ Law lies in the mental construction of everyone who has different individual and social experiences including experiences between researchers and informants, so that the law is diverse and plural. This type of research is qualitative research.⁷ This research uses a social legal research approach. The type of data used is primary and secondary data. Data analysis was done through descriptive analysis.⁸

¹ Kementerian Hukum Dan HAM, Jumlah Pelanggaran HAKI Di Jawa Tengah, Kementerian Hukum Dan HAM, Semarang, 2019

² OK. Saidin, Aspek Hukum Hak Kekayaan Intelektual, Rajawali Pers, Jakarta, 2015, p. 284

³ Abdul Halim Baraktullah, Urgensi Perlindungan Hak-Hak Konsumen Dalam Transaksi E-Commerce, Jurnal Ius Quia Iustum, Universitas Islam Indonesia, Yogyakarta, 2017, p. 6.

⁴ Sri Endah Wahyuningsih dan Agus Sunaryo, the role of prosecutor office in the eradication of corruption criminal acts in indonesia, Jurnal Pembaharuan Hukum Volume IV No. 2 Mei - Agustus 2017, p. 248.

⁵ Agus Salim, *Teori dan Paradigma Penelitian Sosial, Dari Densin Guba dan Penerapannya*, (Yogyakarta:Tiara wacana Yogya,2001), p.33-34.

⁶ Erlyn Indarti, *Orasi Ilmiah: Menjadi Manusia Merdeka: Menggagas Paradigma Baru Pendidikan Hukum untuk Membangun Masyarakat Madani*, Sumber Guba dan Lincoln, p. 24

⁷ Anis Mashdurohatun, Gunarto & Adhi Budi Susilo, The Transfer Of Intellectual Property Rights As Object Of Fiduciary Guarantee, Jurnal Akta. Volume 9 No. 3, September 2022. Daniahsyah, Anis Mashdurohatun, Reconstruction Of Mediation In Environmental Disputes Settlement Based On Pancasila Justice, Journal Of Law And Political Sciences, Volume.24 Issue 3, Scientific Association For Research And Strategic Studies Faculty Of Law - Academy Of The Aalborg – Denmark 2020, pp. 123-138.

⁸ Anis Mashdurohatun, Gunarto & Oktavianto Setyo Nugroho Concept Of Appraisal Institutions In Assessing The Valuation Of Intangible Assets On Small Medium Enterprises Intellectual Property As Object Of Credit Guarantee To Improve Community's Creative Economy, JPH: Jurnal Pembaharuan Hukum, Volume 8, Number 3, December 2021. See too Anis Mashdurohatun, Adhi Budi Susilo, Bambang Tri Bawono, Copyright Protection towards the Society 5.0, Journal of Southwest Jiaotong University, Volume.56. Issue.2, 2021, pp.394-403.

C. DISCUSSION

Value reconstruction is interpreted as a process of rebuilding or recreating or reorganizing. As for what is rebuilt in this case is the value (value).

According to Azyumardi Azra, the revitalization of Pancasila as the ideological common ground of the Indonesian nation-state is the most feasible and therefore more beneficial for this nation in the future.¹ The law as a product of national legislation will be more perfect if Pancasila is used as a way of life based on Pancasila values.² ³By revitalizing Pancasila values, it can improve the quality of existing laws and regulations, by eliminating even the slightest discrimination.

According to Yudi Latif, Pancasila has provided a cultural basis, namely a Just and Civilized Humanity. This is the principle of humanization in Pancasila which is divided into two parts, including:⁴

1. Equitable humanity; And
2. Civilized humanity.

Gustav Radbruch said that law is an element of culture, law embodies one of the values in human concrete life, namely the value of justice, including:⁵

- a. Circumstances mean equal rights for everyone before the court;
- b. Finality or usefulness;
- c. Legality or legal certainty.

Furthermore, in 2004 based on Law Number 10/2004 concerning the formation of laws and regulations, Article 2 states that Pancasila is the source of all sources of state law. The placement of Pancasila as the source of all sources of state law is in accordance with the intention of opening the 1945 Constitution of the Republic of Indonesia in the fourth paragraph namely, Belief in One Almighty God, Just and Civilized Humanity, Indonesian Unity, Democracy Led by Wisdom in Deliberation /Representation, and Social Justice for All Indonesian People.⁶

Pancasila is the basis and ideology of the State and at the same time the philosophical basis of the State so that any content material in laws and regulations may not conflict with the values contained in Pancasila. ⁷The Second Precept of Pancasila "Just and Civilized Humanity" implies that the existence of the Indonesian nation must place itself as a complete human being, respect itself as a human being and respect other human beings as respecting itself. In the context of formation, law is placed as a means to regulate human protection (law for humans), and not vice versa humans create laws to oppress other humans (not humans for law).

The Fifth Precept of Pancasila "Social Justice for All Indonesian People" implies that justice is the basis as well as the goal. That the value of social justice is the goal to be achieved by implementing the previous values. Theoretically or conceptually, the construction of the legal semiotic model can be explained, namely the first precept becomes the light for the second precept, the basis of a just and civilized humanity, which is symbolized by a chain with circular and square eyes on the lower left of the Pancasila shield. The meaning is that laws that are progressive reflect human rights or adhere to humanitarian principles, meaning that every material content of laws and regulations must reflect the protection and respect for human rights and the dignity of every citizen.⁸

The Fifth Precept of Social Justice for All Indonesian People, means that laws that are progressive in nature must manifest a sense of justice in society or adhere to the principles of justice. The regions are part of the national legal system which is based on Pancasila and also adheres to the principles of order and legal certainty. ⁹Therefore, every content of Legislation must be able to create order in society through the guarantee of legal certainty. There are two standards for the formulation of Pancasila as a source of Indonesian criminal law which indicates that Pancasila is used as the main reference, namely the objectives of the national criminal law and the values that must be implemented from the formulation of the provisions of the national criminal law. If we look at the history of the formation of the State,

¹ Azyumardi Azra, 2010, *Revitalisasi Pancasila, Rindu Pancasila, Kumpulan Tulisan*, Kompas, Jakarta, p. 10

² Anis Mashdurohaturun, Hayyan Ul Haq, Sony Zuhuda, Social Function Reconstruction of Intellectual Property Rights (IPR) Based On Justice Values, *International Journal of Law Reconstruction*, volume. 1. Issue. 1. 2018, pp. 141-160. See too Anis Mashdurohaturun, *Constructing And Developing The Social Function Principles In Utilising Copyright Products Related To The Fundamental Rights*, South East Asia Journal of Contemporary Business, Economics and Law, Volume. 7.Issue 4. 2015,pp.123.

³ *Ibid.*

⁴ Syaiful Arif, 2016, *Falsafah Kebudayaan Pancasila, Nilai dan Kontradiksi Sosialnya*, Kompas Gramedia, Jakarta, p. xv.

⁵ R. Otje Salman, 1987, *Ikhtisar Filsafat Hukum*, Armico, Bandung, p. 45.

⁶ *Ibid*

⁷ In the Preamble of the 1945 Constitution, several main ideas are implied that can be used as a guide in the implementation of national development, including its implementation in forming statutory regulations.

⁸ Respect for human rights and the dignity of every citizen and resident of Indonesia proportionally and adhere to the principle of unity in diversity, which means that any content material in laws and regulations may not contain matters that discriminate based on background, religion, ethnicity, race, class, gender or social status as well as any material content of laws and regulations must reflect balance, harmony and harmony between the interests of individuals and society with the interests of the nation and the State and also adhere to the principle of equality in law and government. Article 6 paragraph (1) letter h Law Number 12 of 2011.

⁹ Penjelasan Pasal 6 ayat (1) huruf l Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan.

The material content of laws and regulations must pay attention to the diversity of population, religion, ethnicity and class, special regional conditions, and culture, especially regarding sensitive issues in the life of society, nation and state, so we will find a national agreement that the 1945 Constitution needs to oblige the government and other state administrators to maintain noble human character and uphold the noble moral ideals of the people and high morals.

According to Mokhammad Najih, the objectives of national criminal law must include the following objectives:

- a. The national criminal law aims to protect the principles of God and religion that live in Indonesia.
- b. The national criminal law aims to protect the body and soul of Indonesian people.
- c. The national criminal law aims to protect the human mind of Indonesia.
- d. The national criminal law also aims to protect the descendants/regeneration of the Indonesian nation.
- e. The national criminal law aims to protect Indonesian human property.

In accordance with the values of Pancasila which are implemented in criminal law laws, the values of God give birth to many norms and teaching systems that are believed to bring goodness and benefit to humans. The value of humanity is for humans, not vice versa, humans are for criminal law. Criminal law norms need fair accountability, civilized action qualifications, also determine fair and civilized punishment.

National criminal law must not destroy the principles of humanity and human rights. Criminal law is enacted and enforced by taking into account human needs in their community and the surrounding environment.

In addition to the values of Divinity and Humanity, the values of unity and oneness can embody the values of nationalism. Acceptance of religious norms, customs, laws that live in society, makes criminal law easy to implement and the objectives of criminal law are easy to realize. Implementation of criminal law norms does not create hostility between perpetrators and victims, does not cause disputes between law enforcement agencies and the like.

Reconstruction of values taken from Pancasila justice when compared with the values of justice in the teachings of Islamic law, then the highest justice is divine justice (GOD) which is absolute, but Pancasila justice which is based on Belief in the One and Only God remains integrated in absolute justice as its main source. which demands that all legal decisions must be fair and civilized. Reconstruction of Copyright Criminal Act Regulations Based on Pancasila Justice Values In the criminal justice process for violations based on Pancasila justice values, apart from being in tune with religious values, divine values, justice values and human values contained in the philosophy of the Indonesian State, the reconstruction of these values is also seen from a perspective, for example:

The preamble of the 1945 Constitution is full of statements (declarations) and acknowledgments that uphold very noble and basic human dignity and values.¹ The statement affirmed, among other things, the right of every nation to independence, a free, orderly and peaceful life, the right to develop the nation to achieve prosperity and prosperity, sovereignty, consultation and representation, nationality, humanity, justice, belief in belief in One Almighty God. The statements in the opening of the 1945 Constitution clearly contain a soul and spirit that is not much different from the Universal Declaration of Human Rights (UDHR) which was accepted at the UN general assembly on December 10, 1948.²

Aspects of Human Rights (HAM) contained in the 1945 Constitution which is a source of law in the formation of statutory regulations normatively become the basis and reason for the reconstruction of legislation that is incomplete and has not regulated the interests of the legal subject intended by the legislator Constitution. Aspects of human rights in criminal law, both general criminal law and special criminal law, must have the character according to Pancasila which is guided by the *Pancakarsa ekaprasetia* as emphasized:

"With the belief in the truth of Pancasila, humans are placed in the nobility of their dignity as creatures of God Almighty with awareness of carrying out their nature as individual beings and at the same time as social beings".

In a very basic humanitarian aspect from the point of view of law and law enforcement, one of which is the criminal law regarding a person must be presumed innocent before there is a court decision that has permanent legal force regarding his guilt, and a person cannot be convicted without fault.³

In essence, law contains ideas or concepts. An abstract concept, even if it is abstract but made to be implemented in everyday social life. Therefore it is necessary to have an activity to realize these ideas into society. This series of activities is in the context of realizing these ideas into reality which is a process of law enforcement.⁴

When the law which is loaded with values is to be implemented, then the law must deal with various kinds

¹ Barda Nawawi Arief, 2014, Kebijakan Hukum Pidana, Perkembangan Penyusunan Konsep KUHP Baru, Kencana, Jakarta, p. 59.

² Untuk lebih jelasnya lihat juga Pernyataan Semesta tentang HAM (Universal Declaration of Human Right).

³ Jiwa kedua asas ini sesuai dengan perumusan Pasal 11 UDHR, Pasal 14 ayat (2) ICCPR dan di Indonesia dalam Pasal 8 dan Pasal 16 (2) Undang-Undang Kekuasaan kehakiman.

⁴ Esmi Warassih, 2005, *Pranata Hukum Sebuah Telaah Sosiologis*, Semarang, p. 78.

of influencing factors from its social environment. Law enforcement should not be seen as something that stands alone but always exists between various factors, the relationship between law and non-legal factors, especially the factors of values and attitudes and views of society, hereinafter referred to as legal culture. Law as a system that is always goal-oriented and that system always interacts with the larger system, namely the environment and the operation of that system creates something valuable.¹

Such an understanding of the system indicates that the legal issues we face are very complex. On the one hand, law is seen as a value system which as a whole is covered by a basic norm called the *grund norm* or basic norm. These basic norms are used as the basis and form of law enforcement. As a value system, the *grund norm* is a source of values and also a barrier to the application of law. Legislative policies or criminal law politics that do not prioritize the Supreme Court as the final gate of justice for other institutions will only make the criminal justice system in Indonesia run smoothly. auto-pilot, and only coordinate in the event of a conflict of interest.

The realization of the reconstruction of values related to the implementation of copyright crimes can be realized through the reconstruction of norms in copyright criminal regulations. Norm reconstruction is carried out by reconstructing the provisions of complaint offenses into general offenses again. In its development, copyright offenses have changed to complaint offenses due to several considerations, namely:²

1. Law enforcement officials will not be able to determine whether a copyright crime has occurred simply by comparing copyright infringed goods with the original work. Only the creator or copyright holder can be more certain which is the original work and which work is not original or an imitation of the original work, so that he can immediately report violations of the exclusive rights of his creations.
2. In carrying out legal proceedings, it is not possible for law enforcement officials to immediately know whether a party has received permission to publish or reproduce a creation. Therefore, there must be a first complaint from the creator or copyright holder.
3. In practice, when copyright infringement occurs, the party whose copyright is infringed prefers compensation from the party violating copyright rather than the copyright infringer being subject to imprisonment.

Enforcement of copyright criminal cases in its development is also influenced by the legal cultural factor of the community, most of whom are reluctant to report violations of their copyright due to the lack of understanding of the community and the rate of copyright infringement in society is too high. This is in accordance with the main nature of criminal law, namely that its implementation does not depend on approval or complaints from the aggrieved party. Copyright offenses as complaint offenses are expressly stated in Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright. Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright states "The crime referred to in this Law is a complaint offense". So that the provisions of Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 Concerning Copyrights need to be abolished. Bearing in mind that copyright offenses as complaint offenses can hinder law enforcement related to copyright crimes because they depend on complaints from the public who do not fully understand the importance of copyright, for example the community of indigenous peoples, and it is well known that copyright crimes are carried out massively and systematically, thus requiring serious law enforcement efforts that are not only based on complaints from copyright owners.

Table
 Reconstruction of Regulations on Copyright Crimes Based on the Value of Justice
 Law Number 28 of 2014 Concerning Copyright and Related Rights

BEFORE RECONSTRUCTION	WEAKNESSES	BEFORE RECONSTRUCTION
Article 120 Law Number 28 of 2014 Concerning Copyrights and Related Rights The criminal act referred to in this Law is a complaint offense.	This provision results in any crime related to copyright and causing harm to the copyright holder cannot be handled without prior complaint.	Article 120 Law Number 28 of 2014 Concerning Copyrights and Related Rights Criminal acts as referred to in this Law constitute general offenses.

D. CONCLUSION

The issue of regulation of criminal copyright offenses has not been fair due to weaknesses in legal substance in the form of Article 120 of the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright which changes copyright criminal offenses to complaint offenses, then structural weaknesses in the form of the inability of law enforcers to take action against perpetrators of criminal rights copyright without any complaints by the

¹ *Ibid*, p. 79.

² Departemen Hukum Dan Ham Ri Badan Pembinaan Hukum Nasional, *Laporan Tim Naskah Akademik Rancangan Undang Undang Tentang Cipta (Perubahan Uu No. 19 Tahun 2002)*, Departemen Hukum Dan Ham Ri Badan Pembinaan Hukum Nasional, Jakarta, 2008, p. 36-37.

copyright owner beforehand, cultural weaknesses in the form of not all people being aware of the importance of copyright registration and the existence of copyrights, so that not many copyright owners really protect their rights through law. Article 120 of the Republic of Indonesia Law Number 28 of 2014 concerning Copyright needs to be abolished. Bearing in mind that copyright offenses as complaint offenses can hinder law enforcement related to copyright crimes because they depend on complaints from the public who do not fully understand the importance of copyright. It is necessary to abolish the provisions related to complaint criminal offenses in Article 120 of Law Number 28 of 2014 and replace them with general criminal offenses, so that there is no need for prior complaints against prosecution for copyright crimes. Article 120 of Law Number 28 of 2014 reads: "Criminal acts referred to in this Law are general offenses".

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