

THE TENSION BETWEEN DERIVATIVE WORKS PROTECTED BY FAIR USE AND COPYRIGHT INFRINGEMENT LIABILITY IN INDONESIA

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ABSTRACT

The act of transforming a copyrighted work is a common thing. Many art workers are inspired to develop and even adopt a pre-existing copyrighted work. The international community in this case recognizes a doctrine which states that copyright in certain cases has exceptions or limitations. These exceptions or limitations are referred to as the fair use doctrine. Fair use is a huge problem in digital media as many large companies try to ignore fair use in an effort to get more profit. Based on that problem the question is How does the role of copyright act provide protection for accommodation derivative works in Indonesia? The research approach used is normative juridical with descriptive analytical specifications. The results is the regulation of fair use in Indonesia copyright act is still unclear on the definition of 'reasonable interest' so it needs to be interpreted in the event of a legal dispute in the future. Based on this, if a work is not managed in an orderly manner based on legal principles, it can cause a dispute between the copyright owner and the copyright manager or other party who violates it.

1. INTRODUCTION

Derivative works refer to the works based on pre-existing creations. The provision of derivative works in terms of definition, protection, shape, and the sample of the object is not clearly governed in Copyright Law. However, Article 40 point (2) of Act Number 28 of 2014 concerning Copyright (hereinafter written UUHC) gives different protection regarding derivative works in which these works are to be given legal protection separate from the original creation. This separate protection is not further explained, leading to the potential of the incompleteness of law regarding how derivative works can be protected and what criteria are needed to allow for the protection of derivative works as separate creation in Copyright Law.

The act of transferring a copyrighted work is a common thing. Many art workers are inspired to transform, modify and adapt a pre-existing work of art without reducing the limitations in the law. Transformative use has been the touchstone of almost every copyright case involving fair use in recent decades, confusing many



because the term transformative does not appear anywhere in the definition of fair use under copyright law. Regarding the legal rules regarding reasonable interests in Indonesia, the boundaries are still unclear so that it needs to be interpreted in the event of a legal dispute in the future.

The term fair use is a limitation of copyright, where the limitation is a form of the social function (fair use/fair dealing) of copyright, by various countries which allows the transformation of a work not to qualify as copyright infringement (Isnain, 2009) but on condition that fairly and/or fairly. Fair use/fair dealing which has been regulated by the applicable legal provisions in Indonesia in Article 43 to Article 49 UUHC. Referring to the provision that the limitations and exceptions are intended for educational purposes, which then becomes a question whether these limitations and exceptions can be implemented on other works. On the other hand, the provisions of Article 40 point (1) letter n UUHC stipulates that derivative works in the form of adaptations and transformations are included in one object that is protected separately without reducing the original creation.

One example of a work that is often transformed is a painting where in contemporary art there is an artistic method that allows an artist to use the forms, techniques, and ideas of other artists' works which is called appropriation. In other words, appropriation is legal plagiarism. For example, one of the most famous is Marcel Duchamp, who in 1919 adapted the Mona Lisa painting by adding a mustache and thin beard as elements of a parody. Therefore, not a few artists also practice appropriation in their creative process, often this aspect of the permit is not paid attention to because it is considered that copyrighted works circulating in the community become public property (Kholis et al., 2022). The general public can indeed transfer other people's copyrighted works without obtaining permission, but only those that meet the requirements for fair use restrictions.

Based on that problem the question is How does the role of Indonesian Copyright Act provide protection for accommodation derivative works in Indonesia? The purpose of this study is to explain the deconstruction of the concept of fair use in the limitations and exceptions of copyright so that rich derivatives in Indonesia can be protected without violating the rights of the original creator.





2. METHOD

This paper uses a normative legal research method because the focus of the study departs from the obscurity of norms, using an approach: statute approach, conceptual approach. The technique of tracing legal materials uses document study techniques, and the analysis of the study uses qualitative analysis.

3. RESULT AND DISCUSSION

Copyright is the exclusive right of the creator that arises automatically based on declarative principles after a work is realized in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations (Republic of Indonesia, 2014). In depth about copyright law can be traced through the legal basis of its regulation. The form of protection of intellectual property rights, especially copyright in Indonesia, is regulated in act No. 28 of 2014 concerning copyright.

Article 40 UUHC explains that protected works are creations in the fields of science, art and literature which include:

- a. Books, pamphlets, presentations of published works, and all other written works
- b. Lectures, speeches, and other similar creations.
- c. Props made for the benefit of education and science.
- d. Songs and/or music with or without subtitles.
- e. Drama, musical drama, dance, choreography, wayang, and mime.
- f. Works of art in all forms such as paintings, drawings, carvings, calligraphy, sculptures, sculptures, or collages.
- g. Works of applied art.
- h. Architectural works.
- i. Map
- j. Batik art or other motif art.
- k. Photography.
- l. Portrait.
- m. Cinematographic works.
- n. Translation, interpretation, adaptation, anthology, database, adaptation, arrangement, modification, and other works resulting from the transformation.



o. Translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions.

p. Compilation of creations or data, both in a format that can be read by computer programs or other media.

q. A compilation of traditional cultural expressions as long as the compilation is an original work.

r. Video games, and

s. computer program

The types of protected works can be divided into two groups, namely original works and derivative works. an original creation is a creation in its original form as created by the creator, there has not been a change in shape or transformation into a different form. Derivative creations are new works that are realized based on a previously existing work. In Black Law, Derivative works is an artistic work taken from existing works that are copyrightable and must be original to be a work in its own rights.

The act of transforming a copyrighted work is a common thing. Many art workers are inspired to develop and even adopt a pre-existing copyrighted work. With the ability of one's creativity, a certain copyrighted work can be added or reduced or transformed into other forms, either temporary or permanent, so that a new work is formed, for example from the form of a statue into a painting or image that is used for certain purposes, a romance story into a drama, dramas become radio plays, or novels into films and so on.

In the general explanation of Article 40 point (1) letter n UUHC 2014 states that derivative works in the form of adaptations and modifications are included in one of the protected objects separately without reducing the original creation, while in Article 9 point 1 letter d regulates adaptation, transformation and modification is the right of the creator to exercise his economic rights. Derivative works that are adaptable mean transforming them, such as a book into a novel, and those that are transformative in nature mean making changes to the format of the creation, such as pop music into dangdut music.

According to Nurgiyantoro (Nurgiyantoro, 2010), transformation is a change, namely a change to a thing or situation. Modification can be interpreted as an effort to make changes with adjustments both in terms of physical materials (facilities and equipment) as well as in goals and methods (methods, styles, approaches, rules and





assessments). While modification is changing from its original form by changing the shape of an item from less attractive to more attractive without losing its original function, and displaying a better shape than the original. Transformation refers more to the reality of the change process, in the Big Indonesian Dictionary (KBBI) (Yandianto, 1997). Transformation means change can be in the form of form, nature, function and so on. If a thing or situation that changes is a work, it is the work that undergoes change.

In line with that, the problem in this research is related to derivative copyrighted works resulting from modifications, transformations and adaptations so that a problem arises regarding the limitations of copyright protection for protected works. The existence of this copyright infringement can hinder the economic rights that should be obtained by the creator. Economic rights owned by a creator if they can be exploited in such a way will provide great benefits and benefits for the creator. The works of this kind of transformation have an economic value that is not inferior to the original works or original works.

Article 40 point (1) letter n of the Indonesia Copyright Act states that the transformation in the form of adaptations, arrangements, modifications and other works resulting from the transformation is included in one of the protected objects separately without reducing the original creation, while in Article 9 point 1 letter d regulates actions adaptation, transformation and modification are the economic rights of the creator, in other words that whoever wants to transform the work must first obtain permission from the creator of the original work.

Many problems arise when the creator of a derivative work does not first ask permission from the creator or copyright holder of the original work. They argue by taking advantage of fair use restrictions. In fact, transformation and fair use are closely related. Permission as an absolute condition can be excluded by the use of fair use. The doctrine of fair use does not have a uniform definition. According to Prof. Eddy Damian, with the regulation of fair use law, copyright law allows someone (a third party) to use or exploit a work without the need for permission from the Author, as long as it is within the allowed limits (Damian, 2009).

According to Paul Goldstein, fair use is generally defined as: "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright (Goldstein, 1989). The definition of fair can be matched with the



principle of propriety in the intellectual property law regime in Indonesia. The actions of users of copyrighted works can be categorized as fair use if they are non-profit, educational, research and developmental (Pratama, 2020). While the provisions in 17 U.S.C. 107 United States copyright law, the parameters that are the exception are clear, namely: (1) not intended for commercial purposes, (2) does not change the nature of the copyright itself, (3) the amount used, and (4) does not affect the market of copyright itself (Ratnajati, 2008).

In mid-March 2021, an artist from Indonesia named Kendra Ahimsa, better known as Ardneks, explained that Twisted Vacancy had taken several unique elements in his work without modification and then traded them. Quoted from The Finery Report, Twisted Vacancy denies that his actions are part of plagiarism. He uses UUHC as a justification for his actions because the law allows a person to take a 10% to 20% similarity. Even though the policy is based on copyright infringement in music, so it cannot be implemented into illustration art because the elements in the image cannot be equated with the composition of notes and bars in music. So, it can be concluded that the illustration work has not been fully protected by UUHC. Moreover, Article 44 UUHC explains that the use, retrieval, and reproduction of part or all of the substantial is allowed as long as it is not used for commercial purposes. Of course this is contrary to the actions of Twisted Vacancy which managed to reap profits of up to Rp. 1.1 billion. (The Finery Report, 2021)

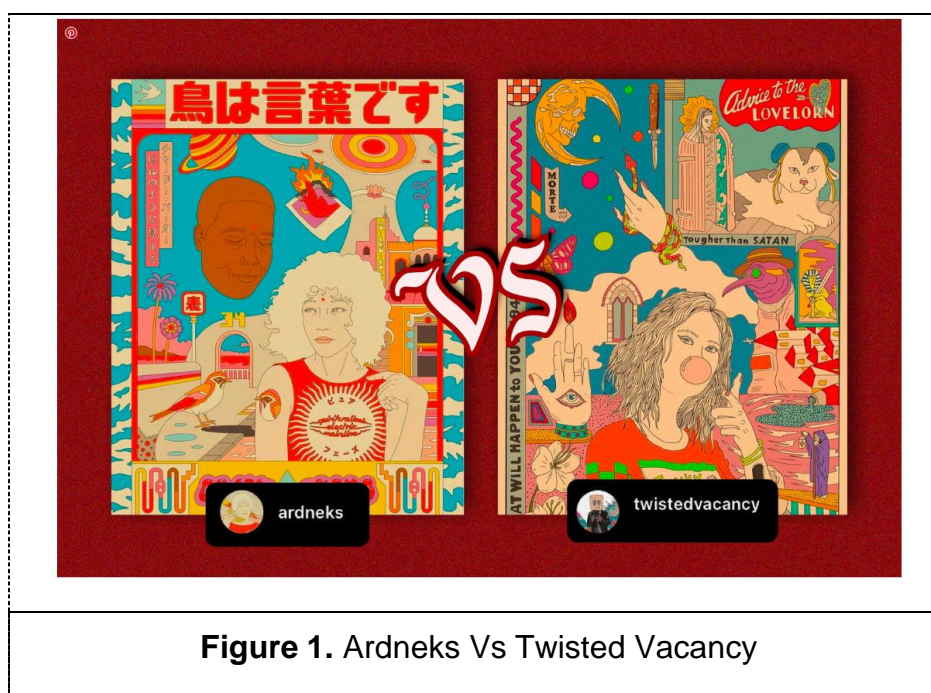


Figure 1. Ardneks Vs Twisted Vacancy



This issue poses a growing threat to creators and users of their works domestically and globally, given that the protection and exploitation of copyrighted works now transcend national borders more than ever thanks to the liberalization of international trade and developments in digital technology. Therefore, a set of effective legal provisions is needed from all possible violations by those who are not entitled to someone's copyright (Photo Mark, 2021).

The regulation of fair use in Indonesia in Article 44 of Indonesia Copyright Act is still unclear on the definition of 'reasonable interest' so it needs to be interpreted in the event of a legal dispute in the future by starting with the sentence of balance in enjoying economic benefits and so on. The principle of exclusion from copyright is not without limits, but there are economic principles that should not be violated, the principle of the form and nature of the copyrighted work that should not be changed and the principle of the interests of the copyright owner himself that should not be violated (Sadalia et al., 2019). With clear boundaries regarding copyright exceptions, the meaning of fair can be matched with the principle of propriety in the legal regime of intellectual property rights in Indonesia. The provisions for fair use in Indonesia, related to the reasonable interests of the Author in Indonesia, are still not clearly defined so that they need to be interpreted in the event of a legal dispute in the future (Margono, 2010).

Fair use is a defense in the Copyright Act that should evolve with the new digital age (Band, 2012). The alleged infringer would likely raise a fair use defense when a copyright owner alleges copyright infringement. (Zikha, 2014). The fair use doctrine has been used as a “defense to claims of copyright infringement” (Samuelson, 2009) in a wide range of cases. The doctrine protects expressive possibilities for education, criticism, and other methods of communication and expression that could not occur if the copyright owners had complete universal control over the ways in which their works are used. Fair use weighs a balance between the protection of copyrighted works and the taking from the copyrighted works in the creation of new works (Enriquez, 2013).

The weakness of the existing legal framework to maintain a balance of interests between individual or group interests and the public interest, allows even to increase the spirit of exploitation of individuals or groups to the exclusion of the public interest. Under the TRIPs agreement, the exploitation of strong exclusive rights has led to





gaps in the use of and access to technology and information. The gap becomes larger when developed countries apply very high standards of IPR protection, with the aim that the intellectual property laws of other countries, especially developing countries, are in line with their intellectual property laws (Drahos P and Mayne, 2002).

Based on this, if a work is not managed in an orderly manner based on legal principles, it can cause a dispute between the copyright owner and the copyright manager or other party who violates it. For its regulation, a set of effective legal provisions is needed from all possible violations by those who are not entitled to someone's copyright.

4. COCLUSION

The role of copyright law is to provide protection for derivative copyrighted works as new works. Although Article 5 point 1 and Article 9 point 1 letter d UUHC in terms of adaptation, transformation and modification of creations, the creator has the right to defend his rights. The doctrine of fair use, provides limitations for the original creator to report if there is a copyrighted work that does not fulfill the economic rights in his creation. Meanwhile, permitted use is a legal doctrine which states that a modified copyrighted work can reuse copyright-protected material in certain situations without requiring permission from the copyright owner." So it is important to uphold the doctrine of reasonable interest so that it can run well without any cases that have to go to court. Nevertheless, Indonesia's Copyright Law remains lacks strict and comprehensive implementing regulations concerning educational fair use. The interest of education as one of the exceptions to copyright does not explain the definitions, criteria, quantitative and qualitative limitations for the utilization of copyrighted works for educational interests, the absence of quantitative limitations, and the number of copyrighted works allowed to be reproduced also creates confusion. The occurrence of the vacuum of law concerning the implementation of the principle of fair use and the establishment of related organizations or agencies responsible to thrive and encourage the promotion, access, and utilization of copyrighted works for educational purposes still has a long way to go.



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