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ALSA INDONESIA SEMINAR MATERIALS SET



THE IMPLICATIONS OF JOB CREATION ACT ON TRADEMARKS REGISTRATION IN INDONESIA

**by: Fantasya Reynita (ALSA LC Universitas Gadjah Mada), Labib Wajdi (ALSA LC
Universitas Padjadjaran).**

Abstract

Trademarks are often used as a way of branding in most products in order to familiarize the customer with said brands as regulated in the TRIPS Agreement which will be subsequently adopted into national law. Like most legal commodities, trademarks have limitations which are different in every jurisdiction that is not limited to Indonesia. As a growing market, Indonesia has seen massive emergence of new local brands, each with its unique branding. Due to this, sufficient regulation is needed to prevent misuses of trademarks. As a result, a new threshold was released by the Indonesian Government in the form of Law No. 11 of 2020, known also as the Job Creation Act which was legally enacted last year. Hence, this paper will discuss more in-depth about the new threshold and the implications to trademarks registration in Indonesia.

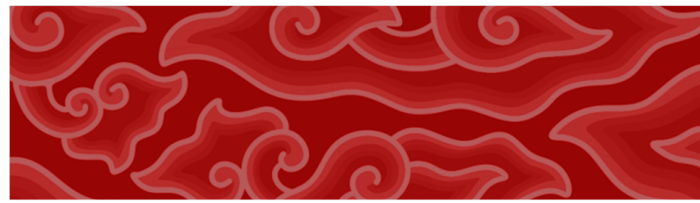
Keywords: Intellectual Property, Trademark, TRIPS Agreement, Job Creation.

I. Introduction

As a symbol or sign, a trademark is one of the essential elements to communicate which typically originates with the owner or seller of a product and which is received by a prospective buyer of that product. As the world economy grows each year, we can look into the World Intellectual Property Organization IP Portal, where there are more than 45,7 million registered trademarks around the world, including Indonesian trademarks.¹

This paper's particular interest is about the implications of the Job Creation Act on Trademarks Registration in Indonesia. Indonesia has recently passed Law No. 11 of 2020 on Job Creation, widely known as the Job Creation Act. Designed to attract foreign investors and in consequence to create jobs – hence the name 'Job Creation' – the regulation has received

¹ World Intellectual Property Organization. (2021)



mixed reception from the public. Whilst most of the criticism surrounding the act revolves around the impairment of Indonesia's nature, there are concerns related to Intellectual Property (IP) law as the act briefly brushes on the subject. An IP law aspect that was changed by the addition of the Job Creation Act is trademark. Consequently, this scenario sparked a few questions regarding **(1)** the effects of the change in trademark law in Indonesia, and **(2)** whether change was made for the better.

1. What are the effects of the change in trademark law in Indonesia?
2. Was the change made for the better?

Before the usage of Law No. 11 of 2020, the Indonesian legal structure had used Law No. 20 of 2016 on Trademark and Geographical Indications (Trademark Law) as a reference for trademarks. One notable change can be seen in Article 20(1) which establishes the criteria for trademarks ineligible for registration, which are:

1. Contrary to state ideology, laws and regulations, morality, religion, morality, or public order;
2. Same with, relating to, or only mentioning goods and/or services for which registration is requested;
3. Contains elements that can mislead the public about the origin, quality, type, size, variety, purpose, use of goods and/or services for which registration is requested or is the name of a protected plant variety for similar goods and/or services;
4. Contains information that is not in accordance with the quality, benefits, or efficacy of the goods and/or services produced;
5. Has no distinguishing power;
6. Is a common name and/or symbol of public property.

Under the Job Creation Act, the criteria is extended to include everything that contains a 'functional form'. However there is no explanation within the Job Creation Act as to what 'functional form' means.



Another change can be seen in Article 25(3) Trademark Law where it is stipulated that any trademark certificate, if not claimed by the owner within 18 months, will be discarded. This regulation has since been erased in the Job Creation Act. Despite these changes, it is imperative to use the Job Creation Act in the areas that are updated only, whereas in the rest of the regulation that is not updated by the Job Creation Act, the Trademark Law is still used.

II. Analysis

1. The Effects of the Change in Trademark Law in Indonesia

The relevant provisions changed by the Job Creation Act in regards to the Trademark Law in Indonesia are **(A)** the addition of 'functional form' to the criteria on ineligible trademarks and **(B)** the erasure of the time cap for trademark claim.

A. The addition of functional form in trademark criteria

Under the Job Creation Act, trademarks are ineligible to be registered under the DGIP if it contains a functional form. However, the act does not provide a clear definition of what constitutes 'functional form'.

In the absence of a clear definition, another option is to view it from a broader legal perspective. A general principle of law that is often used in common law jurisdiction is the functionality doctrine, which is a principle that prevents misuse of trademark law by which a company claims a certain useful feature of a product, rendering future competitors or products as unlawful. In it a feature is considered 'functional' if it is essential to the use or purpose of the product.

One of cases regarding this doctrine is *Qualitex Co. v. Jacobson Products Co., Inc.*² Where Qualitex Co. has green-gold hue within their dry cleaning 'press pads' that they sold to dry cleaning companies. While Jacobson as their rival also sold their own dry cleaning pads to dry cleaners in 1989, which was similar in color to Qualitex's. Then Qualitex sued Jacobson with complaints

² *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 115 S. Ct. 1300, 131 L. Ed. 2d 248 (1995).



of unfair business competition in the United States District Court to the Central District of California. In the end, Qualitex registered their green-gold hue of pads as a trademark within the United States Patent and Trademark Office in 1991. Based on its trademark, they added more trademarks violation cases to its complaint subsequently that year.

The Court held that color can still be trademarked as it does not serve a 'functional' purpose seeing that the threshold for 'functional' is crossed when there's an act of inhibiting legitimate competition by allowing a producer to control useful product features. Because of this, the Supreme Court, Justice Breyer, held that: (1) no special legal rule prevents color alone from serving as trademark, and (2) green-gold color of manufacturer's dry cleaning press pads could be registered as trademark.

Another case that could be more relevant for this doctrine is the Coca Cola bottle shape case.³ Where Cola Cola seeking for a trademark to protect the shape of one of its bottles. But the application denied by the General Court of the European Union.⁴ Jeremy Philips's opinion in his book that a container is not generally reckoned to be a 'mark'. On this basis the distinctive Coca Col bottle could not be registered as a 'mark' in respect on beverages, even though a drawing of it would be a 'device' and therefore a mark. This conclusion is hard to justify when one considers that a container can be as effective as any other means of indicating a link between a trader and his goods.⁵

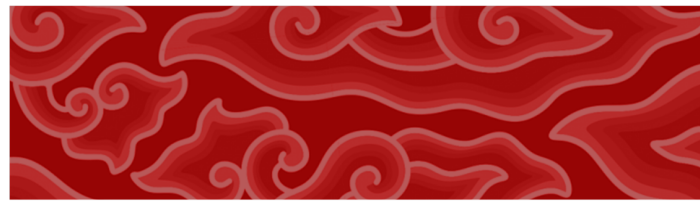
B. The erasure of the time cap for trademark claims

Based on the Job Creation Act, the provisions concerning certificates which are not taken by the mark owner or its proxies within a maximum period of 18 months from the date of issuance of the certificate, the registered mark is

³ Indra Rengkengbara Maasawet. (2017).

⁴ Robbert Keij. (2016).

⁵ Jeremy Phillips (2006).



deemed to be withdrawn and will be abolished.⁶ Therefore, anyone whose certificate of registered trademark has been issued will have legal protection even if the person has not taken the trademark certificate in 18 months. This is not accounting for the reduced waiting time for substance review from the DGIP itself, where the Job Creation Act changed the initial waiting time of 150 days to a mere 30 days.

Within this instrument, the benefits of law are well implemented to the society and reduce trademark disputes.

2. The Impacts of the Change

A. The addition of functional form in trademark criteria

Starting with the positives, the change in regulation will prohibit unethical business practices and, in theory, would promote healthy business growth. However whilst the name 'Job Creation Act' may lead to believe that this series of legislation was released to create more jobs by streamlining the process of business, it fails in doing so as there was little to no effort put into making the regulation legible. The addition of 'functional form' in the trademark criteria without including a clear definition of said phrase will only result in more gray areas, adding more legal loopholes to an already flawed law. A simple but yet to be implemented solution is to set clear boundaries on what constitutes 'functional form'.

B. The erasure of the time cap for trademark claims

An upside to the erasure is ease of usage for anyone looking to register a trademark at the DGIP and was intended to make the process more efficient in Indonesia. Unfortunately, as seen previously, good intentions do not compensate for the lack of thought given in making regulations. While the change will make Indonesia's IP regulation more inclusive and efficient, in the event of a dispute, there is no guarantee that there will be no confusion between

⁶ Agung Indriyanto, et al. (2017).



the parties due to how the registry is sorted. This is because the 18 months cap used before forced companies to give a clear stance regarding their trademarks, whereas now it is a little harder to tell. This leads to the elephant in the room, a situation where there is an unhealthy amount of trademark registrations that are no longer of any interest to their owners. Another issue is the literal abundance of paperwork and the management of it, which can be subsided by switching to e-certificates.

III. Conclusion

The Job Creation Act's implications can be identified into two. They are the new provisions to prohibit the use of 'functional form' in trademarks and the omitted time cap for trademarks claim. The prohibition of 'functional form' in trademarks might need a comprehensive explanation to have the clarity to achieve legal certainty. So that the public can understand the objectives of the lawmaker in regards to the prohibition of the use of 'functional form' in trademarks. In addition, the authors think that if this change has a comprehensive explanation or derived rules, it might have potentially positive impacts on the public. It is hoped that trademarks' rights actually implement the essence of intellectual property rights and not just simply use things that already exist as trademarks.

While the second change omitted the time cap for trademarks, the authors think it potentially causes public confusion and could raise more trademarks disputes if the certificate is still in the form of paper-based. Otherwise, if it will be released in the form of an e-certificate, this new provision can provide benefit to the efficiency of trademarks registration.

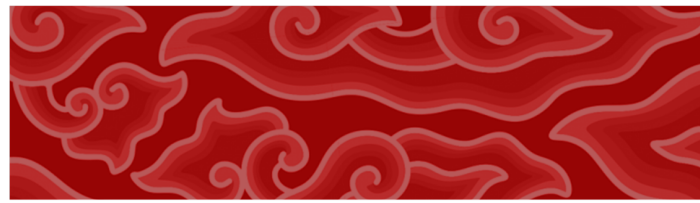
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THE IMPORTANCE OF INTELLECTUAL PROPERTY PROTECTION TO ARTWORK COPYRIGHTS VIOLATION IN THE CYBERSPACE

**by: Iqbal Fauzurrahman (ALSA LC Universitas Airlangga), Salman Imam Karim
(ALSA LC Universitas Diponogoro), Andi Alfisa A.R (ALSA LC Universitas
Hasanuddin).**

Abstract

In this century, everything has become easier than before. Technology makes everything possible with our gadgets. We can share and download anything with just a simple click with our fingers. As technological advancements become more ingrained in our day-to-day life, the phenomenon of the 4.0 industrial revolution is upon us. Technology is merging and has become inseparable from human life. But these circumstances create a new problem for us, this era makes everything look borderless and also lawless. People think that everything on the internet is legal and common property, because of this situation many artists are harmed. Intellectual property rights are defined by the World Trade Organization (“WTO”) as the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his / her creation for a certain period. This is in line with what is stated in the Indonesia Copyright Law Number 19 of 2002, Intellectual Property Rights are exclusive rights that are given by regulation to a person or group of people for their copyrighted work.¹ This intellectual property right contains a statement regarding the existence of copyright and economic rights which are defined in Indonesian law as Copyright is a right that regulates intellectual works in the fields of science, art, and literature expressed in a distinctive form and given to ideas, procedures, methods or concepts that have been outlined in a permanent form. Royalty is a reward for exploiting the economic rights of a work or related rights product received by the creator or the owner of the related rights. The determination of the number of royalties and the procedure for granting royalties is carried out based on a license agreement between the copyright holder or the relevant right owner and

¹ Copyright Law Number 19 the Year 2002, Intellectual Property Rights



the license recipient. In the General Elucidation of Law Number 28 of 2014 concerning Copyright, the development of information and communication technology has become one of the variables, considering that information and communication technology, on the one hand, has a strategic role in copyright development, but on the other hand, it is also a tool for infringement.

Keywords: 4.0 Industrial Revolution, Intellectual Property, Copyright, Artwork, Cyberspace

I. Background

The 4.0 industrial revolution according to Professor Klaus Schwab, the founder of the World Economic Forum, is an era marked with the technological revolution that is blurring the lines between the physical, digital, and biological spheres². This means that technological advancements such as (but not limited to) artificial intelligence, autonomous vehicles, or the internet of things are becoming ingrained in our day-to-day lives and even our bodies. What separates the fourth industrial revolution from the previous one is how technology is merging more and more with human lives and technological change is happening at an unprecedented pace. This new era of technology is propelling a lot of innovation to keep up with the pace of growth and development. The World Intellectual Property Organization released statistics that show an inclined growth of patent applications from early 2000 until this very day. So, innovations (that's patented) go hand-in-hand with the industrial revolution to drive growth and advancements, especially in the areas of technology. According to the Global Innovation Index Report 2020, We can conclude that various statistics show that a stable increasing inclined curvature is to be expected in the foreseeable future, regarding innovation that would lead to intellectual property protection.³ As the need for understanding the protection of intellectual property becomes essential in the years to come, it is essential to be literate with an internationally demanding issue.

² Schwab Klaus, "The Fourth Industrial Revolution", *Penguin Books*, 2016

³ Radurer Alfred, "Opportunities to Reap Finance Through IP for Innovation" *Global Innovation Index Report 2020*. World Intellectual Property Organization



The correlation between the 4.0 industrial revolution and digital artworks lies on the basis of easement that technological advancements have provided to accommodate the elevation of artworks to its fullest potential. The definition of digital art refers to the creation that is made by digital technology and/ or presented through digital technology. This can be in the form of computer edit or drawing, animations, 3D Renderings, music and videos using various available software. One of the indicators of this technological revolution is becoming more engaged with the digital technology in interacting amongst each other, it seems as a positive side effect of the phenomenon. However, in the development process the problems become more complex to handle as technological advancements grow at a rapid pace. Our concern is specified mostly on digital artworks and its protection. Many cases of piracy have been reported to the Ministry of Communication and Information between the years 2017-2019. We need to understand the declaration principle to obtain rights and legal protection of our creation in cyberspace according to Law Number 28 in the year 2014 in regards with copyrights. Which adheres to the principle of whoever manifests their creation in a tangible form and announced/ declared in advance will obtain the rights of their creation. Thus, through this principle, it is often difficult to provide deserved credits to the original owner of the creation, due to the easement of sharing and piracy with the click of a finger.

II. Basic Regulations

Although Indonesia has ratified the TRIP agreement which can have international liability, its enforcement and the general public's awareness regarding the issue is very limited.⁴ Aside from that, Indonesia has also ratified the Paris Convention for the Protection of Industrial Property on the 10th of May 1979, although not in its entirety.⁵ Indonesia's regulation is quite sufficient to resolve and ensure proper intellectual property protection such as the Law Number 14 in the year 1997 about Trademark, the Law Number 13 in the year 1997 about Patent Rights, the Law number 12 in the year 1997 about Copyrights and other law ratifying to international conventions. This climate of intellectual property rights protection needs to be ensured safe and fulfilled to push innovations and other advancements coming from national citizens.

⁴ Hukumonline, "*Penegakan HaKI di Indonesia Belum Efektif*", Jakarta 2000

⁵ Direktorat Jendral Kekayaan Intelektual, Kemkumham RI



III. Legal Mechanisms

According to the Directorate General of Intellectual Property under the Ministry of Law and Human Rights, intellectual property is made up of 7 aspects which include: Patent, Trademark, Industrial Design, Copyright, Geographical Indications, Trade secrets, and integrated circuit layout design⁶. Filing intellectual property is based on the different regulations regarding each aspect. Trademarks are regulated on the Act Number 20 in the year 2016 about Trademark and Geographical Indications, Patents are regulated on the Act Number 13 in the year 2016 about patent, Copyrights are regulated on the Act Number 28 in the year 2014 about copyrights, Industrial Design is regulated on the Act Number 31 in the year 2000 about industrial design, Geographical Indications are regulated on the Act Number 20 in the year 2016 about trademarks and Geographical Indications, and last but not least the integrated circuit layout design is regulated on the Act Number 32 in the year 2000 about integrated circuit layout design. Those regulations above provide a specific procedure that is sufficient to protect the required intellectual property rights. However, the regulations regarding trade secrets seem not necessary to be filled because it will remain confidential if it is protected and kept a secret. Precautions necessary to achieve that are highly recommended to ensure its economic value. Until now, no discussions of such a bill exist. Currently, the Indonesian government has ratified 5 different international conventions that regulate intellectual property protection rights, this shows the countries' willingness to participate and support an international effort to protect each members' state citizen that has ratified their fulfillment of intellectual property rights.

IV. Analysis

Indonesia's Condition Regarding Industrial Revolution 4.0

The Indonesian President, Joko Widodo since 2018 released a road map and Indonesia's strategic plan to anticipate the implementation of the fourth industrial revolution.⁷ His plans and ideas towards the issue have been made the national agenda, in the hope, every national

⁶ *Ibid.*

⁷ Florentin Vindry: "Presiden Jokowi Luncurkan Roadmap Revolusi Industri 4.0", *Tempo*, 4 April 2018



element can work hand-in-hand to ease the transition from the previous revolution to the current one. What this means for Indonesia is that we are 2 years behind from when this term was first introduced by Professor Klaus Schwab in his article on the World Economic Forum.⁸ The reason for this is as simple as the readiness of Indonesia as a nation to compete with the stable development of the rest of the world. This fact is supported by the evaluation data held by the World Economic Forum in collaboration with A.T. Kearney, to assess a country's readiness for the future of production. In the areas of Production Drives Indonesia is ranked 61st for technology and innovation, 55th for human capital, 61st for global investment, 69th for institutional framework, and ranked 94th for sustainable resources.⁹ I would highlight Indonesia's inability to bring strong competition among other countries in the areas of technology innovation as a breaching point about the importance of the protection of intellectual property because this area has a strong correlation amongst each other and is an essential aspect regarding the readiness of future production reports.

Intellectual Property Rights Protection Condition

In cyberspace, it is very easy to find pictures, both illustrations, photography, paintings and various other visual works. Many artists upload their artworks to the virtual world because it is easy and profitable, not as difficult as sending their artwork to a museum or art exhibition. With this convenience, artists can easily capture art lovers with just a touch of the hand, but on the other hand, with this convenience, it is also easy for a work of art to be taken for granted by plagiarizing or using it illegally. taken by illegal users. Poor control systems make art theft in cyberspace very frequent.

With the full realization that this issue requires attentive attention, the current condition that Indonesia is in is considerably not effective. Various data shows countless violations regarding intellectual property rights such as (but not limited to) online piracy, plagiarism, and other violations of intellectual property rights. The Ministry of Communication and

⁸ Schwab Klaus, "The Fourth Industrial Revolution: what it means, how to respond, *World Economic Forum*, 14 January 2016

⁹ World Economic Forum, A.T. Kearney "Readiness for the future of production Report 2018"



Information has blocked 1.745 sites from 2017 through 2019 that violate intellectual property rights. Each year between the period of the past 3 years has shown a significant increase in the number of cases reported about the violations of intellectual property. In the year 2017, 190 cases were reported, 412 cases were reported in the year 2018 and it reached 1143 cases of intellectual property violation contained on online sites.¹⁰ The direct cause of this may stem from the fact that its law enforcement regarding this issue hasn't reached its fullest extent and been very efficient. The public also has a role to play to work hand-in-hand with the law enforcers by being aware and being literate to the rights and responsibilities that each individual has to uphold.

It is essential to ensure the growth and stability of the industrial revolution by enforcing and applying the fullest extent of the law regarding intellectual property rights. The industrial revolution will have a great impact on a nation's economy; a nation's economy is a key factor in the constant continuity of its development. An indicator of stable development is the nation's ability to keep up with the latest technological advancements. The development of a nation requires the brilliant minds of innovators that can bring future technological advancements closer and more engrained to support our everyday needs. It must be clear for these people that we hope that their intellectual property rights will be protected to ensure sufficient credits received and appreciation for their ideas. Competing with other nations is also something to consider why the fulfillment of intellectual property rights must be protected to keep the stability of a nation's development. When innovation is commercialized and not given enough credits by the rightful owner, it then will be undervalued and potential benefits that could be gained from it are likely to be lost. This will give much impact on the economy as a whole, where a big chunk of its essential aspect comes from technology and innovations. The economic market changes every so often nowadays, so it is also crucial to be up-to-date thus more reasons to ensure the stability of the development. Meeting the market's demand by being ready and not being left out on what is supposed to be ready in supply, as is to create a momentum that will synchronize and give the fullest potential of benefits to the economy and

¹⁰ Jamaludin Fauzan. "*Kemkominfo Blokir 1.745 Situs Melanggar HAKI*" Merdeka, 2020



the industrial revolution. The safe conducive climate for inventors will motivate more and more innovations seeing how well they get respected and given enough credits for their innovative ideas. This is essential because most of the populations are dominated (70 Percent) of the productive age.¹¹

The condition of digital copyright protection in Indonesia can be said to be still low, as evidenced by the level of public knowledge about the importance of copyright, cases of digital art theft are not new. One of the trending topics in the virtual world is when one internet celebrity, Awkarin, was accused of plagiarizing. Nadyah's digital illustrator artwork where Nadyah's illustration artwork was traced by Awkarin to the tote bag that Awkarin sold. Suddenly, many people asked Awkarin to be responsible. It did not stop there, the latest case dragged one of the largest malls in Indonesia, Grand Indonesia, which used a sketch of the *tugu selamat datang*, What is interesting here is that the sketch of the *tugu selamat datang* was made in 1962 but was only sued in 2020 from here it can be concluded that the importance of copyright awareness in Indonesia regarding works of art and also for the owner of the work it is important to know how to protect a work of art so that rights are fulfilled moral and economic rights of the creator. In Indonesia, it is not only the protection that is questionable, but what should be questioned is how it is monitored, considering that in this digital era, everyone is free to download and upload their artworks in cyberspace, apart from the need to educate the public about the protection of works, there is also a need for strict supervision by related parties such as with social media platforms and tightening regulations regarding copyright protection in cyberspace.

Regulation to Combat Piracy in the Digital Cyberspace

As we know, copyrights are one of many aspects of intellectual property protection. The domain of copyrights protects artworks and literature, such as but not limited to paintings, music, electronic databases. These forms of digital legal subjects are protected when announced through internet platforms. Through legislative efforts, Indonesia has passed Law Number 19 in the year 2002 about Copyrights. Specifically, Article 1 Number 5 states “Announcements include readings, broadcasts, exhibitions, sale, distribution, or dissemination

¹¹ Sekretaris Kabinet, “*Hasil Sensus Penduduk 2020; BPS: Meski Lambat ada Pergeseran Penduduk Antar Pulau*” 2021



of an Invention with the use of any tool, including internet media, or to do with anything so that a Creation can be read, heard, or seen by others.” The authors would like to highlight that the essence of intellectual property protection is stressed on the substance matter which correlates heavily on appreciation towards innovation and ideas, despite being existing in virtual cyberspace. On an international level, the authors would like to refer to:

a. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

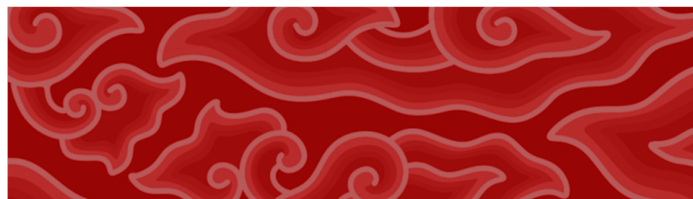
This legal instrument regulates the minimum standards of obligations that its participating member countries have to set forth, including, minimum standards of procedure that are effective to enforce; Civil and Penal administrations; Boundaries; and Its Legal Procedure. The purpose of this agreement is to ensure effective legal instruments to support the enforcement of right bearers and to ensure that the legal enforcement procedure supports safe and secure trades activities.

b. Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention especially in Article 3 Number 1 states “ The protection of this Convention shall apply to (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not; (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.” From here, we can conclude that creators have certainty over the copyright protection legal basis under international law. Although cross-jurisdiction might raise an issue of the practical application of the law.

V. Conclusion

Ensuring the safe protection of an intellectual property right must be fulfilled by the state through the law applicable to each scenario of intellectual property rights violation. By upholding this principle, it is safe to say that a more conducive innovating climate will arise and push more innovations in the areas of industry and technological advancements. Thus, supporting the efforts to ensure stable progress of development in the industrial revolution where it is crucial to take the fullest benefit from its economic potential. The public’s awareness of such a demanding issue must be taken into account to make sure everyone has a role to play



in efforts to protect (at least) their intellectual property. Sufficient legal protocols have been provided by the government's legislation to ensure no vacuum of the law where it is highly necessary and have strong correlations to the nation's economy. Further recommendation from me towards the general public is to educate yourselves regarding your own rights and responsibilities of this issue. Therefore, every effort is integrated to bring the stability of the industrial revolution by implementing intellectual property protection.

In addition to obtaining full legal protection for artists in this digital era, it is necessary to modernize existing regulations and codify our cyber laws and regulations regarding the use of digital works, because they are interrelated. Digital era where everything seems borderless, it is also necessary to build a network between countries regionally or bilaterally to build a cyber ecosystem that is more friendly to cyberspace users and to ensure the absolute security of users. Not limited to the security, economic and moral rights of the artists can be fulfilled and so do the parties who use the artwork can do so wisely without having to violate anyone's rights.



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Trademark Law Treaty

World Intellectual Property Organization (WIPO) Copyright Treaty

World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty

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Law Number 14 in the year 1997 about Trademark

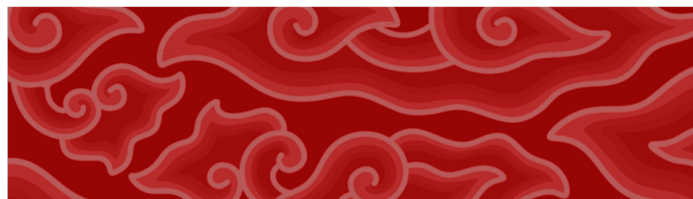
Law Number 13 in the year 1997 about Patent Rights

Law number 12 in the year 1997 about Copyrights

Act Number 20 in the year 2016 about Trademark and Geographical Indications

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Act Number 28 in the year 2014 about Copyrights



Act Number 31 in the year 2000 about Industrial Design

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Direktorat Jenderal Kekayaan Intelektual, Kemenkumham RI



**PHOTOGRAPHY COPYRIGHT PROTECTION:
LEGAL PERSPECTIVE AND EVOLVING ISSUES IN THE DIGITAL ERA**

**by: Fasya Arva Alfonso (ALSA LC Universitas Indonesia), Qiya Islam (ALSA LC
Universitas Brawijaya)**

Abstract

The rapid development of technology comes along with the growth of the internet and changes the behavior of the human community as a whole. These changes of behavior as a whole create a new era called the Digital Era where digital technologies play a prominent role in shaping up and regulating the behaviors, performances, standards of societies. The Digital Era and the Internet, as one of its fastest-growing forms of expression, have posed innumerable new legal challenges to the protection of intellectual property rights. Copyright, as one of the scopes within Intellectual Property Rights, is an exclusive right that gives a creator the exclusive right to make copies of their creative work which arises automatically and aims to protect the creator. The digital era, where technology plays an important role in the speed and breadth of knowledge turnover within the economy and society, raises challenges to the legitimacy of the copyright of a work. This condition raises an obligation for every country to utilize and handle the protection of intellectual property rights, including photography which possesses its own license to be publicly used, also known as Creative Commons. However, currently, there are still countless internet users who disregard the copyright aspect of photography in order to fulfill their own interests, spanning from personal needs to commercial purposes. This phenomenon is an issue which by the least can be prevented in the digital era, where access to various information is much easier including Intellectual Property especially copyright, with the purpose to maintain the rights of the creator.

Keywords: Photography, Technology, Intellectual Property Rights, Copyright, Copyright Protection.



I. Introduction

Photographs are one of the most produced art these days, with more than a trillion photographs are produced annually.¹ The main reason why photography production is exceedingly large is because of the smartphone. Smartphone cameras enable users to shoot and share their photos easily, specifically helped by the existence of numerous social media such as Instagram, TikTok, Facebook, etc. Instagram, for example, is both a playground for sharing photos with friends and a platform where there is lots of strong rivalry among advertisers who rely on photography's expressive ability.² Digital photography however, is entirely different from the conventional one. Digital photographs introduce some new problems that present challenges for law, and some of them are unexpected. In this paper, we explore the perennial problem of law's responsiveness to technological change at the intersection of law and photography.

This paper's particular interest is about copyright policy towards digital photographs. In recent years, there has been debate over how the law should respond to the contradiction between the pervasiveness of photographs and the pervasiveness of unlawful copying.³ Copyright law appears to be the most relevant to the regulation of creative output, including photography.⁴ In many ways, copyright and intellectual property law have become the crucible for concerns and difficulties brought by the emergence of new media for law and policy. These legal and regulatory concerns are being debated in a number of national and international venues, and they are essential to how the digital economy will evolve in the twenty-first century. Copyright is a type of intellectual property that includes rights in creative and literary works, as opposed to industrial property rights such as patents, designs, and trademarks. The idea behind copyright law is that neither the creator of a new work nor the general public should be able to take all of the advantages that follow from the production of a new, original piece of

¹ See Tom Ang, *Photography* 382 (2014) (citing a 2012 estimate by Fujifilm that people take 1.5 trillion images per year globally).

² See Jayson DeMers, "Why Instagram Is the Top Social Platform for Engagement (and How to Use It)", *Forbes* (Mar. 28, 2017), <https://web.archive.org/web/20170328221441/https://www.forbes.com/sites/jaysondemers/2017/03/28/why-instagram-is-the-top-social-platform-for-engagement-and-how-to-use-it/#79d4baca1cc0>.

³ See Jessica Silbey, "Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers"; Eva E. Subotnik, "Originality Proxies: Toward a Theory of Copyright and Creativity".

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authorship. It assumes that original forms of creative expression may be owned by persons who have a moral claim to ownership as well as a valid economic right to gain financially from the use of these works by others as an incentive to create further original works. It also presumes that the use of their original works will be subject to the rules of free and fair exchange, that sufficient remuneration for use by others will be provided, and that protections against misuse will be in place.

Copyright law contains a number of exceptions when it is deemed in the public interest to make works more freely available for free.⁵ However, It is also recognized that original ideas, such as photography, are taken from an existing pool of knowledge and creativity, and that it is thus critical to ensure that such ideas and works can exist in the public domain so that others can use them fairly.⁶ Copyright restrictions should ideally guarantee that copyright law does not needlessly restrict people's capacity to learn from previous works, analyze or discuss cultural materials and contribute to public discourse, innovate and compete, and produce new works of authorship.⁷ This is especially important in photography because copyrights should not be a barrier for creativity, but rather complement it by rewarding all of the photographer. Furthermore, because such information is the lifeblood of democracy, commerce, and the development of future knowledge, broad community access to the broadest possible pool of information, knowledge, and forms of creative expression is a valuable end in itself, as a prerequisite for participation in public life and the development of new knowledge. To balance these conflicting claims on knowledge, copyright law divides the available rights in uses of protected works, giving photographers authority over some of these rights and the general public control over others. This conflict is particularly hard to balance in this digital economy era.

II. Analysis

1. Digital Economy Challenge on Copyrights

⁵See Leval, P.N. (1989) 'Toward a fair use standard', Harvard Law Review, Vol. 103, No. 5, pp.1105–1136.

⁶See Flew, T., Suzor, N., & Liu, B. R. (2013). Copyrights and copyfights: copyright law and the digital economy. International Journal of Technology Policy and Law, 1(3), 297.

⁷See Samuelson, P. (2008) 'Unbundling fair uses', Fordham Law Review, Vol. 77, No. 5, pp.2537–2621.



While copyright disputes have a long history, the intensity of debates over the last two decades has risen around the nature of copyright law, its extent, how it is enforced, and the boundaries placed to its reach. The generalization of worldwide access to the internet and networked personal computers, as well as the related digitization of media material, has been a significant driver of this, but it is indicative of a number of other trends. Four concerns stand out among the numerous that make copyright law increasingly difficult and important in an age of new media and the internet. First, the fast invention and widespread use of technologies that enable low-cost data and information replication has drastically altered the concerns raised by copyright law. Commercial creative industries are distinguished by high costs of original material development, a high failure rate for new commercial products, and near-zero costs of content reproduction.⁸ Unauthorized reproduction of works appears to rights holders as a piracy problem, and much attention has been paid to enforcing copyright in the face of illegal copying, as it is seen as preventing rights holders from amortizing the significant up-front costs associated with the production of new creative works. On the other hand, critics of the copyright industries point to inequitable pricing arrangements as drivers of piracy, particularly in developing countries, and identify the problems as being one of insufficient attention being given to alternative business models in a transformed digital environment. Critics of the copyright industries, on the other hand, refer to inequitable pricing arrangements as causes of piracy, particularly unjust poor countries, and identify the problems as one of insufficient attention being paid to alternative business models in a changed digital world.⁹

Second, the growth of a knowledge economy has resulted in the expansion of intellectual property rights that is stimulated by a successful creative creation that has the potential to generate economic rents throughout time. Third, copyrighted items are now a part of global popular culture in a way that they were not previously unheard-of magnitude. When this is paired with the exponential rise in the amount of material that is widely accessible via digital technology, which also implies that a huge infringement is increasing in both commercial and noncommercial usage of protected goods, as well as non-commercial uses of

⁸ See Hesmondhalgh, D. (2013) *The Cultural Industries*, 3rd ed., Sage, London

⁹ See Karaganis, J. (2011) *Media Piracy in Developing Countries*, Social Science Research Council, Washington, DC



copyright. In this day and age, where most dealings with copyright material may result in potentially infringing copies, which raises the question of what rights people have to utilize copyright material has grown more unclear and it is critical to resolve.

Finally, intellectual property and copyright law have been increasingly globalized over time, most notably with the adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, signed in 1994 after agreement by the signatories to the General Agreement on Trade in Services (GATS), and the establishment of the World Intellectual Property Organization (WIPO) along with the World Trade Organization (WTO). Almost all developing countries are net importers of intellectual property, whereas the United States is a net exporter of intellectual property, thanks to creative sectors such as software and entertainment, as well as many of the world's most valuable trademarks. An author stated that the TRIPS Agreement reflected “unchecked industrial control over the intellectual property agenda” in the 1990s, which was only more successfully contested later by “an increasingly vocal and organized civil society campaign” to resist such dominance.¹⁰

2. The Effect Towards Digital Photography and Occurring Issues with Current Legal Framework

Analyzing from the respective issues that were mentioned above, firstly it can be seen that vast and rapid use of technology opens up opportunity to replicate data, information, and other digital material which drastically would shift the main concern of copyright regulation. The issue that arises from photography copyright in the current digital era can be found throughout the daily use of social media among society. Social media is a communication platform that is used for the purposes of interaction, content sharing, and community collaboration. The most commonly used social media includes Facebook, Instagram, Twitter, LinkedIn, and Pinterest, in which all of the respective social media have a strong reliance towards pictures or photography. As the pictures that are found within social media can be

¹⁰See Sell, S. (2002) ‘Intellectual property rights’, in Held, D. and McGrew, A. (Eds.): *Governing Globalization: Power, Authority, and Global Governance*, Polity Press, Cambridge.



protected by copyright, it is essential that the intellectual property rights aspect of the photography must be taken into account upon using the photographs for various purposes.

The next issue being that the growth of knowledge economy has resulted in the expansion of intellectual property rights, especially related to successful creative creation that possesses strong potential of being monetized, including photography. Currently, the usage of photography is widely used for commercial purpose within the digital era. Within the economic aspect, photography is widely used in multiple form that attract financial profits such advertisement, campaign, artwork until trademark. This phenomenon showcases the impact of photography in the scope of commercial purpose.¹¹ In various events of exploiting someone's creation, there are huge tendencies of neglecting the exclusive rights of the creator. Meanwhile, the entire process of globalization has reduced the enforcement of copyright regulations due to lack of legal socialization and education in regards with intellectual property rights particularly on copyright, to which this is an ironic phenomenon as the digital era supposedly ease the process of spreading every kind of information including law.

Moreover, copyright protected photography is increasing with the assistance of technology. Normatively speaking, intellectual property rights under WIPO is called "creation of mind", meaning that it is a creation that arises from someone's effort, time, and expense. The protection of photography copyright has become complicated over the last few years as new technologies are emerging that hugely impact photography, starting from the simplification of downloading, editing, and reproduction, but also to widely spread the photography through the internet. One of the biggest problem that is commonly faced by photographers is the copyright infringement of their photography by other parties. The lack of information pertaining to their photography's right can be out of control and hard to be maintained. This is considered as national and international issue due to the fact this phenomenon is taking place in the internet in which it disregards state border.¹²

¹¹ Achmad G., (2015). *Rencana Pengembangan Fotografi Nasional 2015-2019*. PT. Republik Solusi.

¹² J. Armstrong, (2007). *Comment: The Digital Era of Photography Requires Streamlined Licensing and Rights Management*. Santa Clara Law Review, Vol. 47.



Under the WIPO legal framework, the copyright aspect of photography is mainly stipulated under the Berne Convention, TRIPS, and GATS. As to respond to the fourth problem, the implementation of the mentioned laws may provide several copyright protection over photography. However, as stated in the previous section of this paper, the existing laws such as TRIPS is considered unfair towards the protection of intellectual property rights within a global case. Multiple countries are now enacting their own copyright related act, which proven to be more relevant and enforceable especially upon providing legal certainty over copyright protection particularly concerning photography and other visual arts. The concrete form of protection upon visual art copyright for example can be seen through the detailed stipulation over right management, resale right (*droit de suite*), and the establishment of collective management organization (CMO). Resale right under the Berne Convention is stipulated in Article 14^{ter}, however this particular provision only applies to countries that regulate resale right. Taking example from The Philippines, it is regulated under Chapter XI of the Intellectual Property Code that every artist whose work is on sale shall receive 5% of sale's gross proceed. As for CMO, there are now over 50 countries that establish their own CMO. CMO essentially manage the primary rights of visual artist, which include reproduction, broadcasting, and communicating to the public. Once again taking example from the Philippines, the Filipino Visual Arts and Design Rights Organization (FILVADRO) was established to advocate the rights of visual artists. Intersecting with the digital era, photography copyright encounters an unprecedented issue, in which everybody around the globe can now have borderless access towards countless photographs for various purposes, which lead to the higher chance copyright infringement.

One of the major issue being that it is becoming more challenging to supervise the copyright aspect of a photograph that is used by internet users, as there is no certain authority or system whose duty is to enforce the copyright law upon a use of photography (Koskinen-Olsson and Lowe, 2012). Pertaining to this phenomenon, we find it critical that states around the world must establish a more versatile international law that can quickly adapt with the dynamics of the digital era, with the sole purpose of globally protecting intellectual property rights, particularly in regards with photography copyright. The concept of this philosophically

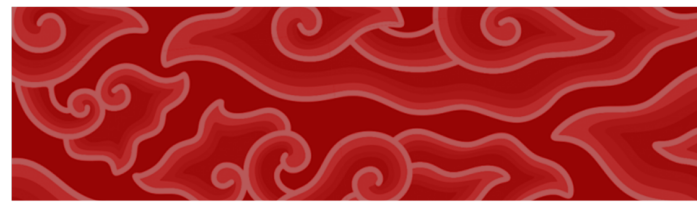


versatile law can be reflected from Satjipto Rahardjo's paradigm of Progressive Law, a paradigm that relies on the constant fluctuation of society with the goal to achieve a law that is contemporarily adaptive without being overly bounded by the rigid process of state bureaucracy.¹³

III. Conclusion

Digital Photography as one of the most produced visual art today is facing a huge and unprecedented challenge with their copyright protection amidst the digital era, where photographs can be easily accessed and used for multiple purposes. the existing regulations pertaining to the intellectual property aspect of digital photograph create a challenge whether they are still relevant upon facing the digital economy. There are four concerns that emerge from this phenomenon, which are fast invention and widespread use of technologies that create a new challenge for copyright law, followed by the growth of knowledge economy that leads to the expansion of intellectual property rights and also copyrighted items are now a part of globally viral culture, and lastly the existing laws regarding copyright are considered unfair. To face these challenges in the digital era, we need to to thoroughly understand how digital photography is used in the internet, with the realization that more extensive socialization of copyright law is required, and more importantly how we can advocate a law that is versatile with the dynamic of digital era in order to constantly protect the copyright of digital photograph.

¹³See Rahardjo, S. (2009). *Hukum progresif: Sebuah sintesa Hukum indonesia*. Genta Pub.



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