

Copyright Protection of Art Containing Nudist Elements Under Positive Law In Indonesia

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DOI: 10.23917/laj.v6i2.17480

Submission

Track:

Received:
9 February 2022

Final Revision:
25 March 2022

Available Online:
26 March 2022

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ABSTRACT

In Law No. 28 of 2014 concerning Copyright, copyright can be granted to photography and painting as works of art produced by human creativity and initiative. Problems arise in realism works of art in the form of painting or photography containing nudist elements. By applying normative juridical research approaches of legislation (statute approach) and conceptual approach, this study examined restrictions based on the meaning of one article that works being the object of copyright protection must comply with morals, religion, morality, public order or national defense and security. The findings revealed that copyright objects in the form of works of art containing nudist elements, as long as they follow the culture of the local community and are not intended to arouse sexual arousal, are entitled to copyright protection.

Keywords: Artwork, Copyright, Protection.

INTRODUCTION

As creatures having the power of reason, creativity, and initiative, humans always produce creative works of art and continue to grow. Works of art, as well as cultural expressions of society, often appear in various ways with their philosophy and values. In this case, ethical or not, good or bad, and whether or not a work of art is beautiful cannot be judged by one perspective alone. Artwork may be judged by society as good and ethical, but at the same time, it can be unethical or taboo for other societies.

One form of art depicting many of the above conditions is realism, which can reveal nudity elements. The most real examples are photography and painting of Balinese women showing their breasts and Papuan people not wearing clothes but only *koteka* to cover their genitals. Such photography and painting are normal and common for their society, but not necessarily for others. It becomes an acceptable work of art or an acceptable work of art containing elements of “pornography”. It cannot be separated from sociological factors since every ethnic group in Indonesia has differences in responding to the parts of the human body being the source of desire and lust and interpreting pornography. The term pornography is formed by the words *pornos* meaning violating decency or obscene and *grafi*, which means writing and now includes pictures and statues. Pornography can take forms of writing and pictures or sculptures that offend the moral sense of those who see and read them.

If drawn into the discourse on intellectual property rights (IPR), such problems and phenomena can become a long and interesting discourse. As regulated in the IPR, photography and painting are included in the copyright regime as a work of art. This copyright has been regulated in Law Number 28 of 2014 concerning Copyright (Copyright Law). The problem is then, in the regulation of Copyright Law, the protection of copyrighted works can only be carried out on works in science, art and literature as regulated in Article 40 of Copyright Law. However, explicitly in Article 50 of Copyright Law, there are restrictions and prohibitions for anyone making announcements on the distribution or communication of works contrary to morals, religion, morality, public order or the defense and security of the state. If interpreted, including in Article 50, it is a work of art that contains pornographic elements or natures.

However, Copyright Law does not regulate which works of art are truly qualified as works of art that contain pornography and which works of art can indeed be said to be “pure” works of art even though they have “nudist” elements. In this context, Law Number 44 of 2008 concerning Pornography (UU Pornografi) is a rule that must be referred to judge whether a work of art containing nudist elements is included in the qualification of a pornographic work of art or not. It is crucial to determine because it will be closely related to the issue of copyright protection for the artwork. Therefore, the authors studied painting and photography containing nudist elements qualified as pornographic works according to Positive Law in Indonesia and the validity of copyright protection for works of art containing nudist elements.

RESEARCH METHOD

This study belongs to normative juridical research. It is research conducted on legal principles and the level of legal synchronization. It aims to analyze a review of artworks containing nudist elements related to intellectual property rights and Pornography Law. It was performed because the researched problems revolve around the applicable laws and regulations. This study also investigated how these laws and regulations have been implemented. This research was carried out using statute and conceptual approaches. The law approach was conducted by examining laws and regulations related to Pornography Law. Meanwhile, a conceptual approach is one type of approach in normative legal research in which researchers try to build legal arguments from the perspective of concepts in the field. Indeed, the case is closely related to events, painting and photography containing nudist elements that can be qualified as pornographic works according to Positive Law in Indonesia and the validity of copyright protection for works of art containing nudist elements.

RESULTS AND DISCUSSION

Artworks Containing Nudist Elements As Creation According to Positive Law in Indonesia

As mentioned in the introduction, the artwork is the object of the copyright regime. As stated in Article 1 of Copyright Law, “Copyright is the exclusive right of the creator that arises automatically based on declarative principles after a work is manifested in a tangible form without reducing restrictions following the provisions of laws and regulations”. In essence, copyright regulates copies, does not regulate original works, and involves small amounts of money. It is usually in the form of quotations imposed to make copies for the needs of other people wanting to enjoy the copyrighted work and not involving large amounts of money that must be paid. Someone gets paid to own work like no other (Goldstein 1996).

Artworks in the form of painting and photography are included in the object of the copyright regime. In detail, the object of copyright is stated in Article 40, paragraph 1 of Copyright Law (UUHC), covering:

- 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 music with or without subtitles;
- e. drama, musical drama, dance, choreography, wayang, and mime;
- f. works of art in all forms such as painting, drawing, carving, calligraphy, sculpture, or collage;
- g. applied art;
- h. architectural works;
- i. map;
- j. batik art or other motif art;
- k. photographic works;
- l. portrait;
- m. cinematography works;
- n. translation, interpretation, adaptation, arrangement, modification, and other works resulting from the transformation;
- o. translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions;
- p. compilation of works or data, either in a format that can be read with a computer program 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.

However, painting and photography as protected creation must be works of art that do not conflict with morals, religion, morality, public order or the defense and security of the state. It can be determined by a contrario interpretation of Article 50 of Copyright Law, which affirms, “Everyone is prohibited from publishing, distributing, or communicating works contrary to morals, religion, decency, public order, or state defense and security”.

In the research context, the question is whether the works of art in photography or painting containing nudist elements, such as Balinese women showing breasts and Papuan people not wearing clothes but only *koteka*, are considered contrary to morality? Of

course, if the parameter used to evaluate is the cultural value of living in society, it will give birth to highly diverse views. Hence, it is not easy to get a legal perspective.

Therefore, to evaluate the work of art in question, it is necessary to employ a more definite approach to legislation. In this context, the legislation that needs to be applied as an analytical tool is Pornography Law. As stated by Wirjono Projodikoro, pornography is an offense relating to writing, pictures or sculptures that offend the moral sense of people who see and read it.

In the big Indonesian dictionary, pornography is defined in two meanings: first, depicting erotic behavior by painting or writing to arouse lust and second, reading material intentionally and solely designed to arouse lust in sex (Indonesia n.d.). Pornography is often contrasted with art. In this case, eroticism is considered a different term from pornography. The term eroticism comes from the Greek word *Eros*, the name of the God of Love, son of Aphrodite. The equivalent of this word in English is eroticism, or in nouns, it is erotica. According to Benny Hoed, eroticism does not have a basic meaning of “obscene”, but rather a description of behavior, circumstances, or atmosphere based on the inspiration of “libido and sex” (H.Hoed 2001).

Oemar Seno Adji cited the definition of pornography according to OPI, as follows: “A writing or an image can violate the feeling of politeness, if the writing or image does not contain the slightest value, but only contains a desire or enthusiasm to deliberately arouse lust so that according to the norms (religion, divinity, science and others) that apply in an era and a society raises the mind of people who read or see it on moral violations” (Adji 1997).

Normatively referring to Pornography Law as contained in Article 1 paragraph 1, the definition of pornography is pictures, sketches, illustrations, photos, writings, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms. Communication media and public performances contain obscenity or sexual exploitation that violates the norms of decency in the society.

According to Pornography Law, the definition of pornographic objects is broader than pornographic objects according to the Criminal Code. The Criminal Code mentions three objects: writing, pictures and objects. Objects of pornography, according to Pornography Law, have been expanded in such a way as to include pictures, sketches, illustrations, photos, writings, sounds, moving images, animations, cartoons,

conversations, gestures, or other forms of messages through various forms of communication media.

Based on Article 1, paragraph 1 of Pornography Law, pornographic objects contain three characteristics:

1. Obscenity
2. Sexual exploitation
3. Violating moral norms

Creation in the form of realism art containing nudity in this context involves painting and photography of Balinese women showing breasts and Papuans not wearing clothes. The authors believe that those objects cannot be said to fulfill the elements and characteristics of pornography because the contents do not contain obscenity. Content containing obscenity must be related to creating the work to arouse sexual desire, or in Oemar Seno Adji's language is to arouse lust, not containing the slightest value deliberately. If the creation of the work is intended as a work of art that aims to reveal the reality of life in society and the philosophical values, not to arouse sexual arousal, it cannot be said to be obscene content. In addition, painting or photography containing nudist elements in the context of the cultural reality of the community cannot be said to violate the norms of decency because the cultural reality complies with the moral values of the local community.

This authors' opinion is in line with the opinion of Cak Kandar, in Kompas 3 February 2006, who stated, "As long as the creation aims to generate creativity and to understand it requires intelligence, there are aesthetic and artistic elements, and contains moral and philosophical values, the work is considered art." In essence, work is said to be a work of art if it was created not to stimulate sexual arousal.

Apart from that, the authors' analysis above is in sync with the legal considerations of the Constitutional Court (MK) in decision No. 10-17-23/PUU-VII/2009, adjudicating the examination of Pornography Law. The Constitutional Court explicitly agreed with the Government expert, Prof. Dr. Tjipta Lesmana and Dr. Sumartono, asserting that five fields could not be categorized as pornography, comprising art, literature, customs, science, and sports. Pictures, sketches, illustrations, photos, writings, sounds, sounds, moving pictures, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and public

performances, in the context of art, literature, customs, science, and sports are not pornographic acts as referred to in Quo Law.

Furthermore, the Constitutional Court believes that Pornography Law does not prohibit the performers of arts, literature, customs, science, and sports from exercising their constitutional rights. Things prohibited and restricted are actors who intentionally display pictures, sketches, illustrations, photos, writings, sounds, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and performances in public not within the framework of these five fields. Thus, insofar as arts, literature and culture are concerned, they can be exempted from the prohibitions under this law as long as they do not conflict with moral norms according to the place, time and environment, and are not intended to cause sexual excitement, following the characters of the people, art, literature and culture (Konstitusi 2009).

With the non-fulfillment of the nature of pornography as stated by the authors, it is proper that creation in a realism art containing nudity can be legally an object of copyright as regulated in Copyright Law, as long as the object of the image is nudist following the cultural reality of the local community and the creation is intended to be unintentional to arouse sexual arousal.

The Legality of Copyright Protection for Artworks Containing Nudist Elements

As one of the developing legal regimes in both developed and developing countries, the issue of Intellectual Property Rights (IPR) needs special attention, considering many violations of IPR around us. IPR was adopted from Intellectual Property and thick with international influences such as the World Intellectual Property Rights Organization. IPR are rights (authority/power) to do something on intellectual property regulated by applicable norms or laws (Sutedi 2009).

One area of IPR is Copyright, which affects the country's economic sector regarding trade matters. In response to this, the Trade-Related Aspect of IPR was formed with the Geneva convention in 1990, applying to countries members of the World Trade Organization (WTO). TRIPs then become guidelines for countries that regulate copyright protection. It means that WTO member countries must harmonize laws based on TRIPs.

Likewise, Indonesia, promulgated in Law No. 12 of 2007, last amended by 28 of 2014 concerning Copyright, explains that Indonesia has become a member of the WTO, approved TRIPs and ratified the Berne Convention for the Protection of Artistic and Literary Works. As the first principle that introduces automatic copyright protection, copyright consists of two aspects: the moral and economic aspects. The moral aspect or personality rights or *persönlichkeitsrecht* focuses on the ownership of the copyright inherent in the creator (Wijaya 2003). In comparison, economic rights are to obtain economic benefits from copyrighted work. These two aspects are the main aspects that must be considered when discussing copyright.

The doctrines that develop in copyright protection include publicity, making available right, proper use, work on a lease basis, character protection, traditional knowledge in the scope of copyright and new scopes such as free software, copyleft, and open source. These are things that the government must accommodate through its regulations because Indonesia is a state of law, not to mention intellectual property rights resulting from human thought or intellectual abilities (Soelisty 2011).

Another source states that several theories are the basis of the legal protection of intellectual property. First, the reward theory states that the creator must be given protection for his success in producing a new creation. Second, the recovery theory focuses on the exclusive rights given to the creator to return the energy, time, and costs incurred to make the creation. The third is the incentive theory, explaining that this protection is given to stimulate creativity to produce more and more new creations. The last is the public benefit theory, asserting that intellectual property is a tool for economic gain (Kansil 1993).

The initial idea of this protection stems from the moral rights personal and attached to a creation, considering that creation is made directly by the creator from the fruit of his mind. As a form of the seriousness of the Indonesian government in addressing copyright infringement, a regulation was made to protect creators or copyright holders (Undang-Undang 2014). The concept of protection, in general, can be seen from the initial process of how the protection is obtained to the law enforcement provided in copyright infringement.

There are two protections in the initial process, from registration or not because of registration. With registration, legal protection is obtained after the rights to a work are registered, while protection automatically or without registration is first recognized by

the Berne Convention, stating that legal protection must be provided without fulfilling any conditions. This automatic protection was later adopted in Copyright Law, which clearly explains that the registration of works is not a must for the creator or copyright holder.

The consequence of not having to register a copyright is that the protection of this work begins since the creation exists. The copyright is attached to the work when a work is made. The function of registration is related to evidence in court. When a dispute arises, a copyright certificate can be used as legal evidence to prove that the work is the right of the party on the copyright certificate.

Furthermore, the registration is also of two kinds, constitutive and declarative (Syahrial 2014). Constitutive means that the right to work is born because the copyright registration certificate has strong power to show that it is the right person whose name is listed as the copyright owner. The emphasis on this constitutive registration is on the evidence of the registration that creates the copyright. In other words, the holder of this registration proof becomes strong even though there are parties who recognize the ownership of the rights to the registered work in the future. It is different from declarative registration, which essentially shows that the copyright owner is the person who registered until someone else proves otherwise.

The difference depicted between the two systems is that in declarative registration, the party issuing the copyright certificate, in this case in Indonesia, is the Directorate General of Intellectual Property Rights (Ditjen HKI), not fully responsible for the truth of the work. It can be seen from Copyright Law, stating that unless proven otherwise, those considered as creators are those whose names are mentioned in work, certify as the creator of a work, are mentioned in the creation registration letter, and are listed in the general register of works as the creator (Undang-Undang 2014).

It indicates that Indonesia adheres to declarative registration wherein the registration process, the Directorate General of IPR does not fully check the truth of work whether it is the original creation of the creator. Copyright Law opens up opportunities for those who feel that the work registered is theirs to prove the validity of the copyright. In other words, the validity of the copyright certificate does not have strong power and fully proves the ownership of the copyright but applies as long as no party proves otherwise.

After discussing the types of registration adopted in Indonesia, the next is to discuss what objects of copyright, including art and literature, are protected by Indonesian copyrights. As explained in the formulation of the first problem, there are problems when discussing art objects because art reflects the freedom of thought. Hence, when discussing art, of course, there will be no limits.

However, speaking of the specifics of art protected by copyright in Indonesia, it follows the standards set by legislation. Freedom of art is limited by related regulations such as Pornography Law on art containing nudist elements. It should be noted that the standard of the nudist elements is not clear, even in Indonesia, where western and eastern Indonesian cultures have different standards regarding these elements.

By studying the formulation of the first problem, the main object of copyright is works of art containing nudist elements. As long as they comply with the culture of the local community and do not intend to arouse sexual desire, they are entitled to copyright protection.

The protection referred to in addition to registration as described previously is also related to law enforcement aspects in copyright infringement. Law enforcement by Soerjono Soekanto is defined as an activity that harmonizes the relationship of values outlined in the rules or views of values that manifests and acts as a series of final stages of value translation to create and maintain a peaceful life. Meanwhile, to determine whether law enforcement has been effective, it can be seen from community factors, the law itself, facilities, law enforcement, and culture (Soekanto 2010).

If described further, the legal aspect in question is Copyright Law, which must accommodate copyright protection. International arrangements provide an obligation for countries to provide strict legal sanctions for copyright crimes (Yanto, 2015). Copyright Law in Chapter XVII stipulates criminal provisions in nine articles, each regulating imprisonment and fines. It should be noted that Article 120 of Copyright Law states that a criminal act is a complaint offense.

It is interesting that since the beginning of the enactment of this copyright arrangement, the offense used has changed. Initially, it was used as a complaint offense, then it changed to a regular offense and is now being used again for a complaint offense. The complaint offense requires a crime to be reported by an interested party (Kumendong 2017). It means that parties uninterested in or directly affected by a crime are not authorized to report the action. This change from an ordinary offense to a complaint

offense is purely to obtain the exact formula beneficial to enforce copyright protection. However, as a consequence of the applicability of the complaint offense, by submitting the prosecution to an interested party, there is an opportunity for the settlement to be carried out amicably between the perpetrator and the interested party outside the intervention of law enforcement (Harahap 1986).

Indeed, the criminal system cannot provide economic protection to creators or copyright owners. If it is related to economic rights violated due to copyright infringement, sanctions in the form of imprisonment do not return the economic rights that the creator or copyright holder should obtain. Therefore, Copyright Law also provides an opportunity for filing civil lawsuits against parties who violate copyright. It is confirmed in Article 105 of Copyright Law, stating that the right to file a civil lawsuit for copyright infringement and related rights does not reduce the rights of the author and related rights owners to prosecute criminally. Even in Article 113, it is stated that violators of economic rights for commercial use can be subject to criminal sanctions.

This arrangement is made in such a way as to protect economic rights, which are part of copyright and provide a deterrent effect by imposing criminal sanctions. The Criminal Code also regulates copyright, namely Article 480, which mentions the crime of piracy.

Provisions regarding the imposition of sanctions on Copyright Law have increased in the sense that since the beginning of the enactment of copyright, namely Law No. 19 of 2002 concerning Copyright, sanctions for copyright violators have been exacerbated by the amendment of the law on copyright. It demonstrates the seriousness of the government to enforce regulations regarding copyright.

Apart from the protection regarding registration and sanctions, legal protection can also be seen in terms of the period of validity of the copyright. The regulation regarding this period provides legal certainty for the creator or copyright holder so as not to worry about the validity of their creation. Copyright Law stipulates that the moral rights of the creator have no time limit. Moral rights continue to be attached to the creator or copyright holder.

As for economic rights, copyright protection for artistic and literary works is regulated in Article 58 of Copyright Law, valid for as long as the creator lives and continues for 70 years after the author's death, starting on January 1 of the following year.

If more than one person creates a work, it is counted from the last creator who died, and if a legal entity owns the creation, it is valid for 50 years from the first announcement. This protection ensures that the creator gets the maximum benefit from his creation. Even with 70 years, it certainly provides benefits for his heirs. Furthermore, the heirs of the creator are also entitled to file a lawsuit against people who intentionally violate the moral rights of the creator.

By observing and outlining the copyright protection regulated in Copyright Law, there is an increase in the quality of regulations from year to year. Both in terms of registration, law enforcement, and copyright validity period, it should be emphasized again that not all copyrighted objects are entitled to copyright protection. Several criteria must be met for an object to be copyright protected. This paper explains the various forms of protection found in copyright and emphasizes what kind of copyright object is entitled to such protection.

However, by looking at the fact that there are still many copyright violations, the regulators must pay full attention to accommodate and re-evaluate, especially to media platforms currently developing rapidly. In addition, another factor is that the public must have legal awareness that violating copyright is not justified by law. The synergy between rule makers, the community, and law enforcement needs to be improved to achieve optimal legal protection for creators. Of course, not following up on copyright infringement reduces people's enthusiasm to compete to produce copyrights, hindering the progress of a country.

CONCLUSION

Based on the description in the previous section, works of art in painting and photography are included in the object of the copyright regime. Normatively, it is explicitly stated in Copyright Law. Painting and photography as protected creation must be works of art that do not conflict with morals, religion, morality, public order or the defense and security of the state. In creation in a realism art containing nudity, it can legally become an object of copyright as regulated in Copyright Law, as long as the object of the image is nudist following the cultural reality of the local community and its creation is not intended to arouse sexual arousal.

Therefore, a suggestion can be made that the concept of protection, in general, can be seen from the initial process of how such protection is obtained to the law enforcement

provided in copyright infringement. Realism artworks containing legitimate nudists as copyright objects are entitled to copyright protection. The protection referred to is related to the work registration and aspects of law enforcement in copyright infringement. Apart from the protection in registration and sanctions, legal protection can also be seen in the period of validity of the copyright. This regulation regarding the period provides legal certainty for the creator or copyright holder. Hence, they do not need to worry about the validity of their creation.

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