

Legal Protection of Internet Intermediary to Copyright Infringement by Users (Comparative Study on Indonesia, USA and European Union)

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ABSTRACT

The enormous use of internet services makes digital workings continually duplicated and disseminated to thousands of people in a short period of time. In addition, the limitations of Indonesian law on the internet intermediary position for copyright infringement by its users become an important matter for conducting comparative studies on the regulation of internet intermediary liability limits in the laws of the United States and the European Union as the country with the highest protection of intellectual property rights. This paper uses normative methodology by examining the library materials or secondary data as the main object. The problems discussed in this study are: *First*, how is the regulation of internet intermediary liability for copyright infringement in its services in terms of Act No. 28 of 2014 on copyright? *Second*, how is legal protection afforded to the Internet intermediary for copyright infringement by users reviewed from the perspective of regulations in Indonesia, the USA and the European Union?

Keyword: *intellectual property rights, copyright, internet intermediary*

1. INTRODUCTION

1.1. Background

The existence of copyright is so important that it must be protected by the latest legal instruments. The rapid development of science and technology requires a renewal in the rules of copyright. This becomes the background of the formulation of Act No. 28 of 2014 on Copyright (hereinafter referred to as copyright act) in lieu of Act No. 19 of 2002 which regulates the same. The latest regulations in copyright act is the special chapter on copyright and related rights content in information and communication technologies precisely Articles 54 to 56 that answer the concerns of copyright owners and related rights in various activities on the internet that have the potential to infringe copyrights. Under this regulation the government has the authority to monitor the

dissemination of copyright and related rights infringement content to cover all or any content that infringes copyright in the electronic system.

The regulations are becoming increasingly urgent given the lives of today's people who are heavily dependent on technology and information. The presence of the internet as a technological advancement led to the massive dissemination of information and communications around the world. (Andi Kurniawati, 2015 : 3) Particularly in Indonesia, the use of internet services began in the early 1990s among students. (<http://www.cc.saga-u.ac.jp/backnumbers/viewer.php>, accessed on April 17, 2017). Based on the latest data from *We Are Social* as quoted by Lina Noviandari, internet penetration in Indonesia in 2015 reached 34%. In other

words, there are 88.1 million users of internet services in Indonesia. A total of 79 million of whom are active social media users and the majorities are domiciled in big cities.

(<http://print.kompas.com/baca/2015/07/21/P-enetrasi-Internet-Belum-Merata>, accessed on December 17, 2017).

The enormous use of internet services makes digital workings continually duplicated and disseminated to thousands of people in a short period of time. (Danu Giritono, 2014: 4) Even the transnational nature of the internet in the distribution of messages, pictures, videos, and other works also creates new problems difficulty in identifying those liable for copyright infringement that occurred on the internet. In addition, the capability of the internet to copy and distribute copyrights widely raises concerns for many parties, especially the creators and industry, where trading managers get expansive liabilities since the emergence of copyright act. (Andi Kurniawati, 2015: 5)

Article 10 of the copyright act determines that the manager of a trading place is liable for the place of sale and/or infringement of the copyright and/or related rights at the center of the managed shopping mall. Although this provision basically targeted shopping centers that allowed the practice of copyright infringement therein, however, in the absence of limitations on "trading places" within the copyright act, the term "trading place" could be interpreted broadly to include a trading place online such as market place and e-commerce. Thus, this rule becomes applicable to service providers measuring as internet intermediary.

In addition, the internet intermediary may also be held liable as a party to assist in the commission of copyright infringement committed by its users under Article 56 of the Indonesian Criminal Code. The reason is that the platform operated by the service provider has enabled the occurrence of the act of copyright infringement. As a result, the potential legal liability of service

providers is becoming increasingly widespread, not only in terms of Article 10 of copyright act, but also other copyright infringements. (www.hukumonline.com, accessed on June 05, 2017) This is complicated by the difficulty of detecting perpetrators of copyright infringement on online access, in contrast to offline access that is generally done on a limited scale and more easily controlled. In addition to free web hosting services, usually offenders are anonymous so it is very difficult to know the uploader of the copyrighted work.

Although until now there has been no lawsuit against internet intermediary for copyright infringement committed by users of the service through the internet, the enforceability of copyright act allows the lawsuit to be sued. For example, until now there have been several cases sued to the courts of America, France and China in particular the lawsuit to the internet intermediary regarding copyright infringement by users of the service. Therefore, it is important to examine how legal protection afforded the Internet intermediary for copyright infringement by its users. In this discussion, researchers used comparative studies between Indonesia, USA and European Union. (www.koran-sindo.com, accessed on December 19, 2017)

1.2. MATERIALS AND METHODS

This research was conducted using juridical-normative approach method. The normative juridical approach is the problem approach by looking at, examining and interpreting theoretical matters concerning legal principles in the form of conceptions, legislation, views, legal doctrines and related legal systems. This type of approach emphasizes the acquisition of information in the form of legal texts related to the object under study. (Abdulkadir Muhammad, 2004: 112) This explanatory research aims to describe more clearly and precisely the problems of legal protection of internet intermediary. The data used in this research is secondary data obtained through library research by reading, studying literature,

legislation, documents related to the issues discussed in this study. The secondary data under study consisted of primary legal materials and secondary legal materials. (Peter Mahmud Marzuki, 2008: 140)

2. RESULT AND DISCUSSION

2.1. Internet Intermediary Liability for Copyright Infringement of its Services Under Act No. 28 of 2014 on Copyright

2.1.1. Copyright Infringement in Act No. 28 of 2014 on Copyright

To obtain protection, a work or creation must qualify for authenticity or originality. (Paul Goldstein, 2001: 161) The definition of authenticity is not contained in copyright acts, even the Bern Convention, international conventions do not require authenticity as a condition of protection, but almost all copyright legislation in different countries applies this requirement. In addition to the requirement of authenticity, the act also requires that a creation must have been laid in a certain expression medium in order to be protected. Copyright does not protect ideas but rather an expression of ideas. Therefore, copyright protection exists when the idea has been laid in a medium of expression so that it can be seen, read and heard.

Copyright infringement is the use of copyrighted work, which infringes the copyright holder's proprietary rights, such as the right to reproduce, distribute, show or display, or create derivative works without the permission of the copyright holder. Copyright infringement occurs when there are similarities between the two existing creations. However, the creator or copyright holder must prove that his or her work has been copied, or else the work is derived from his work. Copyright is not infringed if similar works are produced independently, for example each creator will acquire the copyright of their work. (Dimas Amirul Prihandoko, 2012: 61) For copyright infringement, at least three conditions are required:

1. Existence of a work that is protected by copyright;

2. Actions that constitute a infringement of an exclusive right owned by a creator or a copyright holder such as, propagation or announcement; and

3. There is no legal justification for such action. (Alain Strowel and Vicky Hanley, 2009 : 75)

Copyright infringement may take the form of retrieving, quoting, recording, reproducing, or announcing some or all of the other person's creations, without the author's permission/copyright holder, or prohibited by law, or otherwise in breach of the agreement. Prohibited by law means that the law does not allow such action because: (Abdulkadir Muhammad, 2001: 220)

1. Harm the creator/copyright holder, such as partial copying or the entire creation of others and then traded to the public;
2. Harm the interests of the state, for example to announce a work that is contrary to the government's policy on defense and security;
3. Contrary to public order and decency, such as reproduce and sell Video Compact Disks (VCDs) containing pornographic films.

Creator, copyright holder or associated rights manager who suffers from economic loss for copyright infringement is entitled to file a lawsuit to the Commercial Court and receive compensation. A claim of indemnity in the form of a request to surrender all or part of the proceeds derived from the conduct of lectures, scientific meetings, or exhibitions of works that are the result of copyright infringement. The indemnity shall be payable no later than 6 months after a permanent legal court decision. In the copyright act, copyright infringement is formulated in a contrario, (Liza Erwina, library.usu.ac.id, accessed on December 18, 2017) the act formulates the exceptions to copyright infringement precisely set forth in Articles 43 and 44 concerning acts that are not considered copyright infringement. In addition, the same thing that is prohibited by law is the practice of illegal copying or unlawful

copying and distributing it more widely for economic benefits.

In the context of the internet, illegal copying is the most common offense. The work copied illegally is not limited to music, literature, works, cinematography, and drawings. (<http://www.copyright.org>, accessed on 15 June, 2017) Illegal copying is a worldwide infringement, not least in Indonesia. In the latest Special 301 List of April 2016 issued by the United States Trade Representative, Indonesia entered into the Priority Watch List category which indicates the existence of problems related to protection and enforcement of intellectual property rights and market access to goods containing intellectual property rights. (Office of The United States Trade Representative, 2016: 3) In addition to illegal copying, there is also a new model in which sellers use the internet means to gain economic benefits from the work of others.

2.1.2. Internet Intermediary as a Liable Party in Copyright Infringement on the Internet According to Act No. 28 of 2014 on Copyright

Organization for Economic Co-Operation and Development (OECD) identified internet intermediary as follows:

1. Internet access and service providers (ISPs);
2. Data processing and domain name web hosting provider, including domain name registrants;
3. Internet search engine and portal;
4. Electronic commerce intermediaries, where this platform does not specify the type of goods sold;
5. Internet payment system; and
6. Participatory networking platforms, which include internet publishing and broadcasting platforms that do not create or have their own content to publish or broadcast. (Ms. Karine Perset, 2010 : 9)

Simply internet intermediary is defined as a platform (application or website) that provides communication facilities or interaction from one user to another through the internet. Service

providers serving as Internet intermediaries usually do not provide content on the platform. Most or all of the content comes from the users of the platform (otherwise known as User Generated Content (UGC)). Internet intermediary can be found in online trading services where users can sell their goods to other users through the intermediary platform, can also be a social media, video streaming, and even can include companies that provide Internet Service Providers (ISPs) that facilitate internet access to users. (Danny Kobrata, www.hukumonline.com, accessed on 18 December, 2017) In relation to the issue of which parties may be liable for an infringement of copyright, there are two theories in this case, namely direct liability and secondary liability. In the context of copyright infringement, direct infringer is referred to as a primary party, directly and actively committing an act which is a infringement of exclusive rights owned by the creator or copyright holder. (Gerald R. Ferrera, 2004: 7)

a. Direct internet intermediary liability;

Under copyright act, internet intermediaries are vulnerable to sanctions for copyright infringement by users of their services especially if positioned as a place of trade managers. Potential sanctions can be seen from the formulation of Article 10 of copyright act that reads:

“Managers of trading places are prohibited from allowing the sale and/or copying of goods resulting from infringement of copyright and/or related rights in the trading place they manage.”

Managers of trading places regulated under copyright act do not impose limits on whether to target shopping centers offline or online. When referring to Act No.7 of 2014 on Trade, the place of online trading is also not found explicitly. Nevertheless, the act uses the term "trading through electronic systems" to define trades where transactions are conducted through a series of electronic devices and procedures. Especially when viewed in the general provisions of

copyright act, the internet is also recognized as a tool to announce a creation. So it is not possible to internet intermediary which in the identification also refers to intermediaries online trading through the internet can be sued for copyright infringement by users who are technically difficult to trace.

Copyright act implies internet intermediary to implement a technology system that can prevent or resolve copyright infringement. Though technically, such a system is very difficult to develop. Even internet content providers such as Youtube, Google, Instagram, Facebook are still having trouble creating a technology that can precisely prevent copyright infringement on their platforms. (Danny Kobrata, www.hukumonline.com, accessed on 18 December, 2017) This is considered vulnerability if the copyright acts sanction the manager of a trading place that is known to allow the sale or copying of the goods resulting from copyright infringement or related rights in the trading place it manages.

The use of the word "trading place manager" in all its forms makes the internet intermediary a possible defendant because the law is not strictly limiting, and the absence of technological solutions that trace users of copyright infringement makes internet intermediary more vulnerable. Due to the limited ability to identify and acknowledge the existence of a party actually infringing a creation on the internet, the copyright holder seeks the possibility to hold liability from the internet intermediary for copyright infringement committed by the user. Internet intermediary in this context is fully liable without being able to make any effort in the absence of such a solution.

b. Secondary internet intermediary liability;

In other considerations the internet intermediary may also be positioned through indirect accountability in copyright infringement by its users. Whereas in both

criminal and civil law (Article 1367 Indonesian Civil Law), legal liability is imposed not only on the principal actors acting contrary to law. In common law countries it is also known as the secondary liability model for unlawful acts committed by others. There is also a tendency to deal with copyright infringement with civil litigation rather than criminal lawsuits. This is because parties who feel disadvantaged for copyright infringement prefer compensation rather than corporal punishment such as imprisonment to perpetrators in criminal prosecution. (Tim Lindsey, 2006: 125) It becomes an important matter to provide internet intermediary liability restrictions for unlawful acts committed by its users.

2.2. Internet Intermediary Legal Protection for Copyright Infringement by Users in Indonesia, USA and the European Union

2.2.1. Internet Intermediary Legal Protection for Copyright Infringement by Users in Indonesia

Indonesia has not yet formulated any restrictions on the liability and protection of internet intermediary law for copyright infringement on the internet. Copyright act only provides protection against copyright holders for copyright infringement in information technology-based facilities, through the following efforts:

1. Supervision of the manufacture and dissemination of copyright infringement and related rights;
2. Cooperation and coordination with various parties, both domestic and foreign in preventing the creation and dissemination of copyright infringement content and related rights; and
3. Supervision of recording actions by using any media on the creation and associated rights products at the venues.

Infringement of copyright through electronic system, investigation conducted after reporting process by witness followed by verification process by ministry of justice. If there is sufficient evidence of

such reporting, the minister receiving the report recommends to the telecommunications and informatics ministers to close some or all of the content that infringes copyright in the electronic system or makes the electronic system services inaccessible.

To follow up this mechanism, the Minister of Justice and Human Rights and the Minister of Communication and Information of the Republic of Indonesia issue Joint Regulation No.14/1985/No.26 of 2015 on the Implementation of Closure of Content and/or User Rights of Copyright Infringement and/or Related Rights in Electronic Systems. This joint regulation does not govern the internet intermediary, only in Article 18 states that the content owner and/or user of access rights may request to the minister to reopen the content by applying for the following reasons:

1. no infringement of copyright and/or related rights;
2. there is cooperation or permit from the party as referred to in Article 2 paragraph (2)
3. there is a mediation process with the content closure reporter and/or user access rights; and/or
4. court ruling.

Especially regarding internet intermediary can be seen in Circular of the Minister of Communication and Information of the Republic of Indonesia No. 5 of 2016 on Limitations and Responsibilities of Platform Providers and Merchant Trading Through Electronic Commerce System which is User Generated Content. According to the circular, the platform provider does not apply its liability to electronic system administration if it can be proven that the force majeure, error, and/or negligence of the users of the electronic system. This means that as long as the internet intermediary as a platform provider is able to prove that copyright infringement is due to force majeure or by mistake or even due to negligence of users then internet intermediary responsibilities can be eliminated.

Although the presence of these circular provides restrictions on internet intermediary responsibilities, it is not enough to protect the internet intermediary as a digital industry undertaking. This is because in hierarchy, the circular cannot rule out the rules that exist in legal instruments at the same level of law as copyright acts, government regulations and other rules. In addition, the position of circular is not known in the hierarchy of legislation in Indonesia so that it can be said that it is only an appeal not a rule of law that has a fixed and permanent legal power. It will require an equitable legal instrument to regulate internet intermediary liabilities on the internet as a *lex specialis* that can override laws that are legally threatening business actors in the digital industry.

2.2.2. Internet Intermediary Legal Protection for a Copyright Infringement of Users in United State of America

The United States regulates the limitation of internet intermediary responsibilities through the Digital Millennium Copyright Act (DMCA) legislation effective since 1998. The DMCA adopts a "notice and take down" system in which internet content providers will not be liable for infringing copyrighted content is in its platform as long as the content provider is unaware of the existence of the copyright infringing content, does not receive direct financial benefits from copyright infringing content, and immediately removes the content upon receipt of a copyright infringement report.

In the second chapter of the DMCA entitled Online Copyright Infringement Liability Limitation (OCILLA) there are rules of limiting internet intermediary liability when copyright infringement is committed by users. The limitation of internet intermediary responsibilities in DMCA is known as safe harbor as set forth in section 512. The limitation of DMCA liability is divided into 4 categories:

1. Section 512 (a) governs the limitation of liability when the internet intermediary

acts as a channel of information or facilitates communication between third parties or users of its services.

2. Section 512 (b) provides internet intermediary limitation of responsibilities related to caching systems that are transmissions made in the transmission and are temporary which enable the network to function efficiently.
3. Section 512 (c) provides the limitation of internet intermediary liability in its service in the form of hosting i.e. data storage service or information belongs to the user into an internet intermediary server.
4. Section 512 (d) provides limitations of internet intermediary responsibilities in the provision of information location tools ie means of notification of the location of various information contained in the internet in the form of directories, indexes, references, pointers or hypertext-links.

Based on the DMCA's notice and take down regime, the internet intermediary is required to appoint an agent (required to be registered with the US Copyright Office) charged with receiving complaints or notices of copyright infringement occurring within its network or services, in addition to the agent also notifying the copyright owner of any procedure that must be fulfilled when issuing a claim of copyright infringement to the internet intermediary such as the signature of the copyright owner in both the original and electronic form, the proof of copyright ownership and information about the location where the copyrighted works are distributed without permission is located. This notification should be in the form of formal evidence of communication between agents and parties who feel their rights have been infringed. Upon receipt of notification from the copyright holder, the internet intermediary shall be obliged to immediately remove or exclude access to such information or copyrighted works.

To create a balance, DMCA also provides counter notification procedure to

internet intermediary users. A user allegedly disseminating a work of copyright without permission of the owner is given the opportunity to refute notice from the copyright holder. This is necessary to reduce the risk of pre adjudicated/wrongful takedown. The DMCA adds that although it has been 14 working days since the first time a copyright infringement claim has been received by the internet intermediary, the allegedly illegal content has not been removed by internet intermediary access, the internet intermediary can still enjoy legal immunity while internet intermediary can prove that disappearance or removal of access to such allegedly unlawful content may interfere with or add to the burden of intermediary-owned services. In order to avoid infringement of the privacy of users, the DMCA does not require internet intermediary to actively supervise or actively search for unlawful materials circulating in such internet intermediary-owned servers or network.

2.2.3. Internet Intermediary Legal Protection for a Copyright Infringement of Users in the European Union

European countries set restrictions on internet intermediary responsibilities in the Electronic Commerce Directive (ECD). Unlike the DMCA that uses a vertical approach to the implementation of the limitation of liability for internet intermediary, the ECD uses a horizontal approach which means that the restrictions on internet intermediary responsibilities set out in the ECD apply to various legal domains ranging from fraudulent competition, defamation, pornography, intellectual property rights etc. This is because ECD is not a provision that specifically regulates copyright but Electronic Commerce (e-commerce) activities in general. This can be inferred from the internet intermediary definition set out in the ECD. (Electronic Commerce Directive (ECD), article 2(b) and Directive 98/34/EC, article 1 (2))

Three internet intermediary services that are exempted from their liabilities in the ECD are the same as those set out in the DMCA. In the event that internet intermediary acts as mere conduit or information supplier or party facilitating communication between third parties, it shall be exempted from liability if:

1. does not initiate the transmission;
2. does not select the receiver of the transmission;
3. does not select or modify the information contained in the transmission.

Limiting liability for internet intermediary on caching services is provided when:

1. the provider does not modify the information;
2. the provider complies with conditions on access to the information;
3. the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
4. the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information;
5. the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

In the hosting service, the limitation of liability for internet intermediary applies when:

1. the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
2. the provider, upon obtaining such knowledge or awareness, acts

expeditiously to remove or to disable access to the information.

The fundamental difference between ECD and DMCA is that in the DMCA there is a notice and take down procedure. This mechanism allows for the submission of notice or claim of legal infringement when found material that is allegedly unlawful. The absence of this mechanism causes the hosting service in article 14 ECD to be much criticized. Notification of the notice and take down procedure mechanism is made as evidence of the presence or absence of "actual knowledge" of the internet intermediary for infringement occurring so that internet intermediary shall immediately remove access from the content. The absence of the notice and take down procedure makes ECD does not have a definite standard on how "actual knowledge" of the internet intermediary is being met. While on the other hand it is similar to DMCA, Article 15 (1) ECD internet intermediary is also prohibited to conduct monitoring or searching actively about the problematic content that resides in his server.

In order to resolve the issue of these notice and takedown procedures, the European Commission has several times opened a public consultation called public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic Commerce in 2010 and 2012. To date, there has been no follow-up on such public consultations. Therefore, the rules of notice and takedown procedures in European countries are still varied, depending on the implementation of ECD in their respective countries.

3. CONCLUSION

The conclusions that can be generated from this writing are as follows:

1. To obtain protection, a creation must qualify for authenticity or originality. In addition to the requirement of authenticity, the act also requires that a creation should have been laid in a

certain expression medium in order to be protected. Copyright infringement is the use of copyrighted work, which infringes the exclusive right of the copyright. The regulation of internet intermediary liability for copyright infringement in its services in terms of Act No. 28 of 2014 on Copyright is basically a direct and indirect liability. Direct liability may refer to Articles 10 and 114 of Act No. 28 of 2014 on Copyright. As for secondary liability refer to Articles 55 and 56 of the Criminal Code and Article 1367 of the Civil Code. Based on these liabilities, it is important to define internet intermediary liability for unlawful acts committed by users;

2. Legal protection afforded to the Internet intermediary for copyright infringement by users in both Indonesian, USA and European Union regulations each having different rules and mechanisms. The copyright regulation in Indonesia has not yet formulated the limitations of internet intermediary liability and legal protection for copyright infringement on the internet. Copyright act only provides protection against copyright holders for copyright infringement in information technology-based facilities. Although basically there has been a Circular of the Minister of Communication and Information of the Republic of Indonesia Number 5 of 2016 on the Limitations and Responsibilities of Platform Providers and Merchants of Commerce through Electronic Commerce which is User Generated Content that disbursed the restrictions on platform providers as one intermediary form of the internet but it is only in the form of a circular so as not to have permanent legal power. The United States regulates the limitation of internet intermediary responsibilities through the Digital Millennium Copyright Act (DMCA) legislation effective since 1998. The DMCA applies a "notice and take down" system

wherein an internet content provider will not be liable for copyright infringing content within its platform as long as the content provider does not know the existence of the copyright infringing content, does not receive direct financial gain of copyright infringing content, and immediately remove the content when receiving a report of copyright infringement. While the European Union regulates the limitation of internet intermediary liabilities in the Electronic Commerce Directive which is entirely the same as the DMCA but does not have a mechanism of notice and take down procedure mechanisms, so limitations, especially on web hosting service providers are much criticized.

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