

REFORMING COPYRIGHT FOR THE PARTICIPATIVE WEB: BALANCING CREATOR RIGHTS AND USER CREATIVITY¹

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Abstract

In the era of the “Participative Web,” copyright regulations are increasingly seen as inadequate for fostering creativity, as they hinder the ability of users to remix and create new works from existing ones. This research explores the limitations and exceptions in Indonesia’s copyright law, specifically Law Number 28 of 2014, and their relevance in the digital age. It highlights the growing role of internet users not only as consumers but also as active content creators, blurring the lines between creators and consumers. The study argues that current copyright law, with its rigid structure, restricts freedom of expression and cultural development. It proposes that more flexible copyright limitations and exceptions could facilitate creativity in the participative web, benefiting both creators and users. By comparing Indonesian law with the more flexible “fair use” doctrine in the United States, the research suggests that Indonesia could benefit from adopting a more adaptive approach, including the transformative use doctrine. This would allow for more creativity while balancing the rights of copyright holders. Ultimately, the study calls for a reevaluation of Indonesia’s copyright framework to better align with the needs of the participative web.

Keywords: Copyright Limitations; Participative Web; Prosumer Behavior; Transformative Use; Indonesian Copyright Law.

A. Introduction

Modern Copyright regulation has been criticized for not being able to support fundamental goals such as providing incentives for creativity, so that more flexible and relevant copyright limitations are needed today (Frosio, 2020; Lessig, 2010). This is very evident in the era of the “Participative Web” as internet users not only enjoy copyrighted content on the internet, but also proactively participate by creating works from existing ones (Bonetto, 2018; Organisation for Economic Co-operation and Development (OECD), 2007). An example is various memes or remixes of content on the internet’s user-generated content platform (UGC Platform). An illustration of the active content creation is the existence of 19,025 channels and 5,591,400 videos uploaded on the YouTube UGC Platform in 2006-2016 (Bärtl, 2018). With the current copyright system, everyone must ask for permission before creating a follow-up work from an existing one. This rule indirectly complicates human creativity in this participative web era. Internet technology has created a democratic place in content production, so that everyone can participate in creating copyrighted works or become “Prosumer”, that is, producers as well as consumers (Keltie, 2017; McNally et al., 2012; Oakey, 2011; Organisation for Economic Co-operation and Development (OECD), 2007; Pearson, 2010; Reyman, 2010; Simon, 2016). It

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blurs the relationship between the creator and the consumer of the creation in conventional copyright law.

In the conventional context, consumers of copyrighted content are generally only seen as consumers who are less likely to participate in producing works. One of the considerations is that, previously, the production tools were expensive and not everyone had access to these tools, for example, music processing equipment, cameras, or image processing machines (Shuff & Holtz, 2001). The difficulty of this infrastructure differs in the digital era, for software or hardware for image editing, sound, or video processing become easily accessible to the public (Hviid et al., 2018). Now, people can easily create content with increasingly affordable smartphones. This means that people can easily participate in producing and publishing their content. Generally, they recreate existing content.

With easy access to express their creations on the internet, from creating and recreating existing work, the existence of copyright seems to be a destroyer of human creativity on the internet (Frosio, 2020). Copyright law limits people's freedom to show and build creativity with existing works. Lawrence Lessig, in his book "Remix Culture", discusses the unfreedom of humans in building civilization from existing works. The object of copyright protection is a cultural product, and humans develop their culture or tradition by building from remixing existing cultural products (Lessig, 2008).

The behavior of cultural development from the existing one is illustrated by Lessig as Read/Write Culture. According to Lessig, a culture will be built when a human reads something (Read) and then creates something new by modifying the cultural products around him (Remix) (Lessig, 2008). This certainly illustrates the prosumer activities in the participative web era nowadays. Today, people express themselves by using and modifying existing content. Among others are creating memes or posting an artwork album of a favorite song to social media. The problem is that expressing themselves using another person's work is seen as a copyright infringement if the conventional approach is employed. If it is analyzed, using someone else's work or even modifying it is an infringement of copyright, and using it should require permission from the creator. However, if it is applied, there will be a problem because copyright becomes an obstacle for humans to express themselves and build their culture freely in the era of the participative web.

Examining this problem, the doctrine of limitations and exception of copyright can be used as a solution. The doctrine of copyright limitation and exception was made to balance between the private interests of copyright owners and the public interest in building culture and creativity through existing copyrighted works. There needs to be an adjustment so that these copyright limitations and exceptions can proportionally protect both the rights of the creator and the user in creating and expressing works. Theoretically, the participative web is generally closely related to the theory of copyright limitations and exceptions. The phenomenon of public participation in the participative web is closely related to the social function of a material right, in this case copyright, which usually lies in the limitations and exceptions of copyright. Copyright limitations and exceptions are an instrument of the copyright system to balance the private rights of copyright owners who have material rights with the public interest to use the creations to develop human civilization through new creativity that is useful for society.

Many copyright scholars state that copyright limitations and exceptions need to be designed to be more flexible in meeting human needs in the current era (Bonetto, 2018; Frosio, 2020; Geiger & Izyumenko, 2019; Gowers, 2006; Hargreaves, 2011; Inguanez, 2017; Senftleben, 2017; Thetsidaeng, 2019). Several authors have discussed the reuse of creations such as song covers on social media from the perspective of Indonesian law (Dewi, 2017; Fadhila & Sudjana, 2018; Naim, 2019). However, there is no specific discussion about the conditions of limitations and exceptions of Indonesian copyright and its correlation with prosumer behavior in the participative web era. Then, what are the conditions for copyright limitations and exceptions in

Indonesia? Do the articles on copyright limitations and exceptions in Indonesia need to be amended to facilitate people's way of life in the era of the participative web?

By formulating the problems above, this research analyzed the limitations and exceptions of Law Number 28 of 2018 concerning Copyright (UUHC) and its compatibility with human behavior in the participative web. To provide a detail explanation, this article is written in the following structure: First, it discusses the concept of participatory web and Prosumer Behavior; Second, it presents the concept of copyright limitations and exceptions: the discussion of the participative web era; Third, it explains the regulation of copyright limitations and exceptions in Indonesia; and fourth, it analyzes the suitability of Indonesian copyright limitations and exceptions in dealing with participative web.

B. Method

This research was conducted using a doctrinal legal research methodology. Through this method, the authors analyzed the research object using primary, secondary, and supporting legal sources to find answers and conclusions from the formulation of the problem. Moreover, the author also analyzed the research object by examining primary and secondary legal materials through literature studies. The legal materials include written legal regulations, books, and related articles.

Furthermore, this study uses a comparative legal approach (Soekanto & Mamudji, 1985). In addition to analyzing the limitations and exceptions of Indonesian UUHC concerning the participative web, this study also reviewed legal theories developed in other countries. By referring to the doctrine of fair use and transformative use in the United States, this study sought to provide an overview of how existing copyright limitations and exceptions regulation can be formulated to be more adaptive.

C. Results and Discussions

1. The Participative Web and Prosumer's Behaviour

In the last decade, the internet has no longer become a source of information, but also a place where everyone can contribute via blogs, reviews, or UGC platforms (Blank & Reisdorf, 2012). The internet ecosystem that encourages users to contribute to developing, creating, or distributing content on the internet has encouraged the rise of the concept of "Participative Web" or also known as Web 2.0 (Organisation for Economic Co-operation and Development (OECD), 2007). As the name implies, participative web is a condition when users are no longer consumers of information on the internet but also participate in developing and creating content. At the beginning of its development, users participated by giving comments or reviews on a website, but over time, user participation began to develop into multimedia such as posting text, images, sounds, or videos.

The participative web encourages the creation of a dynamic and creative digital environment. Unlike previous internet use when users were essentially passive audience, participative web empowers users to be actively involved in content creation. This is also known as a new creativity through development when internet users create and reuse cultural products by adding new meanings to them. The generative nature of the internet is also a means for users to share their innovations with other users.

On the one hand, the ease of participating in creating contents by reusing cultural products generates a massive creativity ecosystem. Many new creative products grow and eventually have built new industries and new professions, such as content creators on social media whose contents use existing cultural products. However, this poses a problem when faced with copyright law. According to copyright law, the use of cultural products or copyrighted works is an exclusive right of the creator or copyright owner, which means that the increasingly easy

reuse of creations by users has become a great potential for copyright infringement. This makes people's participation behavior on the internet in developing cultural products using existing works potentially considered a copyright infringement. In addition, this change in dynamics can also blur the boundaries of copyright ownership.

The increasing integration of the internet in human life makes the internet have a new function as a media to share expressions through the content they create. Users' contents uploaded to the internet are generally referred to as User Created Content (UCC) or User Generated Content (UGC). In this article, the author uses the term UGC in discussing user-generated content on the internet.

One of the proofs of the internet being a place of expression is the existence of many social media channels that facilitate users to express themselves through text, images, sounds, or videos on the internet. Not only social media, nowadays, there are many UGC platforms such as YouTube, Soundcloud, or Pixiv whose business model is to accommodate UGC from internet users. In creating contents on this UGC Platform, internet users often involve prior works, for example, content covering songs, fan works from hits creations such as Harry Potter or reviews on a newly released product such as a movie.

As has been said by Lessig (2008), in read/write culture, the contents on the internet that are also a cultural product are generally made with basic materials from existing cultural products. If analyzed using conventional copyright norms, the content of the existing copyright work is protected by copyright. The problem is that many people make new creations by using previous copyrighted works that may already be protected by copyright.

For example, many people express their feelings through a song excerpt on social media. People who are feeling sad can take a few seconds of a song that describes their sadness, then upload it to the internet. This will become a problem if the song is protected by Copyright. As we know, modifying, duplicating or disseminating a work are the exclusive rights of the copyright owner. By referring to the applied copyright law, our activities on social media or the participative web infringe the copyright.

Seeing the contradiction between norms in copyright and the development of internet use, there has been a discussion about the need for updated norms in copyright law (Committee on Intellectual Property Rights and The Emerging Information Infrastructure & Computer Science and Telecommunications Board, 2000; Craig, 2019; Frosio, 2020). The adjustment is primarily to balance the personal interests of the creator and the public interest in expressing themselves in the participative web era. One of the discussions to overcome this problem is the adjustment in copyright limitations and exceptions to provide more free activities on the internet. In the next subchapter, this article will discuss the academics' views in formulating what kind of copyright limitations and exceptions are suitable for the era of the participatory web.

2. Copyright Limitations and Exceptions: Direction of Discussion in the Participative Web Era

Some scholars criticize that the copyright system only accommodates the interests of copyright owners and seems to ignore the need for consumers to be able to interact and express themselves personally (Australian Government Productivity Commission, 2016; Frosio, 2020; Lessig, 2010; Tushnet, 2007). This is proven when compared to the reality of the internet in the participative web era.

Nowadays, the Internet has become a media that democratizes society to be able to participate in cultural production in the form of copyrighted works (Keltie, 2017; Oakey, 2011; Organisation for Economic Co-operation and Development (OECD), 2007). They are not only seen as passive consumers of copyrighted works. Internet users who are also consumers of created content can now easily produce works based on the prior works. However, this convenience is not in line with the copyright norms that are centralistic to copyright owners.

With the current copyright norms, any production using prior works requires permission from the copyright owner (Lessig, 2004; Tushnet, 2007).

As expressing ourselves by using prior creations is an essential part of human digital culture, the copyright system that is now criticized cannot be applied on the internet. The applicable system is considered to be decreasing human freedom of expression and locking human creativity, or hindering the making of a revolution (Frosio, 2020; Lessig, 2010). In analyzing this problem, many scholars argue that the main problem is actually how to maintain a balance in protecting the private rights of creators and also the rights of the public as consumers and users (Landes & Posner, 1989; Murphy TD et al., 2012; Oakey, 2011; Wang, 2018).

Many academics argue that one of the points balancing private and public interests lies in the copyright limitations and exceptions mechanism (Coombe et al., 2014; Erickson & Kretschmer, 2018; Murphy TD et al., 2012; Schendl, 2016; Thetsidaeng, 2019; Tushnet, 2009; Wang, 2018). Copyright limitations and exceptions are an integral component of the copyright regulatory structure (Balganesh et al., 2021). When copyright focuses on the private rights of the creator and rights holder, copyright limitations and exceptions provide boundaries for copyright infringement to support the public interest (Balganesh et al., 2021).

The limitations and exceptions are commonly used to balance private interests and public interests. If well formulated, the limitations and exceptions will support other noble values, which are the purpose of copyright, namely: promoting democracy and developing culture that cannot be realized by exclusive rights (Balganesh et al., 2021). This mechanism becomes important when associated with the democratization occurring on the participative web.

In the next sub-chapter, Indonesian conservative approach and the liberal and accommodated United States Approach to limitations and exceptions will be explained following the participative web era. Those two approaches were employed because those two jurisdictions already have mature copyright systems and showed two different approaches, namely conservative and liberal approaches.

Copyright limitations and exceptions have a fairly conservative approach. This can be seen from the construction of the Indonesian UUHC which restricts limitations and exceptions with specific norms regulated in articles 42-51 of Law Number 28 of 2014 concerning Copyright. These specific norms mean that copyright limitations and exceptions can only be applied to those specific activities. The UUHC excludes specific activities that are not considered a copyright infringement, namely:

Table 1.
The Articles and Norms of Copyright Limitations

Article	Norm	Activities
43	Announcement, distribution, communication and/or reproduction	The national symbols and the national anthem, which according to their original nature
	Announcement, distribution, communication, and/or reproduction	Everything carried out by or on behalf of the government, unless it is stated to be protected by laws and regulations, statements on such works, or when it is applied to a work
	Use	Actual news, whether completely or partially from news agencies, broadcasting institutions, and newspapers, or other similar sources, provided that the source must be mentioned completely.
	Creation and dissemination	Copyright content through information and communication technology media that is non-commercial and/or beneficial to the creator or related parties, or the creator does not object to the creation and dissemination.

Article	Norm	Activities
	Reproduction, announcement and/or distribution	Portrait of the president, vice president, former presidents, former vice presidents, national heroes, heads of state institution, heads of ministry/non-ministerial government agencies, and/or regional heads with due regard to dignity and fairness under the provisions of laws and regulations.
44	Use, extraction, reproduction, and/or alteration of a related work and/or related rights product in whole or in substantial part if the source is fully credited or listed	<p>For education, research, scientific papers, reports, criticisms or reviews without prejudice to the legitimate interests of the creator or copyright owner</p> <p>For security and the administration of government, legislative, and judicial</p> <p>For lectures that are only for education and science</p> <p>For performances that are free of charge, provided that they do not harm the reasonable interests of the creators.</p> <p>To facilitate access to works for the visually impaired, or those with a limitation in reading and/or use of braille, audiobooks or other non-commercial means.</p>
45	The reproduction of as many as 1 copy or adaptation of a computer program made by a user is valid and can be done without the permission of the creator, and if the use of the program has ended, then the copy or adaptation of the computer program must be destroyed.	<p>For the Computer Program Research and Development</p> <p>For Archive or backups of computer programs lawfully obtained to prevent loss, damage, or inoperability.</p>
46	Reproduction	For personal interest in the work that has been announced. Only 1 copy can be made and can be done without the permission of the creator or copyright owner.
47	Reproduction of works done by libraries or archival institutions that are not commercial	<p>For Maintenance, required replacement of copies, or replacement of copies in the event of loss, damage, or destruction of copies from the permanent collection. With the condition:</p> <ol style="list-style-type: none"> 1. Libraries or archival institutions are unlikely to obtain copies under reasonable conditions 2. The making of such copies is done separately or if done repeatedly, the making of such copies must be unrelated.
48	Reproduction, broadcasting, or communication of works	<p>For information that mentions the source and name of the creator completely with the work in the forms of:</p> <ol style="list-style-type: none"> 1. Articles that have been announced 2. Reports of actual events or brief excerpts from works seen or heard in certain situations; and 3. Scientific works, speeches, lectures, or similar creations delivered to the public
49	Temporary Reproduction	To digitally transmit a work with the permission of the creator and use a tool equipped with an automatic copy deletion mechanism that does not allow the work to be displayed again.
	Temporary Recording	For any broadcasting institution, without the permission of the creator or copyright owner, for its activities with their tools

Article	Norm	Activities
		and facilities.
		Temporary recordings must be destroyed 6 months after creation, or longer with the creator’s consent.
		Broadcasting institutions can make 1 copy of temporary recordings with certain characteristics for official archives.
50	Prohibition of announcement, Distribution, or transmission of the work	Contrary to morals, religion, morality, public order or national defense and security.
51	Announcement, distribution, or communication by the government	For national interest without permission from the copyright owner, with the provision that it is mandatory to provide incentives to the copyright owners.

Source: Author’s analysis results

The limitations on activities using works in the UUHC considered not to be a copyright infringement are specifically formulated. In addition, the activities allowed are generally non-commercial. This causes internet users in the participative web era cannot be creative freely using prior copyrighted works, and cannot benefit from the new creations developed. In Indonesia's copyright limitations, creativity on the internet in UGC such as remixes or meme making is considered a copyright infringement and is not included in the exception to the use of works.

For exceptions to works that are not given copyright protection, Article 42 of the UUHC states that: The results of open session of state institutions, laws and regulations, state address or speeches of government officials, court decisions or determination of judges and holy books or religious symbols do not have copyright. It means that these works are excluded from copyright protection in Indonesia. In the internet context, the works above can be used as raw materials in making internet creativity.

Unlike the approach in Indonesia which constructs copyright limitations and exceptions with closed norms, the United States uses a more flexible approach called “fair use” (Gowers, 2006; Hargreaves, 2011). Fair use is stated in section 107 of the US Copyright Act. Fair use is a basic principle developed through case law to categorize whether a use of a work is said to be a copyright infringement, or is forgiven and considered fair use. In its approach, fair use uses several factors that must be categorized, namely: The Purpose and character of the use, including whether such use is commercial or is for nonprofit educational purposes; The nature of the copyrighted work; The amount or substantiality of the portion used; and The Effect of the use on the potential market for value of the works.

In the first factor, the principle of fair use will assess the purpose and characteristics of the use. In this case, it will be examined whether the use benefits the community, such as: criticisms, comments, news reporting, and teaching. In this case, the use of the works for such purposes is not considered as copyright infringement. Non-commercial use tends to be said as fair use and not a copyright infringement compared to commercial use. The next consideration, the most interesting topic in the era of the Participative web, is whether the use of this work is a transformative use or not. This concept of transformative use was developed from the case law of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) which will be discussed in several sub-chapters below.

The second factor of fair use is whether the work has been published or not. This is because the original creator has the right to determine whether or not his work can be published. In

addition, copyrighted works that are factual and have a low element of creativity will have a lower probability of fair use than works that have a high element of creativity.

The third consideration is how much and how substantial the work is used for the benefit of fair use. In this case, the higher percentage of works used, the more burdensome for a use of a work not considered fair use. The fourth factor considered is the effect of the unauthorized use of works on their market. If the use of a work will cause harm to the market value, then the use likely cannot be categorized as fair use. For example, the use of a work by another person that causes a decrease in the sales and the financial condition of the creator or copyright owner will not be considered fair use.

Transformative use is part of the first factor of fair use (Porsdam, 2015). The use of a work is considered transformative if the result produces a work that differs in form and nature from the original work. Transformative works are considered to provide new meaning and purpose from the materials used so that they are assessed as giving new value, and even creating a new market for the original work (Gowers, 2006), for example, the parody song "Pretty Woman" was disputed in the case of *Campbell v. Acuff-Rose Music* in 1994. The interesting thing here is that a work that is considered transformative will be seen as a new work and can be given copyright protection which means that the work can be used economically by the creator without being bound by the previous creator.

This thought will raise the question of whether transformative work as a new creation will harm the economic interests or artistic integrity of the previous creators. However, in *Acuff-Rose v. Campbell*, the Supreme Court judges of the United States argued that the parody of Roy Orbison's song "Pretty Woman" did not affect the success of the original song (Gowers, 2006). In protecting the creator of a work used in a transformative way, the United States still protects the moral rights of the creator of the prior work (Gowers, 2006). In this case, the protection of moral rights still guarantees the creator the right to get credit for his creation and the right to avoid insulting or damaging his reputation (Gowers, 2006).

The concept of transformative use is suitable for the use of work in the participative web. This is because the concept of transformative use can be the basis for various kinds of internet creativity that produce works with new meanings by using prior works. For example, dangdut music may be remixed into jazz music which eventually gives rise to a new meaning and value, and does not compete with each other. Moreover, the creator of a new work can have the opportunity to get the copyright on his creation, which means he can still get the incentives from the work he has created.

3. The Analysis of the Conformity of Indonesia's Copyright Limitations and Exceptions in Addressing the Participative Web

When comparing the norms of copyright limitations and exceptions in Indonesia with the United States, it can be seen that Indonesia still adheres to specific norms that cannot facilitate the use of information in the context of participative web. This specific normative approach limits the use of works in developing internet creativity from the participative web. When the use of works is only limited to certain norms and activities without considering the context of use, the creativity will be hindered. This is because the legal logic directly excludes things that are not allowed as an offense. After all, they are not following the legal norms.

In this closed norm condition, the use of works for comments, criticism, parody or recreation of works will be difficult because they are not included in the permitted activities. Consequently, this will hinder internet users and the public from producing new value from existing creations. It can be criticized that Indonesia's copyright limitations and exceptions mechanism still cannot facilitate and take the added value that grows from internet creativity on the Participative Web.

To prepare an infrastructure for copyright limitations and exceptions that can benefit internet creativity, Indonesia can try to examine a more flexible approach like the one done in the United

States. The American approach determines the basic norms of fair use in considering the nature of an unauthorized use as a violation or not. Through this approach, Indonesia is expected to be able to analyze the context of the unauthorized use of the work and examine whether or not the use provides better benefits to society. Therefore, it will not create a binary limitation of “infringement” and “non-infringement” that does not consider the context and effects of the unauthorized use of the work.

Indonesia can also develop its version of the “transformative use” doctrine to open up opportunities for developers. With the doctrine of transformative use, developers will have the opportunity to own the copyright of the new creations they create. The work must also meet the requirements of “transformative use”, that is, the new work must have a different meaning, function and characteristics from the work that is the material for its creation. This will open up opportunities for Indonesia's creative industry, especially those based on internet creativity such as remixes, parodies, satires and others. The development and application of the transformative use doctrine in Indonesia can be discussed further in future studies to find out whether or not Indonesia conforms to apply the transformative use doctrine in its positive law. or what kind of transformative use doctrine is suitable for Indonesia’s legal infrastructure.

D. Conclusion

This research discusses the challenges faced by traditional copyright law in the era of the participative web, where users are no longer just consumers of content but also actively create and modify existing works. This shift has blurred the boundaries between creators and consumers, raising issues with the application of copyright laws that restrict people’s ability to remix or alter existing content. The rigid nature of copyright law fails to accommodate the freedom of expression on the internet, where users frequently create derivative works such as memes, remixes, or fan content based on prior works.

The research also compares Indonesia’s copyright system with a more flexible approach, such as the one adopted in the United States, particularly the concepts of “fair use” and “transformative use.” These flexible frameworks provide greater space for creativity in the digital realm, allowing works that transform the original into something new to be protected and provide economic benefits to the creators of new works. Therefore, the study suggests that Indonesia should consider reforming its copyright law to better accommodate the participative web by incorporating the principle of transformative use, which would, in turn, support the growing internet-based creative industry.

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