

Technium.

49/2023



The 7th International Conference on Social Sciences
Organized by Faculty of Social Science
and Law Manado State University

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Penal Mediation in Settlement of Copyright Crimes in Indonesia

Muhammad Saiful Fahmi*, Rudini Hasyim Rado, Mulyadi Alrianto Tajuddin, Nurul Widhanita Y. Badilla, and Ricardo Goncalves Klau

Department of Law Science, Faculty of Law, Universitas Musamus, Merauke 99600, Indonesia

Abstract. This study aims to obtain an overview of Penal Mediation in the Settlement of Copyright Crimes in Indonesia. The research method uses a normative juridical approach, type of data uses qualitative data and data sources in the form of secondary data, data collection methods using literature study methods, and documentation. Furthermore, the data will be analyzed qualitatively and then conclusions will be concluded with deductive approach. In the provisions of Article 95 of Law Number 28 of 2014 concerning Copyright henceforward referred to as the Copyright Law, the government has given options to the parties in resolving disputes, namely by Alternative Dispute Resolution, Arbitration, and Court Institutions. The implementation of this mediation is known as penal mediation. Penal mediation pursued in the event of misdemeanor offenses and cases of a delict nature. The imposition of criminal law related to copyright infringement that requires mediation in advance in addition to piracy follows the function of criminal law as an ultimum remedium which is the last resort if other laws cannot provide a solution, however, for criminal acts of piracy, mediation is not carried out (penal mediation) but directly by using the litigation mechanism in this case the district court.

Keywords: Penal Mediation, Copyright, Crimes.

* Corresponding author: m.saifulfahmi@unmus.ac.id

1 Introduction

Copyright infringement often occurs in Indonesia, even those infringing acts seem considered as commonplace. This is due to the low level of public knowledge of copyright and the lack of socialization and law enforcement on violations that occur. [1] When talking about infringement, there is someone's rights or interests that we violate. In the context of Copyright, these rights and interests are the exclusive rights of creators and copyright holders consisting of economic rights and moral rights.

There are three forms of disputes related to copyright, namely tort, license agreements, and disputes over rates of remuneration or royalties. After knowing the form of the dispute, the creator or copyright holder can determine whether the problem wants to be resolved amicably through alternative dispute resolution (mediation, negotiation, or conciliation), arbitration, or the courts. The Commercial Court is the only court authorized to hear copyright disputes under the law.

Based on a report from the United States Trade Representative (USTR) in 2023, Indonesia with 8 other countries like Argentina, Chile, China, India, Mexico, Russian Federation, South Africa, and Vietnam are included in the Priority Watch List (PWL). PWL is a list of countries that according to USTR have a heavy level of intellectual property (IP) violations. As presented in the table issued by the International Intellectual Property Alliance (IIPA) 2023 Special 301 Report on Copyright Protection and Enforcement below:[2]

Tabel 1.1 Priority Watch List and Watch List Countries IIPA 2023

Priority Watch List	Watch List
Argentina	Brazil
Chile	Canada
China	Colombia
India	Ecuador
Indonesia	Nigeria
Mexico	Peru
Federation Russian	Poland
South Africa	Switzerland
Vietnam	Taiwan
	Thailand
	United Arab Emirates

From the USTR data through IIPA 2023, Indonesia is included in a country with a fairly severe level of IP infringement, even Indonesia is also seen as a country whose modernization or amendment of its national copyright law through Law Number 28 of 2014 concerning Copyright has failed to keep up with market and technological trends.

However, data from the Directorate General of Intellectual Property (DGIP) of the Ministry of Law and Human Rights in the last three years has actually obtained various achievements and even exceeded the target, this can be seen from the number of IP applications received of more than 256 thousand or an increase of 28 percent compared to 2021. Trademark applications reached more than 120 thousand or increased by 16% from the previous year, Patent applications in 2022 to 14,062, from 12,467 applications last year or an increase of 12.79%, an increase in Copyright registration of 34 thousand from the previous year or an increase of 40.93% in 2022. The increase in applications is partly due to the Automatic Approval of Copyright Registration (POP HC) in the 2022 Copyright Year Declaration.[3]

The high number of IP applications is also directly proportional to the number of disputes that exist, for example, with regard to copyright and even copyright violations are relatively easy to occur, according to data from the Criminal Investigation Agency of the National Police, there were 958 cases of intellectual property rights violations during 2016-2021. The figure includes, among others, violations of trademarks (650 cases), copyrights (243 cases), and patents (18 cases).[4]

The term mediation has been known in Indonesia since it accommodated in Supreme Court Regulation No. 2 of 2003 which was later amended through Court Regulation No. 1 of 2008 and currently in force, namely Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court, it should be noted that all of the Court Regulation only mentions mediation in the context of civil cases, so none of them regulates the issue of penal mediation.

The term penal mediation in positive law in Indonesia first appeared through Police Letter No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Case Handling Through Alternative Dispute Resolution, later amended and replaced through Circular Letter No. SE/8/VII/2018 dated July 27, 2018: SE/8/VII/2018 dated July 27, 2018 on the Application of Restorative Justice in Criminal Case Resolution. Although this provision is partial in nature, one of the principles of mediation referred to in this Circular Letter emphasizes that Restorative Justice cannot interpreted as a method of peaceful termination of cases, but more broadly on the fulfillment of a sense of justice for all parties to the case. However, if there is no new agreement resolved in accordance with applicable legal procedures, it also applies as one of the methods in the settlement of Copyright disputes.[5]

In the provisions of Article 95 of Law Number 28 of 2014 concerning Copyright hereinafter referred to as the Copyright Law,[6] the government has given options to the parties in resolving disputes, namely by Alternative Dispute Resolution, Arbitration, and Court Institutions.[7] If the chosen dispute resolution effort is through the courts, then the creator or copyright holder

has the option to file a lawsuit for compensation (civil) or resolve it criminally. However, the choice of dispute resolution through the criminal realm is the last resort (*ultimum remedium*) in the settlement of copyright disputes.

2 Research and Methods

2.1 Research Approach

The problem approach that will be used in this research is using a normative juridical approach. The normative juridical approach is legal research carried out by examining library materials or secondary data as the basis for research by conducting a search on regulations and literature related to the problem under study [8].

The normative juridical research approach is operationally carried out with library research, in this study reviewing and analyzing based on Law Number 28 of 2014 concerning Copyright, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, and Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court.

While the legal theory used is the theory of legal protection, namely protection by using legal means or protection provided by law, aimed at certain interests, namely by converting the interests that need to be protected into a legal right. In the law of "rights" is also called subjective law. Subjective law is an active aspect of the legal relationship provided by objective law, in terms of subjective law are norms/rules [9].

2.2 Type and Sources Data

In this study, secondary data sources will be used, namely data obtained from library materials or literature that has a relationship with the object of research. In this study, the secondary data sources are literature, articles, journals and sites on the internet related to research [10]. Secondary data can be in the form of legal materials consisting of primary legal materials, secondary legal materials and tertiary legal materials.

Primary Legal Material

Primary legal materials are legal materials that are binding. In this case, the primary legal materials are Laws and regulations of the Supreme Court.

Secondary Legal Material

Secondary legal materials are legal materials that provide an explanation of primary legal materials, namely books and journals that are relevant to penal mediation and copyright.

2.3 Method of Collecting Data

Data collection methods in this study, are as follows:

Literature Study

The data examined in the research can be in the form of data obtained through library materials and or directly from the community.

Documentation Method

The method of documentation in research is as a means of assisting researchers in collecting data or information by reading letters, announcements, meeting summaries, written statements of certain policies and other written materials. This data search method is very useful because it can be done without disturbing the object or research atmosphere [11].

3 Results and Discussion

Dispute resolution in addition to using court and arbitration mechanisms, can also be done by the parties to the dispute through mediation, negotiation, or conciliation. The Indonesian government's efforts in upholding justice in the field of copyright can be seen from the dispute settlement stipulated in Article 95 of the Copyright Law, including through a) Alternative Dispute Resolution (mediation, negotiation, and conciliation) b) Arbitration and c) Judicial Institutions.[12]

Forms of disputes related to Copyright, among others, disputes in the form of unlawful acts, license agreements, disputes over rates in the withdrawal of fees or royalties. What is meant by alternative dispute resolution in Article 95 of the Copyright Law is a dispute resolution process through mediation, negotiation, or conciliation.

In simple terms, mediation is a way of resolving disputes through a negotiation process to obtain agreement between the parties with the assistance of a mediator who is neutral and does not impose a settlement. The result of mediation is a peace agreement that is strengthened by the mediator into a peace deed. While conciliation is a dispute resolution between the parties mediated by a conciliator, the conciliator is active in providing advice and opinions on the problems that occur. Meanwhile, negotiation is a dispute resolution between the parties that is carried out without a third party.

Mediation is a form of out-of-court dispute resolution. Generally, mediation is used in dispute resolution in the realm of civil law. The legal basis for mediation in Indonesia is regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (AADR Law).

Concerning criminal offenses, the provisions on mediation in Article 95 Paragraph 4 of the Copyright Law: "In addition to the infringement of Copyright or Related Rights in the form of Piracy, as long as the parties to the dispute are known to exist or are located in the territory of the Unitary State of the Republic of Indonesia, they must first pursue dispute resolution through mediation before bringing criminal charges".

However, there is no further clarity in the explanation of the article "whether the meaning of mediation is an out-of-court settlement following Law No. 30 of 1999 or within the court as stipulated in Court Regulation No. 1 of 2016".[12] The provision also does not explain further, the legal consequences if mediation for criminal offenses other than piracy is not conducted, whether the criminal case stops or is not processed (not accepted) or continues/processed by applicable legal provisions.

The mediation process is carried out by the police as a mediator who mediates the meeting of victims and perpetrators to resolve their cases. The implementation of this mediation is known as penal mediation.[13] Penal mediation is pursued in the event of misdemeanor offenses and cases of a delict nature. This mediation is carried out because of the authority in the form of discretionary actions from the police and is regulated in the Chief of Police circular letter No. Pol: B/3022/XXII/2009/SDEOPS on Case Handling through Alternative Dispute Resolution which emphasizes the settlement of criminal cases with alternative dispute resolution procedures as long as agreed by the parties.

Thus, the settlement of IP disputes through penal mediation has applied the concept of restorative justice, namely putting the victim back in his original position compared to punishing the perpetrator, so that exclusive rights holders whose rights have been violated will get compensation or recovery as the opinion of G Bazemore and Mark Umbreit "Restorative Justice is about restoring victims, restoring offenders, and restoring communications" Justice is about restoring victims, restoring offenders, and restoring communications), and Tony Marshall who said, "Restorative Justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future".[14]

The existence of penal mediation in resolving criminal cases in Indonesia is generally regulated in the Chief of Police Circular Letter Number: SE/8 / VII / 2018 where this further serves as a guideline for investigators in handling criminal acts even though it is limited and internal and not a general binding statutory rule, but regardless of the legal framework, the criminal justice system in Indonesia, especially police law enforcers as investigators, has been ordered by law in the form of certain powers to set aside a criminal case without having to proceed to court (non-litigation efforts). This is as stipulated in Law No. 2 of 2002 concerning the Indonesian National Police (Police Law), stipulated in Article 18 has given the police the authority to exercise discretion, namely the right not to process the law against criminal acts as long as it is in the public interest or morals, because discretion is essentially between law and morals.

Article 18 paragraph (1) of the Polri Law states that "in the public interest, officers of the Indonesian National Police in carrying out their duties and authorities may act according to their judgment". Furthermore,

paragraph (2) emphasizes that "the implementation of the provisions referred to in paragraph (1) can only be carried out in very necessary circumstances by taking into account statutory regulations and the Code of Professional Ethics of the Indonesian National Police". In its explanation, the limitation of "acting according to one's judgment" is an action that can be taken in acting must consider the benefits and risks of its actions and forms in the public interest. Even when connected with Article 18 of the Police Law with Article 7 paragraph (1) letter j of the Criminal Procedure Code (CPC), "investigators because of their obligations have the authority to take other actions according to the law that is responsible". Regarding these other actions as stipulated in Article 16 paragraph (1) letter L of the Police Law and Article 5 paragraph (1) number 4 of the Criminal Procedure Code that "other actions of investigation and investigation are carried out if they meet the conditions, namely (a) not contrary to a rule of law; (b) in line with the legal obligations that require the action to be taken; (c) must be appropriate, reasonable, and within the scope of his/her office; (d) reasonable considerations based on compelling circumstances; and (e) respect for human rights".

In addition, when used carefully, discretion, which in Dutch is called discretionary or German fries *ermessen* and English discretionary power, is a deviation from the principle of legality.[15] This is in line with Article 2 of the Police Law, it point up that the police function is one of the state government functions in the field of law enforcement based on the spirit of justice, so that the use of discretion is legal and justified by law.

The law should not be reduced solely to enforcing the law in the sense of writing but also unwritten law as long as it is for the sake of realizing justice for every litigant. So when discretion is linked to penal mediation, it is stated that principle the use of the idea of penal mediation is nothing but for the sake of realizing substantive justice, not merely procedural justice.[16]

The realization of substantive justice through penal mediation has received its umbrella in each sub-system of criminal justice, for example, at the level of the Prosecutor's Office there is seponing and discretionary authority owned by the police. Thus, the discretionary authority that is in the hands of the police as long as it is carried out with full responsibility is another form of penal mediation that can also be implemented by the police at the investigation stage to create harmony and peace for the conflicting parties and the realization of justice or restoration of conditions both for victims, perpetrators, and society.

The imposition of criminal law related to copyright infringement that requires mediation in advance in addition to piracy follows the function of criminal law as an *ultimum remedium* which is the last resort if other laws cannot provide a solution, however, for criminal acts of piracy, mediation is not carried out (penal mediation) but directly by using the litigation mechanism in this case the district court, because the act

is philosophically reflecting moral degradation, namely the absence of respect for other parties who with their hard work try to produce new inventions.

4 Conclusions

Copyright infringement often occurs in Indonesia, even those infringing acts seem considered as commonplace. This is due to the low level of public knowledge of copyright and the lack of socialization and law enforcement on violations that occur. There are three forms of disputes related to copyright, namely tort, license agreements, and disputes over rates of remuneration or royalties.

In the provisions of Article 95 of Law Number 28 of 2014 concerning Copyright hereinafter referred to as the Copyright Law, the government has given options to the parties in resolving disputes, namely by Alternative Dispute Resolution, Arbitration, and Court Institutions. The mediation process is carried out by the police as a mediator who mediates the meeting of victims and perpetrators to resolve their cases. The implementation of this mediation is known as penal mediation. Penal mediation is pursued in the event of misdemeanor offenses and cases of a delict nature.

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