

**LEGAL PROTECTION OF THE VIDEO GAME AGAINST UNFAIR  
BUSINESS COMPETITION UNDER COPYRIGHT LAW IN INDONESIA**

**(Analysis of Supreme Court Decision No. 2349 K/Pid.Sus/2014)**

**A BACHELOR DEGREE THESIS**

Presented as the Partial Fulfillment of the Requirements  
to Obtain the Bachelor Degree at the Faculty of Law  
Universitas Islam Indonesia  
Yogyakarta



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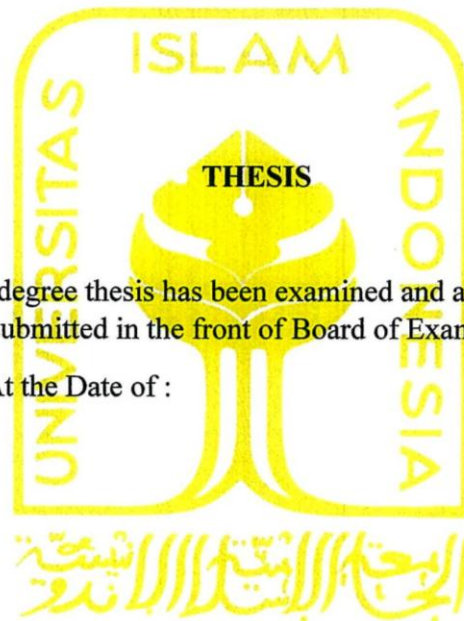
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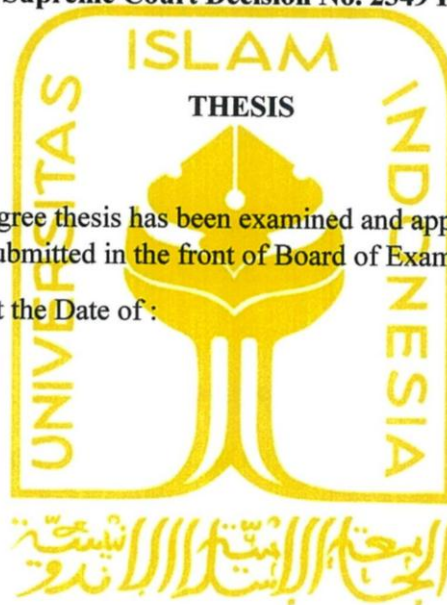
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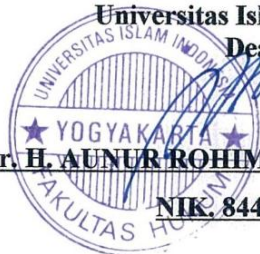
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## **MOTTO**

" Don't look at who's talking but see and hear what's being said."

*-Ust. Khalid Basalamah-*

“ You'll never understand until the thing happens to you.”

*-Unknwon-*

“ Never judging people from based on what you see, because Allah judges people  
based on what he knows.”

*-Karim Jovian-*

## **DEDICATION**

I dedicate this thesis with lovingly, sincerely, honesty specially to:

Allah SWT, since his Rahmat and Rahim always abound to me

The most important person in my life who has give all of them for me, My Heros :

*Mgs Abdullah Sobri*

*Roesnani HAR*

All of My siblings and My liltle angels who always give me a strength to face all  
of the difficulties

*Mgs Brilliant Hidayah, Msy Sorayah, Msy Yunia, Dzaky, Sayyid, Dzayan,  
Aisyah, and Fatimah*

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## **ABSTRACT**

*The increase of technological developments rapidly affects the progressively striking lifestyle due to technological developments that affects mass communication model to perform daily activities. With the rapid growth of technology nowadays, consumer's demand with tertiary needs is increasing. This causes many traders to do such unfair business in running their business. The purpose of this research is to find out the crimes of Copyright infringement in Indonesia and to see the role of government in upholding the law in the field of Copyright. Nowadays, some businessmen are doing various ways to gain more profit. One of the attempts to defend the right is to register a brand and logo due to the number of irresponsible actions that can harm a company, such as fraud cases, logo plagiarism and product imitations. Of course as an entrepreneur, they will feel aggrieved because the profits and public confidentiality decreases. This is the reason why intellectual property especially in copyright field needs protection.*

**Keywords: Copyright Infringement, Legal Protection, Unfair Business**

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# CHAPTER I

## INTRODUCTION

### A. Context of Study

Video game is one of the entertainments has quite a lot of people to unwind or simply spend leisure time. The number of video game enthusiast is increasing throughout the world and in Indonesia. This is evidenced by the increasing sales of video game machines and the visitors of internet cafe to play the video game.

The development of information technology in society today cannot be denied. Information technology is one important requirement for people. Many of the changes that occur according to the needs of people initially from analog to all-digital at this point so that information technology becomes technology development trend.<sup>1</sup>

Along with the increase of development that requires digital technology, the competitors growing urge to fulfill the consumer's demand which grow each day. It is making the creator or competitors race to create something new. In the product, the creator would want to protect its copyrights so that competitors cannot take the creation of the creator without permission from the creator.

What is meant by copyright is the exclusive rights for the creator to publish or reproduce his creations in the fields of science, art and literature, among others, may consist of books, computer programs, speeches, lectures, speeches and other inventions similar to it, as well as related rights copyright. Recording sound and/or

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<sup>1</sup> Suherman, Ade Maman, *Aspek Hukum Dalam Teknologi*, Ghalia Indonesia, Jakarta, 2002, hlm. 28.

images show an actor (performer), for example, a singer or a dancer on the stage, is related rights protected by copyright.<sup>2</sup>

The use of Internet technology related to the pattern of interaction between people, either individually, or government organizations have given birth to a new phenomenon in the field of law. One of the new phenomena in terms of copyright protection is digital works. The term digital works themselves are not the only terminology that is known in the case of digital creation, another term can be found and has the same meaning, such as digital content, digital information, or digital copyrights. In this context, internet technology has a wide range of digital contents, such as digital images, e-books, charts, tables, movies, and songs, and other digital works.<sup>3</sup>

One example of copyright case of infringement that occurred in Indonesia is the defendant named Gunawan which underwent a hearing in an unfortunate district court. The defendant explains the location of the Experience Game Shop has reproduced, traded and sold the work of others without permission to the consumer. With evidence in the form of 2,179 pieces of PS (Play Station) 1 CD and 160 pieces of PS 2 CD confiscated from Experience Game Shop at Jalan Bendungan Sutami No. 15-E Malang, among others 5 pieces of PS 1 CD with the title DUEL MASTER GLOBAL is illegal/plagiarism.

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<sup>2</sup> Tim Lindsey, (ed.), *Hak Kekayaan Intelektual Suatu Pengantar*, PT. Alumni, Bandung, 2013, hlm. 06.

<sup>3</sup> Agus Riswandi, Budi, *Doktrin Perlindungan Hak Cipta di Era Digital*, FH UII PRESS, Yogyakarta, 2016, hlm. 01-02.

The acts committed by defendant Gunawan began with the information from Sony Computer Entertainment Inc.'s lawyer, Pumomo Adityo, S.H. which explains to have found the sale of Play Game I Play CD and DVD Play Station 2 in Game Experience Shop at Jalan Bendungan Sutami Number 15 E Malang City which is not original.

With the invention, then Pumomo Adityo, S.H. reported it to Polwil Malang and on the report, the next is Witness Moch. Syaikhu, S.H. together with Handik Suzen from Polwil Malang as Chairman of Operation Team, conducted a raid/operation against copyright infringement, especially the sale of DVD, VCD, MP3, and CD illegally pirated as the result of Copyright Infringement at Experience Game Shop on Tuesday, September 5, 2006 around at 16.30 WIB.<sup>4</sup>

A creation must be an original. In other words, the creation must be produced by people who recognize the creation as an essay or creations of themselves. The work should not be copied or reproduced from other works. If the author or authors have applied levels of knowledge, skill and judgment equal to an expert into the creation process of his work, this will be considered sufficient to meet the nature of originality in order to obtain copyright protection.<sup>5</sup>

In UUHC Indonesia, the originality principle is regulated in Article 1, third paragraph. Copyright protects only original works, but it does not require the

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<sup>4</sup> Supreme Court Decision Number 2349 K/Pid.Sus/2014

<sup>5</sup> Tim Lindsey, (ed.), *Op.cit.*, p.106

creativity of the work. A creator is able get ideas based on general knowledge and this does not have to take a long time or expertise to create.<sup>6</sup>

The result of the creations will be an original creation, if the creation is not a replica/clone of other creations, and then it has used the intellectual ability, imagination, dexterity, skill or expertise that is poured into a distinctive and personal form.<sup>7</sup>

The protection of intellectual property rights is the core of the recognition of property rights and right for a certain period of time to enjoy their own or exploit such property. Over a period of time, others cannot enjoy, use, or exploit such rights without permission.<sup>8</sup>

Copyright protects original artistic and literary expressions. Generally speaking, the underlying software which a video game run is protected as a literary work, also the artwork and sound are protected as an audiovisual work. Under the terms of the Berne Convention for the Protection of Literary and Artistic Works (1886), which set minimum standards in international copyright law, protection is immediate and automatic and there are no formal requirements to register a work for it to be protected, although in some jurisdictions it is advantageous to do so. The artwork in a video game enjoys copyright protection as no one has the right to copy the creator's original work. Certain standard and commonplace elements of the

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<sup>6</sup> *Ibid*, hlm 106

<sup>7</sup> *Ibid*, hlm 106

<sup>8</sup> Kholis Roisah, *Konsep Hukum Hak Kekayaan Intelektual*, Setara Press, Malang, 2015, hlm.23

artwork in video games, however, fall under the doctrine of scenes à faire. These elements are not copyrightable to the extent that they are necessary to execute a particular genre of work. Copyright does not protect ideas as such; for example, a game of golf will always include holes, golf balls, golf clubs, golfers, grass, trees and water. While it is not legal to copy these elements verbatim from another golfing game, video game designers have the right to include such standard elements in their games.<sup>9</sup>

Based on TRIPs Agreement which is contextualized with the adoption of the doctrine of copyright protection, some things can be noted in this regard, starting from Article 7 of the objectives of the TRIPs Agreement. Article 7 of the TRIPs Agreement stated that:<sup>10</sup>

*“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”*

Copyright has some basic principles. Some basic principles of copyright include:

1. What is protected by copyright is original, an idea that has been realized. One of the fundamental principles of copyright protection is the

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<sup>9</sup> Catherine Jewell, *Communications Division*, accessed from [http://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2012/04/article_0003.html) on the date of 01 April 2017 on 14:06

<sup>10</sup> Agus Riswandi, Budi, *Doktrin Perlindungan Hak Cipta di Era Digital*, FH UII PRESS, Yogyakarta, 2016, p. 67.

concept that copyright only is to respect the embodiments of an invention such as books, so it does not disrespect or do not deal with the substance.

This principle can be derived from other principles, namely:

- a. An invention must have authenticity or originality. Authenticity is very closely related to the embodiments of an invention.
- b. A creation, copyrighted if creation is concerned is realized in the form of writing or other material form. This means that an idea or a thought is not a creation.
- c. Due to copyright the exclusive right, then there should be no one else should do the multiplication and announcements except with the permission of the creator.

## 2. Copyright arises by itself (automatically)

A copyright exists when an inventor realize his idea in a tangible form. With the manifestation of an idea, a creation born. Creation is born can be declared and can not be announced. A creation that is not announced, the copyright remains the creator.

3. A creation does not always have to be announced to acquire copyrights. A creation that was announced or unannounced both of them can obtain a copyright.

4. Copyright is the legal right of a creation that must be separated and must be distinguished from the physical custody of a creation.

5. Copyright is not an absolute right.<sup>11</sup>

Copyright is the form of intellectual property, and protection to the expression of an idea (but not the idea itself). Take Pac-Man, for example. Copyright protection protects the actual artwork and sounds in the game as an audiovisual work, and the underlying source code as a literary work. No one can copy the actual images and sounds used during the game, illustrated in Fig. 1, or the underlying program.

However, copyright does not protect the idea of a player controlled character eating dots in a maze-like game board while being chased by differently colored evil characters such as the caterpillar game shown in Fig. 2. Copyright protection exists the moment a creator fixes an expression in a tangible medium. This means the moment you save your source code to disk, or you sketch out the artwork for your game character or level art, you automatically have copyright protection without doing anything further.

A creator can also choose to register the copyright which provides certain additional benefits, such as the right to statutory damages for copyright infringement. Copyrights were historically regarded of as the only form of “substantive” intellectual property protection for computer software, but that couldn’t be farther from the truth.

The term copyright in Indonesia was born when "Indonesian cultural congress" was held in Bandung on October 1951, the legal expert who proposed the term copyright is Prof. Moh. Shah, S.H. Copyright is a substitute for author rights which in Dutch is known as Auteursrecht. The reason for the replacement of the term

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<sup>11</sup> Agus Riswandi, Budi, *Op.cit.*, p.118-119

does not only include the author's rights, but also the rights of musicians, painters, scientists, sculptors, etc.<sup>12</sup>

Copyright is an exclusive right granted to either the creator or the assignee. Inside copyright there are two kinds of rights, namely; moral rights and economic rights. Moral rights is right to inherent in the creator, among others; the right to be named in his creation and the right not to make changes to the creation without the author's permission. Economic rights is rights to economic benefits. This right may be the right to multiply and the right to announce. Usually in the utilization of economic rights there is economic value obtained by the party which is announced and reproduced.<sup>13</sup>

## **B. Problem Formulations**

1. How is the legal protection of foreign creation under Indonesian Copyright Law without the official brands of the original product seen.
2. Could the absence of foreign agent in Indonesia be the reason to commit Copyright Infringement related with Supreme Court Decision No. 2349 K/Pid.Sus/2014.

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<sup>12</sup> Agus Riswandi, Budi, *Hak Cipta Di Internet Aspek Hukum Dan Permasalahannya Di Indonesia*, Yogyakarta: FH UII Press, 2009, p. 74.

<sup>13</sup> *Ibid*, p. 75.



### **C. Research Objectives**

The purpose of writing this thesis is to fulfill the academic requirements to obtain a law degree in law faculty of Islamic university of Indonesia. Besides the previous purpose, there are other purposes which are:

1. To find out whether there are any protection under the law to foreign creation in Indonesia to protect the copyright's holder.
2. To analysis the legal position and responsibility of the business actor against video game piracy.

### **D. Benefits of Research**

This paper is expected to help questions regarding to video game violation actions within the framework of copyright protection, therefore, it becomes clear how the responsibility of copyright infringement from the dealer is held to the creator.

### **E. Definition of Terms**

**Copyright** is an exclusive right for the creator or the recipient of the right to announce or reproduce his or her creation or grant permission to it without prejudice to restrictions under applicable legislation.<sup>14</sup>

**Copyright violation** is the use of copyrighted works that infringe the exclusive right of the copyright holder, such as the right to reproduce, distribute, display or display copyrighted work, or create derivative works, without the

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<sup>14</sup> Copyright Law No.28 of 2014, article 1 section 1.

permission of the copyright holder, usually publishers or other businesses representing or assigned by the creator of the work.

**Plagiarism** is the deliberate and knowing presentation of another person's original ideas or creative expression as one's own. Generally, plagiarism is immoral but not illegal. If the creator gives unrestricted permission for its use and the user claim the expression as original, the user commits plagiarism but does not violate copyright laws. If the original expression is copied without permission, the plagiarist may violate copyright laws, even if credit goes to the creator. And if the plagiarism results in material gain, it may be deemed a passing-off activity that violates the Lanham Act.

**Unfair Business Competition** encompasses a variety of practices that cause an economic injury to a business, through a deceptive or wrongful business practice. The most popular example of unfair competition is trademark infringement. The law of unfair competition is mainly governed by state common law. In the areas of trademarks, copyrights, and false advertising federal law may apply.<sup>15</sup>

## **F. Theoretical Review**

The point of view of an individual or a legal protection as the creator of a creation protected by copyright law stems from a theory that cannot be separated from the dominance of the school of thought of natural law that emphasizes the

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<sup>15</sup> Unfair Competition Law and Legal Definition., accessed from <https://definitions.uslegal.com/u/unfair-competition/> on January 16, 2018 at 17:10.

human factor and the use of reason as known in the Civil Law System as a common legal system used in Indonesia.<sup>16</sup>

The influence of the school of natural law in the Civil Law System against an individual who creates various creations that then obtain legal protection for a creation that is intellectual property. Within the framework of universal recognition, there is no doubt that a work has benefits for life worthy and economic value that leads to three kinds of conceptions: the conception of wealth; the conception of rights; and conception of legal protection.<sup>17</sup> Article 27 (2) Universal Declaration of Human Rights mentioned that:

*“Everyone has the right to protect of the moral and material interest resulting form any scientific, literary, or artistic production of which he/she is the author”<sup>18</sup>*

Substantively the notion of intellectual property rights can be described as the extent of wealth arising or born out of human intellectual ability. Intellectual Property Rights make works that arise or are born out of human intellectual ability as the core and object of its arrangement. Article 7 of TRIPs stipulates that the protection and enforcement of Intellectual Property Rights Law aims to encourage the emergence of innovation, transfer and dissemination of technology and the mutual

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<sup>16</sup> Golkar Pangarso, *Penegakan Hukum Perlindungan Ciptaan Sinematografi*, Bandung, P.T. Alumni, 2015, p.82-83.

<sup>17</sup> Eddy Damian, *Hukum Hak Cipta*, Bandung, P.T. Alumni, 2003, p.18.

<sup>18</sup> Golkar Pangarso, *Loc. Cit.*

benefit of income and users of technology knowledge, by creating social and economic welfare and balance between rights and obligations.<sup>19</sup>

It is necessary to become a principle in distinguishing copyright protection from other intellectual property rights that copyright protects the literary works and artistic works with all forms of development in this world. Copyright is part of a set of rights called Intellectual Property Rights (IPR) which arrangement is in legal science and is called IPR Law. The IPR Law, encompassing a field of law in which the juridical rights of works or human-generated creations coincide with economic and moral interests.<sup>20</sup>

Video game can also be categorized as a creation which must be protected under copyright law. Due to the reason that making a video game, the creator must devote all the ideas and prioritize the aspect of originality it is not to be perceived as imitating or plagiarism of other works.

Copyright protection itself are divided into two, namely protection of moral rights and protection of economic rights.

- a. The purpose of protection of the creator's moral rights are to: (1) continue to include or exclude his/her name on the copy in connection with the use of his/her creation for public; (2) use aliases or pseudonyms; (3) defend its right in the event of distortion of creation, mutilation of creation, modification of creation, or things which are detrimental to self-respect or

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<sup>19</sup> Golkar Pangarso, *Loc. Cit.*

<sup>20</sup> Suyud Margono, *Hukum Hak Cipta Indonesia*, Bogor: Ghalia Indonesia, 2010, p. 21.

reputation. Protection period is given indefinitely in accordance to Article 57 paragraph (1) of Law 28 of 2014.

b. The protection of Economic rights is to provide during the life of the creator and continues for 70 years after the creator dies, commencing on 1 January of the following year (Article 58 paragraph (1) of Law 28 of 2014). If the copyright is owned by a legal entity, then the protection period shall be valid for 50 years from the first announcement.

However, only a certain creation is protected for the period of 70 years, it is the work of art in all forms such as; painting, drawing, carving, calligraphy, sculpture, sculpture, or collage. For video game itself, in accordance with Article 59 paragraph (1), the protection is given for 50 years from the first announcement.

Video game itself means a game that uses interaction with the user interface through images generated by video devices. Video games generally provide a reward system such as a score calculated based on the level of success achieved in completing tasks within a game.

Game aims to entertain, usually the game much preferred by children to adults. Games are actually quite important in brain development to improve concentration and train to solve problems precisely and quickly because there are various conflicts or problems that is required for us to solve them quickly and

precisely. On the other hand, game can also be harmful because of the addiction to the game leads to neglegation of another activity and will disrupt them.<sup>21</sup>

Based on scholars's definition, video game is:

1. According to Clark C. Abt, game is an activity that involves a player's decision, seeks to achieve goals "constrained by a particular context" (eg, restricted by rules). (Serious Games New York,: Viking Press, 1970)
2. According to David Parlett, Game is something that has the "end and how to achieve it": it means there are goals, results and set of rules to achieve both.
3. According to Augustine Nilwan in his book "Programming Animation and Professional Game", game is a computer game made with techniques and methods of animation. If one wants to deepen the use of animation, then they must understand the making of game, or they should understand the techniques and methods of animation, because the two are related.
4. Based on point of view of Dawang Muchtar, game is something that can be played with certain rules so that there are winners and some are defeated, usually in a context not serious or with the purpose of refreshing.
5. Based on Katie Salen and Eric Zimmerman, a game is a system in which players engage in artificial conflict, defined by rules, that produce measurable results.

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<sup>21</sup> Bangun Marlina, Jodi Priombodho, Melati Puspa Dewi, Muhammad Indera, Priyanto Tantowi, accessed from <https://hakkajiten.wordpress.com/index/pengantar-teori-game/pengertian-game/> on 06 May 2017 on 14:02

To equate understanding, the writer is citing a conceptual reference from Black's Law Dictionary that defines plagiarism as follows:<sup>22</sup>

*“The deliberate and knowing presentation of another person’s original ideas or creative expression as one’s own. Generally, plagiarism is immoral but not illegal. If the expression’s creator gives unrestricted permission for its use and the user claim the expression as original, the user commits plagiarism but does not violate copyright laws. If the original expression is copied without permission, the plagiarist may violate copyright laws, even if credit goes to the creator. And if the plagiarism result in material gain, it may be deemed a passing-off activity that violates the Lanham Act”.*

The definition of the dictionary distinguishes between immoral and illegal acts. Certainly, if the plagiarism is an original creative expression, then the plagiarist is considered to violate Copyrights Law. Meanwhile, the assessment of plagiarism is a violation of Copyright is also expressly stated by the World Intellectual Property Organization, in the 1980 glossary, as follows:<sup>23</sup>

*“Generally understood as the act offering or presenting as one’s own the work of another, wholly or partly, in a more or less altered form or context. The person so doing is called a plagiarist; he is guilty of deception and, in the case of works protected by copyright, also of infringement of copyright”.*

Nowadays, copyright has become an international issue that aims to determine the political direction of relations between nations, economic politics, defense politics, and cultural politics. Copyright and also other rights such as; Patent and mark is used as a measuring instrument to determine the direction of the status of

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<sup>22</sup> *Black’s Law Dictionary*, 2004, Eight Edition, p.1187 as quoted by Henry Soelistyo on the book *Plagiarisme: Pelanggaran Hak Cipta dan Etika*, Yogyakarta: Penerbit Kanisius, 2011, p.15.

<sup>23</sup> WIPO, 1980, *WIPO Glossary of Terms Laws of Copyright and Neighboring Rights*, p.192 as quoted by Henry Soelistyo on the book *Plagiarisme: Pelanggaran Hak Cipta dan Etika*, Yogyakarta: Penerbit Kanisius, 2011, p.15.

developed, developing or underdeveloped countries, especially in terms of determining the royalty. Regarding to copyright infringement, copyright infringement basically occurs when the copyright material is used without permission and there must be similarity between the two works. The claimant must prove that his work was imitated or violated or traced, or it came from his creation. Copyright is also infringed when all or substantial parts of a copyright-protected creation have been copied. The task of assessing and examining whether the part used is important, has a distinguishing element or easily recognizable part. Substance is intended as an important part rather than a large part. Similarly, consideration should be given to the balance of rights or interests between owner and society.<sup>24</sup>

Based on Article 95 Copyrights Law of 2014, the settlement of a copyright dispute may be made through alternative dispute resolution, arbitration or trial. The competent court is merely a commercial court. In addition to copyright infringement and/or related rights in the form of piracy, as long as the disputing parties are known to exist and/or residing in the territory of Indonesia must first settle dispute settlement through mediation prior to criminal prosecution.<sup>25</sup> According to criminal provisions on Copyrights Law No.28 of 2014 regulated in article 112-118, which stated the criminal actions of Copyrights, are:

- a. *Any Person who unlawfully and / or without permission of the Creator or copyright holder violates the economic rights of the Author as referred to in Article 9 paragraph (1) a, b, e and g or subparagraph g for*

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<sup>24</sup> Golkar Pangarso, *Op. Cit.*, p.93-94.

<sup>25</sup> *Ibid.*, p.94.



*Commercial Use shall be liable to Imprisonment of a maximum of 4 (four) years and / or a maximum fine of Rp1,000,000,000.00 (one billion rupiah).*

*b. Any Person who manages the trading place in any of its forms knowingly letting the sale and / or copying of goods resulting from a violation of Copyright and / or Related Rights at the trading place under its management as referred to in Article 10 shall be liable to a fine of not more than Rp100,000,000 , 00 (one hundred million rupiah).*

*c. Any Person who violently violates the economic rights referred to in Article 23 paragraph (2) a, b, and / or f, for Commercial Use shall be liable to a maximum imprisonment of 3 (three) years and / or criminal A fine of at most Rp500,000,000.00 (five hundred million rupiah).*

*d. Any Person who fulfills the element as referred to in Article 25 paragraph (2) letter d conducted with the intention of Hijack shall be punished with imprisonment not exceeding 10 (ten) years and / or a fine of not more than Rp4,000,000,000.00 (four billion rupiah ).<sup>26</sup>*

Computer program is a set of instructions expressed in the form of language, code, scheme, or in any form intended for the computer to perform certain functions or to achieve certain results.<sup>27</sup> Creation or Related Rights products that use production and/or data storage facilities based on information technology and/or high technology, shall comply with the licensing rules and production requirements stipulated by the authorized institution.<sup>28</sup>

The authority of the Government to conduct supervision relating to copyright infringement in Cyber Law perspective is stipulated in Article 54 UUHC,<sup>29</sup> and the role of the public to report any knowledge to infringement of Copyright and/or Related Rights through electronic systems for Commercial Use.<sup>30</sup>

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<sup>26</sup> Copyright Law No. 28 of 2014, *Op. Cit.*, article 112-118

<sup>27</sup> *Ibid*, Article 1 number 9.

<sup>28</sup> Undang-Undang RI, Nomor 28 Tahun 2014, Article 53 section (1).

<sup>29</sup> Undang-Undang RI, Nomor 28 Tahun 2014, *supra*, on Article 54 “*Untuk mencegah pelanggaran Hak Cipta dan Hak Terkait melalui sarana berbasis teknologi informasi, Pemerintah berwenang*”

<sup>30</sup> *Id*, Article 55 and 56.

## **G. Research Method**

The study is a normative legal research, which is a study of systematic law conducted on certain legislation or recorded. This study is focused on examining the legal liability by game distributors in the law of copyright protection in games as an intermediary creator with consumers as a third party. Based on the legal research perspective disclosed above, researchers generally collect primary and secondary data. Primary data is data obtained directly from interviews and field surveys relating to community behavior. Secondary data is data obtained by applying library materials.<sup>31</sup> However, the researcher will use normative-legal research methods. The research methods are categorized as follows:

### **1. Types of Research**

Legal research is either normative or empirical. The results of normative law research are prescriptive in nature: the norms provide a prescription as to how one should behave in accordance with the norms. Normative legal research involves the study of the law as an object and removes any non-legal material from the scope of this research. In contrast, empirical legal research focuses on the application of laws in society. This research paper analyses dichotomy between normative and empirical research and assesses its relevance and usefulness in legal research. While, empirical research is

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<sup>31</sup> Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, 2009, p. 23.

based on observed, measured phenomena and derived from knowledge of actual experience rather than from theory or belief.

## **2. Research Objects**

The object of this study is originality aspects of the creation of video game in framework of copyright protection in Indonesia

## **3. Research approach**

The approach that used in this study include:

- a. Statute approach (judicial) is a research approach to examine all of laws and regulations that related with the legal issue that presented; and
- b. Conceptual approach is research to refer to legal principles. These principles can be found in the views of scholars or legal doctrines.<sup>32</sup>

## **4. Research Data**

Sources of data in this study consisted of primary and secondary data with explanation following below.

- a. Primary data is the data that is obtained directly on interview which is related to the issue.
- b. Secondary data is data obtained by library research consisting of:
  - 1) The primary legal materials are the materials that have legally binding which includes:

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<sup>32</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2005, p.138.

- a. Law of Republic Indonesia Number 28 of 2014 about Copyright;
  - b. World intellectual property organization on Copyright.
- 2) Secondary materials is the materials that are not legally binded, including books, newspaper, literature and the result of previous research about copyright protection especially protection on internet.
  - 3) Tertiary materials are from primary and secondary sources, often to provide an overview of the topic. This type of material rarely contains original material. Tertiary materials are usually a decent source of data and facts presented with context to help interpret a topic such as textbooks, almanacs, bibliographies, encyclopedias, dictionaries, directories or handbooks, wikipedia is an example of a tertiary web source.

## **5. Data Collection**

Data collection was conducted by researching literature reviews and interviews with the following explanation.

- a. Literature study is an evaluative report of information found in the literature related to selected area of study. The review should describe, summarize, evaluate and clarify the literature work. It should give a theoretical base for the research and help the author determine the

nature of the research. Works which are irrelevant should be discarded and those which are peripheral should be looked at critically.

## **H. Systematic of Writing**

To understand better the system of this thesis, the framework of this thesis is divided into 4 chapters which is in each chapter there is sub-chapters as follows:

**Chapter 1**, consists of background of this study, legal issue, problem formulation, the purpose of this study. At the end is explanation about the system of writing.

**Chapter 2**, describes about study of normative regarding general overview of Intellectual Property Rights, Overview of Copyright, Regulation about Copyright Protection. In this chapter, the author use theoretical approach concerning legal issue of this study.

**Chapter 3**, contains a result or an answer through data analysis about the problem related with the title. First, it will explain the legal protection based on Indonesian law. Second, the case of video game plagiarism and the regulation of creator's royalty will be examined.

**Chapter 4**, contains conclusions of all the previous chapters and expected be useful to people or study.

**Bibliography** is a list of author's references to support the writing of this material. References are cited from book of law, legislation, article, and internet.

## CHAPTER II

### THEORITICAL FRAMEWORK OF INTELLECTUAL PROPERTY RIGHT AND COPYRIGHT

#### A. OVERVIEW OF INTELLECTUAL PROPERTY RIGHTS

##### 1. Definition of Intellectual Property Rights

Intellectual Property Rights (IPRs) are the economic rights afforded by law to a creator or inventor of a work of human intellectual ability. The World Intellectual Property Organization (WIPO), an international agency under the United Nations focusing on intellectual property rights issues which provides the following definition:<sup>33</sup>

*“Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, image, and design used in commerce.”*

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce IP is protected in law, for example; patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.<sup>34</sup>

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<sup>33</sup> Khoirul Hidayat., *Hukum HKI Kajian Undang-undang dan Integrasi Islam*, UIN-MALIKI PRESS, Malang, 2012, p.02.

<sup>34</sup> World Intellectual Property Organization ( WIPO ), <http://www.wipo.int/about-ip/en/> diakses pada 14 oktober 2017 on 13:08.

Intellectual property consists of a series of right in intellectual creations and in certain forms of identifiers. Generally, there are two main policy bases that underline intellectual property rights. The first is the policy of encouraging new intellectual creations. It is the main policy basis of patents, industrial designs and copyright. A patent, an industrial designs or a copyright confers an exclusive right on the owner, for a finite period to prevent others from exploiting its subject matters in an invention, a design, or a literary, or an artistic work. The exclusive right enables the owner to recover a reward for originality and investment in the creation of originality, and thus serves as an incentive for further investment in the development of new intellectual creations. The second main policy basis is the orderly functioning of the market through the avoidance of confusion and deception.<sup>35</sup>

Intellectual property rights are the right of material, the right to something that comes from the work of the brain, the work of the ratio. It is the result of the work of the reasoning of *human ratio*. That is on the one hand, there is an emotional work. The work of the heart in the abstract form known as the sense of fusion of rational and emotional work results in a work called intellectual work.<sup>36</sup> The term intellectual property right now is standardized in various regulations issued by the government. If traced further, intellectual property rights are actually part of the object, that is, the immaterial object (immaterial). Objects within the framework of

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<sup>35</sup> Rodney D Ryder, *Intellectual Property and The Internet*, LexisNexis, New Delhi, 2002, p.63-64.

<sup>36</sup> OK.Saidin, *Aspek Hukum Hak Kekayaan Intelektual*, PT RajaGrafindo Persada, Jakarta, 2015, p.10.

civil law can be classified into various categories and one of the categories is the grouping of objects into the classification of tangible and unrealized objects. For this matter, the limitation of the object put forward by article 499 of the Civil Code, which stated:

*"According to the Law the so-called material thing is every item and every right that can be controlled by property rights".*

Furthermore, as explained by Prof. Mahadi, goods, by article 499 of the Civil Code is a material thing (*stoffelijk voorwerp*), while rights are immaterial objects. This description is in line with the classification of objects according to Article 503 of the Civil Code, namely the classification of objects into groups of tangible and intangible objects.<sup>37</sup>

The Indonesian intellectual property law system is not a single legal system in the sense of standing alone. Indonesian intellectual property law has an interaction or intersection or relationship with other legal areas within the country of Indonesia. Substantively, the law of intellectual property rights consists of legal norms and principles. Normatively, the legal arrangement of intellectual property rights is regulated in various separate laws and regulations. Nevertheless, even though regulated in its norms, intellectual property rights are still seen in relation to other laws and regulations. When copyright laws, patent laws and other laws refer to the

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<sup>37</sup> *Ibid.*, p. 13.



existence of an intangible material right in the legislation, the limits on material rights should be seen in the Civil Code, in particular the KUHPerdata II book on things.<sup>38</sup>

Before discussing copyright more, the history of the convention or international agreement of copyright must be acknowledged firstly. Copyright is subject to the Bern Convention (1886) and Universal Copyright Convention (UCC) (1952). According to the Bern Convention, copyright is a right that effectively protects the author or his work in the form of works of art and literature. The Convention has three principles, namely as follows:<sup>39</sup>

- a. The principle of national treatment or assimilation, which means providing equal protection to the creations derived from the participants of the convention such as providing protection for the creation of citizens themselves.
- b. The principle of automatic protection, which means protection is not granted for any formalities, such as copyright registration and official notification of the announcement or registration fee.
- c. The principle of independence of protection, protection is not dependent on the existence of protection in the origin country of the creation.

According to the principle of national treatment above, then a copyright will get legal protection in another country as the protection is provided by the

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<sup>38</sup> *Ibid*, p.44.

<sup>39</sup> Yusran Isnaini, *Buku Pintar HAKI*, Ghalia Indonesia, Jakarta, 2010, p.03-04.

country of origin. Similarly, the principle of automatic protection, in general countries in the world today adheres to the principle of automatic protection so that copyrighted works produced in a country will get copyright protection in other countries without having to register in advance formally.

## **2. Multimedia in view of Intellectual Property Rights**

Multimedia has been present in our midst as a helpful tool in solving various problems. This era of multimedia cyberspace has become a part of everyday activities, especially for the business sector. Multimedia theories have been defined in various forms, but to further simplify the understanding of multimedia is given as a product that combines text, graphics audio, images, and or moving pictures in digital form.

The text in this case includes written forms such as: books, magazines, newspapers, manuals, and written forms that are specifically intended for a product as well as instructions, usage instructions and help screen.

While graphics are anything related to graphics, it includes all the creations that have traditional forms of charts, charts or maps,<sup>40</sup> and live images can include movies and videos.<sup>41</sup> In traditional media usually only provide passive role for the user or user, for example can only see or hear it, but with multimedia user can do the

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<sup>40</sup> Budi Santoso, *Butir-Butir Berserakan Tentang Hak Atas Kekayaan Intelektual Desain Industri*, CV.Mandar Maju, Bandung, 2005, p.101.

<sup>41</sup> Allan Williams, Duncan Calow, Andrwe Lee., *Multimedia, Contracs, and Licensing, FT Law & Tax.*, London, 1996, p.1.

right selection and experience desired. Thus the key value added in multimedia is the interactivity that can be reciprocated in accordance with the wishes. Most audio-visual technologies used at this time, such as TV broadcasting agencies, radio, video, audio cassettes, have used analog systems or technologies used to support the system has been widely developed has been widely accepted.<sup>42</sup>

Article 1 paragraph 1 of the draft Law on industrial design provides a definition of industrial design that is a creation of the form, configuration, or composition of lines or colors, or lines and colors or combinations of them of three dimensions containing aesthetic value and can be realized in a pattern of three dimensional or two dimensional and can be used to produce a product, goods or commodity industry and handicraft.<sup>43</sup>

TRIPs does not govern the definition of industrial design. TRIPs only govern the obligations of participating countries to protect industrial design, protection criteria, violations and protection terms.<sup>44</sup>

To obtain the legal protection, an industrial design must meet the criteria of newness as set forth in Article 2 section 1. An industrial design is deemed new if on the date of receipt, the design of the industry is not the same as the pre-disclosure (Article 2 section 2) made before the date of receipt or priority date if the application

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<sup>42</sup> *Loc. Cit.*, p.102.

<sup>43</sup> Budi Santoso, *Op. Cit.*, p.80.

<sup>44</sup> Nandang Sutrisno, *Perlindungan Hukum Terhadap Desain Industri, Rahasia Dagang, DTLST*, Makalah Seminar, Yogyakarta, October 4, 2000, p.2.

is filed with priority right (Article 2 section 3). The criteria have been in accordance with the desired TRIPs which states that:

*“members shall provide for the protection of independently created industrial designs that are new or original”*

Characters play a very important role in video games. Some games will feature newly created fictional characters, some might use previous existing works, for example, if a new iteration in a series of video games with reoccurring characters is developed. However, characters in video games can also be non-fictional, such as, football players in FIFA 15 (EA Sports, 2014), which are designed to be reproduced from their real counterpart as faithfully as possible.<sup>45</sup>

Character protection encompasses two areas of concern: characters as copyrightable subject matter and the scope of protection which is accorded to characters under copyright law. Both issues are inextricably tied to the idea-expression dichotomy, especially in the realm of character copyright. Judicial interpretations have substantially clarified the discernment of idea and expression in the context of copyright, as well as the proper test for infringement. In the area of character copyright, a distinction has been made between literary characters which are created primarily through ‘word portraits’ and cartoon or other graphic characters which are created through visual representation, actions, and personality. Professor Nimmer suggests that character is most readily protectable where both the original work and the copied work consist of cartoons or other graphic representations rather

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<sup>45</sup> Julian Stein., *The Legal Nature of Video Game – Adapting Copyright Law to Multimedia.*, Vol. 2., 2015., p. 47.

than 'word portraits.' The present discussion focuses on cartoon or other visually represented characters.<sup>46</sup>

For instance, the case that occur not only in Indonesia but around the world also face a similar case that the creation in the field of intellectual property rights should get legal protection is the case of Mobile Legends Games are now loved by smartphone users. However, for PC gamers who are familiar with the game titles "League of Legends" (LoL), it certainly does not take long to realize that there is something awkward in Mobile Legends. The game released last year looks very similar to the game LoL made by Riot Games. It is reported that Riot has filed a lawsuit against Shanghai Moonton Technology over alleged copyright and trademark infringement. The lawsuit filed to the California Central District Court on July 6, 2017. In the 44-page lawsuit it was explained that Moonton's game in question is Mobile Legends: 5V5 MOBA, Mobile Legends: Bang bang, and Magic Rush: Heroes.

It's not hard to know the reason for Riot's slack on the Mobile Legends game developer. Moonton trace the League of Legends down to the smallest details. Reported by Dotesports.com, the beginning of this problem is the logo. Both use the same font with the shield background as a logo.

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<sup>46</sup> Mary Patricia Culler., *Copyright Protection for Video Games: The Courts in the Pac-Man Maze.*, 1984., p. 551.

Furthermore, it is the battlefield area of Mobile Legends and League of Legends. It is clear that there are obvious similarities in texture, battlefield design, and color schemes between the two popular games. In fact, the location of almost every destination in the Mobile Legends game is similar to the map on the game LoL, and Summoner's Rift.

Riot party has asked several times for the Google Play Store and Apple's App Store to remove Magic Rush and Mobile Legends: 5V5 MOBA. At that time, Moonton had time to remove Mobile Legends: 5V5 MOBA from the application store. However, soon Moonton re-released the exact same game with the addition of some minor changes and a new name: "Mobile Legends: Bang bang".

Riot believes that Moonton has scooped out hundreds of thousands and even millions of dollars from tracing LoL. It is unfortunate that the popular game is involved in cases of copyright infringement. If proven guilty, most likely Mobile Legends fans have to swallow a sense of disappointment because of the dismissal of the game. Riot demands to have full rights over material deemed to be traced and compensation of \$ 150,000 per violation. The lawsuit has reached the court and is just waiting for the court to decide.<sup>47</sup>

## **B. OVERVIEW OF COPYRIGHT**

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<sup>47</sup> Kintan Utari J, *Mobile Legend Digugat Atas Tudingan Menjiplak Riot Games*, accessed from <http://www.pikiran-rakyat.com/hidup-gaya/2017/07/12/mobile-legends-digugat-atas-tudingan-menjiplak-riot-games-404999> on the date of 16 December 2017 at 16:54

## **1. History of Copyright in Indonesia**

In terms of its history the concept of protection in the field of copyright began to grow clearly since the discovery of the printing press in medieval Europe. The need in this area of copyright arises because with the printing press, the works of copyright are easily reproduced mechanically. This is what initially grew copyright. However, in subsequent developments, the content and scope of legal protection has been heavily criticized, because those who are considered to enjoy protection are only publishers of printing and publishing, while the authors are not properly protected. The European philosophers who pioneered the criticism used the argument that the works of creation are essentially personal reflections or alter ego of its creator. Then a new concept grows: author's right instead of copyright. In subsequent developments, the content and scope of copyright settings are essentially the same. The emphasis is placed on the protection of the creator and the recipients rights of the creator, language or term may be different.

The formal juridical Indonesia was introduced to copyright issues in 1912, at the time of the promulgation of *Auteurswet* (Wet van 23 September 1912, *Staatsblad* 1912 No.600). Although at that time Indonesia had enacted *Auteurswet* 1912, in reality the compliance and enforcement of its provisions had not been properly actualized. This is evident from the existence of books published in the form

books translation whose authors come from several countries in Europe, without asking permission to translate first from the original author.<sup>48</sup>

The authenticity of a work, whether in the form of essays or creations, is essential to the protection of the law by copyright. That is, the work must really be the work of the man who recognizes the work as his essay or creation. Likewise, there must be relevance between works to jurisdiction whenever the work would like to be protected. In Indonesia, the rights of the author/creator is called the author right, since the enactment of *Auteurswet 1912 No. 600*; which then used the term copyright in the next legislation.

Legal protection by copyright today protects the work or creations of authors, creators, artists, musicians, playwrights, programmers, and other. They are protected by the rights of authors from actions of others who reproduce or reproduce their work without permission. On article 1, the first paragraph of the Indonesian Copyright Act states that copyright is a special right for both the creator and the recipient of the right to announce or multiply his creations and grant permission to it without prejudice to restriction under applicable laws and regulations. Thus, copyright is intended as an exclusive right for the creator to produce his own work or grant permission to others to perform such action within the limits of applicable law.

The development of the copyright law regulation is in line with the development of the needs of today's society, even the development of international

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<sup>48</sup> Rachmadi Usman, *Hukum Hak Atas Kekayaan Intelektual*, PT Alumni, Bandung, 2003, p. 55-56.



trade, meaning that the concept of copyright has been in accordance with the public's interest to protect the rights of the creator in respect of his creation, not to the publisher anymore. On the other hand, for the sake of trading, the arrangement of copyright has become an important material in the TRIPs agreement that is integrated in the GATT / WTO. In addition, the concept of copyright has evolved into a balance between natural justice and the interests of society.

In fact, the 1886 convention on International Convention for the Protection of the Literary and Artistic Work which has been revised several times is the basis of international copyright protection. Therefore, the idea of creating a universal law known as the Universal Copyright Convention (UCC) comes. Indonesia has ratified the Berne Convention in 1997. The Berne Convention essentially requires member states to protect the works.<sup>49</sup>

After the independence of Indonesia, the provisions of *Auteurswet* 1912 are still in effect in accordance with the transitional provisions contained in Article II of the Constitution of the 1945, article 192 of the Constitution, the Republic of Indonesia Union, and Article 142 of the provisional constitution of 1950. The enactment of 1912 *Auteurswet* is certainly temporary, so that the new arrangement of copyright in accordance with the needs and ideals of national law was pending. The provisions of *Auteurswet* 1912 are out of date that, in practice, consequences are subject to awkwardness, perceived as detrimental to the interests of the parties whose

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<sup>49</sup> Endang Purwaningsih, *Perkembangan Hukum Intellectual Property Rights*, Ghalia Indonesia, Bogor, 2005, p.01-02.

lives depend on the field of copyright. Anyway the arrangements contained in the *Auteurswet* 1912 were felt less encouraging the creation and dissemination of intellectual work, so less encouraging advancement of science and art useful to accelerate the growth of the nation's intelligence. *Auteurswet* in its arrangements lacks a fair balance between the rights of the creator to oversee the spread of the work and the public interest in maintaining the spread. Accordingly about the issues, a new copyright law was compiled and legalized, namely, Law No.6 of 1982 on Copyright, which was validated on April 12, 1982. Law No.6 of 1982 replaced *Auteurswet* 1912 which was deemed to be incompatible with the needs and the ideals of national law. In addition, this is done to encourage and protect the creation, dissemination of the work of science, art and literature and accelerate the growth, intelligence and life of the Indonesian nation.<sup>50</sup>

## **2. Background the amendment of Law No.19 of 2002 to Law No.28 to 2014 about Copyright**

In consideration to Law No.28 of 2014 about Copyright stated some things that can be viewed as the background of the birth of this new law:<sup>51</sup>

- a) Copyright is an intellectual property in science, art, and literature that has a strategic role in supporting the development of the nation and

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<sup>50</sup> *Ibid*, p. 57-58.

<sup>51</sup> Bernard Nainggolan, *Komentar Undang-Undang Hak Cipta*, PT Alumni, Bandung, 2016, p. 28-29.

promoting the general welfare as mandated by the Indonesian Constitution of 1945;

- b) The development of science, technology, art, and literature, is very rapid that it requires increased protection and assurance of legal certainty for its creators, copyright holders, and related rights;
- c) Indonesia has become a member of various international agreements in the field of copyright and related rights, therefore, further implementation is required in the national legal system so that national creators and creators are able to compete internationally;
- d) Law No.19 of 2002 regarding to Copyright is no longer suitable with the development of law and the needs of society, so it needs to be replaced by new law;
- e) Based on the considerations referred to in letter a, letter b, letter c, and letter d, it is necessary to form a law on Copyright.

Through Article 1 of Law No.28 of 2014, we can see that the new Copyright Law provides a slightly different definition for some things. In addition, in the definition section, the New Copyright Act regulates more, such as the definition of "fixation", "phonogram", "multiplier", "royalty", "Collective Management Institution", "piracy", "commercial", "indemnification", and so on. In the new

copyright law also arranged in more detail about what copyright is. Copyright is an exclusive right consisting of moral rights and economic rights.<sup>52</sup>

When it is seen from the general explanation of Law No.28 of 2014 which explains Copyright contains an interesting description of the urgency of reforming copyright laws linked to the economy. In the general explanation, it is said that the development of creative economy which became one of the mainstay of Indonesia and the various developing countries of the rapidly of information and communication technology require the existence of the reformed Copyright Law, considering the copyright becomes the most important base of national creative economy. With the Copyright Law that meets the elements of protection and development of creative economy, it is expected that contribution of copyright sector and related rights to the state economy could be more optimal.<sup>53</sup>

TRIPs Agreement, there are still some things that need to be refined to provide protection for intellectual works in the field of copyright, including efforts to advance the development of intellectual works derived from the diversity of art and culture of the nation. With that in mind, it is deemed necessary to replace the UUHC by Law Number 19 Year 2002 regarding Copyright. It is realized because the wealth of art and culture, as well as the development of intellectual ability of Indonesian society needs adequate and legal protection in order to build healthy business competition climate required in implementing national development, then a new

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<sup>52</sup> <http://www.hukumonline.com/klinik/detail/lt54192d63ee29a/ini-hal-baru-yang-diatur-di-uu-hak-cipta-pengganti-uu-no-19-tahun-2002>, accessed on November 10, 2017 at 17:56.

<sup>53</sup> *Ibid.*, p. 29.

UUHC was established, namely Law No. 28 of 2014 on Copyright to suit the legal development and the society necessity.

The House of Representatives of Republic Indonesia and Government Representative of Law No.19 of 2002 about Copyright with Law No.28 of 2014 is a genuine effort by the State to protect the economic rights and moral rights of the creator and the owner's rights as an important element in the development of creator's creativity and owner of the associated rights to be creative. The denial of economic rights and moral rights can erode the motivation of the creators and nationally will have a widespread impact on the collapse of Indonesian macro creativity. Reflecting to the developed countries, it appears that adequate protection of copyright has succeeded in bringing the creative economy significantly and making a real contribution to the economy and people's welfare.<sup>54</sup>

### **3. Definition of Copyright**

Copyright refers to the legal right of the owner of intellectual property. In simpler terms, copyright is the right to copy. This means that the original creator of a product and anyone he gives authorization to are the only ones with the exclusive right to reproduce the work. Copyright law gives creators original material, the exclusive right to further develop them for a given amount of time, at which point the copyrighted item becomes public domain.<sup>55</sup>

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<sup>54</sup> *Ibid.*, p. 29-30.

<sup>55</sup> <https://www.investopedia.com/terms/c/copyright.asp>., accessed on November 12, 2017 at 17:16.

The legal definition of Copyright can be understood through Article 1 section 1 Law No.28 of 2014, which states:<sup>56</sup>

*“Copyright is an exclusive right of the authors that arise automatically on the basis of a declarative principle after a work is manifested in its tangible form without prejudice to restrictions in accordance with the provisions of legislation.”*

Other definitions of Copyright can be found on World International Property Organization (WIPO) and TRIPs agreement, which is stated that Copyright is:

*“Copyright (or author’s right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.”*

Article 9, subarticles 2 TRIPs states:<sup>57</sup>

*“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”*

The basic regulations about copyright are contained in Article 7 section 1 - 8 of the Berne Convention which states:<sup>58</sup>

- (1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.*
- (2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.*

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<sup>56</sup> Law No.28 of 2014 of Copyright., Article 1 section 1.

<sup>57</sup> TRIPs Agreement., Article 9 subarticles 2.

<sup>58</sup> Berne Convention, Article 7 section 1-8.

*(3) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.*

*(4) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.*

As for the understanding Copyright According to experts, as follows:

- a. According to Patricia Loughlan, Copyright is a form of ownership which grants the holder of exclusive right to oversee, use and utilize an intellectual creations, as the creations set forth in the category of copyright, namely literature, drama, music and art work, as well as sound, film, radio and television broadcasts, as well as published papers through publishing.
- b. According to McKeoug and Stewart, Copyright is a concept in which the creator (artist, musician, film maker) has the right to utilize his work without allowing others to copy his work.
- c. Imam Trijono says that copyright has the meaning not only of the creator and the result of his creation which is protected by law, but also this extension provides protection to those given authorization to the issuer of the translation rather than the work protected by this agreement.

According to point of view some experts, we can conclude that copyright is a form of private ownership of a creation in the form of an embodiment of a creative idea in the arts, literature and science. When buying a book, it is buying the right to lend and keep the book as you see fit. The book is yours personally in its real form.

However, when purchasing this book, it is not purchasing the copyright of the paper in the book owned by the author of a publisher as a book.

#### **4. The Function of Copyright**

Copyright is a special right for either the creator or the recipient the right to announce or multiply his or her creation and grant permission to it without prejudice to restrictions under applicable legislation. In this article it is explained that with the special right of the author, it is intended that no other person may exercise such rights or anyone else except by the author's permission.<sup>59</sup>

This copyright is an exclusive or special right for the creator. This right is not sought by the government, but when a person creates it must be declared and his name imprinted on the creation. It causes the creator to have exclusive rights by itself and is protected by law. The reason is when it is not announced, the creator does not get exclusive rights. Some of the exclusive rights generally granted to copyright holders are the right to:

1. To make copies or reproductions of creations and sell copies;
2. To import and exporting creations
3. To create derivative works or creation (adapt creation) derivatives
4. To display or showcase the creation in public

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<sup>59</sup> Sophar Maru Hutagalung., *Hak Cipta Kedudukan & Peranannya dalam Pembangunan.*, Sinar Grafika., Jakarta., 2011., p. 179.



5. To sell or transfer exclusive rights to other persons or persons.

### **5. Registration of Copyright**

The author is the person whose name is registered in the general register of creation and the official announcement to the Ministry of Justice and Human Rights of the Republic of Indonesia, the Directorate General of Intellectual Property Rights, as defined in the law, also the person whose name is mentioned in the creation or announced as the creator of a work. In conclusion, that the author may register his copyright to the Ministry of Justice and Human Rights or not. The copyright registration is only to facilitate the proofing process in the event of a dispute about who the creator of an actual work.<sup>60</sup>

Registering Copyright at General Register of Copyright is done or registered by creator or the copyright holder. How to apply copyright in Indonesia is submitted to the Directorate General of Intellectual Property Rights duplicated documents written in Indonesian language and accompanied by copyright samples or their replacement with a fee. Regarding the application for copyright registration, the Directorate General of Intellectual Property Rights shall issue a decision no later than 9 months from the date of receipt of the complete application for copyright registration. The power of the copyright holder in question is an intellectual property rights consultant registered to the Directorate General of Intellectual Property Rights.

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<sup>60</sup> *Ibid.*, p. 21-22.

Registering a creation does not automatically obtain a copyright. Registration of copyright is a must for the creator or copyright holder and the inception of copyright protection in the beginning since the creation existed or materialized and due to the registration of copyright. This means that either a copyrighted creation or an unrecorded copyright is protected. In addition, the copyright registration procedure in the General Register of Copyright does not imply to endorsement of the content, meaning, intent or form of the creation of which the copyright is registered. Intent of DG Intellectual Property Rights shall not be liable to the contents, purpose or form of the creation of which the copyright is registered.

The existence of Consultant of Intellectual Property Rights has been regulated in PP No.2 Year 2005 concerned in Consultation of Intellectual Property Rights and regulated in decision of Director General of Intellectual Property Number H-17.PR.06.10 in 2005 regarding to Registration Instruction in the field of Intellectual Property Rights. Intellectual Property Rights Consultant is a person who has expertise in the field of Intellectual Property Rights and specifically provides services in the field of submission and application of registration in the field of Intellectual Property Rights managed by the Directorate General of Intellectual Property Rights and registered as a consultant of Intellectual Property Rights in the Directorate General of Intellectual Property Rights. The Consultant of Intellectual Property Rights in performing his duty shall be entitled to:

- a. Represent, and assist the interest of the service user to arrange the application of Intellectual Property Rights to the Directorate General of Intellectual Property Rights accompanied by an attorney, and
- b. Acquire rewards for services. In addition, the Consultant of Intellectual Property Rights also has an obligation to: (1) Comply with the laws of Copyright and other legal provisions; (2) Protect the interests of the service user by maintaining the confidentiality of information relating to the copyright registration application authorized by the creator; (3) Provide consultation services and socialization of copyright, including the procedure of application for Intellectual Property Right.

List of General Copyright in Indonesia, among others, contains data on:

- 1. The name of the creator and the copyright holder;
- 2. Date of receipt of copyright registration application letter;
- 3. The full date of the requirement under Article 37 of the Copyright Act 19 Year 2002;
- 4. The copyright registration number. Registration of copyright is deemed to have been done when the copyright registration application has been declared complete and received by Directorate General of Intellectual Property Right. Registration of copyright in Official Gazette Copyright by DG copyright.

Registering a copyright in Indonesia is easier, among others, can be submitted through the Regional Office of the Ministry of Justice and Human Rights

in each provincial capital. This policy has been started since 2000, specifically for copyrights, patents and Trademarks, based on the Regulation of the Ministry of Justice of the Republic of Indonesia No. M.09-PR.07.06 Year 1999, regarding to the appointment of the Regional Office of the Ministry of Justice and Human Rights to accept the application of copyright registration, and pursuant to the Directive of Intellectual Property Rights Directive, and based on the Directive of Intellectual Property Rights No. DG. H-08-PR.07.10 Year 2000.

Since 2004, the policy of registering Copyright by registering to the Ministry of Justice and Human Rights is further refined, covering all areas of Intellectual Property Rights, Copyright, Industrial Design, Layout Design of Integrated Circuits, Trade Secrets, Patents and Trademark Rights. In the area of copyright, there is no known copyright registration request by using priority right as in other areas of Intellectual Property Rights. The reason is in copyright, recognition by the state will automatically be granted when the creation first appeared, as well as the author's recognition.<sup>61</sup>

## **6. Abolishment of the legal powers of creation and product registration related rights**

Abolition and cancellation of Copyright based on the Law of the Republic of Indonesia Number 74 of 2014. The legal power of recording the creation and related

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<sup>61</sup> Iswi Hariyani., *Prosedur Mengurus HAKI Yang Benar.*, Penerbit Pustaka Yustisia., Jakarta., 2010., accessed on <http://www.pengantarhukum.com/2014/06/tata-cara-pendaftaran-hak-cipta-di-indonesia.html>., at November 16, 2017 on 17:37.

rights products is in fact only a proof of the beginning of copyright ownership and related rights. However, the force of this law can be removed with various reasons as regulated in Article 74 section 1-2 of Copyright Law No.28 of 2014 which states:<sup>62</sup>

- 1) The legal power of Recording of Works and Related Rights products is omitted due to:
  - a. The request of a person or legal entity whose name is registered as a Creator, Copyright Holder, or owner of the Related Rights;
  - b. The period of time as referred to in Article 58, Article 59, Article 60 paragraph (2) and paragraph (3), and Article 61;
  - c. The court's decision of obtaining a permanent legal force concerning the cancellation of the Record of Works or the Related Right product; or
  - d. Violating religious norms, norms of morals, public order, defense and security of the state, or the laws and regulations that the abolition is undertaken by the Ministry.
- 2) The abolishment of a work on the request of a person or legal entity whose name is recorded as a Creator, Copyright Holder or owner of Related Rights as referred to in paragraph (1) letter a shall be charged.

Article 75 Copyright Law No.28 of 2014 stated that:<sup>63</sup>

*"Further provisions concerning the abolition of the legal power of the Record of Works and the products of Related Rights referred to in Article 74 shall be governed by a Government Regulation."*

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<sup>62</sup> Bernard Nainggolan, *Op.cit.*, p. 160.

<sup>63</sup> Article 75 Copyright Law No.28 of 2014.

Based on article 74 and 75, some conclusions are drawn as follows:

1. The legal power of recording the creation or the associated product's rights will be removed as such:
  - a. The request of the person or legal entity whose name is registered as the creator, the copyright holder, or the rights owner concerned;
  - b. The lapse of copyright protection and related rights to the creation and related rights products;
  - c. The judgment of the court which has obtained a permanent legal force concerning the cancellation of the creations' recording or related rights product; or
  - d. The violation of religious norms, norms of morals, public order, defense and state security, or the laws and regulations that the abolition is undertaken by the Minister.
2. The elimination of the registration of a creation at the request of a person or legal entity whose name is recorded as the creator, copyright holder, or owner of the associated rights is charged.

## **7. Time period of Copyright**

As it is known since creation is manifested as a result of the emancipation of the copyright to the creation, it means that from then copyright shall come into force. The author has the right to publish, reproduce, announce his creation, and prohibit others to multiply and/or commercially use his creations. All things must be originally.

Similarly, copyright cannot be separated from the validity period or the time will be limited. The issue of copyright is not the same thing between one creation and another because it is influenced by the nature of the creation of the copyright group. There are two kinds of properties that are original and derivative. The validity period also depends on the type of the object of the copyright, and whether the object is published or unpublished.

Copyright is valid for a limited period of time, and the duration varied by country. As a right that has a social function, copyright has a certain period of validity which is to avoid excessive monopoly of the creator.<sup>64</sup> In Indonesia, based on Article 59 Law Number 28 of 2014 regarding Copyright, the period of validity of a copyright is as follows:

*(1) Protection of Copyright on Creation:*

- a. photography works;*
- b. Portrait;*
- c. cinematographic works;*
- d. video games;*
- e. Computer program;*
- f. paperwork;*
- g. translation, commentary, adaptation, arrangement, modification and other works of the transformation;*
- h. translation, adaptation, arrangement, transformation or modification of traditional cultural expression;*
- i. compilation of Creation or data, whether in a format that can be read by Computer Program or other media; and*
- j. compilation of traditional cultural expressions during the compilation is original work, valid for 50 (fifty) years from the first announcement.*

*(2) The copyright protection to a work in the form of applied artwork shall be valid for 25 (twenty five) years from the first announcement.*

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<sup>64</sup> Ade Sanjaya, <http://www.landasanteori.com/2015/09/perlindungan-hak-cipta-pengalihan-masa.html>, accessed on November 18, 2017 at 17:00.

Copyright Protection of Works in the form of applied artwork is valid for 25 years from the first announcement. The state as the holder of copyright over traditional cultural expressions (including one or a combination of forms of expression as follows: a) Textual verbal, both oral and written, in the form of prose and poetry, in various themes and content of messages, which can be either literary or informative narratives, b) Music, including vocals, instrumental or combinations, which includes motion, including dance, theater, such as, puppet performances and folk plays, both in the form of two dimensions three dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile, etc. or any combination, and c) traditional ceremonies. The right to the creation is set forth in Article 60 paragraph (1) -The Number 28 of 2014 is valid indefinitely, meaning it is valid throughout the ages.

Although copyright is valid throughout the ages, but because the copyright on the creation is a common property (*rescommunis*), anyone can copy or reproduce the work without requiring prior permission from the state as the copyright holder, provided that the person concerned is an Indonesian citizen because he shares his copyright. Whereas the state as the copyright holder of a creature whose creator is not known shall be valid for 50 (fifty) years since the creation was first made announcement.

## **8. Transfer of Copyright**



The transfer of copyright cannot be done verbally, but must be done in writing both with and without notarial deed. When the transfer of rights is not done in writing but verbally, then the possibility of the transfer of copyright will not be legally binding enough. The most common way of copyright transfer is by written agreements. There are two ways of transferring the copyright, especially economic rights through a written agreement known in practice, the first is the transfer of copyright from the creator to the copyright holder in the form of assignment (*overdracht*) or could be translated in submission that causes copyright ownership to move entirely and to the party who received the submission. The second way is to grant permission or license based on an agreement which stipulates the rights of the copyright holder within a certain period of time to perform certain acts within the framework of exploitation of the creation whose copyright still owned by the creator.

Transfer of copyright is regulated in Article 121 Copyright Law No.28 of 2014, as follows;<sup>65</sup>

- a. Applications for the recording of Works and related Rights products that are still in process, are settled in accordance with the provisions of Law Number 19 Year 2002 regarding Copyright;*
- b. A registration letter of a Work which, by virtue of this Law, is called a Letter of Record of Works which has been issued before this Law, shall remain in force until its expiry of the period of expiration;*
- c. Collection and Distribution of Royalties by professional organizations or similar institutions with any titles which existed before the Act became effective until the establishment of a Collective Management Institution in accordance with the provisions of this Law;*
- d. Professional organizations or similar institutions with any existing title whose duties and functions of collecting, administering and / or distributing Royalties prior to the coming into effect of this Law shall adapt*

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<sup>65</sup> Copyright Law No.28 of 2014, Op.cit, article 121.

*and change to the Collective Management Institution for a maximum period of 2 (two) years from the date of its entry into force This Act.*

## **9. Islamic Review on the Copyright**

Basically copyright is used to protect a work of creation in the form of science, art and literature to reduce piracy on the work of his creation. Copyright may be transferred to another party in order to announce or reproduce a work with the creator's permission.

A copyright in a work of authorship ordinarily immediately becomes the property of the author who created it, and only the author or those deriving their rights through the author can rightfully claim copyright. Copyright law provides individuals and companies with the right to demand payment from others for the use of said copyrighted materials. Naturally, the actual monetary value of these rights hinges on the demand for granting permission to use a work protected by copyright law.<sup>66</sup>

Although a copyright owner has certain exclusive rights, there are some limitations that Congress has imposed which are referred to as “fair use”. For years, the courts have discussed whether certain kinds of copying of copyrighted works should be permitted. Under some circumstances, copying is believed to be socially desirable and yet not unfair to the copyright owner.<sup>67</sup>

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<sup>66</sup> Frank H. Foster., *Patents, Copyrights, & Trademarks.*, John Wiley & Sons, Inc., Canada., 1993., p. 145.

<sup>67</sup> *Ibid.*, p. 152.

The scholars in the Indonesia also pays serious attention to the rampant practices of IP rights violations. The Indonesian Ulama Council (MUI) has adopted Fatwa No. 1 of 2003 on Copyright and Fatwa No. 1/MUNAS/VII/MUI/15/2005 on Intellectual Property Rights.

According to Chairman of Fatwa MUI, KH Ma'ruf Amin explains that any form of copyright infringement, is an illegitimate tyranny. In the light of his considerations, the Indonesian Council of Ulama (MUI) considers the practice of copyright infringement to have reached an alarming stage. Many parties are harmed, especially copyright holders, state and society.<sup>68</sup>

In Al-Qur'an, it is explained in Q.S Al-Baqarah verse 188, Allah SWT which declares,<sup>69</sup>

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ  
لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

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<sup>68</sup> Decision of Indonesian Council of Ulama (MUI), No. 1/MUNAS VII/MUI/15/2005, on protection of Intellectual of Property Right (IPR).

<sup>69</sup> Al-Quran, Surah Al-Baqarah verse 188

Meaning: “And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].”

The Prophet Muhammad also says in his Hadits which is narrated by Imam Ahmad states:

*“is income from the work of his own hands, and all good buying and selling ”*

It has interpreted that production of an intellectual work is the work of the brain and also the work of his hands, and the Holy Prophet greatly appreciated a work produced by his own hands even he dated it as the best income.

## CHAPTER III

### LEGAL PROTECTION OF THE VIDEO GAME AGAINST UNFAIR BUSINESS COMPETITION UNDER COPYRIGHT LAW IN INDONESIA

(Analysis of Supreme Court Decision No. 2349 K/Pid.Sus/2014)

#### A. Legal Protection of Video Games

Intellectual Property Right relates to products which are works of art or literature or written works including scientific works that are intellectual property that is copyrighted as part of Intellectual Property Right and traded globally, so, in turn, it requires effective legal protection from all offenses. The involvement of technological options, both patented and in the form of trade secrets, which took place from the planning stage and continued until the stage of manufacture, or the use of the mark when the product is marketed, indicates the involvement of Intellectual Property Right from the beginning to the end of production. It can be said that IPR has been present since the beginning of production until the time of marketing or publishing.<sup>70</sup>

Copyright protection is time-bound. Under the international agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that is administered by the World Trade Organization (WTO), protection should last at least 50 years after the death of the author. There is a trend for countries to adopt longer terms than the minimum requirement by TRIPS and the treaties administered by the World

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<sup>70</sup> Golkar Pangarso, *Op. Cit.*, p. 84.

Intellectual Property Rights Organization (WIPO)<sup>71</sup>, e.g. a term of the life of the author plus 70 years, or at least 70 years from first publication if the author is not a natural person.

IPR issues touch on various aspects such as technology, industry, social, cultural, and other various aspects. However, the most important aspect of the protection of intellectual work is the legal aspect. Law is expected to overcome various problems that arise related to the IPR. The law should be able to provide protection for intellectual work, so as to develop the creation of society which ultimately leads to the goal of successful IPR protection.<sup>72</sup>

Two aspects of video games have been the subject of copyright. Creators of video games (or their assignees) have sought copyright protection for the computer programs which control the games and for the audiovisual display or "sights and sounds" of the games. Interpretation of copyright law in the subject areas of characters, games, and computer programs has proven the importance of video game's litigation. Most of the reported cases are dispositions of motions for

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<sup>71</sup> These include: Berne Convention for the Protection of Literary and Artistic Works (of September 9, 1886, completed at Paris on May 4, 1896, and revised and amended several times since then; last amendment in September 28, 1979); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention; done at Rome on October 26, 1961); Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (of October 29, 1971); Copyright Treaty (adopted in Geneva on December 20, 1996); Beijing Treaty on Audiovisual Performances (adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013).

<sup>72</sup> Golkar Pangarso, *Op. Cit.*, p. 117.

preliminary injunctions, and in most instances the preliminary injunction has been granted. The importance of granting preliminary injunctions in litigation over video game copyright infringement should not be underestimated. Individual video games enjoy a rather short-lived or at least unpredictable span of popularity. Thus, a preliminary injunction may be the only means of relief, because the "game may fade from the scene before the final rights of the parties are adjudicated."<sup>73</sup>

The technological aspect is a very dominant factor in the development and protection of IPR. The development of information technology is very fast nowadays which has caused the world to feel more narrow, information could easily and quickly spread to all corners of the world. In such circumstances, IPR becomes increasingly important.

This easiness of reproduction is both a virtue and a drawback of technology. It dramatically reduces costs and production time, and enables new distribution channels, like online media stores, in addition to traditional physical discs or cassettes. On the other side, it brings a whole new world of possibilities for duplicating and distributing content without the required authorization. Machines capable of creating thousands of exact copies of a compact disc or computer networks that can transfer a movie in minutes are just some examples.<sup>74</sup> Copyright initially vests in the authors of an original work of authorship. Typically, an author is anyone

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<sup>73</sup> Mary Patricia Culler., Op. Cit., p. 555.

<sup>74</sup> Dana Dahlstrom, Nathan Farrington, Daniel Gobera, Ryan Roemer, Nabil Schear., *Piracy in the Digital Age.*, University of California, San Diego., December 6, 2006., p. 02.

who contributed an original element to the work. In the case of works made for hire, the employer is deemed the author for the purpose of copyright ownership. Copyright grants authors certain exclusive rights to reproduce, adapt, distribute, display, and perform their original works of authorship, depending on the nature of the work in question. Copyright owners may transfer or license their exclusive rights in whole or in part, with few limitations. Copyright owners also may file civil actions for the infringement of their exclusive rights, and recover damages or obtain an injunction. Under certain circumstances, the government may file a criminal action for willful infringement.<sup>75</sup>

The prevailing theory of copyright protection is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship by providing a salient incentive to marginal authors.<sup>76</sup> The Supreme Court has explicitly and repeatedly held that the Intellectual Property Clause adopted the theory:<sup>77</sup>

*“ The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of author and investors in Science and useful Arts.”*

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<sup>75</sup> Brian L. Frye, Christopher J. Ryan, Jr. & Franklin L. Runge., *An Empirical Study of Law Journal Copyright Practices.*, 2017., p. 210.

<sup>76</sup> Of course, there are alternative., deontological theories of copyright protection., See generally., Peter S. Menell, *Intellectual Property: General Theories*, *ENCYCLOPEDIA OF LAW & ECONOMICS: VOLUME II* (Boudewijn Bouckaert and Gerrit de Geest eds. 2000)., <http://encyclo.findlaw.com/1600book.pdf>.

<sup>77</sup> Brian L. Frye, Christopher J. Ryan, Jr. & Franklin L. Runge, *Op. Cit.*, p. 211.



Under this economic theory, copyright gives authors certain exclusive rights in their works of authorship in order to provide an incentive for them to invest in the production of those works. It follows that copyright is justified when it provides a salient incentive to marginal authors, and not to be justified when it does not.<sup>78</sup>

In the analyzed economies, copyright infringement is generally pursued by the copyright owner. However, in some cases (e.g. commercial scale piracy) the infringement may also be subject to ex officio criminal proceedings. In order to address this issue, some countries have devoted special police units to counter online IP crime (United Kingdom, Korea). In addition, some countries have considered new legislation to block websites that host copyright-infringing materials, for example, Italy and the United States.<sup>79</sup>

## **1. Legal Protection of Video Games in Indonesia**

### **a. Violation of Copyright of Video Games**

Development in digital era has a positive impact and negative impact. Positive impacts include improving people's lives, improving science and technology, and upgrading skills. On the other hand, there are negative impacts, with the advancement of technology in the field of graphics make modern printing tools available then skilled labor created a printing business which is against the law. It is

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<sup>78</sup> Ibid., p. 211.

<sup>79</sup> *Copyright In The Digital Era: Country Studies.*, 2015., p. 215.

to print the work of others without the author's permission. Technological advancements in electronics are available in recording devices such as audio and video which is against the law as well, i.e. recording the work of others without the permission of the creator or the copyright holder. The goal is to gain personal benefits without paying taxes. Such acts is included as copyright infringement.<sup>80</sup>

Copyright infringement may take the form of retrieving, quoting, recording, reproducing, and announcing the creation of another person, whether it is in whole or in part without the author's or copyright's authorization. In contravention of copyright law, improperly or otherwise violating the provisions of the law copyright as well, for example:<sup>81</sup>

- 1) It is permitted to quote without permission but exceeds 10% set by law;
- 2) Quoting or recording another's creation inserted into his own creation without mentioning its source;
- 3) Misusing permission of the creator or copyright holder for commercial purposes, such as reproduce the books and then traded by earning a profit;
- 4) Exceeded the amount allowed in the agreement, for example, in the agreement it is determined 3000 pieces but 6000 pieces are published.

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<sup>80</sup> Seodjono Dirdjosiswono., *Hukum Perusahaan Mengenai Hak Atas Kekayaan Intelektual.*, Bandung., Cv. Mandar Maju., 2000., p. 64.

<sup>81</sup> Ibid., p. 64-65.

## **b. Type of Copyright Infringement**

Copyright infringement is not only in the form of paper or print, but also audio or video recordings. The crime of copyright infringement can be divided into two types according to the Indonesian Publishers Association's broadcast:<sup>82</sup>

- 1) Taking or quoting the creation of others and applying it as if it were a creation of itself. The act is called plagiarism. This might happen to any type of work.
- 2) Taking the creation of others to be reproduced and announced as originally without altering the form, content, creator or author, publisher or recorder. This act is called piracy. Hijacking is mostly done in the form of books and works of audio and video recordings, such as cassettes and videotapes.

Piracy of another person's work is a criminal act of copyright infringement. The work is wild, hidden, and unknowable to many people, let alone by tax officials. Hijackers are unlikely to pay taxes to the state. Obviously the hijacker of another's work is harming the state, inhibiting the creation of other's own work, hampering the purpose of advancing the general welfare.<sup>83</sup>

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<sup>82</sup> *Ibid.*, p. 65.

<sup>83</sup> *Ibid.*, p. 65.

### **c. Threat of punishment against Copyright Infringement**

According to the provisions of section 113 on sections 3-4 of Law No.28 of 2014, copyright infringement in cases of piracy resulting in profits for piracy and damages to the creator of the work may be criminalized as follows:<sup>84</sup>

- 3) *Any Person who without rights and/or without permission of the Creator or copyright holder violates the economic rights of the Author as referred to in Article 9 paragraph (1) a, b, e and/or g for Use Commercial is subject to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah).*
- 4) *Any person fulfilling the element as referred to in paragraph (3) conducted in the form of piracy shall be liable to a maximum imprisonment of 10 (ten) years and/or a maximum fine of Rp4,000,000,000.00 (four billion rupiah).*

According to Indonesian Copyright Law, the recognition of the rights of creators is divided into two types, namely economic rights and moral rights. These economic rights include reproduction rights; distribution right; adaptation rights that include the right of translation, the right of dramatization, the right of the film; performance rights: the right to a sound recording (Mechanical Right); rights to a broadcasting program. The embodiment of legal protection for economic rights is incarnate in the determination of the type of prohibited conduct and its criminal sanctions provided for in article 72 Copyright Law.

## **B. Analysis of Supreme Court Decision Number 2349 K/Pid.Sus/2014 case of**

### **Cassette Hijacking**

#### **1. Case Position**

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<sup>84</sup> Copyright Law No.28 of 2014 article 113 section 3-4.

The defendant, Gunawan, on Tuesday, September 5, 2006 at approximately 16.30 WIB and another time in 2006, locates Experience Game Shop at Jalan Bendungan Sutami Number 15-E Malang City or some other place that is still included in the jurisdiction of the Malang District Court, "Intentionally broadcast, exhibit, circulate or sell the creation or the proceeds of Copyright Infringement to the public due to the fact that the game store owned by Gunawan sells pirated tapes without the permission of the creator or the copyright holder.

Gunawan is proven to infringe the copyright because the products he sell is illegal/not original/pirated/copyright infringement that it does not meet the elements as an optical disc product of the work of the original game record:<sup>85</sup>

1. Identifying the cover image / CD place

- a. The absence of a hologram (symbol of the copyright holder/record company and/or authorized distributor) on the front cover or in the form of a hologram CD.
- b. There is no payment mark of tax/VAT.
- c. There is no number and date of STLS (Letter of Passed Sensor).

2. Identifying the back of the discs

There is no Production Code (located IFPI International Identification) which is a 4-digit numeric digit, for identification of the origin of the Optical Disc's manufacture plant.

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<sup>85</sup> Supreme Court Decision No. 2349 K/Pid.Sus/2014

3. Other identification that declares that CD is not original/illegal
  - a. Illegal CD/pirated products are sold at a much cheaper price than the original/illegal/original CDs.
  - b. Pirated products sold with serial numbers are not accompanied by text/narrative film stories (short story films).

The judge decided that the defendant Gunawan has committed a criminal act "Intentionally broadcasts, exhibits, distributes or sells to the public a work or goods resulting from copyright infringement" as stipulated and criminalized in Article 72 paragraph (2) of Law Number 19 Year 2002 on Copyright. The defendant is imposed a penalty by imprisonment for 2 (two) years with the order of the Defendant detained and to pay a fine of Rp. 5,000,000.00 (five million rupiah).

According to Article 380 section 1-2 Indonesia Criminal Code, states the criminals are threatened with imprisonment for a maximum of two years and eight months or a maximum fine of seventy-five thousand rupiah for those who do:<sup>86</sup>

- 1) *whoever puts a false name or sign, falsifies the original name or mark on or in a work of literature, scholarship, art or craft, in order that one may assume that it is actually the work of a person whose name or sign is placed on or in it ;*
- 2) *person who intentionally sells, offers, deposits, has inventory for sale or incorporates to Indonesia, literary, scientific, artistic or craft work, in which or has been placed a false name or sign, or whose original name or sign has been falsified , as if it were really the work of a man whose name or sign had been falsely placed.*

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<sup>86</sup> Indonesia Criminal Code Article 380 section 1-2.

A market economy allows and encourages the competition between industrial and commercial organizations. As competitors are out to win, they may sometimes be tempted to use malicious means to gain an unfair advantage such as making a direct attack against a competitor or misleading the public to the detriment of a competitor.

Indonesia's regulation declares clearly that plagiarized the work of others intentionally to gain profit is against the law. In this case, the suspect as the owner of the game store is aware that tracing and selling the work of others without the permission of the copyright holder is a violation of the law.

However, the defendant did not accept and filed an appeal on the grounds that the judge who handled the case had made a mistake in interpreting the acts committed by the defendant Gunawan who is selling pirated or non-original products was against the law. The defendant said that the goods are not registered and protected by copyright under Indonesia's Law.

Therefore, although the copyrights of PlayStation 1 and PlayStation 2 DVD Players are not registered at the Directorate General of Human Rights and Human Rights, the protection of Copyright in the Law of the Republic of Indonesia stating that copyright is not required to obtain legal protection but is automatically protected. Based on the principles of international law which states that Indonesia has become a member of the Agreement Establishing at World Trade Organization which includes

the Agreement on Trade Related Aspects of Intellectual Rights, hereinafter referred to TRIP through Law Number 7 Year 1994, besides, Indonesia has also ratified the Berne Convention for the Protection of Artistic and Literary Works through Presidential Decree of R.I. Number 18 of 1997 and the World Intellectual Property Organization Copyrights Treaty referred to as WCT through Presidential Decree No. 19 of 1997.<sup>87</sup>

Legal protection of foreign creation in Indonesia may be avoided if the country or its creation in Indonesia has bilateral agreements or other agreements agreed upon by Indonesia. In article 95, UU no 28 of 2014, it has been explained that the dispute resolution of the Settlement of Copyright can be solved through some alternatives, such as, arbitration, or court. The court is authorized to address the issue of copyright dispute namely the Commercial Court.

Actually, in the settlement of copyright dispute both parties and citizens of Indonesia as long as they have bilateral and multilateral agreements as in the intent in the copyright laws. Although changes in copyright laws continue to engage in the protection of foreign copyrights due to the increasingly high number of foreign residents living in Indonesia who can and may create copyright that is likely to be similar to or equal to the copyrights registered to the IPR Director General.

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<sup>87</sup> Supreme Court Decision No. 2349 K/Pid.Sus/2014



## **2. The Absence of Foreign Agent in Indonesia is a reason for Business Actor to commit Copyright Infringement**

Unconsciously, cases of violations of business ethics are common and natural in the present. Society witnesses many violations of business ethics in business activities in Indonesia. Many things are related to violations of business ethics done by irresponsible businessmen in Indonesia. These are forms of unfair competition by businessmen who would like to dominate the market. In addition to dominating the market, there are other factors which also affect businessmen to violate business ethics, among others, to expand market share, and to get a lot of profits. These three factors are common reasons for business people to violate ethics in various ways.

Business reputation is be regarded as one of the industrial wealth in the form of copyright, design and patent regime in which each of these areas receive special protection, which furthermore in the reputation of their business will result directly from the existence of certain products (goods or services). A business reputation can arise due to an effort of creativity as well as promotional efforts as well as the commercial steps to broadcast the product to audience so that they are acknowledged to the product.<sup>88</sup>

A business reputation will in fact remain part of the intellectual property arrangements and commercial and investment efforts in enriching intellectual

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<sup>88</sup> Suyud Margono., *Hak Milik Industri Pengaturan dan Praktik di Indonesia.*, Ghalia Indonesia., Bogor., 2011., p. 225.

property discourse. The development of law and business makes the protection of business reputation a national activity. In practice, successful are those who have good will in society with a lot of effort to generate time and money just to build a reputation for its products.

Reputation or goodwill in the business world is seen as one of the keys to the success or failure of a business. Many entrepreneurs are competing to maintain reputation by maintaining product's quality and providing the best service to the community as consumers. In the common law system known as the principle of passing off, which means that legal protection is given to a product (goods or services) given because the value of the product has a reputation. With this legal protection, the business competitors are not entitled to use the brand, letters, packaging, image, or service of the product which has a reputation.<sup>89</sup>

Copyright infringement is defined as “the unauthorized or unlicensed copying of a work subject to copyright.” The principles of copyright and fair use are pertinent to a discussion of plagiarism, they are included as well. For example, it is considered fair use to photocopy or print out one chapter of a book or one article from a journal issue, but not the entire work. Rules governing the use of copyrighted materials in classrooms and in course reserves are of particular concern to faculty, who are expected to become familiar with and apply them in their course preparation. In order to comply with fair use guidelines, for example, faculty may supply students

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<sup>89</sup> *Ibid.*, p.234.

with citations and ask them to duplicate the articles themselves, rather than hand out multiple copies in class.<sup>90</sup>

Passing off is also basically to prevent others from doing some of the following;<sup>91</sup>

- a. Presenting goods or services as if they belonged to someone else.
- b. Running the product or service as if it has a relationship with the goods belonging to someone else.

Related to this case, the defendant is objected to the sentence awarded to the defendant. The defendant explained that he was doing a fair deed because in Indonesia there is no official agent of the product that he trace or multiply, such as Playstation. Therefore, the consumers find it difficult to buy or enjoy the product and in the end because of the increasing demand, the defendant decided to reproduce and sell the product for consumer convenience.

For that reason, the defendant still wants to maintain his business reputation among consumers. Although the reasons and requests for the cassation are accepted by the judge, the defendant's actions can be harmful to the copyright owner and the state due to the fact that the perpetrator of piracy or plagiarism certainly does not pay taxes on goods that are traded.

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<sup>90</sup> Stephanie Ballard., *Give Credit Where Credit is Due: Avoiding Plagiarism and Copyright Infringement.*, 2011., p. 01.

<sup>91</sup> Suyud Margono., *Op.Cit.*, p. 235.

Although the reason is ultimately accepted by the judge as the excuse of forgiveness and the request of the defendant's cassation was granted but the act of defendant did was a violation of copyright, and as explained in Article 114 Law No.28 of 2014 Copyright Law, which declares:<sup>92</sup>

*“Any Person who manages the trading place in any of its forms knowingly letting the sale and / or copying of goods resulting from a violation of Copyright and / or Related Rights at the trading place under its management as referred to in Article 10 shall be liable to a fine of not more than Rp100,000,000 (one hundred million rupiah).”*

Violations of ethics can happen anywhere, including in the business world. In order to gain the maximum profit, many companies justify any means. This fraudulent practice is not only harmful to society, but the company as well. Many things are related to violations of business ethics is often done by irresponsible businessmen in Indonesia. Business practices that occur so far are considered ignoring ethics, sense of justice and often colored practices which are not commendable.

In any of such cases, any person has the right to apply to the Copyright Board to obtain a license to reproduce and publish such work, and it is not necessary to be the reproduction of the work, in any case it must be in printed form, since it is conceded in the section which explains that reproduction of any such work in any such case might even be in any other form analogous to be printed. Such reproduction

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<sup>92</sup> Law No.28 of 2014 Copyright Law.

is meant for purposes of systematic instructional activities, the price to be fixed for such reproduced edition may even go lower than one.<sup>93</sup>

The right which is granted by copyright in an artistic work is nothing more than the right to prevent copying. However, the defense of common source must be strictly applied and the second person must go to the common source. It is not permitted to copy the work of the first author, no matter how common the subject could be.

It is not only the selling or letting for hiring, but also the making for sale or hire, of infringing copies of the work that constitutes infringement. A mere attempt to make sale, or to hire will not constitute infringement. Otherwise, it would be under the condition that the person's way of trading displays or offers any infringing copy of the work. The mere making of infringing copies of the work does not infringe the copyright, unless they are made for purposes of sale or hire.<sup>94</sup>

The originality is required for acquisition of copyright in an artistic work which needed to be demonstrated that the work was not copied from another. The principle is applicable to being the same in the case of literary or other works. In order to be original, the work does not need to be novel in the sense that it is used in the law of patents. The originality is required by the Act in relation to the expression of the thought. There must be something either in the design, or the execution of the

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<sup>93</sup> T R Srinivasa Iyengar., *The Copyright Act, 1957, 6<sup>th</sup> edn.*, Butterworths India., New Delhi., 2000., p. 247.

<sup>94</sup> *Ibid.*, p. 366.

work which shows it not to be a mere copy of some other work. When an artistic work is merely a reproduction, with minor improvements of a previous work, it is not original. On the other hand, when the additions and improvements are substantial, there may be a copyright in such additions and improvements as well.<sup>95</sup>

It is not easy to find a clear-cut and worldwide definition of what constitutes that acts contrary to honest practices. Standards of ‘honesty’ and ‘fairness’ may differ from country to country in order to reflect the economic, sociological and moral concepts of a given society. Therefore, the notion of ‘honesty’ has to be interpreted by the judicial bodies of the country concerned. The concept of honesty established by international trade should also be taken into consideration, especially in cases of competition between organizations in different countries.<sup>96</sup>

WIPO also states that failure to comply with honest practices should arise “in the course of industrial or commercial activities”. This can be broadly understood as being the activities of organizations providing goods or services – particularly the selling or buying of such products or services – and activities of professionals such as medical doctors or legal experts.

Protection against unfair competition is an ever-evolving notion that has to adapt to the evolution of trade, and the development of new principles and obligations

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<sup>95</sup> *Ibid.*, p. 353.

<sup>96</sup> Protection Against Unfair Competition., accessed from [http://www.esa.int/About\\_Us/Law\\_at\\_ESA/Intellectual\\_Property\\_Rights/Protection\\_against\\_unfair\\_competition](http://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition)., on January 7, 2018., at 13:44.

for participants in the business market. Originally, it is designed to protect the ‘honest businessman’ which scope of protection is against unfair competition which has now been enlarged to include protection of the customer as well. Nowadays, the laws against unfair competition aim to ensure fair competition in the interests of all concerned.

Violation of copyright in the field of science, art and literature, creations and technological innovations (intellectual property) in principle is a criminal act as a violation of property rights of others in general. Violation of copyright is certainly a loss, not only to copyright holders (authors, publishers, music / songwriters, record producers and films, etc.) that inhibits the spirit of creations and ideas, but also the affected country, for not obtaining income tax on the profits derived from the hijacker.<sup>97</sup>

The action of copying, printing, translating, duplicating, reproducing, modifying and otherwise commercially-motivated works or products of a person or a party without the permission of the copyright owner or his legitimate heirs or authorized by the author is unethical and *zhalim* which is forbidden by Islam. For such actions, it may fall under the category of theft and prosecution of others' rights

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<sup>97</sup> Setiawan Budi Utomo., *Hukum Pembajakan dan Barang Bajakan.*, accessed from <https://www.dakwatuna.com/2010/01/05/5239/hukum-pembajakan-dan-barang-bajakan/#axzz53TksNFhk>., on January 7, 2018., at 13:55.

or embezzlement and fraud in the context of violating the mandate/agreement between the parties concerned. According to Surah An-Nisa verse 29 stated that:<sup>98</sup>

يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ  
تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ  
رَحِيمًا ﴿٢٩﴾

Meaning : “O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.”

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<sup>98</sup> Al-Qur'an Surah An-Nisa verse 29.



## CHAPTER IV

### CONCLUSION AND RECOMMENDATION

#### A. Conclusion

Based on the problem formulation and analysis as provided in previous chapters, the author concludes as follows:

1. Intellectual property rights is an exclusive intellectual property, creations, or intangible assets without any permission of others enable people to gain economic benefits from such creations. Intellectual property rights do not protect ideas or plans that have not been realized into a real creation, therefore to get intellectual property rights protection a creation must be a tangible creation and registered under the law. The importance of an intellectual property rights protection is to protect the copyright of its creators, both individuals and groups. Moreover, the competition of intellectual property in business and economy is getting tighter and crueler. Society has heard and realized a lot about the impersonation of particular products. It appears that some small entrepreneurs who make similar items with the original company is well known.
2. Intellectual property rights includes many of the rights that one has concerning Copyright. Copyright may be construed as a proprietary right attached to copyrighted works such as papers and videography. Copyright is

basically the right granted to the Copyright holders to publish or even to exploit the work of his creation in various ways with the aim to gain profit from the creation. If any other party who is not a Copyright holders wishes to use the work of a person's creation for personal or public interest, then such party shall seek permission and obtain the consent of the Copyright owner to use their creation.

3. In general, Copyright contains economic rights and moral rights of Copyright holders. Economic rights are the right to economic gain over copyright. Economic rights shall be the profits of any sums derived by the use of the copyright by the work, or because it is used by another party under the license granted. Furthermore, Copyright contains a moral right is a right that protects the personal interest or reputation of the inventor or creator. This moral right is attached to the person of the creator. Moral rights cannot be separated from the creator because they are eternal and personal. This personal trait shows the characteristics associated with the good name, ability and also the integrity that only the creator has.
4. In practice, law enforcement in Indonesia regarding to Copyright infringement has not been taken seriously and has not been fully implemented. Evidenced by the existence of court decisions about Copyright infringement that relieves the punishment of criminal of Copyright infringement itself. Thus, making businessmen who do cheating in the business are not afraid of the law force in Indonesia.

5. Related to the case above, it is evident that businessmen in Indonesia are still doing a lot of copyright infringements to generate a lot of profit from other people's copyrighted work. Business perpetrators who infringe copyright do not aware and even tend to not care that the works have got the protection of copyright law and this makes the number of counterfeit goods appear and sold in the market. Nevertheless, there remains a striking difference in the quality of materials and the level of durability which is very low. Such actions could be detrimental to the creators of original products and brands, as well as consumers, or when the related companies have not registered trademark products.

## **B. Recommendations**

At the end of this writing, the author provides some recommendations as follows:

1. To the judges who are examining the need for a deep analysis in providing legal considerations, judges must be able to realize in detail about the chronology of the defendant's incident so that it is not easy to provide a decision that lightens the defendant. Furthermore, the success of enforcing Copyright protection depends not only on the substance of law in Indonesia alone, but the police who also have a role in the enforcement of Copyright law itself. Being one of the factors of the delayed limit of Copyright infringement in Indonesia, such plagiarism and piracy lies in the lack of law enforcement

officers especially police. Indonesia is expected to enlarge the law of enforcement apparatus strongly and firmly so that the perpetrators can be decrease from the crime which is the Copyright infringement.

2. It is expected that the Supreme Court of the Republic of Indonesia to provide a competent judge in intellectual property rights field the chronology itself. In deciding a Copyright case, the judge should see the international law as a matter of consideration and not only focus on Indonesia's law. It is important to see that the defendant undertakes Copyright infringement of works registered abroad and judges should be protected the Copyright holders.

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## **5. Verdict**

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