

CHAPTER I

INTRODUCTION

1.1 Background

Intellectual Property Rights play a vital role in protecting the interests of inventors and creators of patents, trademarks, and copyrighted works. These rights ensure that individuals can gain benefits of their innovations. The importance of intellectual property dates back to the *1883 Paris Convention for the Protection of Industrial Property* (hereinafter, Paris Convention)¹ and the *1886 Berne Convention for the Protection of Literary and Artistic Works* (hereinafter, Berne Convention).² These foundational agreements led to the establishment of the World Trade Organization, which helped create the 1995 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (hereinafter, TRIPS), which is the most comprehensive multilateral framework governing intellectual property today.³

Intellectual Property Rights aims to strike a balance between the public's interests and those of creators, encouraging an environment where creativity can flourish for everyone's benefit. To achieve this balance, we need a strong

¹ *Paris Convention for the Protection of Industrial Property*, 1883. Available at <https://www.wipo.int/treaties/en/ip/paris/>.

² *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, revised 1979, World Intellectual Property Organization. www.wipo.int/treaties/en/ip/berne/.

³ World Trade Organization. *TRIPS: The Agreement on Trade-Related Aspects of Intellectual Property Rights*. World Trade Organization, n.d. https://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

legal framework and effective enforcement mechanism to ensure that inventions and creative works are protected.

As globalization significantly influences the evolution of Intellectual Property Rights, it exerts a noble impact on the creative industries, especially in contemporary art. Defining "*contemporary*" can be tricky, it generally refers to the period after World War II up to the early 21st century, often characterized by innovative or *avant-garde* approaches. What makes contemporary art unique is that it doesn't have a specific origin; instead, it reinvents and reinterprets existing art forms, as seen in movements like Appropriation Art. While contemporary art is enjoyed worldwide, the lack of consistent copyright laws and regulations governing its use and distribution remains a challenge.

In Indonesia, copyright infringement continues to be a significant challenge within the creative industries, even with relatively comprehensive laws in place. This highlights the necessity for ongoing updates to copyright regulations to keep up with technological advancements and innovations. The legal framework governing copyright in Indonesia is primarily outlined in *Law No. 28 of 2014* concerning Copyright (Hereinafter, Indonesian Copyright Law).

Article 1 of this law defines copyright as:

"exclusive rights of the creator that arise automatically based on the declarative principle after a creation is manifested in a tangible form, without diminishing the restrictions as stipulated by the laws and regulations."

This legal framework aims to protect artistic creation by establishing a system of economic incentives, granting property rights to artists for their work and encouraging a wide range of creative outputs across various genres. However, the *Indonesian Copyright Law* falls short in providing a clear definition of art and only delineates flexible categories of art works eligible for protection. These categories include architectural works, maps, batik art or other patterned art, photographic works, paintings, portraits, cinematographic works, and more.

While contemporary art certainly falls within the scope of the *Indonesian Copyright Law*, challenges arise when it comes to regulating appropriation art due to its distinctive characteristics. The core issue is that many appropriation art styles are inspired by existing works; artists often draw creative ideas from their surroundings and different art forms—art is a wellspring of inspiration. For instance, conflicts often emerge when a photographer discovers that their work has been used by another artist to create a derivative piece without permission. Despite photographers' attempts to assert that such unauthorized use is illegal, the evolution of fair use doctrine seems to favor appropriators. This tension between copyright law and appropriation art raises important questions about where one artist's rights end and another's begin.

Although the *Indonesian Copyright Law* grants exclusive rights to creators, these rights are not entirely absolute due to the existence of the fair

use doctrine. This doctrine introduces certain limitations on both moral and economic rights, allowing for situations where protected works can be used without the explicit consent of the rights holders, either with or without compensation. At the same time, it also recognizes and safeguards the moral and economic rights of the author. The regulation, scope, and application of the fair use doctrine vary across jurisdictions, with its origins in the United States.

In the United States legal framework, the fair use doctrine is outlined in Title 17, Section 107 of the 1976 *United States Copyright Act* (hereinafter, U.S. Copyright Act). The initial part of this section states that "*fair use of a copyrighted work, including reproduction in copies or phonorecords or through any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.*" Due to its common law system, U.S. courts have made numerous attempts to categorize actions that can be considered a fair use. For instance, works such as commentary, criticism, research, teaching, news reporting, or parody may qualify as fair use.

Based on evolving legal precedents, the fair use doctrine in the U.S. provides a more detailed legal defense involving a comprehensive four-step test. This test considers factors like the purpose and character of the use, the nature of the copyrighted work, the extent and significance of the portion used, and the impact on the market value of the original work.

In contrast, regulations regarding the fair use doctrine in Indonesia are less clearly defined and are more commonly recognized as "*Limitations on Copyright*," as outlined in Articles 43 to 49 of Chapter VI of the *Indonesian Copyright Law*. Unlike the United States, the *Indonesian Copyright Law* does not explicitly specify the qualifying factors for fair use exemptions. Instead, it outlines limitations based on reasons of protecting "*public order*" or "*reasonable interest*". The lack of detailed clarification on "*reasonable interests*" creates ambiguity, especially since Indonesia does not identify specific factors for fair use limitations, unlike the U.S., which incorporates four distinct factors. Consequently, copyright law varies from country to country where every jurisdiction has its own limitations in categorizing what actions fall under fair use. While the underlying principles remain consistent, the details differ. Even in the European Union, where extensive harmonization of copyright law has occurred across the 27 Member States,⁴ differences persist. The disparities between Indonesia and the U.S. are more pronounced, particularly concerning copyright defenses, scope, and the fair use doctrine.

Among all copyright frameworks, the Author chooses to compare *Indonesian Copyright Law* with that of the U.S. because *U.S. Copyright Law* exemplifies a strong commitment to protecting copyright and preventing infringement. This is evident in its continual updates and modifications to the

⁴ European Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

legal framework, ensuring alignment with societal evolution. For instance, every year, the United States Chamber of Commerce publishes the International Intellectual Property Index (hereinafter, IP Index), which evaluates countries based on factors such as Intellectual Property growth, the commercialization of IP assets, law enforcement, system efficiency, and participation in international treaties. This index provides a comprehensive assessment of each country's intellectual property framework, offering insight into their policies for fostering innovation, creativity, economic growth, and investment opportunities.

A comparison of the 2024 International IP Index shows a stark contrast between the United States and Indonesia. In the copyright category, the U.S. scored an impressive 95.48%, ranking first among the 55 countries surveyed, while Indonesia only score 30.40%, placing it in the fourty-nine in the same category.⁵ This significant disparity highlights the inefficiencies in copyright protection under Indonesian law. The high rate of copyright infringements and insufficient enforcement of copyright laws has led to Indonesia's inclusion on the United States Trade Representative's Priority Watch List for 2024.⁶ This list identifies countries perceived to have insufficient intellectual property

⁵ *International IP Index 2024: Indonesia to Catch Up on IP Commercialization*. AFFA. May 10, 2024. Available at: <https://affa.co.id/global/2024/05/10/international-ip-index-2024-indonesia-to-catch-up-on-ip-commercialization/>

⁶ *USTR Releases 2024 Special 301 Report on Intellectual Property Protection and Enforcement*. United States Trade Representative, April 2024. Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/april/ustr-releases-2024-special-301-report-intellectual-property-protection-and-enforcement#:~:text=Seven%20countries%20are%20on%20the,engagement%20during%20the%20coming%20year>

protection or enforcement, prompting increased scrutiny from the United States and inviting intensified bilateral engagement.

Therefore, as appropriation art gains traction in the digital age, there has been a significant rise in copyright infringement lawsuits relating to artistic works. It often seems as though everything has already been invented; artists frequently draw from a well of influences, blending familiar elements to forge their own unique creations. This makes the quest for originality particularly challenging. Online platforms have facilitated the widespread unauthorized duplication of copyrighted artworks, making them easily accessible and manipulable. For artists engaging in this kind of work, a critical question arises: can their creations be defended as fair use of copyrighted material?

The challenge lies in establishing clear boundaries that protect existing artworks while also allowing for innovation through the fair use doctrine. This study examines the protection of contemporary artworks, particularly those involving appropriation art, by exploring the nuances of the fair use principle within the copyright laws of Indonesia and the United States. The goal is to identify where subjective artistic expression intersects with objective regulatory frameworks, thereby establishing standards that differentiate between inspiration and copyright infringement. Additionally, this paper aims to investigate the feasibility of aligning *Indonesian Copyright Law* with the U.S.' four factor fair use assessment while ensuring appropriate limitations to prevent overly broad copyright coverage.

1.2 Formulation of Issues

The focus of this thesis is on how *Indonesian Copyright Law* should practically accommodate the fair use doctrine, particularly for appropriated artworks. Although Indonesia has regulated fair use under this law, it lacks clear limitations on the factors that determine whether a work qualifies as fair use. Therefore, based on the background elaborated above, the formulated problems in this paper are as follows:

1. How does the copyright legal system differ between Indonesia and the United States?
2. How does the Indonesian copyright regulation, relating to the fair use doctrine for appropriated artworks, differ with the United States in terms of framework and application?

1.3 Research Purposes

The general aim of this paper is to gain a comprehensive understanding of the legal protection afforded to appropriated artworks, achieved through a comparative analysis between Indonesian and *U.S. Copyright Law*. On a specific note, this paper has 2 main purposes, namely;

1. To understand the differences and similarities between the copyright law of Indonesian *Law No. 28 of 2014 concerning Copyright* and the *United States' 1976 Copyrights Act*; and
2. To examine the copyright exceptions provided by the fair use doctrine under the *United States' 1976 Copyrights Act*, comparing these to

Indonesia's copyright exceptions. This analysis seeks to determine whether the fair use doctrine could serve as a viable alternative or solution for copyright exceptions, thereby better safeguarding artists' interests in creating transformative or appropriated artworks.

1.4 Research Benefits

This research is expected to provide benefits, both in theoretical and practical terms, as follows:

1.4.1 Theoretical benefits

Theoretically, the author aims to provide insight into the loopholes in Indonesian copyright law pursuant to *Law No. 28 of 2014 regarding Copyright*. By comparing the existing regulations with the *Copyright Act of 1976 in the United States*, which offers an exception to copyright through the fair use doctrine, the research seeks to highlight the underdeveloped nature of this regime in Indonesia. Moreover, this paper serves as a reliable source of data and information, scientifically accountable and contributing to the expansion of knowledge in the field of law, specifically in Civil Law and Business Law. It acts as a reference for learning and the creation of academic works, particularly those related to intellectual property rights, especially copyright. Ultimately, the author hopes this research will contribute to a deeper understanding of *Law No. 28 of 2014* and bridge the gap between existing Indonesian

copyright regulations and the more developed fair use doctrine seen in other jurisdictions, such as the United States.

1.4.2 Practical benefits

The findings of this research aim to serve as a study resource that is expected to be beneficial to the academic community of the Faculty of Law at the *University of Pelita Harapan*. It also seeks to raise awareness for concerned parties, particularly artists, legal practitioners, government agencies, international and national business actors, and the public about the significance of copyright protection, particularly in the context of foreign art. It is also expected to offer solutions to various issues within the scope of copyright, particularly in the realm of appropriation arts and the fair use doctrine.

Furthermore, considering the increasing digitalization in the 21st-century, this research is expected to promote awareness among the public regarding the importance of safeguarding copyright for artworks. All things considered, the Author hopes that this research can provide input for the government to reform Indonesia's regulation regarding the fair use doctrine. A reformed copyright regulation would guarantee the economic rights of artists, encouraging the creation of new contemporary artworks by creative minds in Indonesia.

1.5 Framework of Writing

This thesis is structured following the guidelines outlined in the *"Faculty of Law Standard Operating Procedures for Writing Undergraduate Student Thesis year 2024"* and is divided into five chapters that will ease the readers to understand the discussion of this thesis. Each chapter consists of several sub-chapters corresponding to the discussion and research materials.

CHAPTER I: INTRODUCTION

This chapter consists of the introduction, which gives a background to the issues that will be discussed further in this thesis by the Author. This chapter is further divided into five parts, which are background, problem formulation, research purpose, research benefits, and writing structure.

CHAPTER II: LITERATURE REVIEW

This chapter will be further divided into five sub-chapters. First, the author will outline the regulations governing copyright law for Appropriation arts in Indonesia and the United States. Second, the author will elaborate on the definition, scope, tests, safeguards, and legal consequences related to copyright infringement in artistic expression, specifically on the fair use exception. Next, the author will briefly define art within the context of copyright law. This will be followed by the analysis on the development of the Fair use determining factor through

United States' case law. Finally, the author will discuss the tension or problem between appropriation art and Fair use doctrine

CHAPTER III: RESEARCH METHODS

This chapter will discuss the method of research, type of data, analysis pattern, and approach used in this discussion.

CHAPTER IV: DISCUSSION AND ANALYSIS

This fourth chapter will discuss the research problem and provide solutions for it. This chapter will be subdivided into 3 additional sections, with each of these sections addressing the corresponding research question outlined in chapter two of this thesis.

The first sub-chapter will consist of analysis on how Fair use exception for appropriation arts is regulated under the Indonesian and United States legal system. The second sub-chapter will analyse the implication of the United States 4 determining factors of Fair use. Last, analyse the extent of protection afforded to appropriation artworks.

CHAPTER V: CONCLUSION

This final chapter provides conclusions drawn from the research findings to answer the issues raised in the fourth chapter. Moreover, the Author will give suggestions and

recommendations regarding these matters and propose potential regulations that could be formulated and enforced in the future and give alternatives for appropriation artists. These regulations aim to enhance public comprehension of the latest policies concerning artwork copyright, thereby offering legal clarity and protection for all parties involved.

