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Out of court settlement of song and music litigations in Indonesia

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Abstract

The aim of the study is to investigate out of court settlement of song and music litigations in Indonesia by making a Library Research and adopting a descriptive normative approach. As a result, agreements dealing with the transfer of music copyright should contain a provision on the option of making an amicable out-of-court settlement of disputes or through a dispute settlement mediation institution. In conclusion, it would be better if every agreement dealing with the transfer of music copyright also contains a provision on the option of making an amicable settlement of disputes through a dispute settlement mediation institution.

Keywords: Litigation, Arbitration, Song, Music, Piracy.

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Acuerdo extrajudicial de litigios de canto y música en Indonesia

Resumen

El objetivo del estudio es investigar el arreglo extrajudicial de litigios de canciones y música en Indonesia haciendo una Investigación de la Biblioteca y adoptando un enfoque normativo descriptivo. Como resultado, los acuerdos que tratan con la transferencia de derechos de autor de música deben contener una disposición sobre la opción de realizar una solución amistosa de las controversias extrajudicial o mediante una institución de mediación para la solución de controversias. En conclusión, sería mejor si cada acuerdo que trata con la transferencia de derechos de autor de música también contiene una disposición sobre la opción de hacer una solución amistosa de las controversias a través de una institución de mediación para la solución de controversias.

Palabras clave: Litigios, Arbitraje, Canción, Música, Piratería.

1. INTRODUCTION

The western society has much believed in out-of-court settlements of causes related to disputes or infringements of copyrights. A legal culture that aims at efficiency and effectiveness of public and individual relationship is dominant. Irrespective of the size of the infringement case and the compensation involved, the two parties would prefer out-of-court settlement as a testimony of their belonging

to a modern sophisticated culture believing in reconciliation more than hostility. Moreover, the court would take long time and also are subjected to issues like red tapism and highcost. Likewise, in the third world countries of the Eastern world, this reconciliatory attitude amounting to a legal culture could be seen as a part of the local culture. For example, Japanese companies faced the issues of copyright infringements and other disputes in accordance with their Japanese culture. They offered a priority to mutual harmony and trust as the Japanese proverb says:

The harmony among the people is more important than the position advantages; secondly, the Japanese considered that a decision through consultations is more important than litigations through a court (Kazuyoshi, 1994: 12).

Like the Japanese, other oriental societies like the Chinese and the Koreans to hold the traditional belief that law is an order from the ruler to maintain order. This viewpoint is rooted in the Confucius teaching which postulates that law always adjoins the punishment. The Indonesian Law too provides for such out-of-court settlement believing that the person accused is not guilty since another party deceived her/him. Hence, the law permits the litigating parties to settle the claim of the original composer through mutual agreement. Moreover, the judicial process in Indonesia is impractical and consumes a lot of time, cost and energy. This research is conducted by making a Library Research using a descriptive normative approach. The data used comprise secondary data with primary legal materials in the form of

legislation, and other scientific books and tertiary legal materials in the form of dictionaries. The analysis is made by using a qualitative data analysis method which is descriptive and analytical in nature.

1.1. Problem Statement

The success or failure of copyright protection, including that of music and songs as intellectual property, depends much on the law that governs these copyrights or intellectual property right. It also depends much on the legal apparatuses or the agencies such as the police, the court of law, the attorneys and the judges. Previous research studies reveal that the enforcement of Copyright Law is very low globally. One of the reasons for such phenomenon is that the political will of the law enforcing apparatuses or agenciesis inadequate as compared to the increasing number of copyright infringements (Majalah, 1978;Hill, 2011). Moreover, there are budget and resources constraints with law enforcing apparatuses, especially the police.This not only delays the litigation process and the judgment but also results in a slow eradication of song and music piracy.

1.2. Previous Case Reviews

Results of past researches reveal that the punishments imposed by the court on song or music copyright violations are very lenient as compared to those prescribed in the law for similar offenses (Hill, 2011). Accordingly, the criminal sanctions imposed on the violators cannot hold up or prevent other members of the community from

committing the same offense. Hence courts have failed to achieve the objectives of the criminal law. As a result, the practice of out-of-court settlements was introduced in matters related to infringements of copyrights, including that of music and songs. Owing to the pretension of maintaining their reputation, business relationships and efficiency as well as longtime consumption and high costs, the parties are also reluctant to take the matter to the court. This study takes into account all these issues with the help of a content analysis of previous cases of infringement and copyright violation both globally and in Indonesia.

The study investigates to what extent the judicial process in Indonesia is impractical in terms of consumption of time, cost and energy. There is a need to study whether the current law has any provision for making out-of-court amicable settlements of disputes or whether any dispute settlement mechanism exists that can arbitrate such disputes. It is also important to investigate that if such an arbitrating or mediating mechanism exists, whether the disputing parties would accept and abide by its decision as final and binding.

Another landmark settlement of the disputes over the infringement of copyright settled out of court can be seen in the case of Frank Music Corp v. CompuServe in the US. Frank Music Corp had brought an action to Manhattan District Court in the name of more than 140 music publisher members of Harry Fox Agency (HFA), the National Music Publishers' Association. The action was brought because CompuServe had violated the right to the song Unchained Melody together with more than other 900 songs owned by HFA

members. CompuServe continued to provide an online computer network which includes a music database. The access to this database requires the fee for a certain number, the violation of which was subject to a monthly service fee. In return for such services, the customers can upload songs and download the illegal records from the bulletin board. CompuServe did not want the users to participate in such illegal making.

This significant dispute settlement agreement would certainly have a side effect. Firstly, this settlement was a landmark decision, which could lead to the extensive industrial practices of musical work licenses that are utilized by the online computer services. Secondly, this settlement motivated the other online providers to bring additional actions. Thirdly, this settlement provided a discretion on the Internet about illegal uploads and downloads. In the Indonesian context, too, there have been numerous cases of song and music copyright infringements, but most of which were settled out of court (Barendregt, 2002).

This speaks of the legal oriental culture that is reluctant to bring disputes to the court since they consider that a court is a place for criminals. They prefer to uphold the watchword Trust the people rather than the Paper. They strongly believed that litigations can be settled on a consultative basis for mutual agreement through conciliations and mediations. From the Auteurswet 1912 enforcement, the inheritance of the Dutch colonialism, to the Indonesian Copyright Law of the Republic of Indonesia, there have been instances of song and music

copyright infringement cases. When compared to cases in the US and the UK, the cases in Indonesia are more out-of-court or amicable settlements through an arbitration board or an agency.

Another example of an amicable settlement of the infringement case was seen in the dispute over the song Warung Pojok. This song was so famous that it was pirated by 13 recording companies in various versions and sung by different singers. Being depressed, the composer, Abdul Adjib, issued warnings to the recording companies that had perceivably pirated his song. Some record producers who received Adjid's warnings answered the letter of this Cirebon artist. Almost in chorus they admitted that they had bought the song master from another party. The artist, who had made 50 songs, said that since it was them who first reproduced the song, they should be liable for the dealings (Sekewaël, 2016).

The chords and lyrics of the song Warung Pojok, which was created in 1967, are very simple. However, after this song was sung for the first time by Uun Kurniasih, the second wife of Adjid, with the accompaniment of tarling, a typical Cirebon music, it became a top hit in the record cassette markets.It seems that the success of this song has attracted the other recording companies to take their share of the fortunes. The song could be heard through the voice of Lilis Suryani or Dian Piesesha. Even the title of this song was used as the title of a national movie. As calculated, 25 volumes of cassettes containing this song in different versions have been produced. The infringers came

from Malang, Semarang, Solo, Klaten, Bandung, and Jakarta (Yazdanjoo and Fallahpour, 2018).

Adjid admitted that he was aware of the importance of legal protection to his artworks only after his song was pirated by many illegal producers. For this reason, the song was registered with the Directorate of Patent and Copyright of the Department of Justice only on February 23, 1989. Armed with this registration status he intended to sue the record producers who have frequently violated his rights. Teddy Djauhi, the boss of Suara Parahiyangan, one of the producers sued by Adjib that admitted guilty. Around 1,000 cassettes of Warung Pojok were directly withdrawn from the circulation. Besides, he also tried to approach Adjib, but Adjib was arduous to negotiate. He even rejected the money amounted to Rp. 300 thousand offered to him.

He was also unwilling to mention the amount of money he claimed. Teddy admitted that he had sold 4000 cassettes of this Warung Pojok song. Adjib confirms that in March he was confronted with the Investigation Unit of City Police, Bandung. He also admits that he refused to receive the compensation amounted to Rp. 300 thousand offered by Teddy. Adjib perceives that Teddy did not have good faith. Adjib's objective is to give a lesson to them so that they respect the artists. Without the songwriters, they cannot gain profits. Finally, the case was settled amicably by the parties concerned.

2. THEORETICAL FRAMEWORK

Owing to the nature of its subject, this study adopted a theoretical and non-empirical approach. A qualitative methodology was adopted employing a combination of descriptive and analytical methods. Hence, right at the outset a few legal cases and other litigation practices adopted in a court of law in the settlement of infringement cases of song and music compositions were discussed citing instances of cases invoicing heavy compensation as well as amicable out-of-court settlements. Next, a few more cases were studied in the context of the Indonesian Copyright Laws. Simultaneously, a critical overview of the Copyright Acts was also made to highlight the principle of out-of-court settlement as an oriental practice embedded in the cultural legacy of the people.

Overall, the study analyzed a few samples of cases with a content analysis approach. The study has been divided into two parts: First, an understanding of the Infringement violations in song and music compositions in the light of Copyright laws; second, a content analysis is done of the cases specifically of the Indonesian music industry. The study took a start with the global situation hinting at the western approach towards litigations and giving priority to out-of-court settlement practices

3. ANALYSIS AND DISCUSSION

This study is based on the proposition that any music or song copyright law involves two distinct rights: first, the right to protect a musical composition often referred to as a musical composition or a song — to recognize its specific arrangement and the combination of musical notes, chords, rhythm, harmonies, and lyrics. Second, the right to protect the recording of that song or the musical composition, which is termed as sound recording under copyright law. It is often the case that both rights are owned by separate individuals or entities rather than by one. For instance, music publishers will own the musical copyright, and the record companies will own the sound recording copyright.

The documentation browsed for this study revealed that a music copyright, whether a musical work or a sound recording, is created only when it is satisfied that the song or the sound recording is an original work of authorship and that it must exist in a tangible medium of expressions, such as a MIDI file or a digital (or analog) recording. It is however not necessary to register its copyright under the Copyright Act. The copyright protection issues generally arise only after the song goes in the public domain when doubts are raised over its authorship or originality. The courts while giving judgments however hold the view that rhythm and harmony cannot be original as they are in the public domain and are abstract in nature while melody or the music

composition can be determined as original and protected under copyright law.

Likewise, it was observed while studying the sampled cases of copyright infringement that the defendant argued that the plaintiff cannot have copyright because the song was not original.

For example, in 2007, the company 50 Cent was sued over the use of a line go shawty, it is your birthday in the song In Da Club. The plaintiff, a music publisher, claimed that the lyric was copied from its song it is your birthday. However, the court ruled for 50 Cent, holding that those lyrics were not original because the phrase was a common chant at hip hop events and nightclubs, and had appeared in other prior songs. Moreover, Luther Campbell admitted that he had not created that phrase. So, if a song or lyric was not original, it was not protected under copyright law.

Hence, technically, in order to be found guilty of infringement, two things must be proven. First, there needs to be direct or indirect evidence of access to the original composition. If that is been established, substantial similarity between the original and supposedly infringed-upon work needs to be determined. In Indonesia, the song or music piracy or as the infringement was widespread even after the enforcement of the National Copyright Law. These cases of copyright infringement, especially music and song copyright violation, were settled amicably. Here are a few examples and the manner in which they were settled out-of-court or otherwise amicably and harmoniously. These cases deal with multiple issues such as song

copyrights, royalties between the song composer, the record producer and the music publisher, and so on. A few cases were solved amicably out-of-the court while others were solved through an arbitration agency.

3.1. Out-of-court settlement cases

This case relates to the song the hollies for which PT. Aquarius Musikindo had obtained EMI's license in 1990. The song was however distributed by PT.Indo Semar Sakti without the approval of the license holder. Thousands of song cassettes were reproduced on the pretext that the singeror the copyrights were confusing. PT. Aquarius Musikindo, as the holder of EMI's license. contacted the head office of EMI to solicit for directions. An amicable out-of-court settlement was made, in which PT. Indo Semar Sakti agreed to pay the royalty in accordance with the number of cassettes it had distributedto PT. Aquarius Musikindo (Radjagukguk,1997; Rahardjo,1997).

A similar dispute took place between the same two parties in relation to a few other songs: Long Way Home, Sweet Chain, Lesser for Two Evils, What Price and From the Beginning.PT. Aquarius Musikindo intended to distribute an album of these songs in Indonesia through JVC but found that these songs were already being distributed by PT. Indo Semar Sakti, who had obtained the distribution license of these songs from Sony for the USA and not for Indonesia. When disputes grew, Sony negotiated with JVC and it was mutually agreed

upon that PT. Indo Semar Sakti was not entitled to distribute the album in Indonesia, and the cassettes that had already been distributed should be withdrawn. PT. Indo Semar Sakti also paid the royalty to JVC for the business he had done so far.

In 1996 a dispute arose over the song Back for Good, created by Gary Barlow. The mechanical right of this song was controlled by EMI Music Publishing. It so happened that this song Black for Good was changed into a parody Mencontek by PT. Musika, without changing its melody. The cassettes of the new parody song were also distributed in Indonesia without obtaining permission from EMI Music Publishing, who issued a warning after finding of this infringement. Finally, PT. Musika agreed to pay a royalty in accordance with the Mechanical Right Rate applicable in Indonesia. The similar out-of-court settlement was also made in the dispute over the song Dimana created by Joko Esha, which was changed into another song Asmara. This song was presented by Novia Kolopaking through Musica Studio's production. The song Dimana had previously been given to Mahmud to be sung by him. However, the recording process had never been realized until finally it was sung by Anci La Ricci under the arrangement of Pance Pondaag, and also by Frilly Pricilla in 1992 through JK Record production under the arrangement of Hanry Anggoman. Joko Esha sued both companies for infringement of copyrights and failure to take permission. Finally, the above-stated case was settled amicably through mutual agreement.

During the course of this study, a few other cases of copyright infringement were analyzed where the parties solved the dispute out-of-the court. In 1993 Katon Bagaskoro had composed the song Dinda Dimana which was sung by Nia Zulkarnaen in 1994 under the title Kanda Dimana. The cassettes were distributed by DD record, but the song lyrics were inconsistent with those agreed upon. When admonished, DD Record made an apology statement and the lyrics were changed into the ones stated in the agreement. Another example of the amicable settlement was over the dispute of the authorship of the song Kasih Seorang Pramuria. The composers of this song were named as Charles Hutagalung and Albert Sumlang; however, another composer Irin Hengky claimed himself to be the real composer of the song. He presented evidence in the form of a notebook and revisions of the song. Henky did not claim any compensation nor threatened for any other legal action.

A dispute arose over the authorship of another song titled Persembahanku. The singer and composer who had been enjoying all royalty and privileges were suddenly challenged by an individual in Yogya who claimed that he was the real composer of this song. The music publisher tried to negotiate with this person in Yogya but they failed to reach an agreement because the amount of compensation was very high. Furthermore, not convinced by the evidence produced by this person, the company decided to find the original composer of the song who was finally found with solid evidence in the form of original text and book of the song and this person in Yogya was reprimanded.

The company paid a reasonable royalty to the original composer without any penalty payment. Last, but not the least, there were disputes over a few Indonesian songs that were produced in the Netherlands such as Rangkaian Adelati, Di Bawah Sinar Bulan Purnama, and Bengawan Solo. The Dutch producer of these songs though printed the real names of composers of these songs but did not seek their permission to produce these songs. Moreover, the Dutch producer did not have the license too. Finally, this case was settled amicably when the Dutch producer paid normal royalties plus the penalties to the entitled persons.

3.2. Cases of Arbitration

Besides the cases settled amicably as described above, there are also several cases that were settled through an Arbitration Board which was initiated by YKCI, the Indonesian Artworks Foundation or the PAPPRI, an organization that gives protection to artists and composers (Indriastuti, 2019). The first example can be cited of the song Mutiara Yang ffilang created by Agus Muhadi and sung by the music group of SMEP (Junior High School of Economics) at the Indonesian Broadcasting Station. Many years later, Yessy Wenas claimed that this song was his creation and was composed jointly with Dodo. Meanwhile, this song was recorded on a phonograph by PT. Remaco and sung by Erni Johan. The dispute was brought to the Ad Hoc Arbitration Board of YKCI. The award of this Arbitration Board

declared that Agus Muhadi was the original composer of the song and he was entitled to its copyright and proceeds.

Another dispute settled by PAPPRI was the one relating to the screen presentation of the song Kubawa Sepi by a TV station without the permission of the composer, Simon Pattiwael. This was a theme song in the telenovela titled On Hama (a Thai film) which was presented by AN TV station. The song was sung by Ratu Nur and produced by Naviri Record. Simon Pattiwael complained to PAPPRI that he was the aggrieved party because his song had been used as a theme song without his knowledge. This case was not brought to the court and was settled through arbitration agreeable to both parties (Silaparasetti et al., 2017).

3.3. Foreign Song Piracies in Indonesia

The incidents of piracy increased during the 1990s when newspapers reported of raids on shops that were allegedly selling pirated CDs. The two suspected masterminds of the piracy were found to be BP alias FK, the owner of N Records, and SS, the director of an empty-cassettes factory, P. Ironically, they were also members of ASIRI (Indonesian Records Industry Association). Both the suspects denied the charges of piracy on the pretext of producing CDs that contain cover version songs. The popular song of Whitney Houston I Will Always Love You, for instance, was re-recorded with new music which was made very much like the original and sung by the local

singer, whose name is normally not mentioned. However, ASIRI concluded that besides filling the CDs with cover version songs, the two suspects had also re-recorded the original western songs illegally. Moreover, the copyrights of the song I Will Always Love You in Indonesia was held by PT (Soo et al., 2019).

Musica International. Finally, when consultative deliberations were pursued, the P. the company paid a royalty to Musica International. for every cassette sold. Several other instances exist of piracy of foreign songs involving four recording companies in Indonesia, i.e., ASIRI, Aquarius Musikindo, the holder of EMI and WEA licenses, PT. Musica International (BMG), PT. Indo Semar Sakti (Sony Music), and PT. Suara Sentral Sejati (Polygram).

4. CONCLUSION

This study is an outcome of the debate whether litigations over song or music copyright could be settled out ofcourt. The litigants, such as singers or music producers, do not want the disputes arising between them to be brought to the police or the court. They use the best possible efforts to avoid the settlement of dispute in such a manner. They try to avoid the drawback, time, energy and cost consuming bureaucracy of judiciaries. This approach is associated with the attitudes and behaviors referred to as legal culture. For western people, the out-of-court settlements originated from the culture of

modern society who are guided by efficiency and effectivity.There are many copyright infringements or disputes relating to copyrights that are settled out of court by the related parties.

The entrepreneurs prefer to settle the infringements and disputes through amicable consultations for mutual agreement than bring them to the police or the court for settlement. This method of settlement is used in order to avoid the lengthy and time-consuming court procedures, which need high spending and energy consumption.The out-of-court settlements are usually influenced by the attitudes and behaviors of the parties. For oriental people, such as Japanese, Korean and Chinese, the law is traditionally regarded as an order/ command from the ruler to maintain order. The people in these countries traditionally subscribe to the Confucianism teachings, in which the law is always accompanied by punishment. Accordingly, these people are traditionally reluctant to bring their commercial disputes to the court because in their image the court is a place for criminals. Such civil offenses are therefore settled through consultations, conciliations and mediations.

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