



Copyrighted Content Commercialization on OTT Media in Indonesia

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Received: 11th February 2021; accepted: 13th September 2021

Over-the-Top (OTT) can be defined as a service provider delivered through a network and/or infrastructure owned by an operator without directly involving telecommunication operators. OTT as a media can be in a form of video, voice, news, conference, data centre, cloud service, networking service, game, mobile messaging and many others. Initially, OTT was needed as a telecommunications network operator and Internet Service Provider (ISP), hereinafter referred to as an operator. The OTT media was also intended to increase the number of customers and profit earned. Data traffic is predominantly driven by the number of users making cyberspace the main consumption in the form of data, bandwidth and content. OTT has absolutely no accountability to bandwidth, copyright content and redistribution of content.

Keywords: Copyright, Content Commercialization, Over the Top (OTT), Legal Protection, Industrial Revolution 4.0, Indonesian Copyright Law, Internet Copyrights, Electronic Information and Transactions Law, Internet of Things (IoT), Cyberspace

Article 1.1 of Law Number 28 of 2014 on Copyright states that copyright is an exclusive right of a creator that arises automatically based on a declarative principle. Therefore, copyright exists in line with the manifestation of a creative idea into a tangible form. Nowadays, the rapid development of science and technology clearly indicates the emergence of a digital era not only in highly-developed countries but also in many developing and even underdeveloped countries. This development has been affecting many aspects of human life in a way that has never been imagined before.¹ Experts define this phenomenon as the emerging of the 4th Industrial Revolution (Industrial Revolution 4.0). A digital economy concept is applicable not only to the Internet world but also to global economic impacts on information and communication technologies.² In the Industrial Revolution 4.0, many facets of life have been disrupted and the business sector has undergone fundamental changes. In this regard, copyright is one of the factors causing extraordinary disruption in various sectors.

OTT is a common definition of service that is delivered over a digital network, of which the infrastructure of the network is owned by a digital network operator but the workability as well as the benefit arrangements resulted from the service are not

directly involving the network operator. OTT services can be in the forms of voice, audio, video, telecommunication, news, conference, data centre, cloud, networking, game, mobile message and many others.

Initially, the presence of OTT was needed by telecommunication network operators and Internet Service Providers (ISPs) to increase the number of customers and the possible profits. One of the influences in this related activity is the encouragement of the rapid progress of the economic globalization, so that technological advances must continuously adapt to the international market that includes various countries.

In the 21st Century, communication technology has rapidly evolved and infiltrated the complexity of human activities. It also becomes a predominant sector in general technological development as well as advances in communication technology. Consequently, it leads to a demanding efficiency, when the usual duration in mechanical communication is significantly decreased. Besides, communication technology can also penetrate territorial boundaries and transform bordered nations into a borderless jurisdiction. A technology that has been the main cause of this revolution is the internet.³

There is a significant change in copyright related to work with regards to information technology both in the society in general and the people as individuals

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that affects their daily behaviour. Rapid technological developments bring progress to almost all walks of life.⁴ Further, the development of information technology can improve performance and productivity as it allows people to conduct their activities more quickly, precisely and accurately. The development of information and communication technology has also resulted in the absence of area boundary (borderless).⁵

The development of information and communication technology also includes challenges that need to be faced aside from broad opportunities. Information technology generates a more efficient process of collecting, storing, processing, transmitting, producing, and delivering from and to industry and/or society.⁶ Industrial Revolution 4.0 is a continuation of the previous industrial revolutions. Industrial Revolution 4.0 is a combination of manufacturing industries optimized with the latest internet technology. This revolution is not triggered by only emergence of one technology but the interaction of several technologies that creates new ways of production.⁷

The study in this paper utilizes normative and comparative juridical approach. Normative juridical is research by explaining provisions in the applicable legislation. Meanwhile, Comparative juridical is based on legal comparison. It also applies qualitative descriptive, namely the form of research with a method or case study approach. This research concentrates intensively on one particular object and analyzes it as a case study in which the data was collected from various sources. Besides, this study also conducted the law comparison with other developing countries, more specifically, compares the national and international legal instruments that apply in several countries in regards to legal protection on economic rights, especially, on contents broadcasted digitally through social media.

Legal Protection Mechanisms on the Copyright of Commercialized Content

Copyright in OTT Application

In essence, copyright settings in OTT applications or better known as digital copyrights have not been explicitly regulated in Indonesian Copyright Law. Hence, it requires a deeper study of the law to find provisions regarding Internet Copyrights. As in Article 1 number (11), *“an announcement is the reading, broadcasting, exhibition, of a work by using any means, whether electronic or non-electronic, or doing so in any way so that work can be read, heard, or seen by others”*. This Article explains that whether

it is digital or conventional, electronic or non-electronic, internet or not, it is related to a method or act of announcement so that the copyrighted work can be seen and read massively and thoroughly by the general public. Therefore, copyright basically is not limited to physical forms, but also to the forms of creations that are digitized for announcements by the creator or copyright holder. Thus, the moral rights and economic rights to the creation remain attached to and reside with the creator or copyright holder in the initial form of the creation.

Further in the provisions of letter p Article 40 Paragraph (1) of the Copyright Law states that one form of protected work is a compilation of works/data that can be read by a computer program. This is the basis of copyright protection in digital form in general and Internet Copyrights in particular. The existence of digital copyright is also supported by Article 1 point 9 of the Copyright Law that is defined as a set of instructions expressed in the form of language, code, scheme, or in any form intended for computers to work to perform certain functions or to achieve certain results.

In computer programs, there is computer software that is divided into system software and application software. System software consists of an operating system that is a set of programs that coordinate all computer hardware activities such as Microsoft and iOS. While application software is a program designed to make users more productive and/or to help users with personal tasks (eg. websites, software, hotel tickets booking, playing videos or songs, and so on).⁸

It can be concluded that an application can be classified as a computer program. For instance in the creation of music, songs and movies such as Spotify, Joox, TikTok, Youtube, Netflix, Telegram and others. This is because creation contained on the internet has changed its form into a creation in digital format. Copyright that changes in the copyrighted works of music and songs, when uploaded to the internet, can be referred to as the right to create derivative works (the Adaptation Right). Copyright grants the owner of the work the exclusive right to create derivative works of the copyrighted work that has been made. It is stated in Article 9 paragraph 1 letter c of Law Number 28 of 2014 on Copyright that regulates the adaptation, arrangement, or transformation of works. A derivative work is a new work that is realized because it is based on an existing work that is a revision of the original work, a translation, or can be in the form of a work

that is compiled, changed or adopted into another form. Changes in copyrighted music and songs can also come from poems and quotes in films.

Legal Consequences of Copyright Infringement on OTT Application

As previously mentioned, OTT applications such as Spotify, Joox, Youtube, Netflix and Telegram are part of digital copyright. Thus, in the event there is a copyright infringement, it can have legal consequences because the arrangements are implicitly and explicitly accommodated by Indonesian Positive Law. Some forms of activity that can be indicated as copyright infringement are mainly covering music, songs and streaming films illegally.

Covering is identical to the activity of performing other people's songs by a third party who is not the creator or copyright holder. In the Cambridge Dictionary, Cover is defined as "*to put or spread something over something, or to lie on the surface of something*". It can be said, for example, that to cover a song means that the person who does the cover will be different from the work of the original songwriter, even the popularity of the covered song might be higher than the original song. In principle, covering activities are not illegal, as long as they are carried out within certain limits. Violations occur at the time the cover is carried out without an agreement by both parties between the one who covers and the creator or copyright holder whose song is covered and used to get economic benefits from the covering activity.⁹ This is in accordance with Article 8 of the Copyright Law.

Streaming of copyrighted works is defined by the Cambridge Dictionary as "*the activity of listening to or watching sound or video directly from the internet*". In the Copyright Law, streaming services can be included in the category of cinematographic works that include works protected by Article 40 paragraph (1) of the Copyright Law. In the explanation of the article, it is stated that cinematographic works are creations in the form of moving images, including documentary films, advertising films, cartoon, and reportage or story film made in a screenplay.

Music and film copyrights are the scope of intellectual property, namely copyright protected by Article 40 of the Copyright Law. Then in Article 58 letter (d) of the Copyright Law, copyright protection of songs or music with or without text, then the creator of the song is entitled to economic rights to the work of his/her creation.

With regard to a license, in Article 1 number 20 Copyright Law, a license is defined as written permission granted by a copyright holder or related rights owner to another party to exercise economic rights over his/her creation or related rights products with certain conditions. In Article 82 Paragraph (1) of the Copyright Law is on license agreement, then Paragraph (3) stipulates that the license agreement is prohibited from being a means to eliminate or take over all the rights of the creator to his/her creation.

Article 43 letter (d) of Copyright Law contains exceptions for copyright infringement, one of which is in the creation and dissemination of copyright contents that is non-commercialized information and communication technology.

Intellectual property protection is an object that is protected in Law Number 19 of 2016 on the Amendments to Law Number 11 of 2008 on Electronic Information and Transactions, precisely in Article 25 stating that "*electronic information and/or electronic documents compiled into intellectual works, internet sites, and intellectual works contained in them are protected as intellectual property rights based on the provisions of the laws and regulations.*" This is because electronic information and/or electronic documents contain economic and moral values for the creator, so they should be protected. So, if there is illegal access to music or films as content for OTT applications, there will be legal consequences for violating Article 30 of the Electronic Information and Transactions Law, that:

- (i) "*Any person intentionally and without rights or against the Law accessing other people's computer and/or electronic systems in any way.*"
- (ii) "*Any person intentionally and without rights or against the law accesses a computer and/or electronic system in any way with the aim of obtaining electronic information and/or electronic documents.*"
- (iii) "*Any person intentionally and without rights or against the law accesses a computer and/or electronic system in any way by violating, breaking through, exceeding, or breaking into the security system.*"

Thus, it is stated in Article 46 Paragraph (2) of the Electronic Information and Transactions Law that "Everyone who fulfils the elements as referred to in Article 30 Paragraph (2) shall be sentenced to a maximum imprisonment of 7 (seven) years and/or a maximum fine of 700,000,000.00 IDR (seven hundred million Rupiah)."

The Use of Copyrights Music and Song on OTT Applications with Royalty Fees

Copyright contains moral and economic rights for every use of copyright by third parties, thus it is required to pay royalties to the creator or copyright holder. According to Article 1 number 21 of the Copyright Law, royalties are "*rewards for the use of the Economic Rights of a Work or Related Rights Product received by the creator or the owner of the related rights.*"

Furthermore, there is another mechanism that allows the commercial use of the work without needing permission from the Author but still having to pay compensation to the Author through the National Collective Management Institute, namely in Article 23 Paragraph (5) which in the explanation of the Article can be seen that "reward to the author is a royalty that is standardized by the National Collective Management Institute." Furthermore, the government is currently showing serious efforts to regulate music royalties and again with the issuance of Government Regulation Number 56 of 2021 on Management of Song and/or Music Copyright Royalties. In Article 2 Paragraph (4), royalties are imposed on commercial public services in either analog or digital form. Then Article 9 regulates the commercial use of songs and/or music by first applying for a license to the copyright holder or related rights owner through the National Collective Management Institute.

Arrangements of Content Creation and Commercialization Practices through OTT Media

The phenomenon of covering music and song that violates copyright is something that seems to be commonplace, for example on Youtube. However, the revenue generated from the monetization system of digital streaming platforms is actually higher than that of original musicians or song owners. Moreover, many of the cover had not got permission to distribute the results of covering the song, or secretly stole the works of the musician.¹⁰ So, according to the *Prakarsa Antar Musik Publishing Indonesia* (PAMPI), special protection is needed in relation to the protection of copyrighted works so that creators are not harmed both morally and especially economically.

In addition, Telegram also contributes to the circulation of illegal films and streaming. The government, more specifically, the Ministry of Communication and Information, based on complaints from the public, the Director General of

Intellectual Property Rights and Film Business Actors/Film Associations, blocked the application.¹¹ Further, the phenomenon of illegally selling Spotify, Joox and Netflix premium accounts also contributes to the gap for copyright law enforcement in Indonesia. This is because what makes the activity of selling premium accounts illegal is that the procedures commonly carried out by online shops are not in accordance with the official provisions of Spotify, Joox and Netflix.

To take a case in point, on Spotify, the seller initially bought a Spotify account officially from Spotify and then shared the original Spotify Premium account with a hack, because Spotify does not have a shared account feature, meaning that one premium account can only be used by one user. The actions taken by the seller constitute a violation of the economic rights of the copyright holder, namely Spotify. This is because sellers are trying to get multiple profits from selling an app program without giving Spotify copyright holders economic rights. This sales activity can be interpreted as the process of distributing the Spotify application program. In Article 1 Number 17 of the Copyright Law which regulates "*Distribution is the sale, distribution, and/or dissemination of Works and/or Related Rights products.*"

From the aforementioned explanation, it can be concluded that the illegal sale of Spotify Premium is a prohibited act that violates Article 9 Paragraph (1) letter (b) of the Copyright Law on the reproduction of works in all its forms, which injures the economic rights of the copyright holder, because the (illegal) seller performs the act of copying without creator's permission (Spotify). This illegal Spotify premium account sale is categorized as piracy, which is regulated in Article 1 number 23 of the Copyright Law.

With regards to the form of legal protection provided by the Copyright Law to objects of copyright protection, it is repressively regulated in Article 95 Paragraph (1) of the Copyright Law, through alternative dispute resolution, arbitration, or courts. While the criminal provisions that can be filed in a lawsuit related to piracy are in Article 113 Paragraph (4) in conjunction to Paragraph (3) of the Copyright Law. Based on the article above, the form of copyright protection against illegal sales on social media or marketplaces can refer to litigation or non-litigation methods.

OTT Application Content as a Creative Economy Driver

Industrial Revolution 4.0 significantly changes economic life, business models and business

processes. In the production process, there is a link between material products and computer-based products. One technology closely related to Industry 4.0 is the internet of things (IoT). The most important IoT technologies in Industry 4.0 are mobile computing, cloud computing, and big data. Industry 4.0 development is predicted to be faster than the three previous industrial revolutions. This Industrial Revolution emphasizes on the application of digital aspects in every industry such as information technology, cellular communication and e-commerce. In an era of massive data exchanges, economic growth and digital technology development have been supported by global citizens from various backgrounds.¹²

Currently, telecommunication operators experienced a decrease in revenues since SMS and telephone services are rarely utilized. Their customers communicate more often via data network. This phenomenon concludes that telecommunication operators and OTT organizers should improve their services of digital contents to get the protection and benefits from this era. Electronic information is also highly recognized both officially and publicly as it can be used as valid evidence in courts in accordance with applicable law in Indonesia.¹³

Information technology and telecommunications can be utilized in a range of fields, such as in education, business, government and social life. The rapid development of science and technology has become a daily reality and is even a non-negotiable demand of the community. The fundamental purpose of the development of science and technology is a change in the future of human life that is better, easier, cheaper, faster and safer. The advent of science and technology, especially information technology such as the internet, has encouraged the community at large to achieve their life goals in a short period of time, both legally and illegally, by justifying any means they deemed necessary to gain profit. The adverse effects of "cyberspace" development is unavoidable in the lives of modern society today and in the future.

With regards to copyright, the protection of software in cyberspace can be found in several international conventions. Berne Convention for the Protection of Literary and Artistic Works 1886 is one of the conventions. This convention is ratified by the Republic of Indonesian Presidential Decree Number 18 of 1997. The Convention can be considered the oldest convention on copyright. It does not regulate software *per se*, instead, software is regarded as a part of literary

works in accordance with Article 2 Paragraph (1) of the Berne Convention stating that software is literary works shall be protected.¹⁴

OTT is a service with contents in the form of data, information or multimedia that operates over internet network. It can also be said that OTT services "ride" or join because they operate on an internet network owned by a telecommunications operator. In this case, copyright has a special role to protect everything that is found on the internet media. Examples of companies operating in OTT services are Facebook, Twitter, YouTube, Viber, and others. OTT service companies such as WhatsApp and others generally have no form of an official collaboration with telecommunications operators. This fact has been rising a controversy for telecommunications companies in Indonesia, thus the Indonesian government intends to form regulations on the OTT service providers. Communication technology, however, is currently highly demanded as it provides the public with efficiency as it can penetrate territorial boundaries without being blocked by national borders and free from time constraints.

The Industrial Revolution 4.0 also marks the development of a creative economy where many aspects of life were disrupted and the business sector experienced fundamental changes. This being the case, copyright becomes a force that can manage and regulate the extraordinary disruption in various fields. Specifically, technology related to the Industrial Revolution 4.0 is the Internet of Things.¹⁵

To take a case in point, a product of the creative economy is copyright of an online taxi application. This new form of transportation is able to compete and even outperform conventional taxi even though the company does not have a fleet of vehicles like the conventional taxi companies in general. This application can connect users (customers) with their drivers as well as control processes by their company. This stage of industrial revolution requires rules and regulations, including the protection of intellectual property. In this millennial era, intellectual property is an innovative and integrative human work, in another sense that the country gives exclusive rights to the creators for their creative works.

Furthermore, with regards to the regulation of databases in Indonesia, it is only regulated on the prohibition of duplication for personal interests without the permission of the author or copyright holder, precisely in Article 46 Paragraph (2) letter ©, namely "*all or substantial parts of the database in digital*

form." However, the act of commercialization without a permit has not been regulated. Meanwhile, based on the national creative economic development, after of 2009 can be defined as a new era after an agriculture-based economy. Information technology and creativity intensify industry and information by relying on ideas and knowledge from human resources as the main production factors in its economic activities.

Conclusion

Telecommunication operators lose a huge number of customers because their SMS and telephone services are rarely used. Customers communicate more frequently via data networks. It can be concluded that telecommunication operators and OTT operators should work together to improve services in the field of digital content in addition to obtain appropriate protection and benefits in this current information technology development. E-Commerce is an example of a digital economy presence. E-commerce is defined as a concept of digital economic transactions involving the internet, the World Wide Web, applications and browsers in transactions that essentially use digital technology as a medium in carrying out economic transactions. Factually, OTT is a service with content in the form of data, information or multimedia that runs over internet network. It can be said that OTT service is a "ride" as it is operating on the internet network owned by a telecommunications operator.

Operators of telecommunication and OTT should synergize because, without the content, the data is useless due to the rise of users switching from the era of SMS to social media services. The emergence of OTT has become a competition for the telecommunication operators. The fact that electronic documents are deemed valid as evidence in courts has not been a strong legal force if the country has not yet specifically regulated electronic information and transactions.

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