THE SHIFT OF THE OFFICE AND THEIR EFFECTS ON THE EFFECTIVENESS OF CRIMINAL LAW PROTECTION AND ENFORCEMENT IN COPYRIGHT LAW

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Abstract. This study aims to analyze the theoretical problem of shifting the type of offense from the original ordinary offense to a complaint offense in Article 120 of Law Number 28 of 2014 concerning Copyright, and the idea will be associated with the reasons used as the ratio legis forming legislation in carrying out the shift in the type of offense. As normative legal research, this research uses a statutory, historical, and conceptual approach. From the results of the study, it can be concluded that the shift in the types of offenses that exist today, has an impact on the birth of several new legal problems, including the ratio of legislators to the legislature that changes the types of offenses in the copyright law into complaint offenses, which can be overcome by taking into account several provisions in the copyright law and add some new provisions without having to decide to change the type of offense. In addition, the shift in the types of offenses has caused law enforcement officials to be passive in finding, prosecuting, and prosecuting subjects who commit copyright crimes. So, from the problem in shifting this type of offense, the projection that is trying to be offered is to shift the current offense to be returned to a normal offense, and with the central role of copyright in the state economy, it has become important to form an integrated special institution/institution. which handles all types of copyright piracy, not only criminal acts in the field of copyright.

keywords: Shifting offense, criminal law, copyright

A. INTRODUCTION

Van Bemmelen and van Hattum, as quoted by Eddy O.S Hiariej, essentially stated that "Criminal law today has only reached a certain stage in its history of development, although the endpoint has not yet been reached". This should be understood considering the obsolete phrase in Dutch "Het recth hinkt achter de feiten aan" which means that the law is always left behind from events. Criminal law, which can be called "the science of the law of crime", is slowly but surely starting to try to anticipate the need for the law by the community with the aim of general law to regulate the peaceful association of human life, as well as the specific purpose of criminal law which is aimed at upholding the rule of law, protect the legal community.

Fulfilling legal needs in dealing with the times. often the things that exist are empirically naive, cannot be covered by legal rules. Even related to the formulation of

offenses in criminal law, it is one of the complex and important things to be studied fundamentally considering that in addition to one of the four characteristics of criminal law, which is specific in defining offenses and punishments, another point that is also important to take into account is the impact of the formulation The type of offense is intended to indicate the success and effectiveness of the offense when applied. The specific characteristics of criminal law in defining offenses and punishments, as well as the impact of the formulation of the types of offenses intended to indicate the success and effectiveness of these offenses when applied, are interesting things to study, if they relate them to the conditions of the current legislation in Indonesia. This is what regulates criminal acts in the field of copyright.

In the provisions of the current laws and regulations regarding criminal acts in the field of copyright, there has been a shift in the types of offenses from what was originally an "ordinary offense" to a "complaint offense". Indeed, this shift in the types of offenses in copyright crimes is not the first time this has occurred. Instead, this has happened 4 (four) times, starting with the type of complaint offense in Law Number 6 of 1982 concerning Copyright, then changes were made to state that copyright crimes are ordinary offenses in Law Number 7 of 1987. Law Number 12 of 1997, Law Number 19 of 2002 concerning Copyright, and the last is Law Number 28 of 2014 concerning Copyright which is currently in effect, which states that copyright crimes are reformulated in the type of offense complaint.

The shift in the type of offense mutatis mutandis will certainly influence the law enforcement mechanism of the offense. This, of course, also applies to copyright regulations that have shifted the types of offenses. However, the next legal question that arises with the shift in the types of offenses from ordinary offenses to complaint offenses is the extent to which the effectiveness of the types of complaint offenses in Law Number 28 of 2014 concerning Copyright currently in effect, towards the protection and law enforcement of criminal acts in the field copyright by adjusting the ratio legis, shifting types of offenses by legislators and current crime models for these crimes. So based on the description above, the author took the initiative to study further about "Shifting Offenses and Its Effects on the Effectiveness of Protection and Criminal Law Enforcement in Copyright Law"

B. RESEARCH METHOD

This research is normative research which in its journey will continue to include empirical data to support the truth and provide sharpening of arguments in several research segments with an effort to answer the proposed legal problems and aim to find certain legal statements or legal analysis with logic and depth. which is more complex related to "Shifting Offenses and Its Effects on the Effectiveness of Protection and Criminal Law Enforcement in Copyright Law". As normative research, of course, the data sought in this research is in the form of secondary data. This secondary data will later consist of legal materials that include "primary legal materials", "secondary legal materials", and "tertiary legal materials." Accompanied by several approaches including statutory approach, historical approach, and conceptual approach.

Thus, this literature-based normative or doctrinal research seeks to find "one right answer" to the legal problem or question "Shifting Offenses and Its Effects on the Effectiveness of Protection and Enforcement of Criminal Law in the Copyright Act", with efforts to systematize legal propositions and the study of legal institutions through legal reasoning or rational deduction.

C. RESULT AND DISCUSSION

In June 2008, the Minister of Trade of the Republic of Indonesia released a blueprint for the development of the Indonesian creative economy 2009-2025 as a further development of the creative industry sub-sector which was later known as the creative economy. In simple terms, the term creative economy itself is defined as a process of increasing value-added results derived from intellectual exploration and exploitation in the form of human intellectual creativity, individual and group skills and talents that have the potential to improve welfare through the creation and utilization of creative power that has an important influence on the welfare of the Indonesian people. and protected as Intellectual Property Rights (IPR). From the blueprint for the creative economy, it gave birth to components of the creative industry as intellectual capital which includes technology, art, culture, and copyright business with the creative industry as the main umbrella and an integral part in the development of the creative economy sector to have a positive impact on life. nation and state, as well as to stimulate economic growth.

Based on the brief description of the blueprint above, it is known that "copyright" which is one component of the creative economy has been recognized by the Government of Indonesia as one of the factors that have an important role in stimulating long-term economic growth for the country. This is understandable considering that the data found show that in general the exports of developing countries (including the State of Indonesia) in the form of products and natural resources can no longer be proud of. So with the important role of this copyright, it would be an obligation for the government to provide an adequate legal platform as a medium for the protection of the copyright.

Indeed, the State of Indonesia already has a legal platform that is specifically intended for copyright protection which is regulated in Law Number 28 of 2014 concerning Copyright. In this provision, the protection provided "attempts to balance the interests of the creator/copyright holder and the state" which includes protection both "morally" and "economically". In addition, another protection provided which is the focus of this study is the law enforcement mechanism in the event of a criminal act in the field of copyright.

However, as stated earlier, that protection related to law enforcement mechanisms in the event of criminal acts in the field of copyright as regulated in the Criminal Provisions Articles 112 to Article 119 of Law Number 28 of 2014 concerning Copyright, has experienced a shift in the type of offense to a complaint offense. which includes all criminal provisions in the law as accommodated in Article 120 of the quo Law which expressly states that "Criminal acts as referred to in this Law constitute a complaint offense." In the shifting of the offense, it is known that the change in the type of offense in the copyright law from the original ordinary offense to a complaint offense as a whole, by the legislators is based on at least 3 main reasons or legal ratios, which include:

1. Law enforcement officials will not be able to determine whether a copyright crime has occurred only by comparing the goods resulting from copyright infringement with the original creation. Only the creator or copyright holder can be more certain which is the original creation and which is the non-original or imitation of the original creation so that they can immediately report the violation of the exclusive rights of their creation.
2. In carrying out the legal process, law enforcement officers may not immediately know whether a party has obtained permission to publish or reproduce a work. Therefore, there must be a first complaint from the creator or copyright holder.

3. In practice, if there is a copyright infringement, the party whose copyright is violated prefers compensation from the party who infringes the copyright rather than the copyright violator is subject to imprisonment.

In the author's opinion, from the three reasons or legis ratios that are used as the basis for thinking by legislators to make decisions on changing the type of offense as a new strategy in law enforcement of criminal acts in the field of copyright, there are several criticisms as an anti-thesis that the author wants to convey against these three basic points of change. Of course, the position of the author who gives criticism here is a clear sign of the author's disagreement with the shift in the types of offenses in the copyright law, which are at least based on the following main reasons.

First, the criticism of the ratio legis point 1 (one) which states that law enforcement officers will not be able to determine whether a copyright crime has occurred only by comparing the goods resulting from copyright infringement with the original creation. So for that reason, only the creator or copyright holder can be more sure which one is the original creation and which one is not the original or an imitation of the original creation so that they can immediately report the violation of the exclusive rights of their creation.

Save the author in the ratio legis point 1 (one) from the legislators, presumably giving birth to its antinomy in the current copyright law. Where, if you pay attention to the provisions in Chapter II Part Two concerning Moral Protection for Creators and Copyright Holders, Article 7 letter (a) and letter (b) of Law Number 28 of 2014 concerning Copyright. It is expressly said that the state guarantees the protection of the moral rights of the creator/copyright holder by creating a method or system that can identify the originality of the substance of the creation and its creator through information codes and access codes as copyright management information and copyright electronic information. Of course, with a method that can identify the originality of the substance of the work, it should be understood that the state through the relevant agencies in the field of Intellectual Property Rights (IPR) guarantees to provide moral protection to the creator/copyright holder by knowing which words are original and which are pirated without need confirmation from the creator/copyright holder.

In addition, it should be understood that one of the reasons for the birth of the method mentioned above is intended so that the creator/copyright holder feels safe from piracy which can lead to a copyright crime by the presence and involvement of the state to protect the copyright. Of course, the role of the state as a guarantor for the creator/copyright holder is not without reason. Bearing in mind, with the lack of copyright infringement or criminal acts in the field of copyright, it will further increase state revenue so that the relationship is of course mutually beneficial between the state as guarantor and the creator/copyright holder as a party that generates income not only for the creator and the holder. copyright, but also to the state. However, as it is known that the legislators have shifted the offense through Article 120 of Law No. 28 of 2014 concerning Copyright becomes a complaint offense, which in the event of a criminal act in the field of the copyright requires the creator/copyright holder himself who reports a criminal act against the work of his creation so that law enforcement can be carried out against the crime. Of course, this is felt to be unfair considering that the country also benefits from the work of the creator/copyright holder, but in terms of protecting the creation, it is entirely left to the creator/copyright holder who must supervise his creation so that piracy is not carried out. Thus, with the shift in the offense, despite the mutually beneficial relationship between the state and the creator/copyright holder, the state is no longer

active in finding, investigating, prosecuting, and prosecuting the perpetrators of criminal acts in the field of copyright, but is left entirely to the creator/copyright holder.

Thus, from the description above which is the criticism of the first point of the reason for the legislators to change the type of offense in copyright crime because only the creator knows the originality of his creation with the construction of Article 7 letter (a) and letter (b) of Law a the quo will surely fall. Bearing in mind that the formulation of the article has given a firm answer to the problem in point 1 (one) of the legis ratio of the legislators that the state guarantees that the method they offer can protect the moral rights of the creator/copyright holder, who can identify the originality of the substance of the creation and its creator through information code and access code as copyright management information as well as copyright electronic information known for the birth of this method to distinguish original and pirated works without prior confirmation from the creator/copyright holder.

Of course, with the loss of that reason, it can no longer be used as a basis for thinking that changing the type of offense in a copyright crime is the right decision. Bearing in mind, the state that participates in enjoying the results of the copyrighted works of the creator/copyright holder seems to be conducting a monopoly by handing overall responsibility for protecting the work from piracy only to the creator/copyright holder without playing an active role in helping to protect the work by changing law enforcement mechanisms in copyright field as a complaint offense.

Second, criticism of the ratio legis point 2 (two) states that it is impossible for law enforcement officials to immediately know whether a party has received permission to publish or reproduce a work. Therefore, there must be a first complaint from the creator or copyright holder. In the author's opinion, the second reason for this legislator would give birth to its own ambiguity. Where, if you pay attention to the description in Chapter II Part Three concerning the Protection of Economic Rights of the Creator/Copyright Holder, it is known that this second reason can be overcome without the need to change the type of offense in the copyright law. This can be done, if Article 9 of the a-quo Law is added a paragraph that provides solutions and answers to this problem, and assists in further elaborating the provisions in Article 9 paragraph (1), paragraph (2), and paragraph (3).

Bearing in mind, the current scope contained in Article 9 is only limited to protecting that everyone who exercises the economic rights of the creator/copyright holder is required to obtain a permit and a prohibition to exercise economic rights to duplication and/or commercial use without permission. Presumably, this provision should be added by 1 paragraph which is positioned as Article 9 paragraph (4) which establishes and regulates a platform containing a database accompanied by methods and special conditions for the subject who will exercise the economic rights of the creator/copyright holder, as well as it also regulates the explanation, affirmation, and evidence that the subject who wants to exercise the economic rights has obtained permission from the creator/copyright holder. So, if on the way, it is found that there are subjects who exercise the economic rights of the creator/copyright holder but no reports are found in the government-owned database platform. Relevant law enforcement officials can immediately follow up on this matter as a copyright crime without having to wait for a report/complaint from the copyright holder/creator which they feel will be more effective and efficient

Furthermore, with the addition of one paragraph, in addition to answering the problem that is used as a ratio legis for legislators to change the type of offense in

copyright crimes, It is also intended to resolve several other legal problems in the copyright law that are affected by the shift in the type of offense. Another legal problem referred to here is the problem related to the conflict and inconsistency of the articles in the copyright law. This provision can be seen in Chapter VIII concerning Copyright and Related Rights in Information and Communication Technology Article 55 which states that anyone who knows about copyright infringement and/or related rights through an electronic system for commercialization can report to the minister. Furthermore, if the results of the verification from the minister (Minister of Communication and Information Technology) show that a criminal act or copyright infringement is true, the minister has the right to close the site or block the web that infringes.

Through the construction of Article 55 of the quo Law above, if it is interpreted through a "systematic or logical interpretation" model of what is meant by the phrase "everyone", it can be concluded that each person referred to is "individuals (hij die)" and corporation. However, in this provision, there is no juridical limit on what kind of person can report copyright infringement. Is everyone a creator/copyright holder, or is everyone in question general in nature-based only on their knowledge of copyright infringement or copyright crimes. If you use the same interpretation model, which is a logical system to answer the question of what kind of person can report a copyright infringement or copyright crime, of course, this is solved when referring to Article 120 of the quo Act that can report copyright infringement. or a copyright crime is only the creator/copyright holder.

However, the contradiction and inconsistency of the complaint offense in Article 120 of the Law arise when Article 55 of the quo Law is interpreted with a "teleological" interpretation model. Bearing in mind, from this interpretation, it will give a conclusion that the phrase each person referred to is not only the creator/copyright holder but, each person in question is general which is only based on his knowledge of copyright infringement or copyright crime. The author's argument in drawing this conclusion is based both on the construction and explanation of Article 55 paragraph (3) of the quo Law which does not state at all that the reporter must be the creator/copyright holder. Thus, it is not regulated and stated explicitly that it must be the creator/copyright holder who reports copyright infringement or criminal acts through information and communication technology facilities. "A contrario" opens the opportunity for anyone who knows of a copyright infringement or crime to report it.

The impact is with the vacuum of the rules that do not explicitly regulate and limit who can report copyright infringement or criminal acts. In turn, this will also open up opportunities for indications of closing and blocking sites by the minister of the relevant field in connection with copyright infringement or criminal acts through information and communication technology media without the need for consideration from the creator/copyright holder whose creation has been violated. Meanwhile, it should be noted that the types of offenses contained in the current copyright law are complaints that the government through the relevant ministries should not be able to do without a prior report from the creator/copyright holder. This is considering that in addition to legal certainty, of course, there is a desire from the creator/copyright holder to be able to meet with the perpetrator which allows the perpetrator to be prosecuted and tried so that there is a possibility that a fine from the prosecution can be accepted as compensation for the creator/holder. Copyright. In addition, with indications of website closure and site blocking by the government through the provisions of the article which do not explicitly regulate the subject, presumably in addition to eliminating the role and indication of

compensation for victims, it also violates legal certainty concerning inconsistency in implementing the provisions of laws and regulations that have been made. stipulates that a copyright offense is a complaint offense that requires a report from the creator/copyright holder as a condition for prosecution or other actions related to law enforcement and the interests of the victim.

Thus, from the brief explanation above by the author on the criticism of point 2 (two) the ratio legis forming the law which changes the type of offense in a copyright crime into a complaint offense, it can be reiterated that this is not an appropriate law enforcement strategy. Considering that, in addition to the amendment of the offense causing inconsistencies and contradictions in the articles in the copyright law, the problem in the second point ratio legis by the legislators can be overcome by adding the provisions in Article 9 which is positioned as paragraph (4) without the need to change the whole type offense against copyright law

Third, criticism of the ratio legis point 3 (three) states that in practice if there is a copyright infringement, the party whose copyright is violated prefers compensation from the party who violates the copyright rather than the copyright violator is subject to imprisonment. In the author's opinion, the problem of the ratio legis gives birth to the opinion that it seems as if the legislators did not pay attention to several other provisions of the article contained in the copyright law concerning criminal sanctions for copyright infringement.

For example, the provision in Article 1 number 25 states that: Compensation is the payment of a sum of money charged to the perpetrators of the infringement of the economic rights of the Creator, Copyright Holder, and/or Related Rights owner based on a court decision in a civil or criminal case which has permanent legal force for the losses suffered by the Author, Copyright Holder and/or Related Rights owner.

From these provisions, it can be emphasized that even if there is a crime in the field of copyright, it does not necessarily eliminate the criminal sanction of a fine against the perpetrator who commits a crime in the field of copyright. In addition, if you pay attention to the provisions in Article 96 paragraph (2), it is known that the creator, copyright holder and / holder of related rights who have suffered economic losses are entitled to receive compensation that is given and included at once in the court's decision regarding copyright and/or copyright criminal cases. or related rights. Of course, with the formulation of the article mentioned above, if no more reason can be used as a basis for thinking that when a criminal case is in the field of copyright, the economic loss of the creator/copyright holder will be lost when the offense governing the type of offense is ordinary. Instead, the existence of this provision creates a situation that is the opposite of what was conveyed by the legislators who changed the offense from a copyright crime to an admin offense.

In addition, the author's argument at this point is further supported by the fact that if you look at the criminal provisions in Article 112, Article 113, Article 114, Article 116, Article 117, Article 118, and Article 119 of Law Number 28 of 2014 concerning Copyright. It is known that the entire construction of the article even though it contains the threat of criminal sanctions that are "single track system" but is cumulative. This means that in addition to imprisonment, there are other cumulative sanctions in the form of fines. Meanwhile, the application of the article elements in the judge's decision on criminal acts in the field of copyright is cumulative. This can be seen from the overall construction of the article mentioned above, which uses the phrase "and/or" in the selection of criminal sanctions that can be imposed. This means, the phrase shows and gives freedom to

judges to impose cumulative criminal sanctions with criminal sanctions of fines and imprisonment simultaneously against perpetrators of copyright crimes, except those contained in Article 115 which only includes fines. With such a construction, of course, the imposition of cumulative imprisonment and fines will have a deterrent effect on the perpetrators as "special prevention", and learning from other subjects so as not to do the same thing as "general prevention" and as psychological coercion (pzychologischezwang).

So, from the three contra reasons that the author criticizes for shifting the types of offenses in the copyright law from ordinary offenses to complaint offenses, it is not the right and effective strategy in preventing and overcoming criminal acts in the copyright field. Bearing in mind, apart from what has been described above, other criticisms that were also present were related to the construction of Article 120 of the quo Law which generalizes all criminal provisions in the copyright law into a complaint offense. Because of this construction, it has an impact on the birth of a reduction in law enforcement mechanisms that affect the function of law enforcement officers, especially investigators, both the police, PPNS, and other investigators in the ministry environment that administers the law to be passive. This means, although investigators can know of a criminal act in the field of copyright, this does not necessarily make them able to enforce the law against these actions. Rather, as is the doctrine in the complaint offense, this process can only be carried out with a complaint or prior report from the creator/copyright holder which, in the opinion of the author, makes it even more difficult to enforce the law against copyright crimes in Indonesia. It does not stop there, another thing that needs to be considered from the construction of Article 120 of the quo Law is the nature of the complaint offense which is an absolute complaint offense. This means that this absolute complaint offense affects that in the event of a report, the reporter cannot make a separation, which means that all parties who commit piracy of their copyrighted work must be prosecuted. This is certainly difficult for creators/copyright holders and investigators when a crime is committed using a digital platform as a media/modus operandi of a crime, or when a massive copyright crime is committed on its way.

Therefore, to deal with and provide solutions to criticism of the shift in types of offenses and legal problems that arise from the shift. The author offers projections that can be used as consideration for preventing and tackling copyright crimes and their various problems which will be described as follows:

1. It is necessary to carry out a partial reformulation of the provisions of Article 120 of Law Number 28 of 2014 concerning Copyright, by changing the type of complaint offense currently in force into an ordinary offense. In the author's opinion, this is intended in addition to solving some legal problems that were born as a result of the shift in offenses in copyright law. Another goal that is important to note is that the types of ordinary offenses in copyright crimes will be more suitable to be used by considering the legal culture in Indonesia. Where, by involving the public to be directly involved in efforts to overcome copyright crimes, it will indirectly become a preventive tool that educates the public about the importance of respect for copyright which has a central influence not only on the individual creator/copyright holder but also affect the country's economy. Thus, with this report's offense model, in addition to being "criminal hygiene" on the one hand as a means of prevention and "criminal politics" as a more effective means of countermeasures, on the other hand, this will affect changing the pragmatic

paradigm of society to be wiser in using the work of the community. other people's copyright.

2. The projection, which is a continuation of the previous point, is to form an integrated special institution/institution that not only handles criminal acts in the field of copyright, but also all forms of copyright piracy. Later, this integrated special institution/institution is a combination of several agencies consisting of the Police, the Ministry of Law and Human Rights (KemenkumHAM) especially the Directorate General of Intellectual Property Rights (Directorate General of Intellectual Property Rights), and the Ministry of Communication and Information (Kemkominfo) who act pro-active in seeking, prosecuting, and adjudicating matters relating to piracy in the field of copyright. Considering in addition to the type of offense that influences the problem of law enforcement of criminal acts in the field of copyright. With the current institutional format as well as sectoral egos and strict barriers between each agency, it will certainly be a hassle and other legal problems for the prevention and control of not only criminal acts in the field of copyright, but against all forms of copyright piracy.

D. CONCLUSION

From the description that has been presented above, conclusions can be drawn regarding the shift in the types of ordinary offenses to complaints against the protection and law enforcement of criminal acts in Law Number 28 of 2014 concerning Copyright which is currently in effect, as well as adjusting the legal ratio for shifting types of offenses. offenses by legislators and current crime trends. The impact on the birth of several legal problems which in turn, make the protection and enforcement of criminal law in the field of copyright ineffective both for the state, creators/copyright holders, and related rights, as well as for people who are indirectly affected by reduced state revenues by piracy and copyright crime.

Thus, with the ineffective application of the complaint offense in the criminal provisions of the copyright law. So there should be a legal reform that does not only change the types of offenses that currently exist into ordinary offenses. However, legal reform here includes the establishment of an integrated special agency/institution aimed at dealing with all types of piracy in the field of copyright and criminal acts in the field of copyright.

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