www.bircu-journal.com/index.php/birci
Budapest International Research and Critics Institute-Journal (BIRCI-Journal)
Humanities and Social Sciences
ISSN 2615-3076 Online)
ISSN 2615-1715 (Print)
Budapest Institute

Juridical Review on Collection and Distribution of Royalties for the Use of Copyrights of Song and/or Music on Over-The-Top Services in Indonesia

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Abstract

Digital Disruption has changed people's way of enjoying entertainment nowadays, and this has been accelerated by the pandemic COVID-19. One of the visible shifts is the way people watch and enjoy entertainment services. Conventional broadcasting institutions such as television, pay-to-play television, and radio, have now found no less powerful competitors: digital platforms and over-the-top services. In Indonesia, the market share of television and subscription television services will be severely shaken by the discontinuation of 18 cable/pay television networks belonging to the Disney group and will focus on streaming services or its over-the-top service, namely Disney+. Various similar services such as Netflix, VIU, GoPlay, WeTV and others also compete for market share in OTT services. OTT is relatively new in Indonesia, so the regulations governing it are still not comprehensive and detail. The content displayed by OTT contains numerous copyrights and neighbouring rights of the song works, those of belonging to the Songwriter, Performer and the Phonogram Producer. Copyrights in Indonesia is regulated in Law no. 28 of 2014 on Copyrights, and the Law does not yet regulate the use of copyrights and neighbouring rights in OTT services. Law No. 32 year 2002 on Broadcasting has not accommodated over-the-top services as broadcasting institutions. The Decision of Indonesian Constitutional Court No. 39/PUU-XVIII/2020 stipulates that OTT content cannot be equated with linear television content, the Constitutional Court rejected the proposal to change the definition of a broadcasting institution to include OTT as a broadcasting institution. This of course will affect the collection of song copyright's royalties in Indonesia, given Government Regulation no. 56 of 2021 on Management of Royalties of Song and/or Music does not specifically regulate OTT, only regulates broadcasting institutions. These absences certainly does not reduce the obligation of the OTT to fulfil its obligations to the Songwriter and/or Copyrights' holder by the reason it is not regulated in details by laws and regulations. A regulation that stipulates the existence, use and matters related to copyrights in OTT is very necessary. This topic will be analyzed qualitatively and combined with facts in Indonesia and worldwide regarding implementation of collection and distribution of royalties of copyright of the song and/or music in Indonesia. This paper intends to further examine the obligation to pay royalties of the song and/or music copyrights by over-the-top services in Indonesia.

Keywords
over-the-top; royalty of copyright of the song and/or music; broadcasting institution; electronic system operator

I. Introduction

The outbreak of this virus has an impact of a nation and Globally (Ningrum *et al*, 2020). The presence of Covid-19 as a pandemic certainly has an economic, social and psychological impact on society (Saleh and Mujahiddin, 2020). Covid 19 pandemic caused all efforts not to be as maximal as expected (Sihombing and Nasib, 2020).

Digital disruption has been accelerated by the limitations of face-to-face meetings caused by the COVID-19 pandemic, and it has resulted in various changes in people's behavior as in entertainment consumers. One of the rapidly emerging technological developments in responding to consumer needs in the pandemic era is internet-based over-the-top services. In contrast to conventional broadcasters, which are linear services, OTT services provide non-linear services because they do not use fixed lines in transmitting their content.

"A common trend noted across the world has been the increasing smartphone and internet penetration. Factors such as low data cost and the availability of affordable smartphones are further disrupting the traditional television & broadcast, and related industries to bring about a dynamic shift in the way content is being consumed. The rise of audio as well as video over-the-top (OTT) platforms played an instrumental role in this shift (Delloitte, 2019)."

OTT services not only provide audio content, but also audiovisual contents in the form of films, videos, and others. Various OTT services have been operating in Indonesia, for example OTT audio services are Spotify, Joox, Langit Musik, etc. As for audiovisual OTT services, such as Netflix, Disney+ hotstar, VIU, WeTV, Goplay, etc.

Regarding the content and capacity of OTT services which are not considered as broadcasting institutions under Indonesian law, as decided in the Constitutional Court Decision Number 39/PUU-XVIII/2020, dated January 14, 2021, the Petitioners are PT. Visi Citra Mitra Mulia (INEWS TV) represented by David Fernando Audy as President Director and Rafael Utomo as Director (Applicant I) and PT. Rajawali Citra Televisi Indonesia (RCTI) represented by Jarod Suwahjo and Dini Aryanti Putri as Director (Petitioner II) (Putusan Mahkamah Konstitusi Nomor 39/ PUU-XVIII/2020, 2021).

The Petitioners are Private Legal Entities in the form of companies engaged in television broadcasting, which causes unequal treatment between the Petitioners as conventional broadcasters using radio frequency spectrum and internet-based broadcasting providers, such as OTT services in carrying out their broadcasting activities. The different treatment is because conventional broadcasting is bound by the provisions of Law 32/2002, while broadcasting using the internet such as OTT services is not bound by the provisions of Law 32/2002. In addition, internet-based broadcasting providers, such as OTT services, are not subject to the Broadcasting Code of Conduct and Broadcasting Program Standards (Pedoman Perilaku Penyiaran dan Standar Program Penyiaran /P3SPS) in creating broadcast content and if they violate they will be subject to sanctions by the Indonesian Broadcasting Commission (Komisi Penyiaran Indonesia/KPI) as part of their supervisory duties (Silalahi, 2021).

In providing services to their users, OTT uses many copyright of songs and/or music both in the content provided by them and in their services in general. OTT audio services, for example, mostly-if not entirely-uses copyrights of the songs and/or music to be played and distributed to their users. It is possible for services in the form of podcasts to only use a small part of the copyright of songs and/or music as themesong or backsong, but still be considered as using copyrights of the songs and/or music commercially. Likewise for OTT audiovisual services, which use copyrights of the songs and/or music in the content provided to its users.

Upon the issuance of the Constitutional Court Decision related to the types of services and content of OTT services, the use of copyrights of the songs and/or music in OTT services is doubtful because they are considered to have no legal standing on the collection of copyright royalties on songs and/or music. Furthermore, because OTT services are considered not as a broadcasting institution, the obligation to pay royalties as stated in Government Regulation no. 56 of 2021 on Management of Song and/or Music Copyright Royalties does not cover OTT services because it cannot be defined as a broadcasting institution and therefore, is not obliged to pay royalties for the use of song and/or music copyrights in the OTT services it provides to users.

This is certainly detrimental to songwriters and copyright holders of songs and/or music whose creations are used commercially in OTT services. This paper intends to examine the extent of the obligation to pay royalties for song and/or music copyrights by OTT services that use copyrights of the songs and/or music in the content provided to users of the OTT services.

II. Review of Literature

Primary data are regulations on copyright, broadcasting institutions and the operation of electronic systems, although special regulations regarding the use and collection of royalties on song and/or music copyrights in Indonesia have not yet been regulated. Specifically secondary data in the form of literature, journals, and dictionaries related to the problems that exist in this study. All required data were collected by literature study.

III. Research Method

This research was conducted by juridical-normative method by analyzing primary data and secondary data, analyzed qualitatively and combined with existing facts in Indonesia regarding the implementation of the collection and distribution of royalties for song and/or music copyrights in Indonesia. This paper will compare the collection and distribution of royalty of copyrights of the song and/or music in OTT services prior to Constitutional Court Decision Number 39/PUU-XVIII/2020, and how it shall be applied afterwards. This topic has been discussed with relevant experts in this regard from practitioners and academics.

IV. Results and Discussion

4.1 Over-The-Top (OTT) Services in Indonesian Legal Perspective

One of the peculiarities of internet technology is in the form of digital technology that does not distinguish between the original form and the non-original form of the material stored and distributed in it. As a consequence, the issue of copying works, the problem of announcing a copyrights of the work to the public and other copyright issues are becoming increasingly important to discuss (Lindsey, et al, 2006).

Over-The-Top services are widely recognized worldwide, and regulation of OTT services in relation to the use of copyrights of the songs and/or music is widely practiced. OTT services that transmit audiovisual content are also known as IPTV or "over-the-top delivery of traditional television content over the Internet"(Fund, et al.,2016). This definition states OTT services as television in a different form of transmission from conventional television.

Regarding the OTT service business model, the World Intellectual Property Organization ("WIPO") calling these OTT services for activities of viewing TV programmes and films on multiple devices, such as televisions, tablets, computers and smartphones ("multiscreen" viewing) while choosing between scheduled programming or on-demand services, to be viewed at a time of their own choosing, and these new services are provided through the open Internet (WIPO, 2017).

Indonesian law has not comprehensively regulated OTT services which are considered as 'new products' resulting from technological developments. There is overlap and discrepancy between the prevailing laws and regulations in Indonesia related to the regulation of OTT services which of course creates confusion in its implementation in the field.

Law No. 32 of 2002 on Broadcasting ("Broadcasting Law") does not clearly regulate the definition of OTT services as broadcasting institutions.

The Circular Letter of the Minister of Communication and Informatics No. 3 of 2016 on Provision of Application and/or Content Services Through Internet (Over-The-Top) in Article 5.1.3 states that Provision of Application Services and/or Content through the Internet (over-the-top), is the provision of Application services through the Internet and/or the provision of Content services through the Internet.

In relation to the use of copyrights of the songs and/or music in OTT service content, the National Collective Management Organization (Lembaga Manajemen Kolektif Nasional/LMKN) in the Decree of the National Collective Management Organization Nomor: SK. 03. LMKN. VIII. 2019 on the Delegation of LMKN Authority to the Wahana Musik Indonesia and/or the Sentra Lisensi Musik Indonesia as the Coordinator of the Implementation of Collection and Distribution of Royalties (Koordinator Pelaksana Penarikan dan Pendistribusian Royalti/KP3R) to withdraw and/or collect the royalties of songwriting and/or music and/or related rights products under Section SEVENTH letter j (i) stipulates Royalty Rates for Television Broadcasting Institutions in this case namely Royalty Rates for Free to Air Television and Internet Network-Based Television (simulcasting & webcasting/streaming televisions). This means LMKN classify OTT

services as broadcasting institutions, and therefore are required to pay royalties in accordance with the stipulated tariff.

This is interesting because the Constitutional Court has decided that OTT Services in Indonesia can not be classify as broadcasting institution. Furthermore, in its decision, the Panel is of the opinion that the main elements of the definition of "Broadcasting" in Article 1 point 2 of the Broadcasting Law are: (1) its activities are in the form of broadcasting; (2) using radio frequency spectrum over the air, cable and/or other media; (3) received simultaneously and simultaneously by the public with a broadcast receiving device. These elements cannot be separated from each other, therefore a new activity can be said to be broadcasting if it fulfills these three elements.

The judges must determine the operation of the OTT service which can be considered a legal event where the existing laws and regulations have not accommodated in detail and comprehensively regarding the OTT service.

A judge must act as a law maker in the event that the statutory regulations do not mention a provision to resolve a case that occurs. In other words, judges must adapt the law to concrete matters, because regulations cannot cover all legal events that arise in society (Kansil and Kansil, 2010).

The general conclusion that can be drawn is: if the law tries to be in line with developments, only these developments affect society and become an unavoidable or important thing to do. Even then, attempts to expand or adapt the principles of law have seemed to be the only way to respond to the revolution, despite the fact that the latter has seemed unpredictable and that the principles of law existed previously only to be stretched beyond their limits (Endeshaw, 2007).

In the Constitutional Court's Decision, what is meant by wireless broadcasting through media (transmission) is satellite, not the internet, so it can be concluded by the Constitutional Court's Decision that in Indonesia, OTT services are not considered as broadcasting institutions.

The issuance of this Constitutional Court Decision makes the Circular Letter and LMKN decisions to be null and void because they are not in accordance with the Broadcasting Law. Based on the legal principle of *lex superior derogat legi inferior*, it can be concluded that a higher regulation wins or applies compared to the regulation below it, therefore the Circular Letter and LMKN's decision are invalid if the regulation deviates from the provisions of the Broadcasting Law.

As a consequence, the withdrawal, collection and distribution of copyright royalties for songs and/or music used and played in OTT services which are considered as Internet Network-Based Television which previously made based on the LMKN Decree becomes irrelevant and cannot be done anymore.

4.2 Obligation to Pay Royalty for the Use of Copyrights of the Song and/or Music in Indonesia

In discussing the issue of copyright as part of Intellectual Property Rights (IPR), it is necessary to first discuss the meaning of Intellectual Property Rights. Intellectual Property Rights are material rights, rights to an object that originates from the work of the brain, the work of human ratios (Citrawinda, 2003).

Intellectual Property Rights need to be protected because their creation takes time and effort and costs a lot. Owners of Intellectual Property Rights who have devoted their thoughts, energy and costs are reasonable to get compensation if the Intellectual Property Rights are used in the commercial field (Santoso, 2009). For this reason, IPR protection which is a proprietary system is a reward for the expression of personality or incentives for creators, inventors or designers for their sacrifices in producing intellectual creations that have significant financial implications (Jened, 2014).

If there is no protection for Intellectual Property Rights, it is certain that there will be unlimited exploitation, imitation of creativity and hard work of other parties which may cause no economic benefits for the inventor or owner of Intellectual Property Rights, and in the end will kill creativity and hinder human civilization.

"*In terms of digital copyright protection in Media OTT Streaming Content in Indonesia, this topic must be discussed in cunjonction with two legal regimes: copyright law and cyber law. Copyright protection in Indonesia is mainly regulated in the Copyright Law, while the "umbrella regulation" of Indonesian cyberlaw is held in EIT Law (*Sihombing, *et al.*, 2021)."

In the context of this research, a license is granted by the songwriter and/or copyright holder through a license agreement.

Licensing can be understood as a form of granting permission by the IPR holder in this case are the economic right of the songwriter and/or the copyright holder of the song works, to another party based on an agreement to grant/transfer the right to enjoy economic benefits, to use all or some rights, within a certain period of time and conditions.

Copyrights Law itself defines a license as a written permission granted by the songwriter or copyright holder or related rights/neighbouring rights owner to another party to exercise economic rights over their work or related/neighbouring rights products under certain conditions.

The license agreement is accompanied by the obligation to give royalties to the Copyright Holder by the Licensee. The amount of royalties that must be paid to the Copyright Holder by the Licensee is based on the agreement of both parties by referring to the agreement of the professional organization (Jened, 2014).

The term license in the transfer of copyright to other parties has been found in the Indonesian Copyright Act 1997. The inclusion of the legal term "license" in the copyright laws and regulations is based on the provisions of Article 6 bis(1) of the Berne Convention. This provision is needed to provide a regulatory basis for licensing practices in the field of Copyrights, as known in patents and trademarks (Saidin, 2013).

The use of copyrights of the songs and/or music is generally regulated in Article 9 of Copyrights Law, where for every use of copyright requires approval from the songwriter and/or copyright holder. Article 9 Copyrights Law regulates 9 commercial uses of copyright, but in practice in Indonesia there are 2 (two) classifications of commercial use in song and/or music copyrights, namely:

a. Reproduction/mechanical Rights which in practice are collected and distributed with other rights: adaptation, synchronization (harmonization), translation, transformation, and others.
b. Performing Rights whose royalties are collected and distributed together with the rights of communication to the public and broadcasting;

Reproduction Rights, together with other rights referred to in point a, in practice in Indonesia, are withdrawn, collected and distributed by music publishers. Music publishers get a mandate from songwriters who are its members, and provide licenses for and on behalf of songwriters and/or music to users. The value of the license granted by music publishers is not regulated in the prevailing laws and regulations in Indonesia, so the amount is determined based on common practice and the agreement of the parties in the license agreement.

Withdrawal, collection and distribution of copyright royalties for the use of performing rights of song and/or music copyrights in Indonesia and other rights referred to in letter b shall be carried out by the Collective Management Organizations ("Lembaga Manajemen Kolektif/LMK") of the Author as mandated in Article 87 of Copyrights Law. In Indonesia, there are 3 (three) LMK of Author that have obtained operational permits from the Minister of Law and Human Rights, namely Wahana Musik Indonesia ("WAMI"), Yayasan Karya Cipta Indonesia ("YKCI") and Royalti Anugerah Indonesia ("RAI").

Indonesian Government Regulation No. 56 of 2021 on Management of Song and/or Music Royalties regulates the use of performing rights, communication rights to the public and broadcasting on certain objects mandated to LMKN. Although the controversy regarding LMKN including its form, mandate, power and authority in withdrawing, collecting and distributing song and/or music copyright royalties is still being debated to this day, in practice LMKN continues to operate and withdraw, collect and distribute royalties of copyright of songs and/or music in Indonesia.

Previously, the withdrawal, collection and distribution of royalties for songwriters were carried out by WAMI who was appointed as the KP3R for the 2015-2020 period. LMKN through KP3R withdraws, collects and distributes royalties for copyrights of the songs and/or music by setting certain rates for each use of copyrights of the songs and/or music. In addition to the fields managed by the LMKN, the LMK of songwriters also withdraws, collects and distributes performing rights royalties in accordance with the powers granted by its members for the song use other than those of manage by LMKN.

Intellectual Property Rights are territorial, in the sense that their enforcement in a legal area outside the Republic of Indonesia can only be done by registering IPR in that area. LMK withdraws and collects song and/or music copyright royalties outside the

territory of Indonesia by entering into reciprocal agreements with LMKs or Collective Management Organizations (CMOs) around the world. A reciprocal agreement is an agreement that creates basic obligations for both parties (Badarulzaman, 2014).

In the Constitutional Court Decision, the Court is of the opinion that the supervision or control over the content of OTT services transmitted through an electronic system is actually subject to the provisions of Law no. 11 of 2008 on Electronic Information and Transaction ("EIT Law"). It can be concluded that the Court is of the opinion that OTT services are Electronic System Operators (Penyelenggara Sistem Elektronik/PSE) as defined in the EIT Law and not as broadcasting institutions.

Article 1 number 5 of EIT Law regulates Electronic Systems as a series of electronic devices and procedures that function to prepare, collect, process, analyze, store, display, announce, transmit, and/or disseminate Electronic Information. Although it does not stipulate the definition of Electronic System Operator, Article 1 number 6 stipulates the definition of Electronic System Operation as the utilization of Electronic System by state administrators, Persons, Business Entities, and/or the public.

Then how to withdraw, collect and distribute copyright royalties of songs and/or music to OTT services as Electronic System Operators? Is it because OTT services cannot be considered as broadcasting institutions, so OTT services do not need to pay royalties for the use of copyrights for songs and/or music?

A good legal system cannot necessarily be realized by constantly making new laws and regulations, but it requires an in-depth study of the extent to which the existing legal framework can be optimized (Makarim, 2005).

The decision of the Constitutional Court states that the regulation of OTT service content is regulated by sector in various laws and regulations. Regulations regarding copyrights for songs and/or music in Indonesia are regulated in Copyrights Law, therefore regarding the use and obligation to pay royalties for the use of such songs and/or music in OTT services must be based on the provisions of Copyrights Law.

Intellectual Property is a private right (Hardjono, et al., 2019). Economic rights are the exclusive rights of the songwriter or copyright holder to obtain economic benefits from the song works. That is, for the use of copyrights of the songs and/or music, the songwriter and/or copyright holder are entitled to economic benefits.

Copyrights Law stipulates that any and all use of copyright including the use of copyrights of songs and/or music must obtain the approval of the songwriter and/or copyright holder. Article 9 of the Copyrights Law regulates some uses of copyright to songs and/or music, and OTT services need to investigate further, on a case by case basis, regarding what economic rights are used by their services. In the event that the OTT service uses the copyright of the song and/or music in point a, the OTT service must pay to the songwriter and/or music publisher authorized by it. In the event that the OTT service uses the copyright of the song and/or music in point b, the OTT service must pay to the songwriter and or the collective management agency authorized by him. In practice, OTT services will use both rights in point a and point b, at least 1 type of right in each point, so OTT services are required to do rights' clearance for such use and therefore pay copyright royalties for songs and/or music.

The biggest difference from the payment of royalties for song and/or music copyrights by OTT services as broadcasting institutions (prior to the Constitutional Court Decision) with obligations on payment of royalties for song and/or music copyrights by OTT services as Electronic System Operators is that the amount of royalty rates for broadcasting institutions has been determined by LMKN while the amount of tariffs for OTT services as Electronic System Operators is an agreement of the parties in accordance with applicable industry standards.

V. Conclusion

OTT service as a form of technological development in the entertainment world is new and different from the technology that have existed before. Although OTT services have not been regulated in detail, completely and thoroughly in Indonesian law, this does not mean that OTT services are not required to comply with the provisions of the laws and regulations in force in Indonesia.

Regarding the use of copyrights for songs and/or music in OTT services, because in the Constitutional Court Decision Number 39/PUU-XVIII/2020 OTT services are not categorized as broadcasting institutions but as Electronic System Operators, then for the use of copyrights of the songs and/or music in the OTT service, the provisions for the Commercial Use of Song Works as regulated in Copyrights Law shall be applied.

OTT services are required to obtain permission from the songwriter and/or copyright holder of songs and/or music, for each of the different rights used by them. In the event that the OTT service uses the performing rights and communication to the public, the OTT service is obliged to pay royalties for the copyright of songs and/or music to the Collective Management Organization where the songwriter and/or copyright holder is a member and gives power of attorney. In the event that the OTT service uses reproduction/mechanical rights, adaptation, synchronization, publishing, translation and other rights, the OTT service must obtain a license from songwriters himself or a music publisher.

For OTT services that have not been regulated in detail and comprehensively in Indonesian law, especially with the issuance of the Constitutional Court Decision Number 39/PUU-XVIII/2020, the author suggests several things for orderly administration and fulfillment of the rights of songwriters and/or copyright holders of songs and /or music:

1. Dissemination of OTT services as Electronic System Operators, including the legal consequences in Indonesian law, both related to content and technology used in providing services to its users. The shift of OTT services from broadcasting institutions to Electronic System Operators does not reduce the obligation of OTT services to pay royalties for song and/or music copyrights used in their content.
2. Adjust an/or amend to the laws and regulations related to OTT services which are made based on the understanding of OTT services as broadcasting institutions and not as Electronic System Operators as they should be. Furthermore, to dismiss regulations that are not comply with the prevailing law above them. A synergistic, mutually supportive, non-overlapping and non-conflicting legal structure will provide legal certainty for relevant industry players in Indonesia.

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