CONSTRUCTING AND DEVELOPING THE SOCIAL FUNCTION PRINCIPLES IN UTILISING COPYRIGHT PRODUCTS RELATED TO THE FUNDAMENTAL RIGHTS

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ABSTRACT

This research is aimed at constructing and developing the principle of social function in the utilisation of copyright products related to the fundamental rights. It will be focused on the utilisation and optimisation of books as the core instrument in developing education. Constitutionally, education is one of the fundamental elements regulated under the 1945 Constitution, article 28 and 31. Therefore, theoretically, those articles oblige the government in respecting, fulfilling and protecting the accessibility of public to educational resources, information and technology, especially books. This obligation allows the government to change, review, revoke, add, eliminate and re-examine any policy, regulation and articles that pay deprive the people to access their fundamental rights, i.e. books. In visualising the above states obligation, this research suggests that the government could construct the the core Indonesian values such as communualism, spiritualism, and inclusivism. Those values are basic vales that can be used to formulate and construct the principle of social function. This is common sense as any regulation is a product (emergent properties) of the collective awareness of people. Due to the communalism, spiritualism and inclusivism values as collective awareness and norms, so all public policy or legislation products should be based on the principle of social function as crystalisation of the the core Indonesian values. For that reason, the construction of social function principle in the utilisation of copyrights products become imperative. At the technical level, this visualisation may activate the guardian articles, such as compulsory licence, fair use doctrine, government use, parallel import in manifesting the embodiment of the social function principle in the utilisation of copyright products related the fundamental rights. This embodiment will help the government in endeavoring their obligation, that are respecting, fulfilling and protecting the fundamental rights of people.

Key Words: Constructing, Developing, The Social Function Principle, Utilising Copyright Products Related, The Fundamental Rights

Introduction

Constitutionally, education is one of the fundamental elements set out in Article 28 and 31 of the 1945 Constitution. Therefore, it requires the government to respect, fulfill and protect the public in accessing educational resources, information and technology, especially books that are fundamental rights of the people.

The book as a lead instrument in promoting and developing education, as well as being an important means to establish human nature and guide nation civilization. The book is a form of intellectual property of person that gets protection automatically, and also one of the rights that the government must respect, fulfill and protect. The book as a lead instrument in promoting and developing education, as well as being an important means to establish human nature and guide nation civilization. The book is a form of intellectual property of person that gets protection automatically, and also one of the rights that the government must respect, fulfill and protect.

Through the implementation of the international principles of the protection of Intellectual Property Rights (HKI), including copyright, in accordance with WTO-TRIPs Agreement, the basic of IPR protection, including Copyright based on protection of

1Books are also as information media, which can be used as the reasources of study for developing knowledge, ability and personality, as well as entertainment. So supporting many states race developing books industries in their states, USA, England, Japan, France and Germany are still dominating books establishment. Then Rusia, S pain, China, India, Egypt and any other states, continue to increase the books product, not only for the needs of their states, but also for international needs. So active books industries in Denmark and Israel, so the ratio between the amount of books published and the amount of the educators are higher than in USA, England and France. The height of books production in some countries mentioned above resulted international books markets are dominated by those countries, and other countries become consumers from their books products. Read B.P.Sitepu, Urgensi Undang-Undang Perbukuan, Makalah ini dipaparkan di Seminar Masa Depan Buku Digital di Indonesia Yang diselenggarakan oleh Pusat Pranking dan Pengolahan Data dan Informasi (P3DI) Sekretariat Jenderal DPR RI Selasa, Jakarta, 19 Juli 2011, http://bantangsitepu.wordpress.com/

2At first, chosen the word ‘Hak atas Kekayaan Intelektual’ (Intelectual Property Rights) or IPR (popularized by Bambang Kesowo), for translating ‘Intelectual Property Rights’. According to Bamabang Kesowo, the used of term mentioned before, namely ‘Hak Milik Intelektual’, not quite right because have not describe the core elements existed in Intelectual Property Rights. Look in Bambang Kesowo, 1995, Pengantar Umum mengenai Hak atas Kekayaan Intelektual di Indonesia, Jogjakarta, Fakultas Hukum Universitas Gadjah Mada, p. 6. Presumably, the use of intellectual property rights arising from the translation "what it is". Furthermore, in terms of the rules of Indonesian grammar are generally relying on rule-Explain Explained, the equivalent of that is at the moment less consistent. Furthermore, in this paper used the term "Intellectual Property Rights", following the terminology used to refer to a business unit in the Department of Law and Legislation (Directurate General of Intellectual Property Rights) under Decree of Law and Legislation No.M3.PR.07.10 Year 2000 and Approval of Minister of State for Administrative Reform No., 24/M/PAN/I/2000 January 19 2000.

The use of this term has consulted to the Center for
individual rights (individual rights), seems to make very narrow space for social functions in Copyright so it’s stronger protection of exclusive rights to the creator.

The social function of copyright UUHC regulated in Chapter V Article 14 -Article 18 the term of copyright restrictions. Commonly known as doctrin fair use / fair dealing in many WTO member countries. The article 15 point (a) and subparagraph (e) UUHC states that “on the condition that the source must be mentioned or referred to, is not considered a violation of copyright. The use of another party’s creation for the purposes of education, research, writing papers, preparing reports, writing criticism or review of an issue without natural harming from the creator; e. Reproduction of a work other than a computer program, in a limited way or by any means or similar process by public libraries, scientific or educational institutions, and non-commercial documentation centers solely for the purpose of its activities; Thus the activity of the book propagation through a photo copy machine, as much done by students and teachers in many colleges despite arguing for educational equipment, it’s including acts that violate copyrights. The reality is still rampantpropagationof books without permission and the cases of plagiarism of scientific papers both in the universities and the general public, which is very harmful especially for creator/author both morally and economically, and society in general. This happens because the Indonesian people still understand copyright as common property (res communis), whereas the basic concept of Copyright Laws regard Copyright as private property (res nullius). Communism in a society, it’s tangible with the culture of mutual aid that is one of the prominent features in Indonesian society, this value has raised its own conception of property rights.

For the people of Indonesia property rights has a social function, which may be enjoyed by other communities, it is in accordance with the opinion of Adi Sulistyono, similar to the current of Sociological Jurisprudence. The main function of law, among others to protect the public interest, social interest and individual interest. So in principle emphasizes the importance of a balance between formal law with the law of life in the community, between the interests of the rulers and the public interest.


The term Intellectual Property Rights (IPR) is officially used throughout the Act governing IPR in Indonesia today, namely U.U. No. 30 Tahun 2000, U.U. No. 31 Tahun 2000, U.U No 31 Tahun 2000, U.U No 14 Tahun 2001, U.U. No 15 Tahun 2001, serta U.U. No. 19 Tahun 2002. The term intellectual property rights explicitly mentioned in the legislation stated: the Directorate General is the Directorate General of Intellectual Property. Authorization is the Consultant of Intellectual Property Rights. In section Considering Law Trade Secrets mentioned that the legal protection of trade secret as a part of the intellectual property rights system, as well as other in IPR Act. Intellectual Property Right term used in the Gari-garis Besar Haluan Negara tahun 1993, BAB IV (F) Bidang Ekonomi butir 1 sub g. In the published literature, experts in Indonesia using the term Intellectual Property Rights, arguing that the term possession or ownership is more appropriate to use than the term of wealth, because the sense of Property has a more specific scope than the term wealth. According to the Civil Law system in Indonesia, Wealth Law covering material Law and commitments Law, while IPR is immaterial one which is also the object of Property Rights as provided in Material law, hence more appropriate to use the term Hak atas Kepemilikan Intelektual (HaKI). See Ahmad M Ramli, 2000, Hak Atas Kepemilikan Intelektual : Teori Dasar Perlindungan Rahasia Dagang, CV Mandar Maju, Bandung, p. 23-24. Sudargo Gautama dalam buku Segi-segi Hukum Hak Milik Intelektual,(1990),dan C.S.T. Kansildalam buku Hak Milik Perindustrian dan Hak Cipta ( 1997) menggunakan terminologi Hak Milik Intelektual. See also Mochammad Djhumana, dalam karangan bukunya menggunakan istilah Hak Milik Intelektual.

3The doctrine of fair use /fair dealing (or fair usage fair use) are generally implemented by many countries that allow propagation of creation, but do not qualify as copyright infringement.


5http://www.attmajaaya.ac.id/content.asp?id=6904

6Adi Sulistyono, Eksistensi & Penyelesaian Sengketa HaKI ( Hak Kekayaan Intelektual ), UNS Press,Surakarta, 2008, p.34.


8Ibid, p.18.
The values of communalism, spiritualism and inclusivism as a collective consciousness and norm are core values of Indonesia. All public policy or statute products, including UUHC should be based on the principle of the social function as the crystallization of the core values of Indonesia.

Constructing and developing the social function principle may support the government in implementing their obligation to respect, to fulfill and to protect the rights of people constitutional. This idea could be visualised and embodied into: exploring and identifying the Indonesian core values and constructing them into the legal figure as well as activating the guardian Articles such as compulsory license, fair use doctrine, government use, parallel imports and so forth.

2. The nature of social function principle

2.1. Basic concept and rationales

The concept of property rights in intellectual property rights (including copyright) classified as intangible. It is based on the concept of property rights in general is known to have property rights over movable and immovable objects. Ownership of the moving objects can be divided into ownership of tangible movable goods and intangible movable objects (intangible). But it’s true that all property rights on the products which have economic value, in this function of right essentially have a social function.

The function principle of land ownership rights stipulated in Law No. 5 of 1960 On Agrarian Principals (UUAP), Article 6, which formulates that “all land rights have a social function”. In the explanation of the article states that not only property right that has a social function, but all rights of the land.

The principle of the social function is the communal value of the Indonesian nation with the culture of life together and helping each other energized by the spirit of mutual aid, it’s actually a reflection of the philosophy values of Pancasila which consists of the value of divinity, humanity, unity, democracy and social justice. Based on stratification, the value of social justice is the peak value of the pyramid from the system of Pancasila value11.

The principles concept of the social function of property rights is the public interest above the individual interests, and more balance between individual interests and the social interests that aim to achieve social welfare for all the people of Indonesia, it is also consistent with some of the opinions of the experts of IPR, Ajip Rosidi, Abdulkadir Mohammad and Budi Santoso. Hayyan Ul Haq.

Hayyan Ul Haq, explained that principle concept of the social function is an effort utilizing the products and resources (resources) for the prosperity or welfare of the people is also an attempt to realize collective value (communal) of property products for the benefit of the people. With the social functions are also very relevant to the Public Interest as set out in Article 8 of TRIPS Agreement.

9 Intellectual property rights (including copyright) is a property that appears as a result of a person's intellectual creativity. So the concept of intellectual property right is the same as the rights to the land, because the same intangibles. See Budi Santosa Op.Cit. p.123.

10 So it is not justifiable that the land will be used (or not used) solely for their own interests let alone cause any harm to the public. Land use should be tailored to the circumstances, and the nature of the rights, welfare and so utility for his welfare and happiness and for society and state. Then in Article 2 paragraph (3) BAL AGRARian Principle Law states, public interest and private interest must offset each other so that finally achieved the ultimate goal, those are prosperity, justice and happiness for the whole people.


12 Ajip Rosidi, suggests that more than property rights everywhere, a work social function through its spread in the community and as long as people still need it, during which the social function of copyright. In this regard, the social function is defined in a narrow sense. Which in broad terms means a creator / writer should be able to sacrifice their copyright when the public interest expect it. Ajip Rosidi, Undang-Undang Hak Cipta 1982, Pandangan Seorang Awam, Djambatan, Jakarta, 1984, p. 12.

13 Abdulkadir Mohammad, explained that: ‘according to the Indonesian legal system, each property has a social function as well as intellectual property rights (IPR). Abdulkadir Muhammad ‘Kajian Hakum Ekonomi Hak Kekayaan Intelektual’, Citra Aditya Bakti, Bandung, 2001 p. 25. Further explained that the social function implies that property owners in addition to private interests, the public interest as well. The public interest is a restriction on the use of private property rights are governed by the Act. Use of Intellectual Property Rights (IPR) by the owners is limited by law. such restrictions are defined as follows: (1) Use of Intellectual Property Rights (IPR) should not be detrimental to the public interest, (2) Use of Intellectual Property Rights (IPR) in addition to the welfare of individual owners, as well as to the welfare of society in general. The owner must be willing to sacrifice their rights when the public interest so desire, (3) Use of Intellectual Property for the benefit of society must be transferred in writing, either in the form of common agreement and the license agreement, (4) Possible implementation of social functioning in Article 14, Article 15, Article 17 of Undang-Undang Nomor 12 tahun 1997 (Konsolidasi). Abdulkadir Muhammad, Ibid. Budi Santoso explained the emergence of the term anti-IPR, which confirmed that the movement does not mean opposing someone Copyright but intend to restore possession to mankind. IPR has been monopolized by the big countries and big companies that benefit the human being secondary Budi Santoso, Dekonstruksi Hak Cipta. Klinik HKI UNDIP, Semarang, 2006, p. 227.

2.2. Elements of social function

Actually, the actualization of the social function of property rights to land is the actualization of abstract legal ideas to be reality. Beside has the right, which means it contains fality function, the social function of property rights to land also contains obligations that means as a control function to the land owner. There are various obligations to be actualize by landowners, are as follows:16:

1. The obligation to use his land in accordance with the condition of the land, the nature and the purpose of their rights so that the owners are not allowed to abandon their land;
2. The obligation to use or exploit their own land in accordance with the plan set by the government;
3. The obligation to use or exploit their land in a balance between the individual interests as the owner with outside interests that is social interest.
4. Obligation for land owners to assume that their own land is not a commodity trade, so they must make their land not as an object of speculation.

With the social function of land property rights is one important element in justice, so it is always closely related to the guarantee of private property rights and the common interest, which is to keep the people do not harm one another mutually and directing people to use proprietary right for mutual interest. In such a relationship, so the element of the social function of property rights stated as follows:

1. The social function of property rights aim to achieve individual welfare and social welfare. Sustainability should be maintained, every act breaking the things or objects that social functioning is a despicable act (immoral) to be given sanctions (Article 15 jo. Article 52 UUPA).
2. Embodiment of social function, that for a while in relation to the public interest, should be kept to themselves interests who have weak economymeget protection fairly,
3 Interpretation. Reality of property right has social function very widely, namely by using "standard of common needs" (public necessity), "good for the public" (public good) or "utility for the public" (public utility).

The most important elements of the social function of property rights is balance, fairness, usefulness and truth patterned. Sustainability should be actualize by some related disputes. http://www.jstor.org/discover/10.2307/1372959?uid=3738736&uid=2&uid=4&sid=21101361788203.....History has proven that interpretation of the "public interest, convenience and necessity" is subject to prevailing political forces. The development of new technologies continues to test the trusteeship model of broadcasting and what the public interest epitomizes. Despite it's ambiguity, this phrase remains the regulatory cornerstone of telecommunications policy in the United States.

2.3. Core values related to social function

Pancasila is the basic relationship of the basic values which are the crystallization of various values that live in a society which is the soul of the nation (volksgeist) in the Indonesian people is the guiding star (leidstar) in the life of society, nation and state of Indonesia17.

Interwoven of the basic values as outlined in the five principles of Pancasila consists of Belief in Almighty God, just and civilized humanity, the unity of Indonesia, Democracy led by Wisdom in deliberation / representatives, and social justice for all Indonesian people enshrined in the Preamble of the Constitution of RI State 1945. These values are consistent with the values of 5 pillars characteristics:

1. Transcendence: Recognizing that human beings are creatures of Almighty God. From it will bring servitude solely on the One God This awareness also means understanding one's self and environment so as to prosper.
2. Humanization: Every human being is essentially equal in view of God, except distinguishes science and piety. Man was created as a subject that has the potential.

15 According to the Random House Dictionary, Public interest is "1. the welfare or well-being of the general public; commonwealth. 2. appeal or relevance to the general populace: a news story of public interest. Public interest has been considered as the core of "democratic theories of government" and often paired with other concepts, "convenience" and "necessity." Public interest, convenience and necessity appear first time in the Transportation Act of 1920 and also appear in the Radio Act of 1927. After that, these three concepts became critical criteria for making communication policies and solving disputes. http://www.jstor.org/discover/10.2307/1372959?uid=3738736&uid=2&uid=4&sid=21101361788203.....History has proven that interpretation of the "public interest, convenience and necessity" is subject to prevailing political forces. The development of new technologies continues to test the trusteeship model of broadcasting and what the public interest epitomizes. Despite it's ambiguity, this phrase remains the regulatory cornerstone of telecommunications policy in the United States.

16http://www.museum.tv/eotvsection.php?entrycode=publicintere. Public interest can also mean good things for the community as a whole society (Things that are good for community as a community). In this sense every society certainly has things to all people, such as goals, common security, justice, fair play, a better quality of life, and so on. See Y. Warella, Public Interest dan Kepentingan Perseorangan, Semarang. ejournal.undip.ac.id/index.php/dialogue/article/view/529


3. Diversity: Awareness of the many differences in the world. However, being able to take similarity to cultivate strength
4. Deliberation: Liberation (emancipation) on the suppression of human beings. Therefore, not justified the colonization of man by man.
5. Justice: Justice is the key for welfareness. Fair does not mean equal, but proportional.

Thus the Indonesian basic values clearly reflected in the values of Pancasila in which the load the value of spiritualism, collectivity, and inclusiveness. This Indonesian basic value which is the basic of social function of property rights in the fulfillment of the fundamental rights of the public in the use of intellectual work product. First principle of Pancasila is “divinity values” that reflect the religious consciousness of the nation. In fact Indonesian society is a divinity society that sincerely acknowledge as God’s creation. It is an autonomous consciousness, self-consciousness that the people of Indonesia human beings who believe in God.

The principle of Indonesian people is the principle of Almighty God. Because Indonesian People are divinity nation. As a consequence of human beings is the creation of Almighty God. So the human relationship with God is a noble dignity. Dignity is the basic of human beings to continue their life, that all men have the same right to life, because their dignity obtained from the God.

Collectivism has the meaning as family or mutual aid illustrate the association style of original life style of communities in Nusantara (Indonesia). Although understanding that collectivism in social interactions and processes of rural products. Its content is mutual help. Collectivism contains two elements: the common property and cooperation. In traditional rural communities, it is reflected on the land owned together and worked together. So although collectivism translated into collective property of the means of production, which are attempted together to fulfill common needs.

Bung Karno interpreted the spirit of mutual cooperation of kinship, while Soepomo interpreted kinship more as a biological organism concept. Thus, in integrality state real governance of Indonesia, according Soepomo, leaders united together with the people and leaders shall uphold the unity and balance in the society. This is Soepomo interpretation of the concept of manunggaling kawuloan Gasti. Unity between the leaders and the people, between the group of people, bound by the spirit embraced by the people of Indonesia, that is the kinship spirit and the spirit of mutual help.

The Indonesian nation is a nation born out of diversity and difference are held together by the collective consciousness to exist as a sovereign and independent nation. The founder of the state (founding fathers) agreed Pancasila, which is the crystallization of the noble values of the nation, and set it as the state foundation. Inclusivism as a principle of life that is full of diversity and pluralism. But through the noble intentions and set aside the interests of the group, religion or class. With the motto of Bhinneka Tunggal Ika.

3. Copyright products related to fundamental rights

Copyright is the exclusive right of the creator or copyright holder to publish or reproduce the creations that arise automatically after completion of creation are born without decrease the restrictions under applicable laws.

These exclusive rights are owned by the creator to prohibit or permit to make changes to the content creation, title creation, the name of the creator and the creation itself. Creation which is protected is the creation in the fields of science, art, literature, according to Article 12, Paragraph 1 (a) of Act number 19 of 2002 on Copyright, include: (a) Books, pamphlets computer

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18 Integrative theory that pioneered Spinoza, Adam Mueller, Hegel and Gramsci argued that the state was not established to ensure the interests of individuals or groups, but ensure the whole community as a whole. The state is an integral society, a collective organism. Thus, in integrality theory is the life and welfare of the whole nation. View Sofian Effendi, Sistem Pemerintahan Adalah Jati Diri Bangsa, UGM, YogyaKarta, 2005, p. 5-6
19 Sukarno, Hatta and Soepomo are three figures declared the formation of the Repbulik Indonesia country based upon the Indonesian people way of life, namely kinship, which is in the discourse of the pro-independence proclamation synonymous with colectivisme.
20 http://istambil.com/id/artikel/mengukuhan-visi-kebangsaan-pesantren
21 Translated by word, the word bhinneka (diversity) means “diverse” or different. The word neka in Sanskrit means “kind” and a forming the word “aneka (variety)” in Indonesia language the word tunggal (single), means “one”. The word iku means “that (itu)”. Unity in Diversity Literally translated “all kins that one”, which means even vary but essentially remain the Indonesian nation is a unity. The motto is used to describe the nation and the unity and integrity of the Unitary Republic of Indonesia which consists of diverse cultural, language, region, race, ethnicity, religion and belief. See http://id.wikipedia.org/wiki/Bhinneka_Tunggal_Ika
22 In the explanation of Article 2, paragraph 1, which is the exclusive right is a right that is solely dedicated to the holder so that no other party may take advantage of that right without permit the holder. In the definition of “publish or reproduce” including translating, adapting, arranging, changing the shape, sell, rent, loan, import, display, publicly perform, broadcast, recording, and communicating the creations to the public through of any kind means.
program, arrangement typographical arrangement of a published work, and all other written works. (b) sociables, lectures, speeches and other creations are realized by means pronounced. (c) Instruments are used for the purposes of education and science. (d) Creation of songs or music with or without text, including musicians and sound recordings. (e) Drama, dance (kareografi), puppet shows, pantomim. (f) The work of the show. (g) Works of broadcast. (h) Fine art in all forms such as painting, drawing, sculpture, calligraphy, sculpture, calligraphy, collage, applied arts in the form of crafts. (i) Architecture. (j) Map. (k) batik art. (l) Photography. (m) Cinematography. (n) Translation, interpretation, adaptation, potpourri, and other works transferor manifestation results. These Creations are protected as a separate creation, without prejudice the copyright or other creations.

Every citizen has the right to produce a creation and gain access to a copyrighted creation to develop themselves and their environment. It is a fundamental human rights as set in the Constitution of Republic of Indonesia in Section 28F of the 1945 Constitution states that:

“Every person has the right to communicate and obtain information to develop personal and social environment, and the right to seek, obtain, possess, keep, process and convey information by using all available channels.”

4. Constructing indoensian core values into the legal figure of the social function

4.1 Basic Values of Social Function In Pancasila

Pancasila in its position as the source of all sources of state law because it contains ideals of law (Rechtsidee), basic values, as well as the basic philosophy for the organization of the state of Indonesia. Pancasila is the “guiding star” as well as criticism norms (rule of assessor / size / acid test) an ethical-philosophical, and becomes a margin of appreciation doctrine of all the laws that exist. The forming laws and regulations when performing activities of law-making (legislation) should always be oriented, constrained, measured, assessed, and guided by the basic values of Pancasila, which these basic values are summarized in the principles of Pancasila.

Pancasila values are the fundamental values that always exist and inherent in human life. The basic moral values whichis alwaysactual and mutually to each other in human action. Thus, the values contained in Pancasila is an integral unit and full and establishes a value system for the nation of Indonesia.

The values contained in the moral principle V Social Justice for all the people of Indonesia along with believe in one God, a just and civilized humanity, unity and integrity, must be set in the reconstruction of the social function of copyright in books in order to fit with the dynamics of the Indonesian nation life, to create an effective balance between the rights of creators / copyright holders and the public asusers of book creation work to be actually implemented in the social welfare of the nation life and state.

Basic Values of Social Function In Islamic Law

The Value of social function in Islamic law seems to embody the concept in social welfare, Islam known with the glorious teachings that are not familiar with the differences of race, skin, nation and religion. However, more emphasis on the principle of mutual help, humanity, justice, etcetera and so that should be upheld as a pillar of lives for the poor, orphans, beggars, vagabonds, slaves, and so on.

All of these values can be found in Al-Qur’an statement, including the five themes inspired by Pancasila, namely:

(1) Belief in One God or Tawhid

24 Hamid A.S. Attamimi, explaining that the values of Pancasila has a constitutive function that determines whether the Indonesian legal system is the correct rule of law, in addition to the regulatory function that determines the positive law in force in Indonesia is a law that is fair or not. See Hamid A.S. Attamimi, Pancasila sebagai ideologi dalam berbagai bidang kehidapan masyarakat, berbangsa dan bernegara, Jakarta, BP-7 pusat, 1991, p 24.
26 Sila (moral principle) V Pancasila, “social justice for all Indonesian people” is the basis of social function. While Article 33 Constitution 1945 is a concept sosial. function since Indonesia proclaimed its independence on August 17, 1945, our founding fathers had laid foundation of social justice for all citizens Indonesias as one goal in the shape of the establishment of Republic of Indonesia.
27 Allah says: “It is not righteousness that ye turn away-then face to the East and West, but the virtue of those who believe in Allah and the Last Day, the angels, the books and His prophets, who donated the property to the immediate family loved it, orphans, the needy, the traveler, who asked for and in terms of make up / memerdekakan slave / slave, who establish salat and zakat issued, the refining agreement, if promised, and patient in times of trouble and at a time when war, they are the people the righteous and dutiful. (Al-Baqarah: 177). then Allah says: “Say:” Verily, my Lord is able to expand and restrict riziki gift to anyone he wants, and whatever you dermakan would be the replacement, because he is the best -whether it gives good luck, (Saba: 39). And they gave a very preferred food to the poor, orphans and the captives. (Al-Ihsan: 8)
(2) a just and civilized humanity or human concepts through the terms of Al-Qur'an: al-insan al-nas, and al-Basyar.

(3) Unity of Indonesia or the unity of people (umah) or the integration of people.

(4) democracy guided by the wisdom of policy in deliberation and representation of the concept of the Caliphate and deliberation.

(5) social justice for all Indonesian people or justice (al-adl) economics of a political nature. This is consistent with the general law principles of Islam, namely Taushidullah (divinity), insaniyah (principle of humanity), Tasamuh (tOLERANCE), ta'awun (mutual help), Silaturahmi (Gathering) Baina al-nas (the bond of affection between people), Justice, and Benefit.

Thus the values of mutual assistance, equality and solidarity, justice, mutual help in order to achieve social welfare, which is clarified Islamic law should be the basis of the reconstruction of the social function on book copyright creation in nominative stipulation.

4.1. Basic Values of the Social Function in Customary Law

Indonesian Adat (customary) law simply has known immaterial rights, such as rights to certain customary title of a person because of his position in society or association rights owned by the person who made the painting decoration or ornament on his boat in the island of Key and certain motifs on fabrics found in minangkabau. 

The concept of property rights from the communalistic people has the traits that the property right devoted to the public interest. The real concepts of Indonesian property rights can be drawn from customary law especially with regard to land rights based on customary rights. The style of togetherness in customary law is meant that in customary law is more priority for common interests, in which private interests are covered by common interest. One for all and all for one, the legal relationship between the members of indigenous peoples based on the sense of togetherness, kinship, mutual help and mutual aid.

Therefore the local values of customary law became the basis for the reconstruction of the social function of work creation in books in normative provisions are as follows:

1) The value of the Sublime mind, humble, respectful and brotherhood;

2) The value of mutual aid and mutual help are strong;

3) Contains the value of the steady levelness sense as a direct reflection of the humility that causes that we do not want to be respected by others but we also do not want to serve anyone too;

4) The value that reflects a sense of brotherhood is strong among the members of our society.

5) As well as the value of respect and appreciation for the work of others.

5. Developing the social function principle in the utilisation of copyrights products

Based on the TRIPS Agreement Article 8 and 31, each member of WTO which has ratified the TRIPS Agreement obliged to do the product adjustment of IPR laws (including UUHC) in accordance with the character or characteristic of the nation as well as accommodate the the benefit of intellectual products for the public interest. Based on the collective philosophy of Pancasila and the 1945 Constitution as the Republic of Indonesia Constitution that inspired by Pancasila values. 

Moral principle V of Pancasila and Articles 28, 31, and 33 of the 1945 Constitution.

The values of social justice for all Indonesian people (Moral Principle V) containing values of communalism, spiritualism and inclusivism is a meta value of the social function principles that function as a norm that become a control and an indicator for all products of legislation in fulfilling the fundamental rights of society (Article 28) in using the product of books copyright as an important instrument in promoting and developing of Education (Article 31) are very useful to improve the welfare of society (Article 33).

29 In Islam, an individual and a society truly transformed to fight in the cause of Allah, establish the airy spirit in the realization of God's grace and help uphold the sovereignty and power, as in the sentence: La ilaha illallahu Muhammad ur Rasulullah "(There is no god but Allah and Muhammad is the messenger of Allah). This is Tawhid which has three sides: (1) La ilaha, no god except: a rejection of all existing structures and keprayaan that tied people to obey and believe what He has created man, (2) illallah, besides Allah, submission only to the Esa, submission to authority only, and (3) the only method to get two goals is to follow the apostles. Apostles in accordance with human beings. It is God who creates and manages a truly hold power and set up and ordered everything. (Qur'an: 5:123), (Qur'an: 7:54), (Qur'an: 24:55) Islam transformation must menunjukkanahwa struggle for dignity and social justice based on the recognition of God's omnipotence and sovereignty. See Abdurrahman Wahid.Dkk, Islam Tanpa Ke kerasan. KLis Printing Cemerlang,Yogyakarta. 2010.p. 158-159.


Through social justice will be realized the general welfare for all members of society (social). The Justice is justice which is giving balance where property rights have social function. Although the principles of social functions in the abstract realm, but its entry can be forced to be the norm, because the principles of social functions serve as the glue sustainable living together in society. The principle of the social function is the realization of communal of the customs of Indonesian people who live and thrive. As Gustav Radbruch opinions of its entry into the law could be enforced33 Friedrich Carl von Savigny with his volkgeist theory, the true law is the law which thrives from the uterus of people's lives.34

Thus the development of a national law will typically reflect nation character and continue to grow in accordance with its own national trademark35. In the context of HKI protection arrangements, Law makers should optimize the balance between protection force of exclusive rights granted to the creators to encourage the birth of creative works on the one hand, and on the other hand the power of protection to the rights of society or the public's right to use and enjoy the creative work. Through the Social Planning William Fisher36 balancing moral rights and economic rights to achieve justice and interesting cultural.

Thus developing the principles of social function in fulfilling the social fundamental rights in the use of the bookcopyright product is an obligation of governmentas holding mandate of constitution. The concept of developing a social function on books copyrighted works have included the principles of social functions in Chapter II, in Chapter V of Copyright Restrictions Article 14 through Article 18 UUHC, the need for fair use doctrine, institutions to handle, and activate the guardian articles

1. Activating guardian articles in the utilization of copyright products

6.1 compulsory license

Article 11bis(2) and Article 13(1) of the Berne Convention for the Protection of Literary and Artistic Works provide the legal basis for compulsory licensing at international level.

They specify under which conditions members to the Berne Convention may determine or impose conditions under which exclusive rights may be exercised, for example through compulsory licensing. The Berne Convention states that member states are free to determine the conditions under which certain exclusive rights may be exercised in their national laws. They also provide for the minimum requirements to be set when compulsory licenses are applied, such as that they must not prejudice the author's right to fair compensation.

Based on berne convention WTO member states are obliged to make the rules and make adjustments in its domestic law. So from the Indonesian government is obliged to control the use of creation in the wider community through compulsory licensing. As well as providing an opportunity even help people who have difficulty in using and developing other creations because of financial, as well as any other reasons that might be because of the financial and other support they can not use the creations of others.

In this case the government has authority to obligein obligation licensing of copyright holder is required to provide a very useful invention in the world of education in fulfillment of the fundamental rights to facilitate the public in accessing creation without interfering with reasonable interests for the creator.

Indeed, the principles of sustainability and the protection of fundamental rights not only serves as a meta-value, but also a very concrete operational guidelines in appreciating and restricting compulsory licensing considering the constitutive elements that

33 Radbruch conceded notions of morality (justice) to be relevant in legal science, because after all it is nothing else but the people’s morality which is expressed in customs. Given the assumption that legal norms just represent what customs would command if there were no laws, it is imperative to have a closer look at the characteristics of customs first. Radbruch writes about the relationship between laws and customs on the one hand and morals on the other, he claims that law and customs can ‘justify the coercion exercised by them on their own’. G. Radbruch, ‘Rechtsphilosophie’ in A. Kaufmann (ed) Gesamtausgabe vol 1 (Heidelberg: C. E. Müller Verlag, 1987), 97 [original 1st edition: 8-9].

34 Bernard L. Tanya,DKK, Teori Hukum Strategi Tertib Manusa Lintas Ruang dan Generasi,CV KITA, 2006, p.4-5


36 Fisher offers his own (condensed) sketch of an attractive intellectual culture as being one that includes:

a) Consumer welfare (we should seek a combination of IP rules that maximise consumer welfare by optimally balancing incentives for creativity with incentives for dissemination and use)

b) A cornucopia of information and ideas (citizens should have access to a wide and varied array of information, ideas and forms of entertainment)

c) A rich artistic tradition (the more complex and resonant the shared language of a culture, the more opportunities it affords its members for creativity and subtlety in communication and thought)

d) Distributive justice (to the greatest extent practicable, all persons should have access to all informational and artistic resources)

e) Semiotic democracy (in an attractive society, all persons would be able to participate in the process of making cultural meaning)

ensure the sustainability of life together had been formulated in Article 28 of 1945 Constitution, such as the right to information (Article 28-F), and the right of education (Article 31-1). Therefore, any exploitation of the rights or interests of the parties (individuals and corporations) that are contrary to the fundamental rights is unconstitutional. Based on the logic of the law, the articles of which assert the constitutional rights of the people is clearly the highest order, which requires the state to respect and protect the fundamental rights of citizens, even at the level of interpersonal relationships.

The function of protection of this fundamental rights is essentially a positive obligation that force the government to take action or policy actively to ensure effective protection for the fulfillment of the fundamental rights of its citizens. Fulfillment of positive obligations is the responsibility of the country could have implications on the state's obligation to amend laws that already exist, create a new law, even changing the pattern of a compulsory license in UUHC potentially hamper individuals and communities meet their fundamental rights.

6.2. Fair use doctrine

Fair use doctrine Article 15UUHC, states: Provided that: the sources must be mentioned or cited, the following is not considered as the violation of Copyright:

a. The using of other Creations for educational purposes, research, writing papers, preparing reports, writing criticism or review of an issue without harming the reasonable interest of the Creator;
b. Taking other party creation, in whole or in part, for purposes of defense inside or outside the court;
c. Taking other party creation, in whole or in part, for purposes of:
   (i) a lecture solely for the purpose of education and science, or
   (ii) the presentations or performances that are free of payment with stipulation not disturb the reasonable interest to the Creator.
d. Reproduction of a creation in science, art, and literature in Braille for the visual purposes, unless the reproduction is for commercial purpose;
e. Reproduction of a creation other than computer program, in a limited manner or by any means or process that is similar to a public library, scientific or educational institutions, and non-commercial documentation centers solely for the purpose of its activities.
f. The changes were done based on consideration of the technical implementation of works of architecture, such as building construction;
g. Making of a backup copy of a computer program by the owner of Computer Programs undertaken solely for its own use. In the explanation of Article 15 Clause (a) the need for interpretation of the use of another party's creation substantially and qualitatively measured typically by not harming the interest of the Creator. Then Article 15 letter (e) relating multiplication ...... "in a limited way or by any means or process that is similar to a public library, scientific or educational institutions, and non-commercial documentation centers solely for the purpose of its activities "considering many activities of students and lecturers within the College and the general public make multiplication books with reasons for education then to balance the interests of individual rights and community needs to build the principles of the social function of the doctrine of fair use.

The basic principle of protection of IPR (including copyright) in civil law influenced by the school of Natural Rights so that more protect the moral rights and the protection of the basic principle of right in common law that is influenced by the school of utilitarian, so more protect economic rights.

In Fair Use doctrine Article 107 of the 1976 ActAmerika just confirm 4 things, namely:

1. The nature and purpose of the infringing use, including whether the use is commercial in nature, or for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount of the copied portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.


3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
   (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
   (b) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

It is not easy to decide what is and what is not a fair use. However, taking into account the importance of balance the rights of society in the fulfillment of fundamental rights particularly in education (Article 31 of the 1945 Constitution), as well as the report result of UNESCO of Asia Pacific stating 13 million of Indonesia's population is still not literate.

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37(Grosheide, 2004; Cherednychenko, 2006). dalam Hayyan ul haq, kompas, 2006
38http://www.michaelgeist.ca/content/view/1637/125/
39 Alan Latman, Fair Use Of Copyrighted Works, United States Government Printing Office Wa8iltngton : 1960,P.18
40 Statistik bookyear 2011. ResultsUnesco report, the number of new titles published Indonesia only 0.0009% of the total population. Very much compared to the average in other developing countries, 55 book titles per million population, while developed countries 95 book titles per million population. Then in Indonesia instead of growing better than in previous years, but inoulineetshowsthe state ofthe_statusquo. See Daniel Dhakidae, Ekonomi Politik Industri Buku di Indonesia, tulisan dalam buku, Buku Membangun Kualitas Bangsa, Kanisius,1997,p.187. See also Eddy Damian, Hukum Huk Cipta,Edisi ketiga Cetakan ke-1, PT Alumni, Bandung,2009, p.
The government is obliged to make the rules fair use doctrine for the realization of the right balance of both moral rights and economic rights of creators and so the community right to ensure the fundamental rights (Article 28) to access, utilize and develop the book as a means of transforming information of science maximally useful in improving the quality of human resources and to accelerate the realization of the state in realizing the welfare society lives, nation and country as it’s aspired by the founders of Indonesia.

For that fair use doctrine should be adapted to the principles of social function which is the crystallization of the communalism value, spiritualism and inclusivism which is the basic value of Indonesia, which is clarified into the values of Pancasila as the nation philosophy and inspires the 1945 Laws as the Indonesian constitution. The principles of social functions including the principle of good faith, the principle of balance, the economic expediency principle, the principle of nationalism, the principle of social justice, and the principle of development.

6.3. Government use

With the development of human civilization, supported by the advancement of science will surely be more beneficial in reducing or solving problems of human fate in the arena of global community. Birth of intellectual works that can be enjoyed and used by all elements of society can motivate the emergence of intellectual works that are more useful in expanding self-society and the nation together to accelerate the realization of the state goal, namely the Indonesian people welfare.

For that is needed law in favor of the people, social justice, which reflect the protection of human rights, as laid down in the 1945 constitution. The law is not only serves as a guideline for the behavior of the people, but also for government officials and organizers all over the state. Article 31 Constitution 1945 has obliged the government to provide education that is the fundamental rights of the people as stated in Article 28 of the 1945 Constitution.

Thus, the government must implement protection and provide books as the most important instrument in education, where the public can easily access all products in particular copyright books that are very useful in improving the quality of human resources as well as to improve the social welfare of the community. So taking over the creation of products of copyrights by the government is the obligation for fulfillment of fundamental rights.

Thus, the government is also obliged to take over the product's creation of copyright particularly the books from either Indonesian or foreign society, both in translation and propagation as well as announcements through electronic and print media does not interfere with normal interests for the copyright holders equally.

6.4. Parallel import

Pasal 6 TRIPs tidak melarang adanya Parallel Import. The general view is that developed countries oppose parallel imports and that developing countries favor parallel imports. Although the issue has been raised in the international arena, the TRIPS agreement for one has left open the question of exhaustion. Although TRIPS addresses the issue, it only does so to state that there is no reconciliation on the matter. As a result, each member country to the agreement is free to decide how they will deal with exhaustion of IPRs and parallel imports by their own national laws and courts.

The provision of textbooks to schools and universities, and reading books that are useful with a relatively low-administered by a body called the National Book Trust (NTB) formed by the Ministry of Education in 1957. The agency also publishes books in English and in regional languages in India. As one of the efforts to provide books at a low price, especially books of science, education and engineering, Government of India waives the books of the license.

Constitutionally, education is one of the fundamental elements regulated under the 1945 Constitution, article 28 and 31. Therefore, theoretically, those articles oblige the government in respecting, fulfilling and protecting the accessibility of public to educational resources, information and technology, especially books. This obligation allows the government to change, review, revoke, add, eliminate and re-examine any policy, regulation and articles that pay deprive the people to access their fundamental rights, i.e. books. By doing parallel import o librooksto Indiaw isn't contrary to Government policy in the field of religion, defense and state security, morals and public order after consultation with the Copyright Board.

Conclusion and recommendation

Conclusion

41 Roberta Rosenthal Kwall, Governmental Use Of Copyrighted Property: The Sovereign's Prerogative, Texas Law Review March, 1989, p.70
42 Alan J. Kasper, A View of the Parallel Imports Issue From an International Perspective, http://www.sughrue.com/files/Publication/51080ce5-5e0f7-415e-98eb-1ee3b141aca9/Presentation/Publication/Attachment/bb332de0-2005-48be-b0f4-1f5a991feabc/par_imports.htm.
(a) Virtually all the rights of economic values have social functioning. Because of the principle of the social function is meta-value that serves as an adhesive, a counterweight and as a control of community in utilizing all copyright products especially the book that became the fundamental rights of society.

(b) the principle of good faith, the principle of balance, the economic expediency principle, the principle of nationalism, the principle of social justice, and the principle of development should be coloring in reconstruction and developing social function principle in UUHC which can support the government in holding obligation to respect, fulfill and protect the fundamental rights.

(c) In activating the guard article compulsory licence, fair use doctrine, the use of government, importparallel and so on, always accommodate the principles of the exist social function and live in a society that is very useful in copyright protection.

1.1. Recommendation

(a) In constructing the law, especially regarding with the ratification of a global legal provisions, important to notice, understand, consider and include formally and the spirit of the 1945 Constitution, which is imbued with the values of Pancasila philosophy, as the translation of basic values of Indonesia in every products of law of IPR including UUHC to guarantee the fundamental rights of the people.

(b) The government should activate the guard article in UUHC among other Compulsory License, Government Use, and making policy on Fair Use Doctrine which are very helpful in law enforcement particular for judges and copyright protection in the utilization and development of intellectual works and will motivate the birth of the intellectual works better which is the fundamental rights of the people.

(c) It’s necessary to build an institution of copyrights licenses cooperate or another institution with Universities to accommodate fulfillment of the fundamental rights ascription the information specifically the books as an instrument of education.

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