

# THE REMIX PHENOMENON AND THE NEED TO REFORM INDONESIAN COPYRIGHT LAW

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## *Abstract*

*The problem in this research is The rapid development of computer technology in the 20th century has encouraged the emergence of the remix phenomenon in society. Remix can be done through the use of computer technology for works/creations that are rearranged, combined and remixed to produce new works. Remix seems to be a new phenomenon, even though historically this practice is actually not a new thing and the extent to which copyright law reform is needed. Can this Copyright Act synergize with the legal structure and culture of Indonesian society in order to create a legal system that can produce justice, benefit, and legal certainty? How copyright enforcement on computer software can create effective legal protection.*

**Keyword:** *Remix Phenomenon, Copyrights, Legal Culture, Reformation.*

## I. INTRODUCTION

The rapid development of computer technology in the 20th century has encouraged the emergence of the remix phenomenon in society. Remix can be done through the use of computer technology for works/creations that are rearranged, combined and remixed to produce new works. Remix seems to be a new phenomenon, even though historically this practice is actually not a new thing.<sup>2</sup>

Most cultures around the world have evolved through the practice of mixing and merging different cultural expressions. The history of American art in the 19th century can be explained in terms of mixing, matching, and merging folk traditions drawn from various natives and immigrants. Another historical example of remixes is *Cento*, a literary genre popular in Medieval Europe that consisted mostly of verses or quotes borrowed directly from the work of other authors and arranged in a new form or new sequence. Similarly, European renaissance art and architecture of the 15th and 16th centuries that come directly from Ancient Rome and Ancient Greece.<sup>3</sup>

Currently the practice of remix is becoming more abundant because of technological advances. In the field of music, for example, electronic music is strongly influenced by the sampling method. In this method, the composer reuses

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<sup>2</sup> Guilda Rostama, 2015, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO Magazine Issue 3/2015. Retrieved from [https://www.wipo.int/wipo\\_magazine/en/2015/03/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html)

<sup>3</sup> *Ibid.*

part of an existing musical recording or records available sounds from nature. The sampling method cannot be separated from the existence of recording devices and manipulation of sound recordings such as phonographs, turntables, as well as the most modern ones such as samplers in the form of software or hardware. Hip-hop music is the first popular music (as a subgenre of electronic music) based on a sampling method, which was born by the habit of manipulating LPs from disc jockey (DJ) through two turntables and audio mixers in the 1970s.<sup>4</sup> Beat music in hip-hop music is created by using parts of recorded music that are tailored to the needs of musical construction to then be composed and mixed with other musical recordings or recordings of their own music.

Throughout history, people have been actively involved in creating and reinventing cultures, a phenomenon Lawrence Lessig calls the Read/Write culture. According to Lessig, there are two forms of media culture whose terminology is taken from computer technology, namely Read/Write (RW) culture and Read/Only (RO) culture.<sup>5</sup> Remix is an essential act of R/W culture creativity.<sup>6</sup> In R/W culture, people do not only hear and interpret, but are also connected with the activity of recreating a work from what they read and listen. The ease of creating digital content makes people's creativity build in the creation of a new work based on previous works. On the other hand, in R/O culture, people simply consume a work without being able to recreate the work. R/O culture refers to the era when the relationship between technology and society is still analog.

In fact, computer technology is getting more sophisticated day by day, thus encouraging the re-emergence of R/W culture. Today, anyone with access to a computer and an internet connection can collaborate and create remixes that combine elements from text, music, and audiovisual works simultaneously to produce new works.<sup>7</sup>

The remix phenomenon poses a challenge to how copyright law should regulate it. In the national context, remixes need to be reviewed based on Law No. 28/2014 regarding Copyright to answer: Is the practice of remixing a copyrighted work basically legal? Is there a need to reform Indonesian copyright law regarding to remix practices?

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<sup>4</sup> Adam Behr, Keith Negus & John Street., 2017, The Sampling Continuum: Musical Aesthetics and Ethics in the Age of Digital Production, *Journal for Cultural Research*, 21:3, 223-240. DOI: 10.1080/14797585.2017.1338277

<sup>5</sup> Lawrence Lessig, 2008, *Remix: Making Art and Commerce Thrive in The Hybrid Economy*, Bloomsbury Publishing, p. 28.

<sup>6</sup> *Ibid.*, p. 56.

<sup>7</sup> Nobuko Kawashima, 2010, The Rise of 'User Creativity' – Web 2.0 and a New Challenge for Copyright Law and Cultural Policy, *International Journal of Cultural Policy*, 16 (3), 337–353. Retrieved from <https://www.tandfonline.com/doi/abs/10.1080/1028663090311161>

## II. DISCUSSION

### 1. Remix Practice is not Entirely Infringe Copyright

The practice of digital remixing is generally done by duplicating, taking, and converting either part or all of an existing work to be mixed with some other works. Taking part or all of a work without permission can mean an infringement of the right to reproduce as regulated in Article 9 (1) of the Berne Convention and Article 9 of Indonesian Copyright law (Law No. 28/2014). One infringement will become a series of infringement if the remixed works are continued with distribution activities, performances, announcements, and communications of creations. In addition, if the remix works meet the criteria for adaptation, arrangement, and transformation, it has the potential to infringe the rights of adaptation, arrangement, and transformation of the work.

The moral rights also apply to remixed works. The provision of moral rights is regulated in Article 6bis of the Berne Convention<sup>8</sup> and adopted in Article 5 Law No. 28/2014. Based on the provisions in Law No. 28/2014, the creator has the right to, "... keep including or not include his name... and defend his rights in the case of distortion, mutilation, modification that is detrimental to his honor or reputation". For example, if a song is remixed in such a way for the benefit of a political campaign so that the original meaning is further removed and it is detrimental to self-respect, the creator can sue on the basis of infringement of moral rights.

Remix works are considered not completely as copyright infringement if it is done in accordance with certain conditions in copyright law. Article 13 of TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights), states, "members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder". Based on this provision, remixes are only exempted in three criteria: (1) for certain special cases, such as non-commercial ones; (2) remixes do not conflict with the normal exploitation of the original creation; (3) remixes must not unreasonably harm the legitimate interests of the rights holders.

Remix works can also be related to quotations provided for in Article 10 of the Berne Convention, "it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose."<sup>9</sup> Hence, it is permissible to remix works that are legally available to the public as long as they are created in accordance with fair practice, and the scope does not exceed that which is justified by the purpose of remixing.

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<sup>8</sup> Article 6<sup>bis</sup> Berne Convention, WIPO, Retrieved from [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P123\\_20726](https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726)

<sup>9</sup> Article 10 Berne Convention, WIPO, Retrieved from [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P144\\_26032](https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P144_26032)

Quotations are often associated with written works, but the Berne Convention uses the phrase "quotations from a work" which means quotes from a work. Work here means that it includes all types of works that are protected under copyright law, not limited to works in the form of writing. With this interpretation, quoting or remixing a piece of music or an image, for example, is the same as quoting a written work. With this kind of interpretation, quoting or remixing a piece of music or an image, for example, is the same as quoting a written work.

In the perspective of Law No. 28/2014, remix works will not be considered as copyright infringement as long as obeying the provisions in Chapter VI of Copyright Restrictions, specifically from Article 43 to Article 51. In Chapter VI it can be summarized to a principle that remixes are not considered as a copyright infringement as long as the source is acknowledged fully, does not harm the reasonable interests of the author, and is limited to the purposes set out in the legislation.<sup>10</sup>

As a comparison, Canada is one of the few countries to include a copyright exception for non-commercial remixed work in their copyright laws.<sup>11</sup> In this case, the provisions of Article 29 of the Canadian Copyright Modernization Act 2012<sup>12</sup> state it is not an infringement of copyright for an individual to use an existing work in the creation of a new work if: (1) the use is done solely for non-commercial purposes; (2) the source are mentioned, if it is reasonable in the circumstances to do so; (3) the individual had reasonable grounds to believe that he or she is not infringing copyright; and (4) the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work

## 2. The Need to Reform Indonesian Copyright Law

Uncertainty about the legal status of remixed works has a negative impact on restrictions on creativity. Few understand why uploaded remixed work in YouTube can be automatically taken down or blocked. Creativity seems to be limited because they are not familiar with the provisions of copyright law.<sup>13</sup> The current copyright law was not designed to support the R/W culture, instead in its development it was intentionally designed to support the R/O culture. Lessig believes that a policy that protects R/O culture by making R/W culture illegal is a mistake.<sup>14</sup>

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<sup>10</sup> Limited to purposes such as: education, research, critical writing, security and government administration, free performances, facilitation of access for the blind, one-time copying for personal interests, informational purposes, national interest, creation and distribution of non-commercial content, and so on.

<sup>11</sup> Guilda Rostama, *op. cit.*

<sup>12</sup> Copyright Modernization Act (S.C. 2012, c. 20, An Act to amend the Copyright Act), WIPO Lex, Retrieved from <https://wipolex.wipo.int/en/legislation/details/12812>

<sup>13</sup> Guilda Rostama, *op. cit.*

<sup>14</sup> Lessig, *op. cit.*, p. 50.

It's time for lawmakers to look at copyright law from a new perspective, keeping in mind the inevitability of the R/W culture and the uncertain legal status associated with remixes. In responding to the practice of remixing, it is appropriate that copyright law needs to be reformed. Legal reform can be carried out in two forms, passive legal reform, where the society is transformed, then the law comes to validate the transformation. The second is active legal reform, namely the law can be used as a tool of social engineering to transform society to be better.<sup>15</sup>

The existing copyright law at the national level is not sufficient to answer the challenges that arise from the creativity of remix practice which is supported by digital technology devices. It is better to make a more fundamental reform to the copyright law itself to facilitate the R/W culture. The following are measures that can be considered in improving copyright law in the future:

### **Digital Tagging System**

A work that was born from digital technology devices is often found in a condition where it is no longer known who the real creator is because of traceability issue. Works whose creators cannot be identified and therefore permission to use cannot be obtained are known as orphan works.<sup>16</sup> Orphan works in the digital realm are characterized by the absence of electronic information or copyright management information attached to the work.

Obtaining license to create remix works might be difficult to implement if the creator is unknown and could not be contacted. Article 39 of the Law No. 28/2014 stipulates that for works whose creators are not known, the copyright is held by the state. However, in this provision, there is no further specification on the procedure for requesting permission from the state. Even now, the implementing regulations have not been made by the government.

The government can add the basis for regulating the digital tagging system to develop a digital tagging system for orphan works which are circulating on the internet. The digital tagging system shall at least contain information in the form of: (a) the name of the creator and copyright holder; (b) year of publication of the work or year of death of the author if it is known that the author has died; (3) contact person who can be contacted; (c) what type of license that determines what can and cannot be done with the work.

This digital tagging system is expected to make it easier for the public to identify the creator in the context of using the work so that the economic rights of the creator can also protected better. Remix activities will also be easier to do legally

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<sup>15</sup> Abdul Manan, 2006, *Aspek-Aspek Pengubah Hukum*, Kencana, Jakarta, p. 6-10.

<sup>16</sup> Bzhar Abdullah Ahmed, 2019, Proliferation of the Problem of Orphan Works Across the World, *the Journal of World Intellectual Property* 22(2). DOI:10.1111/jwip.12135

because they are carried out based on intact source acknowledgment and clear licenses.

### **Common Guidelines for the Criteria of Reasonable Interest**

The phrase "reasonable interest" is contained in Article 44 Paragraph (1) letter a Law No. 28/2014. What is meant by "reasonable interest" in this provision is still not quite clear and tends to lead into multiple interpretations. In the elucidation of the article, a reasonable interest is an interest that is based on a balance in enjoying the economic benefits of a work.<sup>17</sup> The common guideline for the criteria of reasonable interest should be made by the agreement of all stakeholders in order to provide stricter criteria and limitations on the use of work for some purposes such as: education, research, writing of scientific papers, compiling reports, writing of criticism, and so on.

As a comparison, in the copyright law of the United States (US), there are provisions to determine whether the use of a work is a fair use or not, namely: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; (4) the effect of the use upon the potential market.<sup>18</sup>

### **Annual Announcement of List of Public Domain Works**

The term public domain refers to creative works that are not protected by intellectual property laws such as copyrights, trademarks, or patents because the protection period has expired and can be utilized by the public.<sup>19</sup> Works which are circulated on the internet often raise questions whether they are still protected by copyright or are in the public domain. Therefore, it is necessary to have an adequate digital tagging system to identify public domain work based on the information of the date of creator's death or time when a work was first published. In addition, policy makers need to create a legal basis in the copyright law that allows the government to publish a list of any works that have become public domain so that they can be immediately utilized by the public.

### **Reduce the Terms of Copyright Protection**

In Law No. 28/2014 the copyright protection terms last for as long as the creator lives plus 70 years after the creator died. The longer the terms of copyright protection will have an impact on the longer a work becomes public domain and the

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<sup>17</sup> Elucidation of Article 44 (1) letter a.

<sup>18</sup> Kenneth D. Crews, 2001, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, Ohio State Law Journal, 62 (2). Retrieved from <https://core.ac.uk/download/pdf/161434801.pdf>

<sup>19</sup> James Boyle, 2008, *the Public Domain: Enclosing the Commons of the Mind*, Yale University Press, New Haven & London, p. 1.

less freely available works can be used for the creation of remix works. The terms of copyright protection need to return to the standard at least 50 years after the author's death in accordance with Article 7 of the Berne Convention.

### III. CONCLUSION

Computer technology advances have revived the remix phenomenon as a part of R/W culture, which is already familiar in the history of human culture. However, the practice of contemporary remixes from in the perspective of current copyright law in Indonesia is not sufficient. Actually, remixes are not completely infringing copyright if they meet certain conditions specified in the provisions of copyright limitations and exception. The remix phenomenon poses a challenge to the current rules of copyright law that should be reformed to facilitate the creativity of remixing practices. Efforts that can be considered to reform copyright law can be: (1) a digital tagging system to facilitate the implementation of copyright licenses; (2) the making of common guidelines on criteria for reasonable interest by the agreement of all stakeholders (3) annual announcement of list of public domain works; (4) reduce the terms of copyright protection back to the Berne Convention standard.

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