

**Stabilizing Unequal Positions in Copyright Licensing Agreements in Book Publishing:  
Comparison of Approach between the European Union and Indonesia**

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**Abstract**

Book publishing involves licensing agreements between authors and publishers, often leading to inequitable compensation due to imbalanced bargaining power. This research employs doctrinal legal methodology to analyze and compare copyright licensing norms in both the EU and Indonesia. The EU Directive on Copyright in the Digital Single Market (“EU CDSM Directives”) prioritizes enhancing copyright protections and enforcing party rights among member states, particularly emphasizing authors' rights to renegotiate contracts under specific conditions. It is proposed that Indonesia should adopt guidelines that prioritize authors' interests in licensing contracts, acknowledging their disadvantaged bargaining position. Implementing such measures through regulations like Presidential Decrees could streamline processes, thus benefiting authors. Additionally, Indonesia should tailor EU CDSM Directives to local contexts, ensuring enhanced protection and fairer contracts for authors.

**Keywords:** Book publishing, copyright licensing agreement, economic rights.

***Penyeimbangan Ketimpangan Posisi dalam Perjanjian Lisensi Hak Cipta dalam Penerbitan  
Buku: Perbandingan Pendekatan antara Uni Eropa dan Indonesia***

**Abstrak**

*Penerbitan buku melibatkan perjanjian lisensi antara penulis dan penerbit, yang sering kali menghasilkan kompensasi yang tidak adil akibat ketidakseimbangan posisi tawar. Penelitian ini menggunakan metodologi hukum doktrinal untuk menganalisis dan membandingkan norma-norma lisensi hak cipta di Uni Eropa dan Indonesia. Direktif Uni Eropa tentang Hak Cipta dalam Pasar Tunggal Digital (Direktif CDSM UE) memprioritaskan peningkatan perlindungan hak cipta di antara negara anggota, terutama hak penulis untuk melakukan negosiasi ulang terhadap kontrak dalam kondisi tertentu. Indonesia sebaiknya mengadopsi pedoman yang memprioritaskan kepentingan penulis dalam kontrak lisensi dengan mengimplementasikan langkah-langkah tersebut melalui regulasi seperti Peraturan Presiden dapat menyederhanakan proses, sehingga menguntungkan penulis. Selain itu, Indonesia sebaiknya menyesuaikan Direktif CDSM UE dengan konteks lokal.*

**Kata Kunci:** Hak ekonomi, penerbitan buku, perjanjian lisensi hak cipta.

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## INTRODUCTION

These days, authors may not desire having a best-seller label on their book covers as much as receiving fair compensation for their work. Global data indicates a decline in the remuneration authors receive for their creations, making fair pay their primary concern.<sup>1</sup> In a survey conducted by the European Writers' Council in 2020, 40% of those surveyed expect to incur losses due to delayed contracts and lower advances on royalties.<sup>2</sup> Moreover, in the last decade, the average royalty rate for authors in the UK has decreased. This decline in remuneration rates is attributed, at least in part, to the unequal power dynamics between publishers and writers during the negotiation of publishing contracts.<sup>3</sup>

A concerning trend involves book publishers increasingly seeking comprehensive rights, requiring authors to sell "all rights" in a single deal, covering both print and digital platforms, including rights to platforms that may emerge in the future. Despite the expanding array of digital business models, publishers and producers often request extensive rights transfers to enable them to exploit the works without constraints. However, the compensation offered in return is not always seen as proportional to the scope of the rights transferred.<sup>4</sup>

The root of this problem can be traced to the contractual asymmetry, which refers to the unequal bargaining power of the contracting parties, in cases when one side is better informed than the others.<sup>5</sup> Publishers often hold a stronger position due to their financial resources and expertise, while authors with limited commercial power face lengthy contracts, disproportionate remuneration, and little room for negotiation. To solve these problems, lawmakers in many countries have drafted laws to make sure authors get a fair deal when they sign contracts with companies that usually put their own interests first.

One of these regulations comes from the European Union, contained in the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC or simply known as Directive on Copyright in the Digital Single Market ("**the CDSM Directive**"). In order to ensure the equal position of the author as the copyright exploiters', this directive put down several liabilities on exploiters when it comes to executing a licensing agreement, such as providing clear and transparent information to authors about how their works are being used or exploited, establishing mechanisms for adjusting copyright contracts if authors in an event of unfair compensation, and granting authors the right to revoke permission for their works to be used in terms of insufficient utilization by the rights holders.<sup>6</sup>

As the unequal position between authors and right exploiters has been a universal problem, developing countries such as Indonesia have recognised this issue and implemented regulations to regulate it. According to Article 18 of the Law No. 28 of 2014 ("**Indonesian Copyright Law**"), the works of books, and/or all other written works, songs and/or music with or without text that are transferred in a sold flat agreement and/or indefinite transfers, are to be reverted to the Author when the agreement reaches a period of twenty-five years.<sup>7</sup> This regulation became the primary source of protection towards the authors' interest, since it allows them to renegotiate

<sup>1</sup> International Authors Forum, "Creating a Living: Challenges for Author's Income," [https://internationalauthors.org/wp-content/uploads/2020/09/Creating\\_A\\_Living\\_Booklet-1.pdf](https://internationalauthors.org/wp-content/uploads/2020/09/Creating_A_Living_Booklet-1.pdf), accessed on March 28th, 2024.

<sup>2</sup> Porter Anderson, "Authors in the Coronavirus Crisis: The European Writers' Council Report," <https://publishingperspectives.com/2020/06/authors-in-the-coronavirus-crisis-the-european-writers-council-report-covid19/>, accessed on March 28th, 2024.

<sup>3</sup> Johanna Gibson, Phillip Jobson, and Gaetano Dimita, *The Business of Being an Author: A Survey of Authors' Earnings and Contracts*, London: Queen Mary University of London, 2015, p. 5.

<sup>4</sup> Marilyn Burgess and Maria De Rosa, *The Remuneration of Canadian Writers for Literary Works*, Toronto: Communications MDR, 2017, p. 20.

<sup>5</sup> Richard Watt, "Copyright and Contract Law: Economic Theory of Copyright Contracts", *Journal of Intellectual Property Law*, Volume 18, Issue 1, 2010, p. 195.

<sup>6</sup> Article 18 - 22 European Union Directive on Copyright in the Digital Single Market (CDSM Directive) 2019.

<sup>7</sup> Article 18 Indonesian Law No. 28 of 2014 on Copyright (Indonesian Copyright Law).

or revoke the licensing contract for publishing their works every 25 years. Furthermore, the time limit regulation takes into effect upon the Indonesian Government Regulation on the Recordation of Intellectual Property Licensing Agreement (“**PP 36/2018**”).

As different jurisdictions have put in place different strategies to balance the power dynamics between authors and publishers when negotiating licensing contracts, it prompts the question of which approach is more effective. Before this research, no articles had addressed the issue of balancing the unequal bargaining power between authors and publishers in Indonesia; such discussions were limited to other jurisdictions. For instance, Rita Maulitonyte's article titled "Empowering Authors via a Fairer Contract Law" explores how the Australian legal system addresses these challenges.<sup>8</sup> Therefore, this article aims to analyze and compare the approaches taken by Indonesia and the European Union in addressing this issue. By doing so, we can determine which approach is preferable or identify aspects from each approach that could be combined for improved efficiency. In writing this article, it will be guided by a research question: “Which of the approaches is preferable in stabilizing bargaining position between authors and exploiter?”

## RESEARCH METHOD

This research will apply the doctrinal legal research methodology that will be based on the literature study by analyzing legal norms, concepts, opinions, or findings related to the relevant legal issues. Wherein this research, this paper will analyze the legal norms in the EU and Indonesia which governs copyright license agreement. Thus, comparing the legal norms of both approaches in order to find the answer to the research question and the research objectives.

## RESEARCH DISCUSSION

### Comparison of Approach in Stabilizing the Bargaining Position between European Union Law and Indonesian Law

#### 1. Indonesia's Regulation as The Basis of Copyright Law

The enactment of Indonesian Law No. 28 Year 2014 (“**Indonesian Copyright Law**”) might set out more advanced regulations compared to the previous Indonesian copyright provisions. There are several escalated topics which are covered by the new Indonesian Copyright Law<sup>9</sup>, mainly regarding: the extension of the economic right (*vide* Article 58); the legal certainty on collateral type (*vide* Article 16); and the sold transaction provision (*vide* Article 18). First, the moral rights of a copyright protection period is expanded, from 50 years to 70 years, post to the author's year of mortality. Second, the legal certainty of a copyright as a collateral is now clearly regulated as a fiduciary duty, making more discretion for the authors to utilize their creation. Lastly, the protection of the author's economic right is escalated, with the waiver of the sold flat transaction, by the law.

The sold flat transaction is categorized as one material of license agreement. According to the Indonesian Copyright Law, a license is a written permission granted by the Copyright Holder or the Owner of Related Rights to another party to exercise economic rights over their creation or related rights products under certain conditions, whereas the sold flat agreement (It refers to the absolute transaction paid by the buyer for the full absorption of a particular copyrights' economic right in an unlimited time limitation.<sup>10</sup> The legal results of a sold flat transaction raises the tendency of the copyright holder or the owner's economical rights exploitation, as they do

<sup>8</sup> Rita Maulitonyte, “Empowering Authors Via Fairer Copyright Contract Law”, *UNSW Law Journal*, Volume 42, Issue 2, 2019, p. 681.

<sup>9</sup> Trias Palupi Kurnianingrum, “Materi Baru dalam Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta”, *Negara Hukum*, Vol. 6, Issue 1, 2015, p. 99-103.

<sup>10</sup> Article 1 section (20) of Indonesian Copyright Law stipulates the license definition; whereas the definition of sold flat is stipulated in the general explanation of Article 18 of Indonesian Copyright Law.

not have the legal standing to recover the creation after a certain value of remuneration is transferred.<sup>11</sup> Practically, most authors or copyright holders are situated in a lower bargaining position and are deemed to provide the property for less than its market value (or well-known as an undervalue transaction).<sup>12</sup> As the results of this, they only reserve an overwhelmingly slight remuneration, seize only once commercial values, and lose their royalty rights on their works' duplication,<sup>13</sup> as the economic rights have fully belonged to the new holder (the buyer).

Indonesian Copyright Law opts the time limitation approach on the protection of economic rights. As stipulated in Article 18 of Indonesian Copyright Law, such transferred publishing, and/or other literatures, songs and/or music with undefined period clauses shall be constrained by law in a maximum of 25 years. Therefore, any copyright's license with no indefinite period of time, shall be terminated if it reaches 25 years of time, giving the opportunity to both parties to revoke, to renew, or to renew such license agreement subject to their consent.

However, Indonesia has the lack of guidelines on a standard clause in creating a license contract to protect the author in its regulations. The approach of "time limitation" as adapted in Indonesian Copyright Law takes into effect upon the Indonesian Government Regulation on the Recordation of Intellectual Property Licensing Agreement ("**PP 36/2018**"). This regulation, ironically, regulates the material of license agreement with no more than just one article. As stipulated by Article 6 of PP 36/2018, the license agreement shall not comprises clauses which (1) harms the national economic and national interest; (2) creates such limitation that prevent the national seeks into new technology adoption; (3) leads to anti-trust competition; and (4) conflicts with general legal, moral, religion, and public order provisions.<sup>14</sup> The Author criticizes the gray area of the contract standardization that leads to the author's economic rights exploitation, as parties might freely draft the contract under the civil code provision on agreement and transaction.<sup>15</sup> To sum up, looking to that area of standard clause guidelines, the provision seemed to prioritize the public interest, rather than to protect the particular copyright's author and/or holder.

It has been elaborated above that Indonesia lacks the sufficient detailed regulation on the licensing substantial provisions. The "Allgemeine Rechtslehre" theory brought by Nawiasky clearly categorizes each particular state's structured legal hierarchy. These categorized groups namely are: (1) *staatsfundamentalnorm* (respectively Pancasila in Indonesia); (2) *staatsgrundgesetz* (respectively UUD Constitution in Indonesia); (3) *formelgezets* (particularly the Copyright Law 2014 in the copyright fields); and (4) *verordnung and autonome satzung* (the implementation and autonomic regulation).<sup>16</sup> The provision regarding equal footing in the licensing agreement between the author and the publisher exists — as stated by the Copyright Act — yet it does not elaborately rule out the possibility of unfairness in position. Furthermore, it does not specifically mandate a set of guidelines to draft licensing agreement which aims to protect author's rights in a licensing agreement.

Thus, the Copyright Act needs derivative regulations (as the *verordnung and autonome satzung*) which contain such guidelines. This is also the manifestation of *lex speciali derogat legi*

<sup>11</sup> Sudjana (Universitas Padjadjaran), "Mekanisme Jual Putus Sebelum dan Sesudah Berlakunya Undang-Undang Hak Cipta dalam Perspektif Pembangunan Ekonomi Nasional di Era Globalisasi", *AJUDIKASI*, Vol. 3, Issue 1, 2019, p. 96 ; Eleanor Baker, "The Effect of a Property Transaction at an Undervalue and Some Changes to the Standard PLC Declaration of Solvency", <https://www.rwkgoodman.com/info-hub/the-effect-of-a-property-transaction-at-an-undervalue-and-some-changes-to-the-standard-plc-declaration-of-solvency/>, accessed on March 2nd 2024.

<sup>12</sup> *Ibid.*

<sup>13</sup> Erna Tri Rasmala Ratnawati, "Akibat Hukum Perjanjian Jual Beli Hak Cipta dengan Sistem Jual Putus", *Jurnal Widya Pranata Hukum*, Vol. 1 Issue 2, 2019, p. 150.

<sup>14</sup> Article 6 Indonesian Governmental Regulation No. 36 Year 2018 on the Recordation of Intellectual Property Licensing Agreement.

<sup>15</sup> Erna Tri Rasmala, "Akibat Hukum Perjanjian...", p. 158 ; The meaning of "freely draft the contract" shall be understood by the meaning of "consensualism principle" as stipulated by Article 1338 of Indonesian Civil Code.

<sup>16</sup> Berry, "Pembentukan Teori Peraturan Perundang-undangan," *Muhammadiyah Law Review*, Vol. 2 Issue 2, 2018, p.88-89.

*generali*, since the derivative regulations act as *lex specialis* which governs specific matters and setting aside the Copyright Act as the *lex generalis*.<sup>17</sup> Therefore, it will be key in addressing the current gray area regarding the unequal position tendency between the author and the publisher in a copyright license agreement.

## 2. European Union's Regulation as The Basis of Copyright Law

Compared to the relatively new copyright law regime in Indonesia, European Union ("EU") copyright law's history is a complex journey spanning several decades. Notwithstanding of each EU countries' different legal provisions, in general, the alignment of copyright regulations within the European Union unfolded in three distinct phases: an initial phase spanning from 1991 to 2001 marked by significant directive-based harmonization; a subsequent decade from 2001 to 2009 characterized by less substantial progress and reliance on informal guidelines; and finally, a period from around 2009 onwards defined by proactive legal interpretations by the Court of Justice of the EU.<sup>18</sup>

Above all, in 2019 EU managed to pass a directive known as The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, European Union (EU) ("**the CDSM Directive**"). It must be noted that a "directive" is a legislative act that sets out a goal that EU countries must achieve, yet it is the responsibility of each country member to formulate their own legislation regarding the means to achieve these targets.<sup>19</sup> Consequently, the effectiveness of this directive greatly hinges upon the interpretation of its provisions by individual nations.

The CDSM Directive is one of the lengthiest pieces of legislation within EU copyright law, comprising 86 recitals and 32 articles. It is organized into five main sections: general provisions (I), measures to adapt exceptions and limitations to the digital and cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V).<sup>20</sup>

The provisions meant to stabilize the bargaining position of authors could be found in Article 18 through 22 within Chapter 3 of Title IV, which is titled "fair remuneration in exploitation contracts of authors and performers." This could be seen through Article 18 where this directive obligates member States to guarantee authors for receiving fair and reasonable compensation when they license or transfer their exclusive rights for the use of their works or other content. Moreover, pursuant to Article 19, countries must guarantee that authors and performers receive comprehensive information about how their works are being used at least once a year. Furthermore, if these rights are sublicensed, authors and/or their representatives have the right to request further information from sublicensees if their initial contractual partners lack necessary data.

Article 20 provides that member states must ensure that if there is not a collective bargaining agreement offering a similar mechanism provided in the CDSM Directive, authors and performers can ask for fair additional payment if the original compensation from the party they contracted with turns out to be too low compared to the subsequent revenues from their

<sup>17</sup> Bagir Manan, *Hukum Positif Indonesia*, (Yogyakarta: FH UII PRESS, 2004), p.56.

<sup>18</sup> P. Bernt Hugenholtz, "Copyright in Europe: Twenty Years Ago, Today and What the Future Holds", *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 23, Issue 2, **2013**, p. 505.

<sup>19</sup> European Union, "Types of Legislation", [https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en), accessed on March 5th 2024.

<sup>20</sup> The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC ("**the CDSM Directive**").

work.<sup>21</sup> Furthermore, no contract could deprive authors and performers from the right of remuneration adjustment, according to Article 23 (1).<sup>22</sup>

Seeking such remuneration adjustments can be risky for authors, potentially leading to unfavorable treatment or blacklisting within their industries. The CDSM Directive acknowledges this risk and allows beneficiaries to seek assistance from their representatives, such as CMOs or unions. Additionally, Article 21 of the CDSM Directive mandates the establishment of alternative dispute resolution mechanisms to facilitate quicker and less adversarial conflict resolution than court proceedings.<sup>23</sup>

Lastly, Article 22 (1) of the CDSM Directive stipulates that member States must guarantee that if an author or performer has exclusively licensed or transferred their rights to a work or other protected material, they have the right to revoke part or all of that license or transfer if there is insufficient exploitation of the work or material. However, there are some restrictions. For example, regulations can be customized for different industries and types of creative works. Also, it might be determined that revocation only applies for a set period, or authors and performers may have the option to terminate exclusivity agreements instead of completely revoking them.<sup>24</sup>

## **Analysis of Both Approach in Protecting Author's Disadvantaged Position**

### **1. The Benefits and The Challenges of Indonesian Regulation towards License Agreement for Copyright Works**

#### **a. Rights to a Contract Amendment as the Advantage**

The "time limitation" approach on Indonesian Copyright Law limits the enforceability of a copyright license that binds both parties. By the limitation of 25 years of time period, the possibility of "unequal" or "exploitation" issue arises among the proceeding contract after reaching the particular year, might be solved. Not only it provides legal certainty, but also brings the value of fairness and justice.<sup>25</sup>

The parties are not legally justified to create an undefined "unlimited" time of license, making they can either renew (the previous clauses shall prevail), amend (several clauses remain to prevail and several clauses are modified), or to terminate (the entire clauses are ceased). Therefore, the "time limitation" approach alternates the "injured" party (particularly and mostly is the author or the copyright's holder) to look into the new fairer contract clauses to protect themselves from the buyer's exploitation.

Furthermore, another advantage is that the regulation regarding licensing agreement in the Indonesia Copyright Law is not sufficiently detailed enough. Therefore, according to the Author, this can provide benefits for various parties. One of their benefits is the flexibility to arrange the contract according to the subsequent needs, both in derivative regulations and in the licensing agreements. This is also related to the principle of freedom of contract in Article 1338 of the Indonesian Civil Code.

#### **b. Tendency to a Strictly Binding Unfair Contract Clause as the Disadvantage**

These are several forms of licensing agreements between the author and the licensee, including.<sup>26</sup>

##### **1) Exclusive License Agreement**

<sup>21</sup> Article 20 of the CDSM Directive.

<sup>22</sup> Article 23 (1) of the CDSM Directive.

<sup>23</sup> Article 21 of the CDSM Directive.

<sup>24</sup> Article 22 of the CDSM Directive.

<sup>25</sup> Dian Latifiani, "Renewal of the National Contract Law", *Jurnal Hukum Progresif*, Vol. 8 Issue 2, 2020, p. 138.

<sup>26</sup> Putu Ayu Ira Kusuma Wardani dan Ida Ayu Sukihana, "Pengaturan Bentuk dan Syarat Sahnya Perjanjian Lisensi Hak Cipta", *Jurnal Kertha Semaya*, Vol. 9 No. 7, 2021, p. 1229-1230.

An Exclusive License Agreement is an exclusive licensing agreement that adds further promise from the licensor not to enter into a similar agreement with any other party or to impose the right to use patents or their own name. Such a licensing agreement is prohibited from granting the same license to others. Intellectual Property (IP) as a regime of ownership with the granting of exclusive rights is not limitless. Article 30 of the TRIPS Agreement establishes exceptions to the exclusive rights of patents.

An exclusive license agreement grants permission to only one party to use, publish, and reproduce a specific copyrighted work for a predetermined period.

## 2) Non Exclusive License Agreement

A Non-Exclusive License Agreement explains that the licensee does not have rights over third parties, and the licensee cannot avoid sublicense agreements. The owner or holder of the copyright who enters into a non-exclusive licensing agreement remains free to grant or enter into licensing agreements with other parties. A non-exclusive agreement permits the use of copyright to be granted to more than one person, and here, the creator can exercise their copyright themselves. Typically, the agreed-upon timeframe is less than the duration of copyright protection itself.

The provisions regarding licenses are stipulated under Article 80-83 of the Copyright Law 2014. Article 80 paragraph (1) of the Copyright Law 2014 states that anyone who holds copyright has the right to grant a license they possess to another party, based on a licensing agreement letter with the intention of exercising copyright. Based on the wording of this article, a conclusion can be drawn that any licensing related to copyrights is done based on a licensing agreement deed, which explains that whoever holds the copyright will grant special rights to another party with the intention of enjoying the economic benefits of a creation protected by copyright.<sup>27</sup> Copyright holders have the right to grant permission or allow another party to use the creation according to the agreement.

Since granting a license is a type of agreement or contract, the execution of a licensing agreement must adhere to contract law principles. These principles include the freedom to contract, the principle of consensus, the principle of equal footing, the principle of mutual benefit, and the principle of good faith.<sup>28</sup> The principle of freedom to contract provides freedom for the parties in an agreement to determine the form and content of the contract they create. The principle of equal footing places the parties in a contract on an equal level.<sup>29</sup> In a licensing agreement, the position of the author is equal to or on par with the position of the publisher. Consequently, the rights and obligations of the author must be balanced with those of the publisher.

### 1. The Benefits and The Challenge of European Union Regulation towards license Agreement for Copyright Works

#### a. Ensuring Fairness for Authors in Licensing Agreements

The CDSM Directive has successfully addressed the major issue of uneven position in forming copyright works' agreement through the reiteration of right to a fair remuneration. As it was mentioned before in Article 18 of the CDSM Directive, member states are suggested to ensure a fair remuneration applies to authors and performers, both in license contracts and in contracts by which they transfer economic rights to the other party. This particular right could be used by right holders, whether still in formulating agreement or if the agreement has been settled but there are some changes of profit that affect royalty fee.<sup>30</sup>

<sup>27</sup> *Ibid.*, p. 1231.

<sup>28</sup> Hesty D. Lestari, "Copyright Ownership in the License Agreement," *Jurnal Yudisial*, Vol. 6 Issue 2, 2013, p. 185.

<sup>29</sup> *Ibid.*

<sup>30</sup> Upcounsel, "Licensing Agreement: Everything You Need to Know", <https://www.upcounsel.com/licensing-agreement>, accessed on March 2nd 2024.

The CDSM Directive does not only ensure certainty of their honorarium, but also highlights the obligation to specify the revenues in any copyright works' agreement for ensuring transparency between parties, which in this case are authors, publishers, and distributors. In this process, they have the freedom to tailor transparency requirements to suit different types of creations, subject matter, and industries. This standardization provision could involve choosing to omit information for elements of a creation that make only minor contributions, deeming them insignificant.<sup>31</sup>

Next, the importance of the contract adjustment clause in Article 22 of the CDSM Directive might stem from the fact that courts usually step in only when there are highly unusual and morally questionable situations, and simply having unequal bargaining power is not enough to trigger a contract review.<sup>32</sup> Additionally, legal principles like unconscionability require looking at the circumstances when the contract was made. As time passes, copyright contracts often seem unfair, especially as a work becomes successful.<sup>33</sup> Therefore, while general contract law might help in some cases where legislation falls short, the contract adjustment clause is needed to fully solve the problem of unequal bargaining power in author contracts.

Linking back to the problem of having publishers increasingly seeking comprehensive rights which requires authors to sell "all rights" in a single deal including rights to platforms that may emerge in the future, the contract adjustment clause can be used to make sure that authors could renegotiate their remuneration if publishers are making more revenues from different types of platforms such as electronic books or audio books.

Lastly, in situations where there is lack of exploitation by the publishers, authors who regain their rights through the right of revocation addressed in Article 22 can expand the accessibility of their works and broaden their audience by taking steps such as making an out-of-print book more readily accessible, publishing their work in a more cost-effective format or under an open access license, or revamping and re-releasing books with a fresh appearance and style.<sup>34</sup>

#### **b. Addressing Ambiguity: Defining "Lack of Exploitation" and "Appropriate Remuneration"**

Regarding the right of revocation mentioned in Article 22 of the CDSM Directive, the article does not clearly define what qualifies as "lack of exploitation," which raises questions about what level of exploitation would be considered acceptable. For example, there is a gray area of whether or not it is enough for a publisher to print a small number of copies of a book without reprinting it, or if it is satisfactory if a novel is only published in hard copy format without an e-book version. Additionally, we also have to ask whether or not the failure to utilize a novel for movie adaptations or merchandise, despite demand, indicates a lack of exploitation. These questions highlight the need for Member States to clarify the revocation principle by setting a standard for reasonable exploitation in terms of quantity and different ways of utilizing the work that the transferee or licensee must meet.<sup>35</sup>

This ambiguity could also be found in addressing appropriate remuneration. Even though "Appropriate and proportionate" supposedly relates to the economic worth of licensed rights, its meaning remains ambiguous. It is simply stated that compensation should consider "the author's or performer's input to the overall work or content and all surrounding circumstances, like industry norms or how the work is actually used." A payment tied to the earnings generated

<sup>31</sup> Article 19 (3) and (4) of the CDSM Directive.

<sup>32</sup> Rita Maulitonyte, *Op.Cit.*, p. 95.

<sup>33</sup> Lucy Elizabeth Kenner, "Can Legislative Reform Secure Rewards for Authors? Exploring Options for the New Zealand Copyright Law", *Victoria University of Wellington Law Review*, Vol. 48, Issue 4, 2017, p. 576.

<sup>34</sup> Authors Alliance, "Spotlight on Rights Reversion and Termination of Transfer", <https://www.authorsalliance.org/2021/06/09/spotlight-on-rights-reversion-termination-of-transfer/>, accessed on March 10th 2024.

<sup>35</sup> Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition", *Common Market Law Review*, Volume 57, Issue 4, 2020, p. 1026.

by the content's use should generally be the norm, though there might be exceptions allowing for a one-time payment in certain situations. Moreover, there aren't specific guidelines for these exceptions in Recital 73.<sup>36</sup>

### 1. Comparative Reflections on Both Approach

Recently, there are two (2) approaches in protecting the license agreement, which are the (1) time limitation and the (2) standard clauses guidelines.

Indonesian Copyright Law utilizes the "time limitation" approach to protect and to equalize the position between the copyright's author or holder with the copyright buyer. The termination of an undefined period economic right transaction after 25 years ought to bring out the option for the parties to either renew, amend, or terminate their license contract. Upon this termination, it might bring beneficial effect to the "injured party" as there will be an opportunity to draft such new mutualism clauses for both parties. The recognition of the "time limitation" approach seemed to be a better way to tackle the "sold flat" agreement, compared to the previous copyright law.

However, it is unfortunate that Indonesia discarded the standard clause approach by not discussing norm guidelines for protecting authors in creating license agreements. Neither Indonesian Copyright Law nor PP 36/2018 stipulates on how the standard clauses on how the license agreement should be drafted. The lack of this standardization leads to exploitation of a party, due to the utilization of "the freedom principle" in making contracts, according to Indonesian Civil Code. The absence of the guidance standard tends to harm a particular party. Therefore, the alignment of the standard clause that protects the author's interest with the "time limitation" approach, seemed to be a good harmonization in creating a more advanced copyright license agreement protection.

Contrary to Indonesian law, CDSM Directives reflect intricate regulation in protecting right holders by addressing each rights and its purposes. As the longest directive that concerns safeguards for intellectual property rights, this regulation at least governs the holders' rights in four aforementioned articles, which are: the limitations for text and data mining until there are explicit reserved rights for mining purposes; restriction for the usage of educational purposes; the entitlement to modify a contractual arrangement, particularly by seeking equitable additional payment; and the right to withdraw some or all of the license or transfer if the work or material is not adequately utilized within the considerations of several exceptions.

By then, these rights indicate how the directives have governed the rights of copyright holders precisely. It could be witnessed on directives' suggestions towards each party's right to a fair remuneration within the details of revenues in any copyright works' agreement to ensure transparency between parties. Furthermore, this directive has also facilitated contract adjustment clauses. Though this clause could only be attributed to the tendency of courts to intervene only in extreme and ethically dubious scenarios, this clause shows impartiality and resolves insufficiency of the legislation.

Nonetheless, this directive has a vague measurement in fulfilling the determined rights and certain obligations. It could be noticed in the implementation of rights of revocation, since it has mentioned about lack of exploitation. This clause is regulated without setting a definite bar in classifying actions of exploitations, followed by its reasonable explanations. Moreover, as parties are expected to claim a fair remuneration by using the term "appropriate and proportionate", it was not mentioned on criteria that signifies an appropriate and proportionate revenue.

### CONCLUSION

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<sup>36</sup> Recital 73 of the CDSM Directive.

## 1. Summary

In summary, Indonesia and the European Union are both addressing the imbalance in licensing agreements between authors and publishers, who typically hold more power as the exploiters of creative works. This inequality, known as contractual asymmetry, arises when one party possesses greater knowledge or resources during negotiations. Exploiters of copyrights often wield significant leverage, given the substantial investments and expertise required for artistic projects.

Indonesia's Copyright Law emphasizes on the limitations of time on the transferred rights within a contract. As in a set of duration, the transferred rights will return towards the author. In contrast, the European Union focuses on enhancing copyright holder protections, asserting the rights of each party to be enforced by member states. Within EU frameworks, it emphasized the rights of authors to revise signed contracts if a certain situation stipulated in the CDSM directive occurs.

To sum it up, both approaches have shown how each country governs copyright law in accordance with several aspects that affect the development of copyright. It could be influenced by technological developments, market advances, and public awareness. Although law is a precise endeavor, it should also have protected the copyright holders as we recognise the vulnerability of unjust bargaining positions in copyright licensing agreements. Moreover, raising the bar of copyright holder's protection could also aid the government in elevating public awareness.

## 2. Recommendation

Through this research and in accordance with these aforementioned problem identifications, the Author shall convey 2 recommendations as mentioned after below.

*First*, Indonesia ought to internalize guidelines that considers more on authors' interest when creating a license contract to its regulations. This is by putting into account the unequal position between authors and exploiter. However, this article recommends that, in the current times, it should be adapted in such implementing regulations such as the Presidential Decree, the Ministry Regulation, or the Government Regulation. The law theory of "Allgemeine Rechtslehre" urges the role of implementing regulation to be utilized as the "vessel" to implementate the higher legal framework under the structured hierarchy. This is also the concretisation of the legal principle of *lex speciali derogat legi generali*. The reason for this is to ease its legislation procedure or bureaucracy (compared to the legislation bills made by the parliament), as the quick changes for the situation would be significantly beneficial towards many low-to-mid level authors. Granting them access towards better reward of their creative labor without waiting for the long process of law making in the parliament.

*Second*, Indonesia ought to adopt the equivalent guidance in revising the license contract just like what stipulated in the EU CDSM Directives. However, Indonesia should modify the equivalent norms to be more suitable and applicable within Indonesia settings. By adopting the revising conditions for authors if a significant change within exploitation of the works occurs, this would help authors equalize bargaining position within a license contract.

By absorbing these two approaches, there shall be more protection for the copyright's author and/or holder to the more advanced Indonesian copyright framework.

## LIST OF REFERENCES

### Books

- Bagir Manan. *Hukum Positif Indonesia*, Yogyakarta: FH UII PRESS, 2004.  
Johanna Gibson, Phillip Jobson, and Gaetano Dimita, *The Business of Being an Author: A Survey of Authors' Earnings and Contracts*, London: Queen Mary University of London, 2015.

Marilyn Burgess and Maria De Rosa, *The Remuneration of Canadian Writers for Literary Works*, Toronto: Communications MDR, 2017.

The Authors Guild. *The Wages of Writing: Key Findings from the Authors Guild 2015 Member Survey*, New York: The Authors Guild, 2015.

### Journals

Berry, "Pembentukan Teori Peraturan Perundang-undangan," *Muhammadiyah Law Review*, Vol. 2 Issue 2, 2018.

Dian Latifiani, "Renewal of the National Contract Law", *Jurnal Hukum Progresif*, Vol. 8 Issue 2, 2020.

Erna Tri Rusmala Ratnawati, "Akibat Hukum Perjanjian Jual Beli Hak Cipta dengan Sistem Jual Putus", *Jurnal Widya Pranata Hukum*, Vol. 1 Issue 2, 2019.

Hesty D. Lestari, "Copyright Ownership in the License Agreement," *Jurnal Yudisial*, Vol. 6 Issue 2, 2013.

Lucy Elizabeth Kenner, "Can Legislative Reform Secure Rewards for Authors? Exploring Options for the New Zealand Copyright Law", *Victoria University of Wellington Law Review* Vol. 48, Issue 4, 2017.

P. Bernt Hugenholtz, "Copyright in Europe: Twenty Years Ago, Today and What the Future Holds", *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 23, Issue 2, 2013.

Putu Ayu Ira Kusuma Wardani dan Ida Ayu Sukihana, "Pengaturan Bentuk dan Syarat Sahnya Perjanjian Lisensi Hak Cipta", *Jurnal Kertha Semaya*, Vol. 9 No. 7, 2021.

Richard Watt "Copyright and Contract Law: Economic Theory of Copyright Contracts", *Journal of Intellectual Property Law*, Volume 18, Issue 1, 2010.

Rita Maulitonyte, "Empowering Authors Via Fairer Copyright Contract Law", *UNSW Law Journal* Volume 42, Issue 2, 2019.

Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition", *Common Market Law Review*, Volume 57, Issue 4, 2020.

Sudjana (Universitas Padjadjaran), "Mekanisme Jual Putus Sebelum dan Sesudah Berlakunya Undang-Undang Hak Cipta dalam Perspektif Pembangunan Ekonomi Nasional di Era Globalisasi", *AJUDIKASI*, Vol. 3, Issue 1, 2019.

Sulasno, "Lisensi Hak Kekayaan Intelektual (HKI) dalam Perspektif Hukum Perjanjian di Indonesia", *ADIL: Jurnal Hukum*, Vol.3 Issue 2, 2012.

Trias Palupi Kurnianingrum, "Materi Baru dalam Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta", *Negara Hukum*, Vol. 6, Issue 1, 2015.

### Other Documents

Eleanor Baker, "The Effect of a Property Transaction at an Undervalue and Some Changes to the Standard PLC Declaration of Solvency", <https://www.rwkgoodman.com/info-hub/the-effect-of-a-property-transaction-at-an-undervalue-and-some-changes-to-the-standard-plc-declaration-of-solvency/>, accessed on March 2nd 2024.

European Union, "Types of Legislation", [https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en), accessed on March 5th 2024.

International Authors Forum, "Creating a Living: Challenges for Author's Income," <https://internationalauthors.org/wp-content/uploads/2020/09/Creating-A-Living-Booklet-1.pdf>, accessed on March 28th, 2024.

Upcounsel, "Licensing Agreement: Everything You Need to Know", <https://www.upcounsel.com/licensing-agreement>, accessed on March 2nd 2024.  
Hafid Fuad, "Penjualan Buku Bajakan Makin Marak di Marketplace, Penerbit Ketar-ketir", <https://www.idxchannel.com/economics/penjualan-buku-bajakan-makin-marak-di-marketplace-penerbit-ketar-ketir>, accessed on March 8th 2024.

### **Legal Provisions**

Directive No. 790 Year 2019 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Government Regulation No. 36 Year 2018 on the Recordation of Intellectual Property Licensing Agreement.

Law No. 28 Year 2014 on the Copyright Law.