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INTERNATIONAL COPYRIGHT TREATIES AND ITS IMPLEMENTATION UNDER INDONESIAN COPYRIGHT ACT; IS IT A BETTER ACCESS TO KNOWLEDGE?

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Abstract

The Indonesian Government has enacted a new Copyright Act in 2014 on the basis that Copyright protection plays a strategic role for economic development and people's prosperity. This new Act provides a higher standard of protection and ensures more legal certainty to copyrights holders. It is not only expands the scope of protection, duration, but also provides better economic rights to the right holder. This Article analyses Indonesia's obligation under international treaties and whether Indonesia takes full advantages of all the flexibilities available under those treaties to enhance access to knowledge particularly for educational materials. It also analyses substantial provisions of the new Copyright Act in the context of scope, duration, limitations, and its exceptions. This Article argues that strongest protection of copyright is far beyond what is required by the international copyright treaties which Indonesia has acceded to them. This Article also argues that all available limitations and exceptions provided by the treaties that would have opened up access to knowledge has not all incorporated into the new Act. Accordingly, this Act has a potential to inhibit access to knowledge.

Pemerintah Indonesia telah mengundangkan Undang-Undang tentang Hak Cipta yang baru tahun 2014 atas dasar bahwa perlindungan Hak Cipta memainkan peranan yang strategis bagi pembangunan ekonomi dan kesejahteraan masyakarat. Undang-Undang yang baru ini menetapkan standart perlindungan yang lebih tinggi dan lebih menjamin kepastian hukum bagi pemegang Hak Cipta. Undang-Undang ini tidak hanya memperluas lingkup dan jangka waktu perlindungan tetapi juga menetapkan hak-hak ekonomi yang lebih baik bagi pemegang hak. Artikel ini menganalisa kewajiban Indonesia berdasarkan treaties internasional dan apakah Indonesia mengambil semua keuntungan dari fleksibilitas-fleksibiltas yang disediakan oleh treaties tersebut guna mendorong akses ilmu pengetahuan terutama materi pendidikan. berita aktual ini menganalisa ketentuan-ketentuan substansi dari Undang-Undang tentang Hak Cipta yang baru mengenai lingkup, jangka waktu, pembatasan- pembatasan dan perkecualian-perkecualiannya. Artikel ini berpendapat bahwa perlindungan Hak Cipta yang lebih kuat, telah melebihi dari yang syaratkan oleh international treaties mengenai Hak Cipta yang telah disepakati Indonesia. Artikel ini juga berpendapat bahwa semua pembatasan dan perkecualian yang disediakan oleh treaties mengenai Hak Cipta tersebut, yang akan membuka akses pengetahuan, tidak dimasukkan dalam Undang-Undang yang baru, sehingga Undang-Undang ini mempunyai potensi menghambat akses pengetahuan.

***Keywords**: International Copyright Treaties, Indonesian Copyright Act, Access to Knowledge*

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I. INTRODUCTION

By the end of 2014, the Indonesian Government has enacted a new Act on Copyright.[3] This new Act replaces the old Act on Copyright of 2002[4], with the main objective to response to the rapid development of creative economy industries, communication and information technologies.[5] The Government argued that creative economy together with the development of communication and information technologies requires copyright protection in order to contribute to the national economic development and people's prosperity.[6] Because of that, there are a number of substantial changes under the new Copyright Act and the spirit behind such changes is to provide better economic rights for creative industries, neighboring rights, and strong enforcement mechanism.

However, this paper focuses on the significant changes in the scope, the duration of protection, and the limitations and exceptions which are relevant to the access to knowledge and science. Compared to the old Act, for example, the new Act expands the scope of protection and extends the duration of protection for certain types of creation for lifetime of the authors plus 70 (seventy years) after the death of the authors.[7] It also provides improved economic rights to the authors and strengthens it through enforcement mechanism. Interestingly, this new Act mentions that it takes into account that national interest and international copyrights instruments to balance between the interest of authors, copyright holders and society.[8]

From the above spirit and perspectives, it is important to examine whether the new Act still provides some flexibilities allowed by in-

[3] The Act of the Republic Indonesia Number 28 of 2014 on Copyright, State Gazette of the Republic Indonesia of 2014 Number 266, Supplementary State Gazette of the Republic Indonesia Number 5599, entered into force on 16 October 2014.

[4] The Act of The Act of the Republic Indonesia Number 19 of 2002 on Copyright, State Gazette of the Republic Indonesia of 2002 Number 85, Supplementary State Gazette of the Republic Indonesia Number 4220.

[5] Explanatory Memoranda of the Copyright Act of 2014, paragraph 1.

[6] *Ibid.*

[7] This is the feature of the TRIPs-Plus Provisions sets up under Bilateral Free Trade Agreement, see in general in Jakkrith Kuanpoth, "TRIPs-Plus Rules under Free Trade Agreements; An Asian Perspective", in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and Free Trade Agreements*, Hart, 2007, p. 42;

[8] See the explanatory Memoranda of the Act, paragraph 6.

ternational copyrights instruments to enhance access to knowledge in Indonesia,[9] or otherwise inhibit it. Access to knowledge is indispensable to develop the capacity of human resources in developing country Indonesia, and for that purpose, it is important to make education material accessible to the public. In fact, educational materials, particularly for higher education protected under the Copyright Act are not always affordable and available by academics and students in Indonesia. This condition can be seen as barrier to access to knowledge and science.[10]

Access to knowledge is protected under Article 27 of the Universal Declaration of Human Rights,[11] which provides a balance between the right of access and a right to protection of moral and material interests of the authors. Article 15 of the International Covenant of Economic Social and Cultural Rights also express the same thing. It clearly states that everyone has "the right to enjoy the benefit of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author."[12] Furthermore, the objectives of the

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[9] The International Copyright instruments provide some flexibilities, such as fair use doctrine to ensure availability and affordability of educational material. See also in Molly Land, "Rebalancing TRIPS", *33 Mich.J. Int'l L. 433* (2012). Available at: <http://repository.law.umich.edu/mjil/vol33/iss3/1> last visited March 2016; See also Carlos M. Correa, "TRIPs and TRIPs-Plus Protection and Impacts in Latin America" in Daniel Gervais (ed.), *Intellectual Property, Trade and Development; Strategies to Optimize Economic Development in a TRIPs-Plus Era*, Oxford University Press, 2007, pp. 221-257, p. 241

[10] Jakkrith Kuanpoth, Op.Cit.

[11] The Universal Declaration on Human Rights adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris. Article 27 of this Declaration stipulates that:
Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

[12] The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. The Article 15 of this Covenant states that:
1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from

TRIPs Agreement[13] as stipulated under Article 7 also states that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

> *Moreover, the Preamble of World Copyright Treaty also clearly recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information".*[14]

In principle, those international instruments emphases the balance between the private rights and public rights, however, they have not been given influence. It seems that international copyright instruments have developed in such a way to increasingly restrict access to educational material. As a response, there are various efforts have been proposed to safeguard the society to enjoy the arts and to share in scientific advancement and its benefits, such as through a review of the TRIPs Agreement, pressure for development Agenda in the WIPO and movement for Access to Knowledge Treaty.[15] Accordingly, it is impor-

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any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields

[13] Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) of 1994. (Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 15 April 1994, 33 I.L.M. 1197, 1201 (entered into force on 1st January 1995).

[14] WIPO Copyright Treaty(WCT), adopted in Geneva on December 20, 1996, entered into force on March 6, 2002.

[15] The Access to Knowledge (A2K) movement is a loose collection of civil society groups, governments, and individuals converging on the idea that access to knowledge should be linked to fundamental principles of justice, freedom, and economic development. The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities is a major international statement on open access and access to knowl-

tant to analyze whether the implementation of international Copyright instruments under the Indonesian Copyright Act provide a better access to knowledge.

II. THE HISTORICAL DEVELOPMENT OF COPYRIGHT ACT IN INDONESIA

Similar to the most developing countries in which the protection of intellectual property derived from colonial pathways,[16] the development of copyright protection in Indonesia also cannot be separated from the Dutch Colonial power. The First Copyright Act had promulgated in Indonesia, as a part of the Netherlands East Indies was the Dutch Copyright Act of 1912, known as "Autheurswet 1912". A year after that, the Netherlands East Indies also acceded to the Rome revision of the Berne Convention.[17] But, after independence, in 1958, Indonesia officially had withdrawn her membership to the Berne Convention. The government states that to increase the level of education, ability to copy books freely was a needed.[18] This reason is very interesting as it means that at that moment, the Government believed that membership to Berne Convention lead to inhibit the free access of books and other education materials.

In 1982, the Indonesian government enacted a new Copyright Act which provided for copyright protection for lifetime plus 25 years after the death of the author. Interestingly, this Act was only protecting foreign works if the first publication of the work had taken place in Indonesia. National interest can be used as a consideration for regulating copyrights as stipulated under Article 10.[19] Then, due to increased pressure from developed countries demanding more effective protection of

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edge. It emerged from a conference on open access hosted in the Harnack House in Berlin by the Max Planck Society in 2003.

[16] Carolyn Deere, *The Implementation Game; The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford University Press, 2009, pp. 34-37.

[17] Christoph Antons, *Intellectual Property Law in Indonesia, Kluwer Law international*, London, 2000, p. 48

[18] *Ibid.*

[19] *Ibid*., p. 54.

copyright and sufficient protection for sound recording, the Copyright Act was revised in 1987. This revised Act has widened the subject of protection covering video tapes, sound recordings, computer programs, as well as batik. This Act has also extended the period of protection until 50 years after the date of the authors. Under this Act, the works of foreigners can be protected through multilateral and bilateral treaties although the fist publication took place in overseas. The Act also provides flexibility in form of compulsory licenses, in which it can be granted for the purpose of "education, science, and research", if copyright has not been exercised for three years.

Then, in 1994, Indonesia is member to the WTO, and ratified the GATT-TRIPs Agreement.[20] Inevitably, Indonesia re-entered the Bern Convention in 1997,[21] and ratified some other international instruments on intellectual property (IP) including the WIPO Copyright Treaty.[22] Consequently, after ratification of some international copyright instruments above, the Copyright Act has been revised several times, and those revisions made the right of the author even stronger. Accordingly, The First Indonesian Copyright Act is the Act Number 6 of 1982, then it revised into the Act Number 12 of 1997. Then, the last revision was done in 2014 with the enactment of the new Copyright Act of 2014, replacing the Copyright Act of 2002 as mentioned earlier.

III. INTERNATIONAL COPYRIGHT TREATIES AND THEIR PRINCIPLES

A. BERNE CONVENTION

The Bern Convention[23] is considered as the first international convention on copyright protection and it was established in the early 1886.

[20] The ratification of the WTO through the Act of the Republic of Indonesia Number 7 of 1994.

[21] It ratified by Indonesia through Presidential Decree No 18 of 1997.

[22] It ratified by Indonesia through Presidential Decree No 19 of 1997.

[23] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979.

It has been revised several times since its establishment, and the last revision took place in Paris in 1971. Bern Convention embodies three basic principles; (1) the principle of national treatment; (2) the principle of automatic protection; and (3) the principle of independence of protection. Principle of national treatment means that works originating in one of the Member states must be given the same protection in each of the other Member states as the latter grants to the works of its own nationals. Automatic protection means that the protection must not be conditional upon compliance with any formality, while the protection is independent of the existence of protection in the country of origin of the work. If, however, a member state provides for a longer term than the minimum prescribed by the instrument and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

Bern Convention provides minimum standard of protection in relation to the works and the rights to be protected, the duration of protection, certain limitations and exception to copyright.[24] Bern Convention, pursuant to the Appendix agreed upon in 1971, also allows developing countries for certain works and under certain conditions, depart from the minimum standards of protection with regard to the right of translation and the right of reproduction.

B. TRIPS AGREEMENT

TRIPs Agreement is regarded as the second international instrument on copyright protection. TRIPs Agreement is Annex IC to "the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations", and it comes into effect on 1 January 1995. Because of that, all member of the WTO are bound to the TRIPs Agreement, regardless of their level of economic development. The three principles provided by the Bern Convention are also stipulated in the TRIPs Agreement. However, the TRIPs Agreement also introduces "Most Favoured Nation"[25] principle for WTO members.

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[24] Alan Story, "Burn Berne; Why the Leading international Copyright Convention Must be Repealed', p. 771, accessed in <https://kar.kent.ac.uk/251/1/storyg3r.pdf> (last visited April 2016)

[25] See Article 4 of the TRIPs Agreement.

Based on the TRIPs Agreement, WTO members must comply with the substantive law provisions of the Berne Convention and the Appendix except for the moral rights provisions of the Bern Convention, regardless of whether or not they are party to the Bern Convention. TRIPs Agreement also provides minimum standard of protection[26] by ensuring that computer program and databases[27] are added to the categories of copyright works, and by expanding the bundle of rights to include the right to control commercial rental of computer programs and cinematographic works.[28]

C. WORLD COPYRIGHT TREATY (WCT)

The WCT was introduced to adopt the global copyright regime to the challenges posed by the advent of the digital world. The WCT specified copyright into two categories, computer programs[29] and compilations of data or other material.[30] The WCT also regulates three types of exclusive rights; (1) the right of distribution; (2) the right of rental; (3) the right of communication to the public. In this context, the WCT widens the right of communication to the public to cover on-demand, interactive communication through the internet.[31] More controversially, the WCT requires its members to provide legal remedies against the circumvention of technological measures[32] in connection with the exercise of the rights of copyright owners and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management of their rights.

The international standard determined by these three instruments can be used as a minimum standard of national copyright law in developing country Indonesia, which is party to those three instruments. Those international instruments also provide a balance between private

[26] See J.H. Reichman , "Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement", *The International Lawyer*, Vol. 29, No. 2 (Summer 1995), pp. 345-388, accessed at <http://www.jstor.org/stable/40707772> (last visited March 2016)

[27] See Article 10 of the TRIPs Agreement.

[28] See Article 11 of the TRIPs Agreement

[29] See Article 4 of the WCT

[30] See Article 5 of the WCT

[31] See Article 6, 7, and 8 of the WCT respectively.

[32] See Article 11 of the WCT

rights and public rights as mentioned earlier, particularly WCT.[33]

IV. INTERNATIONAL COPYRIGHT TREATIES AND ITS FLEXIBILITIES FOR DEVELOPING COUNTRY

There are several flexibilities provided by these three international instruments above, which can be used by developing country like Indonesia to ensure the maximum access to knowledge. Such flexibilities can be seen in three aspects:

a. The scope of copyright protection
b. The duration of copyright protection, and
c. The limitation and exception

A. THE SCOPE OF COPYRIGHT PROTECTION

It is important to note that the scope of copyright protection, since Berne Convention until the WCT, had progressively amended and expand, not only in the context of the types of work to be protected, but also the rights/uses controlled by copyright. Under the Berne Convention, the scope of protection are as follows:

1. Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, archi-

[33] See in general in Graeme Dinwoodie, "The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking", *57 Cas.W.Res.L.Rev.751*(2007), available at: <http://scholarlycommons.law.case.edu/caselrev/vol57/iss4/5> (last visited on March 2016).

tecture or science.[34]

2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic.[35]
3. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations[36]

Then, Article 9 (1) of the TRIPs Agreement provides that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto". It means that those scopes of copyright protected under the Berne Convention also protected under the TRIPs Agreement. Furthermore, as mentioned earlier, TRIPs extend the scope of protection to include computer programs and compilation of data or other material.[37] The Article 10 (1) and (2) of the TRIPs Agreement states that:

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such.

Moreover, those scopes of protection under Berne Convention and TRIPs Agreement are also reinforced under the WCT, as stipulated in its Article 3. However, the definition of "computer programs'" under the WCT is broader than provided under the TRIPs Agreement to provide greater scope due to the development of technologies.

In the context rights granted, the Berne Convention provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".[38] For the Authors of literary and artistic works, the Convention provides protection which covers the Au-

[34] Article 2(1) Berne Convention
[35] Article 2 (3) Berne Convention
[36] Article 2 (5) Berne Convention
[37] See Article 10 (1) and (2) of the TRIPs Agreement
[38] Article 6bis (1) of the Berne Convention

thors to enjoy the exclusive right of (1) making and of authorizing the translation of their works in the original works;[39] (2) authorizing the reproduction of these works, in any manner or form; [40] (3) authorizing broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; [41] (4) authorizing the public recitation of their works; [42] (5) authorizing adaptations, arrangements and other alterations of their works; [43] (6) authorizing the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced.[44]

While in the context of musical work and words recorded together with musical work, Authors has the right to authorize the sound recording at that musical work, together with such words, if any.[45] Author also has right to the adaptation into any other artistic form of a cinematographic production derived from literary or artistic works.[46] Furthermore, for dramatic, dramatico-musical and musical works, Author has right of authorizing the public performance of their works and communication to the public of the performance of their works.[47]

Authors of shall enjoy the exclusive right of All the above rights provided by the Berne Convention, which are also protected under the TRIPs Agreement in accordance with Article 9 (1). However, the TRIPs Agreement also extended the copyright protection for computer programs and databases, and providing new right of commercial rental for computer programs and cinematographic works.[48]

Then, the WCT also extended the scope of copyright protection provided under the Berne Convention and the TRIPs Agreement by adding some provisions in relation to:

a. the right to control sale and other transfer of copies of copyright

[39] Article 8 of the Berne Convention
[40] Article 9 (1) of the Berne Convention
[41] Article 11bis (1) of the Berne Convention
[42] Article 11ter(1) of the Berne Convention
[43] Article 12 of the Berne Convention
[44] Article 14 (1) of the Berne convention
[45] Article 13 of the Berne Convention
[46] Article 14 (2) of the Berne Convention
[47] Article 11 (1) of the Berne Convention
[48] See Article 11 of the TRIPs Agreement

works

b. broadening the scope of the term communication to the public to cover works transmitted through the internet
c. definitely requiring the provision of legal remedies against the circumvention effective technological measures and the removal or alteration of electronic rights management information without authority.

From the perspective of the scope of protection under the international copyrights instruments above, they tend to extend the scope of works protected under Copyright. Because of that, Member countries like developing country Indonesia should not extend the scope of protection more than provided by those international instruments. Furthermore, although the above scope of protection provided under those international instruments are regarded as "minimum standard", and consequently, Member countries have a freedom to extend the scope of protection higher that provided by those international instruments, Member country like Indonesia should not take this approach. As extending the scope means Indonesia adopt higher standard than provided by the TRIPs Agreements, and it embodies TRIPs-Plus norms, and means also that Indonesia over compliance to the TRIPs AgreemIn determining the level of protection, countries should consider their position as the importer or exporter of copyrighted materials. If a country is importer of copyright material, like Indonesia, it is necessary to maintain the scope of protection at minimum level to ensure that many

works are not protected by copyright and leaving the works in the public domain. For that purpose, it is important for a country to provide protection only to the works that necessary to be protected as copyrights under international instruments in which she is a party to. Similarly, it is also necessary for countries to grant copyright holders only the rights required to be granted under such international instruments. This approach is important to ensure that public can access to knowledge and science, particularly higher education materials.

B. THE PERIOD OF COPYRIGHT PROTECTION

The protection of copyright is for a fixed period of time, and when protection is expired, the works become public domain. Initially, under the Berne Convention, literary works was protected for the life of the author pus seven years after the death, and it was extended until 50 years after the death of the authors. The same period of protection also applies to artistic works as provided by the Berne Convention, TRIPs Agreement and the WCT.[49] For cinematographic works, the period of protection is 50 years after the making of the works or after the works has been made available to the public.[50] Similarly, anonymous or pseudonymous works are also protected for 50 years after the works has been made available to the public.[51] However, works of applied art is protected for only 25 years.[52]

Although the above duration for copyright protection is minimum standard, and countries are allowed to provide a higher standard, it is important to provide a balance protection between the interest of copyright holders and public so that the access to knowledge and science are not in danger.[53] Those international instruments also clearly recognized

[49] See Article 7 (1) of the Berne Convention, Article 9 (1) of the TRIPs Agreement and Article1 of the WCT.

[50] See Article 7 (2) of the Berne Convention, Article 9 (1) of the TRIPs Agreement and Article 1 of the WCT.

[51] See Article 7 (3) of the Berne Convention, Article 9 (1) of the TRIPs Agreement and Article 1 of the WCT.

[52] See Article 7 (4) of the Berne Convention, Article 9 (1) of the TRIPs Agreement and Article 1 of the WCT.

[53] See Vera Frans, "Back to Balance; Limitations and Exceptions to Copyright", in Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property*, Zone Books, New York, 2010, pp 517-529.

the important to provide such balance, particularly the WCT.

C. THE LIMITATIONS AND EXCEPTIONS

For the purpose of increasing access to the public, particularly on educational materials, international copyright instruments provide some limitations and exceptions. This limitations and exception are the forms as follows:

The first is to tolerate parallel importation.[54] There is flexibility for all countries to allow parallel importation of copyright works. Usually, the term of "parallel import" are not specifically mentioned in the national Act, but parallel import of copyright works is tolerated if the country adopts the principle of international exhaustion.[55] Otherwise, if country adopts the principle of national exhaustion,[56] this country prohibits parallel import of copyright works. For the purpose of access to educational material protected under the copyright, parallel import can be used as a main mechanism to gain access, particularly for gaining cheaper materials from overseas. Therefore, it is important for a country to provide international exhaustion rule under her national law.

The second is to allow compulsory license for certain works. Berne Convention provides two options for compulsory licenses available to

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[54] Parallel imports, also called gray-market imports, are goods produced genuinely under protection
of a trade mark, patent, or copyright, placed into circulation in one market, and then imported
into another market without the authorization of the owner of the intellectual property right. See in Raman Mittal, "Whether Indian Law Allows Parallel Imports of Copyrighted Works; An Investigation, Journal of India Law Institute, Vol 55, Issue 4, 2013, p.504.

[55] If a country applies the concept of international exhaustion, the IP rights are exhausted once the product has been sold by the IP owner or with his consent in any part of the world. See "International Exhaustion and Parallel Importation", in World Intellectual Property Organization, accessed at <http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm> (last visited March 2016).

[56] The concept of national exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent. However, the IP owner (or his authorized licensee) could still oppose the importation of original goods marketed abroad based on the right of importation. Ibid.

all developing countries.[57] The fist type of compulsory license can only be granted for the purpose of teaching, scholarship or research.[58] It can be granted for translation of 'works published in printed or analogous forms of reproduction" and publish the translation in "printed and analogous forms of reproduction."[59] While the second type of compulsory license is granted only for use in connection with systematic instructional activities,[60] 'to reproduce and publish "works published in printed or analogous form of reproduction".[61] Accordingly, if a country would like to increase access to knowledge and science, these compulsory licenses should be regulated under national copyright act for publishing local and translated editions of educational materials at reasonable prices.[62]

The Third is to narrow the meaning of "material form". Under the Berne Convention, "fixation in some material forms" is a condition for gaining copyright protection.[63] However, the term "material form" is not specifically defined in the Convention. This opens the possibility for member state to provide a narrow definition to exclude certain material form from copyright protection such as digital form. This approach is very useful if a member nation make use of digital information technology as source of knowledge for public. The problem is that, the development of information technology and communication made many countries provide protection to digital form of technology.

The fourth is to provide a strict rule that copyright is only protect expression, not idea. It is a principle of copyright law that it only protects the expression of idea, and not the idea. This principle "serves the important public policy of preserving and enriching the public domain".[64]

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[57] See the Appendix of the Berne Convention

[58] Article II (5) of the Appendix of the Berne Convention

[59] Article II (1) and 2 (a) of the Appendix of the Berne Convention.

[60] Article III 92) of the Appendix of the Berne Convention

[61] Article III (2) and (7) of the Appendix of the Berne Convention

[62] See Susan Isiko Strba, *International Copyright and Access to Education in Developing: Exploring Multilateral Legal and Quasi-Legal Solution*, Martinus Nijhoff Publisher, Leiden, Boston, 2012, p. 159.

[63] Article 2 (2) of the Berne Convention

[64] Consumer International, *Copyright and Access to Knowledge, Policy Recommendations on Flexibilities on Copyright Laws*, Kuala Lumpur, 2006, p. 26.

This principle is enshrined under the TRIPs Agreement[65] and the WCT.[66] It constitutes a rationale behind copyright protection and can be used as counter argument for an effort to protect new rights which potential to inhibit access to knowledge, such as database right.

The fifth is to prevent anti-competitive practices. Under the TRIPs Agreement, national law can adopt appropriate measures to prevent condition that potential to create an abuse of IPR and have an adverse impact on competition in the market.[67] It is important for country to regulate it as can be used as a useful mechanism to prevent the expensive price of copyright materials due to anti-competitive practices. National legislation should provide the authority for enforcing copyright the power to control anti-competitive practices.

The sixth is to provide no copyright protection for technological protection measures. International copyright treaties, like TRIPs and WCT provide that copyright protects compilation of data or material, but it does not extend to the data or material itself.[68] But usually technological protection measures can be used in such compilation of data to prevent access to such data. As a result, the data or materials cannot be access without authorization or payment. Article 11 of the WCT also stipulates that:

> *Contracting parties "shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law".*

Accordingly, country should not regulate anti-circumvention provision without definitely restrict the control only to certain acts which are

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[65] Article 9 (2) of the TRIPs Agreement states that "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

[66] Article 2 of the WCT stipulates that "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".

[67] Article 40 of the TRIPs Agreement

[68] Article 10 (2) of the TRIPs Agreement and Article 5 of the WTC

considered as the infringement of copyright Act. Unfortunately, many countries have included anti-circumvention provision under national law. It means that they provide scope of copyright protection more than provided by international instruments.

Theseventh is to provide maximum flexibilities for teaching exception. Teaching exception is one of the most essential exceptions for the sake of educational purpose and thus, national law can maximize this scope of exception as this exception is permitted under the Berne Convention.[69] Accordingly, it is important for developing countries to ensure that copyright act is drafted in manner that is to provide the possibility of the use the whole copyright for teaching purposes. Similarly, it is also important for national law of copyright to accommodate all types and forms of utilization in formulating the exception for this purpose, as long as it can justified by the purpose and harmonious with fair practice. It is important to note that this teaching exception should not also be limited to certain types of education, but for all level of education. One the best provision offered by the Berne Convention is that the number of copies of publication which can be made for teaching purposes should not be restricted.[70]

From the above explanation, it can be concluded that the flexibilities provided by Members countries to achieve the teaching purposes can be in the form of: (1) tolerate the use of the whole of a work for teaching; (2) tolerate all types and forms of utilization for teaching; (3) extend the teaching exception to all level and classes of education, including distance education; and (4) do not limit the number copies that can be used for illustrations for teaching. Again, those flexibilities are allowed under the International instruments, and accordingly national law shall be drafted to provide room for such flexibilities.

Furthermore, besides the flexibilities for teaching purposes, there are also flexibilities for quotation exception, which should also be provided at maximum level. Berne Convention provides compulsory exception on quotations for educational purposes.[71] Berne Convention does not restrict the ways quotation can be made, it can be made in any

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[69] Article 10 (2) of the Berne Convention

[70] Consumer International, Copyright and Access to Knowledge, p. 30.

[71] Article 10 91) of the Berne Convention

form, not only for book, but also can be made in the course of lecturer, in sound recording and in visual works of art. This quotation exception is also not restricted to literary works only, but also applies to artistic works. Furthermore, it is also useful to understand that Berne Convention does not restrict the length and the purpose of the quotation.

Moreover, official texts and their translations shall not be protected under copyright. Under the Berne Convention, there is a freedom to determine whether "official text of a legislative, administrative and legal nature, and to official translations of such texts,"[72] be protected under copyright or not. This means that Member countries can leave the official texts and their translations in the public domain. Similarly, political speeches and speeches delivered in the course of legal proceedings shall also not be protected by copyright law. As the Berne Convention stipulates clearly that the protection of political speeches and speeches delivered in the context of legal proceeding can be excluded from protection of copyright.[73] The reason for this is because such speeches embody educational value. Although this flexibility is available to all countries, but unfortunately just few countries provide such flexibility under their national copyright laws.

The last flexibility is to permits the use of copyright works in broadcasts. There is a freedom to decide the conditions under which the copyright holders can exercise his right of broadcasting according to the Berne Convention.[74] The term "condition" can be interpreted as imposition of compulsory license, but it also can be interpreted as free use. This interpretation can be used if we consider that broadcasting can also have a significant role for education, particularly as an instrument of transfer of knowledge. Usually, copyright holders have the right to determine the terms and conditions if his work will be used in broadcasting.[75]

V. INDONESIA'S OBLIGATION UNDER INTERNATIONAL

[72] Article 2 (4) of the Berne Convention
[73] Article 2 bis (1) of the Berne Convention
[74] Article 11 bis (2) of the Berne Convention
[75] Article 11 bis 91 of the Berne Convention

COPYRIGHT TREATIES

As mentioned earlier, Indonesia is country that has ratified all the three international copyright instruments, namely the Berne Convention, the TRIPs Agreement and the World Copyright Treaty (WTO) above. Even though like that, Indonesia still has several flexibilities in designing national copyright law meeting with education agenda, particularly access to knowledge, as analyses above also. These flexibilities can be divided into 3 (three) aspects in line with the above analysis.

The first aspect is about the scope of protection. Indonesia should not extend the protection to the works that are not mandatory to be protected as copyright works under the international copyright treaties. Indonesia should only grant the rights necessary to be granted to the holders of copyright.

The second aspect is about the period of protection. In this context, it is essential for Indonesia to strictly provide minimum period of protection to balance the interest of copyright holders and the public access. This period of protection is clearly specified under the TRIPs Agreement, that are for literary and artistic works, the protection is since life of the author until 50 years after the death of the author. Cinematographic works, anonymous or pseudonymous works are protected for 50 years after the making of the works or after the works has been made available to the public. While for the works falls within the category of applied art, they are protected for 25 years as artistic works. It is important to note that providing longer period of protection than that required by the international copyright instruments may potential to inhibit access to knowledge and science, particularly education materials.

The last aspect is about the limitations and exceptions, Indonesia should use all limitations and exceptions to copyright protection which available for this country in accordance with international instruments with the main objective to enhance the implementation of education agenda, particularly access to educational materials. These limitations and exceptions can be in many formulas, as mentioned earlier.

VI. INDONESIAN COPYRIGHT ACT AND THE SUBSTANTIAL PROVISIONS

After examining the flexibilities provides by the three international instruments, then followed by the Indonesia's obligations under such instrument, it is important to examine the implementation of such obligations and flexibilities under Indonesian new Copyright Act. It covers the scope of protection, the duration, limitations and exceptions provided under the new Act. Significantly, it examines whether this new Act has drafted to accommodate the need for access to knowledge in Indonesia, whether it uses all flexibilities provided under such instruments in maximal ways to provide access to knowledge. Or otherwise, Indonesia is over compliance to those instruments which potential to inhibit access to knowledge.

In the context of the scope of copyright protection, the new Indonesian Copyright Act provides the scope of protection for creation in the field of science, art and literature, which consists of:

a. Books, pamphlets, typographical arrangement of published works and all other written works;
b. Sermons, lecturers, speeches, and other works of utterance
c. Visual aid made for educational and scientific purposes
d. Songs and/or music with or without lyrics
e. dramas, musical dramas, dances, choreographic, puppet shows, and pantomimes
f. works of art in all forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures or collage
g. works of applied art
h. Architectural works
i. Map
j. Batik art and other art of motives
k. Photographic works
l. Portraits

m. Cinematographic works
n. Translations, interpretations, adaptations, anthologies, databases, adaptation, arrangement, modification and other works from the results of the transformation;
o. Translation, adaptation, arrangement, transformation, or modification of traditional cultural expression;
p. Compilation of creation or data either in a format that can be read by the computer program or other media;
q. Compilation of traditional cultural expressions as long as the compilation constitutes original works;
r. Video games; and
s. Computer program.[76]

With the very wide range of subject to be protected under the Article 40 above, it has indicated that the scope of copyright protection under Indonesian Copyright Act is wider than required by the international copyright instruments. This is very clear when "visual aid made for educational and scientific purposes" and "speeches" are protected under copyright. It means also that Indonesia does not use the flexibilities provided under those international instruments, or otherwise, over compliance. From this context, it is very difficult for Indonesia to expect a balance between the protection of copyright and access to educational material. This approach may not appropriate for developing country Indonesia at the time being on the basis that Indonesia needs a better access to educational material to enable this country achieves certain level of economic development.

From the perspective of the duration of copyright protection, the new Indonesia Copyright Act divided the duration of protection into 2 (two) periods. For books, pamphlets, and all other written works; Sermons, lecturers, speeches, and other works of utterance; visual aid made for educational and scientific purposes; songs and/or music with or without lyrics; dramas, musical dramas, dances, choreographic, puppet shows, and pantomimes; works of art in all forms such as paintings, drawings, engravings, calligraphy, carvings, sculptures or collage; architectural works; map; and batik art and other art of motives are protected for the

[76] See Article 40 of the Indonesian Copyright Act of 2014

life of the author plus 70 (seventy) years after the death of the author.[77] But, under the international copyrights instruments, such works is protected for the life of authors plus 50 (fifty) years after the death of the author. The length of protection until 70 years after the death of the author under Indonesian Copyright Act constitutes TRIPs-Plus norm, the norm that are not easily support access to educational materials in Indonesia.[78]

While for photographic works; portraits; cinematographic works; video games; computer program, typographical arrangement of written works; interpretations, adaptations, anthologies, databases, adaptation, arrangement, modification and other works from the results of the transformation; translation, adaptation, arrangement, transformation, or modification of traditional cultural expression; compilation of creation or data either in a format that can be read by the computer program or other media; and compilation of traditional cultural expressions as long as the compilation constitutes original works are all protected for 50 (fifty) year since at the first time it announced. This period of protection is also over compliance to the international treaties. However, for applied arts, they are protected for 25 years since at the first time it announced.

Based on the duration of protection above, it can be argued that Indonesia Copyright Act also provides a longer term of protection compared to the international Copyright instruments in which Indonesia should adhere to them. The approach to provide the longer period of protection under new Copyright Act has a potential to inhibit access to educational material in Indonesia. It means also that Indonesian Copyright Act has not been developed in manner to increasingly support access to knowledge.

Interestingly, the new Indonesian Copyright Act also provides limitations and exceptions. In the context of limitation, the Act clearly points out that there is no economic right for:

[77] See Article 58 (1) of the Indonesian Copyright Act of 2014.

[78] In the US for example, by providing protection for long period of time until 70 years after the death of the authors, society has to wait for long time for the works fall into the public domain where all of people can use it, transform it, adapt it, build on it, and republish it. See in James Boyle, *The Public Domain; Enclosing the Commons of the Mind*, Yale University Press, the US, 2008, p. 11

a. The use of short citation of creation or related rights product for reporting current event intended only for the providing real-time information;
b. Duplication of creation and related rights product only for the purposes of scientific research;
c. Duplication of creation and related rights product only for the sake of teaching, except for performances and phonograms which have been announced as teaching materials; and
d. The use for education and development of science that allows a creation and related rights product may be used without the permission of performers, producers, phonograms, or broadcasting.[79]

This Article 26 above is considered as a "fair use" doctrine,[80] and this doctrine is familiar and permitted under international copyright instruments, and all national copyright laws provides the fair use provisions to ensure access to education and development of science and research.[81] However, the degree of such "fair use" is varied from one national law to another.

While in the context of exceptions, the Act stipulates that, there are some conducts which are not regarded as copyright infringement. These conducts are as follows:

a. distribution and the use of state emblem, and national song according its original nature;
b. announcement, distribution, multiplication of something that held by or on behalf of government, except otherwise be protected by regulation.
c. taking actual news, whether wholly nor partially from news office, broadcasting institution, and newsletter and other sources as long as the source must be completely mentioned; or
d. make and disseminate the content of copyright through media of

[79] Article 26 of the Indonesian Copyright Act of 2014.
[80] The fair use doctrine was developed in the eighteenth century by English Common Law Judges in interpreting the 1710 Statute of Anne, with the main purpose was to encourage learning. The judges held that learning should be encouraged through unauthorized uses. Fair use consists of principles, and its purpose is to ensure that creativity flourishes in the face of over protection of exclusive rights. See in Willian Patry, *How to Fix Copyright*, Oxford University Press, 2011, p. 215
[81] *Ibid.*

information technology and communication that is no commercial and creator has no objection for such conducts;

e. the duplication and distribution of president portrait, and other public figures, by taking into consideration the dignity and fairness in accordance with regulation.[82]

Furthermore, the duplication and modification of a creation, will not be regarded as infringement of copyright if it used for the purposes of (1) education, research, and writing scientific papers; (2) security, governance, legislative and court; (3) speech for the purpose of education and science only; and (4) uncommercial performance.[83] This exception also includes access for education material designed for blind people.[84]

However, for certain types of works or creations, the duplication can be made for one duplicate only, such as for computer program[85] and the duplication for private interest.[86] Furthermore, non-commercial institutions, like library is allowed to duplicate one copy only. Such duplication is only permitted for the sake of education and research, and cannot be repeated.[87] The duplication for the purpose of information also justified as long as it mentioned the source, and name of the author clearly.[88] By providing restriction for one copy only, means that the approach used by Indonesian Copyright Act is to limit the duplications of copyrighted materials, as international copyright instruments does not provide limitation to such duplication as long as for education, and research and development purposes.

Based on the above explanation, it can be clearly concluded that, Indonesia does not use all limitations and exceptions provided by international copyright instruments to enhance access to knowledge and educational materials. It is clear that Indonesia restricts the duplication of books in the library for one duplicate only. But international copyright instruments do not restrict it.

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[82] Article 43 of the Indonesian Copyright Act of 2014.
[83] Article 44 (1) of the Indonesian Copyright Act of 2014.
[84] Article 44 (2) of the Indonesian Copyright Act of 2014.
[85] Article 45 of the Indonesian Copyright Act of 2014.
[86] Article 46 of the Indonesian Copyright Act of 2014.
[87] Article 47 of the Indonesian Copyright Act of 2014.
[88] Article 48 of the Indonesian Copyright Act of 2014.

VII. CONCLUSION

Although access to knowledge and science has a substantial influence for economic progress in developing country Indonesia, new Indonesian Copyright Act has not been developed in manner to increasingly support such access. Providing strongest protection Copyright under new Indonesian Copyright Act is beyond what is required by the international Copyright treaties which Indonesia has acceded to them, even it consists of TRIPs-Plus norms. This new Act provides a higher standard of protection, ensures more legal certainty of copyrights holders, particularly for the effort to provide a better economic rights of the creators/authors. And because of that, This new Act provides unbalance protection between private rights (author's rights) and public rights (the larger public interest, particularly education, research and access to information).

This Article concludes that all available limitations and exceptions provided by international Copyright treaties that would have opened up access to knowledge has not incorporated into this Act. This Act is not only expands the scope of protection and duration, but also provides narrow limitations and exceptions to ensure better economic rights for the right holders, and paid less attention to the access to knowledge, particularly educational materials. Accordingly, this Act has a potential to inhibit access to knowledge.

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