



JUSTICE AND ORDER IN REGULATIONS ON HANDLING THE DISTRIBUTION OF FAKE PAINTINGS JUSTICE AND ORDER IN THE REGULATION OF MANAGING THE DISTRIBUTION OF COUNTERFEIT PAINTINGS

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Abstract

Painting is one of the works of art that is protected by law, but the spread of fake paintings is still rampant. The purpose of law is the existence of justice and the creation of order. Justice and order can be realized if the law proceeds. The sustainability of the law can occur if it is in accordance with the values that exist in society. Therefore, it is necessary to know how the regulation regarding the spread of fake paintings works in society, so the purpose of the law can be realized. The relevant regulations in this regard are more focused on the crime of fraud as regulated in the Criminal Code and Copyright Law. This is because this study will discuss the public issue of the spread of fake paintings. This study is intended to explain how the purpose of law, justice and order, can be realized in terms of handling the fake painting by looking at the situation in the community concerned. Based on the problems raised, the research method that will be used in this study is a normative research method.

Keyword: Fake Paintings, Copyright Law, Criminal Code, Fraud, Justice and Order, Normative Research

1. Introduction

Paintings are works of art that are protected by the Indonesian constitution. This can be seen in Article 28C number (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) which mentions the acquisition of benefits and education from art and culture as the right of every individual ¹. The existence of Law Number 28 of 2014 concerning Copyright (hereinafter referred to as UUHC) is one manifestation of this protection. However, there are still many problems with fake paintings spreading in Indonesia. This problem is not only a matter of copyright infringement, but a crime that exists in the world of art. Based on the article on forgery in the Criminal Code (hereinafter referred to as the Criminal Code) because the act of forgery regulated in the Criminal Code is only forgery of: 1.) currency and paper money, 2.) stamps and brands, 3.) letters ². This article does not cover fake paintings. Perpetrators who forge paintings or who intentionally sell fake paintings can be subject to criminal penalties based on Article 380 Paragraph (1) and (2) of the Criminal Code (fraud article) which reads “(1) Threatened with a maximum prison sentence of two years and eight months or a maximum fine of five thousand rupiah:

1. Whoever places a false name or mark on or in a literary, scientific, artistic or craft product, or falsifies a genuine name or mark, with the intention of making people think that it is truly the work of the person whose name or mark he places on or in it;
 2. Whoever intentionally sells, offers, delivers, has stock for sale or imports into Indonesia, literary, scientific, artistic or craft products, in which or on which a false name or mark has been placed, or whose original name or mark has been falsified, as if it were truly the product of the person whose name or mark has been falsely placed.
- (2) If the proceeds belong to the convict, they may be confiscated.” ³.

¹See "Fourth Amendment to the 1945 Constitution of the Republic of Indonesia", Article 28C number 1.

²See “Criminal Code of the Republic of Indonesia”, Chapter X - Chapter XII.

³Ibid, Article 380 Paragraphs (1) and (2).

This regulation does not solve the problem of the large number of counterfeit paintings circulating in Indonesia. This is because many of these fake works by masters have been sold repeatedly by sellers who are unaware of their authenticity, making it difficult to track down the perpetrators. Buyers often do not feel cheated even though they know the paintings are fake because of the lower price and quality⁴. Inda Citraninda Noerhadi also stated in her book, "The History of Painting Copyright," that to this day, the trade in counterfeit works remains an unresolved issue⁵. Furthermore, there is no specific body that can assess the originality of a painting, making it difficult to verify its authenticity. Counterfeit artworks can even be found in private collections belonging to galleries or art museums. An example of a related case in Indonesia is the case of a counterfeit painting belonging to the private collection of the Oei Hong Djien Art Museum in 2012. Paintings are one of the creations protected by Law Number 28 of 2014 concerning Copyright (hereinafter referred to as the Copyright Law), in accordance with what is stated in Article 40 paragraph (1) letter f of the law⁶. Commercial duplication of a creation without the permission of the creator or copyright holder is also prohibited in Article 9 paragraph (3) of the Copyright Law⁷. In addition, Article 114 in conjunction with Article 10 of the Copyright Law states that "Any person who manages a trading place in any form who intentionally and knowingly allows the sale and/or duplication of goods resulting from infringement of Copyright and/or Related Rights in the trading place he manages as referred to in Article 10, shall be punished with a maximum fine of IDR 100,000,000.00 (one hundred million rupiah)."⁸ However, Article 120 of the Copyright Law explains that the crime referred to in the Copyright Law is a complaint-based offense. This prevents third parties, including buyers of counterfeit paintings, from reporting copyright infringement.

The authenticity of a painting is also difficult to trace. This can be due to limited technology and costs to prove the authenticity of the painting as well as the active role of the artist and other related institutions in collecting works to facilitate the identification process. As a result, differences of opinion regarding a work can arise. An example of a case that illustrates this is the case of the auction of a painting by Nyoman Gunarsa which was declared a fake by Indrawati, the wife of the late Nyoman Gunarsa. She admitted to being very familiar with his work and knew that the work to be auctioned was a fake because the strokes, proportions, and the dancer's style in the painting were different, so she reported this to the auction house. The auction house also stated that the previous owner purchased the painting directly from the artist. still held the auction, even though according to Indrawati he had never sold his work and all those who wanted to buy his paintings always went through him⁹. The Jakarta Masterpiece Auction also stated that the auction for the painting had gone through a selection process and passed the verification of the curator team. In addition to several expert teams and curators from the Jakarta Masterpiece Auction, the painting has also been seen by Independent curators (among them, Agus Dermawan, Tantono, Mikke Susanto, Siont Teja, Yakob,) and other renowned collectors and declared authentic by them. The painting is also a collection of a Professor at the National Resilience Institute (LEMHANAS), which was obtained in Bali directly from the painter and his collection of paintings has never been obtained from other parties (directly from the painter). In addition, the Jakarta Masterpiece Auction also stated that the painting did not receive any objections from Nyoman Gunarsa when he was still alive when it was first auctioned on May 11, 2014, lot 29¹⁰.

Based on the description above, there is a problem regarding the distribution of counterfeit paintings. This research will focus on the suitability of regulations regarding the handling of counterfeit paintings with the legal objectives for the injured parties. The intended legal objectives in this case are regarding order and justice. In addition, the handling in this case will be seen from the follow-up to the sale of the counterfeit painting. The parties to be discussed in this research are those who are harmed by the existence of the counterfeit painting. The discussion only covers painting forgery that occurs domestically. The paintings that will be discussed in this case are paintings by

⁴Inda Citraninda Noerhadi, *History of Painting Copyright*, ed. Zen Hae (Jakarta: Komunitas Bambu, 2012), p. 138.

⁵*Ibid*, p. 171.

⁶Republic of Indonesia Law, "Law of the Republic of Indonesia Number 28 of 2014 Concerning Copyright. State Gazette of the Republic of Indonesia 2014 Number 266. Jakarta" (2014), Article 40 paragraph (1) letter f.

⁷*Ibid*, Article 9 paragraph (3).

⁸*Ibid*, Article 114 in conjunction with Article 10.

⁹Anonymous, "Shameful! Fake Nyoman Gunarsa Painting Auctioned at Masterpiece Jakarta," *beritafajartimur.com*, September 23, 2018, <https://beritafajartimur.com/2018/09/23/memalukan-lukisan-palsu-nyoman-gunarsa-dilelang-di-masterpiece-jakarta/> (Accessed June 15, 2021).

¹⁰Anonymous, "The Painting Auctioned as Masterpiece is Original," *beritafajartimur.com*, September 28, 2018, <https://beritafajartimur.com/2018/09/28/lukisan-yang-dilelang-masterpiece-adalah-asli/> (Accessed June 15, 2021).

maestros, "people who are experts in the field of art, especially music, such as composers, conductors; masters"¹¹. Since this research will discuss the public problem of the distribution of counterfeit paintings (not the issue of buying and selling which only looks at the losses of certain individuals), the regulations will be more focused on the Criminal Code and UUHC. Therefore, the formulation of the problem that will be raised in this research is:

1. How is there justice in handling the distribution of fake paintings for parties who are harmed by the existence of these fake paintings?
2. What is the existing order in the regulations in the Criminal Code and UUHC regarding the existence of fake paintings?

2. Research Methods

The research method used in this study is normative and qualitative. This is because the study will discuss the issue in depth, emphasizing secondary data, such as laws and regulations and other literature, rather than primary data, which is data obtained directly from the community. Furthermore, the author's observations are also included in this study.

3. Results and Discussion

3.1 Justice and Order

This subchapter will discuss the objectives of law that should be realized in existing regulations. This discussion is necessary to assist in answering the problem formulation, which will be discussed further in the following subchapters. In this regard, there are three theories regarding the objectives of law:

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|-------------------|--------------------------|---|
| 1. Ethical Theory | ☐ | the purpose of law is justice |
| 2. Utility Theory | ☐ | law is used for the pleasure and happiness of many people |
| 3. Mixed Theory | ☐ | order as the main goal of law ¹² |

Based on this theory, differences can be seen regarding the primary purpose of law. In this case, the author argues that both justice and order must be realized by law. A balance is needed between justice and order. In a journal written by Asep Warlan, it is stated that justice is the goal of law included in Pancasila. As the main source of law and the philosophical basis of life for Indonesian society, the implementation of regulations must be centered on justice. This justice is an essential demand that every person has and must not be violated, must be protected by law, and can be transformed through various life interests in various fields (economic, social, cultural, and others)¹³. In addition, it is explained in a journal written by Kania Dewi Andhika Putri that justice according to law is the existence of equal rights and obligations. This right is a right that must be fulfilled and owned by everyone, namely the right to receive legal protection and defense. The existence of this right is also balanced by the existence of obligations that must be obeyed¹⁴. In a journal written by Hayat, it is also stated that justice in law is related to legality. A rule can be said to be fair if its application in all cases applies equally to everyone and does not favor certain individuals or groups (not discriminatory)¹⁵.

Based on these considerations, it can be concluded that justice as the goal of law is placed at the constitutional level, which regulates society as a whole in various areas of life and is realized through the application of non-discriminatory rules. However, justice cannot be seen solely based on the goodness or badness of the legal substance in a regulation. The suitability of the regulation to the community concerned must also be considered. This is also reflected in Elly Rosana's statement in her journal. She stated that the implementation of a law depends on the public's acceptance of the law itself, so the law must be in accordance with the principles of justice that exist in society¹⁶. Therefore, the law must follow developments in society. Roscoe Pound also stated that the most important

¹¹"KBBI," kbbi.web.id, accessed September 30, 2020, <https://kbbi.web.id/maestro>.

¹²Oksidelfa Yanto, *The Rule of Law: Justice, Certainty, and the Benefits of Law (In the Indonesian Criminal Justice System)* (Bandung: Pustaka Reka Cipta, 2020), pp. 26-27.

¹³Asep Warlan Yusuf, "Law and Justice," *PADJADJARAN Journal of Legal Studies* 2, no. 1 (2025), pp. 4-5.

¹⁴Kania Dewi Andhika Putri, "A Theoretical Review of Justice and Certainty in Law in Indonesia," *MIMBAR YUSTITIA* 2, no. 2 (December 2018), p. 149.

¹⁵Hayat, "Justice as a Principle of the Rule of Law: A Review of the Concept of Democracy," *PADJADJARAN Journal of Legal Studies* 2, no. 2 (2015), p. 392.

¹⁶Elly Rosana, "LAW AND SOCIETY DEVELOPMENT," *TAPIS Journal* 9, no. 1 (2013), p. 101.

aspect in creating a responsive legal model is social interest¹⁷. Besides justice, there is a theory that suggests that the purpose of law is to create order. According to Mochtar Kusumaatmadja, human interests can be protected through order. This is in line with Sudikno Mertokusumo's view that legal norms essentially serve to protect human interests, thereby realizing the goal of law, which is social order¹⁸. In the mixed theory (one of the theories on the purpose of law), it is stated that order is the main goal of law and a prerequisite for realizing an orderly society. In addition to order, Mochtar Kusumaatmadja also states that there is another goal in the form of justice, the content and dimensions of which vary¹⁹. Based on this understanding of order, it can be concluded that achieving order in society is done through compliance with the law. This is in accordance with what Ellya Rosana stated in her journal regarding legal compliance. Society behaves according to its own legal awareness, so the legal objectives aspired to by the lawmakers are not necessarily realized. Regulations that are intended to strengthen existing values in society will not experience problems with legal awareness²⁰. Similarly, the discussion on justice can be realized in real terms if there is acceptance from society so that the law can be implemented. Therefore, social aspects that arise and develop in society are very important in the continuity of the law. Soerjono Soekanto also explained that social changes do not occur simultaneously with legal changes. Legal development can lag behind the development of other social elements in society, thus causing an imbalance in the development of social institutions (social lag)²¹.

3.2 Justice for Parties Harmed by the Distribution of Fake Paintings

Fine art products have economic value that is dynamically progressive over time. According to Sanento Yuliman, all periods of high sales of paintings are marked by an increase in the number and frequency of exhibitions, an increase in the growth of commercial galleries, sponsors, and collectors, as well as other symptoms such as the presence of counterfeit paintings²². Directly, it can be seen that the existence of counterfeit paintings is detrimental to buyers of counterfeit paintings and copyright holders of the forged paintings. As previously discussed in the introduction, buyers can sue for fraudulent acts of selling counterfeit paintings under the Criminal Code. Copyright holders also receive protection from the Copyright Law. However, because criminal prosecution for copyright infringement is a complaint offense, copyright holders must play an active role in resolving the problem of counterfeit paintings.

Copyright is one of the Intellectual Property Rights (hereinafter referred to as IPR) protected by law. IPR emerged in Western society as a recognition of the creative results of the use of human intellectual abilities. Legal protection for IPR consists of the exclusive right to enjoy economic benefits from the results of intellectual abilities²³. Legal protection of IPR is related to economic issues. Therefore, this legal protection only covers issues regarding the commercialization of IPR²⁴. Few cases of painting forgery in Indonesia end up in court. There are still no deterrent penalties for those that do. Many copyright holders of counterfeit Old Master paintings remain unresponsive to the issue. This has given rise to civil disputes over the purchase of counterfeit paintings²⁵. The proliferation of counterfeit paintings and the lack of scrupulousness and public awareness regarding purchasing fake paintings make it difficult to track their distribution. The absence of regulations or institutions that can oversee the circulation or verify the authenticity of a painting facilitates the spread of fake paintings. These fake paintings can even be found in the

¹⁷Mushafi and Ismail Marzuki, "The Intersection of Law and Society in the Study of Legal Sociology," *Jurnal Cakrawala Hukum* 9, no. 1 (June 1, 2018), <https://doi.org/10.26905/idjch.v9i1.2168>, p. 54.

¹⁸Wahyu Nugroho, "Reconstruction of Development Law Theory into the Formation of Environmental and Natural Resources Legislation Post-Reform in the Building of a Legal State," *Indonesian Legislation Journal* 14, no. 4 (December 2017), pp. 370-372.

¹⁹Yanto, *State of Law: Justice, Certainty, and the Benefits of Law (In the Indonesian Criminal Justice System)*, p. 27.

²⁰Ellya Rosana, "LEGAL COMPLIANCE AS A FORM OF SOCIETY'S LEGAL AWARENESS," *TAPIS Journal* 10, no. 1 (2014), p. 12.

²¹Soerjono Soekanto, *Main Points of Legal Sociology* (Jakarta: Rajawali Pers, 2013), p. 115.

²²Dwi Suwityantini, "Marketing Strategy for Painting Works (Case Study at the Art Jog Fine Arts Exhibition and Art Market)," *Dewantara Economic Journal* 1, no. 8 (August 2018), pp. 67-68.

²³Abdul Latif Mahfuz, "Legal Problems of Intellectual Property Rights (IPR) in Indonesia," *Journal of Legal Certainty and Justice* 1, no. 2 (June 2020), pp. 50-51.

²⁴Wicaksana, "COPYRIGHT PLAGIARISM OF ARTWORKS IN BALI," *Journal of Environment & Development* 1, no. 1 (June 2017), p. 47.

²⁵TEMPO Investigation Team et al., *Tracking Fake Paintings*, ed. Syakieb Sungkar et al. (Jakarta: KPG (Gramedia Popular Library), 2018), p. 229.

collections of art galleries and museums. This raises concerns for parties other than buyers and copyright holders. Sellers, collectors, art galleries, and art museums can suffer losses if the paintings they possess are fake. Art academics will also face difficulties if the photograph of a painting they reference for research is a forgery. Museums are institutions closely linked to science. This is because museums are centers of scientific research whose results are expected to be communicated to the public²⁶. According to American museum expert A.C. Parker, a museum in the modern sense is an institution tasked with actively explaining the world, humans, and nature. Museums were established for the sake of preserving and developing cultural heritage, providing non-formal education, and providing public information. In today's art museums, activities are not only about exhibiting works, but also about community activities such as seminars, book reviews, and others²⁷. Therefore, the presence of fake paintings in museums is very disturbing for academics as well.

Based on the explanation above, the injured parties in this case can be divided into 2 categories, namely

1. Those who are directly harmed:
 - Buyers of fake paintings who buy directly from the fraudsters
 - The copyright holder of the forged painting
2. Those who are indirectly harmed:
 - Other parties such as sellers, collectors, art galleries, art museums, academics

Regulations relating to parties in the first category are already regulated in the Criminal Code and UUHC, while regulations that can prevent or overcome losses for parties in the second category do not yet exist.

According to the author, the legal substance of the regulations addressing counterfeit paintings is fair. This is because the regulations are not discriminatory or biased towards one party. These regulations include articles on fraud in the Criminal Code and general sales in the Civil Code, as well as criminal acts in the Copyright Law. However, these regulations only address general issues and relate to civil economic losses, whereas the justice envisioned in the 1945 Constitution encompasses justice across all areas of life. This demonstrates a legal vacuum in specifically and comprehensively regulating the distribution of counterfeit paintings, for example, the absence of regulations that could prevent their widespread distribution. The justice contained in these regulations does not align with the values of justice inherent in society. These values of justice are not met in the existing regulations.

3.3 Order in Handling Fake Paintings Viewed from the Criminal Code and UUHC

This sub-chapter will focus on the follow-up actions taken regarding the fake paintings, based on the Criminal Code and the Copyright Law. The relevant regulations include those on fraud under the Criminal Code and the sale of fake paintings under the Copyright Law. This is because this research will address the public issue of the distribution of fake paintings, not the issue of buying and selling, which focuses solely on the losses of specific individuals. In the previous subchapter on justice and order, it was explained that the realization of order is closely related to the public's legal awareness to comply with applicable laws. This will not be a problem if the values contained in the regulations are in accordance with the values that exist in society. According to Philipus M. Hadjon, legal protection for the community takes the form of preventive and repressive government actions. Preventive in this case means that the government is more careful in making and making decisions because it is a preventative measure, while the word repressive in this case means the government is firm in making and making decisions because there are rules that are violated²⁸.

Order is expected to be achieved if the law is enforced. In addition to public legal awareness, law enforcement is an effort to implement it. Three elements must be considered in law enforcement: legal certainty, legal benefits, and justice. Legal certainty is expected to create a more orderly society, while benefits are expected to accrue to the public through law enforcement. Furthermore, the element of justice is a key consideration. However, law enforcement is difficult because, in reality, many laws and regulations still do not address issues that arise in society²⁹. As explained previously in the Introduction, the act of intentionally selling fake paintings is classified as a criminal act of fraud as regulated in Article 380 of the Criminal Code. In paragraph (2) of Article 380, there is a follow-up

²⁶Dedi Asmara, "The Role of Museums in History Learning," *Kaganga: Journal of History Education and Social-Humanities Research* 2, no. 1 (June 30, 2019): 10–20, <https://doi.org/10.31539/kaganga.v2i1.707>, p. 17.

²⁷Sasferi Yendra, "Museums and Galleries," *Journal of Arts Management* 4, no. 2 (December 2018), p. 104-105.

²⁸M. Husein Maruapey, "LAW ENFORCEMENT AND STATE PROTECTION (Critical Analysis of the Case of Blasphemy by the Incumbent Governor of DKI Jakarta)," *Journal of Political Science and Communication* VII, no. 1 (June 2017), p. 23.

²⁹Laurensius Arliman S., "REALIZES GOOD LAW ENFORCEMENT IN THE LEGAL STATE OF INDONESIA," *Dialogica Iuridica: Journal of Business and Investment Law* 11, no. 1 (November 2019), p. 9.

JUSTICE AND ORDER IN REGULATIONS ON HANDLING THE DISTRIBUTION OF FAKE PAINTINGS

JUSTICE AND ORDER IN THE REGULATION OF MANAGING THE DISTRIBUTION OF COUNTERFEIT PAINTINGS

Rachma Veda Zainsyah et al

action in the form of confiscation of goods. This is "permissible" if the goods are literary, scientific, artistic or craft products belonging to the convict.³⁰ However, the word "permissible" in the verse indicates that this action is not mandatory. Furthermore, there is no further action in the form of data collection, marking, or destruction by the authorities regarding counterfeit goods, in this case, the fake painting. The victim's active role and awareness in reporting the crime are still required, even though this crime is a common offense. This is because the authorities certainly need information regarding the whereabouts of the fake painting to take action. As explained in the Introduction, paintings are a work protected by the Copyright Law, prohibiting their commercial reproduction without the permission of the creator or copyright holder. Venue managers who know and allow this to happen can also be subject to criminal penalties. However, the criminal offense referred to in the Copyright Law is a complaint offense. This is expressly stated in Article 120 of the Copyright Law³¹. Therefore, the implementation of this article is highly dependent on the active role and awareness of the copyright holder.

The absence of preventive regulations requires the public to take the initiative to take preventive measures in the case of ownership of fake paintings, which can be done. Purchases of artworks made directly from the artist can be done with clear proof of ownership, as well as ownership of paintings as gifts. However, obtaining proof of ownership is difficult for works that are ignored by the artist or retailer. The existence of a certificate of authenticity of the artwork is very important in the case of ownership of the artwork. This certificate is issued by the artist in question or can be assisted by experts if the artist is deceased. This ownership problem is also beginning to be recognized by other parties such as collectors and several other companies with the initiative to conduct data collection and record their collections³². However, these preventive efforts are still ineffective because the regulation of checking the origin of museum collections is still lacking, since the paintings that will be included in the museum collection may be paintings that have been sold or changed hands many times (how far is the traceability of the origin of the museum collection carried out?). Furthermore, not all paintings have a certificate of authenticity, and experts who can be asked to help issue such certificates are still limited. The heirs of the artist who requested the certificate may not necessarily know the authenticity of the painting.

The absence of regulations to prevent the spread of counterfeit paintings also makes parties other than the victims of fraud and copyright holders, as discussed in the previous sub-chapter, dependent on the legal awareness of the victims and copyright holders. The small number of counterfeit painting cases brought to court and the widespread distribution of counterfeit paintings also indicate a lack of activeness in resolving the problem of counterfeit paintings by victims and copyright holders, as well as preventive actions from other parties. Therefore, the author concludes that order cannot be achieved if the regulations are not supported by legal awareness in society and are also not complemented by a preventive regulation or institution that can handle the spread of counterfeit paintings.

4. Conclusion

Based on the results of the discussion in this study, the author concludes that the existing justice in the regulation regarding the distribution of fake paintings is still not comprehensive. The justice contained in the regulation only looks at economic justice, while this problem is not only an economic issue, but also extends to issues in the world of art education. Furthermore, the regulation regarding the handling of the distribution of fake paintings still cannot create order because it is still very dependent on the legal awareness of the community itself and is not equipped with rules or institutions that are expressly and specifically preventative against the distribution of such paintings. However, due to the limited available data, this study is still unable to explain in depth the inconsistencies felt by the parties who are harmed by the related regulations. The author suggests that art institutions should play a role in assisting with painting registration, authenticity checks, and authenticity certificate verification. This is expected to combat the spread of counterfeit paintings. If possible, these institutions could also play a role in monitoring the spread of counterfeit paintings.

³⁰Criminal Code of the Republic of Indonesia, Article 380 paragraph (2).

³¹Law of the Republic of Indonesia, Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright. State Gazette of the Republic of Indonesia 2014 Number 266. Jakarta, Article 120.

³²Noerhadi, History of Painting Copyright, p. 341, 343-352, 363.

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