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## Critical Analysis of the Supreme Court Decision Number 63/PUU-XIX/2021 Regarding Sold Flat of Copyrights

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**Abstract:** This article is titled Critical Analysis of The Supreme Court Decision Number 63/PUU-XIX/2021 regarding Sold Flat of Copyright which criticizes about The Law of The Republic of Indonesia Number 28 of 2014, hereinafter referred as UUHC, especially in Article 18 and 122. The aim of this research is to analyze the concept of sold flat in UUHC which is contradictory compared to common knowledge and its relevance to the law system in Indonesia. The research method used in this writing is a normative juridical research, namely by conducting a literature study. The study shows that the term to return the economic right to the creator after the sold flat contract reaches twenty-five years, is required because the theory which fundamentally underlies the drafting of UUHC was structured to prioritize protecting the creator (subject), not the creation (object). Therefore, instead of forcing that term in UUHC which causes *contradictio in terminis*, this study provides suggestion to remove the concept of sold flat in UUHC and use the concept of license as the only way for creator to transfer the economic right to be exercised by other parties as Licensee.

**Keyword:** Copyright, Sold Flat, License.

### INTRODUCTION

Just as the numbers are important for the mathematics, so are the words for the law. It is because the law was formed from a series of word which defines certain meaning to regulate the flow of rights and obligations as legal acts. Hence, in formulizing a law, the lawmaker is obligated to choose term which do not cause any contradiction. Nonetheless in fact, it is truly unfortunate that the lawmaker in Indonesia pays less attention to the choice of correct vocabulary. Even it is common to find error in typing.

Concerning this matter, the author found contradictory term in The Law of The Republic of Indonesia Number 28 of 2014 on Copyright, hereinafter referred as UUHC, namely the term sold flat which is regulated in Article 18 and 122.

Both articles have actually been requested to The Supreme Court of The Republic of Indonesia, to be reviewed their material truth. In the end, The Proceeding of The Supreme Court decided that Article 18 and 122 of UUHC were contradictory to 1945 Constitution of The Republic of Indonesia, and were deemed that they did not have binding legal force. They are

stated in The Supreme Court Decision Number 63/PUU-XIX/2021 and the author believes that it should also explicitly revoke the term of sold flat.

In term of terminology, sold flat is defined as an act of selling and buying entirely. It means that the object of sold flat is transferred wholly from the seller to the buyer 'at time' the buyer has fully paid the price to the seller which has been agreed before. The term 'at time' also means that the duration of owning the object which buyer had bought, does not be limited by any period of time because the act of sold flat is complete. It is supported by Article 28 H Paragraph 4 of 1945 Constitution of The Republic of Indonesia which states that every person has the right to own private property rights and these rights may not be taken over arbitrarily by anyone. However, UUHC interprets different meaning for sold flat. In UUHC, sold flat is a legal act of selling and buying with a term to return the object of sold flat to the creator after the contract reaches a period of twenty-five years albeit the buyer has paid for it and own it. This term shows that the buyer's right to own the object of sold flat is taken over arbitrarily by the law. Thereupon, both laws are contradictory.

As is known, if there is a contradiction of norm between laws, it is solved by applying The Principle of Derogation to mutually compare and eliminate the validity of either norm. In this case, since UUHC is hierarchically lower than 1945 Constitution of The Republic of Indonesia, The Principle of Derogation used is *lex superior derogat legi inferiori*. It means that UUHC as the *legi inferiori*, is not supposed to regulate a rule which is contradictory with 1945 Constitution of The Republic of Indonesia as the *lex superior*.

For this reason, the author tries to analyze farther about the exact meaning of sold flat and present suggestions which is able to harmonize the theoretical abstractions and the concrete facts in practice.

## METHOD

It is a civil law research, especially studying about Intellectual Property Law and Contract Law. The method used in this writing is a normative juridical research which analyzes written positive law and draws on legal principles for interpreting legal subjects, rights and obligations, legal events, legal acts, legal relationships, and legal objects. The type of data used is secondary data, which means that the data was obtained from the existing sources. The analysis was undertaken by a literature study of library materials which are divided into three legal materials: primary legal materials, namely materials whose contents have binding force on society, such as statutory regulations and their explanations; secondary legal materials, namely legal materials whose contents provide information or matters related to the contents of primary sources and their implementation, such as books, scientific articles, and the internet; lastly tertiary legal materials, namely materials which provide instructions and explanations for primary and secondary legal materials, such as dictionaries.

## RESULTS AND DISCUSSION

Legal problems resulting from an incorrect legal forming should be immediately addressed by The Lawmaker in Indonesia, both from the government and the academics. A usage of an incorrect term cannot be tolerated as a normal thing. By doing so, The Law in Indonesia can develop, both in terms of substance and its implementation.

Beforehand mentioned in the introduction, there is a problem with the term sold flat in UUHC. To anatomize this problem, the author starts with one of The Source of Contract Law in Indonesia which is The Civil Code as the *lex superior*.

Referring to Article 1313 in conjunction with Article 1457 of The Third Book of The Civil Code, Selling and Buying Agreement is an agreement in which a party binds himself to hand over an object and the other party pays the promised price. When this agreement is written, it is called as contract.

Afterwards, all contract complies to The Principle of Freedom of Contract. This principle is universal and essential. Firstly, it is universal because it is applied by all countries in the world, both which adhere to Common Law System or to Civil Law System. In Civil Law System, it is regulated in Article 1320 in conjunction with Article 1338 of The Civil Code which points that:

1. the agreement binds the parties as law for those who make it,
2. the ability to make an agreement,
3. the existence of a certain subject matter,
4. the existence of a reason that is not prohibited, which means it must be implemented in good faith, and
5. the agreement cannot be withdrawn other than by approval of both parties or for reasons determined by law.

Secondly, it is essential because it contains Human Rights, where in Indonesia, it has been accommodated in Article 28 H Paragraph 4 of The 1945 Constitution of The Republic of Indonesia as previously mentioned in the introduction. In sum, the meaning of the freedom of contract is that the capable parties are free to create the agreement containing to any matter, as long as it does not contradict with the law, morality, and public order.

From the summary, it is found nothing mentioning about returning the object of contract. Otherwise, although Selling and Buying Agreement in UUHC is a sold flat contract, UUHC inconsistently regulates to return the object of sold flat after the contract reaches a period of twenty-five years. It is clearly mentioned in Article 18 and 122 of UUHC:

1. Article 18 of UUHC: Creations of books, and/or all other written works, songs and/or music with or without text which are transferred in sold flat, the copyright is transferred back to the creator when the contract reaches a period of twenty-five years.
2. Article 122 of UUHC: At the time this law comes into force, contracts regarding the creation of books and/or other written works as well as songs and/or music with or without text which are transferred in sold flat that was made before the enactment of this Law are returned to the creator with the following conditions.
  - a. A sold flat contract which at the time this law comes into force has reached a period of twenty-five years whose copyright is returned to the creator two years after the enactment of this law;
  - b. A sold flat contract which at the time of enactment of this law has not yet reached a period of twenty-five years, the copyright will be returned to the creator after twenty-five years have been reached since the signing of the intended sold flat contract plus two years.

Examining both articles above, it is concluded that there is no farther explanation about the method of returning the object of sold flat, whether it is returned automatically with or without stated in the contract, or it has to be a certain procedure of retransferring (transfer back).

Apart from that, there is *contradictio in terminis* which means that there are contradictory terms within the same article, namely the term 'Sold Flat Contract is transferred without time limitation' and the term 'return to the creator when the contract reaches a period of twenty-five years.' It is truly contradictory. How is it possible that the term 'without time limitation' is then limited by a period of twenty-five years?

Furthermore, this inconsistency is increasingly visible when comparing Article 18 of UUHC to its explanation. In The Explanation of Article 18 of UUHC, it is stated that what is meant by sold flat is an agreement which requires the creator to hand over his creation through full payment from the buyer so the economic rights of that creation are entirely transferred to the buyer without a time limitation. It is obviously mentioned that there is no time limitation and nothing regulates to return the object of sold flat to the creator. To be more detail, that definition can be itemized into five elements which are:

1. Agreement,
2. The creator hands over his creation

3. Buyer makes full payment,
4. Economic rights are transferred entirely to the Buyer,
5. No time limitation.

The first element above, has already been explained in the beginning. Then, to understand the second and the fourth elements, the author briefs an overview of the copyright. Refer to Article 4 of UUHC, the copyright consists of the moral rights and the economic rights. Between those rights, the economic right is the object of sold flat which is able to be transferred. To be more specific, Article 16 Paragraph 1 of UUHC states that the copyright is an intangible movable object. As regards to the object, the definition can be found in Article 499 of The Second Book of The Civil Code. It states that goods are every object and every right that can be the object of the property rights. This property right is regulated further in Article 584 of The Second Book of The Civil Code. It is said that the property right cannot be obtained other than by taking it, by attachment, by passing of time, by inheritance either according to law or a testament, by appointment, and by a handover or a transfer, only by the person who was rightful to act on. Accordingly, this article is the base foundation for Article 16 Paragraph 2 of UUHC which mentions that the copyright can legibly be transferred in writing. 'In writing' refers to Article 613 of The Second Book of The Civil Code which states that the transfer of account receivable and other intangible objects are implemented by making deed.

Next, the third element is about full payment. In The Civil Code, it is known as a certain price which has been previously agreed by the seller and the buyer. Like transferring the economic right is an obligation for the seller (creator) and a right to the buyer, this full payment is also an obligation for the buyer and a right to the seller. It means that each full payment and transferring the economic rights, are the terms to receive one another. To be more particularized, the full payment is the term to receive the object of sold flat. Those binds both parties in sold flat contract like law.

Moving to the fifth element about time limitation, the term sold flat is called as 'Jual Beli Putus' in Bahasa Indonesia. The word 'Putus,' in accordance with KBBI, has the meaning of 'no longer related,' 'no more connection,' 'finished,' and 'ended.' It is a fundamental basis that the connection and the period of ownership on the object of sold flat which foregoing belong to creator, are ended 'at time' a certain price is fully paid by the buyer. Ergo, it is vivid that the term to return the object of sold flat to the creator, also causes contradiction in terminology.

The only way to understand that time limitation is by observing it from the historical perspective. UUHC is a ratification legal product from a Dutch Law namely Auteurswet 1912 Staatsblad Number 600. It complies to Civil Law System and is influenced by The Concept of Personality Theory (Monist Theory) by G. W. Frederick Hegel. Personality Theory is structured to prioritize protecting the person (subject) which is the creator, not the creation (object). At the same time, UUHC forced conforming to the concept of sold flat which is actually the antilogy of Personality Theory. It was presented by John Locke which is based on Common Law System. It emphasizes the protection on the object (creation). This is the source of the irrelevance of sold flat contract in UUHC.

By ignoring this source of irrelevance, the lawmaker is unfortunately failed to understand that the protection for the creator has been facilitated in the moral rights because it is eternally inherent to the creator. It means that the creator owns the moral rights permanently and continuously. By owning the moral rights in the copyright, the creator has the right to:

1. Continue to include or not include his name on the copy regarding the public use of his creation;
2. Use an alias or pseudonym;
3. Change the creation in accordance with appropriateness in society;
4. Change the title and sub-title of the creation;
5. Defend their rights in the event of distortion of the creation (the act of distorting a fact or the identity of the creation (Explanation of Article 5 Paragraph 1 letter e of UUHC)), mutilation

of the creation (the process or act of removing part of the creation (Explanation of Article 5 Paragraph 1 letter e of UUHC)), modification of the creation (alteration of the creation (Explanation of Article 5 Paragraph 1 letter e of UUHC)), or anything which is detrimental to one's honor or reputation (Article 5 Paragraph 1 of UUHC).

Additionally, these five rights in the moral rights, as regulated in Article 6 in conjunction with Article 7 Paragraph 1 and 2 of UUHC, is protected by the existence of the copyright management information and/or electronic copyright information (Copyright Certificate) containing the following matters.

1. a creation, which appears and is embedded electronically regarding creation announcement activities;
2. the name of the creator, his alias or pseudonym;
3. the creator as copyright holder;
4. the period and conditions of use of the creation;
5. the method or system which can identify the originality of the substance of the creation and its creator;
6. number, information code, and access code.

Copyright Certificate owned by creator is prohibited from being removed, changed, or damaged, as regulated in Article 7 Paragraph 3 of UUHC. It also means that sold flat does not change the identity of the creator on Copyright Certificate. The name in the copyright certificate remains in the name of the creator. Moreover, Copyright Certificate can be obtained by the creator by registering the creation independently on the website of The Directorate General of Intellectual Property of The Ministry of Law, with the following procedures.

1. The creator fills in the Copyright User Registration Form which can be accessed at <https://e-hakbuat.dgip.go.id/index.php/register> which is Appendix I to the Regulation of the Minister of Justice of the Republic of Indonesia Number M.01-HC.03.01 of 1987 on Registration of Creation. Data which must be filled in include the following: email address, password to be used, full name, National Identity Card Number, Date of birth, address, city, postal code, Province, Citizenship, type of applicant (State Ministries and Institutions, Regional Government, Educational Institutions, Research and Development Institutions, Regional Law and Human Rights Offices, Intellectual Property Rights Centers, Intellectual Property Rights Consultants, Micro, Small and Medium Enterprises, Legal Entities, Individuals), gender, and telephone number;
2. The creator will receive an email from COPYRIGHT INFO containing approval for account activation within a maximum period of two working days;
3. The creator enters the website using an account which has been activated at <https://e-hakcipta.dgip.go.id/index.php/login>
4. The creator fills out the Electronic Registration Request Form which can be accessed on the Copyright tab then New Application on the Dashboard;
5. The data which must be filled in include the following: type of application, type of creation, subtype of creation, title of the creation, brief description, date first announced, power of attorney data (if submitted by proxy), data of the creator as owner, data of other copyright holders (if any), attachments in PDF file format uploaded in the column provided with a maximum of 5mb per file, namely an official copy of the deed of establishment of the legal entity or a scan of the applicant's Indonesian Identity Card (KTP or Kartu Tanda Penduduk), company or individual's Tax Identification Number (NPWP or Nomor Pokok Wajib Pajak), statement of application for copyright registration, and sample of the creation (besides PDF it can be JPEG and MP4). After all the data is filled in, click submit.
6. The Creator receives a payment code through email which is valid for two working days and the Creator pays the registration fee in accordance with to the type of application and type of creation with a nominal value which has been calculated by the system based on Government Regulation Number 28 of 2019 on Types and Rates for Types of Open-Tax



State Revenues Applicable to the Ministry of Law. The data will be verified by the Directorate of Copyright within two working days and the Creator will receive a Copyright certificate (Copyright Registration Letter) through email and the Copyright certificate can also be accessed on the Creator's account. The Copyright Certificate contains a QR code.

Displeasingly for the buyer, the only proof for the ownership of the economic rights that he has bought from the creator, is the sold flat contract. If the sold flat contract is written in the form of a private deed, it would become difficult to be verified when it is confronted with a Notarial Deed. In author's opinion, the sold flat contract must be notarized because the verification for the ownership of copyright is highly important just as the sold flat contract of land is required to be made by The Land Deed Official (PPAT) to protect the buyer.

Another protection for creator has also been provided through license contract which is regulated in Article 1 Number 20 of UUHC. License contract is an agreement granting permission to other party as licensee to exercise the economic rights belonging to the creator as licensor and receive a percentage of royalties as an exchange. The amount of the royalty must be decided in common practice and meeting fairness for both of parties (Article 80 Paragraph 5 of UUHC). License contract is also required to be registered in The General Register of The Copyright License Contracts in The Ministry of Law as mentioned in Article 83 Paragraph 1 of UUHC (subject to a fee). If license contract is not registered, it has no legal consequences for the third parties (Article 83 Paragraph 3 of UUHC). This registration is the lawful evidence of ownership for Licensee if a dispute arises later.

Therefore, with the existence of license contract, sold flat contract with term to return the object, is not only unnecessary, it also makes a gap for unfair practice even losses for the buyer or the third party.

If sold flat is forced in UUHC, the term to return the economic right to the creator, must be removed so there will not be any limitation of time for buyer to own the economic right whether to a period of twenty-five years or to any other period because the legal act of selling and buying is complete. However, by doing so, the serious consequence for the creator (seller) is that he can no longer enjoy the commercial rights to his creation forever because the entirety of the copyright has been transferred to the buyer 'at time' the completion of certain amount of price paid to him. Again, this consequence is rooted in Monist Theory which philosophically underlies the drafting of UUHC. It emphasizes the idea that the economic rights and the moral rights in the copyright is not supposed to be separated from each other, but should be a single form. Thus, it is the opposite concept of sold flat which palpably sells the economic right apart from the moral right. It can be deduced that license contract is the fit procedure which preserves the single form of the copyright.

Ultimately, it is necessary to amend UUHC in order to synchronize the consistency between the law and the theory which fundamentally underlies it; whether by modifying the law to equalize to Monist Theory or shifting to Dualist Theory which complies to Common Law System but eminently contradictory with Civil Law System that Indonesia applies.

## CONCLUSION

Initially, UUHC adopted a Dutch Law, namely Auteurswet 1912 Staatsblad Number 600. Thus, the basic essence of UUHC is conformed to Monist Theory in Civil Law System which forbids the separation of the moral right and the economic right in the copyright. Both rights are obliged to remain as single entity to protect the creator. Paying attention to this sense, it can be resumed that the concept of sold flat is actually contradictory to UUHC because it palpably sells the economic right apart from the moral right. In additional, the contradiction is noticeably by comprehending the term of returning the copyright to the creator (seller) twenty-five years later. Thereof, to align in Monist Theory, the only conformable concept to transfer the economic right is by implementing license contract. It protects the creator as licensor to remain owning the copyright in its entirety, both the economic rights and the moral rights, whilst at the same

time the licensee is permissible to use the economic rights by commercially exercising the creator's work (creation) and gaining profit from it while still serves royalty to creator (licensor) whose amount is fairly agreed by both parties.

Finally, if sold flat is forced in UUHC, the term to return the economic right to the creator, should be removed so there will not be any limitation of time for buyer to own the economic right whether to a period of twenty-five years or to any other period because the legal act of selling and buying is complete. Even so, removing this term also means eliminating the value which underlies it, which is Monist Theory that complies to Civil Law System. At once, it also shifts to Dualist Theory which complies to Common Law System because the removing of that term will separate the economic right forever apart from the moral right. Nevertheless, the question is, is it worth the shift?

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