



Protection of Private Rights to Copyright Portraits of Silhouette

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Article	Abstract
Keywords: Copyright, Portrait, Silhouette.	<i>The portrait is copyrighted works protected by the Copyright Law. The problem raised in this study is that when a portrait is taken by a photographer, which is no visible face of the person being photographed. The purpose of this research is to analyze whether the object in the portrait but only in silhouette has a private right to copyright. The portrait to be studied is a portrait entitled "A Farmer's Quiet Journey". The method used is legal research at the legal dogmatic level. Legal research is a process to identify, analyze problems, then solve problems that exist. The results of this study indicate that the portrait with the title "A Farmer's Quiet Journey" contains the object of the person in it, although there is no visible face as identification of the person being photographed, it can still be detected that an object is a person, so the photographic work is assumed to be a portrait. Thus, the person in the portrait has private rights to the copyright of his portrait. Therefore, uploading it at Adobestock still has to be with the permission of the person who owns the silhouette.</i>

INTRODUCTION

A photo is the result of an activity carried out by someone by capturing a moment of what is encountered using a camera. A photo can be interpreted as if it were presenting a visual reality again so that what is printed on a two-dimensional plate is reality itself (Ajidarma, 2016). Law 28 of 2014 concerning Copyright (UUHC) states that two creations are protected by copyright related to photos, namely photographic works and portraits as stated in Article 40 paragraph (1) letters k and l "k. photographic works, l. Portraits". As is known, Copyright is an immovable object which is part of Intellectual Property Rights. (Hermono, 2018)

Article 1 number 10 UUHC provides the terminology that "portraits are photographic works with human objects." In this terminology, portraits are placed as part of photography. Article 40 paragraph (1) UUHC photographic works and portraits are different creations from one another. Examining more deeply, photography is an activity of a photographer in producing a creation which is a form

of expression of a photographer's ideas. Photography is a creative communication process carried out by photographers to produce a creation in the form of a photo by using a camera as a tool used to record light. Photographers express their ideas or thoughts through visual forms. (Ismael, 2017) Photography, used for photographers' works with objects other than humans.

If we pay attention to the terminology of portraits in the Copyright Law, then portraits are a more specific part of photographic works. Another thing that needs to be noted is the phrase "human objects" in Article 1, number 10 of the Copyright Law, this still has not received further explanation regarding the understanding of this phrase. Article 12 paragraph (1) of the Copyright Law states:

"Every person is prohibited from making commercial use, duplication, announcement, distribution and/or communication of portraits that they have made for the purposes of commercial advertising or publicity without the written consent of the person being photographed or their heirs."

This article understands that economic gain from a portrait is prohibited. As is known, a portrait is a photographic work with a human subject. In this case, it can be interpreted as the identity of the human subject being identifiable. Therefore, if the portrait is later used economically, it will be easier to obtain permission.

Problems can arise when a portrait is taken from a distance, revealing only a silhouette and not the face. The photographer took the portrait candidly or covertly. For example, the portrait on the page <https://stock.adobe.com/stock-photo/id/307654363>:



Figure 1. *A Farmers's Quiet Journey*

The uploader titled the photo “*A Farmer's Quiet Journey*”. As can be seen, the photo shows a silhouette of a person but the face is not visible. The photographer, as the person who took the photo, has Copyright for his portrait. Copyright consists of moral and economic rights as a form of exclusive rights granted to the creator and copyright holder. If we pay attention to Article 12 (1) of the Copyright Law, it concerns the protection of exclusive rights to economic benefits from a portrait work. It is easy to identify if the portrait shows a face so that if economic benefits are to be taken as

referred to in Article 12 (1), the party doing so must ask for the consent of the person in the portrait. What if what happens is like in picture 1? Suppose the Copyright Law provides protection for the rights contained in Copyright, namely the private rights of the person who appears in the silhouette. Private Rights are the right to privacy as a right that arises from the right to private ownership of a particular resource. (Brown, 2006). This is what will be discussed in this article.

METHOD

This article is part of a legal research at the level of legal dogmatics. Legal research is a process to identify, analyze problems, and then solve the problems faced. (Marzuki, 2005) Namely about Private Rights in Copyright of the silhouette portrait " *A Farmer's Quiet Journey* ". This legal research was conducted using a statutory and conceptual approach. The statutory approach seeks appropriate norms that aim to analyze whether a portrait that shows a person's silhouette still gets copyright protection. Meanwhile, the conceptual approach is carried out to analyze the portrait from the perspective of the Copyright concept that private rights will be owned by the person who appears silhouetted in the portrait.

The primary legal materials for this research are Law Number 28 of 2014 concerning Copyright and *the Adobe Stock Contributor Agreement Additional Terms to the Adobe General Terms of Use* . Secondary legal materials were obtained from scientific articles and other literature discussing the principles and concepts of copyright, collected using the snowball technique.

After collecting primary legal materials in the form of Copyright Laws, secondary legal materials in the form of legal books on Copyright, and non-legal materials such as photography books. Researchers processed the legal and non-legal materials in a structured manner by reading and then analyzing them to obtain a clearer picture of Copyright protection for portraits containing people without their faces being visible, whether they have Copyright over their portraits. The second issue concerns whether the person in question has the right to sue over their portraits.

After the legal materials are collected, an analysis is conducted to obtain a final argument that answers the legal issue being studied. The method used in this research is prescription, which provides guidance on what should be done, which is the essence of legal research. This method is used to provide new arguments regarding copyright protection for portraits that contain people without their faces visible, whether they have copyright over their portraits. The second issue concerns whether the person in question has the right to sue over their portraits.

The use of descriptive analysis techniques aims to provide a picture of the real phenomena in the application of laws created by legislators. The legal subjects who are the object of this research are comprehensively explored, particularly regarding their reasons for continuing to disregard legal provisions intended to protect private rights over silhouette portrait copyrights.

RESULTS AND DISCUSSION

A. Case Analysis of Portrait Publication

If you pay attention to the portrait terminology in UUHC, So portraits are a more specific part of photographic works. Another thing that needs to be noted is the "human object", this still cannot be further explained regarding the understanding of this phrase. Article 12 paragraph (1) of the Copyright Law states:

"Every person is prohibited from making commercial use, duplication, announcement, distribution and/or communication of portraits that they have made for the purposes of commercial advertising or publicity without the written consent of the person being photographed or their heirs."

This article understands that economic gain from a portrait is prohibited. As is known, a portrait is a photographic work with a human subject. In this case, it can be interpreted as the identity of the human subject being identifiable. Therefore, if the portrait is later used economically, it will be easier to obtain permission.

Problems can arise when a portrait is taken from a distance, revealing only the silhouette of a person and not the face. The photographer took the portrait candidly or covertly. For example, the portrait on <https://stock.adobe.com/stock-photo/id/307654363>

The photo as in Figure 1 was given the title by the uploader "*A Farmer's Quiet Journey*". As we can see, in the photo there is a silhouette of a person but the face is not visible. The photographer as the person who took the photo, has Copyright for his portrait. Copyright consists of moral and economic rights as a form of exclusive rights granted to the creator and copyright holder. If we pay attention to article 12 (1) UUHC then, it concerns the protection of exclusive rights to economic benefits from a portrait work. It is easy to identify if the portrait shows a face so that if economic benefits are to be taken as referred to in article 12 (1), the party doing so must ask for permission from the person in the portrait. What if what happens is like in figure 1? Suppose UUHC provides protection of rights contained in Copyright, namely private rights to the person who appears in the silhouette. This is what will be discussed in this article.

B. Publication of Portraits reviewed from the perspective of Copyright Restrictions in Copyright Law

1) Copyright Protection of Portraits as Creations

Article 40 paragraph (1) of the Copyright Law distinguishes between photographic art and portraiture as protected works or creations, each of which is regulated by letters k and l. This distinction lies in the object in the photo, where a portrait refers to a photographic creation whose object is a human, while a photographic work is a photographic creation produced by a camera and whose object is not a human. A photograph is the result of a "snapshot" by someone who has a camera, either a camera that is integrated with a telephone or a

professional camera that is specially designed. In fact, we know a photographer where in terminology he is someone who produces a photographic work using a camera, the photographer gets economic benefits both directly and indirectly. Thus, the creator of a photograph, whether a portrait or a photographic work of art, is the photographer. As the creator, the photographer has Copyright for his creation. Article 4 of the Copyright Law states that Copyright is an exclusive right consisting of moral rights and economic rights.

According to UUHC terminology, a portrait is a photographic work with a human as its subject. The term "portrait" in UUHC is still considered general, and the definition of a human being is unclear. Humans, as living creatures, have complete body parts, such as a head, torso, arms, and legs. However, some portraits contain human subjects with incomplete body parts, such as passport photos that do not show the arms and legs of the person being photographed.

2) Publication of Portraits without the permission of the person being photographed

Portraits become a dilemma, if they do not clearly show the identity of the person being photographed and taken candidly, as in picture 1. If you look at the photo, the photographer took it from a distance in a rice field and captured a farmer crossing the rice field embankment, which then resulted in only the silhouette of the farmer being seen. The portrait, which was then titled *A Farmer's Quiet Journey* and uploaded to the *Adobe Stock platform*, the page did not request a release (publication approval letter) from the figure in the portrait to the photographer who uploaded it. The release was not requested because Adobe Stock considered the portrait did not specifically show the face of the person in it. As stated in the Adobe upload agreement:

“ 3.2 Releases. If the Work contains the image or likeness of an identifiable person, trademarks, or logos, or certain other distinctive property protected by IPR, you represent and warrant that you have obtained all necessary and valid releases or agreements substantially in accordance with our standard model and property releases for each person or property depicted in the Work. However, if you upload Work designated “for editorial use only,” we may accept it without a model or property release, at our sole discretion, and subject to any of our guidelines or requirements. For Work designated “for editorial use only,” you represent and warrant that: (A) the Work faithfully depicts the subject matter and that all keywords, descriptions, credits, and captions are appropriate; and (B) the Work has not been modified in a way that alters its context or editorial integrity.”

From this case we can understand that in a portrait there are private rights to the objects contained in the portrait. In the private sector there is a value that can be measured economically, namely material rights (Saidin, 2006). So these Private

Rights are the material rights of the person in the portrait which must be protected.

3) Publication of Portraits on Online Photo Sales Platforms in Terms of Copyright Restrictions

An object is identified as a human by identifying the face of the person in the portrait.⁹¹ Then the portrait can easily be recognized as a human object. Object identification can also be done by identifying the body or body shape of the object in the portrait (Budi, 2016). This is to identify that the object in the portrait is a human. With this identification, it can be known and differentiated between the art of photography and the art of portraiture. This is done to be able to apply Article 12 of the Copyright Law (UUHC), which is related to permission to publish portraits.

The word human contained in Article 1 number 10 UUHC requires a deeper understanding, so that the meaning of the word human referred to in UUHC can be understood. Based on the Big Indonesian Dictionary (KBBI) it says that: "Human: a rational creature; human; person.". So it can be interpreted that the meaning of human referred to in Article 1 number 10 UUHC is an object of a rational creature or person, where there are no limitations regarding the identification of the object, whether the human can be identified so that its identity is clear or cannot be identified so that the identity of the object is unclear. So it is clear what is meant by human in UUHC that human silhouettes are also included in portraits, namely works of photographic art that contain human objects in them.

The interpretation used to interpret the meaning of "human" in Article 1, number 10 of the UUHC, which subsequently uses teleological interpretation. In this case, what needs to be examined are the underlying factors or thoughts that led to the creation of a law. Furthermore, a rational explanation is also needed for the purpose of the law (Subekti, 2003).

The portrait entitled "*A Farmer's Quiet Journey*" contains a person as an object, although the face is not visible as an identification of the person being photographed, it can still be seen that the object is a person, so the photographic work is said to be a portrait. Thus, the person in the portrait entitled "*A Farmer's Quiet Journey*" has private rights to the Copyright of his/her self-portrait.

C. Form of Liability for Private Rights over Silhouette Portrait Copyright

According to Peter Mahmud Marzuki, liability is the position of a person or legal entity that is deemed to be obliged to pay some form of compensation or damages after a legal event or legal action (Marzuki, 2005). Liability is a specific form of responsibility, it can be said that way because in responsibility there is actually a liability in it. This can be more clearly seen by using the example of an agreement. If an agreement is legally valid, the parties in the agreement must be responsible for

implementing the contents of the agreement and are automatically willing to be sued if one party fails or implements the agreement but not in accordance with what has been agreed. Similarly, an official who issues a decision or regulation is automatically liable if any party is harmed by the decision by filing a lawsuit against him in the state administrative court.

This liability can be applied to the case of the unauthorized portrait entitled *A Farmer's Quiet Journey*, as it is said that the unauthorized use of the portrait for profit is a form of copyright infringement. Therefore, the subject in the portrait can essentially file a lawsuit in commercial court for copyright infringement against their self-portrait.

However, before filing a lawsuit in commercial court, in resolving Copyright disputes there are efforts that can be made first so that filing a lawsuit in court becomes the last option for dispute resolution. As stated in Article 95 paragraph (1) of the Copyright Law, that: "Resolution of Copyright disputes can be done through alternative dispute resolution, arbitration, or the courts."

The Explanatory Note to the UUHC states that alternative dispute resolution under the UUHC refers to the process of resolving disputes through mediation, negotiation, or conciliation. This differs from the definition of alternative dispute resolution under Law Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, which states:

"Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert assessment."

In alternative resolution of Copyright disputes, it is stated that there are three efforts that can be taken, namely negotiation, mediation, and conciliation. Negotiation is the settlement of disputes outside the court carried out by the disputing parties or their attorneys directly, without the involvement of a third party as a mediator (Usman, 2013). The disputing parties in this case directly conduct negotiations or bargaining to reach a mutual agreement. The negotiation or bargaining is carried out through discussion or deliberation until the interests and rights of the disputing parties are accommodated into a common interest.

If alternative dispute resolution efforts have been taken and do not result in a mutual agreement between the disputing parties, UUHC provides another effort that can be taken to resolve copyright disputes, namely through arbitration. However, this arbitration can be taken when a problem is based on a written agreement from the disputing parties. Because the jurisdiction of arbitration is based on the existence of an arbitration agreement. If an arbitration agreement does not exist, then the resolution of the dispute is subject to the competence of the district court (Irawan, 2010). However, in copyright infringement, if it cannot be through arbitration legal efforts, then a lawsuit can be filed with the commercial court. In the case of this silhouette

portrait, the portrait used was basically not based on an agreement and there was no prior agreement, so there was nothing binding between the two, namely the subject in the portrait and the party who took the photo. However, there is an indication of copyright infringement because the portrait was used without permission and without the knowledge of the person in the portrait.

Compensation is not only intended for violations of Private Rights but can also be for violations of Economic Rights. In cases of unauthorized use of portraits, the subject concerned can also file for compensation for the violation of Economic Rights committed. In accordance with the provisions of Article 12 paragraph (1) of the Copyright Law, which states:

"Every person is prohibited from making commercial use, duplication, announcement, distribution and/or communication of portraits that they have made for the purposes of commercial advertising or publicity without the written consent of the person being photographed or their heirs."

In this silhouette portrait case, the elements of Article 12 paragraph (1) of the Copyright Law, if detailed and then linked to the problems found in the case of the silhouette portrait sold on the Adobestock platform, all elements have been fulfilled, with that the act of using the silhouette portrait of A Farmer's Quiet Journey is included in the violation of Copyright Economic Rights. Even though in the case of the silhouette portrait it is not based on an agreement, the subject in the portrait can still file a lawsuit for damages. Considering that damages are not only submitted for problems of default based on an agreement between the two parties, where then one party does not carry out or carries out the agreement but not in accordance. But damages can also be submitted for violations committed without a prior agreement or based on indications of unlawful acts, both legal acts are generally regulated in Book II of the Civil Code, namely acts categorized as *onrechtmatigdaad* (unlawful acts) and breach of contract. Therefore, damages can arise due to unlawful acts, not only because of breach of contract.

Compensation for violations of Copyright Economic Rights can be given and included simultaneously in the court decision regarding copyright or related rights criminal cases. So that the losses suffered by the creator do not have to be carried out through a civil lawsuit but can also be included in the decision in a criminal case.¹⁰² With this compensation payment, it must be paid no later than 6 (six) months after the court decision that has permanent legal force is issued. This provision is as stated in Article 96 paragraph (3) of the Copyright Law which states:

"Payment of compensation to creators, copyright holders and/or owners of related rights must be paid no later than 6 (six) months after the court decision has permanent legal force."

The subject in the silhouette portrait can also ask the court to stop and prevent the continuation of the infringement, intended to prevent the violation from

continuing and minimize the losses that may arise. This can be realized through a temporary court order, where the court can issue a temporary order to prevent the entry of goods suspected of being the result of Copyright infringement into the trade channel as well as withdraw from circulation and confiscate and then store goods suspected of being the result of Copyright infringement.

These efforts are in accordance with the provisions contained in Article 106 UUHC, which states as follows: "At the request of a party who feels aggrieved by the implementation of Copyright or Related Rights, the Commercial Court may issue a temporary injunction to: (a) Prevent the entry of goods suspected of being the result of an infringement of Copyright or Related Rights into trade channels, (b) Withdraw from circulation and confiscate and store as evidence related to the infringement of Copyright or Related Rights, (c) Secure evidence and prevent its removal by the infringer, and/or, (d) Stop the infringement in order to prevent greater losses."

In violation of Copyright Economic Rights, it is necessary to know first that from a criminal law perspective, property rights that have economic value are assets. If the assets are disturbed, then the person who disturbs is included in the category of legal subjects who commit crimes or violations of assets which are distinguished from crimes against morality, crimes against honor, or crimes against the lives of others. UUHC places crimes against copyright as crimes against property or crimes against assets.¹⁰³ In violation of economic rights, in addition to the subject who feels harmed being able to file for compensation, violations of economic rights can also be subject to criminal penalties. As in the case of the use of unauthorized portraits in the silhouette portrait of *A Farmer's Quiet Journey* in Article 115 of UUHC states:

"Any person who, without the consent of the person being photographed or his heirs, carries out Commercial Use, Duplication, Announcement, Distribution or Communication of the Portrait as referred to in Article 12 for the purposes of advertising or publicity for Commercial Use, whether in electronic or non-electronic media, shall be punished with a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah)."

The provisions regarding criminal acts in the Copyright Law categorize them as complaint-based offenses. This means that investigators have no authority to conduct investigations without a complaint from the creator or the party receiving the rights from the creator. Because copyright infringement in the criminal realm is categorized as a complaint-based offense, creators can report copyright infringement cases to the police. Therefore, copyright infringement cases related to criminal acts as stipulated in the Copyright Law are tried in the District Court, while civil claims are filed in the Commercial Court.

CONCLUSION

Based on the analysis of the problems regarding the protection of private rights over silhouette portrait copyrights, the following conclusions can be drawn:

- 1) Copyright protection extends beyond economic and moral rights. It also protects photographic works in general, and portraits in particular, as portraits are works of photographic art that contain human subjects. This protection concerns the subject of the portrait, a privacy right that must be protected as a fundamental or fundamental right. The photographic work titled "*A Farmer's Quiet Journey*," sold on the Adobe Stock platform, is a portrait because it contains a human element, even though the face of the person being photographed is not visible. The copyright for a photographic work containing a silhouette of a person belongs to the photographer who produced the work. However, the person in the portrait also has privacy rights. Therefore, uploading to Adobestock still requires permission from the owner of the silhouette. Adobestock also seems to need to expand the meaning of its upload conditions clause so that the interests of the owner of the silhouette are still protected.
- 2) Liability is something that must be accepted and implemented by any party who violates copyright. However, before liability is realized through a lawsuit filed by the creator against the party deemed to have committed copyright infringement, there are other remedies that can be pursued first, namely alternative dispute resolution and arbitration.
- 3) If these two efforts are unsuccessful, then filing a lawsuit in court becomes the last option. The liability for copyright infringement in the unauthorized use of portraits in the silhouette portrait of *A Farmer's Quiet Journey* can be realized in several forms, including the subject in the portrait can ask for compensation, ask the court to stop and prevent the continuation of the infringement, in addition the creator can ask the party who took the photo to make a statement requesting that a copyright infringement has been committed or a statement of apology for a copyright infringement in writing and published in print media.

SUGGESTION

Based on the conclusions above, the following suggestions can be given:

- 1) Human subjects in photographs currently lack clear protection, especially when the subject is merely a human silhouette. The Directorate General of Intellectual Property needs to develop regulations regarding the protection of individuals in such portrait works .
- 2) Adobestock, as an uploading medium, is expected to revise the rules or conditions that it applies to parties who wish to upload their photographic works, especially for photos containing human subjects.
- 3) Photographers need to understand the law, especially the concept of copyright, so they can understand the privacy rights and other rights that a person has as the subject of their photo.

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