

CHAPTER I

INTRODUCTION

1.1 Background Research

Allah SWT created man with a nature of interdependence among each other. No one can control the whole of his needs, but man can only achieve most what he needs, he must require what also becomes the needs of others.

Thus each man was created with a blessed of reason that is endowed with all the skills and creativities of his life, so that he can meet his needs and his brother needs. With the advancement of technology and science in this age, then the human needs will easily available in a manner which is more practical and helpful. However this new requirement will not materialize for granted, but it requires some of knowladge, skills, creativity, ideas, and effort from the creator. Then all the form of new creation must be appreciated with the rights of creator over the protection of copyright or the protection of his property.

In the terms of copyright in Copyright Act No.28 of 2014, it is explained that copyright is an exclusive right of the creator or the recipient the right to announce or reproduce the creation or give permission for it without any reduce a limitations or restrictions according to the applicable law.¹ From this term can be drawn the conclusion that copyright is a wealth right of someone that was protected, because a creator would get a royalty from his creation that will be one of his properties or asset of his life.

In the age of trade development, industry and investment, the government has strived to give a legal protection for a relevant parties over their wealth by staying attentive to the interest of the wider society. The

¹ Undang Undang Hak Cipta No. 28 Tahun 2014

acquisition of the copyright protection can be obtained by registering the creation, but unregistered creation will also get a protection, but it will be more difficult because it requires an investigation of the authenticity of the ownership.

When a creator dies, then the copyright or property right will be redirected to others, especially his inheritor by means of donating, wills, bequest, or inheritance. The redirect has been provided in article 16 Paragraph (2) of Act Number 28 of 2014 about Copyright. This redirect is a very important thing which is intended to maintain, protect, and preserve the result of the creation, that have been obtained from the science, creativity, skill, and the time that he had.

In the view of Islamic law, the right mean is belonging to or a law or a benefit that set up by sharia.² According to Musthofa az-Zarqo it said that right is the jurisdiction where the sharia determine a strength or commissions, and this terms is a good terms, because it includes the kind of rights such as right of religion that is the right of Allah upon His servant (praying, fasting), and the civil right such as proprietary rights, and culture right such as the right obedience of child to their parents, and public rights such as the right of legitimacy, and the right of wealth such as basic necessities of life, and the right besides the right of wealth such as the right status of one self. The mean of the power is the right of someone such as protection right and status of one self, or to a certain thing such as proprietary right. The mean of comission here is an obligation for a person such as the person's debt, or the achievement of something such as the right on wage income from his job.³

The creation of someone is a proprietary wealth of the material and have a benefits. The proprietary right is full of right over his proprietary that was born from the result of hard work in realization of his creation and all the

² ص: ٨, ١٩٨٤), دار الفكر: دمشق (وهبه زهيلي, الفقه الإسلامي وأدلته: ٤,

³ ص: ٩, وهبه زهيلي

benefits of being born from it. In Islam, it is stated that property ownership is not for only material but also benefits of thing, then the copyright is a property which can be transferred or bequeathed to their inheritor.

An inheritance or the relic wealth according to the Islamic law, that is all of thing that abandoned by the heir, both in the form of wealth or the right. The inheritance is also called by a relic or *tirkah* wealth. Copyright is the right of any possession that is acceptable in Islam as a right that may be inherited, because a copyright in Islam includes in *haq al ibtikar* (moral right) owned by somebody, which is the right would yield some of royalty or advantages of his work that can be passed on to his inheritor.

The work of the copyright created by everyone has some implications in society, while copyright includes in ownership right that can be transferred by inheritance. So, copyright is must be considered a negative and a positive impact for a society. There is a difference copyright division in Islam and in copyright act, because not all copyright in Islam will get some protection, but it must be observe in beneficial for the community and the negative impact, if it damage and bring the people to the worst, than it will not find of copyright protection moreover been transferred to the inheritor or other parties, because the transferring of copyright to the inheritor it's purpose to keep whole the creation and it can continue to be what it is and be beneficial for the society, it's not continue to undermine and to worst the society by the existence of creation.

In this case, interested to study and compare about Copyright In The Concept of Mawarist And Copyright Act No.28 of 2014.

1.2 Problem Formulation

For problem formulation in these research as belows:

1. How is the copyright division in the concept of mawaris ?
2. How is the copyright division according to Copyright Acts No.28 of 2014 ?

3. What the differences and the similarities of copyright division in the Concept of mawaris and Copyright Act No.28 of 2014 ?

1.3 Purpose Of Research

- a) To know copyright in the concept of mawaris
- b) To know the copyright division according to Copyright Act No.28 of 2014
- c) To know the difference and the similarities of copyright division according to the copyright act Act No.28 of 2014 and concept of mawaris.

1.4 The aims of Research

- a) Theoretically, it is expected to be a science and be a reference to the students and the creator in divert of copyright in the concept of mawaris and copyright act.
- b) In paractice, it is expected to support the creator in divert copyright in the inheritance to keep, protect and care of the creation.

1.5 Review of Literature

In a thesis written by Iran Dwi Harjo Pasca Dinata, student in University of North Sumatra discuss about “The Different of Copyright diversion by Inheritting According To Civil Code And Copyright Act ” done by library research, it tells that law of success is properly in civil code book II, thats tell about Subekti thought that law of success the one of law or rules that regulate and organize the transferring or diversion of wealth who has passed away to their inheritor, it means we can take a conclusion that in law of heir is contained some limits in inheritance, that make some of principle, that moved thing is the wealth of the heir to the his inheritor.⁴ Copyright that inherit to their inheritor is all shape of copyright because in real, copyright

⁴ Iran Dwi Harjo Pascadinata, *Perbandingan Peralihan Hak Cipta Secara Pewarisan Menurut KUHPer dan UUHC No. 28 tahun 2014*, skripsi Universitas Sumatera Utara.

is right of goods and immaterial property right, so it can be inherit to their inheritor that they deserve to receive it.

In a Islamic law journal written by Agus Suryana entitled “Copyright in Perspective of Islamic Law” obtained from the literature research and books pertaining to copyright, has explained that copyright is possession right of some benefits that will end when the owner does some of transactions, even a *tabarru'* transaction (social) or even *tijary* transaction (commerce). Among the *tabarru'* transactions that cause the expiration of rights over the creation is:

- a) Inheritance, when the owner of copyright has died and entitlement will be changed or be transfered to their inheritor.
- b) Bequest, alms, charity, or endowment of prize, when the owner of copyright gave his right to the other parties even in gift, alms, bequest, or charity than he no longer has any right of his creation.⁵

In a thesis written by Putri Nirina Nurul Iman titled “Analysis of Copyright Endowments” done by library research. Based on this analysis it can be taken some conclusions, that the owner status of donation wealth is spite from the property creator or the holder of copyright, that copyright is the order of God (Allah SWT) to the entity or corporate who receives the endowments to manage and take care of wealth of endowments.⁶

Inside the thesis and journal that mentioned above, it has discussed about:

- a) The objects of copyright inheritance in generally speaking, so all the objects of copyright can be inheritance in a diversion of copyright. Yet, this research tells about Copyright In The Concept of Mawarist And Copyright Act No.28 of 2014.

⁵ Agus Suryana, *Hak Cipta Dalam Islam*, Al-Maslahah jurnal hukum dan pranata sosial

⁶ Putri Nirina Nurul Iman, *Analisis Terhadap Wakaf Hak Cipta*, Skripsi Fakultas Hukum Universitas Hasanuddin Makassar, 2016

- b) Copyright as an equity right of some benefits that will be ended when the owner do some transaction, even *tabarru'* transaction (social) or *tijary* transaction (commerce). Yet, this research tells about Copyright In The Concept of Mawarist And Copyright Act No.28 of 2014.⁷
- c) The status of the copyright owner is out of from his wealth after he does the endowments of his right, and that copyright will be the order to for a person or corporate that receive the endowments of that copyright. Yet,s this research tells about Copyright In The Concept of Mawarist And Copyright Act No.28 of 2014.

Moreover, this research can be a new research, because this research discusses a copyright diversion according to copyright acts and mawaris concept.

1.6 Theoretical Framework

a) Copyright

Copyright according to copyright acts is an exclusive right for the creator that appears in a declarative or the recipient of right to announce or multiply their creations or to give some permissions for it without lessening any boundaries according to the regulation of the valid acts. The mean is that the right of the creator to keep and to continue the product or the creation.

In Cairo declaration of Human Right In Islam No.49/19 P about copyright mentioned, “ Everyone shall have the right to enjoy the fruits of his scientific, literary or technical production, and the right to protect the moral and material interest steaming there form prouded that such production is not to contrary the principal of syari’ah.”⁸ The result of this declaration is declaring that the creator or the copyright holder

⁷ Agus suryana,hal.269

⁸ Ibid, page. 251

allowed to take the benefit (royalty) from their creation because does not break the precept of islamic law.

Wahbah Al-Zuhaily, he has declared that there isn't a true argumentation (*dalil sharih*) about copyright, but in this side, it can be relied upon to beneficence rule or damage rule, because with this rule it will realize the purpose of syariat.⁹ In a other senses that Islam is allowed a copyright even there isn't a true argumentation staged of it, but it may has the benefit for the society, it's by beneficence rule that give some benefit to the creator and the mankind in realization, supplying, application, and guarding the benefit from the product of copyright. Except that rule, we can use refuse a damage rule that keep the creation from a negative thing or deviation a benefit of creation in society.

The holder of copyright who had died, he was able to ditribute his copyright to his inheritor by inheritance. This transferring copyright is needfull to keep and appreciate the creation although the creator has died, to make a benefit that can be perceived by the society in a long time. Copyright is possession right over the creation which the royalty has been full of the holder of copyright.

b) Inheritance UNIVERSITAS DARUSSALAM GONTOR

Each of human will face his destination of death. The human who has faced to Allah is firmid that he has a family that he left who should be his responsiblities in his life. So, it's not a strangely thing when someone has died and he left his kindred so he gave or transfered his riches and his properties to his inheritor. These things have regulate in constitutional law or islamis law.

In a civil law, inheritance has regulated in civil law book II, Inheritance is the grant of right from the successor to the inheritor

⁹ وهبة الزهيلي, ص: ٢٨٦١

as the recipient of right that has a relationship cause a marriage, or relationship of blood caused by death. In article 833 civil law book described “the heirs (inheritor) by itself cause the law gets a property rights over all the stuff, rights, and all accounts receivable people who died”.¹⁰

Heir objects is all of goods even a movable goods or unmovable goods that be a common property and will be inheritance for their inheritor. One of that common property is copyright as an exclusive right of the creation owner that be the pieces of his property that can be inheriting or transferring.

In the Copyright Act No. 28 of 2014 has been described in article 2 (a) that is protected is all creation and product related rights of citizens, residents, and legal entities in Indonesia. In Islam, copyright is also recognized as part of the wealth creators, which this property can be transfer to the inheritor after his death. However, in Islam not all creation can be inherit to his inheritor, if the legacy has damage the benefit on it.

c) Mawaris

Inheritance is an important thing in human life. Islam has regulated the law of inheritance in Al-Qur’an and hadist. The division system has been explained in Al-Qur’an and in *mawaris* concept.

The inheritance law in Islam is the law governing a transition of wealth from the heir (the deceased) to his inheritor (who still alive), either in the form of treasure or property or right of the whole sharia rights.¹¹ In Islam, we have known the study about inheritance, which we know as a science of *faraidh* or *fiqh mawaris*.

¹⁰ 3 kitab undang-undang, KUHPer buku II, Bab XII, pasal.833, (Semarang: Graha media press,2014) hal.187

¹¹ علي الصبوني, مواريث في شريعة الإسلام, (دار القلم, دمشق: ١٩٩٣), ص: ٣٤

The multiple items in the heir that must be understandable, there are:

- a. The successor (*muwarist*) is a person who has a property and will be inherited by the others (the inheritor) after he has die.
- b. The beneficiary/inheritor (*warist*) is a person who is entitled to get a legacy due to several reason as kinship, marriage, and others.
- c. Legacy (*maurust*) is a thing left out by a people who has die, either in wealth or property.¹²

In *fiqh mawaris*, we can find the division system of inheritance to recipient of right according to Islamic law. As for the portion of each inheritor, we can find it out in Al-Qur'an and hadith or in compilation Islamic law. As for an inheritor portion in Qur'an as follows:

يُوصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثَيَيْنِ فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلِأُمِّهِ الثُّلُثُ فَإِنْ كَانَ لَهُ إِخْوَةٌ فَلِأُمِّهِ السُّدُسُ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَاؤُكُمْ وَأَبْنَاؤُكُمْ لَا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفَعًا فَرِيضَةٌ مِنَ اللَّهِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا¹³

¹² Ibid, page.39

¹³ Q.S annisa':11

1.7 Research Methode

1.7.1 Types of research

This type of research is library research as research in library, or review the problems with various references, law books, the Acts and websites that exist.

1.7.2 Data collection

The data is the description of the information that is true and real good that obtained from primary and secondary sources.¹⁴ The researches collect a data obtained trough below:

- a) A primary materials, that is in the form of book materials like a acts and a regulation, or role of fiqh it's coupled with copyright as act No.28 of 2014.
- b) Secondary materials, that is in the form of materials as libraries materials such as literature, journals, and other books relating to transferring of copyright according to inheritance to the inheritor.

1.7.3 Data sources

secondary data is a data that is already written or processed by another person or an institution, books, letters, diaries, reports, and so on. Data source in this study include:

- a) Copyright Acts No.28 of 2014
- b) Fathi adduraini, muqoronah fil fiqh islami wa ushulihi 2, resalah publisher, Beirut
- c) Wahbah Al-Zuhaily, Fiqh Al-Islam wa Adilatuhu, Damaskus: Darul Fikr, 1985
- d) Almaslahah jurnal hukum dan pranata sosial, hak cipta prespektif hukum islam, ditulis oleh Agus suryana.

¹⁴ Tim Prima Pena, **Kamus Besar Bahasa Indonesia**, (Jakarta: Gitamedia press, 2007), hal.15

1.7.4 Data collection tool

For the acquisition of data in the writing of this thesis, data collected through normative method as collecting data from essay writing books and scientific articles, and acts that related to the transferring of copyright by inheritance.

1.7.5 Data analysis techniques

After being finished from collecting a data, then analysis comparative will be done, it's writing method that seek to illustrate the differences and the similarities between the diversion of copyright by inheritance in copyright Acts No.28 of 2014 with the diversion of copyright by inheritance in mawaris concept clearly and detailed.

1.8 Systematic Writing

Chapter I: The introduction, consists of 8 sub topics are:

Background Research, Problem Formulation, Purpose Research, The Aims Research, Theoretical Framework, Review Literature, Research Method, Systematic Writing.

Chapter II: The understanding of copyright which consists of 3 sub topics are:

General understanding of Copyright, General understanding of copyright in Islam, and General understanding of mawaris.

Chapter III: The copyright division in the concept of mawaris and copyright acts no.28 of 2014, which consists of 3 sub topics are:

The Division of copyright in mawaris concept, The division of copyright in copyright Act no.28 of 2014, the differences and similarities between the division of copyright in mawaris concept and in copyright Act no.28 of 2014.

Chapter IV: Conclusion and Suggestion



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