



**A Comparative Legal Analysis of Music Copyright
between Indonesia and the United States of America
in Terms of Online Radio**

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Master Thesis
Submitted in Partial Fulfilment of the Requirements for the Degree of
LLM Law and Technology of Tilburg University

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June 2015

Acknowledgment

Alhamdulillahirabbil 'alamiin... with the help of the Almighty Allah Subhanahu wa ta'ala this thesis can be completed and submitted as one of the requirements for the LLM Degree in Law and Technology of Tilburg University. There are many people who contributed in the process of writing this thesis and making my one year study in Tilburg University possible. I would love to express my genuine gratitude to all of them, but I could not address each and every one since it would require a whole book in itself.

First and foremost, I would like to honor and thank Michael A. Dizon who had been so kind and helpful in supervising my thesis since the very beginning. I would also thank Samantha Adams for spending her precious time to be my second reader.

Immeasurable gratitude for the help of financial and administrative support is also rendered to the Ministry of Communications and Information Technology of the Republic of Indonesia and Nuffic NESO Indonesia who had entrusted their scholarship in me.

I would also like to express my deep sense of thanks to my colleagues from Law and Technology program, especially Teuku Fardan and Kahfiya Hasbi, for all the help and support during my one year study. My sincere thanks are also extended to all the good friends I got to meet through PPI Tilburg, Penggemar Kimchi, and Mie Tektek Statenlaan who had been so kind to me and brought me lots of laughs.

My best gratitude is reserved to the both of my parents. Even though I might not give my mother the best while I could, she always told me that all her teachings, prayers, and endless love were not done to get returns from me. For everything she had done, I could never thank her enough. My father might not be the best father in the world, but he is always my number one man and a thousand thanks would never be enough to show how thankful I am to be his only daughter.

Tilburg, June 2015

a full-time traveler / a part-time student

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1 Introduction

1.1 Background

In this modern life, more people are connecting to the internet and it is for a longer period of time. The amount of time which people spend on the internet can be used for various kinds of activities. One of those activities are music listening. In order to facilitate people who want to listen to music, several kinds of audio services are offered on the internet. A few examples of those audio services are on-demand audio file serving, audio streaming sites, podcasting, and online radio. The latest one is also known as internet radio. Some people also call it webcasting which means a non-interactive and continuous transmission of digital audio file over the internet to let one or more persons listen to the file without giving them permission to permanently save it on their devices.¹ Webcasting is like the internet version of a terrestrial (traditional AM/FM) radio broadcasting.² In webcasting, downloading is made impossible.

Online radio station transmits its content to its listener by using a process called *streaming* which involves the creation of a temporary file on its listener's hard drive that "buffers" the sound and plays it on the listener's computer without having to download the entire file.³ This process is also used by many audio streaming sites to transmit audio files through the internet. Both online radio and audio streaming sites are currently growing in the recorded music business at the moment.⁴ However, they are not the same. The non-interactive aspect of online radio is one characteristic which makes them different from each other. Online radio, in its effort to present music to its listeners, does not allow its listeners to select which song they want to listen to.⁵ A webcaster, a term designated for a person who does webcasting, chooses

¹ Andrew Stockment, 'Internet Radio: The Case for a Technology Neutral Royalty Standard' (2015) 95 Virginia Law Review <<http://www.jstor.org/stable/27759978>> accessed 3 April 2015.

² *Ibid.*

³ Azine Farzami, 'Bonneville V. Register of Copyrights: Broadcasters' Upstream Battle over Streaming Rights' (2003) 11 CommLaw Conspectus <<http://scholarship.law.edu/commlaw/vol11/iss1/11>> accessed 19 June 2015.

⁴ John McDuling, 'An Epic Battle in Streaming Music Is about to Begin, And Only A Few Will Survive' (*Quartz*, 2014) <<http://qz.com/232834/streaming-music-has-become-a-pawn-in-a-high-stakes-chess-match-who-will-win-and-why/>> accessed 19 June 2015.

⁵ William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford University Press 2004).

the song that is going to be played on an online radio.⁶ Listeners also have no control to replay a song according to their wish.⁷

The way online radio works is more or less the same as the way traditional AM/FM radio station broadcasts their content over the air. In many cases, online radio station is actually a simultaneous webcast (“simulcasts”) of existing traditional AM/FM radio transmission in its effort to expand its listener’s base. This kind of online radio station usually offers the same content as the content heard on its AM/FM tuner.⁸ Bringing traditional AM/FM radio transmission onto the internet is only a way to keep its loyal listeners around while at the same time inviting new listeners.

Besides simulcast of existing traditional AM/FM radio transmission, online radio may also be either an internet-only radio station or satellite radio station.⁹ According to its name, the former one is a kind of online radio station which people can only listen to when they are connected to the internet, there is no other way to listen to this kind of online radio station besides by going online.¹⁰ Meanwhile, the later one was initially a satellite radio station which offers a wide range of entertainment over satellite broadcast and gives its listeners an ease to listen to their favorite radio programs while they are on the go. However, due to the change in their consumers’ listening behavior to streaming audio from the internet¹¹, satellite radio stations started losing its listeners. This changing behavior of music listeners forced satellite radio station to go online as well by providing its customers the option to stream its content.

This trend of listening to the music on online radio is without a doubt happening in the United States of America (in this thesis later referred to as the United States or US) where many talented world class musicians actively produce new hit songs every year. According to a recent

⁶ *Ibid.*

⁷ Farzami (n3).

⁸ Stockment (n1).

⁹ *Ibid.*

¹⁰ Benjamin M. Compaine and Emma Smith, 'Internet Radio: A New Engine for Content Diversity?' (2001) 4202-01 MIT Sloan Working Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=290293> accessed 5 April 2015.

¹¹ Emarketer.com, 'Internet Radio's Audience Turns Marketer Heads' (2013) <<http://www.emarketer.com/Article/Internet-Radios-Audience-Turns-Marketer-Heads/1009652>> accessed 3 April 2015.

study, four out of ten Americans listen to online radio for almost ten hours per week.¹² Another recent study also mentioned that the number of people who spend their time listening to online radio has gradually been climbing since 2009.¹³

Ever since online radio became part of the life of US citizens, the federal government of the United States had adjusted their existing law and regulations in order to follow up the development of online radio in their country. Despite the effort from the US federal government, there were still relatively big controversies going on in the United States; two of the controversies are discussed in this thesis. The first controversy regards the additional royalty an online radio station has to pay following the enactment of the Digital Performance Right in Sound Recording Act of 1995 (the DPRA) and the Digital Millennium Copyright Act of 1998 (the DMCA). This additional royalty appears as a result of additional exclusive right given to the holder of copyright in sound recording whose copyrighted work is publicly performed by means of a digital audio transmission.¹⁴ Since it is clearly stated that this exclusive right is only applied in the case of digital audio transmission, traditional AM/FM radio station does not have to pay this additional royalty. The second controversy regards different royalty rates applied to various forms of digital audio transmission as a result of the enactment of the DMCA which established different categories in digital audio transmissions.¹⁵ Following the enactment of these two provisions, many online radio stations protested against unequal treatment which they get compared to what traditional AM/FM radio stations get and what other digital audio transmission providers get.

Americans are not the only music listeners who follow the trend to listen to the music on online radio. This trend also affects many music listeners from many other countries in Europe, Asia, Australia, and even in Africa. A big archipelago country in Asia officially known as the Republic of Indonesia (in this thesis later referred to as Indonesia) is one of these countries experiencing the change of music listening behaviour from offline to online. In Indonesia, this

¹² Bill Rose and Joe Lenski, 'The Value of Internet Broadcasting' (Arbitron/Edison Media Research 2004) <<http://www.808talk.com/extras/IM12Summary.pdf>> accessed 26 November 2014.

¹³ Laura Houston Santhanam, Amy Mitchell and Tom Rosenstiel, 'Audio: By The Numbers' (The Pew Research Center's Project for Excellence in Journalism 2012) <<http://www.stateofthemedias.org/2012/audio-how-far-will-digital-go/audio-by-the-numbers/>> accessed 26 November 2014.

¹⁴ Title 17 of the United States Code §106 (6) (2011).

¹⁵ Hunter Appler and Roger McDorman, 'Internet Radio - The Law - Statutes & Enactments' (*Internet Radio - The Law*, 2010) <<http://www.unc.edu/courses/2010spring/law/357c/001/webradio2/statutes.html>> accessed 21 May 2015.

trend is recently emerging and people only begin to be familiar with many kinds of audio services offered on the internet.

Even with the limitations of internet infrastructure, Indonesians are starting to take a look at other sources to discover music. Some Indonesian-based audio streaming sites and online radio stations appear in order to meet the demand of Indonesian music listeners who are just starting to get used to music streaming. Some well-established traditional AM/FM radio stations begin to simulcast their content on their official websites. Several of these radio stations even create mobile phone applications in order to facilitate their listeners in listening their simulcast on a smartphone. Besides simulcasts, internet-only online radio stations also begin to appear in the radar of Indonesian music listeners.

Unlike the United States, Indonesia does not seem to be as advanced in its law and regulations to support the coming of this new trend in music listening. As a result, webcasters of online radio stations based in Indonesia are wondering what legal procedures they have to follow in order to legally webcast music on their online radio stations. Issues related to copyright are one of the many concerns of online radio webcasters.¹⁶ Webcasters question about whether they have to compensate the artists through royalty payment and to whom they must pay the royalties if they have to.

It is true that the recently enacted *Undang-undang Republik Indonesia Nomor 28 Tahun 2014 tentang Hak Cipta* (Law of the Republic of Indonesia Number 28 of 2014 on Copyright) puts more attention on the ongoing specific copyright issues, especially those related to royalty fees. However, the attention given to such issues does not seem to be clear enough to accommodate the current problems. The lack of clarity in provisions related to collective management organization may be one of the things which cause either Indonesian musicians (composers, public performers, producers) or online radio webcasters being put in a disadvantaged situation. Based on this concern, the researcher feels the need to conduct a comparative law study between the United States and Indonesia in regulating music licensing and the collection of royalties in the area of online radio stations.

¹⁶ Charles Emanuel, '(Media) Audio: Antara Tantangan Dan Harapan' (*Suara Indonesia untuk Perubahan*, 2014) <<http://www.siperubahan.com/read/1266/Media-Audio-Antara-Tantangan-dan-Harapan>> accessed 19 June 2015.

1.2 Research Questions

The central research question of this thesis is, “What can be learnt from the comparison of law and regulations between the United States and Indonesia in the event of supporting the currently developing trend of online radio?” From that central research question, there are several questions appear as follow:

1. What are the Indonesian laws and regulations that apply to online radio?
2. How does the federal government of the United States regulate online radio?
3. In the light of US regulations, what lessons can be learnt and adopted in Indonesia for the benefit of having advanced online radio related law and regulations?

1.3 Significance

The United States is well-known as a fully-developed country in the field of music, broadcasting, online technology and copyright law. Nobody doubts how well the online technology is implemented in the US music and broadcasting industries, including how the United States is far more advanced than any other countries in regulating the industries. Meanwhile, Indonesia only begins to follow the path of the United States as online technology is just getting more into the life of many Indonesians. In order to make sure the transition of music listening from traditional terrestrial broadcasting to online world is smooth and nobody in Indonesian music and broadcasting industries are put in a disadvantaged situation, the government of Indonesia needs to respond quickly in providing strong and reliable law and regulations. Having concern in such situation, this thesis is intended to gain as much knowledge as possible from the United States whose law and regulations related to online radio are already well-established. The result of this thesis hopefully may be used as a guidance for the government of Indonesia in composing an advanced regulation of online radio in Indonesia.

1.4 Methodology

The methodology used in this thesis is comparative law which is a method to look at a normative world and try to uncover similarities and differences between legal systems and legal

rules.¹⁷ The primary Indonesian regulation of this thesis is *Undang-undang Republik Indonesia Nomor 28 Tahun 2014 tentang Hak Cipta* (Law of the Republic of Indonesia Number 28 of 2014 on Copyright) which will be compared to the Title 17 of the United States Code on Copyright Law of the United States and Related Laws. From those two regulations, the thesis focuses on looking for similarities and differences of copyrights in musical composition and sound recording; related rights; and the collection of royalties applied to online radio in both of the countries. Among the various contents of online radio which may attract copyright issues, this thesis only focuses on music which publicly performed by online radio stations. The thesis is also conducted by studying some other related regulations from both of the countries, books, journals, articles and previous research studies.

1.5 Overview of Chapters

In order to answer the aforementioned research questions, this thesis proceeds with four chapters. The second chapter is opened with a brief history of radio broadcasting in Indonesia followed by its current situation and how radio broadcasting in Indonesia is going to the online world. The discussion in the second chapter is then continued by explaining how music copyright in its relation with online radio is regulated in Indonesia and how royalties for Indonesian musicians are collected.

The structure of the third chapter is similar to the second chapter. It is opened with a brief history of radio broadcasting in the United States and followed by the current situation of online radio in that country. How the United States regulates music copyright in its relation with online radio and how the Americans manage to collect royalties for US musicians are two issues explained as well in the third chapter.

The fourth chapter analyses the similarities and differences of regulatory framework discussed in the second and the third chapter in order to make a comparison between legal instruments of Indonesia and the United States in its effort to address issues related to online radio. In the fourth chapter, this research also analyses the ever-happened debates in the United States which relates to a difference in the amount of royalty rates an online radio station has to pay to the

¹⁷ Esin Örüçü, *The Enigma Of Comparative Law: Variations On A Theme For The Twenty-First Century* (Martinus Nijhoff Publishers 2004).

respective copyright holders compared to the amount of royalty rates a traditional AM/FM radio station is obliged to pay. This analysis is then mirrored to situation in Indonesia and the probability of similar problems happen in Indonesia in the near future.

Finally, the fifth chapter presents a concise summary of the contents of the entire research which answers the aforementioned research questions and is polished with legal suggestions from researcher addressed to the law and policy makers in Indonesia as form of contribution in order to improve the online-radio related law and regulations in Indonesia.

2 Regulatory Framework of Online Radio in Indonesia

2.1 The Rise of Online Radio in Indonesia

Radio broadcasting was introduced in Indonesia in the 1920s when a number of commercial radio stations were growing in Europe and the United States.¹⁸ The first radio station in Indonesia is Bataviase Radio Vereeniging (BRV) which was established on 16 June 1925.¹⁹ BRV was broadcasting propaganda in relation to trading and companies.²⁰ The establishment of BRV was followed by some other radio stations which were mostly established by the young generation of Indonesians who used radio stations for art, culture, and political reasons.²¹

In 1942, Japan started its occupation in the regions of Indonesia after winning in fights against the Dutch. Under the occupation of Japan, radio broadcasting in Indonesia was strictly supervised by a centralized body established by the colonial Japan called as *Pusat Jawatan Radio* (roughly translated as Central Radio Office).²² At that time radio broadcasting is only allowed to broadcast their content in Japanese and Indonesian, the use of any local language of Indonesian ethnics was not allowed.²³

Japan did not occupy Indonesia for a long period of time because Indonesia successfully achieved its independence on 17 August 1945, about three years since the beginning of Japan occupation. Soon after the declaration of independence, a national radio station named *Radio Republik Indonesia* (Radio of Republic of Indonesia) was established for the interest of Indonesian people.²⁴ Besides the Radio of Republic of Indonesia which is a non-commercial radio station set up by the government, commercial radio stations established by the private sectors also started broadcasting over the air. The growing number of commercial radio stations in Indonesia are even more significant since 1970s. Until now, the continuous developing of

¹⁸ Farid Aulia Tanjung, 'Sejarah Pendirian Dan Perkembangan Radio Siaran Di Indonesia | BGLC' (*Bumi Ganesha Learning Community*, 2014) <<http://www.bglconline.com/2014/09/sejarah-radio-siaran-indonesia/>> accessed 15 May 2015.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

commercial radio stations in Indonesia are shown by the big number of radio broadcasting stations cramping the Indonesian AM/FM frequency band.

Since frequency is a limited resource, it is impossible to accommodate the request for frequency allocation from all radio station broadcasters. The fact that there is no more frequency available in AM/FM frequency band for radio stations to broadcast over the air stirs radio enthusiasts in Indonesia to look for substitutes. The newly developed digital technology brought them to find the solution on the internet. The solution appears in a form of webcasting. As a result, more Indonesian AM/FM radio stations are simulcasting their over-the-air content on the internet. Popular commercial radio stations such as Prambors²⁵, Mustang²⁶, Elshinta²⁷, and Sonora²⁸ facilitate their listeners with additional features to stream their over-the-air content on their official websites. Radio of Republic of Indonesia, the non-commercial nation-wide radio, had even followed this contemporary step.²⁹ With this new technology, the broadcast of those traditional AM/FM radio stations will not only be listened by people inside the range of the radio station's frequency, but it may also be streamed by people from all over the world as long as they are connected to the internet.³⁰ The once traditional AM/FM radio stations are turned into online radio.

Not different from the situation in many parts of the world, online radio in Indonesia does not only consist of the internet version of existing AM/FM radio stations. There are also a number of internet-only online radio stations. Most of the simulcasting online radio stations already have a base of listeners and offer the same music content with its over-the-air broadcast which is mostly popular songs from well-known artists. On the other side, the Indonesian internet-only online radio stations are usually start-up companies or communities which offer different kind of music content in order to show its own unique characters.³¹ In some cases, those online radio stations even play songs from unknown indie musicians. Some examples of internet-only

²⁵ See <<http://www.pramborsfm.com/>> accessed 15 May 2015.

²⁶ See <<http://www.mustangfm.com/>> accessed 15 May 2015.

²⁷ See <<http://elshinta.com/>> accessed 15 May 2015.

²⁸ See <<http://www.sonora.co.id/>> accessed 15 May 2015.

²⁹ See <<http://www.rri.co.id/home.html>> accessed 15 May 2015.

³⁰ Tanjung (n18).

³¹ Pradipta Nugrahanto, '5 Startup Layanan Streaming Radio Online Di Indonesia' (*Tech in Asia Indonesia*, 2015) <<http://id.techinasia.com/daftar-startup-aplikasi-streaming-radio-gratis/>> accessed 15 May 2015.

radio stations in Indonesia are Berisik Radio³², Demajors Radio³³, Kaskus Radio³⁴, Ruru Radio³⁵, and Hujan! Radio³⁶. These radio stations may not be as popular as Prambors or Elshinta, but Indonesian music listeners are starting to get aware of their existences and use their services.

2.2 Music Copyrights in Indonesia

Music plays a major role in the life of radio broadcasting all over the world. Indonesia is not an exception. Therefore, it is an important job to make sure Indonesian music stays alive by giving protection to the music industry in the form of copyrights and royalties. The history of both copyrights and royalties had started since Indonesia was still under the Dutch colonial occupation. Indonesia first learned about copyright with the enactment of *Auteurswet 1912*.³⁷ During the Japanese occupation, *Auteurswet 1912* was put into a fridge since the applicable law at that time was Japanese military law.³⁸

After Indonesia achieved its independence in 1945, according to transitional provisions of the 1945 Constitution of the Republic of Indonesia, *Auteurswet 1912* was set to remain valid like the rest of legislations inherited from the Dutch colonial until a new legislation came into force to replace each of those pre-independence legislations.³⁹ Thirty-seven years after its independence, the government of Indonesia finally managed to release the first national copyright law to replace *Auteurswet 1912*⁴⁰ as *Undang-undang Nomor 6 Tahun 1982 tentang Hak Cipta* (Law of the Republic of Indonesia Number 6 of 1982 on Copyright) was enacted on 12 April 1982 in Jakarta.⁴¹

³² See <<http://berisikradio.com/>> accessed 15 May 2015.

³³ See <<http://www.demajorsradio.com/>> accessed 15 May 2015.

³⁴ See <<http://kaskusradio.com/>> accessed 15 May 2015.

³⁵ See <<http://rururadio.org/>> accessed 15 May 2015.

³⁶ See <<http://hujanradio.com/>> accessed 15 May 2015.

³⁷ Christoph Antons, *Copyright Law Reform and the Information Society in Indonesia* (1st edn, Sydney University Press 2008) <<http://hdl.handle.net/2123/2358>> accessed 1 February 2015.

³⁸ Rina Sartika Pamela, 'Perspektif Yuridis Mengenai Mekanisme Pemungutan Royalti atas Lagu serta Kendala yang Dihadapi oleh Yayasan Karya Cipta Indonesia (Juridical Perspectives of Mechanism on Collecting Song's Royalties and the Obstacles Which Faced by Yayasan Karya Cipta Indonesia)' (Master, Post-graduate, University of Indonesia 2011).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Law of the Republic of Indonesia Number 6 of 1982 on Copyright.

In the next following years, there is an increasing amount of attention given to copyright from the Indonesians. As a result, Indonesia ratified the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on 1 January 1995.⁴² It was then followed by re-entering the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1997⁴³ and ratifying the World Intellectual Property Organization (WIPO) Copyright Treaty at the same year.⁴⁴ Furthermore, the government of Indonesia successfully amended their national copyright law in 2002⁴⁵ despite the fact that at the same year the country was struggling with its political problems.⁴⁶

Undang-undang Nomor 19 Tahun 2002 tentang Hak Cipta (Law of the Republic of Indonesia Number 19 of 2002 on Copyright) might be considered effective in protecting the owner of copyrights in Indonesia at the time it was enacted, but copyright issues had become more complicated over the years as trends change and technology – especially in relation to information and communication – develops resulting in the requirement of amendment to Indonesian copyright law.⁴⁷ Twelve years after the last copyright law was introduced, a new *Undang-undang Republik Indonesia Nomor 28 Tahun 2014 tentang Hak Cipta* (Law of the Republic of Indonesia Number 28 of 2014 on Copyright) became effective on 16 October 2014⁴⁸ promising stronger protection for the holders of copyright while regulating more sanctions to the violators of copyright⁴⁹.

Different from the previous copyright law, Law of the Republic of Indonesia Number 28 of 2014 on Copyright (in this research later referred to as the 2014 Indonesian Copyright Law) clearly sets which rights it covers. According to Article 3 of the 2014 Indonesian Copyright Law, the act covers copyright and related rights.⁵⁰ This kind of distinction does not exist in the

⁴² See <http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22> accessed 22 May 2015.

⁴³ See <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15> accessed 22 May 2015.

⁴⁴ See <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15> accessed 22 May 2015.

⁴⁵ *Undang-undang Nomor 19 Tahun 2002 tentang Hak Cipta* (Law of the Republic of Indonesia Number 19 of 2002 on Copyright) was enacted on 29 July 2002.

⁴⁶ Antons (n37).

⁴⁷ Danu Lukiantono, Wiku Anindito and Raja Mada Silalahi, *Indonesia: Law No. 28 Of 2014 On Copyright* (Hadiputranto, Hadinoto & Partners 2014) <http://www.bakermckenzie.com/files/Publication/c80c6ba4-b757-4903-8d57-616a4fbf0f7a/Presentation/PublicationAttachment/9e54e149-4faf-4629-86f8-68b650b08791/al_jakarta_copyrightlawenacted_dec14.pdf> accessed 22 May 2015.

⁴⁸ Law of the Republic of Indonesia Number 28 of 2014 on Copyright.

⁴⁹ Iman Sjahputra, 'The New Copyright Law Increases Legal Protection for Copyright Holder' (*Iman Sjahputra & Partners*, 2014) <<http://www.imansjahputra.com/index.php?id=10702>> accessed 22 May 2015.

⁵⁰ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 3.

previous copyright law which generally regulates all provisions related to copyrights and just briefly regulates provisions of related rights.

A definition of copyright is elaborated in Article 3 of the 2014 Indonesian Copyright Law as an exclusive right comprising moral rights and economic rights.⁵¹ Moral rights are eternal rights given to the author of copyrighted works to: (a) be anonymous or not anonymous in his relation to the use of a copy of his work; (b) use alias or pseudonym himself; (c) modify his work according to the propriety in society; (d) modify the title and subtitle of his work; and (e) defend his right in the event of distortion of work, mutilation of work, modification of work, or anything detrimental to the honor or reputation of himself.⁵² These moral rights are supposed to be nontransferable, but the exercise of these rights can be transferred after the death of the author of a copyrighted work whether the transfer of the work is done by will or other causes as long as the causes are in accordance with the law.⁵³ However, the inheritor of these rights may choose to waive or decline the implementation of these rights as long as such decision is made in a written statement.⁵⁴ Since what is known as moral appreciation is naturally immaterial and invisible, there seems to be no direct impact of the exercise of these moral rights to the copyright holder. Therefore, the 2014 Indonesian Copyright Law makes sure that the realization of these rights can be seen from an ownership guarantee of copyright information management and/or copyright electronic information for copyright holder.⁵⁵

Besides moral rights, economic right is the other part of copyright covered in 2014 Indonesian Copyright Law. Economic right is an exclusive right of the author of copyrighted work or copyright holder to get economic benefits out of their work.⁵⁶ The 2014 Indonesian Copyright Law generates the scope of economic rights given to the author of copyrighted work or copyright holder to nine rights.⁵⁷ The first one is the right of publication of their work.⁵⁸ The second one is the right of the reproduction of their work⁵⁹. Reproduction here means a process,

⁵¹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 4.

⁵² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 5 (1).

⁵³ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 5 (2).

⁵⁴ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 5 (3).

⁵⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 6.

⁵⁶ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 8.

⁵⁷ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1).

⁵⁸ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (a).

⁵⁹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (b).

action, or way to duplicate a work and/or phonogram⁶⁰ of the work in any form permanently or temporarily.⁶¹ The third economic right is the right to the translation of their work.⁶² This right does not let anybody translate a work without permission from the copyright holder. The fourth one is the right of the adaptation, the arrangement and the transformation of their work.⁶³ Adaptation work which is also mentioned in the Berne Convention is defined as a right to make an adaptation of a copyrighted work.⁶⁴ The fifth economic right for an author of copyrighted work or copyright holder is the right to the distribution of their work and its copies.⁶⁵ Distribution in the 2014 Indonesian Copyright Law means the sales, circulation, and/or dissemination of a copyrighted work and/or product of related rights.⁶⁶

The last four rights of nine economic rights in the 2014 Indonesian Copyright Law are the right to the performance of a work (performance right), the announcement of a work (announcement right), the communication of a work (communication right), and the rental of a work (public lending right).⁶⁷ Performance right is a right to perform a work in any form of performances by artists – either musicians, actors, or models, including those related to movie screenings and sound recordings on television, radio, and any other types of media.⁶⁸ Meanwhile, what is defined as an announcement in the 2014 Indonesian Copyright Law includes reading, broadcasting, exhibition, or any activity which causes the copyrighted work to be read, heard, or seen by others.⁶⁹ On the other hand, the term “communication” in the communication right is about making a transmission, performance, or phonogram of a work through cable or any other type of media other than broadcasting resulting the work to be received by the public – including making the work, performance, or phonogram to be accessible.⁷⁰ The last one is the lending right which gives the copyright holder a right to receive remuneration when their work is rented out to the public.⁷¹

⁶⁰ According to Article 1 (14) Law of the Republic of Indonesia Number 28 of 2014 on Copyright, *phonogram* is a fixation of sound performance or other sound, or a representation of sound which is not incorporated in any cinematographic or other audiovisual works.

⁶¹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (12).

⁶² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (c).

⁶³ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (d).

⁶⁴ Pamela (n38).

⁶⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (e).

⁶⁶ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (17).

⁶⁷ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (1) (f), (g), (h), (i).

⁶⁸ Pamela (n38).

⁶⁹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (11).

⁷⁰ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (16).

⁷¹ Pamela (n38).

Since an author or copyright holder has all these nine exclusive rights, any person who wants to use any of these rights is obliged to obtain permission from the author or copyright holder.⁷² If any exercise of these rights is undertaken without permission from the author or copyright holder, the action is considered to be a violation of copyright. The 2014 Indonesian Copyright Law also clearly prohibits any reproduction or commercial use of copyrighted work without permission from the author or copyright holder.⁷³

Besides copyright, the 2014 Indonesian Copyright Law also covers related rights which are four exclusive rights related to copyright and given to performers, phonogram producers, or broadcasting institution.⁷⁴ Performers are one or several persons who individually or collectively display and demonstrate a work.⁷⁵ A fine example of performer is a recording artist. Phonogram producer is a person or a legal entity who creates the first fixation of a work and who is responsible for the recording of a sound or voice, whether it is the recording of a performance or other kinds of sound or voice.⁷⁶ Recording label is an easy example of phonogram producer. Broadcasting institution is a broadcasting provider – whether it is a public broadcasting institution, private broadcasting institution, community broadcasting institution, or subscription-based broadcasting institution – who carries its duties, functions, and responsibilities in accordance with the law.⁷⁷ Two examples of broadcasting institutions are television and radio stations.

The first related right set out in Article 20 (a) of the 2014 Indonesian Copyright Law is moral rights of performer.⁷⁸ There are two moral rights given to performers which are right to (a) get their name known as the performers unless agreed otherwise and (b) not get their work distorted, mutilated, modified, or in any way be put in a situation which can harm themselves or their reputation unless agreed otherwise.⁷⁹ The second related right is economic rights of performers.⁸⁰ The economic rights of performers include right to do it by themselves, license

⁷² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (2).

⁷³ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 9 (3).

⁷⁴ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (5).

⁷⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (6).

⁷⁶ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (7).

⁷⁷ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (8).

⁷⁸ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 20 (a).

⁷⁹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 22.

⁸⁰ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 20 (b).

others, or prohibit others to do these following activities: (a) broadcasting or communicating their work; (b) making a fixation of their work which has not been made into a fixation; (c) reproducing the fixation of their work in any manner or any form; (d) distributing the fixation of their work or its copies to the public; (e) renting out the fixation of their work or its copies to the public; and (f) making accessible the fixation of their work to the public.⁸¹

The third right of four related rights in the 2014 Indonesian Copyright Law is economic rights of phonogram producers.⁸² The economic right of phonogram producers includes right to do it by themselves, license others, or prohibit others to do these following activities: (a) reproducing the phonogram of their work in any manner or any form; (b) distributing the original phonogram of their work or its copies; (c) renting out the copies of phonogram of their work; and (d) making wired or wireless access of the phonogram of their work available to the public.⁸³ The last related right set out in the 2014 Indonesian Copyright Law is economic rights of broadcasting institution.⁸⁴ The economic right of broadcasting institution includes right to do it by themselves, license others, or prohibit others to do these following activities: (a) rebroadcasting their contents; (b) communicating their contents; (c) making a fixation of their contents; and (d) reproducing the fixation of their contents.⁸⁵

In relation to those economic rights explained above, there are at least three provisions which clearly set obligations to any person who wants to exercise each or all of those economic rights. The first of this kind of provision is set out in Article 23 (5) of the 2014 Indonesian Copyright Law which says, “Any person who wants to make a commercial use of a work in a performance may not need to obtain a permission directly from its author as long as an amount of remuneration is paid to a Collective Management Organization.”⁸⁶ In a real scenario, a recording artist for example may sing a certain song and get it recorded without asking permission directly from the composer of the song as long as he pays an amount of royalties to a designated collective management organization. The second one says that any person who wants to exercise any of the economic rights of phonogram producer is obliged to get

⁸¹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 23 (2).

⁸² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 20 (c).

⁸³ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 24 (2).

⁸⁴ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 20 (d).

⁸⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 25 (2).

⁸⁶ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 23 (5).

permission from the phonogram producer.⁸⁷ For example, when a radio wants to play a song on air, it must get a permission from its respective recording label. The third provision generates an obligation to any person to acquire permission from broadcasting institution in order to be able to make a commercial dissemination over a certain content of that broadcasting institution.⁸⁸ Rebroadcasting without permission from its original broadcasting station is a fine example to illustrate this provision. Therefore, rebroadcasting cannot be done vigorously without permission from its original broadcaster.

From the explanation of both copyrights and related rights, a big picture can be drawn i.e. the government of Indonesia generally tries to pay attention to the life of composer, recording artist, recording label, and broadcasting station since all of them are the main actors in Indonesian music industry and are entitled to exclusive economic rights as elaborated in the 2014 Indonesian Copyright Law.

Of all those exclusive economic rights explained above, radio station must pay special attention to the economic rights of author (music composer) or copyright holder, performer, and phonogram producer since a radio station makes use of both musical composition and sound recording in broadcasting a song over the air. A musical composition is a work of a music composer, while a sound recording is a work of both performer and phonogram producer. Therefore, a radio station is exercising the economic rights of three legal entities. The first one is economic rights of composers to announce and communicate their work to the public as set out in Article 9 (1) (g) and (h) of the 2014 Indonesian Copyright Law. The second one is the economic rights of performers (recording artists) to broadcast and communicate their work including making the sound recording accessible to the public as set out in Article 23 (2) (a) and (f) of the 2014 Indonesian Copyright Law. The last one is the economic rights of phonogram producers to make the sound recording accessible to the public as established in Article 24 (1) (d) of the 2014 Indonesian Copyright Law.

Since Indonesian law has yet made any classifications on radio stations, all these provisions are generally applied to all types of radio station, including online radio stations. Therefore, an online radio station must be aware of the consequences of these provisions in relation to their

⁸⁷ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 24 (4).

⁸⁸ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 25 (3).

activities of publicly performing songs on the internet. The consequences happen to be in a form of financial remuneration to the author of the song (music composer), the performer (recording artist), and its phonogram producer (recording label). Financial remuneration as a consequence of using economic rights of these three legal entities is better known as royalties.

2.3 The Collection of Royalties in Indonesia

As a result of having exclusive rights of their works, author or copyright holder and holder of related rights are entitled to determine the use of their works. It is up to them whether they are willing to let others use it or prohibit others from using it. There is a provision in the 2014 Indonesian Copyright Law which entitles author or copyright holder or holder of related rights to make a written licensing agreement in order to let others make use of any of the economic rights explained in the previous section.⁸⁹ This licensing agreement may remain valid for a period not any longer than the validity period of its copyright and related right.⁹⁰ Author or copyright holder or holder of related rights may arrange this licensing agreement by themselves or let a third party does it for them.⁹¹

In the licensing agreement, the author or copyright holder or holder of related rights may obtain a small token for what they have done in a form of royalty, unless agreed otherwise.⁹² The licensee is obliged to pay the amount of royalties agreed in the agreement with the author or copyright holder or holder of related rights. Royalty in the 2014 Indonesian Copyright Law is defined as a reward out of the use of economic rights of a work which is received by its author or copyright holder or holder of related rights.⁹³ The determination of the amount of royalties and its payment method must be agreed in the licensing agreement between licensee and the author or copyright holder or holder of related rights.⁹⁴

In relation to licensing and the collection of royalties, there is a specific provision in the case of phonogram. The user of phonogram is obliged to pay a fair remuneration to both performer

⁸⁹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 80 (1).

⁹⁰ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 80 (2).

⁹¹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 81.

⁹² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 80 (3).

⁹³ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (21).

⁹⁴ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 80 (4).

and phonogram producer as an exchange of the use of their phonogram.⁹⁵ The right to receive this fair remuneration is owned by both the performer and phonogram producer for a period of fifty years.⁹⁶ If this provision is applied in the case of radio broadcasting, radio station is obliged to pay the remuneration to both the recording artist and recording label before the radio station could broadcast their song over the air.

As set out in Article 81 of the 2014 Indonesian Copyright Law, the licensing process may be delegated to a third party. This provision is in line with the provision which asks author or copyright holder and holder of related rights to become a member of a collective management organization.⁹⁷ This organization is a non-profit legal entity delegated by author or copyright holder, and/or holder of related rights to collect and distribute royalties.⁹⁸ Looking at this definition of collective management organization, it is clear that the user of copyright and related rights is encouraged to pay royalties through this organization.⁹⁹

These provisions related to collective management organization which in the global scale is better known as 'collecting society' is a whole new concept introduced in the 2014 Indonesian Copyright Law. The previous copyright law briefly mentions about professional organizations which is similar to the concept of collective management organization, but it does not formulate them in details.¹⁰⁰ Meanwhile the current copyright law sets up almost all the details about how a collective management organization should operate and all the requirements to be met by the organization in order to get an operating license from the Ministry of Law and Human Rights of the Republic of Indonesia and be able to legally collect royalties.¹⁰¹ Some requirements which must be met by the collective management organization are like a minimum number of right holders they represent and a maximum amount of fund from the total of collected royalties in a year which can be used for operational cost.¹⁰² In order to support the provisions related to

⁹⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 27 (2).

⁹⁶ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 27 (3).

⁹⁷ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 87 (1).

⁹⁸ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (22).

⁹⁹ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 87 (2), (3), and (4).

¹⁰⁰ Risa Amrikasari, 'Kedudukan Lembaga Manajemen Kolektif dalam UU Hak Cipta yang Baru' (*Hukum Online*, 2014) <<http://www.hukumonline.com/klinik/detail/lt541f940621e89/kedudukan-lembaga-manajemen-kolektif-dalam-uu-hak-cipta-yang-baru>> accessed 25 May 2015.

¹⁰¹ The provisions are overlaid in Chapter XII of the 2014 Indonesian Copyright Law.

¹⁰² Rouse Magazine Editor, 'Indonesia's New Copyright Law' [2014] *Rouse* <<http://www.rouse.com/magazine/articles/news-and-articles/indonesias-new-copyright-law>> accessed 30 January 2015.

collective management organization in the 2014 Indonesian Copyright Law, the Ministry of Law and Human Rights of the Republic of Indonesia had released a ministry regulation about the procedure to obtain and issue operating license of collective management organization including the procedure to evaluate how the organization works.¹⁰³

The 2014 Indonesian Copyright Law has even come up with a plan to establish two National Collective Management Organizations which each represents the interests of different entities.¹⁰⁴ The first organization represents the interests of authors or copyright holders, while the other is the representative of holder of related rights. The way both of the National Collective Management Organizations shall work is also generally set out in the 2014 Indonesian Copyright Law. As a form of commitment to enforce these provisions, Ministry of Law and Human Rights of the Republic of Indonesia recently announced the commissioners of two National Collective Management Organization in Jakarta.¹⁰⁵ One organization represents author, while the other one represents holder of related rights.¹⁰⁶ Each organization has five commissioners who come from different backgrounds in the entertainment industry.¹⁰⁷

Introducing this concept of collective management organization in the newly enacted copyright law is a wise step coming from the government of Indonesia since the collection of royalties for composers and musicians has long been known problematic. The main problem revolves around which organization is rightfully entitled to collect royalties. As an example, there is an old case back in 2006 when Yayasan Karya Cipta Indonesia (YKCI) and Asosiasi Rekaman Indonesia (ASIRI) were fighting against each other because each of them feels entitled to collect royalties.¹⁰⁸ At that time, this problem had even reached *Dewan Perwakilan Rakyat Republik Indonesia* (the House of Representatives of the Republic of Indonesia) which drove them to agree to review the old 2002 Indonesian Copyright Law in order to settle the conflict.¹⁰⁹

¹⁰³ Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia Number 29 of 2014 on Procedure for Requesting and Issuing Operating License and Evaluating Collective Management Organization.

¹⁰⁴ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 89 (1).

¹⁰⁵ Hukum Online, 'Komisioner LMK, Dari Raja Dangdut Hingga Ebiet G Ade' (2015) <<http://www.hukumonline.com/berita/baca/lt54be6f3dbb1a1/komisioner-lmkn--dari-raja-dangdut-hingga-ebiet-g-ade>> accessed 6 February 2015.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Risa Amrikasari, 'Memungut Royalti Lagu, Hak Siapa?' (*Hukum Online*, 2006) <<http://www.hukumonline.com/berita/baca/ho15903/memungut-royalti-lagu-hak-siapa>> accessed 24 May 2015.

¹⁰⁹ Ridwan Max Sijabat, 'Copyright Law to Be Reviewed' *The Jakarta Post* (2006) <<http://www.thejakartapost.com/news/2006/12/05/copyright-law-be-reviewed.html>> accessed 24 May 2015.

Both YKCI and ASIRI are two long-established collective management organization in Indonesia. YKCI had been established since 12 Juni 1990¹¹⁰ while ASIRI claimed to be established in the year 1978¹¹¹. YKCI is a collective management organization established by Persatuan Artis Penyanyi Pencipta Lagu dan Pemusik Republik Indonesia (PAPPRI) who is an associate of the International Confederation of Societies of Authors and Composers (CISAC).¹¹² Meanwhile ASIRI claims to be part of the International Federation of the Phonographic Industry (IFPI). Therefore, both YKCI and ASIRI are already recognized at international level. The younger organization is Wahana Musik Indonesia (WAMI) which was established only recently, 15 September 2006¹¹³. Even though WAMI has not long been established, it had become part of CISAC just like YKCI.¹¹⁴ The three of them manage the collection of royalties for recording labels and music composers. Besides those three, there is the youngest one named Performers' Rights Society of Indonesia (PRISINDO) which was established in 2010 by local musicians in order to manage the performing rights of its members and royalties for the use of sound recordings.¹¹⁵

Even though there are several options available to those who make use of economic rights of author or copyright holder or holder of related rights, each of these organizations are not very well organized, informative, and accessible to the public. One of the examples which shows the lack of Indonesian collective management organizations is the non-existence of information regarding the rates of royalties to the public. In most cases, the rates of royalties are determined according to each agreement made between the collective management organization and the user of copyrighted works. This lack of accountability triggered conflicts between collective management organization and its members. A recent case shows that a group of composers decided to leave YKCI on the basis of unequal treatment in the amount of royalties they receive

¹¹⁰ See <<http://kci-lmk.or.id/sejarah-kci/>> accessed 24 May 2015.

¹¹¹ See <http://www.asiri.co.id/index.php?option=com_content&view=article&id=70&Itemid=465> accessed 24 May 2015.

¹¹² See <<http://www.cisac.org/Our-Members/Member-Directory/By-Territory#i>> accessed 24 May 2015.

¹¹³ See <<http://www.wami.co.id/web2/home/index.php?opt=about>> accessed 24 May 2015.

¹¹⁴ CISAC (n112).

¹¹⁵ See <<http://www.collectingsocietieshb.com/CollectingSocieties/DisplayCollectingSocieties?societyfk=221>> accessed 24 May 2015.

from YKCI.¹¹⁶ In another case, YKCI was alleged to have set an unfeasible amount of royalties which a user of copyrighted works has to pay to them.¹¹⁷

In principle, YKCI itself determines the amount of royalties according to how big the economic benefits received by a user of copyrighted work (a song) as a result of using it for their customers.¹¹⁸ Therefore, radio broadcasting station whose advertising revenue is more than US\$10,000 will not pay the same amount of royalties with radio broadcasting station whose advertising revenue is smaller than that. The final rates of royalties itself is a result of an actual research between YKCI together with copyright holder which shall be applied to any type of radio stations, either terrestrial or online radio stations.¹¹⁹

From the explanation about how the collection of royalties works in Indonesia, it can be seen that a collective management organization plays important roles in the process. There are at least four primary tasks assigned to a collective management organization in its relation to collecting royalties from radio stations, including online radio stations. The first one is collecting royalties from the online radio stations which play songs over the internet for commercial purposes.¹²⁰ The second and the third task are managing the collected royalties and distributing those royalties to its rightful beneficiaries.¹²¹ In the case of online radio, the rightful beneficiaries are music composers, performers (recording artists), and phonogram producers (recording labels). The last primary tasks of a collective management organization is making a coordination with stakeholders in order to determine royalty rates applied to all kinds of radio stations, including online radio stations.¹²²

In its association with webcasting done by online radio station, the 2014 Indonesian Copyright Law gives new power to the Ministry of Communication of Information and Technology of

¹¹⁶ Ari Kurniawan, 'Tak Diperlakukan Adil KCI, Rhoma Irama Bentuk RAI' *Bintang Online* (2013) <<http://archive.tabloidbintang.com/film-tv-musik/kabar/65521-tak-diperlakukan-adil-kci,-rhoma-irama-bentuk-rai.html>> accessed 25 May 2015.

¹¹⁷ Hukum Online, 'YKCI Versus Inul Vizta di Pengadilan Niaga' (2013) <<http://www.hukumonline.com/berita/baca/lt514ffde995646/ykci-versus-inul-vizta-di-pengadilan-niaga>> accessed 25 May 2015.

¹¹⁸ See <<http://kci-lmk.or.id/faq/>> accessed 24 May 2015.

¹¹⁹ *Ibid.*

¹²⁰ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 88 (2) (d).

¹²¹ *Ibid.*

¹²² Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 89 (3).

the Republic of Indonesia to block access to available materials on the internet which infringe copyright and related rights.¹²³ Any person is even encouraged to make a report to the Ministry if they find any infringing materials. Therefore, when an online radio station play song without getting license or paying royalties to its rightful owners, the Ministry has the capability to stop the transmission. However, the implementation of this provision is not an easy task and needs further more technical regulations.

¹²³ Rouse Magazine Editor (n102).

3 Regulatory Framework of Online Radio in the United States

3.1 History of Radio Broadcast in the United States

The United States has a long history of radio broadcast. It is believed that some of the initial radio broadcasters in the United States went on air as early as 1910. KDKA in Pittsburgh is often pointed out as the first radio station in the United States and had started broadcasting in 1916. However, the station was forced to shut off their broadcast because of World War I. KDKA later returned in November 1920 as commercial voice-and-music service.

In the early years of radio broadcasting in the United States, almost half of more than 500 radio stations were non-commercial.¹²⁴ Back in those days, a balanced number of non-commercial and commercial radio broadcasters was being kept since most of the Americans used to believe that commercial broadcasting would bring harm to the public interest because they were owned and operated by greedy and amoral companies.¹²⁵ If there were not strong enough non-commercial broadcasters on air, it might be better for the commercial broadcasters to be totally banned.¹²⁶ Only after 1930, commercial broadcasters in the United States grew in a significant number as a part of media reform movement.¹²⁷ 1930s are even marked as the golden age of radio broadcasting because it was very popular, even theaters decided to wait until certain popular show on the radio was over to open their businesses.¹²⁸

Nevertheless, this so-called golden age did not last long as a new industry took over. An American radio scholar and associate professor of communication at Boston College, Michael C. Keith, once stated that there was a tendency of fear that radio would reach its terminus as television started to crash the market in the beginning of 1950s.¹²⁹ However, radio broadcasters

¹²⁴ Bruce Dixon, 'The Hidden History of US Broadcasting' (*Common Dreams*, 2008) <<http://www.commondreams.org/views/2008/07/02/hidden-history-us-broadcasting>> accessed 1 April 2015.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Ralph Engelman, *Public Radio and Television in America* (Sage Publications 1996).

¹²⁸ Carole E. Scott, 'The History of the Radio Industry in the United States to 1940' (*Eh.net Encyclopedia*, 2008) <<http://eh.net/encyclopedia/the-history-of-the-radio-industry-in-the-united-states-to-1940/>> accessed 1 April 2015.

¹²⁹ Marina Koestler Ruben, 'Radio Activity: The 100Th Anniversary of Public Broadcasting' [2010] *Smithsonian.com* <<http://www.smithsonianmag.com/history/radio-activity-the-100th-anniversary-of-public-broadcasting-6555594/?no-ist=&page=2>> accessed 1 April 2015.

knew how to survive the crisis. Instead of going to the slump, it successfully went on to present a good progress. The successful development of transistor technology allowing radio devices to be smaller and easier to carry around was behind this success.¹³⁰ The fact that radio devices became portable helped a lot in facilitating the busy and active life of modern day people.

In the next forty years, radio broadcasting is still in the US market and continues to develop as broadcasting technology develops. These days the United States is even considered to be the pioneer of modern broadcasting system worldwide for its advanced technological innovations and the fact that their commercial and organizational broadcasting forms are models for many other countries making the US broadcast programming leading the broadcast industry all over the world.¹³¹

The continuous development of broadcasting in the United States has brought the country to an era where broadcasting is not only offered over the air. It has gone online. Radio stations now publicize their content on the internet and everybody can have access to listen to them wherever they are. Location is no longer a barrier because broadcasting is not restricted by the length of radio waves or frequency anymore. On the internet, people from different part of the world can listen to the same radio stations even though they are thousands miles away from each other. It is even possible that the very same radio station which they listen to broadcasts from a place also miles away from them. It is the very benefit of online radio.

As a form of communication transmission, the US broadcasting system is watched by Federal Communications Commission (FCC). Being an independent US federal government agency overseen by US Congress,¹³² FCC plays a role in achieving the current success of US broadcasting system.¹³³ FCC consistently maintains the balance between governmental supervisions and vulnerable societal values¹³⁴. The commission is the primary authority of US federal government in the field of communications law, regulation, and technological innovation.¹³⁵ FCC consists of bureaus and offices whose members work side by side to (1) develop and implement regulatory programs; (2) process applications for licenses and other

¹³⁰ *Ibid.*

¹³¹ Wolfgang Hoffmann-Riem, *Regulating Media* (Guilford Press 1996).

¹³² See <<https://www.fcc.gov/what-we-do>> accessed 20 June 2015.

¹³³ Hoffman-Riem (n131).

¹³⁴ Hoffman-Riem (n131).

¹³⁵ See <<https://www.fcc.gov/what-we-do>> accessed 20 June 2015.

filings; (3) encourage the development of innovative services; (4) conduct investigations and analyze complaints; (5) maintain public safety and homeland security; and (6) provide consumer information and education.¹³⁶

In relation to radio broadcasting, FCC administers and maintains licenses for AM, FM, low power FM, FM translator and FM booster radio stations.¹³⁷ These licenses are what allow the aforementioned type of radio stations to operate their businesses.¹³⁸ FCC only releases licenses after those radio stations file an application to the FCC.¹³⁹ Nevertheless, online radio station is not among those radio stations which are under the eyes of FCC. The closest the commission may have access to exercise its authorities is when the online radio station is a simulcast of traditional AM/FM radio station.

3.2 Current Situation of Online Radio in the United States

In the middle of 1990s online radio was introduced to the public in the United States and has rapidly gained popularity among millions of American listeners.¹⁴⁰ A recent research estimated at least 124 million Americans which is almost half of its entire population listen to online radio in a month.¹⁴¹ The average amount of time those listeners spend listening to online radio in weekly basis reached more than thirteen hours in 2014.¹⁴² The same research also reported that the majority of its listeners prefer online radio for reasons like better audio sound quality and less intrusive commercials compared to traditional AM/FM radio transmissions.¹⁴³ Listeners of online radio are also pleased by a freedom to choose from diverse music genres it has to offer, varied from pop, to disco, to classic rock, to jazz, to movie soundtracks, to 1940s oldies, to contemporary country, to classical, to heavy metal, to seasonal, and many more.¹⁴⁴ This variation of music genres allow online radio listeners to listen to music they are most

¹³⁶ *Ibid.*

¹³⁷ See <<https://www.fcc.gov/encyclopedia/radio>> accessed 25 June 2015.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Stockment (n1).

¹⁴¹ Edison Research and Triton Digital, 'The Infinite Dial 2014' (2014) <<http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf>> accessed 3 April 2015.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Stockment (n1).

likely never listen before – making it beneficial for recording artists and helping in increasing music sales.¹⁴⁵

As explained in the first chapter of this research, there are at least three kinds of online radio stations: online radio station coming from simulcasts of existing traditional AM/FM radio station, internet-only online radio station, and satellite-based online radio station. iHeartRadio who is associated with several traditional AM/FM broadcast stations is an example of the first of the three kinds of online radio station.¹⁴⁶ Two examples of the countless number of existing internet-only radio stations are WVAU which is a student radio station of American University¹⁴⁷ and StreamingSoundtracks.com¹⁴⁸ which is a community-based online radio station associated with the famous Live365. SiriusXM is a sample of US-based satellite radio station which is now also available on the internet offering coast-to-coast coverage of commercial-free music, talks, entertainment, traffic and weather information with digital-quality sound which gives a chance for one to drive from New York to Los Angeles without having to change radio channel.¹⁴⁹

As mentioned above, online radio offers a wide variety of music genres for free. Its listeners do not have to subscribe, which may contribute to the fast growing number of online radio listeners, especially in the United States. In addition to that, the significant technological development of online radio which lets its listeners easily have access to the service may also be one of the keys behind the success of online radio. Contrary to the current situation, at the early days of online radio, listeners used to be able to listen to online radio webcasts only by streaming through their computers.¹⁵⁰ However, in regard to the advancement of mobile technology and internet infrastructure, online radio had been freed from the confinement of computer and can now be heard on-the-go through a wide variety of mobile devices, such as smartphones.¹⁵¹

¹⁴⁵ *Ibid.*

¹⁴⁶ See <<http://www.iheart.com/>> accessed 27 May 2015.

¹⁴⁷ See <<http://www.wvau.org/page/about>> accessed 5 April 2015.

¹⁴⁸ See <http://www.streamingtracks.com/modules.php?name=About_SST> accessed 5 April 2015.

¹⁴⁹ See <https://listenercare.siriusxm.com/app/answers/detail/a_id/3563> accessed 5 April 2015.

¹⁵⁰ Stockment (n1).

¹⁵¹ *Ibid.*

3.3 Music Copyrights in the United States

Even though online radio offers a variety of entertainment other than music such as talks, news, or weather reports; the major content of online radio is still music. As the fuel of online radio, it is important to maintain the sustainability of music production by providing a guarantee of well compensation for the hard work of people working in the music industry. This guarantee appears in a form of exclusive rights popularly known as copyrights.

Copyright law has a long history in protecting music composers and performers against illegal reproduction, adaptation, distribution and performance of their creations.¹⁵² The basic framework for the current copyright law in the United States – The Copyright Act of 1976 – was enacted on 19 October 1976 and is now a part of Title 17 of the United States Code. In relation to music, the copyright law appears to protect two separated works: a musical composition and a sound recording.¹⁵³ A musical composition is defined as a fixed sequence of words, notes, and rhythms which are captured in a written form and which are able to structure a generic sound of a piece of performance.¹⁵⁴ A composer puts together notes, harmony and lyrics in order to create a pleasant musical composition.¹⁵⁵ On the other hand, a sound recording is a recorded version of a musical composition.¹⁵⁶ The US Copyright Act of 1976 has its own definition of sound recording which is “a fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords in which they are embodied”.¹⁵⁷

The copyright for a musical composition is owned by the composer or publisher of the musical composition, while copyright for a sound recording in most cases is in the hand of recording artist or recording label.¹⁵⁸ It is possible for a musical composition to have a multiple cover

¹⁵² Fisher III (n5).

¹⁵³ Title 17 of the United States Code §102 (a) (2) and (7) (2011).

¹⁵⁴ Eric Blouw, 'Just Asking for A Little Respect: Radio, Webcasting & the Sound Recording Performance Right' (2014) 5 Cybaris: An Intellectual Property Law Review <http://web.wmitchell.edu/cybaris/wp-content/uploads/2014/06/vol5_issue2_02_Blouw_Sound_Recording_Performance_Right.pdf> accessed 29 May 2015.

¹⁵⁵ Fisher III (n5).

¹⁵⁶ Eric Blouw (n154).

¹⁵⁷ Title 17 of the United States Code §101 (2011).

¹⁵⁸ Stockment (n1).

versions performed by several different singers and recorded by different recording labels each of which is copyrightable for the originality of its sound recording.¹⁵⁹

Since both of musical composition and sound recording are necessary in webcasting over the internet, an online radio must get permission from the holders of all related copyrights.¹⁶⁰ Before going further down to whom a webcaster must get those permissions from and what a webcaster must do in order to get them, it is important to look at what a holder of these copyrights is capable of according to the US Copyright Act of 1976. These copyrights grant them to do three things.

The first one is reproducing their copyrighted work either in copies or phonorecords.¹⁶¹ The term phonorecord is introduced by the US Copyright Act of 1976. It is defined as a material object embodying sounds – except sounds in motion pictures or any audiovisual work – by any possible method from which sounds can be perceived, reproduced, or communicated directly or with the help of a machine or device, including the material object which embodies the sounds for the first time.¹⁶² All activities related to reproduction, such as recording, publishing, or making copies of a song must be carried out under permission of the right holder.¹⁶³ Reproduction in this case also includes making copies of music sheets and lyrics, composing similar musical composition, and producing mechanical copy of the song.¹⁶⁴ All these activities need permission from the initial copyright holder.

The second one is making derivative works of their copyrighted work.¹⁶⁵ Having this exclusive right allows the copyright holder to forbid one to create a work based upon his existing work in a form of translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other kind of modifications.¹⁶⁶

¹⁵⁹ Blouw (n154).

¹⁶⁰ *Ibid.*

¹⁶¹ Title 17 of the United States Code §106 (1) (2011).

¹⁶² Title 17 of the United States Code §101 (2011).

¹⁶³ Stockment (n1).

¹⁶⁴ *Ibid.*

¹⁶⁵ Title 17 of the United States Code §106 (2) (2011).

¹⁶⁶ Title 17 of the United States Code §101 (2011).

The third one is distributing copies or phonorecords of their copyrighted work to public either by sale, rental, lease, lending, or any other kind of transfer of ownership.¹⁶⁷ Nevertheless, doctrine of “first-sale” limits this exclusive right by saying a once lawfully acquired copy of a song – including a sound recording – may be used for any purposes without permission from the copyright holder of the musical composition, except renting it to the public with commercial advantages.¹⁶⁸

There is also an additional right given to the holder of copyright in musical composition, but not to the holder of copyright in a sound recording.¹⁶⁹ The additional right is better known as public performance right which grants its holder a right to stop anyone from publicly performing his musical composition without his permission.¹⁷⁰ Concerts and song play on any type of radio are two examples of public performance.¹⁷¹ As a consequence of the existence of public performance right, a broadcaster must obtain permission from the holder of copyright in musical composition before a song gets to air on his traditional AM/FM radio station.¹⁷²

This provision looks like an unfair treatment to the holder of copyright in a sound recording since it means that any recording artist or recording label who usually holds the copyright in a sound recording will not earn anything even if the song of which they perform is played on a traditional AM/FM radio station. However, the Digital Performance Right in Sound Recording Act of 1995 (the DPRA) added another additional right for the holder of copyright in sound recording which allows the right holder to stop any public performance of his copyrighted work if it is transmitted without his permission through any digital means.¹⁷³ As a result of this provision, the copyright holder in sound recording may earn a return in a form of royalty every time his music is played on digital radio.¹⁷⁴

The provision set out in the DPRA is however followed by a long list of exceptions. These exceptions show how compromises between stakeholders in music and broadcasting industry (i.e. sound recording copyright holders, radio broadcasters, and performing rights organizations)

¹⁶⁷ Title 17 of the United States Code §106 (3) (2011).

¹⁶⁸ Stockment (n1).

¹⁶⁹ *Ibid.*

¹⁷⁰ Title 17 of the United States Code §106 (4) (2011).

¹⁷¹ Stockment (n1).

¹⁷² Blouw (n154).

¹⁷³ Title 17 of the United States Code §106 (6) (2011).

¹⁷⁴ Stockment (n1).

play a big role in creating regulations.¹⁷⁵ Of all these exceptions, there is one important exception which is relevant to online radio. This exception is laid out in Section 114 (d) (1) of US Copyright Act of 1976 which limits public performance right of sound recording for the non-subscription broadcasters.¹⁷⁶ All the non-subscription broadcasters, such as traditional AM/FM radio stations, are exempted from having to pay royalties to the copyright holder of sound recordings. Online radio also falls in this category since by the time the DPRA was enacted, online radio technology was still an emerging technology and therefore was not specifically addressed in the DPRA.¹⁷⁷ Falling in the same group as traditional AM/FM radio stations, it can be concluded that an online radio is also free from the obligation to pay royalties to the holder of copyright in sound recording.

When audio streaming technology was improving, the music recording stakeholders started getting concerned about the inability of the DPRA to protect their interests.¹⁷⁸ Their concern revolved around the fact that webcasting services like online radio might decrease their record sales leading to a decreasing amount of income they were supposed to receive.¹⁷⁹ Therefore US Congress tried to address this issue by amending the provision of public performance right in sound recording through the Digital Millennium Copyright Act of 1998 (the DMCA). The DMCA removed exception for the “non-subscription transmission other than a retransmission” from Section 114 (d) (1) of US Copyright Act of 1976 causing non-interactive non-subscription webcasters like online radio were subject to paying royalties to the sound recording copyright holders.¹⁸⁰

As a result, an online radio in the United States is bound to get permissions from at least two relevant copyrights holders before webcasting music content on the internet. According to the US Copyright Act of 1976, these two relevant copyright holders are copyright holder of musical composition and copyright holder of sound recording. Permissions from these two copyright holders may be obtained by paying royalties directly to the respective right holders or indirectly through collecting societies.

¹⁷⁵ Blouw (n154).

¹⁷⁶ Title 17 of the United States Code §114 (d)(1) (2011).

¹⁷⁷ Blouw (n154).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

3.4 The Collection of Royalties in the United States

The exclusive rights discussed above entitles its holder to set up requirements before others may legally use one of those rights. These requirements are what called as “compulsory licenses” in accordance to US Copyright Act of 1976. These compulsory licenses give a chance to copyright holder to decide between preventing others to use his rights altogether or giving others permission to use under certain conditions, such as by paying royalties in return of the given permission.¹⁸¹

According to the explanation about copyrights above, there are at least two compulsory licenses required in order to play a song on online radio. The first one is license for public performance of a certain musical composition. The second one is license for performance of a sound recording which in the case of online radio is transmitted over digital audio transmission. Besides these two licenses, the DPRA and the DMCA add another compulsory license needed in the case of webcasting which is a license for the ephemeral copies created from a sound recording in the process of digitally transmitting the audio.¹⁸²

In order to facilitate the process of licensing and collecting royalties for public performances of musical compositions, the US government had the private sectors established three performing rights organizations¹⁸³ or in US Copyright Act of 1976 they are called as performing rights society. According to US Copyright Act of 1976, “performing rights society is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works.”¹⁸⁴ Those three organizations are the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and (3) SESAC, Inc. (SESAC).¹⁸⁵ The oldest of the three is ASCAP established on 13 February 1914¹⁸⁶ and now its members consist of 525,000 composers, songwriters, lyricists, and music publishers from every music genre.¹⁸⁷ Meanwhile the younger BMI – founded in 1939 – currently represents more than 650,000 songwriters, composers and music publishers.¹⁸⁸

¹⁸¹ Fisher III (n5).

¹⁸² Stockment (n1).

¹⁸³ Fisher III (n5).

¹⁸⁴ Title 17 of the United States Code §101 (2011).

¹⁸⁵ Fisher III (n5).

¹⁸⁶ See <<http://www.ascap.com/100.aspx#1914>> accessed 10 April 2015.

¹⁸⁷ See <<http://www.ascap.com/about/>> accessed 10 April 2015.

¹⁸⁸ See <<http://www.bmi.com/about>> accessed 10 April 2015.

On the other hand, SESAC is a much smaller performing rights organization comparing to the other two representing only 30,000 songwriters, composers, and music publishers.¹⁸⁹

The three performing rights organizations work primarily by issuing a “blanket” performance licenses for all of the songs associated with them to radio and television stations by charging a certain amount of fee to those stations.¹⁹⁰ In rare cases, the performing rights organization also offers performance license per individual song, but it is usually more expensive compared to getting a “blanket” license.¹⁹¹

This kind of licensing has been going around the music industry for so many years and traditional AM/FM radio stations must pay the royalties in order to be able to legally play musical compositions on their radio stations.¹⁹² Online radio is not in a different position, it also has to go through the same process. However, as a kind of digital radio stations besides digital cable radio and satellite radio, online radio has to pay additional royalty for the public performance of sound recordings it publicly displays.¹⁹³ This is related to the provision of US Copyright Act of 1976 Section 114 which specifies compulsory license needed in order to legally tackle the violation of copyright in related to public performance of a sound recording which is likely to be carried out by radio stations with digital audio transmission.¹⁹⁴

Meanwhile, in relation to the creation of ephemeral copies from a sound recording in the process of digital audio transmission, Section 112 of US Copyright Act of 1976 creates another compulsory license which can be obtained by paying royalties to the copyright owner.¹⁹⁵ These ephemeral copies are all of the copies created by the music services from the server of their music storage when the music programming takes place to the copies created somewhere else on the internet while the music makes its way to its destined listeners.¹⁹⁶

¹⁸⁹ See <<http://www.sesac.com/About/About.aspx>> accessed 10 April 2015.

¹⁹⁰ Fisher III (n5).

¹⁹¹ *Ibid.*

¹⁹² Stockment (n1).

¹⁹³ *Ibid.*

¹⁹⁴ Title 17 of the United States Code §114 (2011).

¹⁹⁵ Title 17 of the United States Code §112 (2011).

¹⁹⁶ David Oxenford, 'New Music Royalty Rates for Ephemeral Recordings Used by Business Establishment Services' (*Broadcast Law Blog*, 2013) <<http://www.broadcastlawblog.com/2013/11/articles/new-music-royalty-rates-for-ephemeral-recordings-used-by-business-establishment-services/>> accessed 12 April 2015.

These royalties defined in the Section 114 and Section 112 of US Copyright Act of 1976 are overseen by three copyright royalty judges appointed by the Librarian of Congress and will serve for staggered six-year terms.¹⁹⁷ Each of these judges may be reappointed to another six-year terms.¹⁹⁸ These three judges working as Copyright Royalty Board (CRB) were appointed according to the Copyright Royalty and Distribution Reform Act of 2004 and are responsible for determining and adjusting rates and terms of compulsory licenses in Section 114 and Section 112 of US Copyright Act of 1976 including determining the distribution of related royalties.¹⁹⁹ Hearings are held by CRB every five year in order to determine the rates for a five-year period²⁰⁰.

In determining and adjusting rates of royalties, CRB uses two standards applied to different services of digital radio.²⁰¹ As implied in Section 114 of US Copyright Act of 1976, there are at least four categories of digital radio services which are (1) preexisting subscription services (i.e. digital cable radio); (2) preexisting satellite digital audio radio services (i.e. satellite radio); (3) eligible non subscription transmissions (i.e. online radio); and (4) new subscription digital audio transmission (e.g. digital radio via satellite TV).²⁰²

The first standard set forth in Section 801 (b) (1) of US Copyright Act of 1976 is applied for the first and second categories of digital radio services.²⁰³ The second standard which is called “willing buyer willing seller” standard is applied for the third and fourth categories.²⁰⁴ This “willing buyer willing seller” standard is used by CRB in order to determine the rates of royalties of public performance of sound recordings and its ephemeral copies which online radio has to pay. Even though the royalty of ephemeral copies is mostly considered to be insignificant compared to royalty of public performance of sound recording, both licenses are usually combined in a single rate.²⁰⁵

¹⁹⁷ See <<http://www.loc.gov/crb/background/>> accessed 12 April 2015.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Stockment (n1).

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

For the collection and distribution of those royalties, SoundExchange is designated as a receiving agent who is also capable of representing copyright owners in a royalty rate setting proceedings.²⁰⁶ SoundExchange was initially formed in 2000 by the Recording Industry Association of America (RIAA) as one of its internal divisions, but later RIAA developed SoundExchange to be an independent non-profit organization in September 2003. These days SoundExchange claims to represent more than 100,000 registered recording artists and rights holder accounts.²⁰⁷ In its latest report, SoundExchange introduces a fact of having distributed \$US 183 million which is its largest payment ever in the final quarter of 2014.²⁰⁸

SoundExchange is the only performing rights organization in the United States authorized to collect, manage and distribute royalties of public performance of sound recordings through digital means, including online radio.²⁰⁹ The organization only collects royalties on behalf of sound recording copyright holders who have become its members.²¹⁰ The collection and distribution of royalties are for the featured artists and the sound recording copyright holder when their content is webcasted on a non-interactive digital audio service like online radio.²¹¹ According to SoundExchange, a featured artist is “an artist who is prominently featured on a track album”.²¹² SoundExchange does not collect royalties for non-featured artist who is not prominently featured on a track or album, e.g. a back-up vocalist because organizations like the American Federation of Musicians (AFM) and the Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA) are those in charge of the collection.²¹³ In running its business, SoundExchange actively gives payment report to the artist or copyright holder which explain details of money they earned for each of their song track played by all digital audio service providers, including online radio.²¹⁴

²⁰⁶ *Ibid.*

²⁰⁷ See <<http://www.soundexchange.com/about/our-work/>> accessed 12 April 2015.

²⁰⁸ SoundExchange, 'Q4 Digital Radio Report' (2014) <<http://digitalradioreport2014q4.soundexchange.com/>> accessed 10 May 2015.

²⁰⁹ Blouw (n154).

²¹⁰ *Ibid.*

²¹¹ See <<http://www.soundexchange.com/about/general-faq/>> under the question “What licenses does Sound Exchange administer/what royalties does SX administer?” accessed 2 June 2015.

²¹² See <<http://www.soundexchange.com/about/general-faq/>> under the question “What is a featured artist/are artists receiving direct payments from SX?” accessed 2 June 2015.

²¹³ *Ibid.*

²¹⁴ See <<http://www.soundexchange.com/about/general-faq/>> under the question “What reports are provided with each payment/why did my statement contain so many different versions of one recording?” accessed 2 June 2015.

4 Comparison between Indonesia and the United States Regulatory Framework in Terms of Online Radio

4.1 Similarities and Differences between Indonesian and American Copyright Law in Terms of Online Radio

The previous two chapters have discussed thoroughly the regulatory framework of copyright law in its relation to music and online radio in two countries, Indonesia and the United States. From such thorough discussions, it is interesting to draw a comparative regulatory framework between those two countries whose legal systems are quite different from each other.

Even though Indonesia and the United States have different legal system, both of the countries are parties who have signed and ratified TRIPS Agreement, Berne Convention, WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty. Considering this fact, it is not a matter of surprise when the researcher found both of the countries share similarities in its general perspectives of copyright law because both refer to the same international agreement and treaties in composing their own regulatory framework.

While having the same international agreement and treaties as referrals, Indonesia and the United States manage to regulate issues related to copyright in music and radio broadcasting into statutory law. The primary copyright-related regulation in Indonesia is the 2014 Indonesian Copyright Law including its derivative – Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia Number 29 of 2014 on Procedure for Requesting and Issuing Operating License and Evaluating Collective Management Organization. Meanwhile, the primary copyright law of the United States is in the form of a codified law which is Title 17 of the United States Code.

Sharing common benchmarks in making copyright-related regulations does not necessarily mean that the two countries have equally good legal instruments. Indonesia, being a developing country in the southeast of Asia, is far from comparable to the super power country like the United States. Keeping up with its advanced technology, the US copyright law has been arranged in details in order to be able to regulate the process of music licensing and collection

of royalties run well without having to meet any unnecessary obstacles. For example, the US Copyright Law of 1976 classifies provisions according to several categorizations of radio stations, such as the kind of services it offers which can be either subscription or non-subscription service; how the radio station communicates with its listeners which creates an interactive or non-interactive radio station; or how the radio station transmits its contents to the listeners which can be done in the old analogue or the new digital way. Meanwhile, Indonesian copyright law does not have such classifications of provisions. The 2014 Indonesian Copyright Law only offers general provisions applied to all kinds of copyrightable work.

As a comprehensive law which is meant to cover all of the things related to copyright including its technical means, the US Copyright Law of 1976 codified in the United States Code introduces copyright for ephemeral copies which in the previous chapter has been explained as copies of audio created from a sound recording in the process of digitally transmitting the audio. On the other hand, Indonesian copyright law does not recognize ephemeral copies. Since provisions in Indonesian copyright law are not specifically designed, it does not even have specific provision about music licensing applied to digital radio station, there is absolutely no provision about ephemeral copies.

Another noticeable difference in copyright law between Indonesia and the United States is how Indonesia divides copyright into moral and economic rights. The moral rights are exclusive rights created to appreciate the hard work of creators (e.g. music composer) in an ethical way, while economic rights are presented more as financial remuneration for them. The United States, on the other hand, does not have such a classification and only focuses on delivering appreciation to music creators in a form of financial remuneration.

Besides those similarities and differences above, there is another distinctive component in regulating copyright between the two countries. It can be acknowledged from their regulations that the two countries indeed share similar approaches in regulating the collection of royalties. Both countries build a system of national-level collecting societies. In its newly enacted copyright law, Indonesia constructs a National Collective Management Organization. Meanwhile, the United States is already known to have Copyright Royalty Board. However, the two institutions actually share fundamental difference. The National Collective Management Organization designed by Indonesian law makers is entitled to collect and distribute royalties besides coordinating between stakeholders in order to determine royalty

rates applied to all kinds of radio stations. On the other hand, Copyright Royalty Board in the United States is only responsible for the determination and adjustment of rates and terms of compulsory licenses including the distribution process of related royalties. Copyright Royalty Board does not collect and distribute royalties because the United States government has authorized independent organizations like ASCAP, BMI, SESAC, and SoundExchange to exercise such powers.

4.2 The Debates of Royalty Disparity between Different Forms of Radio in the United States

After a long discussion about how Indonesia and the United States regulate copyright in its relation with online radio and an analysis which points out the similarities and differences between the regulatory framework of both countries, this section will elaborate on a more practical and realistic issues revolving around music copyright of online radio, especially rates of royalties.

When talking about online radio, the traditional AM/FM radio station must not be forgotten since it is the beginning of the life of online radio. In the history of US broadcasting, traditional AM/FM radio station never had to ask permission from copyright holder of sound recordings even though it actively transmits sound recordings over the air to the public.²¹⁵ Traditional AM/FM radio stations are only obliged to get permission from musical composers and pay royalties to them. This fact causes its own debate on unequal treatment between composers as the copyright holder of musical composition and recording artists or recording labels as the copyright holder of sound recordings. Recording artists and labels think that they deserve impartial treatment as what is given to the music composers because they are the ones who make the song known to the public. If the musical composition never gets to be publicly performed or recorded, it will only be a piece of written lyrics and notes. However, this debate will not be discussed further as conflict between music composers and public performers is not the concern of this thesis.

Correspondingly to the fact that traditional AM/FM radio stations in the United States have always been free from having to compensate public performance of sound recordings, radio

²¹⁵ Blouw (n154).

station broadcasters have their own arguments in order to justify their position. According to National Association Broadcasters (NAB), sound recordings earn free advertising from radio airplay and NAB consistently points out this argument to the US Congress.²¹⁶ Based on this argument, once listeners hear a new song on the radio and they like it, they will most likely want to listen to the song over and over again. If it is the case, there is a high chance that they will purchase its record leading to an increasing number of records sold for the copyright holder of sound recording. This shows a form of mutually beneficial relationship between recording labels and broadcasters because broadcasters offer recording labels free advertising in exchange of free use of sound recordings.²¹⁷

In contrast to the current situation, this relationship is no longer as promising as it used to be since early 2000s. The way people listen to music has entirely changed due to the development of internet infrastructure and broadcasting technology. People these days prefer to access their favorite music online instead of buying a physical full album.²¹⁸ This leads to a decreasing number of record sales triggering fear from recording labels who believed that music listeners would not purchase traditional records anymore if they could access music anytime anywhere by going online.²¹⁹ Besides recording labels, the change in the culture of music listening also draws the attention of recording artists. Having no right to claim for a public performance of their sound recording broadcasted over traditional AM/FM radio stations, performers could only rely upon percentage share of record sales from their recording labels. The decreasing amount of record sales most likely put both recording artists and recording labels at a disadvantage. It can be seen from here that online technology has its own loophole since it lets music listeners to access music without giving compensation at all to the pocket of recording artists and labels.²²⁰

Realizing this probability, the recording industry pushed the US Congress to hold discussion whether public performance right for the sound recording should be granted in the US copyright law.²²¹ The result of the discussion is in the form of the Digital Performance Right

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Jessica L. Bagdanov, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure* (1st edn, 2010) <<http://www.chapmanlawreview.com/wp-content/uploads/2013/08/14-Chap.-L.-Rev.-135.pdf>> accessed 19 June 2015.

²¹⁹ Blouw (n154).

²²⁰ *Ibid.*

²²¹ *Ibid.*

in Sound Recording (the DPRA) which has been briefly examined in Chapter 3 of this research. The DPRA granted sound recording copyright holders to have exclusive rights to license their copyrighted public performances by means of digital audio transmission.²²² The enactment of the DPRA was meant to address the concern of recording industry over the advancement of digital transmission technology which may create possibilities for music listeners to have access to high quality audio listening without having to pay for a physical recording album. Therefore, US Congress wanted to make sure that those individuals whose livelihood relied upon copyright protection for sound recordings, such as recording artists and labels, would still be well protected even if an innovative digital technology brought effect to how people enjoyed their creative works.²²³

The DPRA designed three-tiered system in order to categorize license requirements into three different rates for (1) non-subscription broadcasters; (2) non-interactive subscription broadcasters; and (3) interactive services.²²⁴ The first is non-subscription broadcasters whose services are not limited to certain consumers. Broadcasters in this category include analog radio broadcasters and webcasters.²²⁵ These broadcasters are subject to the exception in Section 114 (d) (1) of US Copyright Act of 1976 due to its non-interactive nature.²²⁶ Therefore, none of these broadcasters have to pay royalties to the copyright holder of sound recording.

The second category is non-interactive subscription broadcasters which include digital cable radio and satellite radio. These classification of broadcasters are subject to compulsory license regulated in the Section 114 (d) (2) of US Copyright Act of 1976.²²⁷ In order to obtain such license, these broadcasters are required to comply with certain conditions set by an arbitration panel commonly known as the Copyright Arbitration Royalty Panel (CARP) and adopted by the Librarian of Congress.²²⁸

The third category is interactive services. Some examples of these services are those on-demand music streaming sites, such as Spotify, Rhapsody, and Rdio. Since interactive services

²²² Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of Title 17 of the United States Code)

²²³ Blouw (n154).

²²⁴ Digital Performance Right in Sound Recording Act of 1995.

²²⁵ Blouw (n154).

²²⁶ Title 17 of the United States Code §114 (d) (1) (2011).

²²⁷ Title 17 of the United States Code §114 (d) (2) (2011).

²²⁸ Blouw (n154).

allow its user to request the song they want to listen to, these services are the most potential in displacing records sales therefore supposed to be subject to the highest level of copyright licensing requirements.²²⁹ The DPRA subjects these on-demand services to have personal negotiation with each sound recording copyright holder before any sound recording gets to be available on their websites and the copyright holder may refuse to license their sound recordings to these interactive services and keep their works inaccessible on such music streaming sites.²³⁰ The case of which Taylor Swift pulled out all of her songs from Spotify might be a good example of copyright holder stands to protect her work by refusing to license her works to an interactive online music service in the fear of losing the value of their art works.²³¹

It can be seen from the explanation of the first category that the DPRA has been unsuccessful in providing solid protection for the recording artists and recording labels. This is in line with the discussion in section 3.3 where the DPRA was said to be failed in protecting copyright holder of sound recording because the DPRA exempts this copyright holder from getting granted of public performance right in the case of radio broadcasting, whether it is a traditional AM/FM radio station or online radio station.

This condition is not much different from the condition before the DPRA was enacted because the main concern of stakeholders in the recording industry were not solved yet. Their records still get to be publicly performed over the air by radio broadcasting station or on the internet by online radio without neither broadcaster nor webcaster having to pay financial remuneration to them. It is even worse now with the advanced technology of audio streaming, people most likely prefer the free service from online radio instead of buying CDs or paying subscription in order to listen to music. Therefore, the need to grant public performance right of sound recording in the case of online radio was very high since performers and record labels more than deserve to get their works compensated in a form of royalty payments.

Unfortunately, the kind of protection which they asked from the US Congress was still not properly addressed by the DPRA. This inability of DPRA to meet protection demand from the

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Steve Knopper, 'Taylor Swift Abruptly Pulls Entire Catalog from Spotify' (*Rolling Stone*, 2014) <<http://www.rollingstone.com/music/news/taylor-swift-abruptly-pulls-entire-catalog-from-spotify-20141103>> accessed 4 June 2015.

recording industry raised concerns among recording artists and recording labels. As an association established to support and promote the creative and financial vitality of major music companies²³², Recording Industry Association of America (RIAA) was at the front row to submit complain about decreasing in record sales caused by non-subscription webcasting services like online radio.²³³

In order to overcome complain from recording industry, the US Congress released a series of amendments for the US Copyright Act of 1976 as part of the Digital Millennium Copyright Act of 1998 (the DMCA).²³⁴ In the DMCA, the issue of royalties which a webcaster like an online radio station has to pay for publicly performing sound recording through the internet was addressed. The DMCA removed royalty exemption for non-interactive non-subscription webcasting services and made clear that online radio has to pay royalties to sound recording copyright holder in order to be able to webcast their creative works. Both simulcasts (i.e. online radio with contents from traditional AM/FM radio stations) and pure webcasts (i.e. internet-only online radio stations) subject to this obligation.

However, the DMCA did not remove royalty exemption for public performance of sound recordings for traditional AM/FM radio stations. Terrestrial broadcasters are still allowed to publicly broadcast songs over the air without having to pay a single remuneration to performers and record labels. Besides causing financial loss on the side of recording artists and recording labels, this condition delivers unequal treatment to online radio. Webcasters are obliged to get license for public performance right of musical compositions and sound recordings. Meanwhile, terrestrial broadcasters only have to pay royalties to music composers for the public performance right.

Besides the unequal treatment received by online radio compared to terrestrial broadcasters, online radio also has to receive unequal treatment when it is compared to the other type of digital radio. As explained in section 3.3, Copyright Royalty Board (CRB) uses two standards to determine royalty rates for different kind of digital radio services. The standard applied to online radio is “willing buyer willing seller” standard. According to this standard, rates and

²³² See <http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa> accessed 4 June 2015.

²³³ Blouw (n154).

²³⁴ Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of Title 17 of the United States Code).

terms are established the way it would have been negotiated in the marketplace between a willing buyer and a willing seller in case webcasters and copyright holders could not agree on certain royalty rates.²³⁵ The idea of this standard looks pretty good, but there is no open market which can be used as a consistent benchmark.²³⁶ Judges from the CRB had to figure it out by themselves and eventually set up royalty rates for online radio at incredibly high levels.²³⁷

To give a simple illustration, online radio stations in 2007 were asked to pay royalty rates which most of the time approach or even exceed 100% of their revenue for public performance of sound recording.²³⁸ Meanwhile the other digital radio stations only had to pay as much as 6% to 15% of revenues since CRB used different other standard for these radio stations.²³⁹ This incredibly different treatment triggered a group of webcasters led by Radio Internet Newsletter publisher Kurt Hanson to arrange a protest popularly known as “Day of Silence” on 26 June 2007 when thousands of online radio stations were broadcasting static, silence, a message explaining the protest, or simply being totally inaccessible.²⁴⁰

The other standard applied to other digital radio stations besides online radio is set forth in Section 801 (b) of US Copyright Act of 1976 and it guides CRB to set satisfying royalty rates for both copyright holder and copyright user.²⁴¹ On the contrary, the “willing buyer willing seller” standard does not care about the income of copyright user and does not take into consideration the negative impacts of high royalty rates to the related industry.²⁴² As a result of this unfair treatment, online radio stations went to the US Congress a few times to get temporary relief from the irrational rates which most likely drives them bankrupt in no time.²⁴³

In response, Senator Ron Wyden who is a Democrat from Oregon introduced a bill titled Internet Radio Fairness Act (IRF) in 2012.²⁴⁴ IRFA would adopt fair standards and procedures

²³⁵ Blouw (n154).

²³⁶ Mitch Stoltz, 'The Internet Radio Fairness Act: What it is, why it's needed' (*Electronic Frontier Foundation*, 2012) <<https://www.eff.org/Internet-Radio-Fairness-Act-Explanation>> accessed 5 June 2015.

²³⁷ *Ibid.*

²³⁸ Stockment (n1).

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²⁴⁰ Jacqui Cheng, 'Internet Radio "Day of Silence" Hushes Thousands of Stations' (*Ars Technica*, 2007) <<http://arstechnica.com/tech-policy/2007/06/internet-radio-day-of-silence-hushes-thousands-of-stations/>> accessed 6 June 2015.

²⁴¹ Blouw (n154).

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ See <<https://www.govtrack.us/congress/bills/112/s3609>> accessed 5 June 2015.

to help CRB determine royalties based on respect to webcasters.²⁴⁵ Wyden also affirmed that IRFA would “remove the barriers to innovation in digital broadcasting, enable new webcasters to start up and create jobs, and increase competition in the music marketplace”²⁴⁶ while “expanding the broadcast digital market so that artists can obtain broader exposure and more compensation for their music”²⁴⁷.

One of the arguments behind IRFA was the fact that judges from CRB had lack of market information to determine reasonable royalty rates in the case of online radio.²⁴⁸ Therefore IRFA was proposed to make sure CRB including copyright holders and copyright users share the same necessary market information needed to make wise decisions.²⁴⁹ In addition to that, IRFA would create a global music rights database consisting of all of the information related to musical works, such as information about the copyright holder and the ones who may license the work.²⁵⁰ IRFA would also make sure the CRB judges were qualified and able to determine royalty rates which could accommodate the interests of all related stakeholders by setting a minimum level of experience that is relevant to their duties as CRB judges.

Even though IRFA was supported by several trade groups like Consumer Electronics Association (CEA)²⁵¹ and National Association of Broadcasters (NAB)²⁵², IRFA failed to pass by the US Congress since the 112th US Congress wrapped up not long after IRFA was introduced.²⁵³ Nevertheless, the proposed IRFA is expected to be put forward during the 113th Congress²⁵⁴ and gets enacted as statutory law. While waiting for the coming of IRFA or similar bill which will establish equal treatment between all kinds of radio stations, online radio is still in a position to keep fighting over the lowest possible rates to compensate copyright holders.

²⁴⁵ *Ibid.*

²⁴⁶ Ron Wyden, *The Internet Radio Fairness Act Of 2012* (1st edn, 2012) <<http://www.wyden.senate.gov/download/?id=84d76138-a2bc-456d-bfcd-544c6c941647&download=1>> accessed 5 June 2015.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Michael Petricone, 'CEA Endorses Internet Radio Fairness Act' (CEA, 2012) <<http://www.ce.org/News/News-Releases/Press-Releases/2012-Press-Releases/CEA-Endorses-Internet-Radio-Fairness-Act.aspx>> accessed 6 June 2015.

²⁵² Dennis Wharton, 'NAB Statement in Response to Introduction of Webcast Streaming Legislation' (NAB, 2012) <<http://www.nab.org/documents/newsroom/pressRelease.asp?id=2817>> accessed 6 June 2015.

²⁵³ Blouw (n154).

²⁵⁴ *Ibid.*

4.3 Potential Issues and Possible Solutions to the Regulation of Online Radio in Indonesia

The chance of such royalty disparity issues explained in the previous section to happen in Indonesia in the near future is big since Indonesia's radio and music industry are going into the same direction as the ones in the United States. As briefly mentioned in Chapter 2, there were at least two cases ever happened in Indonesia regarding the amount of royalty payment. In one case, some Indonesian musicians thought they did not get what they deserved to get from a collecting society. Meanwhile in another case, a user of copyright works thought that a collecting society set an incredibly high amount of royalties he has to pay to copyright holders. Both cases show how sensitive the issues related to the amount of royalties and licensing fees can be. It will always be problematic until all the stakeholders related to this issues feel that they have received equal treatment among stakeholders.

If similar problems elaborated in the previous section happens in Indonesia, it will be a little difficult for Indonesians to solve the problems. With Indonesian current copyright law, such problems can only be solved by coming to a conclusion that all type of radio stations are set to have to pay the same amount of royalty rates to Indonesian musicians. This argument is based on the fact that Indonesian copyright law is not yet making classifications on radio stations. The 2014 Indonesian Copyright Law even only knows what is called as broadcasting institution which can be a television or radio station. This makes determining royalty rates for all types of broadcasting stations look easy. On the contrary, it could be even more difficult for the collecting societies to come to an agreement about royalty rates with the musicians and broadcasters because there is no legal guidance to help them determine the rates. The lack of transparency in the determination process may also trigger conflict between all related parties.

Even though Indonesian current copyright law does not look reliable enough to solve problems like the ones happened in the United States, the newly enacted copyright law at the very least promises to help solving the seemingly endless issue about who is entitled to collect royalties in Indonesia. By establishing a National Collective Management Organization, this issue is hopefully be resolved in the near future.

However, the establishment of National Collective Management Organization may possibly cause another issue. If people only take a brief look on the provisions about National Collective Management Organization, they may think the organization is just like CRB in the United States because both of them are established by the government in order to take care issues related to royalties. As a matter of fact, there is a slightly different thing that differs them from each other. CRB in the United States only acts as policy makers which one of its duties is to determine royalty rates. Meanwhile National Collective Management Organization in Indonesia acts as policy maker and collecting society since it is rightfully entitled to collect, manage, and distribute royalties including determine royalty rates. At the same time, the 2014 Indonesian Copyright Law also sets up provisions about non-governmental collective management organizations. The existence of both governmental and non-governmental collecting societies may create possible problem in the future. It is better to amend the law and make sure that the National Collective Management Organization does not act as double agents. By taking this step, it is hopefully easier for the organization to focus on their main duties in determining royalty rates in order to minimize conflict related to unequal royalty disparities.

The National Collective Management Organization may start its work by following the step of CRB in being transparent and making information about the royalty rates easily accessible by the public. This is a wise step to work on since it can help decreasing the possibilities of negative practices in the process of collecting royalties, such as collecting societies set an incredibly high amount of royalties just because a certain copyrighted work is more popular than the rest or a giant broadcasting company has to pay much more than the average broadcasting companies with no firm base.

Other than discussing about the possibility of similar issues in the United States may happen in Indonesia, it is also interesting to see some aspects of Indonesian copyright law which need to be improved. The need to improve the current copyright law is unavoidable considering the rapid technological development, especially in the communication and information fields. The primary issue which needs to be addressed by the Indonesian law makers is the generality of copyright law. All provisions in the 2014 Indonesian Copyright Law regulate one single object called “creation” which can be a song, a painting, a book, a poem, or anything as long as it is a work of knowledge, art, or literature.²⁵⁵ Making more specific provisions can be a wise step

²⁵⁵ Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Article 1 (3).

to take since different kind of creation needs different kind of treatment. Legal issues related to each creation is also different from each other. Therefore, special treatment is necessary.

In relation to this research, the Indonesian law makers may start to specify the provisions by classifying the kind of services offered by radio broadcasters according to the media used to deliver the services. Provisions applied to traditional AM/FM radio stations may be arranged differently from the provisions applied to online radio stations even though the principle of equal treatment must be put at the front row in order to prevent possible conflicts in the future. By making such classification in the level of national law, it will be easier for the National Collective Management Organization to create policies related to the collection of royalties that can meet the interests of all related stakeholders.

5 Conclusion

The development of online technology has changed people's preference in getting their source of music. If in the past people rely on the power of radio frequency and music records to listen to the music, now a process called *streaming* gives people access to countless good music on the internet. Facing this phenomenon, radio enthusiasts are forced to keep pace in a form of online radio.

As an emerging technology, the regulatory framework of online radio is recently developed from the existing related regulations. Therefore, the rise of various kinds of issues is unavoidable. Of all the potential legal issues related to online radio, music copyright attracts the most attention from various parties. In the spirit of letting a less developed country learning from an advanced country, Indonesia and the United States have been chosen to be featured as examples in this thesis with their respective online radio and music copyright related laws and regulations.

The primary law applied to music copyright and online radio in Indonesia is the recently amended Copyright Law which was enacted in the end of 2014. As this thesis is written, 2014 Indonesian Copyright Law only has one implementing regulation which was enacted not long after the law itself which is the Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia Number 29 of 2014 on Procedure for Requesting and Issuing Operating License and Evaluating Collective Management Organization. The 2014 Indonesian Copyright Law addresses copyright in a big frame and does not necessarily arrange provisions in a detailed way. However, referring to the same international agreement and treaties as the United States is already a big step ahead compared to the previous copyright law.

Meanwhile, online radio and its copyright issues are addressed in a comprehensive federal Copyright Act of 1976 codified in Title 17 of the United States Code on Copyright Law of the United States and Related Laws. Nevertheless, such a comprehensive regulatory framework does not guarantee zero problems. The debates over unequal treatment and royalty disparity between online radio and other forms of radio in the United States happened in the past few years. Webcasters of online radio in the United States think that they are given unequal

obligation in compensating music copyrights and are charged with higher royalty rates compared to other forms of radio providers.

In the future, similar issues may raise in Indonesia and it will not be easy to handle the problems with the current copyright law the country has. Therefore, it will be wise for Indonesia to learn from the United States in drafting detailed and specific provisions for different copyrightable works. Other than that, what can Indonesia learn from the United States is how the country is being transparent in determining the royalty rates applied to all radio providers, even though this transparency costs protests when the American webcasters learn about royalty disparity. The last thing Indonesia better learns from the United States in regulating online radio and music copyright is how the United States is firmed in appointing Copyright Royalty Board only as policy maker, unlike how the current Indonesian law establishes National Collective Management Organization as both policy maker and collecting society.

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