

Analyzing the Rationality of Criminal Sanctions for Copyright Offences in Indonesia's Creative Economy

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Abstract: Copyright infringement in Indonesia causes economic losses to creators and copyright holders while threatening the sustainability of the creative economy. To address this issue, Law No. 28 of 2014 provides criminal sanctions for certain copyright infringements. However, the use of criminal law remains controversial, particularly regarding the principles of *ultimum remedium*, proportionality, and the objectives of criminalisation. This study analyses the construction of copyright offences in Indonesian law, their relationship with creative economy protection, and the rationality of criminal sanctions based on the theory of the purpose of criminalisation. Using normative legal research with statutory, conceptual, and policy approaches, the study analyses primary, secondary, and tertiary legal materials through qualitative legal interpretation. The findings show that criminalisation is justified to protect the economic value of intellectual works and support the sustainability of the creative industry. Nevertheless, criminal sanctions should be applied selectively to serious, commercial infringements causing significant harm, consistent with the principle of *ultimum remedium*. The novelty of this research lies in examining copyright offences through the rationality of the purpose of criminalisation as a balanced instrument for protecting the creative economy, beyond conventional analyses of copyright protection and law enforcement effectiveness.

Introduction

The creative economy is a sector based on ideas, creativity, intellectual expression, and creative works that possess economic value.¹ In this sector, works are not only understood as the personal expression of the creator, but also as assets that can provide commercial benefits for creators, rights holders, business operators, and the creative industry. Copyright, as an exclusive right, comprises two main dimensions: economic rights and moral rights, where economic rights include the

¹ Amanda Ditania Putri et al., "THE CREATIVE ECONOMY AS A KEY TO IMPROVING PRODUCTIVITY AND COMPETITIVENESS," National Seminar on Tourism and Entrepreneurship (SNPK) 4, no. SE-Articles (30 April 2025): 333-40, <https://doi.org/10.36441/snpk.vol4.2025.346>.

right of public performance and the right of mechanical reproduction.² Thus, copyright functions as a legal instrument that ensures creators can derive economic benefits from their works, whilst maintaining the moral connection between the creator and their creation.

Ideally (*das sollen*), the criminalisation of copyright infringement should function strictly as an *ultimum remedium*: an exceptional instrument reserved for serious, commercial infringements that civil or administrative remedies cannot adequately redress, so that criminal law operates in service of, rather than in tension with, the sustainability of the creative economy. In practice (*das sein*), however, the boundary between civil, administrative, and criminal responses to copyright infringement remains unsettled, and enforcement decisions are not always guided consistently by the scale or commercial character of the infringement. Recent constitutional litigation brought by a group of Indonesian musicians against the criminal provisions of the Copyright Act illustrates that this normative-empirical gap continues to generate genuine legal uncertainty in practice.³ This gap between the normative design of copyright criminal law and its practical operation is the departure point of the present study.

From an economic development perspective, copyright protection is inseparable from the state's efforts to build a healthy and sustainable creative economy ecosystem. Robert M. Sherwood, through his Economic Growth Stimulus Theory, explains that the primary objective of an effective copyright protection system is to drive economic development by providing legal incentives to creators and those in the creative industries.⁴ Legal protection for music, films, books, software, designs, digital content, and other works of art is vital because these works stem from the creators' creative investment, time, costs, and intellectual capacity.⁵ Without adequate protection, creators may lose the economic benefits of their works, whilst the creative industry loses the legal certainty required to thrive.⁶

However, copyright protection in Indonesia is not only pursued through civil and administrative mechanisms, but also through criminal instruments. Law No. 28 of 2014 on Copyright sets out criminal provisions in Articles 112 to 119 in response to certain copyright infringements deemed serious and insufficiently addressed through non-criminal mechanisms.⁷ The choice to employ criminal law indicates that copyright infringement is not always viewed as a private dispute between the creator and the infringer, but may also be seen as an act that disrupts economic interests and the creative industry ecosystem.⁸ Nevertheless, the use of criminal law in copyright infringe-

² Desyanti S A K.Tus, "Economic and Moral Rights of Photographic Works on Social Media," *Vyavahara Duta* 14, no. 1 (2019): 12, <https://doi.org/10.25078/vd.v14i1.1099>.

³ Constitutional Court of the Republic of Indonesia, Decision No. 28/PUU-XXIII/2025 & 37/PUU-XXIII/2025 (30 June 2025), regarding judicial review of Article 95(4) and Article 120 of Law No. 28 of 2014 on Copyright.

⁴ Robert M Sherwood, *Intellectual Property and Economic Development*. (New York:Routledge, 2019), <https://doi.org/10.4324/9780429045530>.

⁵ Eko Arif Susanto, "The Urgency of Understanding Intellectual Property Rights in the Digital Age," *HUKAMA: Journal of Islamic Law* 4, no. 1 (2025): 20-42, <https://doi.org/10.25078/hukama.v4i1.1099>.

⁶ Yoyo Arifardhani, "Criminal Policy on Copyright Infringement," *Salam Journal of Social and Cultural Studies* Vol. 7, No. 4 (2020): 335-52, <https://doi.org/10.15408/sjsbs.v7i4.15166>.

⁷ Pebrianto Pebrianto et al., "Legal Protection of Traditional Indonesian Cultural Expressions within the Intellectual Property Rights System under Law No. 28 of 2014 on Copyright," *Consensus: Journal of Legal Science* 4, no. 4 (2026): 326-32, <https://ojs.stihpada.ac.id/index.php/consensus/article/view/1823>.

⁸ "The Application of Criminal Sanctions for the Offence of Copyright Infringement of Artistic Works for Commercial Purposes," *ALADALAH: Journal of Politics, Society, Law and Humanities* 4, no. 2 SE-Articles (n.d.): 25-38, <https://doi.org/10.59246/aladalah.v4i2.1844>.

ment cases must still be subject to rational scrutiny, as criminal law is coercive, severe, and carries serious consequences for individual freedoms.

This issue is becoming increasingly important as developments in modern law indicate a growing trend towards the use of criminal sanctions in various administrative laws. This phenomenon has given rise to the concept of administrative criminal law, namely the use of criminal instruments within the field of administrative law to strengthen legal compliance.⁹ However, the overly broad use of criminal law can place a burden on the criminal justice system, as criminal law is fundamentally limited in scope and should be used selectively. In the context of copyright, it is worth questioning whether criminal offences are truly a rational instrument for protecting the creative economy, or whether they risk leading to overcriminalisation when every infringement is directed towards criminal prosecution.¹⁰

Copyright infringements in Indonesia still occur frequently in various forms, ranging from digital piracy, the distribution of illegal content, the unauthorised use of works, to the commercialisation of copyrighted works without permission.¹¹ CD and VCD piracy, for example, is not only linked to weak law enforcement but is also influenced by the socio-economic conditions of society, which lead consumers to feel they benefit from the lower prices of pirated products.¹² These conditions indicate that copyright infringement cannot be explained merely as a normative issue, but is also linked to legal awareness, purchasing power, consumer culture, and public perception of the economic value of a work. On the other hand, Indonesia's membership of the World Trade Organisation also demands adequate copyright protection, as failure to meet protection standards can lead to economic consequences, including the possibility of cross-retaliation.¹³

Copyright offences have often been understood as an instrument of punishment against infringers. This perspective is not entirely incorrect, but it becomes limited if copyright offences are viewed solely within the framework of retaliation against offenders. In the context of the creative economy, the primary objective of copyright protection should not stop at punishment, but should also encompass the protection of the economic value of works, the recovery of creators' losses, the prevention of infringements, and the sustainability of the creative industry.¹⁴ Developments in criminal law across various countries also indicate a shift from a retributive or 'punishment-for-punishment' orientation towards an approach that places greater emphasis on rehabilitation, restitution, and a more humane treatment philosophy.¹⁵ Therefore, the success of enforcing copyright offences should not be measured solely by the severity of criminal sanctions, but also by its ability to recover losses and safeguard the sustainability of the creative ecosystem.

⁹ Elwi Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences," *Journal of Criminal Law and Criminology* 1, no. 1 (2020): 1-16, <https://doi.org/10.51370/jhpk.v1i1.2>.

¹⁰ Prihartono Prihartono, "Reconstruction of Regulations Concerning Copyright Offences from the Perspective of Law No. 28 of 2014 Based on Justice" (Sultan Agung Islamic University, Semarang, 2022), <https://repository.unissula.ac.id/26731/>.

¹¹ Cita Tsaabiethah Agustria Sasti et al., "Legal Protection of Book Copyright in the Digital Market and the Liability of Market-places," *JURNAL USM LAW REVIEW* 9, no. 1 SE-Articles (n.d.): 217-33, <https://doi.org/10.26623/julr.v9i1.13340>.

¹² Hasniah Hasniah, "Countering Copyright Infringement of CD/VCD Piracy," *Jihk* 2, no. 1 (2020): 30-46, <https://doi.org/10.46924/jihk.v2i1.131>.

¹³ Arifardhani, "Criminal Policy on Copyright Infringement."

¹⁴ Ni Kadek Prasetya Dewi, "Commercial Music Copyright Infringement in Cafés: A Legal Analysis of the Mie Gacoan Bali Case," *Ekspose: Journal of Legal Research and Education* 25, no. 1 (2026): 1-14, <https://doi.org/10.30863/ekspose.v25i1.10508>.

¹⁵ Ahmad A Shirotol et al., "The Presidential Threshold Debate in the 2019 Election and Ahead of the 2024 Election in Indonesia," *Melayunesia Law* 7, no. 2 (2023): 195, <https://doi.org/10.30652/ml.v7i2.8003>.

The principle of *ultimum remedium* is crucial in assessing the use of criminal law in copyright infringements. Criminal law is, in theory, regarded as a last resort to be employed when other legal mechanisms are insufficient to provide protection.¹⁶ In the context of copyright, this principle is relevant because copyright infringements fundamentally concern private rights and economic losses which, in many cases, can be remedied through civil or administrative mechanisms. The doctrine of *ultimum remedium* no longer applies solely at the legislative stage, but has also entered the implementation stage in law enforcement. Consequently, law enforcement agencies must distinguish between minor, individual copyright infringements and those that are commercial, systematic, repeated, and cause significant harm.¹⁷

Numerous studies on copyright in Indonesia have in fact been conducted, but the majority still focus on the protection of creators' exclusive rights, the effectiveness of law enforcement, and the normative construction of the Copyright Act.^{18,19} Meanwhile, studies on economic criminal law more frequently address criminalisation in general, criminal policy, and the use of criminal sanctions in the field of administrative law without specifically placing copyright as the primary object of analysis.²⁰ Consequently, there remains an area of study that has not been extensively explored, namely an analysis of the rationality of copyright offences as an instrument for the protection of the creative economy, using the theory of the purpose of criminalisation as the primary analytical framework. This area of study is important because criminal policy in Indonesia still exhibits a tendency towards over-criminalisation due to an excessive reliance on imprisonment as an instrument of social control.²¹

Based on this background, this study proposes three research questions. First, how are copyright offences constructed within the Indonesian criminal law system? Second, what is the relationship between copyright offences and the protection of the creative economy in Indonesia? Third, what is the rationale of the purpose of criminal punishment in the use of copyright offences as an instrument for protecting the creative economy? In line with these research questions, this study aims to analyse the construction of copyright offences in Indonesian positive law, explain the function of copyright offences in supporting the protection of the creative economy, and assess the rationality of the objectives of criminalisation in the enforcement of copyright offences in Indonesia.

This article offers a contribution by positioning copyright offences not merely as repressive instruments, but as instruments of legal policy that must be tested against the rationality of the pur-

¹⁶ Arifardhani, "Criminal Policy on Copyright Infringement"; Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

¹⁷ Mahardika Candrasari and Ade Adhari, "THE URGENCY OF ESTABLISHING AN IDEAL MODEL FOR THE ENFORCEMENT OF LAW AGAINST COPYRIGHT INFRINGEMENT IN THE DIGITAL AGE," *Kertha Semaya: Journal of Legal Science* 13, no. 9 SE-Articles (21 October 2025): 2071-87, <https://doi.org/10.24843/KS.2024.v13.i09.p13>.

¹⁸ Hasniah, "Countering Copyright Infringement: CD/VCD Piracy"; Dani Ikhwanto and Rakhmita Desmayanti, "Protection for the Copyright Holders of the Film Keluarga Cemara Under the Copyright Act," *Reformasi Hukum Trisakti* 4, no. 1 (2022): 119-26, <https://doi.org/10.25105/refor.v4i1.13418>; ALINE F LOILEWEN et al., "A COMPARATIVE REVIEW OF COPYRIGHT LAW NO. 19 OF 2002 ON COPYRIGHT AND LAW NO. 28 OF 2014 ON COPYRIGHT," *Ganec Swara* 17, no. 3 (2023): 1037, <https://doi.org/10.35327/gara.v17i3.542>.

¹⁹ T. A. Saputro, N. R. Febriandika, I. Hertanto, and A. R. Rahmawati, "Addressing Intellectual Property Crime in Indonesia: Challenges to Achieving Economic Justice," *Indonesian Journal of Crime and Criminal Justice* 1, no. 2 (2025): 208-29, <https://doi.org/10.62264/ijccj.v1i2.152>.

²⁰ Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences"; Teng J Gunawan, "A Study of the Maximum Limits of Criminal Penalties for Economic Crimes – An Economic Analysis of the Law," *Journal of Criminal Law and Criminology* 3, no. 2 (2022): 53-71, <https://doi.org/10.51370/jhpk.v3i2.84>.

²¹ Moh. Fadhil, "Criminal Policy in Addressing Overcrowding in Prisons," *Al Daulah Journal of Criminal Law and Constitutional Law* 9, no. 2 (2021): 168, <https://doi.org/10.24252/ad.v9i2.15996>.

pose of criminalisation. Unlike previous studies, which have largely focused on the effectiveness of copyright law enforcement or the normative construction of copyright protection, this article links the theory of the purpose of criminal sanctions to the need for the protection of the creative economy.²² With this approach, this article is expected to enrich the study of economic criminal law, intellectual property law, and creative economy law in Indonesia.

2. Method

This study employs a normative legal research method with a doctrinal focus, as the analysis centres on legal norms, legal principles, legal concepts, and legal theories relating to copyright offences as instruments for the protection of the creative economy.²³ This study does not aim to measure empirical data, but rather to examine the legal construction of copyright offences in Indonesian positive law, the relationship between criminal law and the protection of the creative economy, and the rationality of the use of criminal sanctions based on the objectives of criminal punishment. Consequently, this research is descriptive-analytical and prescriptive in nature, as it not only explains the applicable legal framework but also assesses the appropriateness of applying criminal law in cases of copyright infringement.²⁴

The approaches used in this study include a legislative approach, a conceptual approach, and a policy approach.²⁵ The legislative approach is used to examine Law No. 28 of 2014 on Copyright, the Criminal Code, and other regulations relating to the creative economy.²⁶ The conceptual approach is used to understand the concepts of offences, copyright, economic rights, moral rights, the creative economy, criminalisation, *ultimum remedium*, and the purpose of criminal sanctions. Meanwhile, the policy approach is used to assess the direction of criminal law policy in the protection of the creative economy, particularly whether the use of copyright offences is consistent with the principle of proportionality, the principle of *ultimum remedium*, and the need to compensate creators for their losses.²⁷

The legal materials used consist of primary, secondary, and tertiary sources. Primary legal materials include Law No. 28 of 2014 on Copyright, the Criminal Code, regulations relating to the creative economy, and court rulings relevant to copyright infringement. Secondary legal materials include books, journal articles, official reports, and previous research discussing copyright, economic criminal law, criminalisation, and the theory of the purpose of punishment. Tertiary legal materials are used to help explain relevant legal terms. All legal materials were analysed qualitatively through legal interpretation, conceptual reasoning, and normative argumentation to assess

²² Hasniah, "Combating Copyright Infringement: CD/VCD Piracy"; Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act"; LOILEWEN et al., "A Comparative Review of Copyright Law No. 19 of 2002 on Copyright and Law No. 28 of 2014 on Copyright."

²³ Soekanto Soerjono and Sri Mamudji, "Normative Legal Research: A Brief Review" (PT Raja Grafindo Persada, Jakarta, 1995).

²⁴ Fadhil, "Criminal Policy in Addressing Overcrowding in Prisons."

²⁵ Eko Soponyono, "POLICY FORMULATION OF A VICTIM-ORIENTED PUNISHMENT SYSTEM," *Legal Issues*; *Legal Issues* Volume 41, Number 1, Year 2012 DO - 10.14710/Mmh.41.1.2012.29-41, 24 January 2012, <https://ejournal.undip.ac.id/index.php/mmh/article/view/4157>.

²⁶ Lutfi Yusup Rahmathoni et al., "A Legal Review of Complaint Offences in the Enforcement of Copyright Law Based on Law No. 28 of 2014," *Lex Generalis Law Journal* 6, no. 7 (2025), <https://doi.org/10.56370/jhlg.v6i7.1801>.

²⁷ Arifardhani, "Criminal Policy in Copyright Infringement"; Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences"; Ikhwanto and Desmayanti, "Protection for the Copyright Holder of the Film *Keluarga Cemara* Under the Copyright Act."

whether copyright offences have been rationally positioned as an instrument for the protection of the creative economy in Indonesia.

3. Result and Discussion

3.1. The Legal Framework for Copyright Infringement in Indonesia

The legal construction of copyright offences in Indonesian positive law indicates that the state views copyright infringement not merely as a private dispute, but also as an act that may disrupt economic order and the climate of the creative industries. Copyright, as an exclusive right, encompasses economic rights and moral rights.²⁸ Economic rights grant the creator the right to exploit their work commercially, whilst moral rights are absolutely inalienable and inalienable to the creator.

Acts classified as criminal copyright infringements are regulated in Articles 112 to 119 of Law No. 28 of 2014.²⁹ Article 113(2) specifically provides that any person who, without authorisation and/or without the permission of the creator or copyright holder, commits an infringement of economic rights as referred to in Article 9(1)(c), (d), (f), and/or (h) for commercial use shall be punished with imprisonment for a maximum of 3 years and/or a fine of up to Rp 500,000,000.³⁰ The construction of this offence indicates the presence of the element of intent (*dolus*) and the commercial element as constitutive elements.³¹

A significant change in Law No. 28 of 2014 is the reinstatement of copyright offences as offences subject to complaint, as provided for in Article 120.³² This change reflects the recognition that the legal relationship between the creator and the infringer is, in essence, of a private law nature.³³ The legislative history reveals an interesting dynamic: Law No. 6 of 1982 (and the *Auteurswet* 1912) classified copyright offences as offences subject to complaint, then Law No. 19 of 2002 changed them to ordinary offences, and Law No. 28 of 2014 reverted them to offences subject to complaint.³⁴ By being classified as a complaint-based offence, enforcement is based solely on a complaint from the creator or copyright holder who feels aggrieved, thereby granting the victim autonomy to determine whether the case should be prosecuted.

Table 1 summarises this legislative evolution, showing how the classification of copyright offences and the corresponding maximum sanctions have shifted across three successive copyright statutes.

²⁸ K.Tus, "Economic Rights and Moral Rights in Photographic Works on Social Media."

²⁹ Arifardhani, "Criminal Policy in Copyright Infringement."

³⁰ Ikhwanto and Desmayanti, "Protection for the Copyright Holders of the Film 'Keluarga Cemara' Under the Copyright Act."

³¹ Hasniah, "Countering Copyright Infringement: CD/VCD Piracy."

³² Arifardhani, "Criminal Policy Regarding Copyright Infringement"; Hasniah, "Combating Copyright Infringement Through CD/VCD Piracy"; Ikhwanto and Desmayanti, "Protection of the Copyright Holders of the Film 'Keluarga Cemara' Under the Copyright Act"; LOILEWEN et al., "A Comparative Review of Copyright Law No. 19 of 2002 on Copyright and Law No. 28 of 2014 on Copyright."

³³ Arifardhani, "Criminal Policy Regarding Copyright Infringement."

³⁴ Hasniah, "Combating Copyright Infringement: CD/VCD Piracy."

Table 1. Comparative Status of Copyright Offences under Indonesian Law, 1912–2014

Legal Instrument	Year	Offence Classification	Maximum Criminal Sanction (indicative)	Key Feature
Auteurswet 1912 (colonial copyright ordinance)	1912	Complaint offence	Not applicable (colonial-era provisions)	Private-law orientation
Law No. 6 of 1982 on Copyright	1982	Complaint offence (delik aduan)	Imprisonment up to 3 months and/or a fine	Enforcement controlled by the victim
Law No. 19 of 2002 on Copyright	2002	Ordinary offence (delik biasa)	Imprisonment up to 7 years and/or a fine up to Rp 5,000,000,000	State-controlled prosecution regardless of the victim's wishes
Law No. 28 of 2014 on Copyright	2014	Complaint offence (delik aduan), Article 120	Imprisonment up to 3–10 years and/or a fine, depending on the article	Mandatory mediation under Article 95(4) prior to prosecution; restores victim autonomy

Source: compiled by the author from Law No. 6 of 1982, Law No. 19 of 2002, and Law No. 28 of 2014 on Copyright.

Furthermore, Article 95(4) of the Copyright Act stipulates that to bring a criminal charge, dispute resolution through mediation must first be pursued.³⁵ This provision reinforces the principle of *ultimum remedium* in the enforcement of copyright offences, whereby non-criminal mechanisms must be pursued first before resorting to criminal proceedings. Section 105 of the Copyright Act also emphasises that the right to bring a civil action does not diminish the creator's right to bring a criminal prosecution, thereby providing victims with a dual pathway for resolution.

The threat of imprisonment and/or a fine for copyright offences indicates that the legislature views copyright infringement as a crime requiring a criminal response, not merely an administrative offence. However, the status of copyright offences as complaints and the mediation requirements suggest that the state also recognises that the interests of the victim, rather than solely the public interest, are the primary consideration in the enforcement of copyright offences.

3.2. Copyright Offences and the Protection of the Creative Economy

Copyright offences play a vital role in protecting the creative economy, as creative works are economic commodities that generate income for creators and the creative industries. Copyright protection is a tool for economic development, and an effective protection system is necessary to support the overall objectives of economic development.³⁶ The concept of copyright in the modern era aims to support a thriving creative economy and a rich and diverse cultural landscape.³⁷

Piracy poses a serious threat to creators' income and the sustainability of the creative industries. The emergence of piracy is inextricably linked to the socio-economic conditions of society, where the extremely low prices of pirated products act as a draw for consumers.³⁸ The growth of piracy is also linked to the role of society itself as consumers who feel they are benefiting. In the digital context, copyright infringement has become increasingly complex due to the unauthorised uploading of works for commercial purposes onto illegal websites without permission.³⁹

³⁵ Ikhwanto and Desmayanti, "Protection for the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act."

³⁶ Arifardhani, "Criminal Policy on Copyright Infringement."

³⁷ LOILEWEN et al., "A COMPARATIVE REVIEW OF COPYRIGHT LAW NO. 19 OF 2002 ON COPYRIGHT AND LAW NO. 28 OF 2014 ON COPYRIGHT."

³⁸ Hasniah, "Combating Copyright Infringement: CD/VCD Piracy."

³⁹ Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act."

Criminal protection serves as a means of maintaining a favourable climate for creative investment. The consequences of Indonesia's participation in the WTO necessitate the creation of adequate copyright protection, for both domestic and foreign copyright.⁴⁰ Failure to provide adequate protection can be used as justification for imposing economic sanctions and forms of cross-retaliation. Therefore, copyright offences serve not only to protect the individual interests of creators, but also national economic interests in international trade.

Protection for those in the music, film, publishing, app, design and digital content industries requires strong legal certainty. Law No. 28 of 2014 provides better protection for the economic rights of creators and/or holders of related rights.⁴¹ Managers of commercial premises are also liable for infringements of copyright and/or related rights in the shopping centres they manage. This provision demonstrates that copyright protection is not only directed at direct infringers, but also at parties who facilitate such infringements.

However, criminal protection must be directed not only at punishing perpetrators, but also at redressing losses and ensuring the sustainability of the creative ecosystem. The criminal justice system must prioritise broader objectives of criminalisation, or in other words, consider the aspect of public benefit.⁴² In the context of the creative economy, such utility encompasses the protection of incentives for the creation of works, the recovery of creators' economic losses, and the maintenance of an investment climate conducive to the creative industries.

3.3. The Rationality of Criminalisation in Copyright Offences

The criminalisation of copyright infringements can be considered rational if it meets several fundamental conditions. Firstly, copyright infringements must cause significant economic loss. In some cases involving high economic losses, the maximum criminal penalty is insufficient to address the scale of these losses, thereby calling into question the ability of criminal penalties to protect the public or achieve a deterrent effect.⁴³ Economic analysis of crime and punishment emphasises that the formulation of criminal offences must be conducted rationally by comparing the benefits of criminalisation with the expected penalties.⁴⁴

Secondly, non-criminal mechanisms must be proven to be insufficiently effective. Criminal sanctions are regulated under the Copyright Act because, in certain cases, the acts in question are deemed highly reprehensible, and mechanisms other than criminal sanctions are considered ineffective.⁴⁵ However, administrative law is linked to criminal law due to a lack of 'trust' in administrative sanctions to uphold administrative legal norms, thus requiring the assistance of criminal law.⁴⁶ Such rapid growth places a particular burden on criminal law, which has limited capacity, thereby leading to overcriminalisation.⁴⁷

⁴⁰ Arifardhani, "Criminal Policy Regarding Copyright Infringement."

⁴¹ LOILEWEN et al., "A COMPARATIVE REVIEW OF COPYRIGHT LAW NO. 19 OF 2002 ON COPYRIGHT AND LAW NO. 28 OF 2014 ON COPYRIGHT."

⁴² Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

⁴³ Gunawan, "A Study of the Maximum Limits of Criminal Sanctions for Economic Crimes – An Economic Analysis of the Law."

⁴⁴ Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

⁴⁵ Arifardhani, "Criminal Policy Regarding Copyright Infringement."

⁴⁶ Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

⁴⁷ Ramdhan Kasim, "Dehumanisasi Pada Penerapan Hukum Pidana Secara Berlebihan (Overspanning van het Straftrecht)," Jambura Law Review 2, no. 1 (2020): 1–29, <https://doi.org/10.33756/jalrev.v2i1.2402>.

Thirdly, criminal penalties are necessary to act as a deterrent against systematic or commercial infringements. A deterrent effect is important because piracy is often carried out systematically and repeatedly.⁴⁸ The purpose of criminalisation is simply to prevent offenders from causing further harm to society and to deter others from committing similar acts.⁴⁹ However, the leniency of criminal penalties can render the purpose of criminalisation—as the basis of the principle of *ultimum remedium*—futile.

Fourthly, criminal sanctions must be proportionate to the level of harm and the offender's culpability. Current criminal law, which largely focuses on assessing the offender's *mens rea*, appears to overlook the crucial principle that punishment should take into account the harm suffered by victims and society.⁵⁰ Optimal sentencing aims to minimise the social costs caused by crime and the costs of preventing it.⁵¹ Therefore, future sentencing must take into account not only the gravity of the offender's mental state, but also compensatory penalties.

Building on this analytical framework, the following discussion situates the objectives of punishment for copyright offences within four established theoretical perspectives, namely retributive, deterrence, restorative, and utilitarian rationality.

3.3.1. Retributive Rationality

From a retributive perspective, criminal sanctions for copyright infringements can be justified as a response to the offender's wrongdoing in knowingly deriving economic benefit from another person's work without authorisation. Punishment is understood as retribution for the offender's wrongdoing, wherein punishment is an absolute requirement to exact retribution upon those who have committed a wrongful act.⁵² In the context of copyright, perpetrators who deliberately infringe the creator's economic rights for commercial gain have committed a reprehensible act and deserve a criminal response.⁵³

However, a purely retributive approach is insufficient in the context of the creative economy. The fundamental problem with a criminalisation paradigm that remains oriented towards retributive justice is that criminal policy becomes trapped within the paradigm of imprisonment as the most effective and rational form of social control.⁵⁴ Criminal justice should not stop at punishment, but must also take into account the interests of the victim and the restoration of losses. Developments in the concept of criminal punishment have driven a shift from an original focus on retribution towards rehabilitation.⁵⁵

3.3.2. Deterrence Rationality

Criminal law plays a vital preventive role in commercial-scale copyright infringement. The objectives of criminal punishment include specific prevention (against the offender) and general prevention (against society), so that offenders do not cause further harm to society and to deter

⁴⁸ Hasniah, "Combating Copyright Infringement: CD/VCD Piracy."

⁴⁹ Tomo and Burhanudin, "A Legal Review of the Penal Provisions for Violators of Trade Secrets in Law No. 30 of 2000."

⁵⁰ Gunawan, "A Study of the Maximum Limits of Criminal Sanctions for Economic Crimes – An Economic Analysis of the Law."

⁵¹ Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

⁵² Nurmi, Najemi, and Rapik, "A Comparative Study on the Formulation of Criminal Offences of Violence Against Children."

⁵³ Arifardhani, "Criminal Policy on Copyright Infringement"; Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film Keluarga Cemara Under the Copyright Act."

⁵⁴ Fadhil, "Criminal Policy in Addressing Overcrowding in Prisons."

⁵⁵ Hakim, "The Implementation of the Dualist Theory of Criminal Law in the Draft Criminal Code (RKUHP)"; Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

others.⁵⁶ Criminal punishment is not merely a response to the commission of an offence, but serves to prevent the offence from being committed again.⁵⁷ In the context of copyright, the deterrent effect is essential given that piracy is often carried out systematically, repeatedly, and involves organised distribution networks.⁵⁸

However, the deterrent effect will only work if law enforcement is carried out consistently, proportionally, and non-selectively. The leniency of criminal penalties can render the purpose of criminal punishment futile as it fails to deter others. In some cases involving high economic losses, the maximum prison sentence is not even sufficient to cover the losses, thus calling into question its ability to act as a deterrent. By therefore, criminal penalties for copyright offences need to be calibrated to be proportionate to the potential economic losses incurred.

3.3.3. Restorative Rationality

A restorative approach is highly relevant in copyright offences because the primary victims are the creators or copyright holders who suffer economic loss. The shift in the paradigm of criminal punishment from retributive justice towards restorative justice emphasises efforts to restore the situation resulting from a criminal act. In the concept of restorative justice, punishment is directed more towards restoration, not merely punishment.⁵⁹

The application of criminal sanctions in the Copyright Act has reflected a restorative orientation through several mechanisms. Firstly, the requirement for mediation prior to criminal prosecution (Article 95(4)) indicates that the restoration of relationships and compensation for losses are prioritised.⁶⁰ Secondly, the status of offences as complaint-based offences grants victims autonomy to determine whether a case should be prosecuted criminally or resolved through civil mechanisms.⁶¹ Thirdly, the right to bring a claim for damages before a commercial court (Article 99) remains available alongside criminal prosecution.⁶²

Criminal sanctions should be accompanied by mechanisms for restitution, compensation, damages, or the return of economic benefits obtained by the perpetrator. Criminal sanctions that take into account the losses suffered by victims and society constitute an important principle that has been advocated since the inception of criminal law and legal scholarship. Indonesia's criminal justice system, which adopts a double-track system, recognises both criminal sanctions and measures that allow for the application of a restorative approach.⁶³

3.3.4. Utilitarian Rationality

From a utilitarian perspective, criminal sanctions for copyright infringement must provide broader social benefits, namely safeguarding the creative economy ecosystem, enhancing legal

⁵⁶ Tomo and Burhanudin, "A Legal Review of the Penal Provisions for Violators of Trade Secrets in Law No. 30 of 2000."

⁵⁷ Setiyawan and Yulianingrum, "The Impact of the Application of Criminal Sanctions in the Job Creation Law on Environmental Restoration."

⁵⁸ Hasniah, "Combating Copyright Infringement: CD/VCD Piracy."

⁵⁹ Sukma and Cumbhadrika, "The Urgency of Implementing Judicial Pardon as a Reform of Criminal Law from a Restorative Justice Perspective."

⁶⁰ Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act."

⁶¹ Arifardhani, "Criminal Policy Regarding Copyright Infringement"; Hasniah, "Combating Copyright Infringement Through CD/VCD Piracy."

⁶² Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act."

⁶³ Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

certainty, and protecting incentives for the creation of works. The criminal justice system must prioritise broader objectives of criminal sanctions by considering aspects of utility.⁶⁴ The imposition of optimal penalties aims to minimise the social costs caused by crime and the costs of preventing it.

The protection of copyright as a tool for economic development requires that criminal sanctions be directed towards objectives that support the growth of the creative economy.⁶⁵ In fact, many criminal cases are actually 'unworthy' of being brought to court, particularly when viewed in the context of social, economic and cultural developments within society.⁶⁶ Therefore, criminal sanctions for copyright offences must consider the overall economic impact—not only the individual losses of creators, but also the impact on the investment climate, innovation and the sustainability of the creative industries.

3.4. The Problem of Overcriminalisation and Proportionality

The excessive use of criminal sanctions in copyright infringements poses a risk of overcriminalisation that must be guarded against. The trend towards criminalisation in Indonesia is leading to overcriminalisation, dominated by the threat of imprisonment, and this policy plays a significant role in the rate of overcrowding in prisons.⁶⁷ The development of Indonesian criminal law is characterised by the massive growth of legislation containing criminal sanctions, thereby leading to overcriminalisation.

The distinction between minor individual infringements and large-scale commercial infringements must be taken into account in the enforcement of copyright offences. Not all copyright infringements carry the same level of seriousness. The doctrine of *ultimum remedium* should not be applied generally to all types of offences, but rather applied on a case-by-case basis to criminal acts where the offender's degree of culpability is relatively minor and the act does not pose a significant danger or cause public alarm.⁶⁸ In the context of copyright, a distinction must be made between professional pirates operating commercially and engaging in systematic and ordinary users committing minor infringements without commercial intent.

The principle of proportionality in the imposition of criminal penalties is also a significant issue. Criminal law, which often focuses heavily on assessing the defendant's *mens rea*, appears to overlook the crucial principle that sentencing should take into account the harm suffered by victims and society.⁶⁹ The public perceives a legal imbalance when offences with significant economic value are treated the same as those with minimal economic value, as this undermines the principles of justice within the law.⁷⁰

The need for alternative dispute resolution mechanisms must also be addressed. Copyright disputes may be resolved through mediation, arbitration, negotiation, conciliation, or other means chosen by the parties. The Copyright Act has accommodated these mechanisms through the re-

⁶⁴ Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

⁶⁵ Arifardhani, "Criminal Policy in Copyright Infringement."

⁶⁶ Hakim, "The Implementation of the Dualist Theory of Criminal Law in the Draft Criminal Code (RKUHP)."

⁶⁷ Fadhil, "Criminal Policy in Addressing Overcrowding in Prisons."

⁶⁸ Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

⁶⁹ Gunawan, "A Study of the Maximum Limits of Criminal Sanctions for Economic Crimes – An Economic Analysis of the Law."

⁷⁰ Sukma and Cumbhadrika, "The Urgency of Applying Judicial Pardon as a Reform of Criminal Law from a Restorative Justice Perspective."

quirement for mediation prior to criminal proceedings and the effective resolution of disputes through mediation, arbitration, or court proceedings. Diversion and penal mediation are measures designed to address overcriminalisation.

3.5. Institutional Design for Balanced Enforcement of Copyright Offences

Based on the above analysis, a rational model for the enforcement of copyright offences can be constructed through several principles:

3.5.1. Selective Criminalisation

Criminal proceedings must be focused on serious and commercial infringements. The doctrine of *ultimum remedium* requires the selective use of criminal law, only against infringements where the degree of wrongdoing is severe and causes significant harm.⁷¹ Individual and small-scale copyright infringements are more appropriately resolved through civil or administrative mechanisms.⁷²

3.5.2. Restorative Orientation

Law enforcement must provide scope for the restoration of victims' losses. The shift from retributive justice towards restorative justice emphasises restoration efforts.⁷³ The requirement for mediation prior to criminal prosecution under Article 95(4) of the Copyright Act is an appropriate step in this direction.⁷⁴

3.5.3. Proportional Punishment

Penalties must be proportionate to the level of loss and the offender's culpability. Sentencing must take into account not only the gravity of the offender's mental state, but also criminal compensation and the victim's loss.⁷⁵ The concept of individualised sentencing is crucial to ensuring proportionality.⁷⁶

3.5.4. Economic Impact Assessment

Law enforcement must consider the impact on the creative economy. The imposition of optimal penalties aims to minimise social costs.⁷⁷ As copyright protection serves as a tool for economic development, law enforcement must take into account the overall economic impact.

3.5.5. Digital Enforcement Framework

Law enforcement must adapt to the nature of digital infringements. Article 54 of the Copyright Act provides for protection against copyright infringement via internet-based means, includ-

⁷¹ Danil, "The Application of the 'Ultimum Remedium' Principle to Administrative Offences."

⁷² Arifardhani, "Criminal Policy in Copyright Infringement."

⁷³ Saputro, Milono, and Medina, "Criminal Liability of Corporations by Directors in Forest and Land Fire Cases Due to Unknown Causes: An Economic and Environmental Perspective."

⁷⁴ Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film 'Keluarga Cemara' Under the Copyright Act."

⁷⁵ Gunawan, "A Study of the Maximum Limits of Criminal Sanctions for Economic Crimes – An Economic Analysis of the Law."

⁷⁶ Fadhil, "Criminal Policy in Addressing Overcrowding in Prisons."

⁷⁷ Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

ing monitoring the dissemination of copyrighted works. Measures to remove illegal content may be taken through cooperation between the Director General of Intellectual Property Rights and the Director General of Information and Communication Technology in accordance with Article 56(2) of the Copyright Act.⁷⁸

3.6.1 Integration between criminal, civil, and administrative mechanisms

Criminal law does not stand alone, but is linked to mechanisms for compensation, blocking of illegal content, revocation of licences, and public education. Article 105 of the Copyright Act emphasises that the right to bring a civil action does not diminish the right to pursue criminal prosecution. This integration reflects *the double-track system* within Indonesia's criminal justice system, which recognises both criminal sanctions and administrative measures.⁷⁹

4. Conclusion

Based on the analysis conducted, it can be concluded that copyright offences under Indonesian law, as regulated in Articles 112 to 119 of Law No. 28 of 2014, indicate that copyright infringement is not merely viewed as a private dispute, but also as a threat to economic interests and the creative industries. The construction of the offence, which requires elements of intent and commercial interest, as well as the reinstatement of copyright offences as complaint-based offences with mediation requirements, reflects the legislature's efforts to apply criminal sanctions proportionately. Copyright offences play a vital role in protecting the creative economy, particularly against infringements that are commercial, systematic, and detrimental to creators and copyright holders. Copyright protection is an instrument of economic development that supports a creative investment climate and legal certainty in international trade.

The rationale for criminalisation in copyright offences is insufficient if based solely on retribution or deterrence. A criminalisation paradigm that remains oriented towards retributive justice has been shown to lead to overcriminalisation. Criminalisation must be directed towards a more balanced set of objectives, encompassing prevention, restitution, proportionality, and the protection of the sustainability of the creative economy ecosystem. Economic analysis of crime and punishment emphasises that the formulation of criminal offences must be carried out rationally.

A rational model for the enforcement of criminal copyright law must treat criminal sanctions as a selective, proportionate and restorative instrument, rather than as the primary mechanism for all forms of copyright infringement. The integration of criminal, civil and administrative mechanisms, alongside the strengthening of law enforcement in the digital sphere, is an urgent necessity for the protection of the creative economy in the digital age.

5. Suggestion

For legal policy and law enforcement practice, this study suggests that the Directorate General of Intellectual Property, the police, and public prosecutors adopt a clearer, published set of prioritisation criteria for deciding when copyright infringements should be pursued through crim-

⁷⁸ Ikhwanto and Desmayanti, "Protection of the Copyright Holder of the Film Keluarga Cemara Under the Copyright Act."

⁷⁹ Shirotol et al., "The Presidential Threshold Controversy in the 2019 Election and Ahead of the 2024 Election in Indonesia."

inal channels, so that the principle of *ultimum remedium* is applied consistently rather than left to case-by-case discretion. Such criteria should place the greatest weight on the commercial scale of the infringement, the magnitude of the economic loss suffered by the creator or rights holder, and the availability and adequacy of civil or administrative remedies, consistent with the selective-criminalisation model developed in Section 3.5.1 of this article.

For theoretical development, future work may usefully extend the rationality-of-punishment framework used here by testing it against other categories of intellectual property offences, such as trademark counterfeiting or trade secret misappropriation, to examine whether the same balance between retributive, deterrence, restorative, and utilitarian considerations holds across different forms of intangible property. Doing so would help determine whether the selective-criminalisation model proposed in this study is specific to copyright or reflects a broader pattern applicable to economic criminal law generally.

For future research, an empirical follow-up study is recommended to examine actual case-handling patterns at the Directorate General of Intellectual Property, the police, and the courts, so that the normative arguments developed in this article can be tested against real enforcement data, including the frequency with which mediation under Article 95(4) of the Copyright Act is pursued before criminal prosecution and the extent to which sanctions actually imposed correspond to the scale of commercial harm. Such empirical work would complement the doctrinal analysis presented here and provide a firmer evidentiary basis for future reform of Indonesia's copyright criminal provisions.

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