

# The Nature of Penal Mediation as an Alternative to Settle Copyright Crime on Achieving Justice

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## ABSTRACT

Penal mediation is an alternative to solve copyright crimes. This study aims to identify the process of the penal mediation system. This study uses a normative method. The results of the study show that the penal mediation as an alternative concept of solutions offered receives a positive response, especially for businessmen which demands efficiency, confidentiality, lasting relationships / cooperation, no formality, and the settlement emphasizes justice. Through the penal mediation process, it can reach the highest peak of justice because of the agreement of the parties involved in the copyright crime case. Both parties can seek and reach the best solution and alternative to resolve the case. The perpetrators and victims can propose compensation to be offered, agreed upon and negotiated between them together so that the solution reached is "win-win"

## Keywords

Penal Mediation, Alternative Settlements, Crime, Copyright, Justice

Article Received: 10 August 2020, Revised: 25 October 2020, Accepted: 18 November 2020

## Introduction

Penal mediation is an alternative solution on copyrights crime. It has created a dispute resolution system that is needed by business world. The development of society demands on speed, confidentiality, efficiency, effective, and also maintaining the exist relation. Those things cannot be responded by the existing litigation institution, which get many criticisms in its operations because it is considered to be slow, expensive, wasting energy, time, and money, as well as not giving any win-win solution. So, the concept of the alternative dispute resolution system has received a positive response, especially in the business world which requires efficiency, confidentiality, and also the lasting relation/cooperation and no formality also requires a resolution that emphasize on justice.

In the modern society, there is reluctance/unwillingness and laziness of people to litigate through the court either on civil case or criminal case or other administrative cases. It is because protracted or time consuming to get a solution, and often burdened with a cost, taking a long time, and sometimes can made a continuously conflict, not responsive and accommodative and even defame both parties, perpetrator or victim, both the reporter and reported, whether it is the plaintiff or the defendant, for both could get defaming in the middle of society. Thus, it is giving a rise to the model of dispute of resolution or problem outside the court or known as non-litigation, reconciliation, and so on. [1]

The oldest settlement of cases also known as litigation in the court is often creating more new problem which could made the legal settlement more complicated. Alternative Dispute Resolution (ADR) as a new model is to accommodate deal (win-win solution) between the parties, the confidentiality between parties is more guaranteed, avoiding slow performance cause by a formal procedural and administrative, and legal settlement that can be solved

comprehensively in both parties and can maintain a good relationship of both parties. ADR is a model of settlement outside the court to solve the problem amicably. [1]

Settlement through consensus is not new to the Indonesian people. Before the Dutch occupation, Indonesia already had its own laws, namely customary law. The customary law does not differentiate between the settlement of criminal cases and civil cases. All cases can be resolved by deliberation with the aim of getting a balance or restoring the situation. [2]

Mediation seen from the side of Pancasila Philosophy according to Darji Darmodiharjo and Sidharta, the core and the meaning of mediation is a culture that exist for a long time and live in the culture of the nation and traditional Indonesia society. Since long time ago, Indonesia already known "*musyawarah untuk mufakat*" (deliberation to reach a consensus). The Consensus is held on every aspect of society and also held to resolve dispute that is happened in the society. It is one of the values which exist in Pancasila. It means that mediation is Indonesian culture both on the traditional society and also as the country based on Pancasila. It is a way to solve a problem with reconciliation and keep the harmony of the community.[3]

In Indonesia, solving cases through ADR can be found on the Law No. 48 of 2009. Article 60 states that "ADR is a dispute resolution institution or difference opinion through a procedure that is agreed by both parties, namely settlement outside the court by consultation, negotiate, mediation, conciliation, and self-assessment". In Indonesia, ADR can be applied in the civil cases dan still cannot be implemented on a criminal case. Of course, in the future not all criminal case could be solved through ADR and also the implementation will be using a concept and standard of fairness that is applied according to the laws and regulation, religious norm, morals and customary law. Furthermore, according to the Supreme Court, generally the main forms of a dispute resolution, such as a. Litigation/Court; b.

Arbitration; c. Early Neutral Evaluation; d. Mediation; e. Negotiation; f. Fact Finding. Theoretically, the process of litigation is giving more legal certainty rather than outside the court, but for the criminal case not every settlement of criminal cases can be done through litigation by the law enforcer. Both perpetrators and victims can ask to stop the process, if there is a deal between parties then a decision will be requested to the court as a final decision that can be implemented by both parties with mediated by the investigator, public prosecutor and court judge. It means that in every level of judiciary before the main examination of the case is carried out, both parties can ask for reconciliation. [1]

Basically, penal mediation is one of an alternative dispute resolution outside the court that is commonly applied on civil cases. The same with ADR, it is also known regarding on copyrights and intellectual works, labor, business competition, consumer protection, environment and so on. On the positive law of Indonesia, in principle the criminal case cannot be done outside the court. However, the practice of law enforcement in Indonesia has also often solved outside the court through the discretion of law enforcement. The implication of this practice, the settlement of case outside the court, so far does not have any formal legal basis, so it is also common for a case to be done informally for a peaceful settlement through the mechanism of customary law, but it is still processed in the court according to the applicable positive law. The consequences on applying the existence of penal mediation as one of ADR in the field of criminal law is done through restitution on the criminal proceedings. It shows that the differences between criminal law and civil law is not big and this difference become non-functional. [4]

The existence of cases settlement outside the court through penal mediation is a new dimension that is examined through theory and practice aspects. practically, penal mediation will be correlated with the achievement of the court. Through the time, the number of cases in all forms enter the court, so the consequence is being a burden for the court in examining and deciding the case according to the principle of "simple, fast, and low cost" (*Peradilan sederhana, cepat dan biaya ringan*) without sacrificing the achievement of judicial goal which is legal certainty, utility, and justice. Some basic questions arising related to such discussion above, should every criminal case be filed and solved through the court or any other special cases that could be solved through the penal mediation? Indeed, on the polarization and mechanism of penal mediation is needed as long as it is truly desired by both parties (suspect and victim), also to achieving a wider interest, namely maintaining the social harmony.[4]

Mudzakkir states several categorizations as a benchmark and scope for cases that can be resolved outside the court through penal mediation are as follows: 1. The violation of the criminal law is included in the category of complain offense, whether it is and absolute complaint or a relative complaint. 2. The violation of the criminal law have a criminal fine as a criminal threat and the offender has paid for the fine (Article 80 of the Criminal Code). 3. The violation of the criminal law is in category of "violation", not a "crime", that is only threatening by a fine, 4. The violation of the criminal law is one of a crime in the field of

administrative law which placing the criminal sanctions as *ultimum remedium*. 5. The violation of criminal law is in categorized as a light/completely minor and law enforcement official use their power to do a discretion. 6. The violation of the ordinary criminal law that are terminated or not processed in the court (*deponir*) by the Attorney General in accordance with their legal authority. 7. The violation of the criminal law are included in the category of customary criminal law that can be resolved through customary institution. [4]

On the philosophical perspective, the existence of penal mediation containing principle of *win-win* and not ending with a *lost-lost situation* or *win-lost situation* as it is wanted to be achieved by the court with an achievement of formal justice through the law enforcement process. From the perspective of sociology, this aspect is oriented on the society of Indonesia where the cultural roots of the society are oriented on the value of family culture, prioritizing the principle of deliberation and consensus to resolve a dispute in a social system. Strictly speaking, there aspect and dimensions are resolved through the dimensions of local wisdom of customary law. Through the history of law, it can be seen that the first law that applies and is a reflection of the legal awareness of the Indonesia people is the local wisdom of customary law.[4]

## Problems

The study of the nature of penal mediation are focused on how the penal mediation process as an alternative to the resolution of copyright crimes on achieving justice?

## Research Method

This research is a normative legal research or doctrinal research. It applies philosophical and conceptual approaches to view the law as a set of abstract idea and moral idea, including the study of moral justice. [5] The type and source of data are used as a material for this research is a primary and secondary data. The primary data means that the data is obtained from a documentation study, while the secondary data is a data that is obtained from a research of literature of scientific works and laws and regulations that is related to the object of the research.Both primary and secondary data, then, are processed first and then analyzed qualitatively.

## Discussion

According to Susanti Adi Nugroho, mediation is a problem-solving negotiation process where the third parties that is not taking any side on the both parties that having a dispute to gain a satisfactory deal. This is different with litigation or arbitration processes. The mediator does not have any authority to decide the dispute. The mediator is just to help both parties to solving their dispute that was entrusted to him/her.[6, 7]

The establishment of arbitration and mediation institution is a sign of the need for ADR tool to seek a justice in the field of intellectual property. In Indonesia, there is an arbitration institution specially handling a case in the field of intellectual property known as Intellectual Property Rights

Arbitration and Mediation Board (*Badan Arbitrase dan Mediasi Hak Kekayaan Intelektual*). This institution was formed on 2011 and have a high integrity and expert arbitrator on the field of intellectual property. The role of this institution to solved a dispute related to the intellectual property is needed by the entrepreneur in the middle of the increasing number of commercialization of intellectual property. Intellectual property is one of the main assets on the company and therefore their economic interest on the intellectual property is getting higher. The parties are involved on the dispute actually does not want to have a case to be arise. For the entrepreneur, it is important to maintain relationships and it must be maintained for a sustainable business continuity. However, if it is forced to go into the lawsuit, then the case should not be exposed because it involves the name of the company. The image of the company is very important to be maintained. The intellectual property owner, including copyrights, is often dealing with a complex contact with their partner in various collaboration such as developing, production, or product marketing until the brand license, patent, and copyright. It is usually the dispute arises from a problem related to the contract. For example, one of the parties is in default or does not carry out the agreement in accordance with the contact. [8]

Resolving the intellectual property dispute through Intellectual Property Rights Arbitration and Mediation Board have advantages such as the case handling is closed to the public, so the cases will not be exposed to public. Those who litigate is only known by the parties that is involved, so the case will not expose to the outside of the courtroom. In addition, the time period for solving the case is limited. It means that there are a limited time for a case to be solved, so it will give a certainty for the parties. The procedure for resolving cases through Intellectual Property Rights Arbitration and Mediation Board is simple, while the cost is relatively cheaper and the decision is final and binding to the disputing parties.[8]

The methods of dispute resolution through arbitration and ADR have been regulated on the Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution. According to the Law No. 30 of 1999, it is known several ways to dispute resolution namely: a. arbitration; b. consultation; c. negotiation; d. mediation; e. conciliation; f. expert judgement. Among the six ways of resolving dispute outside the court, only dispute resolution through arbitration results in a compelling decision handed down by the third parties, which is arbitrator or arbitrator council, while others settlement methods are classified as alternative dispute resolution, the settlement is left up to the parties, at least giving advice from a third party that facilitates negotiation between parties.[9]

According to the Arbitration and Alternative Dispute Resolution Law, a dispute could be resolved by ADR based on the good faith by overriding litigation in the District Court (Commercial Court). The dispute resolution through ADR is resolved by a direct meeting of both parties, the results then stated in a writing. If the parties cannot resolve the dispute, then both parties, in a written agreement could solving it with a help from a third parties. The role of this third parties is only to facilitate the negotiation of the parties in order to reach an agreement. The agreement then binding

both parties after it is signed and registered to the District Court (Commercial Court). In contrast with ADR, dispute resolution through arbitration is method of dispute resolution which has been submitted to a third party from the start to giving a binding decision for both parties, the decision is final and have a permanent legal force and are binding on both parties.

The peaceful attempts which occurs outside the court when a criminal act is suspected, as the same on a civil case, it is just a settlement not before the a legal official. The peaceful attempts outside the court can be exemplified such as a peaceful attempt between victim and the perpetrators of theft. For civil case, the peaceful attempt are legitimate with the principle and regulation related to civilization. But, for criminal case, a peaceful attempt should be questioned. Those question is arising because of a provision that "there are no peace on a crime" and "achieving peaceful, is not eliminate the exist crime element". There are many minor criminal cases can be processed with the principle of fast, low cost, and simple.[10]

The new copyright law has turned the criminalization-based thinking into remuneration. However, when a violation is keep to happen and piracy is still ongoing, then the copyright law still gives a choice to solve the settlement of cases criminally. The criminal process will still exist, but the extraordinary about this amendment to the Copyright Law is that the judge who decide the sentence for the perpetrators of piracy, then at the same time the judge and his decision can determine the compensation that the pirate must pay to the creator/copyright holder. So, in the criminal verdict there also a civil compensation. It is extraordinary and first time happen in the Copyright Law. Example, in the past when a creator or copyright holder are annoyed by the piracy, then he will pursue the person by criminalization the person. Maybe, the creator or the copyright holder are succeeding to criminalize the pirate with sending them to prison and the compensation that need to be paid to the state, but the creator didn't get anything, he just got satisfied by criminalize the person. The new Copyright law is opening an opportunity for the creator or copyright holder to get compensation. So, the judge in their decision in addition to imposing imprisonment, the judge can also impose compensation sentence on the creator or copyright holder. A creator or copyright holder can file a civil right during the criminal proceeding, there is no need to sue specifically for civil matters. I there a practice? until now I did not exist, but the punishment structure is existing for that. This was a tremendous leap in copyright law.[8]

When creator or the relevant right owner will process the copyright infringement that is not included in the qualification of privacy, which will be processed criminally for copyright infringement, then the first step that will be taken is mediation before making a criminal charge as it is stated on the Article 95 Paragraph (4) of The Copyright Law. Mediation is one of the dispute resolutions through negotiation to reach agreement of both parties assisted by mediator. The mediator appointed by both parties negotiate in order to find a fair settlement for the parties involved in the case. Example, there is a copyright infringement and he want to file a crime report. He come to police station, then the police cannot directly process the report, unless there is prior mediation between the reporter and the person that is

reported. If the mediation process has been carried out but it fails and does not made any decision, the police will then process the report. It is being a question who is the mediator in this copyright case? Mediation could be done in the Directorate General of Intellectual Property, Ministry of Law and Human Rights or other institution such as Intellectual Property Rights Arbitration and Mediation Board (BAM HKI) or law enforcer such as police officer. The new Copyright Law will revive the arbitrator and mediator profession in the Intellectual Property Rights Arbitration and Mediation Board. The question that will arise from many people why is mediation process must be held before the case id reported to the police? From various experiences that have occurred in the criminal case, when creator or a singer litigates, the continuation of his career as a singer will stop there. Because after he made a legal move with filing a report to the law enforcer, usually the user that use the song directly take down the songs or boycotting the songs. In such conditions, then his career as creator/singer will ended. The litigant's song usually disappearing immediately from the market. To solve the problem faced by the creator or the copyright holder, then the Copyright Law have included provisions for mediation in the hope that the problems can be resolved by deliberation or a *win-win solution*.<sup>[8]</sup>

The concept of mediation and arbitration are actually already existed in all Intellectual Property Law such as Patent Law, Trademark Law, and Copyrights Law, but they are not worked optimally because there is no coercive article. Whereas in the Copyright Law, if a person going to take a lawsuit, then this person will first carry out the mediation process. If an agreement is reached in the mediation process, then the case is closed. The form of the settlement depends on the mediating parties. There could be a chance a person who violate the copyright form the creator or the copyright holder agree to give a compensation. So, the approach taken by the new Copyright Law is remuneration, not only based on criminalization. On the old system, the criminal process that involving the litigants actually make the creator and singer even more got a disadvantaged. Example, the creator or the copyright holder is Mr. X, his song is played on a karaoke bar without any permission before, so he criminalizes the owner of the karaoke bar, then it will be processed until on the court. But, after that the creator or the copyright holder didn't get anything, he also didn't get any compensation, even though his song has disappeared from the market and has been take down from any media. So, in this case things that is important for the artist, singer is getting a royalty, things that much more important is their continuity of his/her career in the music industry to keep exist.<sup>[8]</sup>

The application of penal mediation on the criminal justice system in Indonesia is a part of a reform on a criminal law system that will be apply in the future. Penal mediation is a constructive legal breakthrough. It is expected on the future there will be a clear legal protection in the material law and formal law. This is because it aims to: 1) As one of solutions to reduce the buildup of cases in various stages of law enforcement; 2) To reduce capacity of detainees at various level of case resolution and execution at the correctional institution; 3) Is a dispute resolution that considered easy, fast, and simple; 4) Can provide a wider access to the

parties, both as perpetrators of crime and victims of crime to achieve justice; 5) Strengthening the criminal justice system in Indonesia in resolving criminal cases in every law enforcement institution; 6) To provide a moral encouragement for the victims of crime and respect for the dignity of the perpetrator of the crime so there is no continuing conflict in the middle of society. the application of penal mediation concept in a criminal justice system in Indonesia is an important and urgent matter to be used as an operational basis for law enforcer in resolving a criminal case both inside and outside the court.

## Conclusion

Penal mediation process as an alternative dispute on the copyright crime in order to achieve justice, both parties in the case are first sought to carry out the mediation process. If the agreement between is agreed between the parties, then the case is closed. The form of the solution depends on mediating parties. It could be the people who violated the copyright of the creator or the copyright holder agree to providing a compensation in the form of compensation. Through penal mediation, the highest peak of justice is obtained because of the agreement of the parties is involved in the copyright crime case. Both parties can seek and reach the best solution and alternative solution to resolving the case. The perpetrators and victim can propose compensation that is offered, agreed upon and negotiated between the parties so the solution that is reached together is a *win-win solution*. So, the approach adopted by the new Copyright Law is remuneration, not just a criminalization.

## Acknowledgement

The authors are grateful to the Faculty of Law, Hasanuddin University to hold the International Conference on Trade, Business, Human Rights, and Globalization (ICTB-HRsG) in 2020. The authors are also grateful to Promotor and Co-Promotor to help the author to explore and elaborate the legal materials.

## References

- [1] Ketut Sumedana. (2020). Penal Mediation in the Judiciary System based on Pancasila Values [Mediasi Penal dalam Sistem Peradilan Berbasis Nilai-Nilai Pancasila]. Yogyakarta: Genta Publishing.
- [2] Endang Mustikowati, Syukri Akub, & Syamsuddin Muchtar. (2014). Out of Court Criminal Cases Concerning Restorative Justice at the Banggai Resort Police [Penyelesaian Perkara Pidana Di Luar Pengadilan Tentang Keadilan Restoratif Di Kepolisian Resort Banggai]. Jurnal Analisis. 3 (1). 84.



- [3] Andi Tenri Famauri. (2018). Independent Mediation in E-Banking Disputes. (Application of the Principles of Good Faith and Fair Dealing in E-Banking Dispute Resolution Through Independent Mediation as Legal Development in Indonesia) [Mediasi Independen Dalam Sengketa E-Banking. (Penerapan Prinsip Itikad Baik (*Good Faith*) Dan Transaksi Jujur (*Fair Dealing*) Dalam Penyelesaian Sengketa *E-Banking* Melalui Mediasi Independen Sebagai Pengembangan Hukum Di Indonesia)]. Yogyakarta: Litera.
- [4] Lilik Mulyadi. (2015). Penal Mediation, In the Indonesian Criminal Justice System [Mediasi Penal, Dalam Sistem Peradilan Pidana Indonesia]. Bandung: PT. Alumni.
- [5] Irwansyah (2020). Legal Research, Choice of Article Writing Methods & Practices [Penelitian Hukum, Pilihan Metode & Praktik Penulisan Artikel]. Yogyakarta: Mirra Buana Media.
- [6] Susanti Adi Nugroho. (2019). Benefits of Mediation as an Alternative to Dispute Resolution [Manfaat Mediasi Sebagai Alternatif Penyelesaian Sengketa]. Jakarta: Kencana.
- [7] Maskun Maskun, Achmad Achmad, Naswar Naswar, Fauziah P. Bakti, & Amaliyah Amaliyah. (2019). Arbitration: Understanding It in Theory and Indonesian Practice. *Hasanuddin Law Review*, 5 (2), 221-224.
- [8] Ahmad M. Ramli. (2018). Copyright, Creative Economy Digital Disruption [Hak Cipta, Disrupsi Digital Ekonomi Kreatif]. Bandung: PT. Alumni.
- [9] Ahmadi Miru. (2016). Trademark Law, the Easy Way to Study Trademark Law [Hukum Merek, Cara Mudah Mempelajari Undang-Undang Merek]. Jakarta: Rajawali Pers.
- [10] Angrayni, L. 2016. Kebijakan Mediasi Penal Dalam Penyelesaian Perkara Tindak Pidana Ringan Perspektif Restorative Justice. *Jurnal Hukum Respublica*, 16 (1). 88-102.