

Reformulation of Criminal Qualification in Indonesian Intellectual Property Rights Law: A Comparative Study Based on The Concept of *Besonderes Öffentliches Interesse* in Germany

Nadhif Sendy Ziaulhaq

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia,
E-mail: nadhifsendyziaulhaq.std@unissula.ac.id

Abstract. *This study examines the reformulation of the qualification of offenses in Indonesian Intellectual Property Rights (IPR) law using the concept of *besonderes öffentliches Interesse* (special public interest) in German IPR criminal law as a comparative framework. Six Indonesian IPR laws currently in force qualify IPR crimes as absolute complaint offenses, which give rise to various legal problems: passivity of law enforcement officers, low levels of disclosure of IPR crimes, imbalance between the protection of private rights and public interests, and the inability to respond to the challenges of the digital era. This normative legal research with a statutory, comparative, conceptual, and historical approach analyzes the qualification of offenses in Indonesian IPR Law, examines the concept of *besonderes öffentliches Interesse* in German law (specifically article 109 *Urheberrechtsgesetz*), and formulates a reformulation model in the form of the concept of "relative complaint offense" (*relatives Antragsdelikt*). This model maintains the general rule of complaint offense qualification but allows for *ex officio* prosecution by prosecutors if there is a "special public interest" based on six criteria: commercial scale of the violation, significant economic impact, organized violation, impact on public health/safety, massive-scale digital violation, and impact on the national creative industry. This research also produced a normative formulation in the form of draft amendments to the Indonesian Intellectual Property Rights Law and prosecution guidelines. This reformulation is based on Pancasila, the principle of balance, and the proportional *ultimum remedium* paradigm.*

Keywords: *Besonderes Öffentliches Interesse; Complaint Offenses; Comparative Law of Indonesia-Germany; Intellectual Property Rights; Qualification of Offenses.*

1. Introduction

Intellectual Property Rights (IPR) is a legal field with a dual dimension: it represents both private rights and public interests. This dual nature makes IPR a complex legal field, particularly in the context of criminal law enforcement. On the one hand, IPR represents exclusive rights granted to creators or inventors over their intellectual works, so legal protection depends heavily on the rights holder's initiative. On the other hand, large-scale IPR violations can cause significant national economic losses, harm consumers, and hinder innovation and creativity, ultimately impacting the public interest at large.

The problematic issue of qualifying offenses in Indonesian IPR criminal law is an issue that has been the subject of long-standing debate among academics and legal practitioners. The qualification of offenses, which determines whether a crime is an ordinary offense (*gewone delict/Offizialdelikt*) or a complaint offense (*klachtdelict/Antragsdelikt*), has fundamental implications for the prosecution mechanism and the effectiveness of law enforcement. In the context of Indonesian criminal law, the distinction between ordinary offenses and complaint offenses is not merely a technical-procedural distinction, but rather reflects a choice of criminal law policy (*strafrechtspolitik*) based on philosophical considerations regarding the nature of protected legal interests.

Historically, Indonesia has experienced a unique dynamic in terms of qualifying intellectual property rights offenses, particularly in the copyright sector. Indonesia's first Copyright Law, Law Number 6 of 1982, qualifies copyright infringement as a complaint offense. This selection of qualification is based on the understanding that copyright is a private right whose protection depends on the will of the rights holder. However, practice shows that the complaint offense qualification leads to weak copyright law enforcement. Many copyright infringements go unpunished because rights holders are reluctant or unable to file complaints, especially foreign rights holders who do not have representatives in Indonesia.

Responding to these weaknesses, through Law Number 7 of 1987 concerning Amendments to Law Number 6 of 1982 concerning Copyright, the government and the House of Representatives changed the qualifications for copyright offenses from complaint offenses to ordinary offenses. This change was maintained in Law Number 12 of 1997 and Law Number 19 of 2002 concerning Copyright. During this period, law enforcement officials had the authority to take action against copyright infringements *ex officio* without needing to wait for a complaint from the rights holder. This change was considered a progressive step in strengthening IPR law enforcement in Indonesia.

However, surprisingly, Law No. 28 of 2014 concerning Copyright, which replaced Law No. 19 of 2002, actually reverted the qualification of copyright offenses to

complaint offenses. Article 120 of the 2014 Copyright Law explicitly states: "Criminal acts as referred to in this Law are complaint offenses." This change has received sharp criticism from various groups. Bernard Nainggolan, one of Indonesia's leading intellectual property law experts, stated that this change is "regressive" because it degrades the status of copyright crimes. Similar criticisms have been expressed by various academics who believe that the return of the complaint offense qualification will weaken the effectiveness of copyright law enforcement.¹

Not only in the field of copyright, all IPR laws in Indonesia currently qualify IPR crimes as complaint offenses. Law Number 20 of 2016 concerning Trademarks and Geographical Indications, Law Number 13 of 2016 concerning Patents, Law Number 31 of 2000 concerning Industrial Designs, Law Number 30 of 2000 concerning Trade Secrets, Law Number 32 of 2000 concerning Integrated Circuit Layout Designs, and Law Number 29 of 2000 concerning Plant Variety Protection, all establish complaint offenses as qualifying offenses. This situation creates absolute uniformity, where there is no room for law enforcement officials to act proactively in handling IPR violations, regardless of the magnitude of the losses incurred.²

The problems arising from the absolute complaint-based offense qualifications in all Indonesian IP laws are serious and multidimensional. First, from a law enforcement perspective, the police and prosecutors are rendered passive, unable to conduct investigations and prosecutions without a complaint from the injured party. Second, the disclosure rate of IP crimes is very low because many rights holders are unaware that their rights are being violated, lack the resources to file a complaint, or choose to resolve disputes through civil channels. Third, large-scale and organized IP violations, such as mass piracy of digital products and systematic trademark counterfeiting, cannot be effectively addressed by law enforcement.

Fourth, in the digital and e-commerce era, IPR violations are increasingly complex and widespread. Digital content piracy, the sale of counterfeit products through e-commerce platforms, and copyright infringement via the internet occur on a massive scale and across national borders. In this context, the criminal qualifications for complaints are increasingly inadequate because rights holders are often unable to identify and pursue each infringer individually. Fifth, from an international economic and trade perspective, weak enforcement of IPR law negatively impacts Indonesia's investment climate and global competitiveness. Indonesia has consistently been highlighted in the Special 301 Report issued by

¹Bernard Nainggolan, *Empowerment of Copyright Law and Collective Management Institutions* (Bandung: Alumni, 2011), p. 66.

²Law Number 20 of 2016 concerning Trademarks and Geographical Indications; Law Number 13 of 2016 concerning Patents.

the United States Trade Representative (USTR) regarding its weak IPR protection.³

In this context, this study examines the need to seek alternative models that can bridge the tension between the private nature of IPR and the public interest in its enforcement. One interesting model to examine comparatively is the concept of "besonderes öffentliches Interesse an der Strafverfolgung" (special public interest in criminal prosecution) applied in German Intellectual Property Law. This concept is part of the "relatives Antragsdelikt" (relative complaint offense) mechanism that provides flexibility in IPR criminal prosecution.

In German law, specifically Section 109 of the German Copyright Act (UrhG), copyright offenses are essentially complaints offenses, but the public prosecutor (Staatsanwaltschaft) can prosecute ex officio if there is a special public interest in the prosecution. The German model thus strikes an elegant balance between respecting the private nature of copyright and protecting the public interest. Rights holders retain the right to file complaints, but at the same time, the state does not completely abdicate its responsibility to enforce the law when IPR infringement has reached a scale that impacts the public interest.⁴

The selection of Germany as the country of comparison in this study was based on several strategic and academic considerations. First, Indonesia and Germany both have a civil law legal system tradition (Continental Europe), so the legal comparison between the two has a strong epistemological basis. Second, Germany is one of the countries with the most advanced and comprehensive intellectual property rights protection systems in the world. Third, the concept of besonderes öffentliches Interesse in German law has been developed in depth through doctrine, jurisprudence, and practical guidelines (RiStBV), thus providing a mature conceptual framework for learning. Fourth, historically, Indonesian law has been heavily influenced by the Dutch legal tradition, which in turn was influenced by the German legal tradition, resulting in a similar legal paradigm that allows for a more harmonious transplantation of legal concepts.

Martin Linke, in his dissertation entitled "Das besondere öffentliche Interesse an der Strafverfolgung bei relativen Antragsdelikten," provides an in-depth analysis of the concept of besonderes öffentliches Interesse. According to Linke, determining whether or not there is a special public interest in prosecution is a discretionary decision of the prosecutor (Ermessensentscheidung der Staatsanwaltschaft) based on various criteria, including: the severity of the crime (Schwere der Tat), the extent of the violation (Ausmaß der Verletzung), the commercial nature of the violation (Gewerbsmäßigkeit), and the impact on the

³Office of the United States Trade Representative. (2026). 2026 Special 301 Report. Washington, DC: Executive Office of the President. Accessed from <https://ustr.gov/>

⁴Urheberrechtsgesetz (UrhG).

public interest (öffentliche Wirkung). This conceptual framework is what this study attempts to adapt to the Indonesian legal context.⁵

The enactment of the National Criminal Code (KUHP) on January 2, 2026, ushered in a new paradigm in Indonesian criminal law. The KUHP eliminated the distinction between "crimes" and "violations," introduced a double-track system (criminal and criminal action), and regulated adjustments to sectoral criminal laws. This reformulation of criminal law represents an opportune opportunity to reevaluate the classification of offenses in Indonesian Intellectual Property Rights Law and propose a more progressive and equitable concept.⁶

Based on the above description, this study aims to reformulate the qualification of offenses in Indonesian IPR law by using the concept of *besonderes öffentliches Interesse* in German IPR criminal law as a comparative framework. This reformulation is expected to offer a more balanced, proportional, and effective model of qualification of offenses in enforcing IPR law in Indonesia, without ignoring the private nature of IPR itself. This study proposes the application of the "relative complaint offense" model (*relatives Antragsdelikt*) which allows public prosecutors to prosecute IPR violations *ex officio* in cases of "special public interest" (*besonderes öffentliches Interesse*), with criteria and mechanisms adapted to the Indonesian legal and social context

2. Research Methods

This research is a normative legal research (doctrinal legal research) that examines law as an autonomous system of norms. Peter Mahmud Marzuki defines legal research as a process of discovering legal rules, legal principles, and legal doctrines to address the legal issues faced. Normative legal research focuses on the analysis of positive legal norms, legal principles, doctrines, and legal concepts relevant to the research problem. In this research, the object of research is the criminal law norms in Indonesian and German IPR laws, particularly those related to the qualification of offenses and the concept of *besonderes öffentliches Interesse*.⁷

3. Results and Discussion

3.1. QUALIFICATION OF OFFENCES IN INDONESIAN INTELLECTUAL PROPERTY LAW: PROBLEMS AND CRITICISM

A. Map of Crime Qualifications in Indonesian Intellectual Property Law

⁵Martin Linke, "Das besondere öffentliche Interesse an der Strafverfolgung" (PhD diss., Universität Mainz, 2005). Pp 21-35.

⁶National Criminal Code (KUHP) (effective January 2, 2026).

⁷Peter Mahmud Marzuki, *Legal Research*, rev. ed. (Jakarta: Kencana, 2014), pp. 55-56.

This section presents a comprehensive analysis of the criminal provisions in all seven Intellectual Property Rights laws in force in Indonesia. The analysis aims to map the crime classifications used in each law, identify existing patterns, and evaluate the overall consistency and coherence of the crime classification policies.

1) A Comprehensive Comparison of Offense Qualifications Under Seven Sectoral Laws

The legal landscape of intellectual property in Indonesia is regulated through seven sectoral laws that have different substantive characteristics and criminal threats.⁸The following is a comparative table of the qualifications for offenses under the seven IPR sectoral laws in force in Indonesia, complete with article references, maximum sanctions, and the philosophical basis underlying the criminal formulation policy.

B. Sectoral Analysis of Six Complaint Offense Regimes

1) Copyright Law

In the regime of Law Number 28 of 2014, copyright is defined as an exclusive right consisting of moral rights and economic rights. One of the biggest challenges to copyright law enforcement today is massive digital piracy in cyberspace. For example, in the national creative industry, digital works such as the local video game *DreadOut*—which is protected by copyright for 50 years from the time it was first announced based on the provisions of Article 40 paragraph (1) and Article 59 paragraph (1) of the Copyright Law—often experience economic exploitation without permission via illegal download sites.

Article 1 number 23 of the Copyright Law explicitly defines piracy as the unauthorized duplication of a work and the widespread distribution of the resulting duplication to gain economic benefit. This illegal distribution is often carried out through social media platforms and encrypted messaging applications such as Telegram. Although Article 113 paragraph (4) stipulates a maximum prison sentence of 10 years and a maximum fine of IDR 4,000,000,000.00 for perpetrators of piracy, the effectiveness of this sanction is hampered by the qualification of a complaint offense mandated by Article 120.

Police cannot take independent investigative action against sites providing pirated content without a formal complaint from the creator or copyright holder. This requires rights owners to actively monitor the internet, gather evidence of legitimate ownership, prove actual financial losses, and identify perpetrators, who often hide their identities behind anonymous internet networks. For small- and medium-sized creators, the administrative and financial burden of filing these complaints is often too great, allowing digital piracy to continue without legal consequences.

2) Trademark and Geographical Indications Law

Law Number 20 of 2016 concerning Trademarks and Geographical Indications grants registered trademark owners exclusive rights to prevent others from using the same or similar mark without permission. Violations of this right trigger civil consequences in the form of a lawsuit for damages in the Commercial Court, or criminal prosecution through the complaint mechanism.

As a concrete example of trademark enforcement, in the case of the "COCOBRICO" trademark, the owner of CV Indomarin Niaga was charged with infringement of the registered trademark owned by PT Cocotama Makmur Abadi for unauthorized use. Cases like this demonstrate that the imitation of registered trademarks in the domestic market is highly detrimental to original producers who have invested significant capital in building their trade reputations.

However, the classification of all trademark crimes as complaint offenses under Article 103 has sparked serious debate regarding consumer protection. Trademark counterfeiting not only harms rights holders financially but also misleads the public. When brand counterfeiting occurs in crucial products such as medicines, vehicle spare parts, or processed food ingredients that can cause health problems or human death—as threatened with a 10-year prison sentence based on Article 100 paragraph (3), the state still cannot act *ex-officio*. This procedural obstacle is considered to endanger public safety because consumer protection is based entirely on the complaint initiative of registered trademark owners who may be reluctant to report to avoid negative publicity for their brands.

3) Patent Law and Industrial Design Rights

Patent protection (Law No. 13 of 2016) and industrial design protection (Law No. 31 of 2000) are aimed at stimulating technological creativity and product aesthetics that support national industrial competitiveness. Both adopt the complaint offense because the objects of protection are high-value industrial commercial assets.

In the field of industrial design, the criminal sanctions regulated in Article 54 paragraph (1) are aimed at anyone who intentionally and without rights exploits a registered design belonging to another party. The application of this provision can be seen in the legal case involving Marcelina Natasha Soesanto and Liang Soesanto. The defendants were legally and convincingly proven guilty of producing and distributing baby bathtubs without permission from the legitimate industrial design rights holder. The court sentenced them to six and ten months' imprisonment, respectively, and fined Rp 50,000,000.00.

Although this case resulted in a conviction, the legal process only progressed because the industrial design rights holder took the initiative to report the

violation to the police. This characteristic of law enforcement emphasizes that in the manufacturing industry, the state positions intellectual property protection as a private instrument to secure a competitive advantage for businesses.

C. History and Dynamics of Shifting Crime Qualifications

1) Era of Complaint Offenses (Law Number 6 of 1982)

Law No. 6 of 1982 concerning Copyright was the first copyright law enacted by the Indonesian people after independence. Previously, Indonesia had used the 1912 Auteurswet, a legacy of Dutch colonial rule. Law No. 6/1982 qualifies copyright infringement as a criminal offense, considering copyright a private right whose protection depends entirely on the will of the rights holder.

The choice of this complaint-based offense qualification was influenced by several factors. First, the understanding that copyright, as a private right, does not require proactive state intervention. Second, the concern that the ordinary offense qualification would burden law enforcement officials already burdened with a heavy caseload. Third, the consideration that copyright holders are in the best position to detect violations of their rights. However, in practice, the complaint-based offense qualification exhibits several significant weaknesses.

During the period of Law No. 6/1982, copyright piracy in Indonesia was very high, particularly in the areas of recorded music, films, and software. Rights holders, particularly foreign rights holders, faced difficulties in filing complaints for various reasons: the absence of representatives in Indonesia, ignorance of the nature of the infringement, the high cost of legal proceedings, and skepticism about the effectiveness of law enforcement. As a result, Indonesia came under significant international pressure to improve its copyright enforcement.

2) Shift to Ordinary Crimes (Law No. 7/1987, Law No. 12/1997, Law No. 19/2002)

Responding to the weaknesses in the complaint-based offense qualifications and international pressure, the government and the House of Representatives, through Law No. 7 of 1987 concerning Amendments to Law No. 6/1982 concerning Copyright, changed the qualifications for copyright offenses from complaint-based offenses to ordinary offenses. This change is a significant step that empowers law enforcement officials to proactively take action against copyright infringement, without waiting for a complaint from the rights holder.

The General Explanation of Law No. 7/1987 states that the change from a complaint offense to a regular offense is based on the fact that "the public still considers copyright infringement as a common thing" and that "without changing the nature of the offense from a complaint offense to a regular offense, law enforcement against copyright infringement will not be able to run

effectively." This argument implicitly acknowledges that the public interest dimension in copyright infringement cannot be ignored.

The qualification of ordinary offenses is maintained in Law No. 12 of 1997 and Law No. 19 of 2002 concerning Copyright. During this period (1987-2014), law enforcement officers actively conducted raids and confiscated pirated products, particularly in trading centers known for selling pirated goods. The police and Civil Servant Investigators (PPNS) at the Directorate General of Intellectual Property Rights have the authority to act proactively, which contributes to efforts to eradicate piracy, although it has not yet fully succeeded in addressing this problem.

However, the ordinary crime classification is not without its critics. Some argue that the ordinary crime classification has the potential to be overused by law enforcement officials, for example, to pressure certain parties or to criminalize violations that would be more appropriately resolved through civil proceedings. This concern was one of the considerations behind the change back to a complaint-based offense in the 2014 UUHC.

3.2. THE CONCEPT OF BESONDERES ÖFFENTLICHES INTERESSE IN GERMAN IPR CRIMINAL LAW

A. German IPR Criminal Law System

1) Regulatory Framework: UrhG, PatG, MarkenG, GeschMG, StGB

The German IP criminal law system has a complex yet systematic structure, reflecting the German legal tradition of emphasizing codification, systematization, and coherence. Unlike some countries that place all IP criminal provisions in a single comprehensive law, Germany regulates IP criminal provisions sectorally within each IP law, with the Strafgesetzbuch (StGB/German Criminal Code) as the foundation of general principles of criminal law.⁸

The main German IP laws containing criminal provisions include: (a) the Urheberrechtsgesetz (UrhG/Copyright Act) which provides for criminal provisions in articles 106-111a; (b) the Patentgesetz (PatG/Patent Act) which provides for criminal provisions in article 142; (c) the Markengesetz (MarkenG/Trademark Act) which provides for criminal provisions in articles 143-145; (d) the Geschmacksmustergesetz (GeschMG/Design Act) which has been replaced by the Designgesetz (DesignG) with criminal provisions in article 51; and (e) the Gebrauchsmustergesetz (GebrMG/Simple Patent Act) which provides for criminal provisions in article 25.⁹

⁸StGB.

⁹UrhG.

In addition, the Strafgesetzbuch (StGB) also contains provisions relevant to IPR protection, although not specifically aimed at IPR. For example, Article 202a of the StGB on Ausspähen von Daten (data spying) can be applied to cases of digital trade secret theft, and Article 263 of the StGB on Betrug (fraud) can be applied to cases of trademark counterfeiting that deceive consumers. This multi-regulatory approach provides flexibility and specialization in the enforcement of IPR criminal law.¹⁰

An important principle in the German criminal law system is the Subsidiaritätsprinzip (subsidiarity principle): specific criminal provisions in IP law take precedence over general provisions in the StGB (*lex specialis derogat legi generali*). However, general provisions in the StGB (Allgemeiner Teil), such as provisions on guilt (Schuld), trial (Versuch), participation (Teilnahme), and Strafantrag (complaint/application for prosecution in articles 77-77e of the StGB), remain in force and complement the specific provisions in sectoral IP law.¹¹

2) Criminal Provisions in UrhG (Articles 106-111a)

Urheberrechtsgesetz The UrhG is the most comprehensive German IP law in regulating criminal provisions and is also the main model for the application of the concept of *besonderes öffentliches Interesse* in the context of IP. The criminal provisions in the UrhG are regulated in articles 106-111a, which form a structured and layered system.¹²

Article 106 of the UrhG regulates the basic crime of copyright infringement, namely the exploitation of copyrighted works without rights (*unerlaubte Verwertung urheberrechtlich geschützter Werke*). Paragraph (1) threatens a prison sentence of up to 3 (three) years or a fine (*Geldstrafe*) for anyone who, without the consent of the rights holder, reproduces, distributes, or communicates copyrighted works to the public in an unlawful manner. Paragraph (2) increases the criminal threat to a prison sentence of up to 5 (five) years or a fine if the act is carried out commercially (*gewerbsmäßig*). This increase in penalties for commercial acts (*Gewerbsmäßigkeit*) reflects the recognition that commercial violations have a greater public interest dimension.¹³

Article 107 of the UrhG regulates the criminal offense of including the name of the creator without rights on a work or its copy (*unzulässiges Anbringen der Urheberbezeichnung*). Article 108 of the UrhG regulates the criminal offense of violating related rights (*Verwandte Schutzrechte/neighbouring rights*), including

¹⁰StGB.

¹¹StGB.

¹²UrhG.

¹³UrhG.

the rights of performers, phonogram producers, broadcasting institutions, and database creators. Article 108a of the UrhG regulates the criminal offense for commercial exploitation without rights (*gewerbsmäßige unerlaubte Verwertung*), with the threat of imprisonment of up to 5 years or a fine. Article 108b of the UrhG regulates the criminal offense of violating technological control means (*technische Schutzmaßnahmen*) and rights management information (*Rechtemanagement-Informationen*).¹⁴

Article 109 of the UrhG is the key provision governing the prosecution mechanism for all copyright offences. This article states: "In the cases referred to in articles 106 to 108 and article 108b, criminal offences are only prosecuted upon complaint, unless the criminal prosecution authority considers that ex officio action is necessary because of a special public interest in prosecution." This provision introduces the relative model of copyright infringement in the German copyright context.¹⁵

Article 110 of the UrhG regulates the announcement of court decisions (*Bekanntmachung des Urteils*), Article 111 of the UrhG regulates confiscation and seizure (*Einziehung*), and Article 111a of the UrhG regulates additional investigative powers. The overall criminal provisions in the UrhG demonstrate a coherent system: criminal offenses are formulated in layers based on severity, the prosecution mechanism provides flexibility through *besonderes öffentliches Interesse*, and supporting provisions (confiscation, announcement of decisions) strengthen the effectiveness of law enforcement.¹⁶

3) Criminal Provisions in MarkenG (Articles 143-145)

Markengesetz The German Trademark Act (MarkenG) regulates criminal provisions in articles 143-145. Article 143 regulates the crime of trademark infringement (*Strafbare Kennzeichenverletzung*) which covers various forms of unauthorized use of trademarks, with the threat of imprisonment of up to 3 years or a fine for ordinary acts, and up to 5 years for commercial acts. Article 143a regulates the crime of geographical indication infringement, and Article 144 regulates the crime of unauthorized use of official quality marks.

Interestingly, Article 143 paragraph (6) of the Trademark Act also uses a similar relative *Antragsdelikt* model to Article 109 of the Trademark Act. This provision states that criminal acts of trademark infringement are prosecuted upon complaint, unless the public prosecutor deems ex officio prosecution necessary due to a special public interest. Thus, the *besonderes öffentliches Interesse* model is not limited to the copyright field alone, but is also applied in the

¹⁴UrhG.

¹⁵UrhG.

¹⁶UrhG.

trademark field, which shows the consistency of approach in German IP criminal law.¹⁷

The application of this model in the context of trademarks is particularly relevant given that trademark counterfeiting often involves organized crime networks and impacts consumer health and safety. In large-scale cases of trademark counterfeiting, such as the counterfeiting of well-known branded pharmaceuticals or counterfeit automotive parts, German prosecutors can prosecute ex officio without waiting for a complaint from the trademark holder, citing a special public interest related to consumer protection and market order.

Staatsanwaltschaft also plays a role in assessing the appropriateness and proportionality of IP criminal prosecutions. While the Legalitätsprinzip (principle of legality of prosecution) requires prosecutors to prosecute every known crime, there are exceptions through articles 153-154 of the StPO that allow prosecutors to discontinue cases under certain conditions (e.g., minor violations). In the IP context, the combination of Legalitätsprinzip and the flexibility of *besonderes öffentliches Interesse* strikes the right balance: prosecutors cannot ignore IP violations that impact the public interest, but are also not obliged to prosecute every minor IP violation that is more appropriately resolved through civil channels.¹⁸

B. The Concept of Relatives Antragsdelikt (Relative Complaint Offense) in German Law

1) Systematics of Crimes Based on the Method of Prosecution

German criminal law recognizes three categories of offenses based on the method of prosecution, forming a spectrum from prosecution entirely by the state to prosecution entirely at the initiative of the victim. This classification is crucial for understanding the position of *besonderes öffentliches Interesse* in the German criminal law system.

The first category is *Offizialdelikt* (ex officio offense), which is an offense that is automatically prosecuted by the state without requiring a complaint from any party. *Offizialdelikt* prosecution is an implementation of the Legalitätsprinzip regulated in Article 152 paragraph (2) of the StPO. The majority of crimes in the StGB are *Offizialdelikt*, including serious crimes such as murder, theft, and fraud. The second category is *absolutes Antragsdelikt* (absolute complaint offense), which is an offense that can only be prosecuted upon a complaint (*Strafantrag*) from the party entitled to complain. Without *Strafantrag*, the prosecutor is not authorized to prosecute. Examples of *absolutes Antragsdelikt* in the StGB include

¹⁷UrhG.

¹⁸StPO.

Hausfriedensbruch (violation of domestic tranquility, Article 123 of the StGB) and Beleidigung (insult, Article 185 of the StGB in certain contexts).¹⁹

The third category is relative complaint offenses, namely offenses that are essentially complaint offenses but the prosecutor can prosecute ex officio if there is besonderes öffentliches Interesse. This model is an elegant middle ground between Officialdelikt and absolute complaint offenses, providing the flexibility needed to handle cases where the public interest demands prosecution even though the victim has not filed a complaint. In the context of IPR, Article 109 UrhG and Article 143 paragraph (6) MarkenG are examples of the application of the relative complaint model.²⁰

2) Article 109 UrhG as a Model of Relatives Antragsdelikt

Article 109 UrhG is the central norm that introduces the relative Antragsdelikt model in German copyright criminal law. The formulation of this norm is very careful and balanced: "In den Fällen der articlespasal 106 bis 108 und des articles 108b wird die Tat nur auf Antrag verfolgt, es sei denn, daß die Strafverfolgungsbehörde wegen des besonderen öffentlichen Interesses an der Strafverfolgung ein Einschreiten von Amts wegen für geboten hält."²¹

In terms of normative structure, Article 109 UrhG consists of two parts: (a) general rule (Grundregel): criminal acts are prosecuted upon complaint (Antragsprinzip); and (b) exceptions (Ausnahme): the prosecutor may act ex officio if there is a besonderes öffentliches Interesse (Amtsprinzip). This structure reflects the principle that copyright is essentially a private right whose prosecution depends on the will of the rights holder, but the state still has the authority to intervene if the public interest that exceeds individual interests demands so.²²

The use of the phrase "für geboten hält" (deems necessary) in Article 109 of the UrhG indicates that the assessment of whether there is a besonderes öffentliches Interesse is left to the Strafverfolgungsbehörde (criminal prosecution authority), namely the Staatsanwaltschaft. This phrase also implies that the decision involves an element of subjective judgment by the prosecutor, which is consistent with the character of Ermessensentscheidung (discretionary decision). However, this discretion is not unlimited discretion because it must be based on objective considerations regarding the existence of a special and significant public interest.²³

¹⁹StGB.; StPO.

²⁰UrhG.

²¹UrhG.

²²UrhG.

²³UrhG.

3) Prinzip Legalitätsprinzip (Principle of Legality of Prosecution and Opportunitätsprinzip (Principle of Opportunity of Prosecutors)

Understanding the concept of *besonderes öffentliches Interesse* cannot be separated from understanding the two fundamental principles in German criminal procedure law: Legalitätsprinzip (principle of legality of prosecution/principle of mandatory prosecution) and Opportunitätsprinzip (principle of opportunity/principle of discretionary prosecution).

Legalitätsprinzip, as regulated in Article 152 paragraph (2) of the StPO, requires the Staatsanwaltschaft to prosecute any crime of which it is aware, provided there is sufficient preliminary evidence (*zureichende tatsächliche Anhaltspunkte*). This principle reflects a commitment to equality before the law (*Gleichheit vor dem Gesetz*): all crimes must be dealt with consistently without discrimination. Opportunitätsprinzip, on the other hand, provides room for prosecutors to consider factors other than evidence and law in determining whether a case will be prosecuted, including considerations of efficiency, proportionality, and public interest.²⁴

In the context of the relative infringement, the principle of public interest operates at the intersection of these two principles. When the prosecutor deems there to be public interest, the legality applies: the prosecutor has the obligation to prosecute. When the public interest is not met and there is no legal obligation, the prosecutor cannot prosecute. This mechanism creates a dynamic system that is responsive to the specific characteristics of each IPR infringement case.

C. The concept of Besonderes Öffentliches Interesse an der Strafverfolgung (Special Public Interest in Criminal Prosecution)

1) Definition and History of the Concept

Besonderes öffentliches Interesse an der Strafverfolgung literally means "special public interest in criminal prosecution." This concept is a legal clause (*Rechtsklausel*) that provides the basis for the Staatsanwaltschaft to prosecute a crime *ex officio* even though the crime is essentially an *Antragsdelikt*. The word "besonderes" (special) indicates that the public interest in question must exceed the general public interest that exists in every criminal law enforcement; there must be special factors that make *ex officio* prosecution necessary.

Historically, the concept of *besonderes öffentliches Interesse* has existed in German criminal law long before it was applied in the context of IPR. Several provisions in the StGB have long used this concept, for example, article 230 StGB (minor assault/*Körperverletzung*) and article 303c StGB (damage to property/*Sachbeschädigung*). In the context of IPR, this concept was introduced

²⁴StPO.

through article 109 UrhG since the Urheberrechtsgesetz was passed in 1965. The application of this concept in the UrhG shows that German lawmakers recognized from the outset that copyright infringement, although essentially a violation of private rights, can have a public dimension that requires state intervention.²⁵

2) Normative Basis and Analogy in StGB

The main normative basis for *besonderes öffentliches Interesse* in the context of IPR is article 109 UrhG which has been analyzed previously. In addition, a similar concept is also found in various provisions of the StGB which serve as analogies and sources of interpretation. Several provisions of the StGB which use the concept of *besonderes öffentliches Interesse* include: article 182 paragraph (6) StGB (sexual harassment of adolescents), article 183 paragraph (2) StGB (exhibitionism), article 223 paragraph (2) StGB and article 230 StGB (assault), article 229 StGB (negligence resulting in injury), article 248a StGB (theft and embezzlement of small-value items), and article 303c StGB (property damage).²⁶

An analogy with the provisions of the StGB provides a deeper understanding of when *besonderes öffentliches Interesse* is considered fulfilled. For example, in the context of Article 230 of the StGB concerning assault, *besonderes öffentliches Interesse* is considered to exist if: the violation has an impact that goes beyond the personal relationship between the perpetrator and the victim; the violation occurs in a public space and causes public unrest; the perpetrator is a repeat offender; or the act is committed in an extremely cruel manner. These criteria can be analogously adapted in the context of IPR violations.²⁷

3) Criteria for Determining Besonderes Öffentliches Interesse

Martin Linke, in his dissertation "Das besondere öffentliche Interesse an der Strafverfolgung bei relativen Antragsdelikten," developed a comprehensive analytical framework for determining the existence of *besonderes öffentliches Interesse*. Linke's framework serves as an important reference in German legal doctrine and is relevant for adaptation in the context of reformulating the qualifications of Indonesian IPR offenses.²⁸

The first criterion is the severity of the crime. This criterion assesses the seriousness of the violation, based on the nature of the act, the method of execution, and the intensity of the violation. IPR violations committed in a planned, systematic manner and using advanced technology indicate a high level

²⁵UrhG.; StGB.

²⁶UrhG.; StGB.

²⁷StGB.

²⁸Martin Linke., Op.Cit, p 28.

of severity. Mass piracy or large-scale trademark counterfeiting also indicate a significant level of severity.

The second criterion is the extent of the infringement. This criterion relates to the quantitative and qualitative impact of the infringement, including the number of victims, the amount of economic loss, and the geographic reach of the infringement. IPR infringements involving large quantities of products, significant economic loss, or impacting multiple parties demonstrate a level of infringement that meets this criterion.

The third criterion is the commercial nature of the violation. Violations committed commercially, as part of a business activity or with the aim of repeatedly gaining profit, have a stronger public interest dimension than private and sporadic violations. The UrhG itself recognizes this aggravation by increasing the penalty for violations of *gewerbsmäßigkeit* from three to five years' imprisonment.²⁹

The fourth criterion is public impact. This criterion assesses whether the infringement has an impact beyond the bilateral relationship between the rights holder and the infringer, for example, on consumers, market integrity, public health, or economic order. IPR infringements that impact consumer safety (e.g., counterfeit drugs, counterfeit food) or that disrupt fair business competition meet the public impact criterion.

In addition to the four main criteria above, Linke also identifies additional factors that can be taken into consideration, including: whether the perpetrator is part of an organized crime network (*organisierte Kriminalität*); whether the violation is cross-border (*grenzüberschreitend*); whether the rights holder is unable to file a complaint due to certain circumstances; and whether there is public unrest (*öffentliche Beunruhigung*) regarding the violation.

4. Conclusion

Based on the discussions that have been carried out in the previous chapters, this research produces three main conclusions that answer each problem formulation. First, regarding the formulation of the first problem regarding the qualification of offenses in the current Indonesian IPR laws and their legal problems, this study concludes that the six Indonesian IPR laws currently in force uniformly qualify IPR crimes as complaint offenses. Copyright Law No. 28 of 2014 (Article 120), Trademark Law No. 20 of 2016 (Article 103), Patent Law No. 13 of 2016 (Article 164), Industrial Design Law No. 31 of 2000 (Article 54 paragraph 2), Trade Secret Law No. 30 of 2000 (Article 17 paragraph 2), and DTLST Law No. 32 of 2000 (Article 42 paragraph 2) all determine complaint offenses as qualifying offenses. This uniformity gives rise to several serious legal problems, namely: (a)

²⁹UrhG.

an imbalance between the protection of private rights and the public interest, where the public dimension of IPR violations is ignored; (b) the passivity of law enforcement officials who cannot act without a complaint; (c) the low level of disclosure of IPR crimes; (d) the disproportionality between the threat of severe sanctions (up to 10 years in prison) and weak prosecution mechanisms; (e) the inability to respond to IPR violations in the digital era and e-commerce which are massive and anonymous; and (f) the negative impact on Indonesia's investment climate and competitiveness. The history of the shift in the qualification of copyright crimes from complaint offenses (1982) to ordinary crimes (1987-2014) and back to complaint offenses (2014) shows that the problem of qualification of IPR crimes in Indonesia has not found the right balance point. Second, regarding the formulation of the second problem regarding the concept of *besonderes öffentliches Interesse* in German IPR criminal law and its implications for law enforcement, this study concludes that Germany applies the relative *Antragsdelikt* (relative complaint offense) model in IPR criminal law through Article 109 UrhG and Article 143 paragraph (6) MarkenG. This model stipulates that IPR crimes are basically *Antragsdelikt* (complaint offenses), but the *Staatsanwaltschaft* (public prosecutor) can prosecute *ex officio* if there is *besonderes öffentliches Interesse an der Strafverfolgung* (special public interest in prosecution). The determination of *besonderes öffentliches Interesse* is a discretionary decision by the prosecutor based on certain criteria, including: *Schwere der Tat* (severity), *Ausmaß der Verletzung* (extent of the violation), *Gewerbsmäßigkeit* (commercial nature), and *öffentliche Wirkung* (public impact). Prosecutors are guided by RiStBV (*Richtlinien für das Strafverfahren*) in assessing special public interest. The practical implications of this model for German IP law enforcement are very positive: it provides flexibility in prosecution, creates a balance between private rights and public interest, increases the effectiveness of law enforcement, and provides adequate protection against large-scale and commercial infringements. Third, regarding the formulation of the third problem regarding the reformulation of the qualifications of Indonesian IPR offenses based on the concept of *besonderes öffentliches Interesse*, this research produces a reformulation concept in the form of a "relative complaint offense" model (*relatives Antragsdelikt*) which adapts the concept of *besonderes öffentliches Interesse* from German law to the Indonesian context. This model maintains the qualifications of complaint offenses as a general rule, but gives the public prosecutor the authority to prosecute *ex officio* if there is a "special public interest" based on six criteria: (a) the scale of the violation is commercial in nature; (b) significant economic impact; (c) organized violations; (d) impact on public health and safety; (e) violations in the digital space/e-commerce on a massive scale; and (f) impact on the national creative industry. This research also produces a concrete normative formulation in the form of draft amendment articles for the Copyright Law, Trademark Law, Patent Law, and other IPR laws, and proposes the preparation of prosecution guidelines similar to the German

RiStBV. This reformulation is based on the philosophical basis of Pancasila (especially social justice), the principle of balance between private and public interests, and the paradigm of criminal law as a proportional ultimum remedium.

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