



UNIVERSITAS INDONESIA

ANALYSIS OF FIXATION DOCTRINE IN THE COPYRIGHT LAW
APPLIED TO NON-MUSICAL WORKS

UNDERGRADUATE THESIS

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Faculty of Law
International Undergraduate Program
Depok
2017



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Submitted in partial fulfilment of the requirements for the degree of Bachelor of Law

DRIAS RACHMATIRTANI

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Depok
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STATEMENT OF ORIGINALITY

Hereby, I, with the identity below, declare the thesis with the following title:

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**is the result of my own work, and all sources, wither cited or referenced are
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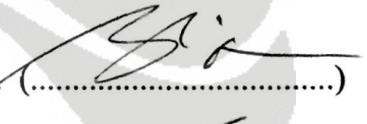
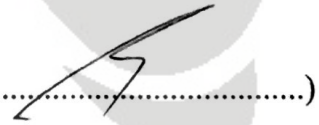


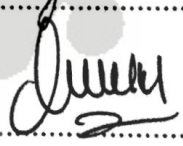
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 Date : July 5th, 2017

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Praise and Gratitude I prayed to Allah, Because of His endless blessing and guidance undeservingly bestowed upon me, the author is given the opportunity to complete this thesis with the title *Analysis of Fixation Doctrine in the Copyright Law Applied to Non-musical Works*, thank you for your unconditional love, and giving me strength from the beginning of my days in University of Indonesia, until the completion of this thesis.

This thesis is completed in order to fulfill one of the requirements to achieve the Bachelor of Law from the Faculty of Law, University of Indonesia, the author acknowledges the limited capabilities and knowledge of the author to result in the completion of the thesis, thus the author sincerely apologizes for the mistake and inaccuracies contained within this undergraduate thesis.

Furthermore the author would like to say my thank to the following people for their endless support and it would be impossible to finish my thesis if it was not their support to:

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With all the shortcomings of the author, the writing of this thesis may not be without error and mistakes. Therefore, with all humility for the sake of

scientific truth, the author will receive and pay attention of all criticism and constructive suggestion. Finally, no matter how small the contribution of thought the author suggested in this thesis, hopefully it will be useful.

Depok,

Author

Drias Rachmatirtani



**STATEMENT OF CONSENT TO THESIS PUBLICATION FOR
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As a member of *Civitas Academica* of the University of Indonesia, I the undersigned below:

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ABSTRAK

Nama : Drias Rachmatirtani
NPM : 1306388654
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Judul Skripsi : Analisa Mengenai Doktrin Fiksasi Dalam Undang-Undang Hak Cipta Terhadap Karya Non-musikal

Skripsi ini membahas mengenai doktrin fiksasi, khususnya terkait dengan interpretasinya dalam Undang-Undang No. 28 Tahun 2014 tentang Hak Cipta.(UUHC) Doktrin fiksasi merupakan salah satu syarat yang harus dipenuhi sebuah karya agar dapat memperoleh perlindungan hak cipta, hal tersebut dinyatakan pertama kali dalam The Berne Convention for the Protection of Literary and Artistic Works (The Berne Convention) sebagai konvensi internasional pertama terkait dengan hak cipta. Indonesia sebagai salah satu negara penandatangan The Berne Convention turut menerapkan syarat tersebut. UUHC dalam Pasal 1 ayat (13) memberikan definisi mengenai fiksasi sebagai “Fiksasi adalah perekaman suara yang dapat didengar, perekaman gambar atau keduanya, yang dapat dilihat, didengar, digandakan, atau dikomunikasikan melalui perangkat apapun.”. Namun definisi fiksasi dalam UUHC diterjemahkan dari WIPO Performance and Phonograms Treaty yaitu perjanjian internasional yang hanya mencakup pertunjukan dan fonogram. Dengan seluruh jenis karya yang dilindungi sebagaimana yang dicantumkan Pasal 40 ayat (1) UUHC, penerapan definisi fiksasi tersebut tidak tepat. Walaupun hal tersebut tidak menimbulkan permasalahan hukum yang serius, tetapi hasil penelitian menyarankan bahwa suatu revisi terhadap Pasal 1 ayat (13) UUHC perlu dilakukan.

Kata Kunci:

Doktrin Fiksasi, Hak Cipta, UUHC, The Berne Convention for the Protection of Literary and Artistic Works

ABSTRACT

Name : Drias Rachmatirtani
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Thesis Title : Analysis of Fixation Doctrine in the Copyright Law
Applied to Non-musical Works

This thesis emphasize on the fixation doctrine, especially with regards to its interpretation under the Law No. 28 of 2014 on Copyright (Copyright Law). Fixation doctrine is one of the requirements in which necessary to be satisfied in order to obtain the protection by copyrights, such action was initiated since the enactment of The Berne Convention for the Protection of Literary and Artistic Works (The Berne Convention) as the first international convention on copyrights. Indonesia as one of the member states The Berne Convention too apply the requirement in its law. In Article (1) point (13) of the Copyright Law, fixation is defined as “Fixation is an audible sound recording, recording images or both, the which can be seen, heard, Reproduced, or otherwise communicated through any device”. However, the definition of fixation as set forth in the Copyright Law was translated from Article 2 point (c) of WIPO Performance and Phonograms Treaty, namely an international treaty in which only covers performance and phonograms. With all of the protected works set forth in Article 40 point (1) of the Copyright Law, the interpretation of the aforementioned definition of fixation seemed to be incorrect. Although it does not create serious legal consequences, the research resulted to a recommendation that a revision on Article 1 point (13) of the Copyright Law is necessary.

Keywords:

Fixation Doctrine, Copyright, Copyright Law, The Berne Convention for the Protection of Literary and Artistic Works

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CHAPTER I

INTRODUCTION

1.1. Research Background

Intellectual Property Rights are the rights given to persons over the creation of their mind¹ which too include energy, initiative, creativity, time and cost. As everyone has the freedom to be creative and create something, thus the innovation and the work that can be created by humans have become diverse. Creation that stems from an idea and then embodies into a form of work is something that has value and often can be used to obtain a financial benefit.

Copyright is a form of intellectual property right in certain types of creative works. Copyright laws govern the ownership and use of products of literary and artistic expression by establishing the types of authorship that are eligible for copyright protection and granting specific exclusive rights to the creators of copyrighter works. Modern copyright regimes seek to balance the rights of creator, which are conferred by law in order to incentivize their efforts against the interests of consumers of copyrighter works, with the utilitarian goals of fostering social and cultural progress and maintaining the free and open exchange of ideas and information.

Creation itself is defined as any work of authorship in science, art and literature produced by inspiration, ability, mind, imagination, dexterity, skill or expertise that is expressed in a tangible form.² This provision is an embodiment of the principle or doctrine in copyright fixation. The fixation principle does not allow an idea of copyright protection. Thus, in order that an idea can be protected by copyright, then the idea should have been expressed in a certain form. The fixation principle requires any particular form of creation. For instance, a song

¹ World Trade Organization, *What are intellectual property rights?*, accessed February 8, 2015, https://www.wto.org/english/tratop_e/trips_e/intell_e.htm

² Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), Article 1 point (3).

that is poured in the form of a sound recording, a paper which is manifested in the form of text, and other things.³

In order to facilitate an understanding of the fixation, then see illustrations below:

- X had the idea to write his experiences during his work as a chef at the renowned restaurant and pass it on to colleagues, namely B. If you want to obtain a copyright, then X must pour his story into written form. If X does not put it into written form and simply convey the idea that he has, then he does not have any results entitled to be protected by copyright. While B put the ideas into an article, the work can be protected by copyright. Meanwhile, X can not claim the work of B, even though A is the person who first initiated the idea. Embodiment idea of writing about his experiences into an article that is referred to as fixation.
- In a magazine photo shoot, there is a model and the magazine hired two photographers. The images from each photographer are entitled to copyright protection, although they have the same object. That is because each photographer will yield a different picture. The embodiment of the same object into a different photo creation in a tangible form that is called a fixation.
- C had the idea to create a computer program and told the idea to the D because they can realize their ideas. If C does not participate in the making of the computer program, then when D embody the idea itself C can not claim copyright of the computer program after it finally made, unless there has been an agreement between C and D prior. The embodiment of the idea of a computer program into a computer program into a tangible form called a fixation.

The most essential concept of copyright is that it provides protection to the way an idea is presented or in other words how it is being expressed into a tangible form. In essence, the terms of a work that the creator has the right to

³ Agus Sardjono, *Hak Cipta dalam Desain Grafis*, Vol. 1, (Jakarta: Yellow Dot Publishing, 2008), page 11-12.

obtain legal protection is the real embodiment of the idea. The conditions need to be met in order to obtain copyright protection is as originality and fixation. Firstly, a work must have been independently created by the author and at least contain a minimum level of creativity. The meaning of the original is that a copyright work is not a copy. Secondly, in addition to be legally protected, a work too shall satisfy the requirement of fixation. What is meant by fixation is not just an idea, but that idea has been transformed into a form. Since the fixation process has been completed, the creator can enjoy the protection of the law without having to carry out formalities of registration or registration form.

A copyrighted work requires a media so that the work can be seen, heard, reproduced, or otherwise communicated through any device. Thus, the development of the times, the media can be used as a platform of a work has becoming increasingly diverse. The right to ownership of the works that arise or born because of the ability of the human intellect in the field of science and technology is called intellectual property rights. The creators should be protected by law and are rewarded for creativity and efforts in making a copyright work. Rights are exactly the basis for the establishment of copyright law.

Copyright law has the objective to protect the creator's creations that can be made up of authors, artists, musicians, computer programmers, and so on. These rights are necessary to be protected from the actions of others without permission publish or reproduce the copyrighted work of the creator.

The purpose of recognizing these works is to attribute certain rights to its creator.⁴ As one of the rights of intellectual property, copyright is a set of exclusive rights, giving creators the right to control the use of their work and the ability to earn from it,⁵ which applies to literary, scientific and artistic works. Exclusive rights cover economic rights and moral rights. While moral rights is the creator's right to be acknowledged as the creator, economic rights under copyright provide help to the creator to commercially exploit by allowing the creator to make copies, rent, show, perform, or play the work in front of the

⁴ Arathi Ashok, "Economic Rights of Authors under Copyright Law: Some Emerging Judicial Trends", *School of Legal Studies, Cochin University of Science and Technology*. Web. Vol 15. Page 1

⁵ Copyright User, *Protecting Your Work with Copyright*, Accessed Feb 22, 2017. <http://copyrightuser.org/protecting/>.

public, as well as communicate, edit, adapt, sell or license the copyright for use by others. As the main objective of copyright is to protect the interest of creator, with such rights being granted, the efforts can be rewarded and when copyright infringement occurs, the creator will have legal grounds to strive for compensation from the infringer such as pay for a license or pay for any financial loss the creator may have incurred. The expression literary and artistic works is defined as including every production in the literary, scientific and artistic domain, regardless of its mode or form of the production's expression.⁶

Law, as something considered as dynamic, also change followings the times and development of the society. Thus, the Indonesian Copyright Act is also experiencing changes and developments. After approval of the draft law replaces the 2014 Copyright Act No. 19 of 2002, there are new terms set forth therein. In Law No. 28 of 2014 concerning Copyright (Indonesian Copyright Law) are the definitions of fixation, phonogram, reproduction; collective management organizations, etc. are not contained in the Act No. 19 in 2002. It aims to make the legislation more detailed and clear.

Definition of copyright according to the Indonesian Copyright Law known as "*Copyright is the exclusive right of the creator that arise automatically based on the principle of declarative after an invention is embodied in a tangible form without prejudice to the restrictions in accordance with the provisions of the legislation.*"⁷" Meanwhile, as has been previously mentioned, the Indonesian Copyright Law include the term fixation on Article 1 point (13) who stated "*Fixation is an audible sound recording, recording images or both, the which can be seen, heard, Reproduced, or otherwise communicated through any device*". Thus, it can be concluded that the fixation in the Indonesian Copyright Law is limited to the audible recording and still image recording, or both can be seen,

⁶ Alhaji Tejan-Cole, *International Copyright Law – Part I: The Berne Convention for the Protection of Literary and Artistic Works, 1886*" Belipo. Accessed Feb 22, 2017. www.belipo.bz/wp-content/uploads/2011/12/copyrightlaw.pdf?

⁷ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), *WIPO Translation*, Article 1 point (3).

heard, reproduced, or communicated via any device.⁸ However as one of the member states of the Berne Convention, the Indonesian Copyright Law should comply with what is meant by fixation as defined in the convention. What defined in Article 1 point (13) of the Indonesian Copyright Law is not in accordance with the doctrine of fixation that has been agreed in international treaties concerning intellectual property rights. This issue will be further discussed in the following chapter of this thesis.

However, according to the formulation of such requirements it implies on the narrowing or restriction on the type of work that can be granted copyright. With the diversity of works that can possibly be created, such article does not encompass and acknowledge all kinds of work. There is no protection to works that are not in the form of song or picture. As of it becomes the main issue in this thesis to be examined and discussed.

1.2. Research Problems

Based on the aforementioned issue, the research questions that will serve as guidance for this paper are as follows:

1. What does the fixation doctrine stipulated under the Law No. 28 of 2014 concerning Copyright imply to?
2. Has the Copyright Law accommodated types of work that can be protected in compliance with the international standard of fixation as set forth in the Berne Convention appropriately?
3. According to the stipulation of fixation under Copyright Law, how are the legal consequences that occur to non-musical work?

1.3. Research Objectives

The objective of this research is to Obtain an analysis on one of the requirements of works protected under Copyright Law particularly subject

⁸ Risa Amasari. "*Menyoal Penyempitan Doktrin Fiksasi Dalam UU Hak Cipta Terbaru* ." Hukum Online. Accessed March 02, 2017. <http://www.hukumonline.com/berita/baca/lt5437a94407a6a/menyoal-penyempitan-doktrin-fiksasi-dalam-uu-hak-cipta-terbaru-broleh--risa-amrikasari--ss--mh>.

fixation on doctrine. In addition Also this research aims to seek for the accuracy of Copyright Law in Determining the types of work that can be protected based on fixation doctrine, as well as its legal consequences on non-musical works.

1.4. Theoretical and Practical Benefit

4.1 Theoretical Benefit

Through this research, it may force the lawmakers, in a way, to be aware of the vague interpretation of fixation doctrine. In addition, the lawmakers may decide on Whether or not the stipulation of fixation doctrine has been Formulated appropriately or there should be another regulation that should be enacted to a accommodate the situation. This can be achieved by examining the doctrine of fixation in Law No. 8 of 2014 concerning copyright and the Berne Convention.

4.2 Practical Benefit

By conducting this research, it would Contribute to help creator understands what it takes to grant Reviews their works with copyrights and prevents the occurrence of misunderstanding. In addition, this research is also expected to be used as the reference to other researchers as well so that readers know and understand the doctrine of fixation in Law No. 8 of 2014 concerning copyright and the Berne Convention in more depth.

1.5. Operational Definition

In constructing this research, there are Terminologies will be widely used through out the paper. To avoid misinterpretation of the Terminologies, the said Terminologies will be defined as follows:

1. Copyright: The exclusive right granted to the creator in the which automatically arises subsequent to the embodiment of invention into tangible form based upon the declarative principle without reducing the restrictions in accordance with the law.⁹

⁹ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), Article 1 point (3).

2. Creator: A person or persons who individually or jointly produce a creation that is unique and personal.¹⁰
3. Creation: Any copyrighted work in the field of science, art, and literature produced based on inspiration, ability, thought, imagination, dexterity, skill, or expertise that is Expressed in a tangible form.¹¹
4. Fixation: Song, image, or audiovisual, the which can be seen, heard, reproduce, or otherwise communicated through any device.¹²
5. Phonogram: Fixation of the phonogram is a sound performance or other sounds, or a representation of the sound, the which does not include the form of fixation incorporate.¹³

1.6. Research Methodology

1.6.1 Type of Research

This paper can be classified as a doctrinal legal research as it focuses on examining Law No 28 of 2014 concerning Copyright and the Berne Convention in respect to fixation doctrine as one of the requirements of copyright. In particular, the research pertains to legal rules, principles, concepts, or doctrines. It will involves the systematic analysis and conformity of the said statutory provisions and legal principals, as well as logical and rational ordering of the legal propositions and principles. Thus, critical review of the legislations will be provided.

1.6.2 Research Typology

There are different approaches to determine the typology of the research paper. Based on its objective, this research is problem solution and problem finding research. However, the research does not Merely Also find the problem but finds the solution to the said legality issues, Thus showing that the research can also be classified as problem solution if approached based on its objective Because It also aims to find the course of action that can be

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

taken in order to Overcome the issues. Meanwhile, if we approach the research based on a form, it is evident that it is prescriptive research, which is a research that works towards finding the solution. The issue in particular is the application of fixation doctrine to non-musical works and the solution Mentioned is the course of action that can be taken to overcome the issue. Another approach is the approach based on discipline whereby the research is a mono-disciplinary research because it is only based on one discipline's method of research, the discipline of law Because it is Considered as a legal research.

1.6.3 Type of Data

The research is conducted through the use of secondary data. Secondary Data Refers to the data collected for other studies, the which will be Referred to for this research and the which can be Obtained through literature that is public in nature. Specifically, the secondary of data that will be Obtained for this legal research is both primary and secondary legal secondary sources of the data as it is in line with the purpose of our research. The primary legal sources are the sources that have binding power to the society such as law and treaties. Primary legal sources are pivotal for the research Because The fixation of doctrine is stipulated under the Copyright Law and the Berne Convention. Secondary legal sources, the which are sources that Gives information or other matters Relating to the contents of the primary sources and its implementation, will Also be utilized. Secondary legal sources are needed in order to give information regarding the primary legal sources, as the interpretation of the primary legal sources has to be in accordance to the actual purpose and meaning behind its formulation.

1.6.4 Tool of Finding Data

As Mentioned previously, the the data that will be used in this research is secondary data. In Obtain secondary to the data, the tool that will be used is a document and / or literature study. This tool is essential in respect to the legal research as the laws and regulations pertaining to fixation doctrine must be

Referred to and Analyzed in order to Determine the root problem of the research. Books and journals must Also be used as a means to better understand concepts, the laws and regulations itself.

1.6.5 Method of Analyzing Data

The method used in the research to analyze the Data Obtained through the secondary of data is the qualitative method of analysis, as the research will process the Data into sentences in a descriptive form, rather than in number form such as in the case of quantitative methods of analysis ,

1.7. Research Systematics

This research will be divided into four chapters, the which will encompasses the following:

CHAPTER I - INTRODUCTION

As an introduction, this chapter will discuss on the background of this research, the problems that are going to be Discussed, the objectives and benefits of this research. In order to support this research, literature review and the operational definition is provided as guidance.

CHAPTER II - OVERVIEW OF COPYRIGHT AND DEVELOPMENT OF FIXATION DOCTRINE

This chapter will discuss the beginning and the initial stages of how fixation doctrine Became one of the main requirements for a work to Obtain copyright and to be protected by the law in the Berne Convention and Indonesian Copyright Law.

CHAPTER III - CONCEPT OF FIXATION DOCTRIN AS A REQUIREMENT OF COPYRIGHT

This chapter will discuss the concept of fixation doctrine as prescribed in the Berne Convention and Indonesian Copyright Law as one of the countries that ratified the convention. Moreover, for a comprehensive understanding, this

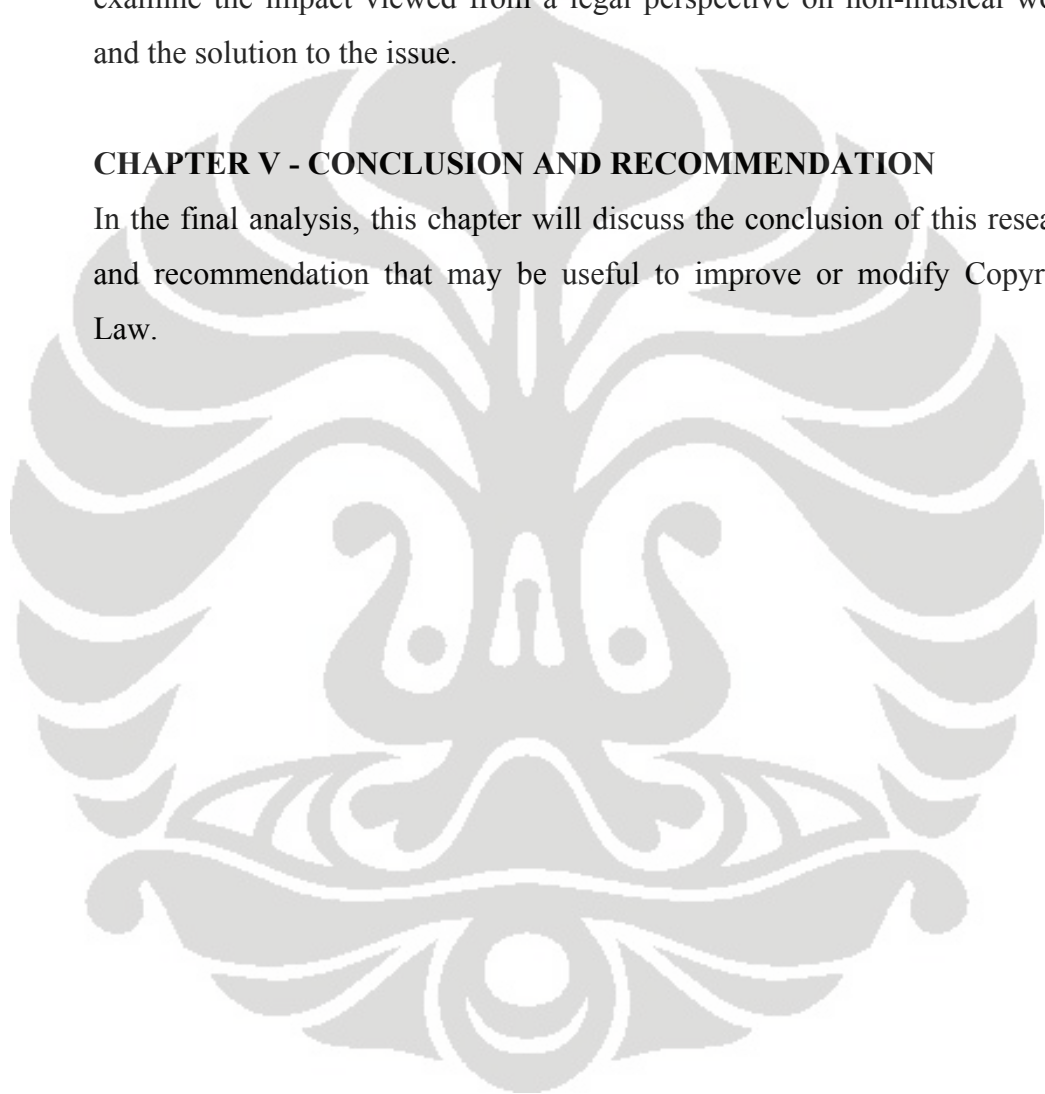
chapter Also will provide comparison between the aforementioned convention and law.

CHAPTER IV – LEGAL IMPLICATION ON THE COPYRIGHT PROTECTION OF NON-MUSICAL WORKS

Based on what is Discussed in the previous chapter, this chapter will further examine the impact viewed from a legal perspective on non-musical works and the solution to the issue.

CHAPTER V - CONCLUSION AND RECOMMENDATION

In the final analysis, this chapter will discuss the conclusion of this research and recommendation that may be useful to improve or modify Copyright Law.



CHAPTER II

OVERVIEW OF COPYRIGHT AND DEVELOPMENT OF FIXATION DOCTRINE

2.1. History of Copyright

Understanding the origins of copyright described as the right to duplicate or reproduce a copyrighted work. It is not clear who first used the term of copyright, none of legislation explicitly mentioned it for the first time. According to Stanley Rubenstein, the term copyright began to famously used at around 1740. In the UK the use of the copyright term first developed to describe the concept in order to protect the publisher of the book to be reproduced by others who do not have the right to publish it. Protection was not given to the author, but rather given to the publisher. The protection was intended to provide a guarantee on investment issuer to finance the printing of a work. This is in accordance with the foundation of the copyright system suppression in the common law system, which refers to economic factors.¹⁴

In further development, protection under copyright law shifted and the protection is given to the creator as the priority, no longer just for the protection of the publisher. The shift brought about changes that then the protection does not only relate to the field of books alone, protection was extended to include the fields drama, music, and artistic work. After the development of technology, the creative works of cinematography, photography, sound recordings, and broadcasting, are also became the works protected by copyright.

At the end of the 19th century continues to grow the need for copyright protection. To meet these needs, in 1886 established a convention that tried to establish a system of copyright rules to the whole world. This convention was ratified in Bern, Switzerland, later known as the International Convention for the Protection of Literary and Artistic Works.

International arrangement concerning copyright besides through the Berne Convention, there is also a Universal Convention in 1952, known as the Universal Copyright Convention of 1952. In the 20th century, the development of copyright

¹⁴ Muhammad Djumhan & R. Djubaedillah, *Hak Milik Intelektual – Sejarah, Teori dan Prakteknya di Indonesia*, (Bandung. PT. Citra Aditya Bakti, 2003), page 47.

arrangements not only in regards to intellectual property, but has also been widened as part separated from the affairs of trade.

2.2. Copyright Under Indonesian Law

Intellectual property rights are the rights arising from the results of the brain thought that producing a product or process that is useful to humans.¹⁵ Basically that is included in the scope is all work in the field of science and technology produced by sense or intellect someone and forming a copyrighted work. The birth of the copyrighted work is the result of human intellectual activity is called author. A work is born out of a force of creativity, initiative, and works set a sacrifice of time and energy thinking creator, has the moral norms that should be regarded as a form of recognition of the results of the efforts of its creator. Utilization of a high-value creation appropriately balanced with an appropriate treatment, either in the form of an award of moral rights and economic rights with a high compensation.¹⁶

Despite the universality of the theory of intellectual property rights, there is still no single agreement on the definition all over the world about what is meant by intellectual property rights. This is due to the definition of intellectual property rights, which are difficult to define in a simple sentence, correctly in which can describe the notion of intellectual property rights as a whole.¹⁷ One who becomes the object of intellectual property is copyright law. Every country has the its own understanding and arrangements, and implementation regarding copyrights, then the following will explain the intellectual property law in Indonesia.

2.2.1 Development of Copyright Law in Indonesia

Way of civilization of a nation continues to grow with the current changes taking place in society, as a result of the development of science and technology.

¹⁵ Rachmadi Usman, *Hukum atas Hak Kekayaan Intelektual Perlindungan dan Dimensi Hukumnya di Indonesia*, Vol. 1, (Bandung: PT. Alumni, 2003), page 12.

¹⁶ Husain Abdullah, *Hak Cipta dan Karya Cipta Musik*, (Jakarta: PT. Pustaka Litera Antar Nusa, 2010), page. 18

¹⁷ Tomi Suryo Utomo, *Hak Kekayaan Intelektual di Era Global*, Vol. 1, (Yogyakarta: Graha Ilmu, 2010), page 2.

Correspondingly, the law as part of human civilization is also demanding constant changes.¹⁸

Basically customary laws in Indonesia are not familiar with the terminology of intellectual property rights. The term intellectual property rights take root and flourish in the Continental European legal traditions and common law introduced in Indonesia by the Dutch in colonial times as a logical consequence of the principle of legal concordance. In the legal literature in Indonesia, the first known is the author's right, that is, after the enactment of *Auteurswet* 1912 Stb. 1912 No. 6000, then followed the terms of Copyright. The term is then used in the subsequent legislation. Understanding both these terms by its development history has quite a big difference.

The term evolved author's right of Europe's embrace of civil law system, so that in the European countries, the Act governing the copyrighted work named Rights Act of the Creator, as in France, Germany, and Australia. Meanwhile, copyright term originated from countries that follow the common law system.¹⁹ At the time Indonesia has been independent, to devise a legal order based on Pancasila and the Constitution of 1945 requires substantial time, the period experienced after the proclamation referred to as the transitional period. Upon this, the shaper Act of 1945 put in some code provision transitional provisions, one of which in Article 2 Transitional rules of the 1945 Constitution stipulates that before the establishment of the new rules, the old rules still apply. On this basis, *Auteurswet* Gazette No. 1912 600 of 1912 is still valid. In essence, it establishes copyright protection of creation in science, art and literature.²⁰ New on *Kebudayaan* Indonesia Second Congress held in October 1951 proposed copyright term for the first time by Prof. St. Moh. The Shah, SH, to replace the term patent which is considered less wide-ranging.

Auteurswet 1912 *Staatblad* No. 600 of the new 1912 was demolished in April 1982 at the time of the enactment of Law No. 6 of 1982 on Copyright. This

¹⁸ H. OK. Saidin, *Aspek Hukum Hak Kekayaan Intelektual*, Vol. 6, (Jakarta: PT. Rajagrafindo Persada, 2007), page 57.

¹⁹ *Ibid.*

²⁰ Gatot Supramono, *Hak Cipta dan Aspek-Aspek Hukumnya*. Vol. 1, (Jakarta: Rineka Cipta, 2010), page 5.

law is the pioneer to be the basis for the development of the field of intellectual property law in Indonesia.

The development of these laws in practice, is considered inadequate because it covers all issues related to intellectual property law, such as the infraction. Copyright Act was also considered not able to compensate for the changes and developments that occur in the community. It can be seen in the content of the Act which provides light penalties against violators of copyright, and there are some things that are also considered less appropriate in lawsuits, Indonesia and the international community.²¹

This makes the Act No. 6 of 1982 should be revised. Thus, President Soeharto incumbent at that time, issued a Presidential Decree 34 of 1986 to establish a Working Group for Implementation Permasala Settlement Legislation Copyright, Trademark Rights Company and Commerce Trademark Rights. The results of the working group is in bidang sentencing, scope of application of the Copyright Act, the period of validity of a copyright, the relationship between the state and the rights holder, also in terms of tackling copyright infringement diuban of offense to a complaint become commonplace. With the improvement of Law No. 6 Know, 1982, will be established Law No. 7 of 1987 that changed some of the previous Act. With this, the regulations of the Act No. 6 of 1982 which was not amended by Law No. 7 of 1987 is declared valid.

Refining process Copyrights Act continues until 10 years later, where Law No. 12 of 1997 was passed. This Penyempuranaan terumatau ntuk adjust to the activities undertaken by Indonesia at the time, which is participating in the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade Counterfiet Goods / TRIPs, which is part of the Agreement Establishing the World Trade Organization. Thus, Indonesia had to adjust the legislation to the WTO framework. With the decision, Indonesia is bound to ratify the treaty by Act No. 7 of 1994 and continue to implement the Act in force in Indonesia, one of which is Act No. 12 of 1997 on Copyright. Then 5 years later, Act No. 12 of 1997 repealed and replaced by Act No. 10 of 2002 on Copyright. The new law can be said to be significantly different from all copyright laws previously. It dikarekan

²¹ Saidin, *Op.Cit*, page 3.

provisions of Law No. 10 of 2002 is adjusted again with the guidelines or standards that have been set in TRIPs.

As time, Act No. 10 of 2002 repealed with the passage of the draft Law of Copyright on September 16th, 2014 by the House of Representatives as Law No. 28 of 2014 on Copyright. Copyright Act is expected to be able to answer all the existing shortcomings in the regulation priorly, and follow the dynamics and development of technology and the creative economy into one of the mainstays in Indonesia. This law is also expected to provide stronger protection for people who have rights towards the creations.

2.2.2. Definition, Functions and Principles of Copyright

Along with the times, so there are some changes that are tailored to the needs and dynamics of the copyright in the premises. With the enactment of the new Copyright Act, there is a difference on the regulation concerning copyright. The law is still the same as the Copyright Act that before, where there are two types of rights contained in the creation, namely copyright and related rights. Both types of these rights is an exclusive right that is economical for the owner of a work. While understanding of copyright under the Act No. 28 of 2014 on Copyrights contained in Article 1 point (1) are as follows:

"Copyright is the exclusive right of the creator that Arise automatically based on the principle of declarative after an invention is embodied in a tangible form without prejudice to the restrictions in accordance with the provisions of the legislation."

In the former regulation, according to *Auteurswet* Copyright 1912 copyright definition in Article I is Cas follows:

"Hak cipta adalah hak tunggal dari pencipta, atau hak dari yang mendapat hak tersebut, atas hasil ciptaannya dalam lapangan kesusasteraan, pengetahuan dan kesenian, untuk mengumumkan dan memperbanyak dengan menggugat pembatasan-pembatasan yang ditentukan oleh Undang-Undang."

"Copyright is the exclusive right of the creator, or the rights of those who have the right, on the results of his creations in the field of literature, science and art, to announce and multiply by suing the restrictions prescribed by law."

In the Universal Copyright Convention also gives the definition of copyright. Article 5 of the Convention on copyright stated as follows:

<p><i>“Hak cipta meliputi hak tunggal si pencipta untuk membuat, menerbitkan dan memberi kuasa untuk membuat terjemahan dari karya yang dilindungi perjanjian ini.”</i></p>	<p><i>The rights referred to in Article I shall include the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under this Convention.</i></p>
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Basically, copyright is a kind of private ownership of an invention in the form of embodiment of a creator of ideas in the fields of art, literature and science. Copyright is a natural right and according to this principle is absolute and is protected rights for the creator of life and a few years later. As an absolute right, it basically can be defended against anyone, who has the right to prosecute any offenses committed by anyone. Thus, an absolute right to have it back or passive aspect, namely that for every person has a duty to respect that right.²²

Stewart formulate some reason or argument, why copyright should be protected and respected, namely²³:

a. The Principle of Nature Justice

The author is the creator or the creator of a work which is an expression of his personality. He should be able to decide whether and how his work published and to prevent the loss or destruction of intellectual work (intellectual or spring). Authors, like any other job, be rewarded for his efforts. Royalties is received as a reward for intellectual work.

b. The Economic Argument

In the modern world, investment is needed to make a creation, such as architecture or a movie work. As a result, all the practical work aimed at providing us for the public, so that the process as well, such as the publication and distribution of books or records too expensive. Investment would not exist if it does not obtain the

²² Djumhan & Djubaedan, *Op.Cit.*, page 56.

²³ Simons, Thad W., and Stephen M. Stewart. "International Copyright and Neighbouring Rights." *The American Journal of International Law* 79, no. 4 (1985): 1115.

expected benefits.

c. The Cultural Argument

The work produced by the creator of a public asset. Therefore, encouragement, stimulation or rewards for their creativity is in the public interest as a contribution to the development of national culture.

d. The Social Argument

The spread of the works of a large number of people to form relationships between groups / levels. Racial groups up to the age of creating a social blend, the creator can be widely disseminated in a short time, meaning they contribute to social progress.

Right to reproduce the copyrighted work is the exclusive right of the creator or someone to whom the creator shift reproduction rights by giving a license. Creator as the owner of the copyright has an intellectual wealth in the form of an intangible that is very personal. A copyright holder has a personal fortune and gives him as the creator to exploit the economic rights of a work belonging to the fields of art, literature, and science.²⁴

In the copyright laws of Indonesia, is expressly stated in the publish or reproduce the invention must consider the restrictions intended to make every use or the proper functioning of copyright must be in accordance with its objectives.²⁵ In any legal act, which creates, legal effect always placed certain conditions. According to Vollmar, the use of authority that does not meet the specified requirements legislation is definitely not obtain legal protection.

In principle, there are basic principles inherent in copyright, among others:

- 1) Copyrighted is an idea that has been tangible and genuine. This principle is derived from several principles, namely:
 - a. A work must have originality in order to enjoy the rights granted by law.
 - b. A copyrighted creation, if creation is concerned is realized in the form of writing or other material form.

²⁴ *Ibid.*, page 46.

²⁵ Saidin, *Op.Cit*, page 62.

- c. Copyright as a special right would lead to a ban for others to have those rights without permission of the creator.
- 2) Copyright arises by itself or automatically.
- 3) A creation does not always have to be announced to acquire copyrights.
- 4) Copyright of a work is a right recognized by law which must be separated and distinguished from the physical custody of a creation.
- 5) Copyright is not an absolute right, it means there is a copyright on the balance between the interests of the owners.

2.2.3. Protected Works and Unprotected Works by Copyright

In order for a creation of legal protection, it is an idea to be realized beforehand in an obvious form. In keeping with the times, there is a classification of creatures that obtain such legal protection. Creation of protected is in the fields of art, literature and science. The types of objects that are recognized as creatures are²⁶:

- a. Literary works: novels, essays, movie scripts, poem, etc .;
- b. Works of music: song, lyric, etc .;
- c. Pantomime dance: choreography to run, such as ballet or modern dance, to pantomime, etc .;
- d. Artworks: painting, print, sculpture, comics, stage devices, art or craft, etc .;
- e. Architectural works of architectural design and Gedun-building;
- f. Maps and diagrams: maps, blue prints, diagrams, design drawings, figures, models etc .;
- g. Cinematography: films for cinema, TV programs, software, video games, etc .;
- h. Photo: photo and photographer.
- i. Computer program.

Categories other creations include the legal protection of creation is

generated by translating, arranging, modify or adapt the original work that is derivative works and creations were superbly checked and repaired as encyclopedia, a collection of poems, magazines and newspapers or compilation. Copyright laws every senagara different from one another, so as to determine the categories of creation should check the laws in each country.

Meanwhile, that is not protected by copyright, is a thought or idea. An idea will not get the protection of copyright, unless the idea is realized in a form that can be touched, heard, seen and enjoyed.

2.3. Overview on the Principle of Fixation and the International Treaty on Principles Governing Fixation

Whenever copyrights met with new technologies, from the printing press to the discovery of other technologies that make it easier for human beings in every way, lawmakers should set an option improbable that expand the scope of copyright so that authors and publishers get a share if their work is commercialized. Dissent in the field of copyright has been around since the past. Opinions wanted copyright with comprehensive coverage grounded in a sense of justice" Unfair if the creator rewarded for his toil, and unfair if the other person to pick the fruit from the tree she planted." But in a group of other intellectuals consider that in the work of each creator to use the work and tradition of creators before; for all creators borrowed from fellow creators, their income should be set aside in part for future generations.²⁷

In Copyright historical, printing press changed the weight of moral reasons against economic reasons in demand-demand copyright. Before. the printing press, moral reason is rarely used because there is no problem. Power issued a book piracy someone to copy the work of an author by hand, equal to the energy released author or scribe who poured it works on paper; of the cost advantages of pirated books is very bad. However, printing machines and other advances in the field of

²⁷ Paul Goldstein, Hak Cipta: Dahulu, Kini, dan Esok, Vol. 1, (Jakarta: Yayasan Obor Indonesia, 1997), page 43.

printing technology result in changes in the basis for the economic sense an essay.

The origin of the formation of the first copyright law in the world is through the Statute of Anne in force in the UK. This law was first introduced to the concept that an author of an essay to be the owner of the rights to copy or rights to CPY, and the protection of their rights. After the entry into force of this law, a copyright work to be protected must be kept within a certain perpustakaan and registered at Stationers' Hall, so there is no automatic copyright protection to works that are not published.²⁸

Judging from the above facts, which embodiment over a copyright work into a media more easily with their growing technology, the intellectual property rights experts developed the idea the necessity for the fixation of a copyright work to get protection. Of doctrines, then the state legislative create the appropriate rules in order to produce a binding international agreement for the countries which join.

2.3.1. The Fixation Doctrine In Copyright Protection

One of the biggest changes that influence the development of copyright protection is after the Berne Convention. This Convention broaden the scope of copyright protection to works that are not published and remove the registration requirement. In countries which adopted the Berne Convention, an individual or a business entity owns the copyright of the work they produce as soon as manifested in several ways such as to write, draw, in physical form and in the form of films other form. This is often referred to as fixation. In some doctrine advanced by the experts, the fixation is an absolute requirement of copyright protection. Here are some of the doctrine of fixation:

1. Roger E. Schechter and John R. Thomas²⁹

In his book entitled Intellectual Property The Law of Copyright, Patents and Trademarks, Schechter and Thomas stated that the statue defines fixation as the embodiment of the work in a tangible means of

²⁸ A Brief History of Copyright, Accessed March 15, 2017, http://www.iprightsoffice.org/copyright_history/

²⁹ *Ibid*

expression that is sufficiently permanent or stable to permit it to be perceived, Reproduced or otherwise communicated, for a period of more than transitory duration.

From these statements, it can be deduced that the fixation on a creature perfectly realized if the creature has to be felt or touched, in reproduction back and can be communicated in the form of the same. In other words, the creation must be written, recorded, both just audio or audiovisual or captured (captured) in some way that makes copyright protected. There is no formality requirements for the creator.

The doctrine of fixation is also stated to the contrary, where there is no copyright protection under federal law for copyright works which did not materialize as speech uttered without preparation, poem or rhyme sung by poets from just from memory without written beforehand, or the appearance of improvisation on music jazz spontaneous. Works that have not realized is called unfixed, could be protected under state law which also apply a different doctrine from every judge to decide. Thus, in the United States, the country where the experts come from, there are differences with respect to time applicable to the embodiment or fixation on a work.

Hence the definition of fixation, which requires a permanent and stable form in the US Code, embodiments are temporary would fail to meet the test of copyright protection under law. Example there is a sculpture that is applied in a rock of ice. An invention must be embodied in a tangible form of protection federal law, there should be a separation in the creation itself with objects that have been realized from the work. A creation can be formed within 2 (two) types of object, which in the US Code referred to as the copies and phonorecords. Copies or copy are all materials that can be used depending on a media creation, for example, books, tapes, dikset, music notation paper, drawing on a piece of paper, etc. While phonorecords is a material object which can sound in fixation. The object of the copy material, can be removed or destroyed without

resulting in ownership of the copyright of a copyrighted work.

2. Tanya Aplin and Jennifer Davis³⁰

In his book entitled *Intellectual Property Law, Text, Cases and Materials*, the British adopted the doctrine of fixation of a copyright work that is included in Literature was, dramatic and musical. In Article 3 point (2) of CDPA determined that an invention will not be protected UNLESS and until it is recorded, in Writings or otherwise. The definition of writing in section 178 CDPA include digital form in an electronic recording. In Article 3 point (3) CDPA, someone other than the creator can record a work is by first getting the permission of its creator. The article states:

"It is immaterial for the purposes of subsection (2) Whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing in that subsection Affects the question Whether copyright subsist in the record as distinct for the work recorded"

Based on this, we can conclude that there is a consideration of the different copyright ownership, ie rights on the content or substance and the creation, and other rights that copyright on the recording.

3. Prof. Dr. Eddy Damian, S.H.³¹

Suatu ciptaan, mempunyai hak cipta jika ciptaan yang bersangkutan diwujudkan dalam bentuk tulisan atau bentuk material lainnya. Ini berarti bahwa suatu ide atau suatu pikiran atau gagasan atau cita-cita, belum merupakan suatu ciptaan. Sebagai contoh dapat dijelaskan tentang suatu pidato yang diucapkan tanpa persiapan atau tanpa teks. Pidato yang demikian baru mempunyai hak cipta jika dirumuskan atau dituangkan dalam bentuk tulisan atau di ketik atau di rekam secara

³⁰ Tanya Aplin, Jennifer Davis, *Intellectual Property Law, Text, Cases and Materials, Second Edition*, (Oxford: Ashford Color Press Ltd), page 116.

³¹ Damian, *Op.Cit*, page 46.

mekanis.

Of the three doctrines above can be deduced that the requirements of the protection of copyright is a creature materialized fixation which is perfect if the creature has to be felt or touched, in reproduction back and can be communicated in the same form. In other words, the creation must be written, recorded both just audio or audiovisual or captured in some way made copyrights can be protected. If the original work has been in fixation, the creation of protected automatically. According to the doctrine of Roger E. Schechter and John R. Thomas and Tanya Aplin and Jennifer Davis, also can be concluded that some form of fixation of a copyright work will not be lost even if all the material object of the work was destroyed. Thus, once a copyright work has been realized, the copyright will be the work will continue to attach to the creation.

Besides fixation, the terms on author's rights must also satisfy the element of originality. In consequence, although the fixation is done by persons who are not the creator, he is not entitled to the content or substance that is in the media that he uses, because the original element inherent in the creator. If no party wants to use or to use it, then it must be with *sepengatahuan* accompanied with the permission of the creator.

2.3.2. The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention)

The Berne Convention has many benefits for the creator as a system which is used as a shield to protect copyrighted works that are not published is also developed by some countries offering registration optionally within the jurisdiction of the respective country. In addition, this fixation was also born as a result of the Berne Convention for therein stipulated that any creation of protected should tangible and not just an idea. Inside The Berne Convention, the idea was first proposed fixation in international agreements. Arranged that copyright protection can be given to the works of literary and artistic.

It is the oldest of the international copyright treaties; It provides a high level of protection and Gives authors the most comprehensive set of rights it is

possible to give them. The continual search for ever better means of exploiting copyright works and the development of cultural exchanges between countries make it vitally necessary to protect copyright not only nationally but internationally. The Berne Convention pursues this aim by ensuring that, in each member country, works originating in the other member countries enjoy the same treatment as reviews those of nationals, and that authors enjoy this national treatment and the Convention's minimum rights completely automatically, without the need to observe your any formality whatsoever.³²

As it has been discussed briefly previously, the world's first copyright law was the Statute of Anne or Act of Anne, enacted in England in 1710. This Act Introduced for the first time the concept of the author of a work being the owner of its copyright , and laid out the fixed terms of protection.³³ According to the Act of Anne, the scope of copyright was limited only to books, however it was then expanded to fashion, engravings, sculptures and dramatic works subsequent to the negotiation between the United States and Prussia and other German states concerning the initiatives to conclude treaties on copyright protection. As of the subject matter was not only limited to literary works only, but Also covers artistic works in addition.

Prior to the establishment of the Act of Anne in 1710, there was no express recognition of authors' rights. The only protection available was that the Governments usually granted privileges to publishers and printers, rather to than the author himself. Such condition occurred not only in the United Kingdom but in most European countries as well. Thus, it was not until the end of 1709 that it was firmly established that the rights accorded under the Act of Anne were authors' rights, rather than publishers' or printers' rights.³⁴ Legislation based on the Statue of Anne Began to Gradually Appeared in other countries outside the United Kingdom, such as the Copyright Act of 1790 in the United States, nevertheless copyright legislation uncoordinated remained at an international level until the 19th century.

Before The Berne Convention was enacted later in 1886, a Considerable

³² http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

³³ *A Brief History of Copyright. Op.Cit.*

³⁴ <http://www.peteryu.com/intip/class2.pdf>

number of bilateral treaties had been concluded since the 1830, nevertheless it was far from being systematic.

The Congress on Literary and Artistic Property was held in Brussels in September 1858, drawing 300 of participants, and discussions were held to Consider the problems experienced in bilateral treaties. However the content Generally coincided with the matters that were subsequently stipulated in the Berne Convention.

In 1875, the Royal Commission on Copyright was appointed to Investigate desirable copyright law. The commission completed a report, the which includes Recommendations on the protection of plays and music as well as the commission's view of desirable international copyright rules. The report indicated resources to more realistic forms of copyright protection and treaties as well as concrete measures for simplifying or improving the procedures, showing effective countermeasures for the copyright-related problems at the time.

Consequently, a conference was held in London in London in 1879, Lisbon in 1880, Vienna in 1881 and Rome in 1882 discussing a desirable international copyright treaty. The conference was initiated International Literary Association or known as the Association Littéraire et Artistique Internationale (ALAI).

In 1883 when the Paris Convention, a multilateral treaty on industrial property rights was concluded, the moves toward the establishment of an international copyright treaty Also stepped up to a new phase on receiving Schmidt's proposal at the previous year's Rome meeting. In response to a request by a committee of the ALAI, the Swiss government Agreed to hold an international conference in Switzerland. Subsequently a draft treaty consisting of 10 Articles was created in the which Became the basic foundation for creating the Berne Convention.

The first diplomatic conference that started on September 8, 1884, delegations from 10 countries Participated, and they Attended the conference taking a cautious stance. Also the discussions were held on the procedure to receiving protection and how translations and adaptations should be protected, and a provisional text of the treaty was developed.

In 1885, 26 delegations from 16 countries, including the new of participants-the United States, Italy and Spain-attended the conference. The conference was held in Berne, Switzerland, and the provisions of the treaty to be signed in 1886 as the Berne Convention were drafted.

There were 12 countries including the United Kingdom, France, Germany and Switzerland attended the conference, held on September 6, 1886. Japan and the United States also participated as observers. As a result, in 1886, the Berne Copyright Union was organized by 10 countries, namely Belgium, France, Germany, Italy, England, Haiti, Spain, Switzerland, and Tunisia with the aim of protecting copyrighted works in the field of art and literature. At the same time, signed the Berne Convention for the Protection of Literary and Artistic Work, which became the first international convention concerning copyright and membership is open to all countries. It was introduced to provide mutual recognition of copyright between the member states, as well as to promote the development of international standards for copyright protection.

The Berne Convention had been amended 8 times since its establishment in 1886, in Paris (1896), Berlin (1908), Berne (1914), Rome (1928), Brussels (1948), Stockholm (1967), Paris (1971), Paris (1979). The major trend was an increase of in the number of member countries, the expansion of the protected subject matter, and lengthening of the term of protection.

The important points of the revisions in Paris in 1896 were that the protection of rights in the translations and serial works was strengthened and the possibilities for copyright protection were opened up for authors of non-member countries as well; and that conversion from a novel to a play and from a drama to a novel was made subject to protection.

With the revisions at the following Berlin conference, it was once again clearly indicated resources to that original literary works, dramatic works, and artistic / musical works were to be protected by copyright, be they published or performed works, and that translations, adaptations, and musical arrangements were to be protected as original works. It was also provided that architecture, choreography, and pantomimes were subject to protection, new media such as automatic pianos, gramophones, and cinematographs were covered as well, and in

contrast to newspaper Articles that could be freely reprinted UNLESS the reprinting was clearly prohibited, articles of periodicals could not be reprinted without the authorization of the author.

At the next conference in Rome in 1928, five sectional meetings Discussed the following topics namely moral rights, radio broadcasting, right of automatic copying and compulsory license, cinematographic and photographic works, and industrially applied artistic works.

At the conference held in Brussels in 1948, it was Decided to set the term of copyright protection at 50 years after the death of the author, and to include cinematographic works, photographic works, and industrially applicable artistic works in protectable subject matter.

At the Stockholm conference in 1967, representatives of many developing countries Participated, and presented the problems Reviews These countries were facing in enjoying the benefits of intellectual property. As a result of discussions, a protocol on copyright protection in developing countries was created.

In the revisions at Paris in 1971, the provisions stipulating protection in developing countries that had been created as a protocol at the previous Stockholm conference was incorporated as an appendix to the main text of the convention.

One of the biggest changes implemented a by the adoption of the Berne Convention was to extend copyright protection to unpublished works and remove the requirement for registration. In countries of the Berne Convention this means that an individual (or the organization they are working for) owns the copyright of any work they produce as soon as it is recorded in a material form, be it by writing it down, drawing, filming, etc ,

In the Berne Convention, contained 3 (three) basic principles the minimum standards for the provision of legal protection. The basic principle is, among others:

1. Principle of National Treatment

Creation that comes from one of the member states should be given the protection of the same copyright laws as interpreted by the creation of the creator of its own citizens;

2. Principle of Automatic Protection

Granting legal protection of copyright must be given automatically without having to meet the requirement or any formality;

3. Principle of Independence of Protection

The legal protection provided without relying on the provision of protection in the country of origin of the creation. However, if a member state provides protection over a longer period than the minimum time set by the Berne Convention itself, and creation no longer protected in their country of origin, protection may be rejected immediately if there is no more protection against these creatures in their home country.

Minimum standards for the protection associated with the creation, the rights of the creator, and the term of protection is as follows:

1. Creation of protected works covers each work in the fields of literature, arts and science, whatever the form of embodiment³⁵;
2. Unless there is a reservation, limitation, or exception, which includes exclusive rights to creators are:
 - a. The right to translate;
 - b. The right to make adaptations and arrangements of the work;
 - c. The right to demonstrate in public the creation of drama, musical drama and music creation;
 - d. Rights to Recite in public a literary creation;
 - e. Rights to broadcast;
 - f. Make reproductive rights in the manner and form of any embodiment;
 - g. Rights to use as material for the creation of audiovisual creation.
3. The term of protection for copyright law is valid for life creator, plus 50 after the creator's death.

³⁵ *Berne Convention for the Protection of Literary and Artistic Works*, Article 2.

In the Berne Convention, the term fixation listed in Article 2 (2) which states the following statement:

"It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected UNLESS they have been fixed in some material form."

Based on the above definition, the fixation should refer to the real form everything creation as a condition of copyright protection. Furthermore, the Berne Convention directs the member states to comply with the requirements fixation. However, each country was given the authority and freedom to develop any kind of copyright works to be protected by the positive law of each country.

Fixation associated with the definition contained in international treaties, the WIPO Performances and Phonograms Treaty, which is a provision on copyright, which focuses on protection to performers, and phonograms also formulate the notion of fixation. In the agreement, mentioned in Article 2 as follows:

"Fixation means the embodiment of sounds, or of the representations thereof, from the which they can be perceived, Reproduced or communicated through a device"

Through the article, it can be concluded that the fixation is defined as a representation of works that can be seen, heard, reproduced, or communicated through a device.

2.4. Fixation Developments In Act No. 28 Year 2014 concerning Copyright

Fixation principle has been applied in the Copyright Act of Indonesia since Indonesia still has or is subject to Dutch law regulations, ie Auteurswet Gazette No. 1912 600 of 1912. The regulation, mentioned in Article 1 as follows:

"Copyright is the exclusive right of the author of a literary, scientific work, or his successors, in title to communicated that work to the public and to reproduce it, subject to the limitations laid down by law."

Then in Article 4 of the aforementioned law states:

"Unless there is proof to the contrary, the person who is named as author in or on the work or, where there is no such indication, the person who, when the

work is communicated to the public, is named as the author by the party who communicates the work to the public, shall be deemed the author of the work "

From the aforementioned articles it can be concluded that the so-called creator is the one who has to announce the results of his creation to public and has made the process of reproduction of his work. However, it is clearly not meet the embodiment of creation itself, but merely an announcement to the general public, the creation is already protected by copyright.

Having no longer the enactment of copyright laws of the Netherlands, in Article 1 point (1) of Law No. 6 of 1982 concerning Copyright defines creator as follows:

"The creator is a person or several persons acting jointly that the inspiration was born a creation based on the ability of the mind, the imagination, dexterity, skill or expertise manifested in a distinctive and personal"

The principle of fixation becomes easier to understand though is not clear, where a work protected by copyright is a creation in the form of a distinctive and personal. Thus, it means that the shape must have translated into a form that can be seen, heard or read. It is the basis of the application of the principles of fixation, unchanged until the amendment of the copyright law in 2002, namely the Law No. 19 of 2002, in which the formulation of words used have not changed.

Revisiting the fixation as a doctrine that states that the copyright protection granted to a person if the invention has been made in tangible form that can be seen, touched, dikomunikasian and reproduced. In article 1 point (1) of Law No. 28 In 2014, copyright is defined as follows:

Indonesian	English
<i>"Hak cipta adalah hak eksklusif pencipta yang timbul secara otomatis berdasarkan prinsip deklaratif setelah sesuatu ciptaan diwujudkan dalam bentuk nyata tanpa mengurangi pembatasan sesuai dengan ketentuan perundang-undangan³⁶."</i>	<i>"Copyright is the exclusive right of the creator that Arise automatically based on the principle of declarative after an invention is embodied in a tangible form without prejudice to the restrictions in accordance with the provisions of the legislation.³⁷"</i>

³⁶ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), Article 1 point (3).

³⁷ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), *WIPO Translation*, Article 1 point (3).

In the article can be seen that there is a statement "embodied in a tangible form". It is in conformity with the concept of fixation when in compare with the Berne Convention. However, in Article 1 point (13), the Law of Copyright back provide a definition of fixation, namely:

<i>Indonesian</i>	<i>English</i>
<i>"Fiksasi adalah perekaman suara yang dapat didengar, perekaman gambar atau keduanya, yang dapat dilihat, didengar, digandakan, atau dikomunikasikan melalui perangkat apapun.³⁸"</i>	<i>"Fixation is an audible sound recording, recording images or both, the which can be seen, heard, Reproduced, or otherwise communicated through any device.³⁹"</i>

In Article 1 point (14), the word fixation is also mentioned, as follows:

<i>Indonesian</i>	<i>English</i>
<i>"Fonogram adalah Fiksasi suara pertunjukan atau suara lainnya, atau representasi suara, yang tidak termasuk bentuk Fiksasi yang tergabung dalam sinematografi atau Ciptaan audiovisual lainnya.⁴⁰"</i>	<i>"Phonogram is fixation sound performance or other sounds, or a representation of the sound, the which does not include the form of fixation incorporated in a cinematographic or other audiovisual creation.⁴¹"</i>

If seen from the definition that has been described above, it can be concluded that the fixation only involves two types of creation. The creation is a creation that has been recorded, either in the form to record sound or image recording. It was adopted on the Article 2 point (c) WIPO Performances and Phonograms Treaty, which has been described in the sub-section before this.

According to Prof. Dr. Agus Sardjono, S.H, M.H. the definition of this fixation is wrong. It was expressed at a special meeting minutes of the committee Bill Copyright 2014, due to fixation in this definition only to the work of music, whereas fixation is a doctrine that applies to all types of creation. If this definition applies in the Copyright Act 2014, then should this bill titled as *RUU Hak Cipta atas Musik*.

In Article 40 of the Copyright Act, there is a category on copyright

³⁸ *Op.Cit.*

³⁹ *Op.Cit.*

⁴⁰ *Op.Cit.*

⁴¹ *Op.Cit*

protected works, these works include:

Indonesian	English
<p>“(1) Ciptaan yang dilindungi meliputi Ciptaan dalam bidang ilmu pengetahuan, seni, dan sastra, terdiri atas:</p> <ul style="list-style-type: none"> a. buku, pamphlet, perjawahan, karya tulis yang diterbitkan, dan semua hasil karya tulis lainnya; b. ceramah, kuliah, pidato, dan ciptaan sejenis lainnya; c. alat peraga yang dibuat untuk kepentingan pendidikan dan ilmu pengetahuan; d. lagu dan/atau music dengan atau tanpa teks; e. drama, drama musical, tari, koreografi, pewayangan, dan pantomime; f. karya seni rupa dalam segala bentuk seperti lukisan, gambar, ukiran, kaligrafi, seni pahat, patung, atau kolase; g. karya seni terapan h. karya arsitektur; i. peta; j. karya seni batik atau seni motif lain; k. karya forografi; l. porter; m. karya sinematografi; n. terjemahan, tafsir, saduran, bunga rampai, basis data, adaptasi, aransemen, modifikasi dan karya lain dari hasil transformasi; o. terjemahan, adaptasi, aransemen, transformasi atau modifikasi ekspresi budaya tradisional; p. kompilasi Ciptaan atau data, baik dalam format yang dibaca dengan Program Komputer maupun media lainnya; q. kompilasi ekspresi budaya tradisional selama kompilasi tersebut merupakan karya yang asli; r. permainan video; dan s. program computer⁴²” 	<p>“(1) Creation of protected includes work in the fields of scienece, art, and literature, consisting of:</p> <ul style="list-style-type: none"> a. books, pamphlets, typographical arrangement of a published work, and all other written works; b. speeches, lectures, and other Similar creation; c. props made for the purposes of education and science; d. songs and / or music with or without text; e. drama, musicals, dance, choreography, puppet shows, pantomimes; f. works of art in all forms such as painting, drawing, engravings, sculpture, calligraphy, statues, or collage; g. works of applied art; h. works of an architecture; i. maps; j. batik artwork or other patterns; k. photographic works; l. images; m. cinematographic works; n. translation, interpretation, adaptation, Anthologies, databases, adaptation, arrangement, modification, and other works as the result of transformation; o. translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions; p. creation of data or complication, either in a format that can be read by a computer or other media; q. compilation of traditional cultural expressions during the compilation of an original work; r. video games; s. computer programs⁴³ ”
<p>“(2) Ciptaan sebagaimana dimaksud pada</p>	<p>“(2) Work as Referred to in paragraph (3)</p>

⁴² Op.Cit

⁴³ Op.Cit

<i>ayat (1) huruf n dilindungi sebagai ciptaan tersendiri dengan tidak mengurangi hak cipta atas ciptaan asli⁴⁴”</i>	<i>letter n is protected as a separate work without prejudice to the rights over the original work⁴⁵”</i>
<i>“(3) Perlindungan sebagaimana dimaksud pada ayat (1) dan ayat (2), termasuk perlindungan terhadap Ciptaan yang tidak atau belum dilakukan pengumuman tetapi sudah diwujudkan dalam bentuk nyata yang memungkinkan penggunaan ciptaan tersebut.⁴⁶”</i>	<i>“(3) Protection as Referred to in paragraph (1) and paragraph (2), Including the protection of the works that are not or have not done announcement but already embodied in a tangible form that Allows the multiplication of such work⁴⁷”</i>

Whereas, in Article 41 presented that can not be protected by copyright, among others:

<u>Indonesian</u>	<u>English</u>
<p><i>“Hasil karya yang tidak dilindungi Hak Cipta meliputi:</i></p> <ul style="list-style-type: none"> <i>a. hasil karya yang belum diwujudkan dalam bentuk nyata;</i> <i>b. setiap ide, prosedur, sistem, metode, konsep, prinsip, temuan atau data walaupun telah diungkapkan, dinyatakan, digambarkan, dijelaskan, atau digabungkan dalam sebuah Ciptaan; dan</i> <i>c. alat, benda, atau produk yang diciptakan hanya untuk menyelesaikan masalah teknis atau yang bentuknya hanya ditujukan untuk kebutuhan fungsional.⁴⁸”</i> 	<p><i>“The work that is not protected rights include:</i></p> <ul style="list-style-type: none"> <i>a. The work that has not been the Tirrenus in the form of estate;</i> <i>b. any idea, procedure, system, method, concept, principle, or discovery Although the Data have been Disclosed, Expressed, Described, explained, or incorporated in a work; and</i> <i>c. tools, objects, or prodycts that are created only to resolve technical problems or Whose shape is only intended for the functional needs.⁴⁹”</i>

With the Article 40 point (1) thereof, where in associate with and opinions of Prof. Agus Sardjono, S.H, M.H. it can be concluded that contained in classified as fixation in Article 1 point (13) is point (d) is a song. Meanwhile, the type of work described in Articlez 40 point (1) not included in the definition formulated fixation in copyright law.

⁴⁴ *Op.Cit*

⁴⁵ *Op.Cit*

⁴⁶ *Op.Cit*

⁴⁷ *Op.Cit*

⁴⁸ *Op.Cit*

⁴⁹ *Op.Cit*

CHAPTER III

CONCEPT OF FIXATION DOCTRINE AS A REQUIREMENT OF COPYRIGHT

3.1 International Standard of Fixation

A new creation or work is said to own the copyright if the it has been manifested in the form of paper or other material. Conversely, ideas, thoughts, and goals have not been regarded as a creation as has been discussed in the previous chapter.

Furthermore, a work copyrighted having a certain measurement that is referred to as Standard of Copyright Ability, as proposed by EW Kinter and J. Lahr in his book, *An Intellectual Property Law Primer* quoted and translated by Rahmi Jened⁵⁰, Standard of Copyright Ability are, among others:

1. Originality

The word "original" ... or the test or "originality", is not that the work be novel or unique. Even a work based upon something already in the public domain may well be original.

2. Creativity

Creativity as a standard of copyright abilities to a great degree is simply a measure of originality. Although a work that copies Merely exactly a prior work may be held not to be original, if the copy entails the independent creative judgment of the author in its production, creativity that will render the original work.

3. Fixation

A work is fixed in a tangible medium of expression when its embodiment in a copy of phone records by or under the authority of the author, is Sufficiently permanent of stable to permit to be a perceived Reproduced or otherwise communicated for a period of more that transitory duration, A work consisting of sound imager of both, that are being transmitter is fixed for the purpose of this title if

⁵⁰ Jened, Rahmi. *Interface hukum kekayaan intelektual dan hukum persaingan: penyalahgunaan HKI*. (Jakarta: PT RajaGrafindo Persada), 2013.

fixation of the work is being made simultaneously with its transmission.⁵¹

Meanwhile, a work must have originality to be able to enjoy the rights granted by the Act. To test the authenticity of the copyright is unlike patents, which rased on the novelty of its creation. Authenticity on copyright work does not have to be completely new, most importantly it has to be able to bring the expression and creativity of the creator.⁵² The work should also contain enough content to set up a work that is original, and can be recorded or embodied in clear form.⁵³

Creation should reflect in a distinctive form, it means that a work must have certain embodiments expression in the media enough to be visible and sufficiently stable to be produced, communicated by other means.⁵⁴ Thus, the real creative works should have been embodied in a particular medium of expression.

With regards to fixation, The Berne Convention as an international agreement related to copyright, also became the pioneer of international standard of fixation that sets certain requirements or standards to measure whether a given work is entitled to copyright protection. The establishment of other international treaties such as the WIPO Performance and Phonogram Treaties was too refers to the rules laid down in the Berne Convention as it has been discussed in the previous chapter.

Related to fixation, Under Article 2 point (2) of the Berne Convention, has been set as follows:

"It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected UNLESS they have been fixed in some material form."

Referring to the article above, it can be concluded that a work can be said to have been realized if it has met the elements of the article is when the works have been fixed in some material form. As the Berne Convention is an

⁵¹ Ibid.

⁵² Damian, Eddy. *Hukum hak cipta*. (Bandung: Alumni), 2014. Page 100
Hector L. Macqueen, *Intellectual Property Rights: Critical Concepts in Law* vol.

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⁵⁴ Rahmi Jened. *Op.Cit.*

international treaty that has been signed by many countries, these countries as members must comply with these standards, although such article given member states to have the authorization to regulate its own implementation in their respective countries.

Thus, Indonesia as one of the signatory states or member states of the Berne Convention also essentially subject and refer to the regulations in setting conditions concerning copyright and also fixation of a work.

3.1.1 The Concept of Works

With regards to the categories of protected works, it began in the UK since the holding of the revision in the Act of 1988, which gave them his influence on the definition of copyright. In the revision, copyright is defined as works which are divided into four categories: literary, dramatic, musical, and artistic.

Literary work means any work, other than a dramatic or musical work, the which is written, spoken or sung, and accordingly.⁵⁵ It also includes a computer program and table or compilation. It also set out in Section 8 of Copyright, Design and Patents Act 1998, the which applied to England. As of, the term literary work covers work, other than a dramatic or musical work, the types of work fall within the definition of literary works are tables, compilations (ie Dictionaries, directories, maps, road books and lists, Although an individual folder will be protected as an artistic work), computer programs and preparatory designs for computer programs Including source code, databases, letters, and notes such as headnotes to law reports, etc. For a literary work to benefit from copyright protection it must be Expressed in print or writing or recorded in some other manner, for instance on a tape recording. Also There must have been sufficient skill and labor in creating the work, so as to make it original and useful.⁵⁶ According to Deborah E. While Bouchox, in her book Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trademarks, literary works

⁵⁵ Copyright in Literary, Dramatic & Musical Works. Accessed May, 10, 2017. http://shodhganga.inflibnet.ac.in/bitstream/10603/52362/10/10_chapter%205.pdf

⁵⁶ "Copyright in literary, dramatic and musical works." In Brief. Accessed May 11, 2017. <http://www.inbrief.co.uk/intellectual-property/copyright-literary-dramatic-and-musical-works/>.

According to the United States Copyright Act is defined as one Expressed in words, numbers, or other verbal or numerical symbols, Regardless of the nature of the material objects such as books, periodicals, manuscripts, phonorecords, films, tapes, discs, or cards, in the which they are embodied.

Dramatic works, According to the Act of 1957 has been mentioned in the which described under section 2 (b) as follows:

"Any piece of recitation, choreographic work of entertainment in dumb show, the scenic arrangement or acting form of the which is fixed in writing or otherwise, but does not include a cinematographic films."

However under the UK Copyright, Designs & Patents Act 1988 has now provided for a simpler definition by laying down that dramatic works includes a work of dance or mime. In order for a work to be constituted as a dramatic work, there are two (three) essential requisites to be fulfilled items, namely it must be reduced to a permanent form, it must be disclose a plot or a story, and it should be capable of being performed either with dialogue, by the action, or both. Essentially, dramatic works is more common to be known as a theatrical performance or a play performed for the stage, movie, television, or radio. Dramatic works usually include spoken text, plot, and Reviews directions for action.

Musical work includes any combination of melody and harmony, either of them reduced to writing to otherwise graphically produced or Reproduced. An original adaptation of a musical work IS ALSO entitled to copyright.⁵⁷ There was no definite definition of musical work in the UK Copyright, however the definition being said previously was based on The Musical Copyright Act 1902. A musical work or composition may be in the form of annotated copy such as sheet music, or in the form of phonorecords such as record, a cassette tape, or a CD.

⁵⁷ "Copyright in literary, dramatic and musical works." Literary, dramatic, musical and artistic works | Copyright | Areas of Law | Law Library | AdvocateKhoj. Accessed May 11, 2017. [http://www.advocatekhoj.com/library/lawareas/copyright/literary.php?Title=Copyright&STitle=Literary%2C dramatic%2C musical and artistic works.](http://www.advocatekhoj.com/library/lawareas/copyright/literary.php?Title=Copyright&STitle=Literary%2C%20dramatic%2C%20musical%20and%20artistic%20works)

The lyrics or words to a musical composition are not protected as a literary work, but rather as a musical work.⁵⁸

Artistic works covers a painting, a sculpture, a drawing in the which include a diagram, map, chart or plan, an engraving or a photograph, an architectural work of art and any other work of artistic craftsmanship. Reviews These works do not need to possess any artistic quality, but the author must have bestowed skill, judgment, and effort upon the work.⁵⁹

If the terms of the Berne Convention as an international agreement relating to copyright, have been assigned as well a variety of works that can be protected by copyright. Such works is contained under Article 2 point (1), the which states the following:

"(1) The expression" literary and artistic works "shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other Writings; lectures, addresses, sermons and other works of the same nature; dramatic- dramatic or musical works; choreographic works and entertainments in dumb show; Compositions musical with or without words; cinematographic works to the which are assimilated works Expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to the which are assimilated works Expressed by a process analogous to photography; works of applied art; Illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. "

According to the aforementioned article in the which governs the type of works it protects, The Berne Convention Applies to every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. As of every works of literary, scientific, artistic or made by the author is eligible to be protected by copyright as its legal protection.

The scientific work is protected by copyright not because of the scientific character of its contents: a medical textbook, a Treatise on physics, documentary on Interplanetary space are protected not Because they deal with medicine,

⁵⁸ Deborah E. Bouchoux, Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade, page 183.
https://books.google.co.id/books?id=x4H0ulrSDIUC&pg=PA309&dq=berne+convention&hl=en&sa=X&ved=0ahUKEwiS66SF_bjUAhWMKY8KHe0XCNY4ChDoAQgwMAM#v=onepage&q=&f=false fixation

⁵⁹ *Ibid.*

physics, or the surface of the moon, but Because they are books and films. The content of the work is never a condition of protection. In speaking of a domain not only literary and artistic, but scientific also, the Convention encompasses scientific works, the which are protected by reason of the form they assume.⁶⁰

The expression "literary and artistic works" must be taken as including all works capable of being protected. In order to illustrate this, paragraph (1) of Article 2 Gives an enumeration of the works. The use of the words "such as" shows that the list is purely one of examples and not limitative: it is a matter of providing a number of guides for the national law-makers; in fact all the main categories of works are set out. The following comments are worth making⁶¹:

1. *Books, pamphlets and other Writings*; since the content of the work makes no difference to the protection, this is, without doubt, the biggest category, if not in numbers, by variety: novels, news, poems, recitations, short stories Whether fictional or not, pamphlets, treatises or handbooks on philosophy, history and all other natural or physical;
2. *Lectures, addresses, sermons, and other works of the same nature*: this category is usually known as "oral works", that is to say Reviews those that are not written down. However there are limits to the protection enjoyed by this category of works by reason of news requirements, for example, the reporting of political or legal speeches, and by the need to quote or take extracts (see below).
3. *Dramatic or dramatico-musical works*; this is a matter of pieces for the theater and, if they have a musical accompaniment, of grand and light operas, operettas, musical comedies, etc.
4. *Choreographic works and entertainments in dumb show* ;in the version prior to that of Stockholm, the Convention Provided that, for these works to enjoy protection, the acting form had to be fixed in writing or otherwise. Since the Convention now Allows national laws to provide that fixation in some material form is a general condition for protection (see below Article

⁶⁰ World Intellectual Property Organization, Guide to the Berne Convention or the Protection of Literary and Artistic Works (Paris Act, 1971). Page 12.

http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

⁶¹ *Ibid.* page 13

2), this need for fixation in writing of the acting form of choreographic works and entertainments in dumb show was Abolished in the Revision in 1967.

5. *Compositions musical with or without words*: here one considers music in its widest form, light (Palm Court or pop) or heavy (hymns, choruses, symphonies) from, whether scored for a single instrument or Several (sonatas, chamber music, etc.) or for large orchestras, and whatever its popular appeal or its purpose (radio and TV advertising jingles as well as symphonic works). Like the works Mentioned in (d) above, musical works, to enjoy protection, need only be fixed in a material form if the national law so demands. On this point the Model Law of Tunis on copyright for the use of developing countries (hereinafter called the Tunis Model Law) leaves the choice of utilizing the expressions "musical works Whether or not in written form" in order to make it clear that Reviews These works need not be Inscribed on a musical score in order to be protected. However the draftsmen felt that it would not in practice be possible to protect improvisations. On the other hand, variations are protected and Also arrangements of pre-existing works, subject of course to the copy- right, if any, in that work (see paragraph (3) of Article 2). Finally, the words "with or without words" in the Convention mean that any words Accompanying the music are protected like the music itself.
6. *Cinematographic works to the which are assimilated works Expressed by a process analogous to cinematography*: here one is considering primarily films in the classic sense Whether silent or "talkies", whatever Reviews their type (Documentaries, newsreels, reports or feature films made to a script), whatever Reviews their length, whatever Reviews their method of making (films on location, films made in studios, cartoons, etc.), or the technical process used (films on celluloid, video tape, etc.) whatever they are intended for (showing in cinemas or television transmission) and finally whoever is their maker (commercial production companies, organization television or mere amateurs).

7. *Works of drawing, painting, architecture, sculpture, engraving and lithography*: this category covers virtually all Whether artistic works in two dimensions (drawings, engravings, lithographs, etc.) or in three (sculptures, statues, works of architecture, monuments, etc.) independent of Reviews their nature (figurative or abstract) and their intention (pure or commercial art). It is worth noting that, in the Tunis Model Law, carpets are Expressly Mentioned in the list of protected works (itself based on the Convention) because of the special importance enjoyed by this type of artistic creation in some developing countries.
8. *Photographic works to the which are assimilated works Expressed by a process analogous to photography*:this covers all independent of subject photography (portraits, landscapes, current events, etc.) and purpose (amateur or professional photographs, artistry or advertising). The Convention speaks of an assimilation in the same terms as Reviews those used in the matter of cinematographic films in order to Ensure protection when chemical or technical processes, now known or yet to be discovered, are used as well as traditional photographic methods. It should be remembered that the Convention leaves open the possibility of refusing protection to Certain categories of photographs. It Might Be Thought to go too far to Confer the copyright on all photographs, Including for example passport photos made automatically by special means (photomatons). It is up to the legislators to resolve Reviews These Difficulties; some laws demand that to enjoy protection photographic works must bear an artistic or documentary character.
9. *Works of applied art*:The Convention uses this general expression to cover the artistic contributions of the makers of knick-knacks, jewelery, gold and silverware, furniture, wallpaper, ornaments, clothing, etc.
10. *Illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science*:this list is self-explanatory and completes the series of the which the Convention Gives examples in order to define the term "literary and artistic works"; it must

always be remembered that this list in paragraph (1) of Article 2 is by no means exclusive.

In addition, the authors of each of Reviews These works are granted with certain rights as legal protection. According to the Berne Convention, the rights of the author of the member states will have equal legal protection of its work in any of other member states.

3.1.2. The Concept of Fixed

The issue of whether a work must be fixed in a tangible form in order to be protected is not dealt within a uniform way. Usually common law countries require that, in order to enjoy protection, the work must be fixed by any tangible, material means for example it could be written on a piece of paper, or recorded on a cassette, a CD, a DVD, or stored a copy on disk or on the computer hard disk, whereas countries with a civil law tradition do not have such a requirement. International law allows for both ways.⁶²

Whether a work needs to be fixed in order to benefit from protection has important practical consequences, especially with regard to works of improvisation such as music, speeches or choreographies. If fixation were required, Reviews those works would not be protected until they are either recorded or transcribed. In order for a work to be protectable, it must be fixed in a tangible medium of expression. A work is Considered as fixed when it is embodied in a copy or phonorecord and is Sufficiently permanent or stable to permit it to be perceived, Reproduced, or communicated for a period of more than transitory duration.⁶³

A copy is a material object other than phonorecord, from the which a work can be perceived, Reproduced, or communicated, either directly by human perception or with the help of the machine. For instance, a famous photograph by Ansel Adams. The photograph Appears on a book cover, calendar, and so forth -

⁶² The ABC of Copyright. UNESCO Culture Sector. Page 19.
http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf

⁶³ Deborah. *Op. Cit.* page 183.

are deemed as copies A they are material objects from the which an image can be perceived. The scope of material objects is broad enough to encompass Writings on paper, images on marble, and even designs on fabric. While, a phonorecord is a material object in the which sounds, other than Reviews those Accompanying a motion picture or other audiovisual work are fixed, and from the which the sounds can be perceived, Reproduced, or communicated either directly by human perception or with the help of a machine. As of, a record, a cassette tape, a CD recording of a song by, for instance the Rolling Stones, are all Considered to be phonorecords. Thus for example, a song (the "work") can be fixed in sheet music ("copies") or in a CD (a "phonorecord"), or both.⁶⁴ While other types of work such as oral presentation, lecture, or live performance is not considered as fixed, UNLESS it is reduced to writing or placed on the film or tape.⁶⁵

Works that have not been fixed in a tangible form of expression are not protected under the Copyright Law, since fixation is one of the Prerequisites for copyright protection. For instance, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded are both ineligible for copyright protection.

According to the Article 2 point (2) of the Berne Convention, fixation offer section only with the administrative requirements such as the registration in order to prove the existence of the work.⁶⁶ Thus it can be deemed as the evidence of documentation in which proof that the work did express by the author in A Certain form.

3.1.3. The Concept of Material Form

The next requirement that must be satisfied for a work to qualify for copyright protection is that the work must be recorded in a material form.⁶⁷ As ideas will not be granted copyright protection, A Certain idea must be expressed

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Mark Davidson, Ann Monotti, Leanne Wiseman, Australian Intellectual Property Law Accessed. May 10, 2017, p. 228
<https://books.google.co.id/books?id=00XjCgAAQBAJ&pg=PA228&dq=material+form+copyright&hl=en&sa=X&ved=0ahUKewiLIK316rjUAhXBuo8KHbLOCTMQ6AEIIZAA#v=onepage&q=material%20form%20copyright&f=false>

into A Certain forms. Such ideas will receive protection in the form in which it is expressed. On the other words, a work is required to be fixed in a tangible medium or some material form; priors it is granted copyright protection.

Others feel that fixation in a material form need not be a condition of copyright; even in the moving picture field there can be "unfixed" films roomates call for protection: for example, a series of images Reproduced on the screen of a television set ought to be protected against reviews their being taken by third parties with video-recording apparatus. In some laws, the moment of first fixation is chosen as the moment at which the work is made-comes into existence. Even in reviews those cases in the which fixation is demanded as a matter of proof, one school of thought Believes that, if a lecture is given extempore, or a tune improvised on the piano, and another records it, the latter, by doing so, perfects the copyright in favor of the lecturer or pianist.

Given reviews these differences, and se the member countries, Werner free to protect only what they consider embodies intellectual creativity, the Convention takes no sides, offers no interpretation and leaves member countries free to the make protection conditional on the work being fixed in some material form. This provision, which was first written in in Stock- holm (in 1967), offers all the latitude Necessary: the countries are free to demand such Generally either fixation or for one or more categories of works.⁶⁸

It is important to note that this requirement only applies to literary, dramatic, musical and artistic works. For copyright to subsist in a literary, dramatic, musical, and artistic works, there must be some physical embodiment of the creation.

For most works, this distinction is not very important. For instance, when writing a book, creating a statute or computer program - the outcome will be resulted in a tangible medium; as of it will Immediately Obtain a copyright protection. Music or visual arts - the creation of a work can be an intangible. However, the work is not fixed in a tangible medium.

As the Berne Convention did not provide any further explanation on what is meant by material form, nor in the Indonesian Copyright Law, Australia is one

⁶⁸ *Op.Cit.*

of the member countries of the Berne Convention does provide further explanation of the matter. According to the Australian Copyright Act 1968, under section 22 (1) the Act Provides that a literary, dramatic, musical or artistic work is made when it is first reduced to writing or some other material form.⁶⁹ Material form, According to Section 10 of the Australian Copyright Law 1968 is defined as follows:

"Material form, in relation to a work or an adaptation of a work, includes any form (Whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (Whether or not the work or adaptation, or a substantial part of the work or adaptation, can be Reproduced).⁷⁰"

Hence, referring to the aforementioned article, no copyright protection is afforded unless the knowledge is recorded into some material form and can be reproduced afterwards. Then to the works that result is not in the form of tangible or material, must be recorded in a medium that can be used as evidence and reproduced. It also means that the material form of a work does not need to be permanent, but does need to be a form from the which the work can be Reproduced.

3.2 Differentiation Between Material and Immaterial

Intellectual Property Rights is the right material, the right thing is something that comes from the work of the brain, the result of the ratio. The results of the work of human reasoning ratio. His work in the form of immaterial objects. Intangible objects.⁷¹ The types of objects, as referred to in Article 503 Criminal Code - the Civil Code is divided into two as follows:

"Properties are tangible and non-tangible."

Intangible or immaterial form (onlichme lijke Zaken) in the form of rights that we may exemplify such as the right to collect, ha katas interest money, lease

⁶⁹ Australian Copyright Act 1968

⁷⁰ Ibid.

⁷¹H. OK. Saidin, Legal Aspects of Intellectual Property Rights (Intellectual Property Rights), PT. RajaGrafindo Persada, Jakarta, 2004, page 9

rights, right to build, right to cultivate, not on objects in the form of network, intellectual property rights, etc.⁷² While tangible or material (*luchamelijke zaken*) is tangible objects that can be seen with the eye. Both objects, tangible and intangible objects, they can be the object of rights.

Intellectual Property Rights can be the object of rights, especially when participating utilized by other parties through licensing. Right to tangible objects called absolute rights over an object, while right over intangible objects called absolute rights over a right.⁷³

According to the civil law system, humans have a natural intellectual property rights which are the product of human thought doings. This means that humans have a natural right to the nature of the products in which material and immaterial, the periodical of intellectual work and should be recognized ownership. If the concept of thought is thus applied to copyright, it can be said that the theory is the most essential foundation owned an intellectual authors of the work or the results of thought produce creations.⁷⁴

Intellectual property laws differ from the actual object, particularly in the case of embodiment. Copyright in a painting, for example, have separate assets of ownership canvas paintings. Another example is kekita we buy a book, where the book physically we have, but not the rights to the book that we buy.

Related to that, it can be described in a case involving Charles Dickens, which is a famous author. Before he died, Charles was made a writing of the book for their children but chose not to publish it. In her will, she gives her in-law the entire personal documents, while the remainder of his wealth in the form of lands given to their children. Among the documents were inherited to the in-law, there is a book that Charles Dickens wrote. The law intends to publish a book written by Charles Dickens and earn royalties from the book for their own benefit. However, children of Charles Dickson bring him to court and pleaded with the royalties from book sales is not extended to the law, but to them as his

⁷²Ibid. Page 12.

⁷³ Abdulkadir Muhammad, *Assessment of Economic Law of Intellectual Property Rights*, PT. Citra Aditya Bakti, Bandung, 2001, page 3.

⁷⁴ Damian. *Op.Cit. Hukum Hak Cipta*. Page 28.

children.⁷⁵ In such case, the court ruled that the law Charles Dickens have ownership rights over documents it receives from the inheritance, but he is not entitled to own the copyright of these documents. Thus, the court ruled that the copyright of the book remains fall to the children of Charles Dickson. Inside his will, Charles Dickson not explain immediately that copyright, apart from the documents he had collected, fell into the hands of law. So on the basis tersebutlah court took the decision, in which the profits and royalties from sales of the book obtained by the children, not the law.⁷⁶

Similarly plumpness modern intellectual property rights regime is not appropriate in providing protection against other forms of intangible cultural heritage. Copyright requires the identification of specific authors, conservation work into tangible form and only provides protection for claims of individuals, rather than collective. Therefore it can not be protected.⁷⁷

A special characteristics of the intellectual property is one of them is that intellectual property is a form of wealth, though in intangible form. Regarding the intangible wealth of property, according to Black's Law Dictionary is defined as follows:

"As used chiefly in the law of taxation, this means terms such as property and marketable has no intrinsic value, but is Merely the representative or evidence of value, such as certificates of stock, bonds, notes promisor, copyrights and franchises."⁷⁸

Furthermore, intangible properties in the Black's Law Dictionary is defined as follows:

"Property the which can not be touched Because it has no physical existence, such as claims, interests, and rights."⁷⁹

Based on the above two definitions which states that the intangible property is an object that does not have a value or market price, but these objects can represent these values. Examples of objects that can hold the value of something intangible is certification and *warabala*. Both, though only the shape of

⁷⁵ *Buku Panduan dasar Hak Kekayaan Intelektual, coordinated by Asian Law Froup Pty Ltd on blahf of Aus AID, page 55.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Black's Law Dictrionary, West Publisihing Co., Centenial Edition (1891-1991), Abridged Fifth Edition, 1991, page 558.*

⁷⁹ *Ibid. page 846.*

a piece of paper, but not kerta the valuable and can be assessed, but the "value" or "price" of the charge contained in a piece of paper. As with copyright generated through the mind or the intellect of someone human, and formed a Harya copyright, intellectual intangibles should be channeled through the media that can hold those ideas.

Copyright is the right material that is intangible, it is proposed by Laddie Presscot and Vitoria. According to him, property rights over objects divided into two, namely the object is not moving and moving objects. Examples of the immovable is land that can be given property rights, the right to cultivate, or on state land use rights to the land. While different moves is divided into two, namely the tangible and intangible objects. Examples of tangible objects are automobiles, aircraft, and books. Meanwhile, examples of intangible objects are accounts receivable and intellectual property, the intellectual property which may in Gant by copyright, patent or trademark rights.

Then, Mariam Darius also argued that the legal system object contains a number of principles, including the right of property provide a strong authority to the owner, the rights that can be enjoyed, transferred, mortgaged, and leased.⁸⁰ Therefore a creature is an intangible right katas, then her attached an essential feature of the right to object, the rights attached to these objects will continue to follow the object anywhere and in the hands of whoever it is otherwise known as the *doit de suite*.⁸¹

Based on the views outlined above, the creations are the product of the human mind, has a value that can be appreciated. A creation of an object that is intangible, but has no value. Therefore, intangibles may further generate economic benefits and raises the concept of wealth. These two things, namely the economic benefits and the concept of wealth, making intellectual creations as an intangible difference to the business world considered a company asset.⁸²

Related to intellectual property law, almost all countries in the world have relatively similar problems in dealing with the development of technology and

⁸⁰ Mariam Darius, Arts, Arena Hukum Bisnis, Vol.1, 1994, page 79.

⁸¹ Mariam Darius, Mencari Sistem Hukum Benda Nasional, (Jakarta: Penerbit Alumni 1981), page 24.

⁸² Damian, *Op.Cit.*, page 40.

society that is constantly changing. Intellectual property law basically to be able to adjust to technological developments generated by the inventors and creators. The lawmakers around the world, not only in Indonesia, struggling to follow new development in the field of computer technology and the Internet in an effort to protect the interests of creators. The judges also often struggle to fit in the new creation and discovery into the basic principles of traditional and intellectual property law. Intellectual property law itself, often accommodating about what is emerging and ever-changing, also to set between what can and what can not be protected. Therefore, the law of intellectual property rights is one of the branches of law are the most criticized.

3.2.1 Restrictions for Protected Works

There are several reasons for the limitation of the scope of copyright⁸³ :

1. A copyright has the purpose of promoting or announcing progress of science and useful arts. The development requires the creator to come free to create a work than its predecessors. If, creator of the first discuss the theory, tells a principle or tell a plot, and it can prevent all parties to use these theories, the development of science and technology will be hampered and underdeveloped.
2. In intellectual property law, there is a regime which gave reward to innovation, the award is known as a patent. Unlike patent protection to copyright protection and the conditions in which the procedure is more complicated and must be pursued more thoroughly. The innovator must be able to prove that his invention is novel and unexpected by means its function is non-obvious. For example, in plastic to keep the medicine, the glue is red and blue, which when put together these patches will be purple. The purpose of the adhesive made with two colors is that patients know when the plastic of the drug has been closed so that the drug remains hygienic. If the copyright protection into the realm of ideas, the concept and the like

⁸³ Schreter & Thomas, *Op.Cit.* page 32.

can be given patent protection. This may disrupt the objective of the patent system settings.

3. Expansion of copyright protection to the realm of ideas can lead to serious problems. Any person other than the creator of the first unable to talk about something if it relates to the creation of the first creator. The example in the case of *Lee v Runge*, the level of the Supreme Court of the United States of America, Judge named Douglas decided as follows:

"The arena of public debate would be quiet, indeed, if a politician could his copyright or a philosopher his speeches treaties and thus Obtain a monopoly on the ideas contained. We should not construe the copyright laws to conflict so patently with the values that the first amendment was designed to protect. "

Of the three reasons above, a restriction should be applied for copyright protection that is not too broad in scope and ambiguous. Arrangements concerning copyright aimed at protecting the rights of creators over the creation of the actions of others without permission exploit their works, one example is to publish or reproduce the copyrighted work.⁸⁴ However, every country has the right to customize and extend copyright protection in accordance with the needs of their respective countries. The legal basis of the revelation According to Article 10 concerning Limitations and exceptions of the WIPO Copyright Treaty (1996) are as follows:

- (1) *Contracting Parties may, in their national legislation, provide for limitation of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in the Certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*
- (2) *Contracting Parties shall, when applying the Berne Convention, confine any limitation of or exceptions to rights Provided for Certain Therein to special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁸⁵"*

According to the article above, the WIPO Copyright Treaty gave to each member states to set limitations and exceptions regarding the creation Can Best

⁸⁴ Tim Lindsey An introduction of Intellectual Property Rights, (1996-1997)

⁸⁵ World Intellectual Property Organization Copyright Treaty, Art. 10.

Be protected in certain cases beyond the provisions in this agreement, but it should pay attention to the interest of creators and not to cause harm.

In a presentation that titled Copyright and Education, presented by Andrew Yeates, there is the three-step test in the scope of copyright protection, among others:

1. Article 13 of the TRIPS on the Limitations and Exceptions

" Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

."

2. Article 9 of the Berne Convention

"(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of reviews these works, in any manner of form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interest of the author. "

3. Article 5 points (5) of Directive 2001/29 / EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

"The exceptions and limitations provided for in paragraphs 1,2,3 and 4 shall only be applied in special cases certain roomates do not conflict with a normal exploitation of the work and other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder. "

Based on those chapters, if Compared to the WIPO Copyright Treaty, both have a commonality. Each country is given the authority and the right to protection of copyright restrictions, especially in certain cases that need attention. Countries should also be able to pay attention to the normal range of use and exploitation of an invention, so it does not cause any harm or aggravating the creator as the right holder.

3.2.2 Legal Basis of Intangible Works

Creations as though the result of human thought and inherent in alamian as a creator of wealth, has received adequate legal protection, because it is one of

human rights. The rights set out in Article 27 of the Universal Declaration of Human Rights in the which is divided into 2 (two) points items, namely:

- (1) *Everyone has the right freely to Participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
- (2) *Everyone has the right to the protection of the moral and material interest in the resulting from any scientific, literary, or artistic production of the which he is the author.*⁸⁶

This shows that the law gives awards and high places to humans as personal life, including creations produced in the form of intellectual property that is intangible. In other words, the concept of which is so exclusive penghargaan given to the individual as an individual creature of God's creation is essentially capable of creating not so individualistic as imagined.⁸⁷ Thus, it can be concluded also that copyright is an intangible in the form of work.

⁸⁶ Universal Declaration of Human Rights, Art. 27

⁸⁷ Damian. Op.Cit. Hukum Hak Cipta, page 28.

CHAPTER IV

LEGAL IMPLICATION ON THE COPYRIGHT PROTECTION OF NON-MUSICAL WORKS

4.1 Application of Fixation Doctrine in the Copyright Law No. 28 of 2014

Fixation, as stated in the Indonesian Copyright Law 2014 in Article 1 (3) of the Indonesian Copyright Law of 2014, in the Indonesian language is defined as follows:

“Perekaman suara yang dapat didengar, perekaman gambar atau keduanya yang dapat dilihat, didengar, digandakan, atau dikomunikasikan melalui perangkat apapun.”

Meanwhile, quoted from the official translation of the Indonesian Copyright 2014 Obtained from WIPO, such article if translated into english is stated as follows:

“Fixation is an audible sound recording, recording images or both, the which can be seen, heard, Reproduced, or otherwise communicated through any device.”⁸⁸

Application of fixation on the Indonesian Copyright Law was initiated in 2014 when Indonesia Became one of the member states of the Berne Convention, the first international treaties on copyright.

According to Mr. Agung Dhamarsasongko as Head of Public Relations of the Directorate General of Intellectual Property, which stated that the concept of fixation in the Copyright Act No. 28, 2014 has been filed with the consideration of fixation associated only with neighboring rights.⁸⁹ It is also recognized by the information given by Mr Andi Kuniawan, SH, as officials from the Directorate General of Intellectual Property Copyright section. Consideration of the House of Representatives to put the definition of fixation into the Indonesian Copyright Act is because the doctrine of fixation alone is clearly defined in Article 1 (3) and Article 1 point (1) as follows:

⁸⁸ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), WIPO Translation.

⁸⁹ Overview Juridical Doctrine Fixation

Article	Indonesian	English
<i>Article 1 point (1) concerning the definition of copyright</i>	<i>Hak cipta adalah hak eksklusif pencipta yang timbul secara otomatis berdasarkan prinsip deklaratif setelah sesuatu ciptaan diwujudkan dalam bentuk nyata tanpa mengurangi pembatasan sesuai dengan ketentuan perundang-undangan.⁹⁰</i>	<i>Copyright is the exclusive right of the creator that arise automatically based on the principle of declarative after an invention is embodied in a tangible form without prejudice to the restrictions in accordance with the provisions of the legislation.⁹¹</i>
<i>Article 1 point (3) concerning the definition of creation</i>	<i>Ciptaan adalah setiap hasil karya cipta di bidang ilmu pengetahuan, seni, dan sastra yang dihasilkan atas inspirasi, kemampuan, pikiran, imajinasi, kecekatan, keterampilan, atau keahlian yang diekspresikan dalam bentuk nyata.⁹²</i>	<i>Creation is any copyrighter work in the fields of science, art, and literature produced on inspiration, ability, thought, imagination, dexterity, skill or expertise that is expressed in a tangible form.⁹³</i>

The essence of the doctrine of fixation itself is the embodiment of an idea into a work that can be seen, heard, and touched. According to the consideration of the Parliament, in the creation itself there are the rights of parties other than the moral rights of the creator. Thus, according to Mr. Court that the definition of this fixation insert for the protection of neighboring rights. Neighboring rights in copyrighted works is an exclusive right for the actors comprising:

- a. Moral rights of performers
- b. Economic rights of performers
- c. Economic rights of phonogram producers
- d. Economic rights of broadcasters

⁹⁰ *Op.Cit.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

4.1.1 The Relation Between Fixation Doctrine Under the Indonesian Copyright Law 2014 And International Agreements

Indonesia as one of the member states of the Berne Convention helped implement the doctrine of fixation in its laws, namely the Indonesian Copyright Act 2014, in the which is not listed on the previous Indonesian Copyright Law. In the Indonesian Copyright Law of 2014, as described above, provides a definition of fixation. The Berne Convention itself does not provide a definition of what is a fixation, but gives freedom to the member states relating to the application of fixation and any work that the country will be protected by copyright.

Then, international agreements relating to copyright are also found in the WIPO Performance and phonogram Treaty, which is in the chapters provide definitions of fixation. In the treaty, the fixation is defined as follows:

"Fixation" means the embodiment of sounds, or of the representations thereof, from the which they can be perceived, Reproduced or communicated through a device⁹⁴"

The WIPO Performances and Phonograms Treaty offer section with the rights of two kinds of beneficiaries, particularly subject in the digital environment items, namely:

- (i) Performers (actors, singers, musicians, etc);
- (ii) Producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds.⁹⁵

By reviewing this, it can be concluded that the WIPO Performance and Phonograms Treaty is an international treaty which specifically regulate copyright on performances and phonograms only. Thus, the definition of fixation provided by the treaty does not include copyrighted work as a whole, but only in the works involving the said performance and producers of phonograms. In other words, the type of work protected by the treaty is narrower compared to protected works are contained in the Berne Convention. WIPO Performance and Phonograms Treaty are specifically governing performance and phonograms only.

⁹⁴ WIPO Performance and Phonograms Treaty, Art. 2

⁹⁵ http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html

When compared with the definition of fixation on the Indonesian Copyright 2014, both have the same meaning in language. Therefore reference to the WIPO Performance and Phonograms Treaty, fixation in the Indonesian Copyright Law 2014 refers to the word which when translated, in the Indonesian language referred to as "recording". Fixation the roots of the Berne Convention are supposed to refer to the real form of a work as a condition of copyright protection, not referring to the recording sound or images.⁹⁶

Thus, it can be concluded that the need for the definition of fixation for reasons of editorial to become clear that the fixation is for the related rights and it was adopted from the WIPO Performance and Phonogram Treaty and not of the Berne Convention, which the agreement is focused on protecting the perpetrators show. As of the adoption of fixation in the Indonesian Copyright Law of 2014, in terms of Article 1 point (13) becomes incorrect when compared with the international standard of fixation according to the Berne Convention namely "works shall be fixed in material form", but refers to the standard in the which sets by WIPO Performance and Phonogram Treaty.

4.1.2 The Intention Behind the Formulation of Fixation Under Article 1 point (13) of the Indonesian Copyright Law 2014

Hence the term fixation in the Indonesian Copyright Law in 2014 referring to the WIPO Performance and Phonograms Treaty, then in Indonesian important elements contained in the definition is a "*rekaman*". In fact, according to Mr. Andi, translation and the inclusion of the notion of fixation in the Indonesian Copyright Law is not solely limited to the works associated with phonograms, but all types of work listed in Article 40 point (1).

According to him, the fixation is not just a recording, but rather a manifestation, or in Indonesia known as "*perwujudan*". The embodiment of the works in Article 40 point (1) is very diverse, as copyright provides protection towards the following works:

- a. Books, pamphlets, typographical arrangement of a published work, and all other written works;

- b. Speeches, lectures, and other similar creation;
- c. Props made for the purposes of education and science;
- d. Songs and/or music with or without text;
- e. Drama, musicals, dance, choreography, puppet shows, pantomimes;
- f. Works of art in all forms such as painting, drawing, engravings, sculpture, calligraphy, statues, or collage;
- g. Works of applied art;
- h. Works of an architecture;
- i. Maps;
- j. Batik artwork or other patterns;
- k. Photographic works;
- l. Images;
- m. Cinematographic works;
- n. Translation, interpretation, adaptation, anthologies, databases, adaptation, arrangement, modification, and other works as the result of transformation;
- o. Translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions;
- p. Creation or data complication, either in a format that can be read by computer or other media;
- q. Compilation of traditional cultural expressions during the compilation of an original work;
- r. Video games;
- s. Computer programs.⁹⁷

Article 1 point (13) is intended to cover the expression of all the protected works contained in Article 40 point (1) items, namely Reviews These works as literary, artistic, and scientific works. With the purpose of referring to the three types of works are, in fact complied with the type of work protected by the Berne Convention. However, because of the definition adopted fixation of the WIPO

⁹⁷ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), *WIPO Translation*, Article 1 point (3).

Performance and Phonograms Treaty, fixation on the Indonesian Copyright Law 2014 Seemed to be narrowed so that the user is not appropriate because it suggests that the fixation only refer to the works related to the performance and phonograms.

When studied in Article 1 point (13) and Article 40 point (1), which can be categorized as merely fixation songs and / or music with or without text. It is also delivered by Prof. Agus Sardjono which reveals that the definition of fixation in the Indonesian Copyright 2014 only to works of music.

Thus, it can be concluded that an error in the intention of formulating fixation into the Indonesian Copyright by what has been outlined in the legislation. Between the intention and what is formulated in the Indonesian Copyright 2014 refers to the contrast. Fixation is a doctrine that applies to all types of creation, while translated into the Indonesian Copyright Law 2014 refers only to the song or other musical works.

4.2. Form of A Work In order to be considered as Fixation

Fixation in a physical medium is required as a condition for copyright to serve as both proof of a work's existence and evidence of a creator's expression.⁹⁸ Thus an idea needs to be expressed in a tangible form beforehand in order to be protected by copyright.

There are materials and media used to deliver a masterpiece. The works of the most common and easiest recognize that the work is protected by copyright is a story or science presented in a book, a song distributed via CD, cassette, or other media, or the works of others basically realized in solid media. However, human creativity continues to grow. Media and also the material used by humans to devote his idea is also increasingly diverse. Many works are made of materials that cannot be existed permanently.

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https://books.google.co.id/books?id=BWJCDgAAQBAJ&pg=PA149&lpg=PA149&dq=copyright+fixation+according+to+the+berne+convention&source=bl&ots=Wo-PQgN7Fs&sig=szF7DEFeyKnGbbBibmsC1tntaME&hl=en&sa=X&redir_esc=y#v=onepage&q=copyright%20fixation%20according%20to%20the%20berne%20convention&f=false

In essence, a work is, when it is expressed, either permanently or temporary has been considered fixed or being embodied. For example, a sand painting. Sand painting is a work of art that is realized by making a drawing or patten. on top of a medium using sand. The sand is very easily destroyed and lost, so that the sand painting can not endure permanently. However, the sand painting is still considered a masterpiece. In addition though born of human thought and creativity, the original sand painting that has been materialized despite temporary.

Intellectual property is an intangible work, so without being stored in a solid, already materialized origin can be regarded as the work of creation that could be protected by copyright. However, the benefit of an intangible work is documented in a solid medium is as evidence, as of can be reproduced. With being expressed or documented in a solid media, it can be used as evidence against the occurrence of infringement against the work.

4.3 The Impact of Fixation Doctrine to Non-musical Works in Indonesia

Although Article 1 point (13) of the Indonesian Copyright Law in 2014 adapted and translated from the WIPO Performance and Phonograms Treaty, copyright protection is granted to the work songs and other works listed in Article 40 point (1) Werner the same. The whole work is copyrighted by the same time period, to be divided into 2 (two) categories. This is explained in Article 58 and Article 59 of the Indonesian Copyright Law, 2014.

The first categories of the length of copyright protection is According to Article 58 of the aforementioned law, in the which states the following:

"(1) Protection on Copyright on:

- a. Books, pamphlets, and all other written works;*
- b. Speeches, lectures, speeches, and other Similar creation;*
- c. Props made for the purposes of education and science;*
- d. Songs or music with or without text;*
- e. Drama, musicals, dance, choreography, Puppet Shows, pantomimes;*
- f. Works of art in all forms such as painting, drawing, sculpture, calligraphy, sculpture, sculpture, or collage;*
- g. Works of architecture;*
- h. Maps; and*
- i. Batik artwork or other motives,*

Valid for the life of the Creator and continued for 70 (seventy) years after his death, starting from January 1 of the next year.

(2) When an application is Referred to in subsection (1) is owned by two or more

- persons, protection of copyright is valid for the life of the Creator who Died most recently and lasts for 70 (seventy) days thereafter, commencing January 1 of the next year ,*
- (3) Protection copyright to a work Referred to in paragraph (1) and paragraph (2) are owned or held by the legal entity shall be valid for 50 (fifty) years since the announcement was first made.⁹⁹"*

The second category of the length of copyright protection is According to Article 59 of the aforementioned law, in the which state the following:

- "(1) The Copyright Protection on:*
- a. photographic works;*
 - b. images;*
 - c. cinematographic works;*
 - d. video games;*
 - e. computer programs;*
 - f. appearance of the paper;*
 - g. translation, interpretation, adaptations, Anthologies, databases, adaptation, arrangement, modification and other works of the results of the transformation;*
 - h. translation, adaptation, arrangement, transformation or modification of traditional cultural expression;*
 - i. Creation or compilation of data, either in a format that can be read by the computer program or other media; and*
 - j. compilation of traditional cultural expressions during the compilation of an original work, is valid for 50 (fifty) years since the announcement was first made.*
- (2) Protection Copyright on a work of applied art shall be valid for 25 (twenty five) years from the announcement was first made. "*

Based on the aforementioned Articles, it can be concluded that there is no special protection to the songs as the only work that is in accordance with the understanding fixation in the Indonesian Copyright Law of 2014. All of these works are given the same protection by law.

Although the translation of definition fixation in the Indonesian Copyright Law 2014 is not appropriate or wrong, since diundangkannya these laws, there is never a case associated with it or caused by it. However, the definition is irrelevant and inefficient existence in the law. So, with the presence of fixation definition in Article 1 point (13) actually gives the impression of ambiguity toward fixation itself.

So with that, the fixation element was the inclusion in Article 1 (1) and article 1 point (3) the Indonesian Copyright 2014 as Mentioned above, does not

⁹⁹ Indonesia, Law No. 28 of 2014 (*Lembaran Negara Republik Indonesia Tahun 2014 nomor 266*), WIPO Translation.

have a significant influence on the implementation of copyright law in Indonesia. With that being said, Also delivered by Pak Andi, that in fact there will be no effect if Article 1 (13) concerning the definition of such fixation in the clear because the element of fixation is already listed in Article 1 point (1) and Article (1) point (3) of the Indonesian Copyright Law, 2015.

4.3.1 Solution

Fixation definition in Article 1 point (13) makes no changes or significant impact on the development and progress of the implementation of the copyright in Indonesia, and also does not give a negative impact on the implementation of the Act. This is reflected because after the promulgation of the article, there is never a case involving or caused by the existence of Article 1 point (13) is.

However, for the sake of efficiency than the Indonesian Copyright Law itself, it will not be a problem if the article is eliminated. According to Pak Andi, the abolition of the article will not provide any impact on the implementation of the Indonesian Copyright Law, there will be no change to the dynamics of implementation.

CHAPTER V

CONCLUSION AND RECOMMENDATION

5.1 Conclusion

In conclusion to the research of this thesis, the research problems set forth in Chapter I have been answered based on theories and facts gathered.

Article 1 point (13) of the Indonesian Copyright Law 2014 covers a definition of fixation in which adopted and translated from WIPO Performance and Phonograms Treaty. In which the treaty focuses only on performance and phonograms, the definition under the Indonesian Copyright Law 2014 seemed to be vague as to what works are protected by copyright. Many think that the translation of fixation under the Indonesian Copyright Law 2014 was mistaken. The definition of fixation set forth in the aforementioned law does not necessarily cover all the type of works contained in Article 40 point (1) concerning protected works, based on research and doctrines it only refers to songs. Therefore, the definition of fixation in the Indonesian Copyright Law 2014 does not imply appropriately as to the kinds of works protected by copyright.

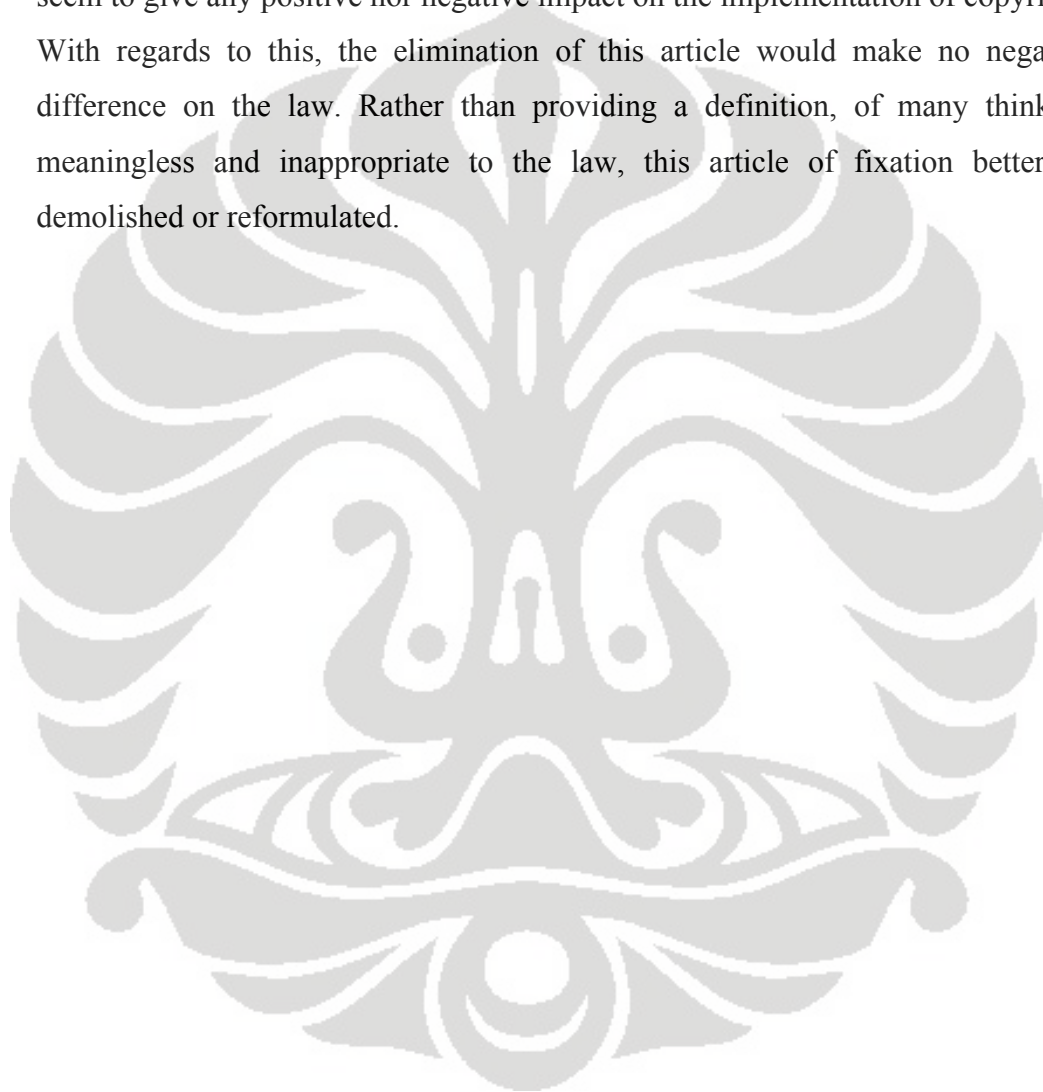
With that being said, the Indonesian Copyright 2014 does partially comply with the international standard of fixation set forth in Article 2 of the Berne Convention, in which requires a work shall be fixed in some material form. Definitions on Article 1 point (1) and Article 1 point (3) of the Indonesian Copyright Law 2014 have actually provided what is meant by fixation. In compliance to the two articles, it covers literary, artistic and scientific work to be protected by copyright – equivalent to the protected works set forth in the Berne Convention. However, it partially in compliance with the Berne Convention when it comes to Article 1 point (13) in which provides a definition of fixation in which refers to WIPO Performance and Phonograms Treaty, made the Article 1 point (13) of the aforementioned law to be inaccurate.

However, due to this translation inaccuracy of fixation under the Indonesian Copyright Law 2014, there has been no legal dispute or issues occurred since the article concerning the definition of fixation was formulated and enacted. Although Article 1 point (13) of the Indonesian Copyright Law 2014 only seem to protect song, it does provide the same protection to the other works

in which contained in Article 40 point (1) of the Indonesian Copyright Law. Every work is given the same amount of right and length due to its copyright.

5.2 Recommendation

As though it does not trigger any legal dispute or issue, the fixation definition in Article 1 point (13) of the Indonesian Copyright Law 2014 does not seem to give any positive nor negative impact on the implementation of copyright. With regards to this, the elimination of this article would make no negative difference on the law. Rather than providing a definition, of many think as meaningless and inappropriate to the law, this article of fixation better be demolished or reformulated.



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