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### Declarative and Constitutive Principles in Copyright Protection

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**Abstract:** This study was aimed at providing full copyright protection toward the copyright works and providing automatic exclusive rights based on declarative and constitutive principles. This study used statute and historical approach, and thus, was a normative study. In addition, it was a descriptive study, which used primary and secondary legal sources. It discussed legal protection and originality of the copyright works. Legal protection was offered by Copyright Act No. 28 of 2014, provided no uncertainty and classified copyright protection into two categories: declarative protection and constitutive protection, in which this act did not make it mandatory for registration. Meanwhile, legal protection needed legal certainty for its application. In relation to the originality of the copyright works, the aforementioned law insisted that it is required for a copyrighted work to be protected. This protection was given to man-made creation, which consisted both of intellectuality works and originality work. Originality means that the works are authentically created by the person claiming as the creator of that work and that it has never been altered. Copyright protection is also known for its originality of how the creator creates that particular work.

**Keywords:** Declarative, Constitutive, Protection, Originality.

#### I. INTRODUCTION

Copyright work is a manifestation of creativity. Copyright work, within the Copyright Act Number 28 of 2014, is defined as a manifestation of creation in science, arts, and literature created based on the inspiration, ability, thought, imagination, dexterity, and skillfulness. Copyright work needs legal protection. This legal protection will ensure the rights of the works and its creator not to be abused. Legal protection is for legal certainty of the works. Copyright is an exclusive right which automatically given based on the declarative principle of a copyrighted work. Its right observes the current regulation Nainggolan, 2016).

The declarative principle is automatically embedded in the creator as the basic idea of the copyright system to protect a work of creativity. Legal protection only effective on material creations that can be seen, heard, or read (Paserangi & Ahmad, 2011).

The declarative principle is a principle obtained by a creator of work when it has taken a physical form. This declarative principle is to directly protect the creation, whereas the constitutive principle is a principle applied to

protect a creation following its registration. The declarative principle of creation is automatically protected when it has taken a form and has been announced. This legal protection is stipulated by the Copyright Act No. 28 of 2014. In addition, this Act also stipulates the registration of copyright. This has proven that copyright protection toward a man's work is yet fully protected. Declarative and constitutive principles are contradictory to each other as the definition of declarative principle does not make it obligatory for a work to be registered to obtain protection, whereas the constitutive principle necessitates for a work to be registered. The problem often arises when the registration of a work is made by others who are not creators of that particular work. Therefore, this study would like to explore this issue, and the title of this study is "declarative and constitutive principles in copyright protection."

#### II. METHODS

This study uses a regulatory approach. The legal source uses are primary and secondary sources as follow: Primary Legal Source: is an authoritative legal source. It consists of legislation and judges' verdicts. The secondary legal source is complementary for primary legal sources such as legal dictionaries, textbooks, and legal journals.

#### III. RESULTS AND DISCUSSION

##### A. Legal Protection

Legal protection in Copyright Act No. 28 of 2014 is intended to provide protection toward a man's work from misappropriation or abuses for personal interest by piracy or plagiarism. Protection for creation is stipulated on the second chapter on creation, which protected by Article 40 (1). Creation protected encompasses creation in science, art, and literature, which consists of: Books, pamphlets, the layout of published writings, and all other writings; Speech, lecture, and similar types of works; Demo kit made for education and science purposes; Song and music with or without text; drama, drama musicale, dance, choreography, puppets, and pantomimes; artworks in all forms such as painting, picture, carving, calligraphy, crafting, statue, or collage; applied artworks; architectural works; maps, bulk artworks or other motive arts; photography works; Portraits; Cinematography works; Translation, interpretation, adaptation, anthology, database, arrangement, modification, and other transformative works; Translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions; Compilation of works or data, either in reading format or in computer programs or another form of media; Compilation

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*by* Nur Mohamad Kasim

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## III. RESULTS AND DISCUSSION

### ➤ Legal Protection

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of traditional cultural expressions as long as the compilation is an original work; Videogame, and Computer program.

Based on the description above, the objects protected by copyright have been stipulated by the copyright Act as mentioned in the Article 1 (1) of the Act that copyright is an exclusive automatic right owned by the creator of a work based on the declarative principle following the creation or materialization of the work without any limitation as stipulated by the law”

Meanwhile, an exclusive right is a right that only belongs to the holder or owner of the right, which gives freedom to the owner or holder of that right to utilize that work, and others are prohibited from utilizing that copyright without obtaining prior consent from the owner or the holder of the copyright (Putra, 2014).

Declarative principles, which automatically embedded to the creator, are the basic idea of the copyright system to protect the man's creation due to intellectual abilities. Legal protection can only be applicable when the creation has taken form into unique visible, hearable, and readable forms. As explained above, the declarative principle is the automatic protection of material creations. However, this principle has a downside on its legality. Copyright Act No. 28 of 2014 also acknowledges legal protection for a work when it has been registered. However, this declarative principle is mentioned in the above mentioned Act.

The Copyright Act No. 28 of 2014 is yet fully protected the works. Making a verbal claim of works is easy when only a declarative principle of the work is applied.

Within a declarative principle of a system, registration of the work is not necessary (the term registration is a similar term used in this Act is similar to the term recording, which was used in the previous Copyright Act). In other words, regardless of the creator who did not register his or her creation, his or her rights toward the work are still protected when that creation has materialized. This right is a control right, thus, there will be no one that can utilize this right without the consent of the creator. Hence, the downside of this declarative system, a lack of legal certainty. It is possible for the creator to be contested by another party who may claim that they are the first creator of that work. It is possible for the contestant to prove that he/she is the first creator and user of that work (Stanzah & Ramli, 2018).

Therefore, legal protection needs legal certainty. Satjipto Rahardjo explains that one of the characteristics as well as the objective of the law is to provide protection to the people, and legal protection to the people should be in the form of legal certainty. Legal certainty in the registration of a work is still unclear as the Copyright Act does not necessitate the registration of work as it has been automatically protected by the declarative principle. Thus the creators often lean toward this declarative principle and

neglect the constitutive principle offers within this Copyright Act.

#### ➤ *The Originality of the Work*

Work protection (Indrawati, 2015) is given to man-made material works, which are produced from their intellectuality as well as contains originality. Copyright law does not protect ideas; it protects individual unique and original creations.

A work (Sinaga, 2017) is considered to be original from the way it is created. In line with the community and technology rapid development, the Copyright Act also protects copyright intellectual efforts of the creators in developing the ideas into material forms. Thus, the idea is visible and hearable. Copyright protection also acknowledges the originality principle. Originality principle is necessary for a work's copyright to be protected. This originality is different from a novelty in a patent, as the originality principle is not copying from other works. Thus, it can only be proven by the creator of that work.

Copyright upheld originality, creativity, and manifestation of a work. Based on these, a work is protected by the Copyright Act No. 28 of 2014 in Article 1 (1, 2, and 3). This Article 1 insists: Copyright is an exclusive right of the creator that automatically arises based on the declarative principle of work following a manifestation or materialization of a work with its limitation set by the observed regulations. A creator is a person or several people who individually or collectively create a unique and personal work. Creation is every work in science, art, and literature, created on inspiration, thoughts, imagination, skillfulness expressed in material form.

The originality of the work is in the sense that particular work is do created by the creator, and as such, its originality is preserved. For instance, in the creation of a song, it involves a process of composing a song in the form of the lyrics and then transforming the lyrics into notes. The originality in the songwriting relates to the documents or writings during which the song is created. Within the WIPO Glossary of Terms of the Law of the Copyright and Neighbouring Rights, the term, “originality” is defined as: “Originality in relation to work means that it is the author's creation and is not copied totally or essentially from another work. Originality is required by copyright law for the composition of the contents as well as the form of their expression, but not in relation to more ideas, information, or methods embodied in the work. Originality is not to be confused with novelty; the pre-existence of a similar work unknown to the author does not affect the originality of independent creation.” Meanwhile, the Berne Convention did not insist on originality as described in Article 1 (3) of Copyright Act, however in several regulations on originality such as: Article 2 (3) which stated that all forms of derivative works obtain protection as of the original work, without limiting the legal protection toward the original work. Article 2 (5) states that encyclopedia and



anthology are also protected, just like the original works as they need intellectual ability in their compilations.

The stipulations within the *Berne Convention*, as mentioned above, implement originality in the provision of copyright protection even in Article 2 (5). It acknowledges creativity as the originality requirement of work.

#### IV. CONCLUSION

The declarative principle is automatic legal protection based on the exclusivity right within the copyright, whereas the constitutive principle is a protection of a copyrighted work based on the registration of a work. These principles are regulated within the Copyright Act No. 28 of 2014. The declarative principle and constitutive principles are contradictory to each other as in the declarative principle; protection is given automatically upon the declaration or manifestation of the work, whereas in constitutive principle, legal protection is given upon registration of a work. In relation to the originality, copyright demands originality, creativity, and the manifestation of a work to be protected by the law as stipulated within the Copyright Protection Act No. 28 of 2014.

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