

# Penerapan Pasal 5 Ayat (2) Berne Convention on the Protection of Literary and Artistic Works: Hukum yang Berlaku dalam Perkara Pelanggaran Hak Cipta = The Application of Article 5 Paragraph (2) of the Berne Convention on the Protection of Literary and Artistic Works: The Applicable Law in Copyright Infringement Disputes

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## Abstrak

Isu ketentuan mengenai hukum yang berlaku dalam sengketa pelanggaran hak cipta sampai hari ini belum banyak didiskusikan di Indonesia, meskipun isu ini menjadi semakin penting dalam era digital modern. Penelitian ini mengkaji ketentuan-ketentuan tentang hukum yang berlaku dalam pelanggaran hak cipta di Indonesia, dengan memperhatikan semua norma hukum internasional maupun hukum nasional Indonesia yang berhubungan. Pertama, suatu analisa terhadap ketentuan tentang hukum yang berlaku dalam pasal 5 paragraf (2) Berne Convention on the Protection of Literary and Artistic Works dilakukan dengan memperhatikan diskusi antara ahli hukum mengenai penafsiran yang tepat dari pasal tersebut, dan juga dengan memperhatikan berbagai praktek nasional mengenai bagaimana pasal tersebut telah diterapkan oleh berbagai negara. Kedua, implikasi-implikasi terhadap ketentuan hukum yang berlaku dalam Pasal 2 Undang-Undang No. 28 Tahun 2014 tentang Hak Cipta di diskusikan, serta bagaimana pandangan-pandangan ahli dan praktisi hukum di Indonesia tentang ketentuan mengenai hukum yang berlaku yang tepat untuk digunakan dalam sengketa pelanggaran hak cipta. Penelitian ini menyimpulkan bahwa walaupun ada debat tentang penafsiran yang tepat dari Pasal 5 ayat (2) Konvensi Berne, pendapat yang paling umum secara internasional adalah bahwa ketentuan tersebut mengharuskan penggunaan hukum dari negara untuk mana perlindungan diminta (*lex loci protectionis*) saat menangani perkara pelanggaran hak cipta. Di sisi lain, para ahli dan praktisi hukum Indonesia cenderung menggunakan *lex fori* dibandingkan *lex loci protectionis*.

.....The issue of the applicable law in international copyright infringement disputes has to this day received little discussion in Indonesia, despite the increasing importance of this issue in the modern digital age. This study attempts to research the possible rules regarding the applicable law that may currently apply to copyright infringement in Indonesia, by examining all relevant norms of international law as well as Indonesian national law. First, an analysis of the applicable law rules contained in article 5 paragraph (2) of the Berne Convention on the Protection of Literary and Artistic Works is conducted by examining the scholarly debate regarding the proper interpretation of the article, as well as by further examining the various national practices regarding how the article has been applied in various countries. Second, the possible applicable law implications of Article 2 of Law No. 28 of 2014 about Copyright is discussed, as well as the prevailing views of Indonesian scholars and law practitioners regarding the proper applicable law rules to be applied in copyright infringement disputes. The study finds that while there is some debate about the interpretation of article 5 paragraph (2) of the Berne Convention, the prevailing view internationally is that it requires the use of the law of the state for which protection is claimed (*lex loci protectionis*) when dealing with copyright infringement. On the other hand, it appears that Indonesian scholars and legal practitioners tend to apply the *lex fori* as opposed to the *lex loci protectionis*.