



**CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA**

**SUMMARY OF DECISION
FOR CASE NUMBER 63/PUU-XIX/2021**

Concerning

Limitation of Sale and/or Indefinite Transfers of Copyright Transfer Agreement

Petitioner	: PT. Musica Studios, in this case represented by Gumilang Ramadhan as the Company Director
Type of Case	: Judicial review of Law Number 28 of 2014 concerning Copyright (Law 28/2014) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	: Article 18, Article 30, and Article 122 of Law 28/2014 against Article 28D paragraph (1) and Article 28H paragraph (4) of the 1945 Constitution
Verdict	: To dismiss the Petitioner's petition entirely
Date of Decision	: Wednesday, November 30, 2022
Overview of Decision	:

The Petitioner is a Private Legal Entity in the form of a limited liability company, which believes that its constitutional rights and authorities have potentially been harmed by the enactment of the provisions of Article 18 and Article 30 of Law 28/2014. The Petitioner considers that the norm of the *a quo* Article is harming his rights because it requires the Petitioner to return the property rights that already belonged to the Petitioner, because such copyright was obtained through an agreement in the form of a sale. In addition, the provisions of the norms of Article 122 of Law 28/2014 also harm the constitutional rights of the Petitioner because it requires the Petitioner to return the copyrights he has owned through a sale and/or indefinite transfer agreement with the creators and/or performers, especially regarding the copyrights which had been transferred before Law 28/2014 came into effect. Therefore, according to the Petitioner, the provisions of Article 122 of Law 28/2014 have violated the non-retroactive principle through the enactment of the *a quo* Article. In addition, the implementation of the norms of Article 18, Article 30 and Article 122 of Law 28/2014 has the potential to create contradictions in their implementation in relation to the norms of Article 63 paragraph (1) letter b of the *a quo* Law;

In relation to the authority of the Court, because the Petitioner petitioned for reviewing the constitutionality of the norms of Article 18, Article 30, and Article 122 of Law 28/2014 against the 1945 Constitution, the Court has the authority to adjudicate the *a quo* petition;

Regarding the legal standing of the Petitioner, the Court is of the opinion that the Petitioner has explained his constitutional rights which he presumed to have been harmed by the enactment of the norms of the law being petitioned for review, namely the norms of Article 18, Article 30 and Article 122 of Law 28/2014. In addition, the presumption that the constitutional rights are harmed as explained by the Petitioner has a causal relationship (*causal verband*) with the enactment of the norms of the law being petitioned for review. Therefore, based on that consideration, the Court believes that the Petitioner has the legal standing to act as the Petitioner in the *a quo* petition;

Whereas regarding the review of the constitutionality of the norms of Article 18, Article 30, and Article 122 of Law 28/2014 as argued by the Petitioner, the Court is of the following opinion:

- Whereas one of the purposes of establishing Law 28/2014 is to protect the creators of books and/or all other written works, songs and/or music with or without text, as well as performers who have the body of works in the form of songs and/or music so that their motivation to be creative shall not be eroded. Therefore, the agreement in relation to the creation of books and/or all other written works, songs and/or music with or without text that have been submitted or transferred entirely to the buyer indefinitely because the creator has received any cash money, as the concept of a sale and purchase agreement in general, it has been evident that it does not provide a guarantee of equal legal protection;
- Whereas in the era of the development of information and communication technology, technological media can be used as a tool for phonogram producers or copyright buyers to distribute any works or copies whose ownership has been transferred in order to obtain optimal benefits. This means that with the advances in technology, economic rights to the creation can be optimized to gain profits from buying the transfer of such copyright. In this regard, the determination of the time period in the norms of Article 18 and Article 30 of Law 28/2014 was formulated because it has been evident that the sale agreement has harmed the interests of the Creator and Performer;
- Whereas the regulation of the restrictions on copyright transfer through copyright re-transfer is not a new legal action, because this practice has already been implemented in the pioneering countries for the protection of intellectual property, especially in the 181 (one hundred and eighty-one) member countries of the Berne Convention. In this regard, the legislators of Law 28/2014 seek to provide the guarantees of protection and balance to the creators and performers of the copyrights that they own exclusively, in particular the restoration of economic rights. Therefore, the creators and performers may also experience the economic benefits of their creations in a sustainable manner;
- Whereas the transfer of copyrights between the creators and/or performers and any other parties generally shall be carried out through an agreement in the form of a sale and/or indefinite transfer, therefore the general principle shall also apply in any agreement, namely the principle of freedom of contract. However, in Indonesia there have been a number of restrictions on the implementation of the principle of freedom of contract through legislations and court decisions. Doctrinally, there are several factors that influence the occurrence of restrictions on the principle of freedom of contract, namely: *first*, the strengthening of the influence of the teachings of good faith,; *second*, the development of the teaching of misuse of circumstances (*misbruik van omstandigheden*); *third*, the development of economic fields that form the trade associations, legal entities, companies and any other groups of people, such as workers, farmers and musicians; *fourth*, the development of streams in society that desires social welfare; And *fifth*, the government's desire to protect the public interest or the vulnerable party. In addition to those factors, the Court must emphasize, the principle of freedom of contract can be limited by law;
- Whereas even though copyright is an object that can be agreed upon, which contains the transfer of ownership of the copyright, in making a copyright agreement it cannot be separated from the concept of moral rights that are inherent in the author and shall be eternal. This is what distinguishes copyright as an object in Law 28/2014 with any material rights according to the Civil Code (*KUHPerdata*), so that the copyright is said to be *sui generis* in character. This is because the copyright does not attach to any movable or immovable objects. Copyright is an intangible movable object. Therefore, in agreeing on a copyright object, one cannot fully base it on the provisions of the Civil Code because the nature of copyright material law is different from the nature of material law according to the Civil Code, therefore it must be specifically regulated in a law that specifically regulates Copyright;
- Whereas the state deems it necessary to regulate the restrictions on the utilization of economic rights over the creation of books and/or all other written works, songs and/or

music with or without text as stipulated in the norms of Article 18 and Article 30 of Law 28/2014. This is because, as the legal facts revealed in court, it has been proven that the bargaining position between the creators and/or performers is often unequal because they are in a more vulnerable position compared to the producers, so this has the potential to cause abuse of circumstances which shall result in the creators and/or performers do not receive sustainable economic rights, which is a compensation in the form of royalties;

- Whereas, the Transitional Provisions in Law 28/2014 are not only regulated in the norms of Article 122, but also in the norms of Article 121 relating to the conditions when they are regulated under Law 19/2002 to be delivered in the new arrangements in Law 28/2014. This is in accordance with the objectives of the Transitional Provisions, so that when the norms of Article 18 and Article 30 of Law 28/2014 are applied there will be no legal problems in the future. Therefore, the enactment of Article 122 of the Transitional Provisions is a logical legal consequence of the enactment of the provisions of the norms of Article 18 and Article 30 of Law 28/2014 which shall require legal certainty so that there is no void when it must be implemented;
- Whereas a provision is needed to bridge the legal conditions that occurred before the enactment of Law 28/2014, *in casu* in relation to the transfer agreement on the creation of books and/or other written works as well as songs and/or music with or without text that are transferred in a sale and/or indefinite transfer agreement that was made before the enactment of Law 28/2014, its copyright shall be returned to the Creators. Therefore, the arrangement for such return of copyrights as stipulated in the norms of the *a quo* Article 122 is in the context of restoring the economic rights because during the period of the copyright transfer agreement, the transferee has received the benefits (economic rights), which constitutionally the creators shall also get the same opportunities and benefits in order to achieve equality and justice between the moral rights and economic rights, as guaranteed by Article 28H paragraph (2) of the 1945 Constitution;
- Whereas the sale and/or indefinite transfer agreement to the economic rights of the creators and performers that have been occurring so far, clearly has not provide the guarantees and legal certainty for the creators and performers, because the ownership of the economic rights of the phonogram producer exceeds the provisions of legislations, *in casu* the norms of Article 24 paragraph (2) of Law 28/2014. In that context, the economic rights of the phonogram producer are given a period of 50 (fifty) years in order to execute the phonogram fixation, and not to use the economic rights of the creator and performers in an absolute manner, as in a sale and/or indefinite transfer agreement. In this regard, the agreement between the Phonogram Producer and the Creators and/or Performers that is in accordance with Law 28/2014 is an agreement to execute a phonogram fixation, not a sales and/or indefinite transfer agreement. By having an agreement to execute the phonogram fixation, the phonogram producer shall get the protection of economic rights as referred to in Article 24 paragraph (2) of Law 28/2014 which shall be valid for 50 (fifty) years from the time of the execution of the phonogram fixation in accordance with the provisions of Article 63 paragraph 1 letter (b) of Law 28/2014;
- Whereas the Court is of the opinion that the connection between the provisions of the norms of Article 18, Article 30, and Article 122 of Law 28/2014 with Article 63 paragraph (1) letter b of Law 28/2014 is the state's effort in providing recognition, guarantees of legal protection and certainty that is balanced and fair in the legal relationship between creators and performers and phonogram producers.

Whereas based on the entire description of the aforementioned considerations, the Court is of the opinion that the subject matter of the Petitioner's petition are legally unreasonable. Accordingly, the Court passed down a decision which verdict is to dismiss the Petitioner's petition entirely.

Dissenting Opinion

Whereas against the *a quo* Decision of the Constitutional Court, there is a dissenting opinion from Constitutional Justice Suhartoyo, as follows:

1. Whereas the provisions of the norms of Article 18 of Law 28/2014 were the triggers to the issues that arise, both the provisions of the norms and at the empirical level cannot be separated from the existence of 2 (two) main substances contained in these norms which contain *contractio in terminis*. As for the substance that contains contradictions in the *a quo* norm is, on the one hand, the *a quo* norm opens the opportunity to carry out a sale and/or indefinite transfer agreement, but on the other hand the *a quo* norm also stipulates that there is a juridical consequence that the sale and/or indefinite transfer agreement shall be transferred back to the creator after the agreement has reached 25 (twenty five) years. Furthermore, this matter is associated with the terminology of a sale and/or indefinite transfer agreement, so it can simply be understood to mean that the agreement is a relinquishment of material rights without any conditions to be resold or automatically re-transferred to the original rights owner indefinitely. Therefore, the condition for such re-transfer to the rights owner (the creator) has made such agreement unclear, both in character and nature. It is possible that the emergence of the norms of Article 18 of the *a quo* Law 28/2014 is solely to pick up a free sale and/or indefinite transfer agreement between the seller and the buyer before Law 28/2014 came into force;
2. Whereas the alleged provisions of the norms of Article 18 of Law 28/2014 are solely to pick up concrete cases of a sale and/or indefinite transfer agreement, which was agreed upon before Law 28/2014 came into force can be proven after I explored the norms of Law 19 /2002, none of which contained a sale and/or indefinite transfer agreement. Therefore, this is one of the reasons for the emergence of the norms of Article 122 of Law 28/2014 which has the impact of being able to reach legal events in the form of a sale and/or indefinite transfer agreement being agreed upon before the enactment of the norms of Article 122 of Law 28/2014 and this fact also confirms that Article 122 of Law 28/2014 clearly violates the principle of enforcing laws that should not be treated retroactively. This is because a sale and/or indefinite transfer agreement is an agreement of the parties which was the absolute right/authority to sell and/or indefinitely transfer becomes the full personal right/authority of the person making the agreement;
3. Whereas furthermore, with regard to the provisions of the norms of Article 30 of Law 28/2014, after the review, the *a quo* norms instead emphasize that since the enactment of Law 28/2014 the procedure for transferring the rights to the works of performers in the form of songs and/or music whose economic rights are transferred and/or sold, the economic rights shall be transferred back to the performers after a period of 25 (twenty-five) years. The provisions of the *a quo* norms are forward-looking, which means that after the enactment of Law 28/2014 there is no longer any system of copyright transfer by sale and/or indefinite transfer in the true sense, namely without separating the moral rights and economic rights. Therefore, the provision of this norm is an affirmation that there is *contractio in terminis* between the provisions of the norms of Article 18 and Article 30 of the *a quo* Law 28/2014;
4. Whereas based on the description of the aforementioned legal considerations, I am of the opinion that the *a quo* Petitioner's petition should be granted in part, as follows:
 - 1) Regarding the provisions of the norms of Article 18 of Law 28/2014, to declare that it is in contrary to the 1945 Constitution and conditionally does not have a binding legal force as long as the phrase "which is transferred in a sale and/or indefinite transfer agreement, the copyright shall be transferred back to the creator" as long as it is not interpreted as "a sale and/or indefinite transfer agreement in accordance with the limited understanding regarding the transfer of copyright according to its nature and legal protection of copyright".
 - 2) Regarding the provisions of the norms of Article 30 of Law 28/2014, to declare that it is not in contrary to the 1945 Constitution and shall have binding legal force.
 - 3) Regarding the provisions of the norms of Article 122 of Law 28/2014, to declare that it is contrary to the 1945 Constitution and does not have binding legal force.