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Traditional Cultural Expressions and Intellectual Property Rights in Indonesia

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Abstract

Protection of traditional culture and knowledge has been a concern in Indonesia. Efforts that have been made to legally protect Indonesian traditional expressions and knowledge usually involve intellectual property (IP) laws. However, the protection provided by IP laws may be inadequate for Indonesian traditional communities that care more about the survival and maintenance of their culture and knowledge than the legal exclusivity of their works. This study uses a normative legal approach with the perspective of hermeneutic circle to look at various studies and legal documents to find reasons why IP laws may not be entirely suitable for the Indonesian context and how an IP-based law can be designed to suit the actual needs of Indonesian traditional expression holders. The results obtained affirm that Indonesian traditional cultural expressions cannot be contained by laws that exclusively limit the usage of those expressions and thus a 'sui generis' law is needed to give a more appropriate protection.

Keywords: Intellectual Property Rights; Traditional Cultural Expressions; Traditional Knowledge; Legal Protection; Sui Generis Law.

Introduction

Many countries have indigenous cultures manifested in the forms of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE). As essential foundations of the cultures, these TK and TCEs often shape the lifestyles, well-being and development of their holders. They also benefit mankind as part of the "common heritage of humanity".¹

The benefits received by the holder communities of their TK/TCEs are often in the form of economic value. Many governments therefore try to find ways to

¹ WIPO, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/ Folklore – A Guide for Countries in Transition* (WIPO 2013).[3].

preserve and develop their TK and TCEs, in order to ensure that their use will contribute to national economic development, as well as improving the social conditions of the indigenous users. The economic significance of TK/TCEs also increase when they are used as inspirational sources by outside artists and creators. However, this commercial value of TK/TCEs held by indigenous peoples and local communities has raised concerns about the risks of misappropriation by outside parties. There are some cases where indigenous expressions have been replicated by outsiders for commercial gain. There are also patents for TK-based creations that are registered without the approval of the original holders, thus depriving these holders of the economic benefits of their own knowledge.²

Worldwide protection of TK/TCE have been encouraged and aided by international organizations such as UNESCO and World Intellectual Property Organization (WIPO). While UNESCO is more concerned with the “safeguarding” of cultural heritage, WIPO deals with the legal “protection” of intellectual and cultural property.³ As its name suggests, WIPO uses Intellectual Property (IP) discourse as the legal basis for protection. The core of the protection provided by IP discourse is to prevent any unapproved replication, modification and usage of TK/TCEs by any party outside the original holders. The goal of the protection is to use the tools and principles of IP to discourage unapproved or improper usage of TK/TCEs.⁴

Indonesia, consisting of numerous islands inhabited by various tribes and ethnicities, is home to a great number of distinct cultures. Many of these cultures have been around for centuries, producing various cultural works and expressions that have endured just as long. These cultural expressions are the riches and heritage of Indonesia that the government has understood should be protected from acts that are harmful to the expressions themselves or to the communities that produce them.

² *ibid.*

³ Lorraine V. Aragon, ‘Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia’ (2012) 19 *International Journal of Cultural Property*. [274]. Lindsey Schuler, ‘Modern Age Protection: Protecting Indigenous Knowledge through Intellectual Property Law’ (2013) 21 *Michigan State International Review*. [759].

⁴ WIPO, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore – A Guide for Countries in Transition* (n 1). [4].

Protection of Indonesian TK and TCEs/folklore has gained more momentum due to recent (and frequent) clashes between Indonesia and neighboring Malaysia on Malaysian use of some Indonesian cultural items. There was also a dispute with a Japanese company that attempted to Intellectually Protect Indonesian TK as belonging to Japan.

Disputes have also arisen over monopolistic tendencies of certain individuals and companies that have formally registered Indonesian folkloric themes. In Bali, for example, a traditional flower pattern is copyrighted by a US Company so that the Balinese themselves cannot sell their handicraft using that style; whereas it is uncommon for the Balinese to register products or crafts regarded as communal items, such as traditional craft styles, as a trademark or copyright.⁵ Most Indonesians deemed the misappropriation and unauthorized use of Indonesian TK and TCEs as a grave offense, especially in dispute cases with Malaysia. These sentiments have prompted Indonesian government to formally protect Indonesian TK and TCE.⁶

Indonesia, however, presents a challenge to IP discourse since many of its TK/TCE holders-local musicians, dramatists, weavers, and other artists-often refuse to claim IP rights for their expressions. These artists view their expressions as belonging to their communities and not to individual creators, and so they are reluctant to claim as the owners of those expressions. At the same time, these artists also recognize the particular innovative contributions of members of their groups and, consequently, their authoritative mark on the produced expressions. Their interests are therefore often at odds with the interests voiced by international and state law-makers for whom “local” is synonymous with “national”.⁷ This is confirmed by a 2018 research the first writer conducted in some TCE *Topeng Malang* (Malang mask dance) communities from Malang, East Java, *Reog Ponorogo*

⁵ I Nyoman Lodra, *Hak Kekayaan Intelektual Dalam Peradaban Masyarakat Bali* (Unesa University Press 2017).[40].

⁶ Afifah Kusumadara, ‘Pemeliharaan Dan Pelestarian Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Indonesia: Perlindungan Hak Kekayaan Intelektual Dan Non-Hak Kekayaan Intelektual’ (2011) 18 *Ius Quia Iustum*. [21]. Lorraine V. Aragon (n 3).[296].

⁷ Lorraine V. Aragon (n 3).[275].

(Ponorogo mask performance) from Ponorogo, East Java, *Pendhet* dance from Bali, and the traditional *tenun songke* (woven fabric) and traditional rituals (“upacara adat”) from Manggarai, East Nusa Tenggara. Generally, the communities said that they were not the creator or innovator of the TCEs, that they were only preserving them and passing on their communal TCEs to their heirs.

Indonesia has drafted a sui generis cultural property law to address the problems of including TK/TCE in an IP law, but this proposed law is deemed by some writers as still inadequate to protect the TK/TCE,⁸ This study therefore attempts to outline a possibly more adequate law to protect Indonesian TK/TCE. It does that by first examines the discrepancy between Indonesian TK/TCE and the current applicable law. Then, it presents a brief description of the proposed sui generis law and its flaws. The study afterwards draws a brief outline of a more adequate law based on Intellectual Property discourse.

This research is a normative legal research with the perspective of hermeneutic circle—a process of understanding and interpreting law through linguistic (syntax and semantic) and phenomenology (philosophical, historical, and comparison). This method is used to interpret texts in a comprehensive way, where the parts of a text cannot be separated from the text as a whole and vice versa; therefore, a comprehensive understanding could be obtained.⁹ The main object (material object) is the norms in IP Law and International Conventions dealing with IP Law becoming standards and guides in understanding the role of the State as the copyright holder of TCE.

The linguistic analysis is used to find the meaning of law from the linguistic point of view, which is then classified in open coding, axial coding, and thematic coding. The philosophical analysis is used in order to find the nature of the State as the copyright holder of TCE. The historical analysis is used to trace the background and consideration of the legislators in formulating the norms dealing with the role

⁸ Afifah Kusumadara (n 6).[22].;Lorraine V. Aragon (n 3).[290].

⁹ Diah Imaningrum Susanti, *Penafsiran Hukum Yang Komprehensif Berbasis Lingkar Hermeneutika* (Indonesian Philosophical Studies 2015).[207-208].

of the State as well as its consequences. The comparison approach is used to analyze TCE in local culture and national policy.

The research data was obtained from the Directorate of Intellectual Property Rights and the Ministry of Education and Culture. The data collected from the Directorate focuses on to what extent the IP Law and the State have facilitated TCE protection, while the data collected from the Ministry focuses on the inventory and documentation processes of TCE as national heritage. The data from IP laws were triangulated by observing and interviewing some stakeholders of TCE: Malang Masks (*Topeng Malangan*), Ponorogo Masks Performances (*Reog Ponorogo*), Pendhet Dance from Bali (*Tari Pendet*), the traditional *tenun songke* (woven fabric), and traditional rituals (*upacara adat*) from Manggarai, East Nusa Tenggara.

Indonesian TK/TCE and Current Law

The phrase “traditional cultural expressions”, and sometimes “expressions of folklore”, is used by WIPO to indicate any tangible and intangible forms wherein traditional cultures and knowledge are expressed and passed on to the next generations.¹⁰ Among these forms are traditional performances, stories, music and songs, names and symbols, handicrafts, designs and architectures. In WIPO context, “traditional cultural expressions” and “expressions of folklore” are interchangeable and seem to have the same meaning.¹¹ Furthermore, TK/TCEs are seen as the fundamental part of the cultural and social identities of indigenous peoples and local communities, incorporating all of their knowledge, skills, values and beliefs that need to be passed on to younger generations. To protect these is to protect and promote creativity and cultural diversity, and to preserve cultural heritages. TK/TCEs and the associated genetic resources are therefore portions of a single and

¹⁰ WIPO, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore – A Guide for Countries in Transition* (n 1).

¹¹ WIPO, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (WIPO 2018).

cohesive heritage for many indigenous and local communities.¹²

The term “Traditional Knowledge”, as a general sense, commonly comprises indigenous cultural inheritance, practices and systems of knowledge. That is to say, TK contains the substance of traditional knowledge itself as well as the cultural expressions, together with the idiosyncratic signs and symbols related to the TK.¹³

There are some meanings associated with the term “protection” that need to be differentiated first to be understood. WIPO mostly deals with protection in the IP sense—that is, protection against illegal copying, modification and usage of TK/TCEs by outside parties. IP tools and principles are utilized to prevent this unauthorized or inappropriate usages. On the other hand, “protection” can also mean “preservation” and “safeguarding”. This include the identification, documentation, transmission, revitalization and promotion of cultural heritage so that its preservation or practicability can be guaranteed.¹⁴ In this case, the goal is to make sure that TK/TCEs will not disappear and instead are preserved and promoted. Compared to IP protection, these preservation and safeguard measures can sometimes answer the needs of TK/TCE holders and guardians in more appropriate ways, such as by recording and documenting them in a database.¹⁵

Protecting cultural heritages entails shielding against damages to the heritage. A popular term representing damaging acts to cultural heritage is “cultural appropriation”. Current Indonesian law is geared towards protection against this cultural appropriation,¹⁶ but the term itself may not yet be widely agreed upon.

For instance, James O. Young defines cultural appropriation in the arts as varied as: 1) the representation of cultural practices or experiences by cultural “outsiders” (sometimes called “voice appropriation”); 2) the use of artistic styles distinctive of cultural groups by non-members; and, 3) the procurement

¹² WIPO, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore – A Guide for Countries in Transition* (n 1).

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ WIPO, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (n 11).

¹⁶ Lorraine V. Aragon (n 3).[292].

of continued possession of cultural objects by non-members or culturally distant institutions.¹⁷ These modes of cultural appropriation would turn problematic when the cultural expressions used were taken without the holders' consent. In this case we may find instances of misappropriation, misuse and theft of stories, styles and material heritage. The problem may become more complicated if the cultural misappropriation and misuse are done to peoples who have been historically dominated and/or remain socially marginalized.¹⁸

In a possibly more popular language, Susan Scafidi defines "cultural appropriation" as taking intellectual property, traditional knowledge, cultural expressions, or artifacts from someone else's culture without permission. This can include unauthorized use of another culture's dance, dress, music, language, folklore, cuisine, traditional medicine, religious symbols, etc. It's most likely to be harmful when the source community is a minority group that has been oppressed or exploited in other ways or when the object of appropriation is particularly sensitive, e.g. sacred objects.¹⁹

Contrasting cultural appropriation with "appreciation", Scafidi lists three terms to be used to distinguish an act of appreciation from that of appropriation: source, significance (or sacredness), and similarity.²⁰ Users should ask themselves whether the source community has tacitly or directly invited them to share a particular bit of culture, and whether the community has a history of being exploited. Cultural significance of an item should also be taken into consideration lest the users may have unknowingly treated a sacred object disrespectfully. Users that appropriate elements of a cultural item in their own works should question themselves to what extent their works are similar to the original. The last restriction is obviously associated with commercialization of works.

¹⁷ James O. Young (2008) in Erich Hatala Matthes, 'Cultural Appropriation without Cultural Essentialism?' (2016) 42 *Social Theory and Practice*.

¹⁸ Erich Hatala Matthes, 'Cultural Appropriation without Cultural Essentialism?' (2016) 42 *Social Theory and Practice*.

¹⁹ Katie J. M. Baker, *A Much Needed Primer on Cultural Appropriation* (Jezebel 2012).

²⁰ *ibid.*

While the above definitions seem to explain that cultural appropriation is often harmful, WIPO seems to differentiate between “appropriation” and “misappropriation”. It also adds the term “misuse” to the list of damaging acts to TK/TCE. WIPO’s definition of “misappropriation” is the commercial use of any non-copyrightable material or concepts, that previously have been collected and disseminated by an organization, in order to have an economic advantage over that particular organization; otherwise, the acts of copying the work of an author who has not claimed or been given exclusive rights for that work. Misappropriation can also mean illegal borrowing or procurement of funds or property whose real owner is not the current holder.²¹ An instance with regard to traditional knowledge is the Sri Lankan legal draft of traditional knowledge protection, in which misappropriation is defined as benefiting from the procurement, appropriation or usage of traditional knowledge where the individual who procures, appropriates or uses that traditional knowledge is aware of, or could not have been unaware of, or fails to become aware of the fact that the traditional knowledge was procured, appropriated or used via some unethical means.²² In the same document, “misuse” is defined by WIPO as the use of a patent to wrongly extend the awarded monopoly to non-patented goods, or to use it to break anti-trust laws. Misuse can also mean unlawful or excessive use, or acts which alter the inherent purpose or function of something.²³

As a better definition of “appropriation” vs. “misappropriation” might still be missing, this study will use the WIPO definition of damaging acts. So the term “misappropriation” and “misuse” will be used to describe damaging acts undertaken by non-Indonesians to Indonesian TK/TCE, differentiating a possibly less harmful cultural appropriation from the obviously more injurious cultural misappropriation. As illustrated briefly in the Introduction section, Indonesian government feels responsible to protect Indonesian cultural heritage and does that in the form of a

²¹ WIPO, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (n 11).

²² *ibid.*

²³ *ibid.*

legislation. Indonesia's current legal basis for the protection of TK/TCE is Law No. 28 of 2014 on Copyright. 'Copyright' is part of Intellectual Property discourse. By implementing this copyright law Indonesia admittedly follows a Western conception of Intellectual Property (IP) rights, in which the protection granted is mainly about the economic rights stemming from creation or innovation.²⁴ This concept may be incompatible with the common characteristics of Indonesian traditional/indigenous communities that seem to be more concerned with the preservation and maintenance of their cultural works than with economic benefits they might gain from making those works exclusive. In this section, the weaknesses of a copyright law are examined.

Firstly, in the current law the holder of TK/TCE is the state. This means that it is the state that has the right to exploit any TK/TCE, and to make legal claims against any perceived violation of the right. However, this also means that the original creator communities, i.e. the indigenous/traditional communities, have no or very little right over their own works. A community may be charged as violating copyright when using their own work without the state's prior permission, such as, for instance, a community that is barred from exploiting its ancestral law because it has no copyright claim over it, or a dance troupe that has to ask the state's permission to use some ancient dances even if the dances belong to the troupe's community.²⁵ Secondly, in copyright law protection is granted to works that have specific authors. Protected TK/TCEs are those that have definite authors, but composite and derivative works of TK/TCE may be copyrighted.²⁶ Nonetheless, most of Indonesian TK/TCE do not have definite authors; most of them are traditions passed down from generation to generation, with the origins rooted in legends or folktales. For example, the traditional dance *Reog Ponorogo* is said to have originated from either

²⁴ Lorraine V. Aragon (n 3).[270].

²⁵ *ibid.*[281, 291]

²⁶ Erin Mackay, 'Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 32 University of New South Wales Journal. [5]; WIPO, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (n 11).[16]

a 15th century social criticism or a legendary romance. Either way, *reog* does not have a definitive author and so belies efforts to copyright it.

Thirdly, copyright regime provides limited protection to its objects. The protection is usually afforded for the entire life of the author plus 70 years after his or her death. After that, the work will enter public domain where it can be freely used “to encourage further innovation and creation”.²⁷ This will be problematic for TK/TCEs, because many indigenous/traditional communities may be reluctant to allow every person to exploit and benefit from their expressions. Holders of secret and sacred TK/TCEs will most likely refuse to allow their sacred expressions become public domain and want to keep the expressions secret for indefinite time.²⁸

It should be noted, however, that this third weakness might not be entirely true for Indonesian indigenous communities. Between 2005 and 2007, there was a dispute between Indonesian officials and a foreign production company over a traditional Sulawesi myth called *La Galigo*. An American artist had used the supposedly sacred myth as material for his dramatic performance overseas. Indonesian officials protested the performance, saying that it eroded and distorted “an Indonesian national literary and religious treasure”. An underlying and unspoken concern was probably the fear that a foreigner might be capable of registering a cultural item, thus preventing Indonesia-as the true owner-from claiming it. Nevertheless, the indigenous community from which the supposedly sacred myth originated, the Bugis people, were not concerned with a foreigner displaying their cultural expression to the world. Instead, they were thankful because the performance had increased interest in their culture both internationally and domestically. In fact, the Bugis people, and other communities in Sulawesi, wanted more variations of the myth be made and performed.²⁹ The indifference shown by some indigenous communities in relation to their ‘sacred’ items seem to bode failure of the insistence

²⁷ Jordanna Bowman, *Coping with Culture: Copyright, Cultural Expressions and Inadequacy of Protection for Māori* (University of Otago 2011).[10].Erin Mackay (n 26).[4].

²⁸ Jordanna Bowman (n 27).

²⁹ Lorraine V. Aragon (n 3).[288].

for a perpetual exclusive right, but lawmakers may find ways around this issue to protect Indonesian TK/TCE from real misappropriation and misuse.

Lastly, another weakness is found by Mackay that is related to the right to exploitation. In copyright law, the right will vest in the person who first expresses the work in material form.³⁰ As a result, TK/TCE holders may find themselves robbed of their ownership rights if an outsider manages to record their expression in a fixed form and call it his or her own. Individuals within an indigenous/local community may clash with each other if one of them claims the community TK/TCE as his or her own simply because he or she is the first person who put it in material form.

Indonesia's Draft of TCE Protection Law

The problems with current law and urgency of protecting Indonesian TK/TCE from misappropriation and unauthorized use by outsiders has prompted the government to focus on drafting a better national legislation on TK/TCE: the draft Law on the Protection of Traditional Cultural Expressions.^{31,32} The main objective of this draft is to regulate the use of IP rights within TK/TCE and their commercialization. It does not, however, aim for the promotion and maintenance of TK/TCE. This is evident from the Preamble section of the protection draft in which ethnic or national diversity, and intellectual works deemed as invaluable riches of the cultural heritage, have in fact become attractions to be *commercially utilized* so the *utilization* must be regulated for the benefit of the people [*italics the original author's*].³³

Some Indonesian scholars are skeptical regarding the urgency of a TK/TCE protection draft, having witnessed the state's indifference towards the damages and thieving acts done to tangible cultural heritage, such as natural heritages and ancient artefacts which have been destroyed and stolen all over Indonesia. In addition, many indigenous communities still abide by customary laws which

³⁰ Erin Mackay (n 26).[3].

³¹ Afifah Kusumadara (n 6).[22].

³² Lorraine V. Aragon (n 3).[288-289].

³³ Afifah Kusumadara (n 6).[23].

elevate the ethics of knowledge sharing and refuse to recognize ownership and monopoly of intellectual property works. Due to this customary law background, many indigenous communities regard IP protection of their TK/TCE as just as vague as the conventional IP concepts such as related rights, copyright, patent, industrial design, and trade secret.³⁴

Indigenous communities may be more receptive towards legal protection that not only regulates IP protection of TK/TCE but also more comprehensively preserves and promotes the TK/TCE. An ideal law should also regulates the non-commercial uses of TK/TCE by third parties outside the traditional context of the custodian community.³⁵

Proposing a *Sui Generis* Law

While the state is concerned with protecting its TK/TCEs' intellectual property and commercial values, the local/traditional communities are more preoccupied with preserving and promoting their TK/TCE as national cultural heritage. These communities rarely view TK/TCE from the intellectual property and commercial perspective, instead emphasize the spiritual values, life philosophy, cultural identity and social-bonding values inherent in them.³⁶ In order to more adequately protecting TK/TCE, Indonesia needs to design a legislation that covers all the unique needs of Indonesian indigenous communities.

For starters, let us look at Africa which also has various TCE. Its copyright legislation tends to emphasize its communal aspects. The scope of rights in folklore can be determined only with reference to the customary practices of specific communities. Unfortunately, current literature on the subject focuses disproportionately on technical difficulties with protecting folklore under intellectual property laws and glosses over other critical issues such as the nature of communal rights in folklore, why they are binding and how they are enforced traditionally.

³⁴ *ibid.*[24].

³⁵ *ibid.*[26-27].

³⁶ *ibid.*[39].

Therefore, understanding the strengths and weaknesses of folklore rights at the community level is essential to an appreciation of how the rights would be treated later under the statutory regimes which purport to enforce such rights in the same manner they are recognized at the community level. It is therefore advisable to take into consideration the communal nature of TK/TCE in drafting a protection law.³⁷

There are major reasons why the draft protection law may fail: 1) the proposed legislation draft only focuses on the IP and commercial values of TK/TCE; 2) there are no formal documentation of Indonesian TK/TCE causing vagueness in the object of protection; 3) many law enforcers and legal courts in Indonesia have not understood concept of TK/TCE protection; 4) the existence and rights of indigenous communities as the ones that maintain and develop TK/TCE are often overlooked; 5) customary law has yet to be accommodated in the TK/TCE Protection Draft, despite its common use in indigenous communities in managing their TK/TCE; 6) Indonesian users are excluded from the benefit sharing condition despite being the largest user of Indonesian TK/TCE; and 7) there are no legal penalties against radical religious groups that have threatened TK/TCE products and the practicing communities.³⁸

Kusumadara recommends revising the proposed protection draft by taking into consideration non-intellectual property rights and non-legal efforts, such as: 1) documenting and creating a database of Indonesian TK/TCE as soon as possible; 2) educating law enforcers and legal courts to avoid confusing TK/TCE protection with IP protection; 3) legislating an indigenous community protection act to protect the existence and rights of indigenous communities as the custodians of Indonesian TK/TCE; 4) revitalizing and including customary law in TK/TCE protection draft; 5) revising benefit sharing conditions to include local users of TK/TCE; 6) controlling and penalizing radical religious groups that threaten TK/TCE and the practicing communities.³⁹

³⁷ Paul Kuruk, 'African Customary Law and the Protection of Folklore' (2002) 5 Copyright Bulletin.[5].

³⁸ Afifah Kusumadara (n 6).[38].

³⁹ *ibid.*[38].

Further elements of protection that should be paid attention to include: 1) rules which encourage and support the exchange of indigenous communities' knowledge, innovations, and traditional practices between themselves; 2) a "veto right," i.e., the right to oppose to any research which would disregard the respect for and recognition of the indigenous rights; 3) provisions which ensure that any transaction aiming at destroying or discrediting the integrity of the indigenous knowledge, innovations, and practices is void; 4) elaborating and legally implementing strategies to "thwart plans" which "adversely affect" their knowledge, innovations, and practical traditions, especially when third parties implement mega-projects in their territories; 5) ensuring that the common use of biological and other resources relating to traditional knowledge remains free, especially when a system for the protection of collective property rights is designed.⁴⁰

The content of protection should cover all works that are identical to the culture and spirit of the TCE community. It means all that customarily shared access to expressive practices, which intertwine cultural education, community-financed rituals, customary recreation, and identity-based representations.⁴¹ The rights protected by this model proposed are communal rights that vest in the community that is linked to the particular cultural expression. These would be the right to give prior and informed consent for uses of works by third parties and the right to object to derogatory and offensive treatment.⁴² It can be also collective rights, limited to the (official) indigenous peoples or tribes.⁴³ Furthermore, matters with respect to the manner, taboos or other restrictions to the utilization of indigenous cultural expression, and the benefits conferred to the tribe through the utilization and authorization, shall be subject to the full discretion of registered indigenous

⁴⁰ Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America, A Legal and Anthropological Study* (Springer 2015).

⁴¹ Lorraine V. Aragon (n 3).[303-304].

⁴² Jordanna Bowman (n 27).

⁴³ Chris Chu Cheng Huang, 'The 2007 Indigenous Traditional Cultural Expression Protection Act (ITCEPA) of Taiwan – An Innovative Sui Generis Regime', *International Proceedings of Economic Development and Research* (2012) 48.[88].

peoples or tribes under their own customary laws.⁴⁴

Whereas in copyright law the author is recognized and in TCE the creator is unknown due to the community as the whole owning the TCE, this model suggests the community as a whole, because TCE is a product of an anonymous, continuous and gradual process of creative activity taking place in a traditional community in the form of successive imitation and following ancestral tradition.⁴⁵ Expressions that should be protected are those with distinctive elements of the traditional artistic traditions developed and maintained by an indigenous community, or by individuals that upheld the traditional artistic standards of such a community,⁴⁶ this include like traditional religious ceremony, music, dance, songs, sculptures, weave and dye, graphics, wardrobes, folk arts and other expressions of cultural activities;⁴⁷ customarily shared access to expressive practices, which intertwine cultural education, community-financed rituals, customary recreation, and identity-based representations.⁴⁸

Communal rights are rights vested in the community that is linked to the particular cultural expression. These would be the right to give prior and informed consent for uses of works by third parties and the right to object to derogatory and offensive treatment;⁴⁹ collective rights, limited to the (official) indigenous peoples or tribes;⁵⁰ matters with respect to the manner, taboos or other restrictions to the utilization of indigenous cultural expression, and the benefits conferred to the tribe through the utilization and authorization, shall be subject to the full discretion of registered indigenous peoples or tribes under their own customary laws.⁵¹ Furthermore, the rights will include customarily shared access to expressive

⁴⁴ *ibid.*

⁴⁵ Lorraine V. Aragon (n 3).[279].; UNESCO and WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (UNESCO 1983).

⁴⁶ *ibid.*

⁴⁷ Chris Chu Cheng Huang (n 44).[88].

⁴⁸ Lorraine V. Aragon (n 3).[303-304].

⁴⁹ Jordanna Bowman (n 27).

⁵⁰ Chris Chu Cheng Huang (n 44).[88].

⁵¹ *ibid.*

practices, which intertwine cultural education, community-financed rituals, customary recreation, and identity-based representations.⁵²

Determination of the owner of TK/TCE deals with recognizing communal rights. This means recognizing that a cultural expression is not just the work of one author, but embodies the knowledge, culture and spirituality of a group, and that each person within that group has an interest in, and link with, that expression. The rights that may be granted in that work vest in the nominated communal body of that group, which could be an incorporation, trust or other existing body,⁵³ or registered indigenous peoples or tribes.⁵⁴ Also, although most Indonesian art producers intuitively reject the idea that they are sole creators, do not ordinarily sign their works, and say they will willingly impart knowledge and share techniques with novices who want to learn and copy their styles,⁵⁵ the same Indonesian artists often already negotiate and enact local norms about partially shared repertoires and certain individuals' special expertise within their restricted local commons. Individual contributions are significant, yet authority over production is socially distributed, not uniformly shared.⁵⁶ Consequently, the new law should take into account the role of these communal rules when defining the owner of a cultural item.

Regarding the protector, this model suggests a state commission as the body responsible for determining applications for registration, as well as maintaining the register of works. The commission would also be responsible for receiving public objections to uses of cultural expressions, providing a number of remedies that would be available in the courts against those who infringed a community's rights.⁵⁷ This commission might be a competent authority or a representative body created by the community; a legal court chosen by the community;⁵⁸ or an administrative agency.⁵⁹

⁵² Lorraine V. Aragon (n 3).[303-304].

⁵³ Jordanna Bowman (n 27).

⁵⁴ Chris Chu Cheng Huang (n 44).[88].

⁵⁵ Lorraine V. Aragon (n 3).[294].

⁵⁶ *ibid.*[294].

⁵⁷ Jordanna Bowman (n 27).

⁵⁸ UNESCO and WIPO (n 46).

⁵⁹ Chris Chu Cheng Huang (n 44).[88].

The term of protection should have no limit, to differentiate from works copyrighted in terms of economic rights. This research proposes that any rights granted must exist in perpetuity. As such, the rights would not expire at any point, but a rights holder could de-register a work if they believed it was no longer necessary for that work to receive the protection of the regime.⁶⁰

Adopting an aspect of IP law that recognizes fair use, the protection of TCE should give limitation of the rights, in the following permitted acts: use for criticism, review and news reporting; research or private study; educational purposes; judicial proceedings; and incidental use.⁶¹ Furthermore, for the purposes of education, illustration; borrowing for creating an original work; news reporting; informatory photography, broadcasting, and recording; expressions located in public places, the rights should be granted to those who want to use it.⁶²

The criteria proposed by WIPO for the aims of TCE protection include: 1) recognizing value (of TCE and their communities); 2) promoting respect (for traditional cultures and peoples); 3) addressing the real needs of communities; 4) banning misappropriation and misuse of TCE; 5) enabling indigenous and local communities; 6) supporting traditional practices and encouraging community cooperation; 7) safeguarding traditional expressions; 8) enabling innovation and creativity in the community; 9) fostering intellectual and artistic freedom, research and cultural exchange on equal terms; 10) contributing to cultural diversity; 11) promoting the development of indigenous and traditional and other cultural communities; 12) precluding unauthorized IP rights; and 13) enhancing certainty, transparency and mutual confidence.⁶³

Conclusion

Generally speaking, the TCE holders observed in this study view legal protection of their works as important but at the same time they consider their

⁶⁰ Jordanna Bowman (n 27).

⁶¹ *ibid.*

⁶² UNESCO and WIPO (n 46).

⁶³ WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles* (WIPO 2010).[3-5].

works as a gift that can be freely shared with outsiders. The major problem with Indonesian TCE is that their characteristics have made it difficult to exclusively limit their use to their own communities and to take legal action against outsiders that in one way or another have used the TCE. In order to provide a more adequate legal protection of these TCE, a *sui generis* law based on IP law may be designed. The term *sui generis* means “of its own kind”, and it pertains to a law which is designed specifically to respond to the needs of TCE holders/indigenous communities.

This study proposes and outlines another draft law which focuses on communal rights in the ownership and commercialization of TK/TCE. These rights include the right to give prior and informed consent for uses of works by third parties and the right to object to derogatory and offensive treatment; matters with respect to the manner, taboos or other restrictions to the utilization of indigenous cultural expression, and the benefits conferred to the tribe through the utilization and authorization, shall be subject to the full discretion of registered indigenous peoples or tribes under their own customary laws; a state commission that would be responsible for the determination of applications for registration, as well as maintaining the register of works; the term of protection should have no limit, to differentiate from works copyrighted in terms of economic rights. However, the protection may be partially withdrawn for certain uses such as education, illustration; borrowing for creating an original work; news reporting; informatory photography, broadcasting, and recording; expressions located in public places, the rights should be granted to those who want to use it.

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