

# Protection of Traditional Cultural Expressions as Intellectual Property in Indonesia: A Juridical-Sociological Review

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## ABSTRACT

The results of human intellectual work do not only occur in the present (modern) but also past intellectual works that last a long time and are passed down from generation to generation. Creations in the past were produced in groups in a community environment which were usually directly related to nature or the environment. So many cases related to traditional culture that have occurred in Indonesia. To maintain traditional cultural expressions, it is necessary to involve individuals, communities and governments and even nations. This study aims to examine the legal system that can provide comprehensive protection for Traditional Cultural Expressions, and can provide protection from sociological implementation as an effort to speed up effectiveness in implementing its policies. The research was conducted through literature study with the technique of collecting legal materials through document studies, which was carried out by reviewing documents on positive law. Furthermore, the data analysis method was carried out through qualitative normative. In order to strengthen the protection of traditional cultural expressions that have been widely published in the community, both local and foreign and/or have been designated as Intangible Cultural Heritage, local governments need to register traditional cultural expressions into the copyright system.

**Keywords:** *traditional cultural expression, formatting, intellectual property, protection.*

## 1. INTRODUCTION

Initially, the protection of Intellectual Property Rights (IPR) was at the national level, then countries agreed to regulate IPR, especially copyright through the Berne Convention of 1886. Several international forums such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) intensively carry out the formation of laws in the field of IPR, so that currently the provisions of national law in the field of IPR must be adjusted to international law. Intellectual Property Rights which has been known so far, in its development a new field is known, namely New Emerging Intellectual Property Rights which includes protection of resources, traditional knowledge, and traditional cultural expressions. Since 2000, WIPO has often conducted negotiations regarding this field. WIPO then formed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions/Folklores. This paper will discuss only one field, namely folklore or commonly known as the term traditional cultural expression, considering that the term folklore is generally used for a narrower thing, namely oral tradition.[1] To avoid ambiguity, in this paper the term Traditional Cultural Expression is preferred.[2]

Based on this definition, it can be interpreted that the creation of intellectual works as intellectual property does not only mean works that are physically present, but also exist as a means of fulfilling inner needs. It is related to the level of human ability and intelligence to create something through the use of different resources.[3] Therefore, the results of human intellectual work do not only occur in the present (modern) but also the intellectual works of the past that last a long time and are passed down from generation to generation. Creations in the past that were produced in groups in a community environment that were usually directly related to nature/environment.

With the existence of normative arrangements that have even become international affairs, it seems that this has not provided a responsive step to an existing problem. The emergence of the issue of injustice felt by developing countries occurs because their traditional cultural expressions do not get protection and respect for traditional customs or communities as owners of traditional cultural expressions. Esmi Warassih suggested that the function is as a means of resolving disputes, as a social control, a social engineering facility, means community emancipation, a means of legitimacy, means control of change or as a means of distribution.[4]

So many cases related to traditional culture that have occurred in Indonesia. The case of Jepara carving

furniture, namely foreign businessman P.T. Harrison & Grill-Java registered a catalog containing pictures of traditional Jepara carved furniture designs, then by adhering to the copyright to the catalog Harrison filed a subpoena to prohibit local craftsmen from producing the carving models listed in the catalog. Even more tragically, some of the traditional motifs that have become part of the historical journey of Balinese silver carving culture such as batun cucumber, batun poh, parta ulanda, kuping guling and jawan (there are about 1,800 more motifs) were registered by foreigners both living in Indonesia and abroad, there are even some local craftsmen who have been sued by foreign entrepreneurs in Indonesia and in export destination countries accused of violating copyrights. Cases of claims of ownership of traditional cultural wealth belonging to the Indonesian people by neighboring countries, such as the use of the traditional song *Rasa Sayange* as a Visit Malaysia advertisement jingle without the authorization of the indigenous people of Maluku as the owner, have provoked controversy between the two countries because there is an assumption that there has been abuse of traditional Indonesian culture. In addition to the issue of ownership claims by the Malaysian side of Batik Parang, Reog Ponorogo, Angklung and finally Pendhet Dance.

With regard to this case, if it is known, that maintaining traditional cultural expressions must involve individuals, communities and governments and even the nation. Henry Merryman adds that nationalism and internationalism of traditional cultural expressions do not require an exclusive theory. The point is that the contemporary world must find a good way to position traditional cultural expressions into law. This action can make a major contribution to policies relating to the positioning of traditional cultural expressions into local, national and international formations.[5] This is the background for the need for improvements to NRE protection apart from only the legal system that can provide comprehensive protection for NRE, but also provides protection from sociological implementation as an effort to speed up effectiveness in implementing its policies.

## **2. RESEARCH METHOD**

The research phase is carried out through a literature study to examine primary legal materials, secondary legal materials, and tertiary legal materials. Data collection techniques are carried out through document studies, which are carried out by reviewing documents on positive law. Furthermore, the data analysis method was carried out through qualitative normative.[6]

## **3. FINDINGS AND DISCUSSION**

The role of law is not to degrade the rights of the people who provide protection with the principle of togetherness in it. However, the role of law becomes very

important, so that the use of cultural heritage as a new economic source does not ignore or alienate the rights of the supporting community. The role of law is very important so that the utilization of this cultural heritage does not fall into the vortex of greed for capital which is very good at looking for opportunities. For the Indonesian people in general, the existence of traditional knowledge and cultural expressions (folklore) is an integral part of the social and spiritual life of the community concerned. The community does not view cultural heritage as possessively. On the other hand, society is very open. They do not mind if outsiders who are not members of the group want to learn about certain traditional knowledge or certain arts from the community concerned.

However, we can see that the emergence of the concept of legal protection for IPR on folklore in Indonesia based on the concept of the Copyright regime does not provide a hundred percent guarantee for the implementation of legal protection because of the many contradictions in existing regulations and the existence of several folklore concepts that cannot be protected by law. Copyright. Meanwhile, the local community itself does not care about the occurrence of misappropriation, due to traditional factors or their views on the essence of folklore. Meanwhile, when no legality is given at all, the high level of risk being claimed by other countries will also be higher. This condition demands an active role from the Government as an authority that is obliged to protect the entire Indonesian nation and the entire homeland of Indonesia from all kinds of threats, including threats to the rights of its citizens. The threats referred to include misappropriation of the collective rights of local community members to folklore as their cultural heritage.

People's behavior and attitudes like this are indeed vulnerable to misappropriation of their cultural heritage by people who only see personal gain as their goal in life. This is where the legal factor plays an important role. The law views cultural heritage in terms of rights, in a sense, who has the right. Therefore, the law also views cultural heritage from the aspect of its protection. How to provide legal protection that is appropriate and correct, and can be understood by members of the community themselves.

### **I. IMPROVEMENT OF THE CONCEPT OF THE NORMATIVE FRAMEWORK**

The weak point of the State of Indonesia in terms of legal protection of its own traditional cultural expressions. The weakness is that there is no strong and appropriate protection system and the limited data, documentation and information on Traditional Knowledge and Traditional Cultural Expressions.[7] Satjipto Rahardjo argued that legal protection is protecting one's interests by allocating a power.[8] The legal protection provided is a form of shared interest in national development efforts. The use of law as such an instrument is a recent development in the history of law. To be able to reach such a level of development, certain requirements are needed, such as the emergence of such

an organization, which is of course made possible by the existence of an increasingly effective central power, in this case none other than the state.

Based on the existing status quo, Indonesia has actually regulated this Traditional Cultural Expression. Where this is regulated in Law no. 28 of 2014 regarding copyright. However, the Minister of Religion has not comprehensively regulated the actual mechanism in terms of regulation regarding Traditional Cultural Expressions in detail. And even now, the comprehensive regulation of Cultural Expression is still in the draft stage. Where the draft is the Draft Law of the Republic of Indonesia concerning the Protection and Utilization of Intellectual Property of Traditional Knowledge and Traditional Cultural Expressions. However, in reality, Traditional Cultural Expressions in relation to Copyright are not two things that can go hand in hand and are still gray, this is because Traditional Cultural Expressions which are cultural heritage cannot be registered as copyright because Traditional Cultural Expressions do not meet the elements of rights. create itself. Traditional Cultural Expressions in this case only have to be maintained and preserved.[9]

A number of non-governmental organizations and artists' organizations are trying to fight for justice for the community and the arts by alternative means through non-judicial institutions, when there is a dispute.[10] In connection with the existence of Law Number 5 of 2017 concerning the Advancement of Culture in it there are no rules related to dispute resolution but if you look at the Draft Law on Traditional Knowledge and Traditional Cultural Expressions detailing explanations related to dispute resolution so that if you look at the condition of the cultural system to maintain For the existence of culture, it is necessary to have regulations governing this matter in order to guarantee the element of legal certainty in it. The dispute in question is a dispute over ownership, dispute over the form and amount of compensation, recovery actions due to the destruction of Traditional Knowledge and Traditional Cultural Expressions. Prophetic is a religious approach to the relationship between science and religion, including in viewing the relationship between humans and nature, in this case moral ethics must upheld, namely by appreciating a work of art, so that certain actions are taken to ensure that the destruction will not be repeated; actions to prevent negative impacts on Traditional Knowledge and Traditional Cultural Expressions. This is stated in chapter VIII of Articles 45 and 46 of the Bill on Traditional Knowledge and Traditional Cultural Expressions.[11]

Although copyright can protect traditional cultural expressions. However, the period of Copyright protection cannot be applied to traditional cultural expressions because traditional cultural expressions are not merely pursuing commercial values (economic rights) but cultural and spiritual reasons that live in society and many works are created only for use in the community itself and allowing the work to be made public property (public

domain) after a certain period of time is contrary to the purpose of the creation itself. This is in line with the provisions of Article 60 of the Copyright Law that Copyright on traditional cultural expressions that are shared property, the protection applies indefinitely. This article clearly aims to protect traditional works.

However, please note that the application of this registration as a copyright is not merely a copyright. However, because moral rights and economic rights to traditional cultural expressions belong to the copyright holder in this case the state, namely the custodian community. The protection in question is all forms of efforts to protect traditional cultural expressions against use that is carried out without rights and violates propriety. The protection of traditional cultural expressions as part of traditional knowledge is very important, at least for 3 reasons, namely (1) the potential for economic benefits resulting from the use of traditional knowledge, (2) justice in the world trade system, and (3) the need to protect the rights of local communities.[12]

In strengthening the protection of traditional cultural expressions that have been widely published in the community, both local and foreign and/or have been designated as Intangible Cultural Heritage, local governments need to register traditional cultural expressions into the copyright system. Indeed, copyright registration is not a must because copyright is declarative, but it is important as proof of ownership in the event of cultural claims by foreign or private parties who want to take economic benefits from the use and utilization of these traditional cultural expressions, either directly or their derivatives.

## II. COMPULSORY ENFORCEMENT OF SOCIOLOGICAL POLICIES INVOLVING THE PARTICIPATION OF THE COMMUNITY AND REGIONAL HEADS

Indonesia is a country that is rich in handicrafts which is a symbol of the wealth of art and culture produced through creative ideas. The cultural diversity that exists in Indonesia has resulted in Indonesia being said to have advantages compared to other countries. Indonesia has a complete and varied cultural portrait. The works of traditional communities are basically included in the object of protection of Intellectual Property Rights.[13] One of the interesting issues that is currently developing within the scope of the study of Intellectual Property Rights is the legal protection of intellectual property produced by indigenous peoples or traditional communities. One of the intellectual property produced by indigenous people is traditional cultural expression. In this case, the community has thought creatively about how to produce something innovatively and still elevate and highlight the nation's cultural heritage.[14]

One solution that can be done apart from only improving the normative framework, can also be a negative protection system/defensive protection

mechanism. In a positive or active Intellectual Property Rights system, especially patents, designs and trademarks, a person will enjoy legal protection if he has applied for rights through registration. Whereas in the negative protection system, the right does not need to be requested because the right is automatically born after an intellectual work is completed. Of course, this negative protection system requires certain requirements so that it can be implemented (enforceable). One very important requirement is the availability of documentation to prove that a work of cultural heritage really comes from a particular community. With the existence of a database of folklore owned by the Government of Indonesia, it will assist the verification process in the event of a folklore claim by a foreign party. The existence of a database also makes it easier to make an inventory of what wealth is owned by the Indonesian people, especially in terms of folklore.

Thus, the role of the Government is no less important is to plan, prepare, and implement the documentation process, then the results are managed in such a way that it brings benefits to the community as a whole. Currently, documentation efforts have been carried out in relation to folklore, for example [there is a Jepara engraving, namely the launch of the CD-ROM series Preserving the National Cultural Heritage at SIMNAS HKI on September 28, 2004 in Semarang, Central Java, which contains data on Traditional Knowledge which is grouped into: medicine, plants medicine, music, dance, carving (including Jepara carving), sculpture, weaving, architecture, food, food, culture, plant breeding, and others. In addition, the Ministry of Culture and Tourism (formerly the Ministry of Education and Culture) has created a cultural database, including:

- a. Cultural database by the SIKT (Integrated Cultural Information System) Program, for the fields of archeology/archeology, anthropology, and history (1995-2002);
- b. Cultural data by PUSDATIN (Center for Data and Information) (2002-2008);
- c. Cultural Map (Culture Map) by the Deputy for Cultural Preservation and Development, based on geography (2003-2005);
- d. Cultural Map with a slightly different version, which collects cultural data by administrative area, by the Director General of NBSF (2005-2007).

In addition, it can also be done by recording the Intangible Cultural Heritage. As is well known, the Ministry of Culture and Tourism in collaboration with UNESCO has produced a Practical Guidebook: Recording the Indonesian Intangible Cultural Heritage. The most important thing that must be included is the scientific justification of ownership of an Intangible Cultural Heritage which is actually nothing but a Traditional Cultural Expression. The scientific justification becomes very important because it is a medium to carry out defensive protection, namely to break the claims of foreign parties on an Intangible

Cultural Heritage originating from Indonesia. Preserve, develop and promote the Intangible Cultural Heritage.[15] This can be done through various media, such as: giving high appreciation to the human living treasure (maestro); providing training scholarships related to the preservation, development and promotion of the Intangible Cultural Heritage; support for studios/institutions that are actively involved in the preservation, development and promotion of the Intangible Cultural Heritage; periodic broadcasting of the Intangible Cultural Heritage in various mass media; make the Intangible Cultural Heritage part of the creative industry, including the tourism industry; etc.

Providing selective access to Traditional Cultural Expressions. If possible, foreign parties who need information on Traditional Cultural Expressions are not given the widest possible access, so that they are able to mass-produce the two intellectual property. Of course, this can be excluded for foreign parties who have good intentions to share the profits from the use of Indonesian Traditional Cultural Expressions.[16] It is necessary to carry out various kinds of research activities to answer the List of Core Issues. The more research that is carried out on this issue will further enrich the understanding of policy makers so that it will be very helpful in the process of drafting relevant laws and regulations. If possible, temporarily utilize the types of Intellectual Property Rights that can be adapted to the characteristics of Traditional Cultural Expressions. There are at least 3 (three) types of Intellectual Property Rights that can be used for this purpose, namely Trademarks, Geographical Indications and Trade Secrets.

#### **4. CONCLUSION**

By seeing the opportunity to carry out legal protection of Intellectual Property Rights on Traditional Cultural Expressions, it is recommended that all stakeholders in the country begin to carry out a systematic and sustainable "movement of all people" to manage the issue of protecting Intellectual Property Rights on Traditional Cultural Expressions. In each region and/or institution it is necessary to form a team or work unit that specifically manages this issue, which works together with the Central Government. This is because the problem of protecting Intellectual Property Rights on Traditional Cultural Expressions cannot be carried out as a "part-time" job. This problem is still something new, so it takes people who are willing to become specialists/experts in this sui generis (unprecedented) field. More specifically, it takes individuals who have legal expertise on Intellectual Property Rights and at the same time culture to be able to answer various problems that arise from the issue of protecting Intellectual Property Rights on Traditional Cultural Expressions.

The government can also facilitate and provide incentives for carving craftsmen in Jepara, including funding allocated for social donations and to stimulate

creativity and performance from art groups focusing on national folklore. The Government's no less important task is to immediately draw up a Government Regulation concerning Copyrights for Folklore held by the State. In addition, the Government may also consider making a sui generis law as an alternative (continuing the drafting of the Draft Law on Traditional Knowledge-Traditional Cultural Expressions). This law can be made by mobilizing existing laws or complementing existing laws by accommodating the principles of Customary Law or adding general recognition/attribution requirements for the use of traditional art materials as well as emphasizing the object of protection of the folklore.

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