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Exploring Models of Legal Protection for Traditional Cultural Expression (TCE)

by

Distinguished Invited Speakers:

Prof. Dr. Mult. Klaus Vellguth	(German)
Prof. Taufik Abdullah	(Indonesia)
Prof. Emil Salim	(Indonesia)
Paul B. Steffen	(Italy)
Prof. Peter Brian Ramsay Carey	(England)
Dr. Sikko Visscher	(Netherlands)
Dr. Joy Thomas	(India)
Dr. Charles Bertille	(Malaysia)
Prof. Dr. Armida S. Alisjahbana	(Indonesia)
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Dr. Daniel Dhakidae	(Indonesia)
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SOCIAL SCIENCE AND HUMANITIES IN LIGHT OF THE CHALLENGES OF A GLOBALIZED WORLD

Ruteng, 18-20 November 2017

Editor: Dr. Fransiska Widyawati, M.Hum

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WELCOMING SPEECH FROM THE HEAD OF STKIP ST. PAULUS RUTENG

It is a great pleasure and pride that the STKIP St. Paulus Ruteng (Saint Paul College), the Research and Community Service (Lembaga Penelitian and Pengabdian kepada Masyarakat - LPPM) and the Committee of International Conference on Education, Culture and Humanities (ICECH) 2017 publish an International Proceeding of the ICECH 2017. The International Conference on Education, Culture and Humanities (ICECH) was conducted from 18-20 November 2017 at three halls: Missio, Roosmalen XII and Roosmalen XI at the campus of St. Paul College. The topic was "Social Science and Humanities in Light of the Challenges of a Globalized World". There were 36 prominent speakers presenting their papers on the field of education, environmental science, social, culture, language and humanities. They came from six different countries: Indonesia, German, Italy, Malaysia, Netherland, England, and India. Hundreds of audiences attended the conference. The conference was successfully organized.

As the head of the STKIP Santu Paulus, I appreciate the publication of this proceeding. I would like to thank to the Commission of Social Science of the Akademi Ilmu Pengetahuan Indonesia (AIPI) Jakarta, to Indonesia Embassy-New Delhi, attaché of Education and Culture, to the Network Pastoral Asia and Yayasan Ende Flores for the support, and networking that made the conference possible be done smoothly and professionally. I thank to the committee and the editor who had worked very hard to prepare the conference and this publication.

I personally expect that the conference could be a starting point to expand our research and knowledge in the area of education, social, culture and humanities. Enjoy reading and see you all at the next conference.

Dr. Yohanes S. Lon, MA

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EXPLORING MODELS OF LEGAL PROTECTION FOR TRADITIONAL CULTURAL EXPRESSION

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Abstract

Traditional Cultural Expression (TCE) is a tradition of a group of society that is inherited through generation and is recognized as a common property. It lies in the interface between copyright law and cultural practice. Legal protections means broadly, both in preventive and repressive manner Preventive protections in TCE context means to take into custody and preserve TCE, and repressive means to guard TCE from appropriation and exploitation that is harmful for local society and the state. There is no international mandate for protection of TCEs, and there is great variation in the level of protection for indigenous and traditional works in national laws. However, there are some models implemented in international level: The Public Domain Model protection TCE through intellectual property right regime; Sui Generis Model; and Recognition and Enforcement of Judgements of Tribal Courts. Indonesia addheres the protection through copyright regime since 1982 Indonesia's Copyright Law had been passed. Which model is appropriate for Indonesia will be discussed in this article, while proposing a comprehensive regulation for cultural heritage.

Introduction

Traditional Cultural Expression (TCE) is a tradition of a group of society that is inherited through generation and is recognized as a common property. It lies in the interface between copyright law and cultural practice. The term of "protection" in this article refers to the Glossary of Key Terms [1], a document prepared by WIPO the Secretariat that refers to protection of traditional knowledge

[1] The work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (World Intellectual Property Organization **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twentieth Session, Geneva, February 14 to 22, 2012,** Glossary Of Key Terms Related To Intellectual Property And Genetic Resources, Traditional owledge And Traditional Cultural Expressions, *Document prepared by the Secretariat* GC has tended to refer to protection of traditional knowledge and traditional cultural expressions against some form of unauthorized use by third parties.

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and traditional cultural expressions against some form of unauthorized use by third parties. There are two forms of protection that have been developed and applied. First, is positive protection. Two aspects of positive protection of traditional knowledge and traditional cultural expressions by intellectual property rights are explored, one concerned with preventing unauthorized use and the other concerned with active exploitation of the traditional knowledge and traditional cultural expressions by the originating community itself. Besides, the use of non-intellectual property approaches for the positive protection of traditional knowledge and traditional cultural expressions can be complementary and used in conjunction with intellectual property protection. For instance, positive protection of traditional knowledge and traditional cultural expressions may prevent others from gaining illegitimate access to traditional knowledge and traditional cultural expressions or using them for commercial gain without equitably sharing the benefits, but it may also be used by traditional knowledge and traditional cultural expressions holders to build up their own enterprises based on their traditional knowledge and traditional cultural expressions.

The second, is defensive protection. Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded intellectual property rights over traditional cultural expressions, traditional knowledge subject matter and related genetic resources. Defensive protection of traditional knowledge includes measures to preempt or to invalidate patents that illegitimately claim pre-existing traditional knowledge as inventions.

In international level, there is no international mandate for the protection of TCEs, and there is great variation in the level of protection for indigenous and traditional works in national laws. There is still a lack of international consensus about the type of protection that would best apply universally to traditional works. The issue has taken on new dimensions since the World Intellectual Property Organization (WIPO) established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), that began working in 2001 for a definitive protection of TCE.[2] However, there are some models implemented in international level.

First, is The Public Domain Model. This model treats TCE of indigenous peoples as part of the public domain, so that anyone can make use of them,

[2] Janice T. Pilch (2009). "Traditional Cultural Expression, International Copyright", *Association of Research Libraries,* University of Illinois at Urbana-Champaign, September 1, p.1.

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and they can continue to change and evolve. The origins of folk traditions lie far back in the mists of time, making it difficult to obtain copyright protection for traditional cultural expressions. As a result, traditions have normally been considered to be in the public domain. Today, as part of the efforts to protect traditional cultural expressions by indigenous peoples, there is a movement to provide protection for traditional knowledge that is in the public domain. Non-indigenous people is also allowed to commercialize aspects of traditional culture, because it contributes to the transmission and dissemination of culture. The supporter of this approach believes that the adoption of this approach will help protecting the public domain without resorting to a further expansion of intellectual property rights scope and will serve to protect the transmission of indigenous culture while giving the people opportunities to gain economic benefits from their traditional culture.[3] Foreign companies using traditional art design and copyrighting them in their own countries addhere to this model. The advantage of this model is that it can promote knowledge-sharing, while reducing the risk that large corporations will use intellectual property rights as a means of exploiting indigenous peoples and stealing their knowledge.

Second, TCE protection through intellectual property right regime. Indonesia follows this model by including TCE in copyright law. Collins[4] states that the protection of folklore through copyright obfuscates its status as a generative resource for derivative works in favour of its status as a carrier of national identity, over which the State can exercise property rights. It is a mistake to use copyright criteria for TCE because TCE is transmitted orally from generation to generation, and customary law contains a margin of error that makes it impossible to achieve the same level of clarity and precision frequently sought in the Western legal concept of copyright.[5]

Third, a *Sui Generis* model. This model will protect TCE through specific law. WIPO model (2002), Panama and Australia are some of the examples.

[3] Yang Chih-Chieh (2010). "A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions", *Asian Pacific Law & Policy Journal*, 11 Asian-Pacific Law and Policy J. 49.

[4] Stephen Collins (2014). "The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana", *Thesis of Doctor of Philosophy*, School of Law, College of Social Sciences, University of Glasgow.

[5] Manfred O. Hinz, (2011) Paul Kuruk (2002). "African Customary Law and The Protection of Folklore", *Copyright Bulletin*, Vol. XXXVI, No. 2, Also read: Manfred O. Hinz (2011). "The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore", *Namibia Law Journal*, Volume 3 Issue 1, January.

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Australia finally included TCE in a specific law, *Australian Heritage Protection Act*, which is more efficent and approriate.[6] Zhang[7] in his research in China proposes a legal protection by modifying the present intellectual property system (including the copyright law) and make use of every opportunity of law revision to establish a ***sui generis*** law in the regime of intellectual property for TCEs protection. Malaysia also uses a *sui generis* model through *National Heritage Act* 2005. Tunisia uses this model by combining copyright law model without terms of protection. The success of this model depends on cooperation among local communites, benefit sharing mechanism, and to what extent indigenous community's interests are effectively represented in a national law.[8]

Fourth, Recognition and Enforcement of the Judgements of Tribal Courts: Decisions taken by indigenous "courts" on TCE-related cases should be recognized and enforceable within the country as well as abroad. Recognizing and enforcing such decisions would be the most appropriate way of effectuating the traditional legal handling of TCEs, i.e. the customary law, and thereby of protecting TCEs themselves.[9] African nations tend to emphasize the communal aspect of this model.[10] The protected TCE content refers only to the usual practices of that community. In Ghana, TCE is part of cultural heritage, preserved and developed by local ethnic communities, including *kente and adinkra* designs.[11] While Purwaningsih[12] shows that the TCE protection should be based on the needs of local community, through sustainable participation of local community.

There are two movements in who would be responsible in protecting TCE. A *common heritage movement* stresses on the task of international society to

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[6] Jake Philips (2009). "Australia's Heritage Protection of Act: An Alternative to Copyright in the Struggle to Protect Communal Interets in Authored Works of Folklore", *Pacific Rim Law and Policy Journal Association*, Aug Vol. 18 Issue 3.

[7] Lisa Zhang (2008). *Protecting Traditional Cultural Expressions From a Copyright Perspective*, Philips IP Academy - Fudan University Law School p.5.

[8] Antons, Cristoph (2013). "Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions", *Modern Asian Studies* 47, 4.

[9] Anna Friederike Busch (2015). *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study*, Berlin Heidelberg: Springer-Verlag, p. 422.

[10] Adebambo Adewopo (2006). "Protection and Administration of Folklore in Nigeria", *SCRIPT-ed*, Volume 3, Issue 1, March, p.10.

[11] Stephen Collins, *Op.Cit.*

[12] Purwaningsih, Endang (2012). **"P**artisipasi Masyarakat Dalam Perlindungan Hukum Terhadap Kekayaan Intelektual Warisan Bangsa, Jurnal Masalah-Masalah Hukum FH UNDIP" Vol.41 No.1 Januari. (2012)

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protect and preserve TCE.[13] While a community level movement stresses the meaning of a specific culture in community level, in which every culture should be appreciated, treated as important, and enforced in the ways that are equal with those recognized by the society.[14] It means that it is the perspective of local community with *business sharing model* would be an alternative scheme preserve their TCE. [15]

Copyright System and Its Weakness and Advantages in Protecting TCE

Although there is no universal law of copyright, in general copyright has some particular concept: moral right and economic right. The Anglo-American system of copyright law has tended to stress the economic aspects of copyright, whereas Continental, civil laws, stresses on "authors' rights" (*droit d'auteur*) which have generally afforded greater protection to the artist/author, especially in the context of moral rights. However, from the nineteenth century onwards, there have been a series of attempts to protect works internationally, the most important being the Berne Convention for the Protection of Literary and Artistic Works which dates back to 1886. In recent years the European Commission has devoted considerable effort to harmonising and strengthening the law of copyright across the EU, and this has generated an increasing amount of legislation.

Although there is no pratice found in protecting TCE throught copyright law,[16] the "advantages" of Copyright Law in protecting Traditional Cultural Expressions is that TCE is easily can be categorized as a "work", a product of human's mind, creativity, and it is an object of copyright system. This is an argument also while the writer conduted interviewed at Directorate General of Intellectual Property, Department of Law and Human Rights of Republic

[13] R. Diah Imaningrum Susanti (2014), "The Probem of Copyright for Traditional Cultural Expression in Indonesia", *Journal of Law, Policy, and Globalization*, Vol. 29/September; See also: Unesco (2011). "Berinvestasi dlm Keanekaragaman Budaya dan Dialog Antarbudaya".

[14] Paul Kuruk, *Op.Cit*. p. 5; Nurmansyah, Nurmansyah, Andhy, dkk., (2010). "Strategi Pelestarian Seni Tradisi; Studi Kasus Kelompok Kesenian Tradisional Lengger di Kabupaten Jember", *Laporan Hasil Penelitian Stranas*.

[15] Krishna Ravi Srinivas (2012), "Protecting Traditional Knowledge Holders' Interests and Preventing Misappropriation—Traditional Knowledge Commons and Biocultural Protocols: Necessary but Not Sufficient?" *International Journal of Cultural Property* No. 19

[16] Interview with Mrs. Nuryati, on June 15, 2017 at Sub-Direktorat Pelayanan Hukum, Direktorat Hak Cipta dan Desain Industri, Direktorat Jenderal Kekayaan Intelektual, Kementerian Hukum dan Hak Asasi Manusia R.I., Jl. H.R. Rasuna Said Kav 8-9, Kuningan, Jakarta Selatan.

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Indonesia, Copyright law as a law that regulates science, art, and literature covers TCE which is one of the expressions of such art and literature. This argument is addhered formally in Indonesia since Indonesia has issued its own copyright act through Law Number 6 of 1982, and it is continuing through Law No. 7 of 1987, Law No 19 of 2002, and Law No. 28 of 2014, all of these are on Copyright.

The weakness of including TCE in Copyright Law here means the difficulties in covering TCE into this area of law. Theoretically-conceptually, moral right of the author cannot be transfered, sold, or separated from economic right. The right in this context is not *copyright,* but *author's right*. The problem dealing with moral right in the copyright law is very unique when implemented to TCE. Moral right deals with maternity right or originality which has to be the purpose of author's right. Original creative works – if they are profit-generating – are often caught up in elaborate industrial maneuvering and marketing packages, meaning that the efforts invested in the work comprise not only the author's labor and creativity but many other economic and aesthetic investments. While copyright, as discussed earlier, is designed to establish the legitimacy of an author, distributors create the "works made for hire" doctrine and different kinds of contractual agreements to allow an author to transfer all rights.[17]

The idea–expression dichotomy is the most difficult to substantiate in the area where culture meets the information sector. By closely observing the process of TCE-making, it can be concluded that such works are evolutionary, derivative, so that is difficult to prove that such works are original as aimed by copyright law. This dichotomy related to fixation requirement, that that copyright comes naturally to the author when the work is created. Theoretically speaking, there is no need to obtain approval, a prior art search, or registration by any agency to qualify for copyright protection. The Berne Convention generally assumes that copyright requires no prior form of registration, and it leaves the decision about whether to require fixation to each of the member countries; neither the WIPO nor TRIPs mentions fixation.[18] This problem would be clearly recognized as TCE tends not to be fixed in a material form.

[17] Lakwan Pang, (2006) *Cultural Control and Globalization in Asia: Copyright, Piracy, and Cinema,* New York: Routledge, 2006, p. 27.

[18] Cohen *et al.* 2002: 65 in Pang, *Ibid.,* p. 29.

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Case Studies from Three Foreign Countries

1. Australia

In Australia, the issue of the protection of traditional indigenous knowledge has attracted the attention of policy makers. The copyright law designed to provide such protection, however, has not been able to give an ideal protection. The main problem with Australian copyright law is that it cannot grasp the communal nature of traditional knowledge ownership, as well as failing to take account of the complex customary law regulations which manage the use of that traditional knowledge.[19] Traditional indigenous knowledge in Australia is 'collectively owned, socially based and evolving continuously', which does not harmonize with copyright concept of authorship.

Moreover, this communal ownership of traditional knowledge may limit the enjoyment of copyright once established. A community that gives consent for the use of a copyrighted art form by people outside their community within a particular circumstance (e.g. art exhibition), might not be allowed to give similar consent for the use of the same art for another purpose (e.g. reproduction by the government), all due to limitations in the copyright terms.[20] An aboriginal artist in Australia, for example, may not become the 'author' of the paintings he creates, since the depicted sacred stories belong not to him but to the tribe or local community of which he is a member. He is merely entrusted to use the sacred symbols and stories for certain precisely defined applications, and this only after having passed through a process of initiation according to the rules of the tribe. Aboriginal law strictly prescribes the content as well as techniques of such paintings, and the community may perceive errors as violating their religious feelings.[21]

The limited scope of copyright protection may also allow judicial courts to supersede the rights of indigenous communities in their decisions. A court, for

[19] Christoph Antons (2005). "Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia", in C. Heath & A. Kamperman Sanders (Eds.), *New frontiers of intellectual property law: IP and cultural heritage - geographical indications - enforcement - overprotection* (pp. 37-51), Oxford: Hart Publishing; ALSO, WIPO document (May 2003), *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, pp. 36-37.

[20] Erin Mackay, (2009). "Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach". *UNSW Law Journal*, Volume 32 (1).

[21] Christoph Beat Graber (2006), Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights, Paper presented at Workshop 'Copyright, Corporate Power and Human Rights', yang diorganisasikan oleh Birkbeck School of Law, University of London, January 2006.

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example, could refuse to recognize the authority of Aboriginal customary law, or declare that communal ownership did not apply to copyrighted materials.[22]

In short, while the copyright law may protect individual indigenous artists, it cannot give the same protection to the communities to which the artists belong. The question of an all-encompassing law that can give thorough protection to the traditional knowledge of indigenous communities, then, remains open and has invited discussions on the possibility of amendments or a *sui generis* system.[23]

Since the Australia Copyright Act failed to protect TCE as the Act only protected the original works of an author who can be identified, Jake Philips, (2009), [24] states that the Australian Heritage Protection Act is more efficient and adequate to protect the unique communal interests of their cultural works. The protection and promotion of TCEs is a requirement induced by the need to respond to the challenges of a globally interconnected world.

On 3 April 2009, the Australian Government formally supported the United Nations Declaration on the Rights of Indigenous Peoples. [25]As an international instrument, the Declaration provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self-determination and participation, to respect the rights and roles of Indigenous peoples within society. It is the instrument that contains the minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world.

2. Tunisia

Tunisia has been praised for being the first country to introduce an Article dealing specifically with the protection of folklore in 1966 in its copyright law, which would be exercised by a 'competent authority' at national level.[26] One of the central concerns of Tunisia in relation to its folklore is the avoidance of its disappearance. The aim of the Law, as far as folklore is concerned, is therefore

[22] Antons (2005), *Loc. Cit*.

[23] Natalie Stoianoff, and Roy Alpana (2015). "Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation". 41 *Monash University Law Review* 745.

[24] Jake Philips (2009), "Australia's Heritage Protection of Act: An Alternative to Copyright in the Struggle to Protect Communal Interets in Authored Works of Folklore", *Pacific Rim Law and Policy Journal Association* Vol. 18, No. 3.

[25] Terri Janke dan Peter Dawson (2012), *Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System*, Terri Janke & Company Pty Ltd 2012, p. 4

[26] Daphne Zografos, 'The Legal protection of Traditional Cultural Expressions, The Tunisian Example' (2004) 7 *The Journal of World Intellectual Property* 7, Issue 2.

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to protect it. On the other hand, Tunisia also considers folklore to be a source of creativity and invention and believes that folklore has contributed to the country's social and economic development. Tunisia considers that there is a link between necessity to safeguard and protect folklore and encouraging its development by enriching it and exploiting it. As a consequence, the dual aim of the Law is to provide protection against illicit exploitation of folklore, but also to keep it alive and ongoing by encouraging its lawful and contemporary use.[27]

3. China

China is an old and historical country with fifty-six nationalities. Different nationalities have their own traditional culture and habits. But how to protect these abundant, special, original, colorful, precious heritage and culture is a big question to modern society when facing the market economy and the invading of foreign culture.[28] Li Luo[29] provides an overview of the overall Chinese legal system with regard to the protection of folklore including public and private law sector, provides new cultural perspective for the reader to consider an alternative approach to the IP protection of folklore, concerns both theoretical and empirical research which provides a vivid and real depiction of the current situation concerning the protection of folklore, the work reviews issues concerning the protection of folklore through the intellectual property legal system, then explores two main issues in the protection of Chinese folklore. The first issue is the influence of Chinese traditional culture on the Chinese intellectual property legal system and Chinese society. The second concerns the deficiencies of the Chinese intellectual property system with regard to folklore.

Many aspects need to be considered when designing a law for folklore in China, including balancing interests among existing rights holders (the authors) and new-setting rights holders (the holders of folklore and the recorders) and the public, the practical situation and cultural situation of a region to make a law operational, and adjust relationships between the current legal system and the new-setting law. This protection model shall mainly remedy deficiencies related to folklore in traditional IP laws. Meanwhile, revision of some parts of current IP laws would better interact with this protection model.[30]

[27] *Ibid.*

[28] Lisa Zhang (2008), Protecting Traditional Cultural Expressions From a Copyright Perspective, Philips IP Academy - Fudan University Law School, p. 5

[29] Luo Li (2014), *Intellectual Property Protection of Traditional Cultural Expressions/Folklore in China* Springer, pp. 35-60.

[30] Luo Li, *Ibid.*

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Weakness in Indonesia's Copyright Model

The protection of TCE in Indonesia has become problematic since Indonesian Government issued the Law on Copyright in 1982, as there are no implementation rules and there is no institution representing the State in the protection of TCE.[31] The role of Indonesian government as copyright holder has been critiqued, as stated in Aragon's research[32] on *intangible property nationalism*. Furthermore, three Indonesia Copyright Laws have been passed without academic text and it is difficult to find out the legislator's intention in including TCE in this copyright regime.[33]

In fact, TCE in Indonesia does not enjoy proper protection: a *wayang* puppet show was forcefully shut down by a radical group in Solo, being accused of contradicting Islam.[34] Mahadewi [35]shows that the copyright law model adopted in Indonesia cannot be implemented in Bali, especially concerning traditional motifs, because the Balinese see work as part of their value system and livelihood. Likewise, many cultural heritage and other artifacts have been destroyed and stolen across Indonesia.[36] A statue of *Arjuna* in Purwakarta had been destroyed by another radical Islamist group.[37] In the case of intangible property, the findings of Kusumadara[38] and Mahadewi[39] confirm that many music, dance, and Balinese traditional silver craft had been appropriated and copyrighted by foreign

[31] Rafles Junarto Poltak Manondang Banjar Nahor (2013), "Perlindungan Hukum Hak Cipta Folklor atas Tari-Tarian Rakyat Indonesia", *Tesis*, Program Pascasarjana Universitas Atma Jaya Yogyakarta

[32] Lorraine V Aragon (2012). "Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia', *International Journal of Cultural Property* No. 19, p. 269.

[33] R. Diah Imaningrum Susanti (2016)"Ekspresi Budaya Tradisional dalam Undang-Undang Hak Cipta Indonesia: Kajian Maksud Pembuat Undang-Undang dan Kajian Perbandingan Hukum" . *Laporan Hasil Penelitian*, Malang: Universitas Katolik Widya Karya.

[34] Kompas (2010). "Menembus Brunei, Gamang di Negeri Sendiri", 22 Oktober.

[35] Kadek Julia Mahadewi (2015). Program Budaya Hukum dalam Keberlakuan Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta Pada Pengrajin Perak di Bali, *Thesis*, Program Pascasarjana Universitas Udayana Denpasar.

[36] Kompas (2009). "Seni Budaya, Tak Ada Perlindungan secara Internasional", 1 September.

[37] Mike Reyssent (2016). Patung Arjuna Dihancurkan, Mengapa Patung Polisi Dibiarkan? www.Kompasiana.co 16 Februari.

[38] Afifah Kusumadara (2011). "Pemeliharaan dan Pelestarian Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia: Perlindungan Hak Kekayaan Intelektual dan non-Hak Kekayaan Intelektual", *Jurnal Hukum* No. 1 Vol. 18 Januari .

[39] Kadek Julia Mahadewi (2015). Program Budaya Hukum dalam Keberlakuan Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta Pada Pengrajin Perak di Bali, *Thesis*, Program Pascasarjana Universitas Udayana Denpasar .

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companies. A study by Sinaga (2014)[40] showed that some community members (e.g., small medium enterprises of Batik) cared little for TCE in the copyright model, because the model cannot accomodate the special circumstances of Indonesian batik, the administration system of the intellectual property right is unaccommodating, as well as weak enforcement. So far documentations of TCE conducted by the government are limited to those that have already globalized, such as shadow puppet, kris, and batik. [41]

Among Asian countries, Indonesia is very late in giving proper attention to the protection of its traditional knowledge and folklore. Indonesia's attention toward this issue has only been awaken in the past three years, following disputes with its neighbor, Malaysia, over some Indonesian traditional knowledge and folklore; for example, Malaysia claimed Indonesian art such as *Pendet* dance from Bali, *Reog* dance from Ponorogo (East Java), the song *Rasa Sayange* of Ambon, and Indonesian batik, to promote its tourism.There are also disputes over Japanese patents on some Indonesian traditional knowledge; for example, Shisheido, a Japanese cosmetic company, had patented Indonesia's traditional knowledge and 11 different compounds of Indonesian traditional medicinal plants (*Jamu*), although in 2002 they withdrew those patents from the European Patent Office amid strong protests by some Indonesian NGOs, such as BioTani PAN Indonesia.[42] Most Indonesians see the misuse and misappropriation of Indonesian traditional knowledge and folklore as a very sensitive issue that insults the identity and pride of Indonesians. Therefore, the Indonesian government is forced to start considering protecting Indonesian traditional knowledge through an appropriate model of legal protection.

The legal and sociological problems are exacerbated by globalization which increases intercultural frictions that may create social tensions among communities and identity claims.[43] TCE consequently became the subject of

[40] Selvie Sinaga (2014). "Faktor-Faktor Rendahnya Penggunaan HAKI di kalangan UKM Batik", *Jurnal Hukum Ius Quia Iustum*, No.1. Vol. 21, Januari.

[41] Kusumadara, Op. Cit.

[42] Kusumadara, *Ibid*.

[43] Unesco, (2011). "Berinvestasi dlm Keanekaragaman Budaya dan Dialog Antarbudaya"; Antons, (2013). "Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions", *Modern Asian Studies* 47, 4, p.1403, Burri, Mira (2010). "Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship", *International Journal of Cultural Property*, Vol. 17, p. 33

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predatory acquisition by trans-national entrepreneurs.[44] Technologies have often been seen as imperiling TCE and inhibiting their protection. The first reason for this concern is that new technologies are viewed as the very epitome of globalisation forces – both as driving and deepening the globalization processes itself and as a means of spreading its effects.[45] This needs a critical understanding on the meaning of "the State as copyright holder in TCE" as in the Indonesian copyright law and its juridical consequences.

The further difficulty is the legal enforcement of Article 44 of Law Number 28 of 2014. [46] If TCE – which contains ethical values, social customs, beliefs, or myths of which intangible heritage is the sign and expression - is covered and protected by the Copyright Law, which it is a big question about whichis the substantial part and which part is not. It is the cultural community that owns the traditional cultural expressions, not the State that has the "moral right" nor "economic right" of TCE. The State is not the creator, even not the right holder of the creation, because the State is a political entity, not a cultural entity.[47]

The most problematic regulation is that the State is the holder of copyright accrding to Law Number 28 of 2014 on Copyright. The State as the holder has actually never received the right from the Author as required in the Article 1 (4) of the Indonesia's Copyright Law, that '*Copyright Holder shall mean the Author as the Owner of the Copyright, or any person who receives the right from the Author, or any other person who subsequently receives the right from the aforesaid person'*.

The State never owns moral rights on folklore because folklore is linked with the community bearing it. As a consequence, besides the "moral right", the "economic right" is owned by the community itself. The community itself has to exploit the creation of a work to reach the largest possible market – most authors and artists have chosen to avail themselves of the possibilities created by

[44] Adebambo Adewopo (2006). "Protection and Administration of Folklore in Nigeria", *SCRIPT-ed*, Volume 3, Issue 1, March, p.10.

[45] Christoph Beat Graber dan Mira Burri-Nenova (2008). *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, USA:Edward Elgar, p.205.

[46] This article deems the infringement of copyright as taking the most substantial part characteristic of the work without citing the source and done not for non-commercial activities or social activities, for advocacy within or outside the court, and for the sake of the blind.

[47] R. Diah Imaningrum Susanti (2014), The Problem of Copyright for Traditional Cultural Expression in Indonesia", *Journal of Law, Policy, and Globalization*, Vol. 29/September.

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industrialization.[48] The role of the State is just to protect and foster the folklore to exist and develop, as stated in the Indonesia's Constitution of 1945, including facilitating the 'economic aspect' of the folklore without holding the copyright.

Although Indonesia is very rich in cultural diversity and folklore and has had several Acts through Copyright Acts since 1982, the Indonesia government is still passing an implementation of article 44 of Copyright Law in the form of a Government Regulation. This regulation is called "Government Regulation on the Copyright hold by the State on Traditional Cultural Expression" (*Hak Cipta yang Dipegang oleh Negara atas Ekspresi Budaya Tradisional*). This bill defines TCE as tangible and intangible *works* as the object of protection, which indicate the existence of traditional culture which is held communally, passing through generations, including TCE dealing with genetic resources. This Bill has not been passed until now. However, theoretically and practically, the provision that the State is copyright holder of TCE is meaningless since TCE is not copyright, and the State is not the copyright holder.

WIPO Models of TCE Protection

WIPO has presented a number of national laws for the protection of traditional knowledge. These include: Tunis Model Law on Copyright (1976), WIPO-UNESCO Model Provisions (1982), Bangui Agreement of OAPI (as revised in 1999), Panama Law No. 20 (2000) and the related Executive Decree No. 12 (2001), South Pacific Model Law for National Laws (2002), and U.S.A. Indian Arts and Crafts Act (1990) and the related Enforcement Act (2000). These laws were compiled as an information resource for countries looking for model laws on which they might create their own laws for the protection of their traditional knowledge.[49]

On the communal or group rights over traditional knowledge:

a. The 1982 Model Provisions recognize the possibility of collective or community rights. Being a *sui generis* system and not a copyright system,

[48] Margaret Ann Wilkinson and Natasha Gerolami, (2009) 'The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright', 26 *Government Information Quarterly* 324.

[49] WIPO document. May 2003. Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore.

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they do not refer to 'authors' of expressions of folklore. They do not even refer directly to the 'owners' of expressions of folklore. Rather, they state that authorizations for using expressions of folklore should be obtained either from an entity (a 'competent authority') established by the State (this option creates a fiction that the State is the 'author' and/or the 'owner' of the rights in the expressions) or from the 'community concerned' (Section 10);

b. Similarly, the Tunis Model Law on Copyright, in so far as it addresses works of national folklore (as opposed to works derived from folklore), states that the rights granted by it in folklore shall be exercised by a Government appointed authority (section 6);

c. The Panama law provides for the protection of the "collective rights of the indigenous communities", and applications for registration of these rights shall be made by "the respective general congresses or indigenous traditional authorities";

d. The South Pacific Model Law vests 'traditional cultural rights' in 'traditional owners', defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community. These rights are in addition to and do not affect any IP that may subsist in TCEs.

Quo Vadis Indonesia?

Indonesia needs to modify the present legal protection for traditional cultural expressions to meet the objectives by making use of every opportunity of law revision. It is better to establish the ***sui generis*** law in TCEs protection when conditions are fulfilled. Some specific methods we propose: 1) identify laws and regulations that are intersect each other dealing with cultural property; 2) Listing tangible and intangible cultural property and analyze whether it is meaningful to differentiate then into the different laws; (3) Draw up the local statutes and regulations through the local people's congresses at various levels for there is no unified law to protect TCEs in Indonesia; 4) Utilize proper administrative measures to support and supervise the protection of TCE.

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