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The Problem of Copyright for Traditional Cultural Expression in Indonesia: The Example of the “Malang Masks”

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Abstract

Folklore, as a part of traditional cultural expression (TCE), has captured the interest of experts in many spheres, including the legal, social, and anthropological. The difficulties exist in attempting to include folklore into copyright regime, as has been done in Indonesian Law Number of 2002 on Copyright. This article will focus on the ambiguity in formulating moral and economic rights of Indonesia's Copyright Law Number 19 of 2002 which implies various problems in folklore as the object of copyright system. A *sui generis* law on intangible cultural heritage and a national bank of cultural heritage to protect TCE is needed.

Key words: folklore, copyright, cultural heritage.

1. Introduction

This article explores the problem raised by including folklore within the Indonesian copyright system from an Indonesian legal perspective. Folklore, as a part of traditional cultural expression (TCE), has captured the interest of experts in many spheres, including the legal, social, and anthropological. Indonesia has become a site of keen interest in the subject. Lorraine V. Aragon has recently explored the Indonesian approach towards its protection of TCE, criticized the state as the holder of the regional arts of Indonesia, through analyzing how tangible cultural expressions are re-scripted as national intellectual and cultural property in postcolonial nations such as Indonesia in the term of “intangible property nationalism”¹. The issues surrounding the movement of heritage occupies a place within both cultural property regimes and within copyright law,² and Christoph Antons explores the possibility of the role that copyright law plays in the protection of folklore in Indonesia, since Indonesia has many ethnic communities producing folklore.³

In this article, I explore from an Indonesian perspective the difficulties that exist in attempting to include folklore into copyright regime, as has been done in Indonesian Law Number of 2002 on Copyright. This article will focus on the ambiguity in formulating moral and economic rights of Indonesia's Copyright Law Number 19 of 2002 which implies various problems in folklore as the object of copyright system.

This first part of this article describes the situation involving folklore expressed in the creations known as Malang Masks, as one example of various TCE in Indonesia. The making of the masks is special, conveying and drawing on local wisdom and environmental concerns. At the second part of this article, I will set out and describe the Indonesia's Copyright Law with its historical background, including its antecedents in Dutch law, analyze how adopting the nomenclature of “copyright” raises the problem involved in formulating and interpreting the law, especially for moral right and economic right for TCE. At the third part, I will focus on how the moral and economic rights – the fundamental concept of copyright law system – are not suitable when they are applied to folklore. The next discussion will be sharpened by one question on folklore, whether it deals with the right of cultural authorship or the right of cultural heritage, and what is the position of the state.

2. Traditional Cultural Expression in Indonesia

2.1 Malang Masks (*Topeng Malang*)

In order to understand the character and difficulties involved in adapting a copyright system to TCE in Indonesia, I begin with a deep exploration of one particular TCE that encapsulates the social, cultural and traditional practices that are essential to the existence of the TCE. *Topeng Malang* or the Malang Mask is a traditional art from Malang – East Java, Indonesia. The masks are created as a craft, and the masks reveal various characters in the human faces they depict. In addition, there is a practice known as “dancing using the mask”, an inherited traditional theatrical performance. Initially, the mask and the dance were a unity because the

¹ Lorraine V. Aragon, “Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia” (2012) 19, *International Journal of Cultural Property*, 269.

² For example Christoph Beat Graber, Karolina Kuprecht, Jessica Christine Lai (eds.), *International Trade In Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012).

³ Christoph Antons, “Geographies of Knowledge, Cultural Diffusion and the Regulation of Heritage and Traditional Knowledge/Cultural expressions in Southeast Asia” (2012) 4, *WIPO Journal*, 90.

craft was made to be performed through dances. All the dancers use masks representing various characters from what are known as the *Panji* Tales.

The Masks have had a difficult history. The late Mbah Karimun, as the *maestro* of the Malang Mask, duplicated and recreated masks from his ancestral communities, as the original masks had been destroyed in the era of LEKRA (*Lembaga Kebudayaan Rakyat*) Communist Party in Indonesia.¹ The crafts have been preserved for generations with the intention that the makers are willing to preserve the heritage of their ancestors and to develop it as a new variation of the mask, as an offspring. The master of the mask, Mbah Karimun, preserved the characteristics of the mask which describing the mixture of real human faces and puppet (*wayang*) with performance of break dance. This style is known as Malang style symbolizing the strong and heroic character².

The Malang mask is influenced by geographical condition and subculture of *Arek Malang* (from Singosari kingdom) which has the characteristic of being firm, strict, and extrovert. These characters influence the music, theater, art, dances, including the craftsmanship of Malang. Most of the sculptural forms of the mask have rather right-angled corners than rounded corners in the faces.

Many regions in Indonesia such as Bali, Madura, Jogja, Solo, have other traditional masks with the different style. The character of Malang Masks is reflected in the form of angles with unlimited ornament (such as flowers, leaves, seeds, fruits, or temples). However, in the traditional art, there are things can be changed and there are things cannot be changed. The things that can be changed in the mask is “the flesh”, whereas the things cannot be changed are “the bones”. In the case of Malang Masks, “the flesh” means the ornament, the smoothness, the kind of wood, and the paint. The things cannot be changed is the character, meaning the angle-form of the mask and the percentage of decorative-realist (75 % : 25 %).³ The table below describes the comparison between Malang Masks and masks from other regions in Indonesia.

	BALI's	MADURA's	MALANG's	JOGYA-SOLO's
Decorative: Realist	0% : 100 %	50% : 50 %	75% : 25%	100% : 0%
The sculpture face	Round, flexible, pliant	Round and angled	Most is angled	Oval, pliant
Material	Human face (realist)	Decorative-realist; smaller; concave	Decorative – realist	Decorative (example : wayang puppet)
Ornament	<i>Miri</i> wood, <i>waru</i> wood	<i>Cangkok</i> wood	<i>Sengon</i> wood, <i>kembang kenongo</i> , <i>avocado</i> wood, <i>nyampo</i> wood	
	Realist	<i>Ukel2</i> , <i>bight</i> , <i>tendril</i>	Unlimited (flowers, seeds, leaves, temple)	Tend to be like the form of temple (triangle)

The process of making the Malang Masks is unique. The wood, as the main material, is chosen at a small forest around the Kedungmonggo Village of Malang. The kinds of wood could be various from *Jati wood*, *mentaos*, *pule*, *waru*, etc.⁴ The cutting of the wood is done using the following steps: 1) seeing the top of the nose with the woodcutter's own eyes - to understand the sign or symbol that the woodcutter won't experience difficulties in the forest. The people in Kedungmonggo village believe that if the top of the nose can be seen through their own eyes, it is a sign from the “universe” nature that they should continue their walking through the forest and it is believed that they would face no dangers (from snake, tiger, or other dangerous wild animals); 2) praying in front of the tree to be used. The prayer is to ask permission to the *spirit as the gatekeeper of the tree*. The local society believes that every tree has its own spirit as its keeper. The prayer must be spoken toward the east (in Javanese language: *wetan*); then 3) cutting the tree. The tree would give *sign* if *she* is willingly to cut. The sign is, as soon as the axe is swung and touches the tree, is that the tree will “bite” (or the axe would pierce the tree). It is a sign that the tree “has no will” to be cut, and the woodcutter would not cut the tree. From the

¹ Interview with Mbah Karimun, 2 December 2004 at Village Kedungmonggo, District Pakisaji, Malang Regency, East Java, Indonesia. LEKRA means Institution of People's Culture, as a literary and Social Movement associated with Indonesian Communist Party. Founded in 1950, LEKRA pushed for the artists and writers to follow socialist doctrine. LEKRA exploit art as a tool of struggle and propaganda. See. *Tempo.Co.*, September 30, 2013.

²Raphaella Diah Imaningrum Susanti, “Perlindungan Hukum Kekayaan Intelektual terhadap Kerajinan Tradisional Topeng, Malang dalam Kerangka Otonomi Daerah’ (2005) 3, *Jurnal Justitia et Pax*,148

³ Interview with Bapak Sunari, 2 December 2004 in Malang City, East Java, Indonesia.

⁴ Names of local trees in Indonesia

modern thinking point of view, the mature tree is more difficult to cut, so “she won’t bite” when she is to be cut because the cambium has been already hard. Thus, unconsciously, the tree cutting for the Malang mask always take care of environment conservation,¹ because the choice of the wood and tree to be cut is done so in order to take care of their environmental condition; 4) Split the piece of tree : the outer layer of the wood is thrown out and the wood’s skin is split into two pieces; 5) Making *Bakalan* (*Mbakali*). “ ‘Bakalan” is a main model of the mask which would be sculptured as a mask with a specific tool; 6) Carving (*memahat, natahi*), meaning to sculpt the eyes, then nose, and the mouth without ears.

The process of making the mask is a prime example of a TCE – it is the knowledge of traditional communities, passed on from generation to generation. So the Malang Mask is an expression of cultural values owned collectively rather than individually.

2.1 Traditional Cultural Expression and Copyright Law

“Traditional knowledge’ and “Traditional Cultural Expression” are terms used during international negotiations within a specialized committee of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).² The IGC convened for the first time in 2001 following fact-finding missions to 28 countries in 1998 and 1999 to find out about intellectual property-related needs and expectations of traditional knowledge holders.³ The term ‘traditional knowledge’ has been used by WIPO in a general sense and in a narrow sense. In a narrow sense, TK refers to traditional knowledge of a technical nature, for example, in relation to agriculture, the environment or medicine, as well as to traditional knowledge associated with genetic resources.⁴ It is distinguished from ‘Traditional Cultural Expression’ (TCE), a term that is used interchangeably with ‘expressions of folklore’ to refer to ‘tangible and intangible forms in which traditional knowledge and culture are expressed, communicated or manifested’, for example, verbal expressions, musical expressions, expressions by action such as dance, and tangible expressions in art and crafts.⁵ Indonesia uses “folklore” term to define the traditional cultural expressions in its Law on Copyright of 2002.

In Indonesia, copyright means an exclusive right for an author or the recipient of the right to publish or reproduce his work or to grant permission for said purposes, without decreasing the limits according to the prevailing laws and regulations⁶; An author means a person or several persons jointly upon whose inspiration a work is produced, based on the intellectual ability, imagination, dexterity, skill or expertise manifested in a distinctive form and is of a personal nature;⁷ whereas Work means any result of works of an author, which shows originality in the field of science, arts and literature;⁸ while art 1 (4) defines copyright holder as 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.

Who protects the folklore and under which regime of intellectual property rights has been discussed long. Anthropologist such as Lorrain V. Aragon criticized the categorization of folklore into the copyright system which is hold by the state as “intangible property nationalism,” to name the impulse of international organizations and postcolonial states to view folkloric cultural practices with a combined sense of ownership rights over the immaterial drawn from intellectual property and a sense of defensive group ownership, drawn from cultural property model.⁹ In 1967 WIPO administered Berne Convention for the Protection of Literary and Artistic Works to enable countries to designate a ‘competent authority’ to represent, protect, and enforce rights to ‘unpublished’ works where the identity of the author is unknown. Although provisions to this effect became included in a number of the few copyright acts that developing countries were introducing at that time, until

¹ Raphaella Diah Imaningrum Susanti, ‘Kerajinan “Topeng Malang” dan Kepedulian Lingkungan’ (2004) 3 *Jurnal Agama dan Kebudayaan Aditya Wacana*, 114.

² Jonathan Franklin, ‘Protecting Traditional Cultural Expressions’ (2008), 8 *Information Outlook*, 27

³ WIPO, ‘Intellectual Property needs and Expectations of Traditional Knowledge Holders’ – *WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge 1998 – 1999* (2001), WIPO, Geneva.

⁴ WIPO, *Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions*, WIPO Doc. WIPO/GRTKF/IC/19/INF/17 May 2011, pp.26-27.

⁵ Ibid.

⁶ Translated by the author from the original text, “*Hak Cipta adalah hak eksklusif bagi Pencipta atau penerima hak untuk mengumumkan atau memperbanyak Ciptaannya atau memberikan izin untuk itu dengan tidak mengurangi pembatasan-pembatasan menurut peraturan perundang-undangan yang berlaku*”. See, Article 1 (1) of Indonesia’s Copyright Law Number 19 of 2002.

⁷ Translated by the author from the original text, “*Pencipta adalah seorang atau beberapa orang secara bersama-sama yang atas inspirasinya melahirkan suatu Ciptaan berdasarkan kemampuan pikiran, imajinasi, kecekatan, keterampilan, atau keahlian yang dituangkan ke dalam bentuk yang khas dan bersifat pribadi*”. See, Article 1 (2) of Indonesia’s Copyright Law Number 19 of 2002.

⁸ Translated by the author from the original text, “*Ciptaan adalah hasil setiap karya Pencipta yang menunjukkan keasliannya dalam lapangan ilmu pengetahuan, seni, atau sastra*.”, See, Article 1 (3) of Indonesia’s Copyright Law Number 19 of 2002.

⁹ Aragon, above n. 1, 269.

1 2002 and 7 India had implemented the provision by notifying WIPO about its designated competent authority.¹ Whereas 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.² 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 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.³

Although Indonesia has included folklore into its copyright system, it does not mean that protecting folklore works well under that system, and this can be tracked through historical background of Indonesia's Copyright Law.

3. Indonesia's Copyright Law

3.1 Historical Background

Indonesia's Copyright Law is named Law on Hak Cipta, the phrase consisting of two phrases: hak (right) and cipta (creation). So, literally, it has a meaning of the right of the creat(or) on (creat)ion. From the first time the law was introduced by Netherlands into Indonesia, it was not named as "Copyright" Law as mentioned in some books, such as Christoph Antons's,⁴ but "Auteursrecht". The naming of "Hak Cipta" is a translation of 2 auteursrecht" (Dutch – meaning "the right about authorship; "droit d'auteur – French; Diritto d'autore - Italia), as European copyright is known, includes some of the most comprehensive provisions on moral rights in the world.⁵ All of these stresses on the rights own by the genius author, or the moral rights, since "hak cipta" is the right of the creator on their creation.

The name has a long history since Auteursrecht was applied by the Dutch Colonial rulers over a hundred year ago by the Auteurswet 1912 Staatsblad Nomor 600 tahun 1912. The Auteurswet was revoked by Indonesian government in 1982, and the name was changed to "Undang-Undang Hak Cipta". In 1987, the Law was changed by Law Number 7 of 1987, then Law Number 12 of 1997, and now the existing Copyright Law is Law Number 19 of 2002. The changes of copyright law is an endeavour in adjusting to international conventions and the relation among nations in international sphere, such as the ratification of World Trade Organization in 1994 which covers Agreement on Trade Related Aspects of Intellectual Property Rights – TRIPS through the Law Number 7 of 1994. In 1997, the government ratified the Bern Convention through the Presidential Decision Number 18 of 1997⁶ and also the World Intellectual Property Organization Copyrights Treaty through the Presidential Decision Number 19 of 1997.

The name of "Hak Cipta" implies the nuances of moral right because it deals with the right of the author and authorship (hak pencipta dan hak kepenciptaan). From the name, there is no indication lead to the right to reproduce or to copy so that it is appropriate to be named "copyright". However, the Law defines "hak cipta" as "the right owned by the author to copy and multiply their works which implies the economic nuances of the right. It is a paradox actually, that the title implies the moral right, whereas the definition implies the economic rights. While the "hak cipta" (derived from author's right) comes from Dutch Colonial which focus on moral right of the author, the term "copyright" (English) meaning "the right to copy, make multiplication."

3.2 The Unclear Distinction between the Moral and Economic Rights

The main source of any problems in the Indonesia's copyright law is moral and economic right. Moral and economic rights cannot be separated as it seems two sides in a coin. All copyright system governs the two rights with different stress. The orientation of moral right recognizes that the intellectual product of human being has intrinsic values as an expression of dignity and creativity of human being. In other words, the artistic works and

¹ Christoph Antons, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions' (2013) 47 *Modern Asian Studies* 1408.

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

³ Ibid.

⁴ See, e.g. Christoph Antons, *Intellectual Property Law in Indonesia* (Kluwer Law International, 2000) 49.

⁵ Mira T. Sundara Rajan, *Copyright and Creative Freedom: A Study of Post Socialist Law Reform* (New York, Routledge, 2006) 43.

⁶ Indonesia has ratified Bern Convention on 24 Desember 1950, but then withdrew its membership to the Bern Convention in 1958 because according to the Prime Minister Djuanda, the Indonesian government needs to copy foreign books freely without paying royalty for education, See: Usman, Rahmadi, *Hukum Hak Atas Kekayaan Intelektual, Perlindungan dan Dimensi Hukumnya di Indonesia* (Alumni, 2003), 35

science are not primarily an economic commodity in which the value is determined by the benefit and the prices attached on the works.¹

In Indonesia, copyright is governed in the Law Number 19 of 2002 on Copyright which is revision of the three-previous copyright law: Law Number 6 of 1982 on Copyright and Law Number 7 of 1987 on Copyright, and amended by Law Number 12 of 1997. However, the problems in copyright are still continue until now. These problems happen both at the level of the written law (statutes) and its application. If the written words are difficult to understand, the application would be more difficult. At the level of the written law, legal indeterminacy lies in the obscure meaning of the provisions, either because of vagueness, inconsistency, and ambiguity, which affects difficulties in interpretation. Difficulties in interpretation seem difficulties in comprehending the words but really difficulties in applicability of the rules to facts.²

Indonesian Copyright Law states twelve types of works protected by copyright in article 12 of the Indonesia's Copyright Law, consisting of books, computer programs, pamphlets, typographical arrangement of published works, and all other written works; sermons, lectures, addresses and other works of utterance; visual aids made for educational and scientific purposes; songs or music with or without lyrics; dramas, musical dramas, and choreographic works, puppet shows, pantomimes; all forms of art, such as paintings, drawings, engravings, calligraphy, carvings, sculptures, collage, and applied arts; Architecture; maps; batik art; photography; cinematographic works; translations, interpretations, adaptations, anthologies, data-base and other works as a result of changing of form of mode.

One of the main source of problems applying this provision is interpreting the meaning of moral and economic rights. From the statute formulation's point of view, both rights are not formulated correctly, so that it causes *legal indeterminacy* and various legal interpretation. At least there are 3 (three) problems dealing with unclarity in the sphere of moral right and economic right. *First*, the vagueness of the term moral right in Indonesian Copyright produces multiple interpretations. *Second*, unclarity in the field of moral and economic right: in the body of the Statute, it is only moral right which is formulate, whereas the economic right is still formulated in the Elucidation section of the Law. *Third*, the vagueness of meaning of moral right and economic right because of the unclarity between the borderline between moral and economic rights.

The formulation about moral right is stated in the seventh section – Article 24 of the Copyright Law in Moral right and the explanation. Article 24 of the Law states that:

- (1) An Author or his heir shall be entitled to require the Copyright Holder to attach the name of the Author on his work.
- (2) It is forbidden to make changes to a Work although the Copyright has been transferred to another party, except with the consent of the Author or his heir if the Author has been deceased.
- (3) The provisions referred to in paragraph (2) shall also be applicable to changes in the title and subtitle of a work, inclusion and changes in the name or pseudonym of the Author.
- (4) The Author shall remain entitled to make changes to his Work in accordance with social propriety.

Furthermore, dealing with the moral right, the General Elucidation³ of Indonesian Copyright Law states as follows:

- (1) "Copyright consists of *economic rights* and *moral rights*. Economic right is a right to take economic advantages from the work and product of neighbouring work. Moral right is a right inherent to the author or performer which cannot be eliminated or removed without any reasons, although the copyright or the related right has been transferred.⁴

Elucidation of Article 24 states that:

- (1) Self-explanatory
- (2) With the moral rights, the Author of a work shall have the rights of:
 - a) his or her name or pseudonym be inscribed in his or her Work or the copy thereof in respect of public use;
 - b) preventing any forms of distortion, mutilation or any other forms of changes including swindling, cropping, destruction, replacement in respect of a work that will eventually damage the appreciation and reputation of the Author.

Besides, not of the above rights may be transferred, during the life of the Author, except on a will and testimony of the Author based on the prevailing laws and regulations.

¹ Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right' (2001) 3 *Copyright Bulletin* 12.

² Bryan Bix, *Law, Language, and Legal Determinacy* (Oxford Clarendon University Press, 1993), 5.

³ The Elucidation is the explanatory memorandum that accompanies most Indonesian statutes and government regulations. It is often determinative in the interpretation of the law, though not formally part of the law itself.

⁴ Translated by the Author. The original text is "*Hak moral adalah hak yang melekat pada diri Pencipta or Pelaku yang tidak dapat dihilangkan or dihapus tanpa alasan apapun, walaupun Hak Cipta or Hak Terkait telah dialihkan.*"

- 6 The provision in paragraph (2) shall also apply to a change in the title or subtitle of a Work, the mentioning and clause of the name or the pseudonym of the Author.
- (3) Self-explanatory
 - (4) Self-explanatory

The carelessness in formulating moral right can be seen in the General Elucidation of Indonesian Copyright Law which states “A Moral right is a right inherent to the author or performer which cannot be eliminated or removed without any reasons, although the copyright or the related right has been transferred.” (underlined the writer). If the provision is interpreted *a contrario*, the meaning would be “A Moral right is a right inherent to the author or performer which can be eliminated or removed with any reasons, although the copyright or the related right has been transferred.” If it were true, then the provision would contradict with Article 24 which protect the right of the author to require the copyright holder to attach the name of the Author on his work.

Second, unclarity in the field of moral and economic right: in the body of the Statute, it is only moral right which is formulated, whereas the economic right is still formulated in the Elucidation section of the Law. Different from moral right which is formulated in a certain section and article (Section 7 and Article 24), there is no regulation on economic right in the body of the Law. The term “economic right” is written in the General Elucidation of the Law, that the economic right is a right to take economic benefits from the creation and the related products.” The structure of placing the rules is illogical because an elucidation of an article should explain the previous terms stated in the article referred in the body of the Law. Whereas according to a good legal drafting, an elucidation should not add a new norm.¹

Although the Law states the advantages of economic right as the author’s exclusive right to do actions having economic values, the concept of “exclusive rights” is not known by most traditional Indonesian people. For land affairs, for example, according to the Indonesia’s Land Law, is not exclusive, because it has a social function.² In a communal society which has priority in kinship (*kekeluargaan, gotong royong*), it is not surprising that the journey of copyright often experienced changes in order to fit with global development.

The third unclarity is about the borderline between moral ¹¹ economic right. Based on Article 24 of the Indonesian Copyright Law, a moral right consists of two rights: right to be identified as the author of a work (Art. 24 par. 1), and the right to prevent an alteration to work that is prejudicial to the honour of the author/the right to integrity (Art. 24 par. 2). Furthermore, both rights are protected in the different period. ⁶ The right to be identified as an author is protected without any limit, while the right to integrity is protected for the period of copyright on the work concerned, except for the mentioning and changing of name or pseudonym of the author.

If the moral right can be transferred on a will and testimony, it means that the moral rights are treated as economic rights, whereas an identity is something inherent which cannot be transferred. So, it should be questioned why this Article gives a chance to transfer the moral rights although it is done by the consent of their heir. Doesn’t it belong to the economic rights? From these provisions, it seems that there is no distinction between both rights.

Since the beginning, the process of passing the Bill of Copyright Act, the concept of moral rights and economic rights was not clear and inconsistent. According to the Bill³ which was initiated by the Indonesian Government under the presidency of Abdurrachman Wahid (Gus Dur) through Indonesian Presidential Decree R.44/PU /XII/1999, the moral right has united character with the creator (*manunggal*), and this is only for sculpture and painting (*seni pahat dan seni lukis*). Rather, the ambiguity of the provisions dealing with moral rights must have been solved by what is the true intent or what was meant by the legislature as they discussed in drafting the Law.

² The most interesting of the discussion was that there is none of the fractions questioned the essence of the moral and economic rights of the copyright, although the two rights are fundamental for the copyright. The term “moral” and “economic” rights was mixed with “private” and “public” rights, and the concern on the “social function” of science that the true science would be beneficial for human being for we have to responsible on what we have had in the world when we died and go to God to account for what we have done. Furthermore, the true creator is “Allah” as the owner of science, even a statement from Reformation Fraction stressed on their disagreement on the economic rights of the author.⁴

¹ Maria Farida Indrati Suprpto, *Ilmu Perundang-undangan, Dasar-Dasar dan Pembentukannya* (Jogjakarta: Kanisus, 1998), 34.

² See, Article 6 of Indonesia’s Land Law Number 5 of 1960 (*Peraturan Dasar Pokok-Pokok Agraria*): “all rights of land has a social function”

³ The Bill of Copyright Law 19/2002 is taken from Secretary General of House of Representatives of the Republic of Indonesia, 2010.

⁴ The complete statement is “Yang akan menuai keuntungan dari penambahan waktu jika hak cipta dijadikan komoditi ekonomi adalah pemilik hak cipta yang berkolaborasi dengan kaum kapitalis. Oleh karena itu, negara-negara maju (*kapitalis*) yang menguasai teknologi hanya akan lebih diuntungkan dibandingkan dengan negara-negara berkembang yang

It takes two and a half year from December 13 since the Government’s proposal to approval of the House of Representatives on July 11, 2002. While drafting the legislation, The Minister of Law and Human Rights of Indonesia explained before the Legislature that the duration of moral rights was perpetual,¹

*“Hak pencipta atas suatu ciptaan terdiri dari Hak Ekonomi dan hak Moral. Hak ekonomi atas suatu ciptaan dapat berpindah kepada pihak lain, misalnya melalui perjanjian atau pewarisan. Sedangkan Hak Moral tetap melekat pada pencipta walaupun hak ekonominya telah berpindah atau dalam hal si pencipta sudah meninggal dunia, ahli warisnya berhak menuntut pihak lain atas pelanggaran terhadap hak moral tersebut”.*²

So, it can be concluded that there was a mistyping at that time the legislation passed. If such a Government’s response had been written as a provision or memorandum at the Copyright Law of 2002, there would have not been such an ambiguity.

3.3 Terms of Protection: For Moral or Economic Rights?

The term “hak cipta” as defined in the article 1 of Indonesia’s Copyright Law is “an exclusive right for an Author or the recipient of the right to publish or reproduce his work or to grant permission for said purposes, without decreasing the limits according to the prevailing laws and regulations.”³ From that definition, it is clear that the moral right- paternity and integrity rights – are not covered in that definition. It is not surprising that in the regulation and in the practice, the “hak cipta” is meant mostly as “economic rights”. The economic rights includes the rights of reproduction, communication, and adaptation. The right of reproduction gives the author control the reproduction of a work including photography, recording, downloading, and the like. The right of communication gives the author control how a work is to be transmitted, communicated, broadcast, performed, exhibited, etc., including how copies of the work are to be distributed. The right of adaptation give the author control the adaptation of a work through translation, dramatization, cinematizing, and the creation of derivative works in general.⁴ In the regulation Directorate General of Intellectual Property Rights, the nuance of “economic rights” is more apparent, by stating that the terms of protection of the copyright is as stated in the Law. The table below describes the term of “economic rights” of the author, because moral rights is perpetual.

Book, computer program, pamphlets, other written works, sermons, lectures, addresses and other works of utterance, visual aid made for educational and scientific purposes, dramas, musical dramas pantomimes, choreographic works, all forms of art: as paintings, drawings, engravings, calligraphy, carvings, sculptures, collage, and applied arts, architecture, map, batik art, translations, interpretations, adaptations, anthologies.	The life time of the Author and 50 (fifty) years after his death
Lay out of published written works, data-base and other works as a result of changing of form of mode, photography, cinematography.	50 (fifty) years as of the first publication.
Puppet shows, pantomime, prehistoric remains, historical and other national cultural objects	Not mentioned
Folklores and works of popular culture that are commonly owned, such as stories, legends, folk tales, epics, songs, handicrafts, choreography, dances.	Held or exercised by the State, shall be valid without any time limit

berlatarbelakang teknologi dan finansial. Misalnya seperti gugatan yang dilakukan Microsoft terhadap warga negara dan perusahaan-perusahaan pelanggar tersebut. Untuk para pemilih hak di negara-negara berkembang akan menjadi sia-sia. Selain itu, yang dianggap memprihatinkan adalah akan ada gejala putusnya perkembangan generasi, karena generasi tersebut tidak memiliki hak publik. Di dalam pandangan agama, ilmu yang bermanfaat bagi banyak orang akan menjadi bekal untuk hari kematian. Jika hak privat dimiliki untuk jangka waktu yang sangat panjang, kapan bisa menjadi hak publik, padahal ilmu itu adalah milik Allah (SWT, Tuhan), dan Tuhan juga pemilik, julukan sebagai Pencipta (Yang memiliki hak Cipta).

¹ Speech by The Minister of Law and Human Rights, Prof. Yusril Ihza Mahendra in the Plenary Session of Legislature on March 30, 2000 on Bill of the Copyright Law.

² The Response of Indonesian Government spoken by The Minister of Law and Human Rights on the General Views of Legislature Fractions 15, 2000, Report on The Bill of Indonesia’s Copyright Law, 139.

³ The original text is “Hak cipta adalah Hak eksklusif bagi pencipta atau penerima hak untuk mengumumkan, memperbanyak ciptaannya, dan memberi ijin untuk itu dengan tidak mengurangi pembatasan-pembatasan menurut perundang-undangan yang berlaku”

⁴ The term “memperbanyak” in Indonesia’s Copyright Law means “to copy or to reproduce”. For economic rights, see, Sybil Foreman, *Copyright Law: World Study*, (University Publications, 2012) 40.

calligraphies and other artistic works.	
The Author of a work is unknown and the work has not been published, the State shall hold the Copyright on such a work for the interest of the Author.	The State shall hold the Copyright on such a work for the interest of the Author; 50 years since the first time known to public
If a work has been published and the Author of which is unknown or the name printed on such work is only a pseudonym	The publisher shall hold the Copyright on the work for the interest of the Author; 50 years since the first time published
If a work has been published and the Author and/or the publisher of which are unknown	the State shall hold the Copyright on such a work for the interest of the Author.50 years since the works is known by public.

4. Is Copyright System Appropriate?

4.1 The Problem of Moral Right and Economic Rights

Since the first national copyright 1982, Indonesia has included folklore as the copyrighted works in article 10 (2), that the state protects and preserve the product of people culture which has been common owned, such as tales, story, legend, folksong, craft, choreography, folkdances, and calligraphy¹. Then the next paragraph states that the state holds the copyright for the foreign.²

In the current copyright law, Law Number 19/2002, Article 10 (2) provides that Indonesia State holds the copyright to various expressions of folklore and to so-called 'products of popular culture'.³ The rationales to cover folklore are stated in the consideration of the Acts that: that Indonesia is a country which has diversity of ethnics/ tribes and culture as well as wealth in the field of arts and literatures which needs the protection of Copyright for the intellectual property originating from the diversity; that Indonesia has become a member of several conventions/ international agreements in the field of intellectual property rights in general, and particularly in the field of Copyright, which needs further manifestation in its national legal system.

As a consequence of the inclusion of folklore within copyright system is that the moral and economic rights are applied for folklore. Moral rights cover the right to be identified as the author (the right of paternity, sometimes also termed the right to attribution, the right to object of derogatory treatment of the works of the right of integrity). Moral rights are traditionally associated with an individualistic view of authorship, derived from European Romanticism of the nineteenth century. Certain cultures do not emphasize the identification of the artist with his or her work, preferring, instead, to value artworks for their own sake, or for their social significance.⁴ Indonesia follows civil law system, moral rights cannot be transferred or sold, and are separate from the economic rights. This is not copyright law, but author's law. If an author thinks his or her work has been changed or presented in a way of which he or she subjectively disapproves, the author has a right to take action.⁵

The problem dealing with moral rights concerns with the unique "moral right" of folklore, which does not match with the concept of originality or paternity of copyright purpose. Marett Leiboff says that if something we create originates from us, then for some types of copyright, we have met one of the ingredients for copyright law.⁶ The originality doctrine, like the "idea-expression" dichotomy, might be morally sound, but it is thorny both in its philosophy and in its practice. The most problematic dimension of the "originality" requirement in our late-capitalist economy is the intimate links between creativities and profits. Original creative works – if they are profit generating – are often caught up in elaborate industrial manoeuvring and marketing packages – meaning that the efforts invested in the work comprise not only the author's labour and creativity but many other economic and aesthetic investments. While copyright, is designed to establish the legitimacy of authors, distributors create the "works made for hire" doctrine and different kinds of contractual agreements to allow an

¹ The original text is: *Hasil kebudayaan rakyat yang menjadi milik bersama, seperti cerita, hikayat, dongeng, legenda, babad, lagu, kerajinan tangan, koreografi, tarian, kaligrafi dan karya seni lainnya dipelihara dan dilindungi oleh negara.*

² The original text is: *"Negara memegang hak cipta atas ciptaan tersebut pada ayat (2) terhadap luar negeri".*

³ 'The State holds the Copyright for folklores and products of popular culture that are commonly owned, such as stories, legends, folk tales, epics, songs, handicrafts, choreography, dances, calligraphies and other works of art.' (Translation by the author from the Indonesian version: *"Negara memegang Hak Cipta atas folklor dan hasil kebudayaan rakyat yang menjadi milik bersama, seperti cerita, hikayat, dongeng, legenda, babad, lagu, kerajinan tangan, koreografi, tarian, kaligrafi, dan karya seni lainnya"*.

⁴ Rajan, above n 21, 213.

⁵ Paul Torremans, *Copyright Law: A Handbook of Contemporary Research*, (Edward Elgar, 2006) 19.

⁶ Marett Leiboff, *Creative Practice and the Law* (Lawbook Co.2007) 18.

author to transfer all rights in a work to someone else, which indirectly or practically, eliminates the entire construct of authorship.¹

By close observation to the process and making of Malang Mask it can be conclude that such works are evolutionary and derivative in nature, so it may be difficult to show that they are original works for copyright purposes.

First, folklore has a unique character that is different from works covered by the copyright regime. What is meant by folklore according to the Elucidation of the Indonesia's Copyright Law is a set of traditional works, made individually or communally in a society displaying social and cultural identities based on standards and values orally and delivered through generations, including folk tales, folk poetries, folk songs, traditional musical instruments, traditional folk dances, and traditional games, product of arts in the form of paintings, drawings, incisions, sculptures, mosaic, decoration, craftsmanship, clothes, musical instruments, and traditional weaving.² There is no "originality" in folklore. Every works of folklore is imitation through generations, as exemplified by the Malang Mask traditional craft making process. It is local, rooted to a particular place and set of experiences and generated by the people living in those places; it is orally transmitted, or transmitted through imitation and demonstration; its is empirical rather than theoretical, it is constantly changing, although often represented as static; its distribution is socially differentiated, for example by gender and age, and it is holistic and situated within broader cultural traditions, so that separating the technical from the non-technical and the rational from the non-rational is problematic.³

Dealing with the right of integrity of the moral right, this right is considered to be the moral right with greatest practical significance, and it is usually limited, as in the international model provided by Article 6bis of the Berne Convention, to actions that prejudice the "honour or reputation" of the author. However, this interpretation of moral rights theory is unnecessarily narrow. The reputation of the author can as well be protected by defamation law.⁴ Moreover, the fact that the most important moral right is directly concerned with the treatment of artworks – the effect of the treatment on the author's reputation acting as a legal device limiting the reach of the right – makes the emphasis on reputation seem slightly artificial. However, the concept of moral right also make a larger contribution to culture, one that tends to pass unremarked. Moral rights contribute to a public interest in culture in at least three, important ways: the generation of respect for creativity, which leads to the creation of culture and encourages the maintenance of cultural heritage; the preservation of the existing cultural patrimony; and respect for historical truth.⁵ The public interest in culture that moral rights protect finds expression in the provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. They appear in the form of rights in culture and public access to culture.

Another difficulty is the fixation requirements in copyright law to qualify for copyright, the work must be an original work of authorship fixated in a tangible medium or expression. Of the three qualifications, "expression" and "originality" are abstract principles, while "fixation" is a material quality that allows the actual copying to take place. Therefore, copyright does not end but begins with fixation, as the real concern of copyright is not creation but infringement, not the definition of authorship but the regulation of the product, reproduction and distribution.⁶ It is only after the work has been fixated in tangible form that it can be copied. The problem of fixation is more obvious in folklore which is known for its tendency not to be fixed.

The further problem is the difficulties in law enforcement. For example, the provision on the infringement of copyright in the form of plagiarism in the Article 15 is not suitable to be implemented. This article states: "Provided that the sources are fully cited, the following is not deemed as Copyright infringement:

- a. The use of a work of another party for the purpose of education, research, scientific thesis, report writing, criticizing or reviewing an issue, provided that it does not prejudice the normal interest of the Author;
- b. The excerpt of a work of another party, in whole or in part, for the purposes of advocacy within or outside the court;
- c. The excerpt of a work of another party, in whole or in part, for the purposes of:
 - (i) Lecturers of which the purpose is solely for education and science; or
 - (ii) Free-of-charge exhibitions or performances, provided that they do not prejudice the normal interests of the Author.

¹ Lakwan Pang, *Cultural Control and Globalization in Asia: Copyright, Piracy, and Cinema*, (Routledge, 2006) 26. See also: Foreman, above n 34, 10 who adds the right not to false attribution as the consequence of the right of attribution, where the work is falsely presented as being another's work.

² Translation by the Author.

³ Ellen, R and Harris, H. 'Introduction' in Ellen, R., Parkes, P. And Bicker, A.eds. *Indigenous Environmental Knowledge and Its Transformations*, (Routledge, 2000). 4-5.

⁴ Rajan, above n 21, 225.

⁵ Ibid 224.

⁶ Lakwan Pang *Cultural Control and Globalization in Asia; Copyright, Piracy, and Cinema* (Routledge, 2006) 29.

- d. Reproduction of a scientific, artistic and literary work in Braille for the purposes of the blind, unless such reproduction is purported to a commercial purpose;
- e. Limited reproduction of a work other than computer program limitedly by using any means whatsoever or by employing a similar process by a public library, scientific or educational institution and documentation centre of non-commercial nature, solely for the purpose of conducting their activities;
- f. Modification of any architectural works, such as building construction, based on consideration of technical implementation;
- g. Making of a back-up copy of a computer program by the owner of the computer solely for his own use.

The infringement of copyright is taking the most substantial part which has been characteristic of the work without citing the source and it is done not for non-commercial activities or social activities; for advocacy within or outside the court, and for the sake of the blind (article 15 and its explanation). Whatever the form of its uses, whether it is for the sake of education, advocacy in the court, preaching, performing, etc, as long as the source is cited, it is not a plagiarism..." Furthermore, according to the Indonesia's copyright act, them taking of the substantial part and the unique part that has been the characteristic of the creation is a copyright infringement.

There are two points need to note. First, the activity of "taking" in a clear form is "copy – paste" (in the written form) ; or *copy* (multiplication – for audio-visual works, such as video, CD). "Taking" in such a form can be done in low to high gradation. Second, dealing with "the substantial part"? The previous Indonesia's Copyright Law¹ provides that the taking may not more than 10 percent. The prevailing Indonesia's copyright law provides that the taking of the substantial part which has been the characteristic of the works although it is less than 10 per cent, is copyright infringement provided that it does not cite the source of which is taken from. So, there are two important things in determining which "activity of taking" can be deemed as plagiarism or not. Taking a substantial part with citing the source, of course it is not plagiarism. Taking substantial part without citing the source is plagiarism. Taking the parts which are not substantial without citing the source, is not a plagiarism, but I think it is better not to be done as it is a silly activity. The table below summarizes the activities which can be classified as plagiarism or not according to Indonesia's copyright law.²

Substantial Part	Citing the Source	Plagiarism?	Notes
Yes	Yes	No	It is an honest activity, ethical manner.
Yes	No	Yes	Should be avoided
No	Yes	No	It is an honest activity. Although it is not a plagiarism, don't do this because it is silly
No	No	No	Make sense

If traditional cultural expressions would be protected by the Copyright Law, the big problem raises: which part of the folklore should be deemed as the substantial part? And which part of it that is not the substantial part?

Folklore is cultural properties containing ethical values, social customs, beliefs, or myths of which intangible heritage is the sign and expression.³ Folklore should be treated as a creation as a whole, so it is impossible to take some parts as substantial and the rest as un-substantial to classify it as infringement. Cultural expressions are very specific and cannot be mixed with any intellectual property regimes such as copyright. The specificity of folklore is on the cultural community "owning" it, not the state. It is the cultural community who owns the folklore or generations fostered by tradition. It is not the state that has the "moral right" nor "economic right" of the folklore, as 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.

The most critical problem is the provision that the State as the holder of copyright. The original version of Indonesia's Copyright Act 1982 has a provision in a section with the heading "the Holder of copyright to national cultural objects" and it included subsections that made it possible for the state, against compensation, to appropriate an author's copyright by Presidential Decree and consent of the Copyright Council, if this was in the national interest. Then, government revised the provision and changed the heading of this section of the Copyright Act to the current 'Copyright to Works of Unknown Authors'. It deleted sub-sections on state appropriation and countered criticism of interference in community interests by (a) including in the provision

¹ Undang-Undang Hak Cipta Republik Indonesia Nomor 17 tahun 1987.

² The table summarizes the activities classified by the Indonesia's Copyright Law, with comments by the author.

³ The Interdependency of the Tangible and Intangible Cultural Heritage, ICOMOS 14th General Assembly and Scientific Symposium.

that the government was exercising this copyright with regards to foreign countries, and (b) by explaining in a memorandum that 'Indonesians themselves are generally free to use it'.¹

The Elucidation of Indonesia's Copyright Law states that: in order to protect folklore and the other products of community culture, the Government can prevent monopolizing or commercialization as well as activities damaging or taking advantage commercially without permission of Indonesia State as the copyright holder. This provision is intended to avoid activities by foreigners which can damage the value of the culture.²

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 has never has the moral rights of folklore because folklore is not identical with the state but with the community bearing it. The role of the state is just to protect and foster the folklore to exist and develop. As a consequence, beside 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 industrialization.³ That the state has to facilitate the 'economic aspect' of the folklore, it is a consequence of the role of the state to protect its people, not to hold the copyright. Furthermore, in fact, the works of copyright cannot be registered in the name of a community or a region, but in the name of individual or a business entity.⁴ It is unfortunately that Indonesia which has been very rich in cultural diversity and folklore has no regulation on traditional cultural expression. The only one that Indonesia has is Law Number 10 of 2011 on Tangible Cultural Heritage (*Undang-Undang Cagar Budaya*), a Law protecting tangible cultural heritage such as temple, monument, landscape, etc. based on Article 32 (1) of 1945 Indonesian Constitution that 'The state shall advance the national culture of Indonesia among the civilizations of the world by assuring the freedom of society to preserve and to develop cultural values.³

Furthermore, Part Three of the Indonesia's Law on Copyright bears the heading 'Copyright to Works of Unknown Authors'. The provisions thus part mix elements from art 15.4 of the Berne Convention with the "national folklore" approach of the Tunis Model Law. Article 11 deals with unpublished (as well as published) works of unknown author, in which case the state shall be the holder the copyright. There has been, however, no designation of a competent authority to represent the author's interest as required by art. 15.4 of the Berne Convention. The rather unusual art.10 (1) declares the state to be the holder of copyright in prehistoric and historic relics and "other national cultural objects". The Indonesian text uses the term of the Copyright Act for a copyright protected work (*karya*) in combination with "relics" (*peninggalan*), although this would be normally be material for heritage rather than copyright protection. According to art 10 (2), the state holds also the copyright to various expressions of folklore and "products of popular culture". Foreigners will need a license to use such material (art.10 (3)). Article 10 requires further implementation via a Government Regulation (art .10 (4)), which has been never issued. If adopted, a Draft law on the Intellectual Property Use of Traditional Knowledge and Traditional Cultural Expressions would regulate such licensing as well as benefit sharing with local custodian in the future. The Copyright Act is also being revised and it remains to be seen whether it will continue to include expressions of folklore or leave the subject matter to the sui generis law.⁵

Last but not least, in view of the many ethnic communities producing folklore in Indonesia, how would a centralized agency be staffed so as to be able to claim sufficiency expertise to represent all these different stakeholders and their interest?⁶ Even at the time of a centralistic government under Suharto, a centralized model of folklore administration on the local customs and rituals of communities could not have been implemented.⁷

The various regional cultures of Indonesia can be expressed with all their differences and uniqueness within Indonesia, but they become part of Indonesia's national culture when they are represented towards the outside world. From the perspective of the Indonesian government, this is important to safeguard a still sometimes fragile national unity; and it also justifies the use of local culture for political symbolism and for tourism campaign aimed at a foreign audience. However, the approach becomes problematic where 'regional' cultures are also represented in regions of neighbouring countries.

¹ Antons, above n 20, 84-85.

² Translated by the Author.

³ Margaret Ann Wilkinson and Natasha Gerolami, 'The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright' (2009) 26 *Governance Information Quarterly* 324.

⁴ The form of Copyright Application, The Regulation of Minister of Law of the Republic of Indonesia Number M.01.HC.03.01.1987

⁵ Antons, above n 3, 90.

⁶ Anton, above n 17, 84-90

⁷ Ibid.

The shift of local and regional cultural expressions to become symbols of national identity leads furthermore to a blurring of the distinction between heritage protection and copyright protection.¹ This is apparent from the first subsection of Article 10, which makes the state the copyright holder to material that is actually not a matter for copyright protection at all, namely “prehistoric and historic relics and other national cultural objects”. Rather than difficult to translate, the Indonesian text combines the word for ‘relic’ (*peninggalan*) with the word used throughout the Copyright Act for a copyright protected ‘work’ (*karya*), thus turning heritage items into objects for intellectual property claims.

The last mentioned part of article 10 seems to have been inspired by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, yet another international convention that was influential at the time of the Indonesian Copyright Act was drafted. The concept of ‘cultural property’ that is now frequently used by communities and by nation states for claims based on tradition and identity, has its origins in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²

Article 10 of the Indonesian Copyright Act, is therefore, an excellent example for a combination of cultural and intellectual property that is symbolically powerful. It creates confusion, however, about the exact nature and strength of the ‘rights’ involved. As for the Indonesian state’s authority to control publication and reproduction of Indonesian folklore and popular culture, it requires further implementation via Government Regulation.³ Perhaps because of the conceptual difficulties discussed above, this Government Regulation has ever been issued. There are, therefore, currently still no rights to such traditional cultural expressions at the national level in Indonesia and the creation of international protection is still under negotiation at the WIPO IGC.⁴

The way to hold the copyright would be a matter about how the state as the copyright holder of the folklores protect them dealing with decentralization policy of Indonesian country. After Asian Crisis in 1997/1998, centralistic government has been changed into autonomy in each regions, and it was realized through the decentralization policy when it has diverted powers from central government to the regions by Local Autonomy Law Number 22 of 1999, the first Local Autonomy Law, then to be amended by the Law Number 13 of 2009 on the same subject. This law regulates the authority of local government to organize and administer the local residents; the local autonomy is administered by paying attention to the diversity of each region. The fundamental principles of local autonomy are the society’s empowerment by developing initiatives and creativities of the local society. In that Law, the local government has authority and freedom to form and exercise policy fits to the initiatives and aspirations of its society members. So, if the state as the holder of the copyright of folklore, it means that the nation has lost ground to the pre-reformation era which everything is centralistic. But the most important thing is that the folklore expressions are found in local areas, because folklore (as any other form of tradition) is of course locally defined and, in the most part, associated with certain regions and territories, such as Malang Mask shown above.

If the copyright is hold by the state, then there is leaving a little room for regional autonomy. In practice, it causes difficulties about who collect the royalty from the exploiter and give it back to the traditional society owned the culture? Both the defense of, and royalty collection for, local Indonesian cultural expressions become, therefore, matters for the national authorities. The following reasons are especially likely to have contributed to the adoption of this approach; first, the Indonesian government regards the matter largely as a question of “us” (Indonesian and their culture) versus “them” foreign tourists, art collectors, artists, and advertising agencies who use material in an inappropriate manner).⁵ Although such an understanding is in accordance with Article 32 of the Indonesian Constitution which declares that the state is the defender and promoter of national culture,⁶ it is simpler to write down than to implement, because until now there is no regulation on how to collect royalties from foreigners in the national interest.

4.2 On Folklore: The Right of Cultural Authorship or The Right of Cultural Heritage?

The state has no moral right nor economic right to the folklore because the state is not identical with the community bearing the folklore, as the state is a political community, not cultural one. The role of the state in this matter is just protecting, maintaining and promoting the existence of the folklore. As a political entity, the state has to make a political decision supporting the moral and economic rights of the community having the

¹ Christoph Antons, ‘What is “Traditional Cultural Expression”’, International Definitions and Their Application in Developing Asia’, (2009). 1 *The WIPO Journal*, 108.

² Aragon, above n 1, 271.

³ Article 10 (4) Copyright Act.

⁴ Antons, above n 17, 1425.

⁵ Antons, above no 3, 1422.

⁶ Article 32 (1) of the Indonesian Constitution requires that ‘the State shall advance the national culture of Indonesia among the civilizations of the world by assuring the freedom of society to preserve and develop cultural values’.

original right. It can be done for example by promoting and improving local community-based tourism. If folklore is to be protected by the copyright system, it must be sure that the community itself is the holder of the copyright because *de facto* they have preserved and maintained the traditional cultural expression. Protecting cultural heritage does not mean to freeze it, for this cultural heritage as a **7** dynamic entity should be exploited in order to develop, to evolve and even to create social progress and **fundamental inspiration for cultural production**. Providing **the State** as a copyright holder might open opportunity to exploit the folklore as a tool of political aim and propaganda, and history had proved so with the Malang Mask.

The *maestro*, *Mbah Karimun*, and his heirs have just duplicated and recreated the previous masks from his ancestral. Their position is to preserve and maintain the masks since he and his heirs wanted to preserve the heritage. So, he and his heirs are the copyright holders of the Malang Masks as the cultural heritage. Heritage means something of inheritance or something that has been passed down from previous generations. It can cover historic buildings or monuments as well as natural landscape.¹ So it has different ideas on how to reward intellectual creativity and authorship. Asian countries had different ideas on how to reward intellectual creativity and authorship. An author's or inventor's reward in the past was derived from his enhanced status in the community rather than from individuality negotiated in contract. It is exactly urged by Christoph Antons² that copying a master's work until one understand the technique is essential. The particular skill lies in the way details are expressed. That is why, the traditional cultural expression such as Malang Mask is not appropriately covered by copyright system which reward originality of an authorship. It is more appropriate to include it into cultural heritage. There are three levels of heritage of folklore: Firstly, the community itself as the heirs of cultural heritage from factual basis that they have been preserving for generations. Secondly, the state as the heirs from the political basis because the folklore lies within its jurisdiction so that the state must protect and promote the folklore for the sake of the community itself and the state as a whole; and then thirdly, all human beings have been the heirs from the humanity basis.

Indonesia has only Law on Tangible Cultural Heritage (Law Number 10 of 2011 on Cagar Budaya) which protects monuments, sites, landscapes, and other tangible heritage, but until now, Indonesia has no laws regulating the intangible heritage such as folklore. Therefore it is strongly needed the existence of *sui generis* law reinforced with a sort of national bank of cultural heritage to protect folklore from appropriation or exploitation of **12** her countries and also to guarantee its existence.

12 The legal recognition of tribal sovereignty is in essence the awareness of communal or group rights. Universal Declaration of Human Rights also provide **12** right to the moral and material interest resulting from any scientific, literary, or artistic production. Folklore should be seen as a **12** ic human right and that concerned organizations should take up the cause as major part of their activities.³ Preservation of cultural heritage was recognized by the United Nations Economic Scientific and Cultural Organization (UNESCO) in 2005 under the **Convention on the Protection and Promotion of Diversity of Cultural Expression**. Indonesia has just done accession but not ratified it. This convention sought to enshrine a number of objectives including, "...cultural diversity is made manifest not only through the varied way in which the cultural heritage of mankind is expressed, augmented, or transmitted through the variety of cultural expression, but also through diverse modes of artistic creation, production, dissemination, attribution and enjoyment, whatever the means and technology used."⁴

Until now, Indonesia has just have the Law on Cultural Tangible (*Undang-Undang Cagar Budaya*, Number 11 of 2010) but have no Laws on Intangible or Traditional Cultural Expression (folklore). However, the Ministry of Culture and Tourism in Collaboration with UNESCO Office in Jakarta has issued a practical handbook for inventory of Intangible Cultural Heritage of Indonesia, but there is no concrete policy for the next after the inventory. The attempts of the Indonesian government to documentation and establish an inventory is just an initial step to the next step needed, i.e, making a *sui generis* law on intangible cultural heritage and a national bank of cultural heritage to protect TCE.

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¹ Devi Rosa Kausar, Sustainability in the Management of World Cultural Heritage, in Dr. Mirat Kasinmoglu (Ed), *Visions for Global Tourism Industry – Creating and Sustaining Competitive Strategies* (In Tech, April 2012).

² Christoph Antons, 'Legal Culture and Its Impact on Regional Harmonisation', in *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International, 2004) 32.

³ D.A. Posey and M.P Goeldi, 'International Agreement and Intellectual Property Right Protection for Indigenous People', in Michael S. Simons, 'Aboriginal Heritage Art and Moral Rights', (2000) *27 Annals of Tourism Research*, 415.

⁴ See Article 4 (1) of the Convention on the Protection and Promotion of Diversity of Cultural Expression

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