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## LEGAL PROTECTION FOR TRADITIONAL CULTURAL EXPRESSION AS CULTURAL HERITAGE

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Traditional Cultural Expressions (TCE) is a cultural heritage which has been passed on for generations, the author cannot be identified, its originality and individuality cannot be traced. Therefore, it cannot be protected as works copyrighted as stated in the Law Number 28 of 2014 on Copyright. This article suggests an approach to the problem of protection, i.e. the reaffirmation of the preeminence of human rights principles in resolving TCE questions. It means that there should be a program of transfer of funding and technology to protect the “best interests” of TCE for the benefit of interested groups as well as the world community. This approach needs a legal protection containing three elements: 1) rules encouraging the community producing TCE to exchange, innovate, and practice their knowledge 2) right to oppose to any appropriation or research which would disrespect and recognize the TCE; 3) provisions ensuring that any transaction aiming at destroying or discrediting the integrity of TCE, innovations, and practices is void; 4) elaborating strategies to balance protection of TCE so as to take into account preservation of the cultural as well as heritage aspects of cultural property.

*Key words:* legal protection, traditional cultural expressions, cultural heritage, human rights

### Introduction

Human being lives within culture, with culture, and through culture. Culture is the house of “human’s being”, culture is “the house of being” of human being.<sup>1</sup> Traditional cultural expression’ is a term that is used interchangeably with ‘expressions of folklore’ to refer to ‘tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested’, for example, verbal expressions, musical expressions, expressions by action such as dance, and tangible expressions in art and crafts.<sup>2</sup>

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<sup>1</sup> “House of Being” is a term posed by a German philosopher, Heidegger, that “Language is the house of being”. See, Jerzy Stelmach and Bartoz Brozek *Methods of Legal Reasoning*, (Dodrecht: Springer 2006), p. 198. See also, John Protevi (Eds), *The Edinburgh Dictionary of Continental Philosophy*, (Edinburgh: Edinburgh University Press, 2005), p. 350.

<sup>2</sup> WIPO. *Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions*, WIPO Doc. WIPO/GRTKF/IC/19/INF/7, 17 May 2011, p. 26.

In Indonesia, the TCE is protected by Law Number 28 of 2014 on Copyright and this TCE is held by the state (Law Number 6 of 1982, Law Number 7 of 1987, Law Number No. 19 of 2002 and Law Number 28 of 2014 on Copy Right). Indonesia has ratified *Convention for the Safeguarding of the Intangible Cultural Heritage* through Presidential Regulation Number 78 of 2007.

Legal protection means that: 1) rules encouraging the community producing TCE to exchange, innovate, and practice their knowledge 2) right to oppose to any appropriation or research which would disrespect and recognize the TCE; 3) provisions ensuring that any transaction aiming at destroying or discrediting the integrity of TCE, innovations, and practices is void; 4) elaborating strategies to balance protection of TCE so as to take into account preservation of the cultural as well as heritage aspects of cultural property.<sup>3</sup> The protection of TCE raises a problem since there is no further regulations since Indonesian Copyright of 1982, and there is no authoritative body representing the state in protecting TCE.<sup>4</sup>

The role of the state as the copyright holder on TCE has been criticized in the research of Aragon<sup>5</sup> through her analysis on the nationalism of intangible properties. The study on the comprehensive legal interpretation based on hermeneutic circle conducted by Susanti,<sup>6</sup> shows that the Law on Copyright Indonesia has not properly protected the TCE because its philosophy and purpose are different: the author's right is individual in nature, has limited protection duration, fixation requirements, and differs from the concept of TCE which has been passed on for generations, the creator is therefore not identified, and cannot fulfill the requirement of originality and individuality. Also, the three Law have been passed without academic document previously, and it could not be traced why the TCE is included in the author's right regime.<sup>7</sup>

In practice, TCE in Indonesia does not enjoy protection properly: the wayang puppet show has been stopped by the radical group in Solo because it was assumed as confronting

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<sup>3</sup> Busch, Anna Friederike. 2015. *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study*, Berlin Heidelberg: Springer-Verlag, p. 124.

<sup>4</sup> Nahor, Rafles Junarto Poltak Manondang Banjar. 2013. "Perlindungan Hukum Hak Cipta Folklor atas Tari-Tarian Rakyat Indonesia", *Tesis*, Program Pascasarjana Universitas Atma Jaya Yogyakarta.

<sup>5</sup> Aragon, Lorraine V., 'Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia', 2012. *International Journal of Cultural Property* Vol. 19, p. 269.

<sup>6</sup> Susanti, R. Diah Imaningrum, "Partialities in the Method of Legal Interpretation", *Journal of Law, Policy, and Globalization*, Vol. 32/Dec. See also, *Penafsiran Hukum yang Komprehensif Berdasarkan Lingkaran Hermeneutika*, Malang: Indonesian Philosophical Studies: April 2015.

<sup>7</sup> Susanti, R. Diah Imaningrum "Penafsiran Hukum yang Komprehensif terhadap Hak Moral dan Hak Ekonomi dalam Undang-Undang Hak Cipta", *Laporan Hasil Penelitian Hibah Doktor*.

Islam;<sup>8</sup> Cultural heritage and various artifact were destroyed and stolen across Indonesia,<sup>9</sup> the statue of Arjuna in Purwakarta has been destroyed by radical Islam.<sup>10</sup> In the intangible property, the finding of Kusumadara<sup>11</sup> and Mahadewi<sup>12</sup> confirms that music, dance, and Balinese traditional silver craft were taken and registered by foreign companies, besides claims of Malaysia over the Indonesia's TCE (e.g: batik, Pendet dance, Reog, song "Rasa Sayange"). Sinaga, in his study<sup>13</sup> showed that community members (e.g., small medium enterprises of Batik) took less care of TCE which are covered by the model of copyright, because copyright cannot accommodate special circumstances of Indonesian batik, the administration system of the intellectual property right which is not accommodating, as well as due to the weakness of its law enforcement. Until now, documentation of TCE that is conducted by the government is only for the TCE that has already become incredibly global, such as puppet, kris, and batik.<sup>14</sup>

TCE as national heritage should be protected through various strategies and methods, considering its connectivity with community's rights, values, meaning, history, and the identity/existence of the community delivered it.<sup>15</sup> Dealing with the issues above, the problems are: 1) Is TCE adequate covered by copyright law as regulated so far? 2) What is the meaning of "the state as the copyright holder of TCE and its legal consequences? And 3) What model of protection should be used in protecting TCE in Indonesia?

This article is aimed to find out the characteristics of TCE as well as of Copyright in order to enable legal scientists and stakeholders to distinguish and classify precisely the position of TCE in copyright context; to find out the meaning of the state as the copyright

<sup>8</sup> Kompas, "Menembus Brunei, Gamang di Negeri Sendiri", Oct. 22, 2010.

<sup>9</sup> Kompas. Seni Budaya, Tak Ada Perlindungan secara Internasional", Sept. 1, 2009."

<sup>10</sup> Reysent, Mike. Patung Arjuna Dihancurkan, Mengapa Patung Polisi Dibiarkan? www. Kompasiana, Feb. 16, 2016.

<sup>11</sup> Afifah Kusumadara 2011(a). "Pemeliharaan dan Pelestarian Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia: Perlindungan Hak Kekayaan Intelektual dan non-Hak Kekayaan Intelektual", *Jurnal Hukum No. 1* Vol. Jan. 18, 2011 (a).

<sup>12</sup> 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*.

<sup>13</sup> Sinaga, Selvie. 2014. "Faktor-Faktor Rendahnya Penggunaan HAKI di kalangan UKM Batik", *Jurnal Hukum Ius Quia Iustum*, No.1. Vol. 21, Januari, p. 77.

<sup>14</sup> Afifah Kusumadara, "Protect and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures", *US-China Law Review*, Vol. 8.

<sup>15</sup> R.Diah Imaningrum Susanti, "Problematika Hak Moral dan Hak Ekonomi dalam Hukum Hak Cipta Indonesia", *Makalah*, disampaikan pada Seminar Nasional Fakultas Hukum se-Surabaya 30 Maret 2013 di Surabaya, See also, Susanti, "The Problem of Copyright for Traditional Cultural Expression in Indonesia", *Journal of Law, Policy, and Globalization*, Vol. 29/September; dan Masango, Charles A. 2010. "Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?" *SA Journal Libraries & Info Science*, 76(1), p. 75.

holder on TCE and its legal consequences; and to find out the model of legal protection to be used to protect the TCE.

## 1. Studying TCE in Indonesian Copyright Law

TCE in Indonesian Copyright Law will be analyzed through a normative legal approach. The main object to study is norms in the copyright law and international conventions as guidances and standards in understanding the role of the State as copyright holder of TCE. The data is obtained through some sources: 1) Primary legal sources, i.e.: Law Number No. 28 on 2014 on Copyright, Presidential Regulation on the Ratification on the *Convention for the Safeguarding of the Intangible Cultural Heritage*, International Conventions on TCE, such as *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage*, *Convention on Biological Diversity*; *WIPO Model Law for Folklore Protection* of 1982, *WIPO Draft Treaty on Protection of Folklore*, *WIPO Draft Treaty on Protection of Traditional Knowledge*, *WIPO-IGC Draft of the Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles*, *WIPO-IGC Draft of the Protection of Traditional Knowledge: Revised Objectives and Principles*; 2) Secondary legal sources are dictionary, encyclopedia, *folklore*, and writings from books and international as well as national journals concerning with TCE. The legal sources collected would be systematically organized, set up in the form of description and table, and analyzed through the hermeneutic circle.

## 2. The State as Copyright Holder of TCE

“The state is the copyright holder of the traditional cultural expression” assumes some following premises:

- a. That TCE is covered by copyright law
- b. That the state is the copyright holder of TCE

Dealing with the first premise, is it correct that TCE is covered by copyright law? Copyright law presumes some characteristics: (1) there is an author, an originator, or someone who create a new thing, It means that the thing he/she created is not derived, copied or translated from something else. It is known as moral right of the author, as a requirement of Article 6bis of the Berne Convention. This concept of moral right does not mean “ethical” or something deals with ethics. The terminology of “moral rights” is a poor translation from the original French *droit moral*, much noted by experienced copyright observers, yet never replaced by a more congenial expression in English law. This idea refers to non-commercial



right of the author.<sup>16</sup> This term refers to someone who was an original position, so that in copyright law there should be a concept of “originality”.

Research conducted by Susanti confirms that there is not originator in TCE. The makers of Malang Mask, for example, do not create something new (character, model, pattern). They have been imitating what their forefathers did. “Originator” means the one who is in the first position, one who initiate and express it in a certain form, whereas in TCE, they are in the middle position, they are only continue, derivate, and preserve the previous works.<sup>17</sup>

Another characteristic of copyright protection is, there is a fixation, the realization of ideas, expression of ideas. TCEs have not been always expressed in certain forms, they often orally and passed from generations. The main points of the TCEs are values and virtues that should be preserved from one generation to the next generations. That is why TCEs are not easily to be included in copyright law protection.

The third characteristic of copyright law is a certain duration of protection. According to Indonesia’s Copyright Law of 2014, most works copyrighted will be protected for 70 years since the author died. Of course this kind of protection is difficult to implement to the TCEs because the author cannot be identified.

The fourth characteristic of copyright law is a concept called “substantial” and “non substantial” part of a work which should be identified to determine plagiarism if the substantial part is copied. The legal consequence of this concept is that imitating or copying the substantial part is infringe the copyright. Can it be implemented to the TCE? Is there any substantial and non-substantial part in TCE? If *Pendet Dance* from Bali was danced by Balinese dancers in such a way that the pupil of their eyes are “tossed” up and down, left and right, could it be called as “substantial”, so that if other person creates a dance with the same eye pupil movement pattern, can it be called “plagiarism? If *Reog Ponorogo*, a traditional show from Ponorogo, East Java were danced with *singobarong* mask with the two *gemblak*, then there is another community doing dance with the same way, can it be called “plagiarism”, and infringe the “copyright”? Of course no, because there is no substantial part in TCE. All elements in TCE is a comprehensive unity forming an expression of traditional culture.

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<sup>16</sup> Mira T. Sundara Rajan, *Copyright and Creative Freedom, A Study of Post Socialist Law Reform*, USA and Canada: Routledge, 2006, p. 32

<sup>17</sup> R. Diah Imaningrum Susanti, “Perlindungan Hukum Hak atas Kekayaan Intelektual Bagi Kerajinan Topeng Malang Dalam Kerangka Otonomi Daerah,” APTIK, *Justitia et Pax*, Vol.3, 2005, Fakultas Hukum Universitas Atma Jaya Jogjakarta, p. 148.

From the argumentation stated above, it can be said that it is improper to categorized TCE in the copyright regime. That Indonesian Law classifies TCE into the copyright law is a mistake in paradigm so far. If TCE cannot be categorized in copyright law, then the next premise that the state is the holder of the copyright, definitely, will be confutable.

### 3. Who is on duty to protect?

If the state is not the “copyright” holder of TCE, who is on duty to protect then? The problem of TCE protection in international society reflects two movements. First, leading to the understanding of common heritage so that it is the duty of international society to take care of it.<sup>18</sup> Second, leading to the understanding on the cultural speciality in community level, in which every cultural manifestation should be respected, treated as being important, and enforced in the same way as recognized by the community.<sup>19</sup> *Model business sharing* is one of alternative scheme from local community to preserve their TCE.<sup>20</sup>

The protection based on intellectual property right through geographical indication can be used to accomodate traditional knowledge-based creativity aspects in agricultural production.<sup>21</sup> Kusumadara<sup>22</sup> proposed to combine legal and nonlegal measures, IP and non-IP measures a mix model between Intellectual property law and non-intellectual property law, because lose their lands and can no longer practice their traditions, Indonesia loses their intellectual heritages and the framework for their unique understandings of life. The strategies needed are to train local communities to document their TCE and use *best practice* in organization and management of their documents.<sup>23</sup> Furthermore, it includes *appropriating the technologies threatening small-scale cultures in order to maintain and disseminate*

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<sup>18</sup> Unesco, 2011. “Berinvestasi dlm Keanekaragaman Budaya dan Dialog Antarbudaya”. Susanti, The Problem of Copyright for Traditional Cultural Expression in Indonesia”, *Journal of Law, Policy, and Globalization*, Vol. 29/September.

<sup>18</sup> Kuruk, Paul.2002. “African Customary Law and The Protection of Folklore”, *Copyright Bulletin*, Vol. XXXVI, No. 2, p. 5. See also, Nurmansyah, Andhy, dkk., 2010. “Strategi Pelestarian Seni Tradisi; Studi Kasus Kelompok Kesenian Tradisional Lengger di Kabupaten Jember”, *Laporan Hasil Penelitian Stranas*.

<sup>20</sup> Srinivas, Krishna Ravi. 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, p. 416.

<sup>12</sup> Dagne, Tesh. 2014. “Protecting Traditional Knowledge in International Intellectual Property Law: Imperatives for Protection and Choice of Modalities”, *The John Marshall Review of Intellectual Property Law*, Number 25, p. 49.

<sup>14</sup> Kusumadara, Afifah, .“Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures”, *US-China Law Review*, Vol. 8.

<sup>23</sup> Shankar, Guha. 2010. “From Subject to Producer: Reframing the Indigenous Heritage through Cultural Documentation Training”, *International Journal of Intangible Heritage*, Vol.05, p. 14; Bivens, Wayne-Tatum. 2010. “Librarians and Traditional Cultural Expressions”, *Journal of Religious & Theological Information*, Vol. 9, p. 49.

traditions, proposing government folk culture policies, developing modes of presentation for new audiences, and creating conditions for traditions to be perpetuated locally.<sup>24</sup>

#### 4. TCE: Copyright Law or Other Law ?

The TCE which is a tradition of a certain community interface between copyright law and cultural practice. However, the protection of TCE through copyright obfuscates the status of folklore as a generative resource for derivative works in favour of its status as a carrier of national identity, over which states can exercise property.<sup>25</sup>

Legal protection has a broad meaning, both preventive and repressive in nature. Preventive legal protection means that we have to take care and preserve the TCE, and repressive one means to safe the TCE from appropriation and exploitation which would harm the local community and the state. Although there is no international mandate to protect TCE,<sup>26</sup> there are some legal protection theories which are implemented in international level. First, teori “tanpa perlindungan” bagi TCE, yang berarti siapapun boleh menggunakan dan mengeksploitasi. Yang<sup>27</sup> supports to treat traditional cultural expressions of indigenous peoples as part of the public domain, so that anyone can make use of them and they can continue to change and evolve, Non-indigenous people should also be allowed to commercialize aspects of traditional culture, because doing so contributes to the transmission and dissemination of culture. Foreign company using traditional motives and then copyrighted it in its country follows this theory.

*Second*, theory of intellectual property right protection, that TCE is protected in IPR regime by including it in IPR field. Indonesia follows this system, by classifying it in the copyright law. Through the comprehensive legal interpretation based in Hermeneutic Circle on the Moral and Economic Rights in Copyright, Susanti<sup>28</sup> concludes that copyright law is inappropriate in protecting TCE because the concept of *common heritage* does not have author, communal in nature, pass through generations, often no fixation, unlimited duration of protection, is totally differ from the copyright that must prove the author, fixation, limited

<sup>24</sup> Baron, Robert. 2012. “All Power to the Periphery: The Public Folklore Thought of Alan Lomax”, *Journal of Folklore Research*, No. 49, p. 275-317.

<sup>25</sup> Collins, Stephen. 2015. “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.

<sup>26</sup> Pilch, Janice T. 2009. “Traditional Cultural Expression, International Copyright”, *Association of Research Libraries*, University of Illinois at Urbana-Champaign, September 1, p. 1.

<sup>27</sup> Yang, Chih-Chieh. 2008. “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., p. 84.

<sup>28</sup> Susanti, 2014, Op. Cit., 2016, Op. Cit.

duration of the protection of economic rights. Furthermore, the finding of Mahadewi<sup>29</sup> confirms that the form of protection given by the state to the traditional motives through registering copyright is not followed by Balinese because they treat their works as a part of value system and earn living.

Collins<sup>30</sup> also states that the protection of TCE in Africa through copyright law obfuscates the status of folklore as a generative resource for derivative works in favour of its status as a carrier of national identity, over which states can exercise property rights. So it is a mistake to use the criteria of copyright for TCE as TCE does not compatible with intellectual property right law, because TCE as a part of customary law that is transmitted orally from generation to generation, so it contains a margin of error that makes it impossible to achieve the same level of clarity and precision frequently sought in Western legal concepts.<sup>31</sup>

Australian Copyright Act still fails to adequately protect indigenous folklore that is used in religious ceremony but is used in inadequately,<sup>32</sup> although The United Nations Declaration on the Rights of Indigenous Peoples (DRIP) should be the basis for the Australian Government when considering how best to protect Indigenous cultural and intellectual property rights. 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.<sup>33</sup> In China, copyright law model is proved inadequately protect TCE.<sup>34</sup> This also confirmed by Molly Torsen that Copyright Law is a poor fit because it requires originality, fixation, copyright term (duration),

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<sup>29</sup> Mahadewi, Kadek Julia, 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.

<sup>30</sup> Collins, Stephen. 2015. "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.

<sup>31</sup> Kuruk, Paul. 2002. "African Customary Law and The Protection of Folklore", *Copyright Bulletin*, Vol. XXXVI, No. 2; 2002; Hinz, Manfred O. 2011. "The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore", *Namibia Law Journal*, Volume 3 Issue 1, January 2011:11)

<sup>32</sup> Philips, Jake. 2009. "Australia's Heritage Protection of Act: An Alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore", *Pacific Rim Law and Policy Journal Association*, Aug. Vol. 18 Issue 3, p. 547)

<sup>33</sup> Janke, Terri dan Dawson, Peter. 2012. *Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System*, Australia: Terri Janke & Company Pty Ltd., p. 4; Dwivedi, Anurag dan Saroha, Monica. 2015. "Copyright Laws as A Means of Extending Protection to Expressions of Folklore", *Journal of Intellectual Property Rights*, Vol. X, July.

<sup>34</sup> Li, Luo, 2014. *Intellectual Property Protection of Traditional Cultural Expressions/Folklore in China*, Switzerland: Springer International Publishing, p. 35 – 60.

fair use/copyright exceptions, moral rights, jurisdiction problem, and even not all indigenous people/tribes want the same kind of protection/exploitation for their TCE.<sup>35</sup>

*Third, Sui Generis Legal Protection Theory.* This model is followed by WIPO (2002), Panama, and Australia. Australia has passed a specific law in TCE protection through *Australian Heritage Protection Act*, which is more efficient and adequate.<sup>36</sup> Zhang<sup>37</sup> in her study in China confirms that it is a big question for modern society like China to protect these abundant, special, original, colorful, precious heritage and culture when facing the market economy and the invading of foreign culture. She suggest that in order to taking the legal protection: 1) We need to modify the present intellectual property system (including the copyright law) to meet the objectives by making use of every opportunity of law revision; 2) It is better for us to establish the *sui generis* law in the regime of intellectual property for TCEs protection when conditions are fulfilled; 3) Some specific methods such as speeding up to declare the “non-material cultural heritage”, nominating some typical person and units which can inherit and pass on a certain branch of folk literature and art; set up the ecology museum in minority nationality regions, drawing 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 China, and utilizing proper administrative measures to support and supervise the protection TCEs plan. Malaysia also uses this *sui generis* model through *National Heritage Act 2005*. Tunisia also, combining the model of copyright law with certain duration of protection. Because of its specific nature, the model non-litigation would be the proper alternative.<sup>38</sup>The success of this *sui generis* law still depends on the cooperation among the local community, benefit sharing mechanism, and to the extent the stakeholders feels that their interests effectively are represented in their national law.<sup>39</sup>

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<sup>35</sup> Torsen, Molly. 2006. *Intellectual Property and Traditional Cultural Expressions*, WIPO; Burtis, Amber T. 2009. “Managing Indigenous Knowledge and Traditional Cultural Expressions: Is Technology the Solution?”, *Information for Social Change*, Volume 29, Summer, Princeton University Library, Princeton, New Jersey, USA, p. 9; Arago<sup>21</sup> p. Cit., Susanti, 2005, Op. Cit., Susanti 2010, Op. Cit., Susanti 2014c, Op. Cit.

<sup>36</sup> Philips, Jake. 2009. “Australia’s Heritage Protection of Act: An Alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore”, *Pacific Rim Law and Policy Journal Association*, Aug. Vol. 18 Issue 3.

<sup>37</sup> Zhang, Lisa. 2008. *Protecting Traditional Cultural Expressions From a Copyright Perspective*, Philips IP Academy - Fudan University Law School, p. 5.

<sup>38</sup> Fathoni. 2014. “Paradigma Hukum Berkeadilan dalam Hak Kekayaan Intelektual Komunal”, *Jurnal Cita Hukum*, Vol. I No. 2 Desember.

<sup>39</sup> Antons, Cristoph. 2013. “Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions”, *Modern Asian Studies*, Vol. 47, p. 1433.

Fourth, theory of legal protection through judgement of tribal court.<sup>40</sup> African states tends to stress on the communal aspects of TCE in using this model.<sup>41</sup> The content which is protected in TCE can be determined only by referring to the practice of community custom. In Ghana, the ethnic community itself who preserve *kente dan adinkra* designs according to its indigenous law.<sup>42</sup> Also, Purwaningsih confirms that the protection of TCE should be based on the needs for *community empowerment through sustainable participation approach*.<sup>43</sup>

## 5. Traditional Cultural Expression and Globalization

Globalization could improve intercultural friction causing tension and identity claim;<sup>44</sup> Study conducted Adewopo<sup>45</sup> suggests that folklore consequently became the subject of predatory acquisition by trans-national entrepreneurs of artistes from the developed world. Advanced technological processes have facilitated the commercial exploitation of works of art, craft, and knowledge of traditional societies on a scale that is unprecedented.<sup>46</sup> It needs an understanding as well as critical explanation on the meaning of “the state as the copyright holder on TCE” as modelled in the Indonesian Copyright Law and its legal consequences.

## 6. TCE as Cultural Heritage?

The role of the state in this matter is just protecting, maintaining and promoting the existence of the folklore. It has no moral right nor economic right as it has in copyright law. It is because the state is not identical with the community bearing the folklore, as the state is a political community, not cultural one. As a political entity, the state has to make a political decision supporting rights of the local community of TCE> It can be done for example by

<sup>40</sup> Busch, Anna Friederike. 2015. *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study*, Berlin Heidelberg: Springer-Verlag, p. 422.

<sup>41</sup> Adebambo, Adewopo. 2006. “Protection and Administration of Folklore in Nigeria”, *SCRIPT-ed*, Volume 3, Issue 1, March., p. 10.

<sup>42</sup> Collings, Stephen. 2015. “The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana”, *The Journal of Doctor of Philosophy*, School of Law, College of Social Sciences, University of Glasgow.

<sup>43</sup> Purwaningsih, Endang. 2012. “Partisipasi Masyarakat Dalam Perlindungan Hukum Terhadap Kekayaan Intelektual Warisan Bangsa, Jurnal Masalah-Masalah Hukum FH UNDIP” Vol.41 No.1 Januari.

<sup>44</sup> Unesco, 2011. “Berinvestasi dlm Keanekaragaman Budaya dan Dialog Antarbudaya”; Antons, Cristoph. 2013. “Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions”, *Modern Asian Studies* Vol. 47, p. 1403. See also, 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.

<sup>45</sup> Adebambo, Adewopo. 2006. “Protection and Administration of Folklore in Nigeria”, *SCRIPT-ed*, Volume 3, Issue 1, March, p. 10)

<sup>46</sup> Graber, Christoph Beat dan Mira Burri-Nenova. 2008. *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, USA:Edward Elgar, p. 205; Kuruk, Kuruk, Paul. 2002. “African Customary Law and The Protection of Folklore”, *Copyright Bulletin*, Vol. XXXVI, No. 2.

promoting and improving local community-based tourism. If TCE 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 dynamic entity should be exploited in order to develop, to evolve and even to create social progress and fundamental inspiration for cultural production. TCE 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 cultural heritage to protect TCE from appropriation or exploitation of other countries and also to guarantee its existence.

The legal recognition of tribal sovereignty is in essence the awareness of communal or group rights. Universal Declaration of Human Rights also provide the right to the moral and material interest resulting from any scientific, literary, or artistic production. Folklore should be seen as a basic human right and that concerned organizations should take up the cause as major part of their activities.<sup>47</sup> 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,

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<sup>47</sup> 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.

production, dissemination, attribution and enjoyment, whatever the means and technology used.<sup>48</sup>

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.

Because TCE does not fit into copyright law protection, then the concept of the state as copyright holder must be evaluated. The consequence of this concept is that the state is the owner (*author*) of the TCE. In this case, TCE would be treated as a “product”. As a “property”, and so that it is classified in the “intellectual property”. Whereas, TCE is not a product. It stress on the values and virtues that should be preserved. Then, the state is not the owner, but the inheritor which should be posited as *cultural protector*, *cultural preserver*, and not a *copyright holder*. If this concept is followed, then a reform of Indonesian copyright should be done, so that responsibilities of the state, stakeholders, and the local community bearing the TCE would be regulated in detail.

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<sup>48</sup> See Article 4 (1) of the Convention on the Protection and Promotion of Diversity of Cultural Expression



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