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The legal instrument of protecting traditional cultural expressions ownership in intellectual property rights law

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Abstract. Indonesia grows with its tribal and cultural diversity. Traditional Cultural Expressions are present as part of the cultural asset of a highly valued state's legacy, which, on the contrary, is prone to misappropriation by other countries. Departing from this weakness, normative legal research is used to analyse the significance of instrument to protect the ownership of Traditional Cultural Expressions in the perspective of Intellectual Property Rights Law by employing statutory and conceptual approach. The legal materials involve primary and secondary data obtained and analysed normatively to investigate the perspective of the issue studied. The research result reveals that the protection for the ownership constitutes both positive and defensive protection, where the former is represented by the enforcement of rules of law, either through ratification of international conventions in national law or through the regulations concerning the protection of Traditional Cultural Expressions that also take legislation in the process, while the defensive protection involves inventory and documentation of the TCEs as part of preservation, safeguarding, and promotion, aimed to maintain the existence of the cultural heritage of the state.

Keywords. Legal Instrument; Protecting; Traditional Cultural Expressions; Intellectual Property Rights

1. Introduction

Indonesia came into existence along with its tribal and cultural diversity. In reference to the 2010 official data of the Statistics Bureau (BPS), Indonesia was reported to have 1,331 tribes across the archipelago [1]. Almost all parts of Indonesia are characterized by cultural uniqueness passed through generations from their ancestors. Cultures represent an identity and uniqueness of a state other countries are possibly lack of [2] [a]. In a general perspective, cultures can be defined as ideas of the people to grow and survive in their community. In this case, Traditional Cultural Expressions (henceforth TCEs) [b] contribute to the formation of the culture with its economic, social, and cultural values that lives in society [3, 4]. People uphold the values and, thus, the TCEs could represent the identity of traditional people of particular communities [5, 6, 7].

These days, TCEs are inextricable from intellectual property, highlighting creativities produced by human brains to meet the needs and for the sake of the welfare of society. These creativities, including, *inter alia*, inventions, art, and literary works, came to the surface representing the intellectuality of human beings, significantly affecting human civilization [8]. The more extensive the humans' creativities are, the further the civilization will develop. The

concept of Intellectual Property Rights (henceforth IPRs) [c] serves as a recognition of humans' creativities, especially when those creativities are made for commercial purposes. This tendency indicates that the IPRs represent a specific connection between a person and a thing [9]. As a result, the legal protection of IPRs must be able to provide protection exclusively for owners [d].

Article 38 of Law Number 28 of 2014 concerning Copyrights regulates TCEs, implying that copyrights of TCEs are under the ownership of the state. Afifah Kusumadara states that copyright law did not have practical importance for Indonesia, as copyright law did not fit Indonesian culture and the level of development and was not consonant with the interest of Indonesians [10, 11, 12]. The weakness of the protection of TCEs *vis-à-vis* copyrights is by virtue of differences of concepts in ownership. For most Indonesians possessing the IPRs, ownership has its social function people can enjoy as long as this function is not deemed a serious infringement although it involves the use by others without the consent of the copyright holder [13, 14]. That is, this irrelevance is by virtue of the principle implying that copyrights refer to individual ownership, while the TCEs refer to communal ownership [15]. Furthermore, the creators of TCEs are generally unknown and they are not original because they are passed through generation [16], contrary to the principle requiring copyright protection to be clear in terms of the identity of the creators and originality [17].

This condition even worsens following the potential of misappropriation [18] [e] of tribal and cultural diversity and intellectual creations of the cultural heritage of a state by other countries. As a matter of fact, the diverse cultural heritage of Indonesia is high in value and has attracted other countries to use it for commercial purposes [19]. Intellectual property as in TCEs created and originally from traditional communities is gaining popularity at global level, and it is traded for even billions of dollars each year from around the globe, and these huge figures fade away into the hands of giant businesses outside the area where the property initially came from, or in the hand of foreign companies [20]. The claim of Indonesian TCEs raised by Malaysia is obvious in tourism advertisement Malaysia on Discovery Channel in Enigmatic Malaysia, displaying *Pendet* dance, Shadow puppets, a song entitled *Rasa Sayange*, and *Reog Ponorogo* [19]. A similar issue is also obvious in the registration of river stone pattern in silver handicrafts from Bali by John Hardy International, Ltd, and this unfair registration interrupted Ketut Deni Aryasa from implementing a similar pattern that has been long known as crocodile skin pattern [21]. This issue indicates that the protection of TCEs as one of the highly valuable traditional intellectual property forms is required. TCEs also represents a cultural heritage that keeps growing, and it even plays a vital role as part of social identity and as a cultural expression of traditional society in modern life of global societies, and this position demands special attention, as P. Ishwara Bhat asserts [22]:

Cultures use properties as the media of expression and blossom them into proud cultural property of the community. The creative human genius, in the process, flowers into arts, architecture, sculpture, monument, painting, literature and other innumerable forms of aesthetic manifestations. Transcending the geopolitical boundaries, they constitute cultural heritage of the mankind irrespective of the point whether they are products of individual talent or of group effort. From the perspective of specific culture, the cultural property that it produces is an overt mark of its identity, a repository of cultural and traditional information, and an essential thing for cultural group's self-understanding. Being visible symbols of culture and creativity, great pieces of art are irreplaceable things, as they attempt to grasp eternity by their beauty and grace, the PIFS Model Law also gives an inclusive list of examples of expressions of culture. The list includes names, stories, chants, riddles, histories and songs in oral narratives, woodwork, metalware, painting,

jewelry, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, ritual performances and cultural practices, the delineated forms, parts and details of designs and visual compositions and architectural forms.

In reference to the above issue, it is vital that the instrument to provide the legal protection of TCEs be taken into account to bring justice and welfare to all the members of society.

2. Methods

This research employed normative method, statutory, and conceptual approach with some data obtained as primary and secondary materials, which were further analyzed normatively to get the prescription according to the issue studied.

3. Results and Discussion

3.1. Characteristics of Traditional Cultural Expressions

Draft World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGCGRTKF) governs the subject matter of protection and the characteristics of TCEs as follows:

“Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

1. verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
2. musical expressions, such as songs and instrumental music;
3. expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
 - (aa) the products of creative intellectual activity, including individual and communal creativity;
 - (bb) characteristic of a community’s cultural and social identity and cultural heritage; and
 - (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

Article 1 of Draft WIPO-IGCGRTKF implies that TCEs refers to all forms, either tangible or intangible, of the products of cultural expressions and traditional knowledge, emerging or manifested and consisting of the forms of expressions or the following combinations:

- a. Verbal expression, such as stories, epic poems, poems, legends, riddles, and other forms of narration; words, signs, names, and symbols;
- b. Music expression such as songs and instrumental music;
- c. Expression of acts such as dances, dramas, ceremonies, rituals, or other performances, either those reduced into materials or not; and

- d. Tangible expressions such as art production, especially in pictures, designs, paintings (including body painting), carving, statue, pottery, terracotta, mosaic, wooden art forms, metal objects, jewelry, baskets, sewing, textile, glassware, carpet, costume, handicraft, music, instrument, and architectural art; in which; (a) products of creative intellectual activities, including individual and communal creativities; (b) characteristics of cultural and social identity and cultural heritage; and (c) maintained, used or developed by the community concerned, or by an individual who has a right or responsibility to act in compliance with *adat* (customary) law and the custom of the society concerned. TCEs are “*religio magis agraris rural*”, representing materials that grow throughout generations, not brand new things that are repetitive, communally supported and not always meaningful in an industrial culture [23]. This definition is congruent with the definition of TCEs as given by the Pacific Islands Forum Secretariat (The PIFS) Model Law arguing that the expressions of culture are defined as any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose and whether tangible or intangible [24].

The characteristics of TCEs according to Draft WIPO-IGCGRTKF are described in the following [25]:

Traditional cultural expressions, often the product of inter-generational and fluid social and communal creative processes, reflect and identify a community’s history, cultural and social identity, and values. While lying at the heart of a community’s identity, cultural heritage is also ‘living’ – it is constantly recreated as traditional artists and practitioners bring fresh perspectives to their work. Tradition is not only about imitation and reproduction; it is also about innovation and creation within the traditional framework. Therefore, traditional creativity is marked by a dynamic interplay between collective and individual creativity. From an IP perspective, in this dynamic and creative context it is often difficult to know what constitutes independent creation. Yet, under current copyright law, a contemporary adaptation or arrangement of old and preexisting traditional materials can often be sufficiently original to qualify as a protected copyright work.

In line with the draft above, the characteristics of the protection given to TCEs constitute: First, social products across generations and communal creative process; second, reflecting and identifying history, culture, social identity, and the values of a community; third, cultural heritage that represents the identity of a ‘living’ traditional community, meaning that it is continuously recreated by traditional artists and creators who work on producing new creations; fourth, traditional creativities marked by the dynamic interaction between communal and individual creativities; and fifth, adaptation or management from the pre-existing sources of TCEs that can satisfy the requirement to give protection of copyrights.

Draft WIPO-IGCGRTKF sets the criteria of TCEs that are protectable [26]:

1. The intellectual creations and therefore “intellectual property”, including both individual and communal creativity; Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs/EoF if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original);
2. have some linkage with a community’s cultural and social identity and cultural heritage; this linkage is embodied by the term “characteristic” which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage.

The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or an “attribute of” a particular people or community.

3. still be maintained, developed or used by the community or its individual members; the notion “heritage” is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs/EoF; an expression must be “characteristic” of such heritage to be protected. It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of “heritage”.

Following the draft, the criteria of TCEs that can be protected constitute: first, intellectual creations include individual and communal creativities; second, intellectual creations demonstrate the connection between culture and social identity and between culture and particular traditional community. This connection is presented by the term "characteristics" used as a reference to show expressions, and they have to be generally recognized, representing both communal identity and cultural heritage and the term "characteristics" is intended to highlight the term “originality” or to imply that protected expressions must be “original”, as “related to” or “attribute” of a certain person or people; third, TCEs as cultural heritage are preserved, developed, or used by a community or a member of traditional communities. That is, the definition of cultural heritage is used to indicate materials, either tangible or intangible, and the legacy of TCEs has been passed throughout generations. Experts generally take TCEs as a legacy if the materials are preserved and passed through two or three generations.

According to the Glossary of Copyrights and related rights, Eddy Damian argues that[27]: “TCEs are creations in art laden with characteristics of traditional legacy as a culture of a state, and it is taken as a shared resource jointly developed and maintained or preserved by a community or people of a particular traditional community or social organizations consecutively”.

According to Draft WIPO-IGCGRTKF, in general, the characteristics of TCEs are given as follows [27]:

- (a) are the products of creative intellectual activity
- (b) have been handed down from one generation to another
- (c) reflect a community’s cultural and social identity
- (d) consist of characteristic elements of a community’s heritage
- (e) are often made by authors unknown and/or unlocatable and/or by communities
- (f) are often primarily created for spiritual and religious purposes
- (g) often make use of natural resources in their creation and reproduction
- (h) are constantly evolving, developing and being recreated within the community

Molly Torsen and Jane Anderson opine that TCEs have the following characteristics: [28]

1. handed down from one to another generation either orally, in writing, or by means of imitation;
2. reflecting a community’s cultural and social identity;
3. consisting of characteristic elements of a community’s heritage;
4. made by “authors unknowns” and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so;
5. often created for spiritual and religious purposes;
6. evolving, developing, and being recreated within the community.

3.2. The Legal Instrument Protection for Traditional Cultural Expressions in Intellectual Property Rights Law

In reference to Glossary of WIPO-IGCGRTKF, protection “refers to the protection of traditional knowledge and traditional cultural expressions against some forms of unauthorized use by third parties” [29]. The instrument of protection aimed to protect the proprietary rights of TCEs covers both positive and defensive protection [30] [f], in which “positive protection” [31] [g] grants IP rights in the TK and TCEs. These rights may be used to prevent unauthorized or inappropriate uses by third parties. It may also enable active exploitation of TK and TCEs by the originating community itself, or example to build up its own handicraft enterprises”.

The positive protection constitutes law making by delegating exclusive rights regarding TCEs to avert any potential of exploitation by unauthorized users or by third parties regarding TCEs. This positive protection is given by establishing law. This protection is so-called because this protection also involves the making of new legal provisions that transform to positive law in its enforcement [23]. Enforcement here can be defined as ratifying international conventions or through the legislative process in the scope of national law.

According to draft WIPO-IGCGRTKF, defensive protection does not grant IPRs over TCEs, but it is rather intended to discontinue those rights from being obtained by third parties as stated in the following: “defensive protection does not grant IP rights over the subject matter of TK and TCEs but aims to stop such rights from being acquired by third parties” [30, 32]. Defensive protection is a strategy to ensure that there is no illegitimate claim over TCEs, executed with inventory and documentation of TCEs. This is all aimed to preserve the TCEs for the next generations and to protect TCEs as intellectual property assets.

Principally, the defensive protection of TCEs is complementary to the positive protection. With it, people of traditional communities could claim IPRs and even could file a lawsuit over misappropriation by other parties. Regarding this issue, draft IGC-GRTKF states that [30, 32]: “protection” can also mean “preservation” and “safeguarding” - the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. The objective in that case is to ensure that TK and TCEs do not disappear and are maintained and promoted.

This defensive protection can also mean "preservation" and "security", intended to ensure that TCEs remain and are manifested in day-to-day activities in traditional communities. In brief, identification, documentation, transmission, revitalization, and promotion of cultural heritage are deemed vital in guaranteeing the preservation and security of TCEs. The protection of the ownership of TCEs can be more appropriately manifested, in terms of security, with recording and documentation in the database instead of with reliance on the protection of Intellectual Property Law. These measures of protection aim to give a comprehensive range of protection of TCEs, as set forth in Draft IGC-GRTKF: “...*non-IP laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP protection*” [33].

Draft WIPO-IGCGRTKF also suggests two approaches including intellectual property protection and non-intellectual property approach involving safeguarding, preservation, and promotion of cultural heritage, where the latter should be complementary and it is assertively stated that [33]

IP “Protection” in this sense is distinguishable from the “safeguarding”, “preservation” and “promotion” of cultural heritage, which refer generally to the identification, documentation, transmission and revitalization of tangible and intangible cultural heritage in order to ensure its maintenance or viability. While instruments and programs for the

preservation and promotion of TCEs as such are valuable and complement the protection of TCEs. Non-IP Laws and program dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP Protection.

Thus, intellectual property "protection" in this scope is separable from 'security', "preservation" and "promotion" of cultural heritage, generally referring to identification, documentation, transmission, and revitalization of cultural heritage, tangible and intangible, to ensure the preservation and existence. Instruments and programs aimed for the preservation and promotion of the TCEs, however, are considered highly valuable and complementary to the protection of TCEs. Non-Intellectual Property Rights law and programs dealing with security and promotion of cultural heritage can play a useful role in complementing law governing intellectual property. The protection of TCEs regulates individual ownership in the creations and innovations to grant control over their exploitation, especially the commercial exploitation, and to provide incentives for the creation and development of TCEs, or known as contemporary TCEs derived from traditional TCEs as a product created by humans.

Furthermore, it is essential to know that IPRs protection is different from 'preservation' and 'security'. A TCEs protection *vis-à-vis* copyrights protects literary works and original art from reproductions, adaptations, public performances, broadcasting, and other forms of communication to the public. Copyright holders have their exclusive rights to prevent or grant others to perform one of those tasks mentioned according to certain rules and restrictions. Copyright protection is majorly meant to stimulate the creativities, to broadcast publicly, and to allow the holders to control commercial exploitations of creations. This protection is also intended to prevent any derogatory use of creations which is still in the spotlight in the materials related to traditional cultures. Conversely, preservation and security within the context of cultural heritage generally refer to identification, documentation, transmission, revitalization, and promotion of tangible or intangible cultural heritage to ensure preservation and existence [34].

As a consequence, it is vital that protection of the proprietary rights of TCEs be given through positive and defensive legal protection entirely, constituting IPRs protection and non-IPRs protection. This is consonant with the principle of flexibility and comprehensiveness, namely [35]:

This principle concerns a need to recognize that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, The draft provisions are therefore broad and inclusive, and intended, while establishing that misappropriation and misuse of TCEs/EoF would be unlawful, to give maximum flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be used to achieve or implement the provisions at the national or regional levels. Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, sui generis extensions or adaptations of IP rights, and specially-created sui generis IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary measures.

That is, the principle of flexibility and comprehensiveness has something to do with the need to recognize effective and appropriate protection of TCEs. This can be achieved through several mechanisms of law such as the need to refer to all mechanisms of law to achieve the objectives of TCEs protection. Specifically, the existing protection seems to indicate that there is less likelihood for a "one size fits all" approach or international "universal" model to protect

TCEs comprehensively, relevant to a national priority, legal scope, culture, and the needs of traditional communities in all states. Each effort to design uniform guidelines for the recognition and protection of TCEs have the potential to narrow down jurisprudential diversity into a single 'model' that may contravene the values, conception, or law of traditional communities existing on earth. Thus, the draft concerning the provisions of WIPO-IGCGRTKF is 'extensive and inclusive', where the draft implies that misappropriation of TCEs violates the law. To grant the flexibility of national and regional authority and the members of communities in setting appropriate mechanism of law, the principle of flexibility and comprehensiveness can be referred to as to achieve and enforce the provisions at the national or regional level.

Therefore, the protection of propriety rights of TCEs can take several comprehensive options, combining the size of ownership, non-ownership, referring to IPRs law and non IPRs law as an extension of intellectual property law, implying that individual ownerships must complement and they must be carefully in balance with non-ownership actions. This approach is considered relatively general in intellectual property, and international law is even responsible to set minimum substantive standards of national law.

4. Conclusion

The characteristics of TCEs as collective cultural heritage handed down throughout generations in traditional communities require both positive and defensive protection of the ownership of TCEs. The positive protection involves international conventions that regulate TCEs in international law or through the litigation process, while the defensive protection takes inventory and documentation of TCEs for security, preservation, and promotion of TCEs. Both of these protections are comprehensive since they cover both IPRs and non IPRs, ownership or non-ownership, exclusive or non-exclusive in compliance with the principle of flexibility and comprehensiveness.

Notes

- [a] Cultural identity of a character is glued to a culture, marking the differences between one culture to another. This diversity in Indonesia is an asset for Indonesia. The creations made by the people of traditional communities are to be protected with Intellectual Property Rights protection.
- [b] The term Traditional Cultural Expressions is mentioned in Law Number 28 of 2014 concerning Copyrights in Bahasa Indonesia, and this term was derived from the term in draft WIPO-IGCGRTKF. This term is also known as folklore in Tunis Model Law.
- [c] The definition of Intellectual Property Rights according to WIPO-Fact finding Missions (WIPO-FFM) 2001: "...include rights relating to: a. literary, artistic, and scientific works; b. performances of performing artists, sound recordings, and broadcasts; c. inventions in all fields of human endeavor; d. scientific discoveries; e. industrial designs; f. trademarks, service marks, and commercial names and designations; g. protection against unfair competition; and, h. all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields".
- [d] See Article 1 point (1) of Law Number 28 of 2014 concerning Copyrights stating "Copyright means an exclusive right of the author vested automatically on the basis of declaratory principle after Works are embodied in a tangible form without reducing by virtue of restrictions in accordance with the provisions of laws and regulations".
- [e] Misappropriation can literally be defined as an act of inappropriately taking something that belongs to some else or claiming ownership of an object for personal benefit. Black's Law

Dictionary defines misappropriation as “the act of misappropriating or turning to a wrong purpose, wrong appropriation”.

- [f] Draft WIPO-IGCGRTKF, Thirty-Eight Session Geneva, December 10 to 14, 2018, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions and see also Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/ Folklore A Guide For Countries in Transition, Version One, WIPO, 2013, p. 5, accessed on 10 November 2020.
- [g] IP laws typically establish exclusive property rights in creations and innovations in order to: grant control over their exploitation, particularly commercial exploitation; provide incentives for further creativity; other forms of protection, like to protect traditional remedies and indigenous crafts and music against misappropriation and enable communities to control and benefit collectively from their commercial exploitation.

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