



## OPTIMIZING THE PROTECTION OF CULTURAL EXPRESSIONS OF INDIGENOUS PEOPLES IN INDONESIA

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### ABSTRACT

There are approximately 33 types of Indonesian culture that have been claimed as belonging to other countries. Among others, there are *Reog Ponorogo* and *Kuda Lumping Dance*; both are from East Java. This proves that the regulation of protection related to TCSe in Indonesia has not provided satisfaction to this nation. Based on this phenomenon, the authors are interested in providing solutions through this research. The type of research is juridical-normative. Furthermore, this research intends to define the TCSe protection mechanisms to assist the Indonesian economy given that legal efforts in developing the “expressions of folklore” will benefit the regional economy. After conducting the research, the authors concluded two major findings. First, so far, the protection of TCSe has not been regulated specifically. As a result, TCSe does not have a strong position concerning its legality. Therefore, it becomes vulnerable and blemishes the occurrence of recognition by other countries which results in losses to the state economy. Second, specific regulations and anti-theft task forces or advocacy groups are urgently needed to help the indigenous people protect the rights of their distinctive intellectual property. Thus, specialized institutions, which control access and benefit-sharing arrangements with foreign users, are required.

**Keywords:** Indigenous Peoples’ Traditional Cultural Expressions; Communal Intellectual Property.

### 1. INTRODUCTION

Traditional Cultural Expressions (“TCSe”) is one of the compelling and evolving topics in preserving traditional intellectual property. TCSe, or TCEs, is a term used by the United Nations (UN), specifically in the Declaration on the Rights of Indigenous Peoples. This term is also used by the World International Property Organization (WIPO) in various international forums<sup>1</sup>. In its draft agreement on the protection of TCSe or expressions of folklore, WIPO specifies criteria such as distinctive uniqueness, indigenous peoples or local communities, and cultural communities or nations, where these forms of expression live and grow among people representing their cultural, and social identity, or heritage that should be maintained. TCSe refers to intellectual assets that have some concerns about cultural norms that are still evolving in a worldwide modern culture. Additionally, it contributes to the communal identity and expression of the culture of the locals. The concept also offers substantial financial advantages to help indigenous peoples sustain their livelihoods. Multiple elements of communal life including verbal expressions such as fairy tales, legends and myths, poetry, riddles, tales, words (e.g. Sumatran Rhymes and Javanese *Parikan*), signs, names, and symbols, exhibit TCSe for Indonesia’s cultural legacy. It also comprises sounds and musical devices such as songs, rhythms, instrumental, drama, ordinary and sacred ceremonials, traditional games, performances, and some tangible manifestations such as art materials, status, crafts (wood, metal, cloth, stone, jewellery, and embroidery), the architecture of traditional dwellings, and sacred sites such as mosques, temples, and churches<sup>2</sup>.

1 WIPO, “Intellectual Property And Traditional Cultural Expressions/Folklore” (Switzerland, 2022).266

2 Prasetyo Hadi Purwandoko, Adi Sulistiyono, and M Hawin, “The Implementation of the Traditional Cultural Expression (TCE) Protection Indonesia Based on Article 38 Law Number 28 of 2014 Regarding Copyright,” *Indonesian J. Int’l L.* 18 (2020): 543.

The research by Purwandoko, Sulistiyono, and Hawin found that people's perceptions of traditional works in developing nations have changed from being seen as standalone items to having economic worth as a result of several factors. Countries with rich cultural heritages and resources have started optimizing their traditional knowledge for international trade. It suggests that long-established indigenous or traditional civilizations' artistic and cultural practices are now seen as valuable economic assets. The theft of traditional culture and cultural knowledge is found in various places under the guise of research collaboration. For example, Balinese artisans were sued in 1991 in the New York District Court because of necklaces of Borobudur motifs. Even at the global level, certain forms of commercialization of renewable energy have been shown to occur without the approval of native peoples<sup>3</sup>.

According to WIPO, TCSe is meant to outline a cultural work that is customary and owned by a traditional community as an intellectual work derived from traditional culture belonging to a traditional community group. Giving this interpretation will serve as a guide for identifying a traditional cultural intellectual work and attributing the bearer to a certain community group.

Rights that are created by the human mind in the form of work that is often held by the community are known as communal intellectual property rights. Traditional knowledge, geographical indicators, genetic material, and traditional cultural expressions are the four categories under which indigenous communal IPR falls<sup>4</sup>. Thus, the authors concluded that communal intellectual property refers to traditional intellectual property possessed by indigenous peoples<sup>5</sup>. Indonesia is ethnically and culturally diverse with an enormous quantity of TCSe that is seen as a cultural legacy. This legacy has to be actively conserved from extinction as well as examined for its economic advantages. TCSe has financial potential in the country, particularly concerning the tourist sector and the creative economy<sup>6</sup>.

Indonesia, the archipelago country, is one among other countries that has intellectual property based on local insight. This local knowledge, presented in the form of wonderful TCSe, is valuable for promoting its culture. Research by Rafianti, Ramli, and Permata highlighted the fact that the traditional art actors have started using technological devices in promoting TCSe as they post the beauty of Indonesia's TCSe through various digital platforms. In that case, Indonesia's local music, exotic and gorgeous dances, and artistic theatre based on classical literature and folklore will be widely recognized. In this industrial revolution 4.0, puppet shows, local dances and music, and other traditional creations can be performed other than live shows. These works of art may be created, captured on video, and posted online; this content will not only support the creative industry but also provide TCSe protection<sup>7</sup>.

According to Dewi Sulistianingsih, protecting intellectual property that is founded on traditional wisdom may be accomplished by developing science and technology that has a financial benefit for the community at large. Additionally, the most essential aspect is to encourage local creativity in strengthening the knowledge of local wisdom-based intellectual property in Indonesia<sup>8</sup>. Tzen Wong and Claudia Fernandini explained that, in promoting renewable energy, the government, public associations, and non-profit organizations play a crucial role in supporting indigenous peoples and communities to sustain their cultural, economic, and social development<sup>9</sup>. In line with Yulia and Zainol, TCSe preservation is vital in nation-building because it

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- 3 Purwandoko, Sulistiyono, and Hawin, "The Implementation of the Traditional Cultural Expression (TCE) Protection Indonesia Based on Article 38 Law Number 28 of 2014 Regarding Copyright."
  - 4 Robiatul Adawiyah and Rumawi Rumawi, "Pengaturan Hak Kekayaan Intelektual Dalam Masyarakat Komunal Di Indonesia," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 10, no. 1 (2021): 1–16.
  - 5 Simona Bustani, "Perlindungan Hak Komunal Masyarakat Adat Dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan Dan Harapan," *Jurnal Hukum PRIORIS* 6, no. 3 (2018): 304–25.
  - 6 John Howkins, *The Creative Economy: How People Make Money from Ideas* (Penguin UK, 2002).172
  - 7 Laina Rafianti, Ahmad M Ramli, and Rika Ratna Permata, "Promoting Traditional Cultural Expressions via YouTube," *Jurnal Dinamika Hukum* 19, no. 1 (2019): 19–39.
  - 8 Dewi Sulistianingsih et al., "Strengthening Intellectual Property Development Based on Local Wisdom in Indonesia," in *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9 2021, Semarang, Indonesia, 2022*. 43
  - 9 Tzen Wong and Claudia Fernandini, "Traditional Cultural Expressions: Preservation and Innovation," *Intellectual Property and Human Development: Current Trends and Future Scenarios* 175 (2011): 179.

displays national identity and cultural heritage. This is also a joint opportunity to promote TCSe to the world. However, as stated in the Copyright Law, cooperation from the public and the government is required to preserve the existing TCSe. Unfortunately, the IPR concepts in the Copyright Law are not equivalent to the TCSe concept which is communal and passed down from generation to generation. Thus, in preserving and protecting TCSe, a concept that corresponds to its existence is needed, namely through data collection in digital libraries.<sup>10</sup> Indigenous peoples have a great potential in creating traditionally oriented works of art and, in essence, these works are only used for ritual purposes. In its development, works of traditional cultural expression have high economic value, so optimal protection is needed to prevent legal violations by foreign parties that can harm economic growth. The development of technology and information today is rapidly spreading and can be easily accessed by every human being in any part of the world. It is in line with the recent development of traditional cultural expressions where everyone can easily access and imitate<sup>11</sup>.

The number of cases of violations that occurs everywhere signifies that the significance of raising consciousness is in the protection of regional cultural expressions that exist today<sup>12</sup>. As an example, a lawsuit occurred against Desak Nyoman Suarti in 1985. She was a silver businesswoman in Ubud Village who produced woven motifs, such as Mats, *Bedegeng*, *Kelakat*, and *Kelabang Mantra*. At that time, Rois Hill, a Marika businessman sued her in the American Court for infringing on his motifs<sup>13</sup>. Based on data from January-July 2008, the revenue in the silver craft was only 60 billion rupiahs, and in the same period in 2015, it only reached 1.4 billion. The declining profit was also caused by the loss of several traditional motifs originating from Bali, which are folkloric works, such as *Parta Ulanda*, *Jawan*, *Kuping Guling*, *Batuh Poh*, and *Batu Timun*. Another example of a case of intellectual property loss is the catalogue “Jepera Harisson & Gill Carving: a Piece of History”. The carving motif, which is an original work of Jepera, is privately claimed by a foreigner (Christopher Harisson) thus prohibiting other parties to use the carving model in the furniture industry. Harisson argued that such work is public domain<sup>14</sup>.

Today, traditional cultural expressions have become a fundamental driving force in terms of economic development in several regions, such as Bali with the *Kecak* Dance, East Java with the Jember Carnival, and Central Java with the *Tingkeban* Ceremony. Thus, communal IPRs that are a knowledge-based economy need to accommodate intellectual property based on regional cultural expressions to develop the tourism economy in rural areas<sup>15</sup>.

The Ministry of Industry of Indonesia stated that the Indonesians suffered a loss that amounted to 40 trillion rupiahs, and it is estimated that the losses experienced by this nation could reach 100 trillion rupiahs by 2030. Thus, in essence, in establishing laws that will be implemented properly, it is necessary to include the values of the community’s outlook on life, the environment, traditions, and human elements<sup>16</sup>. Therefore, the urgency of protecting with legalization as a form of effort and seriousness of the government to protect the nation’s distinctive regional cultural expressions is vital to be ensured to prevent more losses in the future<sup>17</sup>. The

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- 10 Yulia Yulia, Ashiqin Zinatul, and Jumadiah Jumadiah, “The Preservation of Traditional Cultural Expression in Aceh and Malaysia,” *International Journal of Science and Research* 8, no. 11 (2019): 484–88.
  - 11 Mahmuda Pancawisma Febriharini, “Eksistensi Hak Atas Kekayaan Intelektual Terhadap Hukum Siber,” *Serat Acitya* 5, no. 1 (2016): 15.
  - 12 Abdul Atsar, “Perlindungan Hukum Terhadap Pengetahuan Dan Ekspresi Budaya Tradisional Untuk Meningkatkan Kesejahteraan Masyarakat Ditinjau Dari Undang-Undang No. 5 Tahun 2017 Tentang Pemajuan Kebudayaan Dan Undang-Undang No. 28 Tahun 2014 Tentang Hak Cipta,” *Law Reform* 13, no. 2 (2017): 284–99.
  - 13 Simona Bustani, “Transplantasi Hukum Modern Terhadap Budaya Hukum Komunitas Pengrajin Dalam Melindungi Desain Tradisional Kerajinan Perak Celuk Di Kabupaten Gianyar Bali,” *Jurnal Penelitian Dan Karya Ilmiah Lembaga Penelitian Universitas Trisakti* 1, no. 1 (2016): 9–31.
  - 14 Anis Mashdurohatun, Ariy Khaerudin, and Teguh Prasetyo, “Intellectual Property Protection of Indigenous Peoples in Indonesia: Quo Vadis?,” *Sociological Jurisprudence Journal* 3, no. 1 (2020): 1–7.
  - 15 Slamet Yuswanto, “Analisis Pengembangan Usaha Berbasis Kekayaan Intelektual,” *Lingkar Widyaiswara* 4 (2017): 8–24.
  - 16 Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban (Bacaan Mahasiswa Program Doktor Ilmu Hukum Universitas Diponegoro)* (UKI Press, 2006).12-13
  - 17 Atsar, “Perlindungan Hukum Terhadap Pengetahuan Dan Ekspresi Budaya Tradisional Untuk Meningkatkan

1945 Constitution (UUD) has mandated the upholding of cultural civilization and the welfare of all Indonesian people with the wealth of the country with all sectors of culture and natural resources in the scope of tourism it has. Referring to the problems illustrated above, the authors formulated three (3) questions that are considered urgent to be analyzed. The problems are formulated as follows: 1) How is the scope of TCSe in Indonesia? 2) What are the challenges in upholding indigenous peoples' community rights over TCSe in the digital era? 3) What is the solution to the problem of developing and protecting traditional cultural expressions?

## 2. METHOD

This type of research is normative legal research by used case approach. It is a legal study that is done by reviewing secondary sources or library materials<sup>18</sup> as the central material, such as various laws and regulations related to IPR regulations, especially on indigenous peoples' communal rights to traditional cultural expressions<sup>19</sup> as the main data, such as the 1945 Constitution (UUD 1945), Law Number 28 of 2014 concerning Copyright, Law No. 5 of 2017 concerning the Promotion of Culture. Normative Legal Research is understood by Peter Mahmud Marzuki as a legal process, or also about legal doctrines to answer existing legal problems. It is said to be doctrinal research because the research is limited to existing legal regulations and legal materials, and is known as document research because it more often uses secondary data. Therefore, there is no need to search for data directly in the field. In this research, the authors will provide prescriptions regarding the scope of TCSe in Indonesia, the problems in the protection of indigenous peoples' communal rights to TCSe in the era of digitalization, and the solutions to the problems of developing and protecting traditional cultural expressions<sup>20</sup>. Secondary data include, among others, official documents, such as court decisions regarding TCSe, books, and research results in the form of reports/journals, newsletters, and so on.

## 3. FINDINGS AND DISCUSSION

### Scope of Traditional Cultural Expressions

As an archipelago, Indonesia is rich in cultural diversity. Besides, ethnic groups and religious diversity are also national potentials that must be protected. Anything created by an individual that enhances the spectrum of human emotions and thoughts is considered a cultural production<sup>21</sup>. The forms referred to as cultural works can be various types of objects but exclude machines or technology. Machines and technology do not include cultural works because they are mostly related to the development of civilization in the field of technology. Cultural works that enrich feelings are an invaluable heritage, preserved by human history.

Since the 1982 Copyright Law's first adoption, the Indonesian government has acknowledged the value of intellectual property in Indonesian folklore (Article 10 of Law No. 6/1982). The state is alleged to hold copyrights on Indonesian cultural treasures, including prehistoric legacy works, history, cultural artefacts, folklore, and folk culture goods, according to several copyright laws, to prevent outsiders from using them. Preserving and protecting TCSe is important because if TCSe experiences extinction, it will impact the identity of the community that owns it. Therefore, to be able to understand it, the characteristics of TCSe (folklore) should be comprehended beforehand, it's also related with Simona Bustani mentioned in her research before, namely<sup>22</sup>:

- 1) Generally, the transmission and inheritance are done orally;
- 2) It has a traditional nature, in this case, folklore is reached in a fixed form among collectivities with a period of at least two generations;

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Kesejahteraan Masyarakat Ditinjau Dari Undang-Undang No. 5 Tahun 2017 Tentang Pemajuan Kebudayaan Dan Undang-Undang No. 28 Tahun 2014 Tentang Hak Cipta."

18 Abdulkadir Muhammad, "Hukum Dan Penelitian Hukum" (Bandung: Citra Aditya Bakti, 2004).101

19 Soerjono Soekanto, "Penelitian Hukum Normatif: Suatu Tinjauan Singkat," 2007. 1-2

20 Peter Mahmud Marzuki, "Penelitian Hukum," 2013: 22

21 穂積保, "Asian Copyright Handbook= Buku Panduan Hak Cipta Asia: Versi Indonesia," (*No Title*), n.d.

22 imona Bustani, "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat," *Jurnal Hukum PRIORIS* 2, no. 4 (2010): 246–55.

- 3) It has an anonymous nature in which case the name of the creator is no longer known to others;
- 4) It is generally patterned and spontaneous, in this case for example the use of clichés;
- 5) It has a sacred use in collective community life, such as special dances for traditional ceremonies;
- 6) It has a pre-logical nature (it has its logic of thinking that is not following logic in general);
- 7) The ownership becomes collective property.

In Indonesia, TCSe is regulated under Law Number 28 of 2014 concerning Copyright (hereinafter referred to as UUHC) while repealing the provisions of Law Number 19 of 2002. Article 38 of the 2014 UUHC states that TCSe includes:

- 1) Verbal texts, both written and oral, prose and poetry, with a range of subjects and significant messages that can be packaged as literary or conventional narratives;
- 2) Music, whether in the form of vocal, instrumental, or a combination thereof;
- 3) Movement, in the form of dance;
- 4) Theatre, either in the form of puppet performances or traditional plays;
- 5) Fine arts, either in 3-dimensional or 2-dimensional forms made from various forms and materials such as bamboo, ceramics, textiles, paper, metal, stone, wood, and others;
- 6) Traditional ceremonies.

When looking at its scope, the regulation of Indonesian folklore works is quite narrow. Based on the statement of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IC-GRTKF), several Indonesian traditional works should receive protection as folklore, due to their promising cultural and economic values. The traditional works in question are traditional specialities and traditional architectural art<sup>23</sup>.

TCSe in Indonesia is protected by several provisions in scattered laws and regulations. However, as of the end of 2014, Indonesia's copyright law offers some hope for the protection of TCSe. In Article 38 of the UUHC, it is stated that: (1) Copyright on TCSe is held by the state; (2) the state is required to keep track of, protect, and manage TCSe as mentioned in paragraph one (1); (3) the usage of TCSe referred to in paragraph (1) must take into account the values held by the developers' community; (4) government legislation shall govern additional clauses relating to copyright owned by the state over TCSe as mentioned in paragraph (1).

Traditional knowledge is a value system in the life of indigenous peoples, among others, it can be in the form of medicinal plants and medicines, carving art, plant breeding weaving, and indigenous peoples' culture<sup>24</sup>. The state acquires exclusive rights to the copyrighted work as the TCSe's copyright holder. The UUHC lists the following as exclusive rights: publication, duplication, translation, adaptation, arrangement, transformation, distribution, performance, announcement, communication, and leasing.

The WIPO Performances and Phonograms Treaty (WPPT), an international agreement signed by WIPO members and finalized in Geneva on December 20, 1996, only contains a limited amount of information on TCSe. With the greatest possible effectiveness and consistency, the WPPT aims to establish and uphold the protection of the intellectual property of sound recording producers and performers. The WPPT itself also protects TCSe, considering that traditional dances, poems, dramas, songs, music, and various other traditional art forms appear as part of live performances. Therefore, the protection of the performer's right to the performance can also be used in the context of TCSe protection. The distinguishing development between the WPPT and the 1961 Rome Convention is in how they defined the performer. "Performer" is defined as actors, singers, musicians, dancers, and others who act, sing, deliver, declaim, play in, or otherwise perform literary or creative works, according to Article 3(a) of the 1961 Rome Convention. Meanwhile, in WPPT, "performer" is defined even further, considering that the artworks performed cannot only be limited to "literary and artistic works" which means contemporary. Actors, singers, musicians, dancers, and others who act, sing,

23 Reh Bungana Perangin-angin, "Perlindungan Ekspresi Budaya Tradisional di Indonesia," 2017:63-66

24 Atsar, "Perlindungan Hukum Terhadap Pengetahuan Dan Ekspresi Budaya Tradisional Untuk Meningkatkan Kesejahteraan Masyarakat Ditinjau Dari Undang-Undang No. 5 Tahun 2017 Tentang Pemajuan Kebudayaan dan Undang-Undang No. 28 Tahun 2014 Tentang Hak Cipta."

deliver, declaim, play in, interpret, or otherwise perform literary or creative works or manifestations of folklore are referred to as “performers” in Article 2(a) of WPPT. Based on the definition of performers above, the WPPT also protects traditional artists who perform Traditional Cultural Expressions.

## 2.2 Legal Problems in Developing Traditional Cultural Expressions

To some extent, traditional knowledge can be protected by various intellectual property regulations. Nevertheless, there is generally no effective international legal protection for this problem. Compared to developed countries, developing countries have been more supportive of international rights to traditional knowledge. At the same time, developing countries have been critical of the impact of intellectual property rights on social issues such as access to medicines and access to educational materials. However, given their worries about the negative effects of globalization and the importance of strong intellectual property rights, developing nations are questioning the influence of intellectual property rights on social issues like access to healthcare and educational resources<sup>25</sup>.

If an international intellectual property model tends toward longer rather than shorter protection periods, establishes more rather than fewer property rights, imposes consistent substantive minimum protection standards across all nations, and detaches the states’ discretion to tailor substantive standards to their level of economic development, then it is considered protectionist<sup>26</sup>. This is identical to the circumstance that arose under TRIPS and sparked discussion about the improper use of traditional knowledge. In response, several international organizations, including the WTO, have discussed how traditional knowledge and intellectual property are interconnected. In this case, the TRIPS Council was instructed by the WTO’s 2001 Doha Ministerial Declaration<sup>27</sup> to investigate the connection between TRIPS, the Convention on Biological Diversity, and the preservation of traditional knowledge and folklore.

Given the increasingly important role of IPR in the future, the economic potential generated by TCSe in the region will be profitable in the long run. The development of performance facilities to express and actualize TCSe also needs to be improved. In areas with significant existing TCSe wealth, performance infrastructure and facilities are now still at a minimum to facilitate the deployment of community TCSe actualization. Hence, this results in easy recognition by other countries.

The problem of inventory and the obligation to make records by the government can be one of the serious weakness factors. Indonesia’s Copyright Law is not perfect in accommodating protection and proper use for regional communities because copyright is a right owned by individuals for their creations and does not regulate traditional rights owned collectively by a community<sup>28</sup>. Additionally, a common issue with TCSe is that the local population itself does not comprehend what legal protection is or what TCSe are. What they understand is only when a work of creation is widely known and experienced piracy or claim by the adding party then they assume that the copyrighted work they created is good. This means that anyone including foreign parties or other countries may study it and use it for their interests. This is a classic problem in terms of cultural development in Indonesia that makes Indonesian culture often recognized by foreign countries.

Based on records, there are approximately 33<sup>29</sup> types of Indonesian culture that have been claimed as belonging to other countries. Two of them are *Reog Ponorogo* Dance and *Kuda Lumping* Dance from the East Java region. The *Reog Ponorogo* Dance case began in November 2007 when this local dance became one of the dances in the Visit Malaysia 2007 tourism campaign. In the campaign, the writing “*Reog Ponorogo*” which is a mandatory symbol in the *Dadak Merak* mask was missing. This is certainly not suitable with the Basic

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25 J Janewa OseiTutu, “A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law,” *Marq. Intell. Prop. L. Rev.* 15 (2011): 147.

26 Justin Hughes, “The Philosophy of Intellectual Property,” *Geo. LJ* 77 (1988): 287.

27 L Danielle Tully, “Prospects for Progress: The TRIPS Agreement and Developing Countries After the DOHA Conference,” *BC Int’l & Comp. L. Rev.* 26 (2003): 129.

28 Yulia, Y., Zinatul, A., & Jumadiyah, J. (2019). The Preservation of Traditional Cultural Expression in Aceh and Malaysia. *International Journal of Science and Research*, 8(11), 484-488.

29 Binus, “Identitas Nasional Di Tengah Kondisi Pengklaiman Budaya Asli Indonesia Oleh Negara Asing. (July 2020),” <https://Binus.Ac.Id/Character-Building/2020/05/Identitas-Nasional-Ditengah-Kondisi-Pengklaiman-Budaya-Asli-Indonesia-Oleh-Negara-Asing-2/>. accessed on 02 July 2022.

Guidelines for *Reog Ponorogo* Art in Cultural Performances published in 2004. Furthermore, the Malaysian side changed the words “*Reog Ponorogo*” to “Malaysia”. The words “*Reog Ponorogo*” should always be present every time the dance is performed<sup>30</sup>. In addition, there are still many cases that occur against theft by foreign parties such as Ancient Manuscripts from Riau by the Malaysian Government<sup>31</sup>.

On the other hand, at the Miss Grand International event in 2017, there was a Malaysian contestant who used Kuda Lumping as a representation of her culture derived from Javanese culture which they referred to as *Kuda Kepang* or *Kuda Warisan*<sup>32</sup>. In addition, cases of traditional Indonesian food being claimed by foreigners include Lumpia Semarang, Rendang, and Cendol. Such claims/theft of traditional arts and culture that still occur are certainly very detrimental to Indonesia, starting from the economic, social and can damage traditional values and their sacredness<sup>33</sup>. Therefore, there is a need for legal efforts to protect TCSe through sui generis national laws. Among other things, the legal preservation of traditional knowledge can lead to increased use of such knowledge, which is a key driver for higher regional revenue from tourism and a growing number of possibilities. In addition, traditional communities are also more valued and have a sense of belonging.

The impact of ineffective policy mechanisms designed to protect traditional communities’ intellectual property has resulted in outsiders seeking and taking advantage of their assets. The frequent exploitation by external parties is caused by the inadequate legal safeguards for indigenous groups’ intellectual property<sup>34</sup>. This is further supported by the fact that the World Trade Organization (WTO), which upholds intellectual property rights as the cornerstone of the capitalist economy, is in charge of overseeing the regulation of intellectual property that was subsequently formalized in TRIPs. For instance, GATS disregards indigenous rights and cultural identity<sup>35</sup>.

TCSe also has a bright future economically, notably in the tourist sector. Additionally, creative economy sectors like weaving, wood carving, and silver crafting contribute significantly to the nation’s foreign exchange earnings. However, the development of information technology can lead to various inappropriate uses of existing TCSe. Various commercialization of TCSe occurs up to the global level accompanied by various forms of distortion, alteration, or modification of TCSe inappropriately. The claim of the traditional song *Rasa Sayange* without the consent of the indigenous Maluku people as the original owner, and the theft of ancient manuscripts of Southeast Sulawesi which were digitized and commercialized in a museum in Malaysia, are examples of abuse of Indonesian TCSe.

### 2.3 Solutions to the Issue Concerning Communal Rights Protection of TCSe in Indonesia

The development of modern technology, especially in the field of telecommunications, can lead to various improper uses of existing TCSe. Even on a global scale, TCSe are being commercialized in a variety of ways without the consent of the original people who owned them. Various forms of distortion, alteration, and modification of TCSe also accompany this commercialization inappropriately. Cases of claiming ownership of traditional cultural property can occur.

Legal protection of Intellectual Property Rights can be applied to protect traditional wisdom, expressions, and cultural expressions, especially those that have been developed in such a way by individuals without losing

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30 Lisa Clare Mapson, “Kesenian, Identitas, dan Hak Cipta: Kasus ‘Pencurian’ Reog Ponorogo,” *Skripsi, Malang: Fakultas Ilmu Sosial Dan Ilmu Politik. Universitas Muhammadiyah Malang (Tidak Diterbitkan)*, 2010: 46-47

31 Detik News, “Naskah Kuno Melayu Indonesia Diboyong Ke Malaysia. 2009,” <https://news.detik.com/berita/d-s1141485/-naskah-kuno-melayu-indonesia-diboyong-ke-malaysia>, July 12, 2009. accessed on 26 May 2022

32 CNNIndonesia, (2017) “Indonesia Kumpulkan Bukti Kuda Lumping Yang Diklaim Malaysia,” <https://www.cnnindonesia.com/hiburan/20171005084029-241-246243/indonesia-kumpulkan-bukti-kuda-lumping-yang-diklaim-malaysia>. accessed on 16 July 2022

33 Bustani, S. (2018). Perlindungan Hak Komunal Masyarakat Adat Dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan Dan Harapan. *Jurnal Hukum PRIORIS*, 6(3), 304-325.

34 Kholis Roisah, “Legal Politics Of Protection Of Indonesian Traditional Cultural Expressions/Folklore Turnitin,” *Diponegoro Law Review* 2, no. 1 (2017): 185–202.

35 Susan L Robertson, “Globalisation, GATS and Trading in Education Services,” *Supranational Regimes and National Education Policies—Encountering Challenge. Finnish Education Research Association: Helsinki*, 2006.

their traditional characteristics. The system for protecting intellectual property is not just meant to honour an individual's originality but also to (1) accelerate the spread of knowledge about the relevant creativity (result); (2) encourage further development and study of the relevant ideas (result); (3) prevent the occurrence of similar creativity (result); (4) strengthen the relevant inventiveness (result)<sup>36</sup>. Society should uphold and comprehend the system of intellectual property protection, although the legal culture of Indonesian society and intellectual property rights initially clashed<sup>37</sup>. The term "protection" refers to any measures taken to prevent the improper and unauthorized use of electronic benefits transfers (TCSe). For at least three reasons—namely, the possibility for financial benefits from using traditional knowledge, justice in the global trading system, and the requirement to preserve the rights of local communities—the conservation of TCSe as a component of traditional knowledge is extremely essential<sup>38</sup>.

The principles of copyright law contained in The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention 1967) govern the concept of ownership of anonymous works. The 1967 Berne Convention's protections can be used to protect cultural creations whose authors are unknown, even if it does not directly address TCSe protection<sup>39</sup>. The Bern Convention's "anonymous works" clause is a component of intellectual property law that, according to Article 15 paragraph 4, may be indirectly applied to TCSe. It states that: "The Bern Convention signatories shall select competent authorities based on national laws to safeguard published works whose authors are unknown to advocate their interests and uphold their rights. Subsequently, the State must submit 5 (five) of these works to the WIPO Director General"<sup>40</sup>.

Nowadays, cases of violation of regional culture have been rampant for a long time<sup>41</sup>. *World Intellectual Property Organization* (WIPO) is an intellectual property organization, and the relationship between copyright and TCSe is quite complicated. Therefore, WIPO only issued TCSe settlement guidelines between countries at its 33rd session. The further settlement, if there is a conflict regarding TCSe, is regulated based on the provisions of each country<sup>42</sup>. Other factors that also become obstacles, namely,<sup>43</sup>the public is still not fully aware of the significance of registering intellectual property rights, which results in a lot of theft of creative products by foreign parties; there is still a lack of public knowledge about Communal Intellectual Property Rights, this occurs due to the lack of government socialization in providing understanding to the public, as a result, creative industry players do not understand the benefits of IPR protection itself; and the here is still an assumption that the processing time is long and the bureaucracy is complicated, and IPR management requires costs that tend to be expensive. Explicitly, it is common in the bureaucracy for a license to still find illegal levies to facilitate the licensing process.

With these various problems, defensive protection is needed by conducting data collection and inventory efforts. In connection with the inventory, it is necessary to know several important things, namely,<sup>44</sup>inventories should work to preserve indigenous peoples' rights by preventing the theft of their collectively owned

36 Endang Purwaningsih, *Hak Kekayaan Intelektual (HKI) Dan Lisensi* (Bandung: Mandar Maju, 2012):58

37 Sulistianingsih, D., Pujiono, P., Setiawan, A., & Hidayat, A. (2022, February). Strengthening Intellectual Property Development Based on Local Wisdom in Indonesia. In *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9 2021, Semarang, Indonesia*: 39

38 Agus Sardjono, "Hak Kekayaan Intelektual Dan Pengetahuan Tradisional," (*No Title*), 2006: 167

39 Kholis Roisah, "Perlindungan Ekspresi Budaya Tradisional Dalam Sistem Hukum Kekayaan Intelektual," *Masalah-Masalah Hukum* 43, no. 3 (2014): 372–79.

40 Arpad Bogisch, "The Bern Convention for The Protection of Literary and Artistic Works from 1886" (Geneva, 1986). 78-79s

41 Bustani, S. Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat. *Jurnal Hukum Prioris*, 2(4), (2010): 246-255.

42 Priscilia Sakul, "Perlindungan Hukum Terhadap Hak Cipta Warisan Budaya Batik Bangsa Indonesia Ditinjau Dari Perspektif Hukum Internasional," *Lex Privatum* 8, no. 3 (2020) :185

43 Ganefi Ganefi, "Sinergitas Industri Kreatif Berbasis Hak Kekayaan Intelektual Dalam Menunjang Pariwisata," *Supremasi Hukum: Jurnal Penelitian Hukum* 28, no. 2 (2019): 188–204.

44 Yuswanto, S. "Analisis Pengembangan Usaha Berbasis Kekayaan Intelektual. *Jurnal Lingkar Widyaiswara*, 4(4) (2017): 24.



intellectual property (KIK) and/or by not sharing any profits with them; inventories should also be oriented towards making it easier for parties to obtain information on the utilization of KIK; inventory also needs to ensure that it cannot be accessed carelessly, which is considered important because it avoids utilization by third parties that can harm the community; it needs to be communicated to indigenous peoples, that KIK is documented only for inventory purposes.

It is anticipated that the presence of Law No. 5 of 2017 About the Promotion of Culture would improve the protection of traditional cultural expressions. The goal of Article 1 Point (3) on Promoting Culture is to increase cultural resilience and Indonesian culture's contribution to global civilization through the protection, development, usage, and guidance of culture. It also serves as a means of preserving the textual and contextual cultural assets that are present in each regional area and highlighting the key elements of regional culture<sup>45</sup>. However, the irony is that it has not been implemented optimally in each region.

The responsibility of the Ministry of Law and Human Rights (Ditjen KI) is to provide data information systems, form a special forum for Indonesian communal intellectual property works, and publish inventory data on the website platform of the Ditjen KI. However, this does not involve local governments, the Creative Economy Agency, the Ministry of Tourism, and indigenous organizations. Therefore, it is necessary to involve all parties, so that TCSe protection can be optimally protected. In addition, a profit-sharing mechanism is also needed to increase regional income towards national economic development. Raising awareness and protection of TCSe can be done in several ways. It includes socialization to enhance public knowledge and provide insight into the importance of protecting and preserving TCSe, encouraging the community to maintain their customary laws and local wisdom, guiding the communal intellectual property database protection optimization, and taking part in communal intellectual property registration. Although TCSe is legally protected by intellectual property rights, this protection has not always been effective in actual use.

Based on the previous resource. The protection of PTTTCSe in advancing regional tourism must implement efforts that are not only related to IPR and law but also to non-IPR and non-legal ones, namely:

- 1) Creating an attractive means of a website that can be accessed by everyone to introduce traditional cultural expression works to the international community;
- 2) Educate the legal apparatus so as not to override the protection of TCSe, and form a special task force against communal IPR theft in the form of an advocacy team for indigenous peoples as well as a special institution that regulates the mechanism of access benefit-sharing from utilization by foreign parties, and controls and imposes legal sanctions on groups that steal traditional cultural expressions.
- 3) In addition, optimization also requires synchronization of involvement between the Central Government, local governments, and autonomous bodies under them, including the Creative Economy Agency, the Ministry of Tourism, and indigenous peoples' organizations to increase cooperation in inventorying and documenting indigenous peoples who own communal intellectual property.

#### 4. CONCLUSION

Based on the above study, the researchers here would like to conclude the results of this research. Our TCSe has not been specifically protected by sufficient laws or regulations.

As a result, TCSe includes verbal texts, both written and oral, prose and poetry, with a range of subjects and significant messages that can be packaged as literary or conventional narratives; Music, whether in the form of vocal, instrumental, or a combination thereof; Movement, in the form of dance; Theatre, either in the form of puppet performances or traditional plays; Fine arts, either in 3-dimensional or 2-dimensional forms made from various forms and materials such as bamboo, ceramics, textiles, paper, metal, stone, wood, and others; Traditional ceremonies.

The urgency of the need for special regulations or laws and a special anti-theft task force in digital era for communal IPR in the form of an advocacy team for indigenous peoples as well as special institutions that regulate the mechanism of access benefit sharing from utilization by foreign parties. In addition, optimization

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45 Amalia Resti Faozi, "Perlindungan Hukum Terhadap Karya Cipta Ekspresi Budaya Tradisional Di Bidang Seni Tari" (Skripsi. Universitas Muhammadiyah Surakarta, 2018). 19-20

also requires synchronization of involvement between the central government, local governments, and autonomous bodies under them, including the Creative Economy Agency, the Ministry of Tourism, and indigenous peoples' organizations to increase cooperation in inventorying and documenting indigenous peoples who own communal intellectual property.

Therefore, it is necessary to increase the optimization of the regional economy through the potential of regional tourism by utilizing TCSe of indigenous peoples, this can collaborate with the film industry, create a website as a form of digitalization promotion, and so on. Additionally, an exclusive organization that serves as a regional representative is required, and it should be housed in a strategically vital province so that it can monitor indigenous peoples' TCSe in the context of their territories. Also, there needs to be a separate (special) regulation or law (UU) relating to the TCSe of indigenous peoples because the parent law does not regulate in detail. Thus, a more particular law is urgently needed to safeguard indigenous peoples' TCSe.

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## REFERENCES

- Adawiyah, Robiatul, and Rumawi Rumawi. 2021. "Pengaturan Hak Kekayaan Intelektual Dalam Masyarakat Komunal Di Indonesia." *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 10 (1): 1–16.
- Atsar, Abdul. 2017. "Perlindungan Hukum Terhadap Pengetahuan Dan Ekspresi Budaya Tradisional Untuk Meningkatkan Kesejahteraan Masyarakat Ditinjau Dari Undang-Undang No. 5 Tahun 2017 Tentang Pemajuan Kebudayaan Dan Undang-Undang No. 28 Tahun 2014 Tentang Hak Cipta." *Law Reform* 13 (2): 284–99.
- Binus. 2020. "Identitas Nasional Di Tengah Kondisi Pengklaiman Budaya Asli Indonesia Oleh Negara Asing." <https://Binus.Ac.Id/Character-Building/2020/05/Identitas-Nasional-Ditengah-Kondisi-Pengklaiman-Budaya-Asli-Indonesia-Oleh-Negara-Asing-2/>, July 2020.
- Bogsch, Arpad. 1986. "The Bern Convention for The Protection of Literary and Artistic Works from 1886." Geneva.
- Bustani, Simona. 2010. "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat." *Jurnal Hukum PRIORIS* 2 (4): 246–55.
- . 2016. "Transplantasi Hukum Modern Terhadap Budaya Hukum Komunitas Pengrajin Dalam Melindungi Desain Tradisional Kerajinan Perak Celuk Di Kabupaten Gianyar Bali." *Jurnal Penelitian Dan Karya Ilmiah Lembaga Penelitian Universitas Trisakti* 1 (1): 9–31.
- . 2018. "Perlindungan Hak Komunal Masyarakat Adat Dalam Perspektif Kekayaan Intelektual Tradisional Di Era Globalisasi: Kenyataan Dan Harapan." *Jurnal Hukum PRIORIS* 6 (3): 304–25.
- Detik News. 2009. "Naskah Kuno Melayu Indonesia Diboyong Ke Malaysia. 2009." <https://News.Detik.Com/Berita/d-1141485/-Naskah-Kuno-Melayu-Indonesia-Diboyong-Ke-Malaysia>. July 12, 2009.
- Endang Purwaningsih. 2012. *Hak Kekayaan Intelektual (HKI) Dan Lisensi*. Bandung: Mandar Maju.
- Faozi, Amalia Resti. 2018. "Perlindungan Hukum Terhadap Karya Cipta Ekspresi Budaya Tradisional Di Bidang Seni Tari." Skripsi. Universitas Muhammadiyah Surakarta.
- Febriharini, Mahmuda Pancawisma. 2016. "Eksistensi Hak Atas Kekayaan Intelektual Terhadap Hukum Siber." *Serat Acitya* 5 (1): 15.
- Ganefi, Ganefi. 2019. "Sinergitas Industri Kreatif Berbasis Hak Kekayaan Intelektual Dalam Menunjang Pariwisata." *Supremasi Hukum: Jurnal Penelitian Hukum* 28 (2): 188–204.
- Howkins, John. 2002. *The Creative Economy: How People Make Money from Ideas*. Penguin UK.
- Hughes, Justin. 1988. "The Philosophy of Intellectual Property." *Geo. LJ* 77: 287.
- Mapson, Lisa Clare. 2010. "Kesenian, Identitas, Dan Hak Cipta: Kasus 'Pencurian' Reog Ponorogo." *Skripsi, Malang: Fakultas Ilmu Sosial Dan Ilmu Politik. Universitas Muhammadiyah Malang (Tidak Diterbitkan)*.

- Marzuki, Peter Mahmud. 2013. "Penelitian Hukum."
- Mashdurohatun, Anis, Ariy Khaerudin, and Teguh Prasetyo. 2020. "Intellectual Property Protection of Indigenous Peoples in Indonesia: Quo Vadis?" *Sociological Jurisprudence Journal* 3 (1): 1–7.
- Muhammad, Abdulkadir. 2004. "Hukum Dan Penelitian Hukum." Bandung: Citra Aditya Bakti.
- OseiTutu, J Janewa. 2011. "A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law." *Marq. Intell. Prop. L. Rev.* 15: 147.
- Perangin-angin, Reh Bungana. 2017. "Perlindungan Ekspresi Budaya Tradisional Di Indonesia."
- Purwandoko, Prasetyo Hadi, Adi Sulistiyono, and M Hawin. 2020. "The Implementation of the Traditional Cultural Expression (TCE) Protection Indonesia Based on Article 38 Law Number 28 of 2014 Regarding Copyright." *Indonesian J. Int'l L.* 18: 543.
- Rafianti, Laina, Ahmad M Ramli, and Rika Ratna Permata. 2019. "Promoting TCSevia YouTube." *Jurnal Dinamika Hukum* 19 (1): 19–39.
- Rahardjo, Satjipto. 2006. *Hukum Dalam Jagat Ketertiban (Bacaan Mahasiswa Program Doktor Ilmu Hukum Universitas Diponegoro)*. Uki Press.
- Robertson, Susan L. 2006. "Globalisation, GATS and Trading in Education Services." *Supranational Regimes and National Education Policies—Encountering Challenge*. Finnish Education Research Association: Helsinki.
- Roisah, Kholis. 2014. "Perlindungan Ekspresi Budaya Tradisional Dalam Sistem Hukum Kekayaan Intelektual." *Masalah-Masalah Hukum* 43 (3): 372–79.
- . 2017. "LEGAL POLITICS OF PROTECTION OF INDONESIAN TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE TURNITIN." *Diponegoro Law Review* 2 (1): 185–202.
- Sakul, Priscilia. 2020. "Perlindungan Hukum Terhadap Hak Cipta Warisan Budaya Batik Bangsa Indonesia Ditinjau Dari Perspektif Hukum Internasional." *Lex Privatum* 8 (3).
- Sardjono, Agus. 2006. "Hak Kekayaan Intelektual Dan Pengetahuan Tradisional." (*No Title*).
- Soekanto, Soerjono. 2007. "Penelitian Hukum Normatif: Suatu Tinjauan Singkat."
- Sulistianingsih, Dewi, Pujiono Pujiono, Andry Setiawan, and Arif Hidayat. 2022a. "Strengthening Intellectual Property Development Based on Local Wisdom in Indonesia." In *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9 2021, Semarang, Indonesia*.
- . 2022b. "Strengthening Intellectual Property Development Based on Local Wisdom in Indonesia." In *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9 2021, Semarang, Indonesia*.
- Tully, L Danielle. 2003. "Prospects for Progress: The TRIPS Agreement and Developing Countries After the DOHA Conference." *BC Int'l & Comp. L. Rev.* 26: 129.
- WIPO. 2022. "INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE." Switzerland.
- Wong, Tzen, and Claudia Fernandini. 2011. "Traditional Cultural Expressions: Preservation and Innovation." *Intellectual Property and Human Development: Current Trends and Future Scenarios* 175: 179.
- Yulia, Yulia, Ashiqin Zinatul, and Jumadiah Jumadiah. 2019. "The Preservation of Traditional Cultural Expression in Aceh and Malaysia." *International Journal of Science and Research* 8 (11): 484–88.
- Yuswanto, Slamet. 2017. "Analisis Pengembangan Usaha Berbasis Kekayaan Intelektual." *Lingkar Widyaiswara* 4: 8–24.
- 穂積保. n.d. "Asian Copyright Handbook= Buku Panduan Hak Cipta Asia: Versi Indonesia." (*No Title*).

