



TRADITIONAL CULTURAL EXPRESSIONS BOTH WITHIN AND BEYOND THE CONTEXT OF INTELLECTUAL PROPERTY LAW IN INDONESIA

Erlina B¹, Melisa Safitri²

*Faculty of Law, Universitas Bandar Lampung. Email: erlina@ubl.ac.id
Faculty of Law, Universitas Bandar Lampung. Email: melisa.safitri@ubl.ac.id*

Abstract: *Can TCEs crumble under the protection of intellectual property? This question is prompted by the disparity between the characteristics of TCEs and the intellectual property protection criteria. This article emphasize the necessity and significance of establishing a system outside the Intellectual Property system or special protection (sui generis) to protect TCEs because intellectual property law cannot be modified to accommodate TCEs. The law of intellectual property only protects the moral and economic rights of individuals, not cultural or communal rights. Other opinions contend that the existing intellectual property law, particularly copyright law, does not require a new system because the creation of another system is a waste of resources and the state may not be able to fund it. In reality, what must be taken into account is the extent to which ethnic communities control their TCEs.*

Keywords: *Traditional Cultural Expressions (TCEs); Copyright; Indigeneous People; Intellectual Property, Protection.*

I. INTRODUCTION

Traditional Cultural Expression (TCEs) is the word used in Indonesia for intangible cultural assets. This is governed by Law Number 28 of 2014 respecting Copyright, specifically Article 38, which stipulates that the copyright on TCEs is held by the state, with the Ministry in charge being the Ministry of Law and Human Rights' General Directorate of Intellectual Property. For tangible/object cultural assets governed by Law No. 11 of 2010 on Cultural Conservation, the Ministry of Education and Culture, Directorate of Cultural Heritage and Diplomacy, Directorate General of Culture is responsible.

Globalization has tightened human relations. To boost their recognition and competence, a broad range of new items, including TCEs products, are aggressively pushed together with their special characteristics. Likewise, competition is also escalating. Several contemporary products have new TCEs-inspired patterns (e.g., batik and tenun), new harmonies (ethnomusic), etc. This is not surprising because TCEs has a wealth of cultural distinctiveness, and this distinctiveness serves as a unique material for creative designs.

The World Intellectual Property Organization (WIPO) notes that ethnic communities expect national legislation to respect their culture, honour their customary laws, moral and economic rights, and prevent inappropriate use.¹ The vast majority of expectations can be met by an intellectual property strategy. However, the debate about whether intellectual property law is most suitable for protecting Traditional Cultural Expression (TCEs) never ends. Because the terms of the production must be manifested in a concrete form (fixation requirement), the creator is recognized, and the element of originality in copyright law is not present in TCEs, copyright law is insufficient.²

In ethnic communities, TCEs is often passed down from generation to generation. It is sometimes viewed as "the consequence of a slow but persistent impersonal process of creative effort carried out through continuous imitation within the ethnic community".³ Various ethnic communities view TCEs as a tool for capturing their culture, history, and religion; artists must respect their community and cannot disrespect it. unplanned additions to their inspiration. Thus, some have claimed that "innovation's function is limited" and that "loyalty to the traditions inherent in TCEs can conflict with originality requirements".⁴

In addition, TCEs is inherited and spread for centuries from generation to generation. It is not possible to determine who designed the TCEs. Due to the moral rights of the author, this characteristic of the unknown creator's identity seems incongruous with the requirement that the creator's identity be disclosed in the copyright (especially maternity rights).

In addition, based on Law Number 28 of 2014 Article 58 and Bern Convention article 7 the copyright protection period (in terms of economic rights) is restricted to the creator's life plus 70 years. Without knowing the creator's identity, it is difficult to determine when the work was initiated. Works whose protection period has expired become public domain, allowing for them unrestricted usage. From the perspective of the Western paradigm of copyright, TCEs, which has been passed down from generation to generation for millennia, is unquestionably classified as public domain.⁵

¹ WIPO, 2001, *Intellectual Property Needs and Expectations of Traditional Knowledge: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998– 1999)*. WIPO, Geneva, p69-191.

² Lionel Bently and Brad Sherman, 2009, *Intellectual Property*, Oxford University, p91.

³ Lucas-Schloetter A , 2004 *Folklore*, dalam von Lewinski S (ed) *Indigenous Heritage And Intellectual Property: Genetic Resources, Traditional Knowledge And Folklore*. Kluwer Law International, Alphen aan den Rijn, p293.

⁴ Lucas-Schloetter, *Op.Cit*, p294.

⁵ Long ED, 2006, *Traditional Knowledge and The Fight for The Public Domain*. John Marshall Rev Intellectual Property Law 5, p317.

Even if the foregoing concerns are disregarded, it remains doubtful if ethnic communities will assert their rights in the event of infringement. This relates to the acknowledgment of ethnic communities' customary law and the link between customary/customary law and national law. Certain ethnic communities lack traditional community organizations.⁶ Certain tribes assemble in Adat homes in Flores, for instance, for traditional rites. But it is not acceptable to organize a specific association for goods. Therefore, determining which ethnic group to represent might be a challenge in and of itself.

Nationalism and internationalism of traditional cultural expressions, according to Henry Merryman, do not require an exclusive theory. The point is that the modern world must find a way to incorporate traditional cultural expressions into the legal system. This action can make a significant contribution to policies regarding the positioning of traditional cultural expressions within local, national, and international formations.⁷ This is the context for the need for improvements to TCEs protection beyond the legal system, which can provide comprehensive protection for TCEs, but also provides protection from sociological implementation in an effort to speed up the effectiveness of implementing its policies.

The outcomes of human intellectual labour are not limited to the present (modern), but also include long-lasting intellectual works that are transmitted down from generation to generation. Historically, creations were made collectively in a community setting and were typically directly tied to nature or the environment. In Indonesia, numerous cases involving traditional culture have happened. To preserve traditional cultural expressions, people, communities, governments, and even nations must be involved. This essay aims to investigate the legal framework that can provide broad protection for Traditional Cultural Expressions both within and beyond the Intellectual Property Systems.

The research step involves an examination of primary, secondary, and tertiary legal sources. Document studies, which are conducted by examining positive legislation documents, are utilized to acquire data. Moreover, qualitative normative was applied to the data analysis process.

⁶ Zhang, 2007, *Research on Intellectual Property Protection of Folklore*, Law Press China, Beijing, p205-206.

⁷ J. H. Merryman, "Two Ways of Thinking about Cultural Property," *Am. J. Int. Law*, vol. 80, no. 4, pp. 831-853, 1986.

II. DISCUSSION

The Protection of Traditional Cultural Expressions (TCEs) in Intellectual Property System

Folklore, folk songs, and traditional crafts dominate the majority of TCEs. This overview of literature, music, and the arts is crucial for considering an adequate/suitable intellectual property framework to safeguard TCEs. Furthermore, the intellectual property rights system, as a sector intended exclusively for Western-style individual rights, must be evaluated to determine whether it is capable of efficiently defending collective rights. Copyright seems to be the most debated topic of intellectual property law pertaining to the protection of TCEs.

Copyright protection for TCEs encompasses two primary areas. First is the protection of TCEs for which the creator's identity is unknown. The second area is the protection of TCEs where the creator can be identified. The initial domain, protection in which the originator is unknown. TCEs includes cultural manifestations that are verbal, musical, actionable, and intangible. All the previous mentioned embodiments share a common formula or pattern. It is referred to by Chinese scholars as "Mother-style TCEs" or mother-style folklore.⁸

Mother-style Folklore is comparable to all traditional cultural expressions that have come before it. The term appears in the WIPO report as well.⁹ This development of TCEs is the result of long-standing group formation and inheritance from generation to generation. It is challenging to determine who created these archetypes, formulas, and symbols. Thus, the originator of this inherited TCEs is unknown. It can be demonstrated that the community is the source of the TCEs, which is passed down from generation to generation.¹⁰ The inherited TCEs style is a re-creation or re-performance of the previous one.¹¹ The type of "re-development" or "re-show" can be elevated to a relatively superior art form from which people can derive a beautiful emotion as they appreciate artistic works.

From the various copyright laws owned by Indonesia, the reasons for the regulation of TCEs in Copyright and State Duties as Copyright Holders are summarized as follows in Tables 1 and 2.

⁸ Zhang, *Op.Cit.* p40.

⁹ WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO Doc WIPO/GRTKF/IC/5/3, 2003.

¹⁰ Li Luo, Intellectual Property Protection of Traditional Cultural Expressions, DOI 10.1007/978-3-319-04525-2_2, Switzerland:Springer International Publishing, 2014.

¹¹ Zhang, *Op.Cit*, P40.

Table 1.
Differences in Copyright Law in Indonesia in Regulating TCEs

	Copyright Law 1982	Copyright Law 1987	Copyright Law 19/2002	Copyright Law 28/2014
Goals	<ol style="list-style-type: none"> 1. Construction of the law outlined in the GBHN (Decree of the People's Consultative Assembly of the Republic of Indonesia No. IV/MPR/1978). 2. Promote, safeguard, and distribute scientific, artistic, and literary works. 3. Enhance the growth of the nation's intelligence. 	<ol style="list-style-type: none"> a. fostering a more conducive environment for innovation in the fields of science, art, and literature. b. The escalation of copyright violations, particularly piracy. c. Completing the preceding statute (Law Number 6 of 1982 concerning Copyright). 	<ol style="list-style-type: none"> a. Safeguarding racial/ethnic and cultural diversity, as well as artistic and literary wealth, through its advancements. b. As a result, Indonesia is a signatory to a number of international conventions and treaties pertaining to property rights. c. Enhance protection for Authors and Related Rights Owners in the fast- 	<ol style="list-style-type: none"> a. Acknowledgment of the strategic role of copyright in promoting growth and well-being. b. Enhanced legal certainty and protection for creators, Copyright holders, and Related Rights owners. c. As a matter of fact, Indonesia has joined a variety of international agreements in the field of copyright and related rights, allowing its creators and creators to compete internationally. d. The previous rule must be modified

			<p>paced environment of trade, industry, and investment, while taking the interests of the larger community into account.</p> <p>d. A Law on Copyright is required to complete the preceding laws, c and d;</p>	
Contents	<p>Article 10 (1) (1)The state is the owner of the copyright for legacy works History, archaeology, paleoanthropology, and other objects of national cultural significance.</p>	<p>Article 10 "(1) (1) The State holds the Copyright for prehistoric, historical, and literary works" and other national cultural objects" (paleoanthropology omitted).</p>	<p>Article 10 (1) (1) The State owns the Copyright to prehistoric, historical, and literary works. additional national cultural artifacts</p>	<p>Article 38 (1) (1)The State owns the copyright to traditional cultural expressions. (2)The state is required to inventory, maintain, and preserve traditional cultural expressions referred to in paragraph (1). (3)The use of traditional cultural</p>

				<p>expressions, as outlined in paragraph (1), must take into account the values of the community that bears the expression.</p> <p>(4) Additional provisions regarding Copyrights held by the State on traditional cultural expressions, as outlined in paragraph (1), shall be governed by a Government Regulation.</p>
	<p>(2):</p> <p>a. The state preserves and protects cultural results that are the common property of the people, such as stories, sagas, fairy tales, legends,</p>	do not change	<p>(2) The state owns the Copyright to folklore and the results of folk culture that are public domain, such as stories, sagas, fairy tales, legends, chronicles</p>	<p>Explanation of Article 38</p> <p>Paragraph 1: "traditional cultural expressions" includes one or more of the following forms of expression:</p> <p>a. verbal textual, both oral and written, in the form of prose or poetry, with a variety of themes and contents of the</p>

	<p>chronicles , songs, handicraft s, choreogra phy, dances, and other works of art;</p> <p>b. The state holds the copyright for the creation in (2) a to foreign countries.</p>		<p>, songs, handicraft s, choreogra phy, dances, calligraph y, and works of art.</p>	<p>message, which can be in the form of literary works or speeches Informative narrative;</p> <p>b. music, including vocals, instruments, or a combination thereof;</p> <p>c. motion, including dance;</p> <p>d. theater, including puppet shows and folk plays;</p> <p>e. fine arts, both in two- dimensional and three- dimensional forms made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, and others, or a combination thereof; and</p> <p>f. traditional ceremonies. Two (2) self- explanatory sentences. "living values</p>
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				in the community that bears it" refers to customs, customary law norms, customary norms, social norms, and other noble norms upheld by the people of origin, who preserve, develop, and maintain traditional cultural expressions.
	(3) Copyright a work to serve the national interest with knowledge. The holder may be made state property by Presidential Decree based on the Copyright Council's evaluation.	Deleted	(3) For the purpose of announcing or reproducing the Works referred to in subsection (2), the person who Non-Indonesian citizens are required to obtain permission from the relevant authorities.	

	<p>(4) The copyright holders as referred to in paragraph (3) shall be given an award determined by the President.</p> <p>(5) Further provisions regarding copyright held by the state as referred to in this article, shall be further regulated by Government Regulation.</p>	Deleted	<p>(4) Additional provisions concerning Copyrights held by the State pursuant to this Article shall be governed by a Government Regulation.</p>	
		<p>Verses 3 and 4 are made into new Article 10 paragraph (3). As follows: -The copyright of a work in the national interest with the knowledge of the holder can be made state property by a Presidential Decree based on the consideration of the Copyright Council. President.</p> <p>Between Article 10 and Article 11 is inserted Article 10 A which reads as</p>		

		follows: "Article 10A If a work Unless it can be proven otherwise, the State holds the Copyright to the work if its creator is unknown.		
				<p>Article 60</p> <p>(1) The state's copyright on traditional cultural expressions, as outlined in Article 38 paragraph (1), is perpetual.</p> <p>(2) Copyright of Original Works The author does not modify compilations of traditional cultural expressions that are protected as a separate copyright (article 40 UUHC 2014) so long as the compilation is an original work.</p>

Indonesia has in fact regulated this Traditional Cultural Expression based on the status quo. Where this is governed by Law No. 28 of 2014 on copyright. The Minister of Religion has not, however, exhaustively regulated the actual mechanism in terms

of Traditional Cultural Expressions regulation. Even now, the comprehensive regulation of Cultural Expression remains in draft form. Wherein the draft is the Draft Law of the Republic of Indonesia on the Protection and Use of Intellectual Property of Traditional Knowledge and Traditional Cultural Expressions. In reality, however, Traditional Cultural Expressions and Copyright cannot coexist because Traditional Cultural Expressions, which constitute cultural heritage, cannot be registered as copyright because they do not meet the criteria for rights. generate itself Traditional Cultural Expressions must only be maintained and preserved in this instance.¹²

When a dispute arises, a number of non-governmental organizations and artist organizations attempt to pursue justice for the community and the arts through alternative means and non-judicial institutions.¹³ While copyright can safeguard traditional cultural expressions However, the period of Copyright protection cannot be applied to traditional cultural expressions because traditional cultural expressions are not merely pursuing commercial values (economic rights), but cultural and spiritual reasons that live in society, and many works are created solely for use within the community, allowing the work to be made public property (public domain) after a specified amount of time is contrary to the intent of the creation. This is consistent with the provisions of Article 60 of the Copyright Law, which states that Copyright protection applies indefinitely to shared traditional cultural expressions. This article is intended to safeguard traditional works.

Regrettably, that the application of this registration as a copyright is not a copyright in and of itself. However, because moral rights and economic rights to traditional cultural expressions belong to the holder of the copyright, in this case the state, namely the custodian community, these rights cannot be transferred. The protection at issue encompasses all efforts to safeguard traditional cultural expressions from unauthorized and improper use. The protection of traditional cultural expressions as part of traditional knowledge is crucial for at least three reasons: (1) the potential for economic benefits resulting from the use of traditional knowledge; (2) justice in the international trading system; and (3) the need to protect the rights of local communities.¹⁴

Traditional cultural expressions emerge in Indonesia, but the country's legislation tends to lag far behind. In the past, Indonesia had laws protecting TCEs, but no TCEs were protected by a nationally regulated legal regime. On Traditional Cultural

¹² P.Sakul,Y.O.Agow,andN.Pinangkaan,“PerlindunganHukum Terhadap Hak Cipta Warisan Budaya Batik Bangsa Indonesia Ditinjau Dari Perspektif Hukum Internasional,” *Lex Priv.*, vol. 8, no. 3, pp. 184–192, 2020.

¹³ A. Absori, K. Dimiyati, and K. Wardiono, “Model Penyelesaian Sengketa Lingkungan Melalui Lembaga Alternatif,” *Mimb. Huk.*, vol. 20, no. 2, pp. 367–382, 2008.

¹⁴ H. Husamah, “Mengusung Kembali Khazanah Identitas Budaya Bangsa,” *J. Bestari*, vol. 42, 2016.

Expressions, Indonesia did not draft a Government Regulation specifically regulating the State as Copyright Holder until 2017. The state of Indonesia's legal protection of its own traditional cultural expressions is deficient. The lack of a robust and appropriate protection system and the dearth of data, documentation, and information on Traditional Knowledge and Traditional Cultural Expressions constitutes a weakness.¹⁵

Indonesia has a plethora of traditional cultural expressions, but its laws lag far behind. In the past, Indonesia had only laws that protected TCEs, but in practice there were no TCEs that were protected by a nationally regulated legal regime. On Traditional Cultural Expressions, Indonesia has only since 2017 drafted a Government Regulation that specifically regulates the State as Copyright Holder, but the draft regulation has not yet been implemented.

The substance of Indonesian intellectual property law is engrafted from Foreign intellectual property legal system into Indonesian law, but its spirit is not ingrained in Indonesian law. The intellectual property law in Indonesia is heavily influenced by Indonesia's traditional legal culture. Even traditional Indonesian culture and Western intellectual property culture have conflicting philosophies, which presents a number of challenges when it comes to protecting non-renewable resources through intellectual property law. Traditional Indonesian values, for instance, do not recognize "intellectual" wealth owned privately. Despite this, recognizing intellectual property rights as private property rights is the core and basis of the Western intellectual property system.

Protection outside the system of rights to intellectual property

The abundance of handicrafts in Indonesia is a symbol of the wealth of art and culture produced by inventive ideas. As a result of Indonesia's cultural diversity, it has been asserted that Indonesia has advantages over other countries. Indonesia has a comprehensive and diverse cultural profile. The works of traditional communities are, for the most part, protected by Intellectual Property Rights. [13] The legal protection of intellectual property produced by indigenous peoples or traditional communities is one of the fascinating issues that is currently developing within the study of Intellectual Property Rights. Traditional cultural expression is an example of the intellectual property created by indigenous people. In this instance, the community has creatively considered how to produce something innovatively while elevating and highlighting the cultural heritage of the nation.¹⁶

¹⁵ A. 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," *J. Law Reform Progr. Stud. Magister Ilmu Huk.*, vol. 13, no. 2, pp. 284–299, 2017.

¹⁶ D. Rahayu, "Perlindungan Hukum Terhadap Hak Cipta Motif Batik Tanjungbudi Madura," *Mimb. Huk.*, vol. 23, no. 1, pp. 115– 131, 2011.

Traditional Cultural Expressions are prevalent among indigenous peoples who adhere to customary law. The position of customary law is significant for TCEs because customary law is viewed as a social norm for community members to protect and preserve their TCE. On the other hand, intellectual property law, which is intended to protect private individual rights, appears inconsistent with customary law, which frequently protects collective rights.

In Bonda Village, West Manggarai Regency, Flores, for instance, customary leaders use traditional ceremonies to settle land disputes. The same holds true for other indigenous communities. Customary law has been used to regulate non-renewable energy sources since antiquity. In an ethnic community, customary law is viewed as a living practice, although it is not codified.¹⁷ "Customary law is the result of the accumulation of repetitive practices, informal domains that are frequently overseen and enforced by elders, particularly experts and leaders. The role of religion within the community."¹⁸

As stated previously, customary law emphasizes the concept of collective ownership in relation to TCEs rights, as well as concerns regarding TCEs rights controlled by ethnic communities. This differs from the individual property rights that are the foundation of the intellectual property system. In addition, ethnic communities view their heritage as a community responsibility rather than a source of wealth to be exploited for economic gain, which further distinguishes it from the intellectual property system.

This characteristic of customary law, which protects communal interests, makes it difficult for customary law to be accepted by a Western civil law intellectual property system that prioritizes individual interests and values. Due to these contrasts, the intellectual property system cannot protect TCEs in the same manner as customary law.

The Ministry of Culture and Tourism, in collaboration with UNESCO, published a Practical Guidebook: Recording Indonesia's Intangible Cultural Heritage. The most essential element to include is the scientific justification of ownership of an Intangible Cultural Heritage, which is merely a Traditional Cultural Expression. The scientific justification assumes great significance because it serves as a means to carry out defensive protection, i.e., to refute the claims of foreign parties regarding

¹⁷ Lucas-Schloetter, 2004, p259, 316-317.

¹⁸ *Ibid.*

an intangible. Cultural Heritage indigenous to Indonesia. Preserve, develop, and promote the Intangible Cultural Heritage.¹⁹

This can be accomplished through a variety of media, such as: giving high appreciation to the human living treasure (maestro); providing training scholarships related to the preservation, development, and promotion of the Intangible Cultural Heritage; providing support for studios/institutions that are actively involved in the preservation, development, and promotion of the Intangible Cultural Heritage; and periodic broadcasting of the Intangible Cultural Heritage.

Providing access to Traditional Cultural Expressions on a selective basis. Foreign parties who require information on Traditional Cultural Expressions are, if possible, denied the broadest access possible so that they cannot mass-produce the two intellectual properties. This can, of course, be waived for foreign parties with good intentions to share the profits from the use of Indonesian Traditional Cultural Expressions.²⁰

III. CONCLUSION

Taking everything into account, the protection of TCEs should be regulated not only as the part of intellectual property system and beyond. In the intellectual property system, traditional cultural expressions are protected as part of copyright protection, but a deeper examination reveals that the degree of independent effort or creativity of the creator is insufficient to support the protection of TCEs through the intellectual property system, where it is emphasized that "the standards of creativity that exist in TCEs are low, but certainly sufficient to penetrate the threshold of originality required by copyright law.

Indigenous peoples' awareness of intellectual property refers to the extent to which individuals comprehend intellectual property knowledge. This refers to the acceptance and appreciation of the concepts of intellectual property by society. It also reflects the degree to which the respondent community comprehends the connotation of intellectual property and their evaluation of the legal validity of intellectual property. This demonstrates that public awareness of intellectual property has the potential to affect the effectiveness of the application of intellectual property law. The fact is even the indigenous people do not really understand what intellectual property is, what are their attitudes and opinions regarding intellectual property, and most importantly, what is their interest in the legal protection of TCEs and related TCEs law.

¹⁹ D. P. B. A. Asri, "Legal Protection of Traditional Cultural Expression as a Regional Asset in Yogyakarta," in *1st International Conference on Indonesian Legal Studies (ICILS 2018)*, 2018, vol. 192, pp. 147–150.

²⁰ C. Antons, "Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions," *Mod. Asian Stud.*, vol. 47, no. 4, pp. 1403–1433, 2013.

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