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The Obstacles of Copyright Protection Against Traditional Cultural Expression in Indonesia

Fithriatus Shalihah
Faculty of Law
Universitas Ahmad Dahlan
Yogyakarta, Indonesia
fithriatus.shalihah@law.uad.ac.id

Ali Zuryat Hakim
Faculty of Law
Universitas Islam Riau
Riau, Indonesia
alizuryathakim@gmail.com

Abstract -- The special protection of traditional cultural expressions is governed by Berne Convention 1886 and also in its revision (Paris Convention) in 1971, which is mentioned in Article 15 paragraph (4). The traditional cultural expression or Folklore is one of the protected parts for its existence because it is one of the characteristics and identity of a nation. This identity shows the level of cultural nobility of a nation thus its existence must be maintained. The Law recognized by the world community as a place to maintain the expression of traditional culture into the identity of a nation is by giving Copyright to it. As part of Copyright, the protection of traditional cultural expressions is obtained automatically; it means that traditional cultural expressions are protected directly by the law since it was first announced. In principle, intellectual property rights have been attached to the community without having to register. The protection of copyright against traditional cultural expressions in Indonesia is a hereditary culture. Therefore, it has become the common property of the Indonesian nation. And Indonesia has synchronized the legal arrangements in its national law mentioned in articles 38 and 39 of Law No. 28 of 2014 on Copyright. The barrier in protecting traditional cultural expressions in Indonesia is mostly due to the understanding of the traditional ownership of traditional cultural expressions over communal ownership. So in order to hit the cultural barriers, socialization and inure of Copyright are needed to be socialized to the public.

Keywords: Copyright, Folklore, International law.

I. INTRODUCTION

The Berne Convention underwent several revisions, the first revision made in Paris on 4 May 1896, and then it was revised again in Berlin on 13 November 1908. Revision continued on 24 March 1914 in Berne, then revised in Rome on June 2, 1928, in Brussels on June 26, 1948, at Stockholm on June 14, 1967 and the last revision was in Paris on June 24, 1971.

And the revision of Berne Convention 1971 resulted in a potentially Folklore arrangement which is mentioned in Article 15 paragraph (4):

"Right to enforce Protected Rights: (a) In the case of unpublished works where there the identity of the author is unknown, but where there is every ground to presume that he is national of a country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the union. (b) Countries Of The Union which make such designation under the terms of his provision shall notify the Director-General by means of a written declaration giving full information concerning the authority thus designated. The Director-General shall at once communicate this declaration to all other countries of the union[1]."[2]

This Article regulates the protection for the anonymous and pseudonymous works. There is much Folklore in Indonesia that the authors are unknown, so this rule is the closest rule for Folklore protection stated in the Berne Convention.

Folklore is a copyrighted work of a nation which has the exclusive right of the author or copyright holder to govern the use of particular idea or information. Basically, Copyright is the right to copy a work. Copyright can also allow the holder of that right to restrict the multiplication legitimate upon a creation. Copyright has a limited term. Folklore has huge cultural value as heritages that would always develop even in modern society.[3]

Copyright is a type of intellectual property right, but Copyright is very different from other intellectual property rights such as patents, which grants a monopoly on the use of the invention. Because Copyright is not a monopoly to do something, it is a right to prevent others from doing it[4].

Copyright does not protect an idea or concept, but protects how the idea or concept is appreciated and worked on[5]. It recognizes the concept of economic rights and moral rights. Economic rights are the right to economic benefits to creation, whereas a moral right is an inherent right of the author or creator (art, record, broadcast) which cannot be removed for any reason, even if Copyright or related rights have been transferred. An example of the

[1] Arif Lutviansori, 2010, *Hak Cipta dan Perlindungan folklore di Indonesia Dilengkapi dengan Bern Convention For The Protection of Literary and artistic Works, Yogyakarta :* Graha Ilmu, p. 192

[2] Syafrinaldi, 2007, *teaching materials Hak Milik Intelektual*, Faculty of Law, Universitas Islam Riau,PPS.

[3] Kholis Roisah, 2014, *Perlindungan Ekspresi Budaya Tradisional dalam Sistem Hukum Kekayaan Intelektua*l, Semarang : Jurnal Masalah-Masalah Hukum, pg. 372

[4] A. Tenripadang Chairan, 2011, Analisis Yuridis Perlindungan Hukum Terhadap Hak Cipta, Parepare : Jurnal Hukum Diktum, pg. 173

[5] Devi Rahayu, 2011, *Perlindungan Hukum Terhadap Hak Cipta Motif Batik Tanjung Bumi Madura*,Yogyakarta : Jurnal Mimbar Hukum, pg. 123

moral right is the inclusion of the creator's name on the creation, even though the Copyright on the creation has been sold for the benefit of others.

Traditional Cultural Expressions is an integral part of forming a nation's identity. Unfortunately, the collective ownership of it is not being accommodated in Conventional Intellectual Property Rights logically. [6]

Therefore, a common understanding of the existence of Folklore within the scope of Copyright in the national law is required in Law No. 28 of 2014 on Copyright. The Indonesian government should be more assertive in responding to various copyright infringements, especially on traditional cultural expressions (Folklore). There is no excuse for not knowing the creator of folklore (because it has been available for centuries) since if the creator is unknown then it should be the country that acts as its creator.

Article 10 Paragraph 2 of Law No. 28 Year 2014 on Copyright state "The state holds the Copyright on folklore and the products of common people's culture, such as stories, saga, dong-eng, legend, chronicle, song, crafts, choreography, dance, calligraphy, and other works of art ". There are so many kinds of products of common people's culture.[7]

Indonesia is a country which is rich in culture. Especially traditional culture. It is an obligation to protect Indonesian folklore from threats recognition from other countries.[8]

Based on what has been described in the background above, the author conducted research entitled:

a. Copyright Protection against Traditional Cultural Expression in Indonesia According to International Law.

b. Problem Formulation

- How is the harmonization of Copyright protection regulation over traditional cultural expressions in Indonesia based on International Law and Law Number 28 Year 2004 on Copyright?
- What are the obstacles to protecting copyright over traditional cultural expressions in Indonesia?

c. Discussion

II. The Harmonization Of Copyright Protection Regulation Over Traditional Cultural Expressions In Indonesia Based On International Law And Law Number 28 Year 2004 On Copyright.

Regarding the protection of Copyright, there are two very important international treaties in the history of law development on intellectual property protection in the world:

- The Berne Convention is an international treaty on the protection of literary and artistic works. The Berne convention is the oldest copyright treaty in the world, approved on 9 September 1886, and is open to all States to ratify it. There are 133 countries participating in signing this convention, and Indonesia has ratified it on 5 September 1997. This convention provides more concern about material protection to the author for their creations[9].
- General Agreements on Tariffs and Trade (GATT) which includes the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)[10]

The Berne Convention in giving protection to Copyright has three main principles:

- The national treatment of works originating from one of the Berne Convention States must be given the same protection in each of the other Contracting States.
- National treatment is independent of formalities, which means that protection is automatically provided and does not require registration, deposit or formal notice in connection with the publication.
- The protection of the copyrighted work is independent of the existence of protection in the country of origin of the work.

The exclusive rights set forth in the Berne Convention are:

- the right to translate
- the right to perform in public dramatic, dramatico-musical and musical works
- the right to broadcast
- the right to make reproductions in any manner or form
- the right to use the work as a basis for an audiovisual work
- the right to make adaptations and arrangements of the work
- the right to recite literary works in public

[6] Laina Rafiani, Qoliqina Zolla Sabrina ,2014, *Perlindungan bagi 'Kustodian' Ekspresi Budaya Tradisional Nadran Menurut Hukum Internasional dan Implementasinya dalam Hukum Hak Kekayaan Intelektual di Indonesia*, Bandung : Padjajaran Jurnal Ilmu Hukum, p. 499

[7] Emma Valentina Teresha Senewe, 2015, *Jurnal LPPMBidang EkoSosBudKum, Volume 2 Nomor 2*, , hlm. 2

[8] Ayu, Pemata, dan Rafianti, 2017, *Sistem Perlindungan Sumber Daya Budaya Tak Benda di Palembang*, Yogyakarta : Jurnal Mimbar Hukum. P. 206

[9] Ni Ketut Supasti Dharmawan,2014, *Relevansi Hak Kekayaan Intelektual Dengan Hak Asasi Manusia Generasi Kedua*, Semarang : Jurnal Dinamika Hukum, p. 524.

[10] Syafrinaldi, Op.Cit,p.18

World Intellectual Property Organization (WIPO) is a specialized UN agency dealing with Intellectual Property issues. WIPO was created in 1967 aimed to encourage creativity and introducing intellectual property protection throughout the world[11]. This is in line with the purpose of the establishment of WIPO which is a recommendation of TRIPs Agreement that states,

"The WIPO has been established to promote the protection of Intellectual Property throughout the world through co-operation among states and, where appropriate, in collaboration with other international organization.[12]"

WIPO was formally established by the Convention Establishing the World Intellectual Property Organization signed in Stockholm on July 14, 1967 and amended on 28 September 1979. In one of its Articles, WIPO states that the objective of WIPO is to promote the protection of intellectual property rights throughout the world. WIPO currently consists of approximately 184 countries and its headquarters in Geneva, Switzerland. And almost all UN member states are members of WIPO[13]. WIPO as a particular entity of United Nations who has authority on Intellectual Property Rights, giving the definition of IPR itself : "very broadly, Intellectual Property means the legal rights which result from intellectual activity in the industrial, scientific, literary, and artistic fields".[14]

A. Copyright and Neighborhood Right.

WIPO provides the meaning of Copyright as follows:

"Copyright is a legal form describing right given to creator for their literary and artistic works" or Copyright is legal terminology that describes the rights granted to the author for their works in art and literature[15]. Based on this, system which is formed state that anybody could not use the creation result of technology, art, science, and others without the author's consent[16]. The definition of Copyright is also mentioned in the Copyright, Designs and Patents Act 1988 which states, "Copyright is a property right that subsists in certain specified types of works.[17]" In another sense David Vaver in his article entitled Some Agnostic Observations on Intellectual property defines that "Copyright is if one creates a literary, musical, dramatic or artistic work, one automatically has a copyright on it."[18]

The terms from the definition above can be explained as follows:[19]

1) Literary works.

The expression literary work is expressed in print or writing, irrespective of the question whether the quality or style is high. The word literary seems to be used in a sense somewhat similar to the use of word literature in political or electioneering literature, and refers to written or printed matter. As well as works embodying the fruits of considerable creative or intellectual endeavour, copyright has been allowed in such mundane compilation of information as a timetable index, trade catalogues, examination service and the listing of programmes to the broadcast. The principle that there must be sufficient skill, judgment and labour" accordingly cases where the degree of literary composition is slight.

The requirement that a literary work is "original" was only added to stator copyright law in the Act of 1911. The adjective has been read in a limited sense. It is treated as bringing out one characteristic of the requirement of skill, labour and judgment- that the work must originate from the author and not be copied by him from another source.

2) Dramatic works.

These are divined as including a work of dance or mime. They include the scenario or script for the film, the copyright in the film itself being separate. The general principles concerning literary works apply to this closely analogous category. Nice questions can arise over the copyright entitlement of those who provide secondary contributions to scripts written by other playwrights.

3) Musical works : type and quality

The term musical works is defined in the act only as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with it.

4) Artistic works.

- General. Here the tension between different conceptions of copyright becomes market. Some types of work are treated as artistic only if they bear a distinctive element of aesthetic creativity others gain protection simply because labour and capital ought not to be freely appropriable.
- Architectural works and models. An architect's plans fall within category above. It is an actual structure or a model of it which is separately treated in the second category. By implication, some consideration must be given to artistic quality. It may well be enough to show something apart from the common stock of ideas.
- Works of artistic craftsmanship. Considerable miscellanies of artefacts jewelry, furniture, cutlery, toys, educational aids and so on.

Meanwhile, according to the latest Indonesian National Law on Copyright provides the definition that Copyright is an exclusive right for the creator or recipient of the right to announce or reproduce his work or give permission to it

[11] http://id.wikipedia.org/wiki/*Organisasi_Hak_Kekayaan _Intelektual_Dunia*, accessed in August 2008.
[12] Ashok Kumar, *Op. Cit.*, p.4.
[13] Ibid.,Hak Cipta.
[14] Sri Mulyani, 2012,*Pengembangan Hak Kekayaan Intelektual sebagai Collateral (Agunan) Untuk Mendapatkan Kredit Perbankan di Indonesia*, Semarang : Jurnal Dinamika Hukum , p.569
[15] Suyud Margono, Op.Cit.,p.27.
[16] Suyud Margono, 2012, *Prinsip Deklaratif Pendaftaran Hak Ciptaan dengan Asas Kepemilikan Publikasi Pertama Kali, Jakarta : Jurnal Rechtsvinding*, p.237
[17] David I Bainbridge, 1992, *Intellectual Property*, London: Pitman Publishing, p. 27.
[18] Ashok Kumar, Op.Cit., p. 240.
[19] W.R. Cornish, 1989, *Intellectual Property : Petents, Copyright, Trade Marks and Allied Rights, Sweet And Maxwell Limited*, Second Edition,London:, p.268.

without prejudice to restrictions under applicable laws and regulations.[20]

The Copyright Act gives the understanding that Copyright is a special right. That means that the understanding of the law comes from attaching certain attributes to the creator or the owner of that right related to the idea of the need for recognition and respect for the work of the creator, efforts and sacrifices so that intellectual work can be born / created. [21]

And in the General Explanation of Law Number 19 Year 2002 says that Copyright consists of economic rights and moral rights. Economic rights are the inherent right of the creator who cannot be eliminated or removed for any reason, even though Copyright or neighboring rights have been transferred.[22]

The value of Intellectual Property Rights' substance contains individualistic, monopolistic, materialistic, and capitalistic.[23]

Economic rights are the exclusive right of the creator to obtain economic benefits. Economic rights include rights to reproduce, distribution rights, performance and demonstration rights [24] while the moral rights are the inherent right of the creator who cannot be eliminated or removed without any reason even if Copyright or related rights have been transferred[25]. The existence of economic benefits on unmanaged copyright works might cause a dispute between the author and the party who manage the creations[26].

The provisions of this moral right can be found in The Copyright, Designs and Patents Act 1988, which states that [27] . There are four rights within the moral right designation, being:

- the right to be identified as the author or director of work, the paternity right (section 77-79);
- the right of an author or director of work to object to derogatory treatment of that work, the integrity (section 80-83);
- a general right that every person has not to have a work falsely attributed to him(section 84)
- The commissioner's right to privacy in respect of a photograph or film made for private and domestic purposes (section 85)."

III. The Obstacles of Traditional Cultural Expression Protection in Indonesia

There is an inaccurate concepts placement between traditional works that can be protected by the Copyright Act and Folklore which is not included in the category of copyrighted works that are protected by the Copyright Act. Some of the conceptual inaccuracies that are the fundamental characters required in copyright protection are:

- Requirements of authenticity.
- Its creator should be known.
- Ideas or ideas that must be transformed into material or physical form.
- Its limited protection period is a lifetime plus 50 years after its author/creator dies.

As a result, the normative characteristic required in this Copyright Protection is not appropriate with the fundamental character attached to the traditional work of the nation because it can be a justification that this Folklore cannot be said to be genuine because this traditional cultural expression is made by its creator (who has died), then inherited and developed (reproduced and used) for thousands of years, even from generation to generation.

The conceptual distinction between creation in Copyright concept and cultural rights concept is a normative barrier in providing protection to the Folklore owned by this nation. Therefore the government should be more creative in optimizing the legal and non-legal resources to regulate and protect Folklore.[28]

In the case of Malaysian claims against traditional cultural expression some time ago, the government's actions only addressed the claims by forming experts who are in charge of studying traditional art. This step was taken apart to respond to claims for Reyog Ponorogo, Tor-tor dance and Pendet, as well in the case of Rasa Sayange song by the Malaysian Government. According to the former Minister of Culture and Tourism of the Republic of Indonesia Jero Wacik (who served at that time), the government will form a team of experts to study and sort the traditional arts of Indonesia and Malaysia so that there is no mutual claims, especially those including areas such as songs that have been around and developing since time immemorial in both countries and it is not clear who composed it. This cultural and artistic similarity is very reasonable because a lot of Malaysian residents come from Indonesia (who has lived there for a very long time). Nevertheless, the Government promised to continue to improve the protection of traditional art and culture so that it is no longer claimed by other countries[29].

The Government should take a big role related to the protection of the Copyright on this Folklore, or any cultural assets of Indonesia. It would be great if

[20] Law of the Republic of Indonesia No. 28 Year 2014 on Copyright, Article 8
[21] Syafrinaldi, *Op.Cit.*
[22] Ibid.
[23] Kholis Roisah, 2012, *Prismatika Hukum Sebagai Dasar Pembangunan Hukum Di Indonesia Berdasarkan Pancasila (Kajian terhadap Hukum Kekayaan Intelektual*), Semarang : Jurnal Masalah-Masalah Hukum, p. 625
[24] R.Saliman, Hermansyah, Ahmad Jalis, *Hukum Bisnis Untuk Perusahaan Teori dan Contoh Kasus, Jakarta:* Kencana Prenada Media Group, p.185.
[25] Ibid.
[26] Niken Prasetyawati,2011, *Perlindungan Hak Cipta dalam Transaksi Dagang Internasional,*Surabaya : Jurnal Sosial Humaniora, p. 68
[27] David I Bainbridge, *Op. Cit.*, p.75.
[28] Ibid
[29] http://haki.depperin.gi.id/advokasi-hukum, *Perlindungan HAKI Tradisional Indonesia Dalam Perdagangan Dunia,* accessed on 18 October 2016.

Government does not wait from the region concerned in managing the Copyright of the local cultural heritage, but the government through various relevant agencies can facilitate or be proactive toward it (copyright of the local heritage). There is an understanding that taking care of Copyright is so complicated and the perception of local cultural wealth should have become a cultural property of Indonesia. But now the author also does not know whether the Government realized that Indonesia has great and valuable cultural treasures, does the data already exist / available or not? Therefore, the database of cultural richness of each region is needed as well as to see the status of the Copyright of the culture. The author realizes that the current indigenous culture of Indonesia began to disappear due to globalization where many foreign cultures are able to shift the local culture. And unfortunately the condition is still the same until now. In the end, the local culture including Folklore could disappear from the understanding and knowledge of the young generation. Who is actually really in charge of preserving the local culture? Of course it is not wise if we simply blame on the young generation or the local authorities, yet the Government also has to realize its mistakes. Television, mass media and other information sources have forgotten or even almost never showed / shared about the cultural richness of the region. Therefore, once again, the Government with its agencies must begin to protect the culture of the region and always introduce the culture to the young generation, one of them is by using formal education path as the author discussed above.

The role of international law, both bilateral and multilateral agreements, in the development of the law on the protection of intellectual property rights cannot be denied [30]. Law enforcement on intellectual property is becoming more important since the trade in goods and services cannot be separated from the industrial property aspects attached to it[31].

In such societies the governing law also reflects the transitional period (described as the face of law on one leg stepping on modern legal patterns while the other leg is still tackling traditional law). Similar to the law that regulates copyright issues, although normatively it does not have many problems to be applied in Indonesia, culturally it will face many problems. This is due to the philosophy underlying the legal community is different. Copyright appears in the western countries along with the emergence of a society that prioritizes the interests or rights of individuals (private rights) with the capitalistic character, while the people of Indonesia with the pattern of eastern put more values of togetherness (communal). This value affects the way they think that if they work and the results are beneficial to many people, they will be proud of it and do not feel troubled when it turns out other people imitate / copy their work. They even feel benefited because their work has been widely disseminated and known by many people[32].

A large number of traditional cultural expressions that are not listed when referring to the above opinion indicates that there are still some communities who own traditional cultural works who feel happy when their inheritance creations are copied, reproduced or displayed by others to the public. Such acts do not harm their interests because their supposition is more to popularize the expression of their traditional culture among the community. They see that Folklore is not merely a matter of material value, but has social and religious value. They believe in the value of rewards that they will get from God as their knowledge used/applied by other people.

The culture of traditional society in Indonesia generally does not recognize Copyright. The cultural values of Indonesian society do not recognize the individual ownership of Folklore in the field of science, literature and art. The only institutionalized system of ownership in the lives of traditional societies is a land ownership[33]. But the ownership is communal which means it belongs to the family or the customary law community. This is seen from the appreciation of creativity and artwork in traditional society.

Thus in traditional society the expression of traditional culture that has been announced to the public will automatically become public property (public domain). Anyone can imitate or copy the creation without questioning who the creator is. Characteristic of traditional society is togetherness or collective. Copyright has no cultural roots/basis in traditional society. The value of the philosophy underlying individual ownership of human creative work (e.g. in the field of science, literature and art) is the value of western culture which appears in its legal system.

This is the reason why the protection of copyright against traditional cultural expressions (Folklore) encounters many obstacles, especially cultural barriers. So in order to hit the cultural barriers, socialization on Copyright to society is needed aiming to educate society to be positive and respect the Copyright.

IV. CONCLUSION

As part of Copyright, the protection of traditional cultural expressions is obtained automatically; it means that traditional cultural expressions are protected directly by law since it was first announced without having to go through registration. In principle, intellectual property rights have been attached to the community. The protection of copyright against the expression of traditional culture in Indonesia according to international law that stated in the Berne Convention and its revision is a hereditary culture. It has therefore become the common property of the Indonesian nation. And Indonesia has synchronized the regulation in its national law stated in articles 38 and 39 of Law Number 28 Year 2014 concerning Copyright.

The constraints in protecting traditional cultural expressions in Indonesia are mostly due to the understanding of the traditional ownership of traditional cultural expressions in Indonesia over communal

[30] Syafrinaldi, 2003, *Hukum tentang Perlindungan Hak Milik Intelektual, dalam menghadapi era globalisasi, Pekanbaru:* UIR Press, p : 9
[31] Ade Maman Suherman, 2004, *Penegakan Hukum atas Hak Kekayaan Intelektual di Indonesia,* Jurnal Hukum Bisnis, Vol. 23.No.1. p : 86.
[32] Ibid.
[33] Haryati Soebadio, *Aspek Sosial Budaya Hak Milik Perindustrian, p.5*

ownership. So in order to hit the cultural barriers, the socialization and the culture of Copyright are required to be conducted / socialized to the public. The dispute between nations over the recognition of the ownership of traditional cultural expressions is largely due to the neglect of moral rights and the "first to use" principle inherent in traditional cultural expressions

V. SUGGESTION

International law including the laws governing copyright provisions is basically a good moral invitation, as John Austin said that: The International law is not a real law, but just positive morality. Thus sanctions for violators in the level of enforcement are also difficult, considering that this is related to a nation's moral consciousness, for example the awareness of not claiming the folklore of other States. The International agency that is in charge of that matter (e.g: WIPO) should be more thorough in conducting historical tracing to assess the authenticity of folklore.

Law No. 28 Year 2014 is a national law on copyright that is subject to the provisions of international law on copyright. In the Law on Copyright (UUHC) the protection against the expression of traditional culture (folklore) has been set. The effort to preserve Folklore in order not to be extinct can be done through formal education channels by including traditional cultural expressions of each region in the local curriculum, thus the young the future generation not only hear about ancestral and cultural heritage but also know and love them. It is true that saving the culture of a nation is Government responsibility, but it would be better if the community involved in implementing the program.

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