

STRATEGY FOR PROTECTING TRADITIONAL CULTURE EXPRESSION IN INDONESIA

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ABSTRACT

Indonesia is popular with enrichment of cultural legacies and traditional culture expressions. The diversity of traditional culture expression in Indonesia is quite obvious with the presence of various tribes who characterize themselves with higher level of art creativities and traditional culture expressions. Indeed, traditional culture expression is the output of mind work, either in form of abstract or tangible, which can be transferred and captured by human senses.

The claim against injustice is lifted by the developing countries because their traditional culture expressions, or their indigenous/traditional communities as the owner of these traditional culture expressions, are not protected and respected in due diligence in the case of misappropriation. Therefore, the question is "What strategy can be made by Indonesia nation for protecting traditional culture expression in Indonesia?"

Keywords: Strategy, protecting, traditional cultural expression, Indonesia

INTRODUCTION

The misappropriation of traditional culture expression can be defined as the use of the asset of traditional culture expression in commercial way to empower community rights through intellectual property system but without utility partnership.¹ The misappropriation of the assets of Indonesia traditional culture expression by other parties or the developed countries is not public secret anymore. As revealed by newspapers and electronic media, the assets of traditional culture expression are not only misappropriated by foreigners, but also by developed countries. The misappropriation of the assets of traditional culture expression surely disappoints some community groups. It raises a question of how is the governmental role in protecting the assets of traditional culture expression of indigenous community. The review on how to protect traditional culture expression is becoming very relevant issue, and it aligns with academic effort to understand the protection issues. Such review is aimed to explore traditional culture expression in Indonesia in order to improve the development of community economic and to protect community interest.

In term of juridical, Indonesia is not yet founding the regulations that can protect traditional culture expression owned by Indonesia indigenous community. The protection of traditional culture expression in Indonesia is still given based on the explanatory provisions in the

¹ Hanu Waager, *Biodiversity, Traditional Knowledge and Folklore; work onrelated in IP matters in The WTO*, Hein On Line Citation; 3 Intercultural Hum. Rits L. Rev. 215, 2008, P.54; Peter Drahos, *Thinking strategically about intellectual property rights*, World Patent Information, Vol. 29, 2007, P.255-261, Jane G. Payumo, *Protecting and preserving traditional knowledge and plant genetic resources; is ASEAN there yet?*, Plant Genetic Resources and Utilization, Vol. 8, 2008, P.26-34; Silke Von Lewinski, *The Protection Of Folklore*, Hein On Line Citation; 11 Cordozo J Int'l & Comp L, 2003-2004, P.747; G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, Earthscan, UK, 2004, P.52; G. Dutfield, *Protecting The Rights Of Indigenous People; Can Prior Informed Consent Help?*, Chapter 4, P.53-67.

existing copyright regime, which is referred to the provisions stated in Article 10 of Copyright Law. However, these explanatory provisions of this copyright regime still need executory provisions. However, such executory provisions are not yet existed and therefore, both explanatory and executory provisions are not yet effective to protect traditional culture expression.

Different conceptualization of ownership between traditional culture expression and intellectual property system gives a confused consequence. Traditional culture expression must be kept and conserved by each preserver throughout generations by the goal to give benefits for the interested parties. However, the concept of intellectual property ownership is that the misappropriation of traditional culture expression by others or third parties shall be prohibited.

The potentials of traditional community must be great enough to create something huge that deserve for appreciation in form of reward and protection. The community is the holder and also the heir of traditional culture expression who shall be ready to conserve it or even may be negligent enough to make it extinct. The government plays the role of promote and protect. The government shall not only exploit the cultural creative works but also to admit as the genuine keeper of traditional culture expression before international forum. Great attention and proper incentive must be given to persuade the conservation and protection of the culture as the collective belonging of indigenous community not only before national forum but also before global realm. The initial step may be through giving a relevant legislation.

So far, the community only protects traditional culture expression of folklore with their existing capacity. The failure of intellectual property system to protect traditional culture expression of folklore emanates from attitudes or mindsets that only underscore the protection of individual rights rather than community rights. Intellectual Property is usually owned by certain individual or group individuals either in private enterprise or company. Base requirement preceding individual rights is entrustment, and this requirement is highly valued by the developed countries.

Arimbi asserts that Intellectual Property Act in Indonesia still fails to protect creative works of indigenous community.² Main obstruction is the lacking of acknowledgment from community groups. The skill of traditional community is not individual-based but usually group-based. The State is the only holder of the consent for utilizing every idea and creativity of traditional community, but the consent does not include traditional culture expression of folklore, and therefore, traditional community finds difficulties to claim the output of their cultural works.

Stealing Against Traditional Culture Expressions

Indonesia is known with abundance of traditional culture expressions and traditional culture legacies. The diversity of culture is quite prominent because various ethnics live in Indonesia and bring along with them higher level of art creativities and traditional culture expressions. Moreover, traditional culture expression is the product of human thoughts, either in abstract/intangible or tangible forms, which can be transferred and captured by human senses.

Injustice issue has forced developing countries into discomfort because their traditional culture expressions are not given adequate protection. Indigenous/traditional community as the owner of traditional culture expressions may then feel disrespected.

² Endang Purwaningsih, Implikasi Hukum Paten dalam Perlindungan Traditional Knowledge, Jurnal Hukum YARSI, Vol.2, No.1, November, 2005, P. 29.

Esmi Warasih has suggested that regulatory measures must be taken because it can undergo several functions as dispute resolution, social control, social engineering, community emancipation, legitimacy structure, change control and also distributive structure.³

The misappropriation of assets of traditional culture expression can be defined as using assets of traditional culture expressions and intellectual property rights for commercial interest to empower the existence of other traditional culture expressions but through a less mutual partnership system. However, the misappropriation of Indonesia traditional culture assets by other parties or developed countries is very restless recently. As indicated within electronic media, the misappropriation of assets of traditional culture expression is not only undergone by foreign entrepreneurs, but also by some developed countries. The misappropriation of assets of traditional culture expression has caused traditional citizens into disappointment. It raises a question of how is governmental action to protect the assets of traditional culture expression of indigenous community. The appraisal about the protection of traditional culture expression may be quite relevant with academic effort to understand protection issues. Research is then aimed to understand traditional culture expression in Indonesia to improve people economic development and also to look for protective measures for traditional culture expressions itself.

The number of assets of Indonesia traditional culture expression claimed by developed countries is ironically enormous. It includes cultural objects such as batiks, ancient manuscripts, culinary recipes, songs, dances, music tools, designs, plant products, and others. Worse, the misappropriation has taken place for several decades. Data of assets of traditional culture expression claimed by other countries are explained as follows:⁴

No.	Cultural Objects Claimed	Countries That Use Traditional Culture Expressions
	Batik	Adidas
	Batik Pesisir	China
	Rendang	Holland
	Sambal Bajak	Holland
	Sambal Petai	Holland
	Sambal Nanas	Holland
	Jepara Graving	French
	Tempe	Thailand
	Jepara-Distinctive Ornamental Frame	England
	Bali Silver Handicraft	America

The list above indicates that several developed countries have misappropriated Indonesian traditional culture expression. The assets of traditional culture expression are considered as the property rights, the rights for work creations, or the rights for cultures, and all of them are

3 Esmi Warasih, *Pranata Hukum Sebuah Telaah Sosiologis*, Suryandaru Utama, Semarang, 2005, P. 60.

4 Dirjen HKI – Dept. Hukum dan HAM RI, “Peranan Sistem Hak Kekayaan Intelektual Dalam Melindungi Pengetahuan Tradisional dan Ekspresi Budaya Tradisional”, Lokakarya Nasional PT-EBT, Yogyakarta, 3 September 2009.

definitely national resources. It is also the base capital that can be engineered to improve welfare and life quality, and also meaningful to produce better life.

Global phenomenon, in one side, represents a big chance for Indonesian to show their creativities by introducing products from traditional culture expression. In other hand, however, if traditional community themselves does not respect their cultural assets or even lacks of appreciation to it, there will be a possibility that the forward-looking countries with creativities will be eager enough to misappropriate such abandoned cultural assets, and even to claim these assets as “their rights of cultures”. Cultural globalization is a phenomenon that shall give an opportunity for Indonesian to show their pride, respect, and love to their products of traditional culture expression.

Strategy for Protecting Traditional Culture Expression in Indonesia

Governmental strategy for protecting traditional culture expression has been stated in legacy regime. The protection of the legacy of traditional culture expression of local arts has been done by documenting the product of traditional culture expression misappropriated by foreign individuals or business peoples through merchandising. The apprehension against the misappropriation of traditional culture expression still continues because it brings along a huge risk of cultural infringement. The presence of misappropriation may justify the importance of new and comprehensive strategy for protecting traditional culture expression in Indonesia.

The most important goal for inventorying and collecting the data of traditional culture expression is for documenting any kinds of traditional culture expression that must be protected. Documentation is a success key in dealing with the culture-related challenge. Frustration is often preceding the early documentation of traditional culture expression legacies. Centralized documentation may take longer time and is often expensive, but it gives significant impact by distributing the responsibility to produce the documentation of traditional culture expression among expert and traditional community.

The misappropriation of traditional culture expression can be defined as using traditional culture expression in commercial way or in right consolidation way through a certain system but without sharing the benefits from intellectual property usage. The concept of accessing to benefit-sharing of traditional culture expression can be understandable from international perspective. There are two (2) different aspects of benefit-sharing, respectively universal distribution of special benefit and profit-sharing. Both are indeed universal in nature. As noted by Kadri Simm, “universal profit-sharing is a positive potential chance for any outsider companies to use traditional culture expression without developing a benefit-sharing arrangement or without direct engagement with immediate enterprises”.⁵ It is also said that universal benefit-sharing, therefore, can easily mislead into injustice, especially concerning with misappropriation of traditional culture expression.

Michael Finger and Philip Schuler have reported that the goal of benefit-sharing is to help indigenous community to use their traditional knowledge and to take benefits from their creativities and thoughts.⁶ Benefit-sharing may allow indigenous community to use their development strategies to obtain ultimate facilities that may be useful for utilizing their traditional culture expression. Such arrangement may benefit all members of indigenous

⁵ Simm Kadri, Benefit Sharing Frameworks - Justifications for and against benefit sharing in human genetic research, A Report for GenBenefit, 2007, P.18

⁶ Michael Finger and Philip Schuler *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries (Trade and Development)*, World Bank Publications; 1 edition, January 29, 2004,P.183.

community and also general community, especially when their traditional culture expressions are clearly identified and protected without significant transaction cost or without producing what so called “Tragedy of Anti-Commons” as suggested by Michael Heller and Rebecca Eisenberg.⁷

By maximizing the benefits of this arrangement, thus, it is recommended to use the assets or the rights of intellectual properties within limited monopoly system, or it resembles to what has been offered into intellectual property system. Exclusive rights may help traditional community to get higher return from the use or the exploitation of their traditional culture expressions. As revealed by Professor Daes, the output of traditional culture expressions that is easily reproduced by machining at lower cost, or manufactured in greater quantity, may suffer from the diminishing of new or commercial values.⁸

Although traditional culture expression has economical values, indigenous community does not see the cultural legacy through the perspective of property. The legacy is the responsibility of community and also of individuals in the community. Therefore, for indigenous community, the legacy is the community relationship, not the unit of economical rights.

Naomi Mezey has noted that traditional culture expression as the property may be in conflict with the core concept. A property can be owned, controlled by the owner, and transferred over.⁹ Traditional culture expression is then collectively owned, and thus, there is no individual attribute adhered into this property. As a consequence, a claim for traditional culture property is meant to improve traditional culture if this culture is not fixed, dynamic or unstable.

Community and government, especially local government, play important role in contributing or protecting base potentials of traditional culture. The interesting part in the protection of traditional culture is that foreigners are allowed to use and to take benefits from traditional culture through benefit-sharing arrangement. This arrangement offers a way to improve the utilization of traditional culture expression. Proper method for benefit-sharing is by agreement or contract. This method may be consistent to the meaning of the benefit-sharing by which the benefit must be received by the participants of collective interest, in this matter the owner of traditional culture expression.

The ideal contract for the utilization of traditional culture expression must provide an access to the benefit-sharing. Therefore, contract or agreement must be understandable from legal perspective. Indeed, such contract or agreement must be based on Burgerlijk Wetboek which explains contract validity. Parties in contract or agreement must be legally restrained and proportionally assigned to justify the justice for immediate community. Section 1320 Burgerlijk Wetboek has stated that contract validity involves four items such as:

a) Covenant, b) Skill, c) A certain case, d) A legal case.

Subjective requirements to be met in “the utilization of the contract of traditional culture expression” are:

⁷ Wayne Shinya, *Protecting Traditional Cultural Expressions: Policy Issues and Considerations from a Copyright Perspective*, Department of Canadian Heritage, 2004, P.241; James AR Nafziger, ‘The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material’ , Chicago J Intl L, Vol.8, No,147, 2007, P. 151–52

⁸ John Middleton, *Culture*, Capstone Publishing, United Kingdom, 2002, P.53

⁹ Naomi Mezey, ‘The Paradoxes of Cultural Property’ Columbia L Rev, No.204, Vol.107,2007, P. 200-205

The party or parties with interest to use traditional culture expressions (alien) shall be presented in contract; and

The party or parties with interest to take benefit from traditional culture expression (custodian) shall be presented in contract.

It is said that the access to the benefit-sharing from traditional culture expression is regulated based on principles of appropriateness and fairness. Both principles must be attended by parties in contract if they want to access the benefit-sharing from traditional culture expression. "Covenant" is a term referring to a legal validation for the contract if the parties insist on accepting the goal of the contract.

The goal of contract is the objective requirement which influences the questions whether contract provides "legal goals" permitted by the law. If this requirement is not fulfilled, or when the goal of contract is defying the laws, contravening the principles of appropriateness and fairness, or disturbing moralities, therefore, contract is considered not valid.

Covenant, appropriateness, and fairness must be understood as the unity when the contracted parties desire the access to the benefits from utilizing traditional culture expression. Law No.11/2013 on The Validation of Covenant for Genetic Resource Diversity has several functions. It regulates the access to the benefit-sharing from the utilization of traditional culture expressions by using justice and balancing method. It also helps opening chance for better management and utilization of genuine and traditional knowledge and resources. The distribution of benefits from traditional culture expression through justice and balancing method is one way to achieve it. The implication of this regulation may influence the way to understand the existence of indigenous community, local knowledge and community rights.

CONCLUSION

The misappropriation of traditional culture expression can be defined as using traditional culture expression in commercial way or in right consolidation way through a certain system but without sharing the benefits from intellectual property usage. The concept of accessing to benefit-sharing of traditional culture expression can be understandable from international perspective. Therefore, it is important to protect the legacy of traditional culture expression of local arts by taking documentation, inventorying, or developing database about traditional culture expressions in order to produce national documentation comprising of many kinds of traditional culture expression needed to protect.

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