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THE IMPLEMENTATION OF THE TRADITIONAL CULTURAL EXPRESSION (TCE) PROTECTION IN INDONESIA BASED ON ARTICLE 38 LAW NUMBER 28 OF 2014 REGARDING COPYRIGHT

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Abstract

Indonesia as a multicultural and multi-ethnicity country has a wide Traditional Cultural Expression (TCE) which needs active protection as a cultural heritage from extinction and to provide certain economic benefits. However, a lot of elements are endangered due to the effect of globalization, lack of facilities, appreciation, and comprehension which cause erosion of values, functions, and cultural elements. This research was, therefore, conducted to discuss the implementation of TCE protection in Indonesia based on Article 38 Law Number 28 of 2014 concerning Copyright (Copyright Law 2014). It was concluded that the implementation of TCE protection is through the Draft of Governmental Decree concerning TCE but this draft has not been promulgated.

Keywords : Tradition Culture Expression (TCE), protection, Indonesia

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I. INTRODUCTION

Traditional Culture Expression (TCE)¹ is one of the interesting and developed issues in protecting traditional intellectual properties. It is the synonym for the Traditional Cultural Expressions used by the United Nations (UN) in the United Nations Declaration on the Rights of Indigenous Peoples

¹ tangible, or a combination thereof which traditional culture and knowledge are embodied and have been passed on (from generation to generation), tangible or intangible forms of creativity of the beneficiaries, including, but not limited to (a) phonetic or verbal expressions such as stories epics, legends, poetry, riddles and other narratives: words, (sings) names, and symbols; (b) music al or sound expressions, such as songs (rhythms), and instrumental music, the sounds which are the expressions of ritual; (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, (sport and traditional), games, puppet performances, whether fixed or unfixed; (d) tangible expressions, such as material expressions of art, handicrafts, (work of mask), (architecture), and tangible (spiritual forms), and sacred places.

and WIPO. Moreover, the draft of the WIPO Treaty on TCE protection or folklore expression determines the criteria covering all TCEs such as the unique characters, indigenous people or local community, and cultural community or a nation (owned) used and developed by people or community as a part of their cultural or social identity or their inheritance to be protected.

TCE is an intellectual capital with certain issues related to the great cultural value that is continuously developed in global modern society. It also functions as part of the social identity and cultural expression of a local community.² The concept also provides a significant economic advantage to support the livelihood of indigenous people³

The TCE for Indonesian cultural heritage is reflected in different aspects of community life including verbal expressions such as fairy tales, myths, legends, poems, puzzles, narrations, words (pantun from Sumatra, *parikan* from Java), signs, names, and symbols. It also includes musical instruments or sounds such as songs, rhythm, and instrumental music, musical instruments, drama, ordinary and sacred ritual, traditional games, performances as well as real expressions in the form of art materials, status, temple, craft (woods, metals, fabrics, stones, jewelry, embroidery), the architecture of the traditional house, and holy places including mosques, shrines, and churches.

Some of the TCEs observed to have been globalized include music angklung Mang Ujo, Candi Borobudur, Batik, Tenun, Wayang, and Keris which are all almost from Bali as well as the Wayang, Keris, Batik from Java, Saman dance from Aceh, Sundanese Angklung and Noken from Papua which are listed in Representative Intangible Cultural Heritage (ICH) list. This, therefore, shows the TCEs have been globally recognized and this means external or foreign intervention is needed in case the country is not committed to conserving and preserving the TCEs included in the list.

The continuous development of information technology and transformation has encouraged economic globalization,⁴ this is marked by the high level of

² Kholis Roisah, "Membangun Prinsip-Prinsip Perlindungan Hukum Hak Kekayaan Intelektual Berbasis Kearifan Lokal (Studi Perlindungan Hukum terhadap Ekspresi Budaya Tradisional Indonesia) [Building Principles of Legal Protection of Intellectual Property Rights Based on Local Wisdom (Study of Legal Protection of Indonesian Traditional Cultural Expressions)]," (Doctoral Dissertation, Diponegoro University, Indonesia, 2013), 25.

³ "Background Paper No. 1 Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, May 2003" WIPO, 20. See also Terri Janke, "Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights," Australia, 1998, 12, accessed 23 January 2011, frankellawyers.com.au/media/report/culture.pdf. "The percentage of returns to Indigenous people is marginal. In 1989, the Review of the Arts and Crafts Industry estimated that Indigenous people receive just over \$7 million per year from the sale of art crafts. The Strategy notes that the economic benefits to Indigenous artists have improved and could now be about \$50 million per year but the major portion of the sales benefit goes to art trades rather than the artists themselves."

⁴ Brink Lindsay from the Cato Institute, Washington in his book *Against the Dead Hand* showed three dif-

international trade and foreign direct investment.⁵ This globalization concept is associated with the effort of the international community towards improving living conditions, especially after World War 2 (WW2). The global economy creates a push-and-pull interests with a motor of trade and financial liberalization which does not always benefit all the people (and nations).⁶ Therefore, economic globalization and the free trade concept need to be protected. It is also important to note that globalization is not a movement to be resisted and stem but, on the contrary, requires logical thinking to keep it away from its negative effect on justice.

One of the aspects of economic globalization affecting the legal system is Intellectual Property Rights which has become a trend used by communities to protect their intellectual properties. This is considered important due to its relation to the international trading activities and economic growth of a country. The globalization of the Intellectual Property Right (IPR) through International Conventions under WIPO, GATT/WTO including TRIPs Agreement has made conflict of interest more complicated. For example, the articles in TRIPs Agreement do not make mention of the interest to protect the TCE in the Intellectual Property Right system but it has been accommodated in the provisions of the copyright protection system.⁷ Therefore, the issue of Traditional Culture Expression is observed to be recently developing in the IPR field.⁸

Some challenges are also observed to be facing the development of the IPR protection with the focus on the interest of most developing countries such as Indonesia on their intellectual properties such as the traditional knowledge (TK), traditional cultural expression (TCE) or folklore, and genetic resources (GR). Meanwhile, the traditional intellectual property required to be protected by copyright includes the creativity of an individual or a group of people in a community which is expressed through cultural traditions inherited from a generation to another in order to fulfill the needs and welfare of the people and

ferent but interrelated definitions of economic globalization: First, to describe economic phenomenon from the increasing political border market integration (whether political or technological reasons); second, to describe the limited political phenomenon.

⁵ Peter Van Den Bosche, *The Law and Policy of The World Trade Organization Test, Cases and Materials*, (United Kingdom: Cambridge University Press, 2017), 2.

⁶ Ida Susanti and Bayu Seto, *Aspek Hukum dari Perdagangan Bebas, Menelaah Kesiapan Hukum Indonesia dalam Melaksanakan Perdagangan Bebas, Percikan Gagasan tentang Hukum IV [Legal Aspects of Free Trade, Examining Indonesia's Legal Readiness in Implementing Free Trade, The Spark of Idea of Law IV]* (Bandung: Citra Aditya Bakti, 2003), 1.

⁷ IPR (hereinafter abbreviated as IPR) and described further in the literature review sub-section.

⁸ Traditional knowledge is an intellectual property produced by the custom of a society/indigenous/traditional which includes many things ranging from traditional knowledge systems, works of art, literature, philosophy, medicine to others classified as indigenous science and technology.

transmitted orally without anyone knowing its origin.⁹ This can be in the form of traditional knowledge which contains technological elements and technological copyright such as folklore which is an artistic expression.¹⁰

Several problems have been associated with the TCE in this era of globalization and this is reflected through the cooperation, investment, and research efforts transferred from the developed countries to undeveloped ones which lead to the registration of the research results on traditional properties and assets of the undeveloped countries in the developed countries without considering the social and moral value as well as the better ways of sharing the benefits. This, therefore, caused a paradigm shift in how people see traditional works in developing countries from independent objects to those with economic value. Moreover, states with cultural wealth and resources are observed to be focusing on how to optimize their traditional knowledge to be traded internationally and this means traditional artworks and techniques which have been existing for a long time in indigenous or traditional communities are now considered as assets with economic value.

The theft of traditional and knowledge and culture are observed to be taking place in different places under the disguise of research collaboration. For example, Balinese craftsmen were sued in 1991 at the New York District Court for the motif of their product known as the dragon motif bracelet (*gelang motif naga*) and Borobudur motif necklace (*kalung motif Borobudur*).¹¹ Several forms of TCE commercialization are observed to be occurring up to the global level without the permission of the indigenous people. The process is observed to be marred with inappropriate distortion, alteration, and modification of the TCE. An example of this is the *Bulun Bulun v. Nejlam Pty Ltd.*¹² The case where an Australian aboriginal artist sued a textile company producing shirts with “*Maggie Geese and Water Lilies at the Waterhole*” painting without permission. Another similar case is *Foster v. Mountford* where the Pitjantjatjara tribe was reported to have sued the writer of an Anthropology book entitled *Nomads of*

⁹ Sedyawati Edi, “Warisan Tradisi, Penciptaan, dan Perlindungan, [Legacy of Tradition, Creation and Protection],” *Media HKI*, Volume II Number 5, October 2005, 3.

¹⁰ *Ibid.*, 3. According to Group Expert on The Protection of Expression of Folklore by Intellectual Property 1985, folklore only consists of the expression of social and cultural identity contained in works of art and literature and it can only be protected within the framework of copyright protection. Meanwhile, Traditional Knowledge is knowledge, innovation, and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity (the Convention on Biological Diversity, Article 8 j). Therefore, traditional knowledge has wider coverage including the knowledge on plants and animals in medication and foods required to be protected under another framework which is known as the patent and biodiversity.

¹¹ Forum Keadilan Number 31, 1999.

¹² Blakeney Michael, “Intellectual Property in the Dreamtime-Protecting the Cultural Creativity of Indigenous Indigenous People,” in *Oxford Intellectual Property Research Centre, Research Seminar*, 9 November 1999 (London, United Kingdom, 1999), 4.

the Desert which they consider harassment to their cultural values and customs due to the fact that the book shows a traditional picture considered sacred and secret by the tribe. These cases are few examples of several inappropriate use and encroachment of TCE with regards to its commercialization without respecting the economic right of the owners as well as its inappropriate use which is considered as harassment towards the cultural values and customs of the people. Moreover, another Intellectual Property Right case observed to be globally popular with the object or source of the legal dispute being TCE is the Carpet Case.¹³ The number of claims on TCE ownership from Indonesia by foreign parties is due to the minimum protection of its rich cultural assets such as dances, batik, songs, designs, literature work, and several others.

Some issues related to Indonesia TCE were observed in the main theatre of Esplanade, Singapore where the Bugis epic contemporary work *I La Galigo* was performed in 2004.¹⁴ Another important example was reported at the end of 2007 when Indonesians were alarmed by the “Rasa Sayange” song played in a Malaysia tourism website under the Truly Asia theme which was used to promote the website.¹⁵ These add to the already long list of Indonesian culture claimed by Malaysia since Indonesian *batik*, handicraft, and *wayang* have been patented to be used as the country’s brand for Asian display. A similar case was also recorded afterward, and this involved the picture of *Reog* displayed at the Ministry of Culture, Art, and Malaysia Heritage which was observed to have high similarity with *Reog*

¹³ *Ibid.*, 8.

¹⁴ Henry Soelistyo Budi, “I La Galigo: Simulasi Sebuah Kebijakan Eksploitasi ‘Public Domain’ yang Dia-baikan [La Galigo: A Simulation of An Abandoned ‘Public Domain’ Exploitation Policy],” *Journal Masyarakat Seni Pertunjukan Indonesia* 13, (2005): 22. I La Galigo is the longest literature work in the world and is considered sacred by some Bugis people. It consists of 300 thousand stanzas divided into 12 units (6000 folio pages). Its contents are mythological and some are epic (*wiracarita*) which tells about six generations of figures from some kingdoms mostly based in Sulawesi. This literary work is longer than Mahabharata and its text is thought to have been written around the 14th to 17th centuries but began to get attention after Rhoda Grauer from Poughkeepsie, New York met Mohammad Salim, a lontar expert who had studied this manuscript at Leiden University, the Netherlands. See Sinar Harapan 9 Maret 2004 “Mitologi Bugis Kuno itu Kini Milik Dunia”, dan Kompas Cyber Media, 5 April 2002 “Pendahuluan Siklus ‘I La Galigo’ yang Tak Dikenal”. The thousands-year-old and almost forgotten epic was directed by Robert Wilson which is a big name considered to be a milestone in contemporary world theater. The show involved 50 Indonesian artists as the main actors. See also “I La Galigo,” *Kompas*, 14 March 2004, and “I La Galigo: Sejarah Baru Indonesia [I La Galigo: Indonesian New History],” *Suara Merdeka*, 14 February 2004. I La Galigo’s performance attracts several comments from IPR protection such as legal expert, Henry Soelistyo Budi.

¹⁵ “Komisi X: Klaim Rasa Sayange, Malaysia Harus Dituntut [Commission X: Affectionate Claims, Malaysia Must Be Sued],” *Detik*, 1 October 2007, accessed 10 April 2014, <https://news.detik.com/berita/d-836283/komisi-x-klaim-rasa-sayange-malaysia-harus-dituntut>. They argued that even though the song is from Indonesia it has become a Malaysian song a long time ago. Responding to this case, the Commission X of the Indonesian House of Representatives (DPR RI) urged the government to take firm action towards Malaysia for claiming *Rasa Sayange* song as theirs. The government must check the authenticity and origin of the song in Indonesia and sue Malaysia for using it in their tourism promotional material when it is confirmed to have originated from Maluku.

Ponorogo. This shocked the people and government of Ponorogo considering the fact that the district government has patented the *Reog Ponorogo* as copyright owned by the district at the Department of Law and Human Rights of the Republic of Indonesia.¹⁶ Moreover, some of the country's traditional batik was also commercialized by foreign parties such as the Parang batik motif reported to have been claimed by Malaysia.¹⁷

These descriptions showed Indonesia is a multicultural and multi-ethnic country with a wide TCE used as cultural heritage which needs active protection from going into extinction and also to explore its economic benefits for the use of the local economy. The country's TCE has economic potentials, especially in relation to the tourism and creative economy industry.¹⁸ This is due to its economic value as well as the indigenous community rights regulated in Article 18B paragraph (2) and Article 28I paragraph (3) UUD 1945, Article 32 paragraph (1) UUD 1945, Article 15 Law Number 11 of 2005 on Ratification of ICESCR, and Article 23 paragraph (2) Law Number 18 of 2002 on National System of Research, Development, and Implementation of Science and Technology. However, there are several elements discovered to be endangered due to the effect of globalization and lack of facilities, appreciation, and comprehension which has the ability to erode the values, functions, and cultural elements. The regulations implemented to protect the TCE are observed not to be sufficient considering the fact that they are only mentioned in the mentioned in Article 10 and 11, Law Number 19 of 2002 concerning Copyright which was replaced with Law Number 28 of 2014. TCE is also only regulated using only Article 38 in the Copyright Law 2014. Therefore, this research was conducted to study and analyze the TCE protection implementation in Indonesia which can be used as a legal foundation and framework based on Copyright Law 2014. This background led to the research question, how is TCE protection implemented in Indonesia based on Article 38 Law Number 28 of 2014 concerning Copyright (Copyright Law 2014)?

The social-legal research approach was applied in this study and this was selected to understand the law in the context of a policy-making society which is a non-doctrinal approach. This means this research is more focused on the sociologist aspect of the law which is conceptualized as "what is (functioning) in society."¹⁹ Brian Z Tamanaha also states that the

¹⁶ "Terusik Lagi Klaim Negeri Jiran [Malaysia Claims Again]," *Liputan6*, 26 June 2012, accessed on 20 May 2020, <https://www.liputan6.com/news/read/416067/terusik-lagi-klaim-negeri-jiran>.

¹⁷ *Ibid*.

¹⁸ The term Creative Economy was first used by John Howkins in his book, *The Creative Economy: How People Make Money from Ideas*.

¹⁹ Soetandyo Wignjosoebroto, *Hukum, Paradigma, Metode, dan Dinamika Masalahnya [Law, Paradigm, Method, and Dynamics of the Problem]* (Jakarta: ELSAM dan HUMA, 2002), 160-164.

relationship between law and the community is under a frame called “The Law – Society Framework” with some distinct characteristics.²⁰ This present study, therefore, aimed to reconstruct the model of ideal policy based on the uniformity of law which appears in the TCE protection policy after the implementation of the Copyright Law 2014. It was conducted in Surakarta and Jakarta at the Republic of Indonesia Directorate of Culture Ministry of Education and Culture, and Directorate General of Intellectual Property under the Ministry of Law and Human Rights.

II. DISCUSSION

Several countries have focused their attention on the conceptual and operational problems regarding the recognition of indigenous or local communities’ rights. Some cultural and ENT/folklore works have been linked to the protection of intellectual property rights based on different policies to ensure the progress of free trade, environmental conservation, food protection, cultural diversity, and others. This connection has a significant implication on the technical, administrative, and policy aspects of the intellectual property system. Meanwhile, this system has been discovered to not be providing sufficient rights to indigenous or local people even though it is possible to implement the rights on cultural products in the form of the TCE such as the characters and most of the ancient original TCE or folklore. The creators of these folklores or cultural products are, however, anonymous or unknown and this makes it pertinent to have a legal system to protect them.

The IPR law in Indonesia has been developed into seven forms and these include Copyright, Patent, Trademark, Industrial Design, Trade Secret, Integrated Circuit Layout Design, and Plant Variety Protection. There are four laws in Indonesia which explicitly and implicitly mention the TCE and they are stated as follows.

- 1) Law Number 15 of 2001 concerning Trademark (Trademark Law), in chapter VI (Article 50-55) and chapter VII (Article 56-60)²¹ and it was replaced with Law Number 20 of 2016 concerning Trademark and Geographical Indication²² in 2016.
- 2) Law Number 19 of 2002 concerning Copyright (Copyright

²⁰ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press, 2006), 3-4.

²¹ Indonesia. *Undang-Undang tentang Merek*. UU No. 15 Tahun 2001. (*Law concerning Trademark*. Law No. 15 of 2001).

²² Indonesia. *Undang-Undang tentang Merek dan Indikasi Geografis*. UU No. 20 Tahun 2016. (*Law concerning Trademark and Geographical Indications*. Law Number 20 of 2016).

Law) in Article 10 and 11 which was replaced with Law Number 28 of 2014 (in Article 38 and 39)

- 3) Law Number 14 of 2001 concerning Patent (Patent Law)²³ which was replaced with Law Number 13 of 2016 concerning Patent.²⁴
- 4) Law Number 29 of 2000 concerning the Plant Variety Protection (*Undang Undang Perlindungan Varietas Tanaman/PVT*), Article 7.²⁵

The TCE protection is also mentioned in other laws apart from those associated with IPR and these include Law Number 5 of 1994 concerning the Ratification of United Nation Convention on Biodiversity (UNCBD) where Article 8j mentions that the parties which are signatories to the convention need to respect, protect, and retain the knowledge, innovations, and practices which reflect the traditional lifestyle of indigenous or local communities. This is in line with the conservation and sustainable utilization of biodiversity, promotion of its wider application based on the approval from the owner of the knowledge, innovation, and practices, and also to promote fair distribution of profit generated from their utilization.

There are several other developing countries apart from Indonesia observed to have regulated TCE in their legal system, but the arrangement varies. Some such as Sri Lanka regulate folklore protection under the IPR law while others such as Indonesia, Australia, Barbados, Iran, Nigeria, Congo, and Ghana place it under the Copyright Law.²⁶ Moreover, there are countries such as²⁷ Philippines,²⁸ Vietnam,²⁹ Azerbaijan,³⁰ and Panama that regulate folk-

²³ In Chapter II (Article 2-7) of Law concerning Patent, though indirectly, the Patent Law can also be associated with TCE-related inventions because it is also protected by a patent law system. To be protected under the patent system, an invention needs to be something new, have inventive steps, and can be applied to industry. Traditional knowledge, in general, are owned and practiced from generation to generation by word of mouth. Therefore, it will be difficult for it to fulfill the novelty requirement because the knowledge itself is passed down from one generation to the other and this makes it difficult to determine the real inventor.

²⁴ Chapter II (Article 2-8) of Patent Law of 2016 can also be linked to TCE protection but it will be difficult to protect TCE-related technological inventions because it is difficult to fulfill the requirements for novelty due to the fact that TCE-related inventions are passed down from a generation to the other and this makes it difficult to determine the real inventor.

²⁵ See Law Number 29 of 2000 concerning The Protection of Plant Varieties

²⁶ Australia regulates the folklore under Copyright Law. Likewise, some African countries such as Nigeria, Congo, and Ghana. Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes; A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and The United States," *American University Law Review* 48, (1999): 769.769-849.

²⁷ The Republic of Croatia, *Protection and Preservation of Cultural Goods Act*, Law No. 01-081-99-1280/2 03 of 1999.

²⁸ The Philippine, *Indigenous Peoples Rights Act*, Rep. Act No. 8371 of 1997.

²⁹ Vietnam, *Cultural Heritage Law*. No. 28 /2001-QIII0, 2002.

³⁰ Some jurisdictions have bypassed the wait for an international instrument to be accepted and have instead drawn up domestic legislation addressing TCE. The Law of the Republic of Azerbaijan on Legal Protection of Azerbaijani Expressions of Folklore is the most recent example. Panama's Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection

lore as *sui generis*³¹ in the Act which specifically regulates folklore.³² Meanwhile, it is also possible to have another legal protection of the IPR system in the TCE field through copyright and trademark systems but they also have certain weaknesses and are difficult to implement considering the requirements for TCE which are not met as well as the normative rules not formulated explicitly in the articles.

This reality is alarming considering the fact that Indonesia has a rich TCE potential with the law enforcement problems associated with the situation divided into three³³ with the *first* being the most important and associated with the lack of strict regulation for TCE from the substantial and procedural perspective such that when such protection even exists, it is not symbolic, effective, and has no benefits. The *second* is associated with the legal apparatuses with only a few discovered to understand the TCE field while uncertain conditions of normative rules and breakthroughs in the legal indictment related to IPRs are expected to be very helpful. Meanwhile, the IPR model applied in foreign cases is observed to be useful in providing legal protection for traditional knowledge. The third is related to the legal culture aspect and this is linked to the general reluctance of traditional communities to conduct legal processes against the violations of intellectual works associated with traditional knowledge. The government which is expected to have the ability and legal awareness to fight for this protection also has several problems with its legal culture also considered questionable.

and Defense of its Cultural Identity and their Traditional Knowledge of 2000 is another example with an interesting history.

³¹ Black's Law Dictionary defines "*sui generis*" as "the Latin word for 'of its own kind' or class; unique or peculiar. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by the *sui generis* statute designed for that purpose. 'A *sui generis* system specifically designed to address the needs and concerns of a particular issue. There are already several examples of *sui generis* intellectual property rights such as plant breeders rights-as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 (the UPOV Convention') and the intellectual property protection of integrated circuits-as reflected in the Treaty on Intellectual Property in respect of Integrated circuits 1989 ('The Washington Treaty'), among others. The Panama Law No 20 of 26 June 2000 on the Special Intellectual Property Regime concerning the Collective Rights of Indigenous Peoples to the Protections and Defense of their Cultural Identity and Traditional Knowledge is also a *sui generis* regime. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Twenty Third Session Geneva, February 4 to 8, 2013.

³² In the year 2000, Panama passed Law No. 20 (Republic of Panama, Law No. 20, Special Intellectual Property Regime upon Collective Rights of Indigenous Intellectualist, for the Protection of their Cultural Identities and Traditional Knowledge) approving the first *sui generis* Indigenous Intellectual Property (IP) system in the world. While most countries in the world are in the early stages of recognizing indigenous rights in general, Panama which is a developing country and former Spanish colony passed a law that grants its indigenous groups exclusive. See Irma de Olbadia, "Western Intellectual Property and Indigenous Cultures: The Case of The Panamanian Indigenous Intellectual Property Law," *Boston University International Law Journal* 23, (2005): 338, 337-394

³³ *Ibid.*

These show the problems associated with the provision of TCE protection in Indonesia, especially in relation to the IPR. Meanwhile, TCE needs to be urgently protected in the country to tap the economic benefits from the international trading of indigenous (traditional) heritage which are currently being enjoyed by non-indigenous parties and institutions. There is, however, an increase in the awareness of the TCE being exploited haphazardly by foreigners for commercial purposes over the last five years. Moreover, it is assumed that the existing IPR system tends to favor those with high technology while “sacrificing” the true owner of the intellectual property.

The modern IPR legal system which is growing globally and uniformly has facilitated and enhanced the process of economic exploitation and erosion of indigenous cultures. This is due to the fact that this legislation is founded on the “ownership” concept of property (agreement of TRIPs-WTO: Recognizing intellectual property rights as private rights) which is foreign and unfavorable to the indigenous people. This allows economic exploitation by the rights holders.

Therefore, IPR is developed to enable individuals to utilize their intellectual products as a reward for their creativity and also to spur innovation and invention.

Copyright is an item in IPR with the ability to protect traditional works but its protection is limited and insufficient due to the idea that the provisions are not applicable to these objects. It is also important to note that the traditional works are usually not created for commercial purposes but rather for cultural and spiritual needs, thereby, showing the absence of commercial components in their creation. Therefore, some of the conditions limiting the registration of traditional knowledge or works include (1) originality and (2) tangibility which are further explained as follows:

1) Originality

The copyright in the TRIPS system requires protected works to be original in the sense that they are not copied. It is impossible for traditional works to fulfill this requirement due to the fact that they are generally inspired by existing customs which involves patterns replicated over a long period. This replication is, however, part of the custom because there is a rule in the indigenous community which states that a habit not similar to the previous one violates the customary law.

2) Tangibility

The copyright in the TRIPS system requires protected works to be tangible and reproducible. This is not possible with the traditional works to the fact that

they are generally in oral form, seen, shown, and passed down through generations.

These two requirements show the impossibility of subjecting TCE to modern IPR or TRIPs systems due to the differences as well as the difficulty in compromising the principles. Copyright is, however, defined as an exclusive right of the creators or recipients to announce or reproduce their works or give permission for the reproduction without reducing the restrictions provided by the applicable laws and regulations.³⁴ This exclusive right is provided automatically after the work is completed without limiting the restrictions in the applicable laws or regulation.³⁵ Meanwhile, Copyright Law Number 28 of 2017 has a slightly different definition with the creator's exclusive right appearing automatically based on declarative principle after the innovation is realized in real form without reducing restrictions in accordance with the provisions of the legislation.³⁶

Copyright is intellectual property in the field of science, art, and literature which plays a strategic role in supporting the development of a nation and improving public welfare as mandated by the 1945 Constitution of the Republic of Indonesia. The development in these areas has been rapid to the extent it requires an increase in protection and guarantee of legal certainty for creators, copyright holders, and owners of related rights.

Law Number 28 of 2014 concerning Copyright was formulated to protect, provide signs, set the rules for each copyright, and also increase the protection and guarantee legal certainty for the creator, copyright holder, and owner of the related rights. It does not only protect the creators' rights to achieving the innovation which contains economic and moral values but most importantly to provide legal certainty for each copyrighted work. The subject of the copyright is the creator which includes the person or a group of people that individually or jointly produce a unique or personal creation³⁷ through inspiration, the ability of the mind, imagination, dexterity, skill, or expertise poured into a distinctive and personal form. Meanwhile, the copyright holder is the owner of the copyright or the party that receives the legal right from the creator or another party that receives further rights from the first party.³⁸

The creator is defined in the Copyright Law 2014³⁹ as the person whose name

³⁴ Provision of Article 1 Number 1, Indonesia, *Undang-Undang tentang Hak Cipta*. UU No. 19 Tahun 2002. (*Copy Rights Law*. Law No.19 Year 2002).

³⁵ Copy Rights Law Number 19 of 2002, Provision of Article 2 paragraph (1).

³⁶ Copy Rights Law Number 19 of 2002, Provision of Article 1 Number 1.

³⁷ Article 1 Number 2, Indonesia. *Undang-Undang Hak Cipta*. UU No. 28 Tahun 2014. (*Copyright Law*. Law Number 28 of 2014).

³⁸ Copyright Law of 2014, art. 6.

³⁹ Copyright Law of 2014, art. 31-35.

is:

- a) mentioned in the work,
- b) stated as the creator of a work,
- c) mentioned in the work registration letter and/or,
- d) mentioned in the general list of works as creators,
- e) a person that delivers a speech without written materials and with no announcement of the creator,
- f) a person that leads and supervises the completion of a work which consists of several separate parts created by two or more people,
- g) when the person that directs the completion of a work is not present, the one considered as creator(s) are that those that the receive the creation without reducing the copyright of each of their parts,
- h) the person that designed work but was created or implemented by another under the direction and supervision of the designer, and
- i) governmental institution when a work is created by somebody in the service relations unless agreed otherwise.

The works protected under copyright law include those associated with science, art, and literature such as:

- a) book, pamphlets, typographical arrangement of a published work, and all other written works,
- b) lectures, speeches, and other similar creations,
- c) teaching aids made for the benefit of education and science,
- d) songs and/or music with or without text,
- e) drama, musical drama, dance, choreography, *wayang*, and pantomime
- f) works of art in all forms such as paintings, drawings, carvings, calligraphy, sculpture, or collage,
- g) applied art,
- h) architectural work,
- i) map,
- j) *batik* artwork or another motif art,
- k) photography,
- l) portrait,
- m) cinematography,
- n) translation, interpretation, adaptation, anthology, database, arrangement, modification, and others,
- o) works of transformation,
- p) translation, adaptation, arrangement, transformation, or modification of traditional cultural expressions,
- q) compilation of work or data both in a format that can be read with

- computer programs and other media,
- r) compilation of traditional cultural expressions as long as the compilation is an original work,
- s) video games, and
- t) computer program.

It is also important to note that TCE is protected under the Copyright Law⁴⁰ which states that a work is automatically protected after it is completed. The current IPR is based on the concept of individual ownership of property and materialism which is a driving force that originated from western countries considered to be mostly developed countries. The IPR is used as a gold miner for the ability, creativity, and knowledge of an individual.

The nature of Indonesian society and other developing countries is, however, more directed towards the communal and collective ownership systems. Developed countries believe GTRF is a world cultural heritage to be used by anyone and at any time (common heritage of mankind) to ensure its access is affected by the establishment of international legal rules. Therefore, they refuse the appeal from several developing countries which try to include GTRF into the IPR system because the originality cannot be proven and the physical form is not real.

IPR legislation in Indonesia including copyright law can be said to be produced from western transplantation, therefore, it is definitely based on individual and economic interests which contradicts the “traditional cultural riches” considered to be more community-based in developing countries. The process is, however, similar to the transplantation in humans such that when an organ is suitable, it is acceptable by the human body and the part is healed but harms the recipient when it is rejected. The same is true with IPR legislation adoption such that it provides benefit to the country when it matches the Indonesian legal system but causes a greater loss when it is not suitable. There is presently no significant proof from an empirical study showing the positive effect of IPR legislation on the economic growth and social development of developing countries but funds from these nations are observed to be flowing to the developed countries in form of royalty. This was acknowledged by Abbott that IPR protection causes losses for developing countries.

The most important thing in any form of TCE protection, either *sui generis* or IPR, is that it does not harm the owners. The use of IPR law for protection needs to exempt the TCE while *sui generis* is required to provide full coverage. This means the regulation of TCE in Copyright Law is too general and unclear

⁴⁰ Copyright Law of 2014, art. 38.

with several problems observed to be emanating from its implementation. There is, however, an alternative to solve the aforementioned problems in order to protect cultural heritage and knowledge and this is a legal reform to regulate the TCE. This reform is expected to be based on international legal principles without neglecting those associated with the indigenous people in order to foster harmonization in the legal system. Therefore, it is important to understand how the concept of international IPR regulates traditional knowledge.

This discussion shows there are several reasons it is impossible to protect the TCE through the IPR system approach, either nationally or internationally. First, TCE is developed communally and passed down while IPR is developed individually, and this makes it very difficult to protect TCE using the IPR system. Secondly, TCE is a published creation, and this makes it difficult for it to satisfy the aspect of novelty required to be fulfilled in some IPR system requirements such as patents and industrial designs. Thirdly, the TCE currently protected under the IPR system such as copyright do not provide a complete arrangement, and this is not appropriate for the legal protection. This means the TCE is not covered in the IPR system and is relatively hard to be protected under such a system and any steps by the government or private institution for protection through the system tend to fail. This specifically means the protection of TCE through international and national IPR systems approach is a futile act.

Legal protection for TCE is, however, very important and strategic for Indonesia to ensure the enhancement of the cultural, economic, social, and cultural aspects through the conservation of national culture. The country is currently well known for its cultural diversity in terms of art, medicine, and others but it is impossible to clearly identify and provide its exact number of TCE. For example, Yogyakarta is known for *batik* crafts, *wayang*, *plait*, dance, and other arts while Madura is for Madura dance, stories of the kingdom, and medical sciences. From a social perspective, TCE protection clearly has the ability to preserve and maintain social values and this means the government has to focus on these cultural assets owned by the Indonesian people through their continuous identification. From the economic perspective, TCE protection can add economic value to the country through increment in foreign exchange. This is logical considering the fact that the TCE is currently being exploited only for conventional use without being developed as invaluable assets.

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The delay in the ratification of this Draft Law was also supported by the replacement of the Copyright Law Number 19 of 2002 concerning Copyright by Law Number 28 of 2014 with the TCE observed to be regulated in Articles 38 and 39 which are stated as follows,

Article 38:

- (1) The copyright of Traditional Cultural Expression is held by the state.*
- (2) The state is responsible to make an inventory, maintain, and preserve traditional cultural expressions as referred to in paragraph (1).*
- (3) The utilization of traditional cultural expression as mentioned in paragraph (1) has to consider the values that live in its indigenous community.*
- (4) Further regulation on Copyright held by the state regarding traditional cultural expression as mentioned in paragraph (1) is through the Governmental Decree.*

“The values that live in its indigenous community” used in the provision includes the customs, customary law norms, customs norms, social norms, and other noble norms upheld by the indigenous people maintaining, developing, and preserving the traditional cultural expression.

Article 38 explains “traditional cultural expression” as one or the combination of forms of expression including:

- a) textual and verbal or both oral and written such as prose and poetry in different themes and content of the message, which can be in the form of literature or informative narrative
- b) music including vocal, instrumental, or the combination of both
- c) motion including dance and others
- d) theatre including *wayang*, folk plays, and others
- e) fine art both in two-dimensional and three-dimensional forms made of several materials

- f) such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or a combination thereof, and
- g) traditional ceremony.

The TCE copyright owned by the state, therefore, needed to be regulated further with Governmental Decree. Another arrangement observed to be focused on TCE is Article 39 which regulates the works with the anonymous creators.

Article 39

(1) Concerning the work with anonymous creators and unpublished works, the copyright of such work is held by the state for the interests of the creator.

(2) In case the work has been published but the creator is anonymous or only an alias or pseudonym is stated as the creator, the copyright of the work is held by the party announcing the interests of the creator.

(3) In case the work has been published but the creator and the one making the announcement are unknown, the copyright of the work is held by the state for the interests of the creator.

(4) The provisions as referred to in paragraphs (1), (2), and (3) do not apply when the author and/or the party conducting the announcement can prove ownership of the work.

(5) The interests of the creator as referred to in paragraphs (1) and (3) are implemented by the Minister.

The draft of Governmental Decree on Traditional Cultural Expression (RPP TCE) consisting of seven Chapters and 17 articles has currently been completed to implement the provisions of Article 38 Paragraph (4) Law number 28 of 2014 concerning Copyright (Copyright law 2014).

The protection system is implemented in the Copyright Law 2014 through the registration/recording system for legal certainty which is similar to the trademark protection. This, therefore, means there is legal certainty on the TCE protection without the registration/recording of work to the Office of the Directorate of Intellectual Property Rights. It is possible to understand this provision by tracing the origin of the TCE protection idea.

The objective of this governmental decree is to enable the state to take an inventory, keep, and maintain Traditional Culture Expression through the ministry in charge of legal problems, head of a non-ministerial government institu-

tion, and local government as indicated in the following provisions:

- 1) to develop, utilize, promote, preserve, and protect Expression of Traditional Culture as a part of the efforts towards protecting the state wealth and development capital
- 2) to regulate the utilization of Expression of Traditional Culture
- 3) to ensure the fulfillment of the community's rights to have a role in the protection and management of Expression of Traditional Culture
- 4) to provide the framework for the protection and management of Expression of Traditional Culture that can be used in the formulation of public policies at local, national, and international levels.

This draft regulates the sovereignty of Indonesia to take an inventory, protect, and preserve the Expression of Traditional Culture for the greatest prosperity of the people. The draft of the government decree of 2017 defines TCE as all forms of expression of copyrighted works, whether in the form of objects or non-objects, or a combination of both which indicate the existence of a traditional culture held communally and across generations.⁴¹ It also mentions that the state needs to take an inventory, maintain, and preserve TCE and this obligation is expected to be performed by the minister, head of a non-ministerial government institution, and/or local government. The process requires the involvement of the group of people dealing with culture.⁴²

The inventory includes⁴³ field study or feasibility, administrative requirements, and proposing the registration of the results as TCE with the custodian also allowed to deliver the documentation of the TCE accompanied with the description of the name, area or location, and its form to the Minister for registration. The submission of the TCE inventory results and documentation is required in paragraph (2) to contain the classification based on the characteristics including the sacredness, secret or open, and/or when it needs to be firmly adhered to.

This classification is expected to be conducted through the inventory results submitted by the TCE custodians and documentation independently identified either electronically or non-electronically. Furthermore, the Minister is expected to publish the registration letter and include the TCE into the database after which the letter is to be delivered to the minister, head of non-ministerial government institution, local government, and/or TCE custodian that applied for the registration.

The registered TCE needs to be maintained by the minister, head of non-

⁴¹ Article 1, Draft of the Law concerning Traditional Culture Expression, 2017.

⁴² *Ibid.*, art. 5b.

⁴³ *Ibid.*, art. 6.

ministerial government institution, local government, and/or TCE custodian with the minimum maintenance required stated as follows:

- a) preventing the exploitation of TCE which is not consistent with the values, meanings, and the identity of the TCE as well as the social institutions in the communal society,
- b) mediating and/or advocating legal issues concerning TCE, and
- c) conducting diplomacy with other countries

The maintenance process is also expected to include adequate planning and utilization of the TCE to ensure they provide benefits to the custodians. Meanwhile, the inventory is usually conducted by the Minister⁴⁴ through the formation of the national TCE inventory system in the form of a data center to provide information such as the name, form, characteristics, custodian, area or location, description, documentation, and other supporting data on the TCE maintained and preserved by the minister. The data is usually open unless specified otherwise by the minister and this means everyone is allowed to raise and submit objections on the TCEs at the data center under the following scenario:

- a) the TCE is not appropriate with the prevailing social norms in the communal community, and/or
- b) the TCE custodian is not the legitimate custodian.

Everybody is also allowed to utilize the TCE in the data center as long as they can:

- a) mention the origin of the TCE,
- b) maintain the values, meanings, and identity of TCE, and
- c) pay attention to the values in the indigenous community.

The use of sacred, secret, and firmly held TCE, however, needs written consent from the custodian. There is also the need to provide the details on the way it is to be utilized such as announcements, use, manufacture, propagation, dissemination, broadcasting, change, transferring, citation, adaptation.

The national TCE inventory system conducted through a data center was implemented by the government using the Republic of Indonesia Ministry of Law and Human Rights Decree Number 13 of 2017 concerning Communal Intellectual Property Rights Data even though the draft has not been ratified up to today. The decree includes⁴⁵ traditional knowledge, expression of traditional culture, genetic resources, and potential geographical indications.

⁴⁴ *Ibid.*, art. 11.

⁴⁵ Copyright Law of 2014, art. 2.

The TCE included in the Communal Intellectual Property Rights (CIPR) include the following:

- a) textual verbal
- b) music
- c) motion
- d) theatre
- e) fine arts
- f) traditional ceremony
- g) architecture
- h) landscape, and/or
- i) other forms of expression according to development

The following is required in the inventory:

- 1) CIPR needs to be included and the process is expected to be performed by the minister.
- 2) In preparing the inventory, the minister can work with the ministries/ institutions/ and/or local government.
- 3) The inventory is prepared through:
 - a. Field study/feasibility
 - b. Completeness of administrative requirement
 - c. Proposal for the determination of inventory result, and/or
 - d. Data exchange.
- 4) The minister, head of non-ministerial government institution, and/or local government are required to fill the following TCE data in the form⁴⁶ for the inventory of the CIPR data center.
 - a. the name of Expression of Traditional Culture
 - b. custodian
 - c. the form of Expression of Traditional Culture, SDG, PT, IG
 - d. classification
 - e. region/location, and
 - f. description.

Another legislation on TCE is Law Number 5 of 2007 concerning Cultural Advancement which defines cultural advancement as the efforts made to improve Indonesia cultural resilience and contribution at the middle of the world civilization through protection, development, and utilization of culture.⁴⁷ The objective is to develop noble values of national culture, enrich cultural diversity, preserve the nation's cultural heritage, and improve the

⁴⁶ See appendixes of Copyright Law of 2014.

⁴⁷ Article, 5. Indonesia. *Undang-Undang tentang Pemajuan Kebudayaan*. UU No. 5 Tahun 2017. (*Law concerning Cultural Development*. Law No. 22 Year 2017).

image of the nation.

The law also defines protection as the efforts to safeguard the sustainability of culture by developing inventory, protection, maintenance, rescue, and publication. Meanwhile, development is the effort to revive the culture ecosystem as well as to enhance, enrich and disseminate culture. The use is explained as the attempts made to utilize the object of cultural advancement towards strengthening the ideology, politics, economy, social, culture, defense, and security of the country in order to achieve national goals. Moreover, coaching includes the efforts to empower cultural human resources, institutions, and regulations in enhancing and expanding active roles and community initiatives.

The objects of cultural advancement, therefore, include the following:

- a. oral tradition
- b. manuscript
- c. customs
- d. rite
- e. traditional knowledge
- f. traditional technology
- g. arts
- h. language
- i. folk games
- j. traditional sports.

The comparison of the Copyright and Cultural Advancement Laws showed some intersecting parts and these include the following:

TCE in Article 38 of Copyright Law consists of:

- a. verbal textual, both oral and written, in the form of prose and poetry in different themes and
- b. content of messages which can be in the form of literary works or informative narratives,
- c. music including vocal, instrumental, or combination of both;
- d. motion including among other things, dance;
- e. theatre including among others, wayang puppet shows and folk plays;
- f. fine arts, both in two-dimensional and three-dimensional forms, made of several materials
- g. such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or a combination thereof;
- h. traditional ceremonies

The Cultural Advancement Law also mentions

- a. “oral tradition” as the speech passed down from generation to generation by the community, including oral history, fairy tales, utterance, pantun, and folklore.
- b. “manuscript” with all its information which has cultural and historical values such as *serat*, chronicle, saga, and book.
- c. “arts” as an individual, collective, or communal artistic expression based on cultural heritage as well as new creativity-based creation manifested in different forms of activities and/or mediums.
- d. art includes performing arts, fine arts, literature, film, music, and media arts.
- e. “customs” as the habit based on certain values continuously conducted by community groups and passed on to the next generation and these include environmental governance and procedures for dispute resolution.
- f. “rite” as the procedure to conduct ceremonies or activities based on certain values continuously conducted by community groups and bequeathed to the next generation and these include several celebrations such as birth, marriage, death, and rituals of trust and equipment.

The previous definition of protection by Cultural Advancement Law indicates the need for inventory management in maintaining and preserving traditional cultural expressions and the steps include (a) recording and documentation, (b) registration, and (c) data updating. The inventory of the objects is, therefore, expected to be managed through a compulsory integrated cultural data collection system by the central and local governments.

The objects of cultural advancement are required to be safeguarded⁴⁸ by the central and/or local governments as well as through the active role of everyone. This is to prevent foreign parties from claiming the intellectual property of the objects. The process is conducted through the continuous update of the data collection system of integrated culture, provision of the object for the next generation, and championing the promotion of cultural objects as a world cultural heritage.

The central and local governments as well as other people also need to maintain⁴⁹ these objects to prevent damage, loss, or destruction. This is possible through the following:

- a. maintaining the value of nobility and wisdom of the objects
- b. using the objects in everyday life
- c. safeguarding the diversity of the objects

⁴⁸ Law concerning Cultural Development, art. 22.

⁴⁹ Law concerning Cultural Development, art. 24.

- d. reviving and maintaining the cultural ecosystem for every object, and
- e. passing on the objects to the next generation.

The objects of cultural advancement also need to be rescued⁵⁰ by central and/or local governments and through the active role of everyone. This is conducted through the following:

- a. revitalization
- b. repatriation, and/or
- c. restoration.

Publication is the dissemination of information to the public, both domestically and internationally, using several forms of media. The central and/or local governments need to conduct publication on the information regarding the inventory, safeguarding, maintenance, and rescue of the object of cultural advancement. Everyone is also expected to take an active role in the process.

It is also possible to utilize the objects⁵¹ to:

- a. build national character
- b. improve cultural resilience
- c. improve people's welfare, and
- d. improve Indonesia's active role and influence in international relations.

It is also possible to utilize the objects of cultural advancement to build national character and improve cultural resilience by:

- a. internalizing cultural values
- b. innovating
- c. improving adaptation toward changes
- d. intercultural communication, and
- e. intercultural collaboration.

The objects also have the ability to improve people's welfare⁵² by processing them into products in order to maintain the value of nobility and wisdom inherent in the objects.

The findings of this study showed the possibility of linking the implementation of TCE protection in Indonesia to the approach directed towards protecting intellectual property as indicated as follows:

- a. Intellectual Property Protection supports economic development
- b. Protection of intellectual property prevents unwanted use of TCE by

⁵⁰ Law concerning Cultural Development, art. 26.

⁵¹ Law concerning Cultural Development, art. 32.

⁵² Law concerning Cultural Development, art. 34.

- other parties outside the local or indigenous community
- c. Defensive strategies to protect traditional cultural expressions are focused more on the preservation of cultural values contained in traditional intellectual creativity in the community.

The protection approach in points a and b is positive and aims to provide full and comprehensive protection on the rights and ownership of IPR over the traditional cultural heritage. Meanwhile, the approach in point c is defensive and outside the scope of intellectual property law by focusing more on preventing cultural heritage in general and specifically TCE from being lost or extinct. This is directed towards maintaining the integrity of living cultural values while the integrity and existence or sustainability of the TCE in the public domain is accessible to anyone and also to be enjoyed by future generations.

Positive protection approach can be implemented through the following efforts:⁵³

- a. A form of protection under the IPR principles with sui generis rights framework which specifically prevents the commercial and degrading use of TCE without permission.
- b. Similar protection through special IPR principles or sui generis IP rights which can be used as the foundation to conduct commercial studies and cultural cooperation with a third party such as the design of benefits sharing formula when a TCE is used outside its traditional community.
- c. A form of protection using legal provisions outside IPR principles such as the human rights law, the environment as well as the laws regulating the protection of indigenous peoples.
- d. A form of technical protection which involves creating a database with certain security principles aimed at preventing third parties from taking advantage and accessing the TCE without permission.

The main objective of positive protection is very clear and this is mainly to protect the exclusive rights of indigenous people concerning their intellectual creativity. It allows them to benefit from any form of TCE commercialization due to the fact that it is the intellectual creativity created through their cultural values and living social identity. It is important to note that protection is also provided to the unwanted and inappropriate use of the TCE by parties outside the indigenous or local community and the cultural context of the community.

⁵³ Anthony Taubman and Matthias Leistner, "Traditional Knowledge," in *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore (2nd Edition)*, Silke von Lewinski eds., (The Hague, Netherlands: Kluwer Law International, 2009), 59.

The description of the approaches shows the implementation of TCE protection in Indonesia after Law Number 28 of 2014 concerning Copyright (Copyright Law 2014) was established on the positive and defensive protection approaches. The positive protection approach is observable through several legislations on TCE directed towards providing full and comprehensive protection on ownership and IPR rights. Meanwhile, the defensive protection is manifested in the regulations outside the IPR legislation which focus on preventing cultural heritage in general and TCE in particular from being lost or going into extinction. This is directed towards maintaining the wholeness of living cultural values while preserving the integrity and existence of TCE which is accessible in the public domain for the use of the present and future generations. This concept is, however, not designed as an IPR or another exclusive right over the creativity of traditional intellectuals, even for the indigenous community but it is partly regulated in Law Number 5 of 2017 concerning Cultural Promotion.

III. CONCLUSION

The findings show the protection of TCE in Indonesia based on Article 38 of the Law Number 28 of 2014 concerning Copyright (Copyright Law 2014) was implemented through the Draft of Governmental Decree concerning TCE. This draft has been discussed and approved by several relevant ministries but has not been ratified and promulgated up to the present moment. Meanwhile, the Republic of Indonesia Law and Human Rights Minister Regulation Number 13 of 2017 concerning Communal Intellectual Property Data was issued through the Law and Human Rights Minister as well as the Law Number 5 of 2017 concerning Cultural Advancement which also regulates the protection, promotion, maintenance, and management of TCE.

This research, therefore, recommends the following:

- 1) The government should immediately ratify and enact the Draft of Governmental Decree on TCE.
- 2) All local governments in Indonesia should immediately create a database and inventory for TCE in their area.
- 3) Observers of human rights and IPR should encourage the government to immediately ratify and promulgate the Draft of Governmental Decree on TCE to ensure the adequate and appropriate management and protection of TCE in order provide a legal guarantee for the economic rights of indigenous peoples.
- 5) The government should develop a legal culture in Indonesian soci-

ety with a focus on the importance of protecting TCE.

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