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## Economic Potential of Traditional Cultural Expression From The Perspective of Indonesia's Intellectual Property Rights Law

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**Abstract:** Folk Songs are very vulnerable to be claimed by other parties, changed and/or resung inappropriately or deviating from the values of the traditional community. So it is important to conduct a research related to the protection of Folk Songs within the scope of Copyright Law in Indonesia. This research aims to gain knowledge by analyzing the regulation of Folk Songs in terms of Intellectual Property Law, especially Copyright and certainty regarding their commercial use which produces economic benefits. This study employs normative legal research techniques utilizing both conceptual and statutory approaches to comprehend legal facets through relevant literature and regulations. In accordance with the Explanation of Article 38 paragraph (1) of Law Number 28 of 2018 concerning Copyright, which states that the State holds creative rights and that other parties can implement copyright with permission from the creator or copyright holder in the form of a license agreement, this research shows that folk songs are one of the traditional cultural expressions. The Minister is authorized to execute license agreements on behalf of the State with other entities having a similar standing. Despite the issuance of Government Regulation Number 56 of 2022 concerning Communal Intellectual Property to carry out the mandate of Article 38 paragraph (4) Law Number 28 of 2018 concerning Copyright, the provisions regarding the procedures and implementation of this application have not been thoroughly regulated.

**Keyword:** Communal Intellectual Property, Copyright, Folk Songs, Traditional Cultural Expression.

### INTRODUCTION

Geographically, Indonesia is between two continents and two oceans. This geographical location influences various conditions, from climate, environmental conditions to social and cultural diversity. This cultural diversity makes Indonesia a very rich and unique country and nation. Indonesia's diverse culture is rooted in local culture which continues to grow and develop in society, especially indigenous communities. The history and identity of the Indonesian nation cannot be separated from the important influence of Indigenous Peoples. Indigenous peoples are groups of people those residing in Indonesia since ancient times, before the existence of today's modern country. Indigenous people

cannot be separated from their artistic and cultural identity, in the form of traditional clothing, traditional houses, traditional ceremonies, dance, musical instruments and songs. It is important for arts and culture to receive legal protection from the state. One of the state's legal protections for the culture and arts of indigenous peoples is the protection of works through Intellectual Property Law. Intellectual property law is material rights that originate from the results of brain work in the form of reasoning and emotions which give birth to intellectual works in the form of creations (Yoyo Arifardhani, 2007).

Intellectual property is closely related to its creator, so it is included as part of private rights in the manner of exclusive rights protected by the State. Apart from individual intellectual property, there is also communal intellectual property originating from a group of indigenous communities/society. Protection of communal intellectual property is essential as it pertains to the community of creators (Geme, et.al., 2023). The term "communal" in communal intellectual property denotes the shared ownership nature of the rights involved. In contemporary contexts, Communal Intellectual Property denotes rights possessed by customary law communities, serving as a type of traditional cultural heritage that evolves within society and embodies the identity of said community. (Siti Asfiansyah, 2015). The 2023 UNESCO Convention states that various expressions, representations, practices, skills, knowledge and instruments of intangible cultural heritage are part of Communal Intellectual Property (Yunita Maya Putri, 2021).

In this research, the creations related to indigenous communities that will be discussed was Folk Songs in the aspect of Communal Intellectual Property Law, especially Copyright. Folk Songs are very vulnerable to being claimed by other parties, changed and/or re-sung inappropriately or deviating from the values of the traditional community. One example of a song that is allegedly claimed by another party is a song written by Ismail Marzuki with the title Halo-Halo Bandung. The song is suspected to have been plagiarized by the Malaysian state by changing the title and lyrics of the song to be entitled "Lagu Kanak Kanak Melayu Malaysia", where the lyrics were originally "Halo-halo Bandung, ibu kota periang" to "Hello Kuala Lumpur" (Tim Redaksi, 2024).

The Copyright Law, number 28 of 2018, regulates the protection of musical compositions as an example of an intellectual property asset (Article 58, letter (d)). According to the Copyright Law, the person or entity responsible for writing a song has the sole right to profit from the song's success. Royalties from announcing and reproducing songs are examples of economic rights that can be obtained by song creators, while moral rights are in the form of including or attaching the composer's name as an inseparable part of the song and the right to maintain (including changing) the song he created (Aulia, et al., 2020). Likewise with Folk Songs which certainly have potential economic value. This explanation makes it interesting to discuss the protection of Folk Songs and the utilization of economic rights in Legal perspective.

Departing from this background, the identification of the matters examined in this research is as follows:

1. What is the legal protection for Folk Songs as Traditional Cultural Expressions?
2. Can Traditional Cultural Expressions be exploited for commercial purposes?

## **METHOD**

The research method that utilized in this research is normative legal research, where the author believes that there is a vacuum of norms regarding the topic of discussion. This research method was chosen because through this approach, the philosophical, moral and social foundations of a law or policy can be known. Thus, this method helps in formulating appropriate and effective interpretations of existing legal norms. The approach chosen and applied in this research is a conceptual approach and statutory approaches to understand legal aspects based on related literature and regulations.

## RESULTS AND DISCUSSION

### Legal Protection of Folk Songs as Expressions of Traditional Culture

The purpose of law enforcement is to ensure the physical and emotional safety of community members by preventing disruptions and threats from any source, and one component of this endeavor is legal protection. This legal protection originates from legal instruments prepared and determined by the Government for the community as legal subjects. Legal protection for Folk Songs as traditional cultural expressions can be found in the Copyright Law.

Copyright is an exclusive right belonging to the creator with a protection system that automatically generated in accordance with declarative principles. Copyright automatically generated after a work is realized in real form without reducing restrictions. As a material right, the concept of copyright ownership is categorized into 2 (two) rights concepts, namely rights relating to the creator (authorship) and rights relating to the creation (ownership). This categorization is based on an understanding of the nature of copyright protection which involves ownership of intangible objects, so that the essential relationship of authorship has an element of moral rights, where the creator is entitled to always be recognized and appreciated through the works that he produces. As for the second categorization, which relates to the owner of the work or what is commonly called the copyright holder, who only has economic rights (William Jaya Suprana, 2020). Moral Rights and Economic Rights are components that constitute Exclusive Rights, which are always protected by the Declarative principle (First to File), where copyright protection is automatic. An automatic protection system means that this protection system does not require any recording, the creator automatically gets protection as soon as his work is created. It is not necessary to register creations in order to receive Copyright and associated rights, as stated in Article 64 paragraph (2) of the Copyright Law. A foundational document for automatic protection is the Berne Convention, which first came into being in 1886 and was subsequently updated in Paris in 1971. The Berne Convention is the first copyright regulation in the form of a multilateral agreement, which is one of the main principles of Berne Convention itself is Automatically Protection (Rahmi Jened Parinduri Nasution, 2017).

Even though protection automatically takes place when a work is created, creators are still encouraged to register their creations to strengthen the protection of their creations to avoid/deal with disputes that arise in the future. Registration of this work is useful because it can facilitate the evidentiary process upon dispute regarding copyright. Decision making by the Judge regarding his authority becomes more difficult and takes more time to prove if the work is not registered (Ghaesany Fadhila, 2018).

The period for protection of Copyright for Works lasts for the lifetime of the Author with an additional 70 years from the time the Author is declared dead. When the protection of a work ends due to the expiration of the protection period, Copyrighted Work becomes Public Ownership/Public Domain. There is no clear explanation of "public ownership" or "public domain" under copyright law. The World Intellectual Property Organization (WIPO) provides the following definition of the word "Public Domain":

“In common use, the term "public domain" refers to any and all intellectual property that is either not copyrighted or whose protection has expired.”

All efforts to safeguard economic and moral rights are rendered moot in the light of this description. It should be mentioned that the Copyright Law still provides protection for certain moral rights, which remain indefinitely valid. These rights include the ability to choose whether or not one's name appears on copies of one's work, the right to use a pseudonym or alias, and the right to defend one's work against any alteration, distortion, or mutilation that may harm one's honor or reputation .

If a work has become part of the Public Domain, then the work is considered to be part of the property of the general public and everyone can use it freely for any purpose, without needing permission from the creator.

The things described above apply if the Creator is known, but what if the Creator is unknown? In the event that the Author is unknown, based on Article 39 of the Copyright Law, the following conditions are regulated (as long as no Party can prove ownership of The Work):

1. According to Article 39 paragraph (1) of the Copyright Law, the creator's identity is unknown and no notice has been made, thus the State holds the copyright for the creator's benefit.
2. Even when the author is unknown, the party making the announcement has the copyright for the benefit of the creator (Article 39 paragraph (2) of the Copyright Law); and
3. Since the identity of the inventor remains a mystery notwithstanding the notification made by an anonymous party, the State is legally obligated to hold the copyright in order to protect the creator, as stated in Article 39 paragraph (3) of the Copyright Law.

Article 38 paragraph (1) of the Copyright Law additionally specifies that the State possesses the copyright for Traditional Cultural Expressions, in addition to the circumstances mentioned above. The groups that practice Indonesian customary law have a rich cultural legacy that includes traditional cultural expressions. Traditional cultural expressions are protected by the Copyright Law as per legislative requirements. Although not specifically addressed in the Copyright Law, the definition of Traditional Cultural Expressions can be found in two other regulations: Government Regulation 56 of 2022 and Minister of Law and Human Rights Regulation Number 13 of 2017 regarding Communal Intellectual Property Data (Permenkumham No. 13 of 2017). Traditional cultural expressions are defined in two regulations, Permenkumham No. 13 of 2017 and Government Regulation Number 56 of 2022 Concerning Communal Intellectual Property. These regulations state that TCEs can take the form of tangible or intangible goods, or a mix of the two, and that they demonstrate the persistence of a shared cultural heritage across time.

According to Article 38 paragraph (1) of the Copyright Law, folk songs are considered Traditional Cultural Expressions. This law specifies that Traditional Cultural Expressions can include vocal, instrumental, or a mix of these types of music.

### **Traditional Cultural Expressions can be utilized for commercial purposes**

Commercial interests are closely related to economic rights to a work. Based on the Big Indonesian Dictionary (KBBI), Commercial means relating to commerce or commerce; intended for trading; and have high commercial value. The sole right to profit from an invention belongs to the inventor or copyright holder; this is known as economic rights. Economic benefits from a works can be obtained in various ways, including publishing, duplicating, translating, adapting, arranging, transforming, distributing, performing, announcing, communicating and renting works.

Other parties may carry out the copyright implementation if the author or copyright holder gives them permission. If a written agreement is in place, the Copyright Holder or owner of related rights can grant a license to another party in order to implement the use of economic rights to a work. This permission is granted in accordance with Article 80 paragraph (1) of the Copyright Law. Article 1 number 20 of the Copyright Law defines a license as a formal authorization granted by the owner of the copyright or related rights to another party to use their work or related rights goods for commercial purposes, subject to certain terms. "An agreement is an act by which one or more people bind themselves to one or more other people." This definition is stated in Article 1313 of the Civil Code (KUHPer), which governs the formation of licenses as agreements. Payment is required before the Minister can record the License Agreement in the general register of Copyright License

Agreements. In order to put into effect the recording of intellectual property licensing agreements, Government Regulation Number 36 of 2018—also known as PP No. 38 of 2018—came into being.

Similarly, when the State owns the copyright to a traditional cultural expression, any third party that wants to utilize it must first get the State's permission via a license agreement.

In order for a licensing agreement to be legally binding, it must adhere to the requirements laid down in article 1320 of the Civil Code, which states:

1. There is an agreement, which means that the two subjects of the agreement, in this case the creator as licensor, and the license holder must agree.
2. Both sides have the option to reach a mutually beneficial arrangement.
3. The promised agreement must have an object, in this case the work to be licensed.
4. There is no conflict between law, morality, public order and the contents of the agreement.

Of the four criteria in the agreement, two are subjective and have to do with the subject or party entering into the agreement, while the other two are objective. The purpose of the agreement or legal engagement necessitates its inclusion as an objective condition. If one of the 4 (four) conditions as mentioned above is not fulfilled in the agreement, legal consequences will arise as a result. Subjective conditions that are not fulfilled will cause the agreement to be canceled or the agreement can be requested for cancellation to the court, while objective conditions that are not fulfilled in an agreement will result in the agreement being null and void in the sense that the fulfillment of the relevant agreement cannot be fulfilled or the agreement is deemed not to have occurred, and there has never been a legal agreement.

In this case, the State has the status of a Legal Subject in the form of a Legal Entity (rechperson) (Sarah S. Kuahaty, 2011). The following is mentioned in Article 1653 of the burgerlijk wetboek: "Apart from true civil companies, associations of people as legal entities are also recognized by law, whether the legal entity is established by public authority or recognized as such, whether the legal entity is accepted as permitted or has been established for a specific purpose that does not conflict with the law or morality." As a public body, the state has certain responsibilities and rights, and it also has the power to sue or defend itself in court. (Shanti Riskawati, 2022). In this case, the State carries out legal actions by the Minister (Article 39 paragraph (5) of the Copyright Law).

Article 7, paragraph (2) of Government Regulation Number 36 of 2018 concerning the Recording of Intellectual Property licensing Agreements specifies the following elements that must be included in a licensing agreement:

1. Information regarding the time and place a license agreement is signed;
2. Identity and position of the licensor and licensee;
3. Work as the object of a license agreement;
4. Provisions relating to the nature of licensing in the form of exclusivity or non-exclusivity, including if the license is granted in the form of a sublicense
5. Agreement duration;
6. The place where the license agreement applies; and
7. Provisions regarding the appointment of the Party who will pay the annual fee for the patent.

In principle, the State has the right to make licensing agreements with other parties. Nevertheless, comprehensive regulation of the procedures and implementation of this application has not been achieved, despite the issuance of Government Regulation Number 56 of 2022 Concerning Communal Intellectual Property in order to fulfill the mandate of Article 38 paragraph (4) of the Copyright Law. Law No. 56 of the State of 2022 Relating to As a whole, Communal Intellectual Property governs the following: recording, data integration, protecting and preserving communal intellectual property, creating a national

information system for Indonesian communal intellectual property, using communal intellectual property, and financing for inventory, maintenance, and protection of intellectual property communal (B.G. Ari Rama, et. Al., 2023).

In order to strengthen evidence of ownership of Indonesian Communal Intellectual Property and prevent claims from other parties, Government Regulation Number 56 of 2022 Concerning Communal Intellectual Property continues to center on arrangements for carrying out an inventory of Communal Intellectual Property through a database. According to the rules laid down in the statute, a permission is required for the commercial use of KIK (Article 33 paragraph 3). However, regarding the technical implementation there are no specific regulations governing it.

Regulations regarding the use of Folk Songs by other parties need to be regulated immediately because Folk Songs, apart from moral value and economic value, have very high potential if used properly. "Other Parties" who will utilize Folk Songs need to be studied more deeply, as is known in principle, Folk Songs are a communal right of an Indigenous Community which is often used for traditional events. Regarding the use of Folk Songs by other parties, they must pay attention to the fair use principle. In principle, the fair use principle is a form of exception to exclusive rights in a work to be excluded when asking for permission when using a work (Wayan Supria Hadi Putra and I Gede Agus Kurniawan, 2023). The fair use principle was born as a facility to use a creation that was born without any economic orientation towards it but by maintaining the true nature of moral rights in terms of maintaining the dignity or honor of something (Nathania Abigail Hanson, et. al., 2022). Folk songs are considered Traditional Cultural Expressions and so part of Communal Intellectual Property; However, it is necessary to assess the applicability of this fair use concept, which is included in Article 43 of the Copyright Law.

## CONCLUSION

According to Article 38 paragraph (1) of the Copyright Law, folk songs are considered Traditional Cultural Expressions. This law specifies that Traditional Cultural Expressions can include vocal, instrumental, or a mix of these types of music. The groups that practice Indonesian customary law have a rich cultural legacy that includes traditional cultural expressions. According to Article 38 paragraph (1) of the Copyright Law, the State is entrusted with the responsibility of protecting the creative rights of folk songs as one of the traditional cultural expressions. All rights, moral and economic, are included in the protection of creations. Other parties may carry out the copyright implementation if the author or copyright holder gives them permission. If a written agreement is in place, the Copyright Holder or owner of related rights can grant a license to another party in order to implement the use of economic rights to a work. This permission is granted in accordance with Article 80 paragraph (1) of the Copyright Law. The State has the right to make licensing agreements with other parties with the same status as implemented by the Minister (Article 39 paragraph (5) of the Copyright Law). Nevertheless, despite the issuance of Government Regulation Number 56 of 2022 Concerning Communal Intellectual Property to fulfill the mandate of Article 38 paragraph (4) of the Copyright Law, comprehensive regulation of the procedures and implementation of this application has neglected to occur. In order to strengthen evidence of ownership of Indonesian Communal Intellectual Property and prevent claims from other parties, Government Regulation Number 56 of 2022 Concerning Communal Intellectual Property continues to center on arrangements for carrying out an inventory of Communal Intellectual Property through a database.

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