

Legal Protection of Cultural Creation

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Abstract

Intellectual property rights are an important issue in the international trade related to its position which is able to provide a strong position for a developed industrial country. The type of research is a socio-juridical to find answers related to the development of the copyright concept and other rights concerning the cultural creation. To assess the response rate of the State and the community on occupational symptoms and cultural claims, this research was also developed on quantitative research. The results show that the essence of the protection of cultural creation has a meaning as a result of the humanity values expression that puts human welfare in the prime position which can be obtained through the legal protection of the cultural creation. The expression of human values is born as a form of fulfillment of the principle of justice, played by the State provides a protective effect by law. The protection of cultural creation optimally gives the effect of respect to the cultural values and also leads to the creation of harmony between individuals, communities, regions, and even the State.

Keywords: Copyright, Cultural Creation, Intellectual Property Rights, Legal Protection

1. Introduction

The development of the world from time to time is always fulfilled by the emergence of new-world issues. By 2000 was seen as an era with important issues of the world includes: environment, human rights, and Intellectual Property Rights (IPR). Although the law of intellectual property rights is not a new field, but its position becomes so important, especially after the end of the “cold war.” The fall of the Soviet Union that encourage US as the only world policeman to shift the income source of its country’ economic to intellectual property rights.¹

Intellectual property rights are an important issue in the international trade arena related to its position which is able to provide a strong position for a developed industrial country.² The activities of transfer of technology through the licensing process are one of the considerations of the development of economic value (commercialization).³ However, the intention to maximize the economic rights of IPR is exclusively in the hands hands of IPRs owner actually shows the phenomenon of pursuit of profits as much as possible so that the intent of transfer of technology as expected difficult to realize.

The world of commerce and industry is aware that one of the most important effects in the ownership of IPRs asset is the acquisition of economic value in the form of commercialization in trade and industry. An interest of person in designing and developing innovation and creativity in the field of IPR is to obtain Economic Right in addition to the Moral Right attached to IPR and recognized in IPRs conventions internationally.

In the national context, the case of copyright infringement is always become hot news in Indonesia, especially the case that often affects the work of a culture that initially not get attention. If the cultural property of society’s creations are preserved and well managed and strengthened by the legality of their rights, it can be a great pride and an invaluable wealth potential, both as wealth that will generate profits for the country as well as a cultural richness that can show dignity as a nation that has a history of civilization. Understanding cultural strengths and property in the past will encourage to retaining the rights to the work of that culture. It can at least be categorized into several areas of IPR.

Culture is a specific characteristic and a noble heritage of a nation hence it is very important to raise awareness of the meaning of legal protection against the legacy of the creation of culture of the nation. The cultural heritage of a nation must be protected and preserved by the nation itself. But in the protection and preservation, the cultural heritage not only done by the nation itself, but it also be respected and protected by other nations. In this case, it takes an international institution that can protect the cultural heritage of every nation in the world.

Institutions dealing with cultures internationally include *the United Nations Educational Scientific and Cultural Organization* (UNESCO), which generates several conventions to protect the cultural heritage of a nation around the world. In addition to UNESCO, international institution that also protects the copyright of the cultural heritage is *the World Trade Organization* (WTO) which includes *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIP’s). As described on the background, it can be seen that UNESCO and other

¹ Haryanto, I. (2002). *Penghisapan Rezim Hak Kekayaan Intelektual*. Kreasi Wacana, Yogyakarta. p. 22

² Djumhana, M. (2006). *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*. Citra Aditya Bakti, Bandung. p. 4

³ Vlad, M. (2012). Protection of Cultural Property: Particular Aspects and the Case of Romania. *Buletin Stiintific-Scientific Bulletin*, 21, 151-163.

international institutions have an important role in protecting the cultural heritage of a nation.¹

Previous research concludes that UNESCO and other international institutions require that owned cultural heritage should be directly registered to UNESCO to obtain legal protection internationally. Indonesia should build new perceptions and perspectives, which it requires awareness that we have a very diverse culture, and with that property we must be conscious to protect and preserve the cultural heritage for the next generation of Indonesian.²

Actually, for some cultural creation of Indonesian have registered to UNESCO to obtain international recognition as world heritage which is commonly called *Intangible Cultural Heritage*, amounted 6 (six) cultural creation of Indonesian which have been registered for APA (Asia and the Pacific) region.³ If studying the copyrighted creation that has been a problem with foreign countries such as Malaysia then it appears that only *Batik* and *Angklung* have been registered while others have not registered.

One thing that also forgotten in the management of this cultural creation is that there are interrelations of various interrelated aspects of the matter. On the one hand, it can be seen in relation to the economic maximization of the source of the cultural creation. An example, Malaysia utilizes to take benefit for its country from the tourism sector in such a way that one of them utilize the cultural wealth of our country due to neglect in maintaining this cultural asset. It can be noted that this sector contributes directly to 7% of Malaysia total GDP. Meanwhile, if it involves indirect contributions and its effect, this sector contributes up to 16% of the total economy of Malaysia.⁴

Legal protection against the potential of cultural creation will be important to see the direction of IPRs protection in the future. An important protection considers the IPRs regime is built on a free-market economic platform that has the potential to ignore the principles of economic justice.⁵

The problem of copyrighted creation is a legal phenomenon that involves several aspects of the law, especially if the question is the cultural creation. Individuals and society as a collection of individuals constantly develop their creativity to create a work or creation that can fulfill their artistic instincts, fulfill their life needs, facilitate their activities, fulfills their worship/ritual needs and all aspects of comfort in communicating with others, to nature and to their God. In order to fulfill it all as well as its development, the human beings always develop new ideas and then pour into a distinct character.

Based on the background, it can be seen that there are many cultural creations of Indonesian that are vulnerable to be recognized its ownership in the scope of recognition of inter-regional and inter-countries dimension ownership. This happens because the stakeholders, among others local governments do not do or omission of the cultural creation that do not make appropriate inventory efforts in accordance with the law that result in the spread of the issue of mutual claims against some cultural creation. It has the potential for economic losses by other parties on the cultural creation of Indonesian as claims by Malaysia that much attention at that time. There is a loss of economic potential of cultural creation due to own difficulties in optimizing the opinion of cultural creation due to the neglect in the identification and inventory of the cultural ideals that should be expected to facilitate the legality of the cultural creation on behalf of the region and the Republic of Indonesia.

2. Method of the Research

The type of research is a socio-juridical to find answers related to the development of the copyright concept and other rights concerning the cultural creation. The approach used is a statutory and empirical. To assess the response rate of the State and the community on occupational symptoms and cultural claims, this research was also developed on quantitative research. Quantitative data will be qualitative in order to obtain analysis accurately.

3. The Essence of Cultural Creation Protection

Right of ownership is a basic principle of copyright.⁶ There is nothing wrong with rights of ownership, as long as it is adjusted and restricted by social, socio-economic, macro-economic, ecological and cultural interests. At least these interests have a strong effect on personal gain, as strong as society's attitude toward property and its

¹ Risanti, Ana, N., Natasya., Leviza, N. (2011). "Perlindungan Hukum Hak Cipta Terhadap Warisan Budaya Bangsa Indonesia Ditinjau Dari Perspektif Hukum Internasional" in *USU Institutional Repository* (<http://repository.usu.ac.id>). Accessed on Tuesday, 29/01/2013)

² *Ibid*

³ Regions divided into: AFR: Africa, AST; Arab States, APA; Asia & the Pacific, EPA: Europe and North America, LAC: Latin America and the Caribbean.

⁴ Nirwandar, S. (2014). *Building WOW Indonesia Tourism and Creative Industry*. Gramedia Pustaka Utama, Jakarta. pp. 29-30.

⁵ Margono, S. (2016). *Hukum Hak Kekayaan Intelektual*. Pustaka Reka Cipta, Bandung. p. 16

⁶ Smiers, J., & van Schijndel, M. (2012). *Dunia Tanpa Hak Cipta*. Insist Press, Sleman. p. 2

values. From a cultural perspective, some person may ask whether necessary to eliminate private ownership of ones' works? Nevertheless, it created an exclusive and monopolistic right in the use of a creation or work. This is what makes one of the most important aspects of communication between people seem more private and not-dynamic, which ultimately also threatens the existence of democracy.

Traditional knowledge consists of traditional knowledge categorized as non-folklore and folklore, then folklore consists of copyrighted folklore (potentially copyright) and folklore is not copyrighted (not-potentially copyright). Furthermore, Margono reminded this protection is very important because it is known that IPR built on the basis of the free-market economy which it enables the principle of economic justice is neglected.¹ Therefore, this cultural creation should be viewed as an empowerment instrument in various fields, so it should be a collective responsibility with collective action as played by the state, business world and society. In the Indonesian Copyright Act in several amendments, there are several terms and scopes that are always changing. This shows that cultural creation conceptualization in Indonesian legislation is still looking for form.

WIPO through the International Committee on Intellectual Property and Genetic Resource Traditional Knowledge and Folklore in a Survey on Existing Form of Intellectual Property Protection for Traditional Knowledge Prepared by the Secretariat indicates that there are 2 (two) mechanisms that can be done within the framework of *Traditional Knowledge* protection, namely protection in the form of law and non-law.² Protection in the form of law is an effort to protect *Traditional Knowledge* through binding-legal forms such as Intellectual Property Rights, regulations governing the source of genetic resources, especially traditional knowledge, contracts and customary law.

The protection of non-law is a protection provided to non-binding traditional knowledge, including code of conduct adopted through international, government, and non-governmental organizations, professional and private sector. Other protections include compilation of invention, registration and database from traditional knowledge. Likewise, Lutviansory³ offers constructive measures of folklore protection which it termed as solutions in Indonesia that is from the juridical and cultural-social perspectives. The social-cultural perspective is divided into 3 (three) approaches namely: *First*, communication and education approaches to the community; *Second*, empowerment of community groups who supports traditional culture; and *Third*, an approach through formal educational.

The cultural creation as an expression of cultural value implies the meaning that a result of human works that enabling to obtain something. Likewise, if it is associated with the opinions of Smiers and Schijndel⁴ that justify the values of community interaction in working into rewards in the form of rights.

Every society has a culture, namely the work, creativity and sense of human functioning as a means of society to maintain and develop their lives in the natural and social environment that surrounds it.⁵ One element in culture is the work, knowledge and technology, which is defined as the ability of the community to utilizing the forces of nature for the welfare of their life.⁶

Culture is a value expression that develops in society in the form of cultural values. According to Koentjaraningrat⁷ that cultural value is the first level of ideal culture or custom. Cultural value is the most abstract layer and wide scope. Thus, cultural values are considered to be very influential and used as guidance for a society in determining humanity. This implies also that there is a power of society in the form of a good power of thought as citizens of the nation produce value together. True values are believed to be the guidelines acted by the society or nation that has given birth to the culture.⁸

The cultural creations that are dispersed in various regions in Indonesia can be said to be a cultural richness which if it is to be strengthened, the cultural value commitment must strengthen all the activities or stages that can form the establishment of cultural value commitment by systematic inventory, registration and developing all the inner joints in the cultural creation in the form of awareness of registration, sensitivity and concern for the threat of claims.

In a copyright contains many of the values attached to it. These values are cultural capital that is very useful to establish the identity and character of the nation. It will be institutionalized in the culture of the nation and ethnics because it contains elements that build the character, through folklore is a container for the development of the character of the nation, also through the oral expression of proverbs particular advice contained elements

¹ Riswandi, B.A., & Syamsuddin, M. (2005). *Hak Kekayaan Intelektual dan Budaya*. Rajagrafindo Persada, Jakarta. p. 16

² *Ibid* p. 37.

³ Litviansori, A. (2010). *Hak Cipta dan Perlindungan Folklor di Indonesia*. Graha Ilmu, Yogyakarta. Pages. 135-155

⁴ Soelistyo, H. (2011). *Hak Cipta Tanpa Hak Moral*. Rajawali Pers, Jakarta. p. 21; Compared to Smiers & van Schijndel. (2012). *Dunia Tanpa Hak Cipta*. Insist Press, Sleman. p. 3

⁵ R Trisnomurti, S Bachri, A Razak, Patittingi, F. (2016). The Urgency of Competency Test for Unscrupulous Notary in Behavior and Implementation of Position. *IOSR Journal of Humanities and Social Science* 21 (12), 82-86.

⁶ Margono, S. *Op.Cit.* p. 3

⁷ Koentjaraningrat. (2010). *Manusia dan Kebudayaan di Indonesia*. Djambatan, Jakarta, p. 25

⁸ Saptono, A. (2010). *Hukum dan Kearifan Lokal*. Grasindo, Jakarta. p. 59

of character development.

The principle of culture as a character-builder can be realized by maintain cultural products that is cultural creation are maintained and socialized maximally and optimally encourage the birth of a strong sense of sympathy and awareness and eventually grows a high spirit of nationality if then there is interference and threats to the existence of the cultural creation. If the issue of cultural copyrights is drawn into the discussion of copyright, many scholars argues that copyright provisions are inadequate in handling the issue of the custodian of this cultural creation. Therefore, it has the potential to create disturbance such as claims and even occupations from other parties that gradually lead to a conflict. Because this creation has high artistic and economic value, so that by this consideration will encourages efforts to seize in various ways. Economic considerations that go beyond the logic of a State or a community have the potential to weaken the harmonization.

It is commonly known that intellectual property rights protection is a right that is part of economic activity so that it cannot be separated from the economic problem, in turn IPRs protection is irrelevant if it is not related to the process or commercialization of IPR itself.¹ As explained above, it can be seen that the economic element cannot be separated in the discussion of cultural that encourage every human interaction in society so that this element should be a concern.

In author's view, if the State is able to develop its regulatory function by issues a set of laws and regulations, then it can be referred to as a conscious effort of the State in providing legal protection to its citizens. The cultural creations which the cultural value can be represented can provide the means of welfare for society, so that further effects of harmonization creation can be realized, as Anang Husni² argues that cultural values are necessary in order to restore a harmonious relationship which reminds the commitment must be built among the citizens and the community.

3. The Role of State in the Protection of Indonesian Cultural Creation

Indonesia as a developing country that has a collection of cultural creation that are so many and diverse so that it is recommended to do inventory and documentation.³ This situation as a threat of global entertainment industry exploitative can occur if the inventory and registration program is not done. The country realizes that cultural diversity is the wealth and identity of the nation that is indispensable to advance the Indonesian National Culture amid the dynamics of world development so that needed a strategic step in efforts to advance the national culture. It is stated in the Consideration of the Act No. 5 of 2017 on Cultural Advancement. This law was born also based on the consideration that so far there is no adequate legislation as a guide in the advancement of Indonesian National Culture as a whole and integrated. Cultural advancement is an effort to improve cultural resilience and contribution of Indonesia in the midst of world civilization through Cultural Protection, Development, and Utilization.

Regarding the inventory of data, the regulation is found based on Article 1 paragraph (4) of Act No. 5 of 2017 concerning the definition of protection, that protection is an effort to maintain cultural sustainability by inventory, security, maintenance, rescue, and publication. This means that inventory is seen as one way to provide protection in this case an inventory of cultural advancement objects. Thus, it can be said that one of the ways in protecting the culture is through inventory. Similarly, cultural creation as part of the cultural system certainly cannot be separated from all efforts to promote its protection.

The implementation of cultural advancement is carried out by developing noble cultural values of the nation, enriching cultural diversity, strengthen national identity, strengthen the unity of the nation, educate the nation, enhance the nations' image, realize civil society, improve people welfare, preserve the nations cultural heritage, and influence the development of world civilization so that culture becomes the direction of national development.

Brief history of cultural creation (from written sources, books, inscriptions, archives, events relating to cultural creation concerned, reliable testimonials, etc., which can be accounted for) should be of concern as it relates to the validity of the story and the proximity of cultural attachment to the community. In addition it is traced also the name of a cultural teacher or maestro who has knowledge and skills about the cultural creation and the age even with the identity of residence. Also, categorization is done with several options to facilitate the recording and registration such as categories of tradition and oral expressions, including language as cultural heritage objects, folklore, ancient script, traditional games, as well as performing arts, including visual, theater, vocal, dance, music, and film.

The customs of community, rites, and celebrations, the traditional economic system, the social organization system, the traditional ceremonies became a separate category. The fields relating to the intellectuality of humans who intersect with culture into individual categories such as knowledge and behavior habits of nature

¹ Margono, *op. Cit.* Page. 5.

² *Ibid.* Page. 187

³ Soelistyo, *Op.Cit.* Pages. 30-31

and the universe, including traditional knowledge, local wisdom, traditional medicine, and related to the skills of traditional crafts, such as painting, sculpture, traditional architecture, traditional clothes, traditional accessories, traditional food/drink, traditional mode of transportation.

The most important thing is the description of tracing What, Who, Where, How, When, How the process, as well as how social functions of cultural creation concerned. With regard to the condition, the cultural creation are grow, still survive, reduced, endangered, even the possibility of extinction/no longer function in the communities.

For preservation it is necessary to trace the pattern of promotion of the cultural creation with various media and direct promotion, oral promotions, art performances, exhibitions, demonstrations, leaflets, posters, newspapers, magazines, outdoor media, radio, television, film, internet, or there has been no attempt to preserve/promote the cultural creation concerned, as well as a research.

As a cultural creation that has an intellectual value, it is necessary to involve the maestro in order to give input on how best practices to preserve and develop the cultural creation in question. Similarly, documentation efforts are filled in according to the type of documentation format, containing the type of documentation format they have.

Inventory of cultural creation is misdirected or become a stage for subsequent registration which can guarantee the mastery of certain people or communities over a cultural creation. Inventory is a way to examine and trace who actually works with his/her hands and physical both in their position as a person and as a private collection in society so that it can be found precisely who is most entitled to get the economic value and moral value of the cultural creation. If any economic value should be shared based on contractual transactions or cultural creations referred to not categorized as IPR and included in the category of works of relics with mankind, then it can still be categorized as fulfilling the principle of justice on the basis of equality.

A rapid inventory ensures the right of citizens to obtain the work of the physical and hands played by the State in function as regulator and entrepreneurship that will provide financial benefits for individuals, communities and the country. Accurate and systematic inventory guarantees legal protection for the product of the cultural creation. Consideration of the deeper foundation of cultural identity as an important means of expressing yourself in and out, now and in the future, then inventory and subsequent registration activities are essential.

The State considers maintaining cultural identity as an effort to maintain cultural resilience that is part of efforts to safeguard state sovereignty. Cultural endurance ensures people are not colonized by the cultures of other countries. Most Indonesians still do not realize that cultural colonization is much harder to detect and its effects will also be much more profound and last much longer than the military.¹

At this time in Indonesia a lot of other imitations of the culture of other nations with pride while in developed countries has long been realized that cultural endurance greatly suppresses their sovereignty as a nation and state. Taking illustrations when in 2008 the Japanese Ambassador to UNESCO talked that when Japan had just lost the war, the Japanese government actually established a law on the protection of cultural heritage in 1950. The Japanese governments' beliefs at that time gave the effect of Japanese cultural security that contributed to greatness Japan today.² Maintaining cultural heritage in Indonesia is seen to be conducted solely for commercial purposes, this leads to a critical condition because of the consideration of the preservation of cultural heritage by prioritizing its value which is very important for the identity and the dignity of the nation is not become trigger. If this happens then this action has nothing related to the nations' sovereignty.

The birth of the new copyright law implies the impression that it will provide answers to the concerns that have been fall the fate of the rights to the work of Indonesian cultural creation. Claims after claim by another State (Malaysia) on the cultural creation of Indonesia which in turn also Indonesia makes claims of ownership in the form of counter claims. Counter claim is more referred to as a reaction to the action of another State.

Soelistyo³ states that it must be recognized that this claim arises controversy both in terms of copyright existence and the concept of the ownership of the common heritage of mankind, somehow the concept must be elaborated, including the need to trace its historical, classification and a careful and systematic inventory. The result should also be clear, namely what the creation of public domain that categorically can be claimed as the cultural heritage of the Indonesian nation. In other words, what kind of cultural assets are copyrighted by the State.

There is a reason put forward by Malaysia that according to Bernama, who filed for the registration of "Tor-tor" dance is a *Mandailing* community organization in Malaysia. This means not the Malaysian party, but the Indonesian community itself. Of course, they are entitled and have even taken the right measures in order to protect the cultural heritage of their ancestors who came from Indonesia. The story will be different if the

¹ Antariksa, B. (2015). "Kebijakan Perlindungan Hak Kekayaan Intelektual Sebagai Pendukung Ketahanan Pangan, Budaya dan Militer" *Media Hak Kekayaan Intelektual* 12 (2): p. 3

² *Ibid*, Page. 4

³ Soelistyo, H. (2014). *Hak Kekayaan Intelektual Konsepsi, opini, dan Aktualisasi*. Penaku, Jakarta. p. 125

registration is proposed by other communities, such as the Selangor community.

Every society has a culture, the creation or works, creativity and sense of human who serves as a means of society to maintain and develop their lives in the natural and social environment that surround it. One element in culture is the works/creation, knowledge and technology, which is defined as the ability of the community to utilize the forces of nature for the welfare of their life. One mechanism that frequently offered for protecting traditional cultural expressions is to use the protection of communal ownership. Traditional cultural expressions as traditional knowledge in general according to Margono,¹ cannot be directly equated with existing intellectual property rights, besides the need for clear documentation to state that a product or process has traditionally lived and used by the local community.

Essentially, the protection of cultural rights in Indonesia is an effort to overcome any form of exploitation of cultural creation by foreign countries that provide financial benefits only to foreign parties while Indonesia as a country that holds cultural copyright is always dropped far and cannot take advantage of the cultural creations. Thus, this protection aims to provide conceptual clarity so as to provide a clear direction in order to protect the cultural creation, while providing benefits to Indonesia as the owner of the assets of the cultural creation. Of course, an urgent problem to be thought is how the overcoming of disputes if claims between States or possibly between regions occur concerning this cultural creation. Disputes may occur because either a State or a region has legality and claimed by the State or other region, or each rely solely on claims without being able to show evidence of legality.

Potential conflicts over cultural creation may occur in 2 (two) thing: the first is between the local government with communities and the second is between one State and another. Nevertheless, conflict can be solved in the way that both parties dissolve into a similar trait as the sense of destiny in the Malay race that the Malaysian culture creation claimed to be *Archipelagic Heritage* based on the consideration of allied countries/nations.

In this issue, another thing that can be a solution is still respect the cultural creation of other countries or regions then based on consideration of ethnic or racial proximity of the nation to request the use of cultural creation for a cultural purpose. This has been demonstrated by the Selangor government asking for *Kain Ikat Songket Telepuk* and Kelingkan Palembang decoration to become their official dress. Similarly, the government of South-East Johor wants to make *Phinisi* as a communal pride between Bulukumba with Southeast Johor of Malaysia. Any aspect relating to the inventory, registration, recording and dispute resolution must be an activity that is fully committed to resolved, the protection of the cultural creation can be done by rely on the principle of equality of justice that places the rightful party to get moral and economy gain of its intellectual property.

5. Conclusion

The essence of the protection of cultural creation has a meaning as a result of the humanity values expression that puts human welfare in the prime position which can be obtained through the legal protection of the cultural creation. All individual and community interactions that emerges his/her creation are viewed as the respect of rights that are the primary values in the interaction of the community. The expression of human values is born as a form of fulfillment of the principle of justice, played by the State provides a protective effect by law. The protection of cultural creation optimally gives the effect of respect to the cultural values and also leads to the creation of harmony between individuals, communities, regions, and even the State.

The role of State in the protection of cultural creation is still very weak both in issuing the legislation to fulfill its regulatory role and in law enforcement. The role of local government as the basis for the management of cultural creation is still very weak. As a recommendation of research, it is expected that the Ministry of Justice and Human Rights, the Ministry of Education and Culture, and the higher education institution to strengthen the socialization of the importance of the protection of cultural creation as part of the effort to appreciate the cultural values. For related institutions (education, culture and tourism) should coordinates cross-sector to maintain and preserve the cultural creation of Indonesia both domestic obstacles and foreign threats.

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¹ Margono, *Op.Cit.* p. 305

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