

THE PROTECTION OF THE PERFORMING ARTS IN INDONESIA, INCLUDING IN THE DIGITAL AGE

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Abstract: This paper identifies the parameters of the protection that is currently given to Traditional Cultural Expressions (TCEs) as the performers' rights in Indonesia. The paper also offers a description of the legal mechanisms that could be used to further protect TCEs as performing arts. Finally, this paper attempts to suggest ways to enhance the protection of TCEs, and the role that digital media could play in promoting and commercially exploiting performances in the digital era. In particular, this paper notes how performing arts today often digitized not necessarily by, or on behalf of, the performers of TCEs. Instead, this is done, by third parties who rarely aim at protecting TCEs but rather intend to exploit them without being part of the traditional communities that are the custodians of these TCEs.

Keywords: Traditional Cultural Expressions, performing arts, performers rights, digital performance

1. INTRODUCTION

Currently, the legal protection granted to performing arts¹ and performers in Indonesia is lower than that given to authors of creative works that qualify for full copyright protection, such as literary and artistic works. Also, copyright may not adequately protect TCEs. This is because TCEs largely consist of closely resembling creative works that have existed and have been passed down from generation to generation. In other words, a large part of works falling under the TCE umbrella are based on pre-existing works and may lack a key characteristic necessary for copyright protection – originality.² In other cases where TCEs take the form of contemporary iterations' the work is likely to achieve sufficient originality to be given copyright protection.³ Granting sufficient proprietary protection to TCEs in favour of the performing artist is especially important

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¹ Performing Arts: "an art of combining elements of theatre, music, and the visual arts. It is related to the *happening (the two terms are sometimes use synonymously) but performance art is usually more carefully programmed and generally does not involve audience participation. ... However, it was only in the later 1960s and particularly in 1970s that Performance Art became recognized as category of art in itself. ...". See Ian Chilvers, *The Oxford Dictionary of Art* (3rd edn, OUP 2004) 532. According to the Oxford Dictionary, performing arts are a form of creative activity that is performed in front of an audience, such as drama, music, and dance.

² Torsen and Anderson at p. 24-27.

³ *Id* at p. 27

given that the performing artist in Indonesia lacks a steady income.⁴

From his in-depth research, Jaszi finds that almost all Indonesian traditional artists acknowledge an ethic of sharing. He cites, among others, their belief that art exists to be built upon by others and that imitation was an inherent and positive part of the process of artistic production. However, artists still have concerns about the manner in which imitation might occur, particularly where there is no attribution to the original creator.⁵ They may not always like to dispute the case on performing arts as TCEs, but they question the moral and economic context when someone misappropriates their TCEs.⁶ One case in point would be *John Hardy v. Ketut Deni Aryasa*.⁷ In that case, a Balinese artist, Ketut Deni Aryasa, was accused of illegally copying the silver jewellery design called "Batu Kali". The design had been registered at the Indonesian intellectual property (IP) office by John Hardy International Ltd. Ketut argued that

⁴ Sean Williams, 'Competition in the Sundanese Performing Arts of West Java, Indonesia' (1997) 63 *Current Musicology* at p 29 <<https://search.proquest.com/docview/224849324?accountid=48290>> accessed 6 January 2017.

⁵ Peter A Jaszi, 'Traditional Culture : A Step Forward for Protection in Indonesia' Jakarta, Indonesia: Institute for Press and Development Studies (2009) at p 10-17 .

⁶ Interview with Apep Agus Sobandi Hudaya, *Sundanese wayang puppet master*, 22 January 2017. Some members of Indonesia Puppet player Association in West Java against modification of puppet player who change the story from the original pattern, such as the used of mobile phone by *Kresna* character. Besides internal misappropriation, also occur external misappropriation by video shooting service who asked to make documentation of wedding or circumcision events including its entertainment. My puppet performance uploaded occasionally by them to YouTube without permission. I am afraid the uploaded material will harm traditional cultural reputation because my spontaneous puppet characters' conversation is not ready to be record and disseminate because of rude or impolite. I intended the video shooting company asked permission to choose which part to be published or not. I have experience to ask benefit sharing for my performance which published but they refuse it. In the original language, '...diantara para dalang yang tergabung dalam Persatuan Pedalangan Indonesia, terdapat pendapat yang menentang modifikasi oleh dalang yang melanggar reputasi wayang golek, misalnya tokoh Kresna yang menggunakan telepon genggam. Selain misapropriasi secara internal, terdapat pula penyalahgunaan oleh pihak lain, misalnya penyelenggara jasa video shooting yang disewa oleh penyelenggara pesta pernikahan, Pertunjukan wayang saya sering diunggah oleh pihak jasa video-shooting ke youtobe. Kebanyakan yang mengunggah tidak punya etika dalam penyebarluasan karya seni pertunjukan. Khawatirnya akan merusak reputasi pelaku pertunjukan, ucapannya menyinggung orang lain sehingga merusak reputasi wayang golek sebagai budaya tradisional. Inginnya ada etika, pemilihan bagian-bagian yang ditampilkan dan tidak. Lebih jauh lagi inginnya sampai ke pembagian keuntungan secara moneter.'; See also PV Valsala G Kutty, 'National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines' (2002) <http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf> at p 32.

⁷ John Hardy Case, Denpasar Court Judgment: 302/Pid.B/2008/PN.Dps, 6 October 2008.

the design had been known traditionally in his community as the “Crocodile Skin motif”.⁸ In Australia, the performers of TCEs similarly brought an action seeking an injunction and damages for the unauthorized use of their performances.⁹

Part II of this paper begins by outlining the types of performing arts or TCEs in Indonesia. Next, Part III surveys the current legal landscape relating to TCEs. Part IV and V proceed to analyse the future of TCEs and the mechanisms to cope with the trend of digitization. Finally, the paper will make some concluding remarks in Part VI. This paper supports the notion that the IP system should consider mechanisms that more thoroughly protect performers’ rights in the performing arts, particularly in the context of TCEs and dissemination of TCEs with digital technologies. This argument considers that protecting performing arts as TCEs is relevant in order to both safeguard cultural heritage in Indonesia, and create a more performer-friendly environment in terms of TCEs within the Indonesian market. More specifically, it is argued that a higher degree of protection for performing arts in Indonesia would assist performers of TCEs in better promoting their works through various platforms including in the digital media, and preventing the unlawful use of performing arts commercially by unauthorized third parties.

2. PERFORMING ARTS IN INDONESIA THAT ARE TCEs

Indonesia is a multi-cultural country where performing art makes up a small part of Indonesian culture. Performing arts in Indonesia are divided into three parts: dance, music and theatre.¹⁰

A. Traditional Indonesian Dances

There are three main types of dance namely pure dances, dances combined with another art, and dances related to games.¹¹ Pure dances can be presented with or without a story. Pure dances with stories are performed to fulfil ritual needs, such as the *Elang* (Eagle) dance in West Sumba that aims to pay respect to eagles as manifestations of *Marapu* (ancestors). The *Bandara* Dance, which hails from the same region, expresses appreciation to *Marapu* who gave blessings and is played

solely by women.¹² New ritual dances have also been created for contemporary events and festivities. This includes the *Hajat Bumi* ritual, which was choreographed in 2012 specifically for the annual Tomato War Festival in the Bandung Barat Regency. The dance purports to show gratitude towards God who gives food to all mankind.¹³

Dances without stories usually come from kingdoms. This was because kingdoms were cultural centres, with cultural influences from India, China, Arabia, Portugal and the Netherlands. Some of these dances were performed during the 17th century in two of the most famous kingdoms in Central Java, Yogyakarta and Surakarta. The dances were performed only in the palace. Outside Java, dances without stories include the *Pattuddu* originating from Mandar, and the *Pajoge* from Bone, South Sulawesi. In Bali, the *Legong Keraton* is known as a dance that emerged from the Bali Kingdom.¹⁴ These dances were initially performed exclusively for noblemen inside the kingdom, but have been taught and have spread outside the kingdoms since the 20th century. As part of the effort to preserve Indonesian culture, the modern day *Legong Keraton* dance has developed into a dance with a story. For instance, the dramatic *Legong Keraton* dance illustrating the *Sampek Eng Tay* story was created by Ayu Bulantrisa Djelantik and Ni Made Suartini. This has been performed during the Chinese Lunar Festival for the past three years in Jakarta.¹⁵

While some dances without a story originated from kingdoms, others were developed as folk dances. In West Java and Betawi, *Ronggeng* is famous as a folk dance.¹⁶ In Central Java and East Java this kind of dance is also known as *Teledak*. The elements of this folk dance include free movement without rules and a specific head movement when the gong is hit. It is performed with a shawl by women dancers and can be humorous. On

¹² *Id*, at 124.

¹³ Retno, Heriyanto, “Warga Kampung Cikareumbi Gelar Hajat Lembur”, 17 October 2016, accessed on 23 May 2017, <http://www.pikiran-rakyat.com>. Monday, 17 October 2016, peoples of Cikareumbi village held Village Ceremony. The tradition of thank their God for amount of vegetable crop showed by ceremony green mountain at Cileutak block. In the original language ‘Senin, 17 Oktober 2016 warga kampung Cikareumbi menggelar Hajar Lembur. Tradisi ungkapan rasa syukur atas kesuburan tanah yang menghasilkan sayur mayur berlimpah itu juga ditandai dengan ngaruwat hulu wotan gunung hejo blok Cileutak.’

¹⁴ Miranda Risang Ayu, ‘Reforming “Public Domain” The Role of Public Domain in Indonesia Cultural Community: The Cases of Legong Keraton Peliatan Balinese Dance, Sumba Woven Clothes, and Ulin Kalimantan Timber’ (2010) <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_5_b.pdf> accessed 4 May 2017. at p 5.

¹⁵ Interview with Miranda Risang Ayu, 16 February 2017, see also <<http://www.beritasatu.com/hiburan/251391-roman-sampik-engtay-dalam-balutan-tari-legong.html>> accessed 23 February 2017.

¹⁶ Ganjar Kurnia and Arthur S Nalan, *Description of West Java Cultural Art* (Culture and Tourism of West Java Office-Unpad 2003) at p 105

⁸ Damos Dumoli Agusman, ‘GRTKF The Core Concepts and Objectives What They Are and Why Need Protections: Indonesia’s Perspective’

<http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipkt_bkk_09/wipo_ipkt_bkk_09_topic1_1.pdf> accessed 8 January 2017.

⁹ *Wik Peoples v Commonwealth* (1996) 187 Commonwealth Law Reports 1. For a summary, see also Terri Janke, ‘Minding Culture Case Studies on Intellectual Property and Traditional Cultural Expressions’ World Intellectual Property Organization (2003) at p 87-98

<http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf> accessed 27 February 2017..

¹⁰ Tim Lembaga Research Kebudayaan Nasional LIPI, *Kapita Selekta Manifestasi Budaya Indonesia* (Alumni 1984) at p 117.

¹¹ *Id*, at 118.

occasion, the dancer may place her shawl on a man's shoulder to indicate her willingness to dance with him.¹⁷

Dances combined with other arts could be attached with dialogues, songs, or both. Examples would include *Didong*¹⁸, a performing art from Central Aceh, and *Dolodolo* from Flores, which also has a chorus to be sung while dancing.¹⁹ Dances related to games may incorporate acrobatics, magic, or other bodily demonstrations. One example of dance related to games is *Pencak*. *Pencak* or *Pencak Silat* is a type of traditional self-defence in Indonesia. Different regions of Indonesia have different types of *Pencak* and can be found in five regions: Sumatera, Java, Bali and Nusa Tenggara, Kalimantan and Sulawesi.²⁰ Dances with magic called *Sintren* can be found in Cirebon²¹ while dances with body immune demonstration called *Debus* are performed in Banten.²²

B. Traditional Indonesian Music

According to the way they are played, Indonesian musical instruments can be placed into three categories: played by blowing (e.g. *suling*), by plucking (e.g. *kacapi*) and with a bow (e.g. *rebab*).²³ Most traditional music in Indonesia also utilise percussion instruments. According to the cultural background, there are three groups of Indonesian music. First, there is Kingdom music, which is developed in Sunda, Java, and Bali. Such music is played by the *gamelan*, a traditional ensemble of instruments that consists of the *saron*, *demung*, *bonang*, *rebab*, *kendang*, and *gong* in Sundanese music. With technological development, it has been observed by Agus Sardjono that traditional music played by the younger generation is increasingly produced with the synthesizer keyboard using digital sounds.²⁴ For instance, the keyboard is now capable of producing sounds imitating Sundanese Gamelan music in a wedding ceremony.

¹⁷ Lina Marlina Hidayat, 'Pada Upacara Ngarot Di Desa Lelea Kabupaten Indramayu (Sebuah Kajian Interaksi Simbolik)' (2014) 24 No.1 Panggung 59 <<http://simlitmas.isbi.ac.id/e-jurnal/index.php/panggung/article/view/105/105>>. accessed 25 May 2017 8.43 pm

¹⁸ Agung Suryo Setyantoro, 'Mengenal Didong Gayo' (*Balai Pelestarian Nilai Budaya Banda Aceh*, 2014) <<http://kebudayaan.kemdikbud.go.id/bpnbaceh/2014/12/04/mengenal-didong-gayo/>> accessed 25 May 2017 9.05 pm

¹⁹ Sandrowangak, 'Muasal Tarian Dolo Dolo' (*Weeklyline.net*, 2015) <<http://www.weeklyline.net/seni-budaya/20150801/muasal-tarian-dolo-dolo.html>> accessed 25 May 2017 9.22 pm

²⁰ *Id* n 16 at p 102

²¹ *Id* at p 60-62

²² Kementerian Pendidikan dan Kebudayaan, 'Debus Banten Seni Tradisional Yang Mengagumkan Dan Mengerikan' (2016) <<http://kebudayaan.kemdikbud.go.id/debus-banten-seni-tradisional-yang-mengagumkan-sekaligus-juga-mengerikan/>> accessed 25 May 2017 9.28 pm

²³ *Id* n 10 at p 128.

²⁴ Agus Sardjono, 'Culture and Intellectual Property Development in Indonesia' (2011) 1(3) *Indonesia Law Review* 237 at p 248.

The second group of music is the Coastal music. It emerged from the coastal business centres of Indonesia, with influences from India, China, Portuguese and Arabia. This melange of music has resulted in Melayu music, Islamic Music and Bazaar music with distinct Indonesian characteristics.²⁵

The third kind of Indonesian music is folk music. This kind of music is preserved by farmers or fishermen. Its practical function is to be used as entertainment or as a part of rituals. The spontaneous and non-sophisticated attributes of folk music exhibit the authenticity of tone and rhythm. The development of folk music has constantly evolved with the absorption of foreign influences. Thus, we can see how Java's folk music has been influenced by Kingdom music while Batak's music is strongly influenced by church music. Music from Maluku is also shaped by Hawaiian music.

C. Traditional Indonesian Drama and Theatre

The last category of performing arts, theatre or drama, is also further divided into several sub-categories such as Wayang puppet show, Wayang shadow performance, folk theatre, and Melayu theatre. However, pinpointing the original form of traditional Indonesian theatre is no easy task. For example, the Indonesian Wayang puppet show that originates from India, has been modified numerous times before achieving its current unique style. Whereas Indian shadow performances either have very few or no musical instruments at all, their Indonesian counterparts are accompanied by extensive ensembles of Gamelan music. Unlike the Chinese shadow theatre that is considered a minor form of opera, the Indonesian shadow plays stand out as the preeminent art form in Java and has been hailed as "one of the world's most complex and refined dramatic and theatrical forms".²⁶

D. Functions of Performing Art TCEs in Indonesia

Performing arts in Indonesia derive from different ethnic groups for various cultural purposes. Edi Sedyawati gives a comprehensive list of specific functions of traditional performing arts in Indonesia. This mainly includes the summoning of supernatural powers, to recall the spirits of the ancestors, to perform rituals in specific time periods, and to express aesthetic values.²⁷ Soedarsono adopts a different classification, classifying the functions into ritual media (e.g. the birth event, circumcision, marriage, death, harvest, war); private entertainment (e.g. *Jaipongan* dance in West Java, *Tayuban* dance in Central Java and East Java); and aesthetic presentation

²⁵ *Id* n 10 at p 136.

²⁶ Fan Pen Chen 'Shadow Theaters of the World' *Asian Folklore Studies* 2003; 62: 25-64 at 32 <<http://search.proquest.com/docview/224531528?accountid=48290>> accessed 6 January 2017.

²⁷ Edi Sedyawati, *Pertumbuhan Seni Pertunjukan di Indonesia* (Sinar Harapan 1981).at p 53.

(commercial performances where tickets are sold to audiences).²⁸

The functions of performing arts can thus broadly be divided into two types: first, for ritual needs and second, for artistic interest. For instance, everything related to supernatural powers, traditions from their ancestors, and any effort to have a relation with God could be attributed to a ritual function. On the other hand, performing arts for entertainment and/or aesthetic purposes would correlate with artistic interest. An observation that may be made is that ritualistic intent is more evident in performances by rural communities, but in urban contexts such performances are more artistically inclined. The shift in function owes to the abundance of venues and incentives for performers, leading them to convert into professional artists. Nevertheless, both functions need to be taken into account in determining how performing arts can be legally protected.

3. LAWS GOVERNING TCES IN INDONESIA

The abstract, traditional nature of Indonesia's performing arts entitles them to be categorised as intangible cultural heritage (ICH), which calls for efforts for cultural preservation. The types of legal protection that is currently given to TCES in Indonesia can be identified as protection through ICH, copyright and related rights laws. It should be highlighted that safeguarding the TCE performing arts as ICH is a distinct instrument from IP protection.²⁹ As explained earlier in this paper, copyright may not afford sufficient protection to TCES because works protected by copyright must be original.³⁰ Also, to some extent, related rights in TCES must have different treatment with common related rights, particularly for the performers who are usually custodians of the original TCES.

A. Intangible Cultural Heritage

Performing arts can be designated as an ICH for safeguarding or preservation purposes. According to the Article 2 of the 2003 UNESCO Convention for the

²⁸ RM Soedarsono, *Seni Pertunjukan Indonesia di Era Globalisasi* (Direktorat Jenderal Pendidikan Tinggi Departemen Pendidikan dan Kebudayaan 1999) at p 57.

²⁹ *Id* 24 at p 245-248. See also Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (2014) <[http://link.springer.com/10.1007/978-3-319-02955-9.pdf](http://link.springer.com/10.1007/978-3-319-02955-9%5Cnhttp://link.springer.com/content/pdf/10.1007/978-3-319-02955-9.pdf)> accessed 3 May 2017, at p 67.

³⁰ Eddy Damian, *Hukum Hak Cipta* (4th ed, Alumni 2014) at p 106 mentioned that only original products are considered works protected by copyright. See also LM Hayyan UI Haq, 'Requesting the Existence of the Indonesian Copyright Regime in Protecting Cultural Property' in F Willem Grosheide and Jan J Brinkhof (eds), *Intellectual Property Law: Articles on Crossing Borders between traditional and actual* (Intersentia Antwerpen-Oxford 2004) at p 228, which shows that for TCES, imitation of original materials from generation to generation is common.

Safeguarding of ICH, "safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, revitalization of various aspects of such heritage.³¹ Preservation in the ICH context ensures that certain social practices and representations are maintained.³² In Indonesia, the protection of performing arts as ICH is provided by the ratification of the UNESCO ICH Convention through the Presidential Decree Number 78 of 2007.³³

B. International Law Copyright Protection

In contrast, IP rights establish private property rights in creations and innovations in order to grant control over their exploitation and to provide incentives for further creation. The objective of IP protection is to facilitate the orderly functioning of markets through the avoidance of confusion and deception, to safeguard the integrity of and rights of attribution to certain works and creations, and to protect undisclosed information from bad faith use or misappropriation.³⁴

I. Berne Convention for the Protection of Literary Artistic Works

The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention)³⁵ made an attempt to introduce copyright protection for folklore at the international level during the 1967 Stockholm Diplomatic Conference. As a result, Article 15(4)a of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention provide that in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he/she is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author

³¹ Convention for the Safeguarding of the Intangible Cultural Heritage 2003, ss 2 (3).

³² Glossary Intangible Cultural Heritage (Netherlands Commissions for UNESCO 2002) <<http://www.wipo.int/tk/en/resources/glossary.html>> accessed 28 January 2017.

³³ Presidential Regulation of the Republic of Indonesia No. 78 of 2007 Ratifying the Convention for the Safeguarding of the Intangible Cultural Heritage, State Gazette No. 81 of 2007

³⁴ WIPO, 'WIPO/GRTKF/IC/5/3: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions' (2003) at <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf> 11.

³⁵ Berne Convention for the Protection of Literary and Artistic Works (amended in Stockholm 1967) <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=278720> accessed 27 May 2017; Berne Convention for the Protection of Literary and Artistic Works (amended in Paris 1971) <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=278718> accessed 27 May 2017.

who shall be entitled to protect and enforce his or her rights in the countries of the Union.³⁶

In the Article 15(4)b, it is stated that countries of the Union that designate such an authority under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union. Indonesia is a member of the Berne Convention by its ratification on 7 May 1997 through the Presidential Decree Number 18 of 1997.³⁷ In Indonesia, an international treaty requiring no parliamentary approval will be submitted to the president for an approval in the form of presidential decree (recently presidential regulation). Therefore, this convention is binding on Indonesia.

II. The WIPO Performances and Phonograms Treaty

The WIPO Performances and Phonograms Treaty (WPPT) allowed for the protection of TCE performing arts.³⁸ This treaty defined "performers" as actors, singers, musicians, dancers, and other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.³⁹ Performers are also accorded with moral and economic rights under Chapter II or WPPT.⁴⁰ Specifically, performer shall have the right to be identified as the performer of his performances in regard to live aural performances or performances fixed in phonograms. The performer shall also have the right to object to any distortion, mutilation, or other modification of his performances that would be prejudicial to his or her reputation. While all of these provisions are favourable for performers of the performing arts, the major shortcoming of the WPPT is that it is limited to aural performances.⁴¹ Hence, the WPPT would not protect against an unauthorized audio-visual recording of a dance or theatre performance that are TCEs, for instance.

³⁶ The Republic of Indonesia Law No. 12 of 2011 on Legislations, Article 10 (1)c prescribes a definition for 'certain treaties' in order to qualify as content of the laws and the rest will be approve in the form of presidential regulations (previously presidential decree). 'Certain treaties' refers to treaties that will result in an extensive and fundamental impact on the lives or livelihoods of the people which is linked to the state financial burden, and/or that will require an amendment to or an enactment of a law. See: Damos Dumoli Agusman, *Treaties Under Indonesian Law: A Comparative Study* (PT Remaja Rosdakarya 2014) at p 363.

³⁷ Presidential Decree No. 18 of 1997 Ratifying the Berne Convention for the Protection of Literary and Artistic Works (1886),

³⁸ WIPO Performances and Phonograms Treaty (WPPT) (adopted in Geneva on December 20, 1996) <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477> accessed 15 May 2017.

³⁹ *Ibid*, Article 2(a).

⁴⁰ *Ibid*, Chapter II, see especially Article 5 and 6.

⁴¹ *Id* n 40, Article 2(b)

C. Domestic Law Copyright Protection

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) reinforces and expands to some extent the protection of copyright and related rights under the Berne Convention, but excludes the protection of moral rights. While obtaining moral rights over TCEs is important for acknowledgement and appreciation, performers and actors of TCEs also need to make a living and to build a career using their professional skills of singing, dancing or acting. As stated in Article 7 of TRIPS, protecting and enforcing intellectual property rights should be to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare.⁴² TRIPS' emphasis on economic rights does not distinguish between traditional and modern expressions. However, the IP system under TRIPS is often individualistic. This is incongruent with the ideals of TCE performing artists who subscribe to collective and communal forms of custodianship, or equitable ownership.⁴³ These opposing fundamental principles could instead become a barrier to protecting traditional Indonesian performing arts.

Indonesia joined the WTO in 1995 by ratifying the Agreement Establishing the WTO⁴⁴, including the Agreement on TRIPS in its Annex 1C.⁴⁵ Since its independence, Indonesia has enacted several copyright laws in 1982 and 1987.⁴⁶ After joining the WTO, Indonesia amended its copyright law in 1997⁴⁷, now contained in a new legislation in Law No. 19 of 2002, in order to meet TRIPS' requirements.⁴⁸ In 2014, the law was again amended, as in Law No. 28 of 2014, which is currently in force, to keep pace with social, economic, cultural and scientific developments.⁴⁹

⁴² TRIPS Agreement s 7.

⁴³ Antony Taubman, 'Nobility of Interpretation: Equity, Retrospectivity, and Collectivity in Implementing New Norms for Performers' Rights' (2004) 12 J. Intell. Prop. L. 351 at 422.

⁴⁴ Agreement Establishing the WTO (Enacted 1994) <<http://www.ius.uio.no/english/services/library/treaties/14/14-02/wto.xml>> accessed on 15 May 2017.

⁴⁵ Law Number 7 of 1994 on Ratification Agreement Establishing the World Trade Organization.

⁴⁶ The Republic of Indonesia Law No. 6 of 1982 on Copyright <<http://www.bphn.go.id/data/documents/82uu006.pdf>> accessed 27 May 2017. The Republic of Indonesia Law No. 7 of 1987 on Copyright amendment of Law No. 6 of 1982 <<http://www.bphn.go.id/data/documents/82uu006.pdf>> accessed 27 May 2017; see also *Id* n 33 at p 144-147.

⁴⁷ The Republic of Indonesia Law No. 12 of 1997 on Copyright amendment of Law No. 6 of 1982 and Law No. 7 of 1987 <www.bpkp.go.id/uu/filedownload/2/46/450.bpkp> accessed 29 May 2017.

⁴⁸ The Republic of Indonesia Law No. 19 of 2002 on Copyright <http://www.cric.or.jp/db/link/doc/indonesiaCopyrightLaw_bilingual.pdf> accessed 27 May 2017.

⁴⁹ The Republic of Indonesia Law No. 28 of 2014 on Copyright (Law No. 28 of 2014 on Copyright) <<http://www.wipo.int/edocs/lexdocs/laws/in/id/id064in.pdf>> accessed 27 May 2017.

As a preliminary observation, traditional performing arts are definitely part of TCEs under the Law No. 28 of 2014 regime because the explanation to Article 38(1) provides that verbal, textual, music, body movement and theatre all fall under the scope of TCEs.⁵⁰ Performing arts on verbal texts may be both spoken and written forms. Music could be categorized as vocal, instrumental, or a combination of both. In this provision, body movement could encompass dance. Finally, performing arts such as puppet shows and folk story theatre would fall in the theatre category.

Next, the successful performance of *I La Galigo*, a performing arts production based on the TCEs from Bugis, South Sulawesi's epic directed by Robert Wilson, is useful in illustrating the difference between the 2002 and 2014 legislations.⁵¹ Under the previous Indonesian copyright regime, there was a significantly different procedure to be followed if Indonesian folklore was commercialized by a foreign national.⁵² In contrast, under Indonesia's Copyright law as amended in 2014, nationality is no longer a differentiating factor.⁵³ In addition, the 2014 legislation clarifies that Indonesia's TCEs are held by the State and the State is the custodian that regulates the utilization of the TCEs.⁵⁴ However, this provision raises more issues than it resolves. At a fundamental level, the State is not a natural or legal person who can own and control the use of TCEs.⁵⁵ Coming back to our initial story of *I La Galigo*, it is questionable whether Wilson was legally prohibited from promoting the ancient story of the Bugis people. Should he have first asked the State for permission to utilize the ancient story for his production? Nevertheless, even though the production was directed by a foreigner, there were tangible benefits for the Indonesian community that cannot be ignored. First, the performers of the production were mostly Indonesian. The producers gave an opportunity for Indonesian performers to be involved in their international productions based on Indonesian mythology. These productions gave socio-economic benefits in terms of wages to the artists and social pride in their community.

Second, such works facilitate cooperation between local and foreign talent in the performing arts industry, resulting in beneficial skill transfers. In this respect, it is notable that Rama Soeprapto, the Assistant Director of *I La Galigo*, became the director of the Indonesian drama titled "Timun Mas".⁵⁶

Indonesia now has a better provision for regulating TCEs in the Law No. 28 of 2014. In the Law No. 19 of 2002, it is stated that any person who is not a citizen of Indonesia shall, firstly, seek permission from the relevant institution. This provision ensured some State control over the utilization of TCEs to prevent monopoly, commercialization, or misappropriation without consent. This provision was primarily drafted to prevent actions by foreign nationals that may offend the cultural values of Indonesian TCEs.⁵⁷ This provision is regarded as violating the national treatment provision of the TRIPS Agreement through express distinctions among local and foreign nationals.⁵⁸ In Law No. 28 of 2014, there is now no such distinction in terms of grant of permission in protecting and utilizing TCEs. The main principle of utilization of Indonesian TCEs in the recent copyright law is respecting the existing living values in its custodian communities.⁵⁹

D. Protection of Related Rights

Related rights, including those related to the performing arts, were not provided in the first two copyright laws in Indonesia and were first added in Article 43 (c) (d) of Law No. 12 of 1997 on copyright law.⁶⁰ The definition of "performers" is more or less same as in the WPPT that includes works or expressions of folklore. On the other hand, in Law No. 28 of 2014, the definition of performers appears to have been narrowed; it does not explicitly define that performers include those practicing traditional cultural expressions. My suggestion would thus be to interpret the definition of "performers" to include performers of TCEs because of the problems with the current legal definition. This is an appropriate suggestion given that a performer is defined as a person or some people who alone or together perform their works.⁶¹

⁵⁰ The Explanation which defines TCEs is on Article 38 paragraph (1) Law No. 28 of 2014 on Copyright.

⁵¹ Matthew Isaac Cohen 'Reviewed Work: *I La Galigo* by Robert Wilson, Rhoda Grauer, Rahayu Supanggah' Asian Theatre Journal 2005; 22(1): 138–149 <www.jstor.org/stable/4137080> accessed 6 January 2017.

⁵² Law No. 19 of 2002 on Copyright, Section III Article 10 paragraph (3). To publish or reproduce the works as referred to in paragraph (2), any person who is not the citizen of Indonesia shall, firstly, seek permission from the institution related to the matter.

⁵³ Law No. 28 of 2014 on Copyright, Section V Article 38 paragraph (3) provides utilization of TCEs as mentioned in paragraph (1) shall regard the living values of custodians.

⁵⁴ Law No. 28 of 2014 on Copyright, Section V Article 38

⁵⁵ Id n 14 at p 3; Ministry of Foreign Affairs the Republic of Indonesia Secretary Directorate General Law and Treaties, 'Simposium Nasional Sumber Daya Genetika, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional' (2015) <http://pustakahpi.kemlu.go.id/content.php?content=file_detailinfo&id=118> accessed 27 May 2017.

⁵⁶ Tembi News, 'Drama Musikal Timun Mas Bikin Cerita Rakyat Tidak Jadul Lagi', <<http://arsip.tembi.net/peristiwa-budaya/drama-musikal-timun-mas-bikin-cerita-rakyat-tidak-jadul-lagi>> accessed 8 January 2017.

⁵⁷ Explanation of Article 10(2) Law No. 19 of 2002 on Copyright.

⁵⁸ UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) at p 74; Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer Law International 2002) at p 213.

⁵⁹ Law No. 28 of 2014 on Copyright, Article 38(2)

⁶⁰ The first two copyright laws in Indonesia: (1) The Republic of Indonesia Law No. 6 of 1982 on Copyright (2) The Republic of Indonesia Law No. 7 of 1987 on Copyright amendment of Law No. 6 of 1982 id n 47. The protection of performing rights first provided in The Republic of Indonesia Law No. 12 of 1997 on Copyright amendment of Law No. 6 of 1982 and Law No. 7 of 1987 id n 48.

⁶¹ Lorraine V Aragon, 'Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of

However, this new aspect of copyright law still faces challenges in its future implementation. Richard Arnold elaborates some arguments against performers' rights: performers are less deserving since their contribution is subsidiary to that of authors; granting rights to performers may prejudice the rights of authors; performers' rights are an industrial relations issue, they are a matter for collective bargaining between unions and employers; granting rights to performers is impracticable.⁶² In general implementation, related rights are challenged, while the implementation of related rights in TCEs is more complex because of communal ownership. Conflicts of interest between copyright holders and performers will also arise. This law delegates the task of putting further regulation in place to regulate Indonesia's TCEs on the government.⁶³ Hence, the Directorate General of Intellectual Property, Ministry of Law and Human Rights of the Republic of Indonesia has been drafting these regulations for the past few years.⁶⁴

4. THE FUTURE OF PERFORMING ARTS OR TCEs

Although TCEs are protected under IP law as long as the expression exists, this protection only grants right holders a limited monopoly. The theory of property generally recognizes the concept of commons and anti-commons.

Eggertsson wrote that commons is "the first step on the long and complex path from open access to individual exclusive property".⁶⁵ In contrast, an anti-commons is a resource from which each person has a normative power to exclude others and in which no one has a liberty or right to use without the permission of others. Thus, the concept of private property lies between the concepts of commons and anti-commons. Similarly, the concept of state property also lies between them.⁶⁶ Related to the need of *sui generis* system of TCEs, Munzer further says that while an individual person or a corporation has

private property, a tribe has communal property and a government has public or state property.⁶⁷ This theory is compatible with the ownership problem of IP and TCEs.

To protect TCEs, IP law uses the instrument of copyright for literary and artistic works, and uses trademark and geographical indications for cultural products and services. Besides traditional trademarks - like signs comprising words, letters, colours and combination thereof - protection of non-traditional trademarks such as sound and moving pictures are increasing being granted protection.⁶⁸ Despite these measures, protection of TCEs is still piecemeal. Thus, on the international front, recent discussion amongst the members of the Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore have proposed introducing a *sui generis* treaty to protect TCEs in a more comprehensive manner.⁶⁹

At the domestic level, Indonesia's copyright law faces the challenge of deciding whether the creator of TCEs in the performing arts, such as a song writer, a choreographer, an art director, or a puppet master, is also a beneficiary of IP protection as a "new" copyright holder in addition to the State. One argument in support of such a move would be that TCEs are "living culture" that evolves with time and influences, inducing new and creative expressions by the performer. Hence, there should be a delegation of rights between copyright holders and performers to perform and publish their works. There have been instances in Indonesia where works based on TCEs are not protected by copyright because it is not considered an original creative expression. For example, the *Merak Dance* was created by R. Tjetje Soemantri in 1950 inspired by a dance from West Java from a Sundanese tribe. Subsequently, Irawati Durban re-created the *Merak Dance* in 1965. However, as the *Merak Dance* was based on their traditional dance, the Sudanese tribe has always regarded the *Merak Dance* (including its spin offs) as a TCE from West Java.

Performing arts in Indonesia can be divided into pre-existing works and contemporary expressions of such work. Pre-existing works are usually orphan works that cannot be protected by copyright. Nevertheless, related rights can still protect performances of TCEs. Contemporary expressions of pre-existing work can either be individually or communally owned. Both types of ownership are protectable by copyright and related

Indonesia' (2012) 19 International Journal of Cultural Property 269 <<http://dx.doi.org/10.1017/S0940739112000203>> at p 303-304.

⁶² Richard Arnold, *Performers' Rights* (5th ed, Sweet & Maxwell 2015) at p 8-9.

⁶³ Law No. 28 of 2014 on Copyright, Article 38 paragraph (4).

⁶⁴ Legislation Program of Ministry of Law and Human Rights of the Republic of Indonesia of 2015, Rencana Peraturan Pemerintah tentang Hak yang dipegang oleh negara atas Ekspresi Budaya Tradisional, <<http://www.peraturan.go.id/rpp-tentang-hak-yang-diepegang-oleh-negara-atas-ekspresi-budaya-tradisional>>, accessed on 23 May 2017, 08.15.

⁶⁵ Eggertsson, T. 'Open access versus common property' in *Property Rights: Cooperation, Conflict, and Law* (T. L. Anderson and F.S. McChesney eds) (Princeton, NJ and Oxford: Princeton University Press, 2003) at p 73; Cited in Stephen R. Munzer, 'The Commons and the Anticommons in the Law and Theory of Property' (2005), Reprinted from *The Blackwell Guide to Philosophy of Law and Legal Theory*, (M. P. Golding and W. A. Edmundson) at p 148.

⁶⁶ *Id.*

⁶⁷ *Id.* at p 149.

⁶⁸ Hiromichi Aoki, 'On The Ground: Trademarking in Japan' (November 2011) Thomson Reuters <trademarks.thomsonreuters.com/sites/default/files/articles/tcm_trademark_japan.pdf> accessed 24 April 2017.

⁶⁹ 'The Protection of Traditional Cultural Expressions: Draft Articles' (*Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore*, 2017) <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_4.pdf> accessed 28 May 2017.

rights. According to the Copyright Law 2014, a compilation of TCEs is also protected by copyright.⁷⁰ While there is no time limit for the protection of TCEs, a compilation of TCEs may only be protected for a maximum of 50 years from the date of communication to the public.⁷¹ Also, the term of protection of performers' right for any kind of works is 50 years after fixation.⁷²

Rights of performers in Copyright Law 2014 include protection against unauthorised audio and audio-visual fixation. This provision is different from the existing international regulation that only provides for audio fixation. To address the lack of protection against unauthorized audio-visual fixation in the protection of related rights, WIPO adopted the Beijing Treaty on Audio-visual Performances in 2012.⁷³ This treaty has not yet entered into force. Currently, only 15 member states have fulfilled this requirement as against the required number of 30. While Indonesia signed this treaty on 18 December 2012, it has not deposited its instrument of ratification or accession.⁷⁴

Similarly, problems with the IP mechanism in protecting TCEs could highlight the need of having a *sui generis* domestic legislation. Such legislation could accomplish two objectives. First, it could push for further legislation on communal IP ownership rather than individual IP ownership of TCEs. Second, TCE performers' right could be amended to be without time limit. This should be done in order to be consistent with length of protection of TCEs itself. Third, a way of protecting unfixed TCE performances also needs to be found.

5. PERFORMING RIGHTS AND THE DIGITAL AGE

More TCE performances are needed to better promote TCEs since no registration is needed for copyright protection. Alternatively, cultural institutions, performers or individuals can circulate information and knowledge through mass media. According to the International Federation of the Phonographic Industry's report of April 2016, digital revenues accounted for 45 per cent of total revenues, compared to 39 per cent from physical sales.⁷⁵ Thus, another effective way of promoting TCE performing arts in Indonesia could be by digital media. Based on the statistics, I believe that digitization has a huge potential and is likely to play an

important role in the establishment of TCE performing arts in Indonesia. This is supported by the fact that Indonesia is aiming to become the country with the highest use of e-commerce in South East Asia by 2020.⁷⁶

There are numerous benefits in using digital media as a platform to publicize TCEs. First, the use of digital media costs very little in comparison to other mediums. Second, publication also costs less for the performer because he is able to bypass the middleman publisher. Finally, social benefits also accrue to the TCE right holders if digital media is used. Puppet show performance through digital media is one of the best examples. The puppet master will gain social benefits from the use of digital media as an acknowledgment from his junior puppet masters and puppet admirers' community. The other non-monetary benefits are capacity building of local community and cultural preservation through media promotion.⁷⁷ One disadvantage of using digital media to promote TCEs for the community is that it is easy to distribute without permission. The custodian of the TCEs must be able to prohibit third parties from reproducing, translating, adapting, granting further access to the public or commercialization beyond what is authorized.⁷⁸ Another possible obstacle may be the TCE performer's lack of human resources with information technology (IT) skills and technological resources.⁷⁹ To gain that expertise, TCE performers will have to collaborate with IT personnel. Having regard to both the pros and the cons, we now turn to examine how the digitization of TCEs can be better managed.

A. Preserve Culture by Digitizing TCE recordings

Currently, digitization is being utilized by museums, libraries, and archives to preserve intangible cultural heritage. Likewise, such technology has been used in music recording and archiving in the Traditional Music Archive (TRAMA), a research and documentation centre in the University of Khartoum in Sudan focusing on the collection, documentation, preservation, and dissemination of traditional music and folklore. In order to ensure that the tribal groups' related rights are protected, TRAMA takes care to sign consent forms with tribal representatives of each group it represents before any performance is recorded. In its archive, approximately 4,000 recordings are being considered for digitation for preservation and dissemination purposes.

⁷⁰ Law No. 28 of 2014 on Copyright, Article 40 (1)q.

⁷¹ Law No. 28 of 2014 on Copyright, Article 59 (1)j.

⁷² Law No. 28 of 2014 on Copyright, Article 63 (1)a

⁷³ WIPO, 'Main Provisions and Benefits of the Beijing Treaty on Audiovisual Performances (2012)' (2016) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_beijing_flyer.pdf> accessed 29 May 2017.

⁷⁴ WIPO Administered Treaties: Beijing Treaty on Audiovisual Performances (Treaty not yet in force) <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&tr eaty_id=841> accessed 2 February 2017.

⁷⁵ IFPI Global Music Report 2016, <<http://ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016>>, accessed 15 March 2017.

⁷⁶ Badan Koordinasi Penanaman Modal, 'Indonesia to Become The ASEAN's Biggest Digital Economy Country'

<<http://www.bkpm.go.id/en/article-investment/readmore/indonesia-to-become-the-aseans-biggest-digital-economy-country>> accessed 28 May 2017.

⁷⁷ Miranda Risang Ayu, Harry Alexander and Wina Puspitasari, *Hukum Sumber Daya Genetik, Pengetahuan Tradisional Dan Ekspresi Budaya Tradisional Di Indonesia* (1st ed, Alumni 2014) at p 237;

⁷⁸ *Id* at p 216.

⁷⁹ <<http://www.ekonomidigital.id/2017/01/06/potensi-ekonomi-digital-di-indonesia-perlu-dimanfaatkan/>>, accessed 12 January 2017.

Thus, TRAMA works with tribal representatives to make and sell recordings and shares financial benefits with them in a fair manner.⁸⁰

In Indonesia, the usage of digital documentation for cultural preservation is in line with the UNESCO ICH Convention. While the objective of this treaty is to improve the public's access of information of TCEs,⁸¹ free flow of information in this digital era can also bring harm to the custodian of TCEs by unfairly exploiting and commercialising their work. TCE performers should be fairly remunerated for their published performances and should be able to protect their artistic reputations. The ICH Convention does, indeed, limit the public's access to information of secret cultural heritage, as mentioned in Article 13 (d) (2) of this convention.⁸² The report of the independent World Commission on Culture and Development on the ICH Convention, said that the notion of intellectual property might not be right concept to be used when dealing with living creative traditions. The intellectual property protection only giving to the launched idea of developing new concept based on ideas inherent in traditional rules.⁸³

Noting that the development of information and communication technologies represents a challenge to cultural diversity, UNESCO enacted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.⁸⁴ In Article 12, this convention obliges the parties to endeavour to strengthen their bilateral, regional and international cooperation for the creation and promotion of the diversity of cultural expressions. In particular, the parties are to promote the use of new technologies, encourage partnership to enhance information sharing and cultural understanding, and foster the diversity of cultural expressions.⁸⁵ In terms of TCEs, access to information, as well as bilateral, regional, and international cooperation is needed. Again, ASEAN through AWGIPC should take appropriate steps to cooperate to have better establishment in the preservation and promoting TCEs.

B. Additional Legal Safeguards for the Digital Environment

In the digital age, there are at least four sectors that potentially have important roles in utilizing TCEs as performing rights. The four sectors are the government, broadcasting organizations, audio-visual hosting services and user generated content media. The government at any level should take advantage of digitization as a means of preservation, safeguarding, promotion and utilization of TCEs. The national broadcasting organizations should have more broadcasts of TCE performing arts since one of its purposes is to enhance the local culture.⁸⁶ As the internet may have a broader outreach than broadcasting companies, it can help to educate the masses on Indonesian TCEs on a larger scale. Moreover, user generated content on the internet has grown in terms of its audience, providing another avenue for spreading recognition of Indonesian TCEs. Of relevance is Indonesian Law No. 11 of 2008 on Electronic Information and Transaction that makes provision for TCEs in the digital environment. Article 25 states that the IP rights of electronic information and electronic document formatted as intellectual works, internet sites, and intellectual works therein shall be protected as such.⁸⁷

In addition, Copyright Law 2014 also provides for technological protection measures (TPM) in Section VII, Article 52 – 53. Article 52 prohibits the destruction of TPM except for the sake of public interest. Meanwhile, Paragraph 1 of Article 53 provides that works or related rights that use information and communication technology (ICT) must comply with rules of licensing. However, the enforcement of this law will continue to pose a challenge given that the next paragraph of Article 53 delegates the task of enacting further provisions to the government.

The following chapter in Copyright Law 2014 concerns copyright and related right content in ICT. Article 54 gives the government authority to prevent infringement of copyright and related right using ICT. It states that the government shall supervise the manufacture and dissemination of infringing content, as well as cooperate and coordinate in the national or regional level with stakeholders to prevent such infringements. Coordination at the regional level is facilitated by the ASEAN Framework Agreement on Intellectual Property Cooperation, with the ASEAN Working Group on Intellectual Property Cooperation being the responsible group for IP issues in the region.⁸⁸ The government shall also strengthen supervision of any recording actions using media in performance venues. However,

⁸⁰ Molly Torsen and Jane Anderson, *supra* n. 4.

⁸¹ Lucky Belder, 'Friends or Foes? Two Ways of Thinking on the Relation between the Task of Cultural Heritage Institutions and the Protection of Copyright' in Estelle Derclaye (ed), *Copyright and Cultural Heritage* (Edward Elgar 2010) at p 226.

⁸² Rangga Dachlan, 'Indonesia's Implementation of Inventory Obligation under UNESCO's Intangible Cultural Heritage Convention: Problems in the Online Inventories' (*International Journal of Cultural Property*, 2015) <http://www.journals.cambridge.org/abstract_S0940739115000041> accessed 30 May 2017 at p 138.

⁸³ Intangible Cultural Heritage, 'Working towards a Convention on Intangible Cultural Heritage' (UNESCO) <<https://ich.unesco.org/doc/src/01854-EN.pdf>> accessed 30 May 2017 at p 9.

⁸⁴ 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (UNESCO, 2005) <<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>> accessed 2 April 2014.

⁸⁵ *Id* n 85, at p 227.

⁸⁶ Article 5 (j), Article 36 (a) The Law of Republic Indonesia No. 32 of 2002 on Broadcasting

<<http://www.hukumonline.com/pusatdata/download/fl19974/node/11783>> accessed 29 May 2017.

⁸⁷ The Law of the Republic of Indonesia No. 11 of 2008 on Electronic Information and Transactions, Article 25.

⁸⁸ 'About AWGIPC' (ASEAN Intellectual Property Portal, 2017) <<https://www.aseanip.org/About>> accessed 30 May 2017.

enforcement might be problematic if the government is unable to obtain the resources and manpower to carry out these tasks.

Article 55 provides for a process for discovering whether an infringement of copyright and related right has occurred. Any person who has knowledge of a copyright or related right infringement through the electronic system can report this to the Minister. After investigation, the minister may recommend, at the reporter's request, that some parts or all the content and/or user access should be removed. However, this is unlikely to be an effective solution given that the infringer may simply upload the deleted content again after it has been removed.

C. Other Legal Instruments

Other legal instruments and techniques can also be utilised to make it more commercially viable for TCE performers to exploit the use of digital media. These are Creative Common License (CC License), the use of smart contracts, and the enhancement of Collective Management Organization (CMO), as explained further below. These three tools have been used for traditional copyrighted content, but are more complex to use in a digital era.

A CC license is a legal tool that creators and other rights holders can use to grant a limited right to use, while reserving other rights. Hence, right holders who want to make their work available to the public for limited kinds of uses while preserving their copyright may consider using CC licenses.⁸⁹ Benefits of such a license structure include a broad distribution, increased legal certainty and simplification of legal transactions, and the ability to deliberately give up control while retaining some rights.⁹⁰ Yet, IP scholars are often reluctant to encourage CC licenses because of its 'no royalties' paradigm. This system may be criticized as being too optimistic in that users may not buy the physical form of works available digitally.

Another simple yet practical suggestion would be the smart use of contracts. The success of using a contract outlining the legal arrangement relating to the creation and use of a work in multiple contexts is illustrated by Mycelia, Imogen Heap's latest endeavour project which brings together all players such as tech companies, labels, collective management organizations, streaming platforms and creators, to shape the technical, ethical and commercial standards needed. With the infrastructure in place, an artist would be notified and the relevant royalties are paid directly to all those

involved in its creation each time the work is used.⁹¹ Although in a different industry, Indonesia has succeeded in establishing such a payment system with the Go-Jek application, which provides various services such as food delivery and massage by motorcycle. Here, these drivers get the payment directly from the application system.⁹² In my opinion, the use of a similar system to the music or audio-visual industry for TCE performing arts has great potential. For example, YouTube was visited 14,5 million times in Indonesia in 2016, representing 11% of the use of social media.⁹³ If TCEs performers use this media, the economic and social benefit could be great.

The final digital-smart tool available in the toolbox is the Collective Management Organization (CMO). CMOs play a crucial role in managing both transactional and general online use licenses. Currently, the Indonesian CMOs are more concerned with the subject matter of music. However, performing arts such as dance and theatre can be included in the future. Thus, in the Indonesian TCE music industry for example, it is difficult for users to find how to legally download traditional *Sundanese* music. New technology will probably minimize the role of CMOs but it could also lead to a significant expansion of their role.⁹⁴ Furthermore, CMOs also face possible competition from other players such as commercial entities that offer music on the internet.⁹⁵ Ultimately, for CMOs to succeed in its role, it is necessary to understand the internet-based picture of file sharing rather than the simplistic concept of 'piracy'.⁹⁶ In Daniel Gervais' opinion, the online mass peer to peer (P2P) platform is one that CMOs should partner to organise, not quash.⁹⁷ With the aid of technology such as Digital Rights Management (DRM), CMO will become an efficient solution in certain cases.⁹⁸ Despite Gervais' optimistic outlook, the role that CMOs will play in managing licenses in the future is still unclear. In order to succeed, CMOs must be able to acquire the rights they need to license digital uses of protected material and build information systems to deal with more complex rights management and licensing tasks. They will also need to cooperate more fully on both a national and international scale to fully achieve their role as facilitators of rights clearance.⁹⁹

⁸⁹ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press 2004) at p 282.

⁹⁰ Till Kreutzer, *Open Content – A Practical Guide to Using Creative Commons Licences* (German Commission for UNESCO; North Rhine-Westphalian Library Service Centre; Wikimedia Deutschland 2015) at p 13 - 15.

⁹¹ Catherine Jewel, "Mycelia: Shaping a New Landscape for Music", *WIPO Magazine*, 2016 <http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2016/wipo_pub_121_2016_02.pdf>, access 15 March 2017.

⁹² Go-Jek, 'Go-Jek Indonesia' (2017).

⁹³ Asosiasi Penyelenggara Jasa Internet Indonesia, 'Infographic The Penetration and Behaviour of Indonesian Internet Users' (2016) <<https://apjii.or.id/content/read/39/264/Survei-Internet-APJII-2016>> accessed 29 May 2017, at p 25.

⁹⁴ Daniel Gervais, *Collective Management of Copyright and Related Rights*, (Second Edition, Wolters Kluwer, 2010) at p 18.

⁹⁵ *Id*

⁹⁶ *Id*, at p 17.

⁹⁷ *Id*, at p 17.

⁹⁸ *Id*, at p 17.

⁹⁹ *Id*, at p 19.

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6. CONCLUDING REMARKS

“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without lessening mine, receives light without darkening me.” This is a famous quote by Thomas Jefferson, the founding father and author of the United States Declaration of Independence, in a letter to Isaac McPherson.¹⁰⁰ In the quote, Jefferson emphasises that the exclusive rights to invention (patent) are not given as natural right, but for the benefit of society.¹⁰¹ Akin to patents, the most important consideration in protecting TCEs is whether this will benefit society. Hence, it is important to bear in mind the balance between culture dissemination and protecting the interest of an artist, which includes the integrity of his or her work and the prevention of misuse. This is one of the core conclusions of my paper when evaluating current and future measures.

In summary, my paper has detailed the layers of protection that TCE performers currently enjoy in Indonesia. First, there is ICH which safeguards acknowledgment and moral rights. Second, the IP system (e.g. copyright) and related right safeguards economic rights. Also, I have highlighted developments and put forth suggestions that could be used to further protect TCE performing arts in Indonesia. These include building a TCE digital library as to preserve and represent indigenous communities' interests; enacting a *sui generis* legislation on related rights, with a focus on performing arts, recognising the importance of protection through non-traditional trademarks, and enhancing protection based on geographical indications.

At the international level, several steps should also be taken to enhance the protection of TCEs. With respect to digital media, the Indonesian government should improve IT capacity, as well as bilateral and regional cooperation. In particular, cooperation could be enhanced by working closely with other Member states of ASEAN in the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) discussions¹⁰². Also, there needs to be better regulation of consent and contract in the use of digital media. Finally, a collective management of TCEs must be in place to ensure that the licence system covers all beneficiaries such as the community, art directors and performers to meet fairness and share benefits equitably.

¹⁰⁰ Thomas Jefferson, ‘Article 1, Section 8, Clause 8 Thomas Jefferson to Isaac McPherson’ <http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html> accessed 22 April 2017.

¹⁰¹ *Id*

¹⁰² KPL Lao PDR, ‘52nd ASEAN Working Group on IP Cooperation in Vientiane, Lao PDR’ (2017) <<https://www.aseanip.org/News-Events/Latest-News-Events/ct/Details/mid/1956/aid/43>> accessed 30 May 2017.

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