

***Domain Public Payant Model On Used Of TCEs For
Creative Economic Development In Indonesia***

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ABSTRACT

Government policies in developing the economy as raw material for creative economy. The political law of the government is then set out in a presidential regulation governing cultural heritage (including Traditional Cultural Expression/TCEs) as a strategy in the development of the creative economy. However, it is feared that it will increasingly leave the interests of traditional communities as the owner of TCE rights. The approach in this paper uses the study of literature using primary and secondary data. The results of the study need to balance the interests of individual economic actors with traditional society by maintaining the atmosphere by synchronizing or harmonizing supporting legislation. The model of using first pay can then be used as a basis and help the creative economy entrepreneurs in running a business so that it can contribute revenue to the State.

Keywords: Domain Public Payant, Folklore, creative, economic

A. Introduction

The 1945 Constitutions of the Republic of Indonesia, particularly article 32, states that the State's obligation to protect and promote Indonesian culture. This has been translated into various laws in Indonesia such as Law No. 5 of 2017 concerning the Advancement of Culture with its mainstreaming in the field of education, whereas in Law No. 28 of 2014 concerning Copyright with protection of Traditional Cultural Expressions protected under the Copyright legal system.

Legal politics over the use of Presidential Regulation No. 142 of 2018 concerning the Master Plan for the Development of the National Creative Economy in 2018-2025 that the creation of creative works use cultural heritage as a source of inspiration to create and unify and strengthen identity, internationally; unity and integrity, and the existence of Indonesian people in the forum. In addition, it is recognized that cultural heritage as a raw material for creative economy. Statistics and Results of the Special Survey for Creative Economy EKRAF GDP in 2014 amounted to 784.82 trillion and in 2015 it was 852.24 trillion with growth of 4.38%. The Creative Economy contributes 7.38 percent to the total national economy.

The role of TCEs in trade both in its original form and in all its derivative forms because of the innovation shows an extraordinary contribution. So, it is necessary for the State as the copyright holder of the TCEs (based on Law No. 28 of 2014 concerning Copyright) to do the balanced thing to the community who owns the TCEs rights by providing compensation either directly or indirectly. In practice in other countries, traditional cultural expression is placed in the public domain. In Indonesia, it is still unclear whether TCEs is placed in the public domain or not. TCEs utilization is included in Law No. 28 of 2014 concerning copyright and its implementation carried out by Government Regulation, but the mandate of the Act

has not come out until now. So that legally, there are no rules governing the procedures for the use of TCES. In the Draft Law on Traditional Knowledge and Traditional Cultural Expressions for the use of TCES in any form the user is required to have a form of access rights both to the community stakeholders on TCES. There is a concept offered by Victor Hugo mentioning the public payant domain which is defined as "use it and pay later." This concept is offered as a form of compensation for the use of TCES that has entered the public domain. It is interesting to study deeply about TCES entering the public domain and how to use it to support the creative economy in Indonesia.

B. Method

The study of this paper was carried out using a literature study or literature review with secondary material in the form of primary data in the form of legislation and theories related to the use of TCEs as a trading tool and secondary data in the form of research journals. The data are then reviewed as sorted according to the writing theme which is then analyzed using statute approach.

C. Result and Discussion

1. The Concept of Intellectual Property Rights (IPR) and Traditional Communities

IPR protection basically has its own urgency. The urgency is that all intellectual works will be protected. The meaning of the word protected here will correlate to three legal objectives, namely; First, legal certainty means that by protecting IPR it will be very clear who is the real owner; Second, expediency, implies that with IPR protected, there will be benefits to be obtained, especially for those who carry out the protection itself, such as; can give licenses to those who hold the right to IPR with benefits in the form of royalty payments; and Third, is to provide welfare for the holder, especially in the form of an increase in income for the State.

The intellectual works of traditional societies in the level of International and National systems are categorized in 2 (two) terms, namely traditional knowledge and traditional cultural expressions. Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs, and symbols, performances, ceremonies, architectural forms, handicrafts, and narratives, or many other artistic, or cultural expressions.²

The Copyright Act states that the Indonesian State holds copyright over anonymous works, which are part of communal and shared cultural heritage. Examples of these works are folklore, legends, historical narratives, compositions, songs, handicrafts, choreography, dances, and calligraphy. Until now the article has not been revealed by government regulations. So there are many questions still attached about the impact that can be caused.

The culture industry will stimulate public awareness to see themselves again as an important actor in their culture. Encourage public attention to his position in civilization. Furthermore, it is

² <https://www.wipo.int/tk/en/folklore/>

expected to develop into an arena for artists, and the public to explore and compete in the creativity of translating the signs of the times. The case of the music industry can be used as an example, concerning material products of the cultural industry, namely how integrated the industrial products are with the market, has formed a strong and sustainable cultural industry.

Indonesian culture is one of the complexities of culture in the world that has distinctive features and characters, where society is the main supporting element. Culture by itself has been integrated in the order of social life, both in the pattern of life socially, economically, politically, traditional governments and others. However, with the cultural potential that is very potential, and the integrity of the community and culture in the order of social life, it turns out that it is very difficult to build a cultural industry system that will function to support the creative energy of the culturing supporting society.

2. Traditional Culture Expression, and Public Domain

The term traditional cultural expression is used by the international legal community to refer to the works of indigenous peoples and traditional communities, but the term does not have a precise definition.³ Traditional Cultural Expression as the forms in which traditional culture is expressed; form part of the identity and heritage of a traditional or indigenous community; are passed down from generation to generation.⁴

The public domain, public domain, public domain or public domain (English: public domain) consists of creative work, and another knowledges; writing, art, music, science, inventions, etc. for which no person or organization / business entity has proprietary interests. (Proprietary interests are usually carried out with a copyright or patent) Works and inventions in the public domain are considered part of the public cultural heritage, and anyone can use them without restrictions (not including laws relating to security, exports, etc.). Public domain as “the range of uses of information that any person is privileged to absent individualizing facts that make a particular use unprivileged by a particular person.”⁵

The fundamental difference between tangible and intellectual property is that intellectual property is Nondepletable commons, while tangible property necessarily depletes with use. “The tragedy of the commons” is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to “overgrazing,” as soon as an item of property enters the public domain from which everyone may draw. Recognition of perpetual property rights leads to economic efficiency, because a rational owner will optimize the balance between present, and future

³ Janice T. Pilch. (2009). Issue Brief Traditional Cultural Expression. University of Illinois at Urbana-Champaign Visiting Program Officer on International Copyright Association of Research Libraries September 1, 2009. <https://www.scribd.com/document/21305385/Library-Copyright-Alliance-Issue-Brief-Traditional-Cultural-Expression>

⁴ https://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_apa_15/wipo_ipk_apa_15_presentation_terri_janke.pdf

⁵ Designing The Public Domain, Harvard Law Review [Vol. 122:1489Pp. 1490. https://harvardlawreview.org/wp-content/uploads/pdfs/GEdAssistantwebsite,_newVolume_1225_March_PDFsnotesdesigning_the_publicdomain.pdf

consumption. There can be no overgrazing of intellectual property, however, because intellectual property is not destroyed or even reduced by consumption. Once a work is created, its intellectual content is infinitely multipliable.⁶

In Indonesia based on Law no. 28 of 2014 concerning Copyright, a copyrighted work can be released to the public domain if the creator dies, then added 70 years after the death of the creator of the work. However, the Copyright Act in Indonesia still does not regulate detailed provisions specifically regarding TCEs as the public domain or not. The Draft Law on Traditional Knowledge and Traditional Cultural Expressions states in Article 3 that the State holds sovereignty to regulate the management of Traditional Knowledge and Traditional Cultural Expressions for the greatest prosperity and welfare of the people. Then article 12 states that all citizens have the right to use TCEs.

Some countries put TCEs in the public domain. Azerbaijan in the Copyright Law and related right's⁷ article 27 states Azerbaijani folklore expressions (traditional cultural expressions) and Azerbaijani traditional knowledge shall be included in the public domain. On The Law of the Republic of Azerbaijan On Legal Protection of Azerbaijani Folklore Expressions⁸ states The forms of traditional and common as well as commercial use of folklore expressions in the territory of the Republic of Azerbaijan shall be free.

3. Creative Economy based on Traditional Cultural Expressions.

The creative economy concept has emerged as a means of focusing attention on the role of creativity as a force in contemporary economic life, stating that economic, and cultural development is not separate but can be a part of a larger process of development.⁹ The Creative Economy Bill¹⁰ provides an understanding of the Creative Economy is the embodiment of added value from an idea or ideas that contain originality, born of human intellectual creativity, based on science, skills, and cultural and technological heritage is intellectual property. Then in the explanation of article 4 states that Creative Economy based on cultural heritage consists of traditional cultural expressions which include craft arts, crafts, festivals, and celebrations and architectural forms; cultural sites which include archeological sites, museums, art galleries, libraries, historic buildings. Cultural industries embodied in the creative economy or creative industries at this time was the main capital of various countries to increase their national income. A study by WIPO in 2008 mentioned a significant percentage of the creative industry's contribution to GDP. America 11.12% of GDP with 8.49% of

⁶ William M. Eandes, Richard A. Posner .(2003).The Economic Structure of Intellectual Property Law. The Belknap Press of Harvard University Press Cambridge, Massachusetts, and London, England.

⁷ Law of the Republic of Azerbaijan on Copyright and Related Rights (as amended up to Law No. 636-IVQD of April 30, 2013)

⁸ <https://www.wipo.int/edocs/lexdocs/laws/en/az/az101en.pdf>

⁹ The Policy Research Group. (2013). The Creative Economy: Key Concepts and Literature Review Highlights. http://prinnovationhub.com/wp-content/uploads/2018/08/creative-economy-synthesis_201305.pdf, pp. 3.

¹⁰ <http://dpd.go.id/upload/lampiran/ekonomi.pdf>

labor absorbed. South Korea's contribution to GDP was 8.67%. Indonesia absorbs a workforce of 5.4 million workers with productivity reaching 19.5 million per worker per year.

The use of TCES should pay attention to indigenous peoples who have rights to TCES so that it does not happen again as in the case of Louis Vuitton has again met with criticism this time from South Africa, after turning the culturally significant Basotho blanket, into the latest fashion trend for men. For the Basotho, the blanket signifies a sacred ritual and normally does not go for more the R1,000 (\$ 77) much less than the Louis Vuitton hefty price tag of R33,000 (\$ 2,553).¹¹

4. Intellectual Property Audit

In order to avoid violations of copyright in traditional cultural expressions, it is necessary to conduct intellectual property audit both publicly and privately¹² that helps creative economic actors carry out their trading activities safely. WIPO also affirms IPR audit as a systemic review by IPR owners or holders, which is used in business activities. The aim is to identify threats to the company as well as a form of business planning to maintain and improve the company's market position. Intellectual property audit provides an assessment of the intangible assets of a company. The audit helps to quantify the value of the intangible assets to the extent that such value depends on the legal right to those assets. It can be interpreted to mean a systematic assessment of IP processes and procedures adopted in creating or generating IP, including IP assets owned, used and / or acquired by a business and understanding the IP rights / liabilities associated thereto.¹³ Namibia has conducted IP audits publicly¹⁴. The results of recommendations on the TK and TCES section of the government must make the formation of laws in meeting the interests of stakeholders related to misappropriation, loss of valuable assets and sharing of benefits.

5. The concept of Domain Public Payant

Paying public domain (French: *Domaine public payant*, Spanish: *dominio público pagante*) is a copyright regime where copies, presentations or performances of a work that has entered the public domain are still subject to royalties, which are payable to the state or to an authors' association. The principle is that revenue from the work of long-dead artists should be used to

¹¹ Kylie Kiunguyu.(2017). Borrow do not steal: Louis Vuitton strikes again this time leaving behind the Maasai shuka for the Basotho blanket. <https://thisisafrica.me/lifestyle/borrow-not-steal-louis-vuitton-strikes-time-leaving-behind- maasai-shuka-basotho-blanket/>

¹² Ariy khaerudin, Audit HKI sebagai Sarana Pencegahan Pelanggaran HKI oleh Pelaku Industri Kecil, <https://media.neliti.com/media/publications/23096-ID-audit-hki-sebagai-sarana-pencegahan-pelanggaran-hki-oleh- pelaku-industri-kecil.pdf>

Mr. Prerak Hora. (2010). Intellectual Property (IP) Audit - A Legal Perspective. http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Intellectual_Property_-IP-_Audit_-_A_Legal_Perspective.pdf

¹³ Mr. Prerak Hora. (2010). Intellectual Property (IP) Audit - A Legal Perspective. http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Intellectual_Property_-IP-_Audit_-_A_Legal_Perspective.pdf

¹⁴ Mr. Getachew Mengistie, Ms. Naana Halm, and Mr. R.A.Kaakunga.(2016). National Consultant Intellectual Property Audit Report of Namibia. <http://ttatm.sarpam.net/wp-content/uploads/Intellectual-Property-Audit-Report-of-Namibia- for-workshop-2016.pdf>

support the creativity of living artists. It may apply only to certain types of work, such as folklore or traditional cultural expressions. However, communities that wish to control their traditional knowledge or cultural expressions may perceive the royalties as an unwelcome tax. Paying public domain regimes have been introduced and withdrawn in several countries.¹⁵ “*Domaine public payant*”¹⁶, or “pay public domain,” as explained in the WIPO Draft Report of the Sixteenth Session (WIPO / GRTKF / IC / 16/8 Prov. Is a compensation for the use of works in its path to the public domain or applying to the expression of folklore. Typically, payment for commercialization of public domain material is described as a “Use now, pay later” scheme. There are only five countries that use this concept, Uruguay, Bulgaria, Italy, Romania, Yugoslavia and finally Russia.¹⁷ In Romania, only for literal works and drama works that use this concept. Romania used a percentage of 5% of book sales and 2% of ticket sales for drama shows, Italy.

6. The public payant domain model in the use of TCEs to support the creative economy.

Creative economic policies that are encouraged by the government in addition to the creation of a Creative Body (Bekraf) which is given special authority in formulating creative economic policies, then a strategic plan is made with Presidential Regulation Number 142 Year 2018 Concerning the National Creative Economy Development Master Plan for 2018-2025. In its consideration stated that the strategic framework for the development of the national Creative Economy in the long run as a guideline for the Central Government and Regional Government in an integrated and collaborative way to increase the competitiveness of the nation and the contribution of Creative Economy efforts in the national economy.

Government policies contained in a number of regulations should be given appreciation as an effort in carrying out the mandate of the constitution in the framework of a welfare state. Through the establishment of special bodies and various legal instruments clearly use and exploit. The Creative Economy Development Master Plan does not incorporate a balanced strategy into traditional communities if product development from TCEs is used outside of traditional groups or communities. Including using whether to use a permit or not.

Paradoxically what happens is when TCEs are used as raw material for creative economy, but do not recognize traditional society as the owner of rights that have “self-determination” over their culture without being regulated in a clear legal system, instead order is made which fosters abuse in the form of commodification that goes beyond limit on the value of TCEs used. Commodification is defined as an action to make something as a trading object. Examples of violations of commodification are the commodification of the folklore “Laila Majnun” which was produced as a

¹⁵ https://en.wikipedia.org/wiki/Paying_public_domain

¹⁶ <https://unesdoc.unesco.org/ark:/48223/pf0000143960>

¹⁷ *ibid*

mutilated and far from original story (corrosive) Bollywood film¹⁸, the case of the animated film *Mulan* which degraded the original story in China¹⁹ and benefited the film producers (Disney's).²⁰

The model that Victor Hugo offers²¹ with Use now, pay later "is for all KI items that have expired and have fallen into" public domain ". So for TCES in Indonesia, the model offered uses this approach more flexible than having to ask permission from the government first. As in the Bill which prepositions access rights or compulsory through the licensing mechanism in advance to the authorized institutions. Likewise, in the Draft Government Regulation on the use of PTTCES. Article 11 of the Draft Bill states that every citizen, whether an individual, a community or a business entity has the right to utilize Traditional Knowledge and Traditional Cultural Expressionsto be used and are used as raw material for creative economy. Then in Article 15 paragraph 4 states that Utilization in certain economies of scale must be accompanied by the distribution of benefits to the Community Bearer, both in monetary, fiscal, and / or other forms in accordance with the needs of the community. The bill does not explain the percentage of economic benefit sharing, only based on principle of consensus based on treaty law or by looking at the customary law of the developing community. In Law No. 28 of 2014 concerning Copyright, provisions regarding the use of TCEs are interpreted in the explanation of article 38 that their use must pay attention to the values contained therein. Furthermore, the utilization mechanism is regulated by a Government Regulation which until now has not been established.

Utilization of TCEs as in the realm of copyright there are principles of exhausted principle where the Creator has a weakness in controlling the circulation or distribution of his copyright. Likewise, with the use of TCES, the State will experience a number of obstacles in the pattern of supervision over the use of TCES. So in the rule clause in the Draft Government Regulation, it can adopt the thoughts of Victor Hugo. So that it can be substantially regulated in addition to regulating licensing, but also given the space to use it first. In this paper, Hugo's concept is expanded in meaning, not only to support that work for which protection has been completed under the Copyright Act, but can also be applied to the use of TCES. The percentage can see the best practice as in romania. The notion of "pay" can be broadened to mean not only talking about fees (rewards)

¹⁸ Online Presentation by S. B. Malik and Muhammad Usman Ghani, "Commodification of Folklore: A Study of Laila and Majnun in Consumer Culture", <https://marginalisedmainstream.wordpress.com/2013/09/12/commodification-of-folklore-a-study-of-laila-and-majnun-in-consumer-culture/>.

Disney's 'Mulan' Headed For A Live-Action Adaptation. (2015). Retrieved from <https://www.geeksofdoom.com/2015/03/30/disney-mulan-live-action-adaptation>.

¹⁹ Andersen, M. J. (2010). Claiming The Glass Slipper: The Protection Of Folklore As Traditional Knowledge. *Case Western Reserve Journal of Law, Technology & the Internet*, 1(2), spring, 148-164. Retrieved August 06, 2018, from <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1045&context=jolti>

²⁰ Disney's 'Mulan' Headed For A Live-Action Adaptation. (2015). Retrieved from <https://www.geeksofdoom.com/2015/03/30/disney-mulan-live-action-adaptation>.

²¹ Victor Hugo advocated an end to the author's exclusive right at death, followed by an indefinite 'domaine public payant', see Jane C. Ginsburg. (2013). From Hypatia to Victor Hugo to Larry and Sergey: 'All the world's knowledge' and universal authors' rights. *Journal of the British Academy*, 1, 71-94. DOI 10.58

but can also take the form of compensation in other forms. If the use is not in accordance with the values, then compensation can be done with the principle of consensus with the State through an authorized institution. The opinion of the author, because of the liquid nature of TCES as a creation, then the State will certainly have difficulty in overseeing who is the user. The existence of the National Collective Management Institute (LMKN) can also be involved as a royalty collector for businesses that use TCEs as their production material.

So the concept of the State as the Copyright holder of TCES, the State as the holder of “exclusive rights” in the use of TCEs. So that at least provide guidance in the Government Regulation made by giving a percentage of the distribution by taking into account the condition of the company or business actor. Then there is at least a cluster division of types of companies that utilize TCEs. Although there are those who disagree and state the relationship between the public domain and private ownership that a copyrighted work is only a creativity as a social phenomenon manifested through creative practice, the cultural landscape is a likely candidate for both jobs.²²

D. Conclusion

TCEs in the development of innovation-based creative industries have a very strategic role in supporting and contributing to the economy in Indonesia. However, in exploring it must be in accordance with the text and contextual TCES. The creative economy encourages new startups and entrepreneurs. Government policy in supporting and encouraging through a separate body (bekraf) should be appreciated. So in order to support this it is necessary to balance the interests of the individual economic actors with the traditional society by maintaining the atmosphere by synchronizing or harmonizing the supporting legislation. The model of using pay first can then be used as a basis and help the creative economy entrepreneurs, especially those who are still at the startup stage of running a new business or entrepreneur.

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²² Julie E. Cohen. (2006). Copyright, Commodification, and Culture: Locating the Public Domain. L. Guibault and P.B. Hugenholz (eds), *The Future of the Public Domain*, 121–166 ©2006 Kluwer Law International. pp.166. https://staging.communitywealth.org/swealth.org/files/downloads/paper-cohen_0.pdf

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