



**Copyrighting Our Legacy: Recording and Inventory
Mechanism and The Protection of The Communal Intellectual
Property in Bali**

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Abstract

A collective right that communities have over their intellectual property is referred to as communal intellectual property. This kind of right has been recognized by certain international organizations, notably United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization. Some national laws, like those of the United States and New Zealand, have recognized the existence of this right. The foundation for cultural aspects protection in Indonesia is established by the Constitution of 1945. Arrangements for Communal Intellectual Property protection are dispersed over many legislations, including the 2014 Copyright Law and the 2017 the Minister of Law and Human Rights Regulation. The process for recording and inventory is critical for preserving Communal Intellectual Property and avoiding claims of commercial usage by third parties without consent. This study will use socio-legal research to examine the recording and inventory process, as well as the problems encountered throughout the registration procedure at the National Data Center.

Keywords

Communal Intellectual Property, Protection, Bali, National Data Center

I. Introduction

Communal intellectual property or CIP refers to a collective right that communities have over their intellectual property. These types of rights are required because intellectual property is generated, preserved, enhanced, and modified by society as a whole.¹ These rights mostly cover Traditional knowledge (TK), traditional cultural expressions (TCEs), genetic resources, and geographical indications potential (GI potentials). Some international frameworks have recognized the existence of CIP. For instance, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention's preamble recognizes the need of conserving humanity's "intangible common legacy" and highlights the lack of a formal global agreement to protect intangible cultural assets.² The World Intellectual Property Organization (WIPO) General Assembly formed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore in October 2000 to establish a global legal framework that will "ensure the effective preservation" of genetic resources, traditional knowledge, and traditional cultural manifestations.³

Some national laws have acknowledged the existence of CIP. The recognition of a group-rights notion in the indigenous environment is strongly supported by federal Indian law in the United States, which is profoundly rooted in the treatment of Indian peoples extending back to the earliest instances of European-Indian engagement on this continent.⁴ As stated in the Indigenous Peoples Rights Act (IPRA No. 8371) in 1997, the Philippines was the first country to legislate the preservation of indigenous peoples' rights to CIP.⁵ The legislation recognizes indigenous peoples' rights to their ancestral lands and territories, as well as their rights to self-government and empowerment, self-justice, human rights, and cultural integrity.⁶

In Indonesia, the foundation for the protection of cultural aspects is regulated based on Article 32 (1) of the 1945 Constitution. It states that "The state shall advance Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the people to maintain and develop their cultural values".⁷ CIP protection arrangements are spread in several legal provisions such

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- 1 Marilyn STRATHERN, "Transactions: An Analytical Foray" In Eric HIRSCH and Marilyn STRATHERN, *Transactions and Creations: Property Debates and the Stimulus of Melanesia* (New York: Berghahn Books, 2004) at 88
 - 2 The United Nations Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) art. 11, 13, 14.
 - 3 The World Intellectual Property Organization, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, 25 (2001), available at <<http://www.wipo.int/tk/en/tk/ffm/report/index/htm>>
 - 4 *The United States Constitution*, art. I, § 8, cl. 3.
 - 5 Zainul DAULAY, *Pengetahuan Tradisional Konsep, Dasar Hukum, dan Praktik [Traditional Knowledge: A Concept, Legal Basis and Practice]* (Jakarta: Raja Grafindo Persada, 2011) at 116
 - 6 World Intellectual Property Organization, "Roundtable on Intellectual Property and Traditional Knowledge" (Reports at Protecting Traditional Knowledge the Experience of The Philippines, WIPO/IPTK/RT.99/6A) at. 9.
 - 7 Ni Ketut Supasti DHARMAWAN, "Karya Budaya Makanan Tradisional: Dari Pelestarian Hingga Perlindungan" [Cultural Work of Traditional Food: From Preservation to Protection] in Ani PURWANTI,

as in Law no. 28 of 2014 concerning Copyright; Law no. 20 of 2016 concerning Marks and Geographical Indications; and Law no. 13 of 2016 concerning Patents. In particular, CIP is regulated based on the Regulation of the Minister of Law and Human Rights Number. 13 of 2017 (MLHR 13 of 2017) Regarding CIP Data. The obligation to inventory CIP is regulated in from Article 7 to Article 15 of MLHR 13 of 2017, emphasizing the importance of nationally centralized regional CIP data sources in the context of monitoring, preventing misuse of CIP by other parties, and increasing the protection of CIP that includes TK, TCEs, genetic resources and GI potentials.⁸

The recording and inventory mechanism are crucial in protecting CIP. The cultural diversity and natural resources of Indonesia, particularly Bali, are well-known. Indonesia's cultural and natural variety is exemplified by dances, traditional sports, and distinctive foods and beverages. Such beauty draws travelers from all over the world to Indonesia. In March 2022, 14.620 international visitors visited Bali Province directly, according to statistics from the Bali Central Statistics Agency (BPS). As a consequence, Indonesia's culture and natural resources, particularly those in Bali, have unique beauty and charisma to attract visitors and increase tourism, therefore providing economic value to the lives of the state and society. Equally important, Indonesia had a gloomy history where its CIP was claimed by other parties. For instance, the claims of Indonesia Traditional Cultural Expression by Malaysia, where in an advertisement on the Discovery Channel in Enigmatic Malaysia, Pendet, Wayang, and Reog Ponorogo dances are shown in Malaysian tourism advertisements.⁹ Another case was the registration of the Balinese silver stone motif by John Hardy International, Ltd. The registration of the river stone motif causes the Balinese craftsman, Ketut Deni Aryasa, to not use a similar motif which he has long known as the crocodile skin motif.¹⁰

Previous studies have shown that strengthening the protection of CIP related to TK, TCEs, and GI potentials has been undertaken. Some of them have been successfully registered and obtained Certificates of Cultural Works and Certificate of Registration of CIP. Several types of CIP originating from Bali have been successfully registered at Indonesia's National Data Center. For example, *Tari Rejang Ilud Desa Buahan* (music-instrumental, motion-dance, traditional ceremony-ritual from Gianyar Regency), *Megandu* (motion-game from Tabanan

et.al., *Konstruksi Hukum Dalam Perspektif Spiritual Pluralistik (The Legal Construction in Pluralistic Spiritual Perspective)* (Yogyakarta: Thafa Media, 2021) at. 849

- 8 Biro Humas, Hukum dan Kerjasama, "Perkuat Data KIK Indonesia, DJKI Kemenkumham Tandatangani Perjanjian Kerjasama Empat Kementerian Lembaga" [Strengthen CIP Data of Indonesia, DJKI Signed a Cooperation of Four Ministries], 2020, <https://www.kemenkumham.go.id/publikasi/siaran-pers/perkuat-data-kik-indonesia-djki-kemenkumham-tandatangani-perjanjian-kerja-sama-empat-kementerian>.
- 9 Yenny Eta WIDYANTI, "Perlindungan Ekspresi Budaya Tradisional Indonesia Dalam Sistem Yang Sui Generis," [Protection of Indonesian Traditional Cultural Expressions in the Sui Generis System] (2020) 13(3) *Arena Hukum* 388–415.
- 10 Laina RAFIANTI and Qoliqina Zolla SABRINA, "Perlindungan Bagi Kustodian Ekspresi Budaya Tradisional Nadran Menurut Hukum Internasional dan Implementasinya dalam Hukum Hak Kekayaan Intelektual Di Indonesia," [Protection for Custodians of Nadran's Traditional Cultural Expressions According to International Law and Its Implementation in Intellectual Property Law in Indonesia] (2019) 1(3) *Padjajaran Jurnal Ilmu Hukum* 141.

Regency), and *Megoak-goakan Desa Panji* (motion-games from Buleleng Regency). However, those numbers are still very small compared to the various CIPs that are currently growing, developing, maintained, and spreading throughout the regencies and cities in Bali.

Considering that the TCEs of Bali are so diverse, and have not been identified as a whole, it is important to intensify the recording and inventory mechanism. These processes will strengthen legal certainty regarding the original identity of a work originating from the cultural heritage. The urgency of this action is to serve as a preventive measure in preventing claims of commercial use by other parties without permission. This study will analyze the realization of MLHR 13 of 2017 relating to the inventory and recording of CIP legal protection, as well as the challenges faced regarding the registration of CIP from Bali at the National Data Center. It then analyze how the protection model based on inventory and records related to strengthening the protection of CIP as a source of the Balinese creative economy in tourism.

This research uses legal research methods, especially socio-legal methods.¹¹ Primary data is sourced from field research conducted from the districts of Gianyar, Badung and Denpasar city. Purposively, the three regions are relevant to be used as initial samples for empirical research because these regions have succeeded in having a CIP Registration Letter. In addition, an initial assessment of cooperation has been carried out, especially in the Gianyar district in the context of strengthening and protecting culture and CIP. Meanwhile, primary data was gathered using in-depth interview procedures, as well as assistance in the form of interview guides for both informants and respondents, and was documented by picture, video, and book writing approaches. This study also employs a follow-up study approach, namely aiding in the construction of a CIP recording description and completing it with supporting documentation as a pilot model for recording regional CIP at the national data center in order to confirm the origin and ownership of CIP. Secondary legal materials included in this study include doctrines, expert opinions and pertinent ideas, and the findings of prior studies on collective intellectual property published in various literatures and journals.

2. The Laws and Regulations on Communal Property Rights

This article investigates the extent to which national and international law acknowledges CIP, including TK, TCEs, genetic resources, and GI Potentials. The World Intellectual Property Organization (WIPO) is the primary international venue for discussing a worldwide tool to protect traditional knowledge. In October 2000, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) to investigate the links between intellectual property and these related sectors. The WIPO IGC must engage in a text-based negotiation process in order

11 Sulistyowati IRIANTO and SHIDARTA, *Metode Penelitian Hukum Konstelasi Dan Refleksi* [Legal Research Method and Reflection] (Jakarta: Yayasan Pustaka Obor Indonesia, 2011) at. 173.

to develop a worldwide legal framework that would "guarantee the effective preservation" of genetic resources, traditional knowledge, and traditional cultural expressions.¹²

Traditional knowledge is broadly defined as "tradition-based literary, artistic, or scientific works; performances; inventions; scientific discoveries; designs; marks, names, and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields," according to a nebulous definition provided by WIPO.¹³ Intangible cultural heritage is defined similarly to traditional knowledge and appears to cover the same ground. The preamble to the UNESCO Convention makes references to previous international accords, most notably the Universal Declaration of Human Rights. It then acknowledges the need of preserving humanity's "intangible common legacy" and emphasizes the lack of a formal worldwide agreement to safeguard intangible cultural assets.¹⁴

The 1993 Mataatua Declaration on Indigenous Peoples' Cultural and Intellectual Property Rights reaffirmed United Nations Member States' commitment to "adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property, as well as the right to preserve customary and administrative systems and practices." Similar clauses may be found in the Indigenous Peoples Earth Charter of 1992, which also requests that "our right to intellectual and cultural properties be secured, and that the mechanism for its application be in favor of our peoples, investigated thoroughly, and implemented." Usurping traditional knowledge and medicines is likewise prohibited under this charter.

The terminology used in international treaties, such as the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources, demonstrates that there is some interest in commercializing traditional knowledge, or at the very least in participating in the economic gains that result from it. For example, Article 8(1)(j) of the CBD encourages "equitable sharing of the benefits" gained from the use of traditional knowledge. Article 15(5) of the CBD requires state parties to obtain prior informed approval before utilizing genetic resources.¹⁵

Communal rights have been recognized in certain national legislation. The "Indian Commerce Clause" in the United States Constitution, the country's fundamental legal document, recognizes Indian Nations' unique position.¹⁶ The Indian Commerce Clause gives Congress sole authority to regulate contact and commerce with Indian tribes, the Constitution's only officially specified minority group. The Indian Commerce Clause effectively recognises and preserves the tribes'

12 Enninya S NWAUCHE, "The Emerging Right to Communal Intellectual Property" (2015) 19(2) *Marquette Intellectual Property Law Review* 221-244.

13 See, e.g., Daniel GERVAIS, "Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach" (2005) 137 *Michigan State Law Review* 140-41

14 UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, (2003) art. 11, 13, 14.

15 Madhavi SUNDER, "The Invention of Traditional Knowledge" (2007) 70 *Law and Contemporary Problems* 112.

16 The United States Constitution. art. I, § 8, cl. 3.

unique position as quasi-sovereign countries-within-a-nation, much as the Other Nations Clause allows for federal control of commercial connections with foreign nations.¹⁷

In *Journeycake v. Cherokee Nation*, decided in 1894, the Court also affirmed the existence of Native Americans' distinctive community right of possession to land and the need of protecting the unique nature of communal cultural property. In deciding the case, which included a dispute over land payments between the Cherokee and Delaware Nations, the court recognised the unique nature of Native Americans' communal property rights. This case proved that federal Indian law may and does recognize collective rights, as well as the need of retaining communal property within the tribe to guarantee that all members of the community can enjoy it (tangible or intangible).¹⁸

Recognizing and protecting Indigenous cultural and intellectual property rights is a critical element in New Zealand's reconciliation process.¹⁹ The Trademark Act of 2002 authorizes the Commissioner to organize an Advisory Committee to provide recommendations on trademark registrations that include Maori indications, such as text or pictures, based on such suggestions. According to Section 17(1)(b), an absolute reason for refusing trademark registration is if it is likely to insult a significant proportion of the public, particularly Maori.²⁰ In Australia, an indigenous significance mark can be registered in Australia if it meets the requirements of the Australia Trade Mark Act of 1995. A trademark is described as "a sign used to identify items or services exchanged or delivered in the course of business." As a result, a sign may integrate a trademark with a "indigenous significance indicator." Indigenous artists in Australia can prevent others from creating a brand incorporating a "indicium of indigenous significance" by challenging a trademark registration.²¹

The incorporation of communal intellectual property in indigenous peoples' collective rights in the American continent is based on jurisprudence based on Article 21 of the American Convention on Human Rights (American Convention), which recognizes communal property. Article 219 of the American Convention has become the center of indigenous and tribal peoples' collective rights in this sense. In a series of decisions, the Inter-American Court of Human Rights has recognized tribal and indigenous peoples' rights to communal property, largely based on Article 21 of the American Convention.²² The right to collective intellectual property is

17 Bruce DUTHU, "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict" (1996) 21 Vandebilt Law Review 85-86.

18 Angela RILEY, "Recovering Collectivity 'Group Rights to Intellectual Property in Indigenous Communities, (2000) 18 Cardozo Arts & Environmental Law Journal 175.

19 Terri JANKE, "Respecting Indigenous Cultural and Intellectual Property Rights." (1999) 22(2) University of New South Wales Law Journal 631-639.

20 Matthew RIMMER, "Australian Icons: Authenticity Marks and Identity Politics" (2004) 3 Indigenous Law Journal 139

21 Nicole MARTIN "Indigenous Rights: An Analysis of Intellectual Property Protections." (2021) 13(1) American University Intellectual Property Brief 33-49.

22 See generally Thomas M. ANTKOWIAK, "Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court" (2013) 35 University of Pennsylvania Journal of International Law 113. Jo M. PASQUALUCCI, "International Indigenous Land Rights: A Critique of the Jurisprudence of the

included in the constitutions of several Latin American countries. Bolivia and Ecuador, for example, recognize international and multicultural governments and, as a result, collective rights, including cultural and intellectual property rights, inside their boundaries. Specifically, Article 57 of Ecuador's 2008 Constitution, in particular, recognizes a number of collective rights of indigenous communes, people, and nations, including the right to preserve, protect, and develop their collective knowledge, science, technologies, ancestral wisdom, and genetic resources; and it prohibits all forms of appropriation of such knowledge, innovations, and practices.

In Southeast Asia, the Philippines was the first country to regulate the protection of indigenous people's rights to CIP including TK and TCEs as declared in the Indigenous People Rights Act (IPRA No. 8371) on 29 October 1997.²³ The legislation recognizes indigenous peoples' rights to their ancestral lands and territories, as well as their rights to self-government and empowerment, self-justice, human rights, and cultural integrity. Additionally, the legislation protects community intellectual property rights, religious places and rituals, culture, customary knowledge and traditions, and biological resources.²⁴ For instance, Section 10 of IPRA No. 8371 stipulates that indigenous people have the right to own, control, develop and protect:

(1) The past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties.

(2) Science and technology including but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and

(3) Language, music, dance, script, histories, oral traditions, conflict resolution mechanisms, peace building processes, life philosophy and perspectives and teaching and learning systems.

3. The Protection of Communal Intellectual Property in Indonesia

A. How Indonesia's Laws and Regulations Have Regulated Communal Intellectual Property

Nationally, the foundation for the protection of cultural aspects is constitutionally regulated based on Article 32 (1) of the 1945 Constitution: "The state shall advance Indonesian national culture in the midst of world civilization by

Inter-American court of Human Rights in the Light of the United Nations Declaration on the Rights of Indigenous Peoples", (2009) 27 Wisconsin International Law Journal 51.

23 Zainul Daulay, *supra* note 5.

24 World Intellectual Property Organization, *supra* note 6

guaranteeing the freedom of the people to maintain and develop their cultural values". Article 17 Law No. 5 of 2017 on the Advancement of Culture then states that The Central Government and/or Regional Governments in accordance with their respective authorities are obliged to record and document the Objects of Cultural Advancement". This means that the Central Government and/or Regional Governments have full authority to make an inventory of Traditional Cultural Expression.

CIP protection arrangements are spread in several legal provisions such as in Law no. 28 of 2014 concerning Copyright, Law no. 20 of 2016 concerning Marks and Geographical Indications, as well as Law no. 13 of 2016 concerning Patents. In particular, CIP is regulated based on the Regulation of the Minister of Law and Human Rights No. 13 of 2017 (MLHR 13 of 2017) Regarding Communal Intellectual Property Data. Based on Article 1 point 1 of this regulation, CIP is intellectual property in the form of traditional knowledge, traditional cultural expressions, genetic resources, and potential geographical indications.

Traditional knowledge (TK) is intellectual work in the field of knowledge and technology that contains elements of traditional heritage characteristics that are produced, developed, and maintained by a particular community or society. Traditional Cultural Expressions (TCEs) are all forms of expression of copyrighted works, both in the form of objects and intangibles, or a combination of both which indicate the existence of a traditional culture that is held communally and across generations. Genetic Resources are plants/plants, animals/animals, micro-organisms or their parts that have real or potential value. Furthermore, Geographical Indication Potential (GI potentials) is a sign indicating the area of origin of an item and/or product which due to geographical environmental factors including natural factors, human factors or a combination of these two factors, gives a certain reputation, quality and characteristics to the goods and/or products produced that have the potential to be protected by Geographical Indications.

Article 7 MLHR 13 of 2017 stipulates that the obligation to undertake an inventory is carried out by the Minister of Law and Human Rights in collaboration with ministries/institutions and/or local governments. Inventory activities are carried out by: field/feasibility studies; administrative requirements; proposing the determination of the results of the inventory; and/or data exchange. Based on Article 8(1) in conducting an inventory, ministers, institutional leaders, and/or regional heads are required to fill out a form, namely CIP inventory formula both relating to Traditional Cultural Expressions, Traditional Knowledge, and other CIP. In order to fill in the formula, valid data related to the existence of CIP are needed, as well as the ability to describe it which is supported by documentation in the form of written works of Books, Journals, Photos, and Videos, then the formula is submitted for the purpose of registering a CIP at the National Data Center on Director General of Intellectual Property (DGIP) under the Ministry of Law and Human Rights.

B. Why Indonesia Needs to Protect its Communal Intellectual Property

CIP protection is critical to preventing IPR misuse, particularly in relation to the registration of Indonesian CIP by other parties. Malaysia, in particular, claimed and exploited ancient manuscript in 2007. This old book from the Riau Province was taken to Malaysia, converted into an online form, and each visitor had to pay to see it.²⁵ Malaysia also claimed Indonesian Traditional Cultural Expression, with Pendet, Wayang, and Reog Ponorogo dances seen in Malaysian tourism advertising on the Discovery Channel in Enigmatic Malaysia.²⁶

Singapore also misappropriated an IPR action involving Indonesian TCE in the *La Galigo* theatrical performance. It is a traditional piece of *Bugis* art with religious importance, however it was performed in Singapore without the authorization of the Indonesian government.²⁷ *La Galigo*, also known as *Sureq Galigo*, is a wonderful *Bugis* literary masterpiece that employs specific *Bugis* words. This literary work dates from the 14th century AD and is based on stories passed down from generation to generation by *Bugis* people about the time before Islam and mythical stories written in the form of high-quality literature.²⁸

Another example is John Hardy International, Ltd.'s registration of the Balinese silver stone pattern. The registration of the river stone design prevents Ketut Deni Aryasa, a Balinese craftsmen, from using a similar motif that he has long recognized as the crocodile skin motif.²⁹ Other ways Indonesian Communal Intellectual Property has been imitated include carpets, T-shirts, and greeting cards, traditional music combined with rhythmic dance house music to produce best-selling "world musicians" albums, hand-knitted carpets and handicrafts imitated and sold as if "authentic" from the owner, and the process of making traditional instruments being patented.³⁰

CIP protection is also linked to the growth of tourism in Indonesia, notably in Bali. Multidimensional and interdisciplinary tourist activities are significant to be investigated from multiple aspects of science, including legal science, with the dimension of protecting components of community cultural heritage in economic growth, as stipulated in Article 1 point 4 of Law No. 10 of 2009. Tourism has contributed both directly and indirectly to sustainable development goals, particularly those connected to economic growth and productive job possibilities,

25 Tengku Mega RAHMADINI, "Perlindungan Ekspresi Budaya Tradisional Masyarakat Adat Melayu Di Provinsi Riau" [The Protection of Traditional Cultural Expressions of Melayu Communities in Riau] (2020) 7(1) *JOM Fakultas Hukum Universitas Riau* 8-9.

26 Yenny Eta WIDYANTI, *supra* note 9 at 415.

27 Simona BUSTAMI, "Urgensi Pengaturan Ekspresi Budaya (Folklore) Masyarakat Adat" [The Urgency of the Regulation of Traditional Cultural Expressions of Indigenous Community] (2019) 4 *Jurnal Hukum Prioris* 2

28 Directorate General of Intellectual Property of the Ministry of Law and Human Right of the Republic of Indonesia, *Modul Kekayaan Intelektual*, at 28

29 RAFIANTI and SABRINA, *supra* note 10.

30 R. Diah IMANINGRUM, *Ekspresi Budaya Tradisional Dalam Undang-Undang Hak Cipta Indonesia: Kajian Maksud Pembuat Undang-Undang dan Kajian Perbandingan Hukum* (Traditional Cultural Expressions in Indonesian Copyright Law: A Study of Legislators' Intentions and a Comparative Study of Law) (Malang, 2016).

according to the Framework Convention on Tourism Ethics 2020. In the context of this contribution, the recognition of the protection of the community's socio-cultural traditions and practices, including indigenous peoples and the values they adhere to, must be based on the consequences of responsible tourism, as stated in Article 4 of the Tourism Code of Ethics. Furthermore, Article 7 of the Convention stipulates that the contribution of the tourism sector to cultural resources is to improve the standard of living of its people by recognizing its rights and obligations.

Previous research has found that ancestral cultural heritage is developed through tourist activities. Putu Diah Sastri Pitanatri and I Nyoman Darma Putra (2016) demonstrate the potential of culinary tourism in supporting the development of tourism in Bali through the development of traditional Balinese cuisine as a new image in tourism, which also has implications for economic, social, and cultural aspects that improve the community's economy and open job opportunities.³¹ According to Ni Ketut Supasti Dharmawan et al. (2019), the intellectual property law construction model is relevant to protect it. From the legal framework of patents, brands, copyrights, industrial designs, and trade secrets. Brand law, for example, protects the differentiating power of marketed products and services associated to branding image.³²

4. Recording and Inventory Mechanism as A Means of Protecting Communal Intellectual Property

A. The Current Process

Researchers appear to be fascinated by the richness and distinctiveness of Indonesian culture, particularly that of Bali, from both tangible and intangible cultural perspectives. Cultural labels have indisputably become the hallmark of Bali's pulse as one of the world's top tourism destinations. The Regional Regulation of the Province of Bali No. 2 of 2012 concerning Balinese Cultural Tourism clearly regulates cultural diversity in conjunction with tourism growth. In the part devoted to letter (a) of this regulation, it was stressed that Balinese culture is the primary basis of tourist development in Bali, capable of mobilizing tourism potential in the dynamics of local, national, and global life.

Bali's cultural diversity, including the expression of culinary culture, which has developed from one generation to the next, has in reality become one of the new icons of Bali tourism destinations.³³ TCEs in Indonesia in the perspective of Intellectual Property receive protection through the copyright law regime. Protection has many different meanings. More specifically, the Model Provision for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation

31 Putu Diah Sastri PITANATRI & I Nyoman Darma PUTRA, *Wisata Kuliner Atribut Baru Destinasi Ubud* [Culinary Tourism as a New Form of Ubud] (Denpasar: Jagatpress) at 97.

32 Ni Ketut Supasti DHARMAWAN & Desak Putu Dewi KASIH, *Protecting Balinese Culinary Innovation Through Patent Law* (2019) 9(10) IJICC 117

33 *Ibid.*

and Other Prejudicial Actions, defines "protection context" as protection against inappropriate use, namely exploitation from outside communities of folklore or cultural expression works.³⁴ To prevent the use and exploitation of TCEs by parties or communities who are not entitled, it is very important to protect it in the form of an inventory and documentation. Given the extraordinary sophistication of technology in this digital era, a certain community can easily exploit the traditional culinary expression of a community. For example, exploiting Balinese culinary cultural expressions for commercial purposes through various social media or platforms such as TV Channel, Instagram, Youtube and others.

In fact, inventory based TCEs protection has been regulated based on Article 38 of the Copyright Law, which states that the state is regarded the holder of the Copyright for the expressive work. In such context, the state is required to conduct an inventory, preserve, and sustain the existence of TCEs while taking into consideration the values that exist in the community that carries it. Furthermore, it is stressed that the state's existence as a copyright holder is governed by a Government Regulation. Unfortunately, there is currently no government regulation that governs TCEs.³⁵ In the international context, the Convention for the Safeguarding of the Intangible Cultural Heritages, which is an instrument of the UNESCO 2003, also does not specify regarding the form or model of the inventory. The instrument only stipulates that member states are obliged to protect intangible cultural heritage through inventory measures at the national level that are tailored to the situation in each country.³⁶ Indonesia has ratified the Convention through Presidential Regulation No. 78 of 2007 concerning Ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage.

In relation to the uncertainty of the inventory model for TCEs, the results of a study by Abdul Atsar in 2017 suggests that national inventories can be undertaken both in written form such as books and computer databases.³⁷ The study from Dyah Permata Budi Asri also emphasizes documentation and databases for intangible culture in Yogyakarta that includes Gudeg and Bakpia.³⁸ The 4.0 phenomenon also has an impact on the rapid exploitation of traditional culinary expressions through electronic media and social media. This is accomplished by creatively and elegantly packaging it for commercial reasons utilizing audio-visual. In light of this occurrence, it appears that the TCEs documentation model, which is

34 M. TORSSEN, "Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues" (2008) *Intercultural Human Rights Law Review* 201.

35 Ni Komang Irma Adi SUKMANINGSIH, Ni Ketut Supasti DHARMAWAN, MARWANTO, "Traditional Food Arrangements as Expressions of Traditional Culture" (2019) 2(1) *Musamus Law Review* 13.

36 UNESCO, *supra* note 2.

37 Abdul Atsar, *Perlindungan Hukum Terhadap Pengetahuan Dan EBT Untuk Meningkatkan Kesejahteraan Masyarakat Ditinjau Dari Undang-Undang No. 5 Tahun 2017 Tentang Pemajuan Kebudayaan Dan Undang-Undang No. 28 Tahun 2014 Tentang Hak Cipta [Legal Protection of Knowledge and EBT to Improve Community Welfare Judging from Law no. 5 of 2017 concerning the Advancement of Culture and Law no. 28 of 2014 concerning Copyright]* (2017) 13(2) *Law Reform*, 13(2), 292.

38 Dyah Permata Budi Asri, *Perlindungan Hukum Preventif Terhadap EBT di Daerah Istimewa Yogyakarta Berdasarkan Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta [The Preventive Legal Protection for TCEs in Yogyakarta Based on Copyright Law (2018) 1(1) JIPRO: Journal of Intellectual Property* 20.

only carried out by making inventories through recorded forms such as books, will be crushed by the speed with which it is exploited by parties outside the community who use it for commercial purposes through audio-visual means. In this context, it is critical to investigate the feasibility of updating the documentation model, such as through video films as a supplement to the book model, so that the presence of TCEs sources, including Balinese culinary culture, is recognized more rapidly and by the global community. This is due to its rapid cross-border circulation as a consequence of the complexity of information technology, as well as aural visuals that exhibit flowing visual pictures that are simpler to interpret.

Culinary expressions are difficult to protect since the culinary idea is not expressly defined as culinary cultural expressions as specified in Article 38 paragraph (1) of the Copyright Law. Fortunately, one of the TCEs areas is declared to be "Traditional Ceremony" in the Elucidation of Article 38 paragraph (1) letter f. Since ancient times, the display of culinary culture has been an integral aspect of traditional festivities and religious rites in Bali. Taking these factors into mind, it would be appropriate to classify gastronomy as "Traditional Ceremonies." The WIPO Draft Provision on Traditional Culture Expression defines TCEs broadly, covering tangible and intangible manifestations, as well as expressions via action, such as ceremonies and rituals.³⁹

In Indonesia, the official website of the Directorate General of Intellectual Property of the Ministry of Law and Human Rights, namely the e-Search for Intellectual Property Rights, particularly in the CIP Database, acknowledges the presence of cuisine as one of the components of TCEs. *Ongol-Ongol* food is an example of a traditional Betawi cuisine that is typically offered during cultural tradition events and Betawi traditional festivities.⁴⁰ As a result, culinary variety, especially Balinese culinary cultural manifestations, is pertinent to be classified as a component of TCEs. Culinary recognition as one of the sectors of CIP protection is proven not only through the official government website, particularly the Directorate General of IP, but is also an integral component of rituals and celebrations of traditional festivities. Traditional Balinese food, for example, is an important component that supports the implementation of traditional rituals in the framework of culture and tradition in Bali.

As previously stated, the protection of Copyright on TCEs is regulated in Article 38 paragraph 1 of the Copyright Law which stipulates that "Copyrights on traditional cultural expressions are held by the State". In the Elucidation of Article 38 (1) of the Copyright Law, it is explained that what is meant by "traditional cultural expressions" includes one or a combination of the following forms of expression:

39 M. BURRI, "Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship (2010) 17 IJCP 33-63. Lihat juga The WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*.

40 Pusat Data Nasional Kekayaan Intelektual Komunal Indonesia, *Ekspresi Budaya Tradisional, Kuliner, [Traditional Cultural Expressions in Culinary Process]*, 2017 <http://kikomunal-indonesia.dgip.go.id/index.php/penelusuran>

- a. verbal textual, both oral and written, in the form of prose or poetry, in various themes and contents of the message, which can be in the form of literary works or informative narratives.
- b. music, including, *inter alia*, vocal, instrumental, or a combination thereof.
- c. movement, including, among other things, dance.
- d. theater, which includes, among others, *wayang* performances and folk plays.
- e. fine arts, both in two-dimensional and three-dimensional forms made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, and others or a combination thereof; and
- f. traditional ceremonies.

Even Article 4 of MLHR 13 of 2017 in more detail regulates the form of TCEs, namely by providing three additional expressions through points (g) to (i), where this also consists of architecture, landscape and/or other forms of expression according to development.

Based on this explanation, it is clear that the range of TCEs is quite broad, particularly with the sentence "other forms of expression according to development," which gives a safe harbor for a range of TCEs that does not presently exist and may arise in the future depending on the times. TCEs in Bali includes traditional literary works written in the form of *lontar*, traditional music such as Balinese *gamelan*, which has a wide range of styles, *wayang*, and fine arts such as those contained in fine carvings on wood such as Balinese mask carving art, which is unique and distinct from mask carving. Many forms of expression can be used into traditional rituals. For instance, food and drink, which is today also referred to as culinary. By examining the breadth of traditional Cultural Expressions preservation, it is clear that much work must be done to safeguard the existence of TCEs that exists, flourishes, and evolves from generation to generation in Balinese culture.

The works of TCEs are included in the sphere of CIP protection as defined in Article 38 of the Copyright Law. The existence of CIP is inextricably linked to the flow of technical innovations in the 4.0 era. *Lontar's* inventions, for example, have begun to be realized through digitization. The rapid advancement of technology in the globalization age may be witnessed in a variety of developments, one of which is that library collections have begun to be converted to electronic forms that take up less room and are easier to locate again. This is the most recent library evolution, with the rise of digital libraries, which offer benefits in terms of access speed since they are dedicated to digital data and computer network media.⁴¹ The process of converting printed papers to electronic documents is commonly referred to as document digitization. The digitization of this paper was likewise done using *lontar*. Similarly, traditional gastronomy has begun to be extensively distributed via

41 Hijrana BAHAR and Taufiq MATHAR, "Upaya Pelestarian Naskah Kuno di Badan Perpustakaan dan Arsip Daerah Provinsi Sulawesi Selatan" [Efforts to Preserve Ancient Manuscripts at the Regional Library and Archives Agency of South Sulawesi Province] (2015) 3(1) *Khizanah al-Hikmah: Jurnal Ilmu Perpustakaan, Informasi, dan Kearsipan* 89-100. DOI: <https://doi.org/10.24252/kah.v3i1a8>

video and book media.⁴² It requires the help of Videos and Books even in the inventory ranking and documentation of the presence of Videos and Books connected to recorded works of cultural expression.

Lontar is a literary masterpiece that holds wisdom dating back to ancient times. Since the creation, all forms of science, art, and literature have been copyright protected.⁴³ Similarly, *Lontar*, one of the literary works, has undoubtedly earned copyright since its realization. In addition to the *lontar*, the digitization of the *lontar* should be legally protected because it is the embodiment of literary works in digital form. However, the Copyright Law does not directly address the preservation of *lontar* through digitization. On the other hand, the digitization of *lontar* is the result of human intellectual thought that has economic value so that it is entitled to legal protection. Likewise, with regard to traditional culinary, there have also been many technological developments in its development.

In each of its interpretations of Article 40 paragraph (1) of the Copyright Law, it does not explain or provide an understanding that there exist digitized works that are covered by copyright. However, like with *lontar*, the digitization of *lontar* receives copyright protection as soon as the digitization of *lontar* is completed. One of the protected works is another work arising from the transformation, according to the explanation of Article 40 paragraph (1) letter n of the Copyright Law. Another work emerging from a transformation means changing the format of the creation into a different form. This may be read as an explanation for the digital work. Similarly, *lontar* digitization may be considered to be the product of transformation because *lontar* digitization was initially a printed *lontar* turned into digital form. The validity of digitizing this *lontar* is a manner of conserving the object of cultural advancement, as stated in Article 26 paragraph (1) of the Law for Cultural Advancement, which states that "the Central Government and/or Regional Government are required to conserve the Object of Cultural Advancement."

In order to ensure the legal certainty of ownership and legal protection of TCEs, the government is required to conduct an inventory and documentation. It is necessary to have study help in the shape of books and movies for recording and determination. Individual and CIP protection do not need to be refuted in this situation, but rather synergized. It turns out that copyrighted works are required to defend CIP. Books and movies are protected by copyright under Article 40 of the Copyright Law, and their protection is based on individual rights. Regarding inventory mechanism, the Ministry of Law and Human Rights is in charge of this process. The Minister may work with other ministries/institutions and/or local governments to complete the inventory. The inventory can be completed using the

42 Nining SUDIAR, Fiqru MAFAR and H. ROSMAN, "Dari Pdf Ke Flipping Manuscript: Upaya Kemas Ulang Hasil Katalogisasi Naskah Kuno Melayu di Provinsi Riau" [From PDF to Flipping Manuscript: Efforts to Repackage the Result of Cataloging Malay Ancient Manuscripts in Riau Province] (2017) 7(2) *Manuskripta* 21-31. DOI: <https://doi.org/10.33656/manuskripta.v7i2.92>

43 MULYANI, S, "Pengembangan Hak Kekayaan Intelektual sebagai Collateral (Agunan) Untuk Mendapatkan Kredit Perbankan di Indonesia" [Development of Intellectual Property Rights as Collateral to Obtain Banking Credit in Indonesia] (2012) 12(3) *Jurnal Dinamika Hukum* 568-578. DOI: <http://dx.doi.org/10.20884/1.jdh.2012.12.3.128>

following methods: a. field/feasibility studies; b. administrative requirements; c. proposing the determination of the inventory findings; and/or d. data exchange according to Article 7 MLHR 13 of 2017. The CIP inventory is completed by filling out the form attached to MLHR 13 of 2017. The Minister builds a CIP inventory system in the form of a Data Center to carry out the CIP inventory. At the very least, the Data Center contains:

1. name, form, and nature of CIP.
2. Custodian.
3. CIP area/location.
4. description of CIP.
5. CIP documentation; and
6. other supporting data.

Data uploaded by the Data Center is open unless otherwise specified by the Minister. If all the requirements needed in the CIP inventory have been met, a CIP Inventory Registration Letter will be issued.

Some of Balinese TCEs have been successfully registered and obtained Certificates of Cultural Works and Certificate of Registration of CIP. Several types of CIP originating from Bali have been successfully registered at Indonesia's CIP National Data Center. For example, *Tari Rejang Ilud Desa Buahon* (music-instrumental, motion-dance, traditional ceremony-ritual from Gianyar Regency), *Permainan Tradisional Megandu* (motion-game from Tabanan Regency), *Tari Rejang Pande Suci Wedana Tihingan* (motion-dance from Klungkung Regency), *Megoak-goakan Desa Panji* (motion-games from Buleleng Regency), *Tradisi Ari-ari Megantung* (traditional ceremony from Bangli Regency), *Tari Baris Wayang Lumintang* (motion-dance from Denpasar City), *Bungbung Kepyak* (music-instrumental from Jembrana Regency) and *Cakepung* (Theater-puppet, theater-folk theatrical from Karangasem Regency). However, those numbers are still limited compared to the various CIP that are currently growing, developing, maintained, and spreading throughout the regencies and cities in Bali.

B. The Way Forward

To increase the protection of Balinese TCEs, the state should undertake inventory efforts with the assistance of other stakeholders in order to speed up the process. As previously stated, there is a gap between the large number of TCEs in Bali that are waiting to be inventoried and registered at Indonesia's CIP National Data Center on the Directorate General of IP and the government's current limited capability, resources, and funding to inventory the TCEs. It is critical to perform an inventory of TCE works in Bali. It is because registration in this inventory activity constitutes as defensive protection. This means that the sooner we have the certificate, the better we protect our work. The custodian or community where the TCEs is originated can say out loud that such work is theirs in case of something

unfortunate happen in the future, such as others claiming ownership of such works.

As the legal basis for an institution, specifically an academician, to assist with inventory activity is already provided by law (Article 7 of MLHR 13 of 2017), collaboration between government and academician should be one of the solutions to the aforementioned gap. As a result, collaboration between the government and academics to enhance the preservation of Balinese TCEs is critical. Given that the academician's competence is definitely required, particularly in collecting data from custodians and characterizing the TCEs in an area in order for them to be effectively registered at Indonesia's CIP National Data Center.

The partnership between the government and the academician might take the shape of a Cooperation Agreement, with one of its goals being to catalog and register TCE works across Bali. The government may benefit from partnership with academics, among other things: (1) human resources (academicians) who are experts and reliable in their fields; (2) funding, specifically if the government collaborates with academicians carrying out this inventory activity based on a campus/another institution-funded research scheme; (3) an increase in the number of TCEs inventoried and registered; and (4) time savings because the activity is carried out concurrently. Academicians may also benefit from this collaboration in the following ways: (1) updating and upgrading practical skills as they directly engage in the field and interact with society; and (2) realization of their research goal as part of their final report, specifically for academicians carrying out this inventory activity based on a campus/another institution-funded research scheme.

5. Conclusion

Communal intellectual property refers to a collective right that communities have over their intellectual property. Certain international organizations, notably UNESCO and the World Intellectual Property Organization, have recognized this type of right. Some national laws, such as those of the United States and New Zealand, have acknowledged this freedom. Article 32 of the 1945 Constitution establishes the framework for cultural elements preservation in Indonesia. Arrangements for Communal Intellectual Property protection are scattered over a number of laws, including the Copyright Law No. 28 of 2014 and the Minister of Law and Human Rights Regulation No. 13 of 2017. The recording and inventory procedure is crucial for maintaining Communal Intellectual Property and preventing third-party claims of commercial exploitation.

Recording and inventory mechanism has been conducting to protect CIP, particularly traditional cultural expressions. However, this process must be accelerated due of the wide range and quantity of CIP that exist, are passed down from generation to generation, and are utilized and kept in Bali. Furthermore, there is still a shortage of human resources capable of undertaking in-depth descriptions connected to form filling as a consequence of an inventory to be followed up on in recording at the National Data Center.

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