

RECOGNIZING THE PROTECTION OF COMMUNAL INTELLECTUAL PROPERTY

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Abstract:

The protection of communal intellectual property rights is extremely important in Indonesia. Since communal intellectual property rights are not based on a "first-come-first-served" basis, where the first registrants or innovators are first to obtain the intellectual property. However, this method is problematic for traditional based intellectual properties because it is not always known as to when or who first invented a concept. The recent development of intellectual property rights for traditional creation owned by communal does not require proof as of the latest innovation, yet recognize tradition, knowledge, and culture, both written and unwritten. Besides, communal property rights also concede joint ownership for intellectual property owned by communities or groups. Communal Intellectual Property consists of:

- a. Traditional Knowledge (TK)
- b. Traditional Cultural Expressions (TCE)
- c. Potential Geographical Indications (GI)
- d. Genetic Resources (GR).

Keywords: intellectual property rights, communal, traditional

A. Introduction

Intellectual property rights, in essence, not only recognize the intellectual rights of individuals but also the existence of communal intellectual property. Recognition of communal intellectual property rights contained in the 2003 UNESCO Convention regulate intangible cultural heritage through a variety of practices; representations, expressions, knowledge, skills and instruments. They also consider objects, artifacts and related cultural environments for various communities, groups, and in some instances, individuals who are recognized as part of a cultural heritage (Cullet 2006). Cultural heritage is passed down from generation to generation and constantly evolves over time as groups respond to changes in their environment and react to historical events. These actions shape individual identity and creates respect for cultural diversity and human creativity (UNESCO 2014).

The state, through national legislation, respects, protects and maintains the knowledge, innovations and practices of indigenous and local communities that reflect traditional-lifestyle. This is done in accordance with the conservation and sustainable use of biodiversity and to advance its application more broadly with agreement and the involvement of inventors. It is designed in order to stimulate an equitable profit-sharing system, as a result of the utilization of knowledge, human innovation and other practices (Aguilar 2001).

The TRIPS Agreement, as basic regulation for the implementation of protection of intellectual property rights, globally has regulated the protection of Geographical Indications which

recognize communal intellectual property rights. However, the TRIPS Agreement has not legislated the scheme of traditional knowledge, the expression of traditional culture and genetic resources in its regulations. Article 27 (3) letter 'b' of the TRIPS Agreements only reviews trade and traditional knowledge in relation to the wealth of genetic resources (WTO 2001; GRAIN 2000). However, presently WIPO as a TRIPS Agreement management organization has formed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore which formed to discuss legal instruments with the purpose of regulating traditional knowledge, cultural expressions and genetic resources.

Individual intellectual rights are the rights granted by individuals, or legal entities, which give an individual benefit to the rights holder. Although, unlike communal intellectual property rights, these are adjudicated on a "first-come-first-served" basis. Conversely, communal intellectual property rights are based on different principles. Communal intellectual property rights are rights that are owned by local communities or indigenous communities. Communal Intellectual property rights can be in the form of Traditional Knowledge (TK), Traditional Cultural Expressions (TCE), Potential Geographical Indications (IG), or Genetic Resources (GR).

Except, GI whose rights are held by the direct community. Moreover, State's communal intellectual property rights, holds the copyrights to its prehistoric-heritage property and folk culture that owned jointly by states and local community where these heritage originated from. Communal intellectual property rights can be protected directly in the concept of protection of traditional knowledge (TK), and traditional cultural expression (TCE) through patents that owned by states or jointly-owned, and indirectly can be protected through the concept of geographical indication protections (GI) and genetic resources (GR).

The diversity of traditional Indonesian culture in the form of communal culture become an asset of national development. However, the enhancement of interaction intensity with the outside world including intensive and unavoidable trade has triggered an unfair and sustainable commercialization. In fact, the elements of Indonesian culture are vulnerable to being claimed by other countries. Therefore, an integrated national effort is needed to revitalize Indonesia's national culture. The mechanism for commercializing Indonesian culture is needed in the international trade system without having to lose state identity. The success of cultural revitalization and the commercialization of Indonesia's cultural diversity was achieved by building a legal system that protects the cultural-wealth itself. Whereas presently, Indonesia has not had a legislation that regulates and protects communal property rights. therefore, this research reviews as far as the protection of cultural diversity through the concept of protecting communal property rights.

Based on the background above, the authors are interested in discussing Intellectual Property Rights in Indonesia

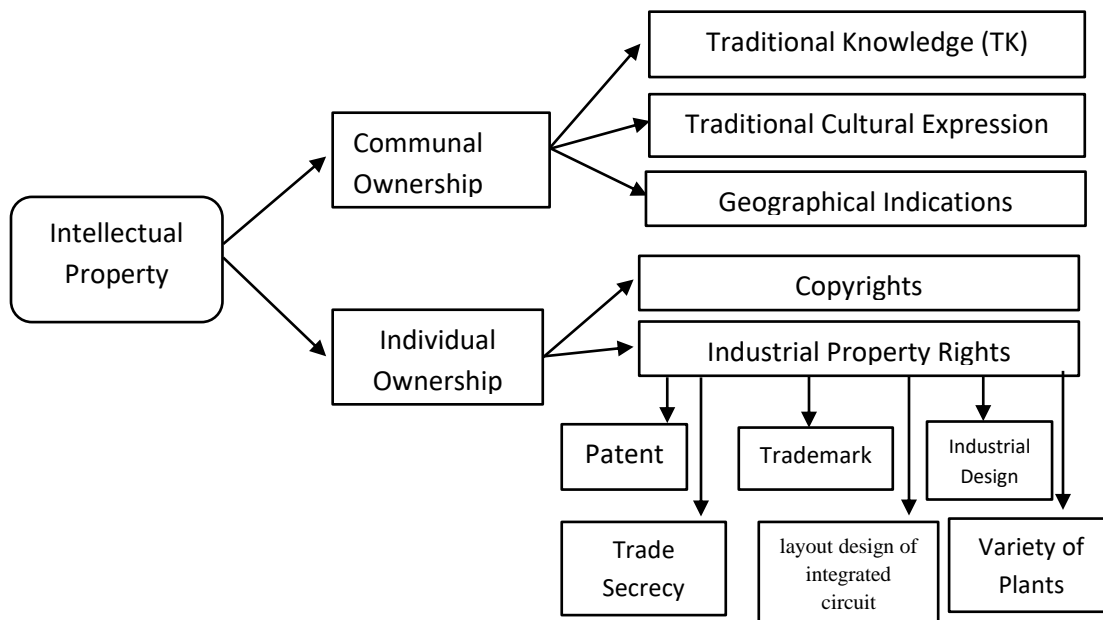
B. Protection of Communal Intellectual Property Rights in Indonesia

Communal Intellectual Property is property that owned by community as a whole . However, there are differences regarding the form of ownership of communal intellectual property and individual intellectual property which will be elaborated through the table and diagram below.

Table 1. The differences of Individual Intellectual Property and Communal Intellectual Property

| No. | Intellectual Property Rights | Individual Intellectual Property | Communal Intellectual Property |
|-----|------------------------------|--|--|
| 1. | Rights Holder | Rights of Individual or Legal Entities | Rights of Local or Indigenous Communities |
| 2. | Economic Benefits | Economic Benefits Only for Individuals or Legal Entities | Jointly-owned (benefit sharing amongst community members or state and community) |
| 3. | Invention Forms | In the Form of Product, or Process (Tangible Invention) | Compiled, Protected and Maintained by Traditions (Intangible) |
| | | The invention shall written and systematically arranged | In the form of TK, TCE, GI, GR. |

Diagram 1. The differences of Individual Intellectual Property and Communal Intellectual Property



Communal Intellectual Property contains of:

A. Traditional Knowledge (TK)

Traditional knowledge is knowledge and technology which contains characteristic elements of traditional heritage that produced, developed, and maintained by the custodians. For example, traditional medicine or herbal medicine. Traditional Knowledge includes:

- 1) Technical Skills (know-how), skills, innovation, concepts, learning and other customary practices that shape traditional community's lifestyles including agricultural knowledge, technical knowledge, ecological knowledge, medical knowledge related to drugs and healing procedures, and knowledge which related to genetic resources (GR);
- 2) Community customary, rites (magic), and celebrations, traditional economic systems, social organization systems;
- 3) Knowledge and behavioral habits regarding nature and universe, traditional medicine;
- 4) Proficiency of traditional crafts productions, traditional food / drinks, traditional modes of transportation.

B. Traditional Cultural Expressions (TCE)

Traditional cultural expressions are all forms of disclosure, both material (immaterial) or immaterial (non-objects) or a combination of both in the field of arts and culture, including literary expressions, which contain characteristic elements of traditional heritage that produced, developed through generations, and also maintained by its custodian (Customary Law Community). TCE's Custodian is an authority and / or caretaker who is an indigenous community that lives in a certain territory and has an equal values and social cohesion to protects, maintains and develops TCE traditionally, communally, and across generations.

The state's mandatory in regards of protects, maintains and invent TCE with the following procedure, which are:

1. The enforcement on behalf of the state is carried out by the Minister, minister/head of a non-ministerial government institution, and / or Regional Government.
2. TCE Custodians may convey the TCE documentation to the Minister to be determined officially as TCE based on the characteristics below:
 - a. Sacred;
 - b. confidential or open; and / or
 - c. firmly executed

State's communal intellectual property rights, holds the copyrights to its prehistoric-heritage property and folk culture that owned jointly by states and local community where these heritage originated from, for example:

1. Life cycle ceremony, traditional ceremony which related to natural phenomenon;
2. Traditional arts;
3. Folk stories, saga, legends, chronicles;
4. Traditional Games;
5. Traditional expressions;
6. Tradition and oral expressions;
7. Language;
8. Traditional architecture;
9. Traditional clothing;
10. Batik, weaving;
11. Traditional Dance;
12. Traditional calligraphy and other traditional art property

Protected EBT includes one or a combination of expressions, such as:

1. Verbal textual, both oral and written, in the form of prose and poetry, in various themes and content of messages, which can be literary or informative kind of narrative;
2. Music, such as vocal, instrumental or combination of both;
3. Motion, such as dance, martial arts, and games;
4. Theater, such as puppet shows and theatrical-folks;
5. 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 their combinations;
6. traditional ceremonies, which also include tools and material productions

TCE legal protection is regulated under Law No. 28 of 2014 concerning Copyright, as the copyright which held by the state. Law no. 20 of 2016 concerning Trademarks and Geographical Indications also regulates provisions relating to TCE Protection, which explained in Article 72 paragraph 7c: *"The abolishment of registered trademarks by the Minister's initiative can be conducted if they have something in common in all: traditional cultural expressions, intangible cultural heritage, names or logos which have been a hereditary traditions."*

C. Genetic Resources (GR).

Genetic Resources are genetic materials that have beneficial values, both real and potential, found in the germplasm of plants, animals and other organisms. GR is regulated for the first time in the Convention of Biodiversity 1992 (CBD). GR is also an important issue in TRIPS Agreements. GR protection is associated with aspects affected by industrialization and international trade, both from the environment and the human side that are often ignored by business parties. GR in the context of the environment should observe the CBD which is usually accompanied by traditional practices that use traditional knowledge. For example, in relation to human rights, the genetic resources used are traditional cultural expressions as the central identity of the traditional community.

So far, the legal protection of the CBD has not refer to Intellectual Property Rights protection system, but through environmental regulations as stipulated in the Convention on Biological Diversity (CBD) ratified by Law No. 5 of 1994 concerning Ratification of the UN Convention on Biological Diversity (United Nations Convention on Biological Diversity).

D. Geographical Indication (IG)

Geographical Indication is a mark that shows the area of origin of an item and / or product due to geographical environment factors including natural factors, human factors or a combination of these two factors which gives reputation, quality and certain characteristics to the produced goods . For example, productions of goods and services of society

Geographical Indication (GI) is the place that identifies products originating from a particular geographical area, which have special quality, characteristics and reputation that are directly related to its origin caused by natural factors (Septiono 2009).

Although the GI concept has existed since the beginning of the industrial revolution, the concept of GI developed and was negotiated at the international level along with the enforcement of TRIPS Agreements that regulated the protection of intellectual property rights (Gervais 2003).

Initially championed by the European Union, GI became important and unique to developing countries (Josling 2006) such as Indonesia because it acknowledge communal rights (Wierma Putri 2015) and does not require innovation so that it is able to protect traditional knowledge and practices (Dagne 2010) which has been passed down through generations.

Currently, developing countries do not only priorities GI as an individual matter, besides the European Union, ASEAN also create GI as a strategic goal in the 2016-2025 ASEAN Intellectual Property Action Plan (South-East Asia IPR SME Helpdesk 2016). Indonesia as one of the participants in TRIPS Agreements and ASEAN members has an importance in developing a comprehensive GI protection system.

GI has the potential to encourage the economy of remote areas in Indonesia in contribution to job creation, enhancement of farmers income and producers in contribution to GDP, as well as the social strength of the community by providing protection to local products GI labeled (Marie-Vivien 2010)

Geographical Indications are protected if they have been registered by the Minister.

Registration is done by:

- 1) Institutions that represent communities in certain geographical areas that seek goods and / or products in the form of:
 - a. natural resources;
 - b. handicraft items;
 - c. industrial products;
- 2) Provincial or district / city regional government.

Geographical Indications cannot be registered if:

- a. Contrary to legislation, and general provisions, morality, state, religion, decency rules;
- b. Misleading or deceiving the community regarding to reputation, quality, characteristics, origin, process of making goods, and their advantages; and the GI is a name that has been used as a plant variety or similar plant varieties, unless there are additional equivalent words which indicate similar geographical indication factors.

Application for Geographical Indication is rejected if:

- 1) Documents Description of Geographical Indications cannot be verified;
- 2) Have similarities to the Geographical Indications that have been registered.

Geographical indications are protected during the maintenance of reputation, quality, and characteristics. these are the basic elements for the protection of Geographical Indications.

Geographical Indications can be abolished if:

- 1) If the reputation, quality, and characteristics that form the basis of protection are decreased or lost;
- 2) Violating provisions because Geographical Indications are prohibited from being registered.

The registered GI have consolidated organizations, gathered stakeholders, through the important role of managing each GI in GI's Group. There is also a progressive increase in management for product quality through tracking system in the several GI formation process. The stakeholders of the GI group have increasingly become aware of the importance of having a control system to monitor product quality. The tracking system has contributed positively to improving coordination in the supply chain, building databases managed and updated by GI groups.

Procedure for registering GI under articles 53-69 of Law No. 20/2016 regarding to Geographical Indications in terms of the registration procedure as follows:

- 1) First step: Submitting an Application
- 2) Second Stage: Administrative Examination
- 3) Third Stage: Substance Examination
- 4) Fourth Stage: Announcement
- 5) Fifth Stage: Registration Opposition.
- 6) Sixth Stage: Registered
- 7) Seventh Stage: Supervision of the Use of Geographical Indications
- 8) Eighth Stage: Appeal.

The protection of communal intellectual property rights has more value for Indonesia because it is not based on first come first served concepts used in registering other property rights in general so that registrants or the first innovators will obtain intellectual property rights.

This is a problem when dealing with findings that are not known exactly when and where they are found. Intellectual property rights also do not require proof as the latest innovation but recognize tradition, knowledge, and culture both written and unwritten. In addition, communal property rights also value joint ownership for intellectual property owned by communities or community groups; both written and unwritten. Finally, communal property rights value joint ownership for intellectual property owned by communities or groups.

C. Conclusion

Indonesia has an importance in providing protection for communal intellectual property rights given the Indonesia's local culture resources. Presently, Indonesia do not have a specific law for communal intellectual property except laws that protect geographical indications. Communal Intellectual Property consists of:

- a. Traditional Knowledge (TK)
- b. Traditional Cultural Expressions (TCE)
- c. Potential Geographical Indications (GI)
- d. Genetic Resources (GR)

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