

Special Intellectual Property Protection for Traditional Cultural Expressions: Rectifying Broad Legal Approaches

Agustianto,¹ Hari Sutra Disemadi,² Oda Ignatius Besar Hariyanto,³
Dame Afrina Sihombing⁴

Universitas Internasional Batam, Indonesia

Email: agustianto.lec@uib.ac.id

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Abstract: *The legal protection of cultural diversity within the context of Traditional Cultural Expressions (TCEs) is not governed by specific legislation, which can significantly hinder the protection and validity of cultural expressions. Utilizing normative legal research methods, this study aims to conduct a comprehensive analysis of the urgency of establishing a specialized legal regime that recognizes and safeguards TCEs as a unique form of communal intellectual property. The analysis supported with a statutory approach indicates that there is a strong urgency to form this specialized legal regime, highlighting normative conflicts in existing regulations. The analysis also outlines how the formation of this regime can be accomplished by referring to a comprehensive normative framework and considering the unique elements that constitute TCEs. The research findings show that existing regulations have not been able to provide adequate protection for TCEs, especially in the context of the Industrial Revolution 4.0, which demands more comprehensive protection, particularly in the digital realm. Therefore, the establishment of this specialized legal regime becomes a crucial step in addressing new challenges in the era of Industrial Revolution 4.0.*

Introduction

The Industrial Revolution 4.0 has transformed the Indonesian tourism sector, introducing digital marketing that enhances accessibility through websites, mobile apps, and social (Primasari et al., 2023). While offering opportunities for innovation and personalized experiences, this shift poses challenges in preserving Indonesia's cultural values. With over 17,000 islands and 300 ethnic groups (Chairy & Syahrivar, 2019), Indonesia boasts abundant Traditional Cultural Expressions (TCEs), integral to tourism (Kusmaningtyas et al., 2023). However, the Industrial Revolution 4.0 technological progress threatens TCEs as communal intellectual property, susceptible to unauthorized digital reproduction. This jeopardizes both cultural communities and the authentic value of TCEs (Hughes, 2020). The urgency lies in establishing a specific legal regime to safeguard Indigenous communities' rights over TCEs, ensuring ethical and sustainable tourism utilization. Existing regulations lack specificity for TCEs in the Tourism 4.0 era, requiring a focused legal framework to balance global protection, utilization, and economic benefits for Indigenous communities (Purwandoko et al., 2021).

Comprehensive study and strategic steps are essential for the government and stakeholders in addressing this pressing need.

In the past decade, the protection of TCEs has been the focus of legal and policy debates in many countries, including Indonesia. A study explains that TCEs represent the living cultural heritage of Indonesia, evolving with intergenerational interactions within traditional societies, thus requiring documentation and legal protection (Khumairoh et al., 2022). However, in the current digital era, TCEs face unprecedented risks of exploitation and misuse. A study indicates that TCEs are generally assets threatened by commercial exploitation, particularly affecting Indigenous communities dealing with specific socio-economic challenges (Kasih et al., 2021). Despite various countries have attempted to adapt their traditional intellectual property legal frameworks to protect TCEs, these regulations often fail to accommodate the unique nature and complexity of TCEs. Meanwhile, the tourism sector has been identified as one of the sectors most frequently exploiting TCEs, creating a paradox where tourism is simultaneously the sector most vulnerable to TCE exploitation (Figuerola, 2021). This aligns with other studies finding that digital content creation technology exacerbates the challenges of TCE protection (Olteanu, 2021). According to another study, these issues can lead to the degradation of the cultural and economic value of TCEs (Leleto, 2019). Hence, there is an urgent need to understand how the right legal regime can facilitate the utilization of TCEs in the tourism sector while ensuring the protection and empowerment of the indigenous communities.

The literature review highlights a research gap in understanding the importance of safeguarding TCEs in the context of Tourism 4.0. With the integration of information technology and data analysis techniques, there is a need for urgent protection of TCEs as a vital communal asset in Indonesia's tourism sector, influenced by the changes of the Industrial Revolution 4.0. This research aims to fill this gap by emphasizing the urgency and outlining normative legal protection for TCEs in the era of Tourism 4.0.

Research Method

This study employs a normative legal research method to analyze the prevailing positive law (Disemadi, 2022). In the context of this study, the researcher adopts a qualitative approach and seeks to comprehend the meaning of the formation of the specific regime for Traditional Cultural Expressions in supporting tourism in the era of the Industrial Revolution 4.0 through regulations and the interpretation of legal texts. To support the analysis, this research also utilizes a legislative approach through secondary data in the form of primary legal sources. The primary legal sources used include Law No. 10 of 2009 concerning Tourism, Law No. 20 of 2016 concerning Trademarks and Geographical Indications, Law No. 38 of 2014 concerning Copyright, and Government Regulation No. 56 of 2022 concerning Communal Intellectual Property.

Results and Discussion

Navigating the Industrial Revolution 4.0: The Critical Role of Intellectual Property Protection in Digital Tourism

The Industrial Revolution 4.0 has revolutionized the tourism sector through the integration of technologies such as Artificial Intelligence, Big Data, the Internet of Things (IoT), and augmented reality (Syed et al., 2021). These innovations allow for more personalized and efficient experiences for travelers, from attracting visitors through digital marketing to enhancing the entire travel journey. However, this shift, termed Tourism 4.0, not only addresses traditional challenges like limited resources and reach but also introduces new hurdles (Mariyono, 2017), including the risk of a one-size-fits-all tourist experience and concerns about privacy and data security (Gajdošík, 2019).

While the benefits of Tourism 4.0 are evident, it also brings about increased competition among tourist destinations (Starč Peceny et al., 2020). Established destinations must innovate to maintain their appeal, leading to the adoption of various technologies. Yet, the emphasis on technology-driven approaches without community participation can marginalize local communities, impacting cultural sustainability and the overall attractiveness of tourist destinations.

The impact of Industrial Revolution 4.0 on tourism goes beyond operations and technology (Lampropoulos et al., 2021). The strategic use and protection of cultural assets are essential, requiring thoughtful policies to integrate innovations responsibly without compromising Indonesia's cultural integrity. In the digital era, safeguarding intellectual property (IP) is crucial for protecting cultural assets in tourism (Permata Budi Asri, 2018). IP-based content is a key tourism driver distributed widely online, presenting opportunities to showcase cultures but also posing risks of rights violations, especially in Traditional TCEs. Robust legal frameworks are urgently needed to adapt IP protection to the rapid, open nature of digital promotion, where content can be easily copied or modified without permission (Tobing et al., 2021). Protecting intellectual property isn't just about law enforcement; it involves empowering local communities to understand and manage their rights. Collaboration between the tourism sector and digital platforms is crucial, ensuring ethical and responsible content utilization (Lee et al., 2017). This collaboration may include establishing ethical standards, implementing copyright tracking tech, and developing fair profit-sharing models with origin communities.

Ultimately, the greatest challenge is to create collective awareness of the importance of appreciating and respecting intellectual property in the digital space. To ensure the sustainability of the tourism industry based on cultural and traditional wealth, there needs to be a joint effort between the government, industry, communities, and the wider society to uphold the values of intellectual property and ensure that technology is used to advance, rather than harm, Indonesia's rich cultural heritage. Furthermore, the utilization of intellectual property protection, in general, must continue to be developed to enhance legal culture, so that intellectual property violations do not become a

negative legal culture that ultimately diminishes the appreciation of creative values (Putra & Disemadi, 2022).

Threats to Cultural Authenticity and the Well-being of Indigenous Communities in the Era of Industrial Revolution 4.0

The authenticity of culture constitutes a crucial component of the tourism sector, particularly within the context of Indonesian tourism. Given the abundance of tourist destinations boasting specific natural beauties worldwide, the Indonesian tourism sector capitalizes on the cultural diversity inherent in its multicultural society. Presently, culture plays an increasingly vital role, with nations competing to develop their respective tourism sectors (Dogru et al., 2021). This competition intensifies with the advent of the Industrial Revolution 4.0, prompting a growing number of tourists and entrepreneurs to expand their ventures in the tourism sector (Pencarelli, 2020). Consequently, cultural authenticity has become an inseparable element of the tourism sector (McIntosh & Prentice, 2017).

Moreover, cultural authenticity is integral to the national identity. Indonesia's geographical condition as an archipelagic nation inhabited by hundreds of ethnic groups not only poses a challenge in terms of cultural diversity but also shapes the nation's identity, which, in a Pancasila context, plays a crucial role in maintaining the unity of Indonesia (Hugo, 2015). The philosophical consequence of this is embodied in the slogan “*Bhinneka Tunggal Ika*,” meaning unity in diversity (Riyanti et al., 2023).

Cultural authenticity holds a pivotal role in Indonesian tourism, implicitly acknowledged in Article 27 of Law No. 10 of 2009 concerning Tourism. This law prohibits activities compromising the “authentic value” of tourist destinations, emphasizing the genuineness attracting tourists. This implicit acknowledgment safeguards tourism interests while preserving cultural authenticity crucial to the national identity. However, the ease of reproducing Traditional Cultural Expressions (TCEs) poses challenges. Potential commercial exploitation, extending to industries like fashion, lacks fair compensation to original communities. Social media's proliferation of holiday-themed content often justifies violating communal intellectual property rights as inspiration, neglecting the impact on cultural values (Lenjo, 2017). This not only harms local communities economically but also diminishes the authenticity of TCEs itself (Leleto, 2019).

Unauthorized exploitation of TCEs can seriously threaten the existence of indigenous communities, as it may result in cultural erosion. Cultural erosion can be understood as the systematic decay of a culture, leading to the deterioration of certain cultural characteristics due to the diffusion of these traits with foreign cultures (Taj & Ali, 2018). Another definition of cultural erosion, which does not specifically mention foreign cultures, is the cumulative damage to a specific ethnic group caused by the attitudes, laws, policies, actions, and behaviors of one or more dominant groups (Matthews, 2019). In the context of tourism, cultural erosion can encompass various elements from both of these definitions, with an emphasis on the general deterioration of culture. In other words, whether it is a foreign culture or a dominant ethnic

group, the focus of this research is on understanding the reasons behind this cultural erosion.

Therefore, many consider cultural erosion as an invasion resulting from the commercialization of culture (Chen, 2022). This perspective provides a more general overview that is consistent with the cultural context as a crucial asset in the tourism sector. In this regard, cultural erosion occurs through the utilization and/or production of products that incorporate cultural values without adjustment and permission from the Indigenous communities of that culture. This context elucidates that concerns regarding the use of TCEs extend beyond reasons of economic interest or benefit but also encompass the misuse of traditional culture. The proliferation of digital technologies has also highlighted the vulnerability of Indonesian TCEs in the digital realm. This was demonstrated in the case of an advertisement featuring *Pendet* Dance, *Wayang*, and *Reog* as part of Malaysia's tourism campaign, titled 'Enigmatic Malaysia', claiming that those cultural expressions are from Malaysia, despite historical accounts showing that those TCEs are actually from Indonesia (Asri, 2018). Therefore, protection must be extended for vulnerable Indigenous communities to prevent the unilateral trading of their cultural values through the commodification and commercialization of culture, ensuring the preservation of various social, cultural, and spiritual elements embedded in TCEs (Mashdurohatun et al., 2020).

Normative Construction of Traditional Cultural Expression Protection

Effective protection for Traditional Cultural Expressions (TCEs) requires a careful approach that takes into account the unique legal elements and requirements that constitute its legal basis for protection, along with the importance of preserving cultural identities (Figueroa, 2021). Furthermore, in the context of the Industrial Revolution 4.0, it's also imperative to have normative constructions that can accommodate the technological and socio-cultural changes. A comprehensive normative construction is also crucial to prevent laws that contradict societal values and needs, emphasizing the importance of a legal framework rooted in accurate and theoretical understanding (Isdiyanto, 2018).

According to Article 1, paragraph 2 of Government Regulation No. 56 of 2022 on Communal Intellectual Property (Government Regulation on Communal IP Regulation), TCEs can be pragmatically defined as various forms of creative manifestations, tangible or intangible, or a combination of both, reflecting the existence of a collectively preserved and intergenerationally transmitted traditional culture. Within the legal framework of communal IP, only geographical indications have separate regulations, dependent not only on the Communal IP Regulation but also on Law No. 20 of 2016 on Trademarks and Geographical Indications (Trademark and GI Law). However, TCEs are not a new concept in the Indonesian IP protection system. TCEs are part of copyright protection, as regulated in Article 38 of Law No. 28 of 2014 concerning Copyright (Copyright Law). Furthermore, the basic elements constituting a TCE are already present in several regulations in Indonesia related to intellectual property.

Table 1. TCEs Elements that Have been Regulated in Indonesia

Culture	Creation	Indigenous Community
Government Regulations on Communal IP: - Article 1 number 2 - Article 6	Government Regulations on Communal IP: - Article 7	Government Regulations on Communal IP: - Article 1 number 7
Copyright Law - Article 38 number 3	Copyright Law - Article 40 paragraph (1) letters o and q - Article 59 paragraph (1) letters h and j	Copyright Law - Explanation of Article 38 paragraph (3)
Trademark and GI Law: - Article 72 paragraph (7) letter c	-	-

Source: Analysis of Primary Legal Sources of Indonesian Intellectual Property

The table above does not consolidate the various normative regulations governing Traditional Cultural Expressions (TCEs). Instead, it focuses on the conceptual elements that constitute TCEs. The Trademark and GI Law, while not normatively regulating TCEs, addresses GI as a form of communal intellectual property alongside TCEs. The normative construction should take into account the unique characteristics of TCEs, which are closely linked to the identity and way of life of the originating communities, and thus require protection beyond economic rights to encompass cultural recognition (Kusuma & Roisah, 2022). This forms the basis for the inclusion of TCEs in the sui generis protection of Communal IP in Indonesia, demanding a more inclusive and participatory legal approach.

The normative protection of TCEs falls under the various creations protected by the copyright regime, notably through Article 38. However, in contrast to the specific regulations for GIs in the Trademark and GI Law, TCEs are only addressed as one form of copyright without detailed explanation. This lack of specificity is crucial, given the fundamental differences between TCEs and copyright, as conceptually recognized in the Trademark and GI Laws. Both GIs and TCEs are communal property rights under Article 4 of the Communal IP Regulation, yet the Copyright Law does not provide distinct protection for TCEs. With the establishment of sui generis protection for Communal IP through the Communal IP Regulation (Syafi'i, 2023), further regulations addressing TCEs must be developed.

The normative construction of TCEs protection in Indonesia within the Industrial Revolution 4.0 framework requires a flexible legal framework balancing the rights of original communities and promoting access to TCEs for

public interests. Regulations similar to Article 53 of the Trademark and GI Law should address diverse recognition and protection, covering announcements, objections, disclaimers, and withdrawals of protected creations. The integration of justice, equality, and sustainability principles is crucial in TCEs protection, involving legal aspects as well as societal ethics and moral values. An effective legal norm for TCEs protection necessitates an approach rooted in local wisdom and respect for cultural pluralism. Referencing the Tourism Law, especially Article 27 prohibiting damage to the authentic value of tourist attractions, provides a normative foundation. TCEs, integral to the tourism sector, should be protected with benchmarks such as the authentic value, distinguishing various conceptual forms of TCEs creations. Existing regulations like Article 38(3) emphasizing alignment with original community values are insufficient, as TCEs may embody values manifested in artistic forms even if no longer present in the community.

Quality control and authenticity supervision of TCEs can be reinforced by expert teams, mirroring the oversight structure for national GIs outlined in Article 59 of the Trademark and GI Law. Addressing the normative deficiencies in the regulations on GI expert teams is crucial, given the current absence of an implementation mechanism under any derivative regulations. Regulations can establish a protection period for TCE rights in line with Article 5(1) of the Government Regulation on Communal Intellectual Property, akin to the perpetual effect of GIs through Article 61 of the Trademark and GI Law. This period, coupled with rights extensions, enables expert teams to automatically assess the quality and authentic value of TCEs seeking extended rights.

In response to the challenges posed by technological advances and globalization, normative construction must anticipate future changes. This involves adapting to the challenges brought by the digital environment. Indonesia, as the only country globally providing special protection for communal intellectual property, has initiated steps, including data inventory per Article 38(2) of the Copyright Law (Ramadhan & Dewi Siregar, 2022). Protection in the digital realm must be comprehensive, regulating various forms of TCE use and potential infringements, such as duplication under Article 49 of the Copyright Law, ensuring effective safeguarding in the era of Industrial Revolution 4.0. The rising popularity of many digital technologies can and must be utilized to help promote many traditional cultures through many ways of communication and storytelling, particularly those with small communities. This utilization must be done carefully, distinguishing between ‘safeguarding’, ‘preserving’, and ‘promoting’ of cultural heritage. Through the identification, documentation, transmission, and revitalization of tangible and intangible cultural heritage, TCEs can be protected while also maintaining a degree of control over maintenance or viability (Awopetu, 2020). To realize the potential of TCEs in the digital context, Indonesia must revisit the existing legal norms, which have been highlighted as having many inadequacies.

Conclusion

Conceptually, there is a genuine urgency to establish specific regulations for the protection of Traditional Cultural Expressions (TCEs). The need for such regulations arises from the inherently individualistic nature of copyright law and normative inconsistencies with the sui generis protection of TCEs as communal intellectual property, as outlined in the Government Regulation on Communal Intellectual Property. The analysis emphasizes the imperative for a complex regulatory framework, particularly in the context of safeguarding TCEs amidst the challenges posed by the Industrial Revolution 4.0. Therefore, it is crucial for the government to recognize TCEs as a potential agenda for inclusion in the National Legislative Program for Law Formulation (Prolegnas). This recognition should take into account the essential elements that constitute TCEs, ensuring a concerted effort to continually develop the tourism sector, which has faced challenges in recent years.

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