
Jurnal Dinamika Hukum

Vol. 19 Issue 1, January 2019

E-ISSN 2407-6562 P-ISSN 1410-0797

National Accredited Journal, Decree No. 21/E/KPT/2018

DOI: 10.20884/1.jdh.2019.19.1.2419

This work is licensed under a Creative Commons Attribution 4.0 International License (cc-by)

Promoting Traditional Cultural Expressions via YouTube¹

Laina Rafianti^{✉ a}, Ahmad M. Ramli^b & Rika Ratna Permata^c

^{abc} Faculty of Law, Universitas Padjajaran, Bandung – Indonesia

Abstract

YouTube is a potential media to promote Indonesian traditional cultural expressions in Indonesia. Even though the promotion of traditional cultural expressions is growing fast, the communal intellectual property law is still a big question mark. The purposes of this paper are, first, to identify how YouTube impact on utilizing Indonesian culture, to analyze how to gain economic benefit from broadcasting through YouTube, and to note how to balance rights and obligations between traditional cultural expressions stakeholders. From a methodological standpoint, this paper used both a normative and ethnography-legal research approach. This paper result is, first, YouTube gives influence directly and indirectly to the promotion of traditional cultural expressions; and second, custodian and performers of traditional cultural expressions potentially receive the economic benefit from broadcasting through YouTube. Ultimately, petahelix approach is required in obtaining a balance right and obligation between traditional cultural stakeholders.

Keywords: YouTube, traditional cultural expressions, intellectual property, copyright

Abstrak

YouTube merupakan media yang berpotensi untuk mempromosikan ekspresi budaya tradisional Indonesia. Meskipun pemanfaatan ekspresi budaya tradisional semakin banyak dilakukan, belum terdapat hukum kekayaan intelektual komunal nasional yang mampu melindungi pelaku seni pertunjukan tradisional. Tujuan dari penulisan ini adalah untuk mengidentifikasi peran YouTube dalam pemanfaatan ekspresi budaya tradisional, menganalisis perolehan manfaat ekonomi dari penggunaan YouTube, serta mencari keseimbangan antara hak dan kewajiban para pemangku kepentingan atas pemanfaatan ekonomi budaya tradisi. Metode penelitian yang digunakan dalam tulisan ini adalah yuridis normatif yang dipadupadankan dengan pendekatan legal etnografi. Hasil penelitian menunjukkan bahwa; pertama, YouTube memberikan pengaruh secara langsung maupun tidak langsung bagi kemajuan ekspresi budaya tradisional; kedua, pengemban dan pelaku pertunjukan tradisional layak untuk memperoleh keuntungan ekonomi dari YouTube; dan ketiga, pendekatan petahelix perlu dilakukan untuk memperoleh keseimbangan hak ekonomi atas pemanfaatan budaya tradisional.

Kata kunci: YouTube, ekspresi budaya tradisional, kekayaan intelektual, hak cipta.

Copyright©2019 Jurnal Dinamika Hukum. All rights reserved.

Introduction

Information technology including media is progressing every day. Starting from the invention of printing press by Gutenberg, until Leonard Kleinrock who has made several contributions in the field of computer networking known as the internet, media is always renewable. No one ever thinks that everyone could become an artist, a journalist, a director or a producer in their own channel called user-generated content

¹ This paper is part of first author's Ph.D. dissertation. This research funded by Lembaga Pengelola Dana Pendidikan-Beasiswa Unggulan Dosen Indonesia Dalam Negeri Republik Indonesia. Contract number: PRJ-5503/LPDP.3/2016.

[✉] Corresponding author: laina@unpad.ac.id

media. YouTube, is one of the user-generated content media which allow the user to upload their content. 1`

Watching YouTube has become more popular than watching television nowadays. In Indonesia, YouTube watch time in 2015 was raising 130% from the previous year (**Mahameruaji, Puspitasari, Rosfiantika, & Rahmawan, 2018**). As a result, nowadays YouTube rather than television that produce the stars of tomorrow. This condition illustrated by an elementary school student from Pekanbaru, Riau. He answered that he would be a YouTuber when President of the Republic of Indonesia asked about his obsession. His reason is by becoming a YouTuber that he would have been a lot of subscribers and would receive money.

Video on YouTube is always interesting for viewer in almost every daily activity. For instance, the tutorial video which demonstrate make-up, cooking, wearing hijab, and how to create something is one type of attractive video to view (Sørensen, 2018: 518). The other kind of video such as traveling, showing recreational places, introducing new café, unique facts, are another way to attract people. Besides that, the funny activity of animals, such as dog, cat, hamster, even bunny is always made people laugh. Moreover, trending video nowadays is song cover. For Example, Gen Halilintar, a family with 11 kids, has 5,120, 872 subscribers. They cover famous songs by Ed Sheran, Justin Bieber, Imagine Dragon, The Chainsmokers and more.

Indonesia, a country with gorgeous traditional cultural expressions has a huge potential value to promote its culture via YouTube. Imagine if every traditional art performers obsess to be YouTubers. They will be uploading the wonderful of Indonesia's traditional cultural expressions through YouTube, promoting Indonesian traditional cultural expressions and encouraging self-funded artists to develop newer cultural expressions creations. Traditional music, exotic and aesthetic dances, artistic theatre taken from ancient literature, will be well-known all over the world. In this industrial revolution 4.0, puppet show, traditional dance, traditional music, and its creation should not only showed in live performance. Those kinds of arts could be produced, video recorded and uploaded to the over the top, and this content will contribute to a creative economy.

Besides advantages, YouTube also has disadvantages influence towards the protection and utilization of traditional cultural expressions. Once the content uploaded to the internet, it will be lasting forever. One YouTube channel viewer is unlimited by the quantity of person and time. A viewer can watch YouTube at any time known as video-on-demand (**Hsieh, Ke, & Lee, 2016**). A viewer also feasible to download the video and make it available offline. Traditional cultural expressions become easy to access and to distribute across Youtube.

In Indonesian, traditional cultural expressions known as communal rights and protected under the Copyright Law. Based on Article 38 of Copyright Law, states that Copyright on traditional cultural expressions is held by the State. This article only focuses on protecting Copyright of traditional cultural expressions without providing

performers' right. As stated in the Article 38 (2), the State obligation is in the field of inventory, maintain, and preserve traditional cultural expressions. Performers' right is regulated for general creation. Whether traditional cultural expressions performers' right is part of general creation or not is a big question mark. The problem is, traditional cultural expressions performance, in general, is unfix form. The protection of performer's right in general creation required fixation to be protected. The intellectual property system should consider mechanisms to further protection of the dissemination of traditional cultural expressions through YouTube by its performers.

Research Problems

This paper proceeds as follows, first, this paper identifies how YouTube impact the promotion of traditional cultural expressions. Second, this paper explores how custodian and performers' of traditional cultural expressions gain the economic benefit from broadcasting through YouTube. In particular, this paper notes how the mechanism of flow of economic benefit from traditional cultural expressions be able to convene the balance of rights and obligations between traditional cultural expressions stakeholders.

Research Methods

This research used both juridical normative and ethnography-legal research approach (**Hammersley & Atkinson, 2007**) in data collection. Data sources collected from digital data collection and conventional technique. Digital data collection was obtained from accessing relevant information via legal databases, research networks, and open access platform. A conventional technique to collect data in this paper was prepared by the interview with local artists and official in the local cultural office. Field research to gain primary data was conducted in Bandung and Cirebon, West Java, Indonesia.

Discussion

The impact of YouTube in Promoting Traditional Cultural Expressions in Indonesia

Traditional Cultural Expressions are another terminology used by World Intellectual Property Organization so as folklore. Since 1982, World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization established the WIPO-UNESCO Model Provisions for National laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. In April 2001, the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held the first meeting. After several meetings, mainly since the fourth session of Intergovernmental Committee in 2002, the term of traditional cultural expressions is used interchangeably with folklore.

World Intellectual Property Organization defines traditional cultural expressions are understood at present to refer broadly (WIPO, 2017):

“Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.”

Words or phrases in the bracket above show that Intergovernmental Committee did not achieve the deal in that meeting. Explained further in the draft articles as follows: actions, such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed; materials, such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places; music and sounds, such as songs, rhythms, and instrumental music, the songs which are the expression of rituals; verbal, such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.

In communal intellectual property context also known as traditional knowledge, which regarded as a common heritage and not as a commodity to be patented for commercial exploitation. Different from traditional knowledge (Hughes, 2012), traditional cultural expressions characteristics are more related to copyright while traditional knowledge is more associated with the patent.

However, traditional cultural expressions are a different regime of intellectual property. The nature of traditional cultural expressions is contrary to the protection of copyright. Wend Wendland characterized traditional cultural expressions are handed down from one generation another, either orally or by imitation (Wendland, 2004: 101). This expressions reflect a community's cultural and social identity and consist of characteristic elements of a community's heritage. Sometimes are made by “authors unknown” and/or by communities and/or by individuals communally recognized as having the rights, responsibility, or permission to do so (Ying, 2005). Moreover, these expressions are not made for commercial purposes but as vehicles for religious and cultural expressions. Finally, traditional cultural expressions are constantly evolving, developing, and being recreated within the community (Mezey, 2007). Meanwhile, the requirement of copyright protection is originality of individual creator (Aragon, 2012) and fixation (Edwina M Watkins, 2003). Because of this difference, specific protection

for traditional cultural expressions is needed, whether sui generis protection or inserted into the existing intellectual property law.

The Internet Treaty of 1996, consist of the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty added right to the set for copyright holders which was intended to fill any gap in the Bern Treaty concerning broadcast and transmitted material (**Ambast, 2008**). It was the right of communication and making available to the public contained in Art 8 of the WCT. This treaty gives the right holder the exclusive right to authorize communication to the public which includes making available to the public of their works in such a way that members of the public may access this works from a place and at a time individually chosen by them.

Articles 10 and 14 of the WPPT regulate the exclusive right of making available to the public, by wire or wireless means, or any performance fixed in a phonogram was granted to both performers and producers of phonograms. This treaty includes explicitly the right to authorize or prohibit access of members of the public to the dissemination of music on the internet. An obstacle of using digital media to promote traditional cultural expressions for the community is easy to distribute without permission. Traditional cultural expressions of custodian must prohibit the third party to do fixation, reproduction, public performance, translation or adaptation, access to the public, commercialization beyond traditional context, and transfer of intellectual property (**Torsen, 2008**). Preventing access to public, fixation or other exploitation of secret traditional cultural expressions are also crucial in using digital media.

On May 24, 2017, Indonesia was adopted The Law Number 5 of 2017 of the Advancement of Culture and was promulgated on May 29, 2017, in State Gazette Number 104 of 2017. Agus Sardjono (**Sardjono, 2017**) divide the objective of this law include the following: develop the nation's noble values, enrich cultural diversity; strengthen national identity; strengthen national unity and integrity; promote the nation's intellectual life; augment the national image; realize civil society; enhance the people's welfare; preserve the nation's cultural heritage, and; influence world civilization, with culture serving as guidelines for national development. He also mentioned that developing, utilizing, promoting, and preserving Indonesian culture were discussed in a series of meetings in the World Intellectual Property Organization Intergovernmental Committee forum.

Developing Indonesian culture is the central core of this law. Mainly, the provisions are objected to creating strategies on developing culture from the lowest to the highest stage of governmental office. Beside that, this law includes the relation between cultural advancement and intellectual property rights. In Article 22 mentioned that the safeguarding of cultural advancement subject matter is essential to prevent the use of Indonesian culture by foreigners.

The Law on the Advancement of Culture defines objects of culture as follows: oral tradition, manuscript, traditional customs, rituals, traditional knowledge, traditional

technology, arts, language, folklore games, and traditional sports, or briefly put elements of culture. (Article 4 of the Law on the Advancement of Culture). Artistic subject matter provided in Law on the Advancement of Culture consists of music, dance, and theatre.

This law also mentioned World Intangible Cultural Heritage. In contrast, provisions on national Intangible Cultural Heritage is not mentioned in this law. Since 2007, Indonesia has ratified the Convention for the Safeguarding of the Intangible Cultural Heritage (**Dachlan, 2015**) as a result of the United Nations Educational, Scientific and Cultural Organization meeting. The connection between Intangible Cultural Heritage and the advancement of culture is bias.

In line with the preservation of Indonesian culture, Indonesian legal system included traditional cultural expressions in the Law Number 28 of 2014 on Copyright. Traditional cultural expressions is known as a communal intellectual property (**Palar, Sukarsa, & Ramli, 2018**) regulated in Article 38 which provided that copyrights of traditional cultural expressions hold by State. Protection of traditional cultural expressions last forever as long as traditional cultural expressions exist. The obligation of anyone that is willing to utilize Indonesian traditional cultural expressions is the concern of the living values which exist in its custodian (**Buana, 2016**). Nevertheless, further provision on the right held by the state on traditional cultural expressions is not regulated yet.

This law also provides derivative works based on traditional cultural expressions such as arrangement, into copyrighted work. Balancing between preservation of traditional cultural expressions and creativity is encouraging in this regulation. Therefore, derivative works and performers right protected 50 years only after first publications.

As progress of the previous copyright law is that, this law provides specific regulation on the related right such as performers' right, rights of producers of phonogram and right of the broadcasting institution. Protection of performers' right divided into moral and economic right. This law defines a performer as one or several persons who individually or together to show and demonstrate work.

Performers moral right includes the right to named as a Performers unless agreed otherwise. Performers right also the right of non-distortion, mutilation or modification of creation, or the things that are detrimental to the honor or reputation themselves unless approved otherwise.

Based on Article 23 (2) of Indonesian Copyright Law, Performers economic right includes the right to implement their own, license, or prohibiting others to do: Broadcast or communicate on the show Performers; right of performers in their unfixed performances; right of reproduction of fixation; right of rental; right of making available of fixed performance.

This law does not separate between performers of general work and works on traditional cultural expressions. Performers economic right valid for 50 (fifty) years since the show was fixed in a phonogram or audiovisual form. The length of protection is

differentiated from traditional cultural expressions as communal copyright which protect the work of traditional cultural expressions without time limitation and the private right to each performer who only has the economic right for 50 years. Traditional cultural expressions are transmitted from generation to generation in unfixed form. Fixation in traditional cultural expressions work is a burdensome requirement because usually, traditional cultural expressions is an oral tradition. Hopefully, from the enhancement of industrial revolution 4.0, fixation of traditional cultural expressions will be easier to do.

Enhancing Economic Benefit for Custodian and Performers of Traditional Cultural Expressions from YouTube Streaming

Approximately ten years ago, when Thomas L. Friedman confided that the world is flat, people were asking of the validity. In the process, people were getting used to the flat world and become common with this. Now, ten years later, the flat world becomes more connected and convergence. Cloud computing even became a trend in recent years. The internet is not only a tool to receive information; moreover, anyone can share information. In the previous age, only broadcast company who can disseminate news, but today, via YouTube, every single person be able to report what happens to themselves whether essential or not, like or dislike, commentary needed or not. YouTuber also collects as much as the subscriber for their channel to get the economic benefit from monetization mechanism. This American video-sharing website allows users to stream (Ariyarathna, 2019), upload, view, rate, share, add to favorites, report, comment on videos, and subscribe to other users.

This free flow of information has two sides of coins; those are advantages and disadvantages (Burri, 2010). Advantages from the information era are traditional cultural expressions promoted well in a flat world without supply a high amount of money; people can get information instantly; information easy to share. There are several disadvantages such as lack of protection of moral rights of traditional cultural expressions community for spread content on the internet; easy to infringe copyright; lack of originality of the first uploader, and so on.

YouTube, similar with the others user generated content platform has procedures for removal of content, on the basis that it is breaches intellectual property law (Lobato, Thomas, & Hunter, 2011). This online video sharing website has a mechanism to prevent copyright infringement. The first step is to submit a copyright takedown notice. The user might submit a copyright infringement notification if their copyright protected work was posted on YouTube without authorization. Before sending a copyright complaint, the user has to consider the application of fair use, fair dealing, or similar exception to copyright. To submit a copyright takedown, the user can easily go through from web form. YouTube gives a chance to a Copyright owner to change they misidentified content or change their mind about the complaint after submitting a copyright infringement notification. A guideline to file a copyright infringement above is

relevant for private copyright law. Different for traditional cultural expressions as a communal intellectual property, which held by State. Strict prevention of promoting traditional cultural expressions will harm the advancement of culture itself.

In the fields of arts, every person is granted the opportunity to utilize traditional cultural expressions arts as raw materials for their creativity in contemporary works. One of the examples in Indonesia is musician Dwiki Dharmawan, who has been using traditional cultural expressions music as the source of inspiration in the composition of his creative works. Dwiki has been successful in touring overseas performing Indonesian traditional cultural expressions music to become part of universal music in the world. Moreover, Dwiki (**Sardjono, 2017**) created new jazz arrangement of “Janger” Balinese Folksong and uploaded it to YouTube.

As the case of traditional cultural expressions arts utilization, the arts of custodian communities can be used as material or source of inspiration in creating new works of art, which may potentially obtain copyright protection. According to the Law on the Advancement of Culture, the object of the advancement of culture must be used in a manner that does not damage the noble values and wisdom contained in traditional cultural expressions art underlying them. Also, utilization by large corporation or foreigners must be based on the prior approval of the relevant public authorities. This provision is not in line with copyright regulation in Indonesia which eliminate mechanism of asking permission from public authorities for foreigners.

Based on Article 37 of the Law on the Advancement of Culture, approval can be granted provided that the following requirements of utilization are fulfilled: (1) prior informed consent (PIC); (2) benefit sharing; (3) the origins of the object of the advancement of culture concerned are indicated. Dissimilar with TK, Article 26 paragraph (1) of the Patent Law of 2016 required mention disclosure of origin in a patent description as the requirement of patent registration. Prior Informed consent and benefit sharing concepts (**Santyaningtyas et.al., 2016**) seem unacceptable with traditional cultural expressions cultural expressions subject matter. This process can be limited and become a barrier to the creation of new art.

For the preservation purposes, the use of YouTube platform is potential to give a direct impact of Indonesian culture promotion. Direct impact also senses by the performer of traditional cultural expressions cultural expressions. One of example is based on an interview with Sundanese puppet master, Apep A.S. Hudaya who uploading Sundanese puppet via YouTube is the promotion to people who want to invite him. YouTube viewers attracted to learn Sundanese puppet and also monetization from YouTube viewers. At first, Apep only thought that by uploading his performance the digital cloud documentation is safer than place it on the external hard disk. He also would like to share people who is himself and how impressive his ability to play Wayang Golek. After his video distributes broadly, more people contacted him to learn Wayang Golek which originated from Sunda, West Java. He realizes that YouTube gave him economic benefit from monetization mechanism when his management told him so.

Another opinion came from Iman Rohman, a vocalist of Iman Jimbot and Friends, who collaborate Sundanese music and western music. Iman also using YouTube channel as a media to promote his performance. He mentioned that the indirect impact for traditional cultural expressions local community not only in monetary form (interview with Iman Rohman, 21 April 2017). For example, Karinding, a traditional music instrument from West Java, became more popular because Iman and his group often play Karinding and share worldwide through YouTube. His plays saw by Japanese people, who then curious to know the live performance of Karinding in Indonesia. The impact of digital dissemination is not only giving impact to performers YouTube channel but broadly effect for tourism in Indonesia.

Moral rights are independently from the economic rights of authors and performers. Anglo Saxon countries emphasise the right to copy. Different from civil law countries who concern of the authors right, moral right is essential to protect. Based on John Locke and Hegelian Theory, copyright is morally deserved (**Friedman, 1994**). They justification o copyright might be different, but they recognize that copyright should be consist of moral right. International legal bases of moral right were in Article 6 of the Berne Convention. The author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. For performers, WPPT grants protection for moral rights (**Gates, 2010**). Performers shall have the right to be attributed as author or performer, the right not to have work or performance falsely attributed to another performer, and the right of integrity.

According to the Indonesian Copyright Law, Article 38 (3), utilization of Indonesian Traditional cultural expressions must respect the existing living values in its custodian. Traditional cultural expressions moral rights are held together in the name of Indonesia but performers on traditional cultural expressions held individual performers rights only.

To protect moral rights of traditional cultural expressions holder in this information age, users who communicate traditional cultural expressions in YouTube shall: attribute the performing arts to all custodians, composers, choreographer, director who contributed to the work; ask for correct wording of how the person or community wishes to be attributed with ownership of performing arts; the works of composers, choreographer, directors, and custodians should be attributed at all stages, from consultation to distribution, including use of the copyright notice, attribution of a language group, and indicated the local origin of traditional cultural expressions (**Australia Council for the Arts, 2007**).

Traditional cultural expressions are easy to promote. In Indonesia, as mentioned by Wendland, traditional cultural expressions are not merely made by authors unknown, the community also found that communal creation made by individual creator recognized as having the rights. For example, Jaipong dance created by Gugum Gumbira

is well acknowledged as traditional cultural expressions from West Java. People in West Java, outside West Java and also foreigner are free to learn and perform this dance. They already know that Gugum Gumbira created jaipong dance. He allowed people to use and develop Jaipong into newer derivative work of Sundanese folk dance.

Moreover, World Intellectual Property Organization has established intensive, hands-on training to indigenous peoples and local communities on how to safeguard their music, performances, art, designs and other traditional cultural expressions. This program aimed to assist communities to create intellectual property rights in their cultural heritage in the form of a digital photograph, audiovisual material, sound recordings, and databases. It also exercises control and makes informed decisions on access and use by third parties. This program also offers the potential for communities to draw income from the utilization of their cultural assets if they so wish and in a way that corresponds to their values.

From the interview with Nono Sampono, traditional cultural performance from Gegecik, defines that people in Gegecik, Cirebon do not care about the protection of performers right of their traditional theatre. Gegecik, one of District in Cirebon famous with traditional theatre (Sandiwara Cirebon) which taken from ancient literary of Cirebon Kingdom. Their plays recorded by someone then uploaded to the YouTube Channel without consent and indeed without remuneration to the theater players. They are happy as long as they play theatre and having money from live performance without worrying about dissemination of their fixation via YouTube because they love to share. This is the unique value of Indonesian people.

On YouTube copyright guideline, moral rights do not recognize. Moral right in Anglo Saxon country such as the United States does not have a place in their national legislation. Sometimes, the moral right of the author denied if television re-broadcast content from YouTube. Television only give information such as, 'courtesy of YouTube'. YouTube guidelines on copyright mention that user should comply with various regulation from each country.

YouTube provide YouTube's Content ID software which analyses samples of musical works provided by the recording industry and collective management organizations and compares them with the videos uploaded to the websites (**Boroughf, 2015**). The software establishes a link between an existing work an uploaded work such as folksong. If the content matches, the video may be automatically informed by e-mail that the material has been disabled "as a result of a third-party notification claiming that this material is infringing". The user is also notified that "Repeat incidents of copyright infringement will result in the deletion of your account and all videos uploaded to that account", and is requested to delete any videos for which they do not own the rights, and to refrain from uploading additional videos that infringe on the copyrights of others".

YouTube is protecting copyright, but still, lack mechanism on protecting traditional cultural expressions. Custodian of traditional cultural expressions has not been recorded their performance in the recording industry, they use traditional music in

their daily life. Moreover, communal intellectual property holder in Indonesia nowadays is not engaged with collective management organization. Any traditional performing art uploaded in YouTube will be treated as copyrighted work by the user and managed by collective management organization (Liu, 2012). Meanwhile, the user often not having relation with the custodian, traditional cultural expressions' holders, and traditional cultural expressions' performers. Of course, they deserve to have an economic benefit from uploading traditional cultural expressions.

Hopefully, custodian and performers' of traditional cultural expressions acquire the economic benefit from broadcasting through YouTube. The use of YouTube as video sharing media should convene the balance of rights and obligations between traditional cultural expressions stakeholders (Goffe, 2012). Getting economic benefit from YouTube is not simple. The user has to be creative, tactical and keep the spirit to get monetized. According to YouTube provisions, to be reviewed, all channels need at least 4.000 watch hours in the previous 12 months and 1.000 subscribers. The requirement is more difficult than before. With this high requirement, the most economic benefit comes to YouTube than to each user.

Economic benefit for user comes from advertisement (Dehghani, Khorram, Ramezani, & Sali, 2016). An account had monetized when the viewer showed an ad in the very beginning of the video being played. Income comes to YouTube from advertisement. According to the YouTube partner program, YouTube will pay user 55% of net revenues recognized by YouTube from Ads displayed.

Lessig (Lessig, 2002) mentions that to regulate copyright before the internet should consider for things, those are law, norms, market, and architecture. There is a balance between law, norms, market, and architecture. The law limits the ability to share content, by imposing penalties on those who copy and share content. The Architecture means mechanism, such as penalties are reinforced by technologies that make it hard to copy and share. The market is a mechanism to make the high price to copy and share content.

Balancing Rights and Obligations between Traditional Cultural Expressions Stakeholders

“By striking the right balance between the interest of creators/innovators and the wider public interest, the intellectual property systems seeks to nurture a fair environment in which creativity and innovation can flourish”, written by Begona Venero Aguirre and Hai Yuean Tualima (Peoples & Communities, 2017), World Intellectual Property Organization Indigenous Fellow 2015-2017 in a practical guide to intellectual property for indigenous people and local communities. This guide mentions that traditional cultural expressions is public domain. In the other side Miranda Risang Ayu Palar, Indonesian scholars (Palar, 2010), did not agree with that statement. Traditional cultural expressions belongs to the custodian in particular or some local communities. Miranda states that based on the Indonesian situation, two important views should be

considered. The first view, the public domain is not held by individuals but by communities or by the government on behalf of the communities. The second view is more connected with the urgency to provide specific and more reserved protection for traditional cultural expressions for the most significant benefits for local cultural communities as the original right holders. In this second view, public domain is a concept based on the existing Intellectual Property Rights, and more specifically, on the current Industrial Property regimes, which regard the creativities of 'modern' people is pointed in the individuals' creativity only.

Traditional cultural expressions in intellectual property context has been discussed in World Intellectual Property Organization forum. Beside World Intellectual Property Organization, World Trade Organization is another international intellectual property forum which regulates intellectual property related to trade. World Trade Organization established an international intellectual property regulation in the Agreement on Trade-Related Aspect of Intellectual Property Rights. The objective of this Agreement is emphasis on economic right. This agreement tries to give more benefit to performers in general without separating between traditional and modern expressions. The terminology of traditional cultural expressions is not provided in the Trade-Related Aspect of Intellectual Property Rights Agreement. Intellectual property system using this agreement is more individualistic. Compare with traditional cultural expressions performing arts which cover broader interest, this agreement does not meet the requirement of collective and communal forms of custodianship.

Article 7 of the Trade-Related Aspect of Intellectual Property Rights Agreement regarding the objectives to balance rights and obligations, reflect the possibility to give benefit to the traditional cultural expressions holder and traditional cultural expressions performers. The right of traditional cultural expressions performers should balance with their obligation to give benefit to the custodian.

Based on literary research, Australia as one of the countries which have an enlightened concern of the protection of traditional cultural expressions and the right of the custodian. They frequently produced guidelines, Codes of Conduct, or Protocols concerning this subject matter. The objection is getting a balance right and obligation between custodians and users. As indigenous and traditional communities are increasingly being recognized as having legitimate opinions about how traditional cultural expressions and traditional cultural expressions collections should be managed, several of these communities are developing their guidelines, code of conduct and protocols. Some are being created for digital archives, museum, library or research (Torsen & Anderson, 2010). It is about the time to set their standards and safeguards for how art performance art should be broadcasted Custodian should be aware of what intellectual property rights will remain with the community and where permissions for use into the future will be required.

From Protocols for Producing Indigenous Australian Performing Arts, drama and dance become two crucial focus. The following principles are the framework for

respecting indigenous cultural heritage: respect; indigenous control; communication, consultation and consent; interpretation, integrity and authenticity; secrecy and confidentiality; attribution; proper returns; continuing cultures; recognition and protection (Evans & Sinclair, 2015).

For producing performing arts, the organizer should be respecting indigenous communities. When organizing a dance performance, it is respectful to seek the consent of the custodian. If consent is given, it is important to acknowledge country and custodian. Indigenous cultures should be represented in a manner preferred by those cultures. Avoid derogatory or outdated perspectives and terminology. If the development of dance does not need an indigenous community, it is best to designate an indigenous person to liaise between the groups. The dance form among the indigenous community is varied. Accepting this diversity is important to fostering a cultural development. Cultures are living, dynamic, and following contemporary trends (Sardjono, 2011). When a dance is adapted from traditional dance, it is important to identify the authorized person.

Moreover, the indigenous community has the right to control their cultural affairs. Communication, consultation, and consent are also important to do. The informed consent is important in the use of traditional dance. For drama and dance, the consultation process may take some time, could be until three weeks. Consultation is not the same meaning as consent, this is only the beginning of getting consent. Performers and choreographers have to respect the cultural protocols of the custodians in the creation of a dance performance. The context of a dance performance must be accurate. Giving exhibition of dance should be accompanied by the history and acknowledgment of the custodians of the dance. Where the permission to perform is given, special regard must be given to authentic use of the steps and styles. When recording a dance, it is important to consider the owner of a copyright, storage, and administration of video access. The record must complete with the name of the dances, the dancers, time and place taken.

Performance organizer should consider that some indigenous material is confidential and not to disseminate to people outside the communities. The reproductions of names and images of deceased people are offensive on many indigenous community beliefs. Secret and sacred materials under Australian customary law is used for particular purpose and time (Gervais, 2003). The material can be seen or heard only by clan members. The development of performing art should respect the personal privacy of the indigenous community.

Attribution of individual contributions to the performance of a traditional work is possible if needed. Benefits will be share not restricted to royalties or fees. An indigenous community could ask proper returns in having knowledge of lighting, sound, performance management. The protocol will change because cultures are evolving. Maintaining a relationship with a community or individual for future consultation is important. Good practice was done by Bangarra Dance theatre (Janke & Quiggin,

2002a) who has developed contractual arrangements on recognizing cultural contributions to their work.

One of the case studies on asking permission from the right people is Deep Forest song. In 1992 the album Deep Forest was released. The album fused digital samples of indigenous music from Ghana, the Solomon Islands and African Pygmies with techno-dance rhythms. The band got access to the digital samples from the recordists-ethnomusicologists who had worked with these groups and deposited the recordings in a cultural archive. Permission was not sought from the group whose songs were recorded. Some of the indigenous musicians were not credited for their contribution. The US album cover states that part of the proceeds was donated to the Pygmy Fund, a charity that provides support to the Efe People. But according to one observer, the music sampled was not from the Efe people. There is no other evidence of indigenous musicians being paid for the use of their work on the album. Large profit was made with no returns to indigenous musicians. The music was appropriated without consent or attribution, and potential claims to copyright were ignored. This practice denied all right to self-determination (Janke & Quiggin, 2002a).

The Australian government also learned from the case study on recording communally owned music (Australia Council for the Arts, 2007). During the 1970s a number of recordings were made of traditional songs from Central Australia for ethnographic purposes. One such record is now being sold commercially through tourist shops, but no proper consent for commercial exploitation of the music had been obtained, and no royalties were paid to the owners. Terri Janke has commented: the indigenous performers of the songs complain that they have not received any royalties from the sale of the album. They were under the impression that the song was recorded to preserve the knowledge of the song as part of a language maintenance program. They were not told that the recording would be sold for profit.

Concerning the copyright of music on the internet, the Australian Copyright Act has amended the Digital Agenda Act 2000. The amendments introduce a right of communication to the public to cover copyright material in the digital domain. Making traditional cultural expressions available on the internet certainly increases exposure and distribution options for traditional cultural expressions. It can also increase the risk of communal intellectual property rights infringement and reduce control over traditional cultural expressions material. To obtain proper consent, it is necessary to provide adequate information, ask the right people, consent fully, be prepared that consent may be withheld.

As a comparison in the digitalization framework, Australia has established several regulations on the protection of copyright in the photograph of two-dimensional art (McCutcheon, 2017). For some museum such as in the Art Gallery of Western Australia, New South Wales, Victoria, South Australia, and Queensland, take a photograph of artwork in the museum is prohibited. For instance, in the Art Gallery of South Australia,

the copyright statement as follows (“The Art Gallery of South Australia: Copyright Statement,” 2018):

1. Copyright in this Site is owned by the Government of South Australia.
2. Copyright in the material included on this Site is either owned by or licensed to the Government of South Australia. Copyright in the material provided by the Government of South Australia agencies and instrumentalities and non-government organisations belongs to those agencies and organisations.
3. Apart from any use permitted by the Copyright Act 1968, the Government of South Australia grants visitors to the site a licence to download, display, print and reproduce this material for private use or for non-commercial purposes only.
4. No licence to publish, communicate, modify, commercialise or alter this material is granted. For reproduction or use of the Government of South Australia’s copyright material beyond this limited licence, permission must be sought from the relevant agency or instrumentality of the Government of South Australia, as identified in the relevant www page.

Again, the most important utilization from any traditional cultural expressions material is consent and contract (**B. Arewa, 2010**). Before developing new work, utilization of traditional cultural expressions should be asking permission to the custodian. Finally, giving returns to the custodian could be in a monetary or non-monetary benefit.

Indonesian Copyright Law still need implementing legislation on the protection, promotion, and utilization of traditional cultural expressions. So far, there is no legal cases arise on traditional cultural expressions claim. Although traditional cultural expressions custodian keeps silent, they are disappointed when someone misappropriated their traditional cultural expressions in a moral and economic context. Dinda Satya Upadja Budi, music academician mention that music performers should be aware of traditional cultural expressions utilization without consent. That time, when a group of musicians was a rehearsal, a foreigner who is their colleague recording the music without permission. When he gets back to his country, he remixes the music with his style into a new creation based on gamelan without giving anything in return to the Indonesian performers.

YouTube as media for promoting and utilizing traditional cultural expressions will disseminate traditional music, dance, puppet show, and drama from Indonesia. Since the nature of traditional cultural expressions is different from the conventional copyright, YouTube should elaborate the policy to comply with the protection of copyright holder and performers of traditional cultural expressions.

Although YouTube does not have the protection of traditional cultural expressions, the custodian should take several steps to safeguard their property. Protocol or guidelines must be arranged by a community to specify which actions are permitted or not. At first, they can create a general protocol for all types of traditional cultural

expressions but in the future, they can create more specific guidelines for traditional music, traditional dance, and traditional drama separately.

Recognizing that intellectual property knowledge of custodian is limited, they should ask an advisor regarding the promotion and utilization of their traditional cultural expressions. Private intellectual property consultant or cultural development advisor from government may guide the community to better protection.

In the protocol, the custodians also should mention contact person or the authority to further communication with everyone who has the intention to develop their culture. If the certain traditional cultural expressions is already inscribed as intangible cultural heritage, a contact person is already fulfilled. The need step is harmonization between intangible cultural heritage inscription and the protection of traditional cultural expressions.

Finally, and the most important thing is, the custodian should arrange a contract with a party in the context of promoting traditional cultural expressions. The contract should consist of clauses such, respecting the community as traditional cultural expressions custodian, copyright protection, performers' right protection, and benefit for the community. Lesson learn from Australian Protocols (Australia Council for the Arts, 2007), custodian of traditional cultural expressions must have proper returns and royalties for derivative works created based on traditional cultural expressions.

In the other side, before YouTube users uploaded traditional cultural expressions materials, here are some recommendations to consider:

1. Communicate with the custodian when utilizing traditional cultural expressions materials to prevent false interpretation (**Picart, 2013**);
2. Negotiate fee or other benefits with the musicians, dancers, player, director;
3. Acknowledge and adequately remunerate local communities' cultural advisors for their contribution;
4. Find out whether local communities seek benefits other than royalties;
5. Try to make sure that relevant local communities share in the benefits from any commercialization of their cultural material.

Harmonization between several stakeholders is needed to promote traditional cultural expressions via YouTube. Guidelines shall create in collaboration with government, traditional cultural expressions custodian, academician, industry, and media itself. The government in the local and national level have the same obligation to concern on traditional cultural expressions subject matter. In the Law of Advancement of Culture, the planning of cultural development starting from the government in the city/district level to provincial government level and the national level.

The role of intellectual property academician in promoting traditional cultural expressions is essential for dissemination of communal intellectual property protection. Indonesia with a huge amount of people, intellectual property dissemination should continuously proceed. Misinterpretation of individual right and communal right in copyright will dissolve through lectures and discussions.

Academician on communication science will be functioned in the documentation. Art science also important, because the subject matter of traditional cultural expressions to be uploaded in YouTube is performing art. Management discipline is also needed to give skills to manage a video monetization. Multidiscipline science is required in order to gain a great promotion of Indonesian traditional cultural expressions through YouTube.

Traditional cultural expressions custodians should collaborate with industry, in this regard, performance industry. Local television media in West Java For instance, linking the channel with “Sampurasun Cepot”, a puppet show program into YouTube as an integrated marketing communication (**Wahid & Rizki, 2019**). Industry can solve the problem where traditional cultural expressions custodian has a limitation in funding. Industrializing traditional cultural expressions, again, should be in line with the values and protocol if any. Collaboration within this pentahelix will produce a great promotion of Indonesian traditional cultural expressions.

Conclusion

YouTube gives impact to the promotion of traditional cultural expressions directly and indirectly. The use of YouTube in promoting Indonesian culture will impact at least for three parties, the State, custodians, and performers. The direct impact is more to the performers than to the State or the custodians as a holder of traditional cultural expressions, since the lack of protection on how the state hold copyright in the field of traditional cultural expressions as mentioned in Article 38(1) of Copyright Law. Performers, through streaming material fixation through YouTube will gain direct impact from performing rights and indirect impact of performing live performance in their future invitation by the viewer. On the other side, indirect impact for the State and custodian is cultural advertising the traditional cultural expressions. As stated in the Article 38 (2), The State shall inventory, maintain, and preserve traditional cultural expressions as an authentication of Indonesian cultural identity. The promotion of Indonesian culture will invite tourists to visit Indonesia as well.

Custodian and performers’ of traditional cultural expressions are potential to receive the economic benefit from streaming through YouTube. Based on Article 23 (2) Copyright Law, performers have economic rights to implement their right, license or prohibit others to broadcasting or communication of performance including YouTube streaming. Despite the definition of Performers in Copyright Law 2014 do not explicitly included the performer of traditional cultural expressions, the definition of performers should define in a broad sense.

Compare with best practices in Australia in balancing rights and obligation, such protocol is a suitable option to implement in Indonesia. Considering Indonesian traditional community do not have an awareness of the right of communal intellectual property, the role of government still have to be dominant. Moreover, guidelines shall

create in pentahelix collaboration including government, traditional cultural expressions custodian, academician, industry, and media for a proportional balance between them.

Suggestion

A better implementation such as regulation, ethics, and guidelines is needed in the use of YouTube to promote Indonesian traditional cultural expressions. Enhancement of law culture that communal intellectual property is essential and necessary to promote the local culture become popular in Indonesia. Awareness of communal intellectual property rights should be disseminated in local and national community custodian. Thus, they become be a guardian of their traditional cultural expressions when the beneficiaries having intention to stream those cultural materials through YouTube. In advance research, the role of collective management organization should empower in returning back benefit to the custodian and performers' of traditional cultural expressions.

Acknowledgement

We would like to give our gratitude to Prof. Dr. Eddy Damian, S.H., who gave relevant suggestions to this paper. Thanks to Dr. H. Subrata, Drs., M.H. who provided feedback to this research, may you rest in peace. We would also like to thank Information Technology and Intellectual Property Law Department, Faculty of Law, Universitas Padjadjaran to give support for the research process of this article. Notably, Dr. Danrivanto Budhijanto, S.H., LL.M. in IT Law for his concern with the development of intellectual property subject matter related to information technology.

References

- Ambast, S. (2008). Protecting performers' rights: Does India need law reform? *Journal of Intellectual Property Rights*, 13(6), 574-582.
- Aragon, L. V. (2012). Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia. *International Journal of Cultural Property*, 19(Special Issue 03), 269-312. <https://doi.org/doi:10.1017/S0940739112000203>
- Ariyaratna, L. (2019). Streaming of Digital Content and Right of Reproduction in Australia: A Dubious Matter for End-Users. *European Intellectual Property Review*, 41(2), 89.
- Australia Council for the Arts. (2007). *Protocols for producing Indigenous Australian music* (No. 2nd edition). Surry Hills.
- B. Arewa, O. (2010). YouTube, UGC , and Digital Music: Competing Business and Introduction : The Rise of UGC. *Northwestern University Law Review*, 431, 1-36.
- Boroughf, B. (2015). THE NEXT GREAT YOUTUBE : IMPROVING CONTENT ID TO FOSTER CREATIVITY , COOPERATION , AND FAIR COMPENSATION. *Albany*

Law Journal of Science and Technology, 25(1), 95–127.

- Buana, M. S. (2016). Living adat Law , Indigenous Peoples and the State Law : A Complex Map of Legal Pluralism in Indonesia. *International Journal of Indonesian Studies*, 104–213.
- Burri, M. (2010). Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship. *International Journal of Cultural Property*, 17(1), 33–63. <https://doi.org/10.1017/S0940739110000032>
- Dachlan, R. (2015). Indonesia's Implementation of Inventory Obligation under UNESCO's Intangible Cultural Heritage Convention: Problems in the Online Inventories. *International Journal of Cultural Property*, 22(01), 131–151. <https://doi.org/10.1017/S0940739115000041>
- Dehghani, M., Khorram, M., Ramezani, I., & Sali, R. (2016). Computers in Human Behavior Evaluating the influence of YouTube advertising for attraction of young customers. *Computers in Human Behavior*, 59, 165–172. <https://doi.org/10.1016/j.chb.2016.01.037>
- Edwina M Watkins. (2003). May I have this Dance?' Establishing a Liability Standard for Infringement of Choreographic Works. *Journal of Intellectual Property Law*, 10(2), 437–463.
- Evans, M. M., & Sinclair, A. (2015). Navigating the territories of Indigenous leadership : Exploring the experiences and practices of Australian Indigenous arts leaders. *Sage Journals*, 12(4). <https://doi.org/10.1177/1742715015574318>
- Friedman, B. (1994). From Deontology to Dialogue: The Cultural Consequences of Copyright. *Cardozo Arts & Entertainment Law Journal*, 13:157.
- Gates, M.-E. (2010). Problems In Applying Traditional Cultural Expression Laws To The Unique Medium Of Dance,. *University of Louisville Law Review*, 48, 665–692.
- Gervais, D. J. (2003). Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge. *Cardozo Journal of International and Comparative Law*, 467–495.
- Goffe, M. (2012). Recent developments in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. *Queen Mary Journal of Intellectual Property*, 1(1), 90–98. <https://doi.org/10.4337/qmjip.2011.01.06>
- Hammersley, M., & Atkinson, P. (2007). *Ethnography* (3rd ed.). London: Routledge.
- Hsieh, C.-H., Ke, C.-H., & Lee, C. (2016). An Adaptive Video-on-Demand Framework for Multimedia Cross-Platform Cloud Services. *Journal of Software Engineering and Applications*, 9, 155–174.
- Hughes, J. (2012). Traditional Knowledge, Cultural Expression, and the Siren's Call of Property. *San Diego Law Review*.
- Janke, T., & Quiggin, R. (2002). *Performing Cultures: Protocols for Producing Indigenous Australian Performing Arts*. Strawberry Hills.
- Lessig, L. (2002). The Architecture of Innovation. *Duke Law Journal*, 51.
- Liu, W. (2012). Models for Collective Management of Copyright from an International

- Perspective : Potential Changes for Enhancing Performance, 17, 46–54.
- Lobato, R., Thomas, J., & Hunter, D. (2011). Histories of User-Generated Content: Between Formal and Informal Media Economies. *International Journal of Communication*, 5, 899–914.
- Mahameruaji, J. N., Puspitasari, L., Rosfiantika, E., & Rahmawan, D. (2018). Bisnis Vlogging dalam Industri Media Digital di Indonesia. *Jurnal ILMU KOMUNIKASI*, 15(1), 61–74. <https://doi.org/10.24002/jik.v15i1.1007>
- McCutcheon, J. (2017). Digital access to culture: copyright in photographs of two-dimensional art under Australian copyright law, 7(4), 416–443.
- Mezey, N. (2007). The paradoxes of cultural property. *Columbia Law Review*, 107(8), 2004–2046.
- Palar, M. R. A. (2010). Reforming “Public Domain” The Role of Public Domain in Indonesia Cultural Community: The Cases of Legong Keraton Peliatan Balinese Dance, Sumba Woven Clothes, and Ulin Kalimantan Timber.
- Palar, M. R. A., Sukarsa, D. E., & Ramli, A. M. (2018). Indonesian System of Geographical Indications to Protect Genetic Resources , Traditional Knowledge and Traditional Cultural Expressions. *Journal of Intellectual Property Rights*, 23, 174–193.
- Peoples, I., & Communities, L. (2017). *Protect and Promote Your Culture*. Geneva.
- Picart, C. J. S. (2013). Cross-Cultural Negotiations and International Intellectual Property Law : Attempts To Work Across Cultural Clashes Between Indigenous Peoples and Majoritarian Cultures. *Southern California Interdisciplinary Law Journal*, 23(37).
- Risang Ayu, M. (2009). *Geographical Indications Protection in Indonesia Based on Cultural Rights Approach*. Jakarta: Nagara.
- Santyaningtyas, A. C., et.al. (2016). STRATEGY FOR PROTECTING TRADITIONAL CULTURE. *Academic Research International*, 7(June), 281–287.
- Sardjono, A. (2011). Culture and Intellectual Property Development in Indonesia. *Indonesia Law Review*, 3(December).
- Sardjono, A. (2017). Symphonizing Intellectual Property Laws in the Advancement of Culture. *Padjadjaran Jurnal Ilmu Hukum*, 4(3), 437–453.
- Sørensen, I. E. (2018). Content in Context: The Impact of Mobile Media on the British TV Industry. *Convergence: The International Journal of Research into New Media Technologies*, 24(6), 507–522. <https://doi.org/10.1177/1354856516681703>
- The Art Gallery of South Australia: Copyright Statement. (2018).
- Torsen, M. (2008). Intellectual Property And Traditional Cultural Expressions: A Synopsis Of Current Issues. *Intercultural Human Rights Law Review*, 3.
- Torsen, M., & Anderson, J. (2010). *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries, and Archives*. WIPO Publication No.1023(E). Geneva.
- Wahid, U. M., & Rizki, M. F. (2019). Upaya Komunikasi Pemasaran Terpadu Televisi Lokal Melalui Budaya Lokal. *Jurnal Kajian Komunikasi*, 6(2), 160. <https://doi.org/10.24198/jkk.v6i2.15821>

- Wendland, W. (2004). Intangible Heritage and Intellectual Property: challenges and future prospects. *Museum International*, 56(1-2), 97-107. <https://doi.org/10.1111/j.1350-0775.2004.00463.x>
- WIPO. (2017). WIPO IGC TCEs Draft Articles 34.
- Ying, K. C. (2005). Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution? *Journal of Malaysian and Comparative Law*, 32, 31-70.