

Copyright Protection for Folklore from the Legal Perspective

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Abstract

The concept of expressions of folklore lacks a universally accepted definition, despite its recognition in various national and international legal frameworks. Generally, it encompasses cultural materials transmitted across generations, often created collectively and without identifiable authorship. This paper examines the extent to which copyright law can effectively protect such expressions, focusing on Malaysia and Indonesia as case studies. It traces the historical development of the debate on folklore protection, particularly since the 1967 Stockholm revision of the Berne Convention, and evaluates key challenges such as originality, fixation, and authorship. The paper further explores the implications of treating folklore as part of the public domain, especially in developed jurisdictions, and how this perspective influences global policy approaches. This study adopts a qualitative doctrinal legal research approach. Through analysis of the *Rasa Sayang* dispute, the paper highlights the complexities surrounding shared cultural heritage within the Nusantara region. It argues that while national legal frameworks provide some degree of protection, they remain insufficient in addressing cross-border issues. The study proposes that principles such as national treatment and collective ownership could serve as viable mechanisms to safeguard shared folklore. Ultimately, it underscores the urgent need for enhanced regional cooperation to prevent future disputes and to ensure the sustainable protection of folklore from misappropriation by external parties.

Keywords: expressions of folklore; copyright law; Malaysia and Indonesia; regional cooperation; cultural heritage protection

Introduction

The phrase expression of folklore does not have a single, universally agreed-upon definition despite having multiple definitions in several national, regional, and international treaties. However, in general, expression of folklore can refer to pre-existing materials that have been passed down orally or by imitation from one generation to the next. These materials are usually produced by unidentified, difficult-to-find authors or by communities, and they are routinely evolving, developing, and being recreated within the community.¹

There is continued support to extend copyright law over expressions of folklore. The Stockholm Diplomatic Conference for the Revision of the Berne Convention in 1967 marked the beginning of the discussion on whether folklore should be subject to the copyright law. Despite the challenge of establishing copyright criteria of originality, fixation, and author identification, Anderson argued that the need for fixation motivates the local community to document their expressions of folklore; the demand for originality does not place an undue burden on protection.² Folklore is viewed as being in the public domain in developed nations, which shapes many national and international policy frameworks.³ Malaysia and Indonesia, two nations with diverse populations and rich cultures, actively support initiatives to safeguard the expression of folklore, which should not be exploited for commercial gain without permission. In 2007, a dispute involving a *Rasa Sayang* song, a popular folk music in the Malay Archipelago or *Nusantara*,⁴ depicts the intricacies of protecting the shared folklore of regional origin, as claims of misappropriation of folklore among neighbouring countries are sensitive issues,⁵ and difficult to sustain, as there is no documentation of its musical heritage. Such a dispute should not trigger tension between neighbouring countries but should be viewed as a potential pathway for greater regional cooperation based on a common goal to protect against misappropriation by a foreign entity outside the region. Attempts to protect folklore of regional origin require concerted efforts between neighbouring countries, above and beyond national law protecting and folklore. Currently, there is a lack of regional cooperation to protect and manage folklore of regional origin.

This paper analyses how copyright laws in Malaysia and Indonesia protect folklore. Reflecting on the tension between Malaysia and Indonesia over the *Rasa Sayang* song, this paper argues that, despite the intricacies of protecting folklore under copyright law, the notion of national treatment and collective ownership can be used to protect and respect shared folklore of regional origin. But, in the absence of regional cooperation between neighbouring countries, similar tensions are bound to occur again.

Methodology

This study adopts a qualitative doctrinal legal research approach to examine the protection of expressions of folklore under copyright law, with particular focus on Malaysia and Indonesia. The research is primarily based on library-based analysis of primary and secondary legal sources. Primary sources include national legislation on copyright in both jurisdictions, as well as relevant international instruments such as the Berne Convention for the Protection of Literary and Artistic Works. Secondary sources consist of scholarly articles, books, policy papers, and reports that discuss the legal, cultural, and policy dimensions of folklore protection. The study scrutinises the aspect of primary data, including official documents, legislative texts, and policy guidelines.^{6,7} It demands the critical interpretation of legal texts, case law, and comparative statutory provisions, focusing on normative as opposed to empirical construction. Data collection is mandatory⁸ and this is a useful study and review stage.⁹

Folklore in Indonesia and Malaysia

Folklore or *budaya rakyat* (literally translates as people's culture) in the Malay language and *cerita rakyat* (literally translates as people's stories) in the Indonesian language is diverse and living. Folklore comprises stories, customs, clothing, and behaviour that are inherited and practiced by the society of a nation.¹⁰ It is crucial to recognise the relevance of folklore to the cultural and social identities of the local

¹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Forty-Sixth Session, Geneva, 27 February 2023 – 3 March 2023. WIPO/GRTKF/IC/46/7

² Michael Jon Anderson, Claiming the Glass Slipper: the Protection of Folklore as Traditional Knowledge. *Case Western Reserve Journal of Law, Technology & the Internet* (2010) 1(2), 148-164

³ Manas Kumar Ganguli, Laina Rafianti & Sabuj Kumar Chandhuri, Policy Framework for the Protection of Cross Border Traditional Song-Bauli: A Case Study. *Pertanika Journal of Social Sciences and Humanities* (2019) 27 (4): 2687-2702

⁴ The term was first used in a classic Malay literature *Hikayat Melayu* (Malay Annals)

⁵ Aiffah Kusumadara, 'Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures' (2011) 8 *US-China Law Review*, 548-565

⁶ Mohd Zahir, Mohd Zamre, T. N. A. T. Zainudin, R. Rajamanickam, and Z. A. Rahman. "Arahan Do Not Resuscitate (DNR) dalam Sektor Kesihatan dari Perspektif Undang-Undang (Do Not Resuscitate (DNR) Order in Health Sector from the Legal Perspective)." *Akademika* 89 (2019a): 143-54.

⁷ Mohd Zahir, Mohd Zamre, T. N. A. T. Zainudin, H. Yaakob, R. Rajamanickam, H. Harunarashid, A. A. Mohd Shariff, Z. Abd Rahman, and M. Hatta. "Hak Pesakit bagi Melaksanakan Arahan Awal Perubatan: Suatu Gambaran Umum (The Patient's Right to Implement Advance Medical Directive: An Overview)." *Sains Malaysiana* 48 (2019b): 353-359.

⁸ Na'aim, M. S. M., Mohd Zahir, M. Z., Rajamanickam, R., Dahlan, N. K., & Hashim, H. (2025). Analysing ministerial reasons for banning books under the Printing Presses and Publications Act 1984. *Malaysian Journal of Syariah and Law*, 13(2), 401-412.

⁹ Ab Rahman, N. H., Mohd Zahir, M. Z., & Althabhwani, N. M. (2023). Repercussions of COVID-19 lockdown on implementation of children's rights to education. *Children*, 10(3), 474. <https://doi.org/10.3390/children10030474>.

¹⁰ Kamus Dewan edisi keempat (Dewan Bahasa dan Pustaka, Kuala Lumpur, 2005)

communities.¹¹ In the past, folk tales,¹² folk music and folk epic were forms of entertainment and pastime. Narrators of folklore known as *penglibur lara* or storytellers, tell folk stories with elements of humour intermixed with traditional poems of *pantun*¹³, *syair*,¹⁴ *gurindam*,¹⁵ and *seloka*.¹⁶ Nothing has ever been written down, documented, or otherwise done by *Penglibur Lara*. Folklore was not properly recorded because of its ancient origins and lack of institutional requirements for a writing system or preservation policies; instead, it was passed down orally over many generations. Folklore continues to inspire creations of new creative works today. The adaptation and new rendition of folk tales, folk music and folk epic into modern urban culture of film and music,¹⁷ such as movies of *Puteri Gunung Ledang*, *Hikayat Merong Mahawangsa*, and *Badang* in Malaysia,¹⁸ and *Lara Jonggrang (Candi Prambanan)*¹⁹, *Siti Nurbaya*, *Sangkuring and Malin Kundang in Indonesia*²⁰ have received enormous support from moviegoers. In Malaysia, a celebrated Malaysian animated series of *Upin & Ipin and Friends* had, in 2019, incorporated three folk characters of *Mat Jenin*, *Bawang Merah Bawang Putih*, and *Raja Bersiong* into a movie called *Upin and Ipin: Keris Siamang Tunggal*. Similarly, in Indonesia, local animation works that have been widely distributed in the form of VCDs and DVDs have adopted characters from folk tales, including *Petualangan Si Kancil*, *Prambanan*, *Malin Kundang* and *Lutung Kasarung*.²¹

Rendition of folk tales into anthologies, such as the works of author Ninot Aziz's *Southwest Asia's Folk Tales and Hikayat Fandom* and some authors from Indonesia, including Zuhriah, Said Sulaiman and M. Hasbi Salim in "*Antologi Cerita Rakyat Nusantara* (the Archipelago Folklore Anthology)"²² and theatre are not uncommon.

Through its *Once Upon a Time* series, the Performing Arts Centre of Penang (PenangPac) had presented a new interpretation of Malaysian folk stories in 2021. Eight folk tales were presented in four parts in the *Once Upon a Time* series; Part I: *Badang: the Magnificent & Si Tanggang: the Ungrateful Son*, Part II *the Curse of Mahsuri & Raja Bersiong: the King with Fangs*, Part III *Bawang Putih Bawang Merah & the Fairy Princess of Gunung Ledang*, Part IV *the Adventure of Musang Berjanggut & Sanggul Beracun: the Revenge of Cik Siti* and Part V *Tun Teja: Tale of Love & Betrayal, & Pak Belalang: the Astrloger*.²³ In Indonesia, art performances in the form of theater whose stories are based on folklore are also being used as a tool for tourism promotion^{24,25} amid the raging COVID-19. Supported by the Ministry of Tourism and Creative Economy and in collaboration with the Australian Marketing Institute (AMI) in a virtual event on 29 August 2020, a theatrical art performance entitled *The Indonesian Folk Tales - Putri Mandalika* series, a folk tale from Lombok (West Nusa Tenggara) succeeded in attracting as many as 2000 viewers.²⁶

Given the inherited cultural commonalities between Malaysia and Indonesia, it is not surprising that many folklores are common to both countries, with some variations in names and locale, as illustrated in Table 1 below. Indeed, both countries are part of the Malay Archipelago or *Nusantara*,²⁷ comprising the modern nation-states of Malaysia, Indonesia, Singapore, Brunei and the southern part of Thailand. The people of Nusantara are united by their shared culture and language, yet there have occasionally been disputes about who is the rightful owner of particular pieces of folklore.

| Types of folklore | Malaysian | Indonesian |
|---------------------------------|----------------------------------|----------------------------------|
| Folk tales | <i>Badang</i> | <i>Si Badang</i> |
| | <i>Mat Jenin</i> | |
| | <i>Bawang Merah Bawang Putih</i> | <i>Bawang Merah Bawang Putih</i> |
| | <i>Raja Bersiong</i> | |
| | <i>Si Tanggang</i> | <i>Si Tanggang</i> |
| | <i>Musang Berjanggut</i> | |
| | <i>Tun Teja</i> | |
| | <i>Pak Belalang</i> | <i>Pak Belalang</i> |
| Folk song | <i>Rasa Sayang</i> | <i>Rasa Sanyange</i> |
| | <i>Wau Bulan</i> | <i>Soleram (Suliram)</i> |
| | <i>Tepuk Amai-Amai</i> | <i>Lancang Kuning</i> |
| | <i>Burung Kakak Tua</i> | <i>Burung Kakak Tua</i> |
| | <i>Geylang Sipaku Geylang</i> | <i>Tudung Periuk</i> |
| Folk dance (eg, <i>Pendet</i>) | <i>Boria</i> | <i>Tari Reog Ponorogo</i> |
| | <i>Dabus</i> | <i>Tari Tor Tor</i> |
| | <i>Dikir Barat</i> | |
| | <i>Joget</i> | |

Table 1: Examples of Folklore in Malaysia and Indonesia

In 2007, the Malaysian Tourism Board adopted the *Rasa Sayang* song in their marketing campaign, much to the chagrin of Indonesia, which is Malaysia's neighbour. The song is thought to be an old Indonesian folk song that came from the Maluku Islands and was sung by the Indonesian people for a very long time. According to Indonesia, foreign claims to Indonesia's folklore were seen to be a misappropriation of its folklore.²⁸ Indonesia's claim was bolstered by copyright law and the perspectives of the historical background of the song.

¹¹ Manas Kumar Ganguli, Laina Rafianti & Sabuj Kumar Chandhuri, Policy Framework for the Protection of Cross Border Traditional Song-Baul: A Case Study. *Pertanika Journal of Social Sciences and Humanities* (2019) 27 (4): 2687-2702

¹² Some famous folk tales are *Badang*, *Mahsuri*, *Puteri Gunung Ledang* and *Puteri Lindungan Bulan*.

¹³ Puisi lama yang biasanya terdiri daripada empat baris dalam tiap-tiap rangkap (baris pertama merupakan pembayang maksud dan yang selainnya mengandungi maksudnya). *Pantun* is part of poetry which consist of four lines of An old poem that usually consists of four lines in each stanza (the first line is a foreshadowing of the meaning and the rest contains the meaning).

¹⁴ *Syair* is a traditional Malay poem made up of four-line stanzas with a similar rhythm at the end of the stanza.

¹⁵ *Gurindam* is a form of poetry that consisting of two lines, containing various lessons.

¹⁶ Puisi yang mengandungi ajaran (sindiran, jenaka dll). Poems that contain teachings (satire, humor, etc.)

¹⁷ Manas Kumar Ganguli, Laina Rafianti & Sabuj Kumar Chandhuri, Policy Framework for the Protection of Cross Border Traditional Song-Baul: A Case Study. *Pertanika Journal of Social Science and Humanities* (2019) 27 (4): 2687-2702

¹⁸ Ida Madiha Azmi, Tragedy of the Commons: Commercialization of Cultural Heritage in Malaysia. *Queen Mary Journal of Intellectual Property* (2012) 2(1): 66-78

¹⁹ Nurlaila and Agus Nursalim, "Roro Jonggrang: Animation Of Folklore For National Cultural Education Media," *Rekam* 18, no. 1 (2022), <https://doi.org/10.24821/rekam.v18i1.6699>.

²⁰ Ady Prawira Riandi, "Cerita Rakyat Indonesia Yang Diangkat Ke Dalam Film." *Kompas*, 2022, <https://entertainment.kompas.com/read/2022/11/30/153942066/cerita-rakyat-indonesia-yang-diangkat-ke-dalam-film?page=all>.

²¹ Heri Setyawan, "Membangun Film Animasi Cerita Rakyat Indonesia," *Jurnal Komunikasi Profetik* 6, no. 1 (2013): 31-42, <https://ejournal.uin-suka.ac.id/isoshum/profetik/article/view/1174>.

²² Zuhriah, M. Hasbi Salim, Alpansyah, Siti Jumariyah, *Antologi Cerita Rakyat Nusantara* (Jakarta: Pusat Bahasa Departemen Pendidikan Nasional, 2007).

²³ Performing Arts Centre of Penang (PenangPac) <https://www.cloudjoi.com/org/performing-arts-centre-of-penang>. Unfortunately, PenangPac had ceased operation on 15 Jan 2022 due to the aftermath of covid-19 pandemic.

²⁴ Alpan Ahmadi Baiq Yulia Kurnia Wahidah, "Analisis Pengaruh Bau Nyale Sebagai Salah Satu Ikon Pertamina Sirkuit Mandalika Dalam Pelestarian Kearifan Lokal," *Jurnalistrendi : JURNAL LINGUISTIK, SASTRA, DAN PENDIDIKAN* 7, no. 2 (2022): 132-37, <https://doi.org/https://doi.org/10.51673/jurnalistrendi.v7i2.1155>.

²⁵ Nuning Juniarshih Ratih Rahmawati, Taufiq Ramdani, "Potential Development of Bau Nyale Tradition as Cultural Tourism in Lombok," *SANGKÉP: Jurnal Kajian Sosial Keagamaan* 5, no. 2 (2023): 149-56, <https://journal.uinmataram.ac.id/index.php/sangkep/article/view/6790>.

²⁶ Vien Dimiyati, "Indonesian Folk Tales Tunjukkan Sektor Parekraf Produktif Di Tengah Pandemi (Indonesian Folk Tales Show That the Tourism and Creative Economy Sectors Are Productive in the Midst of a Pandemic)," *Inews*, 2020, <https://www.inews.id/travel/destinasi/indonesian-folk-tales-tunjukkan-sektor-parekraf-produktif-di-tengah-pandemi>.

²⁷ O Puteh, *Sastera Remaja ditinjau daripada Beberapa Perspektif (Adolescent Literature from Several Perspective)* Dewan Bahasa dan Pustaka (1989 Kuala Lumpur); Yusten Karulus, *The Indonesia-Malaysia Cultural Heritage Dispute: A Case Study of the Pendet Dance and Rasa Sayang Song*. 2019. MANU. 29(Jun): 137-172

²⁸ Afifah Kusumadara, 'Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures' (2011) 8 US-China Law Review, 548-565.

According to Edward Pea, the song "Rasa Sayange" was a creation of Paulus Pea, his older brother and a musician from Maluku.²⁹ In 1958, the song was recorded at a state-owned sound recording company, PN LOKANANTA, located in the city of Solo, in the form of gramophone long-playing records.^{30,31,32} Jero Wacik, the Minister of Culture and Tourism in 2007, contended that they found evidence that in 1958 PN LOKANANTA had recorded the song "Rasa Sayange".^{33,34} He also explained in more detail the history of the Rasa Sayange song so that it can be known outside Indonesia. He explained that the song is actually a Maluku folk song that has long been known by the Indonesian people. When Indonesia hosted the Asian Games in 1962, the President of the Republic of Indonesia at that time, Mr. Soekarno, distributed 100 vinyl records as souvenirs to all heads of delegations from each country. Each LP contains 8 Indonesian folk songs, one of which is the song "Rasa Sayange" recorded by PN LOKANANTA.³⁵

A musician from Maluku, Christ Pattikawa, added that another possibility is that the song Rasa Sayange became widely known in Malaysia due to a visit by an Indonesian cultural mission to Malaysia. In addition, it is also possible that the move of a Jakarta Symphony Orchestra (RRI) conductor, Syaiful Bachri, to Malaysia in the 1960s, was one of the factors that caused the song to become widely known in Malaysia through the scores of the songs he brought and played in that country.³⁶

Malaysia equally said that the *Rasa Sayang* song is a Malaysian folk song on the basis of that. The clash between Malaysia and Indonesia over folklore claims illustrates the tenacity of geographical borders between countries with similar ethnic, linguistic and cultural origins.³⁷ Indonesian authors argued that other possible conflict also involves *Batik, Tari Reog Ponogoro, Wayang Kulit, Lagu Rasa Sayange, Rendang, Angklung, Tari Pendet and Tari Piring, Kuda Lumping*,³⁸

Although it is feasible to argue that both nations have legitimate claims to the song, it would be impossible for Malaysia or Indonesia to assert exclusive ownership without solid proof of the song's musical origins. Claims conflict between countries with inherited cultural similarities, like Malaysia and Indonesia, are distinct from issues of misappropriation. The latter involves unjustified appropriation of folklore, whereas claims of conflict usually occur between countries with similar and shared cultural traits. An ethnomusicologist from Singapore asserted that the Rasa Sayang song was a common ASEAN song, even though not all ASEAN member nations share the melody.³⁹

Folklore and Copyright in Malaysia

In Malaysia, the Copyright Act 1986 grants the owner of copyright a statutory exclusive and transferable right for a specific period. Literary works, musical works, artistic works, films, sound recordings, and broadcasts are the types of works covered by section 7 of the Copyright Act 1987, while derivatives of these works are protected by section 8 of the same Act. The Malaysian government has adopted a voluntary notification mechanism for copyright, rendering copyright registration not mandatory. Under the Act, the protection for "folklore" is insufficient and constrained. Folklore and folk music may be regarded as literary and musical works, respectively, but the oral nature of folklore and the need for originality and fixation under copyright laws hinder the recognition of such works.⁴⁰ Folklore as such is not protected under copyright, and it is not unlawful for others to use it for their own purposes. This opens the door for others to adapt, adopt, and change the folklore and claim ownership of the resulting new works. Ida asserts that there is a gap in the existing copyright law for folklore.⁴¹ The Act only refers to folklore once, in the context of live performance." Section 3 of the Act states that a performance includes 'a performance in relation to the expression of folklore, which is given by one or more persons in Malaysia, whether in the presence of an audience or otherwise.' But it does not preclude new renditions of folklore from being protected as works if the copyright requirements of originality and fixation are met, such as when folktales, folk music, and folk epics are adapted into contemporary urban culture in the form of film, music, anthologies, and theatre. Without a specific acceptance of "folklore" as works, it is unclear what kinds of folklore are protected, leaving the phrase open to judicial interpretation.

Folklore and Copyright in Indonesia

Indonesia's familiarity with the Copyright Law dates back to its historical period prior to achieving independence in 1945. *The Auteurswet* (1912) or a copyright law, was introduced during the Dutch colonial era (1602-1942) and continued to be enforced through the Japanese occupation (1942-1945) and into the early stages of Indonesian sovereignty. In 1982, the initial Copyright Law of the nation (Law Number 6 of 1982) was effectively enacted, and subsequently underwent four amendments in 1987, 1997, 2002, and 2014.^{42,43}

Substantially, Indonesia's Copyright Law provides protection for a diverse array of creations in the domains of art, literature, and science. This encompasses written materials, speeches, educational aids, musical compositions, dances, visual arts, applied arts, cartography, photography, cinematic works, adaptations, and software.⁴⁴ Aside from this encompassing range, the Indonesian Copyright Law also addresses Traditional Intellectual Property Rights through distinct provisions, forming part of a holistic approach to safeguarding intellectual assets stemming from traditional cultures.⁴⁵ This safeguarding has been in place since the introduction of the inaugural national

²⁹ Ary B Pass, "Lirik Lagu Rasa Sayange Ciptaan Paulus Pea," KR Jogja, 2023, <https://www.krjogja.com/musik/1242457238/lirik-lagu-rasa-sayange-ciptaan-paulus-pea>.

³⁰ Febe Bachtiar, "Perlindungan Hukum Ekspresi Budaya Tradisional (Folklore) Dalam Rangka Pemanfaatan Potensi Ekonomi Masyarakat Adat Jepara" (Universitas Indonesia, 2011), <https://lib.ui.ac.id/detail?id=20166940&lokasi=lokal>.

³¹ Ruslam Burhani, "Lagu 'Rasa Sayange' Terbukti Milik Indonesia," Antaranews (Kantor Berita Indonesia), 2007, <https://www.antaranews.com/berita/80288/lagu-rasa-sayange-terbukti-milik-indonesia>.

³² Pass, "Lirik Lagu Rasa Sayange Ciptaan Paulus Pea."

³³ Priyambodo RH, "Lagu Rasa Sayange Pertama Kali Direkam Di Lokananta," Antaranews (Kantor Berita Indonesia), 2007, <https://www.antaranews.com/berita/80046/lagu-rasa-sayange-pertama-kali-direkam-di-lokananta>.

³⁴ Bachtiar, "Perlindungan Hukum Ekspresi Budaya Tradisional (Folklore) Dalam Rangka Pemanfaatan Potensi Ekonomi Masyarakat Adat Jepara."

³⁵ Burhani, "Lagu 'Rasa Sayange' Terbukti Milik Indonesia."

³⁶ Burhani.

³⁷ Ida Madieha Azmi, Tragedy of the Commons: Commercialization of Cultural Heritage in Malaysia. *Queen Mary Journal of Intellectual Property* (2012) 2(1): 66-78

³⁸ 8 Budaya Indonesia Pernah Diklaim Malaysia, dari Batik hingga Wayang Kulit. < <https://nasional.sindonews.com/read/601555/15/8-budaya-indonesia-pernah-diklaim-malaysia-dari-batik-hingga-wayang-kulit-1637100680?showpage=all> accessed 20 August 2022;

WIPO, The Protection of Traditional Cultural Expressions: Draft Articles Facilitators' Rev. (2019). Available at <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tc.es.pdf> accessed 25 June 2021.

³⁹ The Asian Journal: The Rasa Sayang Controversy https://www.nas.gov.sg/archivesonline/audiovisual_records/record-details/609a2d8e-1164-11e3-83d5-0050568939ad

⁴⁰ Ida Madieha Azmi, Tragedy of the Commons: Commercialization of Cultural Heritage in Malaysia. *Queen Mary Journal of Intellectual Property* (2012) 2(1): 66-78

⁴¹ Ida Madieha Abdul Ghani Azmi, Voices from the Dead: the Uneasy Case of Indigenous Cultural Expression. *International Journal of Law and Management* (2016) 59 (4): 522-533

⁴² Tomi Suryo Utomo, *Perlindungan Hak Kekayaan Intelektual Di Era Global – Sebuah Kajian Kontemporer* (Yogyakarta: Graha Ilmu, 2010): 6.

⁴³ HKI Ditjen and IPRs Co-operation Programme EC-ASEAN, *Buku Panduan Hak Kekayaan Intelektual Dilengkapi Dengan Peraturan Perundang-Undangan Di Bidang Hak Kekayaan Intelektual* (Jakarta: Ditjen HKI - ECAP II, 2006): 9.

⁴⁴ Article 40 of the Indonesia Copyright Law (Law Number 28 of 2014).

⁴⁵ Modern copyright protection and traditional intellectual property are regulated in different articles. The Article 40 is intended for creations based on individual rights while Article 38 is used to protect traditional cultural expressions.

copyright law in 1982, which replaced the previous colonial-era Dutch copyright law.⁴⁶ The main objective of folklore protection in Indonesia centers on granting the state the power to oversee and safeguard Indonesian folklore to prevent foreign exploitation and misappropriation.^{47,48,49}

This strategy seems to be significantly influenced by the 1971 Berne Convention, which endorsed the integration of folklore protection into copyright law based on outcomes from the 1967 Stockholm Diplomatic Conference.⁵⁰ Additionally, the provisions for folklore protection within the Indonesian Copyright Law stem from Indonesia's distinct attributes, characterized by its diverse cultures (comprising 1,239 intangible cultural heritages)⁵¹ and its variety of ethnic communities (consisting of 1,340 separate ethnic groups).^{52,53} With a population of 278 million⁵⁴ and an expansive territory spanning over 17,000 islands^{55,56}, Indonesia stands as the world's most extensive archipelagic nation.^{57,58} Its cultural wealth encompasses a multitude of expressions, including traditional dances, musical heritage, village arts, and folk traditions intrinsically intertwined with local mysticism, philosophical foundations, religious convictions, and cultural motives.^{59,60,61}

As per Article 38 of the Current Indonesian Copyright Law (Law Number 28 of 2014) and its official elucidation, the term "folklore" has been replaced with "Traditional Cultural Expressions" (TCE), outlining the parameters of TCE encompassing forms of communication such as verbal (oral and written), music, movement (including dance), theater (comprising Wayang or puppet performances and folk plays), fine arts (both two-dimensional and three-dimensional with diverse materials), and customary ceremonies. This covers various modes of communication, including literary creations, vocal and instrumental music, dance choreography, customary theatrical presentations, artwork involving a range of materials, and customary rituals.⁶² The extent of safeguarding includes all these aspects rooted in traditional culture and passed down across generations. The State is entrusted with the duty to preserve and uphold TCE, ensuring its respectful use in harmony with traditional cultural values and practices.

IPR experts frequently engage in scholarly dialogues concerning the contrasting attributes of folklore and copyright protection. A notable distinction lies in the communal essence of folklore versus the individual-centric essence of copyright. Unlike copyright, folklore lacks a distinct originator and is intricately tied to the lives of its participants, leading to indefinite protection. Conversely, copyright emphasizes creators' exclusive rights and necessitates precise specifications of scope, rights holders, and protection duration.^{63,64} Within this context, safeguarding folklore should occur beyond the modern intellectual property rights framework, but rather necessitates specialized regulation or a separate Folklore Law (Sui Generis system).^{65,66,67,68} Indonesia is currently working on measures for safeguarding folklore outside the Copyright Law, although the bill's consideration remains pending at both executive and legislative levels.

The incorporation of folklore protection clauses within the Indonesian Copyright Law generated feedback from experts, underscoring the absence of implementing regulations that subsequently affected the protection itself.⁶⁹ Kutty highlighted that the protection of folklore within the Indonesian Copyright Law remains insufficient due to the absence of comprehensive regulations, creating a gap in protecting cultural products of communal significance.⁷⁰ Several challenges arise, including unclear guidelines on managing foreign utilization, fair royalty distribution from the use of traditional cultural expressions, and the recipients of such payments.⁷¹ Moreover, the provision designating state copyright over communal property primarily for thwarting foreign commercial misappropriation can yield complications. Although intended to allow unrestricted use for Indonesian citizens, this provision lacks specificity regarding potential local business exploitation of folklore elements. The uncertainty surrounding customary law's role in intellectual property protection exacerbates the issue. The limitations of the Copyright Law concerning folklore's regulation could result in insufficient defense of tangible folklore elements, thereby potentially permitting local and foreign exploitation⁷², ultimately jeopardizing folklore's preservation.

The concerns raised by Kutty also align with the reservations and critiques expressed by several Indonesian intellectual property experts. Afifah Kusumadara criticized the provisions related to benefit sharing outlined in the proposed Bill. She specifically highlighted that the scope of benefit sharing should encompass not only foreign entities but also extend to Indonesians and domestic companies. It is suggested that the benefit-sharing framework within the PT EBT Bill should cover both monetary and non-monetary compensation, acknowledging the

⁴⁶ The Indonesian Copyright Law of 1982 acknowledges the state's entitlement to historical heritage and national cultural assets, encompassing narratives, songs, and handicrafts, and extends safeguarding to cultural outcomes shared as communal property. Yet, the phrase employed to denote folklore is "benda budaya nasional" or "national cultural property" and the provisions regarding these aspects remain relatively unspecified.

⁴⁷ Utomo, *Perlindungan Hak Kekayaan Intelektual Di Era Global – Sebuah Kajian Kontemporer*: 71.

⁴⁸ P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines*, Study No 2 (New Delhi: World Intellectual Property Organization, 2002): 32, https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf.

⁴⁹ Lindsey Tim et al., *Hak Kekayaan Intelektual (Suatu Pengantar)* (Bandung: Alumni, 2003): 278.

⁵⁰ Tim et al, 278.

⁵¹ Vika Azkiya Dihnii, "Jumlah Warisan Budaya Takbenda Di Indonesia Menurut Kategori (2013-2020)," *Databoks*, 2021, <https://databoks.katadata.co.id/datapublish/2021/09/21/indonesia-miliki-1239-warisan-budaya-takbenda>.

⁵² Indonesia - Portal Informasi Indonesia, "Suku Bangsa," Indonesia - Portal Informasi Indonesia, 2017, <https://indonesia.go.id/profil/suku-bangsa/kebudayaan/suku-bangsa>.

⁵³ Badan Pembinaan Hukum Nasional, "Naskah Akademik Rancangan Undang-Undang Tentang Folklor," *Naskah Akademik* (Jakarta, 2009): 32, https://bphn.go.id/data/documents/na_ruu_tentang_folklor.pdf.

⁵⁴ As of April 25, 2022, Worldometer published statistics indicating that Indonesia's overall population reached 278,752,361 individual Monica Ayu Caesar Isabela and (Editor), "Jumlah Penduduk Indonesia 2022," *Kompas Nasional*, 2022, <https://nasional.kompas.com/read/2022/04/27/03000051/jumlah-penduduk-indonesia-2022>.

⁵⁵ Indonesia, "Jumlah Pulau Di Indonesia Capai 17.000," Indonesia - Portal Informasi Indonesia, 2017, <https://indonesia.go.id/profil/suku-bangsa/kebudayaan/suku-bangsa>.

⁵⁶ Kementerian Luar Negeri Republik Indonesia, "Indonesia at a Glance," *Konsulat Jenderal Republik Indonesia*, 2016, https://kemlu.go.id/vancouver/en/pages/indonesia_at_a_glance/2016/etc-menu.

⁵⁷ The World Factbook, "Explore All Countries - Indonesia," CIA, 2023, <https://www.cia.gov/the-world-factbook/countries/indonesia/>.

⁵⁸ Anastasia Anjani, "10 Negara Kepulauan Terbesar Di Dunia, Salah satunya Indonesia," *Detik*, 2021, <https://www.detik.com/edu/detikpedia/d-5679064/10-negara-kepulauan-terbesar-di-dunia-salah-satunya-indonesia>.

⁵⁹ James R Brandon, *The Performing Arts in Asia* (Paris: United Nations Educational, Scientific and Cultural Organization, 1971): 10, <https://unesdoc.unesco.org/ark:/48223/pf0000003091>.

⁶⁰ F. McCarth Kevin et al., *The Performing Arts in a New Era* (Pittsburg: RAND, 2001): 5, https://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1367.pdf.

⁶¹ Joan Kee, *Models of Integrity: Art And Law In Post-Sixties*, First Edit (Oakland: University of California Press, 2019): 1.

⁶² The protection of folklore in the Indonesian Copyright Law has undergone changes since 1982 through 4 series of substantial amendments. Initially, the 1982 Copyright Law acknowledged the state's rights to historical and cultural works and protected cultural products collectively. The 1987 Copyright Law introduced significant changes by recognizing state rights over various works, but common cultural products remained unprotected. The 1997 Copyright Law brought more changes, specifying copyright for unknown creators. Law no. 19 of 2002 further detailed copyright protection for unknown creators, compared to previous laws. The Copyright Act of 2014 represented a significant advancement by introducing the concept of Traditional Cultural Expressions (TCE), superseding the previous use of the term folklore. Under this updated terminology, TCE encompasses a broader spectrum of cultural expressions, with the state being accountable for inventorying, safeguarding, and upholding traditional culture and its inherent values.

⁶³ Nasional, "Naskah Akademik Rancangan Undang-Undang Tentang Folklor: 16-17".

⁶⁴ Andhika Putra Herzani, "Peran Pemerintah dalam Menginventarisasi Ekspresi Budaya Tradisional Indonesia," *Jurnal Hukum & Pembangunan* 50, no. 4 (2021): 956-978, <https://doi.org/10.21143/jhp.vol50.no4.2865>.

⁶⁵ Nasional, "Naskah Akademik Rancangan Undang-Undang Tentang Folklor: 28."

⁶⁶ Tim et al., *Hak Kekayaan Intelektual (Suatu Pengantar)*: 363.

⁶⁷ Yeni Eta, "Rancangan Undang-undang Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Ditinjau dari Aspek Benefits Pasal 8J UNCBD," *Arena Hukum* 7, no. 3 (2014): 458-471, <https://doi.org/10.21776/ub.arenahukum.2014.00703.8>.

⁶⁸ Burton Ong, "Harnessing the Biological Bounty of Nature: Mapping the Wilderness of Legal, Socio Cultural, Geo Political and Environmental Issues," in *Intellectual Property and Biological Resources* (Singapore: Marshall Cavendish Academic, 2004), 8 - 9.

⁶⁹ Kutty, *National Experiences with the Protection of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines*: 31.

⁷⁰ Kutty: 31 -32.

⁷¹ Kutty: 31.

⁷² Kutty: 32.

involvement of Indonesian individuals and companies in the commercial exploitation of Indonesia's traditional cultural expressions. These enterprises span various sectors such as textiles, entertainment, cosmetics, and herbal products.⁷³

Additionally, Kusumadara voiced her worries about the lack of clarity and coordination surrounding the documentation of Indonesia's traditional cultural expressions, particularly between pertinent government bodies and among local communities, local administrations, and the central government.⁷⁴ She recommended establishing a comprehensive inventory of these expressions through documentation and a centralized database. This initiative would require the designation of a specific ministry to oversee such tasks and the establishment of collaborative protocols among relevant ministries. The process of documenting traditional cultural expressions by local communities and regional governments should also be streamlined and integrated with the efforts of the central government, necessitating a cohesive cooperative framework.⁷⁵

Amidst various critiques surrounding the presence of the Folklore provisions within the Copyright Law, a positive development emerged in 2017 that brought about hopeful prospects for folklore protection in Indonesia. Effective from May 24, 2017, the Indonesian Culture Advancement Law (Law Number 5 of 2017) came into force. However, the Bill on the Protection and Utilization of Traditional Knowledge and Traditional Cultural Expressions related to Intellectual Property (PT&EBT Bill) is still awaiting approval.

The question arises: can the Culture Advancement Law sufficiently address the gaps in folklore protection under the Indonesian Copyright regime, a concern frequently raised by IP experts and scholars? The answer lies in the necessity of both laws. Despite their distinct purposes, these laws can complement each other. While the Culture Advancement Law aims to diversify culture, strengthen national identity, and educate the populace, the PT&EBT Bill centres on safeguarding intangible traditional cultural heritage against misuse by foreign entities.⁷⁶

The scopes of the Law and the Bill also differ. The Law on the Advancement of Culture emphasizes efforts to improve cultural resilience and contribute to Indonesian culture through culture protection, development, and utilization, related to community works like oral traditions, manuscripts, customs, and more.⁷⁷ On the other hand, the PT & EBT Bill centres on safeguarding and commercial use of intellectual property connected with artistic endeavours, including literary forms that encapsulate distinctive features of traditional heritage. These expressions are created, advanced, and upheld by local communities or cultural practices.⁷⁸ Additionally, the PT&EBT Bill addresses the Copyright Law's deficiencies in protecting traditional expressions with more precision. In conclusion, both laws are imperative to ensure a comprehensive shield for Indonesia's cultural heritage.

Conclusion

In conclusion, the protection of expressions of folklore under copyright law presents both conceptual and practical challenges, particularly due to issues of authorship, originality, and fixation. While Malaysia and Indonesia have demonstrated a commitment to safeguarding their cultural heritage, existing national legal frameworks remain limited in addressing the transboundary nature of shared folklore. The Rasa Sayang dispute exemplifies how overlapping cultural claims, when unsupported by clear documentation and cooperative mechanisms, can give rise to tension between neighbouring states.

This paper has argued that the application of principles such as national treatment and collective ownership offers a potential pathway to recognise and protect shared cultural expressions more equitably. However, without a structured framework for regional collaboration, such principles alone are insufficient to prevent recurring disputes. Therefore, it is imperative for countries within the Nusantara region to move beyond unilateral approaches and establish coordinated legal and institutional mechanisms. Strengthening regional cooperation would not only mitigate conflict but also enhance the collective capacity to protect folklore from misappropriation by external entities. Ultimately, a balanced approach that integrates national laws with regional initiatives is essential to ensure the preservation, respect, and sustainable use of shared cultural heritage.

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⁷³ Afifah Kusumadara, "Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures," *US-China Law Review* 8, no. 6 (2011): 37, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/uschinalrw8&div=48&id=&page=>.

⁷⁴ Kusumadara: 27.

⁷⁵ Kusumadara: 27-28.

⁷⁶ This conclusion is obtained by comparing the provisions of the Culture Advancement Law (Article 1 point 3 concerning the description of Culture Advancement and Article 4) and the PT&EBT Bill (Article 1 point 4 and 6 regarding the explanation of Protection and Utilization).

⁷⁷ Article 1 point 3 and Article 5 of the Indonesian Law on Advancement of Culture.

⁷⁸ Kusumadara, "Protection and Sustainability of Indonesian Traditional Knowledge and Folklore: Legal and Non-Legal Measures: 23."

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