

*Research Article***Quo Vadis Traditional Cultural Expressions Protection: Threats from Personal Intellectual Property and Artificial Intelligence**

Ni Ketut Supasti Dharmawan<sup>1\*</sup>, Desak Putu Dewi Kasih<sup>2</sup>, Putu Aras Samsithawrati<sup>3</sup>, Putri Triari Dwijayanthi<sup>4</sup>, Made Suksma Prijandhini Devi Salain<sup>5</sup>, Mirah Mahaswari<sup>6</sup>, Made Grazia Ustriyana<sup>7</sup>, Robert Vaisile Moisa<sup>8</sup>

<sup>1,2,3,4,5</sup>Faculty of Law, Universitas Udayana, Indonesia

<sup>6</sup>School of Social Science, Faculty of Arts, Monash University, Australia

<sup>7</sup>Nishimura & Asahi, Singapore

<sup>8</sup>National University of Political and Administrative Studies, Bucharest, Romania

\*supasti\_dharmawan@unud.ac.id

**ABSTRACT**

Legal certainty for Communal Intellectual Property protection on the inventory and record-keeping arrangements in terms of ownership proof in Indonesia, has increasingly been regulated in various regulations. However, threats are also growing. Traditional Cultural expression works are easily turned into personal video works. Along with that, such works are also vulnerable as those are easily threatened by Artificial intelligence's ability to express works made from previous works of art such as paintings. This article aims to analyze Traditional Cultural Expressions protection which are transformed or adapted into personal works or works made by Artificial Intelligence and the measures to overcome these threats. The results show that referring to Government Regulation 56/2022, the commercial use of Traditional Cultural Expressions works both in the form of adaptation and transformation by individual humans and Artificial Intelligence is required to obtain a permit and pay attention to the distribution of benefits which will further be determined by the Minister. However, regulations on this mechanism has not been explicitly regulated. Measures to overcome threats can be made through measures to turn threats into opportunities and strengths. It is also relevant to prioritize countervailing measures, namely by following the pattern of threats as a balancing act.

**Keywords: Countervailing Measures; Threats; Traditional Cultural Expressions**

**A. INTRODUCTION**

Indonesia is a country that is famous in the world not only for its beautiful natural panorama but also for its traditional arts and culture. For example, Bali is already known worldwide as one of the provinces in Indonesia that has rich arts and cultures (Soeprapto, & Yohana, 2021). Bali has various nicknames such as *Pulau Dewata* or the Island of the Gods (Arini, Paramita, & Triana, 2020) and the last paradise (Kamajaya, &

Nugroho, 2020). These existing works of traditional art and culture have existed for a long time and have been maintained, guarded, and preserved by the various communities that support them in each region across generations. This management is motivated by the custodial community's ideals (Nurhasanah, Siburian, & Fitriana, 2021). Art and culture are very useful in supporting the tourism sector. With strong tourism potential, human resources, and historical as well

as economic aspects can be created (Saputra 2020).

Works of art that are created on the basis of human intellect can be given protection from an Intellectual Property Rights (IPR) perspective. IPR is a right given to people who are able to create works from their thoughts (Husny, 2023). Indonesia's participation as a member country of the World Trade Organization (WTO) brought impact on IPR protection in Indonesia where the IPR law in Indonesia has been changed and adapted to meet the standards set out under Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement (Geofrey, & Roisah, 2020).

The works that are the focus in this study are those included in Communal IPR. Communal IPR works is one of the tourist attractions and; therefore, able to support tourism activities and produce economic benefits. The various types of Communal IPR, this article specifically discusses Traditional Cultural Expressions (TCEs) works. The expression of TCE's work is not individual but shared by a collective entity which is a small group or indigenous people (Kusuma, & Roisah, 2022).

Traditional cultural expressions are part of cultural expressions, namely "the results of group and community creativity, which have cultural content, in this context, expressing cultural identity through symbolic meaning, artistic dimensions and cultural values. In connection with the existence of cultural content is the reason why traditional cultural expressions have

historically been associated with copyright (Martinet, 2019).

TCE protection is related to intangible cultural heritage and traditional knowledge, which contains cultural content and traditions. Susanti, Susrijani, & Sudhiarsa (2019) stated that international organizations such as UNESCO are more concerned with protecting cultural heritage from a "safeguarding" perspective, while WIPO is more concerned with the legal "protection" of intellectual and cultural heritage. WIPO uses Intellectual Property Rights (IPR) as a legal basis for protection that aims to prevent the use of TK/TCE that is not approved by the community of origin or inappropriate use (Susanti, Susrijani, & Sudhiarsa, 2019).

In national level, Indonesia as a member of international convention related to Intellectual Property protection, and also in fact is very rich with creation works in the field of TCE/TK, therefore, the Indonesian government has been seen to pay attention to Communal IPR through various legal regulations in the Communal IPR sector.

The Indonesian government has been seen to pay attention to Communal IPR through various legal regulations in the Communal IPR sector. The latest of which is Government Regulation Number 56 of 2022 concerning Communal Intellectual Property (PP 56/2022). However, there are still various threats that must be faced in this digital era. The digital era with all its technological sophistication brings not only profits

for one person but also potential losses for other parties. TCE's work cannot be separated from the threat of transformation or adaptation into personal work by other people outside the custodial community or work created by Artificial Intelligence (AI). Social media is known to provide a digital platform for people around the world (Purwanto, Fahmi, & Cahyono 2023). These threats and their commercialization without permission can easily be carried out by other parties outside the custodial community. For example, TCE's dance work is adapted into a personal video work recorded by the viewer and can easily be commercialized by uploading it to such viewer's personal social media. Currently, AI is also able to transform famous paintings, such as Vincent Van Gogh's paintings, to appear alive and real (Ayuningtyas, 2023).

AI also can produce other IPR works. Ramli et al (2023) elaborate that AI was created by humans, and is a simulation of human intelligence that is modeled in machines and programmed to think like humans. Currently, AI even can produce works of IPR like humans, such as creating songs, making new inventions, as well as making industrial designs.

The question arises, whether AI can be qualified as a legal subject of creator, inventor, or designer and then register as IPR. Simply, AI can produce works as humans and has implications for IPR such as in the fields of copyrights (Ramli et al, 2023). It can be considered as a new threat in the field of IPR including Communal IPR.

Another empirical fact related to the threat of personal ownership of communal IPR can be elaborated on in the Turmeric Patent Case which is the traditional knowledge of Indian society and is also related to Geographical Indications. Indonesia also has local wisdom in the form of traditional knowledge, as does India, which is also vulnerable to the threat of personal ownership if comprehensive protection is not carried out early on. For example, the local wisdom of the people of South Sulawesi regarding genetic resources by using Paliasa leaves (*Kleinhovia hospita* Linn.) as a medicinal plant. which is well documented in the ancient text "*lontarak pabbura*" and was organized by Ammatoa as a Kajang traditional leader. Therefore, a protection model is needed to protect traditional knowledge and genetic resources related to traditional knowledge through a *sui generis* system as a model of positive protection and defensive protection to provide comprehensive protection for the traditional knowledge of the Indonesian people (Adhiyatma, & Roisah, 2020). It is only a matter of time that AI can also do the same with Communal IPR's work. So, it is important to analyse the protection of TCEs that are transformed or adapted into personal works or works created by AI and the steps that can be taken to overcome this threat.

There are similar previous studies such as those conducted by: (1) Gema (2022) which raised legal regulations related to creation as input data for the development of Artificial Intelligence (Gema, 2022); (2) Sawitri and Dharmawan (2020) who raised the issue of

transforming *lontar* creative works in the form of digitization (Sawitri, & Dharmawan 2020); (3) Purwandoko, Sulistiyono, & Hawin (2021) raised the issue related to the protection of TCE in Indonesia by recommending that the government regulate TCE protection by developing a legal culture in Indonesian society in the context of the importance of protecting TCE through inventory and having a database to ensure adequate and appropriate management of protection towards TCE to provide legal guarantees for the economic rights of indigenous peoples (Purwandoko, Sulistiyono, & Hawin, 2020); (4) The study of Heng Li (2023) shows that awareness of one's mistakes, beliefs, opinions, and knowledge, can increase a person's openness to experience in accepting ChatGPT. Humility is associated with a more favorable attitude towards ChatGPT, the results of the study show that Chinese university students with higher levels of intellectual humility are more accepting of ChatGPT, there is a causal relationship between intellectual humility and acceptance of AI. Intellectual humility plays an important role in accepting new technologies in the AI era (Li, 2023); (5) Desak Putu Dewi Kasih et.al 2021 emphasize that the protection of Traditional Knowledge and Traditional Cultures Expression is still vulnerable to the threat of exploitation by commercial actors. Therefore, it is needed to amend the law by considering both national law and international law by ensuring that international legal instruments can help traditional communities in the context of affirmative action for indigenous communities

(Kasih et al, 2021); (6) Hananto, & Prananda (2019) argue that the Geographical Indications legal instrument relevant to be used to protect traditional knowledge characterized by geographical conditions that are economically and spiritually considered valuable assets for the community of origin in the area (Hananto, & Prananda, 2019) (7) Alberto Vargas (2022) emphasize that WIPO's efforts to protect the culture of indigenous peoples have been going on for a long time, aiming to produce legal policies that can be widely adopted. WIPO is also considering new proposals relating to the protection of Sacred TCE. In this context, it is important to have a thorough justification argument regarding the definition of sacred. it is important to provide clarity as to what exactly is being granted protection. The goal of international protection for indigenous Intellectual Property is important and worth pursuing (Vargas, 2022). From the various studies that have been presented, the similarities are in the legal protection of Communal Intellectual Property Rights including TCE. However, this article has originality due to the focus of the discussion is the specific legal protection of TCE and steps to overcome threats to TCE that are transformed or adapted into personal works or works created by AI.

## B. RESEARCH METHODS

Research was carried out using socio-legal methods by analysing legal issues not only from legal perspective but also from cultural and

technological perspectives. There are some approaches that were used in this research: Conceptual, Analysis, Statute, Case, and Comparative approach. The primary data are collected by interviewing the relevant informant and respondent while the secondary data are collected by using snowball technique. All of those data were analyzed step by step started from description, comparison, interpretation, systematization, argumentation and evaluation.

### C. RESULTS AND DISCUSSION

#### 1. Protection of Traditional Cultural Expressions That Adapted into Personal Works or Work Created by AI

##### a. TCE Transformed or Adapted Into Personal Work

Indonesia is one of the countries with a very high level of cultural diversification (Roisah, 2021). In this regard, it is very important to have a mechanism to maintain the preservation of such diverse culture because it is vulnerable to extinction and there are many claims by foreign parties regarding ownership of TCE as a part of Indonesian culture (Roisah, 2021). One example, the *Pendet* dance from Bali, was once claimed by another country.

Reflecting on and learning from phenomena such as claims of works by foreign parties, the Indonesian government has actually taken good first steps in providing Communal IPR protection, including TCE. Communal IPR protection in Indonesia also in line with protection efforts at the international level. WIPO, which is

concerned about the protection of Traditional Knowledge (TK), TCEs and Genetic Resources (GR), continuously reviews its protection using all previously existing WIPO working documents, namely WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18 and WIPO/GRTKF/IC/40/19. Updates to the protection of GR, TK, and TCEs are also confirmed through IGC-mandate point d. through the 2022-2023 agenda, continuously update the protection of GR, TK, and TCEs, apart from using all previous WIPO working documents, also adding contributions from Member States, identifying domestic legal arrangements, impact assessments, databases, then compiling and making them available online information about national and regional *sui generis* regimes (Dharmawan et al, 2023).

In Indonesia currently, regulations regarding protection related to Communal IPR can be found in various provisions of law. TCE protection is stated in Article 38 of Law No. 28 of 2014 concerning Copyright (Law 28/2014). Protection of TK and GR is regulated through Article 26 of Law No. 13 of 2016 concerning Patents (Law 13/2016), as well as the protection of Potential Geographical Indications (PIG) regulated in Law No. 20 of 2016 concerning Trademark and Geographical Indications (Law 20/2016).

The current laws and regulations in Indonesia that specifically regulate Communal IPR are:

- a. Minister of Law and Human Rights Regulation Number 13 of 2017 concerning Communal

Intellectual Property Data (Permenkumham 13/2017); and

- b. the newest is PP 56/2022 concerning Communal IPR.

Other provisions related to Communal IPR protection in Indonesia can also be observed from the existence of Law No. 5 of 2017 concerning the Advancement of Culture (Law 5/2017) and Government Regulation No. 87 of 2021 concerning Implementation Regulation of Law 5/2017. The object of cultural advancement itself basically has a connecting thread with the work object protected in the Communal IPR regime. Furthermore, at the Bali local level, protection related to Communal IPR can refer to several provisions as follows:

- a. Bali Province Regional Regulation No. 4 of 2020 concerning Strengthening and Promoting Balinese Culture (Perda Bali 4/2020);
- b. Bali Governor Regulation No. 1 of 2020 concerning Management of Balinese Fermented and/or Distilled Drinks (Pergub Bali 1/2020);
- c. Joint Decree of the Chair of the Bali Province *Parisada Hindu Dharma* Indonesia, the *Bendesa Agung Majelis Desa Adat* of Bali Province, the Chair of *Majelis Pertimbangan dan Pembinaan Kebudayaan (Listibiya)*, the Head of the Bali Province Cultural Agency and the Chancellor of ISI Denpasar Number: 117/PHDI-BALI/IX/2019 on the Strengthening and Protecting Balinese Sacred Dance; and
- d. Gianyar Regent Regulation No. 86 of 2021 concerning the Protection of Regional Culture

and Intellectual Property (Perbup Gianyar 86/2021).

Before discussing further, the focus of this article, namely TCE which is transformed or adapted into personal work or work created by AI, it is important to first gain an understanding of what Communal IPR is. There are different styles in conveying the definition of what Communal IPR is in the two regulations. The definition of Communal IPR in Permenkumham 13/2017 can be found at the beginning of the General Provisions, namely in Article 1(1). The definition is more towards Communal IPR consists of several types, namely TK, TCE, GR and PIG. Meanwhile, in PP 56/2022 Communal IPR is defined in Article 1(1) by more elaborating on what Communal IPR is rather than defining it by mentioning its types. So according to Article 1(1) PP 56/2022, Communal IPR is IPR whose ownership is communal and has economic value by upholding several aspects, namely moral, social and national culture. In this case, the rights to Communal IPR are held by the state so that it is the state that has the obligation to carry out inventory, safeguard and maintain them (Article 3(1) and (2) PP 56/2022).

As has been explained, TCE is one type of Communal IPR. TCE is all forms of expression of creative works in the form of objects or intangibles or a combination of the two which shows the existence of a traditional culture that is held communally and across generations (Article 1(2) PP 56/2022). To be clearer, PP 56/2022 has regulated the elements that must be fulfilled in

order for a work to be categorized as TCE. The elements for a work to be called TCE according to Article 6 PP 56/2022 are:

- a. Having traditional values, perspectives and forms that are compiled, developed and maintained in and outside the traditional context;
- b. Administered and carried out communally and collectively by customary law communities and/or local communities as communities of origin;
- c. Continuously developed by the home community in response to history, nature and the environment;
- d. Across generations, the work is used, maintained and then passed on continuously; and
- e. Providing awareness of identity, sustainability and promotion of respect for cultural diversity and creativity.

Those are the 5 elements so that a work can be categorized as TCE based on Indonesian laws and regulations. Furthermore, TCE itself has various types. Based on Article 7 (1) PP 56/2022, the types of TCE are: (a) verbal textual; (b) music; (c) motion; (d) theatre; (e) fine arts; (f) traditional ceremonies; (g) architecture; (h) landscape; and/or (i) other forms of expression according to development. Article 7(1) letter (i) PP 56/2022 actually provides space for other types of works in the future which have the potential to be included in the TCE categorization but have not been identified at the time this regulation was created, provided of course that the work meets the

elements of TCE. Both PP 56/2022 and Permenkumham 13/2017 have provided space for other forms of expression of TCE according to developments as a type of TCE. Meanwhile, Article 38 in Law 28/2014 which also discusses TCE, in its explanation of what types of TCE are, does not mention the existence of space for other types of work in the future which have the potential to fall into the categorization of TCE as a type of TCE.

Referring to the explanation above, the types of TCE that are often performed and used in tourism support activities are dance and music. In Bali, for example, tourists are often greeted with the *Pendet* Dance as TCE, which is intended as a welcoming dance. Apart from that, there is also *Balinese songket* cloth which is one of the TCEs from the two-dimensional fine arts (Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan HAM RI, 2020a) category which is a typical Balinese souvenir. This *Balinese songket* cloth is also often used not only by Balinese people in their traditional activities but can also and is often used at national events. For example, when the President of Indonesia (Mr Joko Widodo) used *Balinese songket* to attend dinner with the leaders of the G20 countries at a prestigious world event, namely the G20 Summit in November 2022 (Putri, 2022).

The focus raised in this article is on TCE which is transformed or adapted into personal work or work created by AI. Examples related to the transformation and adaptation of TCE into personal IPR work are very frequent and easy to

find, especially in the current era of digital technology. An example is when a *Pendet* Dance which is TCE's work is being performed. Visitors can easily record the dance as a video (personal IPR) or take photos (personal IPR). Furthermore, the visitor may easily uploads the video and photo work on his social media. There is also a potential of the uploaded personal IPR work becomes popular so that he got economic benefits (for example monetization) from the results of the upload because it was considered good and enjoyed by the public. Even though these cases are often encountered, unfortunately neither PP 56/2022 nor Permenkumham 13/2017 which specifically regulates Communal IPR provide a definition of what transformation or adaptation of TCE work into personal work is. This transformation and adaptation can apparently be seen from several articles in Law 28/2014 which regulates copyright. TCE and Copyright are interrelated because basically the types of TCE are works in the realm of art and literature which are the scope of Creations in Copyright (science, art and literature-Article 1(3) of Law 28/2014).

Regarding TCE and referring to the provisions of Article 40(1) of Law 28/2014, it is known that one of the works protected in Indonesia is: (1) translation, adaptation, arrangement, transformation or modification of TCE (Article 40(1)(o) Law 28/2014); and (2) the TCE compilation as long as the compilation is an original work (Article 40(1)(q) Law 28/2014). Apart from that, Article 40(1)(n) of Law 28/2014 also determines that one of the protected works is “....

adaptations, arrangements, modifications and other works resulting from transformation”. From the explanation of this article, definitions of adaptation and transformation can be found. Here is the definition:

- a. Adaptation is changing a creative work into another form. For example, a book is turned into a film (explanation of Article 40(1)(n) Law 28/2014).
- b. Another work resulting from transformation is changing the format of a copyrighted work into another format, for example pop music into *dangdut* music (Explanation of Article 40(1)(n) of Law 28/2014).

Thus, in the context of the audience recording the TCE dance on video, it is assumed that they are carrying out an act of adapting a creation. Adaptation of an TCE into a personal IPR work in the form of a video. Even for personal IPR works on TCE as regulated in Article 40(1) letters (o) and (q) of Law 28/2014, the creator is given protection for 50 years from the time the work was first published (Article 59(1) of Law 28/2014). Thus, the visitor who recorded a video of an TCE dance that he watched apparently has legal protection in the form of personal IPR Copyright for his video for 50 years since he announced the work (for example since it was first uploaded on his social media). Apart from this, the creator or copyright holder for the TCE dance work essentially has economic rights, one of which is to adapt or transform the creation (Article 9(1)(d) Law 28/2014). So from the perspective of the Copyright Law, every person who wants to



exercise economic rights, for example the visitor, must first obtain permission from the Creator or Copyright Holder if they want to carry out commercialization in the form of adaptation (changing the TCE dance into a video to be commercialized and uploaded in the media social) in accordance with the provisions of Article 9(2) of Law 28/2014. This is also related to the benefit-sharing mechanism discussed at the end of this sub-discussion.

### **b. Work Created by AI**

Next discussion is on the transformation of creative works carried out by AI. Not long ago, in people's opinion, AI was just part of science fiction. However, today, AI has changed the way people live their daily lives (Puntoni et al, 2021). AI is basically a system inspired by human intelligence which is projected in a model and programmed in such a way that machines can carry out the function of receiving and processing information like humans (Sulaiman, & Christy, 2021). In contrast to classical computing, where the programmer provides the exact type of input, outputs and logic, AI is based on providing information (inputs) and the desired outcome to the machine, then letting the machine develop its own path to achieve the set goal (Valinasab, 2021).

An example is a face painting by Vincent Van Gogh whose expressionist style is made to look like a real face image by AI (Direktorat SMP Direktorat Jenderal Pendidikan Anak Usia Dini Pendidikan Dasar dan Pendidikan Menengah Kementerian Pendidikan, Kebudayaan, Riset dan

Teknologi, 2023) (Ayuningtyas, 2023). Recently in 2023, CNN reported that Jane Friedman, author of multiple books, shocked by the sale of new books under her name which in fact she never wrote and appear to have been generated by AI. This is troubling because with the sophistication of AI, AI can easily imitate an author's style and produce work without the acknowledgment of an author whose writing style is being imitated, regardless of whether AI claims to have written it itself and confess this is created by AI or in this case pretend to be Jane Friedman even though appear to have been generated by AI (Duffy, 2023). It is very possible for AI to do something like this with existing TCE works.

### **c. The Protection**

The phenomenon of adapting TCE works into personal works, both in the realm of Copyright and other personal IPR of a commercial nature without the permission of the TCE custodian, is detrimental to the custodial community which has preserved, maintained and developed the TCE. In this regard, it is appropriate for the existence of TCE works to receive legal protection in the same way as protection for personal IPR. For Communal IPR, its existence is also intertwined to the process of human intellectual creativity. Of course there is also a sacrifice of time and energy to express work which, apart from being a identity, also has social, cultural and economic functions. Reward Theory is relevant to put forward in relation to IPR protection.

Robert M Sherwood stated that the history of IPR is essentially the emergence of recognition that a community benefits when it encourages its creative and inventive people by honouring the products of their minds (Sherwood 1999). Reward Theory by Robert M. Sherwood emphasizes that parties who succeed in producing works in the field of IPR should be given awards for all their efforts in exerting their abilities to produce these works (Masnun, Sulistyowati, & Ronaboyd, 2021). It can be stated that in the context of IPR protection it is very important to provide protection in the form of rewards or appreciation for the existence of works resulting from human intellectual creativity. In this context, it would also be relevant to be associated with creative works of a communal nature. In the context of legal certainty, protection based on reward theory is very important to be constructed through statutory regulations.

In Indonesia, currently, legal protection for Communal IPR is specifically regulated in Permenkumham 13/2017 and PP 56/2022. These two provisions basically emphasize legal protection based on inventory and recording of Communal IPR, including TCE. In this context, the obligation for inventory and recording lies with the State. The state, in this case the Minister, is the one who carries out government affairs in the field of law and human rights, as a form of implementing its obligations in accordance with Article 3(2) PP 56/2022 jo. Article 7(2) Minister of Law and Human Rights Regulation 13/2017. However, even though it is the State, in this case

the Minister who carries out government affairs in the field of law and Human Rights, who is obliged to inventory the work of KIK, in its implementation there is room for the State to collaborate with ministries or institutions and/or Regional Governments through the provisions of Article 3(3) PP 56/2022 jo. Article 7(3) Minister of Law and Human Rights Regulation 13/2017. The legal umbrella for carrying out this collaboration should be welcomed by all parties. This is because there are still many other Communal IPR works in Indonesia that are waiting to be inventoried and recorded, even though the government has successfully carried out its obligation to inventory and record Communal IPR, including TCE, which has now been carried out periodically. However, collaboration with various parties will really help strengthen the protection of Communal IPR works, including TCE.

Desak Putu Dewi Kasih et al in their study regarding the collaborative approach of Government and Academics, stated that currently there are still limited capacities, human resources and funding experienced by the state in inventorying such a variety of TCE (Kasih et al, 2023a). By remembering that the inventory of a Communal IPR work, including this TCE, is a legal measure for defensive protection, the sooner this is done, the better. Therefore, the collaboration space Article 3(3) PP 56/2022 jo. Article 7(3) Permenkumham 13/2017 needs to be implemented as fully as possible. One form of realization of this collaboration can be realized through a Cooperation Agreement between the

Minister who handles government affairs in the field of law and Human Rights with ministries or institutions and/or Regional Governments.

Referring to the provisions of Article 3(3) PP 56/2022 jo. Article 7(3) Permenkumham 13/2017, in fact there is no word that explicitly mentions "academics" or other related parties as parties who can be invited to collaborate. Provisions of Article 3(3) PP 56/2022 jo. Article 7(3) of Permenkumham 13/2017 only stipulates that cooperation in carrying out the inventory can be carried out between the Minister who carries out government affairs in the field of law and Human Rights with ministries or institutions and/or Regional Governments only. However, as a first step, at least these provisions can be said to be a legal umbrella for good cooperation. However, in the future, it is also possible to revise these provisions by adding that academics and/or other related parties can help maximize the inventory and recording process. However, in current practice, it is very common for Regional Governments to collaborate with academics or researchers who have expertise in the field of Communal IPR to assist with the inventory and recording process. Especially in the process of extracting data from custodial community and Master of Works that have the potential to receive Communal IPR protection.

These academics or researchers are considered to be parties who have qualified expertise, such as the ability to conduct in-depth interviews and write descriptions for a Communal IPR's work, in order to help the government carry

out its inventory and recording obligations. It does not just stop there, in fact this collaboration can also bring benefits in terms of funding, where Communal IPR researchers from a university on several occasions also have official funds that can be used and intended for the inventory process of Communal IPR work in the communities they research. For example, funding to create and edit videos related to TCE's work so that the results obtained are of good quality with high resolution so that they are able to clearly depict the work that will be recorded and do not give the impression that it was simply created and described. It should be emphasized that Communal IPR recording is free of charge and therefore funding originating from academics or/other related parties can be used not for the recording costs themselves, but for other things to support inventory and recording, such as making a suitable video to describe a work.

Third, providing a digital platform called "National Data Center for Indonesian Communal Intellectual Property" which can be accessed on the page <http://kikomunal-indonesia.dgip.go.id/>. This platform makes it very easy for various parties to access and find out what works have been inventoried and recorded as works owned by Indonesia, complete with various details, including who the owner or custodian is. For example, if you search for *Pendet* Dance in the data center, the result will appear that the work is a Communal IPR which is included in the TCE classification originating from Bali (Direktorat Jenderal Kekayaan Intelektual Kementerian

Hukum dan HAM RI, 2020b). As for the classification, the Communal IPR data center shows that the work is open.

In the existing laws and regulations in Indonesia, both those regulating IPR and those specifically regulating Communal IPR, there is nothing that determines or defines explicitly what constitutes an open or closed work. In their study, Desak Putu Dewi Kasih et al in their writing on Sacred and Open TCE stated that closed or open TCE refers to whether the TCE work is sacred or not (Kasih et al, 2023b). Thus, if it is open, the work is not sacred and can be used for commercial purposes such as being displayed as an activity to support tourism businesses (Kasih et al, 2023b). This is in line with the description of the *Pendet* Dance provided on the National Data Center for Communal Intellectual Property page in Indonesia, that this dance can be used to welcome big guests or other cultural events. Furthermore, the data center also provides information that custodial community for *Pendet* dance is Bali Warini Dance Studio with Maestros or Cultural Teachers named Ni Ketut Arini, S.ST and I Nyoman Suarsa (Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan HAM RI, 2020b).

With easy and clear access to various Communal IPR works that have been successfully inventoried and recorded, this step is one of the government's good defensive steps in preventing claims for Indonesian KIK works from foreign parties. From the explanation above, it can be seen that the National Data Center for

Communal Intellectual Property in Indonesia has complied with the provisions of Article 30 jo. Article 31(1) PP 56/2022 where in the context of Communal IPR inventory, the Indonesian Communal IPR Information System must at least contain: (1) name, form, nature; (b) Home Community; (c) region; (d) description; and (e) documentation of a Communal IPR. And even PP 56/2022 has further provided protection for KIK works, including TCE, which are sacred, confidential and/or held strictly based on the applicant's request, so the data is closed (Article 31 (2) PP 56/2022).

The state, in this context, the central government seems to have been optimal in providing access for the public to check the existence of Communal IPR works, including TCE, which have been successfully inventoried and recorded through the presence of the National Data Center for Indonesian Communal Intellectual Property.

In order to provide data on the existence of Communal IPR that has been inventoried and registered, this has also been carried out at the local level. For example, in Bali, the Ministry of Law and Human Rights of the Republic of Indonesia in the Bali region has succeeded in establishing a digital platform called "Cominpro (Communal Intellectual Property) Bali". In this context, it will be very helpful for the wider community who want to specifically access Communal IPR work data, including TCE from those specifically from the Bali region, to be able to access Cominpro Bali via the page

<http://portalkanwilbali.kemenkumham.go.id/cominpro/>. On this page, infographics are also presented which easily provide an overview for people who access it, how many types of KIK (TCE, TK, GR, and PIG) are owned by each district and city in Bali.

Bali Province consists of 9 districts and cities. Through Cominpro Bali, Communal IPR data can be accessed in Bali Province, Denpasar City, Badung Regency, Gianyar Regency, Klungkung Regency, Bangli Regency, Tabanan Regency, Karangasem Regency, Jembarana Regency and Buleleng Regency (Cominpro Bali, 2023). The Communal IPR data documentation model, whether available through the National Data Center or at the provincial level such as Cominpro Bali, is actually a concrete step in strengthening Communal IPR protection. The existence of this documentation plays an important role in the context of legal certainty regarding the existence and ownership of types of Communal IPR that have grown and been passed down from generation to generation in regions in Indonesia. Therefore, it is also relevant to develop similar documentation models in other regions.

The successful process of inventorying and recording an TCE work is actually indirectly assumed to provide defensive protection for the TCE. So, in the event that TCE that has been inventoried and recorded is then transformed into Personal Work or Work Created by AI in the context of commercialization, the custodial as the community that carries it can demand from other parties who commercialize it a fair profit sharing

or benefit-sharing. So, in the process of commercializing a Communal IPR work, including TCE, it is of course appropriate to obtain permission first from the owner or right holder of the Communal IPR. This is in line with the provisions of Article 5 PP 56/2022 where the Right to KIK (TCE, TK, GR, Indication of Origin (IO) and PIG)) is an inclusive moral right, which is guaranteed and/or carried out by the Community of Origin, which has economic benefits, and valid indefinitely. This commercialization is related to the "economic benefits" in Article 5 PP 56/2022 which are determined to be contained in Communal IPR work.

In English terms, scholars often refer to benefit-sharing as "fair and equitable" benefit-sharing. In fact, the context of fair and equitable distribution of benefits itself can be traced back to 1992 with the existence of the 1992 Convention on Biological Diversity (CBD). It is known that, apart from the United States, all countries in the world have ratified the CBD, which aims to conserve biodiversity, achieve its sustainable use, and reward its custodians with a fair and equitable distribution of benefits (Schroeder et al, 2020). Since then, the concept has been applied in several international agreements and soft law instruments, including those on food and agriculture, climate change, and human rights (Tsioumani, 2020). Tsioumani argues that while fair and equitable distribution of benefits is the aim of various environmental treaties and the focus of sophisticated regulatory efforts, the

concept does not appear to be enshrined in IPR instruments (Tsioumani, 2020).

Tsioumani also pointed out that unlike environmental treaties such as the CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), there are no explicit requirements regarding fair and equitable distribution of benefits in IPR instruments, arguing that IPR protection benefits society as a whole overall by promoting innovation (Tsioumani, 2020). In line with this, Ni Ketut Supasti Dharmawan et al (2023) in their study stated that with minimal and unclear benefit-sharing arrangements in Indonesia, it is necessary to implement a model for strengthening Communal IPR in a Communal IPR Law (*Undang-Undang KIK*), especially through the process of transplanting Communal IPR policies, including benefit-sharing content, which is currently distributed in various statutory provisions of laws and regulations (Dharmawan et al, 2023a). Furthermore, currently the regulations that specifically regulate Communal IPR are at the level of Government Regulation (PP) and Ministerial Regulation (Permenkumham) so that a special Law is needed considering that the hierarchy of a Law (*Undang-Undang*) is higher so that it is hoped that it will be able to provide stronger legal protection for Communal IPR in Indonesia (Dharmawan et al, 2023a). To achieve this goal, of course, the State needs to take serious steps in realizing such law. Concerning state sovereignty, the highest power lies with the State, where the State has the right to regulate

matters within its territory (Santoso, 2016). The arrangements will be made to achieve welfare and protection to its community, including custodial community.

It needs to be emphasized that currently, benefit-sharing has only been glimpsed in Law 5/2017 and Law 13/2016, especially in the article regarding GR. So, the mechanism for benefit-sharing related to Communal IPR in general needs to be clarified, such as through what instrument the parties need to do it (does it need to be through a written contract) as well as what percentage of benefit-sharing for each party can at least be the basis for a fair distribution.

## **2. Traditional Cultural Expression and Personal Work Transformation: Turning Threats into Strengths**

Studies on the protection of Economic Rights for IPR owners, both personal and communal, which are used commercially by other parties, do not seem to be sufficient to study them from the legal and economic realm alone, but also from the technological realm.

Richard Posner through his theory "An Economic Analysis of Law" plays an important role in the evolution of the emergence of economic legal analysts. Posner is known as one of the figures who devoted his attention to the relationship between law and economics. At the beginning of his studies, Posner focused on the study of 'Law and Economics' which focused on economic problems with a legal dimension. The next stage, in connection with Gary Becker, his study began to turn to "the Economic Analysis of

law." In the current development of the digital era, it seems that apart from the use of economic analysis to study law, the technological dimension also plays a very important role in the legal aspect, especially in the era of digital hyperconnectivity which is closely connected with the Internet of Things (IoT), the application of AI algorithms, and Big Related data makes effective and efficient decisions that are able to optimize processes and all connected behavior (Calvo, 2020). In this era, humans are closely connected with fellow humans, as well as humans with machines, application networks and other devices, which are not only able to connect communities in developed countries, but also throughout the world, including Indonesia (Samsithawrati, Kurniawan, & Supasti, 2020).

The era of advanced technological innovation that allows people to connect quickly and across national borders, is also moving to influence the information and transformation of IPR works, even in the realm of traditional works. A new phenomenon is developing, communal works are easily transformed into digital works such as videos which have a personal protective aspect. For example, *Cak Bona* as one of the TCEs from Bali has been inventoried and registered with TCE Registration Number 51202300244, the results of its transformation can easily be observed as a video work via digital media. In this context, for example, a tourist who turns out to be a famous influencer can easily adapt the TCE dance that he watches on stage into a personal IPR video work just by using a

camera or cell phone and then uploads it to his personal social media. Monetization from social media is commonplace, especially if it is owned by famous influencers. Even now, such phenomena are developing in everyone. In this era, with the camera one has, one can easily become a video maker or photographer. The economic benefits of this personal video work are not yet clear about the distribution of economic benefits to the community of TCE bearers whose work is the object of the video work, which becomes the object of the personal work. Such a phenomenon is a threat to works with communal ownership.

TCE works that are transformed into personal works by people who are not members of their community not only threaten the ownership of traditional dance works, but also spread to weaving works and even paintings. For example, Balinese *Endek* Weaving which has been registered as an TCE work with Registration Number TCE.12.2020.0000085 at the Directorate General of Intellectual Property of the Ministry of Law and Human Rights of the Republic of Indonesia in 2020, also threatens to be transformed into embroidered work with traditional Balinese *endek* and *songket* weaving motifs to be commercialized through digital media and sold physically in shops and markets in Bali. Another phenomenon is that through the use of AI technology, paintings and photographs can be produced that are more beautiful than the original work. It is not impossible that such a phenomenon will also spread to paintings that have a

communal existence, such as the Gianyar Bali *Batuan* Style paintings.

Efforts, actions or measures that can be carried out in order to deal with threats to the existence of TCE works that are transformed into personal works, especially in the context of these works resulting in monetization for other parties who transform TCE works into personal works without permission from the community that develops and preserving it, or without permission from the government which is considered to be the owner of TCE, it seems that efforts or actions that can be taken are not only from the perspective of resolving violations, but are also relevant in prioritizing efforts to strengthen legal protection for TCE through a self-evaluation model, SWOT analysis, namely by recognizing Strengths, Weaknesses, Opportunities, and Threats (Threats). All factors are examined, recognized, then analyzed to make a decision. Threat factors are recognized, studied so they can be used as a driving factor for improvement. In this context, turning threats into reinforcing factors of TCE protection. And so on, weakness and threat factors are used as opportunities for strengthening.

The visible weakness of Communal IPR protection, including TCE, is that currently in Indonesia there is no institution that assists custodians in obtaining benefit-sharing in the event that TCE works are utilized by other parties, such as being transformed into personal works for commercial purposes. In the context of personal IPR protection, for example Copyright, there are

already regulations regarding Collective Management Organization (LMK) and National Collective Management Organization (LMKN) as regulated in Article 87 and Article 93 of the Law 28/2014. The role of LMK is to assist creators, copyright holders and related rights owners who have become LMK members to obtain economic rights, namely to obtain reasonable compensation in the form of royalties from users who use copyrighted works for commercial purposes. The user enters into an agreement with LMK which essentially regulates the user's obligation to pay royalties for the Copyright and Related Rights used. Furthermore, LMK is tasked with collecting, and distributing royalties to creators or copyright holder. The existence of LMK, as well as the LMKN, is actually a strength in the context of protecting the Economic Rights of creators which is in the realm of personal IPR protection.

Historically, the existence of Collective Management Organization, known internationally as CMO, has existed since the 18th century in France, then developed in the United States and other countries, including South Africa. The existence of CMO from a historical perspective is aimed more at collecting and distributing royalties in the field of musical creative works, the aim of which is to help and achieve the best economic scale for the interests of its members. CMO can act on behalf of its members to collect royalties for commercial use of copyrighted works. CMO has an important role related to protecting the economic rights of creators and copyright holders to obtain royalties for commercial use of



copyrighted works (Dharmawan et al. 2023b). By paying attention to the strengths that exist in personal Copyright protection related to economic rights through LMK and LMKN, it is hoped that efforts can be made regarding weaknesses in Communal IPR, namely by changing weaknesses into opportunities and even into strengths by reflecting and learning from the model protection that exists for personal IPR. In this context, there is an opportunity for the custodian community to obtain benefit sharing related to TCE works that are used commercially by users through the formation of LMK. The State which is considered to be the owner of communal IPR, as well as the State's role and responsibility for the community, will hopefully be able to realize the formation of LMK for personal IPR including TCE, so that weaknesses can be turned into protective strengths.

The threat to the protection of TCE works appears to be one of them being easily transformed into personal works for commercial purposes either through advances in AI technology or people as users. In this context, the efforts and actions that can be taken are also relevant in prioritizing the SWOT analysis, namely changing threats into opportunities and ultimately strengthening. The ability of users outside the custodial community to utilize TCE works to become video works, mini cinematography works, photo works, or other personal works by utilizing technological innovation, could be an opportunity for learning for custodial community to also be able to produce personal works.

Efforts that can be made include, for example, developing Intellectual Property Digital Management in the custodial community. In other words, the TCE community is able to transform works inherited and developed through digital media into personal works, such as videos. Observing and learning from developing phenomena, it would be relevant for people who preserve and develop TCE to have personal accounts on digital media, as well as periodically broadcast digital creative content works related to TCE on digital media. The presence of the State in this context is also very important, namely facilitating training for the custodial community regarding the management of communal wealth in relation to the digital-based creative economy. Here, threats are transformed into learning opportunities and also strengthen protection.

In order to support those effort above, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore conducted Expert Workshop Forty-Seventh Session, 5 -9 June 2023 at the Headquarters of the World Intellectual Property Organization (WIPO) in Geneva and the result is the government has obligation to make a digital databases for TCEs. Each TCEs should be added with the language. It will show the place of origin of the TCEs itself and makes it easier to repatriate TCEs which have been misappropriated. Digital databases system has 2 (two) functions at once: defensive and positive protection. Its systems automatically provide positive protection, recognizing who is create,

develop, generate, hold, use or maintain such resources, knowledge and expressions in a collective context are the right holders. The local community as the right holder have the economy and moral right of their TCEs. It means they have right to produce derivative works in order to preserve their TCEs and increase their prosperity. (World Intellectual Property Organization, 2023).

Likewise, in terms of threats to TCE works such as weaving and *songket* works which are transformed into embroidered products using machines, one of the actions that can be taken is a balancing act to turn threats into opportunities and strengthening. The custodial community, with government assistance in the framework of the creative economy, is also able to produce adapted works using, for example, embroidery machines. In this context, the TCE weaving community itself is the one who, in marketing their work, markets their woven works as TCE at relatively high prices because the process and complexity of making them takes a long time and is traditionally produced through the weaving process, at the same time they also market their adapted works in the form of machine embroidery works whose price is relatively affordable for consumers in general. Efforts like this would be relevant to be categorized as balancing countervailing measures in a positive context. In relation to this balancing effort, the filter is of course in the community to determine what types of woven work and what motifs can be developed into derivative works developed within the framework of the creative economy, and what

types of motifs whose existence must be maintained in their original form as woven works. Its needs are closely related to traditional ceremonies and rites.

In the context of handling threats to individual ownership claims and the use of AI, it is also important to take a look at other countries' practice. In European Union (EU) for example, the EU Commission published a proposal to govern AI in EU. So, in the EU, there will be specifically law that regulate AI, namely AI Act. The Commission proposes to establish a technology-neutral definition of AI systems in EU and establish classifications for AI systems with different requirements and obligations based on a risk-based approach. This means AI systems that pose 'unacceptable' risks will be banned while a wide range of 'high risk' AI systems will be permitted, but subject to a series of requirements and obligation to gain access to the EU market (European Parliament, 2023). Reflecting on what is being prepared by the EU, it is possible for Indonesia to consider making specific laws and regulations on AI in the future by considering the risk-based approach like the EU. Thus, later, this legal instrument can reduce detrimental risks to humans without hindering the development of science and technology from time to time.

#### D. CONCLUSION

TCE protection which is included in the scope of Communal Intellectual Property protection in Indonesia has actually been regulated in various provisions, namely through

Article 38 of Law 28/2014, Permenkumham 13/2017, and PP 56/2022, which essentially regulates that the state is obliged to inventory and record TCE. Based on Article 1 (2) PP 56/2022, it can be stated that TCE is all forms of expression of creative works in the form of objects or intangibles or a combination of the two which shows the existence of a traditional culture that is held communally and across generations. Commercial use of TCE works, whether in the form of adaptation and transformation by human individuals or AI, must obtain permission and pay attention to the distribution of benefits, the regulations for which will then be determined by the Minister. However, regulations related to this mechanism have not been regulated explicitly. Meanwhile, a phenomenon that is developing in the current digital innovation era, there appears to be a threat where TCE works are transformed into personal works by people outside the custodial community which are commercialized. Measures that can be made do not only focus on resolving violations, but also prioritize action, in the form of measures to turn threats into opportunities and strengthen protection. Such as the initiation of the formation of LMK in the context of extracting economic benefits (benefit-sharing) related to TCE works that are commercialized by people outside the custodial community. Other measure that can be done by the state is to facilitate the TCE community in developing Intellectual Property Digital Management in the context of developing the creative economy, as well as balancing actions, namely the community itself

adapting TCE works such as weaving and *songket* which are open in nature and can be developed into embroidery works using machine technology mechanisms and marketing them side by side with TCE work which is made using traditional weaving culture. These actions can be categorized as balancing actions, namely countervailing measures in a positive context.

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