

# Protection of Intellectual Property Rights of the Tengger Adat People's Knowledge

Emilda Kuspraningrum<sup>a</sup>, Thohir Luth<sup>b</sup>, Yuliati<sup>c</sup>, Rachmat Safa'at<sup>d</sup>,  
<sup>a</sup>Faculty of Law Universitas Mulawarman, <sup>b,c,d</sup>Faculty of Law Universitas  
Brawijaya, Email: <sup>a</sup>[emildakuspraningrum@fh.unmul.ac.id](mailto:emildakuspraningrum@fh.unmul.ac.id),  
<sup>b</sup>[thohir.luth@ub.ac.id](mailto:thohir.luth@ub.ac.id), <sup>c</sup>[yuliaticholil@ub.ac.id](mailto:yuliaticholil@ub.ac.id), <sup>d</sup>[rachmad.syafaat@ub.ac.id](mailto:rachmad.syafaat@ub.ac.id)

The concept of intellectual property rights has been initiated with western thoughts and accepted gradually in the eastern world, including in Indonesia. The aim of this paper is to explain about the affirmative action that the Indonesian government takes to accommodate the concept of intellectual property rights of the Tengger Adat people. Based on Article 18B paragraph (2) of the 1945 Indonesian Constitution and Article 27 paragraph (2) of the Universal Declaration of Human Rights it is implied that every person has a right to protection for his/her moral and material interests. Therefore, in making a policy intended to protect the knowledge of the Adat community, the Indonesian government should take into account four components, namely: (1) justice; (2) economics; (3) culture; and (4) social matters.

**Keywords:** *Protection, Intellectual Property Rights, Tengger Adat People's Knowledge.*

## Introduction

So far, the protection for intellectual property rights has been largely a western concept. History has recorded that intellectual property rights date back to the legislation called Corpus Juris existing under the ruling Caesar Yustianus in the empire of Binzantium (Gieseke, 1957). Initially, intellectual property rights had different characteristics compared to the right of ownership of tangible objects. The ownership of intellectual property rights is linked more to intangible objects (*immaterielles egentum*) (Syafinaldi, 2003). Thus, it can be said that intellectual property rights are part of the rights of materials (Saidin, 2004) of private law (Djumhana, 2006).

The existence of intellectual property rights also comes from Article 27 Paragraph (2) of the



Universal Declaration of Human Rights stating “Everyone has the right to the protection for the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (Lindsey, Damian, Butt, & Utomo, 2013). The progress of the protection for intellectual property rights is more about addressing protection for assets and materials resulting from the protected intellectual property, such as the drug company Pfizer.Inc or Roche Holding AG that spent a small fortune to build their business empire. They have spent billions in promoting their products to protect their reputation from others using their trademarks. Moreover, the protection for intellectual property rights has guaranteed that it will benefit people, especially the owners of intellectual property rights, in the long run. In other words, it is more profit-oriented. The western concept of intellectual property rights seems to be forcibly applied in developing countries, where Indonesia is among them. By ratifying several international agreements, Indonesia is deemed to abide by the uniform structure of intellectual property rights initiated by WTO.

Despite the fact that Indonesia is categorised as a republic and abides by positive law as stipulated by the ruling government, still the people cannot set themselves apart from the influence of other legal sources, Islamic law and *Adat* law, that are also recognised by the Indonesian constitution. This matter is no longer confusing in Indonesia, but it is now rather seen as a value since it is seen relevant to the motto of the state *Bhineka Tunggal Ika* (unity in diversity).

When the concept of intellectual property rights was welcomed in Indonesia, this concept, resulting from western thoughts, may not have had a similar perspective to that of Indonesia. Indonesia with its multiple tribes, one of which coming from *Adat* communities where 80% of their life pattern has been adopted from traditional structures and has passed through generations staying intact. Thus, different perspectives are inevitable.

If the intellectual property was to be based on the productivity of the thoughts of individuals, there would be countless intellectual properties that could be contributed to the *Adat people*. For example, the skill to mix ingredients for traditional medicine, the skill to weave, to make batik, to make woven fabrics, to write food recipes and to build based on the architecture of *Adat* housing are some examples resulting from the *Adat* people’s ideas that could help them produce valuable and priceless items. Interestingly, the *Adat* people do not generally see tangible and intangible things as a source that financially benefits them for their own sake, but it is more due to social interests for the merit of all. Moreover, it is no longer rare to see such traditional knowledge of the *Adat* people having to face *biopiracy* committed by the people living in industrial countries who are aware how valuable the knowledge or intellectual creation of the *Adat* people is in the global market.

Therefore, the concept of intellectual property rights according to the *Adat* people deserves

more attention and room for the regulation that provides protection for intellectual property rights that are in line with Article 27 Paragraph (2) of the Universal Declaration of Human Rights implying that everyone deserves protection for their moral and material interests (United Nations, 1948).

## Research Methods

This research is categorised as an empirical study that is more focused on primary data directly obtained from the real life of the community by means of observation, interviews, questionnaires and so forth. The result was presented in a descriptive-explanative structure involving description and analysis by understanding the legal issues concerning intellectual property rights that should exist in the life of the *Adat* people despite the different perspectives.

## Discussion

Tengger has an area of 40 km from north to south and 20-30 km from east to west. It lies on a plain of 1000m-3675m in altitude. The caldera of Tengger is the largest sea of sand that lies at an altitude of 23000m, stretching as long as 5 to 10 km. Bromo crater is still active and lies at an altitude of 2392m. To the south lies Mount Semeru with an altitude of 3676m above sea level. The *Adat* people of Tengger, or commonly called Tengger tribe, live near Mount Bromo. The *Adat* region of Tengger consists of two parts called *sabrang kulon* (the western part, represented by Tosari village, district of Tosari, the Regency of Pasuruan) and *sabrang wetan* (the eastern part, represented by Ngadisari village, Wanantara, jetak, District of Sukapura, the Regency of Probolinggo).

Tosari and the other three villages refer to the process of the opening ceremony of Karo, which also marks the opening of Jhodang Wasiat/Jimat Klontong of the *Adat* people of Tengger who live in the three regions of East Java: the regency of Probolinggo, Regency of Pasuruan, and the Regency of Malang. The secondary material for this research was obtained by exploring the existence of the knowledge in traditional medicine in the region of Malang regency, particularly in Tosari and Ngadas village. Tengger and Javanese Tribes are different in terms of their cultural values.

To maintain their survival, the locals of Tengger implement sensible eating, in which they do not consume too much meat but eat a higher proportion of vegetables. When they feel unwell, they are likely to seek traditional medicine to cure themselves. This indicates there is general knowledge in the Tengger community. In addition, particular medical practices are sometimes performed by certain people called shaman or Ratu, as most Tengger people call them. Ratu have an authority to manage things related to *Adat* matters in Tengger. Not all people can become Ratu since there are several requirements as explained by Murdi, the head of Ratu in

the Tengger community:<sup>1</sup> “those who wish to become Ratu must be kind hearted, have true intention separated from daily life matters, have self-sacredness, and have an absolute willingness to serve in the *Adat* community”. The shaman of pandhita is a religious and traditional leader inaugurated in Yadnya Kasadha ceremony (Saputra, 2009).

Traditional knowledge is an integral part of cultural legacy from the traditional community that owns it (Daulay, 2011). For the native people, culture is made of concepts that are integrally related; culture is a product resulting from continuing interaction and connection among humans, plants and the lands of the ancestors (Xanthaki, 2000) (Effert, 2016). Traditional knowledge is owned and controlled by a community, people or a tribe of a certain region that is passed through generations and develops alongside environmental changes (Sardjono, Hak Kekayaan Intelektual & Pengetahuan Tradisional, 2010). Traditional knowledge, according to WIPO, is classified into: agricultural knowledge, scientific knowledge, ecological knowledge, medicinal knowledge including related medicine and remedies, biodiversity-related knowledge, expressions in folklore, music and dance performances, songs, handicrafts, linguistic elements, and moveable cultural objects (Aini, 2012). The use of traditional knowledge itself is limited and is presented in a simple way by the locals (Aryanto, 2014).

The procedure of traditional remedies performed by the Tengger people indicates that they have traditional knowledge of traditional medicine and traditional knowledge covers many different types of knowledge.

This can be distinguished by the elements involved, potential or actual application of knowledge, level of codification, individual or collective form of ownership and legal status. The desire to protect kindergarten has produced a body of literature and many regulatory proposals and actions in different international forums. Traditional knowledge is defined as having an important implication for type and scope of possible protection regimes (Correa, 2001), in which a masterpiece is produced from a work of thoughts. This indicates the relevance to the concept of intellectual property rights because the traditional medicine knowledge involves method, diagnosis and health care including physical, mental and spiritual therapies. The application of those methods is influenced by the dominating culture and belief in a certain community (Correa, 2002). Traditional knowledge consists of domains of intellectual property rights that comprise the scope of communal intellectual property such as folklore, that is defined as an expression of traditional culture, industrial design manifested from cultural products, genetic resources, geographical indications and geographical indications of origin (Fathoni, 2014). However, when the concept of law concerning intellectual property is merely understood without accommodating the living law, it may lead to conflict and spark disputes in court. It can be accepted since the dispute resolution regarding intellectual property rights

---

<sup>1</sup> An interview with a Ratu also serving as Adat Head of Tengger Community

regulated in law concerning Intellectual Property Rights takes litigation process. In fact, recognition of intellectual property itself is considered “new” according to the scope of thoughts of the Indonesian people. In other words, the concept of intellectual property rights is ‘not originally’ from Indonesia. Indonesian cultures imply that cultural products and the thoughts to create (recently known to have the potential of intellectual property rights) are considered as “common heritage maintenance” that everyone can own (Correa, 2002).

Indonesia is a state with legal pluralism (Griffiths, 1986), in which there is positive law that is run by the current government, Islamic law run by the majority of Muslims in Indonesia and *Adat* law strongly believed by several *Adat* people living in several regions in Indonesia. This research is more focused on the *Adat* people of Tengger in East Java Indonesia. The Indonesia government should not overlook one of the components believed by one of the three laws mentioned (Smith, 2010). Bagir Manan argues that the cultural, social, religious and political background of Indonesia has led to the application of all the legal systems: *Adat* law, Islamic law and continental law (Manan & Magnar, 1997). The existence of *Adat* communities in Indonesia is obvious. This existence carries essential meaning in the social life since law not only serves as a parameter of justice, order and peace, but it also guarantees the existence of legal certainty. At the next level, law is even seen to be responsible for the development, welfare and the protection of the people (Hamzah, 2001).

Within the social structure of the *Adat* community, people’s lives are recognised in the Indonesian Constitution article 18 B paragraph (2), implying that the state not only gives recognition but also gives respect to the law that applies in an *Adat* community. *Adat* communities in Indonesia grow and develop under the unique cultures where the values are highly respected by the people.

With the constitution, it is advisable that the Indonesian government regulates what has been expected by the people into the system of legislation that accommodates their aspirations. Therefore, understanding by developing the qualitative method through field observation is required. This method was employed based on a phenomenological perspective – a perspective that provides a space for either individual or group “origin” (Kriekoff, 2003).

Satjipto Rahadjo sees the state of law of Indonesia as a state that cares. This concept is relevant since Article 34 paragraph (2) confirms that as a part of constitutional guarantee, a state is obligated to develop a policy that is “affirmative action” based for the sake of its people (Dworkin, 1996).

As an affirmation in setting the balance between the role of individuals and common interests (Community Forestry, 2000), the system of intellectual property rights are based on the following:

1) Justice matters. A creator or a person who makes a product based on his/her intellectual capacity is seen to deserve a portion of justice from the perspective of law. Law provides protection for the creator in the form of an authority to take action related to his/her creation, which is commonly known as a 'right'. Every right, according to law, should have a base, which is described as a certain event that serves as a reason why a right is attached to the person concerned. Law has become a "tool" for those with a strong financial position to intimidate the weaker ones. Therefore, the law (in terms of its enforcement) has shifted further from the concept of justice. This situation is probably "suspected" as an event caused by "normative reduction phenomenon" (Rasyidi & Putra, 2003).

In terms of intellectual property rights, the reason behind why a right is embedded to a person is the intellectual capacity owned by the creator of a product. An injustice harming the intellectual property right holder can be seen when his/her exclusive rights are not recognised. This can lead to the failure of achieving legal objectives such as order, legal certainty and justice (Sufiarina, 2012). Protection is not restricted to the state a creator belongs to, but it also takes protection stretched further outside borders because any rights embedded to individuals require other parties to act (commission) or not to act (omission) (Ajid & Anshar, 2011).

2) Economic matters (Chang, 2001). Intellectual property rights result from creative activities triggered by the capacity of the thoughts of people expressed to public audience in varied shapes. The products made are beneficial and useful for the life of human beings. The conception of intellectual property rights is based on intellectual works produced by human beings that take energy, time and money. All these efforts strengthen the condition that the products produced offer economic value that benefit people (Alfons, 2017). In the concept of intellectual property rights, receiving compensation or profit from what one has produced, which is known as an economic right (Hariyani, 2010), is considered acceptable. However, the compensation given in the perspective of *Adat* communities can be either material or non-material as described by the principle of religious magic that is believed by the *Adat* people that compensation does not always come as a tangible object but that it can also be intangible but still perceivable, such as feeling secure due to protection and recognition of the products created. The protection can also come from God. Ownership is common due to the economic traits attached to individuals. These traits require human beings to fulfil their needs in society. Ownership according to Anil K Gupta involves individual, community and public domain ownerships (Gupta, 2003).

3) Cultural matters. A creation is principally aimed to support survival. From one creation in the past follows other forms of products that are later developed (Wendland). Agus Sardjono opines that traditional knowledge is inseparable from efforts taken to protect traditional knowledge since Indonesia is one of the states in the world with diverse traditional knowledge and cultures (Sardjono, 2010). With such a concept, the development of knowledge, art and

literature has a significant contribution to improving the standard of living, civilisation and peoples' dignity, in addition to giving merit for the people and the state. The recognition of peoples' creation, artwork and intention following the system of intellectual property rights is an effort that is inextricable from the hope that is intended to revive the spirit and interest in maintaining cultural sustainability in the form of creation and artwork presented in the future.

4) Social matters. Law does not regulate humans as individuals that stand alone, without any interference from others, but regulates the humans' interest as social individuals who interact with others and are bound to a community (Ramalho, n.d.). In the concept of social balance, the *Adat* people do things not for their own interests but for the merit of all (Safa'at, 2013). Therefore, the condition in which all that rights are recognised by law, whether this recognition is given to individuals, a community or a unity, will be for the merit of everyone.

### **Conclusion**

Traditional knowledge of the *Adat* people resulting from the ideas of intellectual creation has different characteristics of ownership from intellectual property rights in the western concept. The ownership of traditional knowledge of the *Adat* people that involves individual ownership, community and public domain and that is forced to enter a regime of protection for intellectual property rights certainly needs to take into account justice, economics, culture and social matters. Indonesia, constitutionally, has laid the basic concepts of protection for traditional knowledge, leading to the manifestation of the protection of traditional knowledge of the *Adat* people.

## REFERENCES

- Aini, D. C. (2012). *Telaah Yuridis Ketentuan Perlindungan Pengetahuan Tradisional Dalam Hukum Internasional*. Depok: Universitas Indonesia.
- Ajid, S. A., & Anshar. (2011). *Pertanggungjawaban Pidana Komandan Militer*. Yogyakarta: Lasbang Pressindo.
- Alfons, M. (2017). Implementasi Hak Kekayaan Intelektual dalam Perspektif Negara Hukum. *Legislation Journal Indonesia*, 304.
- all, T. L. (2013). *Hak Kekayaan Intelektual Suatu Pengantar*. Bandung: PT Alumni.
- Aryanto, H. (2014). Pemanfaatan Pengetahuan Tradisional Indonesia Berdasarkan Potensi Daerah sebagai Modal Pembangunan. *Journal of Law and Development*, 298-299.
- Chang, H.-J. (2001). Intellectual Property Right and Economic Development: Historical Lessons and Emmerging Issues. *Journal of Human Development*, 13-20.
- Community Forestry. (2000). Food and Agriculture Organization of the United Nations. Retrieved from fao.org: <http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf>
- Correa, C. M. (2001). *Intellectual Property Right, Issues and Options Surrounding Protection Traditional Knowledge*. Geneva: The Quaker Office United Nations.
- Correa, C. M. (2002). *Protection and Promotion of Traditional Medicine Implications for Public Health in Developing Countries*. Argentina: University Buenos Aires.
- Daulay, Z. (2011). *Pengetahuan Tradisional Konsep Dasar Hukum dan Praktiknya*. Jakarta: PT Raja Grafindo Perkasa.
- Djumhana, M. (2006). *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*. Jakarta: PT Citra Aditya Bakti.
- Dworkin. (1996). *Freedom's Law: The Moral Reading of The American Constitution*. Cambridge: Harvard University Press.
- Effert, T. (2016). Biopiracy of Natural Product. *Phtomedicine*, 170.
- Fathoni. (2014). Paradigma Hukum Berkeadilan dalam Hak Kekayaan Intelektual Komunal. *Journal Cita Hukum*, 297.
- Gieseke, L. (1957). *Die Geschichtliche Entwicklung des deutschen Urheberrechts*. Germany: Universität Göttingen.
- Griffiths, J. (1986). What is Legal Pluralism. *The Journal of Legal Pluralism and Unofficial Law*, 1-55.



- Gupta, A. K. (2003). *Rewarding Conservation of Biological and Genetic Resources and Associated Traditional Knowledge and Contemporary Grassroots Creativity*. Ahmedabad: Indian Institute of Management.
- Hamzah, A. (2001). *Bunga Rampai Hukum Pidana*. Jakarta: Ghalia Indonesia.
- Hariyani, I. (2010). *Prosedur Mengurus HKI yang Benar*. Yogyakarta: Pustaka Yustisia.
- Kriekoff, V. J. (2003). Tinjauan Antropologi Mengenai Hak Masyarakat Adat dan Wewenang Negara. In E. Masinambow, *Hukum dan Kemajemukan Budaya* (p. 173). Jakarta: Yayasan Obor Indonesia.
- Lindsey, T., Damian, E., Butt, S., & Utomo, T. S. (2013). *Hak Kekayaan Intelektual*. Bandung: PT Alumni.
- Manan, B., & Magnar, K. (1997). *Beberapa Masalah Hukum Tata Negara Indonesia*. Bandung: PT Alumni.
- Ramalho, A. (n.d.). *Intellectual Property and Social Justice*. Retrieved from [https://www.ivir.nl/publicaties/download/Ramalho\\_IP%20and%20social%20justiceDR\\_AFT.pdf](https://www.ivir.nl/publicaties/download/Ramalho_IP%20and%20social%20justiceDR_AFT.pdf)
- Rasyidi, L., & Putra, I. W. (2003). *Hukum Sebagai Suatu Sistem*. Bandung: Mandar Maju.
- Safa'at, R. (2013). *Rekonstruksi Politik Hukum Pangan*. Malang: UB Press.
- Saidin, OK. (2004). *Aspek Hukum Hak Kekayaan Intelektual*. Jakarta: Rajawali Press.
- Saputra, L. A. (2009, September 12). *Dukun-dukun Gunung Bromo*. Retrieved from Kompas.com: <https://travel.kompas.com/read/2009/09/12/05074220/dukun-dukun.gunung.bromo?page=all>
- Sardjono, A. (2010). *Hak Kekayaan Intelektual & Pengetahuan Tradisional*. Bandung: PT Alumni.
- Sardjono, A. (2010). *Hak Kekayaan Intelektual & Pengetahuan Tradisional*. Bandung: PT Alumni.
- Smith, J. (2010). *The Complexity of Traditional Law: Coherence and Fragmentation of Private Law*. *Electronic Journal of Comparative Law*, 10.
- Sufiarina. (2012). *Hak Prioritas dan Hak Eksklusif dalam Perlindungan Hak Kekayaan Intelektual*. *Law Journal Adil*, 39.
- Syafrinaldi. (2003). *Sejarah dan Teori Perlindungan Hak Kekayaan Intelektual*. *AL-Mawarid Edixi IX*, 3.
- United Nations. (1948). *Universal Declaration of Human Rights*.



Wendland, W. (n.d.). Intellectual Property Rights in Intangible Cultural Heritage. South Korea: ICHCAP.

Xanthaki, A. (2000). Indigenous Cultural Heritage in International Law. *European Journal of Law Reform*, 348.