

Protecting Balinese Culinary Innovation through Patent Law

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The era of 4,0 undeniably influences the innovation product of Small and medium-sized enterprises in Bali including the culinary industry. Balinese traditional culinary is offered to the global marketplace both in the form of its origin and its innovation. More protection is needed from the intellectual property perspective. The study aims to examine the protection of Balinese culinary innovation through patent. The normative legal research used in this study is conducted by employing the law and economic approaches. The study shows that, traditional Balinese culinary is relevant and protected under Article 38 of Indonesia Copyright law as part of Traditional Culture Expression. However, it seems to bring potential conflict related to the benefit sharing concept. Then, a simple patent regime can be considered to protect Balinese culinary innovation. Providing incentives and rewards for the inventor in a balanced way to the community is part of keeping and respecting values embodied in society.

Key words: *Balinese Culinary, Innovation, Traditional Culture Expression, Patent Law, Incentive.*

Introduction

Culinary culture, including in the Bali-Indonesia tourism area, is currently developing rapidly as influenced by advanced innovation, such as through the innovation of TV Channels. These TV channel's broadcast various types of innovations of traditional culinary that are mostly deep-rooted in developing countries or Asian countries. More and more creativities related to traditional culinary are innovated and become a new source of economic growth of the community. For instance, Ubud, the Gianyar Regency is one of the areas designated as a gastronomic destination in Indonesia, because it meets the characteristics of the existence of a combination of traditional and international culinary, the readiness of product supply, and the

value of local taste is inspiring chefs to integrate traditional culinary to become new type of food that is suitable for global market tourism. Culinary as part of gastronomic can be considered as a tool to build and open diplomacy (Kristianto, n.d.).

The creativity of Balinese traditional culture culinary as a new icon of the tourism destination in Bali, that was originally passed down from generation to generation for the daily food of the Balinese society, as well as required for religious rituals in society, from the perspective of Intellectual property regime, can be protected under the Indonesian Copyrights law, particularly as part of traditional cultures expression under Article 38 of the law No. 28 of 2014 in conjunction with the WIPO (Dharmawan, 2017; Russell and C.M. Samuel, 2018). Furthermore, people who develop traditional culinary businesses in the tourism destination of Bali, such as *Warung Nasi Bu Mangku Kedewatan* and *Warung Babi Guling Bu Oke* protect their businesses through trademark protection. Besides the trademark regime, the innovation of traditional culinary also promising to be protected under the patent law. *The Gudeg Jogja* for example, that originally it is served as the daily food of community in Yogyakarta, now, this type of food is offered to the global market and it has been registered in Indonesia to obtain patent protection (Wahono, 2012). To develop more protection for traditional Balinese culinary from patent law perspective like culinary Gudeg in Yogyakarta, especially for the innovation and creativity of traditional culinary that have been developed for global market tourism, it becomes important to discuss the patent law protection on the development of culinary culture. Therefore, this study aims to elaborate on the potentiality of protecting the innovation of traditional culinary culture through patent registration.

Theoretical Background

In optimizing the protection of traditional Balinese culinary in the modern era of 4.0, a number of theoretical frameworks are used to explore a philosophical foundation for the protection of the exclusive rights of the owners. Reward theory and risk theory explore the importance of protecting the creative work of human beings and the fairness of returning the investment of the inventor in his innovative work. The essence of reward theory is innovation, reward, and incentive (Waelde, Laurie, Brown, Kheria, & Cornwell, 2014). Robert M Sherwood's view emphasizes that the connection of intellectual-property with economic development can be elaborated from these three perspectives: creative minds that exist in every country are potential national resources, the origins of intellectual property indicate its role in fostering development, the important role for intellectual property in economic development (Sherwood, 2000). Labour theory - the natural right theory of John Locke's view as a moral basis for the protection of intellectual property rights emphasizes that the right to property exists because of the creative effort and the outpouring of time that is contributed and invested to produce creative or innovative works. Therefore, creative people have an inherent right to their intellectual



property because of the labour they have invested in it. Furthermore Cwik reveals that labour theory with a new view from the perspective of the productive capacities' views (Cwik, 2014).

In the perspective of economic analysis of law, Richard Posner argues that flourishing law and economics association has both positive (that is, descriptive) and normative aspects. It tries to explain and predict the behavior of participants in and persons regulated by the law, in connection to efficiency, utility, wealth or other values. The law and economics movement has influenced reform in a number of important areas including the regulation of public utilities and common carriers as well as the division of property (Posner, 1998) (Posner, 2014). Related to the Posner theory, Hikmahanto Juwana reveals that efficiency, for example, can be used for simple mechanisms and does not need to be rigid (Juwana, 2017). In the ground of patent protection, Posner states that the patent can be protected for a certain period and the applicant can take benefit of his innovation, the innovation must also be non-obvious and useful. The justification for creating protection for all forms of intellectual property regime including patent monopoly is that without the ability to appropriate the returns to their innovative activities granted by these monopolies, the market would not be supplied by innovation research and creative work (Baker, Jayadev, & Stiglitz, 2017).

The strengthening and harmonization of patent law at the national level in order to protect the innovation technology of human beings since 1990s has trended towards international protection, mostly under the Paris Convention and Trade-Related Aspect of Intellectual Property Rights Agreement (TRIPs Agreement) (WTO, n.d.), which covers not only Copyrights, Trademark, Trade Secret, Industrial Design but also Patents. Those international conventions provide a rule for non-discrimination system as well as the priority of rights and protection based on first to file system or first to invent (Allred & Park, 2007).

Research Methods

The normative legal research was used in this study by analysing national and international legal materials in conjunction with the law and economic approach. Several international legal documents are used as a legal basis consist of the Paris Convention, the TRIPs Agreement, the WIPO Performances and Phonograms, Beijing Treaty on Audio visual, UNESCO-WIPO Model Provisions for National Laws and Paten Cooperation Treaty. Meanwhile, at the national level, the Law Number 28 of 2014 Concerning Copyright (Intelektual, n.d.), the Law No. 20 of 2016 Concerning Trademarks and the Law no. 13 of 2016 Concerning Patents are elaborated to protect the potential innovation of Balinese culinary traditional culture for the global market.

Discussion and Conclusion

The Protection of Traditional Balinese Culinary Through, Traditional Cultures Expression Under Indonesian Copyright Law

Bali-Indonesia which is known as being rich in customs and culture passed down from generation to generation, including in the field of traditional food culture, originally makes and serves a variety of traditional Balinese foods for the interests of the daily life of local people and also for the religious ceremonies. Balinese foods are diverse, the most popular ones that currently are served to support tourism industry in Bali are namely: *lawar* (minced meat salad), *betutu* (roast duck or chicken), *sate lilit* (Balinese satay), *babi guling* (whole spit-roast pig), *jukut urab* (mixed vegetable), *sambal matah* (Balinese sauce), as well as *nasi campur* (a plate of white rice served with a number of other Balinese dishes) (Hotels.com, n.d.). Currently, nasi campur, as part of icon culinary in Bali, can be found both in small markets and in restaurants. By observing and understanding that in today's life, Balinese culinary has become iconic among Balinese tourism, and even in the wider global marketplace, therefore it needs to be protected, particularly from the intellectual property dimension.

The Balinese culinary works can be protected under Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs). According to the World Intellectual Property Organization (WIPO) TK as a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. Therefore, the elements of TK are as follows, knowledge, know-how, skills, innovations or practices; that is passed between generations; in a traditional context; and that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian. Meanwhile, TCEs are the forms where traditional culture is expressed whether in tangible, intangible or mostly combination of those two. In any material object, there is often a symbolic or religious element from which it cannot be separated. Songs, dances, designs, handicrafts, tales or any other artistic or cultural expressions are some examples of TCEs.

In examining the protection of TCEs, it can be understood that those creative works belong collectively. As a consequence, any rights and benefits should be invested into communities that preserve them rather than in individuals. Concerning the protection of TK and TCEs, WIPO comes to a very specific understanding by using Intellectual Property (IP) regimes and their principles to prevent unauthorized uses of TK and TCEs by third parties. Controlling the used of TK and TCEs by third parties, as well as, benefiting from the commercial exploitation of TK and TCEs by third parties is an example of positive protection. The second approach is defensive protection, which aims to stop people from outside of the community from getting IP rights over TK and TCEs. India as an example has been using this approach as a defensive strategy, by compiling traditional medical knowledge databases. Both approaches are needed

to protect TK and TCEs, particularly in the WIPO perspective, the “benefit-sharing” concept has used as a legal basis of a positive protection approach. The benefit-sharing approach looks simple but it is not easy to implement it. For example, in Bali Island, each regency has a similar traditional culinary, called *Belayag*, this reality has the potential to raise conflict among them by claiming that the *traditional Belayag* culinary belongs to every regency. Therefore, it can be stated that the act of determining food sources in Bali is not always going to be easy because every regency may claim that several unique food cultures are developed from their community, which have been passed down from generation to generation.

By using the benefit-sharing concept under TK and TCEs regimes to protect these creations culinary culture, who should receive the benefit-sharing? which communities should sign the benefit-sharing agreement? In our point of view, the problem is that it is not only difficult to determine where the benefit-sharing should go, but also it has the potential to rise conflict among societies. This situation also causes the societies to go far away from their philosophy *Tri Hita Karana*, the philosophy of Balinese, in which human beings balance between God, humans, and nature. Therefore, regarding life in harmony for the community, it seems understanding the protection of Balinese culinary is not only thinking about benefit-sharing but also more importantly by making the room for the recognition concept of a so-called acknowledgment concept. In our point of view, it might bring prosperity to societies naturally. For instance, by recognizing several Balinese culinary such as *Balinese Sate Lilit*, *Balinese Betutu*, *Balinese Babi Guling*, *Balinese Lawar*, as well as *Balinese Belayag*, has its source of origin is from Bali. In this context, when people need to consume originate Balinese culinary culture they will come to Bali. Protecting culinary culture through the TK and TCEs model is important. However, more importantly, to bring life go in harmony. Therefore, the acknowledgment concept may be the solution that needs to be concerned.

Referring to the WIPO which in essence states that cultural heritage is also considered as a source of inspiration and creativity for parties who are outside of the customary context, and in today business, many products are created by using indigenous knowledge, including the forms and materials of traditional cultures such as fashion, handmade crafts, and traditional music. Various types of modern creativity works that go to globalization market place and commerce brought by new technology, also by realizing that protecting those of commercialization of traditional expressions no longer happy only rely to the benefit-sharing of TCEs, therefore all forms of intellectual property are relevant to be used whether copyrights, related rights, trademarks, industrial designs as well as patents (WIPO, 2004). In Indonesia the contexts, the protection of creativity of traditional cultural expression as it is discussed previously are protected under copyright law. Based on Indonesian Copyright Law, particularly Article 38 of the Law no. 24 of 2014, TCEs Under Article 38, which provided that copyrights of traditional cultural expressions hold by State, the protection given as long as the TCEs exist, in this contexts there is also the obligation of anyone willing to utilize the Indonesian traditional



cultural expressions is the concern of living values which exist in its custodian (Rafianti, Ramli, & Permata, 2019). Furthermore, to provide evidence concerning the existence of the traditional cultural expression, the state is obliged to inventory, preserve, and maintain it as is stipulated under Article 38 (2) of the Indonesian Copyrights Law.

The Potential of Protecting Culinary Innovation through Patent Regime

The innovation that is known as the process of bringing valuable a new product of goods and services to the marketplaces, or in other words advanced technology brings enormous change for almost all aspects of life, social cultures, economic including the legal aspects, specifically in the era of the 4,0 industry. Every process of change is bound by process law and balance law (Mulyasana, 2019). It is likely also relevant think of the balance of law when regarding the traditional creativity of Balinese culinary for example, going beyond national marketplace to the global marketplace as driven by innovation technology, and how to provide more balance of the law between those, and the custodian who preserves the traditional culture expression and the inventor who thinks about change and innovation, making the food available to be consumed world-wide in an efficient way. In this context, it is relevant to put forward Posner's view concerning efficient, utility, and values to bridge the balance of law among parties. Values rooted in the expression of traditional culture are still being considered, as well as the acknowledgment of the origin of an innovative product which can also be considered as part of respecting values. From point of our view, that balance of rights means the balance protection rights both for people who are the owner or custodian of the Balinese traditional cultural expression and people who are making the Balinese traditional culinary available for the global market in an innovative way. In the contexts of intellectual property protection, the term 'IP' refers to unique, value-adding creations of the human intellect that results from human ingenuity, creativity, and inventiveness, moreover, intellectual property has an important role in helping a business to develop and maintain innovation-based excellence (Kalanje, 2006). Rewarding and granting such exclusive rights for the inventor is relevant by arguing from the labour theory - the natural rights theory of John Locke as well as the reward theory and risk theory of Robert M Sherwood. As revealed by Mac Queen, the essence of reward theory is innovation, reward, and incentive. Of course, the inventor will have the exclusive right for his or her innovation if his innovative works fulfil the requirements of patent rights, that it is new or novelty, inventive steps, based on the Trade-Related Aspects of Intellectual Property Rights Agreement (Cole, 2015), and more importantly the challenge related to non-obviousness for a patent granted (Shenoy, 2016). In addition, in India, for example, pharmaceutical product patents are granted and determined by the objection of a granting patent by using the Section 3 (d) of provision Indian Patent Law, in the ground of lack of novelty and inventive steps or non-obviousness (Sampat & Shadlen, 2018). The term inventive step is usually used in Europe, meanwhile, the term of non-obviousness is used in the United States.

In Indonesia the requirement of the granted patent protection for the people who are creative producing innovative works regulated based on the Law No. 13 of 2016 concerning Patents. Based on Article 2 the Law No. 13 of 2016, the patent protection covers a. Patent; and b. Simple patent. Furthermore, Article 3 emphasizes that the patent as referred to in Article 2 letter a. shall be granted for the innovative works that fulfil the requirements of the patent that is: new inventions, inventive steps, and can be applied in the industry. Meanwhile, the simple patent as referred to in Article 2 letter b. shall be granted for each new invention, development of products or processes that already exist, and can be applied in the industry. By understanding that regulation, it can be considered that traditional Balinese culinary, after becoming a creative-innovative product, at least it can be protected through a simple patent. For simple patents, the requirements for obtaining patent protection are not as complicated as Patents that are regulated under Article 2 letter a, because, in simple patents, requirements concerning non-obviousness are not as strict. One of the simple patents that are developed from traditional culinary is *Gudeg*. The traditional culinary from Yogyakarta, that is a special food made from jackfruit namely "Gudeg" supported by the Indonesian Institute of Sciences (LIPI). Yogyakarta and the Gudeg merchants currently are in the process to get a patent granted from the State through the Directorate General of Intellectual Property of the Republic Indonesia. The Gudeg Yogyakarta, after being developed using an innovation, the duration of this warm food can be enjoyed for up to one year without reducing the taste. Originally, referring to the traditional way of this culinary only for 2 days. Of course, this innovation becomes very attractive to consumers from the city and is even brought abroad as a souvenir. Even more, this culinary was also developed with various variants, for example, there are vegetarians. The ingredients do not use flavourings and preservatives. the process of being handled by the Director-General of Information Commission of the Ministry of Law and Human Rights (Wahono, 2012).

Lesson learned from *the Gudeg Yogyakarta* to obtain the patent are granted, it likely that traditional Balinese culinary also has the potential to be patented. Balinese culinary *Betutu*, *Belayag*, *Serobotan*, including *Sambal Matah*, with the local taste of Bali has the potential to be developed as an innovative product either in the form of can products or another type of packaging products, as a result of advanced technology. Encouraging creative businesses including traditional Balinese culinary into innovative products will undeniably lead to a new economic source for the community. As stated in the consideration section of the Indonesian Patent Law, patents are intellectual property granted by the state to the inventor related to the inventions in technology have a strategic role in supporting development nation and promote public welfare, the prosperity of the nation and state, hence increasing protection for inventors and patent holders, it is also very important to foster a healthy business climate. However, in encouraging the potential of traditional Balinese culinary to grant a simple patent, it is very important the role of local government provide legal constructions in helping Small and

medium-sized enterprises (SMEs) registering their creative innovations. To get patent protection based on patent registration application to refers to first to file system, as it is regulated under Article 24 until Article 37 the law No. 13 of 2016. To protect the creative and innovative products until achieving the registration application process, the government can play an important role from upstream to downstream. As in West Java of Indonesia, in order to protect the innovative works, the role of local government is developing a model of intellectual property rights protection by implementing various strategic steps, such as: encouraging a community development facility, improving the legal culture, documenting the traditional creative innovation, facilitating registration, including training in order to reduce obstacle in obtaining intellectual property protection (Nurani, 2019). Although by encouraging patent protection on Balinese traditional culinary plays an important role particularly on economic perspective, a number of values should be considered in order to keep the spirit of living together in harmony based on the Balinese philosophy *Tri Hita Karana* and the Indonesian philosophy *Pancasila*. In these contexts, for example, several traditional culinary works are not produced in an innovative way, if it is really important for religious ceremonies. Therefore, the society as custodian and government together preserve keeping Balinese traditional culinary in its original form. This is to be concerned as part of respecting, links and matches the system of value in Indonesia (Haq, 2008). As revealed by Posner, the law and economics are related to efficiency, utility, and values. Efficiency is important for the economic perspective it can be brought by the advanced of technology. However, life in harmony as part of understanding, respecting, as well as implementing values also play an important role in the surrounding community.

Conclusions and Suggestions

Conclusion

The emergence of Balinese traditional culinary as the new icon of the tourism destination in Bali, has led to both legal and economic approaches that are adequately protected under Indonesian Copyright law, particularly as part of traditional cultural expression as regulated under Article 30 of the Law Number 28 of 2014. The existence of traditional culinary that is hereditary from generation to the next generation, categorized as a collective work, it can be understood that the exclusive rights of this type of cultural expression, including the expression of traditional culinary, belong to the State. The protection of culinary culture through the Traditional knowledges and traditional cultures expression tends to carry out conflict among societies in the ground of benefit sharing, particularly among the society who serves as custodians to preserve the traditional cultural expressions. Each regent argues that she or he has the ownership of specific Balinese traditional culinary dish, such as *Betutu* and *Belayag*. In fact, this type of Balinese culinary exists in all regions of Bali. As a consequence, it is not easy to determine benefit-sharing, and who should obtain the right to fruit the benefit-sharing of the Balinese traditional dishes. Furthermore, by understanding the rapid change in the almost



life of the community, this becomes a new challenge of protecting traditional culture expression if only rely on the provision of traditional cultural expression under copyright law. Therefore, other intellectual property regimes such as trademarks, and industrial designs, including patents are eligible for traditional culture culinary.

Patent regimes, particularly simple patents can be considered to protect Balinese culinary innovations by encouraging the creative and innovative works through advanced technology, it seems to bring major change to the innovation of culinary, allowing it to become available for the global market, which will bring benefits for both for the consumer and the inventor. The consumer will be possibly obtaining the product easily and rapidly and the inventor will have a big opportunity getting incentives and rewards based on his creative-innovative works. However, in order to keep harmony, the balance of protection between the inventor and the custodian who preserves the traditional culinary dish needs to be concerned. The matter of protecting Balinese culinary not only relates to providing innovative work that is new or a novelty, inventive steps, and industrial applications that will bring efficiency and utility, but more importantly is also keeping the values that are embodied in society ensuring they still exist and are respected.

Suggestion

The role of local government is needed in order to provide the balance of rights, both for the creative inventor and the owner or the custodian of the traditional cultural innovation, including in the contexts of Balinese culinary. Furthermore, the role of government in providing legal bases as well as the facility to conduct training and support technical assistance in intellectual property protection is needed for a better future of culinary business.



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