Copyright and conflicting claims about culture and property in Indonesia

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1. Pre-copyright era Europeans, going back to Plato, also spoke of the paternity they felt in relation to the books they gave issue to.

2. I am indebted to Dr. Maribeth Erb for bringing was dropped in the 2002 law.

3. Indonesia’s 2002 law implemented under existing copyright law and was generally known as ‘Mrs Tien Per Cent’ because, it was said, she took 10 per cent from each national contract.

4. Indonesia’s prior copyright law regulated uses of folkloric works only ‘by foreigners’, but this phrasing was dropped in the 2002 law.

5. I am grateful to Dr. Maribeth Erb for bringing Nela to my attention, introducing me to Nela’s family, and providing insightful comments on the Manggarai situation.

6. Wives of Indonesian political leaders often wield great power in corrupt regimes. The wife of President Suharto (1966-1998) was named Tien. She was generally known as ‘Mrs Tien Per Cent’ because, it was said, she took 10 per cent from each national contract for herself.

7. Geographical indication certification might seem a better targeted intellectual property strategy for this product, but it would fail where a cultural expression is not regionally distinct.

Over the past few decades increasing global trade has facilitated the spread of both intellectual property laws and United Nations cultural property language into new national zones. The rapid expansion of proprietary laws, and their sometimes dubious potential for enactment, raises questions about the meaning and uses of emerging claims for intellectual and cultural property ownership. My research on the aims and practices of Indonesian regional artists shows how both intellectual and cultural property legal initiatives mismatch what producers do. Current efforts to globalize intellectual and cultural property discourses now naturalize two foreign property ownership models among people who not only have not asked for these ‘human rights’, but who also draw boundaries of possession, creative authority, and repertoire access differently from most Western modern artists.

This article addresses how developing nations, under pressure from international groups, are using intellectual property laws and language to make proprietary claims over locally produced arts and expressive cultural activities. Using the example of Indonesia, I here analyze the provincialism of intellectual and cultural property models and the alternative authority processes used in an informal commons beyond the wired West.

Indonesia’s 2002 copyright law

The world’s fourth most populous nation, Indonesia, reacted to multinational corporate and World Trade Organization pressures for stricter intellectual property laws with an unusual 2002 copyright law. The law combines standard copyright provisions to suit the West with atypical (or sui generis) cultural property provisions. The pivotal provision in the 2002 law says: ‘the state holds copyright over folklore and the people’s cultural products’.

This declaration conveys the high stakes of this law for Indonesian arts producers and audiences – as well as for anthropologists cognizant of emerging applications of our own unleashed technical term, ‘culture’. The wording enlarges cultural property’s scope beyond its usual protection of particular sets of tangible valuables – by and large culturally sensitive items such as pillaged grave goods or rare archaeological artifacts (Brown 2005) – to enclose even intangible creations such as unrecorded dances or stories.

I performed multi-site field research with a variety of Indonesian regional artists – musicians, dancers, puppeteers, dramatists, carvers, painters, batik makers, and weavers – whose views regarding the proper authorities over ‘folklore’ or ‘traditional cultural expressions’ were never consulted by the Indonesian law makers (Aragon 2012). Among these art producers, expressive productions are not deemed property, most makers do not claim authorship, and copying is not seen as an ethical problem. Instead, skilled art practitioners, in consultation with their communities, manage their collaborative productions and sharing (or sequestering) of lore without recourse to formal law (Aragon 2011).

‘Folklore’, ‘tradition’, and ‘culture’, are historically complex and politically problematic terms often used to describe the informally managed domains of shared knowledge and ethical practice, which I here am calling ‘lore’. Collaborative or layered forms of authority are not well recognized in copyright’s formulation of authorship with its philosophy of possessive individualism (Macpherson 1962; Jaszi & Woodmansee 1994, 1996). Hence, new tensions have been set into play by Indonesia’s efforts to combine conventional copyright law with redrawn cultural property provisions that give the state nominal control over the exchange and use of local creations such as songs, dances, handicrafts, and even ancient myths.

Two types of legal models in Indonesia’s 2002 law – intellectual and cultural property – aim to overrule the lore of Indonesian regional arts. Lore, which I describe as a third creativity management regime (separate from intellectual and cultural property law), is called ‘tradition’ or ‘custom’ (adat) by Indonesians using their national language. Thoughtful analysts acknowledge that customary practices are flexible, not static. They arise and vary over time, as well as by region and genre. What Indonesians
call ‘customary arts’ or ‘traditional arts’ (kesenian adat or kesenian tradisional) are produced by selectively sharing knowledge according to methods that are negotiated by artists and their sponsoring audiences. It is a locally limited commons focused on social relationships and processes, not just products. Lore differs from both copyright and cultural property models because it is a distributed authority model. Not everyone has equal ability and rights to produce and copy works. Greater authority may be claimed by, and conceded to, those of advanced skill, age, gender, or pedigree. The informal and distributed aspects of lore differentiate it not only from Euro-American intellectual property, but also from the homogeneous communal rights model presented in UN cultural property doctrines. Indonesian ethnographic examples show how many artists producers rebuild the idea of copyright claims to their works and genres, illustrating the gap among different Indonesian stakeholders’ aspirations for national law’s relationship to regional lore.

Copyright law and authorship

Indonesia’s 2002 Law on Copyright awards those who practice Western-style individualistic arts, such as canvas painters, authors, choreographers, and popular music composers, the now-standard international copyright protection. Depending on the type of work created, copyright lasts for 50 years after a work is published, or 50 years after the death of its creator. This part of Indonesia’s copyright law accords with the international mandate of the 1994 Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Policed by the World Trade Organization, the TRIPS agreement requires national laws that conform to Euro-American standards and corporate concerns about ‘Third World piracy’. The result looks like legal parity with the developed world, but in practice it is not. Very few of Indonesia’s informal creators claim individualistic authorship, even those whose creative works are just as novel and remarkable as those who claim copyright elsewhere. Multiple sources contribute to any creative work. Think of the African-American blues elements in Rolling Stones and Led Zeppelin songs or, for that matter, Plutarch’s tales of antiquity in Shakespeare. The erasure of these contributions, the legal fiction of original authorship in copyright law, generally is not sought in Indonesian communities. Indonesia’s regional artists – musicians, dancers, puppeteers, dramatists, carvers, painters, and weavers – imagine the properties of their productions differently than most Western artists producers do. Although some skilled experts boast about their accomplishments, few wish to assert proprietary claims over them. Rather, producers tend to couch their contributions within what they see as a more important authority: the ancestral canon. A common artists’ perspective was illustrated in June 2005 at the Indonesian Institute of the Arts in the court city of Solo. Along with a multinational research team of lawyers, community activists, ethnomusicologists, and anthropologists, I listened to Javanese gamelan musicians, composers, choreographers, and shadow puppeteers speak about the wellbeing of the traditional arts taught at the national arts conservatory. The meeting advanced the team’s task to consider artists’ perspectives regarding possible impacts of Indonesia’s 2002 copyright law. Ultimately, these master artists and imaginative performers parried our questions about their personal contributions and claims with the startling words, ‘We don’t call ourselves creators’. For varied reasons, most Javanese gamelan musicians, choreographers, and puppeteers disavow authorship over even their most original contributions by presenting themselves as mere followers of their traditions. By attributing the genius of their accomplishments to inherited traditions, forebears, or God (Tuhan or Allah), rather than to themselves, Muslim, Hindu, and Christian regional artists separate ‘voice’, the delivered formulation of their performance or artwork, from ‘agency’, the principal authority said to be responsible for their actions (Goffman 1981; Keane 1997: 139). They describe themselves as conduits, not sources. Some Javanese artists even describe copying an old exemplary work as like ‘making a child’ (mutrani, Javanese). This frames imitation as a fertile and creative genealogical process rather than a mechanical reproduction. Within the orally transmitted repertoire, there is no original or ur-text. In contrast to Walter Benjamin’s discussions of Western modern art (Benjamin 1969), concepts of copyright-worthy originals and inauthentic replicas make little sense. For many Indonesians, each work within the repertoire adds its own aura to a trajectory of versions. Each, potentially, is a stellar ‘new original’ and an intentional, ethically pure, work of art. Their separation of voice from agency, preference for locally negotiated authority, and keen recognition of their own collaborations and ancient borrowings from distant lands (such as the Ramayana epic), begins to explain their ethical refusal of authorship and copyright law itself. In short, copyright law’s concept of authorship and property has cross-cultural problems.

Folklore as state property

That the internationalization of intellectual property laws such as copyright does not offer immediate benefits to developing nations like Indonesia has not escaped the attention of Indonesian government lawyers (Sardjono 2006). In fact, they fear additional predatory commerce from foreign and multinational businesses that may now register Indonesian creations as their property. As ordinary citizens who have no legal means of registering their creations, they could withhold traditional knowledge from foreigners. Indonesian legal experts such as Sardjono argue that the national government must do it for them.

The 2002 law’s solution is to place folkloric knowledge under state copyright, thereby precluding any naïve generosity with Indonesian knowledge resources. As in Ghana (Boateng 2011), this communal fix to regulate a less-than-full commoditization of commons advances permanent collective rights overseen by the state as the alternative to conventional copyright’s limited-term rights for an individual original creator. Before the 1980s, the international legal community considered copyright law unsuitable to regulate or “protect” works of folklore (von Lewinski 2008). Local collaborative arts did not seem to meet copyright’s key criterion of individual originality. Considered ‘unauthored’, they were placed outside the purview of intellectual property law (Perlin 2011: 115). Intangible works, such as unwritten and unrecorded stories, also lacked copyright’s requirement of ‘material fixation’. Of scant commercial interest, often easily replaceable, and rarely claimed in proprietary language, lawyers had trouble recognizing the relevance of most non-Western or traditional arts, much less declaring them cultural property under human rights law. However, the situation is now changing. Postcolonial nations including Indonesia, Ghana, Panama, and Vanuatu have written intellectual property laws that regulate ownership of ‘traditional cultural expressions’, the moniker that now often replaces the F-word (folklore) in UN doctrines discussing indigenous or traditional peoples. When international forums recognized the problems of authorship and iniquities in developing nations’ capacity for utilizing conventional intellectual property law, they posed cultural property models as well-meaning solutions to support creators’ rights.
Cultural property laws aim to heal old wounds, generally by repatriating wrongly removed cultural artifacts. But, when extrapolated for intangible cultural activities, cultural property fixes create two new predicaments. The first is the necessity to identify (or invent) precise cultural property owners. The second is the necessity to identify (or invent) precise cultural property units to be owned.

Indonesia’s 2002 copyright law makes the state – in practice, state agents at different scales – a default copyright owner. It makes vaguely described cultural products and activities the ownable objects. Article 10 reads: ‘The state holds copyright over folklore [folkl] and people’s cultural products that are owned in common, such as stories, folktales, legends, historical chronicles, songs, handicrafts, choreography, dances, calligraphy, and other artistic works’. Article 31 adds that state copyright over folklore and people’s cultural products ‘has no time limits’. Perpetual claims are characteristic of cultural property repatriation laws but inimical to the limited terms and ‘ultimate public social benefit’ aims of copyright law.

The law distinguishes works of ‘folklore and people’s cultural products’ from ‘anonymous works’. The state holds copyright over anonymous works for 50 years after the work is first made public. The phrasing and exigesis from the law’s core supporters indicate that anonymous works (‘works where the author is unknown’) are deemed to be original creations by past individuals, as opposed to collaborative folkloric works. But, the law never explains how the difference can be determined.

The law’s cultural property provisions echo Indonesia’s postcolonial eminent domain law laws, which say that forests or irregularly planted lands can be appropriated by the state. In this respect, there would thus appear to be an addition to Indonesia’s national economic aspirations to the exploitation of raw natural resources, namely refined ‘cultural products’. Yet, the idea that the state may usurp ‘the work is first made public. The phrasing and exigesis from the law’s core supporters indicate that anonymous works (‘works where the author is unknown’) are deemed to be original creations by past individuals, as opposed to collaborative folkloric works. But, the law never explains how the difference can be determined.

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The philosophical implication of Indonesia’s cultural property claims also echo the 18th and 19th-century American idea that unused wilderness equals waste, and it is the charge of property law to remedy the profligacy of common law (Purdy 2010: 50-53). In short, Indonesia’s copyright law follows historic eminent domain law law in potentially encasing the local practices and cultural knowledge of its ‘disorderly’ citizens for future state-imposed order and commercial development.

Cultural theft and the Flores weaving motif

After passing the 2002 copyright law, Indonesian officials began media campaigns about the purported cultural theft of regional artworks by foreigners. First, they accused the American avant-garde artist Robert Wilson of misappropriating an ancient ethnic Bugis epic from Sulawesi Island for his 2004-2005 multimedia theatrical production ‘I la galigo’. In fact, Wilson’s team began his project with local support, hired an all-Indonesian cast, and made a transformative work from bits of an uncopyrighted tale (Aragon & Leach 2008).

Next, Indonesian politicians began accusing neighbouring Malaysia of stealing a vast array of ‘Indonesian’ cultural works and genres — including everything from a regional folk song and masked dance to batik and beef curry (Aragon 2012). The fact that the nations were fighting about the exclusive ownership of long-shared knowledge and practices was overlooked. So was the fact that the boundaries between Indonesia and Malaysia are arbitrary lines drawn by the Dutch and British empires.

These disputes over ‘copyright’ might seem flimsy, even nonsensical to an outsider. But they were (and are) pursued with an angry passion as mass media accusations echo in public discussions across the archipelago. Although the cultural works and activities at issue would not normally fall under copyright law in the West, Indonesia’s law had put them there. Yet, there was a problem. The cultural property articles of the 2002 law were never shored up with implementing regulations that would enable specific litigation to take place. Ultimately, high-level state lawyers and politicians were making exaggerated accusations about foreigners’ cultural thefts that accomplished little besides encouraging proprietary thinking among a domestic audience.

To address the toothlessness of the 2002 law, Indonesia drafted several cultural property laws regulating ‘traditional cultural expressions’ and ‘traditional knowledge’ between 2007 and 2009. These draft laws viewed regional arts as owned by customary communities in cooperation with state oversight, and included sanctions for violations. They, however, were still top-down and seemingly unenforceable. The drafts have yet to pass parliament although senior government lawyers are still seeking ways to legalize state control over informal cultural resources. Indonesia is working with the UN’s Inter-governmental Committee (ICG) of the World Intellectual Property Organization (WIPO) to write an umbrella language for how a harmonized set of national and international laws could regulate ‘traditional cultural expressions’, ‘traditional knowledge’, and ‘genetic resources’.

In the wake of the laws and public debates, a few local Indonesian leaders seized upon the idea that state units such as districts should copyright elements of ‘their’ local culture. A dispute I encountered on Flores Island is exceptional in that it entails no foreign ‘cultural thieves’. As some observers have feared, the 2002 law is vague enough to suggest that state agents have the authority to make cultural property claims, which could usurp the existent informal authorities and modes of sharing among local producers.

In June 2011, I visited western Flores aiming to meet Nela, a skilled ikat weaver of the Manggarai ethnic group. Nela had quarrelled with the wife of the head (bupati) of the newly created West Manggarai District about the district’s plan to copyright a local weaving motif. Indonesia is divided into, and ruled through, its provinces, districts, and sub-districts. When the authoritarian Suharto regime ended in 1998, a decentralized reform process resulted in the creation of many new districts aiming to develop their own resources. West Manggarai District was created

Fig. 2. Behind-the-screen view of shadow puppet drama with gamelan orchestra led by puppeteer Ki Purbo Asmoro, Solo, Central Java, Indonesia, July 2005.
The move to claim a supplementary weft motif named ‘chicken eye’ (mata manuk) as a way to distinguish and advance the new district economically was controversial among weavers such as Nela. The pattern is basically a horizontal diamond or lozenge with a dot in the centre. Elementary in design and unquestionably old, this is not the kind of ‘new and original work’ that standard Euro-American copyright law covers. As a folkloric handicraft, however, it falls under the state’s copyright authority as specified by the 2002 law.

Widely shared and produced within and beyond western Flores, the chicken eye motif also is not the kind of culturally sensitive, rare, or stolen work that cultural property laws normally cover. So, the Indonesian government’s legal initiatives clearly have both an aspirational element (what political leaders and citizens imagine they can do given what the law says) and a rhetorical or persuasive element (including what authority citizens might concede to government agents and their business partners under pressure). Historically, the Indonesian government has defined the boundaries of its geographic-political units according to their alleged cultural or ethnic characteristics. Suharto-era education and propaganda programmes imagined, and depicted in posters and books, each province as having one house style, one gendered pair of traditional costumes, and one dance (Fig. 4).

In reality, the diversity of peoples moving across what are now Indonesia’s national and district borders is messy and complex. The words ‘mata’ for eye and ‘manuk’ (or manu) for chicken are ancient Austronesian words, retained in many of the now mutually unintelligible languages spoken throughout the Indonesian archipelago. Historical evidence suggests that Manggarai people learned their now characteristic weaving techniques when western Flores was influenced from the 15th-17th century by the Muslim sultanates of Bima on Sumbawa Island, and Goa on Sulawesi Island (Erb 1997, 1999). The chicken eye motif is commonly used by all ethnic Manggarai weavers, most of whom live inland, across three Flores districts (Fig. 5). These facts led to Nela’s heated dispute with the politicians. Sadly, however, Nela died before I arrived in Flores. Her cousin explained the local weavers’ opposition in her stead. With exasperation, he said, ‘Our ancestors did not live only in West Manggarai!’ How could one newly created political subset of ethnic Manggarai claim a design element long used by all of them?

I learned that the controversial plan arose when the district head installed his wife, an outsider from another island, as head of the new district’s handicraft bureau. She was tutored at a seminar in the capital Jakarta on the state’s new economic vision to register handicrafts as intellectual property. Then, she and her husband lobbied and applied to provincial leaders for a district-level copyright over several Manggarai weaving motifs.6 Visiting the house of her relatives in 2011, I reached the (now former) district head’s wife by telephone to discuss the plan’s status. Apparently their uncooked vision for copyrighting the weaving motif was to make weavers outside the new district (more numerous than those inside) pay fees in order to make and sell textiles with the popular chicken eye ornament (Fig. 6). Although her husband had been voted out of office in the previous election, she said they were ‘still in the process of seeking copyright’ for the motif even though ‘it was not yet achieved in law’.

Comments I heard in Flores, like those across Indonesia, often confounded legal terminology. Some Flores pundits spoke of ‘patenting’ (patenkan) the weaving motif, thereby conflating two types of intellectual property law, as well as destabilizing intellectual and cultural property models.
District leaders’ assertion of property ownership also seemed aimed at commercially branding district products with a culturally familiar graphic symbol. Their desire to foster a newly invented political identity, in addition to political rent seeking, overshadowed conventional technicalities of both law and lore.

Handmade textiles have long been traded among Indonesian families, regions, and islands. When women marry into a new village, they often introduce their natal designs and teach younger kin. Nela’s cousin said that Manggarai recognize certain textile motifs as more characteristic or emblematic (ciri khas) of particular regions, but it ‘is not allowable for anyone to assert claims to own motifs because we all come from one stock’ (literally, ‘one bamboo clump’). Nela’s cousin and family said the attempt to copyright weaving designs was just political gamesmanship, a way that outsider politicians were trying to jockey for power with their new district. Public acceptance appeared unlikely.

Another Manggarai weaver I met, Maria, also opposed copyrighting weaving designs. Maria was a colleague and sometime competitor of Nela. Both successful older business women, they spent decades teaching weaving so other Flores women could support their families. Maria’s major objection was that ‘copyright will kill the small entrepreneur’. For Maria, weaving is a rare job where Flores women, excluded from other income opportunities, can work hard, excel, and succeed. She said that no one should own the designs and techniques for Manggarai textiles because that ownership inevitably will favour the powerful. Like Nela and her cousin, Maria considers the inscrutable technicalities of law to be essentially politics by other means (Latour 1996; Riles 2005: 986).

Maria said that she created several supplementary weft motifs now copied by others. This is one way local repertoires change. But, echoing a prominent Javanese puppeteer I interviewed, Maria said she didn’t mind imitators or demand special recognition because she changes designs frequently and wants weavers in her community to succeed by whatever means they can. Maria’s son interjected that he could always distinguish his mother’s superior workmanship in an unmarked pile of textiles. As a skilled artisan, she said, she needs no legal claim to signal her weaving excellence to the tutored eye. Like most of the Indonesian artists or artisans I interviewed, they insisted that with the tried and true guidelines of local lore, they don’t need the intervention of national law.

Conclusion

The Indonesian examples show that it is technically difficult from both legal and cultural perspectives to copyright folkloric works, much less their elements, in ways that support the local practices and practitioners who make those kinds of works. Nevertheless, as an unintended consequence of the global expansion of intellectual property law and cultural property language, local knowledge and informal expressive activities worldwide are being re-envisioned as individual, national, or group-based resources amenable to property ownership through law. In Indonesia, this is promoted by the startling placement of authoritarian cultural property provisions in an otherwise boilerplate copyright law. It divides the nation’s population into two types: modern citizens who can claim standard copyrights, and ‘traditional’ citizens whose works are placed by government officials under the regulatory purview of the state in its capacity as a new copyright holder. The concept of culture and its owners is scaled up or down to the boundaries of the state (or district), while cultural activities and works are disembodied from their local contexts and histories to become cultural objects made property.

The example of Indonesia’s copyright law also demonstrates how international intellectual property law is not being collaboratively built by international organizations, nations, and local communities according to a uniform architecture that has even acceptance. Instead, we see postcolonial state leaders claiming ownership of cultural works, as well as specifying the political boundaries of groups who should be allowed to use and identify with those works.

This sometimes looks like wishful thinking on the part of out-of-touch bureaucrats. But, as anthropologists have noted, laws interpret and explain (even create) behaviour that they purport only to regulate (Geertz 1999: 215). Property models, whether individual or communal, promise new social relations and hierarchies.

Hearing the voices of local Indonesian arts producers who advocate for the autonomy of their non-proprietary authority regimes, or lore, is an important antidote to the claims of multiethnic nations and districts to be exclusive copyright owners of works, styles, and genres of ‘cultural property’. Finally, to the extent we detect provincialism and legal fictions in Indonesia’s peculiar copyright law, we may better recognize the ethnocentric aspects of the imported intellectual and cultural property models that it refracts.

Fig. 5. Highland Manggarai woman weaving on a backstrap loom in Barang Village, Cibal District, Flores, 2011.

Fig. 6. Labuan Bajo woman holding ceremonial textile showing the ‘chicken eye’ motif proposed for the district-level copyright, Flores, 2011.