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LEGAL PROTECTION ON CULTURE RESERVE IN MALANG CITY

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Abstract
Protection of cultural heritage is a nation's commitment to protect its cultural heritage. This study aims at finding the relationship between the law on cultural preservation and the law of traditional cultural expression in copyright law, especially about cultural richness and its juridical consequences and to know the application of law on cultural heritage in Malang as mandated by Law Number 11 of 2010 on Cultural Heritage. To achieve these objectives, juridical research was conducted with the orientation of two approaches, namely normative juridical to achieve the first objective, and empirical juridical to achieve the second goal. The normative approach was carried out with the stage of conducting a positive law inventory and its historical context, classification, and semantic, syntactic and phenomenological analysis. Empirical juridical research was conducted by examining how the practice of implementing the cultural heritage law in the field, namely in the city of Malang. Primary data obtained through observation and interviews with informants. Secondary data obtained from the document of education and culture of Malang City, books and related journals. Data analysis was done by triangulation with experts in the field of cultural preservation, presented in the form of description and tables. The results showed that: 1) there is an unconformity between the laws governing cultural heritage and copyright law, especially Traditional Cultural Expression. 2) In the city of Malang, the protection of cultural heritage has not been fully done since there is no Culture Preservation Ethic, Cultural Heritage Team of Malang City that can not work optimally.
Keywords: Cultural Reserve, Traditional Cultural Expressions, Cultural Heritage

I. INTRODUCTION

Promoting national culture by guaranteeing the freedom of society in maintaining and developing its cultural values is the mandate of Article 32 Paragraph (1) of the 1945 Constitution. Several laws that attempting to realize this are Law No. 28 of 2014 on Copyright and Act No. 11 of 2010 on Cultural Heritage. In 2017, the new Law is published, namely Law No. 5 of 2017 on Cultural Progress.
In article 38 of Law No. 28 of 2014 on Copyright, it is determined that the copyright on traditional cultural expression is held by the state. The expression of traditional culture "includes either one or a combination of forms of expression a) textual verbal, both oral and written, in the form of prose and poetry, in various contents and text, which may be literary or informative narratives, b) music, among others, the vocal, instrumental, or combination thereof, c) movements, including, among others, dance, d) theater, among other things, puppet performances and folk plays, e) fine arts both in the form of two dimensions and three dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile, etc. or any combination thereof and f..
The regulation of cultural property is also contained in Law Number 11 of 2010 on Cultural Heritage (hereinafter abrbreaviated as CH). Article 1, namely: "Cultural Heritage is a cultural heritage in the form of Cultural Heritage, Heritage Buildings, Cultural Heritage Structure, Cultural Heritage Sites, and Heritage Areas on land and/or in water that need to be preserved because it has an important value for history, science, education, religion, and/or culture through the process of determination."
At a glance, these two Laws can be distinguished, ie that related to culture, Copyright

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Law protects intangible cultural expression while CH protects traditional tangible cultural expression. But this is not always true, since the Copyright Law also protects the art, both in the form of two dimensions and three dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or a combination thereof. Such forms of juridical work may also be included in the category of cultural heritage if it qualifies as a cultural heritage. For that reason, a clear mapping is necessary to ensure that cultural property is categorized under which law, so legal protection is also clear which legal umbrella.

Preservation of cultural reserves is an attempt to maintain connectivity between present and the past. The goal is to improve the welfare of the people as well as lifting the civilization of the nation through the ancient relics. The mission of Cultural Heritage Act is to slow the loss of cultural heritage from Indonesian territory.

The description above serves as the background for the problems formulated as follows: 1) What is the relationship between the law on Heritage and Copyright Law, specifically on cultural property, and what are the legal consequences?; 2) How the application of the law on the Heritage in Malang?

Cultural heritage is a cultural heritage in the form of Cultural Heritage, Heritage Buildings, Cultural Heritage Structure, Heritage Sites, and Heritage Areas on land and/ or water that need to be preserved because it has important value for history, science, education, religion, and / or culture through the process of determination. Cultural heritage as part of cultural wealth has a cultural significance (cultural significance). Then there are two aspects of cultural richness: 1) The property aspect, which derives from the fact that cultural richness consists of tangible objects, displable objects. The implication is that it can be owned, or at least controlled; and 2) cultural aspects, derived from the cultural significance of the object.[1] Therefore, objects that belong to cultural riches can not be treated as things in the usual sense because no one can have them. Defining cultural richness without reference to culture is not only stupid, but also dishonest. This kind of thinking seeks to reinforce ownership claims while at the same time contaminating the things that value the object to the holder.[2] Cultural riches and world heritage sites are a vital source that enriches life, the spiritual foundation. These resources are not for individuals or groups of people or nations, and are not seen as belonging, but beginning to be seen as mutual assets of all humanity.

There are two schools of thought in the study of cultural wealth.[3] First is cultural internationalism, a flow that cares about the physical preservation of things, which explains the concern in the principles of the law of wealth. This argument is generally accepted by "greedy" nations, museums, collectors and archaeologists, all of which seek to protect their access to cultural wealth for aesthetic, educational, or proprietary purposes only. The legal principles they propose are the right to ownership, conquest, placement, and purchase on the basis of good faith.

Secondly, the school of thought is known as "cultural nationalism", which is primarily linked to the cultural usefulness of the cultural treasures. His argument is coupled in the principles of human rights. The demands are for cultural dignity and self-determination culturally. This argument is embraced in the framework of repatriation of culturally meaningful objects to the source country or to those who have it (more on human rights). It is also to preserve the intangible heritage that tends to follow the inventory model, then release it from the public domain, and return it to the person or group who is suspected as

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1. Roger W. Mastalir, "A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law", *Fordham International Law Journal*, Volume 16, Issue 4 1992 Article 3, p. 1037.

2. Roger W. Mastalir, *Ibid.*

3. Roger W. Mastalir, *Ibid.*

the creator.4
Tensions in the international world occur between nations that acquire cultural and national origin, related to the protection and repatriation of cultural wealth. The main subject of [12]asion is: the essence of cultural richness. So the question of whether cultural wealth should be protected by national efforts and international efforts remains unanswered.5
There are major changes in the field of cultural heritage conservation, in terms of theory and practice of protecting it. Among these are the scope and category of inheritance, ranges from single monuments to groups and regions, tangible and unimportant, e[7]. In addition, the issue of cultural significance or the meaning of cultural heritage, discussed by Alois Riegl in the early 20th century, has grown and extended to other countries since the Burra Charter (1999). To date, many authors discuss the value of cultural heritage, including definitions, theories, a[7]d methods for evaluating cultural heritage in practice. Subsequently, in the mid-1970s the Council of Europe raised the issue of integrated conservation, as stated in the Amsterdam Declaration (1975). A year later, UNESCO reiterated this issue further in Nairobi Recommendation (UNESCO, 1976). Now, it is a trend everywhere that conservation work not only relies on individuals or a profession, but is related to conservation with other fields, so it is multidisciplinary. Conservation is not only the area of experts, but also the general public as the owner of the inheritance itself. Communities are responsible and participate in decision making.6
Austria and Russia, in the UK for example, there are about 6,000 collections, whereas in Australia there are about 3,000 ethnographic objects of Indonesia. The diplomatic effort to restore the masterpieces was done in 1978. After that, the effort stopped until now. The result of the diplomacy in 1978, the Dutch Government finally returned, among others, Nagarakertagama manuscripts, Prajnaparamitha statues as high as 1.26 meters, saddle Pangeran Diponegoro, and a collection of gold from the kingdom in Lombok, West Nusa Tenggara. Horse saddles, statues, and gold are currently stored in the National Museum, while Nagarakertagama manuscripts are kept in the National Library.7 Until now, bronze and bronze piglets, presumably from the Majapahit era, still belong to the Metropolitan Museum, USA.8
Article 1 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinaft[10]eferred to as "UNESCO 1970") UNESCO defines objects including cultural property, as follows:
For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
1. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
2. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
3. products of archaeological excavations (including regular and clandestine) or of

[1]
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4. Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property", *International Journal of Cultural Property*, Volume 12, Issue 1, February 2005, hlm. 40. Baca juga: Francesco Francioni, 2011. "The Human Dimension of International Cultural Heritage Law: An Introduction", *The European Journal of International Law* Vol. 22 no. 1.

5. *Ibid.*

6. Cheung, P.T.Y. “Civic Engagement in the Policy Process in Hongkong: Change and Continuity”. *Journal of Public Administration and Development, 31*, 2011 p. 113-121.

7. *Ribuan Benda Sejarah Indonesia di Luar Negeri, Majalah Arkeologi, July 16 2013.*

8. *Dok. Metropolitan Museum, 2017.*

4
archaeological discoveries;

4. elements of artistic or historical monuments or archaeological sites which have been dismembered);

5. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

6. objects of ethnological interest;

7. property of artistic interest, such as:(i) pictures, paintings and drawings produced entirely byhand on any support and in any material (excluding industrial designs and manufactured articles decorated **by** hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs;(iv) original artistic assemblages and montages in any material;

8. rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

9. postage, revenue and similar stamps, singly or in collections

10.archives, including sound, photographic and cinematographic archives;

11.articles of furniture more than one hundred years old and old musical instruments."

Meanwhile, Japan classifies cultural richness into several groups: (1) structures such as temples, temples, and private houses; (2) Buddha Statue; (3) paintings; (4) calligraphy; (5) other skills referred to as waza such as performing arts and craft techniques; (6) traditional events and festivals. The unchanging landscape over time, the villages and towns of history are also treated as cultural riches.
In the Cultural Heritage Protection Act of Japan, cultural property is categorized as follows[9]:
1. Tangible cultural wealth: consists of: (a) riches of high historical value and high artistic value such as structures, paintings, sculptures, crafts, calligraphy, archaeological artifacts, and other historical objects. Except for the structure/building, the wealth is generally called "fine and applied arts".
2. Intangible Cultural Property
3. Intangible cultural wealth is defined as riches that have historical or artistic value such as drama, music, and craft techniques. Wealth is united in people or groups who have mastered the *waza*.
3. Folk Cultural Properties (Folk Cultural Properties). This is inseparable from understanding transitions in the daily life of the community, such as (i) customs and habits associated with a) how to eat, dress, and house (b) work, (c) to believe and (d)) Annual events (ii) the performing arts of the people, iii) people's skills (iv) clothing, application, and housing used in conjunction with the previous;
4. Monuments, including graves, forts, fortifications sites, or temples and monumental houses, which have high historical or scientific value. Included in the monument are gardens, bridges, ravines, beaches, mountains, and other beautiful places that have artistic value and beautiful scenery. In addition, including animals, plants, and geological and mineral formations that have the value of science;
5. Cultural landscape, is a scene that has evolved along with the lifestyles of Japanese society and with regional geo-cultural picture. This natural landscape can not be separated from the understanding of the lifestyle or life of Japanese society;

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9. Cultural Properties Department, Agency for Cultural Affairs, JAPAN, March 2015. "Cultural Properties for Future Generations: Outline of the Cultural Administration of Japan", diakses dari http://www.bunka.go.jp/english/index.htm, 27 Desember 2016. Baca juga: Russell, James Edward, 2011. "Cultural Property and Heritage in Japan", *Dissertation*, SOAS, University of London.

6. Traditional Building Group: is a high value building and forms a historical scene along with its surroundings.

Beyond the cultural wealth mentioned above, the Japanese government organizes, selects and lists important items in each category as Important Cultural Properties, Important Intangible Cultural Properties, Important Tangible/Intangible Folk Cultural Properties, Historic Sites, Places of Scenic Beauty, and Natural Monuments. The Japanese government gives high priority to protect it. In addition, the protected ones are: a) underground/buried cultural riches, and b) the traditional skills and techniques necessary for the restoration and preservation of cultural wealth (the technique of conservation of cultural property).
Japan's Cultural Wealth Protection Act (*Bunkazai hogoho*) has influenced Japanese performing arts. The law establishes Japanese performing arts as "cultural riches". It provides a powerful impulse like national surveys that help provide a comprehensive picture of the art that exists; and he helps in the living by stimulating the formation of local communities as conservationists.[10] Due to Japan's care to nurture and promote cultural wealth through legal instruments, the Cultural Heritage Protection Act of Japan has been named the most sophisticated and complete law for this and is seen as a model for other countries that are looking for ways to protect their cultural treasures.[11]
The issue of lost cultural wealth has become an issue in East Asia, including Japan, Korea, and China. When Japan entered Asia from the 20th century to the end of World War II, the cultural treasures of China and South Korea were sent back to Japan. From Korea there are items related to the Commandery Auction, items from the Three Kingdom Period tombs, pots from the Goryeo Dynasty, stone paintings, temple paintings, sculptures, and other ancient documents.
From China there are some objects related to Manchuria. Examples of items associated with the National Palace Museum in Taiwan include specimens that include antiques, books, and other archaeological items. Incidents such as loss of specimens of Peking Man have also occurred. China has recorded the incident called "Index of Cultural Property Looted by Taiwan."
A joint conference was held between Japan and Korea in 1952 to begin negotiations for the return of various cultural assets. In 1965 a total of 163 volumes and 852 books, as well as 20 examples of communication materials submitted. Included are 176 ceramics, stone carvings, archaeological objects, and personal accessories of 434 items. Nevertheless, some cultural treasures are treated as private, while others are not handed over because they are located north of the armistice line. The list of these items is not published.[12]
The aims of this study are 1) to find out the relationship between the laws governing cultural heritage and the laws governing traditional cultural expressions covered by copyright, particularly those relating to cultural wealth and its legal consequences; and 2) to know the application of cultural heritage law as stipulated in Act Number 11 of 2010 on Cultural Heritage.

II. METHOD

This research is a juridical research with two approaches, namely 1) normative jurisdiction to find the relationship between the law of Culture and the law of traditional cultural expression in copyright law, especially about cultural richness and its juridical consequences; 2) empirical juridical to know achieve the implementation of law on cultural

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10. Barbara E. Thornbury, Temple University, Philadelphia, "The Cultural Properties Protection Law and Japan's Folk Performing Arts", *Asian Folklore Studies*, Volume 53, 1994, p. 211.
11. Geoffrey R. Scott, "The Cultural Property Laws of Japan: Social, Political, and Legal Influences", March 2003, *Pacific Rim Law & Policy Journal Association*, p 316.

12. Mitsuzane Okauchi, Waseda University, *Waseda Online*, accessed on December 26, 2016.

heritage in Malang as mandated by Law Number 11 of 2010 about Heritage.
Sources of data obtained from documentary studies conducted by the authors on: 1) Primary law materials, among others, Law no. Law No. 11 of 2010 on Culture, International Conventions on Cultural Property 2) Secondary law materials are dictionaries, encyclopedias, related writings in books and international and national journals in the field of cultural property. The collected legal materials are arranged systematically, presented in the form of descriptions and tables, and analyzed using legal theories and methods of approach relevant to the research questions to be answered; 3) Research Aid[13], which is helpful research instrument. The law has developed its concepts in distinctive terms. To understand and master these concepts, the author uses an adequate dictionary and legal encyclopedia and is often used as the reference standard by legal writers. In addition, because cultural property is in the realm of culture and the realm of law, researchers also use special encyclopedia cultural property.
After the legal material was collected, an analysis was conducted using the Lingkar Hermeneutika method with semantic, syntactic, and phenomenological analysis, then presented in the form of descriptions and tables, and analyzed using legal theories and methods of approach relevant to the research questions to be answered.
The empirical juridical approach is used to analyze how the application of protection of Culture in Malang City. Data obtained from in-depth interviews with the Department of Culture and Tourism of Malang City, which in this case provided by 1) Department of education and culture of Malang city, in this case represented by Head of Section History, Art, Tradition and Museum, Mrs. *Dra. Wiwik Wiharti Rodiah, M.Si* and 2) Sie Tourism Promotion and Secretary of Cultural Heritage Team of Malang City. Data analysis is done by comparing legal and practice provisions, analyzing them based on legal principles, and triangulating with experts in the field of cultural preservation.

III. DISCUSSION

A. Relationship between Law No. 28 of 2014 on Copyright and Law No. 11 of 2010 on Cultural Heritage

Discussing these two laws has the following relevance. First, they protect the product of human reason in science, art, and literature, which is certainly the result of culture.[14] Both laws contain elements of culture, containing 7 (seven) elements, namely language, knowledge system, social system or social organization, living and technology equipment system, living livelihood system, religious system and arts.[15] The relationship between the two laws can be analyzed by analyzing important concepts in both of the law, its scope and its juridical consequences.
The results of an analysis of the laws governing cultural heritage and copyright law indicate an unconformity between the two. This unconformity is evident from the overlap of arrangements between tangible cultural properties set forth in Law No. 28 of 2014 on Copyright, in particular Traditional Cultural Expression, as well as regulated in Law No. 10 of 2011 on Cultural Heritage (CH). Therefore, the linkage between these two laws lies in Traditional Cultural Expressions governed by both Copyright Law and by CH. Arrangement of *EBTs* in 2 (two) different laws results in overlapping arrangements, resulting in undefinable juridical consequences for which the law will be applied in an object. This is what in law is called legal indeterminacy. The legality of indeterminacy in this case is not definitively determined in terms of which law includes traditional cultural expressions

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13. Morris L. Cohen, dan Kent C. Olson. 2016. *Legal Research in a Nutshell*, St. Paul Minn: West Publishing Co.

14. See: Koentjaraningrat dalam bukunya, *Kebudayaan, Mentalitas, dan Pembangunan,* 1974. Jakarta: Gramedia, which put forward the notion of culture as "the whole system of ideas, actions, and the work of human beings in the framework of the life of society which is made human self by learning.
15. Koentjaraningrat, *Ibid*.

including the tangible in terms of the protected scope and content.
Firstly, the concept of the work as a form of culture, as stated by the Kuntjaraningkat above; Law No. 2 of 2014 calls it a "creation", defining it as "any creative work in the field of science, art, and literature resulting from inspiration, ability, thought, imagination, dexterity, skill, or expertise expressed in concrete form. "The concept of creation involves identification as the creator (so as to know the moral rights of its creator), the originality of the creator (the inspiration, the ability, the mind, the imagination, etc.) and the fixation (expressed in the real form). Furthermore, economic rights (the right to reproduce, the right to economic benefit) will be the next consequence of the existence of that moral right.
Second, the scope protected in both laws contains the same object. Copyright Law protects Traditional Cultural Expression (Copyright Law article 38), in which the copyright is held by the State, including art both in the form of two dimensions and three dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramic, paper, textile, etc. or any combination thereof. CH also protects cultural heritage objects, so long as it meets the age requirement (minimum 50 years) that has a close relationship with the culture and history of human development. Thus, there appears to be "overlap" or "wedge" between Copyright Law and CH in terms of traditional cultural expression.
Thirdly, in terms of juridical consequences: The same object is protected by different laws resulting in different juridical consequences. The arrangement of a cultural object within the Copyright Law as Traditional Cultural Expression results in the existence of moral rights and economic rights under copyright law, the state as the copyright holder of *EBT*, as well as the custodian as the heir to the keeper, the guardian of *EBT*.[16]
With regard to cultural richness in the development of Indonesian regulations, a Law on the Promotion of Culture (LPC) has been issued, through Law No. 5 of 2017, in which the object of cultural promotion includes: a. oral tradition; b. manuscript; c. customs; d. rites; e. traditional knowledge; f. traditional technology; g. art; h. language; 1. folk games; and traditional sports J..
The linkage between Copyright Law, CH and LPC can be found in Chapter IX, Closing Provisions, article 59 LPC, that all laws and regulations relating to the Object of Cultural Progress are declared to remain in force as long as they are not contrary to the provisions of this Law. Therefore it can be concluded that Copyright Law and CH remain in effect because it does not conflict with this newly published LPC. Nevertheless, there are things that still need to be observed, because the Traditional Cultural Expressions as well as Heritage Objects become the object of cultural promotion. More specifically, there are objects of cultural objects covered in the third domain, such as traditional handicrafts, which may be included in Traditional Cultural Expressions (with juridical consequences included in the realm of Copyright Law), within the Sanctuary (with juridical consequences included in the realm of CH), as well as in the law of cultural promotion, as traditional crafts enter the realm of traditional knowledge and art.
Issues that may arise are as follows: handicraft art that has been passed down from generation to generation, such as Topeng Malang, for example,[17] including Traditional Cultural Expressions or Heritage Objects? The legal consequences of the arrangement will be different if they are categorized as Traditional Cultural Expressions, ie they will be protected by Law No. 14 of 2014 on Copyright, whose copyrights are held by the state. The next consequence is, the state will hold the moral rights and economic rights of the traditional cultural expression. Unlike the case if the art of handicrafts inherited from generation to generation is categorized as Heritage Objects. He will certainly be protected under the Act No. 11 of 2010 on Cultural Heritage, where the legal consequences, among

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16. The term "custodian" has just appeared in the Government Regulation Draft (RPP) on Traditional Cultural Expressions. The RPP was obtained by researchers from the Directorate General of Intellectual Property Rights, Ministry of Law and Human Rights on 7 June 2017.
17. R. Diah Imaningrum Susanti, "*Kerajinan Topeng Malang dan Kepedulian Lingkungan*", *Aditya Wacana*, December 2004.

others are: (1) his ownership is taken over by the state if there are no heirs, (2) Everyone can have and / or master with due regard to its social function as long as it is not contrary to the provisions of the Act; and (3) conservation funding is borne by the government. The presence of Law No. 5 of 2017 on Cultural Progress has not been able to harmonize the overlap between the two laws, although this law prohibits destroying facilities which unlawfully destroy damage, eliminate, or result in the unavailability of facilities and improving infrastructure culture.

With the recent development of the LPC, it is necessary to question the relevance of the distinction between Traditional Cultural Expressions (most of which are intangible cultural heritage) regulated under copyright law and objects of traditional cultural expression in the cultural heritage law (which is a tangible cultural heritage). At least researchers have two reasons.

Firstly, the distinction between intangible cultural heritage and tangible cultural heritage does not have any legal significance, since both Traditional Cultural Expressions and Heritage Objects are "heritage" or heritage. It is supported by international instruments - WIPO-UNESCO Model Provisions, 1982,[18] yakni:

"Productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community, in particular: (i) Verbal expressions, such as folk tales, folk poetry and riddles; (ii) Musical expressions, such as folk songs and instrumental music; (iii) Expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and (iv) Tangible expressions."

Meanwhile, the cultural heritage is also a "heritage", that CH affirms it as a "cultural heritage," known as tangible cultural heritage. If both are the heritage of the nation, the next question: why formulating both in two different rules, with different juridical consequences?

Observing traditional cultural expressions as the nation's heritage in the Copyright Law, in fact this has been happening for 35 years, since Indonesia has a national Copyright Law, namely in 1982. Although it has changed 4 times, no government regulation has ever been published to fulfill the mandate of the copyright law.[19] Presumably, the government is having difficulties with the concept of "the state as the holder of copyright over traditional cultural expressions", as mandated by Copyright Law, so in the unpublished Government Regulation Draft it is only written: "The Right to Expression of Traditional Culture is held by the State for the interest of the custodian and the community Indonesia[20]."

Secondly, nowadays in the international world there is a tendency not to separate between tangible and intangible cultural heritage, because both are both national heritage, and are regulated in one law, not separated. Malaysia for example, has the National Heritage Act 2005.

Among cultural observers, is currently being pushed unification of the concept of tangible and intangible cultural heritage into the term "*saujana*". The word is still rare to hear this is the original Indonesian word, which literally according to Indonesian Dictionary means "as far as the eye can see". The word "*saujana*" was then agreed upon in the 2003 Indonesian Heritage Conservation Charter to be used as a translation of 'cultural landscape'. *Saujana* is a reflection of the relationship between man and his culture and his natural environment in the unity of space and time. Nature, among others, can be mountains, mountains, forests, deserts, and rivers, while culture is the result of creation,

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18. See: WIPO-UNESCO Model Provision, Geneva, 1982
19. R. Diah Imaningrum Susanti, "Perlindungan Hak Cipta atas Ekspresi Budaya Tradisional", *Laporan Penelitian*, Universitas Katolik Widya Karya, 2016.
20. Naskah Rancangan Peraturan Pemerintah ini diperoleh dari Departemen Pendidikan dan Kebudayaan Jakarta, on June 16, 2017.

taste, wish, and human works, such as tradition, belief, way of life, and so forth. Nature is a community partner, and both in dynamic conditions form "*saujana*".
Saujana reflects the community's way of processing land and sustainable natural resources. *Saujana* reflects the existence and development of local communities in managing the environmental system for a long time, so as to achieve harmony of life with nature and maintaining the cultural identity of the community. Saujana is a complex phenomenon with a tangible and non-bodily (intangible) heritage identity. Therefore, the cultural heritage that is physical and not bodily feasible to be united in an umbrella of legal protection, namely the law on the nation's cultural heritage, so as not to cause different legal consequences.

B. Implementation of City Government Duties in the Field of Cultural Heritage Protection

Ethical Preservation of Heritage is an important thing that must be determined by the Government of Malang. It is recalled that for the preservation of cultural heritage, Cultural Heritage Preservation Activities shall be carried out or coordinated by the Conservation Experts with due regard to the preservation ethic (article 53 CH). Until now, there is ethics as intended has not been set.
Cultural preservation in cross-sector and territory is done in coordination with the head of the area where the cultural reserve is adjacent.[21] For example, a cultural heritage object located on the border of Malang City and Malang Regency is coordinated with the district government to determine the status level of the cultural heritage object.
Until recently, data objects/areas/buildings/sites that have the potential to be designated as a Cultural Heritage of 274, in which a number of 212 collected by the local government, and 52 collected by the community. The city of Malang has a wealth of historical buildings, although not a few have changed. Realizing the wealth, the City Government of Malang formed an identification team in charge of recasting cultural heritage sites. The seven-member team consists of five historians, archaeologists and academics, while others came from the Department of Culture and Tourism (*Disbudpar*)[22], and only worked in January 2017. In addition, there are communities who care about the preservation of this cultural heritage, which regularly discussed under the coordination of Secretary of Cultural Heritage Team, ie community of Malang Heritage Community, Survival Malang, Pandu Heritage, etc. Members of the community consist of various backgrounds, and aims to conduct studies to formulate recommendations to the Cultural Heritage Team of Malang City.
The Cultural Heritage rating is set based on National, Provincial, and Regional ratings. Ranking is based on the meaning and value of the cultural heritage history for the Indonesian government as a whole, for the province, or for the local area.
The determination of cultural heritage status is done through three stages: 1) inventory; 2) assessment by Cultural Heritage Team, and 3) status determination. Until now, the Government of Malang has a Cultural Heritage Team consisting of seven members of academic background, historian, and architecture. Currently, small data collection has begun. Interim results, cultural reserves are grouped between the municipal and local governments. Examples of cultural reserves managed by individuals include the State Electricity Company (*PLN*), Post Office, Cor Jesu Building, Betek Water Tandon and Bank Indonesia Building (*BI*).
In addition to identifying, the team is also tasked with exploring the truth of historical values on each site. The team will find out and determine the truth of the stories relating to the site. If it is found to be valid and accompanied by supporting evidence, it will be used as

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21. Hasil wawancara dengan Dra. Wiwik Wiharti Rodiah, M.Si, Kepala Seksi Sejarah, Seni, Tradisi dan Permuseuman, on July 28, 2017.

22. *Merdeka.com, Malang*, October 12, 2016.

a cultural preserve. Conversely, if there is no enough evidence, it needs only to be used as folklore.

Dwi Cahyono, historian of State University of Malang said that the number of cultural preservation in the city of Malang as many as 180 pieces. But all of them have not been embedded in the Mayor's Certificate to support its preservation. As a result, the cultural heritage that has changed its function does not have a strong legal umbrella. If there is a decree, for example there are those who want to dismantle, its affairs with the law," said Dwi, taking into account the current situation, the cultural heritage of the type of building becomes the main focus. In addition, there are also the cultural heritage of crafts and traditions typical. Heritage buildings have many specifications. The city of Malang is very rich with historic buildings, but not a few have changed.[23]

Meanwhile, the National Culture Heritage Team (*TACBN*) is conducting a second phase review of this year on Culture Reserve which has the potential to become a national ranking.[24] The results of the review will result in a rating recommendation, which will be provided to the Minister of Education and Culture to be subsequently stipulated in the decision letter.

Currently, in the city of Malang, OEN SHOP is designated as a cultural heritage object, while other buildings that have been known to have historical value (Jl. Ijen 6 - Bung Tomo house), Kajoetangan Church, Cor Jesu Church, Buk Gludhug, etc., are still being recommended by the Team to become a Cultural Heritage.

The determination of cultural heritage status serves to provide legal certainty for the object/building/area. The legal effect of determining that status is on the financial consequences (provision of reserve funds for the rescue of the Cultural Heritage in the event of an emergency and invention that has been designated as a Cultural Heritage, including incentives, tax deductions, etc.), consequences of conservation by the Government, national registration in the National Registration system, its use for education and research, and its protection responsibility by the Government.

The lack of determination of cultural heritage status is caused by the newly established Cultural Heritage Team of Malang City in mid 2016, and at the end of 2016 only get certificate from National Agency for Professional Certification (*BNSP*). The team is working with the Ministry of Culture, Directorate General of Culture, and only works in early 2017, with financial and human resource constraints. Practical to date there are still many objects that have historical value and potentially to be established as cultural heritage objects still have not gained that status.

IV. CONCLUSION

The conclusions of this study are as follows:

1. The relationship between Law No. 28 of 2014 on Copyright and Law No. 11 of 2010 on Cultural Heritage lies in both of which equally organize the same object. Arrangement of Traditional Culture Expression in two different laws leads to overlap/unconfirmed rule of thumb (legal indeterminacy). This is manifested in the following: 1) The concept of the work (creation); 2) Protected scope, and 3) Judicial consequences. The juridical consequences of cultural objects in Copyright Law as Traditional Cultural Expressions result in moral rights and economic rights under copyright law, the state as the copyright holder of *EBT*, as well as the custodian as the heir to the keeper, guardian of the *EBT*. While the juridical consequences of Traditional Cultural Expressions which may be protected as cultural heritage objects are: 1) There is no moral right and economic right to such cultural heritage objects; and 2) the State becomes a preserver and protector of

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23. *Ibid.*

24. *Berita Kementerian Pendidikan dan Kebudayaan RI, Direktorat Jenderal Kebudayaan*, June 9, 2016.

cultural heritage. The issuance of Law No. 5 of 2017 on Cultural Progress has not been able to harmonize the overlap between the two Laws.
2. In the city of Malang, the protection of cultural heritage has not been fully done since there is no Culture Preservation Ethic, Cultural Heritage Team of Malang City that has not been able to work optimally since it has only been established for a year, and need adequate fund to conduct research and study about cultural heritage conservation practices in Malang as mandated by Law Number 11 of 2010 on Cultural Heritage.

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REFERENCES

Antons, Christoph. 2004. 'Legal Culture and Its Impact on Regional Harmonisation', *in Intellectual Property Harmonisation within ASEAN and APEC*, Kluwer Law International.
Brown, Michael F. , 2005. "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property", *International Journal of Cultural Property*, Volume 12, Issue 1, February.
Cohen, Morris L. dan Kent C. Olson. 2016. *Legal Research in a Nutshell*, (St. Paul Minn: West Publishing Co.
Cheung, P.T.Y. 2011. "Civic Engagement in the Policy Process in Hongkong: Change and Continuity", *Journal of Public Administration and Development*, Vol. 31.
Cultural Properties Department, Agency for Cultural Affairs, JAPAN, March 2015. "Cultural Properties for Future Generations: Outline of the Cultural Administration of Japan", diakses dari http://www.bunka.go.jp/english/index .htm, 27 Desember 2016.
Fitria, Isnen Yahaya Ahmad, Faizah Ahmad, 2015. Conservation of Tangible Cultural Heritage in Indonesia: A Review Current National Criteria for Assessing Heritage Value, Procedia - Social and Behavioral Sciences 184.
Francioni, Francesco, 2011. "The Human Dimension of International Cultural Heritage Law: An Introduction," *The European Journal of International Law* Vol. 22 no. 1.
Klatt, Matthias. *Making the Law Explicit, The Normativity of Legal Argumentation*. Portland:Hart Publishing, 2008.
Liputan 6.com., Perlindungan Setengah Matang Ratusan Cagar Budaya Kota Malang, Januari 2017.
Mitsuzane Okauchi, "Looted Cultural Property-Who Owns It?" Waseda University, Waseda *Online*, diakses tanggal 26 Desember 2016.
Majalah Arkeologi, "Ribuan Benda Sejarah Indonesia di Luar Negeri", 16 Juli 2013.Merdeka.com, Malang, 12 Oktpber 2016.
Mastalir, Roger W. "A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law", *Fordham International Law Journal* Volume 16, Issue 4 1992 Article 3, hlm. 1037.
Russell, James Edward, 2011. "Cultural Property and Heritage in Japan", *Dissertation*, SOAS, University of London.
Scott, Geoffrey R. 2003. *The Cultural Property Laws of Japan: Social, Political, and Legal Influences,* March Pacific Rim Law & Policy Journal Association.
Stelmach, Jerzy dan Brozek, 2006. *Methods of Legal Reasoning,* Dodrecht: Springer.

Copyright © 2017 Jurnal Prasada P-ISSN: 2337-795X

Surya Online, *Ini Lokasi dan Bangunan yang Diduga Cagar Budaya Baru di Kota Malang*, 4 Pebruari 2017.
Thornbury, Barbara E., 1994. Temple University, Philadelphia, "The Cultural Properties Protection Law and Japan's Folk Performing Arts", *Asian Folklore Studies* Volume 53.

International Conventions and Legislation

Berita Kementerian Pendidikan dan Kebudayaan RI, Direktorat Jenderal Kebudayaan, 9 Juni 2016
Bern Convention on the Protection of Literary and Artistic Works of 1886.
Convention on the Protection and Promotion of the Diversity of Cultural Expressions 20 October 2005.
Universal Declaration of Human Rights, 1948.
International Convention on Social, Cultural, and Political Rights, 1966.
WIPO-UNESCO Model Provision, Geneva, 1982.
Republik Indonesia, Undang Undang Dasar 1945.
Republik Indonesia. *Undang-Undang Nomor 28 tahun 2014 tentang Undang-Undang Hak Cipta*.
Republik Indonesia, Undang-Undang Nomor 11 tahun 2010 tentang Cagar Budaya.
Keputusan Presiden Republik Indonesia Nomor 18 tahun 1997 tentang Pengesahan Berne Convenstion for the Protection of Literary and Artistic Works.

Dictionaries and Encyclopedias

Gardner, Bryan A. (Ed.). 2009. *Black's Law Dictionary* 9th Edition, St.Paul MN: West Publishing Company.
Grondin, Jean. 2005. *Dictionary of the History of Ideas*. Charlottesville, VA: University of Virginia Library, Gale Group.
Protevi, John (Eds), 2005. *The Edinburgh Dictonary of Continental Philosophy*, Edinburgh: Edinburgh University Press.
Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, Edisi Ketiga, Jakarta: Balai Pustaka, 2001.
Thomas A. Green, 1997. *EBT, An Encyclopedia of Beliefs, Customs, Tales, Music, and Art* Santa Barbara, California Denver, Colorado, Oxford, England.

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