



Utilization the Economic Value of Intellectual Property (Copyright) as Collateral Object in Indonesia

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ARTICLE INFO

Article history:

Received Okt 06, 2022
Revised Okt 13, 2022
Accepted Nov 03, 2022

Keywords:

Copyright;
Economic Value;
Guarantees

ABSTRACT

Intellectual property is the creator's exclusive right, which includes moral rights and economic rights. Economic rights contain economic (commercial) value. Government Regulation Number 24 of 2022 concerning the Creative Economy provides a platform for intellectual property assets to become objects of guarantee for financial institutions, through bank institutions and non-bank financial institutions to maximize their application in business activities. Fiduciary collateral institutions conduct the practice of financing intellectual property asset such as intangible assets as an object of guarantee in bank institutions by utilizing the economic value of intellectual property assets in accordance with the provisions of Article 16 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary collateral, which naturally according the requirements of the object as material rights in accordance with the provisions of Article 499 of the Civil Code. Because of a lack of preparation by several relevant stakeholders, obstacles to the implementation of the use of economic value on intellectual property assets in intangible assets (copyright) have become a problem. In addition to the aspect of legal substance (strictness rule of intellectual property assets as objects of guarantee in each legislation), legal structure (lack of preparation of interested parties, especially the role of appraisal and legal audit service agencies in the valuation of intellectual property intangible assets) and legal culture (legal culture education on the introduction and understanding of intellectual property as an object of guarantee) have not been fully fulfilled. Awareness of each related party as well as regulatory reform through implementing regulations are required to ensure that this policy is implemented successfully.

ABSTRAK

Kekayaan intelektual adalah hak eksklusif pencipta, yang mencakup hak moral dan hak ekonomi. Hak ekonomi mengandung nilai ekonomi (komersial). Peraturan Pemerintah Nomor 24 Tahun 2022 tentang Ekonomi Kreatif menyediakan platform aset kekayaan intelektual untuk menjadi objek penjaminan bagi lembaga keuangan, melalui lembaga bank dan lembaga keuangan non-bank untuk memaksimalkan penerapannya dalam kegiatan usaha. Lembaga agunan fidusia melakukan praktik pembiayaan aset kekayaan intelektual seperti aset tidak berwujud sebagai objek jaminan di lembaga bank dengan memanfaatkan nilai ekonomi aset kekayaan intelektual sesuai dengan ketentuan Pasal 16 ayat (3) Undang-Undang Nomor 42 Tahun 1999 tentang agunan Fidusia, yang tentu saja. sesuai dengan persyaratan objek sebagai hak material sesuai dengan ketentuan Pasal 499 KUH Perdata. Karena kurangnya persiapan oleh beberapa pemangku kepentingan terkait, hambatan pelaksanaan penggunaan nilai ekonomi pada aset kekayaan intelektual dalam aset tidak berwujud (hak cipta) menjadi masalah. Selain aspek substansi hukum (aturan ketegasan aset kekayaan intelektual sebagai objek jaminan dalam setiap peraturan perundang-undangan), struktur hukum (kurangnya persiapan pihak-pihak yang berkepentingan, terutama peran lembaga penilai dan

lembaga jasa audit hukum dalam penilaian kekayaan intelektual tidak berwujud) dan budaya hukum (pendidikan budaya hukum tentang pengenalan dan pemahaman kekayaan intelektual sebagai objek jaminan) belum sepenuhnya terpenuhi. Kesadaran setiap pihak terkait serta reformasi regulasi melalui peraturan pelaksana diperlukan untuk memastikan bahwa kebijakan ini berhasil dilaksanakan.

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I. INTRODUCTION

The expansion of creative economy (ECRAF) in Indonesia as a strategic sector of the national economy has a real impact on the ability of a creator or copyright holder to be more productive in expressing his creation as well as a basis for motivation in creating a new creation. Economy Creative as a form of economic sector development relies on the quality of creative and innovative human resources, which cannot be separated from creation in the fields of science, art, and literature that are protected by Intellectual Property Rights, namely Copyright (Shafrina et al., 2021). The emergence of Law Number 28 of 2014 concerning copyright as a legal protection, particularly for creators, to enjoy the exclusive rights contained in their work, which is very likely to be utilized by economic value contained in the creation as well as the existence of creative economic policies in Indonesia, which are considered to provide opportunities for the community (creator) to optimize economic benefits in developing their business.

Nowadays, intellectual property rights especially copyrights, can be used as collateral by financial institutions (banks and non-banks (Bettig, 2018; Geiger & Izyumenko, 2020). The existence of moral and economic rights attached to the author's creation cannot be separated from the new policy of intellectual property as a collateral object, so for monetization, the creator can utilize copyright as a collateral object in accordance with the provisions of Article 16 of Law Number 28 of 2014 concerning Copyright in conjunction with Article 9 of Government Regulation Number 24 of 2022 concerning the Creative Economy. The role of economic value in intellectual property assets as collateral objects should be determined through a valuation process, so that the value of intellectual property assets must be equivalent to the creditor's value of credit. The valuation method requires economists or independent appraisal agencies to assess intellectual property assets intangible assets in accordance with the valuation method and requires 5C and 7P credit analysis principles to determine whether the prospective customer is an authorized person as the owner of intellectual property assets who has authority over the goods and is worthy of being given credit to support his business activities.

The new policy on financing intellectual property assets as collateral objects by financial institutions will continue to be the main focus in Indonesian regarding its technical implementation, despite the fact that it has not provided a clear and in-depth understanding of the policy, so it will become a new polemic that is difficult to implement (Denchev et al., 2019; Mody, 2019). The regulation of intellectual property assets as collateral objects is only considered an announcement because there is no preparation in both

internal and external sectors to provide a maximum forum for the implementation of this new policy and create inconsistency legal principles, which will make it difficult to enforce intellectual property assets as collateral in Indonesia and have a particularly negative impact on the country's economy. Based on all of the descriptions, the researcher is interested in conducting research under the heading "Utilization the Economic Value of Intellectual Property (Copyright) as Collateral Object in Indonesia."

II. METHOD

This research method used is normative juridical law research, which uses a descriptive qualitative research method in reviewing the principles of positive law relevant to the object of research, the stages of which are conducted through library research using secondary data sources comprised of primary, secondary, and tertiary legal materials.

III. RESULT AND DISCUSSION

The Economic Value of Copyright be Used as a Collateral Object in Indonesia

Financial institutions have an important role in the growth of the community's economic sector in a country. The provision and distribution of funds by financial institutions in order to improve the welfare of the community, plays an important role in the growth and movement country's economy (vey et al., 2022; Adler, 2018). In addition, financial institutions also have an important role as an essential element, especially for the community in terms of the enlargement of business development, which requires a guarantee whose value is equivalent to the value of credit so that the provision of credit is given in accordance with the abilities and the necessity to community with prudential banking as a basis credit grant. The function of a guarantee in providing bank credit is as a guide for interested parties, especially the bank, who will feel more secure with the guarantee provided by the debtor as a customer, because if there is a risk of default, the bank can make execution of the guarantee in the form of a loan that has been given through an agreement (Sambe, 2016), between the debtor and the creditor by guaranteeing objects.

The implication of a credit agreement between the debtor and the creditor creates a legal obligation, that is repayment of the debtor's debt for his material guarantee, which is in accordance with the principle of material guarantee that all movable and immovable assets of the debtor, either present or future, shall be regarded as securities for the debtor's personal agreements in accordance with the provisions of Article 1131 of the Civil Code. This means that all debtor property will be used as collateral for debt repayment while adhering to the principle of material security, namely creating material rights that required as a material rights' characteristics, such as: 1) giving absolute power over the object; 2) having the nature of *droit de suite* and revindication of objects; 3) having the nature of *droit de preference* towards the settlement of its receivables; 4) being transferable; and 5) the object is an object that meets the requirements as an object of economic value and can be controlled by a person or a specific legal entity.

Copyright as one of the intellectual property rights is classified as a material right that can be used as an object of guarantee in Indonesia, because intellectual property assets essentially have economic value whose utilization can provide a separate benefit from the existence of exclusive rights attached to the results of human intellectual creation in the form of moral rights and economic rights (Oliar et al., 2019; Kahn & Wu, 2020). Moral rights giving the author with various controls over the use of his creation by granting the author the right to claim his creation as the creator (right of paternity) and to prevent its

use in a way that the author deserves to reject or that is not agreed upon (right of integrity), (Tanu, 2003) whereas economic rights provide benefits in the form of financial benefits for their own use or for the commercialization of their copyright (license). Based on the concept of copyright as an exclusive right, copyright can be categorized as part of material law in accordance with the provisions of Article 499 of the Civil Code. In line with this statement, Otto Hasibuan argues that "copyright is a property right to which it applies the properties of property rights as regulated in civil law legislation." (2008).

Due to the importance of the potential economic value contained in copyright, Government Regulation Number 24 of 2022 concerning the Economy Creative (ECRAF) provides a forum for ecras authors to optimize the economic value that exists in intellectual property assets as objects of debt security through a fiduciary collateral scheme in accordance with the provisions of Article 9 of Government Regulation Number 24 of 2022 concerning the economy creative. The characteristics of copyright as an object fiduciary securities arise from the provisions for the transfer of economic rights to copyright in the provisions of Article 16 paragraph (3) and (4) of Law Number 28 of 2014 concerning Copyright, so that copyright can be used as an object of fiduciary collateral in accordance with the provisions of laws and regulations, so that utilization of economic value as an exclusive right of a creator to his creation must meet the requirements for objects of economic value that can be valued in money, because that guarantee object will provide legal certainty to the creditor along with the interest which will keep returning by way of cashing out that guarantee (Azmi, 2016). The provision implies that the debtor's material guarantee for all of his assets is a good faith effort by his obligations in the form of paying off debts in accordance with the agreement, however, if the debtor breaches the contract, the principle of bad faith applies to him.

Technically, the imposition of intellectual property assets as collateral means that the creator's exclusive rights will continue to be attached to the creator as a debtor, with which his existence as the creator or copyright holder can still control the objects and receive natural benefits such as the economic value of his creation, which is used to pay off debts owed to creditors with fiduciary collateral (Ulinuha, 2017), and at the same time the proof of ownership creator's creation (copyright certificate) used to be a debt guarantee with a certificate protection period that is still valid. This means that the absolute requirement for intellectual property assets as debt guarantees is that they have been registered in order to have legal protection in accordance with a country's jurisdiction (not a public domain to provide legal protection and certainty for creators) (Holland, 2019; Jutte & Quintans, 2019). The legal protection for copyright in a country arises automatically when the copyrighted creation is realized in material form (declarative regime), but registration to the Directorate General of Intellectual Property through the DJKI electronic application (iproline) so that the economic value of a copyrighted creation is valid as an object of debt guarantee. In terms of assessing copyright as an object of debt guarantee, a copyright certificate as written proof of ownership of the copyright will certainly help prove who the copyright owner is (Subagio Gigih Wijaya, 2010).

The utilization of the economic value owned by the creator of his copyrighted work as a debt guarantee must be compatible with the requirements as an object of commercial value, where the amount of the object's value as a guarantee object at least the amount of the debt proposed by the debtor as the creator or copyright holder, and the purpose is that if the debtor commits a breach his agreement or declared bankrupt, the copyright as an object of material security can be liquidated. The imposition of economic value that can be imposed on copyrighted objects as material rights through fiduciary collateral is the intangible assets of ownership guarantee, because it has been stated in Law Number 28 of 2014 concerning Copyright, which clearly states that copyright is an intangible object (Kurniangrum, 2017), and the meaning of the use of the phrase "rights" can be interpreted by the existence of exclusive rights

as private rights belonging to an author (creator), and on the other hand if classified as company assets, intellectual property is included in the category of intangible assets. The existence of intangible assets in company assets is identifiable intangible assets such as copyrights, patents, brands, etc., and unidentifiable intangible assets such as consumer loyalty to products (Helianti Hilman, 2001).

The economic value of copyright as an object of collateral must be assessed properly and appropriately so that the value of the object can be equals to the value of credit granted as stated in the principal agreement. The determination of valuation as a form of final assessment decision on the value of intellectual property assets is an identification process from the results of calculations between the benefits and risks obtained from intangible assets (Team, 2022) that carried out by competent parties or institutions in their respective fields in order to capitalize on the growing commercialization of the intellectual property industry. Determination in the calculation of the valuation can be reviewed through a simple and modern approach to intellectual property assets as the object of guarantee (credit guarantee). According to Sri Mulyani in the Journal of Legal Dynamics (2012: 573), this simple approach reviews several aspects, including:

1. The market approach provides a systematic framework for estimating the value of intangible assets based on the analysis of actual sales and/or tangible licensing transactions that are comparable to objects.
2. The income approach provides a systematic framework for estimating the value of intangible assets based on capitalized economic income, present value, or future value. The value of the economic income will come from the use, license, or lease of the intangible object.
3. The cost approach provides a systematic framework for estimating the value of intangible assets based on the principle of economic substitution, commensurate with the costs that will be incurred as a comparable substitute as a unit function.

The modern method of valuation approach to intellectual property assets as a guarantee object can be evaluated using the following criteria: a) cost and benefit analysis; b) expert panels or peer reviews; c) field or case study; d) network analysis; e) foresight; f) benchmarking; g) innovation survey; h) microeconomic method; i) productivity studies; and j) control group approaches (Thomas Hoerer 2004).

The guarantee of copyright financing as an object of guarantee is based on an agreement made between the creator or copyright holder as the debtor and financial institutions, both bank and non-bank financial institutions as creditors, with the process of flow mechanism for guaranteeing intellectual property assets preceded by individuals or legal entities submitting a credit application in writing which describe the purpose of loan (Ade, 2006). The feasibility analysis of the decision to determine guarantee credit scores is carried out in the practice of financing intellectual property assets as an object of collateral by banks institutions through 5C and 7P principles. The 5C credit analysis principle is: Character, Capacity, Capital, Collateral, and Condition, whereas the 7P credit analysis principle is: Personality, Party, Purpose, Prospect, Payment, Portability, and Protection (Sasmita, 2021), followed by credit analysis to determine the amount credit limit (Legal Lending Limit), in which the overall application of the principle aims to assess the extent to which the debtor can be trusted to obtain credit and provide benefits for bank institutions (Puspitaningtyas, 2012).

Intellectual property assets as collateral objects on the principal agreement (credit agreement) must be followed by secondary agreement as a fiduciary collateral (*accessoir*). According to the provisions of Article 4 Law Number 42 of 1999 concerning Fiduciary collateral, if the recipient of fiduciary guaranteed to be paid off with fiduciary collateral are finished, the fiduciary collateral also completed (Badriyah, 2020), which explains that fiduciary collateral is a secondary agreement to a principal agreement that creates an obligation for the parties to perform, such as to give something, do something, or not do

something, which can be valued in monetary terms. The imposition of fiduciary collateral agreement is made with a notarial deed in Indonesian and fiduciary collateral deed contains: a) The identity of the fiduciary giver and recipient, b) the main agreement data guaranteed by the fiduciary, c) a description of the objects that become the fiduciary object, d) The value of the guarantee, e) the value of the object that is the object of the fiduciary guarantee (Badriyah, 2020).

The superiority of fiduciary guarantee certificate lies in the title of the certificate "FOR JUSTICE BASED ON GOD ALMIGHTY" which contains executorial fiat. Fiat executorial means that if the debtor breaches the contract or is in a state of bankruptcy, then the intellectual property assets as objects of fiduciary collateral can be executed as repayment of the debtor's receivables. The execution of intellectual property assets is accomplished not through confiscation or taking the object of guarantee, but rather by executing the economic value of the intangible intellectual property asset (copyright) or by selling the economic value that is the object of the fiduciary collateral from the authority giver fiduciary to the fiduciary recipient himself through public auction and deducting the repayment of receivables from the sale proceeds, or through private sales carried out in accordance with article 16 paragraph (2) of Law Number 28 of 2014 concerning Copyright (Ulinnuha, 2017), Execution does not necessarily have to be carried out on intellectual property as an object of guarantee, but there must be a court decision that has permanent legal force (*inkracht van gewijside*) if an execution must be carried out. (Jened, 2022).

The practice of financing intellectual property as an object of collateral by financial institutions and non-bank financial institutions is carried out by providing capital in the form of funds through instalment payments (credit). The type of intellectual property asset financing by non-bank institutions is carried out through finance companies, venture capital companies, and infrastructure financing companies, while other forms of monetization supported for intangible assets of intellectual assets can be carried out through evaluation from intellectual property value in the form of: Intellectual Property Backed Loans, Intellectual Property Sale and Leaseback, Intellectual Property Legal Finance, Intellectual Property Royalty Securitization, Intellectual Property Auction, and Non-Fungible Intellectual Property Token (NFT) (Jened, 2022), with the following requirements: (Module 11, Intellectual Property Valuation, World Intellectual Property Organization: 8): a) The IP asset must be subject to specific identification and a recognizable description; b) There should be some tangible evidence or manifestation of the existence of the IP asset (e.g., a contract, a license, a registration document, a computer diskette, a set of procedural documentation, a listing of customers, recorded on a set of financial statements, etc.); c) It should have been created or have come into existence at an identifiable time (or time period) or as the result of an identifiable event; d) It should be capable of being legally enforced and legally transferred; e) It should be capable of having its income stream separately identifiable and isolated from the contribution of other assets employed in the business; f) It should be capable of being sold, without selling the other business assets of the enterprise to the same buyer; and g) It should be subject to being destroyed or to a termination of existence at an identifiable time (or time period) or as the result of an identifiable event.

The Obstacles Using Copyright as a Guarantee Object

The fiduciary institution chosen by Law Number 28 of 2014 in relation to copyright is to optimize the use of economic value contained in copyright as an intellectual property intangible asset and to create legal relations between the recipient of fiduciary and the giver of fiduciary, rights and obligations of each party to pay off debts. However, the implementation of utilization intellectual property assets as objects of fiduciary collateral has not been completed properly due to several obstacles including the following:

- a. Financial institutions should apply the prudential banking principle when making loans, especially when guaranteeing intellectual property and intangible assets. The precautionary principle must be followed because of the 5C and 7P principles.

According to Maryanto (2011), the 5C principles assessment contains: 1) Character, show that the debtor must have good intentions and have a high commitment to return all his obligations in accordance with the agreement that has been signed together; 2) Capacity, an analysis of customer management's ability to manage the company so it can generate profits and be able to pay all current and future obligations; 3) Capital, related to an assessment of how much the debtor's contribution to the company's financing for his work (project); 4) Collateral, only serves as a second solution (second way out) if the troubled debtor is unable to pay off his loan obligations; and 5) Condition, this includes economic analysis both nationally, regionally, and internationally that affects the debtor's ongoing business.

While other assessments with the 7P principles consist of (Andira, 2011): 1) Personality, this includes the personality or behaviour of the debtor; 2) Party, is grouping of customers into certain groups based on capital, loyalty, and character, which will have an impact on the facilities provided; 3) Purpose, knowing the customer's purpose in taking credit; 4) Prospect, an assessing the customer's business in the future that will generate profits for both the customer and the bank; 5) Payment, to review the availability of credit payment sources from prospective debtors in terms of credit payments to be submitted; 6) Profitability, an analysis customer ability to seek profits from business developments after receiving funds; and 7) Protection, Credit protection from a group of companies, guarantees, or holding companies is required if something unexpected occurs.

- b. There is no clear regulatory concept regarding intellectual property as credit collateral, particularly in terms of the intellectual property asset valuation system and the concept of due diligence:
- c. The concept of due diligence is defined as an important process to ensure the object and subject ownership of intellectual property assets that will be used as bank collateral (Kurnianingrum, 2017). Furthermore, due diligence provisions are implicit in Law Number 42 of 1999 concerning Fiduciary Collateral, which naturally accords the requirements of the object as material rights regarding the identity of the fiduciary giver and recipient to provide an overview of material facts to provide certainty regarding the legal risks of the transaction activities.
- d. Economists use a unified concept to evaluate intellectual property assets rather than an asset valuation method with simple parameters (a market approach, an income approach, and a cost approach) to value intangible assets. The provisions of the Fiduciary Guarantee Deed, which contain information about the collateral object involved and the value collateral, can be used to obtain an estimate of asset value, so the assessment must be in accordance with the characteristics of each intellectual property asset.
- e. If intangible assets are to be imposed as objects of fiduciary collateral, both creators and copyright holders must be socialized. Registration is a must for objects fiduciary collateral because, in addition to providing legal protection and certainty, registration assures the creditor that the debtor is the party who has authority to guarantee the goods.
- f. In Indonesia, there is no independent appraisal agency who is certified and competent in identifying and calculating economic value of intellectual property rights using existing valuation methods, parameters, and principles. The establishment of an appraisal is an urgency due to the importance of its position in calculating economic value of intellectual property assets, particularly in the case of debtor defaults.
- g. Indonesian Notary Association (INI) had not already made preparations to socialize important aspects related to the use of economic value in intellectual property assets as collateral objects to

notary members through seminars or workshops, both online and offline. The important aspect related to: 1) any intellectual property object that a financial institution can use as a credit guarantee; 2) clauses that must be detailed in the guarantee deed whose object is an intellectual property asset especially intangible asset (Public Relations Faculty of Law, University of Indonesia, 2022); 3) the distinction between legal subjects (legal entities and individuals) in credit collateral applications, as well as considerations and risks; and 4) the importance of synchronization and mutual understanding between financial institutions and notaries regarding each party's roles and responsibilities.

- h. There's no political willingness from Indonesian banks to accept intellectual property assets as collateral (Jened, Intellectual Property Rights as Collateral, 2022) because intellectual property valuation in Indonesia basically can be performed by appraisal firms with adequate capabilities, such as the Public Appraisal Service Office, the Professional Appraisal Society Indonesia, and others. The use of technical valuation only necessitates with good coordination between banks and appraisals, so bank politicization plays an important role in the passage of this arrangement.

In addition to the existing constraints in the related sector, there is a need for renewal and improvement, particularly in intellectual property as a collateral object by financial institutions, which is carried out in the aspects of:

- a. Legal Substance

Improvements to existing norms in the provisions of Law 42 of 1999 concerning Fiduciary Guarantees and Law 28 of 2014 concerning Copyrights, including for strict regulations regarding the transfer of intellectual property; the mechanism for the transfer of intellectual property as an object of collateral with a notary deed; and the requirements for intellectual property as an object of collateral.

- b. Legal Structure

Stakeholder readiness in handling intellectual property technical mechanisms and procedures as the object of collateral, through: 1) The Ministry of Law and Human Rights' Directorate General of Intellectual Property, through increased understanding of the accurate substantive examination of applications for intellectual property certificates as well to understanding of approval and rejection applications for registration intellectual property assets; 2) Financial institutions through increased understanding financial institutions about intellectual property as an intangible asset whose value is far greater than tangible assets; and 3) The requirement for an intellectual property legal audit profession to assess elements of originality and validity of intangible intellectual property assets.

- c. Legal Culture

Increasing understanding, particularly of intellectual property as a collateral object, such as renewing understanding among the public, relevant agencies, and law enforcers to encourage the optimization of intellectual property's role in a country's technology commercialization industry.

IV. CONCLUSION

Intellectual property assets (copyright) as an intangible asset can be guaranteed by financial institutions in Indonesia, both banks through fiduciary collateral and non-bank financial institutions through loans, because they meet the requirements as objects of economic value. In terms of evidentiary interests, intellectual property assets must be registered with the Directorate General of Intellectual Property Republic of Indonesia, which is also the party authorized to provide guarantees, to determine ownership of copyright.

The imposition of intellectual property assets (copyright) as objects of fiduciary collateral is hampered by: a) lack of legal support for the mechanisms and procedures for regulating intellectual property as collateral; b) lack of preparation from stakeholders related to both financial institutions and the Indonesian Notary Association (INI); c) lack of independent appraisal agencies; d) lack of a clear regulatory concept regarding intellectual property as collateral and e) intellectual property reforms are required, particularly in terms of legal substance, legal structure, and legal culture.

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