

Intellectual Property Rights Guarantee: Roles and Challenges for Notaries

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Abstract: Exclusive rights in intellectual property as intangible movable objects can be used as objects of fiduciary collateral based on statutory regulations, although positive law has regulated that IPR can be used as collateral, in practice it is still not widely implemented, because of the incomplete legal certainty regarding the assessment mechanism, limited time period for IPR apprentices, as well as further regulations regarding the execution of guarantees in the event of breach of contract or default. The role of a notary is very important as a general official who makes fiduciary guarantee deeds, of course it is a challenge for notaries to be able to understand the implementation of fiduciary guarantees in the form of IPR. This writing aims to find out more about the systematics of fiduciary guarantee deeds with IPR objects, as well as the role and challenges of notaries as makers of fiduciary guarantee deeds with IPR objects. The method used is doctrinal or normative research, with an approach to positive legal regulations. This research is explanatory, which aims to test theories and hypotheses related to the application of IPR as fiduciary collateral.

Keyword: Intellectual Property, Fiduciary Guarantee, Notary.

INTRODUCTION

The development of the creative economy in Indonesia is increasing, both in the form of large and small businesses. Every creative economy entrepreneur in running his business is constrained by the need for capital or funds to support the development of the business he is running. The need for business actors for business capital is closely related to the need for capital loans, supporting this by attracting capital loans, providing credit facilities or other financing facilities by banking institutions and non-bank financing institutions, to meet the need for business capital required by creative economy business actors, banking institutions and non-bank financing institutions, in providing a loan, financing or credit facility, must comply with risk management provisions (Krisna & Dahana, 2022) in carrying out its business as regulated in related laws. Apart from that, in order to provide legal protection for business actors and banking institutions or non-bank financing institutions in providing loan or financing facilities, they are required to implement risk mitigation, where the risk mitigation is a guarantee provided by the debtor or business actor who will borrow funds (Peraturan Otoritas Jasa Keuangan Tentang Penyelenggara Usaha Perusahaan Pembiayaan, 2018). A glimmer of hope with the promulgation of regulations regarding copyright in Law Number 28 of 2014 concerning Copyright, Law Number 13 of 2016 concerning Patents, and Government Regulation Number 24 of 2022 concerning the Creative Economy.

Intellectual Property Rights (IPR) can be transferred or transferred, and have commercial value so they can be categorized as intangible movable objects that can provide social and economic benefit value (Kurnianingrum, 2017). Law Number 28 of 2014 concerning Copyright (Copyright Law), article 16 which states that copyright is an intangible movable object that can be transferred or transferred, therefore copyright can be used as an object of fiduciary guarantee. Apart from that, Article 108 paragraph (1) of Law Number 13 of 2016 concerning Patents (Patent Law), states that the right to a patent can also be used as an object of fiduciary security. It has also been promulgated regarding its implementation, as support by the Creative Economy Agency with its enactment Government Regulation number 24 of 2022 concerning the Creative Economy. The Financial Services Authority "OJK" also provides support, through a Press Release by OJK dated 4 April 2023 regarding Synergies to Support the Use of Intellectual Property as Credit Collateral, and letter number s-12/D.03/2022 dated 2 September 2022, to all commercial banks conventional in connection with support for the implementation of intellectual property as credit collateral. So, for creative economy business actors who are owners of intangible movable objects to which an intellectual property right is attached, they can make their intellectual property assets an object of fiduciary collateral. Of course, this opens up opportunities for business people, especially creative economy business people, to be able to use their intellectual property assets as collateral in the form of fiduciary guarantees (Otoritas Jasa Keuangan, 2023).

Even though it has been clearly stated that IPR can be used as an object of fiduciary security, there are still obstacles in its implementation. For example, the assessment of intangible movable objects, the period of IPR protection which has limits, regulations implementing IPR to be used as fiduciary collateral objects, which to date, in Indonesia there is still no legal certainty that clearly regulates the mechanism for assessing objects. moving intangibles, as well as legal certainty related to implementing regulations which state that the use of IPR can be used as collateral to guarantee credit by banking institutions and financial institutions (Kurnianingrum, 2017). Apart from what is mentioned above, another certainty that has not yet been clarified is if there is a failure to pay by the debtor or a default which requires the execution of collateral in the form of intellectual property rights. It is appropriate to refer to the provisions in the Fiduciary Law, followed by regulations regarding the transfer of IPR (Undang-Undang Jaminan Fidusia, 1999).

The existence of obstacles that cause doubt in using IPR as collateral, does not result in IPR not being able to be used as collateral, because based on positive law it is stated that IPR can be used as collateral, but in practice IPR as collateral is still rarely found. This is a challenge for notaries as officials who have the authority to make fiduciary guarantee deeds, especially with IPR material objects. Apart from that, a notary must fully understand the aspects of guaranteeing intellectual property rights using a fiduciary scheme.

This research aims to analyze and find out more about the systematics of IPR guarantee deeds as credit guarantee objects, as well as the role and challenges of notaries as public officials who have the authority to make fiduciary guarantee deeds with IPR guarantee objects.

METHOD

The method used in this legal research is doctrinal or what is also commonly known as normative research. Normative research in this research was carried out by searching for written legal regulations or positive law (Soekanto & Mamudji, 2001), namely Law number 42 of 1999 regarding fiduciary guarantees, Law number 13 of 2016 concerning patents, Government Regulation number 24 of 2022 concerning the Creative Economy, and Law number 2 of 2014 concerning the Position of Notaries. The research typology is explanatory, where research tries to test a theory or hypothesis to support or refute a previously existing research theory or hypothesis. The data collected through literature study in this research is secondary in nature. The data referred to is in the form of primary legal materials and secondary legal materials. Next, the data collected was analyzed qualitatively.

RESULTS AND DISCUSSION

Intellectual Property Rights as Collateral for Intangible Movable Objects and Fiduciary Guarantees

Humans with their intellect can create creative and innovative work. The results of this work are invisible but invaluable because its development can become a profitable business for the creator and the people who use it. The works created and innovated become a creative industry in which exclusive rights are attached to the creator or inventor (Undang-Undang Republik Indonesia, 2016).

The exclusive right of the state to protect and respect its creators, in the form of; economic rights that can be used for publishing, duplicating, adapting, distributing, performing and renting his work, and moral rights as appreciation and respect for the creator who has created a valuable and useful work. These rights are to protect the creator and the works created as intellectual property rights (Annisa, 2023), So it can be concluded that intellectual property rights are exclusive rights granted by the state, in the form of moral rights and economic rights, moral rights are rights inherent to the creator, and economic rights are protection rights for the creator in the economic sphere.

Regulations regarding objects are contained in the second book, the Civil Code. Goods or objects are defined as anything that can be owned with property rights or which can become the object of property rights (Subekti & Tjitrosudibio, 2006). Goods or objects are divided into tangible and intangible, movable and immovable forms (Subekti, 2005). Intellectual property rights according to the Copyright Law are intangible movable objects that can be transferred in whole or in part. The object in this case is a work to which exclusive rights are given, which are invisible but have value because the work becomes property of the creator and can be transferred by inheritance, gift, written agreement, or other reasons that can be implemented according to law. so that the guarantee of intellectual property is the imposition of guarantees on exclusive rights, namely on the economic rights attached to the intangible movable object (Mulyani, 2012).

IPR, which is an intangible object, and control over the object remains with the owner, can be used as collateral in the form of a fiduciary guarantee scheme. In order to be used as collateral, IPR must be recorded or registered with the Ministry of Law (Pasal 10 Peraturan Pemerintah, 2022) because in the guarantee, it is the IPR certificate that has been recorded or registered that will be charged with fiduciary guarantees. Apart from that, IPR as an object of collateral must have a contract agreement or have the proceeds from profits for the IPR owner, or it can be said to be a license agreement (Pasal 7 Peraturan Pemerintah, 2022).

"Guarantee is all movable and immovable property belonging to the debtor, both existing and future, as collateral for the debtor's individual obligations" (Pasal 1131 KUHper, 2006). Guarantees arise because of agreements that give rise to performance, whether they are credit agreements with banking institutions or financing institutions, or debt and receivable agreements. guarantees are given as a function of risk mitigation to provide protection for creditors regarding the fulfillment of their receivables, guarantees can be given in the form of material guarantees or individual guarantees, where individual guarantees will provide a direct relationship between the recipient and the individual who guarantees them as included in this

individual guarantee, namely individual guarantee (personal guarantee) or usage agreement (borgtocht). Meanwhile, material collateral is a guarantee that gives direct control to the creditor to control the objects that are guaranteed to fulfill the creditor's receivables by the debtor. Included in material guarantees are guarantees for mortgage rights for immovable objects or fiduciary rights for movable objects. This material guarantee follows where the object is located (droit de suite) (Sofwan, 1980).

Fiduciary guarantees apply to both fixed and movable assets, tangible and intangible. Because collateral will remain in the control of the person who provides it, fiduciary collateral is a product used to guarantee and protect creditors, lending institutions, or recipients of collateral based on the principle of trust (Pusdatin, 2023). A fiduciary guarantee is a derivative agreement from the main agreement, which gives rise to an obligation, with a guarantee attached (Pasal 4 Undang-Undang Jaminan Fidusia, 1999).

In practice, there are intellectual property rights that are used as collateral in BNI bank. Based on research by Sri Mulyani, the right to a brand, which is one of the IPRs, is accepted as an object of fiduciary collateral by BNI, on the grounds that there are internal BNI provisions relating to recipients of collateral, which can be accepted or not, which is one of the collateral that can be accepted is the brand. Apart from that, the brand used as collateral has a certificate and has a standard value, listed in the financial report, so that the brand can be bought and sold. However, BNI only accepts collateral in the form of this brand, not as basic collateral, but only as additional collateral. This is because in guarantee practices, there are still obstacles. In the form of juridical factors, namely the lack of recognition of brands as fiduciary collateral in Bank Indonesia regulations, as well as in the Law on Marks, indirectly there is no legal recognition of brands as fiduciary collateral. then economic factors, there is no certainty about economic value and market share, in terms of measuring brand value (Mulyani, 2014).

The Role and Challenges for Notaries as Makers of Fiduciary Guarantee Deeds with IPR Objects

A notary is a public official appointed by the state, who is given the task within the scope of civil law, to create documents regarding deeds, agreements and decrees, to the extent desired by the parties or required according to statutory provisions. Based on Article 1868, "an authentic deed is a deed made by or before an authorized public official and at the place where the deed is made, with the form and procedures in accordance with the provisions of the law" (Undang-Undang Jabatan Notaris, 2004). If you violate the provisions of this article, the deed made by a notary will become an inauthentic deed or the same as a private deed. Basically, a deed is an agreement that creates an agreement regarding the will of the maker, then it is made before a notary as a public official so that it becomes authentic, therefore, as an agreement, the deed must be made to meet the requirements in Article 1320 of the Civil Code, this also meets the material requirements from a deed, namely subjective requirements; agreement of the parties to bind themselves to each other, skill in making the agreement, and objective conditions; a certain thing, and a lawful cause (Pasal 1320 jo 1365, 2006). Apart from that, the deed made by a notary must also meet the formal requirements as stipulated in the Law on the Position of Notaries, namely the provisions on the systematic description of the making of the deed, from the start of the deed to the closing of the deed (Pasal 38 Undang-Undang Jabatan Notaris, 2004).

Authentic deeds made by notaries are divided into 2 (two), as follows; 1. Relaas deed, namely a deed made by a notary, which is made according to what the notary sees and hears, then put into writing, namely a deed; 2. Deed of Partij, namely a deed containing agreements or statements from the parties who, based on their needs, appear before a notary, then the statements from the parties are confirmed by the notary into a deed, or a deed made before a notary (Tobing, 1980).

One of the deeds which according to statutory provisions must be made by a notary is a fiduciary guarantee deed, based on the provisions of the Fiduciary Law, apparently in Article 5 paragraph 1 which reads "The encumbrance of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a Fiduciary Guarantee deed". A fiduciary guarantee deed is an authentic deed in the partij deed category, which contains an agreement between the parties, in the form of a guarantee to transfer an ownership right, namely the object that is the object of the guarantee (Sofwan, 1980).

The fiduciary guarantee deed is a partij deed, namely a deed made by a notary based on information from the parties appearing, so that the notary is not responsible for the contents of the deed as long as the notary has made it and his role has carried out his duties and obligations without violating statutory provisions, and has made a deed in accordance with formal requirements based on regulations (Yulianti, 2019). However, if a deed made by a notary violates the provisions of the formal requirements, in the form of subjective conditions, a lawsuit can be filed against it in court in the form of cancellation of the deed, by the party who feels disadvantaged, resulting in the deed made by the notary becoming legally defective, if the deed violates the objective conditions then against which the deed can be declared null and void (Adjie, 2018). This certainly has an impact on notaries who always make deeds, notaries as public officials who have been sworn in, carry professional and moral responsibilities.

Therefore, notaries are not only obliged to pay attention systematically to the making of deeds based on statutory regulations, but also other important matters relating to the scope of the deed they are making. In this case, a fiduciary deed with IPR objects. The notary as a neutral party, in making the deed, must mitigate risks and provide security protection for both the recipient and the guarantor, and avoid parties in the deed made by the notary feeling disadvantaged by the deed which the interested parties appear before the notary, in this case the notary. has a role in providing legal counseling, as regulated in the Notary Position Law (Pasal 15 ayat (2) huruf e Undang-Undang Jabatan Notaris, 2004).

In terms of the scope of the fiduciary guarantee deed for objects in the form of IPR. Legal counseling by a notary can be about the mechanisms and processes of IPR which can be used as collateral, which is a derivative agreement from the main agreement previously made by the debtor and creditor, and based on positive law in Indonesia can be used as collateral. The notary can explain the risks in using IPR as collateral for fiduciary objects, especially regarding the time period, where each holder of exclusive rights to IPR has a different period of time. Regarding the guidelines for assessing intellectual property to be used as collateral, as regulated in article 12, Government Regulation no. 24/2022, "appraisal of intellectual property is carried out by; cost approach, market approach, income approach, and other approaches that are in accordance with applicable assessment standards." However, the notary needs to make sure and provide an understanding in assessing the intellectual property that will be used as collateral (Pasal 12 Peraturan Pemerintah, 2022). The contents of the fiduciary guarantee deed, regarding the rights and obligations that must be obeyed by the parties, the legal consequences of imposing fiduciary guarantees on IPR, in the form of confiscation of the execution of the guarantee, in the event of a breach of promise or default, as well as the process of execution which refers to the provisions in the fiduciary guarantee law, with; implementation of the executorial title, the notary can explain the execution process, where the implementation will involve the transfer of IPR until payment is sufficient to creditors, as stated in the provisions for transfer of IPR in the regulations for each intellectual property right.

Systematics of Fiduciary Guarantee Deeds with IPR Objects Made by A Notary

As according to the provisions of the Copyright Law and Patent Law, IPR as an intangible movable object can be used as collateral under a fiduciary guarantee scheme (Pasal 29 ayat 1 Undang-Undang Jaminan Fidusia, 1999). This is the legal basis for notaries in making fiduciary

guarantee deeds with IPR objects. As an object of fiduciary guarantee, in making the deed and the process must comply with and be made in accordance with the provisions of the Law on Fiduciary Guarantee. The form of a fiduciary guarantee deed must be in the form of a notarial deed.

The systematics of fiduciary guarantee deeds determined by law must at least contain:

a. Identity of the Fiduciary Giver and Recipient;

b. Data on the main agreement guaranteed by fiduciary;

c. Description of the objects that are the object of the Fiduciary Guarantee;,

d. Guarantee value;

e. Value of objects that are the object of Fiduciary Guarantee (Pasal 6 Undang-Undang Jaminan Fidusia, 1999)

The head of the fiduciary guarantee deed contains the identities of the fiduciary giver and recipient, in this case the fiduciary giver is the IPR holder based on the registration or recording in the form of an IPR certificate. Then, the fiduciary recipient is the institution that provides financing or the creditor. Due to this, the notary must correctly confirm who is the holder of intellectual property rights, as well as the recipient of the guarantee, which is a subjective requirement of a deed regarding the competence of the party facing the notary.

Another subjective requirement is the agreement between the parties. As a derivative agreement from the main agreement or initial agreement between the creditor and the debtor, in the premise of the fiduciary deed, information is provided regarding the credit or financing agreement that has been agreed and signed. include a statement regarding the receipt of financing or credit by the debtor by stating the nominal amount, the amount of debt that existed until the fiduciary deed was made, and which may arise at a later date, in the appropriate amount based on the main agreement (Pasal 7 Undang-Undang Jaminan Fidusia, 1999). It also includes a statement regarding the agreement to grant and transfer collateral, in this case the collateral provided is an intangible movable object in the form of IPR which can be transferred by agreement, namely by means of a fiduciary deed.

Then, as an objective condition of the agreement, it is filled with a description of information regarding IPR, along with the total value of the IPR that will be provided by the debtor or collateral provider, clearly stating the recording or registration data at the relevant ministry, which is referred to as the object of the fiduciary guarantee (Mulyani, 2014). Followed by a clause regarding statements and guarantees from the debtor or guarantor, which contains a statement that the object of IPR is legally and truly his, a statement regarding the object of IPR is not in dispute, dispute or confiscation of collateral from third parties.

Because an agreement is an act by which one or more people bind themselves to one or more people (1313 KUHper, 2006) which creates an agreement in the form of rights and obligations between parties who agree to comply with the contents of the agreement they make (1365 KUHPer, 2006). So in the fiduciary deed, clauses regarding the rights and obligations of the parties are included, so that the deed includes the debtor's promise, as long as the debt being guaranteed has not been repaid, the debtor will continue to maintain, extend, renew, and other things that need to be done to maintain ownership, and creditor claims from the fiduciary deed, as well as from the IPR itself (1365 KUHPer, 2006). Followed by a clause regarding the creditor's release from any responsibility arising from the use of IPR by the debtor, it can also be included regarding the creditor's right to receive financial reports, or check the IPR provided as the object of collateral. Clause regarding other promises related to the prohibition of debtors from re-dividing IPR collateral. Then, the clause regarding granting power to the proxy or creditor to register fiduciary guarantees at the relevant ministry, such as that the fiduciary guarantee deed is only valid if it has been recorded in the fiduciary register book (Pasal 14 ayat 3 Undang-Undang Jaminan Fidusia, 1999).

Fiduciary guarantees are given to provide security to creditors if the debtor fails to fulfill their achievements, so a clause regarding the execution of fiduciary guarantees is included. In the event that the debtor fails to fulfill the achievements in the main agreement, the guarantee provider gives the authority to the creditor to carry out the transfer of IPR.

Finally, the notary can state the basis for making the fiduciary deed with IPR guarantee, regarding the statement that the deed was made and complies with the laws and regulations in Indonesia.

Based on these clauses, the notary has stated the objectives of the presenter based on the information and supporting documents provided by the presenter, into a fiduciary deed, which deed is based on statutory regulations, the notary has the right to make.

CONCLUSION

The development of the creative economy in Indonesia is increasingly rapid, both in the large and small business sectors. One of the main obstacles faced by creative economy entrepreneurs is access to capital to support their business growth. A glimmer of action, with the existence of regulations regarding the use of Intellectual Property Rights (IPR) as collateral in the form of fiduciary guarantees. This is regulated in statutory regulations, such as Law Number 28 of 2014 concerning Copyright and Law Number 13 of 2016 concerning Patents, which provide the legal basis that IPR can be used as collateral.

The challenges for notaries in making fiduciary guarantee deeds, especially in understanding the implementation of fiduciary guarantees in the form of IPR, notaries also have a role in providing counseling in the technical aspects of imposing IPR guarantees as fiduciary guarantees and ensuring that the guarantees are implemented properly until they can be registered, including in execution process in case of default.

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