

COPYRIGHT BINDING AND ASSESSMENT AS A FIDUCIARY GUARANTEE IN CREDIT AGREEMENTS IN INDONESIA

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Abstract

Copyright in Indonesia, as protected by Law No. 28 of 2014, comprises moral rights and economic rights. Copyright, under Article 16 of the Copyright Law, is an intangible movable object that can be used as a fiduciary guarantee, thereby enabling potential credit through banking or non-banking institutions using copyright as collateral. Therefore, this research aims to understand the binding and valuation of copyright as an object of fiduciary collateral in credit agreements in Indonesia. This legal research method uses normative legal research, namely through library study, with a legislative and conceptual approach. The research results show that Copyright can be used as an object of fiduciary collateral in credit agreements, namely through the encumbrance of Copyright based on a notarial deed, including the Copyright certificate, which in this case serves as the primary collateral, and then the licensing agreement, which in this case serves as a source of profit (as additional collateral). The economic valuation of Copyright collateral uses several approaches, including the cost approach, market approach, income approach, and other approaches as defined by valuation standards. However, until now, there are no Bank Indonesia regulations governing Copyright as collateral, nor are there guidelines for determining the liquidation value of Copyright as fiduciary collateral in Indonesia.

Keywords: Fiduciary Guarantee; Copyright Binding; Copyright Valuation.

INTRODUCTION

The development of technology and human creativity has led in the emergence of many creative works. These creative works... For example, paintings, songs, films, books, and many others. Creating such works requires thought, effort, time, and expense. The Indonesian government protects a person's creative work, including through Law No. 28 of 2014 concerning Copyright.

Copyright is a right that regulates intellectual works, including those in the fields of knowledge, art, and literature, expressed in a unique and permanent form. (Mujiyono et al., 2017)

There is a fundamental difference between Copyright and other Intellectual Property Rights, such as patents or

trademarks, namely that copyright, according to Article 1, number 1 of the Copyright Law, is an exclusive right owned by the creator that arises automatically based on the declarative principle after the creation of a work in tangible form.

The meaning of the declarative principle is that it does not require creators or copyright owners to register their creations with the Directorate General of Intellectual Property Rights as long as they have been previously announced. Meanwhile, Intellectual Property Rights regimes such as Trademarks and Patents emphasize the constitutive system aspect, providing legal protection through prior registration and recording with the Directorate



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General of Intellectual Property Rights. (Fidhayanti & Yaqin, 2023: 96)

The concept of Copyright is divided into moral rights and economic rights. Moral rights are inherent to the creator, while economic rights refer to the right to receive royalties or income from inventions, works, or products produced. In the context of UUHC, it is stated that the creator or copyright owner has the right to reproduce or derive economic benefits from their creation. (Hafid Hudzaefi et al., 2023: 120)

Both rights are transferable. Moral rights are transferred only through a will or other legal means after the Creator's death. Meanwhile, the transfer of economic rights to another party requires the Creator's permission and approval. This permission is an absolute requirement. If another party exploits the work without the Creator's consent and acceptance, it could constitute copyright infringement. (Putra et al., 2019: 51)

Copyright is categorized as a property right. Article 16 of Law No. 28 of 2014 concerning Copyright states that "Copyright is an intangible movable object that can be used as an object of Fiduciary Guarantee."

According to Liona N. Supriatna, the issue of copyright as a fiduciary guarantee is an interesting because it concerns an intangible asset. Tangible assets used as collateral often encounter problems in their implementation. Of course, this issue could also arise with intangible assets, such an intellectual property. (Wila Wahyuni, 2022) .

Creative industry players who own copyrights, as well as financial institutions, must fully understand how intangible movable assets such as

copyrights can be used as collateral in credit agreements. This is especially true regarding the binding and valuation of collateral in the form of copyrights.

Financial institutions, such as banks, certainly need to consider collateral when conducting financing. Although collateral is an accessory agreement, following the principal agreement, such as a credit agreement, banks will ensure that the collateral is uncomplicated and protected in the event of default. Therefore, binding and assessing collateral in a credit agreement is crucial to provide certainty and prevent losses for the financial institution.

The object of guarantee in the form of Copyright, as stated in Article 16 of the Copyright Law, is an interesting concept because Copyright has economic value but is not a tangible object.

Even though the legal norms regarding Copyright state that Copyright is an intangible movable object and can be used as a fiduciary guarantee, there needs to be clarity regarding the binding of intangible movable objects such as Copyright.

Thus, this does not give rise to legal consequences when Copyright is used as collateral in a credit agreement, and neither party feels disadvantaged.

As for the background of the problem, the study in this article examines how copyright is binding and used as collateral in credit agreements in Indonesia.

RESEARCH METHODS

The type of research used is normative juridical legal research. That is, writing is done by examining library materials (law in books), consisting of

primary legal materials originating in legislation and secondary legal materials that include theories and literature relevant to the problems discussed. The approach in this legal research is statutory, namely a study of various legal regulations that are the focus and related to the topic of discussion. In addition, this legal research uses a conceptual approach, namely an approach to the problem that refers to the opinions of scholars in the literature relevant to the topic of discussion as a supporting basis. Furthermore, the collected legal materials are processed and compiled descriptively, and a conclusion is drawn deductively, namely, from general to specific matters.

RESULTS AND DISCUSSION

Copyright is granted to creators for their creative works, including works in the fields of science, art, and literature. In Indonesia, the first copyright regulations were enacted in Law No. 6 of 1982. These regulations were subsequently amended by Law No. 28 of 2014, which remains in effect today and is known as the Copyright Law (UUHC).

According to Article 4 of the Copyright Law, creators have two rights over their copyright: moral rights and economic rights. Moral rights are rights inherent eternally to the creator, while economic rights are the exclusive rights of the creator or copyright holder to obtain financial benefits from their creation. (Andini Setiani Umar, 2024)

Moral rights cannot be transferred while the creator is still alive; they can only be assigned if the creator provides a will or for other reasons after the creator's death. If a creator transfers moral rights, the recipient can waive or refuse to

exercise those rights by written statement. (Ulinuha, 2018)

Regarding economic rights, creators will receive economic rights in the form of royalties or income from their creative works. According to Article 9 paragraph (1) of the Copyright Law, the creator's economic rights arise due to several things, namely: the publication of the creation, duplication of the creation in all its forms, translation of the creation, adaptation, arrangement, transformation of the creation, distribution of the creation or copies thereof, performance of the creation, announcement of the creation, communication of the creation and rental of the creation.

These economic rights can be transferred or assigned as stipulated in Article 16 paragraph (2) of the Copyright Law, which regulates the transfer of economic rights to copyright, including transfers or assignments due to inheritance, gifts, wills, written agreements, and other reasons permitted by statutory regulations. With the transfer of economic rights, the copyright owner will receive income in the form of compensation.

Management of economic rights to these rewards can be carried out by an institution called a Collective Management Institution (CMO). While in principle, *royalties* or rewards can be collected directly by the creator or copyright holder, this is generally done through the CMO. This is because the CMO is responsible for managing economic rights to copyrighted works, including songs, music, books, films, and related products. To collect royalties for the use of a job, the copyright owner or

copyright holder must be a member of the CMO.

Although the Copyright Regime in Indonesia adheres to the declaratory principle, meaning that Copyright arises automatically upon the creation of a work in physical form, not merely through registration. However, to provide legal certainty regarding copyright protection, especially for commercial use, Copyright must first be registered with the Directorate General of Intellectual Property Rights, which will then be recorded and will receive a certificate as proof of ownership.

Copyright, according to Article 16 paragraph (1) of the Copyright Law, is an intangible movable object. Therefore, Copyright is a property right that is bound by the characteristics of property rights as regulated in civil law, namely in Article 570 of the Civil Code, which states that property rights are the right to fully enjoy and control an object as freely as possible, as long as it does not conflict with the law and the status of the object guaranteed by law.

According to Subekti in his book Principles of Civil Law, an object can be classified as a movable object because of its nature or by law. (R. Subekti, 2003) From this definition, Copyright is included in the category of movable objects because it has been determined by law, namely in the Copyright Law, Article 16, paragraph (1).

Copyright and the property rights attached to it, which are intangible movable objects with transferable economic value, can be used as collateral. As is known, one of the principles in guarantee law is that the object used as collateral can be transferred if the debtor

cannot pay off his debt. (Salim HS, 2008) Therefore, Article 16 paragraph (3) of the Copyright Law states that Copyright can be used as an object of fiduciary guarantee.

Copyright is an exclusive right as an absolute right granted to its owner, so the copyright owner is given the freedom to use the Copyright he owns, including to use it as a Fiduciary Guarantee. (Indra Rahmatullah, 2014)

According to J. Satrio, the law of guarantee is the legal framework governing a creditor's guarantees of receivables against a debtor. (J. Satrio, 2002) The legal basis for Guarantees in Indonesia generally refers to Articles 1131 and 1132 of the Civil Code. Article 1131 of the Civil Code states: "All objects belonging to the debtor, both movable and immovable, existing and new ones that will exist in the future, become collateral for all individual obligations." Then Article 1132 of the Civil Code states: "The objects become joint collateral for all people who owe them; the proceeds from the sale of the objects are divided according to balance, unless there are valid reasons for priority among the creditors."

Collateral can be classified into two categories: general and specific. In general, all creditors have equal standing with respect to other creditors (*concurrent creditors*). Because creditors do not receive preferential rights, debt repayment is carried out proportionally. This general collateral arises from law, so it does not require prior agreement. Meanwhile, a specific collateral arises from a contract between the creditor and the debtor. This collateral can be in the form of material or personal collateral. (M. Hawin, 2018)

Material collateral is a guarantee in the form of absolute rights to an object with the characteristics of having a direct relationship with a particular object belonging to the debtor, can be maintained against any party, always follows the object, and can be transferred. (Siti Ismijati Jenie, Prihati Yuniarlin, 2019) Copyright, which is the absolute property right of the creator and has an economic value that can be transferred, is included as a special guarantee, in the form of material collateral, one of which is a fiduciary guarantee, as stipulated in Article 16 paragraph (3) UUHC. For this reason, copyright, which is used as a fiduciary guarantee, requires a prior principal agreement.

Fiduciary guarantees in Indonesia are regulated in Law No. 42 of 1999 concerning Fiduciary Guarantees. Article 4 of the Fiduciary Guarantee Law explains that a Fiduciary Guarantee is a subsidiary agreement to a principal agreement that creates obligations for the parties to fulfill their commitments. From this provision, it is clear that the binding of Copyright as a fiduciary guarantee depends on the principal agreement, which is a debt or credit agreement. (Siti Ismijati Jenie, Prihati Yuniarlin, 2019)

Article 1, number 2 of the UUJF states that Fiduciary Guarantee is a guarantee for movable objects, whether tangible or intangible, and immovable objects, especially those that cannot be burdened with mortgage rights as referred to in Law No. 4 of 1996 concerning Mortgage Rights.

Tangible movable property includes jewelry, securities, motor vehicles, heavy equipment, sea and river transportation, air transportation, and so on. Intangible

movable property includes copyright, as previously described.

Referring to Article 1, number 1 of the UUJF, it explains the meaning of fiduciary, namely, "fiduciary is the transfer of ownership rights to an object based on trust, with the provision that the object whose ownership rights are transferred remains in the control of its owner.

What is meant by the provisions for formulating fiduciary obligations in Article 1, number 1 of the UUJF, according to J. Satrio, is:

a. There is a transfer of ownership rights through a trust

According to J. Satrio, property rights are rights inherent in the owner of an object. These rights are linked to a specific subject, which is ultimately their authority. Therefore, the provisions regarding the transfer of property rights refer to the transfer of the owner's authority over a particular object.

The transfer of ownership rights is carried out on the belief that the creditor or recipient of the fiduciary guarantee will use the authority granted solely to protect their interests as creditors. The fiduciary guarantor also trusts that ownership of the fiduciary guarantee will transfer to the fiduciary guarantor upon repayment of the debt.

b. Control of the object remains in the hands of the fiduciary giver

The transfer of ownership of the fiduciary collateral is carried out by means of a *constitutum possessorium transfer* (control of the object remains in the hands of the fiduciary grantor). According to J. Satrio, the indirect transfer of *constitutum possessorium* means that ownership rights over the

fiduciary object during the guarantee period are divided into 2 (two: "economic ownership rights" and "legal ownership rights". The economic ownership rights remain in the control of the fiduciary grantor, while the legal ownership rights are with the creditor receiving the fiduciary. The legal ownership rights are to protect creditors and anticipate that the debtor or a guarantor may not fulfill their obligations.

Based on the provisions contained in Article 1 number 1 of the UUJF as explained above, in the case of the transfer of copyright as an object of fiduciary guarantee, the provisions for the transfer of rights in question are the transfer of authority from the copyright owner in trust to the recipient of the fiduciary guarantee, however, the transfer is only for the transfer of authority over the creator's economic rights. In contrast, the authority over the creator's moral rights, as explained previously, cannot be transferred because the creator's moral rights can only be transferred if the creator provides a will or for other reasons after the creator dies.

If copyright is used as an object of fiduciary guarantee, then control of copyright as a material right remains in the hands of the copyright owner or the fiduciary guarantee provider in the form of copyright, because what is given to the recipient of the fiduciary guarantee in the form of copyright is the power over its legal property rights. In contrast, its economic property rights can still be controlled by the copyright owner or the fiduciary guarantee provider. The copyright owner can still take advantage of his economic rights during the guarantee, except for the act of default

from the debtor or the fiduciary guarantee provider, then, the legal property rights held by the recipient of fiduciary guarantee play a role to protect him in carrying out the withdrawal of economic rights from copyright as payment of the debt of the copyright owner or fiduciary grantor.

If Copyright is used as the object of Fiduciary Guarantee, then, according to Article 4 of the UUJF, Fiduciary Guarantee is a secondary agreement to a principal agreement that creates an obligation for the parties to perform. Therefore, the binding effect of a fiduciary guarantee in the form of a copyright depends on the principal agreement; the principal agreement referred to here is a debt or credit agreement. (Siti Ismijati Jenie, Prihati Yuniarlin, 2019)

The placement of collateral subject to a fiduciary duty is regulated in a contract that gives rise to an agreement. According to Subekti, a contract is "a legal relationship between two individuals or parties based on which one party has the right to demand something from the other party, and the other party is obligated to fulfill that demand." This contract is the result of an agreement. (Dewi, 2019)

Copyright used as fiduciary collateral is only a subsidiary agreement to the principal agreement. Copyright can be used as fiduciary collateral if the copyright owner pledges the economic rights to their copyright to a bank in a debt or credit agreement. The recipient of the fiduciary collateral stipulates in the deal that the fiduciary collateral provider must surrender the copyright as collateral for the repayment of the debt.

Copyright, which is an intangible movable object, is subject to Article 613 of the Civil Code, which states that the transfer of intangible objects is carried out by making an authentic deed that transfers the rights to the object to another person who agrees in writing. This is in line with the provisions of Article 5 of the UUJF, which states that a notarial/authentic deed makes the encumbrance of fiduciary collateral objects.

Copyright binding under a notarial deed includes a Copyright certificate, which in this case serves as the principal collateral, and a license agreement, which in this case serves as additional collateral (as a profit generator). The Copyright Certificate serves as a reference for financial institutions and banks. (Ni Putu Ayu Arlita Dewi, 2023)

The binding of copyright as a fiduciary guarantee through a notarial deed is then registered as a fiduciary guarantee and issued as a fiduciary guarantee deed. Registration of copyright as a fiduciary guarantee is intended so that the general public, who have an interest, can know the data, including changes that occur during the guarantee, which are reported and recorded at the fiduciary registration office. Therefore, the list in question is declared open to the public so that it can have legal consequences for interested third parties. (J. Satrio, 2011)

A copyright that has been registered as a fiduciary security and recorded in the fiduciary register at the fiduciary registration office creates a copyright encumbrance as a fiduciary security. Therefore, the holder of a fiduciary security in the form of a copyright will receive a fiduciary security certificate

from the fiduciary registration office on the same date as the receipt of the fiduciary application/registration.

In a notarial deed registered as a fiduciary guarantee according to Article 6 of the UUJF, it must contain at least:

- a. Identity of the fiduciary giver and recipient;
- b. Data on the principal agreement guaranteed by a fiduciary;
- c. Description of the object that is the object of fiduciary guarantee;
- d. Guarantee value; and
- e. The value of the object that is the object of fiduciary guarantee.

The registration and inclusion of data, as stipulated in Article 6 of the UUJF, are intended to fulfill the principles of fiduciary guarantees, namely publicity and specialization. The principle of publicity requires fiduciary registration at the fiduciary registration office, while the principle of specialization requires comprehensive data to be included in the fiduciary deed. (Septarina Budiwati, 2015)

Following this binding and registration, a fiduciary guarantee in the form of Copyright is created. Thus, Copyright is now bound as a fiduciary guarantee.

In determining the collateral value and value of copyright used as fiduciary collateral in bank credit agreements, the receiving bank will assess the proposed copyright fiduciary collateral submitted by the prospective borrower. The assessment is conducted both legally and economically.

Legally, copyright is assessed under the provisions of laws and regulations governing its legality and use as a fiduciary security. Economic assessments

are then conducted by considering aspects related to the monetary value of the object or copyright used as fiduciary security.

A legal assessment is expected to determine the suitability of copyright as an object of fiduciary security. An economic evaluation is expected to determine the value (price) of copyright as an object of fiduciary security.

According to Siti Ismijati in her book entitled Introduction to Indonesian Guarantee Law, there are at least several things regarding the legal assessment of material guarantee objects in credit agreements, including:

- a. Legality of Credit Collateral Objects;
- b. Validity of Use of Credit Collateral Objects ;
- c. Legal documents relating to ownership of the credit collateral object;
- d. Whether or not there is potential for a dispute on a credit guarantee object.

For the economic assessment of copyright used as fiduciary collateral in credit agreements, reference should be made to Government Regulation No. 24 of 2022 concerning the implementing regulations of Law No. 24 of 2019 concerning the Creative Economy. This Government Regulation governs intellectual property-based financing schemes.

This government regulation is a derivative regulation of Law No. 24 of 2019 concerning the Creative Economy. The UUEK provides an opportunity for creative economy actors to pledge their intellectual works, such as copyrights, if they need capital to advance their creative economy businesses. With the enactment of this law, the regulation on Copyright as a fiduciary guarantee is more specific for

creative economy actors. Thus, Government Regulation No. 24 of 2022 concerning implementing regulations for Law No. 24 of 2019 was enacted to provide special rules for creative economy actors who own Intellectual Property Rights, or in this case, Copyright, which will serve as a fiduciary guarantee.

As stipulated in Article 9 of Government Regulation No. 24 of 2022, in implementing the Intellectual Property-Based Financing Scheme, banking and non-banking financial institutions use intellectual property, including Copyright, as collateral for debt, including in the form of fiduciary collateral.

Article 12 of the PP outlines several approaches that can be used in the economic valuation of intellectual property, namely the cost approach, the market approach, the income approach, and other approaches in accordance with applicable standards. The approaches to assessing Copyright as Fiduciary Security are outlined as follows:

- a. Cost Approach

This approach is based on the indication of value through the application of economic principles. The cost approach method is applied through an evaluation mechanism based on costs and market depreciation. For example, two films with identical production costs can generate different revenues; one might earn 5 million, while the other has a low audience. Even though the cost approach is similar, the film that attracts a larger audience has greater economic value. Therefore, valuation using the cost approach is the most appropriate method for objectively determining the monetary value of a creative work.

b. Market Approach

This method treats copyright as a dynamic intangible asset, calculated by comparing recent sales, transactions, or transfers with those of similar assets in the market. However, this approach poses difficulties in assessing a work's market value. For example, songs or books are difficult to value based on their individual market prices, as transactions in intangible goods are currently very limited.

c. Income Approach

Referring to this method, the income approach is the most practical, because the Creator or Copyright Holder must consider three measures: first, assessing future income from the type of copyrighted work that utilizes his economic rights; second, measuring the duration of income; third, evaluating the risks associated with copyright in the event of a decline.

d. Alternative assessment approaches in accordance with assessment standards

This alternative approach is used if the previous three approaches fail in assessing the economic value of copyright. However, it is essential to note that the valuation approach must still prioritize the principle of accountable economics. For example, if a songwriter wants to distribute their work through a record label, they can assess its economic value by the royalties they receive. Royalties serve as a concrete document to confirm the economic value of the copyrighted work; however, it should be noted that these royalties are still managed and distributed by the Collective Management Institution (LMK). This aims to strengthen the creator's bargaining

power as a fiduciary guarantee provider with banks, because royalties from their copyrighted work are guaranteed under LMK's responsibility.

The existence of LMK can make it easier for Intellectual Property Assessors to assess Copyright by providing official data regarding the amount of royalties received by Copyright holders in a specific period, which can be used as a reference for determining the economic value of Copyright.

According to Government Regulation No. 24 of 2022, authorized Intellectual Property Appraisers must hold a public appraiser's license from the Ministry of Finance, possess competency in Intellectual Property appraisal, and be registered with the ministry that manages the Creative Economy. The appraisal panel is a group of individuals appointed by financial institutions.

Article 12, paragraph (5) of the PP also explains that Intellectual Property Assessors are responsible for assessing Intellectual Property, including Copyright, which will be used as collateral, namely by conducting market analysis and evaluating reports on its use in industry.

In accordance with Minister of Finance Regulation Number 101/PMK.01/2014, economic valuation is the process of issuing a written opinion on the monetary value of an appraisal object in accordance with the Indonesian Valuation Standards (SPI). The Indonesian Valuation Standards are guidelines that appraisers must follow in conducting appraisals through the process of identifying and understanding the scope of the assignment, collecting data, selecting data, analyzing data, applying

the valuation approach, and preparing the final report. (Ibrahim, 2020)

The economic valuation of copyright is crucial, as it relates to the purpose of securing credit/receivables. If a creditor, or in this case, a bank, does not know the value of the copyright assets used as collateral to repay a debtor's debt, it will be difficult to assess its economic liability in the event of default, especially if the amount of funds being borrowed is substantial.

However, referring to Article 43 of Bank Indonesia Regulation Number 14/15/PBI/2012 itself There are no explicit provisions regarding copyright as collateral, in the BI regulations only recognizes several objects as collateral, namely: securities and shares that are guaranteed through pawning, land, buildings and residential houses that are guaranteed by mortgage rights, machines integrated with land that are guaranteed by mortgage rights, aircraft or ships measuring more than 20 cubic meters that are guaranteed by mortgages, motor vehicles and inventory that are guaranteed by fiduciary, as well as warehouse receipts that are guaranteed by security rights over warehouse receipts.

This indicates that, to be precise, until this writing, the author has not found any regulations from Bank Indonesia or the Financial Services Authority (OJK) that explicitly regulate copyright as collateral for bank credit, even though copyright is considered a material security, primarily as a fiduciary security. This is because there is a rule that allows copyright to be used as fiduciary security and to have transferable economic value.

CONCLUSION

Copyright binding is carried out under a fiduciary guarantee deed made by a notary, attaching a Copyright certificate, which in this case serves as the principal collateral, and a license agreement, in which serves as proof of profit generation (as additional collateral). The Copyright Certificate serves as a basis for financial institutions or banks to execute if the creditor is negligent in fulfilling its obligations. As for the assessment of Copyright as a fiduciary guarantee, it can be carried out in two stages: legal and economic. Legal assessment assesses the eligibility of Copyright as an object of fiduciary guarantee, including legal documents related to Copyright ownership. In contrast, economic assessment determines the monetary value of Copyright as collateral using approaches such as the cost, market, and income approaches. However, the market approach remains difficult because Copyright is an intangible movable.

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