
COPYRIGHT REDUCTION AS A FIDUCIARY WARRANTY OBJECT IN BANKING PRACTICES IN DENPASAR CITY

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Abstract

Intellectual Property Rights as part of the legal system are closely related to the business world, especially with industry, trade and investment. With Intellectual Property Rights the improvement of intellectual works as well as research and development that are able to produce new techniques and technologies is stimulated, which will excite the business world. Copyright is one part of intellectual property has the largest scope of protected objects, because it includes science, art and literature, in which also includes computer programs. Copyright becomes the most important base of the national creative economy and has a strategic role in supporting the nation's development and promoting the general welfare as mandated by the 1945 Constitution of the State of the Republic of Indonesia. In Article 16 paragraph (3) Law Number 28 of 2014 on Copyright determines that Copyright can be used as an object of fiduciary guarantee. In paragraph (4) it is determined that Copyright as the object of fiduciary guarantee as referred to in paragraph (3) shall be conducted in accordance with the provisions of applicable laws and regulations. From the provisions of Article 16 paragraph (3) and paragraph (4) above, Copyright as intangible moving object may be used as loan collateral (bank) by the creator or copyright owner with fiduciary burden and the imposition of the charge shall be based on legislation in the banking field. Research on the imposition of Copyright as the object of fiduciary guarantee in banking practice in Denpasar City is done to know its implementation in banking practice. In addition, also to know the constraints faced by the bank if the credit agreement used Copyright as the object of fiduciary guarantee. By knowing that, the specific targets to be achieved in this research are the results can be used by the legislator to design and formulate the legal substance of the new drafting model of legal norms that regulate the guarantee, especially the Copyright as the object of fiduciary guarantee, so that more can guarantee the existence of legal certainty and business certainty for both creditor (bank) and debtor. This research is an empirical legal research and factual approach is done by looking at the real situation in the research area.

Keywords: copyright reduction, fiduciary warranty, banking practice

I. INTRODUCTION

Intellectual Property Right is the right of a working to arise or to bear due to human intellectual ability such as copyrights, artwork, technology, or thoughts that are given and internal to the creator of the work is very useful for human life and its existence cannot be denied. Intellectual Property Rights generally is generally related to the protection of the application of ideas and information of commercial value. Intellectual Property Rights exist only when the human intellectual ability has shaped something that can be seen, heard, read or practically used.

Helianti Hilman and Aldian Romadoni mention that Intellectual Property Rights is an exclusive right granted by the state to a person or group of persons or entities to hold a monopoly on the use and benefit of intellectual property.¹ The exclusive rights granted by the State to the individual perpetrators of Intellectual Property Rights (inventors, creators, designers and so on) are intended as a reward for the work (creativity) and for others to be stimulated to further develop it again, so that with the Intellectual Property Rights system society is determined through the market mechanism. In addition, the Intellectual Property Rights system supports the establishment of a good documentation system of all forms of human creativity, so the possibility of the production of technology or

1)Heliani Hilman dan Aldian Romadoni, 2001, *Pengelolaan dan Perlindungan Aset Kekayaan Intelektual*, The British Council, Jakarta, p. 30.

other work of the same can be avoided or prevented. With the support of good documentation, it is hoped that people can use it maximally for their lives purpose, or develop further to provide higher added value.² Tomi Suryo Utomo mentions Intellectual Property Rights is a right arising from the outcome by the thought of the brain that produces a product or process useful to human.³ Intellectual Property Rights as part of the legal system are closely related to industry, trade and investment or in short with the business world.

Intellectual property in Intellectual Property Rights is manifested in the right form. In the concept of legal science of ownership of rights is not to the object but to the results of human intellectual abilities, namely the expression of an idea poured into a real work that is very abstract. However, Intellectual Property Rights are the same as ownership of the land, which contains economic value and is a commercial asset or commercial property. The rights that appear in Intellectual Property Rights are, in principle, the same as property, which has the right to be protected by the state, the right to rent to another party, has the right to profit profitably. The difference is that there is a timeframe of the right severity. If it is transferred to another party, there are special rules that govern it. The Intellectual Property Rights System is a private right that is characteristic of Intellectual Property Rights, that is a person may freely apply or register his or her intellectual work.

Copyright is one part of intellectual property that has the widest scope of objects protected, because it includes science, art and literature (art and literary) in which also includes computer programs. Copyright becomes the most important base of the national creative economy and has a strategic role in supporting the development throughout the nation and promoting the general welfare as mandated by the 1945 Constitution of the Republic of Indonesia.

Article 16 paragraph part (3) of the new Law of Copyright is Law, Number 28 of 2014 in lieu of the Law of Copyright, Number 19 of 2002, which is not in accordance with the development of law and the needs of the community, where the replacement shall be based on the consideration that the preferred is national interest and the balance between the interests of the creator, the copyright holder or the rights owner concerned about the community and the provisions of the international agreement in the field of Copyright and Related Rights determine that Copyright can be made as a fiduciary security object. In paragraph (4) stipulated on the provision that Copyright as an object of fiduciary guarantee as referred to in paragraph (3) is implemented in accordance with the provisions of applicable laws and regulations. From the provisions of Article 16 paragraph (3) and paragraph (4) above, Copyright as intangible moving object may be used as collateral for credit (bank) by the creator or owner of the Copyright with fiduciary burden and the imposition of the charge shall be based upon the laws and regulations in banking.

Based on the background of the problem as described above, the main issues to be explored in this paper can be formulated as follow:

- 1) How is the implementation of bank credit agreement on the copyright as the object of fiduciary guarantee?
- 2) What are the constraints faced by banks in the credit agreements with copyright as fiduciary security objects?

II. DISCUSSION

A. Implementation of Credit Agreement of Bank on Copyright as Fiduciary Guarantee Object

1. Bank Credit Agreement

a) Definition of Agreement

In Article 1313 of the Civil Code, "the covenant is an act by which one or more persons commit themselves to one or more persons."

Definition of the agreement by scholars working in the field of law is considered to have some weaknesses, because in addition to being too broad and incomplete, it also does not give a clear picture of the agreement itself. Considered too broad, because the agreement is defined as "a deed" (*handeling*) and not "legal act" (*rechts handeling*).

Sri Soedewi mentions that including the word deed (*handeling*) are also actions such as *zaak waarneming*, *onrechtmatigedaad* and so forth, which it caused a stomach because of the law. If each level of agreement is referred to as an act, it may cause consequences, that any act which is not a legal act can be cited as an agreement.⁴

Mariam Darus Badruzaman also mentions the understanding of the agreement contained in Article 1313 of the

2) Direktur Jenderal Hak Kekayaan Intelektual, 2003, *Buku Panduan Hak Kekayaan Intelektual*, Diterbitkan oleh Direktorat Jenderal Hak Kekayaan Intelektual Departemen Kehakiman dan Hak Asasi Manusia Republik Indonesia bekerja sama dengan APEC, p. 4.

3) Tomi Suryo Utomo, 2010. *Hak Kekayaan Intelektual (HKI) di Era Global*, Ed. I. Yogyakarta: Graha Ilmu, p. 1.

4) Sri Soedewi Masjchoen Sofwan, 1980. *Hukum Perdata Tentang Perutangan, Bagian B*. Seksi Hukum Perdata Fakultas Hukum Universitas Gajah Mada, Yogyakarta, 1.

Pewrata Law. It is said that agreement may include matters concerning the promise of marriage, which is an act within the field of family law which may also give rise to an agreement, but is peculiar because it is controlled by its own provisions, so that BOOK III of the Civil Code directly does not apply to it. Similarly, against the act against the law there is no element of consent.⁵ The same is also stated by Abdulkadir Muhammad, who suggests the understanding of the agreement set forth in Article 1313 of the Civil Code can also include marital sustenance, marriage promises set forth in family law, while the treaties referred to by the Book III of the Book Civil Law is only a material agreement.

The illustration of agreement definition above is considered incomplete since if it is seen from the formulation of one or more people, the people themselves bind to one or more others, the formula creating the impression of a unilateral agreement, which is only about one party who bind himself to the other party. It is considered not to give a clear picture, because it has not indicated the intention of holding the agreement that is to cause any legal consequences. Agreement which have no legal effect cannot provide legal protection for parties to defend their interests to others. Due to these weaknesses, scholars contribute their thoughts by giving clearer insights:

Subekti formulates, the covenant is an event in which a person promises another person or where the two men promise to do something.⁶ Abdulkadir Muhammad mentions, the covenant is an agreement by which one or more persons bind themselves to implement a thing in the field of property.⁷ Sudikno Mertokusumo argues that the agreement is a legal relationship between two or more parties based on an agreement to cause legal consequences.⁸

For the validity of a contract must be fulfilled with the conditions as laid down in Article 1320 of the Civil Code:

- 1) agree those who commit themselves;
- 2) the ability to make an agreement;
- 3) a certain thing;
- 4) a lawful cause.

b) Definition of Credit (bank)

Etymologically, the term of the *credit* is derived from Latin, *credere* which means 'trust'. For example, a debtor customer obtaining credit from a bank is certainly someone who won the trust of the bank.

According to Article 1 point 11 of the Banking Act, credit is the provision of money or claims that can be equivalent, based on a loan agreement or agreement to repay the debt after a certain period of time with the granting of interest. Mahmudin explained that in terms of credit, there are two aspects compared, such as economic aspects and juridical aspects. The economic aspect is the existence of interest payment by those receiving the loan in return received by the creditor as an advantage, while the juridical aspect is the existence of two parties binding in an agreement in which each party has the right and obligation.⁹

- 1) There are several principles contained in credit terms, namely:
- 2) the existence of the principle of trust in lending and borrowing agreements;
- 3) the existence of principle/principle of consensus in agreement;
- 4) the existence of good ethic principle, when trust given by lender (creditor) to debtor to pay the debts.
- 5) *pacta sunt servanda*¹⁰

c) Elements of Credit

The essential element of bank credit is the trust of the bank as the creditor to the debtor's customer. Trust contains the meaning of the belief of the creditors that the credit has been given to the debtor which is truly re-received within a certain time according to the agreement that has been made between the creditor and debtor. There are some elements of credit, namely:

- 1) trust, that is, the belief of the creditor that his achievement in the form of money, goods, or services will actually receive it again within a certain period of time in the future;
- 2) grace period, which is a period that separates between giving achievement with counter achievement that

5) Mariam Darus Badruzaman, 1983. *Kitab Undang-Undang Hukum Perdata, Buku III, Hukum Perikatan Dengan Penjelasan*, Alumni, Bandung, p. 89

6) Subekti., R. !984 *Hukum Perjanjian*, Intermedia, Jakarta. p.1.

7) Abdulkadir Muhammad, *Op.Cit.*, p. 45

8) Sudikno Mertokusumo, 1986, *Mengenal Hukum, Suatu Pengantar*, Liberty, Yogyakarta, p. 96.

9) Mahmoeidin, 2005, *Aspek-Aspek Kredit Bank*, Gunung Agung, p.7.

10) Suharningsih, 2011, *Analisis Yuridis Terhadap Perjanjian Kredit Dengan Jaminan Barang Inventory Dalam Bingkai Jaminan Fidusia*, Wisnuwardhana, Press Malang, p. 11

will be accepted in the future. In this time element there is an understanding of the value of money from money, that is, money is now higher than the value that will be received in the future;

- 3) degree of risk, i.e. the level of risk that will be faced as a result of a period of time that separates between awarding achievements with counter-achievement that will be accepted in the future. The longer the credit is given, the higher the risk level. With this element of risk arises the guarantee in lending;
- 4) the precision or object of credit is not only given in the form of money, but may be in the form of goods or services. But because modern economic life is now based on money, the credit transactions involving money are every time encountered in credit practices.

d) Fundamentals of Crediting

In the provision of credit or financing based on sharia principles, the bank shall pay attention to matters as stipulated in Article 8 Paragraph (1) and (2) Act Number 7 of 1992 concerning Banking as amended by Act Number 10 of 1998 which determines:

Paragraph (1): In granting credit or financing based on sharia principles, commercial banks must have confidence based on an in-depth analysis of ethics and capability, and ability of the debtor's customers to pay off the debt or return the financing referred to as agreed.

Paragraph (2): Commercial banks shall have and implement guidelines credit and financing based on sharia principles in accordance with the provisions stipulated by the Bank of Indonesia.

Based on the aforementioned provisions of the aforementioned article, and according to the explanation of Article 8 paragraph (2) it is mentioned that the credit and financing guidelines based on sharia principles stipulated by Bank Indonesia which must be owned and implemented by banks in the provision of credit and financing:

- 1) credits or financing based on sharia principles are made in the form of written agreements;
- 2) the bank must have confidence in the ability and capability of the debtor's customers, among others, obtained from a careful assessment of the character, capability, capital, collateral, and business projects of the debtor's customers; c. the obligation of banks to establish and implement lending or financing procedures based on sharia principles; the bank's obligation to provide clear information about the procedures and terms of credit or financing based on sharia principles;
- 3) the prohibition of banks to provide credit or financing based on sharia principles with different requirements to debtor customers and / or affiliated parties to
- 4) the settlement of disputes.

In lending, besides depending on the above guidelines, it should also be guided by the 4 P and 5 C formulas as described below.

Formula 4 P can be described as follows.

- 1) Personality.
- 2) In this case, the bank looking for complete data about the personality of the applicant credit, including his life history, experience in trying, association in society, and others. It is necessary to determine the credit approval filed by the credit applicant;
- 3) Purpose.
- 4) In addition to the personality of credit borrowers, banks should also seek data on the purpose or use of such credit in line of business credit of the bank concerned;
- 5) Prospect.
- 6) In this case the bank must conduct a thorough and in-depth analysis of the form of business to be performed by credit applicants, for example whether the business run by credit applicants have prospects in the future in terms of economic aspects and needs of society.
- 7) Payment.
- 8) That in the credit distribution, the bank must know clearly about the ability of the credit applicant to pay off the credit debt in the amount and time period specified.¹¹

Formula 5 C can be described as follows.

11) Hermansyah, 2005, *Hukum Perbankan Nasioal Indonesia*, Prenoda Media. Jakarta, p. 59-62.

- 1) Character.
- 2) That the prospective borrower's customers have character, morals, and good personality traits;
- 3) Capacity.
- 4) That prospective borrower customers have the ability to manage their business activities and be able to see future prospective so that their business will be able to run well and provide benefits, which ensures it is able to pay off its credit debt in the amount and timeframe that has been determined.
- 5) Capital.
- 6) In this case the bank must first conduct research on capital owned by credit applicants.
- 7) Collateral.
- 8) Collateral is a guarantee for credit approval which is a backup for possible risks on the future of the debtor customer, such as bad credit. This guarantee is expected to pay off the remaining credit debt, both principal and interest.
- 9) Condition of economy.

In lending by banks, the general economic conditions and conditions of the crediting business sector need to require attention from banks to minimize the potential risks posed by economic conditions.

In credit, granting by the guarantee bank is important, since the main function of the guarantee is to convince the bank or creditor that the debtor has the ability to pay off the credits granted to him in accordance with the mutually agreed credit agreement. It can be mentioned that the guarantee is a safety in case of risk, i.e., the debtor is not able to return the debt. In Article 8 of Law, Number 10 of 1998, it is stated that in order to reduce risk, credit guarantee or financing based on sharia principles, in the sense of belief in the ability and ability of debtors to settle their obligations in accordance with the agreement is an important factor must be considered by the bank. In banking practice there are two terms used to explain the existence of collateral, namely collateral and collateral. Guarantees are referred to as the trust given by the bank's creditors on ethics and the ability to pay debtor debts, whereas the collateral is intended with the material goods of the debtor who are pledged to repay the debt. So it can be mentioned, that the collateral is:

- 1) is an additional guarantee;
- 2) objects / property of the debtor's customers handed over to the creditor (bank);
- 3) to obtain credit or financing facility.

With the issuance of Law, Number 28 of 2014 on Copyright, it can be said that Copyright can be used for credit guarantee with fiduciary burden as stipulated in Article 16. This means that Copyright as an intangible moving object can be made object of fiduciary collateral.

Under the provisions of Article 1, paragraph (4) of the Fiduciary Collateral Act, the Law, Number 42 of 1999, fiduciary security objects may be:

- 1) moving objects both tangible and intangible; b. immovable property, especially buildings which are not burdened by mortgages; c. objects that can be owned and transferred by law; d. registered or unregistered objects;
- 2) inventory

Although copyright can be the object of fiduciary guarantee, the results of the research indicate that until now there are no prospective borrowers who apply for credit by using copyright certificate as credit guarantee with fiduciary burden. If any applicant applying for a loan under a copyright certificate that is burdened with fiduciary execution or the procedure is the same as a regular credit application, that is, the terms of the loan application generally have to be fulfilled, for example the terms of the contract as specified in Article 1320 of the Civil Code, the existence of collateral or collateral, eligibility, and so forth.

B. Constraints Confronted by the Bank in Credit Agreement with Copyright as Fiduciary Assurance Object

In Article 1, Number 1 of Law Number 28 of 2014 on the Right Copyright, Copyright is an exclusive right of the authors arising automatically on the basis of a declarative principle after a work is manifested in its tangible form without prejudice to restrictions in accordance with the provisions of the law.

In Article 1, point 3, it is stated that creation is any work of creation in the field of science, art, and literature produced by inspiration, ability, thought, imagination, dexterity, skill, or expertise expressed in the real form.

Furthermore, in Article 9, it is specified that the creator or copyright holder shall have the economic right to perform:

- 1) publication of the creation;
- 2) duplication of creation in all its form;
- 3) translations of creation;
- 4) adaptation, arrangement or transformation of creation;
- 5) distribution of a work or a copy thereof;
- 6) reference to creation;
- 7) announcement of creation;
- 8) communication of creation; and
- 9) rental of creation.

The definition of economic rights is the exclusive right of the creator or copyright holder to obtain the economic benefits of creation (Article 8).

Under the terms of Article 6 of the Fiduciary Guaranty Act, fiduciary security shall at least contain the following:

- 1) the identity of fiduciary givers and fiduciary recipients;
- 2) the underlying agreement of fiduciary securities;
- 3) description of objects of fiduciary collateral;
- 4) the value of the guarantee;
- 5) nilai benda yang menjadi obyek jaminan fidusia.

In the event of default to the debtor, fiduciary execution of fiduciary may be made and the fiduciary giver shall be obliged to surrender the object to be the object of fiduciary guarantee in the execution of fiduciary guarantee execution. If the fiduciary donor does not hand over the fiduciary security object at the time of execution, the fiduciary receiver shall be entitled to take the fiduciary assurance object and, where appropriate, to request the assistance of the competent authority. The execution of fiduciary assurances may be made in accordance with Article 29 of the Fiduciary Guarantee Act, namely:

- a) if the debtor or fiduciary giver has defaulted, the execution of the object to which the fiduciary assurance object may be made:
 - 1) the implementation of the executorial title by the fiduciary recipient, since according to the provisions of Article 15 paragraph 2 of the Fiduciary Collateral Act, the fiduciary guarantee certificate shall have the same executive power as the judge's decision which has had permanent legal force;
 - 2) the sale of objects which become the object of fiduciary assurance on the fiduciary receiver's own power through the general disposal as well as taking the settlement of the receivables from the proceeds of the sale;
 - 3) a sale under the hands of a consent of the fiduciary giver and recipient in such a manner as to obtain the highest price that benefits the parties.
- b) the execution of the sale shall be conducted after the expiry of a one month since it has been notified in writing by the giver and/or fiduciary receiver to the parties concerned and announced at least in two newspapers circulating in the relevant area.

From the results of the study, it is found that the constraints faced by banks in credit agreements with copyright assurance as fiduciary security objects are that the bank has difficulty in assessing copyright as an intangible moving object, since the security object must be assessed for determine the amount of credit to be given, because the value of collateral must be greater than the credit to be given. If the debtor is defaulted, then to sell the auction of collateral goods, i.e., the copyright as the fiduciary guarantee object will have difficulty, because the person who will buy the auction of copyright as the fiduciary guarantee object does not understand the copyright itself.

III.CONLUSION

Based on the discussion above, the overall discussion result of the discussion can be concluded as follows:

- 1) Until now there is no creator or copyright recipient applying for credits under copyright as a fiduciary security object.
- 2) 2.The constraints faced by banks in credit agreements with copyright guarantees as fiduciary security objects are that banks have difficulty in assessing the copyrights as fiduciary security objects, and such ap-

praisal in credit agreements is essential to determine the amount of credit to be provided, as the amount of credit to be given is no greater than the fiduciary value of copyrighted rights. In addition, there may be difficulties in the fiduciary-borne copyright tender if the debtor is defaulted.

- 3) 3. Whereas due to the Law on Copyright, Law Number 28 of 2014 has not yet implemented the Regulation of the Implementation, it is necessary to formulate its Implementation Rules immediately.
- 4) 4. It needs to be socialized that with the enactment of the Copyright Act, Law Number 28 of 2014, copyright as an immovable moving object can be used as collateral for fiduciary loans, so that the creator or copyright holder knows that the copyright can be made credit guarantees with fiduciary burden, so that the creator or copyright holder can obtain credit from the bank

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