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Research Article

Legal Certainty of Intellectual Property That Becomes an Object of Debt Collateral in Bank Financial Institutions According to Government Regulation Number 24 of 2022

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Abstract: The purpose of this study is to understand the form of intellectual property regulation that is the object of debt collateral in bank financial institutions and the form of execution of intellectual property that is the object of debt collateral in bank financial institutions in the event of default according to Government Regulation Number 24 of 2022. This study uses a normative legal research method with a statutory regulatory approach and a conceptual approach. The legal materials used include primary legal materials in the form of legislation covering intellectual property and collateral, secondary legal materials in the form of interviews with Rikson Sitorus as Chair of the Legal Analyst Working Group for Copyright and Industrial Design, DJKI, Ministry of Law and Human Rights and Muhammad Fauzy as Coordinator of Intellectual Property Facilitation II, Ministry of Tourism and Creative Economy/Baparekraf, scientific papers and related documents. The validity of legal materials is carried out by harmonizing legal materials in order to find the suitability of legal materials with the issues being answered. Based on the research results, it was found that: (1) Intellectual Property as an object that has a movable and intangible nature, the same as other property rights, can be transferred and assigned to other parties, such as being used as a credit guarantee object by the owner of the intellectual property. PP 24 of 2022 opens up opportunities for all types of IP to be used as bank collateral. (2) Execution of IP as Collateral can be carried out by; if the collateral is bound by fiduciary, it can be executed following the provisions contained in the Collateral Law, if using a contract in creative economic activities, the settlement process is carried out based on the provisions of the existing contract, if using the right to collect in creative economic activities, the right to collect can be executed by demanding payment through a legal process in accordance with the existing agreement.

Keywords: Collateral; Execution; Intellectual Property.

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1. Introduction

The development of the economy and business world in the early 21st century experienced rapid growth, driven by the globalisation process that created a flow of interaction and mutual influence between countries. This era of globalisation, which cannot be avoided, brings consequences in the form of increasingly heavy demands for competitiveness, forcing business actors, both individuals and legal entities, to require relatively large funds in order to develop and survive in global competition. This condition results in business actors being unable to rely solely on internal funding to meet their operational needs, making the debt-receivable or credit mechanism a much-needed alternative solution.

In the context of Indonesian law, debt regulation is explicitly addressed in various laws and regulations. Based on Article 1 number 6 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, debt is defined as an obligation that is stated or can be stated in an amount of money either in Indonesian currency or foreign

currency, which arises due to an agreement or law and must be fulfilled by the debtor. Meanwhile, in banking practice, the term "credit," which originates from the Latin "creditus," meaning trust, has become the primary mechanism for providing financing (Wijayanta, 2014).

Along with the development of the creative economy as one of the leading sectors in national economic growth, there is a need for a guarantee instrument that can accommodate the unique characteristics of creative assets. The creative economy, defined as the embodiment of added value from intellectual property derived from human creativity based on cultural heritage, science, and technology, has excellent potential but faces obstacles in accessing traditional forms of financing. This is because most assets in the creative economy are in the form of intangible intellectual property, making it difficult for conventional financial institutions to assess and use as collateral (Kurnianingrum, 2017).

Intellectual property, comprising copyright and industrial property rights such as patents, trademarks, industrial designs, integrated circuit layout designs, and trade secrets, is essentially a tangible asset that holds commercial and economic value. As an intangible asset, intellectual property possesses characteristics that enable it to be transferred through various legal mechanisms, including sale and purchase, inheritance, grants, or licensing agreements. These characteristics allow intellectual property to be used as collateral in credit transactions (Kurnianingrum, 2017).

International recognition of intellectual property as a collateralizable asset was given in the 13th session of the United Nations Commission on International Trade Law (UNCITRAL) in 2008, which discussed the issue of security rights in intellectual property. The results of the session agreed that intellectual property can be used as collateral or security to obtain international bank credit (Kurnianingrum, 2017).

In Indonesia, the legal basis for making intellectual property as collateral has been accommodated in several sectoral laws. Law Number 28 of 2014 concerning Copyright explicitly states in Article 16 paragraph (3) that "copyright can be used as an object of fiduciary collateral." Similar provisions are also contained in Law Number 13 of 2016 concerning Patents, which, through Article 108 paragraph (1), states that "rights to patents can be used as an object of fiduciary collateral." [3].

A more comprehensive breakthrough was then realised through Government Regulation No. 24 of 2022, concerning the Implementing Regulations of Law No. 24 of 2019 regarding the Creative Economy. This PP provides a broader legal umbrella by regulating the requirements for submitting intellectual property-based financing, assessment methods, and the parties that can assess intellectual property to be used as collateral. The advantage of PP 24/2022 is its non-limitative nature regarding the types of intellectual property that can be used as collateral, thus providing opportunities for all types of intellectual property to be used as collateral [4].

However, the implementation of intellectual property as collateral for bank credit still faces various complex problems. The characteristics of intangible assets raise concerns for banks as creditors, particularly regarding aspects of assessment, enforcement, and legal certainty in the event of default. This problem necessitates a thorough examination to ensure that the fiduciary guarantee mechanism for intellectual property can provide sufficient legal protection for all parties involved.

Based on the description above, the research questions that arise are: (1) What is the form of legal certainty for intellectual property as an object of debt collateral in bank financial institutions, as per Government Regulation Number 24 of 2022? The results of the analysis show that this PP provides certainty by requiring that IP must be registered and recorded at the Ministry of Law and Human Rights, managed by the owner or recipient of the transfer of rights, and recognised as an object of fiduciary collateral that has executive power. (2) What is the mechanism for executing IP as debt collateral in the event of default? Although PP 24/2022 refers to the Fiduciary Guarantee Law, its implementation still faces technical challenges, including the absence of specific regulations for assessing IP assets, unclear execution procedures for intangible assets, and the lack of a specialised IP appraisal institution.

Based on this research, it is essential to assess the legal certainty of intellectual property used as collateral for debt in banking financial institutions, as per Government Regulation Number 24 of 2022. This study aims to provide clarity on the legal mechanisms that regulate the use of intellectual property as fiduciary collateral, as well as identify potential legal issues that may arise during its implementation.

2. Literature Review

Research on legal certainty for intellectual property as an object of debt collateral requires a robust theoretical foundation to analyse the complexity of existing legal issues. The two main theories that form the foundation of this study's analysis are the theory of legal certainty and the theory of legal protection, both of which are interrelated in providing a framework for understanding the implementation of Government Regulation Number 24 of 2022.

2.1. Theory of Legal Certainty

Gustav Radbruch, as the originator of the theory of three legal objectives (justice, utility, and legal certainty), is the primary foundation in understanding legal certainty as one of the fundamental pillars of the legal system. Radbruch emphasised that legal certainty comprises four basic elements: the law is a positive thing that applies, the law is based on facts, facts must be formulated clearly to avoid misinterpretation, and positive law must not be easily changed. Utrecht strengthened this concept by providing two definitions of legal certainty: first, the existence of general rules that enable individuals to know what actions may or may not be taken; second, in the form of legal security for individuals against government arbitrariness. Peter Mahmud Marzuki added a practical dimension by defining legal certainty as a real form of written or unwritten legal rules that contain general guidelines for behaviour in society. Meanwhile, Jan Michiel Otto provided a more comprehensive definition of legal certainty by emphasizing the need for clear, consistent, easily accessible rules and consistent application by government agencies and independent judiciary [5].

2.2 Legal Protection Theory

The theory of legal protection in the context of this research refers to the concept developed by several Indonesian legal experts. Satjipto Rahardjo defines legal protection as an effort to protect a person's interests by allocating power to them to act in their best interests. Setiono expands this definition by emphasising that legal protection is an action or effort to safeguard society from arbitrary actions by authorities that are not by the rule of law, thereby promoting order and peace. Muchsin adds a social dimension by defining legal protection as an activity that protects individuals by harmonising the relationships between values or rules embodied in attitudes and actions, thereby creating order in social life. Philips M. Hadjon makes a significant contribution by classifying legal protection into two types: preventive legal protection, which provides the opportunity for the people to file objections before government decisions are definitively formed, and repressive legal protection, which functions to resolve disputes through general courts, government agencies as administrative appeal institutions, and special bodies [6].

These two theories serve as important analytical frameworks for understanding how Government Regulation Number 24 of 2022 provides legal certainty and protection for creative economy actors who wish to utilise intellectual property as collateral for debt in bank financial institutions. The theory of legal certainty helps analyse the extent to which the regulation provides clarity, consistency, and certainty for all parties involved. The theory of legal protection, on the other hand, helps understand the protection mechanisms provided to intellectual property owners and financial institutions in the guarantee and execution process.

3. Proposed Method

This study uses a normative legal methodology that focuses on the study of the application of rules and norms in positive law, where the law is conceptualised as norms that apply in society and become the basis for behaviour, with a statute approach that examines various regulations related to intellectual property, guarantees, and financial institutions including vertical and horizontal synchronisation between regulations, and a conceptual approach that is based on legal norms, legal principles, scholarly opinions, and legal doctrines, especially the concept of legal certainty and legal protection. This study is both descriptive and analytical, thoroughly examining the applicable laws and regulations and then connecting them to legal theories and the practices of implementing positive law. It utilises qualitative analysis of data in the form of a series of words that are processed systematically. The sources of legal materials used include primary legal materials in the form of laws and regulations such as the Civil Code, Copyright Law, Patent Law, Trademark Law, Fiduciary Guarantee Law, and regulations related to the creative economy, secondary legal materials in the form of interviews with experts, law books, journals, papers and articles, and tertiary legal materials in the form of legal dictionaries, KBBI, and encyclopedias, all of which aim to analyse legal

problems related to intellectual property as an object of debt collateral in financial institutions and find comprehensive legal solutions [7].

4. Results and Discussion

4.1. Form of Legal Certainty Regarding Intellectual Property as an Object of Debt Collateral in Bank Financial Institutions According to Government Regulation Number 24 of 2022

Government Regulation Number 24 of 2022 concerning the Creative Economy (PP 24/2022) is a transformative legal basis that accommodates intellectual property (IP) as an object of debt collateral in bank financial institutions. This regulation addresses the needs of creative economy actors for access to financing by utilising intangible assets while enhancing legal certainty through structured requirements and mechanisms. This legal certainty is reflected in the recognition of IP as an intangible object that meets the principles of property law, such as absolute rights, which can be transferred and maintained against other parties. PP 24/2022 explicitly states that all intellectual property (IP) classifications, including copyrights, patents, trademarks, industrial designs, and trade secrets, can be used as collateral, provided they meet the criteria for registration with the Directorate General of Intellectual Property (DJKI) or have been commercially managed. This requirement eliminates previous ambiguity, especially for types of IP such as trademarks and industrial designs that were previously not explicitly regulated in sectoral laws (Syafrida et al., 2023).

IP-based financing mechanisms are regulated through three forms: fiduciary guarantees, creative economic contracts, and collection rights. Fiduciary guarantees are the primary option, where IP ownership is temporarily transferred to the creditor until the debt is paid off, as stipulated by the Fiduciary Law. However, its implementation faces technical challenges, such as the absence of guidelines from the Financial Services Authority (OJK) that accommodate IP in POJK No. 40/2019 concerning the Bank Asset Quality Assessment. For example, Article 45 of the POJK only includes tangible collateral, so banks are hesitant to accept IP even though PP 24/2022 has come into effect. To overcome this, the government is initiating a revision of the POJK to align with the IP-based financing scheme (Rikson Interview, 2024).

Valuation of IP as collateral also requires a multidisciplinary approach. PP 24/2022 regulates four valuation methods: cost, market, income, and exceptional standards. The income approach is the most relevant, considering that the value of IP depends on future economic potential, such as royalties or licenses. However, public appraisal institutions in Indonesia still have limited competence in valuing intangible assets, unlike practices in Hungary or the United States, which already have specialised institutions. The Indonesian Appraisal Standard (SPI) 321, issued by the Indonesian Society of Appraisers (MAPPI) in 2024, is a critical guide; however, its effectiveness can only be thoroughly tested after November 2024 (Interview with Fauzy, 2024).

On the other hand, PP 24/2022 also mandates transparency of IP data through the integration of the DJKI system with financial institutions. This allows banks to access ownership information, commercialization history, and legal status of IP before approving financing. However, business actors still face administrative obstacles, such as complicated IP recording procedures and registration fees that are not affordable for MSMEs. In addition, the risk of executing fiduciary guarantees on IP, such as the difficulty in selling intangible assets in the secondary market, is a crucial consideration for banks (Husny, 2023).

Thus, PP 24/2022 has established a progressive legal framework for the use of intellectual property (IP) as collateral. However, its implementation requires synergy between institutions, improvements to supporting regulations, and an increase in the capacity of public appraisers. The success of this scheme will depend on the government's commitment to providing adequate legal and technical infrastructure, as well as intensive socialization to creative economy actors and banks

4.2 Execution of Intellectual Property Used as Debt Collateral at Bank Financial Institutions in the Event of Default According to Government Regulation Number 24 of 2022

The agreement is made by the parties as the basis for their legal relations regarding the agreements, which have been approved, thereby creating rights and obligations for the parties. With the existence of an agreement, everything that has been agreed upon can run smoothly.

Usually, but in practice, under certain conditions, the exchange of achievements does not occur. It always runs as expected so that an event occurs by default.

Default comes from Dutch, which means poor performance. According to the Law Dictionary, default means negligence, breach of promise, or failure to fulfil one's obligations under an agreement. What is meant by default is a situation where, due to negligence or error, the debtor is unable to fulfil the obligations as stipulated in the agreement and is not in a state of force majeure (Iwanti, 2022).

Default is an action by a debtor who breaks a promise or does not fulfil his obligations by the contents of the agreement that has been agreed with the creditor. Creative economic actors, in this case, debtors, are considered to be in default if they undertake the following actions (Abdullah et al., 2024) :

- The debtor did not do what he had promised to do.
- The debtor has carried out what was stipulated in the agreement, but not as promised in the agreement.
- The debtor did what he promised, but it was too late
- The debtor has done something that is not permitted in the agreement

One form of default that typically occurs in financing agreements is the debtor's inability to pay the debt as agreed. In general, if the debtor is unable to pay and there is collateral, the collateral will be sold to cover the amount of the existing debt. In terms of KI as collateral, as regulated in PP No. 24 of 2022, it does not explicitly outline the mechanism for executing KI collateral in the event of debtor default. PP No. 24 of 2022 only regulates that the settlement of financing disputes can be carried out through the courts or outside the courts, as per Article 40, paragraph (1).

According to Muhammad Fauzy, the Coordinator of Intellectual Property Facilitation II at the Ministry of Tourism and Creative Economy/Baparekraf, financing disputes that utilise IP as collateral will be resolved through legal channels, by applicable laws and regulations, including fiduciary agreements or arbitration, if a prior agreement is in place (Interview with Fauzy, 2024).

One alternative dispute resolution and/or arbitration institution that can be used is the Financial Services Sector Dispute Resolution Alternative Institution (LAPS SJK), which was established based on POJK No. 61/POJK.07/2020. LAPS SJK, in carrying out its duties, must facilitate dispute resolution in the form of mediation and arbitration, as stated in Article 8 paragraph (3) of POJK No. 61 /POJK.07/2020. LAPS SJK has the function of resolving disputes in the financial services sector outside the courts, both conventional and sharia: banking, capital markets, insurance, pension funds, pawnshops, financing, venture capital, credit guarantees, financial technology, payment systems, or other transactions that are under the supervision of the Financial Services Authority and/or Bank Indonesia (Qomarani, 2023). Therefore, SJK LAPS can be an option for creditors and debtors in cases where a financing dispute arises involving KI as collateral.

In the implementation of the execution that the Fiduciary Guarantee binds, the fiduciary giver is required to hand over the object that is the object of the Guarantee. On the other hand, if the Fiduciary giver does not hand over the object that is the object of the Guarantee at the time the execution is carried out, the fiduciary recipient has the right to take the object that is the object of the Fiduciary Guarantee and if necessary, ask for assistance from the authorized party (Fitria, 2022).

The authority to carry out execution can only be carried out by the creditor if the debtor is in default by taking into account the agreement relating to the execution of the object that is the object of the Fiduciary Guarantee, namely the promise to execute the object that is the object of the Fiduciary Guarantee in a manner that is contrary to the provisions as referred to in Article 29 and Article 31 of the Fiduciary Guarantee Law and the promise that gives the Fiduciary Recipient the authority to own the object that is the object of the Fiduciary Guarantee if the debtor is in default (Usman, 2009:165).

Article 8, paragraph (2) of PP 24 of 2022, states that "(2) Creditors can verify the registration letter or KI certificate which is used as an object of fiduciary guarantee and can be executed in the event of a dispute or non-dispute". Referring to this article can serve as a legal basis to support the implementation of execution seizure. However, it is necessary to re-examine the verification process for KI certificates to ensure that it is executed correctly and that the execution process itself is in order, thereby providing legal certainty to creditors (Reskin, 2022).

Before the creditor carries out the execution seizure, the debtor must first receive a warning letter or summons three times from the creditor as a sign of good faith, reminding the debtor. However, suppose the debtor does not demonstrate good faith to the creditor after receiving the third warning letter. In that case, the creditor may take action to carry out an execution seizure in accordance with the provisions of the credit agreement (Wati et al., 2021). In the case where the object of an Intellectual Property guarantee is implemented in the form of a Fiduciary Guarantee, as referred to in Article 9, letter a, of PP 24 of 2022, its execution can refer to Law Number 42 of 1999 concerning Fiduciary Guarantees. The provisions for the Execution of Fiduciary Guarantees are regulated in Articles 29 to 43 of Law Number 42 of 1999 concerning Fiduciary Guarantees. Considering the provisions of Article 29 paragraph (1) of the Fiduciary Guarantee Law, which states that: "if the debtor or fiduciary giver defaults, the object that is the object of the Fiduciary Guarantee can be executed. Considering that the Fiduciary Guarantee certificate has the same executorial power as a court decision that has permanent legal force, with this executorial power, the fiduciary recipient can immediately execute a public auction of the Fiduciary Guarantee object without going through a court decision.

However, creditors no longer have the freedom to directly execute the object of the fiduciary guarantee if the debtor objects to voluntarily surrender, as per the Constitutional Court's Decision Number 18/PUU-XVII/2019 and Number 2/PUU-XIX/2021. The constitutional judge interpreted the phrase "executory power" and "the same as a court decision that has permanent legal force" in Article 15 paragraph (2) of the Fiduciary Law as not having legal force as long as it is not interpreted against a fiduciary guarantee that does not have an agreement regarding breach of promise (default) and the debtor objects to voluntarily surrendering the object that is the fiduciary guarantee. All legal mechanisms and procedures for implementing the execution of the Fiduciary Guarantee Certificate must be carried out, applying the same standards as those for executing a court decision that has permanent legal force. In addition, the phrase "breach of promise" in Article 15, paragraph (3) of the Fiduciary Law does not have binding legal force as long as it is not interpreted to mean that the existence of a breach of promise is not determined unilaterally by the creditor but instead based on an agreement between the creditor and the debtor or based on legal efforts that determine that a breach of promise has occurred [19].

Based on the interpretation of the constitutional judge, the creditor has the right to directly execute the fiduciary guarantee object if a default or breach of promise has occurred and is agreed upon by both the creditor and the debtor or Certain legal efforts have been made that determine that a default or breach of promise has occurred. However, if the creditor and the debtor disagree that there has been a default and the debtor does not voluntarily surrender the fiduciary guarantee object, the creditor is required to sue the debtor as the defendant in the district court domiciled in the area stipulated in the credit agreement. The creditor is allowed to carry out the execution seizure after obtaining a decision and order from the panel of judges (Agustianto et al., 2023).

Suppose you have made legal efforts in court. In that case, the implementation procedure follows the Technical Guidelines for Administration and Technical Courts for General and Special Civil Courts (Book II), which explains the procedures and methods for subsequent executions, such as the execution of a court decision that has permanent legal force. Furthermore, if the defendant does not implement the Court Decision, there are two types of execution: real/actual execution and execution by payment of a sum of money, with the following procedures (Fitria, 2022):

- The applicant for execution submits an application to the Chief Justice of the first instance court, requesting that the decision be executed;
- The Head of the first instance Court summons the losing party (respondent) to be given a warning (aanmaning) so that he carries out the contents of the decision within 8 days in accordance with Article 196 of the Herzien Inlandsch Reglement ("HIR") / 207 Rbg;
- The Head of the first instance Court summons the losing party (respondent) to be given a warning (amazing) so that he carries out the contents of the decision within 8 days by Article 196 of the Herzien Inlandsch Reglement ("HIR") / 207 Rbg;
- An auction sale follows an auction sale order after an announcement has been made by the auction provisions. Then, ending with the handover of the auction proceeds to the execution applicant by the amount stated in the decision.

An alternative to the KI court decision, which is bound by a fiduciary agreement, is that the debtor is unable to fulfil their obligation at a later date. The creation, which is used as

collateral, can be executed using the provisions in the Fiduciary Guarantee Law; the creditor can make an execution effort, namely (Fitria, 2022):

- Execution of Fiduciary Guarantee Objects Based on Parate Execution Through Public Auction The provisions of Article 15 paragraph (3) of the Fiduciary Law stipulate that if the debtor defaults, the fiduciary recipient has the right to sell the object that is the Fiduciary Guarantee Object under his authority. Through public auction execution, KI execution can be easily executed, and there is ease in its implementation if the debtor (Fiduciary giver) defaults as a manifestation of the position that precedes the creditor (Fiduciary Recipient).
- Execution of Fiduciary Guarantee Objects based on the agreement of the Fiduciary Giver and Receiver Through Private Sales Execution of objects that are Fiduciary guarantee objects can be carried out through private sales, as long as there is an agreement between the Fiduciary giver and the Fiduciary recipient. Private sales can be conducted even when sales through public auctions have been held, but they are generally less profitable for the parties involved. This means that the execution of fiduciary guarantee objects does not have to be limited to public auctions, depending on the agreement of the parties.

If between the creditor and the debtor binding the IP as the object of the Guarantee using the form of a " Contract in Creative Economic Activities " as in Article 9 paragraph (2) of PP 24 of 2022, if the debtor defaults, then the execution is carried out by referring to the provisions of the contract, which may include the rights to the economic results of the intellectual property that has been agreed upon. The settlement process is carried out by the provisions of the existing contract, which may involve arbitration or court proceedings to demand the fulfilment of contractual obligations or compensation. In addition, if the "Right to Collect in Creative Economic Activities " financing scheme is implemented, and the debtor defaults, the right to collect can be executed by demanding payment through a legal process by the existing agreement. The process of settling the right to collect can be initiated by filing a lawsuit with the court to obtain the rights claimed by the contract and applicable regulations (Rikson Interview, 2024).

5. Conclusions

Based on the research results, Intellectual Property Rights (IPR) are part of the law on intangible movable property as regulated in Book II of the Civil Code, which allows the transfer of rights through a credit guarantee mechanism. Government Regulation Number 24 of 2022 has opened up opportunities for all types of IPR, such as copyrights, patents, and industrial designs, to be used as objects of debt collateral, provided that the IPR has been registered, managed independently, or transferred. The IPR-based financing process requires a creative economy business proposal, proof of IPR ownership, and an official certificate from the Directorate General of Intellectual Property (DJKI). Financial institutions then verify the business, validate IPR certificates, assess assets, disburse funds, and monitor the returns on financing. Although there is no single assessment standard yet, PP 24/2022 accommodates three valuation approaches: cost, market, and income, which can be carried out by public appraisers or panels appointed by financial institutions. In the event of default, the execution of IPR as collateral can be carried out through the courts (for fiduciary guarantees), contract settlement, or collection of rights by the agreement.

To optimise the use of IPR as collateral, the Financial Services Authority (OJK) needs to revise POJK 40/2019 by including IPR as a legitimate collateral object and formulating technical guidelines for verifying creative economy businesses and IPR certificates, in line with PP 16/2020 concerning copyright. An IPR asset appraisal institution certified and accredited by the government or OJK is also necessary to ensure transparency in valuation, considering that current appraisal practices still rely on public appraisers without established standards. In addition, the optimisation of the DJKI IP Marketplace as an IPR after-sales platform needs to be improved through extensive socialisation to form a dynamic transaction ecosystem. The synergy between regulators, banks, and creative business actors is also necessary to build trust in the economic value of IPR while mitigating legal and financial risks associated with this financing scheme.

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