



## The utilization and legal certainty of copyright as fiduciary guarantee object

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### Abstract

This research aims to evaluate Article 16 paragraph (3) of the Copyright Law (UUHC) which states that copyright can be used as an object of fiduciary guarantee as well as examine problems regarding determining the economic value or valuation of copyright which is used as an object of fiduciary guarantee, as well as finding legal certainty regarding whether there was a breach of contract by the debtor regarding copyright which was the object of fiduciary guarantee. Data sources use primary and secondary data sources. Research characteristics are normative juridical. This research analysis uses qualitative analysis.

The results show that: First, the mechanism for evaluating the economic value of copyright which is the object of fiduciary guarantees can be carried out by institutions that have competence in their fields such as Appraisal institutions or what are usually called public appraisal service institutions. Synergy is also needed with other institutions such as collective management institutions as the institution that carries out management related to royalties from copyright so that there is legal protection and certainty for both the debtor as fiduciary giver and the creditor as fiduciary recipient, secondly, on the side of legal certainty related to copyright as an object of fiduciary guarantee if there is a breach of contract at the time of implementation agreement, then the object being executed is the economic right, not the moral right of a copyright, this is because only moral rights remain attached to the creator of the work.

**Keywords:** Copyrights, fiduciary guarantee, breach of contract, law certainty

### Introduction

Development in the economic sector is an important step to face industry 4.0. in the industrial era, acceleration that relies on technology in all walks of life, aims to achieve a just society as stated in the 1945 Constitution of the Republic of Indonesia. This can also be done through continuous national development activities, which are meant here to be sustainable. There is an interrelated relationship between development actors, both from the government, individuals and legal entities. Apart from mutually sustainable cooperation, large funds are also needed to increase sustainable development activities.

As a result of this large need for funds, in legal practice there are various forms of funding that are used to meet the needs of parties who need these funds to achieve their goals. The funding in question is not free funding, in Indonesia itself it is known there is a guarantee made by the party giving the fiduciary guarantee, namely the debtor and the party receiving the guarantee or what is usually called the creditor, the guarantee is in the form of objects owned or controlled (Mulyani, 2014)<sup>[4, 7]</sup>.

Fiduciary guarantees complement the weaknesses in Pawn Guarantees. Due to the weakness of the pledge guarantee, the object of the pledge is in the hands of the pledgee, so the pledger cannot use the pledged object, even though the object of the pledge is important and very useful for the pledger if he wants to use it to run a business. This is different from fiduciary guarantees, where debt guarantees are material in nature, which in principle provides movable objects as collateral by giving control over the objects guaranteed to the debtor. However, the transfer of ownership of the collateral object is given to the creditor, then the creditor hands over control of the object that is the collateral object to the debtor in trust (Fiduciary) (Sofwan,

1980). As is known, regulations regarding fiduciary guarantees are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. Based on the law, it provides a wide range of fiduciary collateral objects. Fiduciary collateral objects can be tangible or intangible movable objects as well as immovable objects that are not encumbered with mortgage rights.

Copyright as an object of fiduciary guarantee is listed in Article 16, Paragraphs (1), (3), and (4) of Law Number 28 of 2014 concerning Copyright (UUHC). They are as follows: (1) Copyright is an intangible object. (3) Copyright can be used as an object of fiduciary guarantee. (4) Provisions regarding copyright as an object of fiduciary guarantee, as referred to in Paragraph (3), are implemented in accordance with the provisions of statutory regulations. Based on the Legislative Regulations regarding copyright, which can be used as an object of fiduciary guarantee, it can be seen that copyright can indeed be used as such. This is because copyright is an exclusive right that includes moral rights and economic rights. This is stated in Article 4 of Law Number 28 of 2014 concerning Copyright (UUHC), which determines that copyright is exclusive. Exclusive rights mean that a creator has the sole right to enjoy the results of their creation or give permission to others to use it. Additionally, there are moral rights, which are attached to the creator indefinitely and cannot be transferred as long as the creator is still alive. However, they can be transferred after the creator's death through a will or other means. Economic rights refer to the ability of a work to generate economic benefits through reproduction and duplication. Currently, the issue of copyright for works of art has become a matter of particular concern among Indonesian society, especially among Indonesian artists, actresses, and musicians.

Let's just say that in 2023, there will be a dispute regarding copyright between the songwriter and singer, Ahmad Dhani and Once Mekel. This dispute arose because Ahmad Dhani stated that Once Mekel, as the singer of Dewa 19 band, was not allowed to sing the songs of Dewa 19 at a concert. Ahmad Dhani claimed that Once Mekel had not paid royalties for the songs he sang, both on air and off air. It should be noted that Once Mekel had already Dewa 19 Band at time.

In this copyright dispute Article 95 paragraph (1) of the Copyright Law states that the dispute can be done through alternative resolution arbitration, or court. Finally, April 18, 2023, a mediation process was conducted at the Office of the Ministry of Law and Human Rights between Ahmad Dhani and Once Mekel, with the Minister of Law and Human Rights, Yassona H. Laoly, acting as the mediator. During this mediation, both parties reached an agreement that Once Mekel would not sing any more songs from Band Dewa 19 until further notice. Reflecting on the legal issues related to copyright, it is important for the government and relevant parties to pay attention to copyright matters. There is a possibility that in the future, there will be individuals who exploit the economic value of copyright for personal gain, such as using copyrighted works as objects of fiduciary guarantee.

Copyright is a right that is born from the creativity or thought of a person who creates a work that can be expressed to the general public and can support human needs (Roisah, 2015). In essence, copyright is a right to enjoy the economic value of the results of one's intellectual creativity.

In its implementation, there are also several obstacles in using copyright as an object of fiduciary guarantee. These obstacles arise because there are no specific implementing regulations regarding copyright as an object of fiduciary guarantee. This situation creates quite a big risk for banks to be able to accept copyright as collateral. Copyright is an intangible movable object and until now there has been no standard regulation on how to assess or estimate the economic value of a copyright.

In practice, there are indeed appraisal institutions or public appraisal institutions which have the task of assessing the valuation of works that have economic value, but the problem is that there are no regulations that comprehensively regulate the valuation or determination of the value of copyright objects that will be used as collateral objects. Fiduciary. If there are no regulations regarding determining the value of the copyright for a work which has comprehensive consequences for this matter, it will cause the economic value of the copyright to be uncertain in terms of its economic value. In other words, the economic value of a copyright is fluctuating if it is related to copyright which can be used as fiduciary collateral. And if the debtor as fiduciary guarantee has the potential to default on the debt and receivable agreement, then this could cause losses for creditors who wish to carry out execution due to the fluctuating value of the fiduciary collateral object.

This is a new problem, so legal certainty is needed for creditors as parties receiving fiduciary collateral so that the economic value of the copyright is permanent and creditors can carry out execution of the object of the fiduciary guarantee. Because there are no specific regulations relating to creations as objects of fiduciary guarantees, in this regard we use Law Number 42 of 1999 concerning Fiduciary

Guarantees with its implementing regulations, namely Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Deeds Fiduciary Guarantee.

Based on the background above, this issue really needs to be studied in depth. In general, the issue is how to ensure that the regulations regarding determining the valuation of the use of intellectual property rights as an object of fiduciary guarantee remain consistent and exist, as well as how to provide legal certainty for creditors if the debtor doing breach of contract in the implementation of fiduciary guarantee whose collateral object is copyright.

### Research Methods

This research uses normative legal research methods. Peter Mahmud Marzuki explains in his book that legal research creates coherent truth regarding applicable legal rules, legal principles, and legal doctrines that exist in society in order to answer existing legal problems (Marzuki, 2013)<sup>[2]</sup>.

Characteristic of this Legal Research is using prescriptive character, namely research aimed at getting suggestions about what should be done to overcome certain problems that can produce new arguments, theories, or concepts as prescriptions for solving the problems faced. Prescriptive means that the object of legal science is coherence between legal norms and legal principles, coherence between legal rules and legal norms, and coherence between individual behavior and legal norms (Hartono, 2006)<sup>[1]</sup>.

This research uses a conceptual approach. According to Peter Mahmud Marzuki, the conceptual approach is an approach that departs from the views and doctrines that develop in legal science, in order to find ideas that give rise to legal understandings, concepts, and principles relevant to matters, as a basis for building a legal argument in solving the legal issues faced.

### Result and Discussion

#### The Utilization and Legal Certainty of Copyright as Fiduciary Guarantee Object

Before we discuss the mechanism for determining the economic value of a copyright, which is the object of fiduciary guarantees, according to the World Intellectual Property Organization (WIPO), intellectual property rights are broadly divided into two parts, namely:

- a. Copyright
- b. Industrial Property Rights, which include:
  1. Patent
  2. Industrial Design
  3. Brand
  4. Repression of unfair competition
  5. Layout design of integrated circuit
  6. Trade secrets

Based on these two sections, both Copyright and Industrial Property Rights have moral and economic value attached to the creator of the copyright or industrial property rights. Intellectual property rights arise as a result of human intellectual abilities. In this era that relies on acceleration in the fields of technology and information, everyone is required to follow the latest developments and carry out innovations to be able to compete in various industries, including the arts industry. Many people find alternative sources of income, such as creating works of art in the form of songs or becoming content creators on platforms like YouTube.

This indicates that the development of the creative economy has exceeded many people's expectations because it can help the Indonesian economy. The Minister of Tourism and Creative Economy Sandiaga Uno stated that the creative economy sector is one of the largest contributors to gross domestic product (GDP) in Indonesia, namely IDR 1,100 trillion or 7.44% of GDP. With this data, Indonesia ranks 3rd after the United States with Hollywood and South Korea with K-Pop in the creative economy industry sector in a country (Datik, 2023). Of course, this achievement should be appreciated. However, behind the success of the creative economy industry in increasing GDP in Indonesia, the actors in this industry still face several obstacles in their business, one of which is regarding financing.

According to data reported by Hukumonline.com, 92.37% of players in the creative economy industry still use personal funds to conduct their business activities (Huzaini, 2019) <sup>[9]</sup>. However, this presents problems, such as the lack of physical assets that can be used as collateral, like fiduciary guarantees. Despite this, Article 1, Paragraph 2 of Law Number 42 of 1999 defines fiduciary guarantees as "guarantees for movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights, which remain under the control of the Fiduciary Giver, as collateral for the repayment of certain debts, giving the Fiduciary Recipient a preferred position over other creditors." This demonstrates that players in the creative economy industry can use their copyright or industrial property rights as objects of fiduciary collateral because copyright and industrial property rights are considered intangible assets. Additionally, copyright regulations stipulate in Article 16, Paragraph 3 of UUHC that "Copyright can be used as an object of fiduciary guarantee."

Another problem is related to the valuation of copyright itself, one of the intangible assets that is difficult to obtain financing from banks. If valued in money, copyright can have a fantastic value, but this does not convince banks as financing institutions to accept fiducia guarantees in the form of copyright rights. According to the Head of the Legal Department of the Financial Services Authority (OJK), Rizal Ramadhani, stated that the reason banks provide financing with copyright as a collateral object is uncertainty in valuation and risk management. Banks in Indonesia apply the principle of prudence in managing the majority of customers' money, which also has a very big risk if you apply copyright as an object of fiduciary collateral, especially if there is a breach of contract on the part of the debtor.

There are several valuation methods that have been developed by economic, financial, and other experts in fields related to patents, technology, and intellectual property. There are three methods that can be used, which are generally applicable for use as collateral assessments and can also be applied for assessing intellectual property rights and can also be used to analyze the value of copyright (Mulyani, 2014) <sup>[4, 7]</sup>.

**1. Cost Approach:** This approach method is used by calculating the current replacement or reproduction cost of an asset and deducting physical damage and/or all other relevant forms of obsolescence. This approach emphasizes

the value of intangible assets based on the economic principle of substitution, which is commensurate with the costs that will be incurred as a comparable replacement.

**2. Market Approach:** This market approach is used by comparing the object of assessment with other objects that are comparable and similar and have a selling price. Market Approach is an appraisal approach that is carried out by comparing the appraisal object with other objects that are comparable and similar and have a selling price. This market approach contains two types of differences, namely comparable market value and comparable royalty value. Comparable market value is determined by referring to the comparison of prices for the types of copyright in the transaction, while comparable royalty value is determined by referring to the comparison of the average royalties for intellectual property rights (Rahmatullah, 2015) <sup>[5, 8]</sup>.

**3. Income Approach:** This method uses a framework for assessing an asset by calculating or calculating future value. In this case, it is used to determine the present value of income that will be received in the future for the object of assessment. This will be received with a discount rate. The future value comes from the mechanism for using the license and the average royalties obtained.

Related to these three methods, in this research, the author found that there was no special institution tasked with dealing with the problem of determining the value of a copyright. This caused the application of these three methods to not run optimally.

According to the provisions contained in Article 43 of Bank Indonesia Regulation Number 15/PBI/2012 concerning the assessment of the quality of commercial bank assets, collateral can be determined as follows:

- a. Securities and shares that are actively traded on the Indonesian stock exchange or have investment grade and are tied to a pledge;
- b. Land, buildings, and residential houses tied to mortgage rights;
- c. Machinery which is an integral part of the land and is bound by mortgage rights;
- d. Aircraft or sea vessels with a size of more than 20 (twenty) cubic meters that are tied to a mortgage;
- e. Motorcycle vehicles and supplies tied to a fiduciary basis; and/or
- f. Warehouse receipt which is bound by security rights over the warehouse receipt.

As can be seen from several objects according to the provisions of PBI number 15.PBI/2012 concerning the assessment of the quality of commercial bank assets, copyright certificates are not shown because at this time they are not included in the list of collateral intended by Bank Indonesia. Apart from that, there are no guidelines or policies yet related to the assessment that can be used by public appraisers in assessing the economic value of copyright. Plus, there are no government regulations that comprehensively regulate the mechanism for fiduciary charges on copyright.

Then, related to the fulfillment of legal certainty regarding copyright, which is the object of fiduciary guarantees, this research found that the method of executing copyright as a fiduciary guarantee object is different from material rights

such as motorbikes, cars, or other property rights. The execution of copyright is not sufficient as stated in the fiduciary guarantee law. This is because the mechanism for executing copyright objects has not been clearly regulated. Copyright cannot be sold at a public auction or on the securities trading market. However, the copyright law does provide provisions for the transfer of copyright that can be used to execute the copyright object.

The transfer of copyright is regulated in Article 16, paragraph (2) of Law number 28 of 2014 concerning Copyright, which states that:

"Copyright can be transferred or assigned, either in whole or in part, due to:

- a. Inheritance
- b. Grant
- c. Waqf
- d. Will
- e. Written agreement; or
- f. Other reasons that are justified in accordance with statutory provisions."

From the provisions contained in Article 16, paragraph (2), according to the author, the most relevant method for executing copyright as an object of fiduciary security when the debtor is in default is by transferring the copyright through a written agreement. The written transfer of the agreement should also be stated in the form of a notarial deed because there are many broad aspects opened up by the law that need to be regulated in detail.

The deed of copyright transfer agreement made by a notary regulates matters relating to the transfer of copyright which are generally carried out in accordance with the agreement between the parties and of course do not violate the provisions of the applicable laws and regulations, this transfer through a written agreement is only granting the right to enjoy economic rights or economic benefits from a copyright, and within a certain period of time and certain conditions as well, while moral rights remain attached to the creator of the work and these moral rights cannot be changed even until the copyright expires (Projodikoro W., 1986)<sup>[3]</sup>.

The next process is that the notarial deed, which has been agreed upon by the parties, must be recorded/registered and announced to the Directorate General of Intellectual Property Rights. The application is made in Indonesian and is subject to an administrative fee. The transfer of copyright of this written agreement must be registered because if the transfer of copyright is not registered and announced in the General Register of Copyrights, the consequences are not binding on third parties. And when transferring copyright through a written agreement, the party holding the license agreement will obtain the right to utilize the economic rights of the copyright.

Through the description above, the author in this research also believes that the execution of copyright is different from the execution of other material rights such as motorbikes, cars, and other objects. The difference lies in the place where the execution of copyright is carried out. Copyright cannot be executed through public auction or securities trading. Then, the execution of copyright as an object of fiduciary security is carried out by executing economic rights only. Moral rights remain attached to the creator. This is because the economic rights of a copyright are considered to have sales value and are in accordance

with the elements stated contained in the nature of material guarantee.

Reflecting on the explanation above, the author is of the opinion that in this case, legal certainty is very necessary to provide a solution to creditors as recipients of fiduciary collateral in the form of copyright. If legal certainty is fulfilled, there will also be legal protection from the debtor's side as a fiduciary guarantee provider.

### Conclusion

Until now, there is no policy or statutory provisions that comprehensively discuss the mechanism for determining the valuation of the economic value of a copyright, which is the object of fiduciary collateral. This becomes an obstacle to the use of copyright as an intangible movable object for individuals or companies that have intangible assets (Intangible Assets). It is only explicitly listed in several related policies such as Law number 42 of 1999 concerning fiduciary guarantees and Law number 28 of 2014 concerning copyright, without any further regulations regarding procedures and/or mechanisms for assessing the valuation of copyright used as the object of fiduciary guarantees. If seen from perspective of legal certainty regarding copyright as an object of fiduciary collateral, there are various obstacles. This includes the policy regarding the valuation or appraisal of a copyright object, which is not yet available to date. The mechanism regarding execution if the debtor defaults is also unclear. This makes banking institutions in Indonesia still doubtful and tend not to accept copyright as collateral in providing financing to debtors. This is because in PBI number 15.PBI/2012 concerning assessing the quality of commercial bank assets, copyright certificates are not yet included in the list of collateral in Bank Indonesia Regulations.

### Suggestion

The government should pay more attention to creators of works of art, both individuals and companies who own these intangible assets, because if intangible assets such as copyrights can be utilized optimally, it will have an impact on economic growth in Indonesia. This shows that the creative economy sector can help increase state income. Apart from the importance of special competence in assessing the economic value of intangible assets that must be owned by public appraisers in Indonesia, synergy is needed between related institutions such as the Appraisal institution and Collective Management (LMK) Institutions in seeking solutions to determine the valuation of a copyright. In order to create legal certainty related to mitigating the risk of default on copyright, which is the object of fiduciary collateral, cooperation is needed between the government, in this case, which makes policies related to banking institutions to formulate a special policy that regulates risk mitigation and copyright execution procedures that are the object of fiduciary guarantees. This will provide clarity regarding legal certainty for creditors and legal protection for debtors.

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