

The Use of Economic Rights in Copyrights as Objects of Fiduciary Guarantees in the Conception of Legal Certainty

Nur Istain^{*)}

^{*)} Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, E-mail: nuristain@gmail.com

Abstract. *Economic and legal developments on Copyright in Act No. 28 of 2014 Concerning Copyright provide new arrangements regarding Copyright that can be used as objects of Fiduciary Guarantees. The purpose of this study is to find out the implementation of Act No. 28 of 2014 concerning copyright which states that economic rights in copyright can be used as objects of fiduciary guarantees in the conception of legal certainty. What is the compatibility between Copyright as an object of Fiduciary Guarantee and Act No. 42 of 1999 concerning Fiduciary Guarantees. The approach method used in this research is the Normative Juridical approach. Normative Juridical Approach, namely legal research conducted by examining literature or secondary data as a basis for research by conducting a search of regulations and literature related to the problem under study. The results of the study show that the principle of Copyright as an object of Fiduciary Guarantee in Act No. 28 of 2014 concerning Copyright cannot be separated from the theory of natural law which respects every product of the human mind. In addition, in Act No. 28 of 2014 concerning Copyright, there is a reward theory, recovery theory, incentive theory, risk theory and macro interest theory so that Article Copyright as an object of Fiduciary Guarantee is included in Act No. 28 of 2014 concerning Copyright. In principle, Copyright can be used as an object of Fiduciary Guarantee because Copyright is an intangible movable object and economic rights that can be guaranteed. Arrangements regarding Copyright as an object of Fiduciary Guarantee are in accordance with the provisions of imposition.*

Keywords: *Copyrights; Fiduciary; Immaterial; Property.*

1. Introduction

The rapid development of science in line with the needs of modern society has made human discoveries in various fields very numerous and varied which are

used for human survival in modern times. Humans with the gift of reason that God has given have extraordinary creativity from time to time in order to maintain their survival according to the needs of the times. The position of reason is very high, making humans the only creatures of God who have creativity, taste, intention. Allah said "And why do they not think about (happening) themselves? Allah did not create the heavens and the earth and what is between them but with the right (purpose) and in an appointed time. And indeed most of the people really deny the meeting with his Lord". There is an order for humans to use their minds in their service as creatures. Humans with the intellect given by God can produce creations that continue to grow, not only in the form of physical discoveries. Humans can even find something called intellectual property, namely wealth that arises or is born from human intellectual abilities. Works that arise or are born from human intellectual abilities can be in the form of works in the fields of technology, science, art and literature. Property Rights Works that arise or are born from human intellectual abilities can be in the form of works in the fields of technology, science, art and literature. Property Rights Works that arise or are born from human intellectual abilities can be in the form of works in the fields of technology, science, art and literature. Property Rights

Intellectuals or what is commonly referred to as IPR are rights that are obtained from the results of human thought to be able to produce a product, service, or process that is useful for society. Intellectual property rights classify intellectual property into several parts, one of which is copyright. Copyright is the exclusive right of the creator that arises automatically based on the declarative principle after a creation is realized in a tangible form without reducing restrictions in accordance with statutory provisions.

2. Research Methods

The approach method that will be used in this study is the Normative Juridical approach. Normative Juridical Approach, namely legal research conducted by examining literature or secondary data as a basis for research by conducting a search of regulations and literature related to the problem under study.¹

¹Soerjono Soekanto & Sri Mamudja. 2001. *Nornative Legal Research (A Brief Overview)*. Jakarta: Rajawali Press. p. 13-14.

3. Results and discussion

3.1. The use of economic right in copyright as an object of fiduciary warranties in the conception of legal security

Intellectual property rights are immaterial assets that can generate high economic profits or are of high value, this can happen when used to market a certain item industrial product, high economic value is related to the quality or quality of the product in the eyes of consumers, product quality is marked by a well-known mark attached to merchandise, a well-known mark is an intellectual property right that is the source of the owner's material wealth. Intellectual property rights are a source of material wealth for their owners because they have economic value. In industrial and trading activities, economic benefits are not only enjoyed by owners but also by other parties, as follows;

1. Intellectual property rights are used to run a certain business for the owner himself, for example a trademark or service,
2. Intellectual property rights are manifested in the form of models and designs for an industrial product which are then marketed to consumers, for example architectural works and house buildings,
3. Intellectual property rights are transferred for use/benefit to other parties through licenses (permits) so as to obtain multiple benefits, from self-use and licenses, for example copyrights, brand rights are licensed to producers, brand rights are licensed to trading companies, patents are licensed to trading companies, patents are licensed to industrial companies.

Economic value encourages scientists to continue to think in order to produce new creations or inventions that bring economic benefits, these benefits are not only obtained by the owner, but also by the licensee, from an economic perspective Intellectual property underlies industrial development which means it will increase economic growth in the form of an income country (growth national product). With the development of IPR (Intellectual Property Rights) in Indonesia, it should have a positive impact and convenience for copyright holders, especially in obtaining access to loans from banking institutions or other financial institutions in order to obtain loan funds for the development of existing creations and to obtain creative works in the field of intellectual property rights.

Copyright law was first regulated in Indonesia after 1945 in Act No. 6 of 1982 concerning Copyright. After it came into force, it was then amended by Act No. 7 of 1987. Then it was changed again by Act No. 12 of 1999. To fulfill adequate regulations, the previous Law was amended by a new Law, namely Act No. 19

2002 concerning Copyright, and copyright arrangements underwent changes again which later became Act No. 28 of 2014 concerning Copyright. Meanwhile, TRIPS or Trade Related Aspect on Intellectual Property Rights formulates the rules in the agreement governing IPR, namely TRIP which aims to increase IPR protection in Zaiken: Journal of Civil and Business Law | 420 implementation of IPR protection. The basic foundations governing copyrights in TRIPS or trade related aspects on intellectual property rights are regulated in Articles 9 to 14. These basic rules have been accommodated in Act No. 19 of 2002 concerning Copyright, which has now been updated by Law The new Copyright in Act No. 28 of 2014 concerning Copyright. Copyright in Indonesia is regulated in Act No. 19 of 2002 concerning Copyright and has been updated through Act No. 28 of 2014. The law through article 1 number 1 provides the understanding that copyright is an exclusive right for creators or copyright holders to publish or reproduce their creations, which arises automatically after a work is born without prejudice to restrictions according to the applicable laws and regulations. The notion of copyright in the declarative principle provides legal protection automatically when a creation has been created (born) without having to register it first. TRIPS acknowledges that a creation deserves legal protection when the creation is an expression or embodiment of an idea in accordance with (Article 9 paragraph 2 TRIPS). And one of the requirements for the authenticity or originality of a creation is that it has its own shape and characteristics as well as a manifestation of authenticity on the basis of creativity which is personal in nature from the creator's own thought, implying that the creation is the highest ego (alter ego) of the creator.²

Copyright is an exclusive right that has two rights, namely economic rights and moral rights. Economic rights are the rights to obtain economic benefits from their works and items included in the copyright category. Copyright can be categorized in the law of objects that have immaterial properties, which then becomes one of the foundations that the economic value in Copyright can be used as an object of Fiduciary Guarantee.

Moral rights arise because of the rule that everyone has the right to respect and respect the works of others and it is not permissible to take or change someone's work to be in his name. Furthermore, copyright is a category of intangible movable objects that are transferable in whole or in part because copyrights can be transferred or transferred in whole or in part, among others due to inheritance, grants, or written agreements, fiduciary guarantees.

In this case, it strengthens the basic foundation that copyright can be used as collateral, because copyright can be categorized as an intangible movable object,

²Guidance. Khoiril. 2018. Intellectual Property Rights Intellectual Property Rights Law. Malang: Setara Press pp 31-32.

but the economy has a value that can be valued in money and can be transferred through agreements such as buying and selling as collateral for debts such as movable objects. Previously, the Copyright Law did not regulate copyright as an object of fiduciary security, but after the existence of Act No. 24 of 2014 and explained in article 16 paragraph (3) which states that Copyright can be used as an Object of Fiduciary Guarantee, and it is emphasized that in its implementation Copyright as an Object of Fiduciary Guarantee is based on a legal basis as stated in the Law. With the entry into force of Article 16 paragraph 3 it is stated, artists or industry players can make it easier to make credit at banking institutions or non-bank lending institutions, by guaranteeing their work to be fiduciary guarantees. Article 16 paragraph 3 still requires further explanation regarding the imposition of copyrights as objects of fiduciary guarantees, what copyright provisions meet the criteria and can be used as collateral.

In Article 1 paragraph 2 of the Fiduciary Guarantee Law, the definition of fiduciary guarantee is formulated, namely "A fiduciary guarantee is a guarantee right over movable objects, both tangible and intangible, and intangible objects, especially buildings that cannot be burdened with mortgage rights as referred to in the Law. Act No. 4 of 1996 Mortgage, which remains in the possession of the Fiduciary giver, as collateral for the settlement of certain debts, which gives a priority position to the Fiduciary recipient over other creditors."³

This means that the law on fiduciary guarantees expressly states that fiduciary guarantees are collateral for goods or material guarantees (*Zakelijke zekerheid* security right in rem) which gives a priority position to fiduciary recipients, namely rights that take precedence over other creditors. This right is not removed due to bankruptcy and/or liquidation of the fiduciary provider (Article 27 paragraph (3) of the Fiduciary Guarantee Law).

The type of material that can be used as collateral as an object of fiduciary guarantees is that it must have economic value that can be valued in money, this is emphasized if the debtor in carrying out the loan cannot fulfill his debt obligations or is in default. So that the collateral can be taken over to pay off the debtor's debt. Regarding that copyright can be used as an object of fiduciary guarantees, it is required that the copyright must have an economic value that can be valued in money. And the right institution that allows imposition on the copyrighted object is a fiduciary guarantee institution, namely an intangible movable object. Due to the absence of laws and regulations that specifically regulate further the forms of copyright that can be used as fiduciary burdens,

1. Copyright must be registered with the Directorate General of Intellectual Property Rights of the Ministry of Law and Human Rights,

³Usman, Rahmadi. 2009. Civil Guarantee Law. Jakarta: Sinar Graphics. p. 153.

2. The Copyright must have an economic value estimate that can be accounted for,
3. The copyright has been managed by the Collective Management institution, so that the royalty value can be known,
4. Intellectual property rights certificates are included in the types of buildings that are allowed in bank credit financing.
5. If necessary, another guarantee is given in the form of a personal guarantee or borgtocht from the company that owns the copyrighted work.

The Copyright Law states that in its implementation Copyright as an object of fiduciary guarantee is carried out based on statutory provisions, in this case it is stated that copyright has economic value, but copyright is an intangible object, it will be difficult to determine its economic value because it is different from other movable objects such as motorized vehicles. Based on Article 6 of the Fiduciary Guarantee Law, it is stated that the fiduciary guarantee deed requires a description of the object that is the object of the fiduciary guarantee, the identity of the fiduciary recipient and the fiduciary giver.⁴

Comparing the elements of objects regulated in Article 499 of the Civil Code and Article 1 number 4 of the Fiduciary Law with the characteristics of Copyright, it can be found that copyright has fulfilled the requirements that can be used as collateral objects as regulated in article 1 number 4 of the Act No. 42 of 1999 concerning Fiduciary Guarantees, namely as objects that can be owned and transferred, have economic value, and are intangible objects. The transfer of property rights carried out by the fiduciary giver in trust as collateral for debt to the fiduciary recipient is not as strong as the transfer of property rights in a sale and purchase agreement. When compared to the fiduciary guarantee agreement, the transfer of rights still depends on a condition, namely if the fiduciary giver commits a default.⁵

As it is known that credit is given to the debtor based on the "trust" of the creditor in the debtor's ability to repay the debt in the future, in the guarantee law a principle of trust applies which is seen as the main guarantee. According to the author, in terms of obtaining legal certainty for creditors. It is still not perfect and there is still unclear regulation in its implementation, these blurred norms such as the problem of economic value of copyright as an intangible object, ownership and transfer of copyright as an object of fiduciary guarantees. Before

⁴Setianigrum, Budi, Reni. Mechanism for Determining Economic Value and Binding of Copyrights as Objects of Fiduciary Guarantees. *Legal Media Journal*. Vol. 23. no. 2 p. 235.

⁵Camelo, Tan. 2006. *Fiduciary Guarantee Law a coveted Need*. London: Alumni. p. 190.

executing the agreement, it is very important that the Copyright as the object of the fiduciary guarantee must first be registered with the Directorate General of Intellectual Property. This registration is carried out with the aim that the fiduciary giver is the copyright holder and prevents the debtor from not carrying out his achievements. So that if the fiduciary giver commits a default, execution can be carried out without having to go through a court decision. This legal issue occurs because there is still a lack of specific regulatory arrangements governing copyright that can be used as an object of fiduciary guarantee so that in the future it does not pose a risk for creditors to be able to accept copyright as an object of guarantee, copyrights as objects of fiduciary guarantees that meet guarantee standards that are acceptable to banking institutions in Indonesia and the application of the principle of prudential banking, where banks must obtain certainty of returning funds that have been lent to holders of intellectual property rights

3.2. The role of the notary in making fiducian warranty deeds with copyright objects

Notary is a public official appointed by the government to assist the general public in terms of making agreements that exist or arise in society. The need for written agreements to be made before a notary is to ensure legal certainty for the parties to the agreement. Written agreements made before a Notary are called deeds. The aim is that the deed can be used as strong evidence if one day there is a dispute between the parties or there is a lawsuit from another party.

Every fiduciary deed must be made by a notary, because a notary is someone who has the authority to make fiduciary deed or other things. This is in accordance with Act No. 2 of 2014 Article 1 Letter 1 concerning the position of Notary is a public official authorized to make authentic deeds and other authorities as referred to in this Law or based on other Laws. In making a fiduciary deed, it is necessary to have an agreement and agreement between the notary and the maker, because of that, trust is highly prioritized from every notary and the maker of the deed. At the time of making the fiduciary deed, a person must be physically and mentally healthy and over twenty one years of age. If someone is over twenty-one years old, that person can make the deed because he is considered an adult or legally capable. According to Act No. 2 of 2014 Concerning the Position of Notary Article 15 paragraph (1) Notaries have the authority to make authentic deeds regarding all actions, agreements and stipulations required by laws and regulations and or desired by interested parties to be stated in an authentic deed , guaranteeing the certainty of making the deed, keeping the deed, providing grosse, copies and excerpts of the deed, all of this as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law.

One of the deeds that must be made with a Notary deed is the Fiduciary Guarantee Deed. The Fiduciary Guarantee Deed as a Notary deed must fulfill the elements that have been determined by law in the process of making it so that it meets the criteria to be called an authentic deed, including the elements of reading the deed, signing the deed at the time and this is stated explicitly in the deed. According to Article 1 paragraph (1) of Act No. 42 of 1999 concerning Fiduciary Guarantees, Fiduciary is the transfer of ownership rights to an object on the basis of trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object.

The authority of a Notary to make a deed of imposing fiduciary guarantees on Copyright, in this case the notary is indeed given this authority as stipulated in Article 15 paragraph (1) of Act No. 2 of 2014 jo. Article 5 paragraph (1) of Act No. 42 of 1999. Although objects guaranteed by fiduciaries in the form of copyrights are relatively new in the field of law, it is a challenge for Notaries, Business Actors and Other Banking/Financial Institution Parties to be able to apply them in the future. Letters of Registration of Works for creations that are registered with the Director General of Intellectual Property Rights and/or Letters of Declaration of Copyright Ownership made in writing, both authentic and underhand, for works that are not registered are considered valid only to serve as supporting documents for Notaries in making deed of imposition of Fiduciary Guarantees on Copyright. However, the creation registration letter cannot be said to be authentic documentary evidence like a deed. The creation registration letter is only a letter that is not a deed in nature and only serves as proof of ownership of the Copyright given to the Author for his work which has been registered at the Director General of Intellectual Property Rights, Ministry of Law and Human Rights of the Republic of Indonesia. Enforcement of Copyright as an Object of Fiduciary Guarantee in Indonesia is not as easy as turning the palm of the hand to implement it even though Act No. 28 of 2014 concerning Copyright has accommodated this opportunity. If in the future the concept of fiduciary guarantees for copyright is actually implemented, it is necessary to carry out further arrangements regarding the fiduciary guarantee mechanism that has copyright as an object.

In addition to compiling legal regulations at the level of and/or under the Act, another important thing to do is for the Government through the Ministry of Law and Human Rights of the Republic of Indonesia to socialize Intellectual Property Rights (IPR) and the implementation of Article 16 paragraph (3)) The Copyright Law provides an opportunity for everyone, both private business actors and MSMEs and other business entities engaged in creative industries in the fields of art, literature, science and technology to be able to guarantee their copyrights fiduciarily. The need to provide understanding to Notaries regarding the making

of a fiduciary guarantee deed on copyright because of course in the guarantee deed there will be additions and/or clause changes.

The development of IPR as a guarantee object for financing institutions, one of which is banking, can be seen in the Fiduciary Guarantee Law. Fiduciary guarantees are considered the most appropriate form of guarantees, where fiduciary guarantees are a means of legal protection for bank security, namely as a certainty that debtor customers will pay off credit loans. A fiduciary agreement is not a guarantee right born by law but must be agreed in advance between the bank and the debtor customer.⁶Conceptually, a fiduciary guarantee is a material guarantee. Fiduciary as one of the guarantees is an element of bank credit security that was born preceded by a bank credit agreement. Article 1 point 1 of the Fiduciary Guarantee Law states that fiduciary is the transfer of ownership rights to an object on the basis of trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object.⁷A fiduciary guarantee is a guarantee right over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Act No. 4 of 1996 concerning Mortgage Rights which remain in the possession of the fiduciary giver, as collateral for the settlement of certain debts which gives the fiduciary recipient a priority position over other creditors. The enactment of the Fiduciary Guarantee Law is intended to fulfill legal needs that further spur national development and to guarantee legal certainty and be able to provide legal protection for interested parties.⁸Conceptually, a fiduciary guarantee is a material guarantee, after the fiduciary-encumbered object is registered⁹at the fiduciary registration office.¹⁰So that if the fiduciary encumbered object is not registered, the recipient's rights arising from the existence of a fiduciary encumbrance agreement are not material rights but individual rights.¹¹This is where the role of the notary as a public official who makes the Deed of Fiduciary Guarantee on Intellectual Property Rights is very much needed. Provisions regarding the proceeds from objects that are objects of fiduciary guarantees, substance of encumbrance, binding, and registration of guarantee rights in intellectual property, must be agreed strictly and clearly in the Deed of Fiduciary

⁶Tan Kamelo. 2004. *Fiduciary Guarantee Law A Coveted Need: History, Development, and Implementation in Bank and Court Practices*, Bandung: Issuer PT. Alumni, p. 187.

⁷UU no. 42 of 1999 concerning Fiduciary Guarantees. Article 1 point 1

⁸The weighing section of Law no. 42 of 1999 concerning Fiduciary Guarantees.

⁹UU no. 42 of 1999 concerning Fiduciary Guarantees, Article 11 paragraph (1)

¹⁰UU no. 42 of 1999 concerning Fiduciary Guarantees, Article 12 paragraph (1)

¹¹Betty Dina Lambok. *Legal Consequences of Written Agreement from Fiduciary Recipients to Fiduciary Givers to Renting Fiduciary Collateral Objects to Third Parties*. Thing. 224. quoted indirectly by Sri Mulyani, *Development of Intellectual Property Rights as Collateral (Collateral) to Obtain Banking Credit in Indonesia*. 2012. *Journal of Legal Dynamics*, Vol. 12. No. 3. September 2012. p. 568-578.

Guarantee on Intellectual Property Rights. According to article 6 of the Fiduciary Law, the Fiduciary Guarantee Deed as referred to in article 5 of the Fiduciary Law contains at least:¹²

1. Identity of the party giving and receiving Fiduciary, what is meant by "identity" includes full name, religion, place of residence/place of domicile, place of birth, date of birth, gender, marital status, occupation.
2. Principal agreement data

As explained above, the Fiduciary Guarantee agreement is *accessoir* in nature, so that the Fiduciary Guarantee Deed must include data on the main agreement, namely regarding the "types of agreements" and "debt" guaranteed. Regarding the type of agreement, it is usually in the form of a reciprocal credit agreement and a debt acknowledgment deed which is a unilateral agreement. Meanwhile, regarding debt, article 7 of the Fiduciary Law states that debt whose repayment is guaranteed by a fiduciary can be in the form of: existing debt, agreed debt, and debt whose execution time can be determined. In the Fiduciary Guarantee Deed, it is mandatory to state information regarding the main agreement data, namely, whether it is made in notarial form or underhand, the date and number of the principal agreement made in notarial form.

3. Collateral item description

The requirement regarding "description of collateral objects" is a logical requirement, because the Fiduciary Law really wants to provide legal certainty, and this is in accordance with the specialization principle it adheres to. Namely about the identification of the object, and proof of ownership. In the Deed of Fiduciary Guarantee on Intellectual Property Rights, it is obligatory to describe the substance of the encumbrance, binding, and registration of the guarantee rights in intellectual property.

4. Guarantee value Guarantee value shows how much burden is placed on the collateral object. This means that the creditor as the Fiduciary recipient can only take the maximum amount (maximum) of the value of the guarantor. The condition for mentioning the amount of "guarantee value" has a close relationship with the nature of the Fiduciary Guarantee Right as a right that "prioritizes/principle of *droit de preference*".¹³The amount of the guarantee burden is determined based on the amount of the burden that is installed

¹²J. Satrio. 2002. *Fiduciary Material Guarantee Law*, Bandung: Citra Aditya Bakti, pp. 205-212.

¹³The principle of *Droit de preference* is a right that gives creditors a position over other creditors.

(collateral value), but the preference right is limited by the amount (remaining) of the collateralized debt.

5. Collateral value

Is the value of the collateral object, the value of which is determined according to a benchmark value or on the basis of an assessment from the appraisal team which is addressed and approved by the parties. The requirement to mention the value of the collateral object is a new requirement in the guarantee law. In Mortgage, Mortgage or Pledge guarantees, it is not required to mention the value of the collateral object.

The encumbrance of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed.¹⁴Exceptions apply to Fiduciary Guarantee agreements that existed before the enactment of the Fiduciary Law.¹⁵According to Ratnawari W. Prasodjo, the reason for the Fiduciary Law stipulates the form of a fiduciary guarantee agreement with a notarial deed as follows:

1. The notarial deed is an authentic deed so it has perfect evidentiary power.
2. Fiduciary Collateral objects are generally movable objects.
3. The law prohibits re-fiduciary.

4. Conclusion

In carrying out his position, a Notary must be careful and responsible because every mistake made in the deed is attached to the responsibilities of his position, both morally, civilly and criminally. In making a fiduciary deed with a guarantee object in the form of copyright, the Notary is required to provide counseling in advance to the appearers regarding the contents of the deed, the object of the guarantee and the value of the guarantee so that the deed of guarantee made and the fiduciary certificate issued have executorial value so that it can be executed by the creditor in the event of default. In this case the Notary is responsible for loading the deed that is as good as possible for the parties.

¹⁴Fiduciary Law, Article 5 paragraph (1)

¹⁵Fiduciary Law, Article 37 paragraph (2)

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