



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

“Legal Development in Various Countries”



IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INTANGIBLES INTELLECTUAL PROPERTY DEVELOPMENT CONCEPTS AS BANKING PRINCIPLES IN INDONESIA¹

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A. Introduction

The impact of globalization is very complex, including liberalization in the world trade system, increased labor mobility and capital, the establishment of trade blocs and the dissemination of technology and communication.²

James Canton states that there are ten major globalization technologies³ such as Internet, biotechnology, nanotechnology and wireless communications⁴ will enable global trade, open market and free enterprise system.

¹Presented in the 3rd International Conference "Legal Development In Various Countries" held by Faculty of Law, Sultan Agung Islamic University on 5 September 2017.

²AnisMashdurohatun, Tantangan Ekonomi Syariah dalam Menghadapi Masa Depan Indonesia di Era Globalisasi, in Artikel Jurnal Dinamika Hukum, Fakultas Hukum Unsoed, Purwokerto, Vol.11, Februari Tahun 2011.hlm.77.

³ Globalisation challenges many of the traditional assumptions about International law, its relationship to domestic law, the ways in which it is created and the methods of its enforcement. The Law Department is engaged in cutting edge research and study of the normative and institutional implications of this challenge and of its theoretical and practical ramifications in a variety of fields ranging from the regulation of trade and investments, the protection of human rights and the international criminal responsibility of individuals, security and environmental governance, and the safeguarding of the diversity of cultural heritage. Lihat <https://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/TheImpactofGlobalisationonInternationalLaw>

⁴James Canton, Penerjemah: Inyik Ridwan Muzir, 2010, *The Extreme Future 10 Tren Utama yang Membentuk Ulang Dunia 20 Tahun ke Depan*, Tangerang, Pustaka Alvabet, hlm.261. it is further explained that some of the drivers that will shape globalization in the future include:

- 1) "Availability of energy sources and affordable energy prices.
- 2) Global terrorism and crime trends.
- 3) Press freedom.
- 4) Ethnic conflict within and between countries.
- 5) Respect for legal certainty and individual rights.
- 6) The growth of weapons of mass destruction.
- 7) Adoption of innovation and global technology, such as internet.
- 8) Open market followed free trade.
- 9) Supply chain that allows global trade flows.
- 10) Poverty alleviation and improvement of living standards.
- 11) Health care and surveillance of global disease outbreaks.
- 12) The spread of global democracy and human rights.
- 13) Considering global assistance to increase self-reliance.
- 14) Environmental degradation.
- 15) Access to education "

Globalization by Albrow refers to the whole process whereby humans on earth are incorporated into a single world society—aglobal society. Trade globalization or more popularly known as world free trade is characterized by GATT and TRIPS approval (M. Albrow: 1990, Adi S: 2006, Anis M: 2013).

Indonesia has ratified the Trade Related Intellectual Property Rights of Inclusive Counterfeit of Goods (TRIP's) Agreement, Annex 1C of the World Trade Organization (WTO) in 1994. It expressly stipulates that all member countries shall abide by and implement the universal standards of Trade Related Intellectual Property Rights Including Counterfeit of Goods hereinafter in brief TRIP's full compliance in protecting Intellectual Property Rights.

Intellectual Property Rights includes copyright and industrial property rights covering patents; brand, industrial design, integrated circuit layout (integrated circuit lay outdesign), trade secret, protection of plant varieties. This right contains moral rights and economic rights that are global (Insan Budi Maulana: 2000).

The main purpose of the IPR system is to ensure that the creative process continues to provide adequate legal protection and provide sanctions against those who use such a creative process without permission. In further developments, IPR became a very promising economic commodity especially for a number of countries that make IPR (developed countries) producers. This reasoning underlies the inclusion of IPR into the international trading system.

IPR as a material right, which is divisible means that it can be transferred wholly or partially to another party. This whole or partial transfer is indicated by an act committed with respect to the exercise of rights, through Inheritance; Grant; Will; Written agreement; or. Other causes justified by the legislation (Anis M: 2014).

With the increase of development activities, the need for funding is also increasing, which is mostly obtained through credit activities. The importance of the credit funds in the development process demands a protector for the creditor and related parties. They should get protection through a strong guarantee agency which can also provide legal certainty for all interested parties.⁵

⁵Explanation of Law Number 4 Year 1996 on Deposit Rights

The role of National Banking needs to be improved in accordance with its function in collecting and channeling public funds that pay more attention to financing. The activities of the national economic sector with priority to cooperatives, small and medium entrepreneurs, and various layers of society without discrimination will strengthen the structure of the national economy. Indonesia has entered into international forums such as the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC), and the Association of South East Asian Nations (ASEAN) which required various adjustments in the national banking regulations.⁶

The work of the reasoning ratio is in the form of immaterial objects ie intangible objects (H. OK Saidin, 2003: 9). IPR is closely related to intangibles and protects intellectual works born from human creation, taste and intention (TomiSuryoUtomo, 2004: 1). In the Indonesian legal system, moving objects are divided into tangible and intangible moving objects. IPR is a part of property rights for immovable moving objects (Budi Santoso, 2006: 34).

Government has been done policy in developing the community economy continuously, by preparing the RPJM 2000-2025. It is a mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia. Government legal politics in improving the competitiveness of the investment in accordance with the Vision of the Indonesian Mission 2005-2025, then it is necessary that IPR may bring royalty to the creator/inventor/designer/holder of rights and foreign exchange of the country.

AEC Blueprint is a guideline for ASEAN Member Countries to achieve AEC 2015, where each country is obliged to implement commitments in the blueprint. Inside the AEC Blueprint contains four main pillars of economic competitiveness IPR that integrates with the global economy. (AEC 2015 Blueprint).

IPR is as intellectual property which is the result of the thought of the human brain. It is distinguishes between human resources and natural resources (SDA), so the difference is very significant that the natural resources like oil and minerba (minerals and coal) can not be renewed. As the results of research Budi Santoso (2010) IPR has become the largest source of income in the state budget in the United States. It is in anticipation of the government that the un-renewable Natural Resources and the availability of natural resources is increasingly

⁶General Explanation of Law Number 10 Year 1998 concerning National Banking

depleted. Ironically, Indonesia has yet to optimize IPR, but more relies on the natural resources it has as a source of state revenue.

Based on IPR as part of intangible object law, this right can be transferred. According to its nature and type, it can be used as collateral. Therefore, the need for legal certainty for every citizen who has IPR certificate, either in the form of copyright, patent, trademark, trade secret, industrial design, and layout design of integrated circuit can be used as collateral in banking. Especially those who move on their trademark SMEs can be used as a Warranty. The results of the Cooperative and Micro, Small and Medium Enterprises identification, the perpetrators of Micro, Small and Medium Enterprises has many constraints in producing products, weak partnerships with financial institutions and limitations in market development both regionally and globally. Therefore, SMEs need to get business capital and the banking institutions need the object of guarantee as a guarantee of returning capital. So it is necessary to study in depth the concept of intangible development of Intellectual Property as a guarantee to the banking in Indonesia.

B. DISCUSSION

1. The position of Intellectual Property in the Legal Object

There are two kinds of objects, the tangible and intangible object as specified in Article 503 BW. This intangible object in Article 499 BW is called as Right. The example of right is claim rights, cultivate right, mortgages and IPR (intellectual property rights). Both tangible and intangible objects (rights) may be the object of rights, if participated in by other parties through license. The right to a tangible object is called the absolute right of an object, whereas the right to an intangible object is called the absolute right of a right, in this case Intellectual Property Rights (IPR). In order to gain a more detailed understanding, the following objects and rights schemes are presented. (Abdulkadir Muhammad: 3-4, Anis M: 2013).

In accordance with the nature of IPR, it is grouped as intangible individual property rights (Bambang Kesowo: 4). IPR is an intangible movable object, as a moving object, IPR may be transferred in whole or in part because inheritance, grant, testament, made into the State property. The agreement must be made by deed, provided that the agreement is only in the authority mentioned in the deed.

IPR has divisible nature, means it can be transferred wholly or partially to another party. The whole or partial transfer is indicated by an act committed with respect to the exercise of rights. On copyright, the complete redirection includes the right to announce, reproduce, and authorize to announce and / or reproduce the work.

2. Principles of the object as a Guarantee In banking

The existence of collateral in the field of credit is considered important although it can not be said absolutely. However, the disbursement of credit without collateral means enlarge the level of risk (degree of risk) that must be faced by the bank (Bambang Kesowo: 63). Black "s Law Dictionary mentions security: The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc. Given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. The name is also sometimes given to one who is surety or guarantor for another. (Bryan A. Garner, 2004: 1314-1315)

Guarantee is a preventive measure to secure debtor's debt that has been given by the creditor. It is done by pledging the debtor wealth, so that the debtor fulfills the obligation to pay back or with the existence of the ability of third party to fulfill the debtor's achievement. (Djuhaendah Hasan, 1996: 201). Objects that can be used as security objects are the objects that meet the requirements of having economic value and can be taken over. Objects (*zaak*) have a broad sense, means is that everything can be owned by people. In Article 499 *Burgerlijk Wetboek* (BW) is given an understanding of the object "called material is each goods and every right that can be controlled by property rights". So, the scope is very broad because the term object (*Zaak*) contains terms of goods (*goed*) and rights (*recht*). Goods have a concrete meaning (tangible) in the sense it can be seen, touched such as books, tables and others. On the other hand, the right refers to the intangible meaning of things such as receivables such as receivables on behalf of, intellectual property rights such as copyright, and patents. Regarding the types of credit guarantees by BW are distinguished:

- a. Physical Guarantees, the legislation is guarantees which its existence as determined by law. It does not need to be contracted between creditor and debtor. Guarantees arising out of law are general guarantees provided for in Article 1131 BW that all material liabilities of the existing of immovable either existing or new immigrants shall be borne in the future for any personal engagement.

- b. Physical Guarantees is occur from the agreement between the creditors and the debtor. Guarantees arising from the special guarantees is personal guarantees (Borgtocht/Personal Guarantee) stipulated in Article 1820-1850 BW or material assurance that there are certain objects provided by the debtor or third party as collateral.

One type of objects that can be used as the object of collateral is the credit. If the credits are used as security object, the guarantee institution used is the guarantee institution of pawn and fiduciary. Object pledge is a moving object as regulated in Article 1150 BW, which includes tangible and intangible movable objects, such as credit (see Section 1152 jo. 1153 BW). The object of fiduciary guarantee prior to the coming effect of Law Number 42 Year 1999 (hereinafter referred to as the Fiduciary Guaranty Act) is generally a moving object consisting of inventory, merchandise, receivables, machine tools and motor vehicles. However, since the enactment of the Fiduciary Guaranty Act, the definition of fiduciary guarantee is extended. Thus, the object of fiduciary guarantee includes tangible and intangible moving objects and immovable objects which can not be burdened with mortgages under Law No. 4 of 1996 on the Right of Dependence Land along with Objects related to the Land. In Article 1 Sub-Article 4 of the Fiduciary Guaranty Act, it is stated that object is anything that can be owned and transferred, whether it is tangible or intangible, registered or unregistered, mobile or immovable that can not be burdened with mortgages or mortgages.

3. Arrangement of Intellectual Property as collateral in various Countries

WIPO, 2007 Its Important IPR Regime Can Be Used as Credit Guarantee

In 2000, the United Nations Commission on International Trade Law (UNCITRAL) established the Working Group to deal with security rights in private property, including intangible assets. The Working Group is mandated to develop recommendations for an efficient legal regime for the security rights of goods involved in commercial activities, including intangible assets, and to identify issues to be addressed, including the appropriate form of instruments and scope of assets that may serve as security.

The decision to undertake work in the field of secured credit law is taken in response to the need for an efficient legal regime. This decision will remove legal barriers to secured credit and thus could have a beneficial impact on the availability and cost of credit. In 2007, UNCITRAL concluded its Legislative Guidelines containing recommendations for a uniform

legal regime for guaranteed financing, which also includes IP financing. This Legislative Guideline shall be considered in the context of prior policy by UNICTRAL, including the United Nations Convention on the Assignment of Accounts Receivable in International Commerce and the Law on Cross-Border Models of Bankruptcy.

The form of security that can be granted on intellectual property (registered and unlisted) is a lien. Only intellectual property rights that have a legal basis can be transferred. In the Dutch legal literature, there is a discussion that intellectual property rights have a legal basis and it can be diverted. It is likely that the intellectual property listed above can be burdened with liens. Liens on intellectual property rights are made by a written deed of promise. In addition, liens on certain intellectual property rights may be registered to make the appointment executed as against a third party. The registrant follows a list of Dutch intellectual property and security provided to them: The Dutch Patent Office (*Octrooiencentrum Nederland*). Benelux Intellectual Property Office (Benelux Bureau voor de Intellectuele Eigendom).

The United Kingdom Intellectual Property Office has published a summary of a study concerning banking on Intellectual Property: Banking on IP. The role of intellectual property and intangible assets in facilitating business finance. Small and medium sized-enterprises in the United Kingdom are able to use intangible assets, and particularly Intellectual Property, for financing purposes.⁷

4. Concept of Intangibles Development Intellectual Property as a Guarantee On Banking In Indonesia

Until the 1990s, nearly all business could readily point to their company's valuable assets. Those assets usually consisted of real estate, such as trucks, manufacturing facilities, or equipment, referred to as personal property. The past few years, it has seen tremendous growth in another type of property: intellectual property. It is called intellectual property because it is the product of human creativity, thoughts and inventiveness. Although much of intellectual property is intangible, it can be more valuable than real or personal property⁸. Intellectual property is generally considered as comprising four separate but often overlapping types of

⁷ Banking on IP? The role of intellectual property and intangible assets in facilitating business finance

⁸ Ibid, P.3

property rights, copyrights, trade marks, patents and trade secrets trades⁹. Example, Coca Cola for as collateral.

The assignment of patents as collateral determines the savings of firms and magnifies the effect of innovative rents on investment in research and development (R & D). We analyze the innovative firms that face random and lumpy investment opportunities in R & D. High growth rates of innovations, possibly higher than the real rate of interest, may be achieved despite financial constraints. There is an optimal level of publicly funded policy by the patent and trademark office that minimizes the legal uncertainty surrounding patents as collateral and maximizes the growth rate of innovations.¹⁰

While intangibles have been used as a "floating-charge" rate in junk bond contracts from as early as the 1980s, extending credit on intangibles by collateralizing separable and contractible intangibles emerged in mid-1990s. For example, in 2001 Bank of America underwrote a term loan of \$ 350 million for Levi Strauss that was collateralized by company's trademarks. The deal further included a revolving credit line secured by company's inventory. The company used these funds to reduce its borrowing costs, restructure its debt and redesign its core business lines. Moreover, in 2003 the company refinanced its debt by pledging again its trademarks as collateral for a new term loan of \$ 500 million. Similarly, Astrazeneca, Ann Taylor, and GIK Worldwide are some of the companies that pledged their intellectual property to raise credit.¹¹

IP Valuation and Intangible Asset Valuation, a crucial aspect of Appraisal Economics' valuation services involves IP valuation, also known as Intellectual Property valuation. These assets must be valued for purchase price allocation purposes when a business is acquired. This allocation is required under ASC 805 (formerly SFAS 141), "Business Combinations." In addition to real estate and machinery / equipment valuations, Appraisal Economics has extensive experience in intangible asset valuation, and establishing the useful lives of such assets. Among the various types of intellectual property and intangible assets to which the

⁹ Ibid,P.3

¹⁰ Amable, B., J.B. Chatelain, K. Ralf. 2010. Patents as collateral. *Journal of Economic Dynamics & Control*, 34: 1092-1104.

¹¹ Maria Loumioti, *The use of intangible assets as loan collateral*, University of Southern California. Diaksesdalam https://msbfile03.usc.edu/digitalmeasures/loumioti/intellcont/theuseofintangiblesasloancollateral_final-1.pdf

Trademarks and trade names, Patents and licenses, Unpatented proprietary technology and Copyrights.¹²

A consensus is emerging in the academic literature that secured lending with respect to creditworthiness. Moreover, a recent study found that loans secured by intellectual property (IP) value performs worse than those secured by intellectual property (IP) value of IP assets, especially patents, as collateral.¹³

The credit agreement between the bank as creditor and debtor has several functions, they are:¹⁴

1. Serves as the principal agreement if it is associated with a guarantee binding agreement;
2. Serves as evidence, so that it can be known the rights and obligations of each party; and
3. Serves as a tool to monitor the use of credit by debtors.

In the credit application, the bank needs to review the loan application by examining, among others: Character (personality); Capacity (ability); Capital (capital); Collateral (collateral); Economic condition (condition of economy).

Sri SoedewiMasjchoen stated that¹⁵: "For the sake of the creditors of the holding, the law provides a guarantee against all creditors and about the entire debtor's property. The existence of a guarantee for the debtor is for the security of capital and legal certainty for the giver of capital, this is where the importance of the guarantee institution. Fiduciary is a term derived from Roman law, which has two terms, namely as a noun and adjective. As a noun, the term Fiduciary has the meaning of a person who is given the mandate to take care of the interests of a third party in good faith, full of caution, cautious and honest. The person in the

¹² <https://www.appraisaleconomics.com/range-of-services/asset-appraisal/intangible-assets/>

¹³ Sung Kim, *IP Asset Value as Collateral: The Increasing Use of Patents as Collateral in Asset-Based Lending*, Februari 2016, diakses dalam <http://www.abfjournal.com/articles/ip-asset-value-as-collateral-the-increasing-use-of-patents-as-collateral-in-asset-based-lending/>

¹⁴ H.R. Daeng Naja, *Hukum Kredit dan Bank Garansi The Bankers Hand Book*, Citra Aditya Bakti, Bandung, 2005, hlm. 183.

¹⁵ Sri SoedewiMasjchoen, *Hukum Jaminan di Indonesia Pokok-pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty, Yogyakarta, 2003, hlm. 2.

faith is burdened with the obligation to do the deed for the benefit of others. As an adjective, the term fiduciary denotes an understanding of matters relating to trust.¹⁶

State regulation related to fiduciary guarantee, such as Law Number. 42 of 1999 on Fiduciary Guarantee (commonly referred to as UUJF); Law Number 10 Year 1998 concerning Banking Law Number 2 Year 2014 regarding Amendment of Law Number 30 Year 2004 regarding Notary Public Official Government Regulation Number 21 Year 2015 Regarding Procedure of Registration of Fiduciary Guarantee and Fiduciary Guarantee Deed Making Cost, Letter Circular of the Directorate General of General Law Administration Number AHU.OT.03.01-11 of 2013 on Registration of Changes and the Abolition of Fiduciary Guarantee Certificates. Regulation of the Minister of Justice and Human Rights No. 8 of 2013 on the Delegation of Electronic Fiduciary Guarantee Signing Certificate, Regulation of Minister of Justice and Human Rights No. 9 of 2013 concerning Enrollment of Electronic Fiduciary Guarantee Registration, Regulation of Minister of Law and Human Rights No. 10 of 2013 on Electronic Fiduciary Guarantee Registration Procedure. Circular Letter of the Director General of General Administration Number AHU-06.OT.03.01 of 2013 concerning the Administration System Registration of Electronic Fiduciary Guarantee (Online System). Regulation of the Minister of Finance No. 130 / PMK.010 / 2012 concerning Registration of Fiduciary Collateral for Financing Companies Conducting Consumer Financing for Motor Vehicles With Fiduciary Guaranty Fulfillment; Government Regulation Number 86 of 2000 on Procedures for Registration of Fiduciary Guarantee and Fiduciary Guarantee Fee Deed.

Fiduciary Guarantee has been regulated in Law No. 42 of 1999 on Fiduciary Guarantee. Fiduciary Guaranty is a right of guarantee of tangible and tangible immovable objects, especially buildings that can not be burdened with dependent rights under Law Number 4 Year 1996 concerning Land and Property Rights related to Land. In Article 1 Sub-Article 4 of the Fiduciary Guaranty Act, it is stated that Benda is anything that can be owned and transferred, whether it is tangible or intangible, registered or unregistered, mobile or immovable that can not be burdened with mortgages or mortgages. Fiduciary security plays a role in national development and ensures legal certainty for interested parties fiduciary guarantee shall be registered in accordance with Article 11 paragraph (1) UUJF.

Only in the very specific cases of a fiduciary object or object can be given more than one fiduciary, ie in the case of consortium or syndicated credit granting. Need clarity of what

¹⁶ Tan Kemelo, *Jaminan Fidusia, Suatu Kebutuhan yang didambakan*, Alumni, Bandung, 2014, hlm.40

kind of objects that can be the object of fiduciary assurance. The provisions are contained in Article 1 paragraph (4), Article 9, Article 10 and Article 20 UUF. The objects that become the object of fiduciary guarantee are as follows:

- a) the item must be legally owned and transferable;
- b) may be of a tangible object;
- c) may also be of intangible goods, including receivables;
- d) moving objects;
- e) immovable objects which can not be bound by mortgages;
- f) immovable objects that can not be tied to a mortgage;
- g) either to existing objects or to objects to be obtained later. In the event that the object to be acquired then there is no need for a separate fiduciary charge deed;
- h) may be of one unit or type of thing;
- i) may also be of more than one type or unit of objects;
- j) including the results of objects that have become fiduciary objects;
- k) as well as the proceeds of insurance claims of objects subject to fiduciary collateral;
and
- l) inventory or inventory, trading stock may also be the object of fiduciary collateral, except for agro-commodity or agricultural commodities.

Therefore, based on the provisions of Article 1 Sub-Article 4 UUF, the intellectual property properties which are in object law are intangible and can be transferred, such as copyright (UU No. 28 Year 2014), patent (Law No. 13 of 2014), Brand and Indication Geography (Law No.20 of 2016) and Trade Secret (Act No.30 of 2000) and Plant Variety Protection (Law No.29 of 2000) can be used as fiduciary security object. So that became the basis in the concept of intangible development of intellectual property as collateral to the banking in Indonesia. This has been done by many countries in the world, especially America, Holland and England.

C. CONCLUSION

Intellectual Property Rights (IPRs) are intangible movable goods, as movable objects, Intellectual Property Rights may be transferred or transferred in whole or in part by inheritance, grant, will, belonging to the State, an agreement to be made by deed, with the provision that the treaty only concerns the powers mentioned in the deed. IPR has divisible nature means it can be transferred wholly or partially to another party. The whole or partial transfer is indicated by an act committed with respect to the exercise of rights. The concept of Intangibles development of intellectual property as collateral to the banking in Indonesia, namely through the fiduciary guarantee institution as stipulated in Law Number 42 Year 1996 About Fiduciary Guarantee, In Article 1 Sub-Article 4 of the Fiduciary Guaranty Act stated that Benda is everything that can owned and transferred, whether they are tangible or intangible, registered or unregistered, mobile or immovable that can not be encumbered with mortgages or mortgages. Especially copyrights, trademarks, patents.

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