

# The Implications of Intellectual Property as Objects of Fiduciary Guarantee for Creative Economy Entrepreneurs

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Article	Abstract.
Keywords: <i>Fiduciary; Intellectual; Property</i> Article History Received: 2022-11-01; Reviewed: 2023-01-05; Accepted: 2023-02-15; Published: 2023-02-15. DOI: 10.30659/jdh.v6i1.27150	<i>Intellectual Property (IP) as objects of fiduciary security has not been implemented optimally in financing institutions in practice. In banking practices, the use of IP will cause problems when defaults occur or many debtors are unable to meet the legal obligation of debt repayment. The legal problems that occur related to intellectual property issues as fiduciary security are an obstacle and challenge that the government needs to fix in strengthening the rules that form the basis of intellectual property as an object of fiduciary security, especially for creative economy actors. This study aims to analyze the legal standing of IP as objects of fiduciary security in financing institutions and to analyze the application of IP to the banking sector to creative economic actors in obtaining credit. The research method that is used in this research is a normative juridical method. The research shows that the regulation regarding IP as fiduciary security is regulated by Article 16 (3) of Act No. 28 of 2014 on Copyright and Article 108 (3) of Act No. 13 of 2016 on Patents. A copyright must be registered first at the Directorate General of Intellectual Property if it is to be used as a fiduciary security because without registration there will be no fiduciary security. With the existence of IP as a fiduciary security, banking institutions with the government need to make improvements and policy breakthroughs to the laws and regulations that are adjusted to the implementing regulations related to the implementation of the imposition of IP objects as fiduciary security.</i>

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## 1. Introduction

Intellectual Property Rights (IPR) are rights that arise and are born from the results of thoughts and intellectual property owned by humans. The rights that arise are born from human intellectuals which have a relationship with people personally, as well as human rights for the works that have been made. Intellectual Property Rights

are generally related to the protection of the application of ideas and information that have commercial value.<sup>1</sup>

Broadly speaking, intellectual property rights consist of two types, namely copyright and industrial property rights. These industrial property rights include patents, industrial designs, trademarks, protection of plant varieties, layout designs of integrated circuits, trade secrets. While copyright is an exclusive right which appears automatically when a work has been created. The scope of copyrighted objects also covers a very wide range, namely science, art and literature and includes computer programs in it.

In this regard, the results of the 13th session at the United Nations Commission on International Trade Law (UNCITRAL) in 2008 stated that Intellectual Property Rights (IPR) can be used as collateral in obtaining international credit.<sup>2</sup> Furthermore, in Article 16 paragraph (3) of Act No. 28 of 2014 also emphasized that copyright as an intangible object can be used as an object of fiduciary guarantees. The government in this case provides an opportunity for creative economy business actors to develop intellectual property-based businesses in order to strengthen the creative economy sector in Indonesia and as a form of government alignment with creative economy actors in Indonesia in order to encourage the creative economy to grow further, bearing in mind based on statistical data from the tourism industry and the creative economy for 2020, the creative economy is one of the sectors that will become a pillar of the Indonesian economy in the future.<sup>3</sup>

PP No. 24 of 2022 concerning the Creative Economy issued by the government is one form of implementation of Article 16 of Act No. 24 of 2019 which contains intellectual property-based financing schemes for creative economy entrepreneurs. This regulation is predicted to be a solution to guarantee intellectual property rights.

In PP No. 24 of 2022, states regarding intellectual property-based financing schemes, bank financial institutions and non-bank financial institutions that can use their intellectual property as objects of debt guarantees in the form of fiduciary guarantees; contracts in activities related to the creative economy and/or collection rights against creative economy business actors. In addition, Article 10 states that intellectual property can be used as an object of debt guarantee, in the form of

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<sup>1</sup>Tim Lindsey, dkk. (2011). *Hak Kekayaan Intelektual Suatu Pengantar*. Bandung: PT. Alumni.p. 3.

<sup>2</sup>Financial Services Authority (OJK). Prospects for Intellectual Property Rights (IPR) as Debt Guarantees. Accessed via <https://www.ojk.go.id/ojk-institute/id/capacitybuilding/upcoming/1110/prospek-hak-kekayaan-intellectual-hki-As-jaminan-utang> on September 17 2022 at 09.05 WIB

<sup>3</sup>Ibid.

intellectual property whose form has been registered with the ministry that administers affairs in the field of law; and intellectual property that has been managed either independently and/or transferred its rights to other parties.

However, in its implementation, there are no bank financial institutions and non-bank financial institutions that have the courage to apply intellectual property as a fiduciary collateral asset. The inevitability of legal problems that will occur in the future related to the issue of intellectual property as fiduciary guarantee is an obstacle and challenge that needs to be corrected by the government in strengthening the regulations that form the basis for making intellectual property a fiduciary guarantee. In addition, the absence of clear concepts related to due diligence, valuation of IPR assets, and other aspects has resulted in bank financial institutions and non-bank financial institutions not having the courage to apply intellectual property as collateral to serve as credit collateral.<sup>4</sup>

Therefore, further discussion is needed regarding the juridical provisions regarding the position of IPR as an object of fiduciary guarantees in the financial services sector and the implications for the application of intellectual property for the banking sector to creative economy business actors in obtaining credit as objects of fiduciary guarantees.

## 2. Research Methods

The approach method used in this research is a normative juridical approach. This approach method emphasizes more on the conception that law can be seen as a set of laws and regulations that are arranged systematically and based on a certain order. The normative juridical approach is a method of research approach conducted by examining literature or secondary data as a legal basis for research by conducting a search of regulations and literature related to the problem under study.<sup>5</sup> The research specification used in this study is analytical descriptive, namely describing the applicable laws and regulations associated with legal theories and the practice of implementing positive law concerning the problem.<sup>6</sup> Descriptive research aims to systematically and accurately describe facts and characteristics regarding a population or a particular field. The data collected is purely descriptive in nature so that it is not intended to seek explanations, test hypotheses, make

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<sup>4</sup>Ibid.

<sup>5</sup>Soerjono Soekanto & Sri Mamudji. (2001). *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*. Jakarta: Rajawali Pers. p. 13-14.

<sup>6</sup>Ronny Hanitijo Soemitro. (1988). *Metode Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia. p. 35.

predictions, or study implications.<sup>7</sup> The research data analysis method is a qualitative method which focuses more on the depth of the data and not the amount of data obtained. Viewed from a scientific perspective, this research is legal research, with the Juridical-Normative approach method because this research places legal rules, both national and international, as the major premise or determining factor of a legal research.<sup>8</sup>

### 3. Results and Discussion

#### 3.1. Juridical Provisions related to the Position of Intellectual Property Rights (IPR) as Objects of Fiduciary Guarantees

Act No. 42 of 1999 concerning fiduciary guarantees (UU Number 42 of 1999) has the main objective of providing legal certainty regarding the existence of a fiduciary as a guarantee for the written legal system that applies in Indonesia. This law provides certainty regarding the object and since when a person has fiduciary rights.<sup>9</sup>

In Article 1 paragraph (1) of Act No. 42 of 1999 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. Article 1 paragraph (2) of Act No. 42 of 1999 defines the meaning of Fiduciary Guarantee as a guarantee right for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in Act No. 4 of 1996 which remains in the control of the Fiduciary Giver, as collateral for the settlement of certain debts, which gives the Fiduciary Recipient a priority position over other creditors.<sup>10</sup>

Based on Article 1 point 23 Banking Act No. 10 of 1998 jo. UU no. 7 of 1992, Collateral is defined as additional collateral submitted by debtors to banks in the context of providing credit or financing facilities.<sup>11</sup> In principle, credit guarantees are business feasibility in the form of cash flows from the borrower's business (first way out), but there are times when a bank requires collateral in the form of assets

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<sup>7</sup>Suteki and Galang Taufani. (2018). *Metodologi Penelitian Hukum: Filsafat, Teori, dan Praktik*. Depok: Rajawali Press. p. 133.

<sup>8</sup>Lexy J. Moelong. (1999). *Metodologi Penelitian Kualitatif*. Bandung: PT. Remaja Rosdakarya. p.248.

<sup>9</sup>Supramono, Gatot. (2014). *Transaksi Bisnis Saham dan Penyelesaian Sengketa Melalui Pengadilan*. Jakarta: Pernermedia Group.

<sup>10</sup>Ignatius Ridwan Widyadharma. (1999). *Hukum Jaminan Fidusia Pedoman Praktis, Cetakan ke-1*. Semarang: Universitas Diponegoro. p. 7

<sup>11</sup>Martin Anggiat Maranata Manurung, *Perlindungan Hukum Terhadap Kreditor Apabila Objek Jaminan Fidusia Ternyata Hilang Dan Debitor Wanprestasi (Studi Kasus Di Pt. Bank Perkreditan Rakyat Dinamika Bangun Arta Salatiga)*, Jurnal Akta, Vol. 4 No. 1 (March, 2017). p.37.

(second way out) to further increase the bank's confidence. The process of creating a fiduciary includes fiduciary construction, handing over property rights to goods belonging to the debtor to the creditor while physical control over the goods remains with the debtor (Constitutum Possessorium) with the condition that when the debtor pays off his debt, the creditor must return the ownership rights to the goods to the debtor.<sup>12</sup>

IPR as an intangible object in the object of fiduciary guarantees, its rights arise and are born from the results of human intellectual thought. The definition of intellectual property is regulated in Article 1 number 6 PP No. 24 of 2022, which states that intellectual property is wealth that arises or is born due to human intellectual abilities through creativity, taste and initiative which can be in the form of works in the fields of technology, science, art and literature. Meanwhile, the World Trade Organization (WTO), defines intellectual property:

*"Intellectual property can be defined as the rights given to people over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creations for a certain period of time."*

This means the rights given to someone as a result of creations arising from their intellectual thoughts. These rights provide exclusive rights that can be used within a certain period of time.

This right has a relationship with the person personally, as well as human rights to the works that have been made. IPR in general is also related to the protection of the application of ideas and information that has commercial value. IPR has an element of exclusive rights in which the work is new and can have economic value and be used as an asset by the creator. These exclusive rights include economic rights and moral rights. Economic rights can be in the form of obtaining financial benefits or exploitation, self-use, licensing and transfer of rights. Meanwhile, moral rights are related to personality, attribution rights and integrity rights.

According to civil law, the rights attached to wealth also have a material nature, which is called material rights. The law of guarantees has a close relationship with the law of objects.<sup>13</sup> As explained in Article 503 of the Civil Code, that objects can be

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<sup>12</sup>Munir Fuady. (2003). *Jaminan Fidusia Revisi Kedua*. Jakarta: Citra Aditya Bakti. p. 10

<sup>13</sup>Mariam Darus Badruzaman. (1991). Bab-Bab Tentang Credietverband, Gadai dan Fiducia, Bandung: Citra Aditya Bakti. p. 21

divided into tangible objects and intangible (immaterial) objects.<sup>14</sup> In addition, it is stated in Article 499 of the Civil Code regarding the limitation of objects that objects are each item and each right that can be controlled by property rights.<sup>15</sup> In this sense it can be concluded that intellectual property rights are conceptually included in intangible movable objects (intangible assets). For example, intangible movable objects can include securities, stocks or bonds, drafts or money orders, deposits and intellectual property rights.

These intellectual property rights can be transferred (including through sale and purchase transactions), licensed, donated, even bequeathed to the party authorized to receive them. The transfer of intellectual property rights only includes economic rights, while moral rights remain attached to the creator. The transfer of intellectual property rights in its implementation must also be carried out clearly and in writing, either with a notarial deed or without a notarized deed.<sup>16</sup>

In line with this, the rules that affirm intellectual property rights as objects of fiduciary guarantees are regulated in Article 16 paragraph (3) of Act No. 28 of 2014 concerning Copyright and Article 108 of Act No. 13 of 2016 concerning Patents. In certain countries IPR has become part of the assets that can be used as collateral. According to Francois Painchaud and Jason Moscovich in their research, they concluded that several countries have included IPR as one of the guarantees, including:<sup>17</sup>

#### A. North America Region (Canada and United States)

##### 1) Canada

Guarantee laws are regulated in the Personal Property Security Act. Canada defines intellectual property as intangible movable property rights.

##### 2) United States of America

The definition of intellectual property rights is regulated in Article 9 of the Uniform Commercial Code (UCC). It is implicitly explained that intellectual property can be

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<sup>14</sup>Widya Marthauli Handayani. *Keberlakuan Hak Cipta sebagai Objek Jaminan Fidusia berdasarkan Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta*. Jurnal Legislasi Indonesia, Vol. 16 No. 2 (June, 2019). p.216.

<sup>15</sup>Abbas Abdullah, dkk. *Kedudukan Hak Cipta sebagai Hak Kebendaan dan Eksekusi Jaminan Fidusia atas Hak Cipta*. Jurnal Jentera, Vol. 4 No. 1 (June, 2021), p.444.

<sup>16</sup>Muhammad Yuris Azmi. *Hak Cipta sebagai Jaminan Fidusia ditinjau dari Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta dan Undang-Undang Nomor 49 Tahun 1999*. Privat Law, Vol. IV No. 1 (January-June) 2016. p.100.

<sup>17</sup>Indra Rahmatullah. (2000). *Aset Hak Kekayaan Intelektual sebagai Jaminan dalam Perbankan*. Yogyakarta: Penerbit Deepublish. p. 112-115.

used as collateral because Article 9 broadly defines various types of assets that can be used as collateral.

## B. Europe

### 1) English

The legal concept in the UK, intellectual property rights are equated with other forms of a person's wealth and therefore intellectual property rights can be used as collateral because they are categorized as intangible rights. Intellectual property rights can be used as collateral through the mechanism of legal mortgages, fixed charges and floating charges.

### 2) France

In this country, intellectual property rights are used as collateral for intangible forms of rights through pledges.

### 3) German

Germany recognizes two categories, namely intellectual property rights that need to be registered (patents) and intellectual property rights that do not need to be registered (copyright). In financial transactions, registered intellectual property rights take precedence. The type of IPR that can be used as collateral in financial transactions is due to its transferability. Patents and trademarks have transferability properties so they can be used as collateral. Therefore, in Germany there are 2 forms of securitization of intangible rights, namely pledge and trust security or *sicherungsabtretung* (guarantee of trust).

## C. Asia

### 1) China

In the old guarantee law in China (Guarantee Law of The People's Republic of China) the existence of guarantees for creditors is limited, but guarantees for intellectual property such as trademarks and patents are possible to use as collateral. However, in the provisions of the Property Right Law of The People's Republic of China, IPR can be used as collateral in the form of mortgages and pledges.

### 2) Japan

The use of intellectual property rights in Japan is still relatively new and the implementation of these intellectual property rights can be used as collateral in the form of mortgages and pledges.

In practice, overseas countries that have converted IPR into financing guarantees for financial institutions include Singapore, Britain, Thailand and America. According to the Legal Analyst of Transfer Madya DJKI Kemenkumham RI, Rikson Sitorus, which

was presented at the Seminar: Prospects of Intellectual Property Rights (IPR) as Debt Guarantees, on September 1 2022, several countries have implemented IPR as debt guarantees as an example in Singapore, there is an IPOS (Intellectual Property Office of Singapore) with the types of IPR that can be guaranteed are patents and brands as well as the cooperating banks are DBS, OCBC, and UOB. In addition, in Thailand the types of IPR that can be guaranteed are trade secrets with the cooperation of related banks, namely SME Bank, Bangkok Bank, Government Saving Bank.

In several provisions of laws and regulations, elements that can be transferred are spread over the types of IPR. Based on Article 40 paragraph (1) of the Law on Trademarks, Article 3 paragraph (2) of the Copyright Law, Article 66 paragraph (1) of the Patent Law, Article 5 paragraph (1) of the Trade Secret Law, Article 31 paragraph (1) of the Industrial Design Law, Article 23 paragraph (1) of the Integrated Layout Design Law, is a provision that regulates the transfer of rights, that is, they can be transferred or transferred due to inheritance, grants, wills, written agreements, other reasons justified by laws and regulations.

In addition, in fiduciary, the collateral object is not controlled by the lender (creditor) but is still controlled by the debtor (debtor), and there is no physical surrender. The fiduciary agreement must be made in writing as outlined in a notarial deed and must also be registered. Without registering, a fiduciary guarantee will not be born. Thus, if a copyright is to be used as a fiduciary guarantee, the creation must first be registered at the Directorate General of Intellectual Property. This registration is important as evidence in the event of a default, that the fiduciary giver is the copyright holder and execution of the economic value of copyright can be carried out through the parate executie institution as well as a form of guaranteeing legal certainty for creditors' rights.<sup>18</sup>

Basically, the credit guarantee requirements must meet the following elements:

- 1) Has economic value that can be valued in money and can be cashed
- 2) Ownership can be transferred easily
- 3) Can be owned as a whole based on law where the lender has the right to liquidate the collateral.

Based on the description above, as long as an object of material security has economic value, the object can be used as collateral. Because it can be used as collateral, execution or confiscation of said collateral can also be carried out. In the case of copyright as a fiduciary guarantee, IP in guaranteeing its execution follows

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<sup>18</sup>Magmun Migfar, Amin Purnawan. *Tanggung Jawab Para Pihak dalam Pembuatan Akta Jaminan Fidusia pada Notaris di Busan Auto Finance Rembang*, Jurnal Akta, Vol. 5 No. 1 (March, 2018), p.213.



the provisions of the applicable laws and regulations regarding fiduciary guarantees in general.

### **3.2. Implications for the Financial Services Sector in the Implementation of Intellectual Property Rights as Objects of Fiduciary Guarantees for Creative Economy Entrepreneurs**

Practices in several countries have shown that the financing mechanism of intellectual property management can accelerate the growth of the creation of innovations that support the added value of products or services in economic development in various countries. The creative economy is an embodiment of added value from intellectual property which can be used as an object of fiduciary guarantees in the world of banking and non-financial institutions.

The government facilitates intellectual property-based financing schemes through banking and non-banking institutions which are divided into 2 types, namely intellectual property valuation and intellectual property utilization of economic value. The use of IP with economic value facilitates the application process and optimizes intellectual property as collateral for debt. The intended intellectual property assessment is education and training facilities in intellectual property assessment.

Creative economy entrepreneurs who wish to apply for credit guarantees must have a registration letter or intellectual property certificate registered with the Director General of Intellectual Property. The procedure for applying for financing can be carried out by verifying the business, verifying the legality of intellectual property, disbursing funds and receiving refunds. The forms of Intellectual Property Rights that can be used as collateral for debt are debt guarantees in the form of:

1. Fiduciary Guarantee on Intellectual Property
2. Contracts in creative economic activities
3. Billing rights in creative economic activities

In the case of credit financing to customers, banking institutions must first pay attention to whether the customer will fulfill his performance on the collateral with the principle of prudence. This precautionary principle means that before providing credit facilities to customers, financial institutions must feel confident that the credit provided will be returned, by carrying out in-depth research.<sup>19</sup>

The intellectual property rights proposed in the financing scheme will be assessed in advance by the intellectual property appraiser and the appraisal panel. Besides that,

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<sup>19</sup>Muhammad Hilmi Akhsin, Anis Mashdurohatun. Legal Consequences of Unregistered Fiduciary Guarantees According to Law Number 42 of 1999, Journal of Deeds, Vol. 4 No. 3 (September, 2017), 489.

through PP creative economy. Intellectual property-based financing requirements include:

1. Financing proposals
2. Have a creative economy business
3. Has an engagement related to intellectual property of creative economy products
4. Have a registration letter or certificate of intellectual property

Through intellectual property-based financing in banking, it is necessary to have intellectual property appraisers at financial institutions to conduct intellectual property assessments. The intellectual property appraiser must have a public appraiser license, have competence in the field of intellectual property appraisal and be registered with the Ministry of Tourism and Creative Economy. Appraisal panels from the internal side of financial institutions are also needed so that they can jointly carry out an assessment with intellectual property appraisers. The appraisal panel is appointed by the financial institution and is responsible for making judgments that are not assessed by intellectual property appraisers.

The authority to grant certification has also not been determined whether it will be issued by the Ministry of Tourism and Creative Economy or a certification body. The duties of an intellectual property appraiser are to evaluate the intellectual property used as collateral, conduct a market analysis of the intellectual property used as collateral and conduct a review of the analysis report on the use of intellectual property that has been used in industry. PP creative economy is responsible for creating and developing an ecosystem of creative economy business actors in order to contribute to the national economy and sustainable development. Even so, credit collateral related to IPR in the creative industry is still relatively young in its application and is very dependent on incentives provided by the government and related authorities.

The required form of engagement has not been clearly regulated in Indonesian law. The types of IPR that have a clear legal basis for engagement are only regulated in the Copyright Law and the Patent Law, namely in the form of fiduciary binding, while the legal basis for other types of IPR has not yet been regulated.

From an institutional point of view, the government can form a registration agency for recording IPR transactions and loans, it is necessary to create a liquid ecosystem and market and various IPR-type products as well as support in terms of incentives. In addition, with the existence of intellectual property in fiduciary guarantees for creative economy business actors for banks, assessment guidelines are needed which still need to be regulated by various parties who are experts in the field of intellectual property rights, considering that a standard formula for evaluating intellectual property rights has not yet been established which can be used as the basis for evaluating credit guarantees. . An appraisal institution for the economic

value attached to intellectual property needs to be determined because there is no appraisal institution that specifically evaluates IPR as a reference for banking institutions. Furthermore, it is necessary to stipulate procedures for executing intellectual property and institutions that assist the execution of intellectual property used as collateral. In addition, there is no available secondary market so that at the time of execution, effective sales cannot be carried out, so that banks find it difficult to get a return on the financing credit that has been given.

If the debtor is in default in fulfilling an achievement, the implementation of intellectual property-based dispute resolution can be carried out in the following manner:

1. Through deliberation to reach a consensus.
2. Through court or out of court.

Settlements outside the court can be carried out by alternative institutions in the Financial Services Authority (OJK) or outside the OJK by obtaining OJK approval. Examples of alternative dispute resolution institutions outside the OJK are BANI and BAM HKI.

Therefore, it is necessary to reform laws and regulations that are adjusted to implementing regulations related to the implementation of imposition of IPR objects as fiduciary guarantees, mutual synergy between the government and stakeholders in the field of financial and financing institutions, institutional improvements, policy breakthroughs that can accommodate local interests, socialize and build a legal culture for the community. These improvements need to be carried out with a strong commitment to correcting all weaknesses in the protection of Intellectual Property Rights for creative economy business actors who currently wish to apply for IPR as an object of fiduciary guarantees in banking institutions.

#### **4. Conclusion**

Intellectual property rights as objects of fiduciary guarantees are regulated in Article 16 paragraph (3) of Act No. 28 of 2014 concerning Copyright and Article 108 of Act No. 13 of 2016 concerning Patents. Act No. 28 of 2014 states that intangible movable objects, one of which concerns copyright, can be used as fiduciary guarantees as regulated in Article 16 paragraph (3). The fiduciary agreement must be made in writing as outlined in a notarial deed and must also be registered. Without registering, a fiduciary guarantee will not be born. Thus, if a copyright is to be used as a fiduciary guarantee, the creation must first be registered at the Directorate General of Intellectual Property. As long as a material collateral object has economic value, the object can be used as collateral.

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## **Regulation**

Code of Civil law

Act No. 28 of 2014 concerning Copyright

Act No. 10 of 1998 jo. UU no. 7 of 1992 concerning Banking

Government Regulation Number 24 of 2022 concerning Regulations for Implementing Act No. 24 of 2019 concerning Creative Economy

## **Internet**

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