

ANALYSIS OF COPYRIGHT AS A FIDUCIARY SECURITY LINKED TO POSITIVE LAW IN INDONESIA AND COMPARISON WITH THE UNITED STATES**(ANALISIS HAK CIPTA SEBAGAI JAMINAN FIDUSIA DIKAITKAN DENGAN HUKUM POSITIF DI INDONESIA DAN PERBANDINGANNYA DENGAN NEGARA AMERIKA SERIKAT)****Kelvin Adytia Pratama**

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ABSTRACT

Law number 28 of 2014 concerning Copyright specifies that Copyright as an intangible movable object can be used as an object of fiduciary guarantees. Provisions regarding Copyright as an object of fiduciary security will be implemented by the provisions of the applicable laws and regulations. However, in reality, this is still being debated by various related parties, especially regarding the mechanism for assessing and binding guarantees, so that until now there has been no party that has provided credit with collateral in the form of a Copyright. This study uses a normative juridical method and aims to study the mechanisms for assessing and binding Copyright as an object of fiduciary guarantees in Indonesia, by comparing it to the method used in Common Law countries namely the United States of America.

Keywords: *Copyright, Fiduciary Guarantee, Creative Economy, Valuation Method, Common Law*

ABSTRAK

Undang Undang Nomor 28 Tahun 2014 Tentang Hak Cipta mengatur bahwa Hak Cipta sebagai benda bergerak tidak berwujud dapat dijadikan sebagai objek jaminan fidusia. Ketentuan mengenai Hak Cipta sebagai objek jaminan fidusia akan dilaksanakan sesuai dengan ketentuan peraturan perundang-undangan yang berlaku. Akan tetapi pada kenyataannya, hal tersebut masih diperdebatkan oleh berbagai kalangan terkait, terutama mengenai mekanisme penilaian dan pengikatan jaminan, sehingga sampai saat ini belum ada pihak yang memberikan kredit dengan jaminan berupa Hak Cipta. Penelitian ini menggunakan metode yuridis normatif dan bertujuan untuk mempelajari mekanisme penilaian dan pengikatan Hak Cipta sebagai objek jaminan fidusia di Indonesia, dengan membandingkan dengan metode yang dilakukan di negara Common Law yaitu Amerika Serikat.

Kata Kunci : *Hak Cipta, Jaminan Fidusia, Ekonomi Kreatif, Metode Penilaian, Common Law*

I. INTRODUCTION

Indonesia has very diverse natural resources and human resources. Indonesia is also rich in various kinds of culture and arts which are known in copyright, including songs

or music, batik motifs, dance, written works, and so on. Intellectual Property (“KI”) is wealth that arises or is born from human intellectual abilities. Intellectual Property is the right to enjoy the results of human

intellectual creativity economically. Therefore, the objects regulated in KI are works that arise or are born from human intellectual abilities.¹

KI refers to works that arise or are born due to human intellectual abilities that must be protected. This ability is produced by humans through their power, feelings, and initiative which are realized through intellectual works. The intellectual work that is born then becomes valuable, especially with its inherent economic benefits so that it will foster the concept of wealth in IP which according to Article 8 of Law Number 28 of 2014 concerning Copyright ("Copyright Law") it is said that economic rights are the exclusive rights of the Creator or Copyright Holder to obtain economic benefits from the Creation. The economic benefits of IP can generate financial value from the results of a person's intellectual creativity as a creator. In line with this, based on Article 1 point 1 of Law Number 24 of 2019 concerning the Creative Economy ("Creative Economy Law") it is said that the Creative Economy is the embodiment of added value from intellectual property originating from human creativity based on cultural heritage, science and/or technology.

If implemented in a structured manner, creative economy activists can have a positive impact on the economic growth of a country,

for example, the United States, which since 1997 has made the IP sector one of the largest foreign exchange suppliers, surpassing the electronics or aircraft industries. The United States is the country with the largest acceptance of intellectual property rights in the world.²Data from the World Bank shows that in 2015 the United States recorded revenues from intellectual property rights worth IDR 126.2 billion, beating the Netherlands which was in second place with a value of IDR 42.8 billion, and Japan in third place with a value of IDR 36.6 billion.³

The influence of political power and the strategic position of IP for the United States has also encouraged law enforcement related to IP and the creative economy which has inspired many countries, including Indonesia. In the Copyright Law, it is also possible for IP to be used as an object of fiduciary collateral, as is the case in the United States. This provision is in Article 16 of the Copyright Law, which regulates that copyright as an intangible movable object can be used as an object of fiduciary security. Moreover, in Article 1 Point 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees ("Fiduciary Guarantee Law"), it is said that fiduciary guarantees are security rights over movable objects, both

¹Sudaryat, *Hak Kekayaan Intelektual Memahami Prinsip Dasar, Cakupan dan Undang-Undang Yang Berlaku*, (Bandung: Oase Media, 2010), p. 15.

² Hanisa, *Tinjauan Yuridis Tindakan Pengalihwujudan Atas Karya Fotografi dalam perspektif Hak Cipta Indonesia dan Amerika Serikat*, (Malang: Artikel Ilmiah Universitas Brawijaya, Vol.39 (No.1), <https://doi.org/10.4324/9781315853178>, 2014),

p. 10.

³ Databoks Katadata, United States Largest Recipient of Intellectual Property Rights 2015, accessed at <https://databoks.katadata.co.id/datapublish/2016/09/21/america-serikat-penerima-hak-kekayaan-intelektual-terbesar-2015>

tangible and intangible, and immovable objects, especially buildings that are not can be burdened with mortgage rights. On the basis that copyright is an intangible object, copyright meets the requirements specified as a fiduciary guarantee. This is also in line with the spirit of the Creative Economy Law, the aim of which is to increase creative industries in the form of developing intellectual property in Indonesia.

Legal developments in Indonesia show that copyright should be very beneficial for creative economy activists who are also creators of creative works because the creations they produce can be used to obtain economic benefits because they have value. Adequate protection of copyright has succeeded in bringing about significant growth in the creative economy and making a real contribution to the economy and people's welfare.⁴ However, since it was enacted in 2014, the Copyright Law has not gone far enough in regulating the process of copyright as an asset that can be pledged as collateral.

The Creative Economy Law tries to strengthen the legal basis of copyright as a fiduciary asset. This is stated in Article 16 of the Creative Economy Law which states that:

"Article 16

- (1) The government facilitates an intellectual property-based financing scheme for Creative Economy Actors.*
- (2) "Provisions regarding intellectual property-based financing schemes as intended in paragraph (1) are regulated by Government Regulation."*

In its development as a form of follow-up to Article 16 of the Creative Economy Law, President Joko Widodo has signed and issued Government Regulation Number 24 of 2022 concerning Implementing Regulations of the 2019 Creative Economy Law ("PP 24/2022") as a response to the above problems. PP 24/2022 is an implementing regulation of the Creative Economy Law concerning the Creative Economy and is also an implementing regulation of other laws including the Copyright Law. PP 24/2022 is expected to be a comprehensive manifestation of the development of the Creative Economy which is experiencing several obstacles, such as limited banking access, promotion, infrastructure, capacity development of Creative Economy Actors, and synergy between stakeholders.

In PP 24/2022 there are regulations regarding financing, aka credit, for creative economy actors. PP 24/2022, seems to answer the mandate of Article 16 of the Copyright Law in making intellectual property an asset to become collateral for obtaining financing from financial institutions. The object of debt collateral is implemented in three forms, namely: First, a fiduciary guarantee (transfer of ownership rights to an object) over intellectual property. Second, contracts in creative economic activities. The contract in question is a license agreement, work contract, or work

⁴ Damian, Eddy., *Hukum Hak Cipta*, Cetakan ke-1 Edisiketiga, (Bandung: PT Alumni, 2009), p. 1

order received by creative economy actors. Third, collection rights in creative economic activities. This is the right to claim royalties that users of songs and/or musical instruments are required to pay for commercial use. Please note that the copyright has been registered with the Directorate General of Intellectual Property Rights ("DJKI") and is still within the protection period.

In practice, the problem that has not been resolved in Indonesia even though PP 24/2022 has been issued is related to the assessment or economic assessment of a copyright by financing institutions. Specifically related to valuation issues, secondary market availability, appraisal or price calculation for copyright liquidation, and legal infrastructure for copyright asset execution. However, until this study was made, there were no financing institutions or creative economy activists who could implement the provisions mentioned above. We can see that currently the IPR ecosystem in the secondary market is still not strong enough and the mechanism for determining the valuation of an IPR is still limited. Meanwhile, financing institutions must know the value of the credit collateral. This consideration is closely related to the implementation of the precautionary principle of banks as one of the financing institutions, where financing institutions must obtain certainty of returning funds that have been lent to debtors, who in this case are creative

economy activists.

II. RESEARCH METHODS

The form of research that will be carried out in this study is juridical-normative research. Juridical-normative means research that refers to legal norms contained in legislation and court decisions as well as norms that apply and are binding on society or also concern customs that apply in society.⁵The technique used by the author is to examine written legal norms followed by a study of relevant laws and regulations and reviewing court decisions that have permanent legal force.

The aim of conducting normative legal research is to discover legal rules, and legal principles, including legal doctrine, and see the law in reality in society so that researchers can answer legal problems regarding the certainty of fiduciary guarantee practices in copyright. This legal research is carried out to be able to produce new theories and thoughts as recipes for solving the problems faced so that later the answers expected in legal research will be appropriate, correct, or incorrect.

III. Research Results and Discussion

3.1 Legal Analysis Related to Copyright as Fiduciary Security and its Assessment Linked to Positive Law in Indonesia

In the Copyright Law, a new provision has been regulated that increases the economic

⁵ Soerjono Soekanto, *Pengantar Penelitian*

Hukum, cet. 3, (Jakarta: UI-Press, 1986), p. 42.

value of a Copyright, namely that a Copyright as an intangible movable object can be used as an object of fiduciary collateral. This is stated in Article 16 of the Copyright Law which reads:

Article 16

- (1) *Copyright is an intangible movable object.*
- (2) *Copyright can be transferred or transferred, either in whole or in part because:*
 - a. *inheritance;*
 - b. *grant;*
 - c. *endowments;*
 - d. *will;*
 - e. *written agreement; or*
 - f. *other reasons that are justified by the provisions of statutory regulations.*
- (3) *Copyright can be used as an object of fiduciary guarantee.*
- (4) *"The provisions regarding Copyright as an object of fiduciary guarantee as referred to in paragraph (3) are implemented by the provisions of statutory regulations."*

In the explanation of Article 16 paragraph (2) of the Copyright Law, it is stated that what is meant by "can be transferred or transferred" is only economic rights, while moral rights remain inherent to the Creator. The transfer of copyright must be carried out clearly and in writing, either with or without a notarial deed. This is Sudjana's opinion that the guarantee institution that is most likely to be charged with Copyright as an object of debt collateral is a fiduciary institution considering that Copyright is an object move.⁶

Previously it was explained that PP 24/2022 is the latest regulation regarding copyright fiduciary guarantees if we analyze

the regulation from the side of the borrower (debtor) or fiduciary recipient and the lender (creditor) or fiduciary giver. Fiduciary givers are individuals or corporations who own the objects that are the object of the fiduciary guarantee, while the fiduciary recipient is an individual or corporation who has receivables whose payment is guaranteed by collateral fiduciary.⁷ Regulations related to both can be analyzed based on PP 24/2022 which include the following:

1. Arrangements from the Borrower's Perspective

In practice, the obstacles that have not been resolved in Indonesia, as explained in the Background after the issuance of PP 24/2022, are related to the economic assessment or appraisal of copyright by financing institutions. Specifically related to valuation issues, secondary market availability, appraisal or price calculation for copyright liquidation, and legal infrastructure for copyright asset execution. PP 24/2022, which according to Article 41 PP 24/2022 will come into effect 1 (one) year after the date of promulgation, will come into effect in July 2023. However, until this research was made, there were no financing institutions or creative economy actors such as, in the film industry, the provisions mentioned above can be implemented. Therefore, borrowers, who in

⁶ Sudjana, Hak Cipta Sebagai Jaminan Kebendaan Bergerak Dikaitkan Dengan Obyek pengembangan Fidusia, (Mimbar Hukum Volume 24, Nomor 3, Oktober 2012), p. 407.

⁷ Salim HS, Pengantar Hukum Perdata Tertulis (BW), Cetakan ketujuh, (Jakarta: Sinar Grafa, 2011), p. 128.

this case are creative economy actors or can also be called debtors, can pay attention to the rules of the game in PP 24/2022 before carrying out activities to guarantee film copyrights as fiduciary collateral. This is of course the basis for creative economy actors such as filmmakers and directors to guarantee the films they work on to financial institutions.

Things you need to pay attention to as a borrower when reviewing PP 24/2022 are as follows:

- 1) Implementation of an Intellectual Property Based Financing Scheme
Regarding the financing scheme and conditions for borrowers, it is regulated in Article 7 PP 24/2022, namely:

Article 7

(1) Intellectual Property-based financing is submitted by Creative Economy Actors to bank financial institutions or non-bank financial institutions.

(2) Requirements for applying for Intellectual Property-based Financing consist of at least:

- a. Financing proposal;*
- b. own a Creative Economy business;*
- c. has engagements related to Intellectual Property of Creative Economy products; And*
- d. have a registration letter or Intellectual Property certificate.*

- 2) Intellectual Property Provisions that Can Be Used as Objects of Debt Collateral
KI that can be submitted as a debt collateral object must meet the provisions in Article 10 PP 24/2022, namely:

Article 10

Intellectual Property that can be used as an object of debt collateral is in the form of:

- a. Intellectual Property that has been recorded or registered with the ministry that handles government affairs in the legal sector; And*
- b. Intellectual Property that has been managed either independently and/or the rights have been transferred to another party."*

Letter b

What is meant by "Intellectual Property that has been managed" is Intellectual Property that has been commercialized by the owner himself or another party based on an agreement."

Furthermore, there are additional provisions for economic actors, in this case, borrowers, as regulated in Article 13 PP 24/2022, namely:

Article 13

(1) Creative Economy Actors must record the financing provided by bank financial institutions or non-bank financial institutions in the recording system for facilitating the Financing of Creative Economy Actors.

(2) "The system for recording the financing facilitation of Creative Economy Actors as referred to in paragraph (1) is organized by the ministry which carries out government duties in the field of Creative Economy."

It is reiterated in PP 24/2022 that guarantee companies can provide guarantee facilities to Creative Economy Actors, as stated in Article 14 of PP 24/2022:

"Article 14

Creative Economy Actors who receive financing from bank financial

institutions and/or non-bank financial institutions can obtain guarantee facilities through guarantee companies by statutory provisions."

2. Arrangements from the Lender's Perspective

PP 24/2022 which is the object of analysis in this research has the aim of optimizing human resources, it is necessary to develop the creative economy as the basis for national economic growth, increase the added value of KI as the basis of the Creative Economy which provides massive economic benefits with the nation's intellectual resources, designing and developing an IP-based financing scheme and an IP-based creative economy product marketing system as a stimulus for developing the Creative Economy ecosystem, optimizing the potential of Creative Economy Actors through the use of Intellectual Property resulting from the creativity of Creative Economy actors, increasing the resilience of the Creative Economy ecosystem, and protecting Creative Economy Actors.⁸

Based on the above, PP 24/2022 regulates how copyright can be used as fiduciary collateral. In this case, film copyright as a fiduciary guarantee can refer to the provisions in PP 24/2022. If we examine it from the perspective of the lender or creditor, we can examine the provisions below:

1) Sources of financing

Regarding creative economy financing, it is regulated in Article 3 paragraphs (1) and (4) PP 24/2022, namely as follows:

Article 3

(1) Creative Economy financing comes from:

- a. state budget;*
- b. regional income and expenditure budget; and/or*

.....

- i. "Financing as referred to in paragraph (1) letters a and b is channeled through bank financial institutions and non-bank financial institutions."*

According to these provisions, the government will allocate financing that will be distributed to bank financial institutions and non-bank financial institutions.

2) Intellectual Property Based Financing Facilities and Schemes through Bank Financial Institutions and Nonbank Financial Institutions

Regarding this matter, it is regulated in Article 4 PP 24/2022 which states the following:

Article 4

(1) The government facilitates an Intellectual Property Financing Scheme through bank financial institutions and non-bank financial institutions for Creative Economy Actors.

(2) Facilitation of Intellectual Property Based Financing Schemes for Creative Economy Actors is carried out through:

⁸Explanation section of PP 24/2022

- a. *utilization of Intellectual Property with economic value; And*
- b. *Intellectual Property Assessment.*

In this case, the government said that the intellectual property-based financing scheme through bank financial institutions and non-bank financial institutions is also carried out through intellectual property appraisers which will be explained further. Furthermore, it is stated in Article 5 of PP 24/2022 regarding facilities for the use of Intellectual Property as mentioned above, namely:

Article 5

Facilitation of the use of Intellectual Property with economic value as intended in Article 4 letter a in the form of:

- a. *facilitation in the application process for recording or registering Intellectual Property by the provisions of laws and regulations in the field of intellectual property; And*
- b. *optimizing the use of Intellectual Property as an object of debt collateral.*

Article 5 of PP 24/2022 also mentions KI as an object of debt collateral.

3) Implementation of an Intellectual Property Based Financing Scheme

Regarding the implementation of IP financing, it is regulated in Article 7 PP 24/2022, the provisions of which contain the following matters:

Article 7

- (1) *Intellectual Property-based financing is submitted by Creative Economy Actors to bank financial institutions or non-bank financial institutions.*
- (2) *Requirements for applying for Intellectual Property-based Financing consist of at least:*
 - a. *Financing proposal;*
 - b. *own a Creative Economy business;*
 - c. *have engagements related to Intellectual Property*
 - d. *Creative Economy Products; And*
 - e. *have a registration letter or Intellectual Property certificate.*

Article 7 PP 24/2022 is a general requirement for KI-based financing to be carried out.

4) Provisions for Lenders (Bank Financial Institutions or Nonbank Financial Institutions)

To guarantee certainty to lenders, PP 24/2022 provides the following provisions as stated in Article 8 of PP 24/2022:

Article 8

Bank financial institutions or non-bank financial institutions in providing Intellectual Property-based Financing carry out:

- a. *verification of Creative Economy businesses;*
- b. *verification of the registration letter or Intellectual Property certificate which is used as collateral that can be executed in the event of a dispute or non-dispute;*
- c. *assessment of Intellectual Property used as collateral;*
- d. *disbursement of funds to Creative Economy Actors; And*

e. receipt of financing returns from Creative Economy Actors according to the agreement.

The provisions above must be the basis for lenders assessing potential loan recipients. In the mechanism for assessing objects that will be used as collateral and encumbered by guarantee institutions, the current practice is that financial institutions providing credit (creditors) use the services of a Public Appraiser, called an appraisal. Public Appraisers are third parties who support professionals in the financial sector and can provide professional considerations regarding the assessment of the economic value of objects, which will then be burdened by the guarantee institution.

5) Debt Guarantee Institutions and Their Conditions

Furthermore, regarding debt guarantee institutions that can be used by bank and non-bank financial institutions, it is regulated in Article 9 PP 24/2022, namely:

Article 9

(1) In implementing the Intellectual Property Based Financing Scheme, bank financial institutions and non-bank financial institutions use Intellectual Property as an object of debt collateral.

(2) The object of debt guarantee as intended in paragraph (1) is implemented in the form of:

a. fiduciary guarantee for Intellectual Property;

b. contracts in Creative Economy activities; and/or
c. collection rights in Creative Economy activities.”

Furthermore, Article 10 PP 24/2022 adds additional provisions regarding IP requirements that can be used as collateral objects:

Article 10

Intellectual Property that can be used as an object of debt collateral is in the form of:

a. Intellectual Property that has been recorded or registered with the ministry that handles government affairs in the legal sector; And

b. Intellectual Property that has been managed either independently and/or the rights have been transferred to another party.

6) The Role of State Institutions in Technical Intellectual Property as Fiduciary Security

In Article 11 PP 24/2022 it is said that:

Article 11

"The Ministry which carries out government affairs in the legal sector provides access to data on Intellectual Property which is used as an object of debt collateral to bank or non-bank financial institutions and the public."

It can be understood that the ministry referred to in this article is the Ministry of Law and Human Rights (Kemenkumham), especially DJKI, which must collaborate with bank or non-bank financial institutions and also the community.

If, based on the results of the analysis carried out by the bank as the

lender, the credit facility application is approved, the provision of the credit facility will be stated in a written agreement between the bank and the credit applicant as the borrower, called a credit offer letter. Furthermore, all requirements and documents provided by the bank must be approved by the credit applicant. After that, you can proceed with signing a credit agreement between the credit applicant and the bank or what is usually referred to as a credit agreement.

However, this provision creates new problems, especially from the side of the credit provider who will determine the economic value of the collateral. Copyright is an intangible asset, or in accounting it is referred to as an intangible asset, where intangible assets are non-monetary assets that do not have a physical form that is on the company's balance sheet, which is used to produce goods and services.⁹

The Fiduciary Guarantee Law states that a fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object, while a Fiduciary Guarantee is a security right for movable objects, both tangible

and intangible, and immovable objects. especially buildings that cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights that remain in the control of the Fiduciary Giver, as collateral for repayment of certain debts that give the Fiduciary Recipient a preferred position over other creditors. *unit deficit*.¹⁰

According to Article 1 paragraph (11) of Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to the 1992 Banking Law, Credit is the provision of money or bills that can be equated with it, based on an agreement or agreement between the bank and another party which requires the party to those who are financed return the money or bills after a certain period with rewards or profit sharing.¹¹ The Banking Law also clearly states that Indonesian banking in conducting its business is based on economic democracy by using the principle of prudence. A financial institution, whether bank or non-bank, including financial institutions, when providing credit or financing will generally ask for collateral from the debtor. The collateral in question can be in the form of material collateral or individual collateral. In this

⁹Lisvery, Saoria, Aktiva Tak Berwujud, Jurnal Akuntansi dan Keuangan Indonesia, (Jakarta: Departemen Akuntansi FEUI, 2004), p. 1.

¹⁰Muhammad Syafi I Antonio, Bank Syariah dari

Teori ke Praktik, (Jakarta: Gema Insani Press, 2001), p. 160

¹¹Kasmir, Manajemen Perbankan, (Jakarta: PT Raja Grafindo Persada, 2002), p. 73.

case, the collateral used is fiduciary, the collateral object is not controlled by the creditor remains in the control of the debtor, and is not accompanied by physical delivery. The fiduciary agreement is made in writing in the form of a notarial deed and must also be registered at the Fiduciary Registration Office. After registration, a fiduciary guarantee will be issued.

Thus, if a copyright is to be used as fiduciary security, then the work must be registered first with the DJKI. So that it is clear that if a default occurs, the fiduciary is the copyright holder and execution can be carried out without having to go through a court decision. The mechanism for binding fiduciary guarantees according to the Fiduciary Guarantee Law can be summarized following¹²:

1. Make a Fiduciary Guarantee deed before a Notary.
2. The deed was registered at the Fiduciary Registration Office, which is part of the Directorate of General Legal Administration (now DJKI).
3. Pay the Fiduciary Guarantee registration fee.
4. Issuance of a Fiduciary Guarantee Certificate containing an executorial title.
5. In the Fiduciary Guarantee Deed and Fiduciary Guarantee Certificate, the value of the object and the guarantee value of the Fiduciary Guarantee object are contained.

The profession of Public Appraiser is regulated by Minister of Finance Regulation Number 101/PMK.01/2014 of 2014 which has been amended in the amendment to Minister of Finance Regulation Number 56/PMK.01/2017 of 2017 and has been amended in the second amendment to Minister of Finance Regulation Number 228/PMK .01/2019 of 2019 concerning Public Appraisers ("Public Appraiser PMK"). In this regulation, an appraiser is someone who has competence in carrying out appraisal activities, and who has at least passed initial appraisal training, and a public appraiser is an appraiser who has obtained permission from the Minister to provide services as regulated in the Ministerial Regulation. In Article 5 of the PMK on Public Appraisers, it is stated that the authority of public appraisers covers the following areas of Appraisal services:

1. Simple Property Valuation;
2. Property Valuation;
3. Business Valuation; And
4. Personal Property Valuation

Regarding the assessment of intellectual property rights and intangible assets, it is contained in the Business Appraisal Service. In carrying out the assessment, the Public Appraiser uses the Indonesian Appraisal Standards ("SPI"). SPI itself is a basic guideline that must be adhered to by the Appraiser in conducting the Appraisal. There is also the Indonesian Appraiser Code of Ethics ("KEPI"), the Association of Indonesian

¹² Reni Budi Setianingrum, Mekanisme Penentuan Nilai Ekonomis dan Pengikatan Hak Cipta

Sebagai Objek Jaminan Fidusia, (Yogyakarta: Media Hukum Vol. 23 No.2, Desember 2016), p. 230-242

Appraiser Associations ("GAPI"), and the Indonesian Appraiser Professional Society ("MAPPI") which is the forum for Appraisers. The assessment procedures and mechanisms carried out by Public Appraisers by Article 4 of the Public Appraiser PMK are as follows:

1. identify and understand the scope of the assignment;
2. collect, data selection, and analysis;
3. apply the Assessment approach; And
4. prepare an Assessment Report.

Currently, to determine the value of objects in the form of land and buildings, Public Appraisers use the fair market value in the area where the land and buildings are located. Market Value is defined as the estimated amount of money at the valuation date, which can be obtained from a sale and purchase transaction or exchange of property, between a buyer who is interested in buying and a seller who is interested in selling, in a free transaction, where the marketing is carried out properly, where both each party acts based on its understanding, with due care and without coercion.¹³

For collateral for intangible objects in the form of receivables, the value of the object is equal to the amount of the receivable. These values will be included in the assessment report and will then be used by the lending or creditor financial institution as a basis for granting nominal credit. Bank financial institutions in particular still refer to

Regulation of the Financial Services Authority of the Republic of Indonesia Number 40/POJK.03/2019 of 2019 concerning Assessment of Commercial Bank Asset Quality which relates to copyright as credit collateral has not been further regulated. This is also one of the main factors why banks have not been able to accept IPR as an object of banking credit collateral. To realize this renewal concept, support is needed from the existence of an IPR appraisal institution in Indonesia. Intellectual Property Rights Certificates are currently not included in the list of collateral referred to by the Financial Services Authority ("OJK").

Apart from not being included in the collateral list, for Copyright, until now, there are no appraisal guidelines that can be used by Public Appraisers, so of course there are no financial institutions that accept Copyright as collateral. In Indonesia, the institution for calculating royalties is regulated in the Copyright Law and its derivative regulations, namely the Collective Management Institute ("LMK"), LMK is an institution in the form of a non-profit legal entity that is authorized by the Creator, Copyright Holder and/or Related Rights Owner to manage their economic rights in the form of collecting and distributing royalties. Unfortunately, the scope of royalty withdrawal from LMK is new regarding Songs and/or Music. Meanwhile, there are still many other creations such as films that have high

¹³(3.1. SPI 1, Indonesian Assessment Standards I 2007)

business potential. LMK can work to assist Public Appraisers' efforts in assessing a Copyright, namely by providing official data in the form of the amount of royalties received by Copyright holders over a certain period, to be used as a basis for considering the economic value of Copyright.

In general, financial institutions are willing to provide debt or credit as long as the borrower or debtor provides their assets to guarantee the smooth running of their debt. This situation creates quite a big risk for financing institutions to be able to accept copyright as collateral or security. If necessary, other guarantees are provided in the form of a personal guarantee or borscht from the company that oversees creative work, for example, a personal guarantee from the owner of a film company that oversees a filmmaker. This polemic must be resolved through a collaborative solution between creative economy activists as work creators and the government as policymakers. 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 this case, the government should also create an independent institution such as LMK. So the government must build a legal infrastructure that is structured down to the technical aspects to be able to support the functioning of assessment institutions which

will later assess the economic value of copyright.

3.2 Comparison of the law in Copyright as Fiduciary Security with the United States

The phenomenon of copyright as an asset in fiduciary collateral is not new in practice in other countries. As mentioned above, the United States uses IP as a foreign exchange supplier, which can be proven by the process of using copyright which can be used as an asset as collateral for loans from financial institutions. On September 6, 2005, Marvel Enterprises, Inc. ("Marvel Studio") successfully closed a deal with investment bank Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch Bank").¹⁴ Marvel Studio pledged all copyright and economic film rights for its various characters, including Captain America, Black Panther, Ant-Man, Doctor Strange, and The Avengers, to secure a loan of USD 525,000,000 (five hundred and twenty-five million Dollars). United States) or IDR 8.2 trillion for a seven-year loan from Bank Merrill Lynch. That year, Marvel Studios experienced financial difficulties due to the worsening prospects of the comic book and merchandise business, as well as their desire to enter the filmmaking business. Marvel Studio plans through its subsidiary Marvel Entertainment, Inc., to independently enter the filmmaking business and will use the loan to begin

¹⁴ US Securities and Exchange Commission, Marvel Launches Independently Financed Film Slate With Closing of \$525 Million Non-Recourse Credit

Facility, accessed at <https://www.sec.gov/Archives/edgar/data/933730/00011667905002263/ex99-1.htm>

filmmaking under Marvel Entertainment, Inc.

In the company's poor financial condition, Marvel Studio made every effort to avoid bankruptcy. The details of the deal with Bank Merrill Lynch sound risky and highly unusual in the culture of asset pledging where Marvel Studios is essentially offering the keys to its business as collateral for capital in developing films. which started with the Iron Man films. If the film funded by the loan does not make a profit, then the superheroes pledged as collateral will become the property of Merrill Lynch Bank. These funds were ultimately used to make 10 other films with budgets ranging from U\$ 45 million to U\$ 180 million. With this injection of funds, Marvel Studio managed to make huge profits through the films they worked on and were able to return the rights to the characters they had sold for years, including Iron Man, Black Widow, Thor, Hulk and the rest is history. Currently according to the Box Office Mojo site, the gross income for the film The Avengers: Endgame is USD 2,797,501,328 (two billion seven hundred ninety-seven million five hundred one thousand three hundred and twenty-eight United States Dollars), more than 4 times the loan value which was acquired from Bank Merrill Lynch in 2005.

As we now know, Marvel Studio has become a giant in the film industry thanks to a breakthrough in guaranteeing intellectual property rights in obtaining loans. The

manifestation of added value that makes the characteristics of objects that can be used as objects of debt collateral is that these objects have economic value. As a result, the manifestation of this added value is what makes the characteristics of objects that can be used as objects of debt collateral, namely that these objects have economic value, which means that if the debtor cannot pay off his debt, the object can cover his debt.¹⁵In this example, if the debtor, namely Marvel Studio, cannot pay off its debt, the object (the Thor and Captain America characters) can cover its debt to Bank Merrill Lynch.

Based on the example above, what Marvel has done is supported by regulations regarding making it possible for copyright as an asset to become a collateral object to be pledged to financial institutions through an ownership transfer scheme. In the definition contained in the Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code as contained in the provisions of Definitions, Subject Matter, and Scope of Copyright, which reads:

“A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights contained in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license”

¹⁵Sudjana, *Op.Cit.*, p. 410.

This regulation stipulates that one of the transfers of Copyright is through a guarantee or what is commonly called a mortgage, it is possible for a "transfer of copyright ownership" to become the object of a mortgage or fiduciary guarantee. The concept of collateral in banking in the world, as proposed by Steven Emanuel and Ray D. Henson indicates that collateral can be said to be part of the concept of *security*.¹⁶ In the United States, Intellectual Property Rights are part of choices in action, namely property that is physically invisible so that it cannot be protected physically and therefore requires court determination. This term is classified as intangible property or intangible property which can be exemplified by checks, proof of ownership of patents, copyrights, etc. other.¹⁷

Regarding the provision of financing with collateral for Intellectual Property Rights which are intangible assets, we can see the practice in the United States with the example of Film Copyright, especially in Film Production Financing. In financing a film production, the film producer acts as the debtor. However, banks will prioritize film distributors as a source of payment. Even though the film distributor is the source of payment, the producer must still be responsible for the debt if the distributor fails to pay. As a condition for lending money to a producer, the bank requires the producer to surrender to the

bank the right to receive payment from the distributor by the agreement distribution.¹⁸

The bank "reduces" the value of the distribution agreement to determine the amount of the producer's loan value, "reducing" the value of the distribution agreement involves analysis of the agreement to determine the minimum amount to be paid by the distributor, determination of the circumstances under which the distributor will be relieved of payment obligations, and assessment of the distributor's creditworthiness. Credit depends on, among other things, whether the distributor is a major studio or an independent production company. If the bank feels that it is not safe enough, the bank asks the distributor to obtain additional collateral in the form of a Standby Letter of Credit where the bank is the recipient. In essence, the value of the distribution rights agreement reflects the creditworthiness of the distributor. Once the bank determines the minimum amount the distributor must pay to the producer, the circumstances under which the distributor will be relieved of payment obligations, and the distributor's credit, the bank determines the financing amount.

We can conclude that to finance a film production, the collateral is in the form of distribution rights for the film (if necessary, there is additional collateral in the form of a Letter of Credit), and the value of the financing

¹⁶ Indra Rahmatullah, *Aset Hak Kekayaan Intelektual Sebagai Jaminan dalam Perbankan*, (Yogyakarta: Deepublish Publisher, 2015), p. 78.

¹⁷Ibid., p. 79.

¹⁸Jill Mazirow Eshman, *Bank Financing of a Motion Picture*, (Loyola Marymount University and Loyola Law School, 1992), p. 88.

is determined based on the value of the film distribution agreement. Furthermore, in the United States in determining the economic value of copyright from an economic perspective, intangible assets related to copyright have economic and legal characteristics that are similar to other types of Intellectual Property Rights which include: trademarks, patents, and secrets. trade.¹⁹ There are several methods used in countries following the common law system such as the United States. Examples are the Brand Value Equation Methodology, the Competitive Advantage Technique, and the Royalty Approach. However, three methods are generally applicable to the valuation of collateral and may also apply to the valuation of Intellectual Property Rights. These methods include:

a) Cost Approach Method (Cost Approach Method)

This assessment is based on the costs incurred in developing or creating a copyrighted work, or the costs of creating or developing a similar product or service, without considering the economic value of the copyrighted work. This principle states that the value of an object or piece of intellectual property is not greater than the cost of producing it.²⁰ Regarding cost components, many variations can be

included, starting from labor costs, registration costs for Intellectual Property Rights protection, as well as marketing costs and costs. *time*.²¹ The cost approach does have certain limitations in analyzing the economic value of a copyright. Because of these limitations, the cost approach is often considered to only provide a benchmark for estimating economic value.²²

b) Market Value Approach Method (Market Value Method)

The market approach method is a method where Intellectual Property Rights or intangible assets are valued by comparing them with real-time sales and transactions involving the same assets in the same market. The problem with this market value approach method is the difficulty of analyzing the selling value of a copyrighted work. In other words, it is difficult to convert data on how much the price is "per image", "per-lyric", or "per word". Additionally, the market approach to valuation has been used with tangible assets for which markets have existed for decades, in areas such as real estate, equipment, and raw materials. However, intangible assets, at least until recently, have not been bought and sold frequently enough to be able to build value based solely on direct market

¹⁹ Katherine A. Gilbert, *The Valuation of Copyright Related Intangible Assets*, (Insights, 2009), p. 35.

²⁰ (<http://www.consor.com/intellectual-property-advice/meth-ods-used-to-value-ip-and-ia.html>,

accessed on 16 June 2016)

²¹ (betterbusiness-finance.co.uk/images/pdfs/Valuing_your_Intellectual_Property.pdf, p. 12.

²²Katherine A. Gilbert, *Op.Cit.*, p. 39.

value comparisons; Therefore, analysis and adjustments are almost always necessary. In addition, intangible asset transactions often have undisclosed value.

c) Income Approach (Income Approach Method)

The income approach method determines economic value based on the future income that can or will, be generated from intellectual property or intangible assets. The income approach to Intellectual Property Rights is a widely used valuation method; however, it can be complex, having to decide how to measure "revenue".

Three basic parameters of the income approach are:²³

1. future income streams
2. duration of income stream
3. the level of risk or reduction that may occur

In practice, the cost approach is used less frequently than the income approach or the market approach. Because copyright confers monopoly rights on the owner, the cost approach does not always apply to copyright valuation analysis. However, these three approach methods can work together to produce a mature assessment method.

IV. CONCLUSION

Based on the description above, several points can be concluded in this study:

1. To be able to realize the government's mission to increase the economic value of Copyright, not only issuing regulations regarding Copyright can be made an object of Fiduciary Guarantee in PP 24/2022, but the government must also coordinate with agencies related to this matter, including the OJK, DJKI, LMK, Creative Economy Activists, GAPI, and MAPPI. This ensures that there are no obstacles to implementation in the field.
2. In common law countries such as the United States, there are the same valuation methods between tangible assets and intangible assets, namely in general the Cost Approach Method and the Market Value Method.), and the Income Approach Method plus several additional analyses for the valuation of intangible assets.
3. In the author's opinion, as long-term plan, the government can optimize cooperation between the Ministry of Tourism and Creative Economy and the Ministry of Law and Human Rights in creating an intellectual property asset assessment agency as a long-term plan. In this case, for short and medium-term planning, the OJK, which in its current development functions to organize an integrated regulatory and supervisory system for all activities in the financial services sector, can also study the prospects and feasibility of copyright as an asset in providing credit collateral to

²³ (<http://www.consor.com/intellectual-property-advice/meth-ods-used-to-value-ip-and-ia.html>,

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institutions. financing to provide certainty to creative economy activists and society in general to advance the creative economy industry in Indonesia.

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