

Legal Position On Credit Financing For Creative Economy Actors With Guaranteed Trademark Rights Certificates

Febri Noor Hediati¹, Emilda Kuspraningrum², Setiyo Utomo³
febrinoorhediati@fh.unmul.ac.id, emildakuspraningrum@fh.unmul.ac.id,
setiyoutomo@fh.unmul.ac.id

Faculty Of Law Mulawarman University

Faculty Of Law Mulawarman University

Faculty Of Law Mulawarman University

Abstract

Indonesia is one of the developing countries, one of which is in the field of trade or business. In the field of trade or business such as intellectual property rights. Many creative economy business actors in the UMKM industry in Indonesia, the UMKM industry is an economic sector that directly involves the creative economy community so that it is used as a support for the country's economy. For this reason, the government passed a regulation regarding the ease of obtaining financing in the development of an intellectual property-based creative economy for business actors in the world of trade. So that in this paper examines the legal position of credit financing for creative economic actors with trademark property rights as credit collateral. So that in the future the creative economy business actors can maximise the potential by producing quality products and have economic value. This writing uses a research method with a normative juridical approach conducted by examining library materials with a doctrinal approach. The results of this study are the first to formulate the legal position on the provision of credit financing for creative economic actors with trademark property rights as credit guarantees. This is because there is economic value in almost all intellectual property rights, especially in trademark rights, and as a legal subject, creative economy owners register with the Directorate General of IPR to obtain legal protection from the government with the issuance of IPR certificates. Later the intellectual property rights certificate can be used as a form of collateral from the credit financing process in banks or non-banks. The second effort made by the government to support the development of creative economy businesses by issuing PP no. 24 of 2022 which regulates credit financing based on intellectual property rights with the guarantee of IPR certificates.

Keywords : *Intellectual property rights, creative economy financing, collateral.*

Introduction

Research Background

As a developing country that has a diversity of ethnicities, cultures and religions with a total population in mid-2022 reaching 275 million people, ¹making Indonesia occupy position number 4 (four) in the list of the most populous countries in the world and will continue to

¹ <https://www.bps.go.id/indikator/12/1975/1/jumlah-penduduk-pertengahan-tahun.html>, diakses tanggal 08 Desember 2022

grow, therefore various aspects in Indonesia are developing quite rapidly, one of which is the most significant development regarding technology. One of the biggest effects in the development of information technology is the aspect of trade. With the development of technology, new things will be created, which previously could only be imagined but now can become a reality and can be applied with the support of increasingly rapid information technology.

Various kinds of creativity of creative economic actors that can give birth to the creation of new goods and / or services or the development of old goods and / or services that have their own uniqueness and characteristics. A good or service that will be introduced or marketed to the public by creative economic actors, it requires an identifying or distinguishing mark commonly known as a brand. The brand consists of trademarks and service marks which have more and more choices followed by the development of information and communication technology that supports.

So that people can easily find info related to the advantages of certain brand products according to the wishes of the community. Through trademarks can provide an overview of the originality of a given good or service and be able to know the origin of the goods. Trademark is one of the industrial property rights included in the protection of intellectual property rights that have an exclusive nature where there are restrictions on people who do not have these rights.

Broadly speaking, we can see the function of the brand from various angles, namely when viewed from the point of view of creative economy businesses: a brand can be used as one of the promotional efforts for its merchandise intended to seek, expand and enlarge market opportunities. While from the point of view of consumers: can be used as a selection of products selected and purchased so that the brand can be used as a guarantee in terms of quality and value of an item. When viewed from the producer's point of view, a brand is usually used to guarantee the value of production, especially on quality, then on the wearer.

When viewed from the function of the trademark from the point of view of creative economy businesses, government efforts are needed to develop, expand and enlarge market opportunities for businesses that already have a trademark, which of course the trademark

already has legality in the form of a trademark registration certificate. One form of government effort that now has a form of legislation is Government Regulation No. 24 of 2022 concerning Regulations Implementing Law No. 24 of 2019 concerning the Creative Economy. Where in the Government Regulation contains a lot about the development of creative economy actors, one of which is in the field of intellectual property rights.

Problems

Based on the description of the background, a problem is formulated, namely to examine how the legal position of credit financing for creative economic actors with brand rights as a credit guarantee.

Research Method

This research uses a research method with a normative juridical approach conducted by examining library materials. This method is often referred to as a doctrinal approach. This approach can provide an explanation of the legal rules of law which can then be analyzed, how the relationship between these regulations and the obstacles that occur in these regulations to predict how the effects of these rules. According to Muhammad Muhdar, also said that doctrinal research is directed at a set of norms to be used as research targets through analyzing a relationship between norms, combining theories and norms, content analysis and legal principles. In general, this research will connect between one norm and another norm or connect it with certain legal events.²

Doctrinal research consists of primary legal materials and secondary legal materials. The primary legal materials used include: Law Number 20 of 2016 concerning Trademark Rights and geographical indications, Law Number 24 of 2019 concerning the creative economy, Law Number 42 of 1999 concerning fiduciary security institutions and PP Number 24 of 2022 concerning Regulations on the Implementation of the Creative Economy. Second, secondary legal materials, where secondary legal materials are needed in order to provide an explanation of the understanding of primary legal materials. Secondary legal materials

² Muhammad Muhdar, *Penelitian Doctrinal dan Non Doctrinal Pendekatan Aplikatif Dalam Penelitian hukum*, (Samarinda : Mulawarman University Press, 2019), 11

include: Civil Code, scientific works or books related to fiduciary guarantees, intellectual property rights. The specification of this research, descriptive analytical, is a research that reveals the facts and analyzes the legal symptoms that exist at this time.³ Later it can be linked so that it can find interpretations until comparisons appear on legal materials.

Discussion

Trademark Rights as One of the Intellectual Property Rights Regimes

Humans are one of the creations of Allah S.W.T that has advantages compared to other living things. This is because humans have creative ideas. The idea of creativity is the initial milestone of an invention of intellectual property. Intellectual property is personal property that can be owned and treated the same as other forms of wealth / ownership and is given to the application of ideas and information that have commercial value. The commercial value of the idea arises from creativity that is expressed or poured into the object of goods. So that intellectual property rights are used as assets because they have economic value.⁴ Aristotle also argued that "such a system of individual reward may otherwise reduce social welfare, a reward for revealing information to the state would give rise to fraudulent claims of discovery of malfeasance on the part of public officials". It can be said to have economic value, because intellectual property rights are closely related to exclusive rights. These exclusive rights can be classified into (2) two intellectual property rights regimes, including the copyright regime and the industrial property rights regime. The industrial property rights regime itself includes: trade secret rights, industrial design rights, patent rights, integrated circuit layout design rights, plant variety protection rights (PVP). Trademark, and trademark rights.

Trademark is a branding which includes the name or image that symbolizes the product that can facilitate the public or buyers to know the goods and or services offered in the market.

⁵ Trademark rights is a special right (exclusive right) granted to the owner of the trademark

³ Soerjono Soekanto, *Pengantar Penelitian Hukum*. (Jakarta : UI Press, 1986), 10

⁴ Ahmad M Ramli, *Hak Cipta, Disrupsi Digital dan Ekonomi Kreatif*, (Bandung : PT. Alumni, 2019), 88

⁵ Dian Novita, *Hak Kekayaan Intelektual Bagi Pemegang Hak Merek Suatu Karya Intelektual*, *Jurnal Jendela Hukum*, (2021), 35-40

that has been officially accepted and registered in the general register of trademarks by the state.⁶ On trademark rights have elements, among others:

1. Identity of the goods or services
2. Has a distinguishing function
3. Not contrary to order, decency, and legal norms.
4. Not public domain

John Locke has a famous statement, namely: "life, liberty and property where ownership (property) is part / correlated with human rights. So the right to trademark as one part of the property granted by the state as a form of guarantee over personal property that has added value, economic value, exclusive value that can be utilized and enjoyed by humans. When a brand can perform its function as a value indicator of the product then the brand provides security and warranty to consumers while binding consumer loyalty."⁷

Basic Concept of Legal Guarantee in Financing Institutions

Credit facilities can be used for encumbrance on credit guarantees which include the giver and receiver of the guarantee. One of the security laws is the law of material security. Absolute rights to an object that has a direct relationship with objects. Later the object follows in the hands of whoever the object is (drot de suite). Article 1820- Article 1850 of the Civil Code regulates individual guarantees or third party guarantees. Collateral is a means of substitute payment, which means that the guarantee provided must have a value commensurate with the amount of debt and interest or if necessary exceed the amount of debt and interest agreed upon.⁸

The principles of guarantee law implicitly contained in Article 1131 of the Civil Code include:

1. The principle of Schuld and Haftung People who have made debts have indirectly thought about responsibility if in the future there is a default. His wealth as collateral.

⁶ Rahmi Janed, 2017, *Hukum Merek (Trademark Law) Dalam Era Globalisasi dan Integrasi Ekonomi Edisi Pertama*, (Jakarta : Kencana, 2017),38

⁷ Ranti Fauzia, Tisni Santika, *Hukum Merek perkembangan Aktual Perlindungan Merek dalam konteks ekonomi Kreatif di era disrupsi digital*, (Bandung : Rafika , 2021), 43

⁸ Widya Marthauli Handayani, *Keberlakuan Hukum Hak Cipta Sebagai Objek Jaminan Fidusia Berdasarkan Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta*, *Jurnal Legilasi Indonesia*. Vol 16 (2). Juni (2019), Hal 217

2. The principle of trust The debt giver, when he has bound himself to the debtor, already has trust and confidence that in the future he will pay in full.
3. Moral principle This principle is necessary for everyone who has made a debt to comply with it. So that legal norms must exist to regulate it.

Then there are also other principles of guarantee law, which are contained in Article 1132 of the Civil Code, among others:

1. Creditor Parity, Creditors have the same position. If you have more than one creditor.
2. Balance of Receivables each has a balanced distribution between one another.
3. General The assets of creditors and debtors have equal rights with each other. However, there are exceptions to the general principle, namely preferred creditors, namely creditors whose receivables take precedence over other creditors. This is due to the cost of auctioning movable and immovable property.

The following are the types of guarantees, among others: general guarantees and special guarantees (personal guarantees and material guarantees such as pledges, mortgages, mortgages and fiduciary guarantees). The principles of material security include: giving rise to property rights and there is always a certain object that becomes the object of security. Meanwhile, there are also characteristics of property rights: it is absolute (absolute), has the nature of droit de suite and revindication, has the nature of droit de preference, can be transferred and the object is an object.

According to Article 499 of the Civil Code, objects are goods and rights that can be the object of eigendom rights. The goods also consist of tangible objects and intangible objects (rights). The conditions of the object must have economic value and can be controlled by a person or a legal entity. Below are the objects of property security, among others:

1. Pawn: Movable Objects
2. Mortgage: Immovable object
3. Mortgage: land related
4. Fiduciary Guarantee: movable or immovable objects that cannot be encumbered by mortgages and mortgages.

Tangible or intangible movable objects and immovable objects, especially buildings, that cannot be encumbered by mortgage rights are the scope of fiduciary guarantees. A



fiduciary deed of guarantee includes the identity of the parties to the fiduciary guarantee, data on the principal collateral that has been fiduciary pledged, the value of the guarantee, and a description of the object to be used as the object of the fiduciary guarantee. Recording in the fiduciary register book on the same date that the fiduciary guarantee is recorded automatically creates a fiduciary guarantee.

Trademark Rights as an Object of Guarantee

Trademark Rights as Collateral Object The government has issued regulations regarding intellectual-based financing schemes in banks and non-banks which will be used as utilization of intellectual property that has economic value. This is stated in Government Regulation Number 24 of 2022 concerning Implementing Regulations for Law Number 24 of 2019. The Government can provide facilities for the intellectual property application process and optimization of intellectual property as a collateral object in banks and non-banks, which was ratified on July 12, 2022. What is of concern is that the Government Regulation comes into force only 1 year from the date of promulgation.

Intellectual property rights include objects and have economic value and can be owned as a legal subject. The classification of trademark rights includes intangible legal objects that have value to be used as objects of bank guarantees. Conditions if intellectual property can be used as an object of bank guarantee, among others: has economic value, registered at the Directorate General of Intellectual Property Rights (DJKI) and the most important thing is still able to legal protection, has not become a public domain. Therefore, one of the suitable collateral to be pledged is a fiduciary guarantee based on Article 9 (2) of Government Regulation Number 24 of 2022 concerning Implementing Regulations of Law Number 24 of 2019. In practice, fiduciary guarantees are more attractive to the public than pawn and mortgage, this is because fiduciary guarantees provide convenience and relief to debtors.⁹ The collateral is still controlled by the debtor as usual, but only proof of ownership is submitted to the creditor for collateralization.

⁹ Andi Wahyu Agung Nugraha, *Prinsip-Prinsip Hukum Jaminan Fidusia Dalam Perspektif Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia*, Lex Privatum Vol. VI/No.10/Des/2018, 21 Oktober (2018), 7



With the promulgation of the Government Regulation, it can indirectly support business actors who have a business that already has a brand to develop their business, but based on Article PP No. 24 of 2022 there are things that need to be considered to be able to carry out credit financing schemes both banks and non-banks, among others: in addition to having a creative economy business either managed by themselves or transferring their rights to others, then having a financing proposal, but there is the most important thing and must be done by creative economy business actors, namely regarding having an intellectual property rights certificate. The stages of applying for intellectual property-based financing include: verifying the business, intellectual property legality, intellectual property assessment, disbursement of credit funds and receipt of credit loan funds. After applying for financing, it is first assessed by an intellectual property appraiser and a special panel of appraisers related to the object of intellectual property collateral that will be pledged as debt. The appraisal panel in financial institutions, both banks and non-banks, is tasked with assessing credit or financing that has been appointed by the financial institution. Law No. 42 of 1999 concerning fiduciary security institutions, bank financial institutions, non-bank financial institutions whose debt collateral objects are in the form of fiduciary guarantees. The creditor makes an agreement to provide a loan of money followed by the debtor setting collateral for the credit. Later, it will have legal consequences if an agreement has been made by the giver and receiver of the debt. In the future, the creditor can demand delivery of the collateral from the debtor if the object of collateral has been registered.

Mortgage rights in the possession of the fiduciary that are used as collateral for credit repayment consist of security rights over movable objects, whether tangible or intangible. Either movable or immovable objects. Intangible assets such as intellectual property rights that have economic value that can be transferred under a license agreement. Transfer of ownership that has been carried out by granting credit with fiduciary guarantee where the object of fiduciary guarantee is controlled by the fiduciary giver. Later, the fiduciary guarantee is registered at the fiduciary registration office.

The fiduciary guarantee deed is registered at the registration office of the Ministry of Law and Human Rights, which issues a certificate of trademark rights and fiduciary guarantees. If the debtor has defaulted, the fiduciary has the right to sell the object of the

fiduciary guarantee under its own authority. Thus, the fiduciary security certificate has the same executorial power as the court so that it has permanent legal force. According to Article 41 of Law Number 20 Year 2016 on Trademarks and Geographical Indications trademarks can be transferred due to a license agreement. The bank must carefully assess the object of collateral on the trademark certificate, where each certificate of trademark rights has a different economic value and cannot be predicted so that it also has to do with the amount of credit that can be issued by the bank.

The valuation of intellectual property as collateral for credit guarantee according to Article 12 (1) of PP No. 24 of 2022 must be with a cost, market, income, and other value approaches that are in accordance with applicable valuation standards. The cost approach means the cost of obtaining an asset whose usefulness is equal so that the debtor will not pay an asset more than the cost of obtaining an asset with the same or equivalent use. The market approach results in assets being valued against other comparable assets if there is an indication of value by comparison. The income approach converts future cash flows to present value so as to produce a good indication of value.

As one example, a trademark certificate has a legal protection period of 10 years, so this aspect is also important for the valuation requirements of an intellectual property collateral. The financial services institutions both banks and non-banks not only assess the collateral in the form of brand certificates that are used as objects of debt collateral but must also think further about the problem of the execution of brand rights certificates that are used as objects if the debtor is stuck or unable to pay his debt. Need to pay attention to the costs and benefits of brand rights that are used as credit collateral. Then the banking and non-banking parties must also often monitor or see the quality of the object of the fiduciary guarantee of trademark rights. These legal efforts are carried out by banks and non-banks to minimize the risk of granting credit to debtors. Credit collateral has a price if there are several aspects that need to be considered: ease of transfer of ownership of the object of credit collateral, the price of the object of intellectual property rights collateral in addition to having to think about the stability of its economic value over a long period of time and the utilization of the object of intellectual property rights used as credit collateral.

Conclusion



A product that has economic value in Intellectual Property Rights must be registered with the Directorate General of IPR to obtain legal protection from the government. IPR itself is an object that has economic value and as a legal subject. Brand rights themselves have a value that can be used as an object of bank guarantees based on PP No. 24 of 2022 based on fiduciary guarantees listed in article 9. There are several things that need to be considered before entrepreneurs can enjoy financing facilities with IPR certificate guarantees, namely having a business either run by themselves or managed by other parties. After that, it must compile a financing proposal based on the IPR certificate that has been owned. The stages that must be carried out for applying for intellectual property-based financing include: verifying the business, legality of intellectual property, assessment of intellectual property, disbursement of credit funds and receipt of credit loan funds. After applying for financing, it is first assessed by a team of intellectual property appraisers and a special division that assesses the object of intellectual property collateral that will be pledged as debt. Before the government implements PP Number 24 of 2022 to encourage the development of the creative economy. There are several potential problems that will arise that are still weaknesses of this rule. So there needs to be a detailed rule on how much the economic assessment of IPR certificates with the amount of financing value by banks. And it is necessary to consider how the Financial Services Authority Regulation on IPR certificate-based credit financing if at any time there is a default or bad debt. So there needs to be an ongoing evaluation of the application of these rules.

Suggestion

There needs to be government support through the Directorate General of IPR by collaborating with banks or non-banks to facilitate the process of IPR certificate-based credit financing to support the development of the creative economy. It is necessary to compile in detail the Financial Services Authority Regulation regarding credit financing based on IPR certificates. Which regulates how the collateral assessment panel team works and how the detailed rules if one day there is a bad debt. So as not to harm both the debtor and creditor.

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