



Optimization of Copyright as Fiduciary Guarantee in Increasing Business Productivity

Adinda Annisa Argaputri¹; Zainal Asikin²; L. M. Hayyanul Haq²

¹ Postgraduate program Legal Study and Notaries, Mataram University, Indonesia

² Lecture of Law Faculty Mataram University, Indonesia

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Abstract

This study aims to determine how the requirements for transferring economic rights to copyright optimization as a Fiduciary Guarantee in increasing business productivity, how to determine the economic value in optimizing Copyright as Fiduciary Guarantee in increasing business productivity, and what are the roles and responsibilities of a Notary in making a Guarantee Act. Fiduciary on Copyright in increasing business productivity. The theory used is utility / utilitarianism theory, reward theory, legal certainty theory, and legal responsibility theory. The results of the study show that copyright can be an object of Fiduciary Guarantee due to exclusive rights, namely economic rights owned by the copyright owner. The method used is a normative legal research method. Techniques for studying and analyzing legal materials are using documentary studies. The results of the research show that copyright can be used as an object of Fiduciary Security because copyright is a movable object that is not tangible and that can be transferred to only economic rights to be guaranteed. The requirements for the transfer of economic rights follow the procedures stipulated by UUJF. The current method of assessing the economic value of a Copyright is by using quantitative methods. It consists of a market approach, an income approach and a cost approach. The role of the notary in this case in making the fiduciary guarantee deed has been mentioned in Article 5 paragraph (1) of the UUJF and is based on the responsibilities in effect since taking the oath of office as regulated in Article 65 of the UUJN. Notaries do not participate and are responsible for determining the economic value of a copyright. This is the duty and authority of the Appraisal Agency.

Keywords: *Copyright; Fiduciary Guarantee*

Introduction

Copyright as immaterial movable object is part of a person's wealth, so Copyright can be transferred or transferred, either in whole or in part. Copyright cannot be transferred verbally, it must be in writing either by means of an authentic deed or with a deed under hand.¹ Transfer or transfer of a

¹ Muhamad Djumhana dan Djubaedillah, *Hak Milik Intelektual: Sejarah, Teori dan Prakteknya di Indonesia*, PT. Citra Aditya Bakti, Bandung, 2003, p. 85.

copyright is also regulated in Article 16 paragraph (2) of Law no. 28 of 2014 concerning Copyright, namely:²

Copyright can be transferred or transferred, either in whole or in part because:

- a) Inheritance;
- b) Grants;
- c) Waqf;
- d) Will;
- e) Written Agreement; Or
- f) Other Causes Justified In Accordance with the Provisions of the Prevailing Laws.

In Law Number 28 of 2014 concerning Copyright in Article 16 paragraph (3) it is clearly stated that Copyright objects can be used as objects of Fiduciary Security by following the procedures stipulated by the Fiduciary Guarantee Law. The connection with the conditions that must be fulfilled by Copyright as a Fiduciary Guarantee is the economic value of a Copyright and Ownership of a Copyright (related to Indonesia adhering to a declarative principle rather than a constitutive principle) but in practice it becomes an obstacle due to the absence of norms on the requirements to assess or assess value economics of a Copyright is due to the absence of implementing regulations regulating it considering the main objectives in law are certainty, justice, order and expediency.

Imposition of Copyright with a Fiduciary Guarantee is made with a Notary Deed and the deed also contains the guarantee value and the value of the objects that are the object of the fiduciary guarantee. This is based on Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security, namely "Objects Compensation with Fiduciary Security is made with a Notary Deed in Indonesian and is a Fiduciary Security Deed.

Research Method

The type of research used in this legal research is normative. The approaches used in this study are the Conceptual Approach and the Statue Approach. The legal materials used in this research are primary, secondary and tertiary legal materials. The technique for studying and analyzing is using documentary studies. The data analysis used in normative research is qualitative analysis. Analysis of legal materials obtained in normative legal research refers to the research background described above the norms being studied are experiencing legal void, so the analytical tool used is legal discovery (recthinding). One of the legal findings that can be used in this research is the legal construction method.

Results and Discussion

1. Terms of Transfer of Economic Rights to Copyright Optimization as Fiduciary Guarantee in Increasing Business Productivity

Based on Article 16 paragraph (1) of Law Number 28 Year 2014, Copyright clearly states that "Copyright is an intangible movable object". In this case, Copyright is an absolute material right, which is freely controlled and defended by anyone. In the Elucidation of Article 16 paragraph (2) of the UUHC it is emphasized that: "What is meant by" can be transferred or transferred "is only economic rights, while

² Copyright Law, Law No. 28/2014, TLNRI No. 5599, Article 16 paragraph (2).

moral rights remain attached to the Creator. Transfer of Copyright must be done clearly and in writing either with or without a Notary Deed."

As a material right that is specific in nature, the economic right to a work or work remains in the hands of the Creator or Copyright Holder as long as the Creator or Copyright Holder does not transfer all of the economic rights to the recipient of the transfer of rights to the work. Copyright holders who are not creators only have a part of the exclusive rights in the form of economic rights. Therefore, the material rights in copyright provide a consequence that copyright can be transferred only to the extent of its economic rights. The rights that can be transferred or transferred are at the same time clear evidence that copyright is a material right. Through the definition of Copyright, it can also be seen that Copyright which is part of Intellectual Property Rights is a part of intangible objects (immaterial objects).³

As for the conditions for an object to have an economic value, namely that it must be accepted in general (acceptability), the object is guaranteed its existence by the ruling government, the object must also be durable (durability), its quality tends to be the same (uniformity), the object is not easily faked (scarcity);

In general, every State, at a minimum, recognizes and regulates economic rights which include the following types of rights:⁴

- a) Reproduction Right
- b) Adaptation Right
- c) Distribution rights (Distribution Right).
- d) Public Performance Right.
- e) Broadcasting Right.
- f) Cablecasting Right.
- g) Droid de suite.
- h) Community borrowing rights

As property, copyright can legally be transferred or transferred, either in whole or in part to another party due to inheritance, grants, endowments, wills, written agreements, or other reasons justified in accordance with the provisions of laws and regulations.⁵ The transfer of economic rights to Creative Rights applies *mutatis mutandis* to the transfer of economic rights to Related Rights products. The transfer of Copyright must be requested for recording to the Director General of IPR to be recorded in the general list of works in accordance with Article 76 paragraph (3) of the Copyright Law. In Article 16 paragraph (3) UUHC which states that "Copyright can be used as an object of Fiduciary Guarantee". This is done by following the provisions of Law Number 42 of 1999 concerning Fiduciary Security. Provisions regarding objects that can be the object of the Fiduciary Guarantee are contained, among others, in Article 1 paragraph (4), Article 9, Article 10, and Article 20 of Law No. 42 of 1999 concerning Fiduciary Guarantee. Objects that can become objects of the Fiduciary Guarantee are as follows:⁶

- a) The object must be legally accessible and transferable;
- b) Tangible objects;
- c) Intangible objects, including receivables;
- d) Moving objects;
- e) immovable object that cannot be bound with mortgage rights;
- f) Immovable objects that cannot be bonded with a mortgage;

³ Arif Lutfiansori, *Hak Cipta dan Perlindungan Folklor di Indonesia*, Graha Ilmu, Yogyakarta, 2010, p. 69.

⁴ Muhamad Djumhana & Djubaedillah, *Op.Cit.*, p. 67.

⁵ Copyright Law, Law No. 28/2014, TLNRI No. 5599, Article 16 paragraph (2).

⁶ Munir Fuady, *Jaminan Fidusia*, Penerbit PT. Citra Aditya Bakti, Bandung, 2000, p. 155.

- g) Objects that already exist, as well as objects that will be obtained later;
- h) One unit object, or one type of object;
- i) More than one unit object, or more than one type of object;
- j) Results of objects that have become the object of fiduciary security;
- k) Proceeds from insurance claims on objects that are the object of fiduciary security;
- l) Goods inventory (inventory, trading stock)

Not all copyright objects can be used as objects of the Fiduciary Guarantee. Copyright works that cannot be used as objects of Fiduciary Guarantee, which consist of choreography, props made for the benefit of education and science, dance, pantomime, architectural works, compilation of traditional cultural expressions as long as the compilation is an original work, translations, interpretations, adaptations, anthologies, databases, adaptations, arrangements, modifications and other works of transformations and traditional cultural expressions, and maps.⁷

There are 3 (three) methods of execution of Copyright which are the object of the Fiduciary Guarantee if the Fiduciary Giver or Debtor fails to promise as stipulated in Article 29 of the Fiduciary Guarantee Law, namely:

- a) Implementation of the executorial title
- b) The execution is based on the sale of objects that are the object of the Fiduciary Guarantee through a public auction
- c) Execution of execution based on underhand sales

Regarding copyright as an intangible movable object, it requires State recognition in the form of a Copyright Certificate. This certificate can be used as the object of the Fiduciary Guarantee. Copyright ownership rights can appear automatically from the birth of a Copyright whether it is registered or not, but if it is used as an object of guarantee, it must be registered. Copyright also cannot be burdened with a mortgage or mortgage due to the nature of Copyright which is a movable object.

Copyright if seen from the form of submission, namely as an object of Fiduciary Security, the ownership rights can be transferred juridically in the form of the *Constitutum Possessorium*, where juridically the property rights are owned by the creditor, but in fact the object is in the control of the debtor. If the copyright is to be transferred in its entirety, then the transfer of the copyright holder of the work must be notified to the relevant agency.⁸ Registration of a work to the Directorate General of IPR as a copyright registration agency in Indonesia is very useful in terms of proof if there is a dispute over ownership in the future. In evaluating Copyright as an object of debt guarantee, a Copyright certificate as written proof of ownership of Copyright will certainly help prove who owns the Copyright. This makes Copyright included in the object of the Fiduciary Guarantee because it has fulfilled all the elements and requirements to become the object of the Fiduciary Guarantee in the transfer of economic rights. So that copyright is very possible to be used as an object of debt guarantee in the form of a Fiduciary Guarantee.

2. Methods of Determining Economic Value in Copyright Optimization as Fiduciary Guarantee in Increasing Business Productivity

To be used as a Fiduciary Guarantee, it must have a value that can be measured as collateral for the repayment of the Debtor's debt. In conducting the assessment using the Indonesian Assessment Standard, hereinafter abbreviated as SPI. SPI is a basic guideline that must be adhered to by the Appraiser in conducting the Assessment. As for the standard in general so that it can be assessed as Copyright for copyright works in the fields of science, art and literature, it can be seen from the perspective of:

⁷ <http://etheses.uin-malang.ac.id/11732/1/12220019.pdf> (Accessed on June 22, 2020 at 13.32 WIB).

⁸ M. Bahsan, *Hukum Jaminan dan Jaminan Kredit*. PT. Rajagrafindo Persada, Jakarta, 2007, p. 3.

- 1) Fixation
- 2) Originality
- 3) Creativity

In order to make an economic assessment, the Copyright must meet the following requirements:

- a) A copyright work must be specifically identifiable and identifiable;
- b) There must be concrete evidence of the existence of the copyrighted work (for example, contracts, licenses, registration documents, procedural documentation, etc.);
- c) The copyright work must have been created / already exist;
- d) The copyright work must have legal protection and can be legally transferred;
- e) The copyright work must have a sale value.

In the case of difficulties in measuring the value of a Copyright, a third party is needed as an appraisal of the right guarantee for Copyright to become a guarantee. The appraisal agency itself has guidelines that regulate everything an appraisal agency must do in assessing an object. One of the institutions that can provide an appraisal of the economic value of copyright is the Collective Management Institute (LMK). Collective Management Institution is an institution in the form of a non-profit legal entity that is authorized by the Author, Copyright Holder and / or Related Rights owner to manage their economic rights in the form of collecting and distributing royalties.

There are several criteria that can be used as a basis for assessing the economic value of a Copyright so that it can be used as a guarantee, including:

- a) Copyright must be registered with the Directorate General of Intellectual Property Rights of the Ministry of Law and Human Rights;
- b) The copyright already has an estimated economic value that can be accounted for, it can be seen from the contract value with the company that uses / distributes / distributes / displays the copyrighted work;
- c) The copyright has been managed by the Collective Management Institute, so that the royalty value can be known;
- d) Credit extension is given on a prudential basis, in the sense that the amount of credit value, allocation and time period must comply with Bank Indonesia and / or the Financial Services Authority regulations;
- e) Certificate of Intellectual Property Rights is included in the types of collateral allowed in bank credit financing;
- f) If necessary, another guarantee is given in the form of a personal guarantee or borgtocht from the company that houses the copyright work (for example, a personal guarantee from the owner of the music label company that houses a songwriter).

To prevent problems in the future, the assessment of a Bank to give approval in providing guarantees is carried out based on the 5C (five of credit) principles, namely Character, Capacity, Capital, Condition of Economic , Collateral. The determination of the economic value of a work can be seen from several generally accepted approaches to valuing companies or equity in accordance with the Indonesian Appraisal Standards (SPI) and the Indonesian Appraisal Code of Ethics as stipulated by the Indonesian Valuation Professional Society in the Indonesian Assessment Standards (SPI), Edition VI Year 2015, namely the quantitative method approach:⁹

⁹ *Ibid.*, p. 162.

- a. **Market Approach;**
The market approach compares companies that are valued with comparable companies, their ownership interest in the company and marketable securities that are traded in the market and the relevant transactions of shares of comparable companies. Previous transactions or offers for company components can also be an indication of value.
- b. **Income Approach;**
The income approach can be used to estimate value by anticipating and qualifying the object's ability to generate returns that will be received in the future.
- c. **Asset Approach;**
The asset approach can be used to obtain an indication of the value of an entity, the invested capital, the capital structure and / or the net asset value of the company.

In practice, it is impossible to make an assessment using the market method, the income method, and the cost method at once. Each value valuation above has its own strengths and weaknesses. The value of intangible assets should only use one valuation basis that is acceptable to society. The definition of valuation itself is a process of identifying and measuring the benefits and risks of an intangible asset.

Based on the quantitative method as described above which consists of a market approach, an income approach, an asset approach, there are two formulas that can be used to calculate the economic value of intangible assets in Copyright, namely :¹⁰

$$\text{Projected revenue from licensed asset} \times \text{royalty rate} = \text{royalty savings} - \text{taxes} = \text{after tax royalty savings} \times \text{present value factor} = \text{present value of asset}$$

$$\text{Projected income from licensed asset} \times \text{royalty rate} = \text{royalty savings} - \text{tax} = \text{after tax savings} \times \text{present value factor} = \text{present value of asset}$$

$$\text{Projected revenue, Cost of Goods Sold (COGS), Operating expenses} = \text{operating income} \pm \text{royalty charges} = \text{pretax income} - \text{taxes} = \text{after tax income} - \text{return on contributory assets} = \text{cash flow from subject asset} \times \text{present value factor} = \text{present value of subject asset}$$

$$\text{Projected income, cost of goods sold (COGS), operating costs} = \text{operating income} \pm \text{royalty costs} = \text{income before tax} - \text{tax} = \text{after tax income} - \text{return on contribution assets} = \text{cash flow from assets subject} \times \text{present value factor} = \text{present value of asset subject}$$

With the two formulas above, it is hoped that it can answer the problem in determining the economic value of copyright. This determination of economic value aims to facilitate the Creators or Copyright Holders in determining the value of the guarantee so that their works can be used as objects of Fiduciary Security.

Roles and Responsibilities of Notaries in Making Fiduciary Deed of Copyright in Increasing Business Productivity

Imposition of Copyright with a Fiduciary Guarantee is made by a Notary Deed. This is based on Article 5 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security, namely "Objects Load

¹⁰ Ferry Gunawan C., *Hak Cipta Jaminan Kredit Perbankan Ekonomi Kreatif*, PT Alumni, Bandung, 2018, p. 165-166.

with Fiduciary Security is made with a Notary Deed in Indonesian and is a Fiduciary Security Deed". Notaries also have the role of being a third party, namely witnessing transactions conducted by their clients and also providing legal services needed by the community.

In the case of making a Fiduciary Security Imposition Deed, the Notary Public must explain in detail the contents of the deed's description regarding the objects that are the object of the Fiduciary Guarantee, the guarantee value and the value of the objects which are the objects of the Fiduciary Guarantee. This is because the objects that are guaranteed in copyright are objects or goods that are intangible in nature so that what is submitted to be guaranteed is their right. As for the legal basis in this matter consists of two laws, namely the UUJF and UUHC, the Notary may not refuse to make a Fiduciary Assurance Imposition Deed on Copyright.

The Law on Notary Position and the Notary Code of Ethics provide guidelines for Notaries to carry out their positions and conduct their daily activities. Both provisions are equipped with strict sanctions for violators.¹¹ In carrying out its duties, a notary must be based on the responsibility and morale of his position which comes into force legally and is bound since the notary public takes his oath of office as a notary.

In the Copyright valuation system as a Fiduciary Guarantee, the Notary does not participate in being responsible for determining the economic value of a Copyright. This is because it is not the duty and authority of a notary, but rather the duty and authority of an appraisal agency certified and accredited by the Office of the Director General of IPR at the Ministry of Law and Human Rights and registered with Bank Indonesia and the Financial Services Authority (OJK) The responsibility of a notary is limited to the deed he makes as it is known that the duties and powers of a notary are described in Article 15 of Law Number 2 of 2014 concerning Notary Position. Apart from what has been stated in the article, it is not the responsibility of the notary public.

The responsibilities of a notary as a public official relating to material truth are differentiated into:¹²

- 1) The responsibility of a notary in a civil manner regarding the material accuracy of the deed he makes;
- 2) The notary's responsibility is criminally against the material truth of the deed he makes;
- 3) The responsibility of the Notary based on the Position of Notary Public regarding the correctness of the material in the deed he makes;
- 4) Notary responsibilities in carrying out their duties based on the Notary Code of Ethics.

Imposing sanctions to a Notary who is guilty is aimed at maintaining the dignity of the Notary as an institution of trust because if the Notary commits a violation, it can reduce public confidence in the Notary profession. There are several aspects regarding the application of sanctions against the Notary, namely:

- a) Civil Liability Aspects
- b) Administrative Responsibility Aspects
- c) Aspects of Criminal Liability

¹¹ Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum*, CV Mandar Maju, Bandung, 2000, p. 6-7.

¹² Abdul Gofur Anshori, *Lembaga Kenotariatan Indonesia Perspektif Hukum dan Etika*, UII Press, Yogyakarta, 2009, p. 34.

Conclusions

Based on the results of the research and discussion above, the authors can draw the following conclusions:

1. The Terms of Transfer of Economic Rights Against Copyright Optimization as Fiduciary Guarantee in Increasing Business Productivity are as follows:

Transfer or transfer of Copyright is regulated in Article 16 paragraph (2) UUHC, which can be through inheritance, grants, endowments, wills, written agreements, or other causes justified in accordance with the provisions of laws and regulations. According to Article 16 paragraph (3) of the UUHC, Copyright objects can be used as objects of Fiduciary Security by following the procedures regulated by UUJF. Therefore, the requirements for the transfer of economic rights in Copyright as a Fiduciary Guarantee in increasing business productivity, namely that objects that will be used as objects of the Fiduciary Guarantee must be owned and transferred, tangible or intangible, registered with the Director General of IPR or not registered, and cannot be burdened with mortgage or mortgage rights. In addition to the three things mentioned above, for the transfer of ownership rights to a work, a statement of transfer of rights to the work is required, which is written in Indonesian and witnessed by a notary and both parties in order to have legally binding power.

2. The Methods for Determining Economic Value in Optimizing Copyright as Fiduciary Guarantee in Increasing Business Productivity

In Article 16 paragraph (3) of the UUHC, there is a norm vacuum on the requirements to assess or estimate the economic value of a copyright because there is no implementing regulation that regulates it. It is difficult to measure the value of these economic rights because what is guaranteed is the intellectual rights of the work. In conducting an assessment using the Indonesian Assessment Standards for copyrighted works in the fields of science, art and literature, it can be seen from fixation, originality, and creativity. To be able to make an economic assessment, the Copyright must meet the requirements, namely that it must be specifically identifiable and recognizable, there must be concrete evidence of the existence of the copyright work, must have been created / already exist, must have legal protection and can be legally transferred, must has a sale value. The method of assessment in determining the economic value of a copyright that is currently valid is by using a quantitative method consisting of a market approach, an income approach and a cost approach.

3. The Roles and Responsibilities of Notaries in Making the Fiduciary Deed of Copyright in Increasing Business Productivity

Imposition of Copyright as an object of Fiduciary Security is made with a Notary Deed in Indonesian and is a Fiduciary Guarantee Deed. Notaries also play a role in carrying out State duties in the field of civil law besides being a third party, namely, witnessing transactions carried out by their clients and also providing legal services needed by the public. The notary must be based on the responsibility and morals of his position to be valid and bound since the Notary public takes his oath of office as a Notary. The provisions regarding the responsibilities of a Notary have been regulated in Article 65 of the UUJN. Notaries do not participate and are responsible for determining the economic value of a copyright. This is the duty and authority of the Appraisal Agency. The responsibilities of a Notary are differentiated into the civil liability of the Notary regarding the material correctness of the deed that he makes, the responsibility of the Notary as criminal as to the material correctness of the deed he makes, the responsibility of the Notary based on the Notary Position Regulation regarding the material truth in the deed he makes, the responsibility of the Notary Public in carrying out their duties based on the Notary Code of Ethics.

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