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**REGULATION OF SONG OR MUSIC COPYRIGHTS AS
FIDUCIARY GUARANTEE OBJECTS IN INDONESIA****Heru Setiyono, Dyah Ochtorina Susanti, Khoidin, Budi Santoso**

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Abstract

Fiduciary guarantees for songs or music have been well-received in Indonesia, as stated in Article 16 Paragraph (3) of Law Number 28 the Year 2014 concerning copyrights "copyrights can be used as fiduciary guarantees." Related to this, the song or music creator gets a fresh breeze that the creation of the song or music can be guaranteed fiduciary guarantees in banking or financing. Still, the song or music creator until now has not been able to utilize the results of his creation because no further provisions are governing the application or additional arrangements for the production of songs or music can be guaranteed fiduciary (there is a vacuum in the legislation). In this regard, the formulation of the Laws and Regulations as a follow-up to the copyright of songs or music becomes a fiduciary guarantee in Indonesia that creation truly brings economic benefits to the creator.

Keywords: Copyright, Song or Music, Fiduciary Guarantee.

Introduction

Jimly Asshiddiqie stated that as the rule of law, the law would be the highest command/leader in the nation's offense.¹ Related to this, the law becomes a legitimate tool to determine or regulate everything that is intended or not applied in the context of the unitary state of the Republic of Indonesia. In connection with the notion of Intellectual Property which is a translation of the English language "Intellectual Property", by WIPO (World Intellectual Property Organization) is interpreted as a creation that is produced through the intellectual ability of "creation of mind," namely inventions, written works and works of an artistic nature, symbols, names, images

¹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*. (Jakarta: Sinar Grafika, 2010), p. 57.

and designs used in commerce.² Concerning this, the direction of intellectual property is the recognition of an invention that can be used in the field of trade, which has economic value.

In the economic aspect, Intellectual Property Rights are objects that can be transacted in the process of trafficking in human needs, for the political character to be an instrument of developed countries to influence or regulate developing countries to become the main issue in the World Trade Organization (hereinafter abbreviated as WTO) which gave birth to The Agreement Trade-Related Aspects of Intellectual Property Rights (hereinafter abbreviated as TRIPs), and other legal instruments in the form of laws in the field of Intellectual Property, and other regulations. James W. Nickel, said that economic rights determine who has the power, the power to use, sell or give goods, thus enabling actions that are fundamental to economic activity.³ The economic value of a song or music copyright is philosophically inherent when the song or music has been created and produced by producing economic value both by the creator or copyright holder. Still, legal protection also needs to be given when work can be guaranteed, especially in the fiduciary guarantee. In connection with this, according to Stuart E. Eizenstat,⁴ protection of innovation is very important for the growth of developed countries and developing countries in the future, because with the maximum protection for each of these innovations the state or government also indirectly encourages improvement the economy, including income for the country through taxes that are to be determined on the economic values produced by the creators of an innovation.

The State of Indonesia itself has regulated the issue of copyright in the form of laws, including Law Number 6 of 1982 concerning Copyright, Law Number 7 of 1987 concerning Amendment to Law Number 6 of 1982 concerning Copyright, Law Law Number 12 of 1997 concerning Amendment to Law Number 6 of 1982 concerning Copyright as amended by Law Number 7 of 1987, Law Number 19 of 2002 concerning Copyright, and finally amended by Law Number 28 of 2014 concerning Copyright. In this regard, the exciting thing in this study is related to the latest law, namely Law No. 28 of 2014 concerning Copyright (hereinafter referred to as the Copyright Act), with the scope of which is protected in Article 40 paragraph (1) of the Copyright Act, wherein it regulates that protected works include those in the fields of Science, Art, Literature consisting of:

- a. Books, pamphlets, the appearance of published papers, and all other written works;
- b. Lectures, class, speeches and other similar creations;
- c. Props made by for the benefit of education and science;
- d. Songs and / or music with or without text;
- e. Drama, musical drama, dance, choreography, puppetry, and pantomime;
- f. Artwork in all forms such as paintings, drawings, carvings, calligraphy, sculpture, sculpture, or collage;
- g. Applied Art;
- h. Architectural Works;
- i. Map;
- j. Batik Artwork or other motif art;
- k. Photography;
- l. Portrait;

² Basuki Antariksa. *Landasan Filosofis Dan Sejarah Perkembangan Perlindungan Hak Kekayaan Intelektual: Relevansinya Bagi Kepentingan Pembangunan Di Indonesia*, p. 3. www.kemenpar.go.id, accessed at tanggal 24 Maret 2019.

³ Dewi Astuty Mochtar. *Perjanjian Lisensi Ahli Teknologi dalam Pengembangan Teknologi Indonesia*. (Bandung: Alumni, 2001), p. 99.

⁴ Budi Santoso. *Pergeseran Pandangan Tentang Hak Cipta, Studi Pergeseran Pandangan Tentang Hak Cipta di Amerika Serikat dan di Indonesia*. The inauguration Speech was delivered at the Acceptance Ceremony of Professor Position in Legal Studies at the Faculty of Law Diponegoro, Semarang at 22 Maret 2011, p. 24.

- m. Cinematography;
- n. Translation, Interpretation, Adaptation, Flatten, Database, Adaptation, Arrangement, Modification and other Works resulting from the Transformation;
- o. Translation, Adaptation, Arrangement, Transformation, or Modification of Traditional Cultural Expressions;
- p. Compilation of Works or data, both in a format that can be read by computer programs or other media;
- q. Collection of Traditional Cultural Expressions during the compilation is an original work;
- r. Video Games; and
- s. Computer program.

Song or music copyrights have characteristics as fiduciary guarantees; it is indeed regulated in Article 16 paragraph (3) of the Copyright Act. It differs from fiduciary guarantees in general such as: pawning, leasing movable or other permanent property in which the object is a fiduciary guarantee submitted to the pawning holder (creditor), while the copyright that can be used as a pledge object in the form of goods in the form of collateral, for example: sculpture, or painting, because the purpose of the object is in plain appearance, so that it can be submitted to the pawn holder, but for song or music that is difficult to be used as collateral in the form of a pawn.

Legal issues arise when regulations regarding the copyright of songs and or music can be guaranteed with fiduciary guarantees. For creators, of course, laws or rules regarding the copyright of songs and/or music can be secured with fiduciary guarantees is a form of attention from the state for the creators, especially in terms of financial access to banks or financial institutions. However, perfect regulation and welcomed very well and happily by the creator of the song and or music is only a mere formality provision that can not be implemented or done. Until now the creators of songs and/or music have not been able to access the world of banking or financial institutions to perform fiduciary guarantees for the songs and/or music they have created based on the provisions of Article 16 paragraph (3) of the Copyright Act only, because the banking or the financing institution also does not want to take the risk of approving credit with fiduciary guarantees submitted by song and/or music composers based only on the provisions of Article 16 paragraph (3) of the Copyright Law.

At the level of jurisprudence, that conditions are commonly referred to as "legal vacuum" that is feasible and deserves to be studied in terms of legal science. The vacuum of the law is related to matters relating to:

- a. Follow-up on the mandate of Article 16 paragraph (4) of the Copyright Law provisions regarding Copyright as fiduciary security objects, as referred to in paragraph (3) are carried out following the rules of the legislation.
- b. Until now (this research was conducted) both in the Copyright Act (explanation) or the form of other Regulations (Government Regulations, Perpres, Ministerial Regulations, or different types of legislation) do not regulate further provisions on song copyright and/or music can be guaranteed a fiduciary guarantee.
- c. The consequences of the rule of law, including in this context, both the Creator and the banking sector do not have a strong basis for following up the provisions of Article 16 paragraph (3) of the Copyright Law.

Based on the explanation above, then this scientific paper will try to answer a problem that is whether definite legal arrangements in Indonesia have accommodated the copyright of songs or music as fiduciary collateral objects?

Material and Method

The legal research method in this research is used to explore, process, and formulate the legal materials obtained to obtain conclusions that are following scientific truth to answer the legal issues at hand. The type of research

used is normative juridical (legal research), which is a study that departs from a norm in legislation.⁵ Related to the approach used is the statutory approach and conceptual approach. The legislation approach is the approach taken to examine all laws and regulations that have links with other laws,⁶ in this case, Burgerlijk Wetboek (BW), Copyright Law No. 28 of 2014, Fiduciary Guarantee Law No. 42 of 1999, and Bank Indonesia Regulations, and other regulations. The conceptual approach is carried out when the researcher does not move from the existing legal rules. That's because there isn't the rule of law for the problem at hand. The views and doctrines that develop in formulating concepts related to his research are carried out by exploring the opinions or thoughts of legal experts (legal thinkers) from various countries that explain about it,⁷ to obtain clarity and scientific truth of the concepts law relating to the research being carried out.⁸

The Discussion

The definition of a song is any musical composition that shows its authenticity, whether made with lyrics or without lyrics. A musical unit consisting of a series of sequential tones. Each song is determined by the length of the short and high or low notes, in addition to the rhythm also gives a specific style to a song.⁹ This shows that music is a sound that is arranged into a rhythm and tone, so as to produce a harmonious melody, especially Music is a sound that is composed in such a way, so that it contains rhythm, song, tune, and harmony, especially from the sound produced from instruments which are obtained provides rhythm, where then the rhythm or melody is created, offered to be enjoyed as a work of art.

It should also be noted that the definition of song and music has different meanings, where if the song consists of various elements, namely: melody, lyrics, arrangements, and notations. Concerning the definition of melody, according to Otto Hasibuan, what is meant by melody is a series of tones that are specific in the arrangement according to distance and pitch, obtain a distinctive character, and according to the prevailing musical rules rounded into an organic unity. Lyrics are poems or words that are accompanied by melodies. The arrangement is the adjustment of the melody. The notation is writing a melody in the form of musical notes or numbers. Related to the notion of music is the art of composing sounds or sounds.¹⁰

Accordingly, although the understanding of song or music is different, in practice it is considered to be the same, even in the Elucidation of Article 12 paragraph 1 letter (b) of Law Number 19 the Year 2002 concerning Copyright, song or music is interpreted as an intact work, even though it consists of elements of songs or melodies, poems or lyrics, and their arrangements, including notations. Related to the full meaning as referred to is song or music constitutes the unity of a copyrighted work, whereas in the Elucidation of Article 40 paragraph 1 letter (d) of the Copyright Law, what is meant by a song or music with no text is interpreted as a unified whole copyrighted work.

In this song or music entertainment business, the government is making legal arrangements that will protect musicians from pirating copyrighted songs or music, both conventional and digital, and songs or music in order to immediately get the rule of law from the Government, and Bank Indonesia, the Financial Services Authority

⁵ Peter Mahmud Marzuki. *Penelitian Hukum*, Yuridika, Vol. 16, Nomor 1, Maret-April 2001, p. 103

⁶ Johnny Ibrahim. *Teori & Metodologi Hukum Normatif*. (Malang: Bayu Media Publishing, 2008), p. 300.

⁷ Peter Mahmud Marzuki. *Penelitian Hukum*. (Jakarta: Kencana, 2010), p.137.

⁸ H. Muhjad, et. all. *Penelitian Hukum Indonesia Kontemporer*. (Yogyakarta: Genta Publishing, 2012), p. 46-47.

⁹ Asosiasi Industri Rekaman Indonesia (ASIRI), *Makalah: " Pedoman Perjanjian-perjanjian Pembuatan Rekaman "*, 2000, p. 3.

¹⁰ Otto Hasibuan, *Hak Cipta Di Indonesia, Tinjauan Khusus Hak Cipta Lagu, Neighbouring Rights, Collecting Society*. (Bandung: Alumni, 2008), p.140.

(FSA)), The Minister of Finance quickly realizes his legal regulations related to fiduciary guarantees so as to encourage musicians to be more active to create, and not to hinder financial or financial matters, even though venture capital, and local governments can facilitate the funding, so banks or financial institutions can channel song or music copyrights can be used as collateral for debts, so that they do not violate banking regulations, so they can be accounted for by the Financial Supervisory Agency (BPK RI).

Copyright Law, which regulates the existence of copyright, can be used as a fiduciary guarantee, philosophically because copyright is a law of intangible objects (immaterial), rights that can be used as collateral. Concerning to this matter, copyright itself has two variations, which are Moral Rights and Economic Rights. Related to this, the existence of copyright that regulates can be a fiduciary object. The philosophical goal is that musicians or song or music artists can obtain loans from banks or other commercial financing institutions by guaranteeing their works, this is following Article 16 paragraph (3)) Copyright Act which states that copyright can be used as a fiduciary guarantee.

Copyright has been regulated in the Copyright Act, and Fiduciary Security Law No. 42 of 1996, but customers do not quickly get loans or credit through banks or financial institutions, because the implementation of jurisdiction has not been regulated in other legislation, which currently relies only on Bank Indonesia Regulation (PBI) No. 9/6 / PBI / 2007 which regulates collateral types in general, as stipulated in Article 46 PBI No. 9/6 / PBI / 2007, namely:

1. Securities and shares that are actively traded on a stock exchange in Indonesia or that have an investment rating, and the binding is in the form of a pledge, regulated in BW;
2. Land, buildings, residential houses, machinery which is one unit with the land, the binding is in the form of Mortgage rights, regulated in the Mortgage Law No. 4 of 1996;
3. Aircraft, ships with a size of 20 cubic meters, the binding is in the form of mortgages, regulated in Law No. 1 of 2009 concerning flights;
4. Warehouse receipts, the binding is in the kind of a Warehouse Receipt guarantee, which is regulated in the Warehouse Receipt System Law No. 9 of 2006;
5. Motorized vehicles, and inventory, the binder in fiduciary form as regulated in Fiduciary Security Law No. 42 of 1996, Flats Law No. 16 of 1985; Housing and Settlement Law No. 4 of 1992.

Giving access to a song or music composer to obtain loan support from banks or other financial institutions still requires a long struggle, bearing in mind that there is a void in the rule of law that the creator cannot implement, even though Article 16 paragraph (3) UU Copyright, because it has not there is a regulation from the government, so that the Bank and financial institutions have not dared to provide collateral/guarantees, because they must be accountable to the Indonesian Financial Supervisory Agency (BPK), if possible, the Bank or financial institutions dare to provide a policy of providing loans will certainly face Corruption, that is feared by banks or other financial institutions, unless there are already implementing legal rules, of course, banks will easily provide loan funds.

However, there is currently no regulation that provides collateral for loans or loans to debtors. For banks or financial institutions before giving loan funds will undoubtedly consider the 5C factors, namely: Capital, Character, Capacity, Collateral, Condition, and 7P, namely: Personality, Party, Purpose, Prospect, Payment, Profitability, Protection.

1. Capital is: related to the condition of assets and assets owned, especially customers who have a business. Capital is assessed from the company's annual report managed by the customer, so from the assessment, the bank / financial financing institution can determine whether or not the customer gets a loan, then how much credit assistance will be given.
2. Character / Character is this principle in terms of customer personality; this can be seen from the results of interviews between customer service to customers who want to apply for credit, regarding the background, habits of life, the lifestyle of customers. The principle is to assess whether the customer can be trusted in cooperation with banks.
3. Capacity/ability is: this principle is what values the customer from the ability to run the finances that exist in the business he has. Whether the customer has experienced a financial problem before or not, where this principle assesses the ability to repay the customer's credit to the bank.
4. Collateral / Guarantee is: a principle that needs to be considered by customers, when they cannot fulfill their obligations in returning loans from banks or financial institutions, if this happens, according to the provisions of the bank / financial institution will take over / confiscate the assets that have been promised in debt guarantee. In general, banks / financial institutions in providing credit loans consider factors:
 - 1) Marketable (quickly sold) the warranty.
 - 2) Secured (safe) objects which are guaranteed to be safe and easy to execute, if the debtor defaults.
5. Economy conditions are: this principle is influenced by factors outside the bank or the customer, in the economy of a region or country it is very influential on banks / financial institutions and customers, usually before providing a bank loan financing/financing institutions will conduct a survey / visit both at home and in the office of the prospective debtor company.

Song or music copyrights, if it will be used as a fiduciary guarantee at a bank or financial institution, must be recorded / registered for the Directorate General of Information Commission to obtain a "Letter of Registration of Creation", for ordinary people considered the same as brand certificates, patents and industrial designs obtained based on registration. Thus, it is evident that the recording of the song or music copyrights becomes mandatory if used for bank guarantees or financial institutions using a fiduciary guarantee scheme. In general, banks or financial institutions in providing credit loans to copyrights, of course, in assessing these rights using the following models:

- 1) Cost-Based Model;
- 2) Market-Based Models;
- 3) Income-Based Models;
- 4) Option Model.

Additionally, by using one of the above models, it can be seen the economic value in a creation, in addition to that the bank or financial institution in the fiduciary guarantee process in the form of:¹¹

- 1) Market Value (market value);
- 2) Reproduction Cost (new replacement costs);
- 3) Depreciated Replacement Cost (fair value);
- 4) Liquidation Value (liquidation value);
- 5) Insurable Value / Actual Cost Value (insurance value).

¹¹ Junaidi Akhmad dan Muhamad Joni. *Pemanfaatan Sertifikat HKI Sebagai Collateral Kredit*. Jurnal Volume 6, 2011, p. 135.

In connection with the loading and fiduciary development of copyright to be used as collateral for credit, including:¹²

- 1) Copyright must be registered with the Directorate General of Intellectual Property, the Ministry of Law and Human Rights of the Republic of Indonesia.
- 2) The copyright already has an estimated economic value that can be accounted for, can be seen from the value of the contract with the company that uses, distributes, distributes, displays the copyrighted work.
- 3) The copyright has been managed by the Collective Management Institute (LMK) so that the royalty value can be known.
- 4) Lending is given in the principle of prudence in terms of the amount of credit value, designation and period must be following the provisions of Bank Indonesia and or the Financial Services Authority (OJK);
- 5) Certificate of Intellectual Property Rights, included in the type of collateral permitted in credit financing (the author's notes for trademarks, patents, industrial designs take the form of "Certificates," while the Copyright forms in the form of "Registration Certificate");
- 6) If needed, another guarantee is given in the form of a personal warranty or borgtocht from the company that houses a copyrighted work, for example, a personal guarantee from the record label owner/producer who houses the songwriter.

The actual opinion of researchers in collateral/guarantee copyright, especially songs or music, actually depends on the willingness of the government to implement and regulations, the authors think LMK already exists, just form appraisal (valuation) of IPR, temporarily formed from among musicians, musicians, Intellectual Property Rights consultants, the academics in the field of Intellectual Property, and banking / financial institutions, and the government, in this case, BI and OJK only need to make the rule of law. Related to this, several things must be considered to ensure / fiduciary guarantees for songs or music can be implemented, namely:

- 1) Song or music copyrights that will be used as collateral/debt collateral must be registered to obtain a Copyright Registration Document at the Directorate General of Intellectual Property, Ministry of Law and Human Rights of the Republic of Indonesia.
- 2) The Creator must be a Member of the LMK (Collective Management Institute), making it easier to control the recipient of the royalties used by the user.
- 3) Banks / Financial Institutions must see the track record of their creators, whether creators who are still beginners or creators who have often created songs or music, even have many orbiting famous singers, who are actively creating songs, such as Rinto Harahap, Dedy Does, Koes Plus.
- 4) Before giving credit, banks / financial institutions must conduct a legal audit (due diligence) first with potential customers/composers of songs or music;
- 5) To avoid the risk for the creditor against the Debtor/composer of songs or music, if necessary, a personal guarantee is made, both the debtor's assets and the personal guarantee from the label/producer company under his aegis;
- 6) Statement from the Author, that the Song or music work is not in dispute;
- 7) Banks / financial institutions protect by providing Special Power of Attorney to third parties, what is meant here is that the Bank / financial institution can collect directly from royalties collected and distributed by LMK so that royalty rights are entirely the rights of creditors until The creator pays off his debt.

¹² Reni Budi Setianingrum. *Mekanisme Penentuan Nilai Ekonomis dan Pengikatan Hak Cipta Sebagai Objek Jaminan Fidusia*. Jurnal Media Hukum, Vol. 23 No.2, Desember, 2016, p. 235.

The most important thing that becomes the central legal issue, according to researchers, is that a change or BI Regulation must be published or the issuance of a new BI Regulation, which clearly and firmly stipulates that the creation of a song or music is the object of fiduciary security. With this regulation, fiduciary guarantees for the song or music copyrights in Indonesia can be implemented because financing / banking has a solid foundation that the results of song or music creation have become a chart of fiduciary collateral objects in Indonesia.

Results

Based on the explanation described above, the researcher concludes that Indonesia's definite legal arrangements to date have not accommodated the copyright of songs or music as fiduciary guarantees. This can be seen from Act Number 28 of 2014 concerning Copyrights (in the future referred to as the Copyright Act) and Bank Indonesia Regulations which do not regulate song or music copyrights as fiduciary guarantees. Still, precisely in Article 16 paragraph (3), The Copyright Act itself expressly states that copyright of songs or music cannot be guaranteed as a fiduciary guarantee. Based on this, it can be seen that there is a legal vacuum related to fiduciary collateral objects, besides the non-regulation of the song or music copyrights as fiduciary collateral objects, resulting in Banks or financial institutions not daring to accept requests for fiduciary guarantees by song or music creators.

Suggestion

Based on these descriptions, the researchers conveyed several recommendations to address the issue of fiduciary guarantee of songs or music in Indonesia. The ideas are as follows:

1. For Bank, Indonesia to immediately make a new Bank Indonesia Regulation in which expressly and clearly regulates fiduciary collateral objects that can be guaranteed, one of which is song or music copyright.
2. A valuation/appraisal institution must be formed so that there are institutions that can provide an assessment of a song or music that makes it easy for the Bank / Fund to estimate the nominal loan funds submitted by the song or music creator.
3. For banks, to be included with a power of attorney that is useful if one day the creator of achievement or breach of contract, so that a power of attorney can be executed directly by the Bank/financing for debt repayment.
4. For composers of songs or music, all without exception must be members of LMKN as one of the conditions for the creation of songs or music can be guaranteed fiduciary guarantee.

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