

Fiduciary Guarantee Phenomenon Regarding Intellectual Property Rights in Indonesia

Siti Malikhatun Badriyah, Marjo, R. Suharto

Faculty of Law, Diponegoro University, Semarang, Central Java, Indonesia

DOI: <https://dx.doi.org/10.47772/IJRISS.2024.8110102>

Received: 30 November 2024; Accepted: 04 December 2024; Published: 06 December 2024

ABSTRACT

Collateral is one of the special guarantees. Collateral gives rise to material rights. One of the material guarantees that is widely used is fiduciary guarantees. Intellectual Property Rights can be the object of fiduciary guarantees, but in their implementation there are still various obstacles. This research aims to determine and analyze the phenomenon of fiduciary guarantees on Intellectual Property Rights. This research uses a socio-legal approach, integrating normative and sociological research. The research results show that Intellectual Property Rights can be qualified as intangible objects. Thus, in principle, intellectual property rights can be the object of collateral. One of the most possible material guarantees is fiduciary guarantees. Although Intellectual Property Rights as an object of fiduciary security have been mentioned in statutory regulations, further regulations are not yet clear. In the implementation of Fiduciary Guarantees with Intellectual Property Rights objects, there are still various obstacles, including Appraisal which estimates the value of the guarantee, the economic value is easy to change, Execution in the event of a debtor defaulting. This has the implication that not many financial institutions are willing to accept guarantees for Intellectual Property Rights.

Keywords: Intellectual Property Rights, Fiduciary Guarantee, Collateral

INTRODUCTION

Almost all financial activities of people throughout the world cannot be separated from the role of financial institutions. Financial institutions that act as financial intermediaries for the community, namely those who need funds and those who provide funds. Financial institutions are financial intermediaries as supporting intermediaries which are very vital for maintaining the smooth running of the economy. Financial institutions basically have the function of transferring funds (loanable funds) from savers or surplus units (lenders) to borrowers (borrowers) or deficit units. These funds are allocated by negotiation between fund owners using funds through the money market and capital market [1]. The existence of capital strengthening funds is expected to provide positive injections for community business groups that receive them[2]. Apart from being intermediaries, financial institutions also have a big role in maintaining the stability of money circulation and the country's economy, including Indonesia. Financial institutions are all bodies or institutions whose main activities are in the financial sector. Starting from collecting to distributing funds to the community.

Financing distributed by financial institutions generally requires collateral. Collateral is an important factor in ensuring the security of creditors' receivables. This guarantee is one of the determining factors for a financing institution to decide to channel financing to customers or debtors[3]. Financing carried out between the finance company and the customer is based on an agreement. In the financing agreement, the creditor usually asks for a guarantee. One step to provide protection for lenders is to require collateral from debtors[4]. Collateral is very important for bank loans and facilitates companies in obtaining bank loans[5].

Financial institutions can also be interpreted as institutions that have finances. Whether as a provider of funds to fund business, for consumptive or productive needs, or as a non-funding financial service. One of the

services provided by financial institutions is channeling funds to the community to finance various community needs.

One of the guarantees that is widely used in the practice of people's lives is collateral. Collateral is an important factor in various agreements[6]. One of the collateral is fiduciary guarantees. The word principle is closely related to fundamental, which is a term related to general truth or the basis of reality. This means that the term describes a main thing that becomes the basis. Fundamentals Are Basic Principles. The principle of material guarantee is the principle or foundation and basic principle of material guarantee.

Legal principles have an important meaning in law. Every legal relationship in society is based on legal principles. Legal principles are the embodiment of the values that exist in a society[7]. The legal principles of material guarantees cannot be separated from the principles of guarantees in general which are implicit in Articles 1131 and 1132 of the Civil Code. Article 1131 of the Civil Code states that "all property of the indebted party, whether movable or immovable, whether existing or which will come into existence in the future, shall be borne by all personal obligations." Article 1132 states that "The goods become joint collateral for all creditors against whom the proceeds from the sale of the goods are divided according to the ratio of their respective receivables unless there are valid reasons for priority among the creditors."

Article 1131 of the Civil Code implicitly reflects the principles of Article 1131 of the Civil Code implicitly contains the principles of schuld and haftung, the principles of trust, and the principles of morals.

Article 1132 of the Civil Code implicitly contains the principle of creditorium parity, the principle of balance, and general principles.

Guarantees are broadly divided into two, namely general guarantees and special guarantees. This general guarantee covers all assets belonging to the debtor, as regulated in Article 1131 of the Civil Code. In this case the position of creditors is the same. In this case there is the principle of creditorium parity. The position of creditors in general guarantees is as concurrent creditors. Concurrent creditors are creditors who have concurrent receivables. Concurrent receivables are receivables whose repayment is the same as other receivables. There are exceptions to this general principle as regulated in Article 1132, which can be seen from the sentence "unless there is a valid reason to prioritize one receivable over another. In this case, if there are receivables with privilege rights, pledges and mortgages. In this case, it also includes Mortgage Rights and Fiduciary Guarantees because they have the nature of material collateral such as pawns and mortgages.

General guarantees are generally considered by creditors to provide less legal protection, so creditors usually ask for special guarantees. Special guarantees include personal guarantees (borgtocht) and material guarantees. The principle differences between the two include: personal guarantees give rise to individual rights which are relative in nature, whereas material guarantees give rise to material rights which are absolute in nature. In addition, in material guarantees there is always a certain object that is the object of collateral, whereas in personal guarantees there is no specific object that is the object of collateral, but there is a third party who guarantees that he will carry out the debtor's obligations if the debtor does not carry out his obligations (default).

METHOD

The approach method used in this research is socio legal. In this case, literature research and field research were carried out to find and analyze the principle of imposition of fiduciary guarantees as material collateral for Intellectual Property Rights. The specification of this research is an analytical descriptive. The research was conducted using library research to obtain secondary data and field research to obtain primary data. Secondary data was obtained using literature study techniques, which were obtained from primary legal materials and secondary legal materials. Field research was obtained using interview techniques with informants. In this case there were research informants selected purposively consisting of the Ministry of Law

and Human Rights and the National Legal Development Agency. Data that had been collected was then analyzed using a qualitative descriptive analysis technique, in which the research results were put together with data analysis in the form of descriptions.

RESULT AND DISCUSSION

1. The Phenomenon of Imposing Fiduciary Guarantees

Financial institutions that distribute funds to the public require guarantees from debtors. Obtaining funds by debtors from this financial institution is obtaining funds externally, namely from other parties. Therefore, guarantees really determine success in obtaining funds from other parties[3]. The implementation of fiduciary guarantees is based on the principles of material guarantees. The legal principles of material guarantees are implicitly contained in Articles 1131 and 1132 of the Civil Code.

The principle of schuld & haftung can be interpreted that "every person is responsible for his debts, this responsibility takes the form of providing his wealth, both movable and immovable objects. if necessary, sell it to pay off its debts." The principle of trust means that "everyone who gives debt to another person must believe that the debtor will fulfill his achievements in the future". Moral principles can be interpreted as saying that "everyone is obliged to fulfill his promises." These moral principles are strengthened as legal norms.

The principle of creditorium parity means "if a person has how many creditors, the position of the creditors is the same". The principle of balance referred to is "each creditor gets its receivables in balance with the receivables of other creditors". The general principle means "the existence of equal rights of creditors to the assets of their debtors."

This general principle generally has exceptions. This exception is contained in Article 1132 of the Civil Code. This can be seen from the sentence "unless there is a valid reason to prioritize one receivable over another". In this case, if there are receivables with privilege rights, pledges and mortgages. In this case, it also includes Mortgage Rights and Fiduciary Guarantees because they have the nature of material collateral such as pawns and mortgages.

The principle of schuld & haftung can be interpreted that "every person is responsible for his debts, this responsibility takes the form of providing his wealth, both movable and immovable objects. if necessary, sell it to pay off its debts." The principle of trust means that "everyone who gives debt to another person must believe that the debtor will fulfill his achievements in the future". Moral principles can be interpreted as saying that "everyone is obliged to fulfill his promises." These moral principles are strengthened as legal norms.

The principle of creditorium parity means "if a person has how many creditors, the position of the creditors is the same". The principle of balance referred to is "each creditor gets its receivables in balance with the receivables of other creditors". The general principle means "the existence of equal rights of creditors to the assets of their debtors."

This general principle generally has exceptions. This exception is contained in Article 1132 of the Civil Code. This can be seen from the sentence "unless there is a valid reason to prioritize one receivable over another." In this case, if there are receivables with privilege rights, pledges and mortgages. In this case, it also includes Mortgage Rights and Fiduciary guarantees because they have the nature of material collateral such as pawns and mortgage [8].

Objects according to Article 499 of the Civil Code are all goods and rights that can become objects of Property Rights Goods indicate tangible/tangible objects, while rights indicate intangible objects. Tangible objects are objects that can be perceived with the five senses. In an individual guarantee there is no specific object that is the object of guarantee, but there is a third party who performance if the debtor defaults.

Collateral is one of the special guarantees. Collateral give rise to material rights, so that they fulfill the characteristics of material rights which include:

1. Property rights are absolute, meaning they can be defended against anyone.
2. Droit de suite and revindication properties. Droit de suite means that property rights always follow the object in the hands of whoever the object is in. Revindication is right to claim the object back.
3. Material rights give rise to a preferential position for creditors holding collateral. Individuals guarantees do not create a preferential position for creditors holding individual guarantees.
4. Has transferable properties. The nature of transferability of objects in this case is very important in a guarantee. This because the function of collateral in principle is to provide confidence to creditors that their receivables will be paid in accordance with the agreement. Guarantee are very useful for ensuring the security of the creditor's receivables. In the event the debtor default, the creditor the material achievement.
5. The object is a thing Objects that can be objects of collateral are objects as regulated in Article 499 of the Civil Code. So it includes goods and rights. Goods indicate tangible objects, while rights indicate intangible objects. In collateral, if the debtor default, the creditor can execute the collateral object without to the file lawsuit in court. In individual guarantee, if the debtor defaults, the creditor can not immediately execute certain objects belonging to the debtor, but must file a lawsuit in court.

Fiduciary Guarantee is one of the collateral so it has the characteristics of material collateral. In Article 1 point 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees, it is stated that "Fiduciary Guarantees are security rights over movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in the Law. Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors".

There are several types of material guarantees and each has a special object.

Material guarantees include:

1. The object of the pawn is a movable object. Pawning is regulated in the Civil Code
2. Mortgage objects are immovable objects other than land or land rights.
3. The object of Mortgage Rights is land as regulated in Law Number 5 of 1960 (Basic Agrarian Law) whether or not it includes other objects related to land which are an integral part of the land.
4. The objects of Fiduciary Guarantee are all movable and immovable objects which cannot be encumbered with security rights or mortgages.

Fiduciary Guarantee is one of the material guarantees so it has the characteristics of material collateral. In Article 1 point 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees, it is stated that "Fiduciary Guarantees are security rights over movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in the Law. Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the Fiduciary Giver, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors".

The definition of fiduciary is contained in Article 1 point 1 of the Fiduciary Guarantee Law which states that "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."

From the definition of fiduciary and fiduciary guarantees as mentioned above, in principle fiduciary guarantees are material guarantees. This is because in fiduciary guarantees there are certain objects that are the object of fiduciary guarantees. As material collateral, the fiduciary creditor has the position of preferred creditor. Thus creditors have a special position compared to other creditors. If the debtor defaults, the creditor can execute the object that is the object of the fiduciary guarantee.[9]

2. Fiduciary Guarantee for Intellectual Property Rights

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce[10]. Broadly speaking, Intellectual property right (IPR) is divided into 2 (two) part (WIPO 1988), namely: Copyright, which is the exclusive right of the creator which arises automatically based on the declarative principle after a work is realized in real form without reducing restrictions in accordance with provisions of statutory regulations. Industrial property rights, namely industrial property rights which include, among others, patents, industrial designs, trademarks, overcoming repression of unfair competition, governance design. location of the integrated circuit (layout design of integrated circuit), trade secret (trade secret).

IPR is basically an asset that has economic value and can be classified as a company asset in the intangible asset category. The results of the 13th session of the United Nations Commission on International Trade Law (UNCITRAL) in 2008 stated that IPR would be used as collateral to obtain international banking credit.

The government has issued PP Number 24 of 2022 concerning the Implementation of the Creative Economy Law. In Article 9 of the Government Regulation, it is stated that "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 in the form of fiduciary guarantees for Intellectual Property, contracts in Creative Economy activities and/or collection rights in Creative Economy activities.

"Furthermore, in Article 10 it is stated that Intellectual Property which can be used as an object of debt collateral is in the form of Intellectual Property which has been recorded or registered with the ministry which carries out government affairs in the field of law and Intellectual Property which has been managed either independently and/or the rights have been transferred to a party. other."

According to Law no. 28 of 2014 concerning Copyright (Copyright Law) especially in Article 16 paragraph (3) of the Copyright Law which states explicitly that "copyright can be used as an object of fiduciary guarantee." Article 108 paragraph (1) of Law Number 13 of 2016 concerning Patents (Patent Law) states that "the right to a patent can be used as an object of fiduciary guarantee".

Discussion of IPR as collateral for credit or loans to banks has started to emerge again since the Government issued Government Regulation (PP) Number 24 of 2022 concerning the Implementation of the Creative Economy Law. This is to encourage the Creative Economy to grow further because based on 2020 Tourism Industry and Creative Economy Statistics data, the creative economy is one of the sectors that will become a pillar of the Indonesian economy in the future.

IPR is a right and therefore includes objects. This can be seen in Article 499 of the Civil Code which states that objects are all goods and rights that can be the object of property rights. The goods to show tangible objects, while the right to show intangible objects. Thus, IPR includes intangible movable objects. IPR can be used to attract external financing from banks[11].

The collateral institutions that allow for movable objects are pawning and fiduciary guarantees. For IPR, it is more appropriate to use Fiduciary Guarantee because of the properties of IPR and Fiduciary Guarantee. In addition, the regulations governing IPR as an object of collateral also state that IPR can be an object of fiduciary collateral.

The process of creating fiduciary guarantees has 2 stages, namely the imposition of Fiduciary guarantees (with a notarial deed-AJF) and then the Fiduciary Guarantee Registration. The registration of this fiduciary guarantee means that the Fiduciary Guarantee fulfills the principle of publicity, so that it can be known by the public, thus providing more legal protection to the parties.

In its implementation, IPR as a collateral object is still not widely used. One of the Intellectual Property Rights that is still rarely used as collateral is copyright. Copyright Although it has considerable economic value, it is

a non-traditional intangible asset that is difficult to use as collateral for financial loans[12]. This is because using IPR as collateral still has various challenges and obstacles faced, including appraisal which estimates the value of the collateral, the economic value is easy to change, and execution in the event of a debtor defaulting. Based on these things, there is a need for further study and discussion regarding the implementation of IPR as collateral in obtaining credit in the financial services sector.

CONCLUSION

1. Intellectual Property Rights are intangible movable objects (intangible assets). Therefore, Intellectual Property Rights can be the object of IPR as an object of material security has been regulated in statutory regulations, but detailed implementing regulations do not yet exist.
2. The imposition of IPR as a collateral object is still not widely used due to several obstacles, including appraisal which estimates the value of the collateral, the economic value is easy to change, and execution in the event of a debtor defaulting.

REFERENCE

1. I. Fahmi, "Manajemen Keuangan Perusahaan dan Pasar Modal," *Jamal Wiwoho, Peran LKB dan LKBB*, vol. 43, no. 1, pp. 87–97, 2014.
2. E. Saputra, S. Resmi, Hari Nurweni, and Tri Utomo Prasetyo, "Do Character, Capacity, Capital, Collateral, and Conditions As Affect on Bad Loans," *J. Account. Financ. Manag.*, vol. 1, no. 2, pp. 100–110, 2020, doi: 10.38035/jafm.v1i1.17.
3. G. Fan and V. Yao, "Housing Property Rights , Collateral , and Entrepreneurship : Evidence from China * Property Rights , Collateral , and Entrepreneurship : Evidence from China," *J. Bank. Financ.*, p. 106588, 2017, doi: 10.1016/j.jbankfin.2022.106588.
4. A. Rona-Tas and A. Guseva, "Information and consumer credit in Central and Eastern Europe," *J. Comp. Econ.*, vol. 41, no. 2, pp. 420–435, 2013, doi: 10.1016/j.jce.2013.03.012.
5. J. Zeng, X. Wang, and M. Xiao, "The impact of government property right law on collateral loans: A quasi-natural experiment based on the enactment of Chinese property law," *Int. Rev. Econ. Financ.*, vol. 63, no. January, pp. 273–283, 2019, doi: 10.1016/j.iref.2019.01.007.
6. Siti Malikhatun Badriyah, Mahmudah, Dyah Listyarini, and A. Suliantoro, "International Journal of Multidisciplinary Research and Studies," *Int. J. Multidiscip. Res. Stud.*, vol. 04, no. 12, pp. 102–107, 2021, doi: 10.33826/ijmras/v04i12.1.
7. S. M. Badriyah, *Sistem Penemuan Hukum dalam Masyarakat Prismatic*. Jakarta: sinar grafika, 2016.
8. C. W. Calomiris, M. Larrain, J. Liberti, and J. Sturgess, "How collateral laws shape lending and sectoral activity," *J. financ. econ.*, vol. 123, no. 1, pp. 163–188, 2017, doi: 10.1016/j.jfineco.2016.09.005.
9. siti malikhatun Badriyah, "Dilemma's Use of Leasing Agreement Object as Fiduciary Guarantee Object," 2016.
10. Intellectual Property Organization (WIPO), *What is Intellectual Property?* WIPO Publication No. 450E/20, 2020.
11. P. Torino, "Master degree course in Management Engineering Master Degree Thesis Patent as collateral An empirical analysis on security agreements and patent value Academic Year 2015-2016," 2018.
12. J. Denoncourt, "Secured Transactions in Intellectual Property: Software As Collateral," *Denning Law J.*, vol. 20, no. 1, pp. 249–252, 2012, doi: 10.5750/dlj.v20i1.336.