



RESEARCH ARTICLE

LEGAL PROTECTION FOR BANK AS THE CREDITOR OF INTELLECTUAL PROPERTY AS FIDUCIAL GUARANTEE

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ARTICLE INFO

Article History:

Received 18th February, 2025
Received in revised form
20th March, 2025
Accepted 11th April, 2025
Published online 28th May, 2025

Key words:

Bank; Intellectual Property; Fiducial Guarantee.

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ABSTRACT

This study examines the legal protection afforded to banks as creditors when intellectual property, such as writings or artworks, is used as fiducial guarantee for debt repayment. Employing a normative approach and library research, this research analyzes the bank's role as creditor within Fiducial Guarantee using Intellectual Property. The findings highlight the limitations of the bank's role in utilizing intellectual property as guarantee, and provide insights into the legal protections available to banks in such transactions. This research contributes to the understanding of the intersection of intellectual property law and banking regulations, with implications for banks, creditors, and debtors. This research gave birth of two conclusions, which are highlighting the legal mechanism in dealing Debtor defaulting on the payment of his credit debt repayment obligations, the Bank sees two things, namely; (a) a cooperative and voluntary attitude that allows for the implementation of parate execution without court intervention, and (b) the Debtor's uncooperative attitude which requires the Creditor to take legal action through the District Court in order to obtain a permanent condemnatoir decision for the implementation of execution.

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Citation: Ni Made Krisna Desy Laksmi and Made Subawa. 2025. "Legal protection for bank as the creditor of intellectual property as fiducial guarantee". International Journal of Current Research, 17, (05), 32712-32716.

INTRODUCTION

The existence of the Bank has a crucial role and function to increase equality, economic growth and stability of the Republic of Indonesia (Johannes Ibrahim Kosasih, 2021). Its main activity is as a collector of public funds in the form of current accounts, savings, and deposits. In addition, it also distributes funds in the form of credit to the community. Credit distribution as a real sector activity whose source of funds comes from Third Party Funds has its own risk side (Soetanto Hadinoto, 2013). The risk borne by the Bank is because the Third Party Funds stored must be returned to its customers at any time when needed along with interest. The Bank's risk occurs because the Debtor as the credit recipient is unable to fulfill his obligation to repay the funds that have been lent on time and in the right amount according to the agreement (Astariza Dian Maya Sari, 2005). Therefore, the Bank is required to maintain a healthy condition of its cash flow so that it remains solvent, liquid and profitable (Ifa Latifa Fitriani, 2017). The development that is always rapid and faced with the complexity of the community's needs, makes the Indonesian Government responsive to this. As one example, the development of Intellectual Property can be used as collateral for bank credit debt. A phenomenon like this must be accompanied by adjustments to regulations and policies that

are combined with looking at economic conditions, it is hoped that it can provide flexibility to the community. This form of flexibility is realized by the Indonesian Government through the Bank financing institution in providing credit based on Sharia Principles. It should be remembered that before providing credit whose funds come from a Third Party, the Bank must pay attention to the principles of credit including Sharia Principles as a preventive measure. Sharia Principles are regulated within Article 8 verse (1) *Undang-Undang Nomor 10 Tahun 1998 Tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 Tentang Perbankan* simply called *UU Perbankan*, explains that in providing credit, the Bank must have confidence based on a thorough analysis of the Debtor's good faith, ability and capability in order to repay the credit as previously promised. In addition to the Sharia Principles, the Bank carries out a thorough assessment based on the elements in The Five C's Principle. The topic in this writing focuses on one element of The Five C's Principle, namely collateral, which is an additional guarantee given by the Debtor to the Bank as Creditor based on the Fiduciary Guarantee Agreement Deed. In the realm of Indonesian Guarantee Law, it is categorized into two types, namely general guarantees and special guarantees. General Guarantees are contained in Article 1131 *KUHPerdata* words, "*segala kebendaan si berutang, baik yang bergerak maupun yang baru akan ada dikemudian hari menjadi tanggungan untuk segala perikatannya*

perseorangan". However, R. Subekti, a renowned law expert, says, "*jaminan umum ini sering kali disarankan kurang cukup dan kurang aman karena selain kekayaan si berutang pada suatu waktu akan habis juga jaminan secara umum itu berlaku untuk semua Kreditur sehingga ada kemungkinan beberapa orang dari mereka tidak mendapatkan bagian*". Therefore, in order to legally secure, the Bank should positioned themselves as the Secured Creditor.

Recognizing the responsibility of the Creditor within safekeeping the Third Party's Fund to remain secured, the Bank asked for significant guarantee. J. Satrio, a renowned lawyer, explained, "*hak jaminan khusus pada dasarnya serupa dengan jaminan umum, di mana Debitur memberikan jaminan bahwa setiap kewajiban akan dipenuhi, namun hal ini memberikan posisi yang lebih menguntungkan bagi lembaga pembiayaan Bank sebagai Kreditur Preferen dalam proses penagihan, dibandingkan dengan Kreditur Konkuren*". According to the law experts, both Preferred and Secured Creditor are having positions that are prioritized. However, practically the Bank as Secured Creditor receive rights over Guarantee's objects according to Fiducial credit agreement. For the next part, when the Debtor experienced defaulting within the credit's responsibility, therefore the Bank could execute Fiducial Guarantee's objects faster in order to secure Third Party's Fund source.

Legal perspective related to the provision of credit, without any guarantee is not possible considering the high risk that arises. Guarantee and collateral are terms that can be exchanged but have different concepts between the two. As explained above, general guarantees in Article 1131 *KUH Perdata* which is also known as main guarantee within Credit Agreement. Meanwhile, collateral grew within banking business are assets of Debtor as additional guarantee. Definition of additional guarantee are included within Article 1 number 23 *UU Perbankan* that can be both movable or immovable objects and is *accessoir* from Credit Agreement.

Responding to the needs of the community to increase their efforts in the creative economy sector, the Government supports this by compiling *Peraturan Pemerintah Nomor 24 Tahun 2022 Tentang Peraturan Pelaksana Undang-Undang Nomor 24 Tahun 2019 Tentang Ekonomi Kreatif* which subsequently called as PP 24/2022, Article 1 number 4 sounded, "*skema pembiayaan berbasis kekayaan intelektual adalah skema pembiayaan yang menjadikan Kekayaan Intelektual sebagai objek jaminan utang bagi lembaga keuangan atau lembaga keuangan non-bank agar dapat memberikan pembiayaan kepada Pelaku Ekonomi Kreatif*". It appears that Intellectual Property which is classified as an intangible movable object can be used as collateral for bank debt. PP 24/2022 doesn't specifically regulates the types of Intellectual Property used as the object of the guarantee, but the type of cinematography copyright is the main focus in this writing.

Through various types of intellectual property, only Copyright and Patent Rights are explicitly regulated as objects of Fiduciary Guarantee in debt agreements. This explanation is in line with PP 24/2022 which discusses intellectual property in general. However, the specific emphasis on Copyright are regulated within *Undang-Undang Hak Cipta Nomor 28 Tahun 2014* which provides an explanation regarding its use as an object for Fiducial Guarantee. Seeing the continuity of

intellectual property regulations as an object of Fiducial Guarantee, the Bank continues to consider the secured and marketable factors. The secured factor means that the object used as collateral or Fiducial Guarantee can be perfectly bound in accordance with applicable laws and regulations. Marketable, means that with the acceptance of the collateral object, the Bank can later execute and/or transfer it when the Debtor defaults.

PP 24/2022 contains procedures that implicitly function as legal protection mechanisms for banks as recipients of credit guarantees. One of the methods of protection is stated in Article 8 which states "*verifikasi surat pencatatan atau sertifikat kekayaan intelektual yang dijadikan agunan yang dapat dieksekusi jika terjadi sengketa atau non-sengketa*". Therefore, Intellectual Property which is used as collateral must be registered first in order to obtain a certificate that allows the collateral to be executed, including in the event of a dispute between the Bank and the Debtor. Through this provision, it can be concluded that Copyright as a form of intellectual property can be used as an object of collateral in a Fiduciary Guarantee Deed must be registered with a fiduciary institution and can be executed or transferred because it has economic value. The matter of the transfer is also regulated in Article 16 paragraph (2) *Undang-Undang Hak Cipta* that "*hak ekonomi atas hak cipta dapat dialihkan, baik seluruhnya maupun sebagian karena 'sebab lain yang dibenarkan sesuai dengan ketentuan peraturan perundang-undangan'*".

MATERIALS AND METHOD

The type of approach used to find solutions to legal problems in this research is a normative approach consisting of a legislative approach and a conceptual approach (Bambang Sunggono, 2007). The legislative approach is used to determine the form of legal protection for banks, while the conceptual approach is used as a basis for examining and reviewing various concepts regarding the form of legal protection for banks for fiduciary guarantees whose object is intellectual property (Arliman, S.L., 2018).

Both approaches significant in forming policy within the absence of norms on the execution of Fiduciary Guarantees where the objects are intellectual property as a measurement for Bank protection. Three sources of legal materials are required, namely primary, secondary and tertiary through the collection of appropriate legal data (Peter Mahmud Marzuki, 2009).

RESULTS

Normative Regulations: Normatively, protection for the Bank as a credit provider to Debtors is regulated in Article 1131 and Article 1132 *Kitab Undang-Undang Hukum Perdata*. Both articles state that all objects, both movable and immovable, become collateral for individual obligations. Based on this provision, collateral is classified as general collateral originating from the law. In this case, the Creditor has a position over the right to credit repayment in a balanced (proportional) manner and is not prioritized, so that it only has a position as a concurrent Creditor (Anthonius Adhi Soedibyo, 2023). The Banks can obtain their position as Separatist Creditors, they must have an obligation in the form of a Fiduciary Guarantee Deed made before a Notary and the right

to execute the object of the guarantee before it is allocated to other Creditors. This right is regulated in Article 27 paragraph (1) *Undang-Undang Jaminan Fidusia*, which states that "*penerima Fidusia memiliki Hak yang didahulukan terhadap Kreditor lainnya*". According to legal expert J. Satrio, Article 1134 of the Civil Code states that the special rights granted by law arise automatically from the debt agreement and have an accessory nature (not standing alone). Therefore, Fiduciary Guarantee must be preceded by a principal agreement, which is usually stated in a Credit Agreement Deed (Supianto, S., Rumawi, R., and Budiman, N. T., 2024).

In the context of providing credit by the Bank, collateral as one of the elements of The Five C's Principle in the form of intellectual property, is assessed in accordance with PP 24/2022, through; (a) cost approach, (b) market approach, (c) income approach, and/or (d) other assessment approaches in accordance with applicable assessment standards (Hamonangan, 2020). The cost approach is a method of valuing intellectual property from the amount of production costs incurred to create a Copyright work. Cinematography is very complex in its production, from pre-production programs in the form of story preparation to determining the people who will join a crew. Until the final stage of production which is marked by the screening of the Film or cinematography. Estimates using the cost approach method have limitations in only analyzing economic value, stopping at the amount of production costs. The market approach is used to analyze the value of Copyright compared to the recent sale of similar intangible movable assets in the market. The conversion of the economic value of a film or cinematography work from the number of screenings compared to other similar cinematography works. However, film or cinematography works are not yet effective when used to assess film or cinematography works that are in the process of being made. Furthermore, there is an income approach method as a determination of the economic value of film or cinematography works in the future that will be generated from a film screening.

After the Bank has finally analyzed the intellectual property that will be used as collateral, a binding is carried out which is stated through the preparation of a Fiduciary Guarantee Deed before a Notary. The preparation of this deed is important to include the Debtor's default clause (Tirtawati, N. W, 2016). So, later when a default occurs, the determination of the point where the Debtor's default occurs has been agreed upon in a Deed that has perfect evidentiary power. Before the next step after the default condition, the Bank looks at the Debtor's good faith. This good faith is reviewed from the Debtor's willingness to complete his debt obligations to the Bank as the Creditor by handing over the Fiduciary Guarantee object to the Creditor to be executed immediately voluntarily. The manifestation of this voluntary nature is based on the Debtor's acknowledgment that there is indeed a default against him. The Debtor's default condition is determined from several things, namely; (a) when the obligation to pay the principal and/or interest is not carried out on time and in the correct amount, (b) when the obligation to pay the principal and/or interest is carried out on time, but not in the correct amount, and (c) when the obligation to pay the principal and/or interest is not carried out on time but in the correct amount (Lubis, M. A., dan Harahap, M. Y, 2023). The legal basis is not limited only to the Fiduciary Guarantee Law but after the issue of *Putusan Mahkamah Konstitusi Nomor 2/PUU-XIX/2021* existence of emphasis and affirmation

regarding the execution of the Fiduciary Guarantee object can be submitted to the District Court as an alternative. The alternative referred to here is the option if the default agreement is not reached and there is no voluntary surrender of the Fiduciary Guarantee object by the Debtor, then the execution option cannot be carried out by the Creditor himself, but ask for assistance from the District Court to carry out the execution. Through this Constitutional Court we understand that this affirmation is not intended to eliminate the character of the Fiduciary Guarantee in granting property rights to the Fiduciary recipient. Therefore, the Fiduciary recipient can still carry out the execution parate against the object that is the Fiduciary Guarantee whose legal ownership is his. This point is what is called that the Fiduciary recipient as a Creditor has exclusive authority over the execution parate with the conditions; (a) there is an agreement between the Debtor and the Creditor regarding the default, and (b) the Debtor voluntarily surrenders the object that is used as the Fiduciary Guarantee to the Creditor to be sold by himself. Both conditions indicate that the Debtor has realized and admitted that he has defaulted so that there is no longer any reason not to hand over the Fiduciary Guarantee object to the Creditor (Otoritas Jasa Keuangan, 2022). Intellectual property of the Copyright type has a fairly long protection period. In addition, it has an economic value that has the potential to increase. Copyright is an intangible asset Form of Bank Legal Protection and a simple execution mechanism Intellectual Property used as a fiduciary guarantee. Banks as credit providers to their customers will prioritize credit principles and principles. Based on *UU Perbankan*, Banks must consider additional collateral as a guarantee of repayment when the Debtor defaults.

Through the explanation above, at least the Notary includes 7 (seven) points in terms of compiling a default clause in the Credit Agreement Deed. The Notary should include it clearly and explicitly. The goal is for both parties to understand and truly understand the contents of the Deed that has been read before signing as a form of binding. The default clause that has been determined in the Deed will make it easier for both parties in the future when the Debtor himself fails to pay. Furthermore, Article 38 of POJK Number 35/2018 describes the Creditor's obligations in terms of providing an explanation of the illustration of the calculation of the principal receivables and interest during the financing period. In addition, it is also mandatory to provide an illustration of the imposition of fines and execution costs for objects used as collateral in the form of Fiduciary Guarantees in the event that the Debtor defaults (Peter Mahmud Marzuki, 2009).

Regulations of Rights and Responsibility: Creditors are technically required to issue a warning letter as a warning to immediately make payments after learning that the Debtor has neglected to fulfill his/her obligations. The regulation regarding this warning letter is also regulated in Article 47 paragraph (2) of *Peraturan Otoritas Jasa Keuangan* Number 35/2018, as the Creditor must specifically provide the contents of the material containing; (a) the number of days late in payment of obligations; (b) outstanding principal owed; (c) interest owed; (d) fines owed. The legal basis for the warning letter is contained in Article 1238 of the *KUHPerdata*, which states that "The Debtor is declared negligent by a letter of order, or by a similar Deed or based on the power of the obligation itself, namely if this obligation results in the Debtor being deemed negligent by the expiration of the specified time". The issuance of a warning letter to the Debtor is not

merely an introduction to filing a lawsuit but the Creditor still provides room for negotiation so that it is resolved with a good solution between the Creditor and the Debtor (Bernadetha Aurelia Oktavia, 2025).

Analyzation Over Empirical Facts: Compliance between the assessment criteria regulated and determined by OJK Number 40 of 2019 Article 12 paragraph (3) Banks assess the quality of Debtors by their ability to pay credit debts, namely; "a) smooth, (b) under special attention, (c) less smooth, (d) doubtful or (e) stuck" compared to the condition of the Debtor in default according to the following explanation of the level of Debtor compliance with the Credit Agreement as assessed by the Creditor in their ability to pay repayment;

Smoothness Criteria: The Debtor has the potential for progressive growth in its business activities so that it obtains high and stable profits. That way, the debtor has a source of payment that is in accordance with the loan structure and is able to pay off credit debts on time and in this case there is no problem.

Under Special Attention: The Debtor's business development is limited so that the profit is not maximized and tends to decrease. There are arrears in principal and/or interest payments of up to 90 (ninety) days. Thus, the source of payment is not or is less in accordance with the loan structure.

Less Smooth: The potential of the Debtor's business activities shows limited growth or even tends not to grow which causes low profit. There are arrears in principal and/or interest payments of more than 90 (ninety) days up to 120 (one hundred and twenty) days

Doubtful: The condition of the Debtor's business activities has declined so that the profit is very small and even tends to be negative. There are arrears in principal and/or interest payments exceeding 120 (one hundred and twenty) days to 180 (one hundred and eighty) days

Stuck: The Debtor's business continuity is very doubtful and difficult to recover, resulting in significant losses that cause the Debtor to no longer be able to fulfill all of its obligations. There are principal and/or interest arrears exceeding 180 (one hundred and eighty) days. If this happens, the Debtor's relationship with the Bank will deteriorate and there will be no more trust. Losing business activities mean that the Debtor has no possible source of payment (Otoritas Jasa Keuangan, 2018).

When we analyzed, 5 (five) types of credit quality criteria that the Debtor undergoes are used by the Bank as a determinant of legal steps before going to the litigation process. The warning letter given to the Debtor can be issued when the condition is "under special attention" because there are already arrears in principal and/or interest payments. This is in accordance with one of the elements of default conveyed in the previous discussion by Subekti "The Debtor does what has been promised but the time is later than what has been agreed upon with the Creditor". Departing from this one point alone, it can be determined that the Debtor has clearly neglected to carry out an obligation. A warning letter is generally sent 3 (three) times starting from the due date of the Debtor's principal and/or interest payment. The due date of the payment has been stated in the Credit Agreement and Fiduciary Guarantee Agreement. Far from that, in fact a warning letter can be sent

by the Creditor when the Debtor has made a payment but the amount does not match. However, if after 3 (three) summons have been sent but the Debtor still refuses to perform according to the agreement, the Creditor can immediately proceed to litigation. The Bank will apply to the District Court to obtain a *condemnatoir* and *inkracht* decision for the implementation of execution with coercive efforts against the Debtor. Then, it will proceed to the public auction stage at the Auction Official for the Fiduciary Guarantee object in the form of intellectual property of cinematographic works..

CONCLUSION

According to the analysis within this research, it can be concluded that intellectual property, especially cinematography which is categorized as an intellectual property, can be made as Fiducial Guarantee. Therefore, the Bank as the receiver could exhibit the Five C's Principle and other significant valuation methods. Aside from that, the Bank should applied the Fiducial Guarantee Deeds made in front of Notary in order to fulfill themselves as Secured Creditor. These three things are implemented as a form of legal protection for the Banks that are at risk of credit risk. Furthermore, after the Bank receives the Fiduciary Guarantee object, it will be easier to carry out execution amidst the credit journey when the Debtor is out of agreement. Highlighting the legal mechanism in dealing Debtor defaulting on the payment of his credit debt repayment obligations, the Bank sees two things, namely; (a) a cooperative and voluntary attitude that allows for the implementation of *parate* execution without court intervention, and (b) the Debtor's uncooperative attitude which requires the Creditor to take legal action through the District Court in order to obtain a permanent *condemnatoir* decision for the implementation of execution.

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