

## Optimizing Intellectual Property as a Fiduciary Security Object After the Issuance of Governmental Regulation No. 24 of 2022

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### Abstract

The issuance of Governmental Regulation no. 24 of 2022 on the Executory Regulation of Law no. 24 of 2019 on Creative Economy has become a zephyr for creative economy actors with regard to intellectual property-collateralized financing schemes for their businesses. The regulation also further reinforces intellectual property ownership as a standalone fiduciary object that should no longer be viewed as supplementary collateral. This paper aims to study the optimization of governmental regulation on the creative economy with respect to intellectual property-collateralized financing. To this end, a normative legal method was applied by focusing on the secondary data. The research topic was scrutinized following the prevailing regulation and relevant literature. With the issuance of Governmental Regulation no. 24 of 2022 Creative Economy, it further strengthens the ownership status of intellectual property rights as objects of material guarantees. Every citizen, especially creative economy actors, can apply for business

capital loans, which can be used as collateral objects and can be classified in the form of intellectual property which must be registered or registered with the Director General of Intellectual Property, Ministry of Law and Human Rights. This consequence has an impact on the establishment of an intellectual property appraisal institution that has the task of evaluating intellectual property that will be used as collateral.

## Keywords

*Creative Economy, Intellectual Property, Fiduciary Security*

## I. Introduction

In 2015, Creative Economy Agency announced the Indonesian government's policy direction and strategy in the creative economy sector. The policy aims to provide facilities for actors in entire creative value chains, starting from the creation process, production, distribution, consumption, and conservation. The government issued policy directions and strategies in the industrial, tourism, and MSME sectors as a form of economic recovery with support in various fields, one of which is through increasing people's purchasing power, bolstering businesses, and diversifying the economy for MSME players in 2021 to support the acceleration of economic recovery in Indonesia after the outbreak of Covid-19 in 2020 that caused all sectors of the country's economy to weaken. (Supartoyo, 2022)

Presidential Regulation no. 72 of 2015 on the Amendment of Presidential Regulation no. 6 of 2015 on Creative

Economy Agency has set sixteen subsectors of the creative economy: Application and game developer, interior design and architecture; visual communication design; product design; fashion; movies, animations, and videos; photography; craft; culinary; music; publication; advertisement; performance art; visual art; television and radio. Basically, venture in The creative economy sector is a business that operates by relying on the creativity and innovation of its entrepreneurs. (Sutra Disemadi & Kang, 2021) Creative Economy Agency is expected to help the president formulate and set regulations regarding the creative economy, which could be seen as the representation of the value-added of Intellectual property stemming from human culture, science, and technology.

Creative economy has become the most significant contributor to the country's gross domestic product. This sector accounts for 7.44% of the country's GDP, providing twelve million employment and contribute to the country's foreign exchange by 5.80%. This contribution is predicted to grow as expected for the next five years. (Putri & Wahyuningsih, 2021) From 2015 to 2018, MSMEs made up 61.07% more of the national GDP (gross domestic product) than large firms, which made up 38.93% of the GDP. This demonstrates that MSMEs account for a greater share of business than major corporations. (Sumampouw et al., 2021) Bank Indonesia's mapping analysis result, in collaboration with the World Bank, showed that Indonesia's creative economy sector is dominated by the creative industry, particularly fashion, food, and craft. (Dwi et al., n.d.) Currently, the country's creative economy appears to be dominated by technology-related creativity.

Indonesia offers a relatively high market share for the

creative economy. We Are Social showed that Indonesia has 202.6 active internet users, or 73.7% of the country's total population, and most (98.5%) actively watch videos online. There are approximately 8.2 creative businesses in Indonesia, most of which are hotel, fashion, and craft. Rapid growth is noticed in four creative economy subsectors: Movies, animation, performance art, and visual communication design. This rapid growth is further accelerated by the country's digital technology development. Ministry of Tourism and Creative Economy reported that, in 2019, the creative economy contributed to the country's GDP by Rp. 1,153.4 trillion (7.3% of the national GDP), 15.2% employment and 11.9% export. (Haryo Limanseto, 2022)

Despite its contribution, most creative economy actors face hindrances related to financing in order to develop their business. Small and medium-scale enterprises in creative economy sector often find it difficult to obtain access to financing, as bank and non-bank institution requires an asset collateral to ensure smooth payment, which is difficult to fulfill by most MSMEs.

The government issues Law no. 24 of 2019 on Creative economy (Hereafter Creative Economy Law) and The Governmental Regulation no. 24 of 2022 on Creative Economy (Hereafter, GR 24/2022) to optimize people's creative economy in a systematic, structured, and sustainable manner and eventually support the national development, particularly regarding creative business financing. One of the focuses of these two regulations is to facilitate access to financing for creative economy actors through intellectual property (IP) management. There are five urgencies addressed by GR 24/2022:

1. To execute the mandate from Law no. 24/2019 on Creative Economy
2. To develop creative economy sector as the national economic foothold
3. To enhance the value-added of intellectual property
4. To stimulate the creative economy sector, and
5. To accelerate post-Covid-19 pandemic national economic recovery

GR 24/2022 facilitates intellectual property-collateralized financing scheme through bank and non-bank institutions for creative economy actors, which could be implemented by utilizing economically valuable IP certificate and IP appraisals. The regulation facilitates application or registration of IP according to the prevailing law and regulations and optimize the use of IP as a collateral.

Intellectual property refers to a right that emerges from human intellectual ability and creativity in the fields of technology, science, art, and literature. The development of IP nowadays is not limited to the state's recognition of IP ownership, as it begins to turn into a right that brings economic value for its owners. In short, intellectual property right deals with one's right to economically enjoy the result of his or her intellectual product. GR 24/2022 stipulates that one's IP could be used as the primary collateral.

The 13th session of United Nation Commission on International Trade Law in 2008 had agreed that the intellectual property right (IPR) could be used as a collateral to obtain loan from a bank.(Palupi et al., 2017) This agreement is grounded in the fact that many countries worldwide have used IPR as collateral in the financial institution. This becomes a zephyr for

the business community. The most appropriate type of security for IPR appears to be fiduciary security.

Article 1 number 1 of Law no. 42 of 1999 on Fiduciary, fiduciary refers to the transfer of ownership of an object on trust with the provision that transferred ownership of the object remains in the control of the owner of the object. Fiduciary security itself is defined as an encumbrance right over a movable and immovable object, both tangible and intangible, especially a building that is not entitled to the encumbrance right as stipulated in the Law on Encumbrance Right.

Article 503 of the Indonesian civil code categorized assets into tangible and intangible ones. IPR is categorized as an intangible asset, while tangible assets refer to any object visible or perceivable by human senses. Law no. 28 of 2014 on Copyright categorizes IPR as an intangible object. Thus, it is safe to state that IPR is an asset that could be attached to a security.

In order to implement the stipulation of Article 16 paragraph (2) of the Creative Economy Law, develop the creative economy infrastructure, and provide incentives for creative economy actors, it is necessary to optimize the value of the intellectual property as a significantly beneficial foundation for the creative economy and develop an IPR-collateralized financing scheme and marketing system.

However, some challenges arise with respect to the development of IPR ecosystem:

1. Highly competitive IPR development causes difficulty for MSMEs to penetrate the market competition;
2. From financial stability perspectives, IPR is currently deemed ineffective and high-risk.
3. Currently small portion of investment in intangible objects,

and

#### 4. High dependence of IPR development on innovation.

Prior to the issuance of the Creative Economy Law, one of the major issues faced by creative economy actors lies in the difficult access to loans and the absence of institutions to appraise and verify the economic values of IPR certificate to be used as the collateral.

The issuance of the Creative Economy Law has strengthened the position of IPR certificate as an economically valuable asset, providing Creative economy actors with more facilities to access financing from bank and non-bank institutions. However, the implementation of this law also faces various hindrances, including the way to appraise the economic value of various IPRs with uncertain market values.

Departing from the phenomena described above, this study aims to analyze to optimization of Intellectual property as a fiduciary object for creative economy actors based on GR 24/2022 on the implementation of the Creative Economy Law.

## II. Method

Legal research is a scientific activity that is based upon a specific and systematic method and reasoning to explore a legal phenomenon. This study applied a normative legal approach by exploring secondary data. It analyzed the research problem based on the prevailing law and relevant literature. The secondary data in this study comprised primary, secondary, and tertiary legal materials.

### III. Result and Discussion

In order to achieve the goal of the republic of Indonesia, i.e., a just and prosperous community, the Indonesian government needs to optimize any resource it possesses, especially in the fields of economy, science, and technology. It could be done by various means, including optimizing the creative economy sector. The government categorizes the creative economy community into two types based on their roles: the creative actor and the intellectual property manager. This categorization particularly aims to:

1. Promote all aspects of creative economy in cultural, technology, creativity, and innovation sectors;
2. Enhance people's welfare by increasing the state's revenue;
3. Protect the economy actor's creative product;
4. Open new employment opportunities; and
5. Optimize creative economy actors' potentials.

Intellectual property right has become a trend in the community and is seen as an intangible asset with considerable economic and investment potentials, which is widely discussed in the financial sector. The presence of IPR in the creative economy is expected to support the national economy, which currently depends mostly on the government's incentives. According to A. Zen Ancient, the concept of exclusive rights to intellectual property to right holders is a reward for the remuneration and successes of creators, inventors, and designers' ingenuity, thought, and efforts. Intellectual Property Rights are the authority/power to do something with Intellectual Property that is governed by applicable legal standards. (Alfons, 2017)



According to Nico Kansil, incentives are given to stimulate creativity, in line with Robert M Sherwood who states that incentives are given to designers to support their activities and to protect intellectual property actors. (Sudjana, 2022) According to Bank Indonesia Regulation no. 15/PBI/2012, assets that could be used as a collateral include:

1. Securities and shares that are actively traded on a stock exchange in Indonesia or that have investment grade ratings and are bound as pledge;
2. lands, buildings, and residential property that are bound as mortgage
3. machines that constitute unified units with the lands that are bound as mortgage
4. airplanes or ships with a measurement of above 20 (twenty) cubic meters that are bound as mortgage;
5. motor vehicles and inventories that are bound in fiduciary agreement; and/or
6. warehouse receipts that are bound with warranty right on warehouse receipts.

Meanwhile, Bank Indonesia Regulation no. 17/12/PBI/2015 has obliged banks to provide incentives in the form of financing for MSMEs, which is still limited to tangible assets. To date, the financing facilities provided by the government for MSMEs include:

1. Interest Subsidy for KUR (Kredit Usaha Rakyat) program
2. Interest Subsidy for non-KUR program
3. Loan for MSMEs
4. Kredit Ultra Mikro (Ultra-micro credit program)
5. Hibah Banpres Produktif Usaha Mikro (President's grants)

for Productive Micro-scale enterprises)

These two Bank Indonesia Regulations indeed explain about the use of IPR certificate as a collateral. The issuance of GR 24/2022 facilitates IPR-collateralized financing schemes from bank or non-bank institutions for the creative economy, by which economically valuable, registered intellectual property following the prevailing law could be used as collateral.

Intellectual property results in two exclusive rights for the right holder: moral and economic rights. The former refers to an individual's right to have his/her name mentioned when his/her work is used by another party. It is attached to the IPR owners forever and prohibits another individual from changing their works. Meanwhile, the latter refers to an individual's right to obtain economic benefit from the use of his/her work. (Freddy Harris, 2020) According to Abdulkadir Muhammad, economic right is among an individual's IPR. It is termed economic right because IPR is an economically valuable object. (Setianingrum, 2017)

Intellectual property and its ownership right is one of the developing branches of knowledge following time and technological development. This development should be followed by the protection of the rights. Hence, the state needs to make a regulation to protect the IPR certificate owners. According to the Roman legal system, a creation or a work made using intellectual ability naturally creates a right of ownership for its creator. The Roman legal system recognizes a phrase "*suum cui que tribune*" that guarantee that any object obtained through intellectual ability exists under the right of the object maker. (Imanyanti, 2002)

Contract in a collateral law could not stand alone like

another contract, because it could only prevail after the primary contract. Contract on collateral is *accessoire* to a primary contract. This collateral contract is often in the loan agreement.

The *accessoir* nature of the contract may lead to the following legal consequences.(Rachmadi Usman, 2009)

1. The existence and termination of this contract is determined by the primary contract;
2. This contract is automatically annulled when the primary contract is terminated;
3. This contract is automatically transferred when the primary contract is transferred;
4. This contract is transferred without any special transfer when the primary contract is transferred due to cessie or subrogatie.
5. When the primary contract is annulled, the collateral contract is also annulled.

Intellectual property is an intangible asset, which is part of the property law. An intellectual property right is still abstract in nature and is different from tangible property rights, such as rights to land, vehicles, or properties. According to David I Brainbridge, Intellectual property is a right that emerges from a human's intellectual work and creativity, which is useful and valuable to economically support the right owner's life.(Dharmawan, 2016)

From the civil law perspectives, assets are divided into two categories: movable and immovable. Movable objects are further divided into two groups: tangible and intangible objects, and bring an absolute right over the object. The term *zaak* in the civil code refers not only to tangible object but also to the intangible ones.(Yulia, 2015) The law states that IPR is categorized as intangible object, and the right of ownership of this intangible

object could also be transferred due to inheritance, grant, will, and contract.

The effectiveness of a legal system could be seen by from its ability to achieve its goal.(Lawrence M. friedman, 2009) GR 24/2022 explain the IPR-collateralized financing schemes in bank and nonbank institution, in which the intellectual property could be used in several forms of collateral as follows:

1. Fiduciary;
2. Contract in creative economy activities; and
3. Debt collection rights.

There are three criteria for ensuring that an intellectual property has an economic value:

1. It could be encumbered with as fiduciary;
2. It has contract in creative economy activities; and
3. It has debt collection right in the creative economy activities.

Before the issuance of the Fiduciary law, assets that could be used as fiduciary objects were limited to movable objects, comprising trading stock and motor vehicle. The issuance of fiduciary law has removed this restriction, allowing any transferable assets, tangible or intangible, registered or unregistered, movable or immovable, to be used as collateral. Considering time development and the growing demands for financing, intellectual property rights may serve as an alternative collateral in a financing scheme, which could be encumbered as a fiduciary to bank or non-bank institutions.

The country's economy and development appears to be inseparable from IPR development, while creative economy actors need considerable capital to run their business, most of them tend to prefer to apply for loan. From a theoretical perspective, IPR could be used as collateral because it is

categorized as an economically valuable property right, which has also been accommodated by Law on Intellectual Property right. Even though currently there has been a breakthrough that should be appreciated, namely using intellectual property as collateral, banking regulations have not explicitly regulated the capacity of intellectual property to be used as collateral. The government in this case must be able to bridge the need for financing for economic growth by using intellectual property as collateral (Sulasno, 2018)

For an intellectual property right to be used as collateral, it should be registered in the directorate general of intellectual property of the Ministry of Law and human right and is owned by an individual or has been transferred to others, implying the absolute nature of IPR owners. This absolute nature emerges as an absolute right for the inventor to commercially enjoy her right for a certain period of time, and no one could use the right without consent or the court ruling related to the right.

Bank and nonbank institutions should be prudential in executing IPR-collateralized financing schemes. The applicant's intellectual property should be verified, and its certificate and related statement letter should also be confirmed, in addition to performing business and legal verification. One of the main issues faced by creative economy actors is the absence of intellectual property appraisal companies. The Indonesian Appraisers Code of Conduct and the Indonesian Appraisal Standard issued in 2018 define appraisal as an estimation and opinion of an object's economic value in a certain period based on the SPI and the prevailing law. An appraiser should use more than one approach to estimate the market and non-market values of an object. There are three approaches used in the appraisal process: Market, cost,

and revenue approaches, each of which comprises different methods and techniques. It should also be noted that the data availability and the object are important in determining suitable methods. Differences in results when using various methods could be used to estimate the final value of the object.(Fakhri Ali et al., 2021)

The profession of public appraiser is regulated in the regulation of Ministry of Finance of the Republic of Indonesia no. 101/PMK.01/2014 on Public Appraiser. The regulation defines an appraiser as a person who possess a competence to appraise and at least has graduated from the basic education of appraiser, while the public appraiser is an appraiser who has received permit from the Minister to provide a service as stipulated in the regulation. Article 4 of this regulation also stipulates the procedure and mechanism of the appraisal process done by the public appraisers as follow.(Setianingrum, 2017)

1. Identifying and understanding the task score;
2. Collecting, selecting, and analyzing data;
3. Applying appraisal approaches; and
4. Writing an appraisal report.

Article 12 of GR 24/2022 states that for an intellectual property to be used as a collateral, it should pass an appraisal stage conducted by an appraiser or a panel of appraisers using these approaches:

1. Cost approach
2. Market Approach
3. Revenue approach, and;
4. Other approach deed suitable with the prevailing appraisal standard.

According to Parr, intellectual property right is an activity to determine the monetary value of an intellectual property object. Intellectual property could also appraise to create a sustainable value-added. Different from Parr, Lopes argues that intellectual property appraisal aims to make an investment in intellectual property and express the investment internally and externally, and is a strategic decision to produce a sustainable value creation at the company level or at the macroeconomic level. It is important to use the main accounting standard to appraise an intangible object. Intellectual property appraisal is often done based on several reasons, such as transaction strategies, financial report, litigation, bankruptcy, financing, and tax purposes. Article 12 paragraph (3) of GR 24/2022 stipulates that an appraiser should meet the following criteria:

1. Having a public appraiser permit from the ministry administering the state's finance.
2. Having competence in the field of intellectual property appraisal
3. Being registered in a ministry administering the government's duty in the field of intellectual property.

These criteria have stipulated three state institutions, i.e., ministry of finance, ministry of tourism and creative economy, and ministry of law and human right. The duty of an intellectual property appraiser includes:

1. Appraising intellectual property to be used as a collateral;
2. Performing market analysis of the intellectual property to be used as a collateral, and/or
3. Evaluating the analysis report of intellectual property used in the industry.

With regard to the collateral appraisal, article 6 of

Fiduciary Law stipulated several requirements that should be stated in the fiduciary contract: the identity of the fiduciary grantor and beneficiaries, data on primary contract secured by fiduciary, description of the object, the security value, and the object value. This concept is a part of the due diligence to ensure the object and the ownership for intellectual property to be used as a collateral. The intellectual property valuation refers to a process of determining the monetary value of an intellectual property.(Palupi et al., 2017) There are at least two factors to consider when appraising the collateral:(Johannes Ibrahim, 2004)

1. Secured, meaning that the collateral could be legally bound, and in the case of debtor's default, the creditor could execute the collateral based on a strong legal basis.
2. Marketable, meaning that the collateral to be executed could be sold immediately and monetized to repay the deb.

Fiduciary object is a movable object, either tangible or intangible. However, a valuation of intellectual property right as a collateral is different from that of other assets. While the fiduciary objects can usually be appraised by the appraisal team directly by analyzing the object or the market price, a different approach should be used when it comes to intellectual property right due to its abstract asset value and uncertain market estimates, requiring the bank and nonbank institutions to be prudential to approve an IPR-collateralized loan.

On one hand, IPR-collateralized loan is provided as an incentive for creative economy actor. On the other hand, this inventive may create several problems, including different appraisal among IPR appraiser institutions and among credit appraisers in financial institutions. Therefore, the prudential



banking principle should be optimally implemented to manage the potential risks. Every loan given by a bank institution comes with risks. Therefore, bank should strictly adhere to a sound credit principles:(Djuhamma, 2000)

1. A bank is prohibited to give loan without a written contract
2. A bank is prohibited to give loan to a business considered unhealthy and potentially cause losses.
3. A bank is prohibited to give loan for buying shares
4. A bank is prohibited to give loan that exceeds maximum valuation.

Due to these principles, banking institutions will prioritize a contract with a guaranteed collateral and not rely on trust or belief in the debtor's ability. By securing a collateral, creditors could protect themselves from debtor's default by executing the collateral.(Etty et al., 2018)

Collateral contract is usually made by creditor and debtor to provide security and legal certainty related to the debt repayment to the creditor and to help debtors find financing more easily. As mentioned previously,a financial institution is obliged to apply prudential principle because the bank's fund comes from many sources, including the community's fund.

In other words, every analysis should be done thoroughly and accurately following the prevailing regulation and law from any aspect so that the distributed credit could be repaid on time according to the contract.

Bank and non-bank institutions are considered healthy only when they could perform their function according to the prevailing law.A financial institution is obliged to protect and maintain pubic trust, perform the intermediary function, help streamlining the payment traffic, and support the

implementation government's monetary policies. A bank should implement prudential banking principle in managing funds.(Sobana, 2016)

Lending money equals to giving trust to debtors despite high risks. Loan contains some elements, including: (Etty et al., 2018)

1. Trust, representing a belief that the loan will be repaid according to the contract.
2. Period, referring to time between the giving of the credit and the repayment, implying that the money value distributed during the giving of the credit is higher than the money value to be received during the repayment.
3. Degree of Risk, referring to the level of risk faced during the loan period, the longer the period, the higher the risks.
4. Performance, referring to the performance in the forms of goods, services, or money. In the modern era, performance in loan often refers to money.

Since the issuance of GR 24/2022, intellectual property has turned into a fiduciary and not merely a supplemental security. In practice, when creditors are unsure about the collateral given by the debtor, they usually asked for another collateral, and IPR still serves as an alternative collateral until the issuance of GR 24/2022. This governmental regulation allows IPR to serve as the main collateral that could be standalone without another asset, thus facilitating creative economy actors to apply for loans. However, this regulation appears to burden the creditor, either bank or non-bank institution, because IPR's value is difficult to appraise, potentially contradicting the implementation of sound credit principles.

In order to warrant legal certainty in the case of a debtor's

default, the collateral should be economically valuable, easily executed and sold at any time. The value of the collateral should also be higher than the loan. The issuance of GR 24/2022 should be able to fill the legal gap related to the certainty of IPR-collateralized loans.

Law is used as a guideline and hence must provide legal certainty. Legal certainty refers to clarity about certain norms, which could be used as a guideline by the community. It represents the firmness of law enforcement in the community, without which the law will not be regarded as a behavioral guideline by the community.(Tony et al., 2016)

## IV. Conclusion

The issuance of GR 24/2022 strengthens the status of IPR ownership as a collateral object. Creative economy actors in the country may apply for a business loan using IPR as a collateral. However, the IPR should be registered in the directorate general of intellectual property of the Ministry of Law and Human Rights, and owned by the applicant his/herself. Consequently, it is necessary to establish an IPR appraisal institution to value the IPR to be used as collateral, perform a market analysis of the IPR to be used as the collateral, and /or evaluate the analysis of the intellectual property used in the industry.

The intellectual property right has become a fiduciary and no longer serves as a supplemental security. This condition, however, has resulted in several problems because IPR value is difficult to appraise due to the absence of market price reference, leading to legal uncertainty to protect the creative economy actor from using their IPR as a fiduciary.

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### **Publishing Ethical and Originality Statement**

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