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The Notary's Function in Drafting Fiduciary Security Deeds Involving Patent Rights as Collateral

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ABSTRACT. Government Regulation Number 24 of 2022 on the Creative Economy outlines the implementation of the Intellectual Property-Based Financing Scheme, wherein both banks and non-banking financial institutions leverage Intellectual Property as collateral. This includes fiduciary guarantees over Intellectual Property, contracts within Creative Economy activities, and/or claims within Creative Economy activities. Notably, Patents, a subset of Intellectual Property, can serve as collateral per Article 108 paragraph (1) of Law Number 13 of 2016 concerning Patents, allowing "*patent rights to be used as objects of fiduciary guarantee*." The provision of funding through financial institutions, be they banks or non-banking entities, closely aligns with the collateralization aspect, involving the duties and responsibilities of Notaries. This raises inquiries into the Role of Notaries in Intellectual Property-Based Financing and the Collateralization of Patents as governed by Government Regulation Number 24 of 2022 on the Creative Economy. Employing a juridical-normative approach and incorporating interviews with relevant stakeholders involved in fiduciary guarantee deed preparation, this research aims to discern the roles and responsibilities of Notaries in drafting fiduciary guarantee deeds incorporating patents as collateral objects. Furthermore, the study seeks to establish the Mechanism for Determining the Economic Value of a Patent as agreed upon in the Fiduciary Guarantee Deed.

KEYWORDS. Patents, Fiduciary Guarantee, Notary

The Notary's Function in Drafting Fiduciary Security Deeds Involving Patent Rights as Collateral

Yohana Maranatha, Nadia Inggrida Hartono*

Introduction

In simple terms, intellectual property (IP) is wealth that arises or is born from human intellectual abilities. Works In simple terms, intellectual property (IP) is wealth that arises or is born from human intellectual abilities. Works that arise or are born from human intellectual abilities can be works in the fields of technology, science, art, and literature.[2] Wealth or assets in the form of works resulting from human thought or intelligence have economic value or benefits for human life, so they can also be considered as commercial assets.[3] Works that are born or produced from human thought or intelligence either through the outpouring of energy, thought and creative power, taste and karsanya should be secured by developing a legal protection system for the wealth known as the intellectual property rights (IPR) system.

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2 Rachmadi Usman, *Dasar-dasar Hukum Kekayaan Intelektual* (Jakarta: Kencana, 2021), p. 4

3 Usman.

IPR is a way to protect intellectual property by using existing legal instruments.[4]

Indonesia is one of the countries that participated in signing the agreement on the establishment of the World Trade Organization (WTO) and including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).[5] Every country that is a member of the WTO is obliged to comply with TRIPs and its law enforcement will be carried out by the Dispute Settlement Body under the WTO system.[6] In the Trade Related of Intellectual Property Rights Agreement (Trip Agreement) as part of the General Agreement on Tariff and Trade (GATT) 1944 IPR coverage includes: Copyright and other related rights, trademarks, Geographical Indications, Industrial Product Designs, Patents, Integrated circuit layout designs, Protection of undisclosed information, and control of unfair competition practices in license agreements.

According to the Big Indonesian Dictionary, the definition of "*Patent*" is "a right granted by the government to a person for an invention for his own use and to protect it from imitation (piracy)".[7] Based on Article 1 number 1 of Law of the Republic of Indonesia Number 13 of 2016 concerning Patents (Law No. 13/2016) the definition of Patent is: "*Patent is an exclusive right granted by the state to inventors for their inventions in the field of technology for a certain period of time to implement the invention themselves or give approval to other parties to implement it.*"[8]

Along with economic growth in Indonesia which has increased every year, one of which is the growth of the creative economy which is currently growing rapidly in Indonesia, there is an issue of IPR as a credit guarantee. The government has issued Government Regulation Number 24 of 2022 concerning the Creative Economy (PP No. 24/2022), where Article 9 paragraph (1) states: "*In the implementation of the Intellectual Property-Based Financing Scheme, bank financial institutions and non-bank financial*

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4 Krisnani Setyowati, et.l. *Hak Kekayaan Intelektual dan Tantangan Implementasinya di Perguruan Tinggi* (Bogor: Kantor Hak Kekayaan Intelektual Institut Pertanian Bogor, 2005), pp. 1-2.

5 Kholis Roisah, *Konsep Hukum Hak Kekayaan Intelektual (HKI) Sejarah, Pengertian, dan Filosofi Pengakuan HKI dari Masa ke Masa* (Malang: Setara Press, 2015), p. 5.

6 Sudaryat, et.al. *Hak Kekayaan Intelektual: Memahami Prinsip Dasar, Cakupan dan Undang-Undang yang Berlaku* (Bandung: Oase Media, 2010), p. 34.

7 Tim Penyusun Kamus Besar Bahasa Indonesia, *Kamus Besar Bahasa Indonesia*, (Jakarta: Departemen Pendidikan dan Kebudayaan, 1988), p. 653.

8 Article 1 (1), *Undang-Undang Republik Indonesia Nomor 13 Tahun 2016 Tentang Paten (Indonesian Patent Law*).

institutions use Intellectual Property as an object of debt collateral."[9] Furthermore, Article 108 paragraph (1) of Law No. 13/2016 states: "*Patent rights can be used as an object of fiduciary security*."

Fiduciary itself is the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object.[10] Article 1 Point 2 of Law Number 42 Year 1999 on Fiduciary Guarantee (Law No. 42/1999) states that: "*Fiduciary Guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered by mortgage rights as referred to in Law Number4 of 1996 concerning Mortgage Rights, which remains in the control of the Fiduciary as collateral for the repayment of certain money, which gives priority to the Fiduciary against other creditors*."[11]

In its implementation, there are still various challenges and obstacles faced, including the limited period of IPR protection, the absence of a clear concept regarding due diligence, valuation of IPR assets, and there is also no juridical support in the form of regulations related to IPR assets as objects of credit collateral.[12]

Based on the background of the problem above, the authors formulate the problem, namely: *first,* how is the Role of Notary Position in IP-Based Financing and Fiduciary Guarantee of Patent Rights Based on Government Regulation No. 24 of 2022 on Creative Economy, and *second*, what is the mechanism for determining the economic value of a patent right to be agreed upon in a fiduciary security deed.

Method

The research adopts a juridical-normative approach, as defined by Soerjono Soekanto. This methodology involves an in-depth examination of

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9 Article 9 (1) *Peraturan Pemerintah Nomor 24 Tahun 2022 tentang Ekonomi Kreatif*

10 Rindia Fanny Kusumaningtyas, "Perkembangan Hukum Jaminan Fidusia Berkaitan dengan Hak Cipta Sebagai Objek Jaminan Fidusia." *Pandecta Research Law Journal* 11, no. 1 (2016): 96-112.

11 Article 1 (2) *Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia*

12 Otoritas Jasa Keuangan Republik Indonesia, *Prospek Hak Kekayaan Intelektual (HKI) sebagai Jaminan Utang*, OJK Institute, 1 September 2022, retrieved from https://www.ojk.go.id/ojk-institute/id/capacitybuilding/upcoming/1110/prospek-hak-kekayaan-intelektual-hki-sebagai-jaminan-utang

library materials and secondary data to scrutinize relevant regulations and literature related to the research problem.[13] The rationale for selecting this method lies in its suitability for legal research focused on legislation and written law.[14] In this specific study, the research delves into the legal aspects of notary positions in the realm of IP-based financing. It also explores the enforcement of fiduciary guarantees on patent rights based on Government Regulation Number 24 of 2022 concerning the Creative Economy. Additionally, it examines the mechanisms for determining the economic value of a patent right in a fiduciary guarantee deed.

In addition, this research used descriptive approach. This choice stems from the overarching goal of providing systematic, factual, and accurate descriptions of existing facts. This descriptive approach enables a comprehensive exploration of the legal dimensions surrounding the role of notary positions in the context of IP-based financing and the binding of fiduciary guarantees on patent rights.

Furthermore, legal materials are systematically collected through a precise procedure involving the inventorying and identification of pertinent laws and regulations. The author employs the technique of library research for data collection. This encompasses activities such as reading, analysis, recording, and reviews of materials directly relevant to the research topic. The data, primarily sourced from law books, theses, legal dissertations, journals, and relevant court commentaries, constitute secondary data. This comprehensive approach ensures a thorough exploration of the legal landscape connected to the research questions.

Legal materials integral to this research are categorized into primary, secondary, and tertiary sources. The study draws upon key legislative documents to establish a foundational understanding of relevant legal frameworks. These primary legal materials include the Law of the Republic of Indonesia Number 13 of 2016 Concerning Patents (Law No. 13/2016), Law Number 42 Year 1999 on Fiduciary Guarantee (Law No. 42/1999), Law Number 11 of 2020 on Job Creation (Law No. 11/2020), Law of the Republic of Indonesia Number 2 of 2014 on the Amendment to Law Number 30 of 2004 on the Position of Notary (Law No. 2/2014), and Government Regulation No. 24 Year 2022 on Creative Economy (PP No. 24/2022).

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[13] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)* (Jakarta: Rajawali Pers, 2001), pp. 13-14.

[14] Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2011), p. 25.

Complementary to primary sources, secondary legal materials play a pivotal role in providing a nuanced understanding of the research topic. These materials, derived from influential jurists and scholars, legal journals, expert opinions, legal cases, jurisprudence, and recent symposia, include opinions of legal experts, textbooks authored by renowned legal scholars, law journals, theses, papers, essays, and legal articles. The utilization of these secondary legal materials serves as a guiding "*clue*" for researchers, shaping the trajectory of their exploration and analysis.[15]

Beyond primary and secondary sources, tertiary legal materials contribute supplementary guidance and explanations. These materials, such as legal dictionaries and encyclopedias, provide contextual support and clarification for the understanding of both primary and secondary legal materials. In essence, tertiary legal materials enhance the interpretative aspect of the research, offering valuable insights into the intricacies of the legal landscape under examination.

Furthermore, in relation to normative research, there are various approaches. There are 5 (five) kinds of approaches, namely: Statue Approach, Conceptual Approach, Historical Approach, Comparative Approach, and Case Approach.[16] In this writing, the research approach that researchers use is:

1) Statue Approach, the researcher can explore the problem by using the applicable laws and regulations in Indonesia, namely Law No. 13/2016 and Law No. 42/1999.
2) Analytical Approach, where the research aims to find out the meaning contained by the terms used in the rules of legislation conceptually, as well as knowing its application in practice and legal decisions.[17]
3) The comparative research approach is basically carried out by comparing the contents of legal rules from other countries that are more specific to the legal rules to be studied. This is in order to answer the legal vacuum of positive law as the object of research.

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[15] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Group 2007), p. 155; Johnny Ibrahim, *Teori and Metode Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2005), p. 241.

[16] I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum* (Jakarta: Prenadamedia Group, 2019), pp. 156-169.

[17] Johnny Ibrahim, *Teori & Metode Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2005) p. 268.

Data processing is carried out by systematizing the legal materials that have been collected to answer the legal issues that have been formulated in the problem formulation. Systematization means making classifications of these legal materials to facilitate analysis and construction work.[18] Activities carried out in the analysis of normative legal research data by means of data obtained are analyzed descriptively qualitative, namely analysis of data that cannot be calculated. The legal material obtained is then discussed, examined and grouped into certain parts to be processed into information data. The results of the analysis of legal materials will be interpreted using systematic and grammatical interpretation. Systematic interpretation is interpreting by paying attention to the arrangement in relation to other articles, both in the same law and with other laws and regulations.[19]

Literature Review

Demystifying Intellectual Property Rights: A Comprehensive Overview

Intellectual property is a right obtained from a person's intellectual results that are poured in a tangible form, not just ideas but there is a physical form. Intellectual property is obtained by someone with full sacrifice in terms of cost, energy, and time, so the results of IP need to get protection. IP consists of Copyright and Industrial Property Rights such as Patents, Trademarks, Trade Secrets, Industrial Designs, and Integrated Circuit Layout Designs.[20]

Based on the World Intellectual Property Organization (WIPO) IPR is a right derived from human intellectual activity in the fields of science, industry, art and literature.[21] There are 3 (three) important aspects that are closely related to IPR, including:

a. There are rules regarding the granting of exclusive rights to the holder
b. Rights granted based on the intellectual capacity of human endeavor

[18] Soekanto and Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, pp. 251-252

[19] Soekanto and Mamudji

[20] Lutfi Ulinnuha, "Penggunaan Hak Cipta Sebagai Objek Jaminan Fidusia." *Journal of Private and Commercial Law* 1, no. 1 (2017): 85-110.

[21] WIPO, *WIPO intellectual Property Handbook: Policy, Law and Use*, (Geneva: WIPO, 2011).

c. There is economic value in these intellectual abilities.[22]

Rachmadi Usman defines IPR as the right to ownership of works that arise or are born because of human intellectual abilities in the fields of science and technology. These works are intangible property as a result of the intellectual ability of a person or human being in the field of science and technology through his creativity, taste, passion, and work.[23]

Intellectual Property Rights are rights that arise to protect the results of a person's thinking and / or creativity that produces a product or process that has a use for humans, the right to enjoy economically the results of an intellectual creativity. Substantively, the definition of IPR can be described as property rights that arise or are born due to human intellectual abilities. These intellectual works in the fields of science, art, literature or technology are born with the sacrifice of energy, time and even money. The existence of these sacrifices makes the work produced have value. When added with the economic benefits that can be enjoyed, the inherent economic value fosters the conception of wealth (property) against intellectual works.[24]

The concept of IPR in Indonesian civil law is found in the provisions of Article 499 of the Civil Code, which reads as follows: *"According to the understanding of the Law, what is called property is every item and every right that can be controlled by property rights."* In this provision, it can be seen that the objects of property rights are Goods and Rights. Therefore, IPR as an object of ownership rights is categorized as "*intangible* objects" or "bodiless objects" *(intangibles, onlichamelijk)*.

The legal regulation of IP is not only based on national legislation, but also based on various international treaty laws in the field of IP. National legislation that regulates IP law in Indonesia is as follows:[25]

1. Copyright: Law Number 28 of 2014 concerning Copyright
2. Patents and Simple Patents: Law No. 13/2016
3. Trademarks and Geographical Indications: Law Number 20 Year 2016 on Trademarks and Geographical Indications
4. Industrial Product Design: Law Number 31 Year 2000 on Industrial Design

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[22] Almira Amalia Husna, "Analisis *Doctrine of Equivalent* di Indonesia dalam Sengketa Pelanggaran Paten". *Thesis.* (Malang: Universitas Brawijaya, 2019).

[23] Rachmadi Usman, *Hukum Hak Atas Kekayaan Intelektual* (Bandung: Alumni, 2003).

[24] Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: CV. Mandar Maju, 2012).

[25] Rachmadi Usman, *Hukum Hak Atas Kekayaan Intelektual*, pp. 15-16.

5. Layout Design of Integrated Circuits: Law No. 32 of 2000 Concerning Integrated Circuit Layout Design
6. Trade Secrets: Law Number 30 Year 2000
7. Plant Variety: Law No. 29/2000 on Plant Variety Protection

Unveiling Patents: A Comprehensive Overview of Intellectual Property Protection

Etymologically, the word "Patent" comes from the word patent (English), which means to open up or "open". The opposite word is "latent", which means "hidden".[26] The open concept means that the inventor discloses his knowledge and technology for the betterment of society and in return, the inventor gets exclusive rights for a certain period[27]. What is protected by a patent is the idea born from the invention, not the material object. The idea originates from the process of human intellect that can be applied in industrial processes.

Historically in Indonesia before December 27, 1949, patent registration was subject to the *Octroiwet* 1910 (*Staatsblad* Year 1910 Number 313) which also applied to colonies. To make it easier for those who wanted to apply for a patent in Batavia, an office was established to forward the request to the Patent Board in the Netherlands, under the supervision of the Dutch Ministry of Justice. Until the recognition of the sovereignty of the Republic of Indonesia (1949), the number of patents that had been granted and declared valid in the country was approximately 18,000 patents.[28]

Regulations relating to Patent Protection have been amended many times in Indonesia, until now Patent Protection is regulated under Law No. 13/2016 which is much better and more complete in order to face the globalization of ASEAN and world economic trade. Patent protection in Indonesia is divided into 2 types, namely Patents and simple Patents. The requirements for patent protection are regulated in Article 3 of Law No. 13/2016 amended by Law No. 11/2020 which reads:

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[26] Rachmadi Usman, *Hukum Hak Atas Kekayaan Intelektual*, pp. 324-325.

[27] Slamet Yuswanto, *Memahami Paten Berdasarkan Undang-Undang Nomor 13 Tahun 2016 dan Perjanjian TRIPs* (Bandung: Keni Media, 2017).

[28] G. Kartasapoetra and Rien G. Kartasapoetra, *Konvensi-Konvensi Internasional Tentang Paten dalam Kaitannya dengan Alih Teknologi dan Kepentingan Nasional* (Bandung: Pionir Jaya, 1991).

(1) "Patents as referred to in Article 2 letter a shall be granted for any new invention, containing inventive steps, and applicable in industry.
(2) A simple patent as referred to in Article 2 letter b shall be granted for any new invention, development of an existing product or process, having practical use, and applicable in industry.
(3) Development of existing products or processes as referred to in paragraph (2) includes:
    a. Simple product;
    b. Simple process; or
    c. Simple method."[29]

Parties who obtain Patents and Patent Holders are regulated in Article 1 number 3 and Article 10 of Law No. 13/2016, which reads:

"Article 1 point 3
Inventor is a person or several persons who jointly carry out an idea that is poured into an activity that produces an invention."
"Article 10
(1) The party entitled to obtain a patent is the Inventor or the person who receives further rights of the inventor concerned. If the invention is jointly produced by several persons, the rights to the invention are jointly owned by the inventors concerned."[30]

Based on these regulations, the subject of the patent is the Inventor as an inventor but can also be a person who receives further rights of the inventor concerned.

Under Law No. 13/2016, Patents are granted for a period of 20 years from the date of receipt of the Patent application. A simple patent is granted for a period of 10 years from the date of receipt of the simple patent application.

An inventor or researcher will get at least three benefits from a patent, namely: 1) the financial effect that comes from patent royalties; 2) the

[29] Article 3 *Undang-Undang Republik Indonesia Nomor 13 Tahun 2016 Tentang Paten sebagaimana diubah dalam Undang-Undang Republik Indonesia Nomor 11 Tahun 2020 tentang Cipta Kerja.*
[30] Article 10 *Undang-Undang Republik Indonesia Nomor 13 Tahun 2016 Tentang Paten*

reputational effect of discovering a new idea; and 3) the social effect that impacts the adoption of the inventor's technology which may have intrinsic benefits for inventors who are concerned about promoting patents with new technologies or about validating their research.[31] Moral rights and economic rights for inventors are protected Constitutional Rights in Indonesia.

Safeguarding Trust: An In-Depth Overview of Fiduciary Guarantees

Fiduciary is derived from the Dutch "*fiducie*", while in language English is called *fiduciary transfer of ownership*, which means trust.[32] The term fiduciary has two meanings, as a noun and an adjective. As a noun, fiduciary means someone who is entrusted to take care of the interests of a third party in good faith, being careful, thorough and straightforward. Meanwhile, as an adjective, fiduciary refers to something related to *trust*.[33]

According to the provisions of Article 1 number 1 of Law Number 42 of 1999, *"fiduciary is the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the control of the owner of the object*."[34] Meanwhile, what is meant by fiduciary guarantee based on the provisions of Article 1 point 2 is *"a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered by mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights, which remains in the control of the fiduciary, as collateral for the repayment of certain debts, which gives priority to the fiduciary against other creditors."*[35]

Fiduciary Guarantee recognizes the *Droit de Suite* Principle as stipulated in Article 27 paragraph (2) of Law No. 42/1999, which states that the Fiduciary Guarantee still follows the object of the Fiduciary Guarantee in whatever hands it is in, except for its existence in the hands of a third party

[31] Lisa Larrimore Ouellette, and Andrew Tutt. "How do patent incentives affect university researchers?." *International Review of Law and Economics* 61 (2020): 105883.
[32] Salim H.S., *Perkembangan Hukum Jaminan di Indonesia*, (Jakarta: Rajawali Press, 2014), p. 55.
[33] Tan Kamello, *Hukum Jaminan Fidusia: Suatu Kebutuhan Hukum yang Didambakan* (Bandung: Alumni, 2014), p. 40.
[34] Article 1 (1) *Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia*
[35] Article 1 (2) *Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia*

based on the transfer of rights to receivables or cessie based on Article 613 of the Civil Code. Thus, the right to fiduciary security is an absolute property right or *in rem,* not an *in personam right*. In addition, Fiduciary also recognizes the principle of preference (*Droit de Preference*), which means the right of precedence. This is confirmed in Article 27 of Law No. 42/1999, which gives the fiduciary recipient precedence over other creditors to take the fulfillment of debt repayment payments on the sale of the fiduciary object. The quality of the fiduciary's right of precedence is not erased even if the debtor is bankrupt or liquidated as stipulated in Article 27 paragraph (3) of the Fiduciary Guarantee Law.

Fiduciary Objects are regulated in Article 1 paragraph (4), Article 9, Article 10 and Article 20 of Law No. 42/1999, namely:

1. Objects that can be legally owned and transferred
2. It can be a tangible object.
3. Tangible items include receivables.
4. Moving objects.
5. Immovable objects that cannot be bound by Mortgage or mortgage.
6. Either an existing object or one that will be acquired later.
7. Can be for one unit type of object.
8. It can also be more than one type of object.
9. Including proceeds from objects that are the object of fiduciary security
10. Inventory items.

The fiduciary grantor is the person or corporation that owns the object of the fiduciary guarantee, while the fiduciary beneficiary is the person or corporation that has the receivable whose payment is secured by the fiduciary guarantee. Article 5 of Law No. 42/1999 stipulates that the encumbrance of property with a Fiduciary Guarantee is made by a notarial deed in the Indonesian language, which is a Fiduciary Guarantee Deed.

Overview of the Role of Notary Position in the Fiduciary Deed of Guarantee

Notaries are public officials authorized to make authentic deeds to the extent that the making of certain authentic deeds is not reserved for other

public officials[36] In Law No. 2/2014 on Notary Position (Law No. 2/2014) it is stated that "*Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this law or based on other laws*[37].

Article 15 of Law 2/2014 stipulates that the authority of a Notary is *"a notary is authorized to make authentic deeds regarding all acts, agreements, and provisions required by regulations and/or desired by those concerned to be stated in an authentic deed. Guarantee the certainty of the date of making the deed, keep the deed, provide a grosse, copy and quotation of the deed, all that as long as the making of the deed is not also assigned or excluded to other officials or other persons stipulated by law.*[38]

In general, Notaries in making products in the form of authentic deeds in the form of credit/financing agreements and collateral binding must also apply the precautionary principle in line with the provisions of Article 16 paragraph (1) letter a of Law Number 2 of 2014 concerning the Position of Notary.[39]

In general, the role of a notary in making a deed of property security (fiduciary) according to his authority in Article 15 paragraph of Law No. 2/2014 is specific to:

a. Guarantee certainty of manufacturing date
b. How to keep the deed
c. Procedure for granting grosse
d. How to provide copies and extracts of deeds

Notary's Integral Role in IP-Based Financing and Fiduciary Guarantee of Patent Rights under Government Regulation No. 24 of 2022 on Creative Economy

[36] Rahmad Hendra, "Tanggungjawab Notaris Terhadap Akta Otentik yang Penghadapnya Mempergunakan Identitas Palsu di Kota Pekanbaru." *Jurnal Ilmu Hukum* 3, no. 1 (2012).

[37] Article 1 (1), *Undang-Undang Republik Indonesia Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

[38] Article 15 (1), *Undang-Undang Republik Indonesia Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

[39] *Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang – Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

In tandem with the burgeoning growth of Indonesia's creative economy, the government has actively facilitated IP-Based Financing Schemes through both Bank and Non-Bank Financial Institutions, as outlined in Government Regulation No. 24/2022. This regulatory framework, articulated in PP 22 No. 24/2022, delineates the IP-Based Financing Scheme Facility into two primary components: the utilization of intellectual property (IP) with economic value and intellectual property assessment.

To qualify for IP-based financing, entities must meet specific criteria, including the submission of a comprehensive financing proposal, ownership of a creative economy business, active engagement in intellectual property related to creative economy products, and possession of an IP registration or certification letter. Furthermore, PP No. 24/2022 specifies three distinct forms of IP serving as a debt collateral base: fiduciary guarantees on intellectual property, contracts associated with creative economy activities, and collection rights derived from creative economy pursuits.

This strategic initiative not only bolsters the financial landscape for creative enterprises but also underscores the government's commitment to fostering innovation and economic development within the burgeoning creative sector. By providing a structured framework for IP-based financing, the regulatory landscape seeks to encourage the growth of intellectual property assets and their integration into the broader financial ecosystem.

In essence, the IP-Based Financing Schemes introduced by the Indonesian government mark a pivotal step towards aligning financial instruments with the dynamic landscape of the creative economy, fortifying the symbiotic relationship between intellectual property and economic growth while concurrently safeguarding the interests of stakeholders through a robust collateralization framework.

Based on PP 24/2022, IP as a Debt Collateral Base is bound in a Fiduciary Guarantee over the pledged IP. Patents are IP that can be used as Fiduciary Security Objects. This is regulated in Article 108 paragraph (1) of Law No. 13/2016 mentioned:

"Patent rights can be used as an object of fiduciary security." This is where the role of Notary is needed as a public official who makes the Fiduciary Deed of Guarantee on Intellectual Property Rights. The provisions regarding the outcome of the object of fiduciary guarantee, the substance of encumbrance, binding, and registration of rights to collateral in intellectual

property, must be agreed upon expressly and clearly in the Deed of Fiduciary Guarantee on Intellectual Property Rights[40]

The evidentiary system in Indonesia with tiered evidence (Article 1866 of the Civil Code) consists of:

a) Written evidence carried out by authentic deed or by deed under hand;
b) Evidence by witnesses; Presumption; Confession; Oath.

The provisions of Article 1868 of the Civil Code are the basis for why public officials/notaries are needed, because Notaries are authorized to make authentic deeds. An authentic deed is a deed in the form prescribed by law, made by or before a public official authorized to do so in the place where the deed is made. Notaries have a big role because in every business transaction and every transaction that requires legal force must be made with a Notary deed so that the deed has legal force as stipulated in the Notary Position Law.[41] The making of authentic deeds is the authority of the Notary as a Public Official. This is an important aspect in the binding of collateral, because authentic deeds are strong and absolute evidence. Where this authentic deed serves to clearly determine rights and obligations in order to ensure legal certainty while avoiding disputes.[42] The role of the Notary is also increasingly important because the Notary is directly dealing with the interests of the Community in providing assistance or services. One of the assistance that must be provided by notaries based on Article 15 paragraph (2) letter 3 of Law No. 2/2014 is legal counseling in connection with the making of deeds.[43]

The process and stages of fiduciary encumbrance are carried out through the following:

1. The first process is to make several main agreements in the form of a credit agreement made by a notary;
2. The second process, namely the encumbrance of objects with fiduciary guarantees, is marked by the making of a Fiduciary Guarantee Deed

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[40] Vivi Nurfil Ardhianto, "Peran Notaris dalam Pembuatan Akta HKI (Hak Kekayaan Intelektual) sebagai Objek Jaminan Fidusia bagi Masyarakat Umum." *Al Qodiri: Jurnal Pendidikan, Sosial dan Keagamaan* 16, no. 1 (2019): 205-223.

[41] *Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang – Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

[42] Dominicus Aditio Nugraha, "Akibat Hukum Pembatalan Akta Jual Beli Obyek Jaminan yang tidak dilakukan Pengikatan Jaminan Oleh Kreditur." *Indonesian Notary* 2, no. 2 (2020): 13.

[43] Article 15 (2) *Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang – Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

(AJF), which contains the day, date, time of making, identity of the parties, data on the main fiduciary agreement, description of the fiduciary object, guarantee value and value of the fiduciary guarantee object; and

3. The third process is the registration of the Fiduciary Deed of Guarantee (AJF) at the fiduciary registration office, which will then issue a Fiduciary Guarantee Certificate to the creditor as the fiduciary beneficiary.[44]

According to Article 6 of Law No. 42/1999, the Fiduciary Deed of Guarantee as referred to in Article 5 of Law No. 42/1999 shall at least contain:[45]

1. Identity of the Fiduciary grantor and beneficiary What is meant by "identity" includes full name, religion, residence/residence, place of birth, date of birth, gender, marital status, occupation.
2. Basic agreement data As explained above, the Fiduciary Guarantee agreement is accessoir, so that the Fiduciary Guarantee Deed must include data on the main agreement, namely regarding the "type of agreement" and the "debt" guaranteed. The type of agreement is usually a reciprocal credit agreement and a deed of acknowledgment of debt, which is a unilateral agreement. As for the debt, Article 7 of Law No. 42/1999 states that the debt whose repayment is secured by fiduciary can be in the form of: existing debt, promised debt, and debt that can be determined at the time of execution. In the Deed of Fiduciary Guarantee, it is obligatory to mention information about the data of the principal agreement, namely, whether it is made in notarial form or under the hand, the date and number of the principal agreement made in notarial form.
3. Description of collateral The requirement mentioned in letter c regarding the "description of the collateral object" is a logical requirement, because Law No. 42/1999 is intended to provide legal certainty, and this is in accordance with the principle of specialty. It is about the identification of the object, and the proof of ownership. The Deed of Fiduciary Guarantee on Intellectual Property Rights must describe the substance of the encumbrance, binding, and registration of the right to security in intellectual property.
4. Guarantee value The value of the guarantee indicates how much weight

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[44] Munir Fuady, *Teori Negara Hukum, Cetakan Kedua* (Bandung: Refika Aditama, 2011).

[45] Faranisa Yona Ramadhani, Muhamamad Fakih, and Dita Febrianto. "Kedudukan Akta Otentik Yang Dibuat Oleh Notaris Pada Pembuatan Akta Jaminan Fidusia". *Pactum Law Journal* 1, no. 1 (2017).

is placed on the collateral object. This means that the creditor as the Fiduciary beneficiary can only take repayment of the debt at most (maximum) equal to the value of the guarantee. The requirement to mention the amount of the "guarantee value" is closely related to the nature of the Fiduciary Security Right as a right that "precedes/the principle of droit de preference". The amount of the collateral burden is determined based on the amount of the installed burden (collateral value), but the right of preference is limited by the amount (remaining) of the pledged debt.

5. Collateral value It is the value of the collateral object, which is determined according to a value benchmark or on the basis of an appraisal team aimed at and agreed by the parties. The requirement to mention the value of the collateral object is a new requirement in security law. In mortgages, mortgages and pledges, no mention of the value of the collateral object is required.[46]

The process and stages of the Fiduciary Deed cannot be done without a Notary. Due to the fact that a Notary is an Authentic Deed Official, in order to create legal certainty in Binding a Patent as a Fiduciary Guarantee as stipulated in PP No. 24/2022, an Authentic Deed issued by a Notary is required. That the evidentiary power of an authentic deed is regulated in Article 1870 of the Civil Code which states that; an authentic deed provides between the parties and their heirs or those who get rights from them, a perfect proof of what is contained therein. The power attached to an authentic deed is perfect (volledig bewijskracht) and binding (bindende bewijskracht).[47] This notarial deed has absolute and binding legal or evidentiary power.[48] Based on this description, it is known that the Notary Deed has a function as an absolute and perfect evidentiary tool to prove the truth between the Patent licensee acting as a Debtor and the Creditor Party. Without a Notarial Deed, the Patent Licensee cannot apply for credit or loan based on IP as per PP No. 24/2022. The Fiduciary Deed of Guarantee whose object of guarantee is Intellectual Property in the form of a Patent legally has perfect proof. However, if there is a dispute in the future that occurs between

[46] Article 5 (2) *Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang – Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*

[47] Ardhianto, "Peran Notaris dalam Pembuatan Akta HKI (Hak Kekayaan Intelektual) sebagai Objek Jaminan Fidusia bagi Masyarakat Umum."

[48] Putri Ayi Winarsasi, *Hukum Jaminan di Indonesia (Perkembangan Pendaftaran Jaminan Secara Elektronik)* (Surabaya: CV. Jakad Media Publishing, 2020), p. 110.

the Debtor and the Creditor such as Default, then the Execution of Patent Fiduciary Guarantee still does not have a strong legal umbrella. This is because in essence, Patents have moral rights and economic rights attached to the inventor and also Patents have a limited period of time. Although fiduciary execution related to Patents has been regulated to be carried out based on Law No. 13/2016 and PP No. 24/2022, Law No. 42/1999 has not regulated the execution of Intellectual Property, especially Patents. Researchers are of the view that in order to support the Government Movement in IP-Based Financing as stipulated in GR No. 24/2022, it is necessary to make a special regulation regarding Patents as Fiduciary Security Objects.

Mechanism for Determining the Economic Value of a Patent Right to be Agreed in the Deed of Fiduciary Guarantee

In IP Financing, it has been regulated regarding the Procedure for Filing IP Financing as stipulated in PP No. 24/2022, including:

a) Business Verification
b) Verification of Intellectual Property Legality
c) Intellectual Property Assessment
d) Disbursement of funds
e) Refund Receipt

Based on PP No. 24/2022, the provisions of IP Appraisers are that they must have a Public Appraiser License, have competence in the field of IP valuation and have been registered with the Ministry of Tourism and Creative Economy. Meanwhile, the provisions of the IP Appraisal Panel are that they must be appointed by a Financial Institution and have conducted an assessment that is not assessed by the IP appraiser.

To determine the Economic Value in a Patent Right is carried out by an IP Appraiser, who is in charge:

1. Conduct an assessment of the IP used as collateral
2. Conduct a market analysis of the IP used as collateral
3. Reviewing the utilization analysis report IP that has been used in industry.

There are three generally accepted methods of collateral valuation that can also apply to the valuation of Patent Rights, namely:

1. Cost Approach
   This approach provides an indication of value by calculating the current replacement or reproduction cost of an asset and deducting physical damage and or all other relevant forms of obsolescence, this approach emphasizes the value of intangible assets based on the economic principle of substitution commensurate with the costs that will be incurred as a substitute for the cost approach methods, which include Replacement Cost, Reproduction Cost, Summation.[49]
2. Market Approach
   The market approach is a valuation approach by comparing the object of valuation with other objects that are comparable and similar and have a selling price, this is regulated in the Financial Services Authority Regulation (POJK) Number 8 / POJK.04 / Regarding the Assessment and Presentation of Business Valuation Reports in the Capital Market.[50] Through this method, Patent Rights can be compared with comparable / similar Patent Rights and then calculations are made between patent rights and intangible asset comparison variables This does not need to be specifically assessed because the market value formed is considered to reflect the contribution of the intangible asset.
3. Income Approach
   This method uses a framework of valuing an asset by calculating or calculating the future value of the object of valuation to be received, with a discount rate. The value is derived from the mechanism of using the license and the average royalty earned.

That legally, Patent Rights have been regulated as Fiduciary Guarantees with Legal Umbrella in Law No. 13/2016 and PP 24/2022, but in practice there is still no appraisal institution for Patent Rights objects in Indonesia so that this creates a gap for legal uncertainty in binding the Fiduciary Guarantee Deed with Patent Rights collateral objects. The Researcher is of the view that it is necessary to establish a Special Appraisal Institution related to the

[49] Krisna Harahap, *Hukum Acara Perdata* (Bandung, Grafiti Budi Utami, 2005), p. 545.
[50] Muhammad Charis Marzuqi, "Mekanisme Penentuan Nilai Ekonomis Suatu Hak Paten untuk disepakati dalam Akta Jaminan Fidusia" *Thesis* (Jakarta: Universitas Negeri Syarif Hidayatullah Jakarta, 2019).

Economic Appraisal of a Patent Right in order to realize the guarantee value requirements in the Fiduciary Guarantee Deed. [51]

Conclusion

This study concluded that the Fiduciary Deed of Guarantee, with Intellectual Property in the form of a Patent as its object, possesses legally impeccable evidence. However, in the event of a dispute, such as a default, arising between the Debtor (Patent licensee) and the Creditor, the Notary plays a crucial role as an absolute and perfect evidentiary tool to establish the truth. Without a Notarial Deed, a Patent License Holder cannot avail credit or loans based on Intellectual Property, as mandated by PP No. 24/2022. The study also emphasizes that the execution of Patent Fiduciary Guarantee lacks a robust legal foundation. This stems from the inherent nature of Patents, entailing both moral and economic rights vested in the inventor and subject to a limited timeframe. Despite regulations in Law No. 13/2016 and PP No. 24/2022 governing fiduciary execution related to Patents, the absence of specific provisions in Law No. 42/1999 creates legal uncertainty. To fortify the Government's IP-Based Financing Movement per GR No. 24/2022, the researchers advocate for a dedicated regulation addressing Patents as Fiduciary Security Objects. Furthermore, while Patent Rights are defined as a Fiduciary Guarantee with a legal umbrella in Law No. 13/2016 and PP 24/2022, the absence of an appraisal institution for Patent Rights in Indonesia introduces a gap, necessitating the establishment of a specialized institution for the economic appraisal of Patent Rights to ensure the fulfillment of guarantee value requirements in Fiduciary Guarantee Deeds.

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