

Implementation of Contracts for Creative Economy Activities as Debt Guarantees

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ABSTRACT

With the enactment of Government Regulation Number 24 of 2022, creative economy actors can now apply for financing based on intellectual property. Intellectual property that is used as the object of debt guarantees is a fiduciary guarantee on intellectual property, contracts in creative economic activities, and collection rights in creative economic activities. Contracts in creative economic activities are objects that are still foreign to be used as collateral for debt, so it is still unclear about the implementation and how a contract in creative economic activities can become an object of debt guarantee. The research method used in this research is normative juridical. The result of this research is that contracts for creative economic activities can be used as collateral for debt by nominating the contract. Suggestions that can be conveyed based on research conducted are the need for clearer arrangements regarding the assessment and implementation of creative economic activity contracts as debt guarantees, because the elements of creative economic activity contracts and debt guarantees are quite different.

ABSTRAK

Berlakunya PP Nomor 24 Tahun 2022, maka kini pelaku ekonomi kreatif dapat mengajukan pembiayaan berdasarkan kekayaan intelektual. Kekayaan intelektual yang dijadikan sebagai objek jaminan utang adalah jaminan fidusia atas kekayaan intelektual, kontrak dalam kegiatan ekonomi kreatif, dan hak tagih dalam kegiatan ekonomi kreatif. Kontrak dalam kegiatan ekonomi kreatif merupakan objek yang masih asing untuk dijadikan jaminan utang, sehingga masih belum jelas mengenai pelaksanaan serta cara sebuah kontrak dalam kegiatan ekonomi kreatif dapat menjadi sebuah objek jaminan utang. Metode penelitian yang digunakan dalam penelitian ini adalah yuridis normatif. Hasil dari penelitian ini adalah kontrak kegiatan ekonomi kreatif dapat dijadikan sebagai jaminan utang dengan melakukan novasi terhadap kontrak tersebut. Saran yang dapat disampaikan berdasarkan penelitian yang dilakukan adalah perlunya pengaturan yang lebih jelas mengenai penilaian serta pelaksanaan kontrak kegiatan ekonomi kreatif sebagai jaminan utang, karena unsur kontrak kegiatan ekonomi kreatif dan jaminan utang cukup berbeda.

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I. INTRODUCTION

On July 12, 2022, the government enacted Government Regulation Number 24 of 2022 concerning Implementing Regulations of Law Number 24 of 2019 concerning the Creative Economy (PP 24/22). In Law Number 24 of 2019 concerning the Creative Economy (Creative Economy Law), there is a definition of the Creative Economy itself, which is a manifestation of added value from intellectual

property sourced from human creativity based on cultural heritage, science, and/or technology. Creative economy is an economic activity driven by the creative industry that prioritizes the role of intellectual property. (Anggri Puspita Sari; et.al, 2020)

The creative economy has become an increasingly important sector because the existence of the creative economy has become a contributor to the country's economic growth in recent years. (Sri Hardianti Sartika; et.al, n.d.) The concept of the creative economy itself can realize economic development, based on creativity. Utilization of resources that are not only renewable, but also unlimited, in the form of ideas, ideas, talents, or talents and also creativity. (Sri Hardianti Sartika; et.al, n.d.) Due to the increasing importance of the creative economy industry, the Creative Economy Law was enacted, which then also applies PP 24/22 as the implementing regulation. PP 24/22 is the embodiment of Article 16 and Article 21 of the Creative Economy Law. Article 16 of the Creative Economy Law stipulates that the government facilitates intellectual property-based financing schemes for creative economy actors, and the regulation is regulated in a Government Regulation. (Undang-Undang Nomor 24 Tahun 2019 Tentang Ekonomi Kreatif, n.d.)

The definition of self-financing is regulated in Article 1 number 3 PP 24/22, namely the provision of money or bills that are equated based on agreements or loan agreements between bank financial institutions or nonbank financial institutions and other parties that require the financed party to return the money or bills after a certain period of time by providing compensation in the form of interest or profit sharing. (Peraturan Pemerintah Nomor 24 Tahun 2022 Tentang Ekonomi Kreatif, n.d.) In PP 24/22, the regulation regarding intellectual property-based financing is regulated in Article 9, which stipulates that: In implementing the Intellectual Property-Based Financing Scheme, bank financial institutions and nonbank financial institutions use Intellectual Property as the object of debt guarantee; The object of debt guarantee as referred to in paragraph (1) is carried out in the form of: Fiduciary guarantees on Intellectual Property; Contracts in Creative Economy activities; and/or Bill of Rights in Creative Economy activities.”

From these provisions, it is regulated that the object of debt guarantees in intellectual property-based financing is divided into 3 (three), namely fiduciary guarantees on intellectual property, contracts in creative economy activities, and also collection rights in creative economy activities. From the explanation of the article, what is meant by a contract in creative economy activities includes a license agreement, work contract or work order received by creative economy actors. As for the right to collect in creative economy activities, it can be in the form of a bill right for royalties that are required to be paid by users of songs and or musical instruments for commercial use. As is well known, treasury guarantees are divided into 4 (four) types, namely: Pawn, which is regulated in Chapter 20 of Book II of the Civil Code; Mortgages provided for in Chapter 21 of Book II of the Civil Code; Dependent Rights regulated in Law Number 4 of 1996 concerning Dependent Rights to Land and Objects Related to Land; Fiduciary regulated in Law Number 42 of 1999 concerning Fiduciary.

The differentiator of the four types of treasury guarantees is from the objects that can be pledged for each type of guarantee, as well as the presence of these objects at the time of pledging. Based on Article 503 of the Civil Code, objects can be divided into 2 (two) namely tangible objects and also intangible objects, followed by the following provisions, namely Article 504 of the Civil Code, namely apart from their form, objects can also be distinguished into moving objects and also immovable objects.

Currently, treasury guarantees against moving objects are starting to develop, especially related to credit or public consumption financing. (Heddy Kandou; et.al, 2021) This can be reflected in this PP 24/22, which allows intellectual property, especially contracts in creative economy activities, to become collateral for financing. However, in contrast to fiduciary guarantees on intellectual property as stipulated in Article 9 paragraph (2) letter a PP 24/22, contracts in creative economy activities have not yet determined the type of guarantee that can burden them.

Based on the explanation that has been described above, a formulation of the problem in this study can be drawn, namely how to implement a creative economy activity contract as a debt

guarantee and also how a creative economy activity contract can be used as a debt guarantee. The purpose of this study is to identify and elaborate creative economy contracts as objects of debt guarantee, and are expected to provide benefits to fill the legal gaps contained in positive law in Indonesia.

II. RESEARCH METHOD

This research uses normative juridical research methods, or literature law research. This method means that legal research is carried out by examining library materials or secondary data.(Soekanto, 2019) The type of data used in this study is secondary data. Secondary data includes official documents, books, research results in the form of reports, diaries, and so on.(Soekanto, 2019) The approach used is the statutory approach, which is carried out by examining various legal rules that are the focus of research. The statute approach examines all laws and regulations related to the legal issues being addressed. For research for practical activities, *the statutory approach* will open up opportunities for researchers to study whether there is consistency and conformity between a law and another or between a law and the Basic Law or between regulation and legislation. The result of the study is an argument to solve the problem at hand.(Peter Mahmud Marzuki, 2010).

III. RESULT AND DISCUSSION

Guarantees, basically can be divided into 2 (two) types, namely the first is an individual guarantee or and the second is a treasury guarantee. An individual guarantee is a guarantee in the form of a statement of ability provided by a third party to guarantee the fulfillment of the debtor's obligations to creditors, if the debtor concerned defaults or defaults.(Achmad Rifai dan Sapto Wahyono, 2021) This guarantee can also be said to be a debt insurer regulated in Articles 1820-1850 of the Civil Code. Article 1820 of the Civil Code stipulates that insurer is an agreement in which a third party binds itself to fulfill an agreement with the debtor if the debtor does not fulfill his agreement. From these provisions, it can be concluded that the purpose of the insurer agreement is for the benefit of creditors, which means to guarantee the fulfillment of the rights of the debtor if the debtor cannot fulfill his obligations.(Sofwan, 2001)

While the second type is a treasury guarantee which is a guarantee in the form of wealth by means of separation of part of the property of both the debtor and from third parties, in order to guarantee the fulfillment of the obligations of the debtor concerned with default or default, as regulated in Article 1131 and Article 1132 of the Civil Code.(Achmad Rifai dan Sapto Wahyono, 2021) Article 1131 of the Civil Code stipulates that all movable and immovable goods belonging to the debtor, both existing and future, become collateral for the debtor's individual engagements.

The birth of this treasury guarantee depends on the principle of publicity, which this principle means that the encumbrance of objects with the right of guarantee must fulfill the obligation of announcing to the public.(Gozali, 2021) The embodiment of the principle of publicity is carried out by registering the guarantee of the object with the Registration Office. Unlike the birth of a treasury right in a lien guarantee institution, there is no provision on registration and the right of guarantee is born at the time the object is handed over to a third party. Treasury guarantees consist of 4 (four) kinds, namely:

1. Pawn

Provisions regarding lien are regulated in Articles 1150 to 1160 of the Civil Code. The definition of lien is stated in Article 1150 of the Civil Code which regulates:

“A lien is a right acquired by the creditor to a movable good, which is surrendered to him by the debtor, or by his attorney, as collateral for his debt, and which authorizes the creditor to take payment of his receivables and the goods by way of other creditors; with the exception of the cost of sale as the execution of a judgment on the claim regarding possession or possession, and the cost of salvaging the goods, incurred after the goods as a lien and which shall take precedence.”

From this provision, it means that the object that is collateral in the lien is a movable object, consisting of a tangible object and an intangible movable object which can be in the form of a right to get payment of money such as a receivable letter.

2. Fiduciary

The regulations of fiduciary guarantees in Indonesia are contained in Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) and its implementing regulations. The definition of fiduciary listed in the Fiduciary Law is: (Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia, n.d.)

“Fiduciary is the transfer of the right of ownership of an object on the basis of a trust provided that the object to which the right of ownership is transferred remains in the possession of the owner of the thing.”

The object of the fiduciary guarantee is also regulated in Article 1 number 4, namely everything that can be owned or transferred, whether tangible or intangible, registered or unregistered, movable or immovable that cannot be encumbered by dependent rights or mortgages.

3. Mortgages

Mortgage guarantees are regulated in Article 1162 of the Civil Code up to Article 1232 of the Civil Code. In addition, mortgages are also regulated in Law Number 17 of 2008 concerning Shipping, as well as implementing regulations. Under Article 1162 of the Civil Code, a mortgage is a treasury right to immovable objects, to take reimbursement for repayment of an agreement. The object of the mortgage guarantee is a ship with a minimum weight of 20 m³ (twenty cubic meters) and has been booked in Indonesia.

4. Mortgage

In Indonesia's positive law, Dependent Rights are regulated in Law Number 4 of 1996 concerning Dependent Rights to Land and Objects Related to Land (Dependent Rights Law) and its implementing regulations. The definition of Dependent Rights is contained in Article 1 number 1 of the Dependent Rights Law, which contains:

“Dependent Rights to land and objects related to land, hereinafter referred to as Dependent Rights, are collateral rights imposed on land rights as referred to in Law Number 5 of 1960 concerning the Basic Regulations of Agrarian Principles, following or not following other objects that are integral to the land, for the repayment of certain debts, which gives priority to certain creditors over other creditors.”

For the object of Dependent Rights is regulated in Article 4 of the Dependent Rights Law, namely Property Rights, Business Use Rights, Building Use Rights, and Right to Use on State Land which according to applicable provisions are mandatory to be registered and according to nature are transferable and can be burdened with Dependent Rights. (Achmad Rifai dan Sapto Wahyono, 2021)

With the enactment of PP 24/2022, creative economy actors can now apply for intellectual property-based financing to bank financial institutions or non-bank financial institutions. PP 24/2022 also regulates the scheme of intellectual property-based financing. Based on Article 1 number 4 of PP 24/2022, the Intellectual Property-Based Financing Scheme is a financing scheme that makes intellectual property an object of debt guarantee for bank financial institutions or non-bank financial institutions in order to provide financing to creative economic actors. In Article 4 of PP 24/2022, it is regulated that the government facilitates Intellectual Property-Based Financing Schemes through bank financial institutions and non-bank financial institutions for Creative Economy Actors. Facilitation of Intellectual Property-Based Financing Schemes for Creative Economy Actors is carried out through the use of Intellectual Property of economic value and the assessment of Intellectual Property. (Heriani, 2022)

To get financing, the main thing that creative economy actors must do is to apply for financing to bank financial institutions or non-bank financial institutions. The terms of the financing application are: Financing Proposals; Have a Creative Economy business; Have an engagement

related to Intellectual Property of Creative Economy products; and Have a letter of record or Intellectual Property certificate.

After that, bank financial institutions or nonbank financial institutions in providing intellectual property-based financing conduct: Verification of creative economy enterprises; Verification of a letter of record or intellectual property certificate that is used as collateral that can be executed in the event of a dispute or non-dispute; Assessment of intellectual property used as collateral; Disbursement of funds to creative economy actors; and Receipt of return of financing from creative economy actors according to the agreement.

Regulated in Article 12 PP 24/2022, intellectual property assessment can be used in 4 (four) types, namely the cost approach, market approach, income increase, and other assessment approaches in accordance with applicable assessment standards. All four assessments are conducted by intellectual property appraisers and/or appraisal panels. The assessment panel in question is a credit or financing assessor, and/or an expert appointed by a financial institution.

The cost approach in question is to generate an indication of value using economic principles, i.e. the buyer will not pay an asset more than the cost of acquiring an asset of equal or equivalent use, at the time of purchase or construction. For the market approach, what is meant is to generate an indication of value by comparing the assessed asset with identical or comparable assets, where transaction or quote price information is available. Then for the income approach in question is to generate an indication of value by changing the cash flow in the future to the current value.

Based on Article 9 of PP 24/2022, in addition to fiduciary guarantees against intellectual property, the object of debt guarantee in the implementation of intellectual property-based financing schemes can also be provided in the form of contracts in creative economic activities. The contract of creative economy activity in question can be in the form of a license agreement or an employment contract or a work order received by the creative economy actor. For contracts in creative economy activities, previously there were no provisions that expressly regulated the contract as an object of guarantee because the real contract is an agreement that gives rise to rights and obligations for the parties who make it. The forms of contracts listed in the Explanation of Article 9 of PP 24/2022, these contracts are the basis for obtaining rights for creative economy actors, such as rights as licensees or licensors.(Saputri, n.d.)

A contract or agreement not only provides rights, but also imposes obligations that must be fulfilled by the parties to the contract before the authorized party can collect the rights granted in the contract. In 2006, the Director General of General Legal Administration once issued Circular Number C.HT.01.10-74 of 2006 which was an answer to Notary Sutjipto, a Notary in Jakarta, which confirmed that the Fiduciary Registration Office at the Regional Office of the Ministry of Law and Human Rights of the Republic of Indonesia, refused fiduciary guarantees in the form of accounts or other individual rights in accordance with applicable regulations. The reason for refusing to accept a bank account as a fiduciary guarantee is partly because a bank account is an individual right attached to the person who owns the account, is not transferable and transferable.

Based on the reasons used by the Fiduciary Registration Office at the Regional Office of the Ministry of Law and Human Rights of the Republic of Indonesia, individual rights arising from contracts in Creative Economy activities cannot also be the object of fiduciary guarantees. The function of the guarantee is to provide a position for creditors as creditors who take precedence over debts of debtors if the debtor defaults. In other words, the pledged object will be sold or auctioned to pay off in advance the debtor's debt to the creditor or holder of the treasury guarantee.(Mihardjo, 2021) The contract for creative economy activities cannot be transferred and transferred because it contains rights and obligations attached to the parties, and there is also no absolute value that can be estimated, so the contract of creative economy activity cannot be sold or auctioned to pay off debtor debts.

The contract for creative economy activities cannot be transferred and transferred because it contains rights and obligations attached to the parties, and there is also no absolute value that can

be estimated, so the contract of creative economy activity cannot be sold or auctioned to pay off debtor debts:

“The surrender of receivables in the name and other goods of no stature, is carried out by way of making an authentic deed or under the hand that bestows the rights to the goods, to another person. This surrender has no effect on the debtor before the surrender is notified to him or approved by him in writing or acknowledged by him. The delivery of debt securities upon appointment is carried out by providing them; the delivery of the bond by order is made by giving it along with the endorsement of the letter.”

In addition to cessie, a contract may also be transferred to parties other than the parties to the contract by means of novation or debt renewal. Novation is a stage of replacing a past contract with a newly created contract, resulting in a past contract being invalid, then what is legally valid is then the newly concluded contract, with updates to the clauses containing the terms, circumstances, and updates regarding the parties contained in the contract. (I Gede Angga Permana, 2019) In accordance with Article 1413 of the Civil Code, there are 3 (three) kinds of ways to carry out novation, namely: The debtor makes a new debt bond for the benefit of creditors that replaces the old debt and is written off accordingly; A new debtor is appointed to replace the old debtor, whom the creditor exempts from his attachment; Based on the new agreement, a new creditor is appointed to replace the old creditor, and thus the debtor is exempt from his bond.

From these provisions, it is shown that Article 1413 paragraph (1) of the Civil Code is an objective novation, while what is regulated in the next paragraph is subjective novation. In subjective novation, the change of parties to the contract already indicates the existence of novation. For objective novation, it is more difficult to measure when it occurs because in an agreement there are many terms and conditions. Then in Article 1415 of the Civil Code it is also stipulated that debt renewal or novation cannot be simply estimated; The will of a person to hold such novation must be proved in the content of the deed. It clearly stipulates that novation must be made in the form of a deed drawn up by a Notary. The importance of novation being made in a notarial deed is so that the novation has undeniable evidentiary power. So that if there is a dispute in the future, the creditor can no longer collect the credit facility to the old debtor because there has been a debt renewal or novation, or vice versa according to the type of novation chosen based on the dispute.

Regarding when changes to the terms and conditions can be categorized as novations are not regulated in the Civil Code. Although it is not regulated in the Civil Code, according to J. Satrio, the change in terms and conditions must be seen whether it causes a change in the identity of the agreement which then gives rise to a new agreement that is different from the initial agreement. Thus, the transfer of individual rights in a contract can be carried out by making novations. Thus, the contract is actually transferable and should be used as collateral for debt. Similar to other guarantees, if the contract is used as a debt guarantee by way of transfer or transfer of the contract, the transfer can only be carried out if the debtor defaults so that the creditor is entitled to execute on the debt guarantee.

If you look at the reality on the ground, of course, it will be difficult for financial institutions to order debtors to sign novation deeds when the debtor has defaulted. Thus, in accordance with Article 1253 of the Civil Code, a novation deed can actually be signed simultaneously with a financing agreement with the condition of being resilient. Even if the contract of creative economic activity allows it to be used as a debt guarantee, there are still several things that need to be considered, namely: The essence of debt guarantee is to give priority to the creditor to obtain repayment, not to have the object of the guarantee. So that the creditor must make a sale of the object of the guarantee; Sales through execution auctions for collateral objects in the form of contracts will certainly be more difficult than the sale of collateral objects in the form of tangible objects such as land and buildings, vehicles, and others; Novation can only be done if the debtor's agreement partner agrees to the novation.

IV. CONCLUSION

The implementation of contracts for creative economic activities as debt guarantees is carried out by applying for financing to bank financial institutions or non-bank financial institutions. After that, it is continued by verifying creative economy businesses, verifying collateral, and also assessing intellectual property used as collateral. If the verification and assessment stage of disbursement of funds has been carried out.

Contracts for creative economy activities can be used as debt guarantees by novating the contracts for creative economy activities. Looking at the nature of the collateral that must be transferable to another person, and it must also be executable so that the creditor can repay the debtor's debt. Therefore, the contract of creative economy activities can be guaranteed by novation, namely renewing the contract of related creative economy activities. The novation must be made in the form of a notarial deed, and the novation deed can also be signed simultaneously with the financing agreement with the conditions of deferral. The suggestion that can be submitted based on the research carried out is the need for clearer and more detailed arrangements regarding the assessment and implementation of contracts for creative economy activities as debt guarantees, because the elements of the creative economy activity contract and debt guarantee are quite different.

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