

INTELLECTUAL PROPERTY AS COLLATERAL: THE FUTURE OF INDONESIAN INTELLECTUAL PROPERTY LEGAL POLICY IN COMMERCIAL TRANSACTIONS

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Abstrak

Nilai ekonomi Hak Kekayaan Intelektual (HAKI) diakui secara universal dan dapat dijadikan sebagai jaminan untuk menjamin pinjaman bank. Validitas pernyataan ini telah ditetapkan dalam kerangka internasional dan ditunjukkan melalui praktik yang berlaku di berbagai negara, termasuk Amerika Serikat dan Inggris, yang telah dianalisis dalam penelitian ini. Menanggapi pertumbuhan pelaku kreatif yang luar biasa, Indonesia menerapkan Peraturan Pemerintah Nomor 24 Tahun 2022 tentang Ekonomi Kreatif, yang mengizinkan penggunaan kekayaan intelektual sebagai jaminan utang untuk mengatasi hambatan pembiayaan. Penelitian ini bertujuan untuk mengkaji secara dekat bagaimana kekayaan intelektual digunakan sebagai jaminan pinjaman di Indonesia dan yurisdiksi terpilih lainnya. Pertemuan ini akan menyelidiki permasalahan dan risiko yang terkait dengan jenis pinjaman ini dan mendiskusikan cara-cara yang mungkin dilakukan pemerintah untuk mengatasi permasalahan ini. Studi ini menemukan bahwa meskipun undang-undang Indonesia memperbolehkan penggunaan kekayaan intelektual sebagai jaminan, namun penerapannya masih terbatas karena kurangnya pemahaman masyarakat umum dan dunia usaha mengenai kebijakan dan prosedur yang komprehensif. Selain itu, penelitian ini juga mengusulkan solusi potensial untuk masa depan IP dalam transaksi komersial seperti hipotek

Kata Kunci: *Kekayaan Intelektual; Agunan; Regulasi Ekonomi Kreatif*

Abstract

The economic value of Intellectual Property Rights (IPR) is universally recognized and can be utilized as a form of collateral to secure bank loans. The validity of this assertion has been established within the international framework and demonstrated through the established practices of various nations, including the United States and the United Kingdom, which have been analyzed in this research. In response to the remarkable expansion of creative actors, Indonesia implemented Government Regulation No. 24 of 2022 concerning the Creative Economy, which permits the use of intellectual property as collateral for debt to tackle financing obstacles. This research aims to closely examine how intellectual property (IP) is used as a guarantee for loans in Indonesia and other selected jurisdictions. It will investigate the problems and risks tied to this type of lending and discuss possible ways for the government to address these issues. This study discovered that while Indonesian law allows the use of IP as collateral, its actual application is limited due to a lack of understanding among both the general public and business sector regarding the comprehensive policies and procedures. Additionally, this study also proposes potential solutions for the future of IP in commercial transactions as mortgages.

Keywords: *Intellectual Property; Collateral; Creative Economy Regulation*

A. INTRODUCTION

Intellectual Property Rights (IPR) refer to the legal rights that provide creators with the ability to capitalize on the economic value of their intellectual creations. This protection enables the owner to derive economic benefits from their Intellectual Property (IP), such as licensing fees or royalties. The recognition of its value has increased over time, as its commercial importance has grown in various business sectors. Based on available data, it has been determined that intellectual property intensive industries contribute 38.2% of the United States' GDP¹, which is equivalent to an enormous sum of \$6 trillion.² As for specific examples, Google's trademark is currently valued at \$44.3 billion, highlighting the importance of brand recognition and protection in today's business world.³ Additionally, a significant amount of money, at least \$5 billion, was spent on acquiring music rights in 2021, further demonstrating the value placed on intellectual property in various industries.⁴ The protection of IP rights offers owners the ability to monopolize their creations for a certain period, thereby providing them with an intangible asset that can appreciate over time. In recent years, there has been a growing realization of the importance of IP as collateral in commercial transactions due to its inherent value.⁵

The significance of IP as collateral has been recognized by UNCITRAL⁶ under international law through its Model Law on Secured Transactions. This law contains clauses that enable the establishment and implementation of security interests in various types of assets, including intangible assets like intellectual property.⁷ Its guidance has already had a significant influence on legislators around the world.⁸ In United Kingdom ("UK"), types of IP such as copyrights may be mortgaged that achieved by way of an assignment of the copyright owner to the mortgage (lender).⁹ Similarly, in the United States ("US"), trademarks can be used as security under Article 9 of the Uniform Commercial Code.¹⁰ In the European Union ("EU"), IP rights holders have the ability to seek damages for infringement, which can be used to repay loans or other financial obligations that are secured by the IP rights.¹¹ As a result, majority countries around the world have begun to accept the use of intellectual property as collateral.

This study argues that Indonesia's commercial law and IP legislation align with those of the majority of countries, regarding the acceptance of IP as collateral. According to Law No. 42 of 1999 ("Indonesia Fiduciary Act"), Fiduciary rights are a type of legal authority that can be applied to both physical and non-physical items. For instance, movable assets and intangible items such as 'rights' be subject to fiduciary control.¹² However, IP serves as an additional

¹Jason Fernando, "Gross Domestic Product (GDP): Formula and How to Use It," Investopedia, 2023.

²Marija Lasic, "Crucial Intellectual Property Statistics," USOPTO, 2023, <https://legaljobs.io/blog/intellectual-property-statistics/>.

³Heather Hamel, "Valuing the Intangible: Mission Impossible? An Analysis of the Intellectual Property Valuation Process," Forbes, 2014, <https://www.forbes.com>.

⁴Aaron Lichtschein, "The Ongoing Gold Rush in Music Catalog Sales," JIPEL, 2022, <https://jipel.law.nyu.edu/the-ongoing-gold-rush-in-music-catalog-sales/>.

⁵Marilee Owens and Richards, *The Collateralisation and Securitisation of Intellectual Property*, London (Queen Mary, University of London, 2016).

⁶Mark Garten, "UNCITRAL (United Nations Commission on International Trade Law) Is a United Nations Body That Works to Promote the Harmonization and Modernization of International Trade Laws," United Nations Commission on International Trade Law, 2021.

⁷Andrea Tosato, "The UNCITRAL Annex on Security Rights in IP: A Work in Progress," JIPLP, 2009, <https://doi.org/10.1093/jiplp/jpp128>.

⁸Thomson Reuters, "The Guide Has Had a Notable Impact on Legislators and Organizations, for Example in the Adoption of Australia's Personal Property Securities Act 2009 and the Drafting of South Korea's Secured Transactions Law; Richard Kohn and Goldberg Kohn, "The UNCITRAL," United Nations Commission on International Trade Law, 2010, <https://content.next.westlaw.com>.

⁹Lionel Bently, *Intellectual Property Law* (London: Oxford University Press (OUP), 2022), 313.

¹⁰Xuan-Thao Nguyen, "The Puzzle in Financing with Trademark Collateral," *Houston Law Review* 56, no. 2 (2018).

¹¹European Commission, "Intellectual Property and Access to Finance for High Growth SMEs," 2006; Dodik Setiawan Nur Heriyanto and Alif Muhammad Gultom, "The Power of Legal Certainty in the Trademark Exhaustion Principle Governing Parallel Imports," *Audito Comparative Law Journal* 4, no. 2 (2023): 3–4.

¹²M. Bahsan, *Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia* (Rajawali Pers, 2020), 108.

component in the credit agreement and not the primary guarantee.¹³ Banks currently view IP as collateral that complements or supplements other forms of collateral rather than being the primary guarantee. From an intellectual property perspective¹⁴, Article 16(3) of the Copyright Act allows for copyright to become the object of fiduciary. The same also applies to patents as clearly defined in article 108 of the Indonesian Patent Act.¹⁵ In addition, a trademark as a movable object is included in things that can be fiduciary.

In recent times, Indonesia enacted Law Number 24 of 2022 as the implementing regulations of Law No. 24 concerning Economy Creative (“Creative Economy Regulation”). The Indonesian government aims to promote the growth of the economy as one of the main pillars of the country’s vision by ensuring that IPR serves as a basis for financing. Moreover, the act provides such measures to simplify the process of obtaining funding using IP through financial institutions, including banks and non-banks. This process involves two categories, namely the utilization of IP that holds economic value and an evaluation of IP. Nonetheless, it is important to note that the use of IP as collateral is still relatively new in Indonesia and some challenges need to be addressed, such as the valuation of IP assets and the lack of awareness and understanding among businesses and financial institutions about the use of IP as collateral. Furthermore, the present regulations do not cover clear guidelines on the execution process, nor they provide a clear technical process for transferring the IP as a secured loan (*absence of legal coverage*).

B. RESEARCH METHODE

With normative methodology, this paper aims to conduct a thorough analysis of the use of IP as collateral for loans in Indonesia and several other countries. It will examine the challenges and risks associated with secured loan practices and explore ways in which the government can address these issues. Additionally, the paper will propose potential solutions for the future of IP in commercial transactions as mortgage.

This research applied statutory and conceptual approaches. The statutory approach is used to examine the existing Indonesian domestic regulation in relations with the possibility of the use of IP as collateral. The conceptual approach is applied to analyze the current trend of the use of IP as collateral is in accordance with the basic principles of IP law.

C. DISCUSSION

1. Ip As Collateral: Global Perspective

Using intellectual property as collateral for financing has been a common practice for over years. One notable early example occurred in the late 1880s, when Thomas Edison used his patent for the incandescent electric light as collateral to secure a loan for his new company.¹⁶ In the United States, the use of patents as collateral became more widespread in the early 2000s, as more inventors and companies started to rely on patents as a means of protecting their inventions and securing competitive advantages.¹⁷ During this time, banks and other lenders began to recognize the value of patents as collateral, and offer loans and financing arrangements based on the value of patented inventions. Over time, the utilization of IP as collateral has broadened beyond patents and now encompasses other types of IP, including

¹³Trias P Kurnianingrum, “Intellectual Property as Banking Credit Guarantee,” *Negara Hukum* 8, no. 1 (2017): 31.

¹⁴WIPO, “What Is Intellectual Property?,” n.d., <https://www.wipo.int/about-ip/en/>.

¹⁵“Law No. 13 of 2016 Concerning Patent” (n.d.).

¹⁶Brian W. Jacobs, “Using Intellectual Property to Secure Financing after the Worst Financial Crisis Since the Great Depression” (University of Georgia, 2011), 450.

¹⁷William Mann, “Creditor Rights and Innovation: Evidence from Patent Collateral,” *JFE*, 2018, <https://doi.org/10.1016/j.jfineco.2018.07.001>.

trademarks, copyrights, and more. For instance, David Bowie¹⁸ raised \$55 million in 1997 by issuing asset-backed bonds that were based on the future royalties earned from the publishing rights and master recordings of 25 pre-recorded albums (these bonds had a 10-year maturity period).¹⁹

Using IP as collateral provides several advantages that make it an attractive option for lenders and borrowers alike. *First*, it can boost the owner's returns by enabling increased leveraging. This is possible because many royalty payments are received in a lump sum rather than over a period of time. This amount of money can be put towards upcoming or ongoing ventures that provide a greater yield than the expenses of financing.²⁰ *Second*, IP might be a secure form of collateral compared to other types. As a result, some investors opt to invest solely in intellectual property that is generating licensing royalties. This is because the royalty payments serve as the primary source of cash for repaying the loan, making it an attractive investment option for some.²¹ Furthermore, there are occasions when a company's intellectual property is more valuable than its physical assets. Melvin Simensky suggests that trademarks could account for up to 80% of a company's worth.²² Therefore, it is not surprising that borrowers and lenders are showing more interest in IP portfolios as a potentially valuable form of collateral.

Regulations for creating security interests in patents, copyrights, and trademarks in the United States are governed by both the Uniform Commercial Code (U.C.C) and federal laws.²³ Under the U.C.C, Article 9 governs secured transactions, which includes the creation of security interests in intellectual property. Although the article does not contain specific words of intellectual property, we may interpret from general intangibles are defined as '*any property, other than goods*...'.²⁴ Furthermore, if a property is primarily characterized by its embodiment of knowledge, ideas, concepts, and principles, it is likely to be classified as a general intangible under the U.C.C.²⁵ To establish an IP as a security interest in the United States, certain fundamental criteria must be met. *One* of these prerequisites is that value must be given to the debtor in exchange for the security interest.²⁶ *Second*, it necessitates that the debtor holds a certain level of legal entitlement to the IP that is proposed as collateral. While ownership rights may serve as a basis for such entitlement, it is noteworthy that licensed rights can also be utilized to this end, so long as they comply with contractual stipulations.²⁷ The *last* essential is that the debtor must formally execute a security agreement, which must clearly and adequately identify the collateral that is being pledged as security.²⁸

The 'perfection'²⁹ element of IP securitization is also an important part of intangible property. According to article 9 of U.C.C, financing statement³⁰ must be filed with the appropriate state office, or filing office in the relevant jurisdiction, to establish a security interest in the collateral.³¹

¹⁸Laura Macmillan, "David Bowie Was a Renowned English Musician, Songwriter, and Performer.," Hello Music Theory, 2023, <https://hellomusictheory.com/learn/famous-british-singers/>.

¹⁹Teressa N. Kerr, "Bowie Bonding in the Music Biz: Will Music Royalty Securitization Be the Key to the Gold for Music Industry Participants?," *UCLA Entertainment Law Review* 7, no. 2 (2000): 367.

²⁰Jacobs, "Using Intellectual Property to Secure Financing after the Worst Financial Crisis Since the Great Depression," 458.

²¹Jacobs, 458.

²²Melvin Simensky, *The New Role of Intellectual Property in Commercial Transactions* (John Wiley & Sons, 1994), 5.

²³Xuan-Thao Nguyen, "Collateralizing Intellectual Property," *Georgia Law Review* 42, no. 1 (2007).

²⁴"UCC Uniform Commercial Code," n.d., Art 9, <https://www.uniformlaws.org/acts/ucc>.

²⁵United States v. Antenna Systems, Inc. (1966).

²⁶"UCC Uniform Commercial Code," Art 9. 1 (b) and 1 (c).

²⁷"UCC Uniform Commercial Code," Art 9. 1 (a). "id": "ITEM-1", "issued": {"date-parts": [{"0"}]}, "title": "UCC Uniform Commercial Code", "type": "webpage", "locator": "Art 9. 1 (a)

²⁸Richard M. Assmus, "Value and Risk Considerations for Intellectual Property Collateral," American Bar Association, 2022, <https://www.americanbar.org>.

²⁹"In Legal Terms, Perfection Refers to the Additional Steps That Must Be Taken to Make a Security Interest Become Legally Binding and Protected against Claims from the Third Parties," n.d.

³⁰"UCC Uniform Commercial Code," Art 9.

³¹"UCC Uniform Commercial Code," Art 9.

The requirement of each IP is further governed by prevailing federal laws for each IP type. For example, for copyright, it must be filed to the Copyright Office, ideally within one month of the effective date.³² This filing requirement provides a public notice of the creditor's security interest in the debtor's property and safeguards the creditor's interest in the collateral in the event of a default or bankruptcy.

This study argues that there is a notable resemblance between the practices followed in the United Kingdom and the legal terminology adopted in the United States. In the United Kingdom, IP holds the same status as other tangible assets and can be pledged as collateral to secure a debt, thereby facilitating copyright proprietors to raise capital. This pragmatic approach can prove beneficial for IP holders in terms of financial leverage.³³ Within this context, the process of mortgaging IP involves the transfer of ownership from the IP proprietor to the mortgagee, the lender. This transaction is contingent upon the understanding that the IP will be returned to the mortgagor, the borrower, upon repayment of the debt, or as referred to in legal terms, upon redemption.³⁴

In order to be valid, a mortgage must be in writing and signed by the parties. Where there are joint proprietors, all of them must consent to the mortgage. The validity of a mortgage does not depend on its registration at the Intellectual Property Office, although registering it offers certain benefits. One such advantage is that registration guarantees that the mortgage owner's rights remain intact, despite any conflicting transactions concerning the property. Registration also provides benefits in relation to licensing agreements, as it allows the licensee to obtain complete access to all available rights and legal remedies.³⁵ Moreover, if the mortgage or security pertains to a company-owned patent, it is essential to register it with Companies House. Similarly, for copyright, it is crucial to register the work within 21 days of its creation with the Registrar of Companies to ensure adequate legal protection.³⁶

2. Indonesia Legal Framework

It is an important section of your manuscript. The analysis should be clear and concise. Heading in the discussion section should be consistently written with the structure of the article or the research statement, as mentioned in the introduction. Headings in this discussion use Roman letters (I., II., III., etc.; you can add more than one part of the discussion, it depends on the structure of the discussion you want to write).

Indonesia legal terminology enables the utilization of IP as potential objects for fiduciary guarantees as clearly stated under Article 1 point 2 of Indonesia Fiduciary Act.³⁷ Because Intellectual Property rights are considered intangible assets under the civil code³⁸, they are recognized as belonging to the realm of property law. These rights are capable of being transferred or exchanged through various means, including agreements, grants, inheritance, and other legal mechanisms.³⁹ Although Indonesia's legal framework recognizes that IP assets can be used as collateral for bank loans⁴⁰, it's worth noting that IP cannot serve as the primary guaranteed object. This means that while IP can be used as collateral, it cannot be the sole means of securing a loan. A credit agreement is formed between the debtor and the creditor upon the extension of credit, which subsequently gives rise to a legal relationship between the

³²Jennifer T. Criss, "It's Perfect! Or, Perfecting Security Interests in Intellectual Property," *National Law Review*, 2019.

³³Bently, *Intellectual Property Law*, 333.

³⁴Bently, 333.

³⁵"Trademarks Act of United Kingdom 1994" (n.d.), Art 3 (b).

³⁶"Companies Act of United Kingdom 2006" (n.d.), 859 (a).

³⁷"Indonesian Law No. 42 of 1999 Concerning Fiduciary Guarantee" (n.d.), Art 1 (2).

³⁸"Indonesia Civil Code" (n.d.), Art 499.

³⁹Sri Mulyani, "Realitas Pengakuan Hukum Terhadap Hak Atas Merek Sebagai Jaminan Fidusia Pada Praktik Perbankan Di Indonesia," *JHDM* 112 (2014): 135.

⁴⁰"Indonesian Law No. 8 of 2014 Concerning Copyright" (n.d.).

two parties.⁴¹ Despite the legal provision allowing IP to be utilized as collateral in Indonesia, its practical application remains limited due to a general lack of understanding among the public and business community regarding relevant policies and mechanisms. In addition, banks have not yet recognized IP as the primary form of collateral, but rather as a supplementary or additional form of collateral.⁴²

In an effort to promote greater comprehension surrounding IP securitization and to unlock additional value from creative assets derived from cultural heritage, scientific advancements, and technological innovations, the Indonesian government enacted the Creative Economy Regulation.⁴³ The regulation permits participants within the creative industry to seek financial support from either banking or non-banking financial institutions by leveraging their intellectual property assets as the main object of the guarantee.⁴⁴ To utilize IP as collateral, it is imperative that it has been registered with the Directorate General of Intellectual Property Office (“DGIP”)⁴⁵ and has been independently managed or its rights have been transferred to related parties.⁴⁶ This regulation outlines three types of IPR that can be used as collateral for debt, which include fiduciary guarantees on IP, contracts related to Creative Economic Activities (“CEA”), and collection rights for CEA.⁴⁷ Contracts in CEA refer to agreements such as licensing agreements and work contracts.⁴⁸ On the other hand, collection rights in CEA refer to the rights of collecting royalties that are due to be paid by users of songs and/or musical instruments for commercial use.

This act also introduced a framework for IP financing, which includes four fundamental requirements. These requirements are: a financing proposal, evidence of ownership of a creative economy business, an agreement related to intellectual property for creative economy products, and an IPR certificate.⁴⁹ Subsequently, financial institutions including both banks and non-banks will undergo a number of verification stages for the businesses and letters or certificates of IP belonging to actors in the creative economy, and will provide an evaluation of their intellectual property which will serve as collateral.⁵⁰ To gain a better understanding of the scheme outlined in this act, please refer to the concept map below, which illustrates the mechanisms involved.

Fig. 1. An essential aspect that is also addressed in this context pertains to the valuation of intellectual property rights, which constitutes one of the crucial phases in ensuring the protection of such rights.⁵¹ Similar to the approach method by other countries, it’s necessary to incorporate records of funding from both traditional and non-traditional financial institutions into the recording system (although further policy will be governed under this system).⁵² This new Creative Economy Regulation will be enforced one year after it has been officially announced.

⁴¹Ni K Arcani and Ida A Sukihana, “Hak Kekayaan Intelektual Sebagai Jaminan Kredit Perbankan,” *Kertha Semaya* 10, no. 6 (2022) See Indonesian Civil Code, Art. 1320.

⁴²Denny Antasena, “Hak Kekayaan Intelektual Sebagai Jaminan Kredit Perbankan Menurut Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia” (Universitas Yarsi, 2019).

⁴³“Indonesia Government Regulation No. 24 of 2022 on Creative Economy” (n.d.), Art 1 (1).

⁴⁴“Creative Economy Regulation” (n.d.), Art 7.

⁴⁵Fitri Astari Asril, “The Directorate General of Intellectual Property (‘DGIP’) Is a Governmental Agency Overseeing Intellectual Property Rights System in Indonesia,” A&Co Law Office, 2023, <https://aco-law.com/articles/ip-consultant-in-indonesia-understanding-the-government-regulation-number-100-of-2021/>.

⁴⁶Creative Economy Regulation, Art 10.

⁴⁷Creative Economy Regulation, Art 7.

⁴⁸Creative Economy Regulation, Art 9.

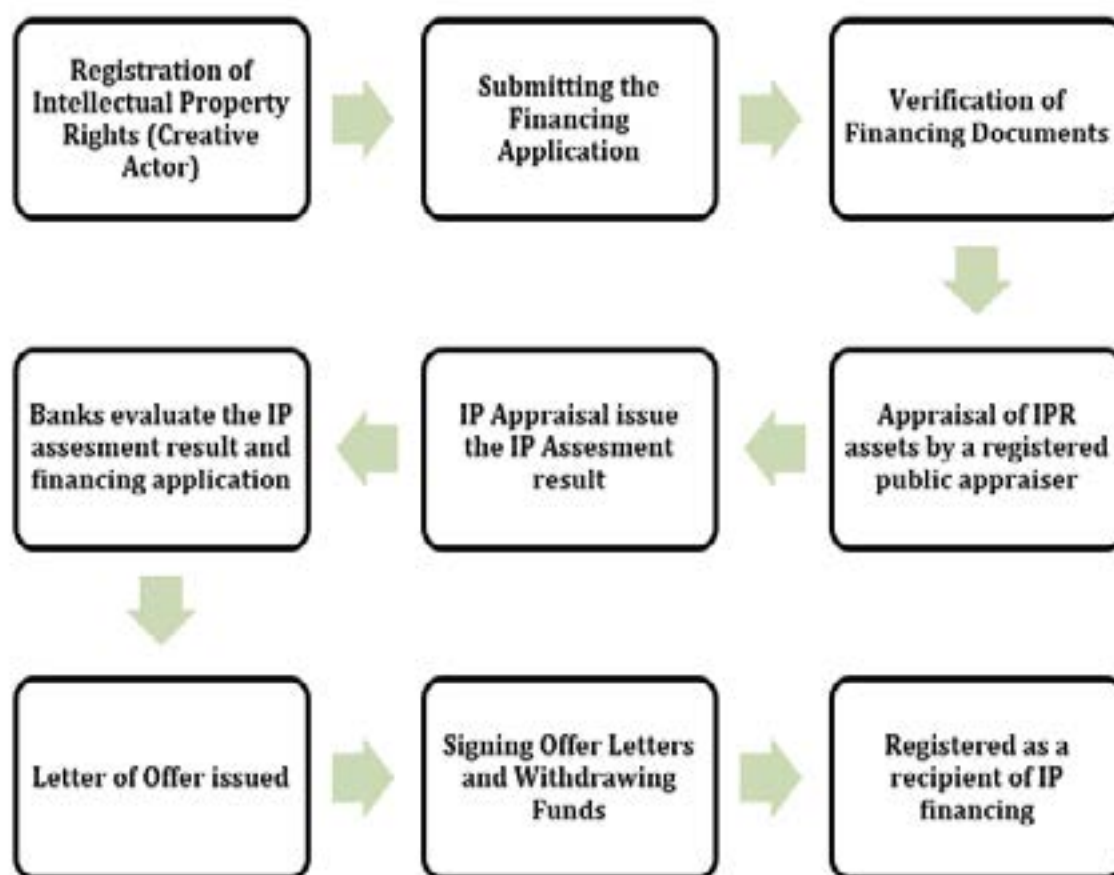
⁴⁹Creative Economy Regulation, Art 7 (2).

⁵⁰Creative Economy Regulation, Art 9.

⁵¹Creative Economy Regulation, Art 12.

⁵²Creative Economy Regulation, Art 13.

Fig. 1 IP financing mechanism based on the Creative Economy Regulation (GR 24/2022)



3. Challenges And Risk For Indonesia

The Creative Economy Regulation brings positive changes by allowing IP to be used as collateral, but it also introduces legal and practical challenges, including issues with IP rights and lenders, who are typically banks. One of the main challenges of using IP as collateral is the difficulty in determining its value. Unlike physical assets, which can be easily assessed based on market value, the value of IP is often subjective and can vary depending on several factors, such as the industry, the level of competition, and the scope of protection. This subjective nature makes it difficult to determine an accurate value for IP, which can result in over- or undervaluation of the collateral.⁵³ Moreover, the value of IP can fluctuate significantly over time, making it challenging to determine its worth accurately. This volatility can result from various factors, such as changes in market demand, technological advancements, and legal challenges. For instance, a patent may lose its value if a competitor introduces a new product that does not infringe on the patent. Similarly, a trademark may lose its value if consumer preferences change, making the brand less popular. As such, the value of IP can be highly unpredictable, and lenders may find it challenging to assess the risk associated with such collateral.

The Creative Economy Regulation aims to provide guidelines for the verification and due diligence system, but it does not offer an in-depth explanation. To carry out the assessments, IP appraisers or assessor panels can be employed. Individuals who are authorized to conduct the assessment must hold a valid public appraisal permit, possess the necessary competence, and be registered with the relevant ministries.⁵⁴ On the other hand, the assessor panel refers to

⁵³Jody C. Bishop, "The Challenge of Valuing Intellectual Property Assets," *NJTIP* 1, no. 1 (2003).

⁵⁴Creative Economy Regulation, Art 12 (3).

credit appraisers or experts appointed by financial institutions.⁵⁵ According to this regulation, IP assessment can be conducted using various approaches, such as the cost approach, market approach, income approach, or other assessment approaches that adhere to the relevant standards.⁵⁶ Nonetheless, the framework for IP valuation provided by the regulation lacks a clear concept and detailed mechanism. Moreover, the certification related to this regulation has not been further regulated, which poses a challenge for the government and financial institutions in the future with regards to the element of IP valuation. Besides, the existing Bank Indonesia Regulation does not have specific instructions or rules regarding the acquisition of bank guarantees for intangible assets.⁵⁷

The other challenges and/or risk that Indonesia might face is in the event the pledger bankrupt or default. One potential challenge is that if the lender seizes the IP collateral, they may lack the expertise required to effectively manage and monetize the assets. This could result in a loss of value for the IP, which may be difficult to reverse. Another problem is the absence of a market capable of absorbing intellectual property assets when players in the creative industry fail to fulfill their payment obligations. Collateral serves as a substitute means of payment, where the value of the collateral provided must be equivalent to or exceed the amount of debt and interest agreed upon. However, if there is no market to absorb the IP assets, it can be challenging to realize their full value in the event of a default.⁵⁸ Real case occurred in 2011, when Kodak⁵⁹ filed for bankruptcy after struggling to adapt to the digital age. Before filing for bankruptcy, Kodak had attempted to raise capital by using its extensive portfolio of patents as collateral for a loan.⁶⁰ At the time, Kodak believed that its patents were worth billions of dollars and that they would be sufficient collateral to secure the loan. However, when Kodak filed for bankruptcy, it was discovered that the value of Kodak's patents was significantly lower than expected, and the IP was not enough to pay back the loan.⁶¹

In Indonesia, the economic value of intellectual property is subject to significant fluctuations and is influenced by market trends. The United States Trade Representative (USSTR) has included Indonesia on its Priority Watch List (PWL) for 2022, indicating that the country still struggles with the issue of IP piracy.⁶² The illegal distribution of pirated content, such as songs and movies, is still prevalent in Indonesia despite insufficient law enforcement. This widespread circulation of illegal products has not only caused a decrease in the official value of intellectual property, but it has also made financial institutions hesitant to provide loans.

The last challenges that Indonesia Government face currently face is related to the low level of understanding among creative economy actors and society as a whole regarding the benefits of IP. This is reflected in the low number of registrations at IP offices, as well as the limited use of IP as collateral prior to the formation of the Creative Economy Regulation. According to the 2020 Statistics on Tourism and the Creative Economy, only 1.98% of creative economy businesses have registered their IPR, while the remaining 98.02% either lack IPR or have not

⁵⁵Creative Economy Regulation, Art 12.

⁵⁶Abdul Hadi and Bima Guntara, "Pembaharuan Hukum Nasional Dalam Upaya Perlindungan Data Pribadi Di Era Disrupsi Kecerdasan Buatan (Artificial Intelligence)," *Jurnal Hukum Mimbar Justitia* 8, no. 1 (June 30, 2022): 233, <https://doi.org/10.35194/jhmj.v8i1.2426>.

⁵⁷"Bank Indonesia Regulation Number 9/6/PBI/2007 of 2007" (n.d.).

⁵⁸Gerid Reskin and Wirdyaningsih, "Pengaturan Hak Kekayaan Intelektual Sebagai Jaminan Utang Menurut PP Nomor 24 Tahun 2022," *PLR* 8, no. 4 (2022): 193.

⁵⁹"Kodak Is a Major Company That Operates Worldwide and Specializes in Commercial Printing, as Well as Advanced Materials and Chemicals," n.d.

⁶⁰Andrew Martin, "Kodak to Sell Digital Imaging Patents for \$525 Million," *The New York Times*, 2012, <https://www.nytimes.com/2012/12/20/business/kodak-to-sell-patents-for-525-million.html>.

⁶¹"Kodak Had Predicted That They Would Sell Their Company for \$2.6 Billion, but the Actual Selling Price Was Much Lower at around \$525 Million.," n.d.

⁶²USTR, "USTR Releases 2022 Special 301 Report on Intellectual Property Protection and Enforcement," 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/april/ustr-releases-2022-special-301-report-intellectual-property-protection-and-enforcement>.

registered them.⁶³ In addition to inadequate regulations at the time, a lack of awareness about the importance of IPR was a major contributing factor to this situation.

4. Current State Of The Industry

The utilization of intellectual property as a means to obtain financing has been steadily increasing over time. Moreover, the current economic turmoil brought on by the coronavirus pandemic, which has resulted in financial distress and limited credit availability, could potentially further reinforce the strategy of leveraging intellectual property as collateral.⁶⁴ This growth has become increasingly prevalent across various industries, including but not limited to entertainment, technology, and pharmaceuticals.

In the entertainment industry, it is common for companies to use their IP assets, such as copyrights and trademarks, as collateral to secure financing for their projects. For example Nickolas Ashford and Valerie Simpson, who were songwriters and producers of popular songs such as “*Ain’t No Mountain High Enough*”, utilized their copyright ownership in 247 songs as collateral to secure bonds valued at \$25 million.⁶⁵ In 2014, the film and television production company EuropaCorp used the rights to its film library as collateral to secure a \$450 million credit facility from JP Morgan, SunTrust Bank, and OneWest.⁶⁶ In Indonesia, the copyright for the film series “*Ada Apa Dengan Cinta*” (both parts 1 and 2) was utilized as collateral to obtain a bank loan facility for the production of the next movie.⁶⁷

In terms of the technology industry, Aon and BrainScope recently concluded a transaction in the technology industry that involves the use of intellectual property as collateral to secure funding for BrainScope, a company that has developed a device to assess brain injuries. Under the funding arrangement, BrainScope can receive up to \$35 million in capital without any negative impact on its current equity value.⁶⁸ This novel approach to using intellectual property as a financing instrument underscores its growing significance in the tech industry and demonstrates how it can be used to foster innovation and drive business growth. On the other jurisdiction in terms of pharmaceutical company, two Chinese public companies received credit from the Bank of China and Hankou Bank Co., Ltd. by using their trademarks and utility model patents as collateral. The loan amounts were 80 million yuan (\$12 million) and 35 million yuan (\$5.2 million) respectively. This was done through China’s IP financing scheme, which has been promoted vigorously in recent years.⁶⁹

In addition to the recent IP financing development where companies use their IP as collateral for loans, it is also significant to note the differences in IP valuation current policies across jurisdictions that Indonesia could learn from. Under WIPO, it recognizes three main principal method of valuing, which are the ‘Income method’ by estimating its economic income and adjusting it to its present value. Second is the ‘market method’ involves comparing the price paid for transferring similar IP assets under similar circumstances. The last known principle is the ‘cost method’ that determines the value of an IP asset by calculating the cost of a similar

⁶³ “Ministry of Tourism and Creative Economy 2021” (n.d.).

⁶⁴ Miriam Rozen, “Inventors Learn to Deploy Their Assets as Collateral,” *Financial Times*, 2020, <https://www.ft.com>.

⁶⁵ WIPO, “What Is Intellectual Property?”

⁶⁶ Mike F Junior and Nancy Tartaglione, “Cannes: EuropaCorp Signs \$450M Credit Facility To Finance English-Language Pics,” 2014, <https://deadline.com/2014/05/cannes-europacorp-signs-450m-credit-facility-to-finance-english-lingo-pics-731450/>.

⁶⁷ Ika Atikah, “Intellectual Property Rights As The Resource For Creative Economic In Indonesia,” *JPHDJ* 22, no. 4 (2022): 451.

⁶⁸ Liz Bury, “Aon Sources \$35mn in IP-Collateralised Funding to Start-up BrainScope,” *Trading Risk*, 2021, <https://www.trading-risk.com>.

⁶⁹ China IP, “Jointown and Goaland Secure Multi-Mln Financing with Pledged IP Assets,” *China IP Today*, 2022, <http://www.chinaiptoday.com/post.html?id=1821>.

or identical IP asset.⁷⁰ In the United States, the valuation of IP can be determined by various professionals such as IP attorneys, business appraisers, and IP valuation specialists. Additionally, the court may appoint a neutral expert to determine the valuation of intellectual property in certain legal disputes. One of the notable professional organizations concerning valuation in the United States called the American Society of Appraisers (“APA”) develops standards in valuation including IP and provides certification to professionals.⁷¹ For instance, in valuing patents, the valuation includes “*Scope of protection, such as jurisdictional coverage, status of registrations and maintenance fee payments, breadth of patent claims and alternatives to the patented invention. Next is the Risks of patent exploitation, such as infringement, etc..*”

This guideline may lead to greater transparency and consistency in IP valuations, reducing the potential for errors and disputes. In the U.K., the government has provided a list of IPR valuation checklists that can assist appraisers in determining the value of intellectual property.⁷² These checklists help appraisers identify and assess the key value drivers of intellectual property, such as market demand, legal ownership, licensing arrangements, and competitive advantages. Recently, a new edition of IP valuation has been produced by organizations such as the Royal Institution of Chartered Surveyors to assist practitioners in the field.⁷³ The new edition explains how the definition of the IP that is being valued, the level of investigation required, the choice of valuation methodology, and the valuation analysis are influenced by the legal, functional, and economic characteristics of the IP asset being evaluated.⁷⁴

Based on the development above we can see that monetizing IP assets through collateral looks promising for companies and individuals looking to secure financing. Data from around the world indicates that the practice of using intellectual property as collateral is on the rise each year.⁷⁵ On the other hand, this study has observed very few examples of the use of intellectual property as collateral in Indonesia, which is a saddening situation considering the benefits for a company or any IP owner. Moreover, the Indonesian government and IP appraisers in Indonesia could gain valuable insights by studying international approaches to intellectual property valuation. This would help them establish effective methods for valuing intellectual property in the Indonesian market.⁷⁶

5. Future Implications

The trend of IP financing in Indonesia is relatively low compared to other countries. This can be observed from the fact that there are very few instances of IP-based financing programs being utilized in the country, and there is limited awareness among businesses and individuals about the potential benefits of using IP as collateral for securing loans. This is a concerning situation given the potential value of IP assets and the role they can play in driving innovation and economic growth.⁷⁷ One of the issue for future that needs to be address is that the IP assets may help innovative Small Medium Enterprises (“SMEs”) to strengthen their position when obtaining business finance. When SMEs require funding, their intellectual property (IP) can

⁷⁰Novianty H Muchtar, “Development of a Valuation System of Technology for the Enhancement of Innovation in Indonesia,” *Heliyon* 9, no. 2 (2023): 1.

⁷¹“ASA Providing Value Worldwide,” n.d., <https://www.appraisers.org/home>.

⁷²UKIPO, “Guidance Valuing Your Intellectual Property,” GOV.UK, 2022, <https://www.gov.uk/guidance/valuing-your-intellectual-property>.

⁷³RICS, “Valuation of Intellectual Property Rights,” 2020, <https://www.rics.org>.

⁷⁴Toby Mendel et al., *Global Survey on Internet Privacy and Freedom of Expression* (UNESCO, 2012).

⁷⁵Jason Ackleson, “Directions in Border Security Research,” *The Social Science Journal* 40, no. 4 (December 1, 2003): 573–81, [https://doi.org/10.1016/S0362-3319\(03\)00069-7](https://doi.org/10.1016/S0362-3319(03)00069-7).

⁷⁶John W. McDonald, “The Institute for Multi-Track Diplomacy,” *Journal of Conflictology* 3, no. 2 (December 13, 2012), <https://doi.org/10.7238/joc.v3i2.1629>.

⁷⁷Auliya Ahmad Suhardi et al., “Peran Perdagangan Internasional Dalam Meningkatkan Produktivitas Perekonomian Di Indonesia,” *Jurnal Manajemen Dan Ekonomi Kreatif* 1, no. 1 (December 26, 2022): 90–99, <https://doi.org/10.59024/jumek.v1i1.33>.

serve as their primary source of income through loaning. This can help boost the SME's market position or increase their profits.⁷⁸

The Creative Economy Regulation in Indonesia aims to maximize the advantages of IP providing new opportunities for individuals in the creative economy sector to obtain funding from traditional financial institutions as well as alternative ones. According to the Ministry of Tourism and Creative Economy's latest statistics, the income generated by the creative economy in Indonesia in 2021 was valued at 1.191 trillion rupiahs. With the implementation of the Creative Economy Regulation, the target is to increase this value to 1.279 trillion rupiahs by 2023.⁷⁹ Furthermore, the government is providing additional assistance to safeguard the financial value of creative products by announcing that YouTube content can now be accepted as collateral for loans at banks. The relevant regulation will be issued in July 2023, and more related regulations are expected to follow.⁸⁰ Hence, the act clearly gives hope to those in the industry to secure financial support for their creative endeavors.

While the current Creative Economy Regulation in Indonesia has brought about significant improvements in the monetization of Intellectual Property, there remains a need for a comprehensive legal ecosystem to support its regulation from relevant stakeholder. This paper believes that it is necessary for the Financial Service Authority ("FSA") in Indonesia, which is responsible for regulating and supervising financial activities in the banking and financial services sectors, to provide additional guidelines regarding the use of IP as collateral.⁸¹ Next, the Directorate General of State Assets ("DGSA"), which is responsible for conducting auctions in accordance with their functional duties, should develop policies that comply with laws and regulations for executing auctions or non-executing auctions for debt collateral objects in the form of Intellectual Property that are bound by fiduciary material guarantees. To complete the ideal ecosystem, the study recommends that the DGIP should create guidelines on the recordation of Intellectual Property securitization, which shall also include the ideal system of IP valuation.

Based on the above, the compatibility between the utilization of Intellectual Property as collateral and the objectives of the Indonesian Creative Regulation issued by the government is expected to foster a positive outlook for commercial transactions in Indonesia, particularly in the realm of Intellectual Property rights although there still homework for the government.⁸² This paper recommendation to establish an ideal framework and ecosystem for Intellectual Property financing mechanisms is crucial in facilitating all sectors and ensuring a more promising future for the commercialization of IP, particularly in Indonesia. By doing so, it is expected that the potential benefits of IP will be fully realized and contribute significantly to the growth and development of the economy.⁸³

D. CONCLUSION

The study posits that Intellectual Property (IP) possesses an inherent economic value that can be leveraged as collateral by banks. This practice of making IP as collateral has been acknowledged by International legal terminology and the other 2 countries (U.S and U.K)

⁷⁸Sati Sukarmijan and Olivia Sapong, "The Importance of Intellectual Property for SMEs; Challenges and Moving Forward," *UMKP*, 2014, 1, <https://doi.org/10.1016/j.umkpro.2014.07.010>.

⁷⁹Nia Niscaya, "Webinar Prospek Hak Kekayaan Intelektual (HKI) Sebagai Jaminan Utang," 2022, https://www.youtube.com/watch?v=2PW4QIIK7_U&t=7073s.

⁸⁰Wulan C Shafira, "Good News: Youtube Content Can Be a Loan Collateral," *Digital Creators*, 2023, <https://ambadar.co.id/article/detail/digital-creators-good-news-youtube-content-can-be-a-loan-collateral>.

⁸¹Sanya D Susanti, "OJK Siapkan Kerangka Regulasi Dukung HAKI Sebagai Jaminan Utang," *Antaran News*, 2022, <https://www.antaranews.com>.

⁸²Nicola Bragazzi and Giovanni Del Puente, "A Proposal for Including Nomophobia in the New Dsm-V," *Psychology Research and Behavior Management*, May 2014, 155, <https://doi.org/10.2147/PRBM.S41386>.

⁸³Vincent Nijman, "An Overview of International Wildlife Trade from Southeast Asia," *Biodiversity and Conservation* 19, no. 4 (April 2010): 1101–14, <https://doi.org/10.1007/s10531-009-9758-4>.

mentioned in this paper. In Indonesia, Intangible intellectual property assets can serve as collateral for bank loans since they have the ability to be transferred and used as security for fiduciary guarantees. Although Indonesian law permits the use of IP as collateral, its practical implementation is restricted due to a lack of comprehension among the public and business community about relevant policies and mechanisms. Moreover, banks have yet to acknowledge IP as the primary form of collateral, considering it as a supplementary option. Whereas, this paper emphasized the significance of utilizing IP as collateral, one of which is to assist SMEs in acquiring funding for their businesses.

The Creative Economy Regulation reinforces the role of IP as the primary collateral for financial funding, particularly for those in the creative industry. The Act tries to cover how the financing system uses IP and the valuation process under the relevant stakeholders. Despite the government's efforts, there are still significant issues to be addressed in Indonesia, such as the lack of a market to accommodate assets in the case of default. Especially with piracy remains a pervasive problem in society, leading to further complications. The unclear guidance on valuing IP may pose a significant problem. To aid stakeholders, the paper recommends that the government adopt the approach of two comparable countries and offer transparent checklists or guidelines for valuing IP.

Last, this paper suggests the government enact further laws to make a comprehensive legal system for the IP financing scheme. Three government authorities that are relevant to this ecosystem are the Financial Service Authority, the Directorate General of State Assets, and the Directorate General of Intellectual Property. To establish a coherent and transparent technical mechanism for utilizing IP as collateral, the three concerned government bodies must develop regulations that align with their respective capacities. Such a collaborative effort would pave the way for a robust legal ecosystem, providing stakeholders with a comprehensive understanding of the requisite procedures.

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