

Implementation of IP-Based Financing in Indonesia: Notaries Point of View

Ranti Fauza Mayana^{1†}, Tisni Santika² and Zahra Cintana¹

¹Law Faculty, Universitas Padjadjaran (UNPAD) Bandung, Indonesia

² Law Faculty, Universitas Pasundan (UNPAS) Bandung, Indonesia

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Despite the huge development of creative industries, 92.37 % of creative industry players in Indonesia are autonomously self-supported and are not supported by any external financing, especially banking credit. Indonesian Government has taken progressive measures through the issuance of Law Number 24 / 2019 on Creative Economy and Government Regulation Number 24 / 2022 on the Implementation of Creative Economy Law to support the Indonesian creative economy businesses by formulating Intellectual Property (IP)-based financing. This study aims to examine the preparatory steps, the procedure of collateral binding and registration that must be carried out by notaries also examine the requirement concerning legal, procedural and technical support in the implementation IP- based financing in Indonesia from notaries perspective. The study shows that several crucial points need to be followed up through synergy and collaboration related to the scope of the notary's role in making authentic deeds for IP-based financing and collateral binding in the form of legal infrastructure, procedural guidelines and technology facilitation in the form of the reliable digital infrastructure that provides comprehensive databases that can carry out the inventorying function, verification, and recording of registered IPs, IP as fiduciary collateral, and IP-based collateral through the synergy of relevant ministries, financial service authority, banking institutions and notaries themselves.

Keywords: Creative Economy, Intellectual Property – Based Financing, Notaries, IP as Credit Collateral

In developing Indonesia's creative economy sector, intellectual property is required as an essential asset creative economy actors produce.¹ The government seeks to drive a competitive Indonesian economy through a program to accelerate the development of the creative economy by involving all related parties.² The progressive step that the Indonesian government has taken in providing a legal basis to drive the national economy through the creative economy is legislating Law Number 24, 2019 on creative economy and Government Regulation Number 24, 2022 on the implementation of Creative Economy Law. These regulations state the mandate for the formulation of intellectual property-based financing carried out by banking and non-bank financial institutions to support Indonesia's creative economy businesses.³

Although IP is not conventional collateral, it can be promising, considering that IP can live in various mediums that generate continuous economic benefits.⁴ However, considering the nature of IP, which is regarded as quite volatile to serve as collateral for debt, coupled with the phenomenon of IP as an object of collateral, is still considered a new thing; it caused

many problems at the implementation level. Adjustment of IP as an object of collateral in an implementable arrangement requires step-by-step planning starting from the initial, mid, and final stages.⁵

The distribution of funding from financial institutions especially from banking institution in Indonesia strongly connected with the implementation of the task, duty and the authority of notaries, as a public official with authority to formulate authentic deeds as the legal basis for credit/financing and its collateral binding. Indonesian Law positioned notaries as trusted parties in private legal relations.⁶ In the implementation of credit/financing, the notary mediates both the banks as creditors and creative economy actors as credit recipients.⁷ Each party has interests that need to be protected and the rights attached to them. Although currently IP as banking collateral and IP-based banking collateral is nearly non-existence in Indonesia, the formulation of IP-based financing in Indonesia raises a high need for the role of a notary in making authentic deeds related to intellectual property.

This research uses a normative juridical approach by examining statutory regulations, theories, and legal principles that are relevant to the research object. The data analysis method is carried out by collecting data

[†]Corresponding author: Email: ranti.fauza@unpad.ac.id

through reviewing library materials, both in the form of documents and applicable laws and regulations relating to the role of notaries in intellectual property-based financing schemes. The results of the analysis are presented descriptively through policies related to intellectual property-based financing schemes from a notary's perspective with the aim of obtaining a systematic picture of opportunities and challenges of the implementation of intellectual property-based financing schemes in Indonesia

Intellectual Property as Collateral in Indonesian IP Law

Several studies show the importance of IP as the resource of the creative economy and how the capital is determinant factor of IP development in Indonesia.^{8,9} Government Regulations Number 24 of 2022 concerning the creative economy through the IP-based financing scheme placed IP as an object of debt collateral for bank financial institutions or non-bank financial institutions in the hope of providing credits to creative entrepreneurs.¹⁰ IP as credit collateral can be provided in 3 schemes, in this case, including contracts in creative economic activities, billing rights in creative economic activities, and fiduciary collateral for IP because IP is an intangible moveable asset.¹¹ It should be noted that even though there is a legitimacy basis for IP as a credit collateral, some conditions must be met for creative economy businesses to obtain credits with IP as collateral and/or IP-based collateral.

The IP must complete the first aspect where the IP that will be the object of collateral has been registered in the Directorate General Intellectual Property Rights under the Ministry of Law and Human Rights of the Republic of Indonesia and the second aspect is the IP that will be collateralized has been managed either independently or transferred its rights to another party so that with the proper management of IP it can be proven that the economic value contained therein.¹² These two things can at least be preliminary evidence to banking and non-bank financial institutions as a creditor that the party applying for credit is the legal owner of an IP and an IP which is the object of collateral, has an economic value to repay the credit at a later date.

Several Indonesian National Laws in the IP regime explicitly regulate IP as an object of collateral in the substance of the article, in this case, Law Number 28 of 2014 concerning Copyright and Law Number 13 of 2016 concerning patents.¹³ Indonesia's Copyright Law

states that copyright is an intangible movable object that can be transferred through inheritance, grants, waqf, wills, written agreements, or other reasons justified by the provisions of laws and regulations.¹⁴ IP as an intangible asset can have economic value even though IP cannot be seen directly by the eyes. It's because innovations produced through one's intellectual abilities play an important role in industrial activities.¹⁵ Copyright is recognized as an object of fiduciary collateral through Article 16 Paragraph 3 of the Copyright Law.

IP is not only recognized as an object of fiduciary collateral through the law on copyright but also the law on patents has recognized patents as an object of fiduciary collateral through the provisions of Article 108 Paragraph 1 of the Law on Patent. Indeed, not all Indonesian national laws regarding the IP regime explicitly regulate IP as an object of credit/financing collateral. However, all IP that meets the requirements of the applicable provisions can be used as an object of collateral. It's because, in essence, every IP has the same character even though it originates from different regimes.

To adapt existing regulations to the current state of society, the government has made progress by including the revision of Law Number 31 of 2000 concerning industrial design into the priorities of the 2023 National Legislation Program. The government submitted a clause to be included in the amendment to the Law on Industrial Design regarding industrial design as an object of fiduciary guarantees, which can be found in Article 62 of the revision of the new Industrial Design Law as an effort to comply with existing regulations regarding the creative economy.¹⁶ The revision of the Law of Industrial Design shows the Government's seriousness in developing the creative economy sector through the provision of a comprehensive legal infrastructure that legitimizes IP as credit collateral, even though there is still numerous legal infrastructure and other technical guidelines that need to be provided between sectors and institutions.

IP as an intangible movable object fulfills the object element to serve as an object of fiduciary collateral stipulated in Law Number 42 of 1999 concerning Fiduciary Collateral.¹³ IP, as a fiduciary collateral object, has fulfilled the aspect of being transferable to other parties. It is an intangible movable object with economic value to be used as an object of credit repayment. To be able to place IP as fiduciary collateral, it must be made through a notarial

deed in Indonesian as a fiduciary guarantee deed. A Notary plays a central role in implementing IP-based Financing through a fiduciary guarantee deed which is included in the authority of a notary.¹⁷ A fiduciary guarantee deed drawn up by a notary on an IP is a collateral binding medium to be able to implement IP-based financing.

A follow-up to laws and other regulations needs to be adjusted to regulations regarding IP as the object of debt guarantees. The types of collateral recognized through the Bank Indonesia Regulations Number 14/15/PBI/2012 regarding the assessment of the quality of commercial banks' assets still do not accommodate IP as a recognized type of collateral. Currently, the Bank Indonesia Regulations regarding the assessment of the quality of commercial banks' assets only recognize conventional collateral to be used as collateral for credit, such as securities and shares that are actively traded on the Indonesian stock exchange, land, and buildings used for residence, land, and building that are not used for dwellings, machinery considered as an integral part of the land, aircraft, ships, warehouse receipts, and inventories.

The government and other related parties must update existing laws and regulations to become one comprehensive and mutually sustainable regulatory unit. The unity of laws and other regulations is essential because, to implement IP-based financing, the parties concerned will refer to the applicable regulations. The renewal of laws and regulations needs to be expedited, considering that the grace period of government regulations on the creative economy is almost over.

Laws and other regulations relating to IP-based financing must provide legal certainty to secure the parties involved, especially since IP as loan collateral is a new phenomenon in Indonesia. Regulations of *Otoritas Jasa Keuangan* – Financial Services Authority Number 42/POJK.03/2017 concerning the obligation to formulate and implement bank credit or financing policies for commercial banks regulate bank credit or financing policies that must pay attention to the principle of prudence in credit or financing. Banking parties are obligated to implement risk management in formulating credit or financing policies.¹⁸

The obligation to apply risk management in preparing credit or financing policies is followed by the existence of administrative sanctions if there is a violation of the Guidelines for Preparing Bank Credit or Financing Policies. There is an urgency to make

adjustments between laws and other regulations so that there is a stable legal basis to give confidence to the parties involved in implementing IP-based financing in practice because the government regulations regarding the creative economy cannot stand alone. Still, the existence of legal infrastructure and other technical guidelines from related parties must support it.

Implementation of Creative Economy Law

Study from Serrasqueiro *et.al* revealed that internal financing dominated the growth of MSMEs during an economic crisis.¹⁹ Case study concerning financial constraints of Micro, Small, and Medium Enterprises (MSMEs) in creative industries in Indonesia from Nareswari *et.al* pointed two main obstacles of creative industries: lack of access to formal financing and lack of knowledge and innovativeness.²⁰ In the term of financing, despite the huge development of creative industries, ² 92.37 % of creative industry players in Indonesia are autonomously self-supported and have not supported by any external financing, especially banking credit.²¹

The Government then issued Law Number 24 of 2019 (the Creative Economy Law),²² which states the formulation of IP-based financing to support creative economy actors. The Creative Economy Law was followed by the Indonesian Government Regulation of Creative Economy, which was issued as the regulatory framework for the Creative Economy Law. In Government Regulation Number 24 of 2022, those regulations take into account based on the fact that adequate capital is required for the preservation and growth of intellectual property as creative ideas.²³ Credit distribution from financial institutions—both banks and non-banks—cannot be separated from the development of creative enterprises.¹⁴

As indicated by Article 1, Point 4 of the Indonesian Government Regulation of Creative Economy, the Intellectual Property Financing Scheme is a supporting plan that makes intellectual property an object of credit collateral for financial institutions (bank or non-bank) to distribute the financing to creative economy players.²⁴ In addition, the government and / or regional government have responsibilities for the growth of the creative economy, as stipulated in Article 36. The formulation of an IP-based financing scheme is one of these responsibilities.

Article 7 and Article 8 of the Indonesian Government Regulation of Creative Economy

mandate financial institutions (bank or non-bank) to provide IP-based financing to:

- (i) Conduct verification on the creative businesses' viability and feasibility;
- (ii) Examine the registration letter and intellectual property certification for authenticity and validation;
- (iii) Assess the intellectual property used as collateral;
- (iv) Distributing funding to creative economy players in the creative economy; and
- (v) Monitoring the loan repayment from the creative economy actors as the debtor according to the credit agreement.

Article 9 of the Indonesian Government Regulation of Creative Economy indicates three options related to collateral for IP-based financing: intellectual property as fiduciary collateral; contracts in creative economic activities, and billing rights in creative economic activities.

Further explanation of Article 9 elaborates that agreements in creative economy activities incorporate license agreements, contracts/orders got by creative economy business, while the right to collect the payment in creative economic activities includes the right to collect royalties that are required to be paid by users of songs and or musical instruments for businesses and/or commercial utilization.

Contracts in the activities of the creative economy, such as license agreements and work / project contracts and orders received by creative entrepreneurs, that can be used as a source of financing in a scheme or model like construction credit, where there is a contract or project that needs financing and payment will be received when the contract or project is finished, which can be used as the source of credit repayment to the Bank.

Notaries Requirement for Implementation of IP-based Financing

The Indonesian banking industry has shown significant growth following the economic crisis caused by the Covid-19 pandemic.²⁵ An important signal of economic recovery can be seen in the increasing intensity of credit distribution, which is one of the implementations of the bank intermediary function, namely channeling funds from those with surpluses to those with deficits.

Further, Article 8 verse (1) Indonesian Banking Law regulated that distributing the credit and/or funding must be carried out based on an in-depth analysis of

good faith and the ability of the potential debtor to conduct credit repayment in accordance with the credit agreement. Implementation of the provisions of Article 8 Paragraph (1) of Indonesian Banking Law is carried out through prudential banking principles, one of which is the 5Cs credit analysis method, which is implemented in assessing prospective debtors, through the analysis of character, capital, capacity, collateral, and condition of the economy.²⁶

The collateral must be provided by the debtor for the risk borne by the creditor related to the distribution of funds. In the context of lending, collateral basically function as a means of protection for channeling funds managed by banks, concerning the funds managed and distributed by these banks are public funds. Banking credit, and as a financial institution that manages heavily regulated public funds, the bank is highly concerned with proper legal documents as supporting evidence as well as administrative completeness. The need for formality and authenticity of credit agreement documents as well as provisions related to guarantee binding encourages banks to use the services of a notary in making related authentic deeds. In this context, the role of a notary is very central as a public official to bridge the interests of the banking sector as a creditor with the debtor. On the other hand, the needs of the banking sector for efficiency and security in lending / credit distribution activities and the needs and rights of the debtor for an agreement that guarantees a balance of rights and obligations as well as legal protection demands professionalism and proportionality of the notary.²⁷

In IP-related regulations implied in Indonesia, there is no explicit obligation for agreements related to IP to be formulated in the form of an authentic deed before a notary, however considering that IP is one of the important assets in business, the legal certainty and compliance of an IP agreement, IP as collateral agreement and other IP-related agreements can serve as a legal document that guarantees the rights and obligations of the parties, as well as legal evidence of legal actions and legal relations between the parties, becomes a necessity. This of course raises a high need for the role of a notary in making authentic deeds related to intellectual property.

Article 5 of Indonesian Fiduciary Law explicitly states that the binding of objects with fiduciary collateral is made with a notarial deed in the Indonesian language namely the deed of fiduciary collateral. Further, Article 13 of Indonesian Fiduciary Law regulates that the applications for registration of

fiduciary collateral are made by fiduciary collateral recipients, its beneficiaries, or representatives by attaching a Fiduciary Guarantee Registration Statement which contains:

- (i) The identity of the fiduciary guarantor and the fiduciary recipient;
- (ii) The date and number of the fiduciary collateral deed, the name, and domicile of the notary who made the fiduciary collateral deed;
- (iii) The data of the loan / credit agreement is guaranteed by fiduciary collateral;
- (iv) The description of the fiduciary collateral object;
- (v) The value of collateral binding; and
- (vi) The value of the fiduciary collateral object.

The provision in Indonesia's Fiduciary Law that obliges fiduciary collateral made with a notarial deed making authentic deeds – which is the authority of a notary as a public official is an important aspect in the process of IP-based financing scheme implementation and its collateral-binding process, especially concerning the administrative process of legal document and the need for legal evidence regarding the legal relationship between the parties.

Creative Economy Law and Government Regulation on creative economy have provided legitimacy for creative economy actors to be able to make IP as an object of fiduciary collateral for funding/credit through bank or non-bank financial institutions,¹⁰ however these regulations still face several challenges in practice for several reasons,²⁷ one of them is that there are no comprehensive and applicable technical guidelines, thus it's important for the government to immediately formulate the IP-based Financing Scheme into a clear, systematic, and applicable regulation as a concrete step for the IP-based financing for financial institutions as well as the guidance for relevant stakeholders including notaries in carrying out their roles, functions, duties, and authorities.²⁷

In general, a notary in making a product in the form of an authentic deed for a credit agreement and collateral binding must also apply the precautionary principle in line with the provisions of Article 16 verse (1) Indonesian Notarial Law which mandates notaries to act trustworthy, honest, thorough, independent, be in an impartial manner and safeguard the interests of the parties involved in legal actions. The precautionary principle attached to the position of a notary in making an authentic deed must be carried out by first examining relevant facts related to the subject and object of the deed itself.

The notary must ensure that the authentic deeds fulfill the legal requirements in the provisions of Article 1320 Indonesian Civil Code and fulfill the formal requirements of an authentic deed so that it has perfect evidentiary power. The application of the precautionary principle includes legal due diligence on related documents comprehensively, for example, the identity of the parties and verification of proof of ownership of an object.

In the Government Regulation of Creative Economy, there are several provisions related to legal due diligence, for example, the provision of Article 7 Paragraph (1) and Paragraph (2) which stipulates that creative economy actors can apply for IP-based financing to financial institutions both bank and non-bank by completing the following requirements:

- (i) Financing proposal;
- (ii) Creative economy business portfolio;
- (iii) Engagement related to IP for creative economy products; and
- (iv) Registration letter or intellectual property certificate.

Even though the provisions of Article 7 and Article 8 of Government Regulation of Creative Economy are aimed at financial institutions, both bank and non-bank, there are several aspects related to the implementation of the position of notary as one of the banking partners in running their business. The role and function of a notary in the distribution of IP-based financing in general cover the stages of pre-realization, realization, and post-realization.

At the pre-realization stage, notary shall conduct the checking and verification of legal documents. The verification covers the legality of the creative economy business of the prospective debtor as a financing applicant. In case the prospective debtor is a legal entity in the form of a limited liability company, notary can submit the request for a complete company profile from the electronic database of General Legal Administration at the Ministry of Law and Human Rights. This will be the basis for conducting legal due diligence regarding the debtor as a financing subject.

Next is the checking and verification of registration letters or intellectual property certificates that are used as loan/credit collateral. In banking credit practices, the verification of the legality and validity of certificates or proof of collateral object ownership generally falls within the task of the notary, considering that this correlates with the fiduciary collateral deed that will be made by the notary.

Procedures for verifying IP registration documents or certificates used as collateral require technical support, including in the form of the comprehensive electronic database at the Directorate General of Intellectual Property (DGIP) which contains data on registered IP records complete with IP history records starting from registration and other processes including the transfer and collateral binding comply with the principle of publicity and can be accessed by the notary. In addition, procedural guidelines are also needed to carry out checks and forms of verification/results of these checking processes, for example, whether DGIP can issue written information regarding the ownership status and clearance of the IP being checked. This is very important because before formulating the deed of collateral binding, the notary must ensure that the collateral object is clean and clear.²⁷

Related to this database, Article 11 of the Government Regulation of Creative Economy mandates that the Ministry of Law and Human Rights provide access to data on intellectual properties that are used as the object of credit/loan collateral to financial institutions both bank and nonbanks and the public. Currently, the database regarding registered IPs can be accessed through www.dgip.go.id. Nevertheless, given the provisions of Government Regulations on Creative Economy which require verification and not just checking by accessing/viewing the IP recording database, progressive steps must be taken in the providing the verification proof for notary. In other words, through the establishment of the digital infrastructure for checking the validity of IP by the notary followed by the issuance of the checking/verification result from DGIP as the basis for the notary to make a deed of fiduciary collateral. Another thing that must also be considered is the validity and actuality of the data listed in the database considering that data can change in a relatively rapid period, therefore, a system that can provide real-time data of IP is needed. This system will also provide legal protection in preventing the possibility of fiduciary binding repetition which is prohibited by Fiduciary Collateral law. The formulation of a supporting database can be supported by utilizing the development of digitalization technology through the application of big data, the role of Artificial Intelligence (AI), and the Internet of Things (IoT).

Notaries need to improve their knowledge and understanding of IP and creative economy framework

and upgrade their soft skills in the formulation of the authentic deed related to IP-based financing. Referring to the provisions of Article 9 verse (2) government regulations of creative economy, IP as credit/loan collateral is carried out in the form of fiduciary collateral on intellectual property, contracts in creative economy activities, and/or billing rights in creative economy activities. Furthermore, the elucidation of Article 9 verse (2) b and c government regulation on creative economy explained that the contracts in creative economy activities include license agreements, work contracts/orders received by creative economy actors while billing rights in creative economic activities include billing rights on royalties that are required to be paid by the users of songs and/or musical instruments for commercial use.

In the realization stage, the application of the precautionary principle by the notary includes the fulfillment of formal requirements related to the reading and signing process of the authentic deed of the credit agreement and collateral binding agreement. The notary shall ensure that the pre-emptive action is carried out by the authorized party to sign the loan/credit agreement along with the binding collateral agreement. The notary must also read the contents of the deed to the parties. The reading of a deed by a notary is a requirement of the authenticity of a deed and is a notary's obligation as stipulated in Article 16 Paragraph (1) letter m Notarial Law. As soon as the deed is read, the deed is signed by the parties, the witness, and notary following the provisions of Article 44 Notarial Law.²⁸

In the post-realization stage, the notary performs follow-up related to the deed of the loan agreement and collateral binding that has been signed by the parties. The notary will issue copies of the deeds and carry out the fiduciary guarantee registration process. Regarding the IP as collateral and IP-based collateral, a notary must understand the requirements for objects that are objects of fiduciary collateral following the provisions of Article 6 letter c Fiduciary Collateral Law which states that a description of objects is carried out by identifying the object and explaining the proof of ownership. These two components must be accurately described in the fiduciary collateral registration process by a notary on the online fiduciary system at the Ministry of Law and Human Rights. Considering the input of the identification of the description of the Fiduciary Collateral Certificate, it must be ensured that the notary has carried out input

data correctly considering that the Fiduciary Collateral Certificate is a form of legal protection for creditors from the emergence of credit risk, especially the risk of repayment. The Fiduciary Collateral Certificate has the same executorial power as a court decision which already has permanent legal force (*in Kracht*).

In addition to legal and technical support in the form of technology infrastructure and technical guidelines that support the implementation of the notary position in the IP-based financing scheme professionally and proportionately through coordination and synergy with the government and relevant ministries. The IP-based financing scheme based on the Creative Economy Law and Government Regulation on Creative Economy needs to be addressed proactively by the notary. IP-based financing which is a relatively new financing model for Indonesia encourages notaries to have adequate scientific understanding and qualified practical skills regarding the characteristics of IP based on the Creative Economy Law and Government Regulation on Creative Economy. The understanding of IP must be supported by analytical skills and critical thinking regarding aspects related to IP, such as aspects of registration and legality as well as forms of monetization as a basis for knowledge to apply the precautionary principle in making authentic deed products related to IP-based financing.

Conclusion

The Creative Economy Law which was followed by up Government Regulation of Creative Economy as its implementing regulations is very important to progress for the formulation of IP-based financing for the creative industry in Indonesia, however, several crucial points need to be followed up through synergy and collaboration, including those related to the scope of the notary's role in making authentic deeds for IP-based financing and collateral binding for IP as the object of fiduciary collateral and IP-based collateral. The implementation of the duties and positions of a notary related to the IP-based financing scheme requires support in the form of legal infrastructure from the Ministry of Law and Human Rights, procedural guidelines from the Financial Service Authority, and technology facilitation from the government as a policymaker through coordination and synergy of relevant ministries to formulate facilities and infrastructure according to the mandate of Government Regulation on Creative Economy including the development of a practical IP-based financing scheme.

The reliable digital infrastructure that provides comprehensive databases that can carry out the inventorying function, verification, and recording of registered IPs, IP as fiduciary collateral, and IP-based collateral is also urgency. The synchronization between related ministries, especially the Ministry of Law and Human Rights, Ministry of Tourism and Creative Economy, and Ministry of Finance in formulating the IP-based financing scheme and related implementing regulations shall be manifesting in the series of practical codes of conduct for financial institutions and notaries. Moreover, the upgrading of the skill and knowledge of notaries completed by certification for example by the Notary Association is needed to foster the knowledge and skill of Notaries regarding the implementation of their duties and authority in IP-based financing schemes.

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