

IMPLICATIONS OF ARTICLE 16 SECTION (3) LAW NUMBER 28 YEAR 2014 CONCERNING COPYRIGHT AS AN OBJECT OF FIDUCIARY

Budi Hermono

Law Department, Faculty of Social Science and Law, State University of Surabaya, Indonesia
E-mail: budihermono@unesa.ac.id

Abstract

Article 16 section (3) of the Copyright Law which stated that copyright can be used as an object of fiduciary is revolutionary in Indonesian law. Copyright is an intangible movable object which has level of difficulty to assess its value. The value of objects is an important thing when it used as objects of fiduciary. The value is equivalent to that of the creditor (fiduciary recipient) will provide a sense of security for the creditor for returning their loan. The application of Article 16 section (3) of the Copyright Law has not been accompanied by an implementing regulation for financing institutions as fiduciary recipients, especially in the standard of assessment of the value of copyright proposed as an object of fiduciary. Financial Services Authority (OJK) needs to formulate regulations that provide copyright standardization used as objects of fiduciary to provide legal certainty for the creditor.

Keywords : copyrights, fiduciary, object of fiduciary

Abstrak

Pasal 16 ayat (3) Undang-undang Hak Cipta menyatakan hak cipta dapat dijadikan sebagai obyek jaminan fidusia, merupakan sesuatu yang revolusioner dalam hukum Indonesia. Hak cipta yang merupakan benda bergerak tidak berwujud yang memiliki tingkat kesulitan saat dilakukan penaksiran mengenai nilai yang dimilikinya. Nilai atas benda, merupakan suatu yang penting bagi benda saat dijadikan sebagai obyek jaminan fidusia. Nilai obyek jaminan yang setara dengan piutang yang kreditur (penerima fidusia), akan memberikan rasa aman bagi penerima fidusia (kreditur) atas pengembalian piutangnya. Keberlakuan pasal 16 ayat (3) Undang-undang Hak Cipta saat ini belum disertai adanya suatu aturan pelaksana bagi lembaga pembiayaan sebagai penerima fidusia, khususnya dalam standar penaksiran atas nilai dari hak cipta yang diajukan sebagai obyek jaminan fidusia. Otoritas Jasa Keuangan (OJK) perlu menyusun regulasi yang memberikan standarisasi, cara penilaian pada hak cipta yang dijadikan sebagai obyek jaminan fidusia, sehingga memberikan kepastian hukum dan keamanan bagi penerima kreditur.

Kata kunci: fidusia, hak cipta, objek jaminan fidusia

Introduction

Copyright is part of protected intellectual property in Indonesia. This can be observed with the promulgation of Act Number 28 Year 2014 concerning Copyright (hereinafter referred to as Copyright Law). This Copyright Law is the latest legislation, previously there were several regulations on copyright used as a basis for providing copyright protection in Indonesia.¹ Replacement of the laws and regulations on copy-

right is carried out as an attempt to make a more proper law; in this case, it is implemented by the government and the House of Representatives to protect their citizens and foreign citizens who have copyright in Indonesia territory.

The Copyright Law regulates many new things in the substance. Some are not regulated in the previous law including more detailed arrangements regarding related rights, especially in phonogram producers, regulation of traditional cultural expressions, and the regulation of copyright as one of the objects of fiduciary, and several other things. Among the three-mentioned issues, that copyright can be used as an

¹ LN Perepechko, Et.Al., "Intellectual Property Protection in Field of Information Technology", *Advances in Economics, Business, and Management Research*, Vol. 38, 2017, p. 520

object of fiduciary is the interesting one.² As known, copyright is an intangible object. Copyrights and other intellectual property such as brands, patents, industrial designs, trade secrets, integrated circuit layout designs, and plant varieties are invisible, intangible. Moreover, copyright has its own peculiarities in providing protection for its rights. Intellectual Property except copyright, rights protection will be given by State to the owner, if the owner of the intellectual property rights registers the intellectual property rights as their owns.³ Whereas in copyright, automatic copyright protection is given when the owner of the rights in this case the creator or the copyright holder has realized his idea based on the existence of creativity to generate an original creation. Thus, the ownership and control of copyright seems to be imaginative because the creator and the copyright holder do not need to register to obtain a certificate of proof of ownership.

The implementation of Article 16 Section (3) of the Copyright Law which regulates copyright can be used as a fiduciary have its own problems. Fiduciary holders must have an authentic fiduciary deed. Thus, the requirements process of making the fiduciary deed are needed. In addition, fiduciary was born due to a debt agreement as the principal agreement. To be used as collateral, an object should be assessed.

The fiduciary institution will be born after the principal agreement namely the loan agreement.⁴ This loan agreement is made by creditors and debtors. Creditors as owners of money lend money to the debtor. Creditors in this case require a security of the money lent so that they need collateral. The definition of fiduciary is stated in Article 1 number 1 of Act Number 42 Year 1999 on Fiduciary (hereinafter

referred to as Fiduciary Law), namely the transfer of ownership rights of an object on the basis of trust, provided that the object whose ownership rights are transferred remain in possession of the object owner.

The Fiduciary Law also provides limited objects that can be used as collateral in fiduciary. This is regulated in article 1 number 4 which stated that object is anything that can be owned and transferred, both tangible and intangible, registered and unregistered, movable or immovable which cannot be burdened with security rights or mortgage. Discussing fiduciary guarantees cannot be separated from the discussion of the Civil Law as the *lex generalis*. In the system of the Civil Code, objects are regulated in the second book that governs the guarantee institution too. The security institutions regulated in the Civil Code are Pawn and Mortgage while the fiduciary institutions are regulated outside the Civil Code.

Article 11 paragraph (1) of the Fiduciary Law requires that objects encumbered with fiduciary must be registered with the Fiduciary Office. The fiduciary registration statement as stipulated in Article 13 Section (2) contains a minimum value of collateral, the value of objects subject to collateral, notary deeds, parties' identities, and so on.

Rights in Indonesia are included in part of Intellectual Property. Other parts of intellectual property such as brands, patents, industrial designs, integrated circuit layout designs, and plant variety rights. Intellectual property, in this case copyright is not an arrangement that is officially owned by Indonesia. When Indonesia joined The World Trade Organization, it has the consequence in which Indonesia must ratify agreements in the World Trade Organization one of which is intellectual property. In civil law, copyright is part of an intangible object that is regulated in the second book of the Civil Code.

Article 1 point 1 Copyright Law provided a definition of copyright is the creator's exclusive right that arise automatically based on declarative principles after a work realized in real form without reducing restrictions in accordance with

² Adriana Brigante, Et.Al., "Intellectual Property and Trademark Legal Framework in BRICS Countries: A Comparative Study", *World Patent Information*, Vol. 49, 2017, p. 5.

³ Xing Liu, Et.Al., "Bank Equity Connections , Intellectual Property Protection and Enterprise Innovation-A Bank Ownership Perspective", *China Journal of Accounting Research*, Vol. 9, 2016, p. 2010

⁴ Matthew Conaglen, Et.Al., "Protectors as Fiduciaries: Theory and Practice", *Trust and trustees* Vol 18, January 2018, p. 21

the provisions of the legislation.⁵ In addition to the creator as the copyright holder, other than the creator who receives the right legally from the creator can also be considered as the copyright holder.

This paper aims to provide thoughts and ideas about the implications of the enactment of Article 16 Section (3) Copyright Law on copyright can be used as an object of fiduciary. Thus, the existence of the article does not become useless in practice.⁶

This is normative legal research which focuses more on the study of literature on primary, secondary and non-legal material. These legal materials, such as laws and regulations, will then be used as a tool of analysis in solving problems. In this case the Copyright Law which is the primary legal material, especially article 16 section (3) will be more discussed by employing theories on copyright and fiduciary institutions by using the legislation approach and conceptual approach which will then be analyzed prescriptively.

Discussion

The Civil Code (*Burgerlijk Wetboek* hereinafter referred to as BW) in BW's second standard book Article 499 stated that objects are each item and every right that can be an object of property rights. In general, objects can be divided whether tangible or intangible objects, movable or immovable objects as regulated in Articles 503 and 504 BW. The concept of objects regulated by BW was reaffirmed in the Copyright Law as stated in article 16 paragraph (1), "Copyright is an intangible movable object". These articles implies that copyright as an object that can be owned by legal subjects, so that this copyright can be transferred to other legal subjects.

The second book BW about objects based on private law perspective also provides concepts of objects that can be used as collateral objects especially pawning and mortgages.

Based on the development of the need for security institutions in the community, security institutions were introduced such as Mortgage Rights and Fiduciary Rights.⁷ As previously explained, the institution is an additional agreement that follows the principal agreement, namely debts. The object of fiduciary as stated in Article 3 of the Fiduciary Law:

This law does not apply to:

- a. Mortgages related to land and buildings, insofar as the applicable law stipulates that the security over such collateral objects must be registered;
- b. Mortgages on ships registered with gross tonnage of 20 (twenty) M3 or more;
- c. Mortgage on airplanes, and
- d. Pawn.

Article 3 of the Fiduciary Law provided an illustration that the scope of objects as objects of fiduciary is broad including movable and immovable objects and tangible and intangible as long as they are not object of security institutions such as pledges, mortgages or mortgage rights.

Copyright which is an intangible and immovable object is affirmed in Copyright Law article 16 Section (3) that copyright can be used as an object of fiduciary. This is a breakthrough to legislators who place rights (intangible objects) as collateral objects. Coverage of copyright protection includes creation which is art, literature and science (Article 1 point 3 Copyright Law). Whereas works that have copyright protection are mentioned in article 40 section (1) Copyright Law. The concept of copyright protection is not protecting creation but protecting the rights contained in creation because of the existence, creativity and authenticity of the creator of a process of creation. Therefore, if the copyright will be used as an object of fiduciary, then the object is the copyright of the creator of the creation and not the form of the creation.⁸

⁶ XM Zhang, Et.Al., Ontologies for Intellectual Property Rights Protection, *Expert Systems With Applications*, Vol. 39, 2012, p. 1389.

⁷ Jeremy De Beer, Et.Al., "Click Here to Agree : Managing Intellectual Property When Crowdsourcing Solutions", *Business Horizons*, Vol. 60, 2017, p. 208 .

⁸ Sri Mulyani, "Pengembangan Hak Kekayaan Intelektual Sebagai *Collateral* (Agunan) Untuk Mendapatkan Kredit Perbankan Di Indonesia", *Jurnal Dinamika Hukum*, Vol. 12 No. 3, September 2012, p. 568.

Protection of copyright is automatically based on the declarative principle (mentioned in article 1 point 1 Copyright Law), meaning that the creator will be protected by his rights to a work if the creation is announced, played, written or other declarative forms. Recording and registering for the acquisition of copyright protection is not a necessity. This is affirmed in article 64 section (2) Copyright Law "the recording of works or products of Related Rights as referred to in section (1) is not a requirement to obtain Copyright and Related Rights". In the explanation of article 64 section (2) the Copyright Law stated "the recording of works and products of related rights is not a necessity for the creator, copyright holder or related rights owner. Protection of a work begins when the creation is present or materialized and not due to recording. This means that a work that is recorded or not recorded remains protected".

Article 16 section (4) of the Copyright Law stated "the provisions concerning copyright as an object of fiduciary as referred to in paragraph (3) are carried out in accordance with the provisions of the legislation". If observed, article 16 paragraph (4) provides an illustration that if copyright will be used as a collateral, the basis of the regulation is the existing legislation, in this case the Fiduciary Law. In accordance with article 11 of the Fiduciary Law, "objects burdened with Fiduciary must be registered". This registration is not for the acquisition of copyright protection, but the copyright that the copyright holder has as an object of Fiduciary must be registered. the application for registration of copyright as an object of Fiduciary is made by the recipient, power of attorney or his representative (Article 13 paragraph (1) of Fiduciary Law), that is the creditor. Statement of application for copyright submission as a security object at least contains (Article 13 section (2) Fiduciary Law):

- a. identity of the giver and the receiver of Fiduciary;
- b. Date, number of the fiduciary guarantee deed, the name and place of the notary who made the Fiduciary deed;
- c. Information of the agreement being guaranteed by the Fiduciary;

- d. Description of the object of Fiduciary;
- e. Value of the guarantee; and
- f. Value of the object of Fiduciary.

The application of fiduciary registration at the fiduciary registration office in principle has the same contents as the fiduciary deed made by a notary (article 6 of Fiduciary Law)

Article 13 section (2) letter f and article 6 letter e stated "the value of the object of fiduciary", in this case copyright will have its own problem. This is due to copyright which is an intangible object has a different character from tangible objects in terms of its value. As explained previously, the object of fiduciary in copyright is its right and not a creation. Consequently, it will provide an uncertainty on the value of copyright that will be proposed as an object of fiduciary. Especially if the copyright owned by the copyright holder is not recorded because of the characteristics of copyright protection itself.⁹ The difficulty of determining the value of this copyright will create uncertainty for the creditor or fiduciary recipient especially regarding the security of returning the receivables.

The Copyright Law promulgated since 2014 regarding the placement of copyright as an object of fiduciary guarantee cannot be implemented so far. Financing institutions stay reluctant to accept copyright as a collateral.¹⁰ In addition to the given reasons, there is no implementation of Article 16 section (3) of the Copyright Law despite in principle the mechanism of the application of copyright as an object of fiduciary is carried out in accordance with the Fiduciary Law as stated in article 16 section (4) Copyright Law. Practically, however, it requires a regulation that governs the copyright mechanism especially regarding the standard of copyright assessment so that the value of the copyright can be specified, once again this is used to certify the return of creditor receivables or fi-

⁹ La Royce F, 2016, *The Industrialization Of The Knowledge Economy: A Rhetorical Analysis Of Intellectual Property Policies*, A Dissertation North Dakota: the Graduate Faculty of the University of North Dakota, p. 97

¹⁰ Baimoldina Svetlana Malikovna, *Concept of Legal Protection of Intellectual Property Rights*, *Procedia Social and Behavioral Sciences* Vol. 176, 2015, p. 999

duciary recipients. In fact, so far, the Financial Services Authority, as the supervisor of financing traffic, does not have copyright-related regulations to be the object of fiduciary.

Conclusion

Arrangement regarding copyright as an object of fiduciary is a brilliant breakthrough in Indonesian legal system. Copyright according to some communities is abstract due to intangible object which has its own constraints in determining the value of copyright itself. For creditors, intangible objects such as copyright become an obstacle in assessing copyright as collateral. For this reason, a more operational arrangement is required when a creation is used as collateral. This will also provide legal certainty and protection for creditors and debtors.

Suggestion

Using copyright as an object of fiduciary is a breakthrough in the world of financing in Indonesia. Creditors who are accustomed to collateral in the form of tangible objects, begin to be known to intangible objects as collateral. However, regulators must prepare a complete and clear regulation and procedure to provide legal certainty for all parties (creditors and debtors). The standard for assessing a copyright (intangible object) of the work needs to be made so that the value of the collateral as the basis for lending can be determined. This will provide creditor security regarding refunds lent to creditors. The Government Regulation as the implementing regulation of the Copyright Law needs to be promulgated so that article 16 paragraph (3) is implementable.

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