

Implementation Principle of Prudence in Using Intellectual Property Rights as Collateral for Bank Credit

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ABSTRACT

Government issued PP Number 24 of 2022, which regulates about riches intellectual as a debt guarantee object for financial institutions, banks or financial institutions non-banks to be able to provide financing to creative economy actors. But, in the practice Still there is problem related emptiness law on riches intellectual used as Banking debt guarantees, namely there is no basis for determining the economic value of an Intellectual Property Right, and if the debtor defaults there are obstacles to the execution of the Intellectual Property Right. Problems the cause uncertainty law and consequences institution finance No accommodate use Property Rights Intellectual as object guarantee. Formulation problem in study This are: 1) Position of Property Rights Intellectual Property as guarantee credit Banking in Indonesia, and 2) Realization principle caution in placement of Property Rights Intellectual Property as guarantee credit Banking. The research method of this article is legal research with a regulatory approach and a conceptual approach. The results of this article are first, HKI can be used as an object of fiduciary guarantee and the general fiduciary provisions apply because HKI is a movable object. The mechanism embodiment principle caution in placement of Property Rights Intellectual Property as guarantee credit banking, can done with analysis of the 5C principles, namely character, capacity, capital, collateral, and condition of economy

KEYWORDS: Collateral, Creative Economy, Intellectual Property Rights, Banking.



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I. INTRODUCTION

Banks are institutions trusted by the public financial institution, which has a very noble mission and vision, namely as an institution that is tasked with carry out the mandate of national development in order to achieve an increase in the standard of living people.¹ This is in line with definition of bank in Article 1 number 2 of the Law Number 10 of 1998, namely business entity that collects funds from public in form savings and distribute them to public

¹ Nindyo Pramono, *Hukum Perbankan Buku 1 (Mengenal Lembaga Perbankan di Indonesia Sebuah Pendekatan dari Perspektif Hukum Ekonomi, Penataran Hukum Perdata dan Ekonomi)*, (Yogyakarta: FH UGM, 1999), p. 1..

in form credit and or forms other in frame increase level the lives of many people. For banking, in the provision of credit that is distributed to the community always contain risk, so that in its implementation, banks must pay attention to principle caution and principle trust.²

In practice, for to reduce these risks, it is necessary guarantee of delivery credit in the sense of confidence in ability and the debtor's ability to pay off his obligations according to that promised is an important factor that must be considered by the bank.³ The nature of a guarantee agreement is generally constructed as an accessory agreement. that is, it is always an agreement that is linked to the principal agreement, serving the principal agreement. In banking practice, the principal agreement is in the form of a credit granting agreement or a credit opening agreement by the bank, with the ability to provide collateral in the form of a mortgage, pledge, fiduciary, security right, *borgtocht* and others.⁴ A guarantee the must own mark economical (can rated with money) and objects the can diverted to party others, so that moment debtor default object guarantee the will used For pay off his debt.⁵

In law known adage law:⁶ “*da mihi factum, dabo tibi ius*” which if translated in a way free : “Show us the facts, then we will give you the facts.” the law.” Adage law This own depth meaning, that before can outlined in a way clear analysis law to a problem law, then must outlined moreover formerly fact or existing data. In this case, based on data from the year In 2016, there were 92.37% of creative economy business units that used their own funds to run their businesses, due to the lack of physical assets that could be used as collateral to obtain financing from banks.⁷ Whereas economy creative Indonesia today This be in position third after America and South Korea. Condition thus, causing business economy creative experience lack of capital, and hamper development economy national.

For overcome problem said, the government publish Regulation Government Number 24 of 2022 concerning the Creative Economy (hereinafter referred to as PP 24/2022), which regulates about riches intellectual as a debt guarantee object for financial institutions, banks or financial institutions non-banks to be able to provide financing to Creative Economy Actors. The provisions of Article 1 number 4 of PP 24/2022, outline that ; “The Intellectual Property-Based Financing Scheme is a Financing scheme that makes Intellectual Property an object of debt collateral for bank financial institutions or non-bank financial institutions in order to provide Financing to Creative Economy Actors”. This provision shows that intellectual property can be used as collateral in banking credit for creative economy actors.

² Yasa Aro Telaumbanua, et.al., “Pelaksanaan Penanganan Kredit Macet dengan Memakai Jaminan Hak Tanggungan pada PT. Bank Rakyat Indonesia (Persero), Tbk, Cabang Gatot Subroto”, *Jurnal Rectum* 4, nomor 2, (2022): 54-67.

³ Leni Oktafiani, dan Irdanuraprida Idris, “Pelaksanaan Pemberian Kredit dengan Jaminan Hak Tanggungan pada Debitur PT. Bank DKI Jakarta Pusat”, *Lex Jurnalica* 12, nomor 2, (2015): 80-94.

⁴ Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia; Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, (Yogyakarta: Liberty, 2011), p.37.

⁵ J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, Bandung, (Bandung: Citra Aditya Bakti, 2002), p.13.

⁶ Geoffrey Samuel, *Rethinking Legal Reasoning*, (Cheltenham: Edwar Elgar Publishing Limited, 2018), p.17.

⁷ Moch. Dani Pratama Huzaini, *Kredit Berbasis Kekayaan Intelektual, antara Upaya Pemerintah dan Prudensialitas Perbankan*, Hukum Online, <https://www.hukumonline.com/stories/article/lt62f11050ef56b/kredit-berbasis-kekayaan-intelektual-antara-upaya-pemerintah-dan-prudensialitas-perbankan>, accessed on November 22, 2024.

But, in the practice Still there is problem on riches intellectual used as Banking debt guarantees, namely:⁸

1. Intellectual property as an object has a different character from objects according to *Civil Code*,
2. There is no benchmark for determining the economic value of an Intellectual Property Right, and
3. In this case, the debtor in default has *an* execution obstacle considering the character of Intellectual Property Rights which is different from objects according to *the Civil Code*.

The problem the cause dilemma, which results in still very little institution finance that uses Intellectual Property Rights Intellectual as object guarantee, and not yet common in Indonesian society.⁹ For overcome existence problem said, then formulation problem in study This are:

1. Position of Property Rights Intellectual Property as guarantee credit Banking in Indonesia, and
2. Realization principle caution in placement of Property Rights Intellectual Property as guarantee credit Banking.

According to Muhammad Syahrums, authenticity study meaningful that Topic research that will be implemented nature original, authentic, not is plagiarism from script or work other people's research.¹⁰ Therefore, it will outlined a number of similar research with study this and will outlined difference (*novelty*) with researches namely: 1) Proceedings of the Seminar entitled Legal and Construction Problems HKI burden as Objects Guarantee in Indonesia, by Riky Rustam, 2022. Research That own similarity in matter discuss construction HKI burden in Indonesia. But there is difference in matter journal the focus on the problems HKI burden,¹¹ whereas study This about the position of HKI as guarantees and mechanisms loading guarantee that reflects principle caution. 2) Journal entitled Property Rights Intellectual as Guarantee Credit Banking, by Ni Kadek Arcani and Ida Ayu Sukihana, 2022. In journal mentioned, there is similarity with study this, related with discussion position and the Concept of HKI as a Guarantee for Banking Credit in Indonesia. However, there are difference in a way fundamental, because study This associated with principle caution banking, while journal the only discuss about the position and validity of HKI as Bank Credit Guarantee.¹² Therefore, research This own novelty.

⁸ Willa Wahyuni, *Tiga Masalah Utama HKI Sebagai Jaminan Utang*, Hukum Online, September 2022, <<https://www.hukumonline.com/berita/a/tiga-masalah-utama-hki-sebagai-jaminan-utang-lt6315b7a5527e4/?page=all>>, accessed on November 18, 2024.

⁹ Riky Rustam, *Problematika Hukum dan Konstruksi Pembebanan Hak Kekayaan Intelektual (HKI) sebagai Objek Jaminan di Indonesia*, Prosiding Simposium Nasional Hukum Pidana, Fakultas Hukum Universitas Islam Indonesia, September 2022, p.68.

¹⁰ Muhammad Syahrums, *Pengantar Metodologi Penelitian Hukum: Kajian Penelitian Normatif, Empiris, Penulisan Proposal, Laporan Skripsi Dan Tesis*, (Riau: Dotplus Publisher, 2022), p.31.

¹¹ Riky Rustam, *Op.Cit.*, p. 69-77.

¹² Ni Kadek Arcani, Ida Ayu Sukihana, "Hak Kekayaan Intelektual sebagai Jaminan Kredit Perbankan", *Jurnal Kertha Semaya* 10, nomor 6, (2022):1267-1278. DOI: <https://doi.org/10.24843/KS.2022.v10.i06.p04>

II. METHODOLOGY

The type of research used in this research is legal research (*doctrinal research*), namely research which is a *know-how activity* in legal science, not just *know-about*.¹³ This study uses a statutory regulatory approach, and a conceptual approach. The statutory approach is used to examine all statutory regulations and regulations related to the legal issues being handled. ¹⁴The conceptual approach is used to analyze through views and doctrines that develop in legal science.¹⁵ Study law This is research based library based, which is known as according to Terry Hutchinson: " *focusing on a reading and analysis of the primary and secondary materials.*" Source material law in study This is material primary law and materials law secondary. Collection ingredients law started with do inventory material primary and secondary law, both from library and the internet (*digital library*). Furthermore material the law that has been collected the identified with use snowball method.¹⁶ The next step in this research is to conduct a study of primary legal materials and secondary legal materials that have been collected using the method interpretation (*interpretatiemethoden*) and construction law or reasoning model (*edeneerwijzen*).¹⁷

III. POSITION OF INTELLECTUAL PROPERTY RIGHTS AS COLLATERAL FOR BANK CREDIT IN INDONESIA

Financing scheme based on riches intellectual is scheme financing that makes riches Intellectual as object debt guarantee for institution bank finance or institution non-bank finance in order to be able to give Financing to perpetrator economy creative, as regulated in Regulation Government Number 24 of 2022 concerning Regulation Implementation Constitution Number 24 of 2019 concerning the Creative Economy (hereinafter referred to as PP 24/2022). The inclusion of HKI material as an object of banking guarantee is considered very important, especially for business actors who have HKI to be able to access bank credit in order to develop their business, considering that Lots the absence of physical assets that can be used as collateral to obtain financing from banks by the perpetrator economy creative.¹⁸

As for wealth based financing intellectual submitted by economic actors creative to the institution bank finance or non-bank financial institutions.¹⁹ What is meant by as subject law perpetrator economy creative said, is perpetrator economy creative namely an individual or group of Indonesian citizens or business entities bodied law or No bodied established law based on Indonesian law that does activity economy creative.²⁰ Activity economy creative, is

¹³ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media, 2017).

¹⁴ Kadarudin, *Penelitian Di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)* (Semarang: Formaci, 2021).

¹⁵ Peter Mahmud Marzuki, *Op.Cit.*,

¹⁶ Agus Yudha Hernoko et al., *Dasar Pengajaran Upaya Peninjauan Kembali Terhadap Peninjauan Kembali Dalam Perkara Perdata*, (Sidoarjo: Ziffatama Publishing, 2016), p. 52.

¹⁷ Philipus M. Hadjon dan Tatiek Sri Djamiati, *Arugmentasi Hukum*, (Yogyakarta: UGM Press, 2008), p. 52.

¹⁸ Trias Palupi Kurnianingrum, *Hak Kekayaan Intelektual Sebagai Jaminan Kredit Perbankan Intellectual Property As Banking Credit Guarantee*, (Jakarta: Pusat Penelitian Badan Keahlian DPR RI, 2017), p. 1.

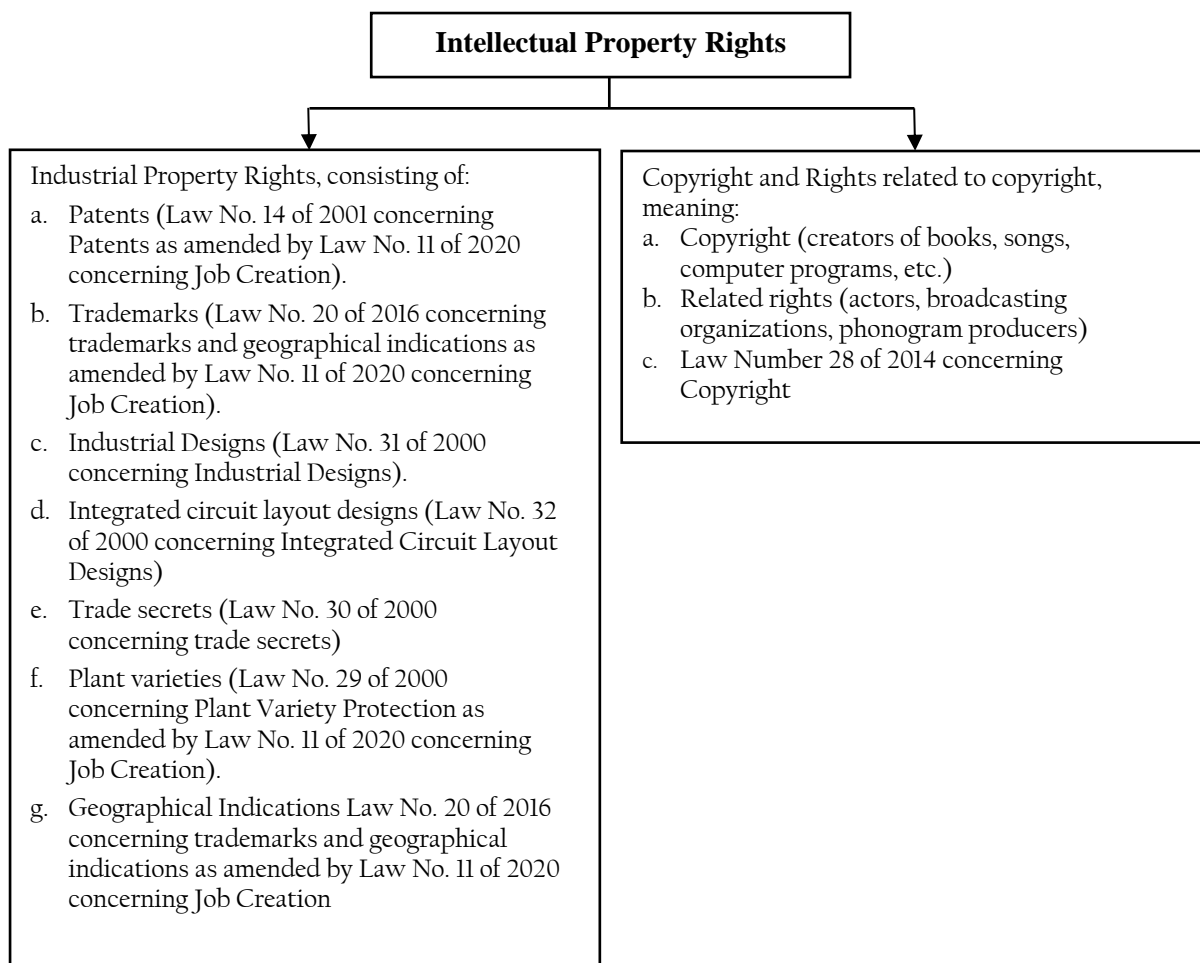
¹⁹ Article 7 paragraph (1) of the Regulation Government Number 24 of 2022 concerning Regulation Implementation Constitution Number 24 of 2019 concerning the Creative Economy

²⁰ Article 1 number 2 of the Law Number 24 of 2019 concerning the Creative Economy.

embodiment mark plus from riches intellectual sourced from creativity human based inheritance culture, science knowledge, and/ or technology.

Property is wealth that arises or is born due to human intellectual ability. through creativity, taste and initiative which can take the form of works in the fields of technology, science, art, and literature.²¹ More continued, Hariyanto, explaining that Intellectual Property Rights are a form of property rights, namely moving object intangible.²² HKI categories are divided into two categories, namely copyright and industrial property rights.²³ For understand category Property Rights Intellectual, can understood in chart as following :

Chart 1. Classification of Property Rights Intellectual



Source : Analysis Results Writer

²¹ Article 1 number 6 of the Regulation Government Number 24 of 2022 concerning Regulation Implementation Constitution Number 24 of 2019 concerning the Creative Economy

²² Hariyanto, "Perlindungan Hukum terhadap Hak Pemulia Tanaman atas Produk Tanaman Hibrida sebagai Bagian dari Hak Kebendaan", *Mimbar Hukum* 20, nomor 3, (2008):485-493. DOI: <https://doi.org/10.22146/jmh.16291>

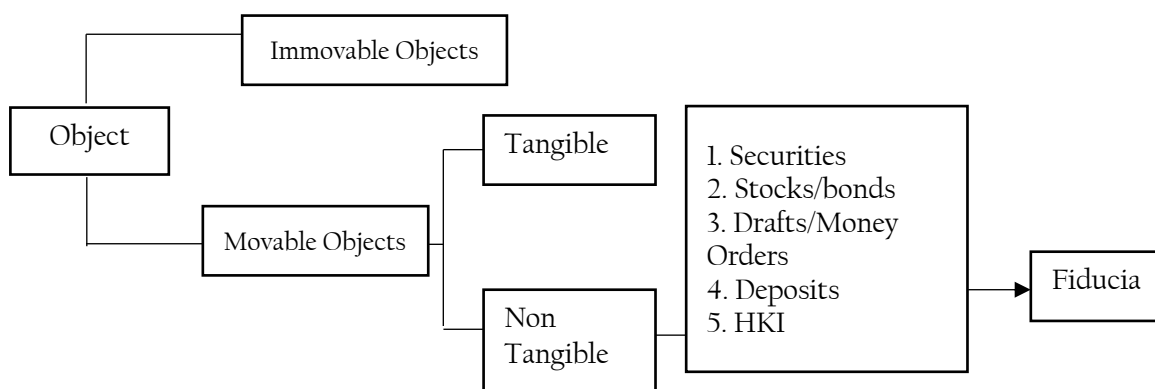
²³ Rahmi Jened, *Interface Hukum Kekayaan Intelektual dan Hukum Pesaingan (Penyalahgunaan HKI)*, (Depok: Raja Grafindo, 2017), p. 14.

Object riches intellectual as above, can guaranteed as guarantee credit banking, with notice provision scheme financing riches intellectual.²⁴ However, previously need known classification law guarantees in Indonesia, namely:²⁵

- a. Material Guarantee (Items), namely material guarantees
Material Guarantee has "material" characteristics in the sense of providing pre-emptive rights over certain objects and has the characteristic of being attached to and following the object in question.
- b. Intangible guarantee (personal), namely personal guarantee.
Individual guarantees do not give preemptive rights over certain objects, however only guaranteed by someone's assets through the person who guarantees it fulfillment of the obligation in question.

Next, in matter This will discussed about development right material riches intellectual in guarantees in Indonesia, namely :

Chart 1 Development of Property Rights



Source : Analysis Results Writer

In Indonesia, the position of HKI as Banking guarantee objects have basically been regulated in statutory provisions regarding HKI, namely as following :

Table. Property Rights Arrangement Intellectual

Copyright	Patent	Brand	Confidential Trade	Industrial Design	Varieties Plant
Copyright can made into as object guarantee fiduciary (Article 16 paragraph (3) of Law 28/2014)	Patent rights can made into as object guarantee fiduciary (Article 108 of Law 14/2021)	No set up special	No set up special	No set up special	PVT rights can switch or diverted Because inheritance, gift, will, agreement in form deed notary, or other reasons that justified by law (Art. 40 paragraph (1) Law 29/2000)

Source : Analysis Results Writer

²⁴ Rikson Sitorus, *Prospek Hak Kekayaan Intelektual (HKI) sebagai Jaminan Utang*, Seminar OJK, September 2022.

²⁵ Salim HS. *Perkembangan Hukum Jaminan di Indonesia*. (Jakarta: Raja Grafindo, 2016), p.22.

On the explanation mentioned, it can be known that riches Intellectual property is a form of property rights intangible.²⁶ It is called as an intangible object d, due to the ownership rights of the results HKI is very abstract when compared to ownership rights of visible objects.²⁷ HKI can be used as collateral for a debt with a guarantee The right thing is fiduciary guarantee.²⁸ In essence, Intellectual Property Rights (whatever the type) can also be used as a fiduciary object. and fiduciary provisions because Intellectual Property Rights are movable objects.

IV. MECHANISM FOR REALIZING THE PRINCIPLE OF PRUDENCE IN THE PLACEMENT OF INTELLECTUAL PROPERTY RIGHTS AS COLLATERAL FOR BANK KREDIT

Principle caution or also called *the prudential principle*, taken from the English word "Prudent" which meaning "Wise".²⁹ Providing credit by the Bank to debtor customers based on the principle caution, namely:³⁰

Banks in carrying out their business activities, including providing credit to debtor customers, must always be guided by and apply the principle of prudence. This principle is manifested, among others, in the form of consistent application based on good faith towards all requirements and laws and regulations related to the provision of credit.

Implementation principle prudence (*Prudential Banking Principle*) in all over activity banking is one of method For create healthy banking, which in turn will impact positive to economy in a way macro.³¹ This is aiming For protect financing from various problem with method know the customer well through identity prospective customer, documents Supporter information from prospective customers and so on.³²

In casu, the procedure submission HKI financing as guarantee banking consists of from stages data verification, verification legality riches intellectual, assessment riches intellectual, disbursement of funds, and receipt refund., with analyze aspects as following :

1) Legal basis

Law Number 24 of 2019 concerning the Creative Economy, and related laws with HKI. Then there is PP 24/2022. However, not yet There is support legal in a way technical, because Not yet There is revision about Bank Indonesia Regulations Number 14/ 15 /PBI/2012 About Asset Quality Assessment General Bank.

²⁶ Trias Palupi Kurnianingrum, *Op.Cit.*, p. 40.

²⁷ Indra Rahmatullah, *Aset Hak Kekayaan Intelektual Sebagai Jaminan Dalam Perbankan*, (Yogyakarta: Deepublish, 2015), p. 16.

²⁸ Hariyanto, *Op.Cit.*, p.493.

²⁹ Permadi Gandapradja, *Dasar dan Prinsip Pengawasan Bank*, (Jakarta: Gramedia Pustaka Utama, 2004), p.21.

³⁰ Sutan Remy Sjadeni, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, (Jakarta: Pustaka Utama Grafiti, 1999), p.173

³¹ Yunus Husein, "Analisis Yuridis Aturan Prinsip Mengenal Nasabah Dalam Mencegah Tindak Pidana Pencucian Uang Pada Transaksi Perbankan", *Lex Jurnalica* 20, nomor 1, (2023): 32-46. <https://doi.org/10.47007/lj.v20i1.6467>

³² Veithzal Rivai, *Islamic Financial Management : Teori, Konsep dan Aplikasi Panduan Praktis untuk Lembaga Keuangan, Nasabah, Praktisi dan Mahasiswa*, (Jakarta: Kharisma Putra Utama Offset, 2008), p.617

2) Legal Subject

Wealth - based financing intellectual submitted by economic actors creative to the institution bank finance or non-bank financial institutions (Article 7 paragraph 1 PP 24/2022);

3) Condition Submission Financing based on HKI

At least consists of from : a) financing proposal, has business economy creative, have engagement related to product HKI economy creative ; and d) have letter recording or certificate riches intellectual.

4) HKI requirements as object guarantee

Among others, a) already recorded or registered with the Directorate General of Intellectual Property; b) already managed Good in a way yourself and/ or diverted his rights to other parties.

5) Form of HKI as a basis for debt guarantee

Can in the form of a) guarantee fiduciary on riches intellectual, b) contract in activity economy creative, and/ or c) rights bill in activity creative economy. (Article 9 paragraph 2 PP 24/2022)

6) Recording Financing Riches Intellectual

Efforts that can be made done is with stages 1) The perpetrator economy creative accept financing from institution bank finance and/ or must to record facility financing economy creative ; 2) System recording facilitation financing economy creative organized by the ministry that organizes task government in the field of economy creative.

7) Evaluation Wealth Value Wealth Intellectual

HKI assessment is carried out by an Assessor Riches Intellectual together with a panel of judges with use approach cost, market approach, approach income, and/ or approach evaluation other in accordance with standard applicable assessment. (Article 12 PP 24/2022)

8) Completion Dispute Financing Creative Economy based on Riches Intellectual

Done through deliberation For consensus, can completed through court or outside court (Article 40 PP 24/2022).

As above, it has been outlined about stages on scheme financing riches intellectual as guarantee banking.³³ However, with scheme on hopefully Still cause problem or challenge banking, namely:³⁴

1. The difficulty count / assess / not existence benchmark special in count need credit, components the economics of an HKI, and the valuation of HKI;
2. HKI appraisal institutions in Indonesia;
3. Term time limited HKI protection ;

³³ Ferdiansyah Putra Manggala, "Dinamika Pembebanan Jaminan Fidusia Terkait Dengan Prinsip Spesialitas," *Jurnal Ilmu Kenotariatan* 4, no. 1 (2023): 78–88.

³⁴ Meralda Amala Istighfarin, "Perlindungan Hukum Kreditur Dan Pemilik Jaminan Dalam Pelaksanaan Perjanjian Kredit Dengan Jaminan Tanah Milik Orang Lain," *Acten Journal Law Review* 1, no. 1 (August 31, 2024): 64–84.

Lex semper debet remedium (law must can become medicine), in line with adage said, in fact problem as described above, can be overcome with implement principle caution banking.³⁵ The principle of prudence can be applied by banks by conducting various kinds of analysis, including by implementing the 5C principle, namely:³⁶

1) Evaluation Character

It is the nature or character of a person who will be given credit (the perpetrator) economy creative must be absolutely credible.

2) Assessment Capacity

Capacity is an analysis to determine the customer's ability to pay credit, from this assessment the customer's ability to manage the business can be seen. This is can done with to observe with Good HKI requirements as guarantee, namely Already recorded or registered with the Directorate General of Intellectual Property, and has managed Good in a way alone and/ or diverted his rights to other parties.

3) Capital Assessment (*Capital*)

it can be seen from the financial report (balance sheet and profit and loss report) which is presented by taking measurements such as in terms of liquidity and solvency, profitability and other measures. This can done with analyze submission perpetrator economy creative in submission loans, with analyze financing proposals, ensure own business economy creative and have engagement related to product HKI economy creative; and perpetrator economy creative own letter recording or certificate riches intellectual

4) Assessment to Debt Business Prospects *Condition of Economy*

The assessment of the condition or prospects of the financed business sector should truly have good prospects so that the possibility of the credit being problematic is relatively small. Therefore, in matter HKI assessment involves assessor Riches Intellectuals and/ or assessment panels that meet the requirements condition with use approach cost, market approach, approach income, and/ or approach evaluation other in accordance with standard applicable assessment.

5) Evaluation Collateral

It is a guarantee given by prospective customers, either in physical or material form. non-physical. The guarantee should exceed the amount of credit given. The guarantee must also be examined for its validity and perfection, so that if a problem occurs, the deposited guarantee can be used as quickly as possible. Therefore, that, it is necessary do checking term time, is it there is dispute, or HKI Already deleted.

³⁵ Mohammad Reynaldy Adam and Wiwik Wulandari, "Kepastian Hukum Akta Perubahan Badan Kredit Desa Menjadi PT. Lembaga Keuangan Mikro," *Jurnal Ilmu Kenotariatan* 4, no. 2 (2023): 162–72.

³⁶ I Dewa Gede Cahaya Dita Darmaangga, et.al., "Penerapan Prinsip Kehati-hatian sebagai Analisis dalam Pemberian Kredit Pada PT BPR Gianyar Partasedana", *Jurnal Kertha Semaya* 1, nomor 8, (2013): 1-13.

Description mechanism implementation of 5C as embodiment principle caution banking, it is expected capable overcome problem about placement HKI guarantee in credit Indonesian banking, and can realize development economy creative.

V. CONCLUSION

Position of Property Rights Intellectual Property as guarantee credit banking in Indonesia is regulated based on provision Regulation Government Number 24 of 2022 concerning Regulation Implementation Constitution Number 24 of 2019 concerning the Creative Economy. HKI is one form of property rights intangible, and HKI (whatever type) can be used as a fiduciary object and fiduciary provisions in general because HKI is a movable object. Wealth - based financing i intellectual For credit banking submitted by economic actors creative to the institution bank finance, with condition Already recorded or registered with the Directorate General Riches Intellectual, and already managed Good in a way alone and/ or diverted his rights to other parties. In the future need existence revision about Bank Indonesia Regulations Number 14/ 15 /PBI/2012 About Asset Quality Assessment General Bank, which accommodates position riches intellectual as object guarantee credit banking, for give certainty law.

Mechanism embodiment principle caution in placement of Property Rights Intellectual Property as guarantee credit banking, can done with analysis of the 5 C principles, namely character assessment (character), capability assessment (capacity), capital assessment (capital), collateral assessment, and assessment of debtor's business prospects (condition of economy), at the stage financing which includes data verification, verification legality riches intellectual, assessment riches intellectual, disbursement of funds, and receipt refund. In embodiment principle caution the banking must cooperate with Assessor Riches Intellectuals and/ or Assessment Panel, as well as Directorate General Riches Intellectuals of the Ministry of Law and Human Rights of the Republic of Indonesia. Need existence improvement competence profession assessor riches intellectual, and provision system management digital collective in provision access to data above riches intellectuals who are made object guarantee and also recording facility funding perpetrator economy creative.

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