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Patent as Object of Fiduciary Guarantee in Banking Credit Practices

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Abstract

Intellectual property is interesting to study since it has a very important role in the advancement of the economy in this era of globalization. Intellectual Property Rights (IPR) are rights that arise from the results of the human brain's thinking that produce a product or process that is useful for the community. IPR includes intangible movable objects as regulated in article 499 of the Civil Code. This intangible object is the result of human thought and the object of ownership is a movable object that can be transferred to another party so that it can be used as a fiduciary guarantee as regulated in Law no. 13 of 2016 concerning Patents (Patent Law). Article 108 paragraph 1 states that "Patent rights can be used as objects of fiduciary guarantee". However, patent rights as objects of fiduciary guarantee in a bank's loan practice are currently unavailable due to obstacles in its implementation. There is no special Asset Appraisal Agency that assesses the economic value of patent rights so that it can be used as a credit guarantee. This makes it difficult for patents to be used as a fiduciary guarantee. To realize patents as objects of fiduciary guarantee, firm and detailed juridical support is needed regarding IPR assets as objects of bank credit guarantees. The valuation of patented assets must be supported by the Patent Regulations protected by the Bank Loan Guarantee and the need for legal access under the Bank Indonesia Regulations to support the patents that are protected by the Trustee Guarantee. So there should be an appraisal agency that can assess a patent right so that it can improve the people's economy and advance the national economy.

Keywords
patent rights; fiduciary guarantee; credit

I. Introduction

Indonesia is a legal state as stated in Article 1, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia. Therefore, in administering the government and the life of the nation and state, it is based on the laws in force in Indonesia. According to Jimmy Asshiddigie, as a state of law, the law must be the highest leader in the administration of a country. Therefore, the law must be a legal instrument that guarantees or controls everything that applies or does not apply to one country, the Republic of Indonesia.

The community as the owner of rights and obligations in its development has experienced very rapid development, such as developments and/or needs related to Intellectual Property Rights (IPR). Intellectual Property Rights is a system that is currently connected with modern living systems to create a creation or invention in business competition.

IPR is a relatively new concept for most countries, especially developing countries. From the end of the 20th century until the beginning of the 21st century, countries agreed to elevate the concept of IPR into a collective agreement in the form of the *Agreement*

Establishing the World Trade Organization ("WTO *Agreement* ") and international agreements.

Intellectual Property Rights are intangible objects if in civil law they are classified as tangible objects and intangible objects according to Article 499 of the Civil Code states: "Objects are every item and every right that can be controlled by property rights". So objects in a juridical sense are everything that can be used as an object of property rights and everything that can be judged. The objects in question include tangible and *intangible goods (intangible goods).*

According to Mahadi, objects of property rights are objects of "objects" and "rights". Nouns defined in the above provisions are "material objects", while "rights" are "intangible objects". This is in accordance with the classification of tangible and intangible objects in Article 503 of the Civil Code, but these absolute rights are not tangible objects which are currently known as HKI. This intangible object is the result of human thought and the object of ownership is a movable object that can be transferred to another party so that it can be used as a fiduciary guarantee which is currently only regulated in Law no. 13 of 2016 concerning Patents (Patent Law) and Copyright Law no. 28 of 2014 concerning Copyright (Copyright Law). Article 108 paragraph 1 of the Patent Law stipulates that "Patent rights can be used as objects of fiduciary guarantees"

According to Salim HS, guarantee law is the entire legal system that regulates the relationship between the guarantor and the guarantee recipient regarding the imposition of guarantees to obtain loans.

The elements in question are:

a. There is a rule of law

In the field of guarantees, two types can be distinguished, namely:

1. Written guarantee rules are legal rules embodied in laws, regulations, agreements, and jurisprudence.
2. Unwritten guarantee rules are the principles of guarantee law that grow, live, and develop in society. Example: land mortgage.

b. The existence of a guarantee giver and recipient

A guarantor is a person or legal entity that submits a guarantee to the debtor's guarantee recipient, while the guarantee recipient is a person or legal entity that will receive a guarantee originating from the guarantor (the creditor), in this case, the legal entity providing credit facilities is a bank or non-financial institution bank

A guarantor is an individual or legal entity that provides guarantees to recipients of guarantees from debtors, while guarantors are individuals or legal entities that receive guarantees from insurers (creditors). In this case, what is meant by the legal entity is that the provider of the loan facility is a bank or non-bank institution.

c. There is a guarantee

Collateral guaranteed by creditors is tangible and intangible guarantees. Tangible guarantees are guarantees in the form of tangible and immovable property rights, while intangible guarantees are intangible guarantees.

d. The existence of credit facilities

The purpose of the guarantee provided by the guarantor is to receive credit from a bank or non-bank financial institution. Creditors provide funds according to the principle of trust, bank or non-bank having confidence that the debtor can repay the loan principal and interest, and the debtor has confidence that the bank or financial institution can provide additional credit.

According to J. Satrio, the law of guarantee is a legal provision that regulates the guarantee of creditors' receivables to debtors. According to Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF), Article 1 paragraph 1: Fiduciary is a form of transfer of ownership rights to an object based on trust provided that the object whose ownership is transferred remains in the control of the owner of the object.

Fiduciary guarantees are security rights for movable objects, especially buildings that cannot be encumbered with mortgage rights, which are regulated in Law no. 4 of 1996 concerning Mortgage which remains in the control of the fiduciary giver as a guarantee of debt repayment which prioritizes the fiduciary recipient over other creditors.

Patent rights as objects of fiduciary guarantees in the practice of providing bank loans, currently there are no banks that carry out these provisions due to obstacles in their implementation, namely the assessment of the value of patents granted and used as credit guarantees. In addition, there is no special Asset Appraisal Agency (Appraisal) to assess the economic value of patent rights.

Formulation of the Problem

Based on the description above, the formulation of the problem is the position of IPR, especially patent rights whose object is burdened with a fiduciary guarantee and obstacles in applying for patents as fiduciary guarantees in the practice of bank lending.

II. Research Method

The type of research used in this research is normative juridical. Normative legal research essentially examines laws that are conceptualized as norms or rules that apply in society, and become a reference for everyone's behavior. The approach used is legal and conceptual, namely a description of a certain concept which is a set of meanings related to the terms described in scientific works. This writing uses a literature study technique approach and uses secondary data, namely the data included in the literature study in the form of legal materials in the form of primary legal materials and secondary legal materials.

The data collection method used in this research is a literature study, which includes law and written books on related rights issues. The data analysis used is qualitative, namely an analysis of the content of the text data, which is then determined with a conclusion that leads to the depth of the law as the applicable law to achieve decisive results and discussions.

The data collection method used in this research is a literature study that includes statutory regulations and related legal documents. The data analysis used is qualitative, namely analyzing the content of textual data which is then constructed into conclusions that lead to the depth of the law as applicable law, with the results and discussion given.

III. Results and Discussion

3.1 The Position of IPR, especially Patent Rights whose Object is Burdened with a Fiduciary Guarantee

Patents are part of intellectual property and fall under the category of industrial property. The intellectual property itself is part of objects, namely intangible objects *(intangible)*. The definition of objects from a juridical point of view is anything that can be an object of rights. Whereas in an engagement, the object of an engagement is not only tangible objects but also intangible objects.

Patent rights are exclusive rights granted by the state to inventors for inventions in the field of technology, and the inventors can implement their inventions themselves for a certain period or allow other parties to implement them. Patent rights granted to inventors are given in the form of certificates which are also known as patent certificates. A patent certificate is a form of the intangible movable object. Patent rights are objects in the material sense according to Article 570 of the Civil Code, and patents are movable objects that can be transferred, for example, sold, granted, inherited, and so on.

The economic condition of the population is a condition that describes human life that has economic score (Shah et al, 2020). Patent rights are practically property that has a commercial (economic) value. In civil law, the concept of material rights *is known*, namely an absolute right to an object where this right gives the right to control directly which can be defended against anyone. In line with the concept of material rights, legal protection of patent rights is an exclusive right granted by law to patent holders. The exclusive rights owned by the patent holder have benefits as a form of intangible object that has economic value and moral rights. With these moral rights, the benefits of patents for their owners are known and remembered by patent users and the wider community. Even as a legal object, patent rights can be the object of a legal relationship which in this case is the object of a fiduciary guarantee.

Fiduciary guarantees have material properties. Banks as creditors need security for a bank credit that was born from an agreement between the debtor and the bank. The fiduciary guarantee is to convince creditors in the banking credit process. Based on article 1 point 1 UUJF states that fiduciary is the transfer of an object's ownership rights based on trust on the condition that the transfer of rights to an object whose ownership rights are transferred to the ownership of the object's owner. The implementation of patent rights as credit guarantees can occur by way of the patent holder as the fiduciary giver submitting the patent certificate as the object of guarantee to the bank as the fiduciary recipient. With the patent rights still in the hands of the owner, the owner can still use his patent to run the company's operations and business until the term of payment of his debts to the bank by way of installments or credit.

Patent rights as intellectual property rights are attached to property law and civil law. Indonesia as a country that adheres to a *civil law system* divides wealth law in the system into two, namely material law which is regulated in the second book of the Civil Code, and binding law which is regulated in the third book of the Civil Code.

According to Article 503 of the Civil Code, a patent is an intangible object due to its intangible nature. If it is related to the types of objects in Article 504 of the Civil Code, patent rights include movable objects whose rights will always be attached to the patent as a product according to the explanation of movable objects in Article 511 of the Civil Code. Article 511 of this Civil Code explains that objects have a movable nature because they have been stipulated by law, such as the right to use movable objects.

The position of a patent in material law is as an object of property rights. According to Article 449 of the Civil Code, what is meant by objects are any goods and rights that can be controlled by a person as property rights. According to Mahadi, the objects referred to in Article 499 of the Civil Code are material objects, while rights are immaterial. From this description, it is in accordance with the classification of objects according to Article 503 of the Civil Code, namely the classification of objects into tangible objects and intangible objects. Patent rights as material security, positioning patent rights as something of value or value for credit guarantees. Patent rights as material rights that have economic value, their existence can be transferred to be an object of guarantee because patent rights are assets.

Because patents have economic value, patents can be used as material guarantees to convince creditors to pay off debts in a credit agreement. This can be seen from the Patent Law which has accommodated these provisions, namely that a patent is an intangible movable object, which can be transferred either in whole or in part by way of inheritance, grant, waqf, will, written agreement, other reasons justified according to the law. with the provisions of laws and regulations. One of the credit distributions with patent guarantees is the bank's prudence principle. Article 8 of Law Number 42 of 1999 concerning Fiduciary Guarantees, which is an absolute requirement for obtaining credit, namely guarantees can be in the form of principal guarantees only. On the other hand, the bank as a creditor based on the precautionary principle always pays attention to the safety of the funds to be distributed. For security, banks usually require additional guarantees in the form of material guarantees.

Collateral or guarantee is considered very important when banks provide credit to debtors. The delivery of this guarantee is given to secure the bank's position if at any time the debtor is negligent of his obligation to repay his credit so that the bank can execute the guarantee. The implementation of the guarantee is carried out based on the guarantee agreement. The guarantee agreement is an additional agreement or *accessory* that is special attached to the main agreement.

A fiduciary guarantee is an accessor agreement *or* an additional agreement from the main agreement which can create obligations for the parties bound in the agreement to fulfill an achievement. That the imposition of an object with a fiduciary guarantee must be made with a notarial deed which must use the Indonesian language which is a fiduciary guarantee deed. The existence of a guarantee is very important to be included as a condition of the loan agreement between the debtor and creditor as a guarantee of repayment from the debtor so that later the implementation of the agreement is more secure and does not harm the parties. However, it can be different if there is an imposition on a patent right because a patent is a movable object that cannot be seen or an intangible object whose existence is not visible then it is not an object or a guarantee but a right contained in the guarantee. Patent rights that are subject to fiduciary guarantees can be transferred either in whole or in part in accordance with Article 74 paragraph 1 of the Patent Law through inheritance, grants, wills, waqf, and written agreements or other reasons justified under the provisions of laws and regulations.

In the case of a patent transfer based on a written agreement, namely a patent certificate as a fiduciary guarantee and based on the written approval of the fiduciary recipient. Patent rights are classified as fiduciary guarantees because patent rights are intangible things. Movable or transferable and intangible property rights or property rights. At the same time, fiduciary guarantees are security rights over movable, tangible, and intangible objects as well as buildings/houses on other people's land, both registered and unregistered, which cannot be used as collateral in a debt agreement and provide special rights to the holder of the security right above the position of other creditors.

Patent rights as objects of fiduciary guarantees as regulated in the Patent Law can be implemented through the process of transferring patent rights in a written agreement that is outlined in the form of a notarial deed in Indonesian and is a fiduciary guarantee deed. Registration also has a legal meaning as a series that cannot be separated from the agreement process. Registration is also a form of embodiment of the principle of legal certainty. Patents that are used as objects for bank credit guarantees must be registered to have full legal force. In addition, after the notarial deed has been made, it must be registered and informed by the Directorate General of Intellectual Property Rights, and the application must be submitted in Indonesian and subject to administrative fees.

Registration requirements are mandatory because patents are property rights granted by the state and their use and implementation are limited for a certain period.

3.2 Barriers to Applying for a Patent as a Fiduciary Guarantee in the Practice of Bank Lending

Treating patents as guarantees and as a trust from creditors to debtors, is the basis for recognizing that the state respects their inventions. However, although this is explicitly stated in the legislation, in practice it does not provide legal certainty. The absence of adequate certainty causes not all national banking institutions to accept the concept of patent ownership as the subject of fiduciary guarantees. There is no reason to state that Article 2 of Law Number 10 of 1995 concerning Amendments to Law Number 7 of 1992 concerning Banking (Banking Law), explicitly states that Indonesian banking is based on economic democracy in carrying out its activities by applying the precautionary principle. . If the subject is a loan guarantee, the bank must have confidence in the creditor's ability to repay the loan on the agreed time. The bank's confidence in the creditor's ability can be determined from the results of the bank's analysis of the debtor by evaluating the elements of the debtor's ability and considering the risk of the debtor defaults. This analysis is very important because it is used by banks using money in their business which is collected from the community at an agreed time.

Collateral is a way for banks to receive debt payments from debtors. Banks use this guarantee to force creditors to pay off their debts. If the debtor does not pay off the debt, then the bank as the creditor applies the execution of material guarantees if the debtor defaults or does not carry out the contents of the agreed agreement. The bank will then check the economic value of the object used as collateral. If the guarantee that can be given to creditors has no economic value, the bank is clearly in danger. This is why banks cannot accept patents as collateral for trust in their debtors. Considering that the bank's business objective is to gain profit, it must balance the prudential (security) element of the bank, because lending banks have a very high risk for banks or customers as depositors of funds *(degree of risk).*

By taking into account the prudential principle of banks in conducting banking activities as regulated in the Banking Law, the obstacle made by banks so far not being granted patents as collateral is in assessing or evaluating patents as collateral. In the appraisal mechanism for objects that are used as collateral, which has become a common practice in the field, banks use the services of a public appraiser, commonly called *appraisal*, as a third party that supports the financial profession. The role of *appraisal* is to provide professional considerations in conducting economic appraisals or object appraisals charged by the guarantee agency. Currently, no institution meets the requirements and is recognized that assesses the economic value of the patent, so this is the reason why it is difficult for patents to be used as collateral for trust to be loaned to banks. The value of patent rights cannot be determined with certainty, so the bank that lends to the debtor "guarantees the patent as an object" based on the guarantee of trust will be worried if the borrower is in trouble or defaults. The patent rights were sold due to the lack of interest of third parties in the market.

To reduce obstacles for banks, as well as to maintain the prudential banking principle and the provisions of Law Number 1 of 2016 concerning Guarantees, it can be implemented, namely by establishing an institution whose obligation as a third party is to secure loans in lending and borrowing activities between patent holders (debtors) and banking (creditors). The institution that becomes the third party will later be the party responsible for the implementation and repayment of the guarantee if the realization of the

loan is at risk of default. The institution can also be in the form of an *appraisal* that can measure the economic value contained in the patent used as the subject of material guarantees. Assessment of patent rights is very important as a guarantee to obtain bank financing so currently there is a need for an independent party to determine the assessment of patents before they can be used as financial guarantees for state/government or private banks (trade associations). In developing countries, including Indonesia, HKl Asset Appraisal Institutions must be established by state institutions (such as BI, OJK, Minister of Finance, DJ KL, Research Institutes, and Universities) and established by private institutions (business associations). *An appraisal* is useful for financial institutions as an appraiser of the economic value of a guarantee to determine the amount of money borrowed. In addition, to ensure that the collateral amount at the time of foreclosure is sufficient to cover the loan obligations, it is necessary to check the collateral provided by the bank.

Based on the legal assessment and economic assessment of the subject of the loan guarantee, for the bank to consider it as a valuable guarantee, it is necessary to establish an approximate value. An estimate of the amount must be determined because usually, the more achievable price of the credit guarantee objective is always lower than the market price. Appraisal by *appraisal* is an estimate or by calculating or estimating the value of an item. With the enactment of these provisions, indirectly the object of a patent can be used as the object of a fiduciary guarantee. If you need a bank loan, the patent holder can use the patent as collateral for the bank.

With the enactment of Law Number 13 of 2016 concerning the Patent Law, Article 108 (1) states that "Patent rights can be used as fiduciary guarantees". In addition, Article 108 (2) of the Patent Law states: "Stipulations regarding the terms and procedures for patent rights as objects of fiduciary security are regulated by Government Regulations". This article is a reference for making derivative regulations based on Article 108 (1) of the Patent Law. In practice, the government has not yet established technical regulations regarding the requirements and procedures for patents as collateral. Thus, there are circumstances where the rules regarding patent rights as the subject of fiduciary guarantees are incomplete so that they cannot guarantee legal certainty due to legal loopholes. This creates confusion among the public, both patent holders and financial institutions, especially banks, about what rules should be applied. In other words, the absence of a Government Regulation regulated in Article 108 (2) also creates legal uncertainty.

The assessment of patent rights has no legal basis, in the form of regulation concerning patent rights as objects of bank loan guarantees audited by Bank Indonesia Regulation (PBI) No. 9/6/PBI/2007 concerning the Second Amendment to PBI No.7/2/PBI/2005 concerning Asset Quality Assessment for Commercial Banks (PBI No.9/6/PBI/2007) about credit guarantees is one of the main reasons why banks cannot practice lending loans with patent guarantees. Whereas as stated above, the fiduciary provisions regulated in the JF Law accommodate IPR as the purpose of banks guaranteeing through fiduciary guarantees.

IV. Conclusion

The position of intellectual property rights, especially patents that have economic value, are objects that should be subject to fiduciary guarantees in banking. By law, based on the Patent Law, the process of transferring a patent with a written agreement can be carried out in a notarial deed using the Indonesian language. However, based on Article 2 of the Banking Law, until now the bank has not received a patent as an object of fiduciary guarantee because of the precautionary principle.

In Indonesia, there is an appraiser, namely *appraisal*, which is an institution in charge of providing an appraisal of an object. That this value will determine the market value and liquidation value as the lowest value for an appraisal motorcycle by *an appraisal*, but in reality *appraisal* as an asset appraisal agency has not specifically assessed a patent right. This has resulted in the difficulty of patents being used as fiduciary guarantees. This creates obstacles for banks and non-banks to receive patents as fiduciary guarantees.

Because of this, there should be an appraisal agency *that* can assess a patent right so that later the patent can be used as a fiduciary guarantee so that it can improve the community's economy and advance the national economy.

Suggestion

For IPR in the form of patents to be of high value and have economic value, it is necessary to have an evaluation agency that can evaluate the value of patent rights as collateral for both banks and non-banks. The valuation of patented assets must be supported by the Patent Regulations protected by the Bank Loan Guarantee and the need for legal access under Bank Indonesia Regulations to support patents protected by the Trustee Guarantee. Encompassing laws that support patents with standard guarantees will further promote the advancement of patent rights and make people more enthusiastic about the development and promotion of patent intellectual property innovation activities. In addition, it can increase welfare and bring high benefits to society and the economy as a whole. In general, it can advance the Indonesian state in the field of patents and patent innovation.

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