

## **POLICY ON ENTRY IN THE USE OF INTELLECTUAL PROPERTY RIGHTS (MARK) DENOTES INTANGIBLE ASSET AS FIDUCIARY SECURITY OBJECT EFFORTS TO SUPPORT ECONOMIC DEVELOPMENT IN INDONESIA<sup>1</sup>**

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### **ABSTRACT**

*The capital is one of the most important factors in the business world. It can be obtained by either financial institutions or bank credit facilities. Intellectual Property Rights (IPR's) is such a human capital that plays an important role in that world. In the global economic development, for instance, IPR's can be used as object to acquire bank credit. In Indonesia, the legal principles governing IPR's including Mark in particular based on the substantial interpretation are regulated by Act No. 42 of 1999 on Fiduciary Security. In banking practices, the use of Mark as intangible asset be fiduciary security object will cause problematic matters when defaults occur or many debtors are unable to meet the legal obligation of debt repayment. The purpose of this research is to build a system of bank loans armed with Mark as fiduciary security object in a policy (regulation) on entry in the use of intellectual property rights (mark) denotes intangible asset as fiduciary security object in Indonesia. The policy gives not only the legal protection but also the legal certainty for parties that support the economic development.*

Key words: Policy, IPR (Mark), Intangible Asset, Fiduciary Security, economic development

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### **Introduction**

There are various forms of capital in business activities, one of which is human capital.<sup>2</sup> The human capital intended for this paper is the Intellectual Property Rights (IPR) in the fields of Mark. IPR particular in Mark regulated by Law Number 15 Year 2001 on Mark is identification in the trading of goods and services to differentiate the company's products with the others (product identity). In the legal context, the function of Mark is as an evidence of ownership of a product in a document. Mark is also as an intangible asset that has a very high value in the growth of a company. In the perspective of a global economy, Mark can be used as collateral to gain access to bank credit.

In Indonesia, Mark as collateral substantially is based on the interpretation of the Law No. 42 Year 1999 on Fiduciary. Although conversely it is not endorsed by the Banking Policy of Bank Indonesia (the Indonesian Central Bank) that IPR can be collateral. *Peraturan Bank Indonesia* (PBI) or Bank Indonesia Regulation No. 14/15/PBI/2012 regarding Asset Quality Rating for Commercial Banks, article 43 as a reference for using IPR as collateral. With the lack of Bank Indonesia's policy to enforce IPR as collateral instrument, then until now has not been enforced IPR as collateral in Indonesian banking practices.

There have been various reasons why IPR is not enforced, among others, due legal factors are not clear and also powered by the Mark's unpredictable characteristic, i.e. we shall calculate IPR's value when the bank will provide loans for the capital, when defaults occur or many debtors are unable to meet the legal obligation of debt repayment.<sup>3</sup> However, Mark in perspective of business is an asset that should be considered in order to encourage the economic development in Indonesia. This

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<sup>2</sup> Kotler dkk, *The Marketing of Nations, A Strategic Approach to Building National Wealth*, The Free Press New York, 1997, in *Bunga Rampai Hak Atas Kekayaan Intelektual*, tulisan Nashir I, IPS (Indonesian Intellectual Property Society), 2001, p.137

<sup>3</sup> Sri Mulyani, *Membangun Konsep Hak Kekayaan Intelektual di Bidang Merek sebagai Intangible Asset Dalam Sistem Hukum Jaminan Fidusia di Indonesia*, Disertasi, Universitas Diponegoro, 2013, p.317

development needs infrastructure including legal consistency regarding the economic and financial institutions to support economic activities.

As a comparison, it can be shown that the policy of China and the United States successfully enforce IPR certification (brand) as collateral for bank loans.<sup>4</sup> Meanwhile, on 19-23 May 2008 was held the 13th session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group VI on Security Interests in New York, discussed the matter of security in intellectual property rights (intellectual property rights in the collateral) that will be used as collateral to obtain bank credit internationally<sup>5</sup>.

### Mark as an Intangible Asset

In the economic context, IPR especially for Marks as an intangible asset can be taken into account, even generating incomes that qualify as a corporate asset. Gordon V. Smith and Russell L. Parr<sup>6</sup> say “intangible assets as all the elements of a business enterprise that exist in addition to monetary and tangible assets. They are the elements, after working capital and fixed assets, that make the business work and the primary contributors to the earning power of the enterprise.” For a company, Mark personifies the very valuable property law may affect consumer’s behavior and it can be traded to provide the definitely income in the future for its owner.<sup>7</sup>

IPR (brand) seen from an object of private ownership (private good). In economics, the private objects produce positive benefits that are excludable and rivalrous, to get the benefit of the people have to pay. In civil law, IPR (brand) as a private object can be rented, traded, or transferred through an agreement.

The good Utilization and management of IPR as Intangible Asset applied by companies in the financial statements can help improve their performance. The financial statements according the legal perspective provided by Article 6 of the Indonesian Commercial Code about Bookkeeping containing records of the company’s property or in other words a record of income and expenditure which can not only be viewed at any time but also known for right and obligation. Meanwhile, according to the accounting perspective, the management of company documents is applied in the financial statements.

Competent Companies efficiently utilize their intellectual assets and they then will increase the market value of the company. The value creation can be used as the growth indicator and the business success, when the company is able to produce something more than the invested resources are applied in the financial statements.<sup>8</sup> According to Guthrie, the financial statements are the most efficient way for organizations to communicate with stakeholder groups considered as interest in the organization control in order to determine certain strategic aspects.<sup>9</sup>

In object law, Mark is as an intangible asset or movable objects (right) substantially based on the interpretation set out in Article 499 Code of Civil Law. Understanding object of the Civil Code does not only include tangible objects, but also includes intangible objects (right). Mark belongs to the category of rights as a legal object. The concept of material attach to the IPR prescribed in the Civil Code 499 can be controlled as property rights. The concept of property rights in accordance with Article 570 of the Civil Code is the right to enjoy a free material and use material that is absolute. The IPR can be obtained according to Article 584 of the Civil Code, including through ownership (*occupatie*), inheritance, and delivery.

Brand as an intangible asset may be the object of credit guarantees. On the one hand, by law, require confirmation of its legality brand as loan collateral. While on the other hand, economically, as a brand brand credit guarantees must truly have value or price according to economic calculation. Based on the explanation above, it can be described as follows:

Table 1 : The concept of brand Assessment from the perspective of law and economics

Perspective of law	Perspective of economic
a. object legality assurance	a. The type and form of security;
b. validity of the use of object credit guarantees	b. Condition object credit guarantees
c. the use of valid documents	c. Ease of transfer of ownership of an object credit guarantees;
d. disputes that can be attached to the loan guarantee	d. The price level is obvious and marketing prospects
e. designation and licensing the use of an object or credit guarantees'	e. use an object credit guarantees
f. the possibility of a binding object credit guarantees	f. Mark in the Accounting Report as business income

Source : 2014 result research

<sup>4</sup> Bisnis Indonesia, Senin, 23 Agustus 2010, hlm.1

<sup>5</sup> Cakrawala Hukum Sidang UNCITRAL Working Group VI on Security Interests, New York, 19-23 Mei 2008, dalam Buletin Hukum Perbankan dan Kearsentralan, Volume 6 Nomor 2 Agustus 2008, hlm.39

<sup>6</sup> Gordon V. Smith and Russel L. Parr, *According to Valuation of Intellectual Property and Intangibel Assets*, second Edition, 1994, p.83 dalam Tony Hadjiloueas Partner, *Intellectual Property valuation, exploitation and finance*, WIPP Workshop on Effective Intellectual Property Asset Management by SMEs, Tel Aviv, June, 2011, dalam <http://www.wipo.int/edocs/mdocs/sme/en/wipo>, akses tanggal 4 Pebruari 2013

<sup>7</sup> Philip Kotler, Kevin Lane Keller, *Manajemen Pemasaran*, Penerjemah Bob Sabran, Edisi ketiga belas, Jilid 1, Jakarta: Erlangga, 2009, p..260

<sup>8</sup> Ihyaul Ulum, *Intellectual Kapital Konsep dan Kajian Empiris*, Graha Ilmu, Yogyakarta, 2009, p.6

<sup>9</sup> J.Guthrie and F.Ricceri, *The Voluntary Reporting of Intellectual Capital; Comparing evidence from Hongkong and Australia*, *Journal of Intellectual Capital*, Vol.7.No.2.pp.254-271, dalam Ihyaul Ulum, *ibid*, p.5

There are several concepts of assessment, to measure brand value as an intangible asset if it will be used as collateral. Concept Assessment according to the Chairman of the Capital Market Supervisory Agency (Bapepam) and Financial Institutions No. Kep-196 / BL / 2012 on Guidelines for Assessment and presentation of reports \ Assessment of the Capital Market, is a way to estimate the value of using one or more methods assessment. Several methods of assessment according to these provisions, namely:

1. Article 1 (15): Approach Asset (Asset Based Approach) is an approach based on the historical financial statements Rating audited object, by means of adjusting all assets and liabilities to fair market value in accordance with the premise that value is used in the Business Assessment. For the assessment of intangible assets, especially the brand that will serve as collateral, the asset approach is more suitable, because by basing on the financial statements of the company that owns the brand.
2. Article 1 (16): the market approach (market-Based approach) is the assessment approach by comparing the assessment object with another object of comparable or similar and have had a selling price.
3. Article 1 (17) Approaches income (income based approach) is the assessment approach by converting the economic benefits or revenues expected to be generated by the assessment object with a certain discount rate.
4. Article 1 (19): Method Discount for Upcoming Income (Multi Period of Income Discounting) is a method of assessment is used to determine the present value of the revenues to be received in the future on Object Assessment which will be accepted, with a discount rate .
5. Article 1 (20): Income Capitalization Method (Capitalization of Income Method) is a method of assessment based on an income that is considered to represent the future ability of a company or business interest which assessed divided by a capitalization rate or multiplied by a factor of capitalization thus becomes an indication of the value of the company or business interest.

Based on the concept of intangible assets assessment, as mentioned above, that it summed to assess brand as collateral can use the asset approach, market value, or cost.

### Mark in Fiduciary Security Perspective

In a historical context, the use of IPRs as collateral to get finance is derived from a loan agreement. As stated Joan F.Garett,<sup>10</sup> that collateral is a borrower's promise of specific property if a loan is not repaid. The IPR was first used as collateral to obtain finance by Thomas Edison in 1880<sup>11</sup> using Edison patented the electric lamp as collateral to finance its business making business into a general Electric Company. In the late 20th century the use of the IPR as collateral is not known, but the current IPR as collateral became more famous since the economy of United States began to change from the base to the IPR-based manufacturing.

The right to the Mark is the intangible objects (right) character can be moved / transferred like other objects, abstract shape, has economic value. In the opinion of Franqois Painchaud and Jason Moscovici<sup>12</sup> that "we are making reference to intellectual property having enough measurable value on its own so as to be used as a practical form of guarantee." The right to the Mark has a measured value can be owned by a person or legal entity subject to the law or transferred to another party. With it is so, and then the right to the Mark can be charged as bank loan collateral objects.<sup>13</sup> However, there are several criteria to the right to the Mark may be burdened by the bank credit guarantee. Additionally, the Mark has economic value and legality (registered as evidence by the certificate of the Mark).<sup>14</sup>

In Indonesia, legal guarantees in the concept of Indonesian Civil generally regulated in Article 1131 of the Civil Code, which states that the whole object of the debtor, if it cannot meet its debt obligations to creditors, the debtor owned material will be sold to the public and the proceeds divided among the objects creditors by each major accounts as provided for in Article 1132 of the Civil Code. The function of legal security provides the legal certainty of debt repayment in the credit agreement or the debt receivable or certainty of realization of an achievement in a treaty. Law of security seen particularly in terms of the agreement between the parties may be individuals or material. There are various kinds of guarantees that are material that Collateral Mortgage, lien collateral, and fiduciary security. Collateral Mortgage immovable object is in the form of land, set in the Law No. 4 of 1996, is a guarantee Pawn is the object moving objects both tangible and intangible set forth in Civil Code Section 1150-1161. Fiduciary object moving objects either tangible or intangible by handover constitutum possessorium regulated by law No. 42 of 1999 on Fiduciary Security. Mark is as one of the objects based on the interpretation of the fiduciary security substantially regulated in Law Number 42 Year 1999 regarding Fiduciary. The fiduciary is one form of a guarantee under the agreement, with the object of moving objects either tangible or intangible.<sup>15</sup>

The guarantee are object. Laws objects set out in Book II of the Civil Code Article 499 s / d in 1232 is the law that governs the legal relationship between a person and objects that give rise to the right to object or property rights (zakelijk recht), namely the right that provides power directly to the person who has the right to control something objects in the hands of anyone

<sup>10</sup> Joan F.Garrett, Banks and Their Customers 99, 1995, in Brian W.Jacobs, *Using Intellectual Property to Secure Financing after The Worst Financial Crisis Since The Great Depression*, Marquette Intellectual Property Law Review, Vol.15, Issue 2/Article 6/ 2011, <http://scholarship.law.marquette.edu/iplr>, akses tgl 29 September 2011, p.451

<sup>11</sup> Brian W.Jacobs, *Using Intellectual Property to Secure Financing after The Worst Financial Crisis Since The Great Depression*, Marquette Intellectual Property Law Review, Vol.15, Issue 2/Article 6/ 2011, <http://scholarship.law.marquette.edu/iplr>, akses tgl 29 September 2011, p.451.

<sup>12</sup> Franqois Painchaud and Jason Moscovici, *Intellectual Property and Secured Transactions: Going The Wrong Way in The Right Direction?*, hlm.1, Robic, LLP dalam <http://www.robic.ca/admin/pdf/895/407-FP-2010>, p.1-2, akses tanggal 4 Pebruari 2013

<sup>13</sup> Sri Mulyani, .....Op.cit, p.94-95

<sup>14</sup> Sri Mulyani, .....ibid, p.313-314

<sup>15</sup> ELIPS, *Lembaga Jaminan*, Program Kerjasama Proyek ELIPS & Fakultas Hukum Universitas Indonesia, 1998, p.68

else that thing was. Property rights are set out in the Civil Code giving pleasure and guarantees. Property rights guarantees that are always associated with an object as a security object can be maintained against any person (absolute).

IPR especially Mark regulated in Law Number 15 of 2001. The rights granted by the state to produce intellectual works in the field of intellectual property, which has a commercial value, either directly automatically, or through registration of the relevant agencies, as rewards, recognition of rights and means of legal protection. The basic concept of granting rights to the Mark is as the object of the guarantee that the Mark including IPR in the field of industrial objects. The Mark arising as a property or birth, due to human intellectual abilities through creativity and imagination, to produce energy requires sacrifice, thought, time and costs, making the work produced have a value.

The Mark is as one of the objects based on the interpretation of fiduciary assurance substantially regulated in Law Number 42 Year 1999 regarding Fiduciary. The Fiduciary is one form of a guarantee under the agreement, with the object of moving objects either tangible or intangible. Setting the right Mark as the existing fiduciary guarantee has been implicit in the substance of loading, binding, and objects registration fiduciary insurance. But explicitly requires clarity in the interpretation, so it can be applied in banking practice in Indonesia. Interpretation of legislation is needed when there is no clarity on the meaning of the legislation. By using the method of hermeneutic interpretation of the law can take a role in order to obtain the meaning of a text.

### Policy on Entry of Intellectual Property Rights (the Mark) as Fiduciary Security

Banks in their lending policies set forth in the Policy Bank Indonesia. Bank Indonesia Regulation or PBI No. 14/15 / PBI / 2012 regarding Asset Quality Rating for Commercial Banks, article 43 guarantees a set of objects Bank Indonesia is recognized. IPR in the field of Mark in particular has not been recognized in the policy of Bank Indonesia. Bank Indonesia does not impose a policy of Mark as a fiduciary security object, because not all Marks have economic value and can be traded. Another consideration is the difficulty in measuring the value of intellectual property (Mark), and how the market share, as well as to anticipate the risk of bank losses, if the IPR will be used as a means of collateral.<sup>16</sup>

Economic development policies, as part of national development is an effort to reach a fair and prosperous society based on Pancasila and the Constitution of 1945 Based on the principles of law contained in the 1945 Constitution, specially Article 33 ( 4 ), there are few formal legislation, either directly or indirectly related to the law of fiduciary security where IPR ( brand ) as collateral object . Under the terms of Article 2 Paragraph ( 1 ) the Board of Directors of Bank Indonesia Decree No. 23/69 / KEP / DIR dated February 28, 1991 on the Insurance Lending states that " Security is a belief in the ability of the bank to repay the loan in accordance with the agreement " .

Terms or the legal norms contained in such Act No.10 of 1998 on Banking, Law No.15 of 2001 on the brand. Bank Indonesia Regulation No. 14/ 15 / PBI / 2012 regarding Asset Quality Rating for Commercial Banks. Right to Brand policy enforcement as a fiduciary guarantee the substasial already implicit in the Act No. 42 Year 1999 on Fiduciary. In view of the substance of the legal aspects of a fiduciary guarantee provisions relating to the use of IPRs to access bank credit.

Table 2: Substance Act No. 42 of 1999 of the existing

Substance	Article	Description
The principle of trust	<b>Article (1);</b>	Fiduciary is a transfer of ownership of an object based on trust;
<b>Object</b>	<b>Article 1(1)</b>	Objects which ownership rights can be transferred.
<b>Preference</b>	<b>Article 1(2); 27</b>	Give precedence to the position of other creditors fiduciary
Object fiduciary understanding objects	<b>Article 1(2); Article 1 (4)</b>	Fiduciary insurance is the right collateral for moving objects both tangible and intangible fixed in mastering giver fiduciary, as collateral for the repayment of certain debt.
<b>Binding of loading:</b>	<b>Article 4</b>	Fiduciary is a follow-up agreement on a basic agreement that creates obligations for the parties to meet an accomplishment.
	<b>Article 5 (1)</b>	Imposition of objects with fiduciary made by notarial deed in Indonesian and is a Fiduciary Deed
Registration fiduciary -asas publicity	<b>Article 11 (1)</b>	Objects loaded fiduciary must be registered.
	<b>Article 12 (1)</b>	Registration is done on a fiduciary Fiduciary Registration Office, at the Regional Office.
The transfer of the right in Fiduciary security :	<b>Article 19 (1)</b>	The transfer of the right to claim the ownership resulting fiduciary obligations to creditors New Recipient
	<b>Article 19 (2)</b>	Fiduciary shift by the New Lenders listed on Fiduciary Registration Office
Execution of the object	<b>Article :29</b>	Execution of the object Fiduciary done:

<sup>16</sup> Sri Mulyani, .....Op.cit, p.176

Fiduciary :		a. titel executorial referred to in Article 15 (2) by the Recipient Fiduciary b. Penjualan objects on the power Recipient Fiduciary through Public Auction c. Penjualan under the hand of the giver and the receiver upon the agreement of Fiduciary.
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Source : Law Number 42 Year 1999 regarding fiduciary

Based on the interpretation substantially Law Number 42 Year 1999 regarding fiduciary, implied in fact have the loading substance, binding, and registration fiduciary security, if the IPR (brand) will be the object of fiduciary assurance as expected in the 13th Session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group VI on Security Interest, secured transactions law, New York 19-23 may 2008, that each country is expected to have the rules of intellectual property as collateral without violating the terms of IPR that has been held each country and should not be violation of international treaties in the field of intellectual property that has been made between countries.<sup>17</sup>

In principle, the essence of the banking practices that guarantee bank credits has three value or function is the value of benefits (economic), the value of juridical (legal certainty) and market share. When items are sold collateral must meet these values, if these values are not met, then the function guarantees are not met. What about the rights to the brand were used as collateral if the three functions of the guarantee are met ?. Related to this is when connected with the flow of the utilitarian Jeremy Bentham (1748-1832)<sup>18</sup> argued that the legislation should be able to provide the greatest possible happiness for most people, so the urge to impose birth trademark policy as collateral is not a thing impossible given the trademark rights have economic value, has a price, can be diverted for sale, lease or pledged. Therefore to meet these three functions, the policy enforcement rights to use the brand as collateral further stipulated in a government regulation that enforces the brand as collateral.

Thinking bases with Hans Kelsen pure theory of law, conceived of law as rules made and recognized by the state, connected with the Fiduciary Law (Law No. 42 of 1999) as the positive law in force in the community, the actual value contained in it giving orders in Article 1, point 2 (second) Fiduciary Law (Law No. 42 of 1999) that the object is moving objects fiduciary assurance whether tangible or intangible, to provide an understanding that the Mark is one manifestation of the intangible have economic value, but did not explain further how The Mark becomes the object of fiduciary security.<sup>19</sup>

The right to Mark can be the object of fiduciary security, arguing that the rights to the Mark are still controlled by the holder of the Mark, while the right has moved to the holders of bank guarantees in this regard. Trademark holder can still use the rights to the Mark in its business activities. The transfer of ownership of an object on the basis of trust with the provision that the objects transferred the ownership rights remain in control of the owner of the object as defined in Article 1 (1) Fiduciary Law. Fiduciary seen from the legal aspect of giving preference (right precedence repayment) of other creditors (unsecured) as follows:<sup>20</sup>

- a. Fiduciary holders have the right precedence of the other creditors;
- b. Fiduciary holder has the right to take precedence in terms of repayment  
Above result object is the object execution fiduciary insurance;
- c. Fiduciary holders have the right to not remove the precedence due to bankruptcy or liquidation.

In accordance to legal construction, the law understood in a unified system in which there are aspects of the substance of the law, the legal structure and legal culture. Similarly, building a legal system of credit guarantees with IPR collateral object (Mark) is required not only the substance of the legal aspects, but also how the structure of the law in addition to the legal culture of society.

In addition it is also important to encourage the implementation of the use of brand recognition as collateral in a fiduciary policies applied in the Bank Indonesia Regulation that provide protection and legal certainty for the parties involved in the loan agreement with the brand as a fiduciary guarantee object by observing the precautionary principle. Aspects of the legal structure is needed in the use of IPR enforcement policy (Mark) as bank loan collateral object, namely in the form of institutions such as the appraisal agency, insurance agencies, the ratings agency Mark, as well as a public accountant. Being the cultural aspect, it takes confidence or trust on the establishment of the IPR as collateral object especially for Mark in banking practices in order to give an effort supporting the Indonesian economic development.

## Conclusion

IPR as a form of human capital has the prospect of economic development of a nation. Human capital is the intellectual property rights, especially in the field of brand has economic value and can be transferred as collateral agreement. Security Agreement in this case is where the fiduciary security object still controlled by the owner, but the right of ownership have passed to the holders of fiduciary.

IPR management is applied particular in Mark of the company's financial statements into a source of revenue for the company. Consideration of the economic value of the IPR, and the unpredictable nature of the Mark is not used as a reason for not applying IPRs as objects of fiduciary guarantee, supported from the public trust and the birth of new institutions such as

<sup>17</sup> Sri Mulyani, *Pengembangan Hak Kekayaan Intelektual sebagai Collateral (agunan) untuk Mendapatkan Kredit Perbankan di Indonesia*, Jurnal Dinamika Hukum, Fakultas Hukum Universitas Jenderal Soedirman, Purwokerto, Vol.12. No.3, September 2012, ISSN 1410-0797, hlm.577

<sup>18</sup> Sri Mulyani, *Hak Kekayaan Intelektual di Bidang Merek Sebagai Intangible Asset Dalam Perspektif Jaminan Fidusia antara Peluang dan Tantangan*, Pustaka Magister, Semarang, 2013, hlm.61

<sup>19</sup> Sri Mulyani, *Membangun Konsep.....*Op.cit, hlm.178

<sup>20</sup> See Article 27 Undang-undang Jaminan Fidusia

Mark Agency, Mark Exchange, Institute of Public Accountants Appraisal Services, insurance agencies and independent for strengthen IPR enactment initiation (Mark) as an object in a fiduciary security policy as an effort to support economic development in Indonesia.

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