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Legal Problematics in the Execution of Copyrights as Fiduciary Collateral in the Indonesian Law

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Abstract

Copyright is an exclusive property right that has economic rights, which can be used as a collateral on a fiduciary basis. In practice, Law of the Republic of Indonesia Number 42 (1999) concerning Fiduciary which is the legal umbrella for parties in carrying out fiduciary practices, has not fully accommodated the implementation of copyright as a fiduciary collateral, especially in relation to the implementation of its execution. Therefore, it is necessary to study the legal certainty of copyright regulation as an object of fiduciary collateral and how the concept of execution of copyright serve as a fiduciary collateral. The descriptive analysis method was used with a normative juridical approach to conduct this research. Secondary data was used as literature reviews and documentation research, which included statutory regulations, international treaties, opinions of legal experts, results of previous research, and other sources related to copyright issues and fiduciary collateral. The results of this study revealed that copyright owners face difficulties in making their creations the object of fiduciary, because of unclear implementation of said regulations including its execution. The provisions of Bank Indonesia Regulations, too, stipulate in a limited way about mobile assets that can be used as fiduciary collateral, while copyright is not listed as one of them. The study recommends creation of firm regulations that can stipulate copyrights as objects of fiduciary collateral and can benefit the creator of the copyrighted work.

Keywords: Copyright, Fiduciary Collateral, Collateral, Economic Rights, Execution.

Introduction

The Law of the Republic of Indonesia Number 42 (1999) declared the Fiduciary Collateral to be the legal umbrella for parties carrying out fiduciary practices. The provisions of Article 1 paragraph (1) of the Fiduciary Law, 1999 interprets fiduciary collateral as such a form of transfer of ownership rights of an object that is based on trust, and provided that the object whose ownership rights are transferred remains in the control of its owner. With the enactment of the law in 1999, a fiduciary transfer was accepted, and executed as the most common form of collateral granted over any tangible movable property.

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Under a fiduciary transfer, the debtor does not have to physically hand over the collateral to the creditor, nor was there any requirement to remove the asset from the debtor's possession. Moreover, a fiduciary transfer was executed only up to the amount specified in the fiduciary deed. As a prerequisite, a fiduciary transfer must be a written agreement in Bahasa Indonesia, in notarial deed form, under which the transferor transfers to the transferee its rights of ownership in the transferred assets or the object of fiduciary guarantee. The transfer of the rights of ownership is only for the period during which the debt under the agreement remains outstanding. After the execution of a fiduciary transfer, the possession of the tangible assets remains with the transferor who can ordinarily use or dispose of the assets. Historically, fiduciary collateral has been around for a long time. During the Dutch rule, fiduciary collateral was known as the *Fiduciaieigendomoverdracht*. This was based on customary law in practice, as well as on the jurisprudence of the time (Supramono, 2013).

However, over the time, fiduciary collateral was executed not only to immobile and tangible assets like buildings but also to mobile assets, both tangible and intangible, and which are not burdened with encumbrance rights. For instance, the Copyright Act, Article 16 of Indonesia Law No. 28 of 2014 declared copyright as an “intangible movable object,” and also qualified to be used as an “object of fiduciary guarantee”. This provision echoes the provisions of Law No.42 of 1999 which had agreed to make tangible, intangible and immovable objects as objects of Fiduciary Guarantee provided such objects remained in the possession of the Fiduciary Giver as a collateral security. Article 16 was thus a new breakthrough compared to the previous copyright laws, namely the Law of the Republic of Indonesia, Number 19 of 2002 concerning Copyright, where there was no regulation regarding copyright as a fiduciary collateral. Besides, Indonesia is a signatory of the agreement known as Trade related aspects of the Intellectual Property Rights (TRIPs), according to which copyrights were accepted under Intellectual Property Rights (Purba, 2005). Such endeavours of the Indonesian government to formulate a regulation in which copyright can be an object of fiduciary collateral needs further probe and interpretation.

Copyright as a part of intellectual property can be classified as material rights (Purba, 2005). Material rights are absolute rights over an object which gives direct power to the owner and can be maintained against anyone. The provisions of Article 16 paragraph (4) of the Copyright Law declares copyright as an object of fiduciary collateral, and therefore must be executed in accordance with the provisions of Article 16 paragraph (3) of the law. In addition, Article 11 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security requires that objects used as fiduciary collateral must be registered at the fiduciary registration office (Law 42/1999). A fiduciary collateral guarantee certificate is also ought to be made at the notary's office as regulated in Article 5 paragraph (1) Law 42/1999 (Naja, 2005). The sole objective of registering a fiduciary collateral is to facilitate the creditors to execute fiduciary collateral in the event of bad credit or default. Likewise, to further benefit the creditors, Article 15, Law 42/1999 allows creditors the execution of fiduciary security to carry out unilaterally.

The mechanism used for fiduciary collateral execution was however very cumbersome, which was like the confiscation of a fiduciary security object (Usman, 2011). The execution was akin to the act of selling the fiduciary collateral as a repayment of the debtor's unfulfilled obligations (Abdulai, 2020; Mitskaya, 2020). The creditor enjoyed the right to execute the object used as fiduciary collateral if the debtor defaults or breaches the contract. The execution of the fiduciary security should be in accordance with the procedure laid down in Article 29 and Article 30 of Law 42/1999. While Article 29 allows to execute the object

of fiduciary security if there is a breach of promise by the fiduciary guarantor, Article 30 requires a procedural method in which the debtor is first obliged to hand over to the creditor the object of fiduciary security to be executed.

In the case of copyright as a fiduciary collateral, the first legal constraint is whether to accept it as a fiduciary collateral tool, which according to the legal procedure, ought to be confiscated (as an object of fiduciary security) if the debtor fails in fulfilling their obligation or commits breach of contract. The legal constraint is that when copyright as an object of fiduciary security is confiscated, what would be the value of such copyrights? Would it be still be considered a part of intellectual property rights, The Law needs to review or revise the provision of a fiduciary guarantee in the case when copyright is used as an object of guarantee. The legal constraint grows bigger when there exists people willing to buy a copyright for some money or when copyright continues to remain a part of the intellectual property rights even after its confiscation as a fiduciary collateral. There is no clarity, therefore, in the law which can clearly define the mechanism for making copyright an object of fiduciary collateral. The current study is an attempt to highlights some of these issues and seek solutions, both legal and economic.

Another challenge in the fiduciary law is the absence of relevant regulations if the fiduciary collateral is a mobile asset like a copyright or a trademark. Prior to the inclusion of copyright as an object of fiduciary guarantee, there were doubts whether any movable and intangible objects can be accepted as fiduciary guarantee. The reason was the lack of guidelines, laws or regulations, which would have evaluated the economic value of intangible objects such as copyrights.

Even the banking sector in Indonesia was reluctant to accept copyright as a fiduciary guarantee against loans since valuation of the collateral in banking is done in the form of money. Hence, if the collateral security is a copyright, or any other form of intellectual property, the challenge was how to assess its value (Ottuh, 2020; Youssoufou, 2020). Another problem was the method of execution. If there is a default or breach of agreement, what procedures should be adopted for the execution of the copyright assigned as a fiduciary collateral. For this reason, till date no bank in Indonesia has sanctioned any loans or financed any projects with copyright as a fiduciary collateral. This was reiterated in the Berne convention (1971), which clarified that; "Protection of copyright includes expressions and does not cover ideas, procedures, work methods or similar mathematical concepts (Pranadita, 2018).

Research Methods

The normative research method was used in this study to assist and answer questions related to the science of law in the dogmatic layer of law. This method is akin to the normative juridical approaches, namely tracing, researching, and studying copyright through legal principles both through national legislation and international conventions. To analyse the findings, this study utilized descriptive analysis, which is a method to provide a systematic, factual, and accurate description of the facts, and to analyse the importance of legal certainty that copyright can be used as collateral for the creator's debt through fiduciary. This data collection method used in this study was mainly literature research and documentation study.

This research study involved several steps: the first step of this literature research or documentation study was to seek secondary data which would lead to primary legal material in the form of binding legal material. This material would include national legislation such as: Civil Code, Commercial Code, Republic of Indonesia Law Number 28 of 2014

concerning Copyright and Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Security, Bank Indonesia Regulation (PBI) Number 9/6 / PBI / 2007, and like. Other theoretical studies, expert reference books and legal journals were gathered as secondary legal material. The second step was to carry out research activities by exploring legal theories related to copyright, economic law, and government policies. The third step was to analyse various legal regulations to understand the law by finding suitable existing legal principles which were related to the problems of this study. The fourth step was to carry out a descriptive analysis of positive laws related to the reasoning of legal theories. The data analysis method used in this research was the qualitative normative method, which allowed a comprehensive presentation and description of all the problems studied, namely the laws and regulations, which were supported by primary materials obtained from literature studies.

Results and Discussion

Copyright as the object of the Fiduciary Collateral

a. Copyright as an intangible mobile asset (immaterial)

The provisions of Article 16 paragraph (1) of the Copyright Law state that "copyright is an intangible mobile asset". Related to the classification of immobile assets, copyright is included in the category of mobile asset because it is determined by law as contained in Article 511 of the Civil Code. Otto Hasibuan has rightly commented, "copyright is the right of ownership (property right) to which the properties of property rights as regulated in civil law legislation apply (Otto, 2008).

b. Copyright is Transferable and Transferable

Article 1 paragraph (4) of the Fiduciary Law states that objects which become the object of fiduciary collateral are anything that can be owned and transferred, whether tangible or intangible, registered or unregistered, mobile or immobile, can be burdened by encumbrance right or hypothec. Therefore, in relation to the object of fiduciary collateral, copyright has fulfilled one of the requirements for objects that can be used as objects of fiduciary collateral because its nature belongs to the category of intangible mobile asset because it is determined by law (Article 16 paragraph (1) (Ginting, 2012).

c. Copyright has an economic value that can be used as collateral

Copyright is related to economic interests or economic rights of individual entities. The existence of economic interests in copyright is a manifestation of the nature of copyright itself, namely that works produced from human thought have value, because these creations are a form of resource, even though their form may be intangible. Producing copyrighted works gives satisfaction to its creator, but from another point of view, these works actually also have economic values which, economically speaking, provide incentives for creativity and innovation (Margono, 2010). This view needs to be understood, and not just to consider it merely as a work that gives inner satisfaction. It is universal and can be enjoyed by anyone, anywhere and anytime, especially with the attitude that this right can be obtained without price. This economic right is taken into account because intellectual property rights can be used / utilized by other parties (industry or trader) to generate profit (Wiradirja et al., 2018).

In addition to obeying the positive laws that apply in Indonesia, most Indonesian people who are Muslims, practice the Islamic law in their daily lives because it is part of their religious orders. "The majority of scholars from the Maliki, Shafi`I and Hambali schools argue that copyrights on beneficial original works are classified as valuable assets, as objects which can be

utilized through syara` (Islamic law)" (Pranadita, 2018). Thus, Islamic law recognizes that copyright is a valuable asset or wealth, just as copyright law recognizes that right.

Legal Problems of Copyright Registration as Object of Fiduciary Collateral.

Copyright law has made many significant advances, especially in making copyright works so that they have more economic value. In the provisions of Article 16 Paragraph (3) of the Copyright Law, it is stated that "copyright can be used as an object of fiduciary collateral". This arrangement is deemed to make creators more enthusiastic in creating their works, given that the copyright can later be used as a collateral for banking.

That copyright can be used as a fiduciary collateral requires further regulations to support its being a legal collateral. Currently Bank Indonesia or the Financial Services Authority (OJK) does not yet have a special department to determine the collateral value of a copyright. Banks in Indonesia have not practiced intellectual property rights, including having not recognized copyright as credit collateral nor accepting it as any fiduciary means. There are several reasons for such obstacles to its acceptance as a credit collateral. One of the reasons, according to the Chairman of the Indonesian Intellectual Property Consultants Association (AKHKI), was that the Ministry of Law and Human Rights did not coordinate with the Financial Services Authority regarding the implementation of the mandate of the Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright (Issetiabudi, 2017). In addition, until three years after the revised copyright law was passed, no bank had accepted copyright as fiduciary collateral, despite its meeting the requirements according to the fiduciary law. The problem faced in Indonesia is that there is no provision on the use of copyright as collateral in the banking credit distribution system. In addition, there is also no assessment agency that has the ability to evaluate the economic value of a copyright.

In Indonesia, there exists the forms of credit collateral, recognized under Bank Indonesia Regulation or PBI Number 9/6 / PBI / 2007. This Law concerns the Second Amendment of the Bank Indonesia Regulation Number 7/2 / PBI / 2005 which concerned Assessment of Commercial Bank Asset Quality, Article 46. The provisions of this Article 46 include:

1. securities and shares that are actively traded on a stock exchange in Indonesia or have investment grade and are bound under fiduciary.
2. land, buildings, and houses that are bound with encumbrance rights.
3. machinery which is an integral part of the land and bound with encumbrance rights.
4. airplanes or ships with a size of more than twenty cubic meters tied with a hypotec;
5. motorized vehicles and supplies bound under fiduciary; and warehouse receipts that are bound with collateral Rights. The Law of the Republic of Indonesia Number 9 of 2006 concerning Warehouse Receipt Systems, specifically designated collateral objects in the form of agricultural, plantation and fishery products.

Though Bank Indonesia Regulation Number 7/2 / PBI / 2005 Article 46 includes several provisions, it does not include copyright certificates as recognized forms of credit collateral.

Legal Certainty of Copyright Arrangement as Fiduciary Collateral in Indonesia

The provisions of Article 16 paragraph (1) of the copyright law state that "copyright is an intangible mobile asset" similar to the classification of immovable objects made in the law otherwise. Based on these provisions of Article 16 of the copyright law, it can be concluded that copyright can now therefore be used as a debt collateral using a fiduciary collateral scheme.

Furthermore, paragraph (4) of Article (16) cites the provisions regarding copyright as an object of fiduciary guarantee. It is also referred to in paragraph (3), hence it should be implemented in accordance with these provisions of laws and regulations. The statutory regulations referred to here are directly related to the fiduciary laws and the Law of the Republic of Indonesia Number 10 of 1998 concerning Banking, hereinafter referred to as banking laws.

Article 1 paragraph (4) of the fiduciary law states that objects which become the object of fiduciary collateral are everything that can be owned and transferred, whether tangible or intangible, registered or unregistered, mobile or immobile, and can be encumbered or hypothec. Therefore, in relation to the objects of fiduciary collateral, copyright has fulfilled one of the requirements for objects that can be used as objects of fiduciary collateral because its nature is included in the category of intangible mobile asset because it is determined by law (Article 16 paragraph (1) of the copyright law).

The fiduciary law also states that fiduciary collateral is the transfer of ownership rights of an object based on trust, provided that the object whose ownership right is transferred remains under the control of the owner of the object. However, since fiduciary collateral is the right of collateral for mobile asset (both tangible and intangible objects) and immobile asset especially buildings, it cannot be burdened by encumbrance rights as referred to in Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights. Thus, it remains in the control of the fiduciary, as collateral for the settlement of certain debts, which give priority to fiduciary recipients.

Based on this description, it can be concluded that copyright can be used as an object of fiduciary collateral because it is classified as a mobile asset that is immaterial and intangible. Besides, copyright can also be transferred, either in whole or in part, as inheritance, grants, endowments, wills, written agreements, or other reasons justified by laws and regulations. In order to bear or guarantee the payment or repayment of certain debts, the debtor is generally required to provide collateral (certain material) which can be valued in money and of high quality with a minimum value equal to the amount owed to him. For this reason, banks and other financial institutions or even individuals should ask for collateral material with the intention that if the debtor is unable to pay off his debt or is declared bankrupt, the collateral material can be encashed to cover the costs of repayment or act as a refund of the remaining amount.

It is also often assumed that collateral material is intended to provide protection and legal certainty at the same time, both to creditors and to debtors. Tying a debt with collateral material will provide legal certainty for the repayment of debtor's debt if the debtor defaults or is declared bankrupt. Hence, the collateral material will provide legal certainty to the creditor along with the interest and will continue to return by encashing the debt guarantee material concerned. To provide legal certainty, Article 11 of the Fiduciary Guarantee Law requires that objects that bear fiduciary effect be registered at a fiduciary registration office in Indonesia. This obligation remains in effect even though the material burdened with fiduciary collateral is outside the territory of the Republic of Indonesia.

The Concept of the Implementation of Copyright as Object of Fiduciary Collateral

Banks as a banking institution, in carrying out activities to collect funds and especially channelling them in the form of credit / loans, are certainly not separated from its prudential principles of being a fiduciary institution. Article 8, paragraph 1 of the Law of the Republic of Indonesia Number 10 of 1998 concerning Banking, reads "In providing credit or financing based on Sharia Principles, Commercial Banks are required to have confidence based on in-depth analysis or good faith as well as the ability and the capacity of a Debtor

Customer to pay off his debt or return the said financing in accordance with what was agreed." It is further explained in the explanation of the article that in essence, while providing a credit / loan (debt) to a customer, if there is a risk, the bank must apply the precautionary principle as set out in Article 2 of the banking law. This Article reads, "In conducting its business, Indonesian banking is based on economic democracy using the principle of prudence" to minimize the risk.

In a debt-receivable relationship, where there is a performance obligation from the debtor and a right to achievement from the creditor, the legal relationship will be carried out smoothly if each party fulfils their obligations. However, in the debt-receivables relationship that is collectible (*opeisbaar*), if the debtor does not fulfil the achievement voluntarily, the creditor has the right to demand fulfilment of his receivables (*verhaal rights*; exercise rights) against the debtor's assets which are used as collateral (Badruzaman, 1994). The transfer of fiduciary collateral is regulated in Article 19 to Article 24. These articles relate to the Indonesian Fiduciary Law, according to which the transfer of rights over receivables are guaranteed by fiduciary results. Such transfers of all rights and obligations of the fiduciary are available to new creditors by law. The process of the transfer of fiduciary collateral requires registration of the new creditor with the Fiduciary Registration Office. This provision can also be applied to fiduciary rights of a copyright, wherein, the transfer of copyright holders is regulated by Article 3 paragraph (2) of the Copyright Law. The Article further states that fiduciary is obliged to hand over the object (copyright) and such object will be accepted as fiduciary collateral in the framework of the execution of the provision of a fiduciary collateral. However, in the event if such objects of fiduciary collateral consist of trading objects or collaterals that can be sold in the market or on the stock exchange, the sale can be made at those places in accordance with the prevailing laws and regulations.

The Fiduciary Collateral Certificate as discussed above cites words "For Justice Based on the One Godhead". This gives to the Fiduciary Collateral Certificate the same executorial power equivalent to a court's decision executing a permanent legal force. If the debtor is in default, the recipient of the fiduciary will have the right to sell the object of the fiduciary collateral under his power. The Law also states that if the provisions regarding the executorial power of the Fiduciary Collateral Certificate are applied to collateral objects such as copyrights, a difficulty will arise in the execution process. Here the execution refers to the sale of fiduciary objects in the form of copyright. According to Article 4 paragraph (1) sentence 2 of the copyright law, "Copyright owned by an author cannot be confiscated, unless the right is obtained against the law". The elucidation of this provision is that "Because it is considered one with the creator and is intangible, in principle the copyright cannot be confiscated, unless the copyright is obtained against the law".

Furthermore, the execution is regulated in Article 29 paragraph (1) of the Fiduciary Law, namely if the debtor or fiduciary provider break their promise, the execution of the object which is the object of fiduciary collateral can be carried out by one or more of the following methods:

1. Implementation of executorial title by fiduciary recipient.
2. Sales of objects which are the objects of fiduciary collateral over the authority of the fiduciary recipient themselves through a public auction in order to collect the payment of the debt from the sale proceeds.
3. Sales of objects without notary can be carried out based on the agreement of the fiduciary provider and recipient to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned.

The sale of objects is carried out after one month has passed since the written notification by the provider and recipient of the fiduciary to the parties concerned and announced in at least two newspapers circulating in the area concerned. In this process, any promise to carry out the execution of objects that are the object of fiduciary security in a manner contrary to legal provisions, is null and void. If after execution the collateral value exceeds the expected value of the collateral, the recipient of the fiduciary is obliged to return the excess to the fiduciary provider. If after execution the collateral value is not enough to cover the debt, the remaining debt is still burdened to the debtor.

It is important to note that a copyright cannot be confiscated because it is attached to the copyright holder. This means that the law protects one's property in accordance with the theory of natural law. In addition, copyright protection does not apply to the object, but to object copyright. Thus, the execution of this copyright cannot be carried out as a basis for human rights recognition. In reality, not all copyrights are valuable or have high economic value. A copyright that is used as a fiduciary collateral is of course a valuable copyright, carrying a high economic value and also a liquidity. However, creditors must ensure that this is based on the principle of prudence.

Based on the aforesaid discussion, it is therefore understood that the execution of copyright as a fiduciary collateral can be done in the following ways:

1. To execute the economic value of the copyright or the sale of the economic value which is the object of fiduciary collateral over the power of the fiduciary recipient through a public auction and collect the receivables from the sale. It can also be executed through a sale without notary which is made based on the agreement of the fiduciary giver and receiver, so that a highest price can be obtained to benefit the parties.
2. To execute the economic value of copyright through license issuance. In this case the license is used as a fiduciary collateral. The copyright as a fiduciary collateral must be interpreted as a creation license that is used as a fiduciary collateral. This also includes the registration of the work referred to in Government Regulation of the Republic of Indonesia Number 16 of 2020 concerning Registration of Works and Related Rights Products. In such a situation, license can be immediately used by creditors immediately if the debtor (the owner of the work) is in default.

The transfer of copyright due to the execution of the collateral cannot remove the moral right of the author to keep his name as the creator. Moral rights are owned by every creator and are valid forever, even though the creator passes away. This differs from the economic rights of the authors which are limited by the period of protection. Economic rights can also be lost when the creator has sold his work to other parties by way of intermittent sale. Authors who have sold their work may no longer enter into licensing agreements with other parties.

Conclusion

This study has revealed useful facts about legal problematics of intellectual property rights about copyrights to be used as fiduciary collateral. It is learned that the regulation of copyright as an object of fiduciary collateral was first regulated in Article 16 paragraph (3) of Law of the Republic of Indonesia Number 28 of 2014 concerning Copyright. This Law was explicitly an extension of and regulated by the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Collateral and Bank Indonesia Regulation (PBI) number 9/6 / PBI / 2007. This Law regulated bank credit collateral by mentioning the limits of what mobile assets can be used as a collateral by fiduciary basis, however, it did not

mention that copyright can be used as collateral on fiduciary basis. This suggests that the legal certainty regarding practical implementation of copyright regulations as an object of fiduciary collateral is not sufficient.

In another revelation of this study, it was found that the concept of the execution of copyright objects as a fiduciary collateral was based on the provisions of Article 29 paragraph (1) of Law of the Republic of Indonesia Number 42 of 1999. This Article states that if the debtor or provider of fiduciary breaches the agreement stated in the copyright used as the Fiduciary Collateral, the creditor can execute the economic value of the copyright either by conducting a sale auction to receive the economic value or by executing the work license for the benefit of the creditor. The auction can be carried out at the public auction hall by making use of the power of the fiduciary recipient and on the basis of the agreement between the recipient and the fiduciary,

The study makes the following recommendations:

1. The rules regarding copyright execution should unequivocally stipulate that only the economic rights of copyright can be executed, and moral rights should not be included. In this way, the copyright holder can still be respected for his copyrighted work even though he has given up his economic rights.
2. The copyright should be used as an object of collateral through a fiduciary collateral institution by utilizing an appraisal service of intangible objects that will objectively determine the economic value of a copyrighted work based on market value. This will help to determine how much loan can be given by the bank or guarantee institution against a copyright creator on a work that is guaranteed, thus it will not harm any party because it provides legal certainty.
3. It is also suggested that there ought to be a revision of the Bank Indonesia Regulation (PBI) number 9/6 / PBI / 2007 which regulates bank credit collateral. This Law clearly states that copyright can be used as an object of fiduciary collateral and therefore the guarantor institution should not hesitate to accept copyright as an object of fiduciary collateral
4. Last, but not the least, it is suggested to create an appraisal team so that implementation regulations can be formulated. This team would regulate the procedures for executing a debtor's copyright (as collateral for debt) in the case of a default or breach of agreement. This should be done in a firm and detailed manner, and it should be reinforced by the provisions of Article 29 paragraph (1) of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary collateral.

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