

CHAPTER 1

INTRODUCTION

1.1 Background

Indonesia is a state that holds high of the laws and regulation that are enacted. When Indonesia declared its independence on August 17, 1945, the founding fathers established that the highest standing law in the hierarchy of laws¹ in Indonesia is the 1945 Constitution of the Republic of Indonesia [“UUD 1945”], thus all laws and regulations promulgated will be bound by the principles laid out in the UUD 1945.² Based on the concept of *Trias Politica* introduced by Montesquieu³, a State has 3 types of power:

- 1) legislative
- 2) executive
- 3) judicative.⁴

First, legislative power holds the power to enact temporary or perpetual laws, including all amendments or abrogates of laws that have been enacted. Second, executive power is the power to execute the laws, such as making peace or war, sending or receiving embassies, establish public security and ensuring all efforts against

¹ Article 7 of Law No. 12 Year 2011

² All Laws and Regulations enacted in Indonesia is “in view of” at least one Article from the Constitution

³ Montesquieu is the principle source of the theory of separation of powers as implemented in many constitutions throughout the world.

⁴ Montesquieu, *Book XI of The Spirit of Laws Vol. 1*, Complete Works, 1748

invasion. Third, judicative power is the power to adjudicate acts that violate the laws. This is done through punishing criminals and adjudicating any disputes that arises between individuals.⁵

In the event the legislative and executive powers unite in the same body of magistrates, there exist no liberty due to the apprehensions that may emerge. When combined with the legislative and executive, the life and liberty of the people would be open to arbitrary control. However, it was joined to the executive power, the judge could possibly behave with violence and oppression.⁶

The executive branch of Indonesia is the President and Vice President who are appointed through votes by the citizens and can only serve a maximum of two five-year terms.⁷ The legislative branch of the nation is the MPR which is made up of two houses: the People's Representative Counsel ["DPR"] and the Regional Representative Counsel ["DPD"].⁸ The highest level of the judicial branch of the state is the Supreme Court, whereby the judges are elected by the President. Second to that is the Constitutional Court who rules on constitutional and political matters, and lastly is the Judicial Commission who supervises the judges.⁹ Through this, it is proven that Indonesia is a state that values the welfare of its citizens and takes into serious consideration, justice for all its people.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition*, p. 361, Kompas Book Publishing, Jakarta, 2008.

⁸ *Ibid.*, pg. 440

⁹ *Ibid.*, pg. 266

Throughout the world, there is no exact system that regulates the hierarchical order of laws and regulation within states. Even if there exists a system, the system is limited only to the principle that states for example that local regulations shall not conflict existing higher-level regulations or in the case of the UUD 1945, this expression is reflected as “the supreme law of the land”.¹⁰ The General Theory of Law and State book written by Hans Kelsen examines the dynamic character of the system whereby norms and functions of the basic norms, reveals a further quirk of law that is the law that regulates its own formation as a result of a legal norm that determines the promulgation of other legal norms and thus to a certain extent, determines the content as well.

According to Kelsen, the norm is tiered in hierarchical arrangements. This means that the legal norms placed on the lower level of the hierarchy is applied, sourced and based on the norms placed on the higher level of the hierarchy. This goes on up until it stops at the highest norm which is defined as the Basic Norm (*Grundnorm*) which Kelsen includes in the dynamic norm system. The laws are always enacted and revoked by institutions who are authorized to enact the law itself based on higher norms, in order for the lower (inferior) norms to form based on the higher (superior) norms thus ending with a multi-layered hierarchy of law.¹¹

¹⁰ Ni'matul Huda, *Negara Hukum Demokrasi dan Judicial Review*, p. 48, Yogyakarta: UII Press, 2005.

¹¹ Aziz Syamsuddi, *Proses dan Teknik Penyusunan Undang-undang*, p. 14-15, Jakarta: Sinar Grafika, 2011.

The hierarchy of Indonesian legislation based on Article 7 of Law No. 12 Year 2011 regarding Making Rules from highest to lowest are:

- 1) The 1945 Constitution [**“UUD 1945”**];
- 2) *Ketetapan Majelis Permusyawaratan Rakyat* – The Decree of the People’s Representative Assembly [**“MPR Decree”**];
- 3) *Undang-Undang* [the **“Law”**] and *Peraturan Pemerintah pengganti Undang-Undang* or *PERPU* – Government Regulation in Lieu of Acts [**“Interim Law”**];
- 4) *Peraturan Pemerintah* [**“Government Regulation”**];
- 5) *Peraturan Presiden* [**“Presidential Decree”**]; and
- 6) *Peraturan Daerah* [**“Regional Regulation”**].

In practice, it is not as simple as the above as there exists Presidential Decrees, Presidential Instructions, Ministerial Regulations, Ministerial Decrees, and Circulation which on numerous occasions, contradicts each other.

As previously mentioned, the Laws is exclusively established by the DPR.¹² The executive branch, that being the President shall propose a bill for consideration by the DPR.¹³ In the course of considering the bill, the DPR will create a small task group that shall discuss the proposed legislation together with the relevant government ministries.¹⁴ Once an agreement has been achieved, the DPR will approve the bill and

¹² Article 20(1) of UUD 1945.

¹³ Article 5(1) of UUD 1945.

¹⁴ Article 20(2) of UUD 1945.

the President will endorse the bill and thus it will be promulgated as a Law.¹⁵ In this circumstance, even if the President declines to endorse the bill approved by DPR, the bill will automatically be enacted within thirty days and will then be promulgated.¹⁶ However, if an agreement cannot be attained by the DPR to enact the bill into a law, the bill shall not be proposed again during the current term of legislature.¹⁷

Globalization in Indonesia is inevitable and thus comes with a series of challenges to its principle of a welfare state, aside from the benefits received. Free markets and free trade have raised concerns that the emergence of the underachievers happen as a result of the free competition against states that have well-established economies.¹⁸ The concept of welfare state is explicitly expressed in the preamble of the 1945 Constitution. The role of the Preamble of the 1945 Constitution is to express the wishes and desires of Indonesian citizens to live in an independent, unified, sovereign, just and prosperous state shown by the fact that they are free, unified and sovereign.¹⁹

The typology of this preamble suggests the ceremonial-symbolic which means the preamble serves to consolidate national identity, however lacks a binding legal force. Following that, the interpretive typology whereby the preamble is granted a guiding role in statutory and constitutional interpretation. Lastly, the substantive in which the preamble serves as an independent source of human rights.²⁰ The legal

¹⁵ Article 20(4) of UUD 1945.

¹⁶ Article 20(5) of UUD 1945.

¹⁷ Article 20(3) of UUD 1945.

¹⁸ Ahmad Erani Yutika, *Perekonomian Indonesia*, p. 61, Perekonomian Indonesia, Malang, 2007.

¹⁹ David Burchier & Vedi R. Hadiz, *Indonesian Politics and Society: A Reader*, p. 296, 1995.

²⁰ Liav Orgad, *The Preamble in Constitutional Interpretation*, International Journal of Constitutional Law, p. 722, 2011.

functions of the Preamble may vary from time to time. As it includes Pancasila, this is viewed as a middle ground between different parties and groups, thus a common denominator for all ideologies and stream that exists in Indonesia.²¹ The Preamble has become one of the most important documents to display national identity as it serves as a mean to unify the citizens from different ethnicities, religions, political affiliation, and traditions.

The third part of the Preamble of UUD 1945 states that by the Grace of God Almighty followed by the noble desire to live a free national life, the citizens of Indonesia hereby declare their independence. Here the paragraph refers to God or a religious figure that being, Allah or God, hand in hand with their proclamation of independence. Lastly, the Preamble closes with the paragraph saying subsequently, to form a government of the state of Indonesia who shall protect all the citizens of Indonesia and its independence, along with the land that has been fought for, and to improve public welfare, to educate the citizens, to participate in the initiation of a world on the basis of freedom, perpetual peace and social justice, therefore the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a people's sovereign state based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia and the democratic life conducted by wisdom of thoughts in deliberation amongst the representatives of the people, and will achieve social justice for all the citizens of Indonesia. With this, we can see that

²¹ Adman Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: a socio-legal study of the Indonesian Konstituante*, p. 15, 1992.

this section firstly shows the national goals through the improvement of public welfare, secondly, we can see that there exist foreign policy through the participation of an establishment towards a world based on peace and freedom, thirdly, the form of government whereby in this case, Indonesia is a democratic government, and lastly, the National ideology or identity through the belief in the One and Only God.

Following that, Article 33 of the UUD 1945 describes the National Economy and Social Welfare whereby:

- 1) The economy shall be organized as a common endeavor based on the principles of the family system.
- 2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.
- 3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.
- 4) The organization of the national economy shall be conducted by economic democracy upholding the principles of togetherness, the efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
- 5) Law shall regulate further provisions relating to the implementation of this article.

The UUD 1945 is the foundation to shape policies and organize the administration in the political, social and economic sector. In a triadic relationship

between the state, the civil society, and the market, it is a foundation to achieve the idealized life if the state, reflecting freedom, justice and prosperity. This triadic relationship provides States the authority and responsibility to intervene unfair market through the enactment of affirmative policies that will protect and safeguard the national economy. Paul Spicker stated that efforts to create common prosperity cannot be separated from economic development as state welfare depends on economic development.²²

The effort to protect Intellectual Property Rights [“IPR”] in Indonesia was undertaken through the stipulation of Article 2 of the Transitional Provision of the UUD 1945 whereby all laws and regulations of the Dutch Colonial legacy continued to be effective for as long as they do not contradict the UUD 1945.²³ On that account, *Auteurswet* became the basis of law for copyright in Indonesia, *Auteurswet* literally translated defines as the right of the creator however for simplicity and practically, it was defined as Copyright.²⁴ Subsequently in 1982, Indonesia ratified Law No. 6 Year 1982 regarding Copyright through the State Gazette No. 15 Year 1982. The Law No. 6 Year 1982 was considered imperfect and demanded a change, thus in 1987, the government with the approval of the DPR, promulgated Law No. 7 Year 1987 as an amendment of Law No. 6 Year 1982 regarding Copyright.

²² Paul Spicker, *The Welfare State – a general theory*, Sage Publication Ltd., 2000.

²³ Article 2 of UUD 1945: All existing laws and regulations shall remain in effect as long as new laws and regulations have not yet taken effect under this Constitution.

²⁴ Rachmadi Usman, *Hukum atas Hak Kekayaan Intelektual: Perlindungan dan Dimensi Hukumnya di Indonesia*, p. 56, Bandung, 2003.

The Development of Copyright following the TRIPS Agreement led to the revocation of Law No. 7 Year 1987 jo. Law No. 6 Year 1982, to Law No. 12 Year 1997. After the implementation of Law No. 12 Year 1997, the government noticed that there needed to be a protection for artists particularly with regard to Copyright. With this, the Law No. 19 Year 2002 was enacted. Following this, it was important for the government to keep up with the fast-changing digital world, thus in 2014, the Law No. 28 Year 2014 on Copyright was enforced – this continues to be the Copyright Law in effect today.²⁵

Globalization is the process of interaction and integration between individuals, companies and governments all over the world.²⁶ The rapid development of globalization requires all parts of the world to continuously to constantly reenact their laws and regulation to cope with the change in technology and society to avoid loopholes in laws which open doors for illegal actions. This thesis will look into the United Nations Commission on International Trade Law [“UNCITRAL”] Legislative Guide on Secured Transactions [“**Guide**”] and the important role it plays in the development of a framework to further progress harmonization and modernization of law on international trade through preparing and promoting the use and adoption of legislative and non-legislative instruments in pivotal aspects.²⁷

²⁵ Rineka Cipta, Gatot Supramono, *Hak Cipta dan Aspek-aspek hukumnya*, p. 5 – 6, Jakarta, 2010.

²⁶ Guttal, Shalmali, *"Globalisation" Development in Practice* p. 523–531, 2007.

²⁷ *A Guide to UNCITRAL: Basic facts about the UNCITRAL*, United Nations Publication, Austria, January 2013.

These instruments are negotiated and discussed through an international process involving a variety of participants, Indonesia included as one of them.²⁸ In relation to this thesis topic, in view of the increasing importance and economic value of intellectual property for business who seek to obtain secured credit, this UNCITRAL Guide applies in principle to security rights in intellectual property. Within this guide it states that when States wish to apply this recommendation, they must keep in mind the national regulations or international agreements which they are a party of.²⁹ Under this guide, security rights over intangible assets such as receivables and intellectual property is dissected. There are mechanisms for transfer of titles that are provided within this guide, whereby transactions that involve the transfer of title from debtor to creditor is a mechanism often used to secure the performance of the debtor's repayment obligation. The transfer of title of assets to the secured creditor, whether conditionally until the loan is fully repaid or subject to a re-transfer to the debtor after a certain amount has been made, is the most common technique resorted to for this purpose.³⁰

The economic development as part of the national development is one of the many ways Indonesia achieve the aspired fair and prosperous society on the basis of Pancasila and the UUD 1945. As such, the Indonesian economy improves year to year in various sectors of the business industry, and with this comes the increasing need of

²⁸ *Indonesia ditunjuk jadi anggota UNCITRAL*, Hukum Online Publication, 29 November 2012, <https://www.hukumonline.com/berita/baca/1t50b76f4d8fba6/indonesia-ditunjuk-jadi-anggota-uncitral/>, Accessed on 1 June 2020.

²⁹ *UNCITRAL Legislative Guide on Secured Transactions*, p. 39 no. 33, United Nations Publication, Austria, March 2010. (“UNCITRAL Guide”)

³⁰ *UNCITRAL Guide Op.Cit.*, p. 51 no. 86 .

funding. For the most part, the funding needed to fulfill all the obligation is earned through lending.³¹ The act of lending has been done for centuries, basically ever since humans used money as a form of payment. This is evident as nearly all human beings through seasons of time have undertaken borrowing and lending activities as an essential part to promote development in economic activities and to increase their social welfare.

Throughout the process of borrowing and lending, there exist a number of parties. First is the debtor who has excess money and would like to lend the money to a party that needs it. Whereas second is the creditor who based on their needs or plan, needs to borrow that excess money. For the most part, the process of borrowing and lending in a society needs a collateral which guarantees the return of the borrowed funds. This collateral must have an economic value and it is the obligation of the debtor to surrender this collateral to the creditor, however this is done on the basis of their agreement.³² In Indonesia, there are a number of institutions that can accommodate to the financial needs of the parties. However, providing finance for the company comes with a collateral of an asset owned by the debtor.

Presently, the instrument of law will be first, Law No. 42 Year 1999 on Fiduciary Guarantee and second Law No. 28 Year 2014 on Copyright. Fiduciary is the transfer of ownership rights of an object on the basis of trust through the mechanism

³¹ Elucidation of Fiduciary Law.

³² M Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, p. 2, Rajagrafindo Persada, Jakarta, 2007.

of transfer of property rights from the debtor's property to the creditor, however the possession of the property is fixed to the debtor.³³ Fiduciary Guarantee is the right of security over tangible or intangible movable or immovable property, which presently is the rights to an intellectual property that remains in possession of the fiduciary grantor as collateral for the settlement of certain debts and thus this gives the fiduciary grantee a superior position compared to other creditors. Seeing that fiduciary guarantee is tied close to the defined object that is either movable or immovable, there is a relatively new provision under the Law No. 28 Year 2014 regarding Copyright, which provides a different context for fiduciary guarantee.³⁴

Fiduciary Guarantee is a type of security guarantee that exists besides mortgage and hypothecation. The birth of fiduciary guarantee in Indonesia did not happen simply due to jurisprudence, but through all the regulations expressed in the law. The Law No. 42/1999 regarding fiduciary [**"Fiduciary Law"**] is an umbrella for the different parties practicing fiduciary. In other words, Fiduciary is understood as an object³⁵ in which the ownership rights are transferred but is still in the control of the owner. The reasoning as to why Copyright can be an object of fiduciary guarantee is because copyright is an immaterial object, adding to that, copyright has the characteristics of an object that can be used as a guarantee, that being this object has economic value. Exclusive rights are

³³ Sfikas, 1997.

³⁴ Art. 16(3) of Copyright Law.

³⁵ In Article 1(4) of Fiduciary Law it can be interpreted that any form of object where the rights can be owned or transferred, whether tangible or intangible, registered or non-registered, movable or immovable, cannot be used as a guarantee.

tied to copyright and exclusive rights mean economic and moral rights. Therefore, because copyright has an economic right, the creator/owner of the right can earn economic profit from the artistic work.

The legal issue arises as there is no procedural provision in the event a debtor does a tortious act or fails to fulfill an obligation, thus leading to a seize to the ownership rights to the copyright. Under the provision, of Article 29(1) Copyright Law, it states that in the event a debtor or fiduciary grantor fails to fulfill their obligations, the object that is an object of the fiduciary guarantee will be executed. Following this, problems for the execution of ownership rights of copyright will arise as it must be clearly explained which part of the copyright will be executed. This is due to the rights that is held within copyrights, such as the inherent moral rights and economic rights.

Embedded within Law No. 28 Year 2014 on Copyright is the permit for Copyright to be an object of fiduciary guarantee. Article 16(1) states that Copyright as a movable intangible good, can be used as an object for fiduciary guarantee.³⁶ Based on these rules, the creator is legally able to use their creations as a guarantee. However, in practice the existence of this law does not simplify the process which the creator must go through to register their creation as a guaranteed object.

The procedure for registration of an object as a fiduciary guarantee is regulated under Government Regulation No. 21 Year 2015 regarding the Procedure of Fiduciary Guarantee Application and the Cost of making a Certificate of Fiduciary Guarantee.

³⁶ Article 16(1) of Copyright Law.

Based on Article 37(2) of the Government Regulation and Article 39 of Fiduciary Law, a fiduciary guarantee is established by the Fiduciary Registration Office that is under the scope of work of the Ministry of Law and Human Rights [“**MOLHR**”] all throughout Indonesia who will then issue the Fiduciary Guarantee Certificate. Herewith it is stated that the application for registration must be done within a maximum period of 30 days after the deed of fiduciary guarantee is made by a public notary.³⁷

The provision in Article 16(3)³⁸ requires further elaboration regarding the imposition of copyright as an object of fiduciary guarantee in terms of which kind of copyright can serve as a collateral. However, the Copyright Law does not regulate the transfer of ownership rights from the debtor to the creditor in the event the debtor who placed their ownership rights over a Copyright fails to fulfill their obligation to repay the amount of money they have borrowed from the creditor. This Copyright Law does not have a regulation which stipulates regarding the steps to transfer the ownership rights.

On the other hand, the Fiduciary Law stipulates the enforcement of a fiduciary guarantee in the event the debtor fails to fulfill its obligations. This states that the fiduciary grantee has the right to sell the object provided under the fiduciary guarantee granted under his authority.³⁹ Therefore fiduciary guarantee is one of the easiest

³⁷ Article 4 of Government Regulation No. 21 Year 2015.

³⁸ Article 16(3) of Copyright Law.

³⁹ Article 15 of Fiduciary Law.

guarantees to execute in the event the debtor fails to fulfill its obligations.⁴⁰ The Fiduciary law provides 3 ways to execute the object under fiduciary guarantee in the event of default:

- 1) The Certificate of Fiduciary Guarantee issued by the MOLHR has the same executorial power⁴¹ as a Court Decision that is final and binding.⁴²
- 2) The sale of object under fiduciary guarantee as long as under the authority of the Grantee himself, can be done through a public auction. With this, the receivable from the sold object shall be made to fulfill the obligations of the debtor.⁴³
- 3) Underhanded sales made based on the agreement of the Fiduciary Grantor and Grantee may be done. This is considered the most beneficial option for both parties as this option will grant the highest price for the object.⁴⁴

In relation to the enforcement of fiduciary guarantees, on the 6th of January 2020, the Indonesian Constitutional Court [**“Constitutional Court”**] issued a Decision No. 18/PUU-XVII/2019 that changes the whole concept of executing objects of fiduciary guarantee, which is not well received by the loan markets. The Decision favors two petitioners which changes the core principles and procedure for enforcement

⁴⁰ Frieda Husni Hasbullah, *Hukum Kebendaan Perdata: Hak-Hak yang Memberi Jaminan* p. 79, 2002.

⁴¹ Article 15(2) of Fiduciary Law.

⁴² Article 29(1)(a) of Fiduciary Law.

⁴³ Article 29(1)(b) of Fiduciary Law.

⁴⁴ Article 29(1)(c) of Fiduciary Law.

of the Fiduciary Law itself. It all began in early 2018 when a petition was filed by a couple [**“Petitioners”**] to the Constitutional Court after a successful civil claim was made at the South Jakarta District Court [**“District Court”**].

The Petitioners commenced the first court case due to a debt collector’s alleged unlawful collection towards lease installments of a luxury car. The debt collector who was recruited by the financing company allegedly made death threats before in due course gained possession over the vehicle. With this, the District Court decided on the side of the Petitioners and awarded them approximately USD15,000 against the financing company along with the debt collector on the basis of using unlawful methods of debt collection [**“District Court Decision”**]. This District Court Decision as specified in the District Court website described that the District Court Decision was upheld by the High Court and presently reviewed by the Supreme Court.

The Issue arises as the Constitutional Court Decision the final, binding and not subject to appeal, decision decides on the following:

- 1) A default must be agreed upon by both the debtor and creditor.
- 2) In the event there exist no agreement on the mechanism of default, the default must be confirmed through a final and binding court decision.
- 3) Upon the agreement regarding the default, or if a final and binding court decision has been achieved, the fiduciary guarantee can only be enforced through the regular enforcement process of a court decision.

On that account, the Constitutional Court Decision changes the legal perspective of Fiduciary Law and reinterprets the definition of “default” in a way that

counters the efforts of the Indonesian government to encourage foreign investment within the country thus reflects that Indonesia is taking steps into becoming a more borrower-friendly jurisdiction.

This Decision was established based on the arguments brought forward by the Petitioner were that the nature of Fiduciary Guarantee as expressed in Article 15(2)⁴⁵ and 15(3)⁴⁶ expresses an interpretation of the following:

- 1) Executorial title – the enforcement of an object of fiduciary guarantee shall conform to “all legal mechanisms and court procedures, similar to a *final and binding court decision*”;
- 2) Final and binding court decision – the enforcement of an object of fiduciary guarantee shall be put on hold up until a final and binding court decision has been attained on the facility agreement and security agreement; and
- 3) Event of Default – the resolution in the event of default shall be agreed upon by both the creditor, as the fiduciary grantee and the debtor, as the fiduciary grantor. However, in the event the default is challenged by the debtor, the court will be obliged to resolve whether or not the default has occurred through a *final and binding court decision*.

The Petitioners’ application was brought forward as *inequality* before the law between a creditor and a debtor with the basis that a debtor has no equivalent legal

⁴⁵ Article 15(2) of Fiduciary Law.

⁴⁶ Article 15(3) of Fiduciary Law.

mechanism to challenge the alleged default. During the hearing of the petition, the Constitutional Court sought the judgments of the Government and the House of Representatives along with experts provided by differing parties. The Petitioners placed heavy reliance on the death threats that were done by the debt collector as supported as well by an expert testimony from the Indonesian Consumer Foundation which underlines the basic problems encountered in debt collection. The Government along with the House of Representative conveyed their perspectives.

Following that legal practitioners and academic experts supported by providing their views regarding the legal principles of the Fiduciary Law. Based on this, they found that it was difficult to reconcile the argument made by the Petitioners about the inequality between debtors and creditors against the legal principles of Fiduciary Law. The Fiduciary Law was legislated to cease the issue of inequality and legal uncertainty for creditors in the event the debtor retains possession over the object under fiduciary guarantee. The House of Representatives highlighted the claim brought in the District Court whereby the Petitioners had defaulted their installment payments since August 2017.

As a result of this decision, it has an adverse impact towards the Fiduciary Law and creates a confusion as to the enforcement of an object of fiduciary guarantee in the event of default. Thus, this thesis will provide an understanding as to the impact of this decision to the practice following this decision.

1.2 Formulation of Issues

- 1) How is the use of Intellectual Property Rights as a collateral implemented in Indonesia?
- 2) How is Copyright as an object of Fiduciary Guarantee enforced under Indonesian Law?

1.3 Objective of research

Indonesia is one of the only countries in the world whereby the most common form of security granted over tangible movable assets is fiduciary guarantee. Under the Indonesian Copyright Law, it is provided that fiduciary guarantee can be granted over a Copyright. However, the mechanism of executing the Copyright into monetary value in the event of default is unclear. Thus, in general the purpose of this Thesis is to give the readers a better understanding about the fundamental concept of Intellectual Property Right as a form of fiduciary guarantee and also to answer the designated problems.

Firstly, this thesis will identify and break down the concept of copyright as a fiduciary guarantee as enabled under the Indonesian law. Secondly, this thesis will first analyze the mechanism of transfer of ownership right when the Copyright becomes an object of fiduciary guarantee. While the ownership right has been transferred to the Creditor, the possession of the Copyright Registration Certificate shall still be on the hands of the Debtor as it is needed to continue generating monetary value. Provided this, in the event the Debtor fails to fulfill its payment obligations to the Creditor, what

mechanism does the Indonesian law provide to the Creditor to have the Copyright Registration Certificate handed over and executed? Which one of the three methods provided under the Fiduciary Law shall be best applicable for Copyright? Lastly, this thesis will examine the best possible mechanism which Indonesia can adopt based on a cross-jurisdictional comparison or through the adoption of principles provided by international institutions such as UNCITRAL.

1.4 Benefit of Research

The benefit of this research shall be divided into two prongs, namely the theoretical benefits and the practical benefits. In the academic aspect, this research is expected to provide information and inputs to the public and scholars, mainly those working in the field of Indonesian Law, specifically regarding Fiduciary Security. This research shall create awareness for borrowers and lending institutions and that the concept of Copyright as a collateral to guarantee loans exist under the Indonesian law.

1.5 Thesis Structure

Chapter I: Introduction

The first chapter introduces the background of the chosen thesis topic regarding copyright as a fiduciary security with reference to the urgency of the issue, purpose, benefits and framework of the writing that will substantiate the entire Thesis. This chapter will shall explain the reasoning as to how Indonesia regulates this mechanism and how this mechanism is looked upon internationally.

Chapter II: Literature Review

The second chapter will comprise of a literature review based on the theoretical and conceptual background concerning the formulation of issues which include security guarantee, intellectual property rights in general, its forms, the interpretation of transfer of ownership of copyright under a fiduciary guarantee. All based on the Indonesian law and the UNCITRAL Legislative Guide on Secured Transactions particularly Intellectual Property.

Chapter III: Research Method

The third chapter discusses the methods of legal research used in writing this thesis. This consists of *first*, the type of research; *second*, the procedures to collect research materials; *third*, procedure to collect the research materials; *fourth*, the approach of the analysis; *lastly*, the obstacles and solutions during the process of drafting this Thesis.

Chapter IV: Discussion and Analysis

The fourth chapter analyzes: *first*, the concept and mechanism of IPR as an object of collateral and with the notion that copyright is the form of collateral accepted under the Indonesian law through fiduciary guarantee. *Second*, the legal remedies for Creditors who are fiduciary grantees of Copyrights and how Indonesia can improve its

mechanism on protection for both debtor and creditor, along with a comparative study on how the rest of the world uses IPR as a form of collateral for secured loans.

Chapter V: Conclusion and Recommendation

The last chapter closes with conclusions and recommendations aimed to ease the issues formulated in prior chapters. The recommendations made are suggestions created by the Author in order to solve the existing problem within Indonesia and other jurisdictions which adopts this concept.

