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EXECUTION OF TRADE SECRET AS OBJECT OF COLLATERAL IN BANKING

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ABSTRACT

Laws and regulations related to trade secrets do not explicitly stipulate that trade secrets can be used as an object of guarantee in banking, causing legal uncertainty for the public and affecting the condition of trade secrets being used as collateral objects and the execution of goods for certain reasons. Writing this article aims to examine and analyze the regulation of trade secrets as an object of guarantee and the execution of trade secrets in the banking. Then, through this article it can provide benefits in the form of juridical understanding related to trade secret legal arrangements as objects of collateral in the banking, contribute literature, and can be considered by the government in establishing laws and regulations related to trade secrets as collateral objects. The legal issue in the form of a veil of norms makes this article use normative legal research methods using a statutory and contextual approach, followed by legal materials in the form of primary, secondary and tertiary legal materials. The results of the study show that trade secrets can be used as collateral in the banking because they have economic value, can be transferred, and have no time limit as long as they are kept confidential. Then related to the execution of trade secrets can be carried out based on the execution of fiduciary guarantees considering that trade secrets can be charged with fiduciary guarantees. The method of execution is through executorial titles, public auctions, and private sales as stipulated in Article 29 of the Fiduciary Guarantee Law. Trade secrets as an object of guarantee have been explicitly regulated and execution of trade secrets can be carried out through private sales and auctions as regulated in the German Lending and Taking Security Act. Based on this explanation, the solution to the legal issues in this article is that Indonesia can amend the Trade Secrets Law by considering German Legislation so as to provide legal certainty for the Indonesian people regarding trade secrets as an object of guarantee.
Keywords: Guarantee Objects; Banking; Trade Secrets.

1. INTRODUCTION

A country has the authority to grant rights to authors or creators which are often known as intellectual property rights (hereinafter referred to as IPR). IPR is an exclusive right intended for creators or creators of their creations which have economic value where this right can be granted automatically or through registration by the state. IPR as an exclusive right has several parts which include trademarks, patents, copyrights, layout design of integrated circuits, plant varietas, industrial designs, as well as trade secrets.[1] Providing IPR to creators functions as an appreciation and protection for someone's invention so that it can stimulate enthusiasm and inspiration for that person. The current function of IPR is not only limited to protecting creators, but as a result of global market developments, IPR can function as collateral or collateral for banking credit.

1 Dewi Asri Jayanto, Zainal Asikin, and Muhaimin, "Kajian Yuridis Terhadap Merek Sebagai Jaminan Pada Lembaga Perbankan," *Jatiswara (Jurnal Ilmu Hukum)* 32, no. 3 (2017): 508–518, 509.

IPR as a collateral object must have commercial value so that later it can be charged as fiduciary collateral, namely security rights for tangible and intangible movable objects as well as immovable objects without being charged with mortgage rights which can be used to guarantee debt repayment and provide the main level to fiduciary recipients as stated in This is stated in Article 1 number 2 of Law Number 42 of 1999 concerning Fiduciary Guarantees (hereinafter written Fiduciary Guarantee Law).[2] The discussion of IPR as the object of collateral was proven at the 13th United Nations Commission On International Trade Law (UNCITRAL) session in 2008, which contained a discussion regarding security rights in intellectual property, namely discussing that IPR can be used as collateral in obtaining banking credit.[3]

Trade secrets as a type of IPR have a very vital role in the business world considering that trade secrets are the main key for a business to survive and develop amidst business competition. Stepher Elias expressed his opinion regarding trade secrets where in general, trade secrets are information that contains commercial value and its confidentiality is protected by the owner, even the rights owner can prosecute parties who steal or use it without permission. In the international arena, trade secrets are also regulated in The Agreement On Trade Related Aspects Of Intellectual Property Rights (TRIPs Agreement), namely in article 39 paragraph (2). This article states that every person/entity has the right to receive protection of information that they possess or possess, where the information is not disclosed and disseminated by them and other parties are not permitted to use it illegally without approval based on procedures that are contrary to honest business practices as long as:

a. Information has a confidential nature where the information is not something that is easily known by someone in a series of activities that are related to the confidential information in question;
b. Has commercial value for the confidentiality of information
c. The owner of the confidential information has made reasonable efforts to protect the information from disclosure.[4]

Based on the TRIPs Agreement, Indonesia, as a TRIPs member country, ratified the agreement by ratifying Law Number 30 of 2000 concerning Trade Secrets (hereinafter written as the Trade Secrets Law) on 2 December 2000, where this ratification was an effort to create a situation that encourages creativity and modernization of innovation so as to encourage the ability to compete both in the national and international arena.

A creator who expresses his innovation in the form of intellectual property certainly has the aim that the goods or services have commercial value. Currently, intellectual property as one of the valuable assets belonging to creators can be used as collateral for debts from banks and financial institutions as stated in article 7 paragraph (1) of Government Regulation no. 24 of 2022 concerning Implementing Regulations of Law no. 24 of 2019 concerning the Creative Economy (hereinafter written Government Regulation on Creative Economy).[5] The text of this article implies that all types of intellectual property which are the result of human intellectual thinking can become collateral object that are able to stand alone without having to be followed by other types of intellectual property and without exception. However, the enactment of these laws and regulations actually gives rise to several problems in IPR which become an object of collateral. Sardjono stated that there are 3 main problems, namely: there is no benchmark for determining the economic value of IPR; the character of IPR which is different from objects according to Burgelijk Wetboek (hereinafter referred to as BW); and execution constraints in the event of a default by the debtor.[6]

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2 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 42 Tahun 1999 Tentang Jaminan Fidusia," Pub. L. No. 168 (1999).

3 Ujang Badru Jaman, "Prospek Hak Kekayaan Intelektual (HKI) Sebagai Jaminan Utang," *Jurnal Hukum Dan HAM West Science* 01, no. 01 (2022): 15–20, 16.

4 Regina Natalie Theixar and I Gusti Ngurah Wairocana, "Subjek Hukum Rahasia Dagang Ditinjau Dari Undang-Undang Rahasia Dagang, Trips Agreement Dan UTSA," *Kertha Semaya : Journal Ilmu Hukum* 7, no. 12 (2019): 1–13, 9.

5 Presiden Republik Indonesia, "Peraturan Pemerintah Republik Indonesia Nomor 24 Tahun 2022 Tentang Peraturan Pelaksanaan Undang-Undang Nomor 24 Tahun 2019 Tentang Ekonomi Kreatif," Pub. L. No. 151 (2022).

6 Ujang Badru Jaman, *Loc.cit*.

Apart from these problems, related to the discussion in this article, there is a vacuum in norms where trade secrets, one of the types of IPR regulated in the Trade Secrets Law, do not have regulations that clearly explain that trade secrets can be used as collateral in banks. As is known, in the banking world there are two types of banks, namely Commercial Banks and Rural Banks (BPR) which are regulated in Article 5 paragraph 1 of Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law) where both have their own characteristics.[7] Commercial banks as explained in Article 1 number 3 of Law Number 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking (hereinafter referred to as the Amendment Banking Law) explains that commercial banks are banks that carry out conventional business activities or are based on sharia principles where payment traffic services are available within them. Meanwhile, BPR in Article 1 point 4 of the Amendment Banking Law is a bank that carries out business activities conventionally or based on sharia principles without providing payment traffic services.[8]

In Indonesia, the application of the use of trade secrets as collateral for objects is also different from one banking institution to another, depending on the policies adopted by the bank. In this case, there are banking institutions that cannot use trade secrets as the object of collateral considering that there are still doubts about the commercial value of trade secrets. However, on the other hand, there are banking institutions that allow the use of trade secrets as the object of collateral, but trade secrets become additional collateral that must be accompanied by guarantees for other intellectual property rights. One of them is Bank Mandiri where based on the results of Irawaty's interview with Harwanto who is the Assistant Vice President Legal Group of Bank Mandiri and Chairiyah Djohan who is the Senior Manager Legal Group of Bank Mandiri that Bank Mandiri has concerns about whether trade secrets have commercial value or vice versa. The idea arises that when the collateral object in the form of a trade secret is executed, no one will be interested in buying the trade secret unless the trade secret is accompanied by other intellectual property such as a brand, so that if execution occurs, people will be more interested in buying the collateral object.[9]

The Trade Secrets Law does not explicitly explain whether trade secrets can be the object of banking collateral, whereas the law only stipulates that the transfer of rights to trade secrets can only be done by grant, written agreement, inheritance, will and other reasons that justified by statutory regulations as stated in article 5 paragraph (1). Meanwhile, the practice of implementing trade secrets in Indonesia, if reviewed again, also contradicts the formulation of article 7 of the Government Regulation on Creative Economy, which in principle is not a derivative of the Trade Secrets Law but can be used as a reference regarding IPR as the object of collateral. In article 7 of the Government Regulation on Creative Economy, it is stated that all types of intellectual property can be objects of collateral without having to be accompanied by other intellectual property. This of course triggers legal uncertainty where the Government Regulation on Creative Economy allows that intellectual property rights, which in various interpretations, can be interpreted as meaning that all types of IPR, including trade secrets, can be made the object of banking collateral without being accompanied by other IPR. This will also have an impact if the trade secret has become the object of collateral which relies on the Government Regulation on Creative Economy and a default occurs by the debtor and requires the execution of the trade secret by the bank as the creditor.

Referring to the explanation above, there are several problem formulations that will be studied and analyzed in this article, including: 1) What are the legal regulations related to trade secrets, which are one type of IPR as the object of collateral in banking? 2) What are the legal regulations regarding the execution of trade secrets as collateral object in banking? Based on the problem formulation, the aim of writing the article is to study and analyze the regulation of trade secrets as the object of collateral in banking as well as to review and analyze legal regulations related to the execution of trade secrets as the object of collateral in banking. By writing this article, it is hoped that it will be able to provide benefits for academics, society and the government, namely in the form of a juridical understanding regarding the legal regulation of trade secrets as

7 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 7 Tahun 1992 Tentang Perbankan" Pub.L. No. 182 (1992).

8 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 10 Tahun 1998 Tentang Perbankan," Pub. L. No. 182 (1998).

9 Ujang Badru, *Op.cit, 18.*

the object of collateral in banking, provide scientific contributions and literature related to trade secrets as the object of collateral in banking, and can be considered by government in the formation of laws and regulations related to trade secrets as the object of guarantee so that legal certainty regarding this matter arises.

In writing this article, there have been several articles that have raised similar issues, but there are differences in the substance of the discussion with this article. The first article entitled Intellectual Property Rights as Banking Credit Guarantee was prepared by Trias Palupi Kurnianingrum with a discussion topic related to the position and obstacles to IPR as the object of credit collateral in banking. The essence of the article is that the position of IPR is as intangible assets that can be used as collateral, because intellectual property rights include movable objects that are intangible, have economic value, can be transferred and can be bound by fiduciary guarantees and obstacles can be in the form of the absence of juridical support, the absence of the concept of IPR assessment, and the absence of a special assessment institution related to IPR in Indonesia.[10] Then, the second article entitled execution of brand rights as additional collateral in bank credit agreements was written by Zaimmatul Ummah with a discussion topic related to the execution of brand rights in credit agreements in banking. The essence of the article is that the execution of trademark rights can be carried out depending on the burden imposed on the collateral object which can be in the form of pledges and fiduciaries.[11] Meanwhile, the article written by the author only focuses on one type of IPR, namely trade secrets, which specifically analyzes the legal regulation of trade secrets as the object of collateral along with the execution of trade secrets in the event of a default by the debtor according to banking law in Indonesia, which is different from the previous article that discussed universally IPR as the object of guarantee and focused execution on brands only. Therefore, there is novelty in legal research which is differentiated based on the focus of the discussion which analyzes only trade secrets as one of the IPRs which differentiates it from previous articles. For this reason, in writing this article the author raised the topic of discussion with the title "Execution of Trade Secrets as the Object of Collateral in Banking".

Then, regarding the structure of the discussion in this article, it is carried out systematically in outlining the main problem formulation based on the legal issues that have been described previously. The discussion in the article is analyzed descriptively so that it will provide clear answers to the main problems and solutions. The structure of the discussion is outlined in 2 discussion sub-chapters which begins with the legal regulation of trade secrets as the object of collateral in banking, then continues with legal regulations related to the execution of trade secrets as the object of collateral in banking. This article is more specific than previous articles and there are no specific references discussing legal issues in this article.

2. RESEARCH METHODS

The emptiness of norms as a legal issue in this article is what makes normative legal research methods a research method. This research method uses an approach in the form of a statute approach which is an approach that carries out an analysis of statutory regulations and a conceptual approach which is an approach to legal concepts that are related to the execution of trade secrets as the object of collateral. In this article, the author will provide a presentation in the form of an analysis of legal regulations related to the topic of this article, followed by legal arguments as characteristic of normative legal research methods known as library legal methods. Through this method, the author understands the substance contained in legal materials, in the form of primary, secondary and tertiary legal materials. Regarding the discussion raised, statutory regulations such as the Trade Secrets Law, Creative Economy Regulations, Banking Law as primary legal materials are used as basic references which are complemented by secondary legal materials in the form of books, articles and tertiary legal materials related to the topic of discussion.

In collecting legal materials, the author uses a collection technique with a card system which starts from collecting and grouping legal materials, then carrying out an inventory by recording and citing through a card system which includes quotation cards, summaries and bibliographies. After that, the author will carry out an

10 Trias Palupi Kurnianingrum, "Hak Kekayaan Intelektual Sebagai Jaminan Kredit Perbankan," *Negara Hukum* 8, no. 1 (2017): 31–54, 33.

11 Zaimatul Ummah, "Eksekusi Hak Merek Sebagai Jaminan Tambahan Dalam Perjanjian Kredit Bank", *Ajudikasi* 2, no. 1 (2018): 1-16, 10.

analysis of the legal materials by applying several techniques including descriptive, evaluative and argumentative techniques. Descriptive techniques are techniques that describe a legal event objectively; evaluative technique is an analytical technique that takes into account several interpretations, namely grammatical (grammar), systematic (certain statutory regulations), and theological (certain theories); and argumentation techniques which are opinions or legal reasoning that function to strengthen the truth of research results.

3. DISCUSSION

3.1 Legal Regulations Regarding Trade Secrets which are One Type of IPR as a Collateral Object in Banking

Indonesian banking has an intermediation function as a collector and distributor of public funds as stated in article 3 of the Banking Law, where the collection of public funds is carried out in the form of savings for people who have excess funds, while the distribution of funds is carried out by providing credit to people who lack funds. In providing credit, banks apply a prudential principle based on economic democracy with the aim of improving people's welfare as stated in article 2 of the Banking Law. To apply the precautionary principle, before providing credit, a credit analysis is required, known as the 5C and 5P principles. The 5C principles referred to are as follows:

1) Character is an analysis related to the personality of the prospective debtor such as character, habits, way of life and family background.
2) Capacity is an analysis of the potential debtor's ability to manage his business which can be seen from the history of the company being managed and experience managing the business.
3) Collateral is an analysis of collateral that allows it to be confiscated and executed if the prospective debtor defaults.
4) Capital is an analysis of the debtor's wealth in the business he manages, which can be seen from the profit and loss report, profit ratio and balance sheet.
5) Condition is an analysis of bank credit that takes into account the economic conditions of the prospective debtor's business prospects

Meanwhile, the 5P principles include:

1) Party or group is an analysis by classifying potential debtors into several groups based on character, capacity and capital.
2) Purpose is an analysis of the intended use of credit proposed by the prospective debtor.
3) Payment or source of payment is an analysis of the estimated possible income generated by the prospective debtor for his business.
4) Profitability or the ability to earn a profit is an analysis carried out by creditors to calculate the profit if they give credit to a particular debtor, in which there is a comparison of the profit if they give credit to one debtor with another.
5) Protection is an analysis intended to anticipate unexpected things so that guarantees or collateral are needed from the debtor.[12]

The fast and rapid development of the economic and business sectors is influenced by various factors, resulting in the development of creativity and innovation by utilizing technology, then with the existence of the economy and creative industry this produces intellectual property (KI), namely wealth that arises from human intellectual expertise so that ideas or innovations are created as a form of creativity. Intellectual property is a right intended to enjoy the results of creativity economically. For this reason, the object of intellectual property is a masterpiece born from human intellectual expertise.[13]

12 Hamonangan, "Analisis Penerapan 5C Dalam Penyaluran Pembiayaan Pada Bank Muamalat HCU Padang Sidenpuan," *Jurnal Ilmiah MEA* 4, no. 2 (2020): 454-466, 458.

13 Siti Nurul Intan Sari Dalimunthe and Ridha Wahyuni, "Perkembangan Hak Kekayaan Intelektual Sebagai Objek

IPR is an exclusive right that is legally granted to an individual or group of people regarding their masterpiece so that the person or group of people is able to obtain and enjoy the economic benefits of their masterpiece which is the result of their intellectual creativity.

Trade secrets are a type of IPR where trade secrets are a form of information that is not leaked to the public in the field of technology or business that has commercial value, is intended for business activities, and is protected confidentially by the rights owner. In this case, what makes trade secrets have economic value is their confidential nature in business activities. There are several characteristics of trade secrets, namely:

1) Information is not leaked to the public;
2) Information is related to technology or business;
3) Has economic or commercial value that is useful in business activities; and
4) Confidentiality is still protected by the rights owner.

Then there are several critical points that exist in trade secrets in accordance with the Trade Secrets Law, namely as follows:[14]

1) The first point, trade secrets must be information in the technological and commercial fields, for example internal processes in creating products/services, drug composition, consumer lists, food and drink recipes;
2) Second point, trade secrets must have economic value that is useful in a business activity;
3) Third point, information must be protected by the owner of the trade secret with proper, proper and reasonable treatment.

As with other types of IPR, the right to trade secrets must also receive legal protection. The legal protection provided for trade secrets originates from several legal theories, including contractual obligation theory, fiduciary relations theory, and misappropriation theory. Contractual obligation theory which interprets a contract as a promise so that all rights and obligations stipulated in the contract must be fulfilled, therefore the implication with legal protection of trade secrets is the obligation for the parties not to disseminate trade secrets based on agreements or contractual relationships that have been previously made as a promise that must be fulfilled.[15] Fiduciary relations theory emphasizes trust in someone where the implication of trade secret protection is trust to safeguard a trade secret given by the holder of the right to the trade secret to the recipient of the right to the trade secret. misappropriation theory emphasizes things that are prohibited, where the implication of trade secret protection is that in obtaining trade secrets, you must use appropriate efforts or they must not be obtained through inappropriate means.[16] Based on this theory, protection of the right to trade secrets must be enforced in all countries, including Indonesia. One of the important requirements to be able to provide legal protection for trade secrets in Indonesia based on the Trade Secrets Law is information confidentiality, which means all forms of information that are confidential.[17] For perpetrators who act without rights in collecting and disclosing trade secret components thereby violating statutory regulations, based on Article 17 of the Trade Secrets Law, violators will be subject to a maximum prison sentence of 2 years or a maximum fine of IDR 300,000,000. Furthermore, regarding the offense in this article, it is a complaint offense, namely an offense that can only be followed up if there is a report or complaint from the victim.

Jaminan Kredit Perbankan," *ADIL: Jurnal Hukum* 14, no. 1 (2023): 28–45, 30.

14 Riandhani Septian Chandrika, "Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang Di Indonesia," *Jurnal Hukum Bisnis Bonum Commune* 2, no. 1 (2019): 11–22, 13.

15 Charles Fried, "Contract as Promise: A Theory of Contractual Obligation", *Michigan Law Review* 81, no.4 (1983): 904-908, 904.

16 AusAid Intellectual Property Rights, *Indonesia Australia Specialised Training Project-Phase* II. 2001, 288.

17 Ahmad M. Ramli et al, "Perlindungan Rahasia Dagang Dalam Industri Jasa Telekomunikasi," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 2 (2021): 215–230, 218.

Along with the development of the business sector, Indonesia has made banking an institution that distributes credit to the community so that it has a big role in carrying out financing for the national economy as well as being a pioneer of economic growth and has high hopes of being able to open up as many job opportunities as possible through increasing production and triggering the formation of new businesses. Banking is everything related to banks, which includes business activities, institutions, followed by the process of implementing business activities. Based on Article 4 of the Banking Law, the aim of banking is to support national development in the context of increasing equality, economic growth and national stability towards improving the welfare of the Indonesian people. Trade secrets are one of the IPRs where the rights arise as a result of human intellectual expertise in a particular field which produces processes or products that have benefits and have commercial value. Therefore, IPR can be a means for someone to obtain banking credit, even internationally.[18]

In practice in Indonesia, the application of the use of trade secrets as collateral object in Indonesia is still not the same between one bank and another, where this still depends on the policies of each bank. In this case, there are banks that cannot use trade secrets as the object of collateral on the basis that trade secrets do not have commercial value. However, there are also banks that allow trade secrets as the object of collateral but trade secrets become additional collateral that must be accompanied by other IPR guarantees, such as Bank Mandiri. Based on the results of Irawaty's interview with Harwanto as Assistant Vice President of Bank Mandiri's Legal Group and Chairiyah Djohan who is Bank Mandiri's Senior Manager of Legal Group, Bank Mandiri has concerns about trade secrets. The concern is in the form of questions about whether trade secrets really have commercial value. In fact, the idea arises that if the object of trade secret guarantee is executed, no one will be interested in buying the trade secret if it is not followed by other IPRs such as brands so as to attract public interest. If the execution occurs then the secret trade must be followed by other types of IPR.[19]

Trade secrets are intangible rights that can be used as credit collateral. According to R. Mark Halligan and Richard F. Weyand, trade secrets have a very important meaning as the most valuable and invisible assets. Jeffrey d. Dunn and Paul F Seiler then argue that trade secrets are very valuable to companies as intangible financial assets and can theoretically be used as collateral if the state has the legal means to protect them. In this case, trade secrets can be used as collateral for a trust, if the trust is a type of secret transfer of ownership rights to an object, with the condition that the object whose ownership rights are transferred remains in the control of the owner of the object. Although a trust is a special mortgage right for a building that is not encumbered with a mortgage as determined in the Mortgage Law, whether tangible or intangible, as well as immovable property that remains in the control of the creditor as collateral for the repayment of certain debts, this gives the trustee special privileges over other creditors.[20]

Apart from the opinions expressed by experts/doctrines as one of the legal sources recognized by Indonesia, if analyzed more deeply in several Indonesian laws and regulations, trade secrets themselves can indeed be used as a guarantee without being accompanied by other guarantees. The analysis is:

1) Trade secrets are an object. Objects according to Subekti are defined as anything that is capable of being controlled because of the right to control or in short it is defined as the object of someone's rights.[21] According to article 499 BW, it explains that objects are every object and right that can become an object of property rights. Then in article 1131 BW explains that all goods, both movable and immovable, existing or in the future which belong to the debtor can be used as collateral

18 Trias Palupi Kurnianingrum, *Op.cit*, 34.

19 Ujang Badru, *Op.cit*, 18.

20 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 42 Tahun 1999 Tentang Jaminan Fidusia," Pub.L. No. 168 (1999).

21 Andhika Mopeng, "Hak-Hak Kebendaan Yang Bersifat Jaminan Ditinjau Dari Aspek Hukum Perdata," *Lex Crimen* 6, no. 10 (2017): 168-172, 168.

in an agreement made by the debtor.[22] Based on this article, trade secrets can be classified as objects considering that trade secrets themselves are the exclusive rights that a person has over his masterpiece, so that trade secrets can be used as the object of collateral.

2) Trade secrets are transferable. Based on article 5 paragraph (1) of the Trade Secrets Law, it is explained that trade secrets can be transferred in several ways, namely: will, gift, inheritance, written agreement, and other reasons permitted by law. In the case of a trade secret that will be used as the object of collateral, of course there is a written agreement made by the debtor and the bank as a creditor which contains certain clauses which constitute an agreement between both parties so that in this case trade secrets may be used as the object of collateral by transferring rights based on a written agreement.

3) The right to trade secrets has no time limit. Based on article 3 of the Trade Secrets Law, it is explained that the right to trade secrets will continue to receive protection if its confidentiality is maintained. So, in view of the time limit for the right to trade secrets, which remains as long as it is kept confidential, creditors should not need to worry about protecting the exclusive right to trade secrets, in fact this is an advantage of trade secrets compared to other IPRs which are used as collateral object.[23]

4) In article 7 paragraph (1) of the Government Regulation on Creative Economy, it is stated that IP-based credit or financing can be submitted to bank financial institutions or non-bank financial institutions so that based on the sound of this article, it gives rise to the interpretation that trade secrets which are one type of IPR have the right to be used as the object of collateral in banking without the requirement to be accompanied by other intellectual property as the object of collateral. In this case, the Government Regulation on Creative Economy is not a derivative of the Trade Secrets Law, but this PP can be used as a reference that provides legal certainty that trade secrets can be used as collateral object in banking because the Trade Secrets Law itself does not expressly state that trade secrets can used as collateral. Therefore, the existence of this Government Regulation on Creative Economy can make it easier for business actors to develop their businesses because they can guarantee trade secrets as collateral without requiring other collateral object.

3.2 Legal Arrangements Regarding the Execution of Trade Secrets as Collateral Object in Banking

Banking is a financial institution that has vital value in the economy of Indonesian society, where banking itself can be classified into 2 types, namely commercial banks and BPRs as stated in the Amendment Banking Law.[24] Banking itself has the main function of collecting funds (funding) and distributing funds (lending) to the community, where banks can be said to be financial intermediaries. People/customers who have financial advantages save their funds in banks which can be in the form of savings, current accounts or deposits, where customers have the potential to earn interest as is the function of banks in collecting public funds. Then, the funds in the bank will be redistributed to the community, especially for people with limited funds in the form of loans followed by interest that must be paid as is the function of banks in distributing public funds.[25] The function of banking in channeling funds through credit to the community to improve welfare, causes every bank to be obliged to instill the principle of prudence in providing credit with the aim of avoiding problems in the future such as bad credit. To apply this principle, when providing credit, the bank and the debtor make a credit agreement which contains clauses that bind and protect both parties with the aim of reducing the risk in the event of default, especially if carried out by the debtor. Apart from that, CH Gatot Wardoyo stated that

22 Kitab Undang-Undang Hukum Perdata (*Burgelijk Wetboek*).
23 Sutan Remy Sjahdeini, "Hak Jaminan dan Kepailitan," Jurnal Hukum Bisnis 11, no.2 (2000): 5-10, 7.
24 Trisandini P. Usanti and Abdul Somad, *Hukum Perbankan* (Jakarta: Kencana, 2017), 1.
25 Lana Almira Luthfiana Istiqlal and Dian Purnama Anugerah, "Perlindungan Hukum Bagi Konsumen Pengguna Kartu Debit Terkait Pembebanan Biaya Tambahan Pada Mesin EDC (Electronic Data Captured)," *Media Iuris* 3, no. 1 (2020): 39–56, 40.

credit agreements also have their own functions, namely: 1) as a basic agreement that determines whether an agreement is void or not void other agreements that accompany it; 2) as evidence in limiting the rights and obligations of both parties, both creditors and debtors; 3) as a tool in carrying out credit monitoring.[26]

With the existence of a credit agreement, to resolve a credit problem such as a default, it is generally resolved by executing it by selling the collateral, as stated in articles 1131 and 1132 BW where based on this article the debtor's movable and immovable assets become collateral for the creditor and if at any time a problem occurs, the goods are auctioned with the sales proceeds divided according to the ratio of receivables. This is also in line with J.Satrio's opinion regarding collateral in credit where the creditor is allowed to take repayment from any assets belonging to the debtor; each debtor's assets can be sold as repayment of his debts; and the creditor's claim rights can only be secured by objects belonging to the debtor.[27]

The object of credit collateral in banking must be an object that has commercial value and in line with human intellectual development today, the results of someone's thoughts in the form of intellectual property can also be used as the object of credit collateral as stated in article 7 paragraph (1) of the Creative Economy Regulations. Based on the sound of the article, trade secrets as a type of a person's intellectual property can be an object of collateral considering that trade secrets have commercial value as regulated in article 1 point 2 of the Trade Secrets Law where trade secrets are information that is not leaked to the public either in the field of technology or business that has commercial value for the purpose of business activities and whose confidentiality is strictly maintained by the owner.[28] A trade secret as the object of collateral is an intangible movable object so that this trade secret is subject to fiduciary guarantee rights as stated in article 1 number 2 of the Fiduciary Guarantee Law which regulates that fiduciary guarantee is a security right for movable objects, whether tangible or intangible, and immovable objects without being burdened with mortgage rights.[29] In fiduciary guarantees, there are subjects of fiduciary guarantees, namely the giver and recipient of fiduciary guarantees. The giver is the person/entity who owns the additional goods, while the recipient is the person/entity who has the bill where payment of the bill is guaranteed by a fiduciary guarantee.[30]

A credit with a fiduciary guarantee generally begins with an agreement between the two parties made based on a notarial deed which requires that all goods tied to a fiduciary must be stated firmly and clearly, such as the amount, number, value, type and date of purchase, number and deed of attachment, as well as the location of goods storage. Apart from that, article 5 of the Fiduciary Guarantee Law stipulates that the fiduciary guarantee deed made by a notary in Indonesian contains at least the identity of the party giving and receiving the fiduciary; data on the main agreement being guaranteed; description of the object as the object of fiduciary collateral; guarantee value; and the value of the object that is the object of the fiduciary guarantee. Then the objects encumbered with fiduciary guarantees must be registered with the Fiduciary Registration Office by attaching a registration statement containing: a. identity of the Fiduciary Giver and Recipient; b. date, Fiduciary Guarantee deed number, name and location of the notary who made the Fiduciary Guarantee deed; c. data on the principal agreement guaranteed by Fiduciary; d. description of the objects that are the object of Fiduciary Guarantee; e. guarantee value; and f. The value of the object that is the object of the Fiduciary Guarantee as stated in article 11, article 12 and article 13 of the Fiduciary Guarantee Law.

The birth of a fiduciary guarantee for a trade secret as the object of collateral causes the ownership rights of the object to be transferred through transfer by constitutum possessorium, namely the right to the trade secret is transferred to the creditor but control remains in the hands of the debtor. Ownership of a fiduciary guarantee does not mean the actual transfer of ownership as per the definition of levering in article 528 BW

26 Vika Oktaviyani and Deci Siti Hamzah Marpaung, "Peranan Hukum Terhadap Perjanjian Kredit Dalam Jaminan Hak Tanggungan," *Jurnal Kertha Semaya* 9, no.9 (2021): 1623-1632, 1625.

27 Dimas Nur Arif Putra Suwandi, "Perlindungan Hukum Bagi Bank Pemegang Hak Tanggungan Peringkat Kedua Dalam Eksekusi Objek Hak Tanggungan," *Media Iuris* 1, no. 3 (2018): 420–438, 422.

28 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 30 Tahun 2000 Tentang Rahasia Dagang," Pub. L. No. 242 (2000).

29 Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 42 Tahun 1999 Tentang Jaminan Fidusia," Pub. L. No. 168 (1999).

30 Muhammad Sabir and Rifka Tunnisa, "Jaminan Fidusia Dalam Transaksi Perbankan (Studi Komparatif Hukum Positif Dan Hukum Islam)," *Mazahibuba (Jurnal Perbandingan Mazhab)* 2, no. 1 (2020): 80–97, 86.

however, in this condition the object is indeed used as the object of collateral but there is no transfer of the object in the manner of sale and purchase, in other words the right to trade secrets as the object of collateral remains in the control of the debtor and can still be used to run its business by utilizing the rights to this trade secret. Through this, the existence of fiduciary guarantees brings benefits to both creditors and debtors, where the debtor not only obtains credit disbursement from the creditor, but the object of the fiduciary guarantee, which in this case is the right to trade secrets, can still be used by the debtor. Meanwhile, the creditor does not need to keep the fiduciary collateral object so there is no need to prepare funds to prepare the location and maintenance costs for the collateral object.[31]

In the case of trade secrets which are used as the object of banking collateral, the banking party has the right to verify the certificate or registration letter for intellectual property which is the object of collateral which can be executed if a case or non-dispute occurs and the bank has the right to carry out an assessment of the intellectual property which will be used as the object of collateral as stated in article 8 letters b and c of the Government Regulation on Creative Economy. In this case, self-execution can occur if a dispute or case occurs. In the explanatory article to article 8 letter b PP Creative Economy explains that "execution if a dispute occurs" is a situation if the debtor does not comply with the clauses that have been agreed in the agreement, therefore, to resolve the dispute, execution is carried out on the collateral object. Meanwhile, "execution in the event of a non-dispute" is a situation where the execution of intellectual property is carried out based on an agreement agreed upon by the debtor and creditor. [32]

Regarding the execution of trade secrets as the object of collateral, this is generally carried out if a dispute occurs, such as a default by the debtor. The default by the debtor causes the object of trade secret collateral in the form of a trade secret certificate to be executed in accordance with the execution under the Fiduciary Guarantee Law considering that trade secrets are subject to fiduciary guarantee rights. Execution of trade secrets as the object of fiduciary guarantee based on the execution of fiduciary guarantees can be carried out in 3 ways as stated in article 29 of the Fiduciary Guarantee Law, namely:

1) Execution Through the Implementation of Executorial Title

Execution of trade secrets through the title executorial is a statement in written form containing the implementation of a court decision which provides guidelines for carrying out confiscation and confiscation auctions (executorial verkook) without a judge's regulation. In this case, based on the sentence "For the sake of justice based on belief in the Almighty God" contained in the fiduciary guarantee certificate, the certificate has executorial power similar to a court decision and also has permanent legal force as stated in article 15 of the Fiduciary Guarantee Law. This is also confirmed in the Supreme Court Decision Number 18/PUU-XVII/2019 and the Supreme Court Decision Number 2/PUU-XIX/2021 which states that the explanation of article 15 paragraph (2) of the Fiduciary Guarantee Law regarding the phrase "Executorial Power" is that this phrase does not conflict with the 1945 Constitution of the Republic of Indonesia and has permanent legal force as long as there is an agreement regarding breach of contract in the fiduciary agreement and the debtor does not object to handing over the object that is the fiduciary guarantee, then all legal mechanisms and procedures in implementing the execution of the guarantee must be implemented and applies the same as the execution of court decisions that have permanent legal force. Execution through this executorial title has several advantages in that it can save time, costs and energy, where the creditor does not need to file a lawsuit like a civil case but the creditor only needs to submit a request for execution of the object of the fiduciary guarantee to the chairman of the district court as stated in article 196 paragraph (3) Herziene Indonesia Reglement (hereinafter referred to as HIR). Then the district court summons the debtor and gives an order to fulfill his achievements. If within the specified time the debtor does not have good faith to fulfill these achievements, the chairman of the district court will give a mandate to the bailiff to confiscate the object of trade secret collateral. as

31 Rumawi et al., "Parate Executie Dalam Fidusia Menurut Ratio Decidendi Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 19, no. 3 (2022): 554–579, 566.

32 Presiden Republik Indonesia, "Peraturan Pemerintah Republik Indonesia Nomor 24 tahun 2022 Tentang Peraturan Pelaksanaan Undang-Undang Nomor 24 Tahun 2019 Tentang Ekonomi Kreatif," Pub. L. No.24 (2022).

stated in article 197 HIR. [33]

2) Execution of Collateral object through Public Auction

In this case, the execution of trade secrets as collateral object can be carried out at a public auction under the authority of the creditor or fiduciary recipient and later the proceeds of the sale can be used as debt repayment as stated in article 15 paragraph (3) of the Fiduciary Guarantee Law. In other words, the sale of the collateral object is the same as selling by execution parate, which means that the execution of the fiduciary collateral object is carried out without asking for help from a bailiff or the head of the district court, but the execution is carried out with the help of the auction office by selling the collateral in general or at auction with the aim that The proceeds from the sale of the collateral object are used to pay off the debtor's debt.[34]

3) Execution of Collateral object Through Under-Hand Sales

Execution of trade secrets as the object of collateral may also be carried out through private sales where there are several provisions that need to be taken into account. The provisions are that the implementation of private sales of fiduciary collateral object can only be carried out if an agreement has been reached between the parties concerned with the aim of achieving the highest price and can bring profits to all parties concerned as stated in article 29 paragraph (1) letter c Fiduciary Guarantee Law. Apart from that, the timing of a private sale cannot be carried out at any time, where the sale is carried out after 1 month from the issuance of a written notification by the creditor and/or debtor to parties who have an interest and the announcement regarding the sale is published in at least 2 newspapers which distributed in the area concerned as stated in article 29 paragraph (2) of the Fiduciary Guarantee Law.[35]

Several countries in the world also recognize the existence of IPR as the object of guarantee, however there are several countries that do not accommodate trade secrets as the object of guarantee where this is strictly regulated in the laws and regulations in each country, such as Thailand and the Netherlands. The Thailand Business Security Act explicitly states that IPR that can be the object of collateral are only copyrights, patents and trademarks.[36] Meanwhile, Dutch Legislation strictly regulates that the types of IPR that can be the object of collateral are copyright, related right, design, community design, database right, patent, planbreeders right, community plantbreeders right, topography and semi-conductor right, trade mark , and domain names which, if freely translated into Indonesian, are copyright, related rights, designs, community designs, database rights, patents, plant breeders' rights, community plant breeders' rights, topographic and semiconductor rights, trademarks and domain names.

Then there is also a country that has regulated that trade secrets can be used as the object of collateral, namely Germany. The German Lending and Taking Security Act regulates that patents, brands, designs and other intellectual property rights licenses can be used as collateral, so that trade secrets as a type of IPR are recognized as the object of collateral.[37] Then it is reiterated in the explanation "by means of a corresponding escrow agreement, it is possible to pledge objects in which the confidential or proprietary information is contained (for example, customer lists), or through an agreement to make the know-how available when conditions for realization of the collateral arise, which is particularly important in the area of software" Based on this explanation, confidential information, which in this case

33 Ila Nabilla Nofianti and Rani Apriani. "Pelaksanaan Eksekusi Objek Jaminan Fidusia Apabila Debitur Cidera Janji," *Supremasi Jurnal Hukum* 3, no.2 (2021): 144-159, 155.

34 Soegianto, Diah Sulistiyani, and Muhammad Junaidi, "Eksekusi Jaminan Fidusa Dalam Kajian Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia," *Jurnal Ius Constituendum* 4, no. 2 (2019): 208–219, 213.

35 Iqbal Maulana, Sufirman Rahman, and Andika Prawira, "Efektifitas Eksekusi Objek Jaminan Fidusia Dengan Penjualan Dibawah Tangan," *Qawanin Jurnal Ilmu Hukum* 1, no. 1 (2020): 1–20, 7.

36 Lorenz and Partner. "Thailand Business Security Act." Oktober 24, 2023, 4.

37 Wolfgang Kotzur, Nefail Berjasevic and Marc Krischer, Oppenhoff & Partner. "Lending and Taking Security In Germany: Overview." Oktober 24, 2023, 7.

is exemplified, namely the customer list, can be used as the object of collateral.[38] German legislation explains in general that in the event of a default which can be in the form of non-payment by the borrower, a guarantee can be immediately implemented, a claim or execution against the guarantee. The form of execution as a method of law enforcement against collateral also depends on the type of security right or asset, where it is explained that for IPR it reads "Security over intellectual property rights can be enforced by way of private sale (if the rights have been assigned or the security provider agrees) or by public auction (if the rights have been pledged and the security provider does not agree to a private sale)" which means that if the collateral is in the form of IPR then the method of law enforcement or execution can be carried out through private sale provided that the rights have been transferred or the guarantor has agreed to this and can go through a public auction if the rights have been transferred and the guarantor does not agree to a private sale).[39]

In this case, each country has its own regulations regarding IPR as the object of guarantee, namely there are countries that do not facilitate trade secrets as the object of guarantee, such as Thailand and the Netherlands, there are countries that regulate implicitly that trade secrets can be used as the object of guarantee, such as Indonesia, and there are countries that explicitly regulate that trade secrets can be the object of collateral, such as Germany. For this reason, the most important thing in a country's laws and regulations is to provide legal certainty for its people so that they are able to implement the laws and regulations in practice uniformly, such as enforcing trade secrets to determine whether or not they can become objects of collateral so that there is uniform policy in all banking institutions in Indonesia and this will also make it easier to provide legal protection for banks and customers.

4. CONCLUSION

The development of human intellectual power today gives rise to brilliant ideas and innovations such as the results of a person's intellectual power which is often called intellectual property. This intellectual property certainly has a commercial value which can generally be traded, but currently intellectual property can also be used as the object of collateral, including trade secrets as a type of IPR. Even though it is not explicitly regulated in the Trade Secrets Law that trade secrets can be used as the object of collateral, if analyzed more deeply in several statutory regulations it shows that trade secrets can indeed be used as the object of collateral in banking, such as article 5 paragraph (1) of the Trade Secrets Law which states explains that trade secrets can be transferred through several methods, one of which is a written agreement, article 3 of the Trade Secrets Law explains that protection for trade secrets is given as long as their confidentiality is maintained so that the object of trade secret guarantees is more profitable than other types of IPR, article 1131 BW which explains goods movable or immovable goods can be used as collateral, and article 7 of the Government Regulation on Creative Economy which explains that all types of IPR can be used as collateral object. Regarding trade secrets which can be the object of collateral charged with fiduciary guarantees, of course the principle of prudence needs to be applied by banks as creditors in providing credit so that beforehand there needs to be a written agreement between both parties with the aim of minimizing risks, especially default by the debtor. If a default occurs by the debtor, this has been anticipated by executing the collateral object. Execution of collateral object is also carried out based on the execution of fiduciary guarantees considering that trade secrets can be subject to fiduciary guarantee rights. Execution can be carried out in 3 ways, namely through the implementation of the executorial title, through a public auction, and through private sales as stated in article 29 of the Fiduciary Guarantee Law. Germany is one of the countries that explicitly regulates that trade secrets can be used as the object of collateral where in the event of a default it is regulated that execution can be carried out through private sale or auction as regulated in the Germany Lending and Taking Security Act. Based on the explanation above, regarding the absence of regulations that explicitly stipulate that trade secrets can be used as the object of banking guarantee, in the future the Indonesian government should be able to make amendments to the

38 Marco Stief. "IP As A Means Of Securing A Loan Under German Loan." Oktober 24, 2023, 4.
39 Wolfgang Kotzur, Nefail Berjasevic and Marc Krischer, Oppenhoff & Partner, *Op.Cit,* 20.

Trade Secrets Law. This amendment to the Trade Secrets Law aims to provide legal certainty for the Indonesian people, especially regarding the function of the right to trade secrets as the object of collateral, especially in Indonesian banking law. Apart from that, regulations related to legal protection for both parties, both creditors and debtors, can contain the legal consequences of default and procedures for executing collateral object so that the Trade Secrets Law can function as a legal umbrella for the Indonesian people.

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