

# Legal Aspects of Asset Valuation on Copyright as Part of Boedel (Countable-List) in the Process of Bankruptcy in Indonesia Following the Latest Copyright Law Act No. 28/2014

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In Indonesia, recording activities of bankruptcy's countable list by a curator are very limited when the conduct of legal proceedings pertaining to some intangible assets especially when we talk about Intellectual Property Right (IPR) from the submitted party of bankruptcy. Even though IPR is an asset the most potential while running business activities. Among the IPR another regime, copyright considered the most striking in assigning its economic value. The monetization of IPR especially copyright may be done by means of economic reckon rights of objects in the number of his rewards or royalty received by copyright holders. The monetization of IPR especially copyright may be done by means of economic reckon rights of objects in the number of his rewards or royalty received by copyright holders.

In various advanced countries in the use of his intellectual property, many businesses made IPR as assets major in their company, for example, Indonesian neighbour countries such as Singapore and Malaysia. Before 2014, Indonesian Copyright Regulation never regulates



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concerning copyrights as a collateral. Indonesia with the latest Act Number 28 the Year 2014 on copyright, specifically in article 16 paragraph 3 expressed with firmly that objects copyright can be used as an object fiduciary security. Where in the law on copyright is mentioned also that in its implementation copyright can be used as fiduciary an object by following the procedures for that has been set up by the laws of fiduciary security?

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Basically copyright equal to other IPR, is an asset that did not have a physical (a tangible asset), businesses have been using the license agreement of copyright as an object considered a claim or invoice that give royalty which for the license and this that can be an asset bankruptcy. Although there have been regulation governing copyrights as a collateral, there are still some problem with copyright license holder from Indonesia, first, it has been very difficult to determine the value of its economic value in addition to the intangible characteristic, second, copyright are also difficult to determined its economic value due to lack of implementation regulations such as the credit with IPR as collateral on Banking Law in Indonesia, the third, until now Indonesian Government have not yet been made institutions specifically to estimate the established in economic value of copyright itself as an assessment objective which can be used as a criterion in judgment that IPR as assets moreover in bankruptcy .

*Keywords: bankruptcy, boedel, copyright, and intellectual property rights (IPR)*

## **Introduction**

In modern time like this, many businesses in developing countries such as Indonesia are using intellectual property rights (abbreviated as IPR) as the main activity of business, the parties involved even usually involves many as vendor, producers, and agency that are multiparty, even there is also multinational is that indirectly beneficial important to socio-economic development between countries. Intellectual property, or "IP," plays a major role in Indonesian creative industry that makes intellectual property licenses and especially significant type of executory contract. Whether you are a licensor or licensee, it's important to know what can happen to IP licenses when a bankruptcy is filed.

The development and industrialization of Indonesia to be an advanced country can only be embodied by improvement of the inde-

pendent industry, healthy, and powerless competitiveness, grateful resources optimally and efficient, and encourage industrial development throughout of Indonesia and its support progress and national economic unity based on society, justice, and values that sublime into the culture of the nation with the utmost national interests. Lifting economic and creative industry to the foreign national is one important thing we need to support, this was said by a presidential candidate named Jokowi as part of the notion of mental revolution in the campaign before elected as current President<sup>1</sup>.

The creative industry is an industry that ended up at intellectuality, an idea, and the ideas that original and realized based on thought and action to create real job opportunities in order to promote the economic growth in this country. Through creative industry trading and transactions, we can exchange many aspects like technology, entrepreneurship, creativity, and traditional knowledge. Nonetheless, even the most creative business that is legally protected sometimes facing possible dispute in such claims IPR. All the businesses based IP always trying to find many ways<sup>2</sup> to reduces dispute risk with a tight manner in the management of rights and obligations between superiors with a subordinate and other businesses that operate in the same field. But that sometimes dispute business keep showing up, settled through trial not always arrive on the target with relatively a longtime process until the result although there was already commercial court, the dispute resolution alternative and a resolution dispute-prevention and strategies represent a good solution to both sides and of course affecting their business profit.

The creative industries are expected to more capable of surviving when it comes to the economic crisis because based on ideas and creativity is the man who indefinitely. In relation to this and the protection of the law relating to the intellectual rights, the problem of the contract both national and international must always be improved so that players were traded can mutually benefit being balanced so as to create the dictates of the healthy market. The creative industry is an industry that derived from the use of creativity, skills and talent individual to create welfare and job opportunities by producing and exploit power creation and the copyright the industry. As for that belongs to a group creative industry is advertising, fashion design, the craft, design, interactive game (games), music, video-film and photography, computer services and software, architecture, music, the art of

performing, television and radio, publishing and printing as well as research and development. In the process of business development, both the government and the investor community requires big fund. On the creative industry, many do not have enough capital, to meet the needs of capital can be obtained by the loans.

*Legal Aspects of  
Asset Valuation  
on Copyright as  
Part of Boedel*

In the world of bankruptcy, traditional rules of contract interpretation and the intentions of one or both of the contracting parties are sometimes ignored and often displaced. One area of bankruptcy in which this phenomenon occurs frequently involves the assumption and assignment of executory contracts.<sup>3</sup>

Business financing cannot be separated from the term about guarantee, and when getting a loan for business over this object small business insurance usually using fiduciary, basically regulatory aspect there has been the Law Number 42 Years 1999 about fiduciary security. On the other hands, the regulation in the field of intellectual property rights has also quite many, the latest Act Number 28 the Year 2014 on copyright, specifically in article 16 paragraph 3 expressed with firmly that objects copyright can be used as an object fiduciary security. Where in the law on copyright is mentioned also that in its implementation copyright can be used as fiduciary an object by following the procedures for that has been set up by the laws of fiduciary security<sup>4</sup>, however in practice, the regulation especially about IPR valuation as asset have not been able to fully to support creative industry development in Indonesia, and IP issues may arise when a party to litigation or a party to a license files for bankruptcy, a complication can arise with respect to litigation in the shadow of bankruptcy if the bankruptcy plan disaggregates certain IP rights in Indonesia especially copyright and patent in such a way that constitutional standing to sue is lost<sup>5</sup>. This paper will focus primarily on the latest Copyright Law in Indonesia that affect the reorganization of the debtor.

### **Literature Review**

In general, the intellectual property consists of those intangible assets that are the creation of the mind. Businesses usually consider inventions, expressions, confidential plans, and branding identifiers as IP.

In Indonesia, the limited company assets can be objects that have a physical (a tangible asset) as though, land, vehicles, and can be objects that do not have a physical (intangible asset) as distributor networks, advertising programs, training materials, parts annuities, customer re-

relationships, and intellectual property rights.<sup>6</sup> We can use Copyright in companies that do not have a tangible asset because with the latest Copyright Law article 16 we also know IP also can categorize as a security for liability of a company<sup>7</sup>.

CEJISS  
4/2018

When a company enters bankruptcy, one of the key decisions it will face is whether to assume, reject, or assume and assign to a third party its executory contracts. For a debtor that is an IP owner-licensor, such “executory contracts” generally include any IP licenses to which it is a party. A debtor-licensor may also choose to sell its IP to a third party, and under certain circumstances, this sale may extinguish any third-party interests in the IP including existing licenses. Although these debtor’s rights do advance the Bankruptcy law in Indonesia primary goal are rehabilitating the debtor and protecting the creditor body, they can work a significant hardship on the debtor’s pre-petition licensees. It also has frequently been noted that the judicial system in Indonesia has not functioned well in dealing with bankruptcy cases<sup>8</sup>.

Unfortunately, the Bankruptcy Law Number 37/ 2004 in Indonesia never states that “intellectual property” includes trade secrets, patents or patent applications, and copyright works, as countable list of bankruptcy (boedel), that address Indonesia Bankruptcy Law doesn’t regulate or allows licensees to elect to retain the right to use certain kinds of copyright or any licensed IP particularly when the licensor rejects the underlying license<sup>9</sup>. Moreover, in certain circumstances, a licensee can retain substantial rights in IP that is sold by the debtor-licensor. The licensing parties’ respective rights will vary greatly depending on the kind of IP involved, the terms of the license, and the action or inaction of the licensee. But we can find some regulation from “Kitab Undang-Undang Hukum Perdata” (Indonesia’s Civil Code) which are article 1233 stated that is in principle indicating that engagement born from a contract has the same power binding as the laws, the regulation is often the reference in clarifying debt sense that a debt is a responsibility of who is born of an agreement. The other articles are 1131 and article 1132 Civil Code, they indicated that objects belonging to debtor including intangible and those who are regulated by law as collateral can be used as part of the countable list as collateral for any debt from the debtor.<sup>10</sup>

IP as assets that have a role in most dominant when companies to normal, would have inferior value when liquidation. Assets that have a role in most dominant of course are assets that have a special pur-

pose as a copyright, patent, the right brand, the right of trade secret, the right of industrial design, a network of the distributor, consumer tissue, advertising system, etc.

IP assets with the usefulness special are generally not assets for trading, so it is hard to give market value, Indonesian Bankruptcy Law are used to the assets that had value in business entities place assets are located. Liquidation assets in Bankruptcy process mean it can be cashed in assets or liquefying assets, namely distribute the right belonging to assets in urgent situations and in fast time which is based on the will buyers in the various forms of the transfer of rights the property of being you could do with assets.<sup>11</sup> We need to really address whether an exclusive copyright license is freely assignable even when the license expressly prohibits assignment.<sup>12</sup>

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### **The Methodology and Model**

The methodology that used in this research is descriptive analytical, that trying to give a picture of the actual problems based on the facts that appear. Furthermore, the research methods used in accordance with the formulation of the problem which is the focus of about legal aspects valuation on copyright in Indonesia.

The approach used in this study is a juridical normative law about Intellectual Property Rights, focusing on Copyright Law. The research that takes literature data supported by the data fields. Normative research is the main research in this study, including legal research library materials. In this study is basic data research classified as secondary data.

Normative juridical research using secondary data. In the legal research, secondary data includes primary legal materials, secondary law, and tertiary legal materials.

The analysis technique used with a qualitative approach. In this qualitative approach is not used statistical parameters. Deductive method is used for the data obtained from the literature search, whereas the inductive method is used for the data obtained from the field and complementary in this study.<sup>13</sup>

### **The Findings**

The major role of intellectual property, or “IP,” plays in our economy makes intellectual property licenses an especially significant type of executory contract. Whether you are a licensor or licensee, it’s import-

ant to know what can happen to IP licenses when a bankruptcy is filed. The restructuring of the company in bankruptcy would be crucially effective if be done with considerations including company assets that have dedicated to the certain economic activity, the assets such as Copyright and IP, in general, must stay with the company, and lack of the assets very significant impact on assets company. The article 16 paragraph (3) (copyright law) that saying, “copyright can be used as an object fiduciary security “, the presence of article this does not necessarily make the bank or other finance companies in Indonesia easily give loans. And let us not forget that intellectual property rights can only be considered as collateral if the IP itself were already registered and still has when the value of bankruptcy, with the manner of proceeding the license agreement intellectual property rights who formerly was and liquidates assets intellectual property rights.

A debtor-licensor’s ability to reject licenses creates a tremendous danger that licensees may have their licenses rejected in bankruptcy, a disastrous outcome for licensees in many cases. Timing is critical to whether a licensee may retain rights pursuant because that section applies only to rights existing at the time the bankruptcy commences.

When a bankruptcy comes, that debtor is an IP licensee, assumption or assignment of that license can provide relief to that debtor. Generally, a debtor can assume a license if he cures any defaults and gives adequate assurance of future performance of the license.

However, the bankruptcy law in Indonesia may limit the debtor licensee’s ability to act through which debtor licensee may not assign a license to another third party if the applicable law, such as IP related laws, indicates that the other contracting party does not have to allow the assumption or assignment and does not consent to the assumption or assignment. Here, a licensor could prevent the debtor licensee from selling the license to another party and receiving any resulting proceeds into the bankruptcy estate. This would presumably protect the licensor from performing the contract with an unintended party.

A debtor licensor may prefer to reject an IP license in order to limit his future responsibilities or costly contractual obligations to the licensee. The Code removes this debtor’s freedom to completely reject a license. As licensees may have become overly dependent upon the IP assets bargained for in the license, the Code provides the non-debtor licensee with options when the debtor rejects an IP license. The licensee first has the option to simply allow the rejection and treat the license

as terminated, thus allowing the licensee to sue for breach under non-bankruptcy law. Alternatively, Indonesia Copyright Law allows the non-debtor licensee to elect to continue to use the licensed IP. If the non-debtor selects this option, the licensee retains his rights that existed at the time of the debtor's bankruptcy case commencement but must continue to pay license royalties to the debtor. Additionally, the licensee waives any right to set-off, or the right to deduct the value of services or money owed to it from its future payments to the licensor. In this situation, the debtor-licensor would not likely provide any new services, such as software updates, but would be obligated to maintain the license under its initial contractual terms. protects the licensee, allowing him to continue his use of the IP regardless of the licensor's bankruptcy.

A licensee in bankruptcy, like a licensor, may choose to assume, reject, or assume and assign its executory contracts, including IP licenses. A debtor-licensee will, however, have a somewhat different set of related considerations in bankruptcy than will a typical debtor-licensor. For example, article 16f from copyright's law in Indonesia is inapplicable when a debtor-licensee rejects a license—the licensor owns the underlying IP so there are no “use” rights that the licensor might need to retain—leaving fewer restrictions on the debtor-licensee in this regard. On the other hand, a licensee's ability to assume and assign a license will vary greatly depending on the kind of IP that is at issue and the exclusivity of the rights conferred. Perhaps the most complex issue facing a licensee is whether it can assume a license outright—in some circuits, the assumption is only possible if a hypothetical assignment would also be permissible. After analyzing the assignability of an intellectual property license under such rules, three things must be considered carefully: The type of intellectual property is the subject of the license (e.g., patent, copyright, trademark, software, knowhow), The license exclusive or nonexclusive; and what the license says about the licensee's ability to assign the agreement, written or expressed on restrict assignment, it expressly permit it, unwritten.

### **Summary and Conclusions**

Whether an economic right from copyright as IP license can be assigned or not will depend on the type of license at issue. Licenses may be treated differently (assignable or nonassignable) based on the kind



CEJISS  
4/2018

of IP that is at issue—for example, patent, copyright, or trademark rights—and may also be treated differently depending on whether the license is exclusive or nonexclusive.

Moreover, even though exclusive licenses confer a broader ability on the licensee to sue for patent infringement, most courts hold that exclusive patent licenses are also generally nonassignable absent consent. A party's ability to enforce its patent rights in litigation may be significantly affected by an adverse party's decision to file for bankruptcy. The automatic stay adds additional complexity to litigation proceedings, potentially creating asymmetrical scenarios where one party can proceed but the other stays, and the need for judicial approval of settlements creates an additional layer of uncertainty for all parties concerned. Similarly, a licensing party's bankruptcy may profoundly affect the rights of other parties. A debtor's ability to reject, assume, or assume and assign an IP license will vary greatly depending on the kind of IP at issue, whether or not the license is exclusive, and whether the debtor is the licensor or the licensee. In some contexts, the debtor has the extraordinary latitude to decide among all options, while in other contexts, certain options are available only subject to the counterparty's rights or consent, or are prohibited altogether. A circuit split on the critical issue of the actual test versus the hypothetical test adds another source of variance with respect to the treatment of the parties to an IP license. Consideration of these issues as early as possible—ideally at the time that a license is drafted, and preferably pre-petition and vigilance in monitoring the bankruptcies of licensing counterparties may mean the difference between retaining one's rights and having those rights extinguished.

Bankruptcy cases can dramatically alter a debtor's assets and contractual obligations. The debtor might have to surrender property, money, and other holdings to creditors. The bankruptcy court might also remove or discharge a debtor's contractual responsibilities, allowing him to breach otherwise valid agreements. These changes work to possibly give the debtor a fresh start in the face of unmanageable debt as well as help creditors minimize their losses. However, third parties might be unduly injured by the bankruptcy case of a debtor with whom they had entered into an agreement. In the case of intellectual property ("IP") licenses, non-debtor licensors may have only intended to provide licenses to the debtor. If that debtor licensee assigns the license to a third party, the licensor could be obliged to maintain an unwanted

ed license. Also, non-debtor licensees contracting to use a debtor's IP might base their entire business around the use of a debtor's property, such as a software product.

As in many areas of law in Indonesia, the rules concerning assignability of intellectual property licenses in bankruptcy law are often less than clear and constantly evolving. Nevertheless, this article has attempted to distil and present those rules in a manner that is helpful to the intellectual property and bankruptcy practitioner attempting to reach a satisfactory resolution of these challenging issues.

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## Notes

- 1 Can be read on the news [kompas.com](http://nasional.kompas.com/read/2014/06/06/1718353/Industri.Kreatif.di.Mata.Jokowi), (2014), '*Creative industry in the sight of Jokowi*,' <<http://nasional.kompas.com/read/2014/06/06/1718353/Industri.Kreatif.di.Mata.Jokowi>> accessed on 6 June 2014
- 2 Treatment of executory contracts in bankruptcy is governed by 11 U.S.C. § 365 of the United States Bankruptcy Code. Although Section 365 does not define the term "executory contract," courts define such a contract as one under which performance is due to some extent on both sides and in which the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other. See, e.g., *Everex Sys., Inc. v. Cadtrak Corp.*, 89 F.3d 673, 677 (9<sup>th</sup> Cir. 1996).
- 3 Sundar CS and Al Harthi FNS (2015), 'Impact of capital structure on firm's profitability with reference to companies listed on MSM (Muscat Securities Market),' *International Journal of Business and Administrative Studies* 1(1), p. 23- 28
- 4 Ambikai and Ishan Z (2016), 'Comparative analysis of law on tort of deviant behaviors in Malaysia and India,' *Journal of Advances in Humanities and Social Sciences* 2(4), p. 243-249.
- 5 Gordon V Smith and Russel L Parr (1994), *Valuation of Intellectual Property and Intangible Assets*, (New York: The United States of America), p 34.
- 6 Kaothan O (2018), 'Organizational attractiveness and person job fit as the predictors of intention to stay of employees commercial bank,' *Journal of Administrative and Business Studies* 4(3), p. 156-164
- 7 It has been noted by David Linnan that in the five year prior to the bankruptcy law amendments of 1998 (Perpu No 1 of 1998), there were only 120 bankruptcy cases in a country of over 200 million: in Linnan, 2000 at p 95.
- 8 Djilali B, Sarra, B and Abdesselem B (2016), 'Proposal of a new model for the Algerian companies to measure the effect of intellectual capital on organizational performance,' *International Journal of Business and Administrative Studies* 2(5), p. 129-142.
- 9 Sri Soedewi Masjchoen Sofwan, *Hukum Perutangan*, (Yogyakarta: Civil Law Section FH UGM, 1980), p 8
- 10 Gordon V. Smith, Russel L. Parr, *Valuation of Intellectual Property and Intangible Assets*, (New York : The United States of America, 1994), p 413.

- 11 See *Gardner v. Nike, Inc.*, 110 F.Supp.2d 1282 (C.D. Cal. 2000), *aff'd*, 279 F.3d 774 (9<sup>th</sup> Cir. 2002); *Morris v. Business Concepts, Inc.* 259 F.3d 65 (2d Cir. 2001).
- 12 Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, (Jakarta: Ghalia Indonesia, 1988), p 35

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4/2018