

Mechanism Of Economic Value Determination Of Music And Song Copyrights Made As Objects Of Fiduciary Collateral

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Abstract— Copyright as object of fiduciary collateral is listed in Law Number 28 Year 2014. It is explained in this law that movable intangible property can be used as collateral object. However, for certain a circle, this matter, particularly the one related to assessment mechanism and attachment of collateral, is still debatable. Creative economy or commonly called creative industry has been seen as an important sector in the development of Indonesian economic. Creative industry refers to a type of industry which utilizes individual creativity, skill, and talent to create prosperity and work opportunity by producing and exploiting individual's creative power. It is undeniable that, in practice, intellectual property right gives protection to creative industry. In song creation process, song writers need to cooperate with production houses or recording companies in order to disseminate and reproduce their creations. In this cooperation, musicians can give a license to a production house or a recording company to disseminate and/or reproduce the songs they create. In return, the song writer or copyright holder has the right to receive royalties over the dissemination or reproduction of their creations from the other party/license holder. A copyright is an exclusive right consisting of an economic right. Economic right is a right to get economic benefits over the creation and products of the related right. These economic benefits can be obtained when the copyright holder gives the right to the third party to use it with commercial objectives based on an agreement or license. A normative juridical method through regulation approach was applied in this study. the specification of this study was a descriptive analysis describing the relationship between *Das Sollen* variable (copyright as a movable property collateral) and *Das Sein* (development of receiver fiduciary object). An analysis by using legal principles, interpretation, and construction was then conducted.

Index Terms— mechanism, copyright, music and song, fiduciary collateral has been seen as an important sector in the development of Indonesian economic.

INTRODUCTION

Music development, as indicated by the development of music industry, in Indonesia is found to be very fast. Creative economic or commonly called creative industry refers to a type of industry which utilizes individual creativity, skill, and talent to create prosperity and work opportunity by producing and exploiting individual's creative power [1].

It is undeniable that, in practice, intellectual property right gives protection to creative industry. The involvement of the state in protecting intellectual property right (IPR) of its people is possible. This is true as although essentially IPR is an instrument to give appreciation to the thinking creation of humans wherever they are from, in its development, IPR gives economic benefits not only to the creator, but also to the state through taxes taken from IPR holders and manpower employed in the industry [2].

A copyright is an exclusive right consisting of an economic right. Economic right is a right to get economic benefits over the creation and products of the related right. These economic benefits can be obtained when the copyright holder gives the right to the third party to use it with

commercial objectives based on an agreement or license [3].

Having been given the license, the receiver can disseminate or reproduce the creation and products of the related right by mandatorily paying royalties to the copyright holder. This also applies in songs/music created by musicians. Today, songs/music receives high appreciation from public. Therefore, protection over moral and economic rights from song writers cannot be ignored.

A song/music piece is a whole creation consisting of lyric and arrangement which can give certain satisfaction to the listeners who are listening to it the song or musical tone. This song lyric or musical tone can be played by anyone or other singers [4].

As a creation, in terms of copyright protection, a song or music piece is not less important than other kinds of creations. This is line with the fast development of song/music industry in Indonesia. However, humans have a tendency not only to create but also imitate and even control other people's creation. Consequently, it is proper to have the right raised as a result of a creation formulated as a property right. This property right should be exclusive and be given high appreciation in the form of legal protection so that the creator can get the economic and moral rights.

In practice, there are many song writers who cannot yet maximally enjoy the royalty they deserve. There are many obstacles hampering the protection of economic right of creators or copyright holders. Hence, it is important to have an institution which assists creators or copyright holders with

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administration of their royalties particularly related to the distribution, in the form of percentages, of profits obtained by the creator or copyright holder or other party who is given the right from the utilization of copyright. In Indonesia and other countries, there are certain institutions assigned to bridge copyright holders and license holders. One of these institutions is known as *Collecting Management Society* (CMS).

In addition to economic right, copyright also has moral right attached to the creator or doer which cannot be omitted or deleted by with reasons even though the copyright or related right to it is transferred to others. As there is economic right which brings financial profits to it, copyright can be used as a collateral object.

Law Number 28 Year 2014 on Copyright regulates copyright as a movable tangible property than can be used as an object of fiduciary collateral. This will be conducted in accordance with prevailing laws [5]. This means that financial institutions, bank and non bank, will accept copyright as credit collateral.

A property used an object of debt collateral of properties is characterized with an economic value meaning that when the debtor fails to pay his debt, he can use this property to cover the debt. A copyright that can be used as an object of fiduciary collateral should be the one which has economic value is registered in Directorate General of Intellectual Property Right [6]. It should also be under a protection period which ensures the economic value of the property. Fiduciary institution is the most possible collateral institution to which copyright can be pledged as copyright is a movable property and pledging is also recognized in a fiduciary institution [7]. In contrast, however, fiduciary object is a movable tangible property while copyright is a movable intangible property.

Banks, in general, are ready to give loan to a debtor as long as the debtor provides his property as collateral to ensure his debt payment [8].

Copyright is a property which is movable and intangible as regulated in Article 16 Paragraph 3 of Law Number 28 Year 2014 on Copyright (known as UUHC). In this law, copyright can be used as an object of fiduciary collateral [9].

In Article 16 Paragraph 3 Law Number 28 Year 2014 on Copyright it is clearly stated that copyright can be used as a fiduciary object by complying with the procedures regulated in this law. It is known that copyright has an economic value yet, as it is an intangible property, assessing its economic value is not as easy as assessing the economic value of movable tangible properties such as vehicles, land, and jewelry.

Collateral or pledge in a credit agreement is absolute as it is required by the law and there is no loan without collateral. Collateral is required to ensure that debt payment is done in a regular and orderly basis. In credit disbursement process, immaterial collateral is also considered to avoid a perception that banks only accept physical collateral. In a credit disbursement decision making, collateral is considered as a very important part as it plays as a the last resource for the assurance that in case the loan is default, the bank can use the collateral to pay the debt [10].

Fiduciary collateral is resulted to supplement the drawback of pledge collateral [11]. The drawback of pledge collateral is the fact that the collateral object is on the hand of

the pledge holder. When the object is transferred to a pledge receiver, the pledge transferor cannot use the object although it is important and useful for the pledge transferor to run his business. Fiduciary collateral is debt collateral which is tangible (both existing debt and debt to exist). In fiduciary collateral, movable property (can be expanded to unmovable properties) is basically used as collateral, which, however, can be expanded into transferring the control and enjoyment over the collateral object to the debtor (by transferring property right over the object to the creditor) and later the creditor returns the control and enjoyment of the object to the debtor based on trust (fiduciary) [11].

Fiduciary Collateral Law defines fiduciary collateral object in a very wide sense. It covers not only movable tangible and intangible property but also immovable property which cannot be burdened with encumbrance right [12]. In a direct way, this law gives chance to every businessman to get credit by using property he has although the property is intangible such as an intellectual property right. In Article 18 Law Number 28 Year 2014 on Copyright it is mentioned that the copyright of creation of books, and /or music with or without text which is transferred in a true sale agreement and/or indefinitely, can be returned to the creator when the agreement reach a period of 25 years.

Based on the above notion, the questions posed in this article include 1. Type of mechanism which can be used to determine the value of the economic right on song/music copyright which is used as a fiduciary collateral object and 2. The role of collective management institution on conduction the appraisal on the royalty of a song/music copyright.

REVIEW OF LITERATURES

Song and Music Copyright

Song and music copyright is an absolute means available to support the sustainability of business activities including discotheques, karaoke, television, radio, etc. However, there are business activities that survive without music. These reasons are used to differentiate the amount of tariff that should be paid by users of music. This means that the amount of tariff depends on the intensity (role) and extensity (length) of music used [13].

In a society, song and music are excellent means of communication to express ideas and certain feelings. Everybody has his own ideas about the beauty of things that can be expressed in the form of song or music. Music is an art of sound composition related to the beauty and the expression of thought and feeling so that when it is played it can touch the feeling of a person enjoying it [14].

Music is an intact creation consisting of song/melody, lyrics, arrangement, and notation [4]. Musical work is all creation which is currently existing or is to be made later. This includes melody with or without lyrics, arrangement, and adaptation. Meanwhile, a song is a combination of music and lyric text in harmony so that the listeners can feel the message the song conveys.

A music work consists of four creation components, namely basic melody, song lyric, arrangement, and notation. These four components may be the creation of a person or a group of persons. Therefore, a creation work may be owned

by several copyright holders [4].

Music which is resulted from a power of creation, intention, and opus as well as the sacrifice of thought and time of the creator in a reflection of human civilization and dignity. In music, there are morale values which should be respected as recognition of the hard work the creator does. In addition, for the surrounding people [15], song or music creation can give not only enjoyment to fulfill the need of feelings and soul only, but also economic value and even potential business opportunity [14].

In the creation of a song, there must be a creator or creators. They are individuals who, with their talent, thought, inspiration, and imagination they develop, can produce specific and private works [16]. As the owner and holder of a copyright, a creator has an exclusive right to announce, reproduce, and disseminate his creation. This right can be transferred to another party without reducing the limitations stipulated by the prevailing laws. A creator is an individual or a group of individuals who have actualized ideas into a work that can be enjoyed. In other words, a creation of a creator is considered to exist since it is announced or published so that that creation can be seen, listened to, and read [17].

Economic Right³

Economic right is the exclusive right of a creator or a copyright holder to get an economic benefit of a creation [18]. A creator or a copyright holder, as stated in Article 8, possesses an economic right to do [19]:

- a. Publishment of Creation;
4. Reproduction of creation;
- c. Translation of creation;
- d. Adaptation, arrangement, and transformation of creation;
- e. Distribution of creation or its reproduction;
- f. Performance of creation;
- g. Announcement of creation;
- h. Communication of creation;
- i. Rental of creation.

Royalty of Music and Song Creation

Royalty is a reward received by a creator or related right holder for the utilization of economic right of a creation or product (Article 1 Paragraph 21 of Copyright Law). Meanwhile, in *Kamus Besar Bahasa Indonesia* (Great Dictionary of Bahasa Indonesia), it is stated that "Royalty is a compensation to use ownership right over a material or property whose copyright is protected, stated as a percentage received over the use of ownership right [20]".

Royalty is a form of payment paid to a copyright holder or performer over the utilization of his ownership. Royalty is paid based on the agreed percentage of the income resulted from the utilization of ownership or other ways [4]. Royalty has to be paid because a song is a human intellectual creation which has a legal protection. Utilization by other party should be based on the permission of the copyright holder. Royalty payment is a consequence of the utilization of service/creation of others. In daily life, a song is a supporting facility in businesses such as restaurant, discotheque, karaoke, and broadcasting [21].

A payment paid to a creator by an assignee, licensee, or copyright holder. Meanwhile, in *Black's Law Dictionary*, royalty is defined as part of a product or profit received by the

copyright holder giving permission to other party to utilize his copyright [22].

It is royalty which makes a creator have an economic value. Royalty is the essence of economic right of a creator or copyright holder. A royalty shows an appreciation to the hard work and talent of a creator or a copyright holder and a motivation for a creator of copyright holder to create new creations. Without royalty there is no decent appreciation to a creator or copyright holder causing the cease of a creation process or creativity [23].

Both in license agreement between creator and publisher and license agreement between creator and recording producer, payment of royalty over a song creation is regulated. There are two systems of royalty payment in song copyright license agreement, namely [24]:

- a. Flat pay (true sale). It is a full payment of royalty over a song creation. With this system, the song creator no longer has a royalty right from the result of sales of music recording album using his song.
- b. In flat pay system, it can be said that after a creator gives his music and song creation to the copyright holder, the creator will receive an amount of payment at once with no royalty to receive over the utilization of his song in the future.
- c. This flat pay system [25] is also regulated in Article 18 of Copyright Law Year 2014 which states that for a song and/or music with or without text which is transferred based on a true sale agreement and/or indefinite transfer, the copyright is returned to the creator when a time period of 25 years is reached.
- d. Advanced royalty. It is a down payment of a royalty to a song creator. In this system, the song creator still is entitled for the royalty from the sales of music recording album using his song. This royalty is calculated based on recorded songs which are sold.

In advanced royalty system, it can be said that in addition to the down payment paid by copyright holder, the song creator will receive advanced royalty payment when certain parties are interested in utilizing the creations.

Determination of the Amount of Royalty Tariff for Users

Users who commercially use a song or music creation should understand that there is a right of the creator and related right holder in every song used. Procedures stipulated by the government and related elements have been developed carefully.

The determination of the amount of royalty tariff is not regulated in detail in Copyright Law⁷ and Government Regulation but it is formulated in the Decree of Minister of Law and Human Rights the Republic of Indonesia Number HKI.2.OT.03.01-03 Year 2016. It is stated that royalty tariff is determined proportionally based on the best practice prevailing in Indonesia. For the determination of Royalty Tariff, the following considerations should be taken [26]:

- a. Internationally Valid References;
- b. Inputs from Collective Management Institutional;
- c. Inputs from Users;
- d. Appropriateness and Justice;

Review on Copyright as Object of Fiduciary Collateral

In Indonesia, using a creation as a fiduciary collateral object is

a new practice. It started only after the enactment of Law Number 28 Year 2014 so that the regulation about it is not yet comprehensive. According to Law Number 28 Year 2014 on Copyright which regulates copyright as an object of fiduciary collateral, artists can get a loan from a bank by using his creation as collateral. This is stated in Article 16 Paragraph 3 that "Copyright may be used as an object of fiduciary" [27]. This Article does not immediately make banks give their loans easily to artists. This regulation in Article 16 Paragraph 3 of Copyright Law requires further elaboration. This is related to the assurance that the banks will get the loan paid back by debtor (artist). Debt payment assurance by using copyright cannot be separated from the value of a song or whether the song is saleable or not. In general, banks will give loan to a debtor as long as the debtor provides his property as a collateral to assure that the debt will be paid in a regular basis. The regulation in Article 16 Paragraph 3 is related or even depends on other laws as mentioned in Article 16 Paragraph 4 that "The provisions of the Copyright as an object of fiduciary referred to in paragraph (3) shall be implemented in accordance with the provisions of the legislation" [28]. The closest legislation is Law Number 42 Year 1999 on Fiduciary Collateral.

In fiduciary, collateral object is not controlled by creditor but it is still under control of debtor and there is no physical transfer. A written fiduciary agreement needs to be made in the form of notarial deed and it should be registered. There will be no fiduciary collateral if it is not registered. Consequently, when a copyright of a creation is to be made as fiduciary collateral, the creation should be first registered in the Directorate General of Intellectual Property. This registration is important as, in case there is an agreement default, it can be used as a proof that the fiduciary giver is the holder of the copyright and the execution of the economic value of the copyright can be exercised through a parate executie institution.

RESEARCH METHOD

Method of the Study

In order to address the problem formulation and the objectives of the study, a normative legal study method was used. Normative legal study has an important role and use which cannot be neglected in the development and construction of law [29].

A juridical normative approach through laws was used. A descriptive analysis was applied. Through this analysis, the relationship between Das Sollen variables (copyright as movable property collateral) and Das Sein (development of fiduciary object receiver) was described. This relationship was then analyzed by using legal principles, interpretation, and construction. The study was conducted in two stages. In the first stage, a literature study by using primary legal materials including Civil Code, Law Number 28 Year 2014 on Copyright, and Law Number 42 Year 1999 on Fiduciary Collateral was conducted. In the next stage, secondary legal materials including opinions of legal experts, encyclopedia, and other sources were reviewed. No calculation or statistical formulation was used in the legal norm analysis.

This method was used as it was in line with the subject of

this study on the mechanism of economic value determination of a copyright. The study was conducted on principles and norms of property laws and intellectual property right. As ownership is private, a comparative study [30] on laws in developing countries which adopted communal system in applying and protecting copyright of song creation and music. Results of international forums held by World Intellectual Property Organization (WIPO) and other international forums which related to the scope of this study and the settlement of legal cases on song/music copyrights were also reviewed.

DISCUSSION

Mechanism of Determination of the Value of Economic Right on Song/Music Copyright Used as an Object of Fiduciary Collateral

Based on the results of the field study, from the economic perspective, it is known that intangible assets related to copyrights of music and song creation have similar economic and legal characteristics. A song is basically an intellectual work of the creator as the embodiment of his feeling, intention, and creativity. A song creation is an existing creation and is perceived as a property which can be used to fulfill non physical or intangible need. For a creator, an ability to create is not only a talent or gift from god which can be used as a means to express his thought and feeling but also a source of living as the creation he creates has morale and economic values. Music and song are resulted from a power of creativity, creation, intention, and sacrifice of thought and time of the creator. It is also a reflection of humans' civilization and dignity. In a song, there are morale values which should be respected as recognition on the work of its creator. For the surrounding people, the existence of a song creation provides not only enjoyment to fulfill the need of feeling and soul, but also economic values and even potential business opportunity. A creation can have a high value if it can give high economic enjoyment and benefits. The utilization of a highly valuable creation should be properly balanced with an appropriate treatment both in the form of appreciation on the morale and economic rights and high compensation.

In this matter, the position of a copyright owner and holder is clear. In a music and song creation, it can be concluded that a song creator fully owns the right to exploit the songs he creates. The general definition of copyright holder outside the creator (a form of transfer), which is currently rising, is much oriented to the one prevailing in common practices in copyright of literature/written creations. Based on this notion, a study on how a real definition of copyright in music and song creation should be developed worths doing.

Copyright of a music and song creation is permanently attached to the creator or transferred to a music publisher. Music and song publisher which has a transferred copyright has a function to maximize and market music creation. The institution of music and song publisher is usually separated from user institution.

Users of music and song creation play a role in mechanical right (reproduction right) and a recording company. For performing right, the users are institutions

which use music creation for commercial purposes. These include broadcasters, hotels, restaurants, karaokes, discotheques, etc. For printing right, the users include institutions which publish music creations in printed forms of notation (song melody) and lyric for commercial purpose. For synchronization right, users are practitioners combining music creation (audio) with picture/film (visual) for commercial purpose

Music publishers, like song creators, usually take care of everything related to the publication of their creation by themselves. However, many song creators deliver this task to music publishers. In this regard, there are three functions of music publishers, namely:

1. Music publisher takes care of administrative matters or working papers including copyright, license, and royalty collection administration,
2. Music publisher provide assistance in supporting creativity by implementing all possibilities to improve creativity through collaboration with composers or other publisher to maximize song creation,
3. As compensation, publishers charge a fee by up to 50% of the total income for new song creations and 15 to 20% of the total income for songs which have ever been published previously.

Management of song creation is conducted by music publisher. The administration depends on the agreement. There is a song by song administration by which only registered songs are administered by the music publisher. With this kind of management, song creators may give his other songs to another music publisher. On the other hand, in a collective administration a song creator gives all of his songs which have been or are being released and new songs to be managed by a music publisher.

Roles of Collective Management Institution (CMI) for the Appraisal of Royalty of Song/Music Copyright

Because of the responsibilities attached to CMIs, these institutions should represent their members (song and music creators in CMI). CMI should constantly strive for improving royalty collection in karaoke businesses by using various means. Efforts done by CMIs to improve royalty collection in karaoke businesses, according to Enteng Tanamal, can be conducted as follows:

1. Dissemination of requirements for royalty collection
This can be done by inviting various related elements and karaoke businessmen. In addition to disseminating information on the requirements of royalty collection, another output of this activity is the formation of a karaoke business forum. It will be more appropriate if in the determination of the amount of royalty to be collected, involvement and discussion with the party as the object of the royalty collection, namely commercial users. It means that there should be a stage in which an agreement is made and clearly stated. In addition, clear calculation formulation should be clear and stipulated by National Collective Management Institution (NCMI) and agreed by Ministry of Law and Human Rights. Finally, an agreement among commercial song users should also be made. This means that all stakeholders should agree with the amount of the royalty to collect. Dissemination omits

all doubt and obscurity and become a clear proof of the recognition of the economic right which should certainly be the right of the creator, copyright holder, and related right holders. Therefore, dissemination is expected to improve the knowledge about the requirement of royalty collection for commercial song and music users.

2. Persuasive approach to business society
Approach which is conducted continuously is expected to evoke commercial song and music users to pay royalty to an authorized institution such as CMI. Persuasive ability is needed not only by salespersons or people in marketing field. Persuasiveness is needed by everyone to run all aspects of his life more easily. This is true as one with persuasive character will be able to "attract" people around him to agree with the things he does and delivers. Being persuasive is a way to communicate to influence and convince others. Hence, persuasive communication should be done by credible sources who are trusted and expert in their fields. Another component which is not less important is the communicator's existence. It is undeniable that, in a persuasion, a communicator whose name is already popular will get attention more easily than those who are not popular [31]. For this purpose, in a dissemination program, a senior artist who is also a founder of CMI is sometimes asked as a speaker to talk about the function of royalty collection. Therefore, in order to reach the success in persuasive communication, communicator existence factor should be taken into consideration. With this persuasive communication, businessmen who initially reject or do not agree with the idea, are expected to reversed their opinion from disagree to agree to the subject.
3. Make a target of income from royalty collection in every local CMI in every region [32].
Setting a target of income from royalty collection in every local CMI in every region can be an effective way to increase royalty collection. Certainly, reachable users should be widen so that royalty collection can be higher than that in previous years.

CONCLUSION

Based on the above discussion, it is concluded that:

1. Advancement in information technology in Indonesia has resulted in significantly increased people's creativity, economic value of copyright. The economic value of a copyright is not merely resulted from making regulations on copyright as an object of fiduciary collateral. Therefore, the government should also coordinate all related institutions including Directorate of Law and Human Rights, CMIs, public assessment services, and Bank of Indonesia.
2. Royalty collection by CMI based on Law Number 28 Year 2014 is not yet effective. This is reflected in the fact that three of five requirements of effectiveness (Soerjono Soekanto), namely the second, fourth, and fifth factors about law enforcement, public, and culture still need further handling. Mechanism of royalty collection is started with delivery of power by a creator or copyright holder to CMI to collect the royalty, announce the delivery

of the use of his copyright to other party for commercial purposes.

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