

## 5. USING INTELLECTUAL PROPERTY RIGHTS AS LOAN COLLATERAL IN INDONESIA

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### ABSTRACT

Intellectual Property Rights (IPRs) are a set of property rights that have economic value. Each of these rights serves as an asset or source of income for those who own it. As a property right, IPRs are able to function as collateral for borrowing funds from financial institutions like banks. This practice is common in many countries but not in Indonesia. Currently, all Indonesian banks only accept tangible assets as collateral to obtain loans. Accepting IPRs as loan collateral would be a great assistance to owners of Indonesian small-medium enterprises (SMEs), especially first starters. All SME owners need capital to finance their businesses and most of them expect to get the funds through bank loans. However, they rarely have tangible assets that can be used as loan collateral. Therefore, if banks accept their IPRs as loan collateral, SME owners would get the utmost benefits of IPRs. While the idea of using IPRs as loan collateral is beneficial, its realization in Indonesia requires a number of things to happen. At present, the Government of Indonesia (Gol) is preparing regulations that support the realization of this idea. In this preparation, it is understood that these regulations go beyond the sphere of IP law.

**Keywords:** *Intellectual Property Rights, Loan Collateral, Indonesia*

### 1. INTRODUCTION

There is no doubt that Intellectual Property Rights (IPRs) have economic value. These rights, just like tangible assets, can be used as collateral for borrowing money from financial institutions. Allowing IPRs to function as loan collateral helps entrepreneurs, especially from SMEs, who do not have tangible assets, to borrow from financial institutions. Yet, using IPRs as loan collateral is an uncommon practice in Indonesia not just because the benefits of IPRs are not widely known in the country, but also because the government has not prepared the supporting system to realize the use of IPRs as loan collateral in Indonesia yet. This paper discusses what preparations have been made by the Gol to make IPRs acceptable as loan collateral in the country.

### 2. THE ROLE OF SMES IN INDONESIA

Small and Medium Enterprises (SMEs)<sup>1</sup> are an important part of the economy of Indonesia. The number of SMEs in

Indonesia is huge, accounting for 56.534.592 units in 2012 and 57.895.721 units in 2013.<sup>2</sup> These numbers comprise 99.99 per cent<sup>3</sup> of the total number of business units in Indonesia in both years.

Because of their enormous number, SMEs contribute significantly to the Gross Domestic Income (GDI) and have become massive providers of employment in Indonesia. During 2013, SMEs contributed more than IDR 5.4 trillion to Indonesia's GDI. The percentage of SME contribution to the total GDI is more than 60 per cent of the total national GDI.<sup>4</sup> With regard to labour absorption, SMEs provided employment to 107,657,509 people in 2012 and the number increased (6.03 per cent) to 114,144,082 in the following year.<sup>5</sup>

Indonesia's first brush with IPRs occurred under the Dutch colonial administration. Since then, IP has developed as a part of the Indonesian legal system. However, the utilization of IPRs is low among residents of the country. Data shows that Indonesia paid USD 1,736,373,354 and only received USD 51,972,617 as charges for the use of Intellectual Property<sup>6</sup> (IP) in 2013.<sup>7</sup> This means that it

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enterprises into three categories, namely micro, small and medium, based on assets and annual turnover. Micro and Small enterprises have total assets from less than IDR 50 million to IDR 500 million and annual turnover from less than 300 million to IDR 2,5 billion. Total assets for medium enterprises are between more than IDR 500 million and IDR 10 billion with annual turnover between IDR 2,5 billion and IDR 50 billion. The term 'SME' is used not only to designate small (SEs) and medium enterprises (MEs) in this article, but also applies to micro enterprises (MIEs). In other words, MIEs and SEs will be categorized as SEs.

<sup>2</sup> Kementerian Koperasi dan Usaha Kecil dan Menengah Republik Indonesia, 'Data UMKM 2012-2013' (*Kementerian Koperasi dan Usaha Kecil dan Menengah Republik Indonesia*, 2015) <[http://www.depkop.go.id/index.php?option=com\\_phocadownload&view=file&id=335:data-usaha-mikro-kecil-menengah-umkm-dan-usaha-besar-ub-tahun-2012-2013&Itemid=93](http://www.depkop.go.id/index.php?option=com_phocadownload&view=file&id=335:data-usaha-mikro-kecil-menengah-umkm-dan-usaha-besar-ub-tahun-2012-2013&Itemid=93)> accessed 25 September 2015.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Charges for the use of IP are the amount of money in US Dollars paid and received between residents and non-residents for the permitted use of proprietary rights (i.e. patents, trademarks, copyrights, industrial designs, trade secrets and franchises). Also, it includes payments and receipts for the use of produced originals or prototypes (i.e. copyrights on books and manuscripts, computer software, cinematographic works, and sound recordings) and related rights (i.e. stage performances and television, cable or satellite broadcast). See, 'Data: Charges For the Use of Intellectual Property, Payments (BoP, current US\$)' (*World Bank*, 2015) <<http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries>> accessed 15 August 2015.

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<sup>1</sup> There are various definitions of SMEs in the world; however, in this article, the definition of SMEs follows what has been provided in a relevant law that applies in Indonesia, namely Law No 20 of 2008 on Micro, Small and Medium Business. It classifies

spends a higher amount of money than it earns from IPRs. Rather than being a creator, it has become a market for non-resident IP producers. Therefore, there is an enormous opportunity for Indonesia to reap the full economic benefits of its IP.

### 3. INTELLECTUAL PROPERTY IN INDONESIA

An IP system has existed in Indonesia since the first half of the nineteenth century. The Dutch colonial administration introduced IP protection through the enactment of legislation<sup>8</sup> and the ratification of some international IP agreements, which not only bound the country, but also had legal effect in its colony, the Dutch East Indies, which is now known as Indonesia. After attaining independence in 1945, Indonesia inherited a set of national IP laws and international agreements, which had been passed and ratified during the Dutch colonial period. At the domestic level, Indonesia continued to apply the Copyright Law of 1912, the Trade Mark Law of 1912, and the Patent Law of 1910. At the international level, Indonesia was a party to the Paris Convention of 1883 on Industrial Property, The Hague Agreement of 1925 on the International Deposit of Industrial Designs, the 1911 Washington revision of the Madrid Agreement of 1891 on the Repression of False or Deceptive Indications of Source on Goods and the Berne Convention of 1886 on the Protection of Literary and Artistic Works.<sup>9</sup>

In the first two decades after independence, IPRs were considered as an impediment to development in Indonesia. As a young developing country, Indonesia needed the transfer of knowledge and technology from developed countries to boost its economy. When there was a change of regime in 1965, Western industrialized countries were invited to support Indonesia financially through international financial organisations, like the IMF and the World Bank.<sup>10</sup> The involvement of Indonesia in these international financial organisations was intended to attract foreign investment to the country. However, in spite of the fact that legal certainty in the area of IPRs would support foreign investment, the government

continued to neglect these issues at that time. Compared to international standards, the legal protection of IPRs in Indonesia was inadequate and, to make matters worse, enforcement was lax.

In the mid-1980s, the price of oil, which had become the primary source of income of the country dropped significantly, causing an economic crisis in Indonesia. To recover from this crisis, Indonesia had no option but to adjust its economic policies in favour of investors, one of whose concerns was the inadequacy of IPR protection in the country. At the same time, US concern about the infringement of its IPRs in developing countries increased. The US government employed persuasive<sup>11</sup> and coercive<sup>12</sup> strategies to stop the infringement of US IP in developing countries.

As a consequence, many initiatives were taken by the Gol to protect IPRs within its borders. Indonesia passed the first national copyright law in 1982 that revoked the 1912 Copyright Law made by the Dutch administration. Nevertheless, the law was still considered weak by the standards of the Berne and Rome Conventions. In the area of patents, the response of the Indonesian government was to pass the first national Patent Law in the year 1989. Prior to that, in 1953, the Gol had passed two decrees, the Decree of the Minister for Justice No JS. 5/41/4 and the Decree of the Minister for Justice No JG. 1/2/17 which provided for the provisional registration of domestic and foreign patent applications respectively. Both legal instruments served as provisional rules to fill the legal hiatus that had emerged in the patent administration since the 1910 Patent Law made by the Dutch colonial government was no longer relevant<sup>13</sup> in Indonesia.

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<sup>7</sup> Ibid.

<sup>8</sup> The first legislation introduced in the East Indies was an Act of the Granting of Exclusive Rights to Inventions, Introductions and Improvements of Objects of Art and of the People's Diligence, which was previously implemented in the Netherlands in 1817 and extended to the colony in 1844. After that, in 1871, provisions on trademark were first introduced providing that a deposit of seals, stamps and trademarks were protected in the Criminal Code. Several years later, in 1885, a complete trademark law was passed in the East Indies. See C. Antons, 'Indonesia' in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 87.

<sup>9</sup> C. Antons, *Intellectual Property Law in Indonesia* (Christopher Heath ed, 1st edn, Kluwer Law 2000), 44.

<sup>10</sup> Ibid 31.

<sup>11</sup> There were continuous rounds of diplomatic meetings between these two countries with an agenda of improving IP protection in Indonesia during that period. Ibid.

<sup>12</sup> The US government threatened to impose trade sanctions. For example, in 1986, the US threatened to cancel the Generalized System of Preferences (GSP) if Indonesia did not improve its IP protection by October 1987. GSP is a US program which provides preferential duty-free entry for about 4800 products from 131 designated beneficiary countries and territories. See The Office of the United States Trade Representative, 'Generalized System of Preference' (2009) <<http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>> accessed 24 June 2009.

<sup>13</sup> The Patent Law of 1910 was in contradiction of Indonesia's sovereignty since it provided that the substantive examination of patent application had to be done in the Netherlands and the Patent Office in Jakarta would only be a branch that could not grant patents. See Sudargo Gautama and Robert N. Hornick, *An Introduction to Indonesian Law: Unity in Diversity* (Alumni Press 1972), 8; Affifah Kusumadara, 'Analysis of the failure of the implementation of intellectual property laws in Indonesia' (PhD, University of Sydney 2000) 55.

The development of trademark law was a bit different. Trademark law was one area of IP law which saw legislation even before the 1980s. Indonesia had already enacted the first national trademark Law in 1961, which had mainly adopted the provisions of the colonial Trademark Law of 1912.<sup>14</sup> However, protection provided by the law, which applied the 'first to use' rather than the 'first to file' in its trademark registration system, did not satisfy countries looking to invest. At the time, there were massive infringements of well-known trademarks and production of counterfeit products in the country<sup>15</sup> that resulted in protests from international well-known trademark owners and US pressure on the Indonesian economy. In response to this, the Minister for Justice issued two decrees in 1987 and 1991 to protect foreign well-known trademarks for both the same and different kinds of goods respectively.<sup>16</sup> Following that, Indonesia passed a new Trademark Law in 1992, which employed the 'first to file' system of trademark registration.

In 1994, Indonesia joined the World Trade Organization, which necessarily involved the ratification of the TRIPS Agreement. As a developing country, Indonesia was entitled to delay the implementation of TRIPS for up to 5 years. However, because the country was not yet ready at that date, the agreement took effect fully a year later in 2001.<sup>17</sup> Shortly before the GoI accepted its full obligation to implement TRIPS in 2001, a package of IP laws that were adjusted to match the TRIPS minimum standards were enacted. These IP laws are: Law No 29 of 2000 on Plant Variety Protection, Law No 30 of 2000 on Trade Secrets, Law No 31 of 2000 on Industrial Design, Law No 32 of 2000 on Integrated Circuit Layout Design, Law No 14 of 2001 on Patent Law, and Law No 15 of 2001 on Trade Mark. One year later, Law No 19 of 2002 on Copyright was passed. In 2014, Indonesia revoked the 2002 Copyright Law and replaced it with a new one, Law No. 28 of 2014.

#### 4. UTILIZATION OF IPRS IN INDONESIA

Although the laws that form the core of IPR have been issued and finalized, the implementation of these laws has never been effective. Part of the problem is the time it

takes to issue the required implementing decree<sup>18</sup> for IP.<sup>19</sup> Despite the fact that the core legislation had been passed several years earlier, some legislations for crucial IP issues, such as patent compulsory license<sup>20</sup> and well-known trademarks<sup>21</sup> still lack the necessary implementing decree. One possible explanation for the delay in the issuance of such implementing decrees may be that the government believes it needs to prioritize other issues that are far more important to the country than IPR. It is overwhelmed by an abundance of complex issues, such as poverty, politics, and natural disasters and IPR has not been a highly prioritized issue.

Beyond legislation, the GoI has also carried out reforms in other areas, such as administration, enforcement, and court proceedings.<sup>22</sup> For example, the branch agencies of the Department of Law and Human Rights at the provincial and district levels were given the power to receive applications for IPR in 2001.<sup>23</sup> Before that, applications for IPR were only submitted to the central office of the *Direktorat Jenderal Hak Kekayaan Intelektual* (Directorate General of Intellectual Property Rights - DGIPR) in Tangerang-West Java.<sup>24</sup> Other reforms include the transfer of most IP disputes settlement<sup>25</sup> at first instance to the Commercial Court from the District Court<sup>26</sup> and the simplification of procedural laws related to settlement of IP cases in the Commercial Court.<sup>27</sup>

<sup>18</sup> This decree contains details of practical implementation to enable legislation to work properly in Indonesia.

<sup>19</sup> C. Antons, 'Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments' (2006) 1 *Journal of Information, Law and Technology* 1, 3.

<sup>20</sup> An implementing decree for a compulsory license has been requested to regulate compulsory license issues in Indonesia in the 2001 Patent Law: Elvani Harifaningsih and Suwantin Oemar, 'Lisensi Wajib Terbantur PP (Compulsory License is Hindered by Government Regulation)' *Bisnis Indonesia* (Jakarta, 12 June 2009).

<sup>21</sup> Implementing decree for well-known trademark has been required by the 1997 Trademark Law and then again by the 2001 Trademark Law. Suwantin Oemar, 'Jangan Gantung PP Merek Terkenal (Don't Delay Government Regulation on Well-Known Trademark)' *Bisnis Indonesia* (Jakarta, 24 June 2008) <<http://haki.depperin.go.id/advokasi-hukum/cetak.php?id=100>> .

<sup>22</sup> S. Sinaga, 'Intellectual Property Law in Indonesia After 2001' (2013) 25 *Mimbar Hukum* 152.

<sup>23</sup> *Minister of Justice and Human Rights Decree No M.11.PR.07.06 of 2003 on The Assignment of the Regional Office of Department of Justice and Human Rights to Receive IPR Application* (2003).

<sup>24</sup> Antons, 'Intellectual Property Law in Indonesia' (n 13), 44.

<sup>25</sup> Related to IP, the Commercial Court only has jurisdiction over copyright, patents, trademarks, industrial designs and the layout design of integrated circuit disputes. Sinaga (n 26) 156.

<sup>26</sup> The transfer is meant to reduce burden of the District Court, so IP cases could be settled in a shorter time. *Ibid.*

<sup>27</sup> All of the IP appeal requests, except in cases related to trade secrets and plant variety protection, can skip the appeal process

<sup>14</sup> Antons, 'Intellectual Property Law in Indonesia' (n 13) 204.

<sup>15</sup> Among the cases, there were two famous cases involving 'Pierre Cardin' and 'Levis' trademarks. All levels of Indonesian court made decisions, which upheld the local company's registration of those two international well-known trademarks. See Kusumadara (n 17) 108–109; A. Rosser, *The Politics of Economic Liberalisation in Indonesia: State, Market and Power* (1st edn, Curzon 2002) 155.

<sup>16</sup> Rosser, 'The Politics of Economic Liberalisation in Indonesia' (n 19) 205.

<sup>17</sup> 'Indonesia Admits Failure in Implementing WTO Commitments' *The Jakarta Post* (online, 22 December) <<http://www.thejakartapost.com/news/1999/12/22/indonesia-admits-failure-implementing-wto-commitments.html>> .

Despite all reforms done by the GoI, utilization of IPRs among local entrepreneurs, particularly among SMEs, is low. The number of IPRs applied for by an Indonesian resident actually outnumbered IPR applications filed by non-residents in 2013 (see table below); however, as mentioned earlier, Indonesia received only around one third of what the country paid for charges for the use of IP in 2013.<sup>28</sup> This means that compared to the total population of Indonesia, which is more than 255 million people, the number of IPR applications by Indonesian residents is insufficient to result in commensurate financial benefits of IPRs to the Indonesian economy.

**Table 1. Statistic of IPRs Application in Indonesia (2013)**<sup>29</sup>

| IPRs              | Resident | Non- Resident |
|-------------------|----------|---------------|
| Trademark         | 44,288   | 16,698        |
| Patent            | 663      | 6,787         |
| Industrial Design | 2,771    | 1,488         |
| Utility Model     | 233      | 116           |

There is no comprehensive statistical data that explains the extent of IPR use among Indonesian SMEs. The only data available is on the application of industrial design in 2013 that includes SME and non-SME categories.<sup>30</sup> Nevertheless, the data seems invalid since out of 4,251 applications of industrial design filed in 2013, only 7 applications have come from the SMEs category. Although the data is rare, based on a quick overview of trademark applications in Indonesia between 2009-2013, it may be assumed that only a small percentage of Indonesian SMEs register their trademark. In this context, the total number of domestic trademark applications for the years between 2001 and 2013 is around 440,000,<sup>31</sup> while the number of

in the High Court and go directly to the Supreme Court. It has the effect of shortening the time required to settle the disputes. Ibid, 157.

<sup>28</sup> See above sub-chapter "Key Facts on Indonesia", 3.

<sup>29</sup> World Intellectual Property Organization, 'Statistical Country Profiles: Indonesia' (2015) <[http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=ID](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=ID)> accessed 11 September 2015.

<sup>30</sup> Direktorat Jenderal Hak Kekayaan Intelektual Republik Indonesia, 'Statistik HKI Tahun 2013-14 (Statistics of IPRs 2013-14)' (2015) <[https://www.dgip.go.id/images/adelch-images/pdf-files/statistik/statistik\\_hki\\_jadi\\_2013-2014.pdf](https://www.dgip.go.id/images/adelch-images/pdf-files/statistik/statistik_hki_jadi_2013-2014.pdf)> accessed 23 September 2015.

<sup>31</sup> Direktorat Jenderal Hak Kekayaan Intelektual - Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia (Directorate General of Intellectual Property Rights - Ministry of Law and Human Rights of Republic of Indonesia, 'Permohonan Pendaftaran Merek Asing & Domestik Tahun 2001 s.d. 2011 (Application of Foreign and Domestic IP Registration from 2001 to 2011)'

Indonesian SMEs is estimated to be around 57.8 million in 2013.<sup>32</sup> This means that only 0.76 per cent SMEs seek protection for a trademark. Compared to other IPR applications, such as for copyright, patents and industrial designs, statistics show that the number of applications in the trademark field in Indonesia is higher.<sup>33</sup> Thus, it may be concluded that the use of other IPRs, which require registration to obtain protection (that is, copyright, patents, industrial designs, layout design (topography) of integrated circuits, and PVP) in the Indonesian business sector is even lower than the percentage mentioned above for trademark applications.<sup>34</sup>

There are various reasons why the utilization of IPRs is so low among Indonesian SMEs. These include a complicated and lengthy registration process, high costs and weak IP law enforcement which make SMEs reluctant to use IPRs in their business activities.<sup>35</sup> Another reason offered is that SMEs do not have sufficient knowledge of the benefits of IPRs.<sup>36</sup> Since Indonesia ratified the TRIPS in 1994 and adjusted its IP legislations to the standard of TRIPS, the GoI, primarily through the Directorate General of Intellectual Property Rights, has actively promoted the importance of IPRs to Indonesian entrepreneurs through various programs. Yet, such programs are given low priority in terms of their budgets, are poorly designed, and are not implemented on a national scale.<sup>37</sup> In addition, compared to the number of Indonesian entrepreneurs, the programs are insufficient and discuss merely legal aspects

(Directorate General 2011) <<http://www.dgip.go.id/ebscript/publicportal.cgi?ucid=376&ctid=3&type=0&id=123>> accessed 2 May 2011; Direktorat Jenderal Hak Kekayaan Intelektual - Republik Indonesia, 'Statistik Merek (Statistic of Trademark)' (Direktorat Jenderal Hak Kekayaan Intelektual - Republik Indonesia, 2014) <<https://www.dgip.go.id/statistik-merek>> accessed 25 September 2015; World Intellectual Property Organization (n 35).

<sup>32</sup> Kementerian Koperasi dan Usaha Kecil dan Menengah Republik Indonesia, 'Data UMKM 2012-2013' (n 7).

<sup>33</sup> For detailed statistics for copyright, patents, and industrial designs, see the website of the Directorate General of Intellectual Property Rights, <<http://www.dgip.go.id/ebscript/publicportal.cgi?ucid=376&ctid=4&type=0&id=139>>.

<sup>34</sup> S. Sinaga, 'Utilization of Intellectual Property Rights By Indonesian Small and Medium Enterprises: A Case Study of Challenges Facing The Batik and Jamu Industries' (University of Wollongong 2012) 7.

<sup>35</sup> S. Sinaga, 'Faktor-Faktor Penyebab Rendahnya Penggunaan Hak Kekayaan intelektual di Kalangan Usaha Kecil Menengah Batik (Factors that Cause Low Utilization of Intellectual Property Rights Among Small Medium Enterprises in Batik Industry)' 21 *Ius Quia Iustum* 61, 70-77.

<sup>36</sup> Sinaga, 'Utilization of Intellectual Property Rights By Indonesian Small and Medium Enterprises' (n 40) 277-278 & 329-331.

<sup>37</sup> Ibid, 226.

of IPRs (how to protect IPRs and the benefits of IPRs protection). They rarely discuss other more relevant issues to the business sector, such as how to market IPRs and how to increase the value of IPRs. For most entrepreneurs, especially small and medium ones, the marketability of their products and services is more important than the protection of their assets.

## 5. INTELLECTUAL PROPERTY RIGHTS AS LOAN COLLATERAL IN INDONESIA: CURRENT SITUATION AND PREPARATION FOR IMPLEMENTATION

### A. CURRENT SITUATION

Apart from the initiatives which are insufficient to promote the utilization of IPRs, there is another Gol program related to IPRs, which deals with the promotion of a creative economy. This program was started in 2007 and is expected to come to fruition in 2025. The creative economy, which includes creative industries, is believed to be suitable for Indonesia, which has rich and diverse cultures and a great deal of creative human resources.<sup>38</sup> Patent, copyright, trademark, and industrial design rights are regarded as IPRs essential to support and give protection to creative industries in Indonesia.<sup>39</sup>

The idea of developing the creative economy of Indonesia has been taken up with full force. It was reflected in the issuance of Presidential Instruction No 6 of 2009 on the development of the creative economy.<sup>40</sup> The former President of Indonesia, Susilo Bambang Yudhoyono, in this instruction, requests the officials who head 27 government agencies<sup>41</sup> and all heads of regional governments (governors and regents/mayors) to support the policy of

The Development of Creative Economy 2009–2015,<sup>42</sup> which focuses on 14 sub-sectors of the creative industry.<sup>43</sup> While there have been new governments in power since October 2015 after Yudhoyono's regime, creative economy programs have been continued. Even the current President of Indonesia, Joko Widodo, has established a special agency, *Badan Ekonomi Kreatif* (Creative Economy Agency - CEA) that has been managing creative economy issues in Indonesia since January 2015.<sup>44</sup>

The idea of a creative economy is worth mentioning here not just because IPRs are a way to meet the target of developing creative industries in Indonesia. In addition to that, the creative industry is dominated by SMEs<sup>45</sup> which need financial assistance to start up and run their businesses. However, lending distribution to the Indonesian creative industry is relatively low. As per Central Bank of Indonesia records from August 2014, only 17.4 per cent credit (IDR 115.4 trillion) was disbursed to the creative industry sector.<sup>46</sup> Banks, as the most common financial institutions which disburse loans to Indonesian SMEs, have strict conditions related to the approval of loan applications. According to Indonesian banking law,<sup>47</sup> a bank needs to apply the precautionary principle in processing loans from their consumers. The precautionary principle is applied by assessing five elements, namely character, capacity, capital, collateral and condition of the economy.<sup>48</sup> Among these five elements, collateral is the

<sup>38</sup> Ibid, 196.

<sup>39</sup> Departemen Perdagangan [Department of Trade], *Rencana Pengembangan Ekonomi Kreatif Indonesia 2009-2015* (Department of Trade 2008) 35.

<sup>40</sup> *Instruksi Presiden No 6 Tahun 2009 tentang Pengembangan Ekonomi Kreatif [Presidential Instruction No 6 of 2009 on the Development of the Creative Economy] (Indonesia)* (2009)

<sup>41</sup> These government agencies are: the Coordinating Ministries for People's Welfare; Economic Affairs; and Ministries of Trade; Industry; Finance; Justice and Human Rights; Agriculture; Communication and Information; Culture and Tourism; National Education; Foreign Affairs; Home Affairs; Manpower and Transmigration; Public Works; Forestry; Marine Affairs and Fisheries; Energy and Mineral Resources; Transportation; National Development Planning; Cooperatives and Small Medium Enterprises; Research and Technology; State-Owned Enterprise; Environment; Agency for the Assessment and Application of Technology (*Badan Pengkajian dan Penerapan Teknologi* – BPPT); the Indonesian Institute of Sciences (*Lembaga Ilmu Pengetahuan Indonesia* - LIPI); Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* – BKPM); and National Standardisation Agency of Indonesia (*Badan Standarisasi Nasional*).

<sup>42</sup> *Instruksi Presiden No 6 Tahun 2009 tentang Pengembangan Ekonomi Kreatif [Presidential Instruction No 6 of 2009 on the Development of the Creative Economy] (Indonesia)*.

<sup>43</sup> The 14 sub-sectors of creative industry mentioned in the Instruksi Presiden No. 6 Tahun 2009 are advertising; architecture; art and antique markets; handicraft; design; fashion (mode); film, video, and photography; interactive games; music; performing arts; publishing and printing; computer and software service; radio and television; and research and development; Ibid art 2.

<sup>44</sup> 'Harapan Para Pekerja Seni terhadap Badan Ekonomi Kreatif (Hope of the Art Workers to Creative Economy Agency)' *Suara Pembaruan* (Jakarta, 29 January 2015) <<http://sp.beritasatu.com/ekonomidanbisnis/harapan-para-pekerja-seni-terhadap-badan-ekonomi-kreatif/76432>> accessed 15 October 2015.

<sup>45</sup> There are no detailed statistics on the number of SMEs in the Indonesian creative industry; however one can conclude SMEs dominate the creative industry sector as 99.99 per cent of the total number of business units in Indonesia are SMEs. See also above p. 2.

<sup>46</sup> Muhammad Khamdi, 'BI: Kredit untuk Industri Kreatif Sangat Kecil (Central Bank of Indonesia: Credit for Creative Industry is Very Small)' *Bisnis Indonesia* (Jakarta, 25 Nov 2014) Finansial <<http://finansial.bisnis.com/read/20141125/90/275382/bi-kredit-untuk-industri-kreatif-sangat-kecil>> accessed 19 October 2015.

<sup>47</sup> Law No. 10 of 1998 on Banking, which amended Law No. 7 of 1992 on Banking.

<sup>48</sup> Elucidation of Article 8 of Law No. 7 of 1992 on Banking.

most difficult requirement for SMEs, especially those which have just started their business. Therefore, this is one reason for the low percentage of loan distribution for SMEs in Indonesia.<sup>49</sup>

Lack of capital is certainly a major obstacle that hampers the development of SMEs in the Indonesian creative industry. It becomes worse when they experience difficulty in accessing credit from banks.<sup>50</sup> This also has a negative impact on the success of the creative economy program, the target for which has been set as 2025.<sup>51</sup> Accordingly, the GoI has begun looking for solutions to help SMEs, especially those in the creative industry, to access loans from banks. One possible solution is allowing IPRs to be used as loan collateral for banks.

## B. PREPARATION TO INCORPORATE IP AS COLLATERAL IN THE INDONESIAN LEGAL SYSTEM

Although it is a new idea in Indonesia, some countries have used IPRs as loan collateral earlier. For example, in 2008, the government of China, through the State Intellectual Property Office (SIPO), launched the pilot IPRs pledge financing project, which uses patent as loan collateral.<sup>52</sup> In 2013, the project has been initiated with several rounds in 29 regions with a total credit amount of CNY 25.4 billion distributed.<sup>53</sup> Another example is that of Malaysia which allocated a budget of RM 200 million to Malaysian Debt Ventures Bhd (MDV) for developing the IP financing fund scheme with IPRs in 2013. Malaysian SMEs in the areas of biotechnology, green technology, advanced technology, and information, communication and technology (ICT) with IPRs will be able to use their IPRs as collateral to obtain funding. Under this scheme, the government of Malaysia provides 2 per cent interest rate subsidy and guarantee of 50 per cent through the Credit

Guarantee Corp.<sup>54</sup> All these examples have inspired the GoI to use IPRs as loan collateral in the country.

The National Law Development Agency (NLDA) under the Ministry of Law and Human Rights took the initiative to prepare for this move. It organized two events in 2013 and 2014 to discuss this matter. The first event was a seminar held in Bandung in 2013 and the other event was a 2014 workshop in Jakarta. The events concluded discussion on some issues such as regulation, method of appraisal, risks posed, and coordination among relevant agencies, that need to be resolved if IPRs will have to be accepted as loan collateral by Indonesian banks.<sup>55</sup>

Currently, in terms of regulation, the only law that deals with the issue is Law No. 28 of 2014 on Copyright, which was passed in 2014. Article 16 (3) provides that 'Copyright may be used as object of *fiducia* security'. According to Law No. 42 of 1999 on *Fiducia* Security, *fiducia* is a transfer of title of an asset on the basis of trust with the condition that the asset be in the possession of the owner of the object.<sup>56</sup> A *fiducia* is a security interest on movable assets, whether tangible or intangible, and on immovable goods that are not subject to a (i) *Hak Tanggungan*<sup>57</sup> under the Security Rights Law; (ii) hypothec on ships with gross tonnage of 20 meters<sup>3</sup> or more; (iii) hypothec on aircraft; or (iv) pledges.<sup>58</sup> Since IPRs are movable assets, in theory, *fiducia* security would be applicable to IPRs. Accordingly, Indonesian lawmakers can include provisions on *fiducia* security in the new Indonesian Copyright Law.

The inclusion of such a provision must be done in other Indonesian IP laws as well.<sup>59</sup> At this moment, there are drafts of three Indonesian IP Laws on Trademark Law and

<sup>49</sup> Naomi Siagian, 'Perlu Skema Pendanaan Kreatif untuk UMKM: UMKM sulit memenuhi jaminan tambahan yang diminta bank. (Need Creative Financial Scheme for Micro, Small and Medium Enterprises (MSMEs): MSMEs are Difficult to Fulfill Additional Collateral Required by Banks.)' *Sinar Harapan* (Jakarta, 15 June 2015) Financial <<http://www.sinarharapan.co/news/read/150616035/perlu-skema-pendanaan-kreatif-untuk-umkm>> .

<sup>50</sup> No additional collateral, high interest rate and lack of capability in making financial reports have been mentioned as factors that make SMEs difficult to access loan from Banks in Indonesia. Ibid.

<sup>51</sup> 'Creative Economy: Rencana Jangka Panjang' <<http://program.indonesiakreatif.net/creative-economy/>> accessed 15 October 2015.

<sup>52</sup> SIPO, Brief on Intellectual Property Development in China, IPSDM 2014, Tokyo, Japan <[https://www.jpo.go.jp/torikumi\\_e/ibento\\_e/program/img/BriefOnIPInChina.pdf](https://www.jpo.go.jp/torikumi_e/ibento_e/program/img/BriefOnIPInChina.pdf)> accessed on October 13, 2017.

<sup>53</sup> 'Patent Right Pledge Financing Amounted to 25 Billion Yuan' <[http://english.sipo.gov.cn/news/official/201402/t20140226\\_907967.html](http://english.sipo.gov.cn/news/official/201402/t20140226_907967.html)> accessed 16 October 2015.

<sup>54</sup> 'BUDGET 2013: Venture Company MDV to Launch Intellectual Property Fund for SMEs' <<http://www.mdv.com.my/en/budget-2013-venture-company-mdv-launch-intellectual-property-fund-smes/>> accessed 16 October 2015.

<sup>55</sup> *Prosiding: Lokakarya Penyiapan Regulasi Hak Kekayaan Intelektual Sebagai Alat Kolateral Dalam Sistem Hukum Nasional (Proceeding: Workshop on Preparation of Intellectual Property Regulation as A Collateral in the National Legal System)* (Badan Pembinaan Hukum Nasional (National Law Development Agency) 26-28 Maret 2014) 91-92.

<sup>56</sup> Article 1 (1) of Law No. 42 of 1999 on *Fiducia* Security.

<sup>57</sup> *Hak Tanggungan* or land security right is security interest that may be granted over certain types of titles to land. This security right can only be imposed on a right of ownership, a right of development and a right of use. See Law No 4 of 1996 Regarding Security Rights Over Land and Goods Attached to Land; Darrel R. Johnson, Muhammad Kadri and Astrid A. Sihombing, 'Indonesia: Enforcement of Security Interests in Banking Transactions' Bank Finance and Regulation: Multi-jurisdictional Survey <[http://www.ibanet.org/LPD/Financial\\_Services\\_Section/Banking\\_Law/BankingLawSurveyApril2010.aspx](http://www.ibanet.org/LPD/Financial_Services_Section/Banking_Law/BankingLawSurveyApril2010.aspx)> 3.

<sup>58</sup> Johnson, *ibid*.

<sup>59</sup> *Prosiding* (n 59) 92.

Patents that are being discussed in the House of Representatives of the Republic of Indonesia.<sup>60</sup> The House is expected to pass these three drafts as Laws by 2019 at the latest.<sup>61</sup> In addition, similar provisions need to be inserted in other IP legislations<sup>62</sup> which have not been considered for renewal or amendment yet. The GoI also needs to harmonize laws and regulations in other relevant areas apart from IP, such as corporate, share market, banking and finance, in order to facilitate transactions which utilize IPRs as loan collateral.<sup>63</sup>

Additionally, it is also important to set up an appraisal agency that assesses the value of IPRs, which will be used as loan collateral.<sup>64</sup> Currently, there is no agency that offers such service in Indonesia; although any accounting firm might be able to do a valuation on IPRs if the model of assessment is agreed on in Indonesia. It would be a good idea for the GoI to learn from neighbouring countries, such as China and Malaysia, which have already introduced the use of IPRs as loan collateral and formed the model assessment. The appraisal agencies must also have good understanding and coordination with other relevant stakeholders, such as banks, the Directorate General of Intellectual Property and the Financial Services Authority.

## 6. CONCLUSION

The idea of IPRs being accepted as collateral by Indonesian banks is still at an early stage. Nevertheless, it is certain that the idea would result in a lot of benefits to Indonesian businesses, especially SMEs. Moreover, it would also support the creative economy program in Indonesia, the most important target for which is SMEs in the creative industry. In order to realize this idea in Indonesia, there is work to be done with respect to the harmonization of IP laws and related legislations, coordination between relevant organizations and the setting up of an assessment model for IP valuation.

## BIBLIOGRAPHY

*Prosiding: Lokakarya Penyiapan Regulasi Hak Kekayaan Intelektual Sebagai Alat Kolateral Dalam Sistem Hukum Nasional (Proceeding: Workshop on Preparation of Intellectual Property Regulation as A Collateral in the National Legal System)* (Badan Pembinaan Hukum Nasional (National Law Development Agency) 26-28 Maret 2014).

<sup>60</sup> 'Prolegnas 2015-2019 (National Legislation Program 2015-2019)' (*The House of Representatives of the Republic of Indonesia*, 2015) <<http://www.dpr.go.id/uu/prolegnas-long-list>> accessed 20 October 2015.

<sup>61</sup> *Ibid.*

<sup>62</sup> These legislations are in the areas of topography, trade secret and plant variety protection.

<sup>63</sup> *Prosiding* (n 59) 92.

<sup>64</sup> *Prosiding* (n 59) 63.

'Indonesia Admits Failure in Implementing WTO Commitments

*The Jakarta Post* (online, 22 December) <<http://www.thejakartapost.com/news/1999/12/22/indonesia-admits-failure-implementing-wto-commitments.html>> .

*Minister of Justice and Human Rights Decree No M.11.PR.07.06 of 2003 on The Assignment of the Regional Office of Department of Justice and Human Rights to Receive IPR Application* (2003).

*Instruksi Presiden No 6 Tahun 2009 tentang Pengembangan Ekonomi Kreatif [Presidential Instruction No 6 of 2009 on the Development of the Creative Economy] (Indonesia)* (2009).

*World Development Indicator 2011* (World Bank 2011).

'BUDGET 2013: Venture Company MDV to Launch Intellectual Property Fund for SMEs' <<http://www.mdv.com.my/en/budget-2013-venture-company-mdv-launch-intellectual-property-fund-smes/>> accessed 16 October 2015.

'Patent Right Pledge Financing Amounted to 25 Billion Yuan' <[http://english.sipo.gov.cn/news/official/201402/t20140226\\_907967.html](http://english.sipo.gov.cn/news/official/201402/t20140226_907967.html)> accessed 16 October 2015.

'Creative Economy: Rencana Jangka Panjang' <<http://program.indonesiakreatif.net/creative-economy/>> accessed 15 October 2015.

'Data: Charges For the Use of Intellectual Property, Payments (BoP, current US\$)' (*World Bank*, 2015) <<http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries>> accessed 15 August 2015.

'Harapan Para Pekerja Seni terhadap Badan Ekonomi Kreatif (Hope of the Art Workers to Creative Economy Agency)' *Suara Pembaruan* (Jakarta, 29 January 2015) <<http://sp.beritasatu.com/ekonomidanbisnis/harapan-para-pekerja-seni-terhadap-badan-ekonomi-kreatif/76432>> accessed 15 October 2015.

'Prolegnas 2015-2019 (National Legislation Program 2015-2019)' (*The House of Representatives of the Republic of Indonesia*, 2015) <<http://www.dpr.go.id/uu/prolegnas-long-list>> accessed 20 October 2015.

Antons C, *Intellectual Property Law in Indonesia* (Heath C ed, 1st edn, Kluwer Law 2000).

'Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments' (2006) 1 *Journal of Information, Law and Technology* 1.

'Indonesia' in Goldstein P and Straus J (eds), *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009).

Departemen Perdagangan [Department of Trade], Rencana Pengembangan Ekonomi Kreatif Indonesia 2009-2015 (Department of Trade 2008).

Direktoral Jenderal Hak Kekayaan Intelektual - Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia (Directorate General of Intellectual Property Rights - Ministry of Law and Human Rights of Republic of Indonesia, 'Permohonan Pendaftaran Merek Asing & Domestik Tahun 2001 s.d. 2011 (Application of Foreign and Domestic IP Registration from 2001 to 2011)' (Directorate General 2011) <<http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=376&ctid=3&type=0&id=123>> accessed 2 May 2011.

Direktorat Jenderal Hak Kekayaan Intelektual - Republik Indonesia, 'Statistik Merek (Statistic of Trademark)' (Direktorat Jenderal Hak Kekayaan Intelektual - Republik Indonesia, 2014) <<https://www.dgip.go.id/statistik-merek>> accessed 25 September 2015.

Direktorat Jenderal Hak Kekayaan Intelektual Republik Indonesia, 'Statistik HKI Tahun 2013-14 (Statistics of IPRs 2013-14)' (2015) <[https://www.dgip.go.id/images/adelch-images/pdf-files/statistik/statistik\\_hki\\_jadi\\_2013-2014.pdf](https://www.dgip.go.id/images/adelch-images/pdf-files/statistik/statistik_hki_jadi_2013-2014.pdf)> accessed 23 September 2015.

Gautama S and Hornick RN, *An Introduction to Indonesian Law: Unity in Diversity* (Alumni Press 1972).

Harifaningsih E and Oemar S, 'Lisensi Wajib Terbantur PP (Compulsory License is Hindered by Government Regulation)' *Bisnis Indonesia* (Jakarta, 12 June 2009).

Johnson DR, Kadri M and Sihombing AA, 'Indonesia: Enforcement of Security Interests in Banking Transactions' *Bank Finance and Regulation: Multi-jurisdictional Survey* <[http://www.ibanet.org/LPD/Financial\\_Services\\_Section/Banking\\_Law/BankingLawSurveyApril2010.aspx](http://www.ibanet.org/LPD/Financial_Services_Section/Banking_Law/BankingLawSurveyApril2010.aspx)>

Kementerian Koperasi dan Usaha Kecil dan Menengah Republik Indonesia, 'Data UMKM 2012-2013' (Kementerian Koperasi dan Usaha Kecil dan Menengah Republik Indonesia,, 2015) <[http://www.depkop.go.id/index.php?option=com\\_phoca\\_download&view=file&id=335:data-usaha-mikro-kecil-menengah-umkm-dan-usaha-besar-ub-tahun-2012-2013&Itemid=93](http://www.depkop.go.id/index.php?option=com_phoca_download&view=file&id=335:data-usaha-mikro-kecil-menengah-umkm-dan-usaha-besar-ub-tahun-2012-2013&Itemid=93)> accessed 25 September 2015.

Khamdi M, 'BI: Kredit untuk Industri Kreatif Sangat Kecil (Central Bank of Indonesia: Credit for Creative Industry is Very Small)' *Bisnis Indonesia* (Jakarta, 25 Nov 2014) *Finansial* <<http://finansial.bisnis.com/read/20141125/90/275382/bi-kredit-untuk-industri-kreatif-sangat-kecil>> accessed 19 October 2015.

Kusumadara A, 'Analysis of the failure of the implementation of intellectual property laws in Indonesia' (PhD, University of Sydney 2000).

Oemar S, 'Jangan Gantung PP Merek Terkenal (Don't Delay Government Regulation on Well-Known Trademark)' *Bisnis Indonesia* (Jakarta, 24 June 2008) <<http://haki.depperin.go.id/advokasi-hukum/cetak.php?id=100>>.

Rosser A, *The Politics of Economic Liberalisation in Indonesia: State, Market and Power* (1st edn, Curzon 2002).

Siagian N, 'Perlu Skema Pendanaan Kreatif untuk UMKM: UMKM sulit memenuhi jaminan tambahan yang diminta bank. (Need Creative Financial Scheme for Micro, Small and Medium Enterprises (MSMEs): MSMEs are Difficult to Fulfill Additional Collateral Required by Banks.)' *Sinar Harapan* (Jakarta, 15 June 2015) *Financial* <<http://www.sinarharapan.co/news/read/150616035/perlu-u-skema-pendanaan-kreatif-untuk-umkm>> .

Sinaga S, 'Utilization of Intellectual Property Rights By Indonesian Small and Medium Enterprises: A Case Study of Challenges Facing The Batik and Jamu Industries' (University of Wollongong 2012).

'Intellectual Property Law in Indonesia After 2001' (2013) 25 *Mimbar Hukum* 152.

'Faktor-Faktor Penyebab Rendahnya Penggunaan Hak Kekayaan intelektual di Kalangan Usaha Kecil Menengah Batik (Factors that Cause Low Utilization of Intellectual Property Rights Among Small Medium Enterprises in Batik Industry)' 21 *lus Quia Iustum* 61.

The Office of the United States Trade Representative, 'Generalized System of Preference' (2009) <<http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>> accessed 24 June 2009.

USA CIA-, 'The World Factbook: Indonesia' <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> - id> accessed 5 August 2015.

World Intellectual Property Organization, 'Statistical Country Profiles: Indonesia' (2015) <[http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=ID](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=ID)> accessed 11 September 2015.