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Promoting intellectual property securitization for financing creative industry in Indonesia: challenges and solutions

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Abstract

This paper aims at promoting prospective Intellectual Property (IP) securitization as a feasible mode of financing creative industries demanding instant capital to operate, develop products and promote market expansion. The proposed approach is dedicated to accelerate new financial sources of support to strengthen and develop creativity and productivity in the creative industries. The current paper introduces a new legal institution which is not regulated yet under Indonesia's positive laws. It shows how creative companies might use this institution to gain direct and indirect benefits. It is acknowledged that this proposal may spark challenges at the doctrinal, normative and practical levels. At the doctrinal level, the potential for challenge refers to the philosophical issue related to exclusive rights doctrine. At the normative level, the challenges are caused by the absence of regulation concerning IP securitization in Indonesia influencing the validity and viability of IP securitization transactions. At the practical level, this proposal may not guarantee the certainty of IP valuation as a unique asset involving complex procedures, interdisciplinary laws, professionals and so forth. In order to overcome the doctrinal challenge, this paper offers relevant principles which may function to balance the acceleration of IP securitization as a new financing mechanism for creativity and prevent unrestricted exploitation of IP exclusive rights. For addressing any normative and practical challenges, this work promotes the need for government involvement in developing and promoting IP securitization by providing economic and legal frameworks, started by enactment of IP securitization regulation and the establishment of infrastructures for IP securitization.

Key words: Intellectual Property, Securitization, Creative Industry Financing

Introduction

Intellectual Property (IP) assets can be monetized because IP offers a variety of financing and economic opportunities to the owners. IP can be sold, licensed, used for collateral or transformed into securities. Like other valuable assets, IP can be recognized as financial assets because IP owners can achieve future cash flow streams. As a cash flow generating asset, it is possible to set up tools and financial instruments for IPs via securitization. Securitization has become a popular technique to raise capital and to obtain liquidity in exchange for the transfer of certain assets.

While asset securitization itself is not new, IP securitization has become a revolutionary mechanism in commercializing IP after the structuring of David Bowie's music catalogue into saleable bonds in 1997. The success of the Bowie Bond shows that IP owners may obtain financial reward alternatives from IP securitization. In theory, securitizing IP is

no different than securitizing any other asset; whereas, on a practical level, securitizing IP presents a number of challenges and problems.

This paper explores the prospect of Intellectual Property (IP) securitization as a feasible financing method for the creative industries in Indonesia. It introduces the prospect of IP assets as a new vehicle for raising liquidity and financing creative industries in order to strengthen and develop creativity and productivity. It also describes how creative industries in Indonesia could use IP securitization to gain direct and indirect benefit by showing the cost and advantages associated with IP securitization.

Since IP securitization is a new legal institution in Indonesia, its application may spark problems at the doctrinal, normative, and practical levels. At the doctrinal level, the problem refers to the philosophical issues related to exclusive rights doctrine. At the normative level, the absence of Indonesian regulation concerning IP securitization may a fundamental problem drawing into questioning and casting doubt on the validity and viability of IP securitization. At a practical level, challenges arise from the uncertainty of IP valuation as a unique asset: the complex procedures, interdisciplinary laws and professionals involved and so forth. In addition, while IP securitization has been growing rapidly in the United States after the successful securitization of the 'Bowie Bond', it has not taken off on a cross border basis because of the diversity of laws and practices.

This work offers relevant principles which may function to balance the acceleration of IP securitization as a new financing mechanism for creative industries and prevent unrestricted exploitation of IP exclusive right, in order to overcome doctrinal challenges. Furthermore, the paper proposes that government involvement in developing and promoting IP securitization by providing the economic and legal frameworks is needed to overcome the normative and practical challenges. The enactment of IP securitization measures and the establishment practical frameworks and infrastructures for the IP securitization transaction will be the first step.

Basic concept of IP securitization

IP securitization definition

There are several different definitions of securitization. Nevertheless, all refer to the process of pooling assets in order to sell them as securities (Fairfax, 1999). According to Thomas Fitch (2000, p. 25), securitization is "the conversion of assets into marketable securities for sale to investors". Similarly, John M. Gabala (2004) defines securitization as the conversion of illiquid assets into marketable securities to investors to provide immediate access to cash. The Indonesia Capital Market Supervisory Agency/BAPEPAM-LK (2003, p. 9) provides a similar definition of securitization as a process of transferring illiquid assets into tradable securities in accordance with the needs of investors. According to Bryan Garner, securitization is a process whereby the right to receive certain future payments is united and then sold in the form of securities (Garner, 2009, p. 1475). Securitization is essentially a process of creating financial instruments that can be marketed to investors based on

underlying assets or financial obligations (Nikolic, 2009, p. 398). The process of issuing securities backed by assets in structured financing is sometimes called "securitization" because assets are turned into securities: they are *monetized*, not through traditional secured borrowing or factoring, but through the issuance of asset backed securities (Sylva, 1999, p.198).

IP securitization is defined as "a financing technique whereby a company transfers rights in receivables (e.g. royalties) from IP holders to an entity, which in turn issues securities to capital market investors and passes the proceeds back to the owner of the IP" (Pandey, 2006, p.2). According to Medansky & Dalinka (2005), IP securitization can also be defined as a financial technique allowing IP owners to obtain lump sums of cash 'up front' from IP receivables, predictable cash flow or royalties. Based on these definitions, it can be concluded that IP securitization is a device of structured financing where IP assets or rights to receive future payments originating in/from IP are converted into marketable securities.

IP securitization moments

At the beginning of the 1970s, securitization started in the United States when the Government National Mortgage (GNME - Ginnie Mae) issued pass through-mortgage backed securities (Culver, 2008). In Indonesia, the term *securitization* was recognized at the beginning of 1997. In 2003, there was a formal regulation of the asset backed securities i.e. BAPEPAM LK Regulation No. IX.K.1 regarding "Guidelines for Collective Investment Contract of Asset Backed Securities", Regulation No. Kep-28/PM/2003. This Regulation was then amended by BAPEPAM LK Regulation No. KEP-493/BL/2008 in 2008.

Conventionally, securitization is backed by traditional assets, such as a mortgage, credit card and auto loan receivables, equipment lease, franchise or service fees (Glasner, 2008, p.27). All of these assets are similar in nature because they represent payment obligation, in the form of receivables or other financial obligations (Glasner, 2008, p.29). More recently, companies have been able to securitize all assets including IP rights because IP is considered a valuable asset. As a valuable asset, IP demonstrating a royalty revenue stream can be transformed into securities traded to investors. IP securitization most commonly involves copyright, trademark and patent assets. Copyright asset is given to the original works and gives the exclusive right to copy, distribute copies, make derivative works and take other defined actions with respect to that expression (Nimmer, 2001, p. 294). Trademark protects the trademark holder's right to use a mark to designate origin and signal quality on products traded through commerce (Nimmer, 2001, p.294). Patent protection provides the owner a monopoly of an invention for a limited term if the invention is non-obvious, novel and useful (Chu, 1999).

The important momentum for IP securitization started in February 1997 when David Bowie, through David Pullman, introduced a new form of securitization by converting his future royalties to be received from certain record sales into securities and sold those securities in a private offering for \$55 million (Fairfax, 1999, p.442). The form of the David

Bowie securities was a bond (called a Bowie Bond) offering a 7.9% interest rate with a 10-year average life and a 15-year maturity (Sylva, 1997). The bonds were backed by royalties on a 25 album catalogue consisting of about 300 songs of Bowie's recordings and song copyrights (Roberts, 1997, p.23). The "Bowie Bond" was the first IP backed securities and the first product of IP securitization (the first music royalties future receivables securitization). The securitization of song royalties by David Bowie begun a new trend that could extend not only to other musicians, but other types of copyrighted works (films, books, etc) or other IP assets (patents, trademarks, for example).

After the Bowie Bond success, several musicians structured song royalties securitization such as James Brown, The Isley Brothers, Iron Maiden and Rod Stewart (Morris, 2009). Other copyright works (films) were also securitized, for instance, Bear, Stearns & Co., Inc. securitized 10 films' future revenues made by Dreamworks - a production company owned by Steven Spielberg (Euromoney, 1998). Merrill Lynch structured a securitization involving revenues of films library owned by the Italian film company Cecchi Gori (Serwer, 1998). While film securitization by New Line Cinema was completed in 1998; in 2003, Vivendi Universal films securitized film royalties (Morris, 2009). PolyGram, a Dutch entertainment company generated a US \$ 650 million bond issue backed by cash flow from films produced over the next three years (Davies, 1998).

Although IP securitization was dominated by copyright assets such as films or music, the other types of IPs such as trademarks and patents were also securitized. Trademarks securitization such as Triac, Guess, BillBlass, Dunkin and drug patent royalties by BioPharma Royalty Trust and Royalty Pharma Finance Trust were examples of IP securitization following the David Bowie securitization transaction (Morris, 2009).

IP securitization processes

The process of IP securitization involves six basic structures. First, a company or individuals, known as the "Originator," must have a pool of quality rights to receive future payments, receivables or income producing assets derived from IP assets (Culver, 1994). The Originator is the entity that originates or generated the receivables that are backed by finance raised (Deacon, 2004, p.575).

Second, the originator values and pools receivables or income producing assets (Benneth, 2006, p.402). Third, the originator transfers these assets to Special Purpose Vehicle (THE SPV) which is an independent standing entity, specifically created for securitization transactions and protected from any bankruptcy or insolvency proceedings of the Originator (Klee & Butler, 2002).

Fourth, the SPV issues securities to investors which are backed by the assets transferred. The SPV generally issues securities in the form of debt or equity instruments. The type of securities depends on whether the SPV will be structured as a pay-through or pass-through vehicle. The SPV issuing equity securities is a "pass-through" vehicle which spread over payments proportionally to the security holders based on the receivables' cash

flow and their ownership share (Fairfax, 1999, p. 448). On the other hand, a pay-through vehicle issues debt instruments and allows security holders to receive fixed payments (principal and interest) that are secured by the receivables based on anticipated cash flow (Fairfax, 1999, p. 448).

Fifth, the proceeds from the sale of securities are used to pay the Originator for the transferred assets. Finally, the payments to the investor purchasing the securities issued by the SPV are paid out of the cash flow generated by the receivables (Shaw, 1990, p. 251).

Benefits of IP securitization

A new funding source is desirable in the vast IP market dominated by record masters, publishing, television, film libraries, high tech and biotech licenses and where production or research costs are high (Haber, 1997). Creative industries, similar to other businesses, need ready capital not only to operate, research and develop the products, but also to expand their market. Creative industries, for instance film companies or music studios, have a difficult time making money on their products instantly. IP securitization seems an appropriate method for funding or financing creativity and productivity in creative industries. Through IP securitization, creative companies can tap into their future cash flows and keep up with the marketplace. IP securitization offering ready capital also benefits film and music studios that need large amounts of money for movies and music productions and promotions.

Accordingly, IP securitization may increase liquidity while diversifying funding options by enabling creative industries to access future income immediately (Scott, 2003). The ability of IP securitization to increase liquidity renders securitization termed "alchemy" because it creates valuable things from what has not existed before, especially in its ability to transform illiquid assets into liquid assets or cash (Fraga, 2005). IP securitization has become a popular technique to obtain liquidity in exchange for the transfer of certain assets (Fraga, 2005, p.5) and to increase liquidity by providing immediate access to cash (Gabala, 2004). More specifically, IP securitization essentially also replaces the rights to future receivables (royalties) with presently available cash, while Lois R. Lupica (1998) argued that process of securitization transforms assets into an instant cash payment future.

Since IP securitization is an essential mechanism for corporations to access ready capital by borrowing against future income streams, it has essential advantages as it allows the company or individual to raise money at a lower cost than conventional financing techniques. IP securitization diversifies financing option to companies unable to access bank and the capital markets. IP securitization seems an attractive financing mechanism for IP owners or creative industries when searching for liquidity because of the great possibility of those parties to access 'instant' money for their operation and development activities. IP Securitization is particularly beneficial to creative companies wishing to accumulate "generalized purchasing power" or engage in long-term investments (Lupica, 1998). Proceeds from IP securitization transactions can be utilized by the IP owners to support new

start ups, expansion, manufacturing or product development, introduction and promotion of new products to the market or to improve their financial performance and investment.

The concept of IP securitization resolves the difficult options of raising a large amount of money, while still retaining ownership in the underlying IP asset. Traditionally, in the world before securitization, creative industries as Originators had two options: borrow money by using their assets as collateral for a secured loan or to sell assets (Janger, 2005, p.303). Whereas, in the era of securitization, the companies/Originators can raise money without selling their property since in IP securitization, the financier purchases mostly the right to the receivables or royalties income but not the underlying IP itself.

IP securitization is also beneficial for society since it offers an alternative investment to investors and provides opportunities to society for obtaining income distribution. The instruments of investment issued by IP securitization will offer safer and stable income. Since IP securitization products are asset backed securities/bonds, they are generally more stable than corporate bonds, and are not as vulnerable to possible future negative ratings of the Originator. In addition, securitization is attractive for investors because the securitization products represent a fixed income investment and a constant rate of return. IP securitization also allows investors to design their investment based on their risk preferences. Investors can compare the risks of securities and identify securitizations with the credit risk they are looking for and invest accordingly (McClean, 2008, p. 564). Moreover, IP securitization also allows society to become involved in funding creativity and productivity. By purchasing IP backed securities, investors/society provide 'instant' cash for creative and productive companies to develop and create new IP products.

Other benefits of IP Securitization techniques are new possibilities for unlocking the wealth contained in intellectual property (Chu, 1998-1999, p. 471). If IP securitization financing can be successfully applied to creative industries and other IP based companies, many more creative and productive activities can be undertaken and utilized by IPs to develop wealth.

The cost of IP securitization

Although a certain IP asset is securitizable, it does not mean that IP securitization runs well. Structuring IP securitization should consider costs and benefits. An estimate of costs is needed to structure a securitization transaction such as fees for professionals in law, accountancy, tax and financial affairs, an amount that would be expected to be large. IP securitization involves more technical expertise than traditional asset securitization and requires more due diligence, affecting the expense and complexity of the overall process. Therefore, the standard of assets to be securitized must indicate the break even point in order to avoid the risks of acquiring benefits from securitization (Kumar, 2006, p. 98). This standard is sufficient to cover the cost to be paid for setting up a complicated scheme of IP securitization.

The challenges of applying IP securitization in Indonesia

At the doctrinal level

There will be a conflicting interest in applying IP securitization because of the doctrinal problem of exclusive rights. IP laws promote and protect two conflicting interests: 1) the stimulation of creativity and productivity; and 2) the exclusive right of creators or inventors to exclude others from using the products of such creative efforts (Chu, 1998-1999). The principle of *exclusive right* is principally aimed at protecting the interest of the individual (creator/inventor) who actualizes his/her existence and potential (Haq, 2008). For instance, copyright protects original works and provides the author the exclusive right to exclude others from using, copying, or compiling the work. The *trademark right* prevents others from using any distinctive images, mark or terms that identify the products or service of a company in order to protect against consumer confusion or dilution of the mark (Frymark, Julie C., 2003, p.172). Patents based on novel, non-obvious and useful standards provide for the right to prevent anyone else from making, using, selling or offering to sell the patented inventions.

The exclusive right of IP is aimed principally at protecting individual interests and seems incompatible with Indonesian values focusing on communal interest (Agus Sardjono, 2007). The communal nature of society makes it difficult for its members to accept an IPR concept that emphasizes individual rights (Agus Sardjono, 2007, p.160). Since IP securitization strengthens the exclusive and monopoly rights of individual IP owners to monetize and commercialize their IP assets, it is difficult to meet communal interests to achieve social welfare. Although the exclusive right is the central concept to protect intellectual products and plays an important role in improving industry and trade development toward economic progress, unfortunately, the exclusive right has been manipulated by a few large corporations which have exploited exclusive rights as the main instrument to accumulate and maximize the interest and profit for IP capitalism (Haq, 2008). The over exploitation of exclusive rights results in misappropriation -manipulation and encourages self interest (Drahos, 1996, p. 119) and capitalism. The spirit of capitalism allows and strengthens the companies' aggressiveness to surpass the social interest (Haq, 2006, p.14).

Since several huge corporations control and dominate IP products and their derivatives in the global market (Haq, 2006), these corporations may be involved in misappropriations and IP exploitation in securitization schemes. If these corporations structure IP securitization in the interests of greed and inordinate self interest in a financial system such as Indonesia's, the beneficial and efficient form of securitization will be changed as commentator has described as "a serpent-like grip" on the real economy (www.sodahead.com/48493/securitization-as-satan). Consequently, IP securitization becomes an 'evil' interfering with the flow of money and ultimately can disrupt the financial system. Extreme securitization will expose the root of financial crisis. According to Niall Ferguson (2008), the global financial crisis in 2007 was relative to the rise and fall of

securitized lending which allowed banks to originate loans but then repackage and sell them.

At the normative level

Indonesia has not regulated IP securitization in any specific *sue generis* system or integrated it into capital markets, or regulation under corporate or financial IP laws. Even for general asset securitization, the regulation is insufficient. Due to the lack of securitization regulation by specific means, some Indonesian banks (BII, Bank Bira, Citibank) and some companies (Astra Sedaya Finance, Bunas Finance Indonesia, and Surya Multidana) have proceeded with asset securitizations in Malaysia and Singapore (Manurung & Nasution, 2007).

The absence of regulation concerning IP securitization certainly sparks a fundamental problem for the application of IP securitization in Indonesia. Without specific regulation, the validation of IP securitization will be questioned. In addition, the uncertainty of the law may raise doubts about determining whether an IP securitization will be worthwhile. Moreover, without certain regulation, there is uncertainty whether the securitization of intellectual property rights is part of the securitization of assets or should be separated and treated differently from the asset securitization. Furthermore, uncertain rules over IP valuation, as well as uncertain laws in relation to IP pertaining to the ownership and perfection of a security interest can delay and risk the abandoning of IP securitization possibilities.

The existing regulations supporting securitization in Indonesia are very limited. Although Indonesia's government has provided President Regulation No. 19 /2005 for "Financing Secondary Mortgages Facility", this regulation is limited for securitization with the underlying asset of housing mortgages only. In the banking area, it can be noted that the Central Bank of Indonesia (Bank Indonesia) has released a regulation of the "Prudential Principle in Asset Securitization for Banks" (BI Regulation No. 7/4/PBI/2005), but it has also a limited scope which is applied for securitization structured by banks only. The current regulations on capital market law are also limited, since they are only related to the issuance or trading of asset backed securities as the products of the securitization process, not the securitization itself.

In addition, there is a conflicting norm between the bankruptcy remote principle as the main principle of IP securitization and Indonesia's bankruptcy law. The *bankruptcy remote principle* is applied to the SPV specifically created to complete securitization. The insulation of the SPV from bankruptcy is an important pillar of a securitization scheme (Locke, 2008, p. 180). The use of the SPV is simply a disguised form of bankruptcy waivers (Klee & Butler, 2002). However, the Indonesian Bankruptcy Act (UU 37/2004) cannot apply the bankruptcy remote principle to the SPV because Article 2 (1) of UU 37/2004 stipulates that every debtor having two or more creditors and failing to pay at least one debt which has matured and became payable, shall be declared bankrupt through a court decision, either at his own petition or at the request of one or more of his creditors. Under the Indonesian Bankruptcy Act, an SPV may not be protected from bankruptcy or insolvency

proceedings because an SPV can be a potential debtor due to the obligation of an SPV to pay the securities holder's investment revenue and other financial obligations.

At the practical level

The critical aspects of IP securitization are the valuation and calculation of IP assets. Calculation and valuation are necessary to determine the feasibility of securitization and to predict future cash flow (Rosenberg & Weiss, 2003). However, at the practical level, IP asset valuation uncertainty is the main practical challenge to structuring IP securitization. IP securitization presents significant difficulties due to valuation issues regarding the intangible nature of IP assets (Lev, 2001). As an intangible asset, the real value of an IP asset cannot be measured accurately. Generally, the real value of particular IP assets cannot be measured accurately because of the nature of IP assets as intangible. Therefore, future cash flows, receivables or royalties with elements that can be analyzed quantitatively are usually considered as suitable for the underlying asset of IP securitization because they can be easily measured. Future cash flow generates assets, receivables or royalties all of which are a better form to be chosen for IP securitization because they demonstrate that the firm has buyers and they are more liquid since they are one step closer to cash (Kirsch, 2007, p.10).

Any IP asset with a cash flow such as receivables or royalties can be securitized because the most important characteristic of the cash flow is predictability (Gabala, 2004, p.331). However, the predictability of IP cash flow or royalties seems uncertain in the era of massive infringement of IP rights. In the digital era, copyright securitization presents uncertainty in royalty collection in the illegal peer-to-peer ("P2P") music file-sharing and illegal downloading sphere, for example. High speed internet technology also contributes to fast-massive infringement which can reduce royalty streams of copyright works. Illegal P2P file sharing and downloading music reduces sales, and harms the market for copyrighted music by reducing sales, depriving copyright owners of royalties (Gabala, 2004, p.323).

The IP infringement precisely affects to the unpredictability of IP or royalty cash flow. Any unpredictability of royalty income due to such infringements may diminish the attractiveness of the future royalty/cash flow/receivables-based securitization. Therefore, it is difficult to securitize IP assets in Indonesia; since in Indonesia, infringements of IP by illegal downloading or digital file sharing or counterfeiting still occur at an alarming rate. Based on the number of IP infringements, the United States Trade Representative continues to include Indonesia with 12 other countries on a priority watch list indicating by country the highest ranked rate of copyright infringement. The International Data Corporation ranks Indonesia eleventh worst of software infringer countries with pirated software circulation running at a rate of 86 % (International Intellectual Property Alliance (IIPA, 2012, 51).

Awareness of IP values and the experience to practice IP securitization are also practical problems in Indonesia. In the United States and other developed countries, companies are increasingly aware of their intangible assets, including IP. They have experienced a shift in the focus of a company's value from tangible to intangible IP assets

and more frequently monetize IP through IP securitization. However, Indonesia has no regulation or experience to structure IP securitization. Most Indonesian creative industries remain dependent on tangible assets and conventional financing transactions. Not many creative industries know how to protect and commercialize their IP assets in IP securitization schemes.

Another practical challenge also arises since IP securitization involves many parties, complex interdisciplinary laws and economic infrastructures. IP securitization is a very challenging area of study because it involves interdisciplinary study and laws including intellectual property, corporate law, capital market, corporate finance and other areas. According to Tamar Frankel (1991), securitization involves not only a part of a financial system, but the whole system, not one or a few branches of law, but most branches of the law. IP Securitization requires professionals and practitioners such as the SPV, servicers, rating agencies, credit enhancers, insurance companies, appraisers, capital market professions and the financial intermediaries. It does not simply need the traditional intermediaries, but the finance subsidiaries of operating companies and government intermediaries (Frankel, 1991).

Indonesia still faces the problem of effectively structuring IP securitization because of this complexity. Financial infrastructures, professionals, the fields of interdisciplinary law and research are not yet ready to support IP securitization in Indonesia. Indonesia has no professionals/practitioners mastering or experiencing the IP securitization process such as appraisers/rating agencies for calculating IP assets, the SPV for transforming IP assets into securities, insurance companies for backing securitization risks, and so forth. Significantly, the current legal and economic infrastructures do not also provide the frameworks, tools and mechanisms for supporting IP securitization such as foreclosure procedures, credit enhancement and credit ratings or markets for IP securitization products.

Solutions for IP securitization challenges

Creating appropriate models for IP securitization

To address problems at the doctrinal level, it is necessary to formulate an appropriate model of IP securitization by analysing some relevant principles. These principles may function to balance the acceleration of IP securitization as a new, alternative form of financing for strengthening and developing creativity in creative industries so as to prevent unrestricted exploitation of the exclusive rights of IP in Indonesia. The principles analysed include legal certainty, justice/proportionality and utility.

Principle of legal certainty

An appropriate model of IP securitization should reflect legal certainty. The legal certainty principle is crucial to resolve the normative problems caused by the absence of IP regulation in Indonesia. According to Gustav Radbruch (2000), legal certainty, along with justice and policy, is one of three fundamental pillars of the idea of law. The importance of legal certainty transcends that of its constituent rules and principles (Radbruch, 2000, p.661).

The legal certainty principle consists of the general rules enabling individuals to be aware of what actions should or should not be done (Marzuki, 2008). The general rules are necessary in social life as a guide for individuals to behave in social life and as a means of protection for accommodating the interests of society. In contemporary Indonesian society, the general rules are set up in the form of acts or regulations. The availability of regulation and the implementation of these rules will create legal certainty. Thus, the regulation of IP securitization is a necessity for the reason of legal certainty. IP regulation that consists of general rules is not only a useful guide for individuals or companies to securitize their assets, but also to accommodate all interests, those of the IP owners and the social interest.

Legal certainty also provides legal safety for individuals from governmental power abuses, because the general rules allow individuals to determine the government's obligation and restricts the unprohibited action of states. James R. Maxeiner (2006) argued that legal certainty protects those subjects to the law from the arbitrary use of state power. By regulating IP securitization, individuals will be protected from the arbitrary use of government power such as a high rate of tax burden for securitization products or maladministration procedures.

By regulating IP securitization, legal certainty will be created. Legal certainty in IP securitization is important since legal certainty may ensure predictability (Maxeiner, 2006, p. 522). It is generally believed that legal rules provide the virtues of certainty and predictability, while legal standards afford flexibility, accommodate equitable solutions and allow for a more informed development of the law. Legal rules framed in clear and unambiguous language are essential for capitalism because they allow the certainty and predictability that capitalist systems require. The important of legal certainty for capitalism was famously articulated by Max Weber: "capitalistic enterprise cannot do without legal security because such security was essential for the investment of capital" (Weber, 1978, p. 833). Capitalists need a legal system that functions in a calculable way; calculability means an unambiguous and clear legal system. A clear and determinate set of legal rules provides certain delimitations of capitalist economic rights and duties.

Since IP securitization aims at raising instant capital, it can be interpreted as a form of capitalism. Thus, it needs certainty and predictability which can maximize economic efficiency. The predictability of IP securitization in raising capital may be assured by creating IP regulation to support legal certainty. Jan Michiel Otto (2003) noted that the legal certainty is reflected by the availability of a regulation which is clear, consistent, accessible and issued by or recognized by state power. According to Maxeiner (2007, p. 522), legal certainty means that: "(1) laws and decisions must be made public, (2) laws and decisions must be definite and clear, (3) decisions of courts must be binding, (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected".

IP securitization is a legal process involving interdisciplinary law and many parties and highly regulated institutions. Thus, the regulation of such securitization cannot be

delayed. IP securitization regulation is necessary as the basis for the validity of the implementation of IP securitization in Indonesia.

Principle of justice and proportionality

The principle of justice in the securitization of intellectual property rights relates to fair and just regulation of IP securitization. Fair regulation means that every interest is protected in a balanced way; thus, everyone may earn as much as what is a part of the right. Since justice can be interpreted as balance or equality (Haq, 2008), IP securitization regulations should ensure a balance between rights and duties, between individuals (IP owners) and the social interest.

The concept of justice expressed by Ulpianus is continuous human will to keep giving everybody his/her own (*Constans et Justitia est Perpetua voluntas is suum cuique tribuendi*) (Marzuki, 2008, p.157). By referring to Aristotle's famous proposition "justice consists in treating equals equally and unequal unequally, in proportion to their inequality" (Wacks, 1995, p.178), justice cannot be interpreted as being that every person receives the same portion, but that what is received should be proportional.

Proportionality is interpreted as a distribution or exchanges of rights and obligations based on the values of equitability, freedom, the proportionality distribution, thereby attaching to the principles of accuracy and equity (Hernoko, 2010). The principle of proportionality emphasizes the fair and reasonable, not the mathematic-base notion of equality. The basic idea of proportionality is to balance conflicting interests (Hilf, 2001, p. 121). This approach facilitates a proper relationship between competing considerations (Nygh & Butt, 1997, p. 941). According to Mads Andenas and Stefan Zleptnig (2007, p. 372), proportionality is associated with the factors of "necessity and balancing", while George Bermann (1977, p. 415) noted that the principle of proportionality provides a guide to balance conflicting rights, interests, values or other purposes.

The proportionality principle can be applied to Indonesian IP securitization regulation by balancing IP owner interest and social interest. It may balance the doctrine of exclusive right providing strong opportunity for individuals (creators or inventors) to manifest their will or interest and to stimulate the production and dissemination of creativity and productivity in science, knowledge and creative works under free market conditions (Haq, 2008, p.1). It means that promoting and accelerating creativity and productivity by structuring IP securitization must be dedicated to also achieving social interest goals without damaging individual IP interests. IP securitization regulation should ensure the personal rights to IP without ignoring public, national or social interest. The regulation should contain the concept of social function utilized so as to restrict IP from over exploitation via IP securitization. The social function of IP securitization can be realized by balancing the rights and duties of IP owners when structuring securitization.

The principle of utility

The principle of utility reflects the spirit of capitalism, emphasizing "the greater benefit for the greatest number" principle as articulated by Jeremy Bentham. Accordingly, based on social justice, the appropriate model of IP securitization should take into consideration the greatest benefits for people. IP securitization should not only benefit the IP owner in commercializing or monetizing IP, but also create welfare for society. It is proven that IP securitization provides economic benefits to the IP owners because:

- a. Securitization increases liquidity by accessing instant cash immediately.
- b. IP owners raise ready capital without selling IP ownership rights, rather than to transfer the royalties, revenues, receivables or income producing assets to the SPV. (Glasner, 2008, p. 39)
- c. The IP securitization, including the sale of securities, is an irrevocable sale of securities (Hillery, 2004).
- d. The economic value of IP may be longer and more valuable over time so that it may be reused or form the basis of another IP securitization after the maturity of first securitization (Katz, 2002).
- e. IP Securitization may stimulate new innovations, creativities and productivity because IP assets can be commercially exploited in more profitable ways (Glasner, 2008).

Although IP securitization provides some benefit and advantages for IP owners, some argue that IP commercialization in securitization transactions appears to pay less attention to social welfare. However, John C. Edmunds (1996, p.118) argued that securitization will actually increase global welfare and it is a "new world welfare machine". Securitization has become the most powerful engine of wealth creation in the contemporary world economy and creates massive wealth globally (Edmunds, 1996). According to Edmunds (1996, p.118), wealth may occur when a portion of income is dedicated not only for consumption but there is a portion for investment in housing, equipment and technology changes. Welfare is created if the flow of money runs into a capital markets and securities traded on the stock market increases (Edmund, 1996). Capital generated from capital market will be beneficial for companies, increase the value of financial assets, and provide income for professionals. The next result of the appropriation capital derived from capital market or securitization process will impact on the economic development because it may be used by companies to develop their products, expand their companies, build new factories or for many other productive activities.

Based on the argument that securitization has become the most powerful engine of wealth creation in today's global economy and creates massive wealth worldwide, in some respects, IP securitization may benefit society because society may obtain income distribution by offering an alternative investment and investment diversification portfolio. The products of IP securitization represents fixed income investment a constant rate of

return. In addition, it allows investors to tailor their investment based on their risk preferences by comparing the risks of securities and identifying securitizations with the credit risk they are looking for and invest accordingly. Finally, society has opportunity to become involved in funding creativity and productivity. By purchasing IP backed securities, investors/society provide immediate cash to creative and productive companies for developing and creating new innovative products.

Government involvement for promoting and supporting IP securitization

To solve the normative and practical challenges of IP securitization in Indonesia, it is necessary for the government to pay attention to and become involved with developing economic infrastructures and legal frameworks. The enactment of IP securitization regulation with its enforcement as well as the establishment of elements and infrastructures for securitization transactions will be the first step for supporting IP securitization.

To establish this first step, the requisite elements derived from the most common form of asset securitization must be adopted. At the most basic level, IP securitization involves a variety of key supporting elements: (a) system finance based upon IP; (b) capital market (market for IP based securities); (c) infrastructure to support securitization.

System finance based upon IP

A system of finance based upon IP seems a key to financial and economic development. The conceptual framework linking IP to financial and economic development has four key elements: (a) the IP securities and inventive linkage; (b) the IP title, collateral and credit linkage; (c) IP liquidity and mobilization; (d) the IP market, transactions, and efficiency linkage. The four linkages are necessary to support effective IP based finance, and all linkages are based upon the existence of the appropriate legal infrastructure.

For the supporting system of finance based upon IP, it is necessary to generate a functioning system of finance based upon IP. The creation of a functioning system of IP based finance involves the precondition of (a) clear property right to IP; (b) clear right to transfer property, including IP, (c) clear rules related to the use of IP as collateral; (d) financial institutions capable of understanding credit enhancement analysis related to IP collateralization for IP backed securities; (e) a clear and predictable system of taxation; (f) appropriate financial regulation and supervision.

Furthermore, the market development in which IPs have an important role must be considered. To establish IP market development, the key elements necessary to reform must include: (a) institutional reforms that better define property rights and improve contract performance; (b) capital market reforms making IP finance available at reasonable rates, especially for individual/retail investors, (c) market reforms such as market regulation and fiscal policies that reduce or eliminate the main distortion in goods and services produced by IP assets.

Capital market (market for IP based securities)

Governments have an important and catalytic role in developing institutions and a system which issues IP backed securities market. To establish the system, the following key principles can be suggested: (a) government must create the legal and financial infrastructures, foreclosure procedures and secured lending laws; (b) government must set up the competition, privatization and sunset provision; (c) the primary role of government in the secondary market should be to guarantee IP backed securities; (d) government should maintain an appropriate supervisory role through regulation concerning IP assets, liabilities and capital.

In addition, in processes of capital market development for supporting IP securitization, several issues which need to be addressed include: (a) establishment of a government supported IP based finance institution; (b) modification of collateral laws to support the transfer of IP; (c) development of laws supporting use of intangible (IP) as collateral; (d) establishment of credit rating and credit enhancement agencies for IP assets; (e) modification of corporation and/or trust laws to support the creation of the SPVs.

Infrastructure to support securitization

To encourage IP securitization market, there are recommendations to accomplish the following: (a) develop legal infrastructure to support primary and secondary IP backed securities market; (b) enhance regulatory capacity; (c) create and improve the IP backed securities underwriting process. It is also necessary to (a) create legal infrastructure to support credit enhancement and credit rating; (b) improve disclosure and develop a rating system; (c) develop appropriate technology for trading, clearing and settlement; (d) create IP based finance corporations; (e) create competitive domestic IP backed securities market with appropriate taxation.

Conclusion

Despite the presence of three main potential challenges (doctrinal, normative and practical) in applying IP securitization in Indonesia, IP securitization should be promoted since IP securitization plays the significant roles of providing new financing alternatives and avenues of financial support for developing and strengthening creativity and productivity in creative industries, especially. Therefore, the Indonesian government's involvement is very crucial for promoting IP securitization by providing economic and legal frameworks. Since the regulation IP securitization is absent in Indonesia, the creation and enactment of IP securitization regulation with its enforcement will be the first major step. The regulation can be set up through law on securitization, financial law, corporate law, capital market law, and/or modification of bankruptcy and collateral laws. Before finding the best model for Indonesia's regulation on IP securitization, the appropriate IP securitization models reflecting the principles of justice, utility and legal certainty should be tailored. Along with enactment of the regulation, the establishment of elements and infrastructures for the transaction will ensure the validity and feasibility of IP securitization transactions.

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