

Government Regulation for IP-Based Financing is Finally Enacted



The Indonesian government recently enacted Government Regulation No. 24 of 2022 on the Implementing Regulation of Law No. 24 of 2019 on Creative Economy (“**Regulation**”). The Regulation confirms and promotes intellectual property (“**IP**”) assets as security objects that can be used to obtain financing from banks and non-bank financial institutions. The concept of taking security over IP itself is not new. It was first introduced in Law No. 24 of 2019, which stipulated that the government would facilitate an IP financing scheme for creative economy entrepreneurs and allow them to develop a marketing system for their IP-based products.

Regulatory-wise, Law No. 42 of 1999 on Fiducia Security (“**Fiducia Law**”) stipulates that a fiducia can be encumbered on any movable intangible object that can be owned and transferred, whether registered or unregistered. In addition, Law No. 28 of 2014 on Copyright (“**Copyright Law**”) and Law No. 13 of 2016 on Patent (“**Patent Law**”) stipulate explicitly that copyrights and patents can be the object of a fiducia security. In practice, we have seen IP assets, mostly trademarks, being used as security objects to secure a loan or financing transaction. Although theoretically, IP assets can be encumbered with a pledge, as suggested above, we have only seen these IP assets encumbered by way of a fiducia security and registered at the Fiducia Office.

However, the authority responsible for recording and registering the ownership over IP assets is the Directorate General of Intellectual Property (“**DGIP**”). Unlike land and property assets, in which ownership and security are registered in one registry maintained by the same authority, namely the National Land Agency (*Badan Pertanahan Nasional* or BPN), the ownership of IP assets is registered with the DGIP, but the holder of a security interest over IP assets is registered with the Fiducia Office.

As analysed below, while the Regulation aims to promote IP (often the sole or primary asset in the creative economy industry) as a valuable and thus acceptable security for a financing/loan transaction, there is still a gap in the practical application.

Implementation

An IP-based financing scheme is defined as a financing scheme that encumbers an IP as the security object to obtain financing from banks and non-bank financial institutions. In the Regulation, creative economy entrepreneurs, which encompass individuals as well as entities (whether legal or non-legal), can obtain IP-based financings from the above lenders.

To obtain such financing, the entrepreneur must submit an application to the lending bank or non-bank financial institution. The Regulation stipulates that at the minimum, the borrower must submit the following documents to the lender:

- (1) A financing proposal;
- (2) Evidence of an existing creative economy business;
- (3) An arrangement related to the IP asset that will be pledged as the security; and
- (4) The recordation letter or registration certificate of the relevant IP.

Upon receipt, the lender will be entitled to, among others, verify and assess the IP that will be encumbered.

The Regulation further stipulates that the following forms of IP-based security objects are recognised and can be provided as a security to lenders in implementing the IP-based financing scheme:

- (1) IP assets encumbered by way of fiducia security;
- (2) A contract that relates to creative economy activities; and/or
- (3) Receivables from creative economy activities.

Importance of Registration

The Regulation stipulates that IP assets that can be used as collaterals are those that have been:

- (1) Recorded or registered at the DGIP; and
- (2) Commercialised, e.g. generating royalty.

We believe that this is not a restrictive provision in the sense that if the IP assets do not fulfil the above requirements, it does not mean that such IP assets cannot be encumbered with a fiducia security or that the fiducia security will be invalid. We think that these requirements are more to clarify that IP assets that fulfil such requirements offer conclusive evidence of the ownership of the IP assets, and that such IP assets have a value that can be used to settle the borrower's obligation towards the lender. Evidently, verification and assessment must be conducted by the lender to determine whether it can be satisfied and comfortable with taking IP assets that do not meet the above requirements as a security object for the financing or loan.

The Regulation further provides that the Ministry of Law and Human Rights will provide a public database of encumbered IP assets. In our view, this public database for encumbered IP assets is needed to ensure that the fiducia security over IP assets can be effectively enforced. Until now, in practice and based on a verbal communication with a DGIP official, the DGIP is not able to record or register a new owner of an IP asset based on an underlying document related to the enforcement of auction minutes. Suppose annotation of fiducia security can be recorded in the registry maintained by the DGIP, this will integrate the data that were previously maintained only by the Fiducia Office to the IP database of the DGIP, with the hope of ensuring a streamlined process when establishing, releasing, and/or enforcing the fiducia security over the registered or recorded IP assets.

When this database and the system at the DGIP become available and are working properly, it will undoubtedly increase stakeholders' trust and reliability in IP assets as security objects. Besides ensuring that the fiducia security can be effectively enforced, the registration of encumbered IPs in the DGIP's database will also be useful to prevent any transfer of the IP assets to another party while being encumbered or the re-encumbrance of the same IP asset to another party.

Valuation of IPs

As mentioned earlier, in taking security over IP assets, the lender will have the right to assess the IP assets. The Regulation provides several approaches that may be taken in valuating IP assets, namely:

- (1) Cost approach;
- (2) Market approach;
- (3) Revenue approach; and/or
- (4) Other approaches in accordance with the applicable valuation standards.

The lender may also appoint an appraiser to determine the value of the IP asset. In doing so, the appraiser must be licensed, competent in the field of IP valuation (i.e. holding a certificate of competence), and registered at the Ministry responsible for regulating the creative economy.

Dispute Resolution

The Regulation also provides that if a dispute involving IP-based financing arises, then such dispute may be resolved through the court or by way of an out-of-court settlement, which must be approved by the OJK, Indonesia's financial services authority.

Next Step Forward

The Regulation will come into effect one year from 12 July 2022. During this one-year grace period, creative economy entrepreneurs should ensure that their IP assets are in order, especially with respect to the recordation of copyrights in the DGIP, which in practice could take around a month or so.

From the consideration section of the Regulation, we understand that the purpose of the Regulation is to stimulate the development of the creative economy ecosystem in Indonesia. The government views that the creative economy ecosystem still faces many obstacles, such as limited access to financing.

Moreover, the reality is that IP assets are often the primary or sole assets of creative economy entrepreneurs.

In our view, the Regulation achieves the general aim of pushing the growth of IP-based financing from the government and local banks or non-bank financial institutions that are supervised by the OJK. However, as mentioned earlier, the DGIP has not begun accepting the registration of IP assets as security, and the Regulation itself does not detail the enforcement of encumbered IPs. As a result, it is likely that enforcement of encumbered IPs may still be a hurdle for lenders, e.g. they cannot sell IP certificates through an auction.

Nevertheless, the Regulation marked a significant step forward in Indonesia's IP regime. While the Regulation does not change any existing provision on encumbering IP assets via fiducia security as regulated under the Fiducia Law, Copyright Law, and Patent Law, it recognises the importance of recording or registering IP assets by giving creators, inventors, and entrepreneurs a new option in obtaining financing. To ensure lenders are on the same page, however, clearer rules and guidance are needed from the government, especially on registration and enforcement.

Contacts



Dewi Soeharto

Partner

D +62 21 2555 7891

F +62 21 2555 7899

dewi.soeharto@ahp.id



Ari Juliano Gema

Partner

D +62 21 2555 7861

F +62 21 2555 7899

ari.gema@ahp.id

Nalendra Wibowo and Achmad Faisal Rachman also contributed to this alert.

Our Regional Contacts

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

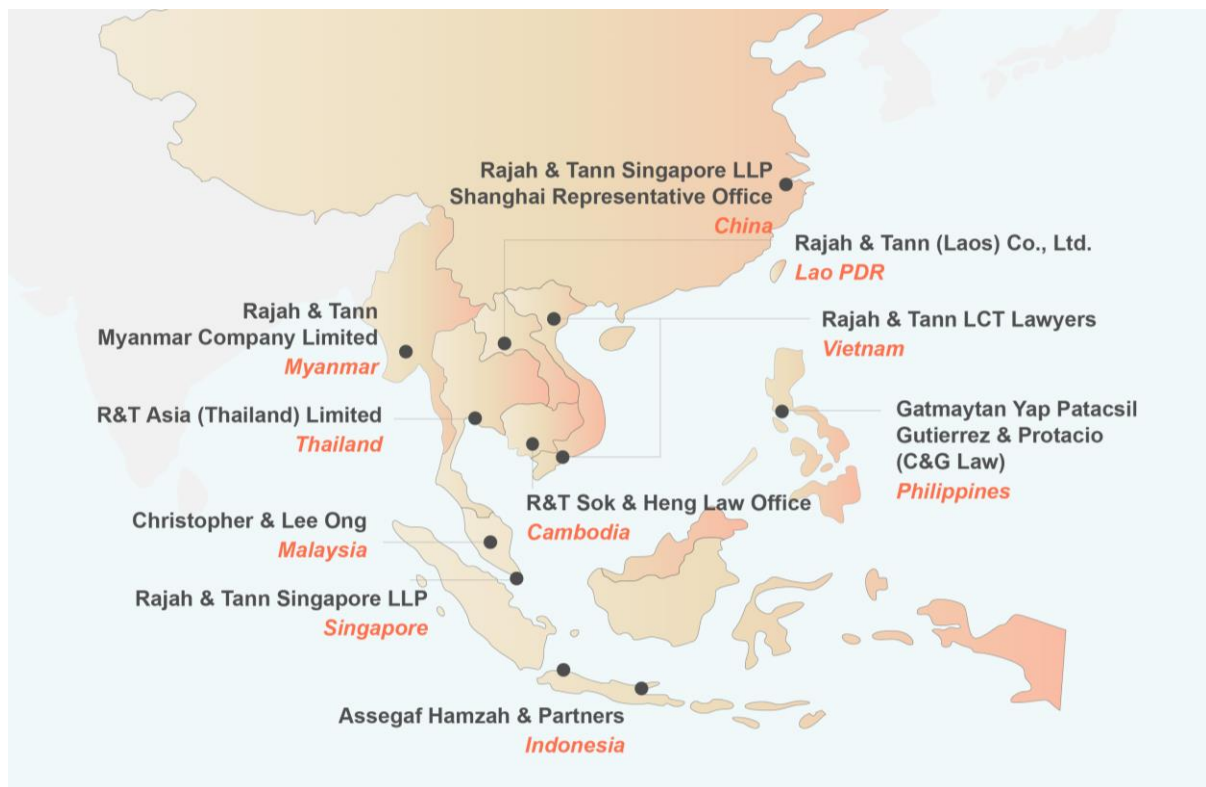
Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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