IETC 2014

Concept of legal protection of intellectual property rights

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Abstract

Evolutionary processes of political system of society inevitably influence a condition of structure of the public relations, first of all, on formation of a new legislative platform of the state. Finding of the state sovereignty of the Republic of Kazakhstan promoted creation of objective public prerequisites for creation of the new legislative norms governing the public relations in qualitatively changed socio-political conditions.

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Peer-review under responsibility of the Sakarya University.

Keywords: concept intellectual property, exclusive rights, patent, scientific works, industrial sample

1. Introduction

In the context of joining International organizations, multilateral international agreements, which have mandatory requirement for equal protection of intellectual property right for both domestic and foreign authors, anticipating entrance of the Republic of Kazakhstan to the World Trade Organization (WTO), veryr actual is the problem of improving measures, aimed at fighting problems of legal protection of intellectual property, in particular, providing their legal protection, preventing crimes in the spheres of using results of intellectual activity.

Professor Dzhekebayev U.S. is right claiming that "the new economic relations in our country are inseparably linked with formation and development as the states, and is right. Processes of cardinal updating of public life are accompanied by revaluation of many parties of legal life of the Republic, including methods and ways of the

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organization of fight against crime, improvement of the criminal, criminal procedure legislation. In this regard high-quality changes undergo criminal and legal and criminological theories. A number of the theoretical provisions which were considered until recently as firm, such as the bases of criminal liability, category of crimes, fault forms, the subject of a crime, the purpose of criminal penalty, are critically reinterpreted taking into account social changes, concrete requirements of law-enforcement activity”.

The laws governing the public relations, arising at creation, use and operation of objects of the intellectual property, the systems which have laid to the main legislative foundation for protection of objects of intellectual property were consistently adopted. First of all, the Constitution of the Republic of Kazakhstan, which article 20 proclaims a freedom of speech and creativity, and also some other acts.

It should be noted that the legal language used in the sphere of a turn of creative results of human activity, such as, for example, the concept “intellectual property”, “exclusive rights”, “piracy” arose recently.

Now illegal use of objects of intellectual activity by various enterprise structures causes great damage not only to authors, founders and performers of objects of intellectual property, but also a significant damage to the state as in the budget of the state taxes for production, use and trade of counterfeit production don’t arrive.

"In the participating states of the CIS level of counterfeit production fluctuates from 73% to 94% (Ukraine – 90%, Belarus – 94, Kyrgyzstan – 86, Georgia – 73%, and two last countries are members of the WTO), and in such countries as the USA, Great Britain, France, the Czech Republic it makes less than 10%, Finland and Italy – 10-25%, Poland and Brazil – 25-50%”.

In legal literature illegal use of intellectual property rights also is called as "piracy", and production used by "pirates", not license production is called counterfeit or "piracy". The word “pirate” occurs from the English word "piracy", having following value:

1). piracy; piracy action;
2). author's offense of author's, publishing or patent law; plagiarism; counterfeiting;
3). illegal activity (especially unregistered radio station, private bus).

The concept of counterfeiting by scientists is understood as various illegal actions in relation to objects of intellectual property. So, for example, according to Shershenevich G. F. "distribution of the literary work for this purpose reproduced completely or in large part by the person which has no copyright and didn't get permission to that from the author or his successor, is called as counterfeiting and makes a criminal offense. However the room in anthologies of articles or fragments from other compositions, at least and more printed page isn't forbidden.

Pilenko A.A. opening counterfeiting questions in relation to patents, I meant the following: “under patent counterfeiting certainly deliberate and unauthorized implementation of the rights implementation of the rights belonging to the patentee, made in the territory of the state which has granted the patent, at such moment when this patent had prohibitive force and in the form of such activity which aimed at systematic contact with uncertain number of the third parties”.

Besides, "violations of the right for works of art can happen doubly: a) any repetition, for monetary benefits, a work of art in its whole structure, without formal consent of the person having not of it the exclusive right, is called as counterfeiting, or illegal copying.

Counterfeiting will be, for example, the copy pictures, being at an exhibition, for its room in the magazine, the statue image on medals, creation of the building according to someone else's plan or a facade. However our law doesn't consider as counterfeiting that case when work of painting is represented by means of a sculpture and vice versa; c) repetition of separate parts from others work of art in the work is called as plagiarism, or illegal loan. The choice from others picture of groups, figures, the heads, a landscape, a sea look and their room in the picture with observance of the same drawing and lighting".

Defining the circle of people, carrying out counterfeiting, Pilenko A.A. considers that "first of all, the one who made this invention can be a counterfactor, certainly; and, in particular, in two cases: 1) as in, when the patentee declared the invention, him independently made and only incidentally coincided with what was also independently made accused (parallel creativity), and 2) also in, when the patentee borrowed – in this or that (even dishonest) – a form at accused the invention made this by last".

Use of counterfeit work without extraction of material benefit also is the fact of violation of intellectual property rights as exclusive rights of the author or the owner are thus violated.

Now the majority of the countries which are carrying out legal protection of objects of intellectual property, are guided by the term approved by the World Intellectual Property Organization (WIPO) by point VIII of Art. 2 from July 14, 1967. In particular, in it is specified that the intellectual property includes the rights relating to:
- to literary, art and scientific works;
- performing activity of actors, sound recordings, radio - and to telecasts;
- to inventions in all areas of human activity;
- to discoveries:
- to industrial samples;
- to trademarks, service marks, trade names and commercial designations;
- to protection against unfair competition;
- and also all other rights relating to intellectual property in production, scientific, literary and art areas.

"The term "intellectual property" in this convention is used in collective sense, designating itself all rights for results of creative activity and some objects equated to it. The list of concrete types of exclusive rights containing in the Convention has approximate character and can be easily added with other results of intellectual activity. That the obligation to provide protection of all rights listed in the Convention in the countries isn't imposed on members of VOIS is obvious also and they define a circle of protected objects of intellectual property. That the obligation to provide protection of all rights listed in the Convention in the countries isn't imposed on members of VOIS is obvious also and they define a circle of protected objects of intellectual property".

According to some scientists, for example, Dozortseva V.A. "the term "intellectual property" is submitted legally insufficiently incorrect. It can make impression about distribution on results of intellectual activity and in general on non-material objects of the mode established by the law for the property right. This impression would be wrong". However, despite it, this term is legislatively fixed and gained rather wide circulation.

Merzilikina R. A. considers that "the intellectual property differs from real property that it possesses dual character: it is non-material, spiritual, however objected by means of the material carrier and when using results of intellectual activity certain material benefits not only for satisfaction of needs of the founder, but also all society" are created.

National legislations define distinction in concepts and norms about intellectual property, "existence of various legal systems and concepts, according to Churin N. F. complicates elaboration of definition of this concept exact, comprehensive and satisfying all as it is unequal in various countries".

The legislation of the Republic of Kazakhstan defines the list of objects of intellectual property in the new Civil Code where in section 5 called "Intellectual property right" all known types of objects of intellectual property, the bases of emergence of the rights for objects of intellectual property, personal non-property and property rights, exclusive rights and the property right to objects of intellectual property, validity periods and transition of exclusive rights to other person, ways of protection of exclusive rights are characterized.

According to Civil Code Republic of Kazakhstan Art. 961 objects of intellectual property right treat:
1) results of intellectual creative activity;
2) means of an individualization of participants of a civil turn, goods, works or services.
Results of intellectual creative activity treat:
1) works of science, literature and art;
2) executions, soundtracks and transfers of the organizations of a broadcasting;
3) inventions, useful models, industrial samples;
4) selection achievements;
5) topology of integrated chips;
6) unsolved information, including know-how (know-how);
7) other results of intellectual creative activity in the cases provided by the present code or other acts.

Means of an individualization of participants of a civil turn, goods, works or services treat:
1) trade names;
2) trademarks (service marks);
3) names of places of an origin (indication of an origin) goods;
4) other means of an individualization of participants of a civil turn, goods and services in the cases provided by the present Code and acts.

Objects of copyright, according to the Law RK "About Copyright and Adjacent Rights" of June 10, 1996 No. 6-1, Art. 7 are:
1) literary works;
2) drama works;
3) scenario works;
4) choreography and pantomime works;
5) pieces of music with the text or without text;
6) audiovisual works (film, TV and video movies, filmstrips and others film and teleworks);
7) works of a sculpture of painting, graphics and other works of the fine arts;
8) works of applied art;
9) works of architecture, town planning and landscape gardening art;
10) photographic works and the works received in the ways similar to photo;
11) cards, plans, sketches, illustrations and the three-dimensional works relating to geography, topography and to other sciences;
12) computer programs;
13) other works.

Objects of copyright also treat: derivative works (translations, processings, summaries, papers, summary, reviews, performances, musical arrangements and other processings of works of science, literature and art); collections (encyclopedias, anthologies, databases) and other compound works representing on selection and (or) an arrangement of materials result of creative activity.

As specifies Serebrovsky V. I., "copyright governs only those relations which are connected with creation and use of works of science, literature and art".

"Object of copyright, - Shershenevich G. F. wrote. - the literary work as the product of spiritual creativity given a written or verbal shape and intended to the address in society is. Reports on court sessions, scientific societies, zemstvos, etc., not expressing spiritual creativity of their originators, can't be considered as such objects".

In the dictionary of Russian of Ojegov S. I. there are two semantic values of work: 1. Creation, product of work, creativity, nature work, work of art, literary work. The second value of this word means result, a result of multiplication.

Generalizing work as a material benefit in a counterbalance of the philosophical category combining the material and ideal phenomenon, Militsin A. gives the following definition of work: work in author's and legal sense – object of a material world, a product of creative activity of the person, existing or existing in the objective form, protected by copyright as individual connection of a matter and a form and as that or in the form of the copies capable to be object of the real rights.

Necessary criterion of object of copyright is creative character and an objective form of its expression. There are different formulations of concept of creativity. According to Yurchenko A.S. creativity is not "intuition", not sudden "inspiration", not unconscious inspiration when the invention or an improvement suggestion appears suddenly, without labor efforts of the person. Creativity is a work, besides work difficult and laborious, caused by social requirements of society. Technical creativity as is natural as development of technology" is natural.

Creativity is peculiar only to the people possessing creative thinking. This circumstance needs to be considered in the course of identification of perpetrators, involvement of suspected persons to the criminal liability, intellectual property rights carrying out violation, and also the characteristic of the identity of the studied criminal.

Necessary indicator of creative activity is the novelty of work which is expressing as in an external form (objective signs of work), and in the internal contents (subjective signs of work). There are the works which value can be shown in the most part in an external form. Works of the fine arts belong to such works.

For work creation the author sometimes needs certain time. The author, in search of the new image, a new form of work, the solution of any task, abstracts, dreams, analyzes information arriving from world around and comes to the new decision, before, born in consciousness of the person, and then, are embodied in a material subject. But the law protects only what have a material embodiment in various forms, allowing to perceive work by sense organs. The ended work may contain some parts which can be separate independent independent works or to be visually and are ideologically interconnected with each other, are addition of the following or the previous component.

"Copyright and related rights, - Pankeev I.A. fairly notes. - can exist and be protected fully only when they will be effectively protected. Numerous researches, acts etc. are devoted to ways and methods of such protection. It is a question not only of a piracy, unauthorized the print out and reprints, plagiarism, illegal sale, etc., but also of fair terms of the contract, high-quality execution of the taken obligations".

In the Law of the Republic of Kazakhstan "About copyright and related rights" of June 10, 1999 in article 6 of item 2 it is specified that copyright extends both on the published works, and on the unpublished works existing in any objective form: 1) written (manuscript, typewriting, musical notation, etc.); 2) the oral; 3) sound-or videos; 4) images; 5) volume and spatial and in other forms. In the same article it is said that copyright doesn't extend on
actually ideas, concepts, the principles, methods, systems, processes, opening and the facts [13, Art. 6].

Also, copyright of work isn't connected with the property right to material object in which work is expressed. Transfer of the property right or the right of possession of any material object doesn't attract transfer of copyright of the work expressed in this object.

Copyright arises at the time of creation of work of science, literature and art in an objective material form, and for objects of copyright it isn't required to obligatory registration of work, other special registration or observance of any formalities. The author and (or) the owner is enough for the notification about the exclusive property rights has the right to use a sign of protection of copyright which is located on each copy of the work, consisting their three elements:

1) Latin letter "C" in a circle ©;
2) Name (name) of the owner of exclusive copyright;
3) Years of the first publication of work.

The author or the owner can register the rights in official registers. Registration is carried out by authorized body according to the legislation of the Republic of Kazakhstan, namely according to the Instruction about the state registration of the rights for the works protected by copyright and the adjacent rights.

The subject of copyright is the natural person which creative activity created work. If work is created by joint work of two or more persons in a co-authorship, the right for the created work belongs to authors in common irrespective of, whether forms such work one indissoluble whole or consists of parts, each of which has as well independent value.

Questions of the theory of development of copyright as subjective civil law by the legislation of the Republic of Kazakhstan Ikhsanov E.U. brought.

The part of the rights for work can pass to the legal entity on the basis of the author's contract, according to the current legislation of the Republic of Kazakhstan "About copyright and related rights". In more detail questions of transition of copyright under the contract reveal in Abuova R. Z. scientific works.

Features of transfers of rights at the conclusion of the author's contract for works of the fine arts are in details shined in Ikhsanov U.K. scientific works.

With the advent of new technologies and forms of fixing and reproduction of sounds and the image, transfer to air, a cable broadcasting, there was an opportunity to extend works in unlimited number that in turn promotes illegal use of works without the knowledge of authors and performers. In this regard, there was a new form of fixing of the rights of authors and performers, is called as the adjacent rights. The adjacent rights are regulated by the Law of the Republic of Kazakhstan "About copyright and related rights".

According to article 34 of the Law of the Republic of Kazakhstan "About copyright and related rights" the adjacent rights extend on statements, executions, soundtracks, transfers of the organizations of an on-air and cable broadcasting irrespective of their appointment, the contents and advantage, and also from a way and a form of their expression.

Subjects of the adjacent rights are performers, producers of soundtracks and the organization of an on-air and cable broadcasting.

As well as for copyright, for emergence and implementation of the adjacent rights it isn't required observance of any formalities. The manufacturer of a soundtrack and (or) the performer for the notification about the rights has the right to use a sign of protection of the adjacent rights which is located on each copy of a soundtrack and (or) on each case containing it and consists of three elements:

1) Latin letter "P" in a circle ®;
2) name (name) of the owner of the exclusive adjacent rights;
3) years of the first publication of a soundtrack.

Actions of the adjacent rights is carried out in case of observance of the certain conditions stipulated in article 36 of the Law of the Republic of Kazakhstan "About copyright and related rights".

Further, the following group of objects of the intellectual property, protected Art. 184-1 of Criminal Code Republic of Kazakhstan, is objects of industrial property. The inventions, useful models, industrial samples belong to industrial property.

The public relations, namely, property, and the related non-property relations arising in connection with creation, legal protection and use of objects of industrial property, are object of regulation of the Patent law of the Republic of Kazakhstan, No. 427-1 accepted on July 16, 1999.

The device, way, substance, strains of microorganisms, cages of plants and animals, and also use of the device
known earlier, a way, substance, a strain on new appointment can be objects of the invention.

Other objects of intellectual property (selection achievements, topology of integrated chips, trademarks, service marks, names of places of goods origin and others), are regulated by other acts.

The significant contribution in formation and development of science of intellectual property right to the Republic of Kazakhstan, mainly Patent law, was brought by professor Kaudyrov T.E. In particular, it defines system of the legislation on protection of intellectual property rights in two main directions: statistical and dynamic aspects.

All normative legal acts concerning results of intellectual creative activity, make separate subsector of the civil legislation – the legislation on intellectual property. This subsector including according to electronic legal base about 70 regulations of various level, was finally created and assumed logically verified air with acceptance in 1999. Special part of the Civil code of RK. In system of institutes and sections of civil law this subsector it is accepted to call "intellectual property right".

Over time the public relations concerning protection of intellectual property rights developed step by step and supplemented with new laws, normative legal acts. Historically, intellectual property right shared on two main types: copyright and related rights and patent law.

Forming concept of legal protection of intellectual property rights, we will consider contents of the word "protection of intellectual property rights". In Ojegov S. I. dictionaries. Dalya V. I. legal dictionaries there is no separate independent concept of protection of intellectual property rights.

In the dictionary of russian of Ojegov S. I. under the word protection, is understood four different values: in the first understanding it is meant "protecting, to protect from encroachments, from hostile actions, from danger, to protect the child, to protect the city from the enemy, to protect, secure against something, to defend (opinion, views) before someone's criticism, objections, to protect the point of view, to defend the dissertation, the project, the diploma – publicly at meeting of an academic council or before the special commission to defend provisions of the thesis, the project, the diploma.

In the second understanding: protection is that protects, serves as defense, to look for protection, be to me protection, to take under protection.

In the third understanding: the word protection makes the collective sense, the protecting party in trial.

In the fourth understanding: the word protection has collective value: part of team (football, hockey) which protects gate to play in protection.

In Dahl V. I. explanatory dictionary. under the word to protect, protect it is meant to preserve, protect, defend, defend, to intercede, not to give in offense; to close, block protecting, to protect itself, to protect himself. Protection – anything, the subject hiding, protecting, protecting whom or something; defense, protection, board. God – my protection! Protect, defender.

In the legal encyclopedia under Tikhomirov M. Yu. edition. also there is no concept of protection of intellectual property rights. In this encyclopedia the word "protection" (English defense, protection) is understood in two aspects: in the first aspect protection is a complex system of the measures applied to ensuring free and appropriate realization of the subjective rights, including judicial protection, legislative, economic, organizational and technical, etc. means and actions, and also self-defense of the civil rights. In the second aspect protection is the right accused or suspected to be protected from charge by means of statements and petitions, uses of legitimate rights, etc. in the resolved way, and also at any stage of process to demand presence of the defender. The defender has to watch strict observance of formalities during process and, without breaking a duty to give truthful evidences or without applying the proofs forging truth, to take measures to that the accused wasn't condemned without sufficient proofs.

About the importance of protection of inventions Shershenevich G. F. notes as follows: "the exclusive situation created in favor of the inventor by the right provided to it, puts it in especially advantageous position in comparison with other producers".

According to Gavrilov E.P. "about protection of copyright speak when they are violated or can be broken, i.e. there is a threat of illegal invasion into the sphere of copyright belonging to a certain person (including the organizations). [28, p. 50].

Historically, intellectual property right shared on two main types: copyright and related rights and patent law. "The patent law, - according to Kaudyrov T.E. is a set of the norms regulating an order of registration or other registration, use, the order, protection of the rights for objects of industrial property".

Other subsection of institute of intellectual property right Kaudyrov T.E. calls copyright.

This formulation, certainly isn't applicable to protection of intellectual property rights, and in our opinion demands some completion since, specifies only certain narrow part of the public relations.
Besides, word "set" often applied in legal literature makes the sense consisting in biological interaction of live organisms therefore, in our opinion, replacement of the word "set" by the word "complex" in this connection, we offer the following formulation is more ethic:

The legislation on intellectual property represents a complex of the rules of law, regulating public legal relationship in the sphere of the intellectual property, arising in the course of creation, registration, realization, use, protection of intellectual property rights.

Thus, proceeding from the above, legal protection of intellectual property represents a complex of the rules of law, regulating public legal relationship in the sphere of the intellectual property, arising in the course of creation, registration, realization, use, protection of intellectual property rights.

Copyright – a complex of the rules of law covering public legal relationship in the course of creation, registration, use, protection of the rights for objects author’s and the adjacent rights.

Patent law – a complex of the rules of law covering public legal relationship in the course of creation, registration, use, protection of the rights for objects of industrial property.

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