Master's Thesis of Indira Keldibekova

Coexistence of the Copyright Law and Freedom of Expression in the online world

온라인 세계에서의 저작권법과 표현 자유의 공존

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Abstract

Controversial relations between copyright and freedom of expression and transfer from analogue to digital worlds raises the question if the conflict between the two laws is a bigger issue online than it was before emerging of the internet and how do certain jurisdictions face challenges introduced by development of the conflict in a new environment.

Experience of the states with advanced copyright legislation can be a good example for countries with emerging copyright legislation and paucity in judicial practice.

From its very emergence copyright in western states continued to develop and become independent from state control and censorship. Unlike Western Europe and the United States copyright law in Kazakhstan went back and forth with additional stagnation during the Soviet period. Today not only the law itself but the legal culture of the society in the country is a legacy of the Soviet regime.

Modern copyright law is largely a product of international agreements. Copyright originates with national law-making bodies but International agreements have now become a primary source of copyright rules.

Copyright and freedom of speech are not only enshrined in various international instruments but also have a constitutional dimension

International copyright law functions as a sui generis system. In view of the global framework international copyright law is an unusual phenomenon driven by three basic principles: minimum standards, national treatment and most-favored-nation treatment.

International instruments not only proclaim the right to freedom of expression

but also set the only legal grounds on which the government can restrict this right. Both universal and regional International instruments have set the same standards by limiting the freedom of speech.

Given that the right to freedom of expression is recognized as being of primary importance, mankind has also recognized that this right is not absolute. Breach of the freedom of expression can be justified under 3 conditions. Governmental intervention should be established by law. Secondly, imposed restriction should reach the aim that is legal under international law, and, third, the restriction must pursue a legitimate aim.

The complicacy of the Internet is in its nature - absence of borders and almost impossibility of control. Court can rule that posting of] copyrighted content is illegal but it is impossible to stop from further spread of the content through the digital dimension. Even if existing law still can be interpreted in some cases so it can still regulate interrelations between copyright and freedom of expression on the internet soon it will be not enough and creation of the new legal instruments will be necessary. Unlike traditional media Internet doesn't have an owner and can not be absolutely controlled.

Republic of Kazakhstan will celebrate the 29th anniversary of Independence this year. Descendant of the Soviet Union legal system, Kazakhstan became a member of the World Trade Organization only few years ago, which means that the country only recently joined TRIPs Agreement and became a part of the global Intellectual Property society.

Currently, regulation of digital copyright in Kazakhstan is mapped and completely subject to the regulatory framework governing copyright in general. There is no specific law relating to copyright in the Internet like the DMCA in

Kazakh legislation.

State with controversial indexes of freedom of speech and freedom of internet activities more than others shows need in application of the experience of successful solutions for the coexistence of copyright and freedom of expression within the digital perspective.

Situation in the region is similar to the rest of the world, copyright protection on the Internet is the weakest point of the national Intellectual Property law. The existing provisions of the law not able still satisfy the interests of all participants in the process of information consumption. Meanwhile, in Kazakhstan copyright and intellectual property products are becoming more vulnerable.

Keyword: Copyright, Freedom of expression, Internet, Kazakhstan
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1. Introduction

Present work considers interaction between copyright and freedom of expression with particular emphasis in the digital environment.

Freedom of expression is a human right that protects seeking receiving and dissemination of information and opinions through any media.

Copyright laws protect one's right of being an exclusive right holder of the work. They guard a person's ability to be paid for copies for his or her work and make sure the work is not changed without permission.

Because of the nature and original targets of two laws, relations between copyright and freedom of expression is very controversial.

Two opposite views have been addressed. One of them is that copyright and freedom of expression are harmonious and complementary concepts: copyright and freedom of expression are consentient as both laws are promoting freedom of speech. Copyright doesn't protect author's idea or the information that protected work can contain. Protection extends only to the "expression" of that idea or information. Therefore, other people are not excluded from expressing the same ideas or using the same information if it was expressed in a different way. Copyright is an engine of freedom of expression and one of the means to promote it. In this light, copyright has become a human right equal to freedom of expression.

On the other hand, there is an argument that copyright is directly opposite to freedom of expression. Even a cursory examination of the origins of copyright law reveals the potential conflict between property rights in intellectual creations and freedom of expression.

In addition to the existing collisions in relations between copyright and freedom of expression Internet has brought big issues for the copyright enforcement. Digital copyrights facing serious challenges as copying and dissemination of works became cheaper, easier and faster and know no borders.

Main function of the internet is to disseminate information among the huge

audience. Internet allows exercising one of the fundamental human rights "to seek, receive and impart information and ideas through any media and regardless of frontiers."[①]

The main questions of this thesis are if the conflict between copyright and freedom of expression is a bigger issue online and development and clash of digital copyrights and free speech on the internet in the Republic of Kazakhstan.

Number of researches and studies are discussing complicated relations between Copyright and Freedom of Expression on the international emphasis or jurisdictions with strong Intellectual Property legislation with its long history and traditions. On the other hand, there are countries that gained their independence just recently and only in the process of emerging proper Intellectual Property legislation suitable for their realities.

Republic of Kazakhstan will celebrate the 29th anniversary of Independence this year. Descendant of the Soviet Union legal system, Kazakhstan became a member of the World Trade Organization only few years ago, which means that the country only recently joined TRIPs Agreement and became a part of the global Intellectual Property society.

For a long period of time there was no critical need for advanced Copyright legislation due to not much production of copyrightable works in the country. However, new time was marked by the rapid surge in development of culture, wide polemic attitudes and trends not only in developed countries but the whole world as a consequence. Copyright continued to evolve with society and technology.

State with controversial indexes of freedom of speech and freedom of internet activities more than others shows need in application of the experience of successful solutions for the coexistence of copyright and freedom of expression within the digital perspective.

As this work considers experiences of the states with long existing history

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① *Art. 19, Universal Declaration of Human Rights. 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III).*

of copyright legislation and number of judicial cases involving resistance between copyright and freedom of expression there will be some suggestions of implementation of that experience into Kazakh copyright law in order to improve and avoid the same challenges many states had to face.

2. Copyright and Freedom of Expression.

2.1 Historical approach.

2.1.1 Soviet History of copyright.

History of Copyright in Kazakhstan doesn't share same origin with Europe and the United States. For a long period of time, Kazakhstan was part of the Russian Empire and until 16 December 1991 was one of the Soviet Union republics. Therefore, operating law in the country was the law of Russian Empire the law of the USSR including copyright area. Accordingly, the history of the copyright law of the Republic of Kazakhstan rooted from history of the Russian copyright law.

In Russian Empire the copyright initially emerged as the right for the literary works as it was in Europe. In process of time the range of objects protected by the copyright expanded to the musical, artistic and other works.

Another similarity with European copyright history was the fact that regulations for publishing of literary works didn't emerge in order to protect the interests of publishers and booksellers or especially writers but as an instrument to set the censorship.

Book publishing was under the state monopoly before 1771. That year in St. Petersburg the first privilege for printing books in foreign languages was granted, simultaneously with issuing of the censorship policy for foreign literature works. As for the private printing presses that could publish books in Russian language it was only allowed by the Decree of January 15th, 1783 and canceled after 13 years as too liberal[②].

Russian copyright of the late 19th — early 20th centuries only granted privileges for exclusive publishing to only certain public entities, scientists corporations and science academies[③].

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② *Sergeyeva A. Авторское право России [Russian Copyright]. Saint-Petersburg (1994)*

③ *Belyatskin S.A. Новое авторское право в его основных принципах [New copyright in its basic principles]. - SPb. The publication of the legal book warehouse "Law". - 1912. - p. 32*

Just like as it was in the Western Europe before, in Russia, the dominant position of the state in the area of book publishing continued until the middle of the XIX century. The first recognition of the authors' rights and interests came with the law of 1828 in special chapter in censorship regulation④. However, only five articles in censorship regulations were devoted to copyright which were complemented by the rules. Only in the Censorship Statute of the later editions norms of copyright were applicable⑤. However, provisions according to which author publishing without complying with the Censorship Statute could be deprived of his copyright still preserved. In addition, copyright was still subordinate to Press committees and inspectors.

Russia has refused from adhering to the Berne Convention in the XIX century because of the political and pecuniary interests of the Russian government in addition to the absence of well organized authors' societies that could protect the rights and interests of the authors in Russia⑥.

On February 4th, 1830 a new Regulation "The rights of writers, translators and publishers", consisting of 40 paragraphs was issued.

The first section was called "The rights of the property of writers, translators and publishers." Though, the Regulation of 1828 has not yet addressed the issue of the legal nature of copyright the Regulations of 1830 considered copyright as the right for the ownership of the work. Within the statutory term author could exercise this right himself or transfer it to another person. Regulations set a 25-years term of copyright for works published by the Academy of Sciences, universities, schools, scientists and other companies, with the right of extension for another 10 years, if the work was published in the last 5 years of the total period. Publication of

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④ *Sergeev A.P. Право интеллектуальной собственности в Российской Федерации [Intellectual Property Law in the Russian Federation]. M., 1996. p. 36-37.* HYPERLINK "http://www.allpravo.ru/library/doc1972p0/instrum1987/item1989.html#_ftn6"

Charter on censorship: [Approved. Apr 22 1828: with the annex of the States and the Provisions on the Rights of Writers]. - St. Petersburg: type. Dep. Nar pros., 1829. Chapter X Art. 420 p.1

⑥ *Kalyatin V.O.Интеллектуальная собственность (Исключительные права)[Intellectual Property (Exclusive Rights)]. Textbook for high schools. - M .: Norma. - 2000. - p.14* HYPERLINK "http://www.allpravo.ru/library/doc1972p0/instrum1987/item1989.html#_ftn7"

somebody's works under his own name was qualified as a forgery entailing not only a liability but also brought to justice. Much attention was paid to the issue of liability for infringement.

Great changes came with the adoption of the Copyright Act on March 20th, 1911. New law absorbed the principles and views of modern western copyright laws of that time⑦.

Copyright Act of 1911 reflected progressive ideas of German law of 1901 and 1907 and the Berne Convention in its Berlin edition of 1908. However, the Act had a traditional for Russian copyright lower level of protection of the rights of authors⑧.

Law extended copyright to literary works, both written and oral (speeches, lectures, essays, reports, messages, sermons, etc...); for music works, including music and improvisation; in the photographic and artistic works (paintings, engravings and other graphic art, sculpture and architecture); as well as geographical, astronomical and other kinds of maps, globes, atlases, drawings in the natural sciences, construction and other technical plans, drawings, diagrams and other similar product⑨. For the first time author's right for translation of their works was enshrined in Russian copyright law.

Copyright Act did not follow international practice In some respects. In particular law allowed free translation of foreign works and didn't protect of cinematographic works.

After the Revolution of 1917⑩ and collapse of Russian Empire Copyright Act of 1911 was cancelled.

Belyatskin S.A. Новое авторское право в его основных принципах[New copyright in its basic principles]. SPb. The publication of the legal book warehouse "Law". - 1912. - p.5.

⑧ Grishin D. Yu.. Эволюция авторского права: от зарождения до наших дней // Проблемы юридической науки в исследованиях докторантов, адъюнктов и соискателей[The evolution of copyright: from its inception to the present day // Problems of legal science in studies of doctoral students, adjuncts and applicants.] Vol. 7, vol. 1. N. Novgorod, 2001

⑨ *Russian Copyright Act, March 20, 1911.*

⑩ *1917 Revolution in Russia brought to dismantlement of Tsarist autocracy and led to the eventual rise of the Soviet Union.*

Number CEC[11] and the *CPC*[12] decrees aimed to the establishment of a state monopoly on the works of science, literature and art adopted.

Decree "On the State Publishing House" adopted on December 29th, 1917 granted special commission with the right to establish the state monopoly on the works of some authors for a term limited to five years. Decree "On the recognition of scientific, literary, musical and artistic works of the public domain" (26 November 1918) passed copyrights of a number of writers and composers to the State property.

During the period of NEP[13] new law "On Fundamentals of Copyrights" was adopted (May 25th, 1928). The law was one of the first full-length legal acts in the field of copyright law, adopted after the 1917 October Revolution. "Fundamentals of Copyrights" 1928 recognized authors' and successors' copyright of for the works that came to existence or located within the territory of the Soviet Union in the form of a manuscript, sketch or other objective form regardless of author's nationality. If the work was published abroad or located there in any objective form copyright law recognized the authorship only in case of existence of the special agreements with the respective State. Law recognized rights of the authors for the life term plus 15 years period after the death. Use of the original works was allowed only under the contract with the author. One of the features of the Fundamentals was the norm introducing state regulation of the industry. Thus, the terms of the assignment of rights to public performance of works and the publishing contracts were regulated by the legislation of the Union republics. Possibility of compulsory redemption of the copyright in a work by the Government of the USSR was established[14].

In 1964 new Civil Code of the RSFSR was adopted. At this stage legislator had a different approach to the regulation of the industry. Legal regulation of copyright has been included to the codified law. The 1964 Civil Code provided more

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[11] *Центральный исполнительный комитет [Central Executive Committee of the Soviet Union].*
[12] *Совет народных комиссаров [Council of People's Commissars].*
[13] *Новая экономическая политика [New Economic Policy 1921-1928]*
[14] *Decision of the CEC and SNK of the USSR of 05.16.1928 the basis of copyright. Source: "NW USSR", 1928, No. 27, Article 246, "Proceedings of the Central Executive Committee of the USSR and the All-Russian Central Executive Committee", No. 113, 05.17.1928.*

complete and detailed elaboration of the copyright. Code provided possibility of granting copyright protection to foreign authors' works published abroad in the framework of relevant international agreements (bilateral or multilateral). However, there were no such agreements until 1973 except for minor bilateral treaties of the USSR.

Soviet Union acceded to the Universal Copyright Convention (UCC)[15] in 1973. This event obligated USSR to ensure a minimum level of copyright protection for authors whose works were first published abroad[16]. Prior to this, the Soviet Union was not a member to any multilateral international agreements on copyright. By the virtue of accession to the UCC foreign works published after May 27th, 1973 in any UCC member country became protected by copyright in the Soviet Union. On February 21st, 1973, seven days before the Soviet Union announced its accession to the Convention, the USSR Supreme Soviet adopted a number of amendments in order to bring the Soviet copyright law into line with the minimum requirements of the Universal Copyright Convention. Soviet republics including Kazakhstan similarly adapted their copyright laws[17]. UCC's administrative functions were carried out by UNESCO and was seen as a bridge leading to membership in the Berne Union. The Soviet Union was not a party to the Berne Convention[18].

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[15] *UN Educational, Scientific and Cultural Organisation (UNESCO), Universal Copyright Convention (as revised on 24 July 1971 and including Protocols 1 and 2), 6 September 1952, U.N.T.S. No. 13444, vol. 943, pp. 178-325.*

[16] *Matveev Yu. G. Международные конвенции об авторском праве [International Copyright Conventions]. Moscow, 1983.*

[17] *Elst, M. Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation. Leiden / Boston: Martinus Nijhoff Publishers, 2005.*

[18] *Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979.*

2.1.2.Formation of copyright in independent Kazakhstan.

Political and economic changes took place in most countries of Central and Eastern Europe and the former Soviet Republics beginning in 1989-1990. Countries became independent and started their transition from a centrally planned economy to a market economy and from a system "democratic centralism" towards pluralistic democracy. These changes also related intellectual property and copyright and related rights within its framework.

The 1971 Paris Act of the Berne Convention contained very comprehensive rules governing protection, possible restrictions and other basic copyright aspects of copyright at the moment. The accession to the Paris Act of new independent states that arose on the territory of the former republics of the Soviet Union took place during the 90s.

Kazakhstan became a member of the International Union for the Protection of Literary and Artistic Works founded by the Berne Convention on April 12, 1999 by accession to the Berne Convention[19].

In 1991, the Fundamentals on the copyright of the USSR and the Union republics aimed at centralization and harmonization of the Soviet republics' copyright laws. 1991 Fundamentals were way more explicit and gave other Soviet Republics less space for taking contrary measures and setting their own rules. Law increased the term of copyright to 50 years after the author's death, first introduced protection of related rights and provided protection for know-how[20].

1991 Fundamentals on copyright was applicable in Kazakhstan until Law of the Republic of Kazakhstan on Copyright and Related Rights was adopted on June 10, 1996

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[19] *Berne Notification No. 199 Berne Convention for the Protection of Literary and Artistic Works. Accession by the Republic of Kazakhstan.*

[20] *Elst, M. Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation. Leiden / Boston: Martinus Nijhoff Publishers, 2005.*

As it is seen from the brief historical review, in western states from its very emergence copyright continued to develop and become independent of state control and censorship. Unlike Western Europe and the United States copyright law in Kazakhstan went back and forth with additional stagnation during the Soviet period. Today not only the law itself but the legal culture of the society in the country is a legacy of the Soviet regime.

2.2 Constitutional and International dimensions of two rights.

2.2.1. Copyright in International Documents.

Copyright and freedom of speech are not only enshrined in various international instruments but also have a constitutional dimension. Copyright is constitutionally protected in some western countries. For example, Section 1(8) of the United States Constitution states that *"the Congress shall have the power to […] promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*"[21]. In Europe Swedish, Portuguese and Spanish Constitutions expressly define copyright as a fundamental right. In most other European states the constitutional nature of copyright is merely inferred by constitutional courts in their decisions.[22]

Internalization of the books market has begun simultaneously with the development of the European marked and vanishing of the existing trade barriers[23]. Not only markets got bigger, piracy has started to spread widely too along with more activities in order to strengthen international copyrights. More countries start to

[21] *U.S. Const. art. 1, § 8*
[22] *Bonadio, E. (2011). File Sharing, Copyright and Freedom of Speech. European Intellectual Property Review, 33(10), pp. 619-631.*
[23] *Paul Edward Geller, Copyright History and the Future: What's Culture Got to Do with It?, 47 J. Copyright Society U.S.A. 209, 220 (2000).*

involve to interstate copyright treaties.

Modern copyright law is largely a product of international agreements. Copyright originates with national law-making bodies but International agreements have now become a primary source of copyright rules. This is the result of the need for international norms and practices, as copyright-protected works move across international borders.

Necessity in adoption of the unified international copyright regimes was increased with the number of activities that emerged as a result of the creation of International Literary and Artistic Association back in 1884. Diplomatic conferences were held in 1884, 1885 and 1886. As the result of those conferences, on September 9th, 1886 Berne Convention for the Protection of Literary and Artistic Works was signed. Convention came into force on December 5th, 1887[24]. There were up to five revisions of the Convention but the basic structure has remained almost unchanged. Revisions significantly increased rights of the authors of copyrighted works. The main target of the Berne Convention is to protect the rights of the authors as it states from the Article 1 "*The countries to which this Convention applies constitute an Union for the protection of the rights of authors in their literary and artistic works.*"[25]

The copyright rules in the Berne Convention represent minimum standards to which all member countries are expected to conform. Norms are not comprehensive and any member country can exceed minimum standards by implementing a higher level of protection in domestic copyright legislation. Therefore, Convention allows member countries to undertake measures for the legislative enactment of Berne principles in accordance with their national approaches.

Creation of the World Trade Organization brought to great shift in International copyright regime. WTO adopted an Agreement on trade-Related

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[24] *E. Ulmer, One Hundred Years of the Berne Convention, 17 International Review Industry Prop. & Copyright Law (IIC) 707, 708 (1986).*

[25] *World Intellectual Property Organization. 1982. Berne Convention for the Protection of Literary and Artistic Works: texts. [Geneva]: World Intellectual Property Organization.*

Aspects of Intellectual Property Rights. TRIPS didn't develop new copyright standards but incorporated Berne Convention into itself[26]. Innovation was in the practical approach of the Berne's norms. Provisions were enforceable by powerful deterrent of economic penalties[27].

TRIPs system can be considered as a successful attempt to harmonize international copyright norms by establishing recognized minimum standards for copyright protection all over the world. However, the term "harmonization" may be incorrect in the case of TRIPs as its standardization has been achieved in non-consensual circumstances. Thus, it can be said that TRIPs Agreement brought to internationalization of copyright norms[28].

In 1996 WIPO issued two Internet treaties: Copyright Treaty[29] (WCT) and the WIPO Performances and Phonograms Treaty[30] (WPPT). Treaties opened for signature in 1996 and entered into force in 2002, officially introducing global copyright law into the digital age. Treaties now represent the criterion for copyright protection for digital copyright issues.

Both treaties recognized that information and communication technologies have a substantial impact on the process of creation and the use of literary and artistic works, production and use of performances and phonograms. New legal framework aims to *"introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments"* [31] However, the perspective on digital issues in the WIPO Internet treaties is highly controversial as it aggressively supports existing framework of copyright law. Like prior copyright treaties, WIPO Copyright Treaties base on that proprietary incentives are a critical

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[26] *Teresa, Sundara Rajan Mira. Moral Rights: Principles, Practice and New Technology. Oxford: Oxford University Press, 2011.*
[27] *Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together, 37 Va. J. Int'l L. 275, 277 (1997)*
[28] *T., Sundara Rajan Mira. Copyright and Creative Freedom: a Study of Post-Socialist Law Reform. London: Routledge, 2006.*
[29] *WIPO Copyright Treaty, Dec. 20, 1996*
[30] *ibid.*
[31] *WIPO Copyright Treaty, Dec. 20, 1996*

requirement for knowledge creation.

International copyright law functions as a *sui generis* system. In view of the global framework international copyright law is an unusual phenomenon driven by three basic principles: minimum standards, national treatment and most-favored-nation treatment.

Minimum standards set by the Berne Convention and not comprehensive, any member country can exceed minimum norms and implement a higher level of protection in approach with domestic copyright law. According to the Convention, author could expect as the minimum term of protection life-time plus 50 years after author's death in every member state[32]. However, states are free no grant longer term of copyright protection in their domestic laws. For example, European Union sets term of life of the author plus seventy years after his death. After publication of the pseudonymous works term of protection lasts for 50 years for that works. Work receives life-time plus 50 years protection term in case if the identity of the author becoming certainly known.

System of the minimum standards not a legal regime that standardize copyright norms but assure that every member country can guarantee the minimum level of protection set by the Berne Convention.

The concept of the national treatment is that authors from all Berne Convention member states should be granted the same protection of their rights as it was given to their own nationals in the respective states. Importance of this principle is that Convention guarantees non-discriminatory treatment in all member states. Also, Convention gives the definition to the “country of origin”, which is the country where the work was first published. In case of simultaneous publication in several countries of the Berne Union, the country that granted the shortest term of protection considered as the country of origin. As to unpublished works, the country of origin is the country to which the author belonged.

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[32] *Art. 7, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979.*

"Authors shall enjoy, in respect of works for which they are protected under this Convention, in the countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."[33]

There are four exceptions for the national treatment.[34]

Most-Favored-Nation treatment rule means treating other states equally. According to WTO agreements countries can't discriminate any of their trade partners and have to give all member states the same benefits that were given to any other. This is a fundamental principle of the World Trade Organization. The international trade rule of "most-favored-nation" was introduced to international copyright law by the TRIPs agreement, although with certain exemptions. Article 4 of the TRIPs Agreement contains same principle for the protection of intellectual property rights.[35]. In addition, Agreement allows exemptions upon measures based on existing Intellectual Property related agreements[36].

2.2.2. Kazakh Copyright Law.

In Kazakh Copyright law copyright is an economic and moral rights of the

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[33] *Art 5.1 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979.*

[34] *These are the only cases where national treatment may be denied: (i) works of applied art: if in the country of origin they are protected solely as industrial designs, a country which grants protection both under copyright law and industrial design law may deny protection under its copyright law (but has to grant protection under its industrial design law (Article 2(7)); 41 (ii) works that are eligible for protection on the basis of the place of publication: the country of publication may restrict the protection of such works under the conditions provided for in Article 6(1); if it does so, the other countries of the Union are not required to grant to such works a wider protection than that granted to them in the country of first publication; (iii) comparison of terms: if a country grants protection longer than the minimum term provided in the Berne Convention and the country of origin of the work grants protection that is shorter than in the first-mentioned country, the first-mentioned country may apply the said shorter term in the case of a work the country of origin of which grants the shorter term (Article 7(8)). (iv) droit de suite: a country that recognizes the droit de suite is allowed to only apply it to works whose authors are nationals of another country which also recognizes this right (Article 14ter(2).*

[35] *Art. 4, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)*

[36] *Final Report of the Study Group on the Most-Favoured-Nation clause: Most-Favoured-Nation clause. Adopted by the International Law Commission at its sixty-seventh session, in 2015, and submitted to the General Assembly. Yearbook of the International Law Commission, 2015, vol. II*

author, person whose creative effort brought to creation of scientific, literary or artistic work. That is the subject of intellectual property regardless of their purpose, content and dignity as well as the method and form of their expression.

Copyright in the Republic of Kazakhstan is regulated by the Constitution, Articles 971 – 984 of the Civil Code, Law "On Copyright and Related Rights" June 10, 1996. Country declared succession of the international obligations and agreements of the former USSR to the WIPO Convention. Member to the Berne Convention for the Protection of Literary and Artistic Works, WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Agreement on Cooperation in Organization of Interstate Exchange of Information and Establishment of National Databases on Copyright and Related Rights, Agreement on Unified Principles of Regulation in the Spheres of Intellectual Property Rights Protection and the Agreement on Cooperation in the Field of the Protection of Copyright and Neighboring Rights[37].

According to the Article 6 of the Law of the Republic of Kazakhstan on Copyright and Related Rights:

"1. Copyright shall extend to works of science literature, and arts which are the result of the creative activity, irrespective of their designation, contents and merits, as well as of their expression method and form.

4. Copyright shall not apply to ideas, conceptions, principles, methods, systems, processes, discoveries, facts."[38]

In Kazakhstan copyright protection is not limited to the scope of literary, artistic and musical works. Article 7 of Copyright law states that computer programs can be protected by copyright despite the form it was expressed including the incoming text and object code[39]. *"3. The following shall also be referred to copyright*

[37] *"Administered Treaties: Contracting Parties > Kazakhstan. WIPO. Accessed January 19, 2020. http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=97C.*

[38] *Law of the Republic of Kazakhstan No. 6-I of June 10, 1996, on Copyright and Related Rights (as amended up to Law of the Republic of Kazakhstan No. 419-V of November 24, 2015).*

[39] *Law on Copyright and Related Rights, Art 7. "2. Protection of electronic computer programs shall*

objects:

1) derivative works (translations, processing, annotations, reports, summaries, reviews, staging, musical arrangements and other remaking of works of science, literature, and art);

2) collections (encyclopedias, anthologies, databases) and other compound works which present the result of creative activity according to an assortment and (or) an arrangement of materials.

However, some types of work can be excluded from copyright protection. According to Article 8 "*1) official documents (laws, court decisions, other texts of legislative, administrative, judicial, and diplomatic nature), and their official translations; 2) state emblems and signs (flags, emblems, decorations, banknotes, and other state symbols and signs); 3) works of folklore; 4) messages about events and facts which are of informational nature.*[40]

Unlike in Korean law where the author can be not only an individual but also a legal entity[41] only individual can be recognized as an author of copyrighted work.

There is no obligatory copyright registration system so just like in most countries copyright occurs by the fact of creation of the literary or artistic work.

After publication of the anonymous or pseudonymous works term of protection lasts for 70 years for that works. Work created in joint authorship protected for the life span of the last surviving co-author plus 70 years after his death. 7 years protection given to the works that were first published within 30 years after authors' death.

On 27 July 2015 Kazakhstan signed the Protocol on accession to the World Trade Organization in Geneva. As one of the conditions to the accession, Kazakhstan has made specific commitments in 10 different sectors not excluding the

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apply to all types of electronic computer programs (including operational systems) which may be expressed in any language and in any form, including the incoming text and object code.

[40] *Article 8. The works that are not the subject matter of copyright. Law on Copyright and Related Rights, The Bulletin of the Parliament of the Republic of Kazakhstan, 1996, No 8-9, art. 237*

[41] *In case when work created by an employee published under the name of a legal entity (the exception is computer programs - such publication is not required when creating them). The authorship of a legal entity arises in these cases, unless otherwise provided by the contract or work regulations.*

area of intellectual property. Therefore, Kazakhstan fully implemented the TRIPS Agreement as of the date of accession.[42].

For the purpose of bringing Kazakh legislation into line with the provisions of TRIPS thresholds for application of criminal procedures and penalties with regard to cases of willful trademark counterfeiting / copyright piracy on a commercial scale was set and applied in a manner reflecting the commercial market place in Kazakhstan, including with regard to the Internet market[43].

A lot of legislative changes have already been adopted and entered into force on 1 January 2015. The amendments affected the copyright protection regime to a certain extent and clarified some practical issues which had not been considered by the national courts earlier. Specifically, there are amendments introduced to the Criminal Code, Administrative Code and Civil Code of Kazakhstan, as well as to the Law 'On Copyright and Neighboring Rights'. In accordance with the amendments, the administrative liability for violation of copyright was excluded from the Administrative Code, since such violation is now referred to criminal offenses. The existing objects of a copyright now include "design". The changes significantly affect organizations managing proprietary copyrights on a collective basis. According to the amendments to the Law 'On Copyright and Neighboring Rights', users are required to report to the organization managing proprietary copyrights on a collective basis, on the use of objects of copyright and neighboring rights, as well as submit other information and documents required for the collection and allocation of remuneration; the list and deadline therefore are defined in the license agreement. When the collected remuneration cannot be allocated or identified due to the failure of users to submit the said reports, the organization managing proprietary copyrights on a collective basis is obliged to keep an unallocated remuneration, and upon expiry

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[42] *Seitova, Aliya. "Kazakhstan: Accession To The World Trade Organization: Kazakhstan's Commitments Related To Intellectual Property." Dentons, January 6, 2016. Accessed January 19, 2020. http://www.mondaq.com/x/456058/Trademark/Accession...*

[43] *Irina Tochitskaya. "Kazakhstan's Accession to the WTO: Overview and Implications for the Eurasian Economic Union". Policy Paper Series. German Economic Team, Belarus IPM Research Center. Minsk, January 2016.*

of three years after its receipt to the organization's account, to include it in the amount allocated in the manner determined by the general meeting of holders of copyright and neighboring rights.

Amounts of collected remuneration allocated and accrued to particular holders of copyright and neighboring rights shall be kept in the account of the organization managing proprietary copyrights on a collective basis and paid to the author and/or the right holder upon determination of or application by such persons regardless of the period of keeping the amounts in the organization's account. The amounts to cover actual costs for the collection, allocation and payment of remuneration shall not exceed 30 per cent of the total amount of collected remuneration. In addition, the organization shall disclose to the public the reports sent to the competent authority in mass media distributed to the whole territory of the Republic of Kazakhstan and on its website, as well as post on its website the information on license agreements concluded with the users. Upon expiry of three months after the receipt of the relevant notice from the holder of copyright and/or related rights, the organization managing proprietary copyrights on a collective basis shall be obliged to eliminate rights and/or objects indicated thereby from licensing agreements with all users and to post the relevant information in the mass media distributed to the whole territory of the Republic of Kazakhstan and its website. The organization managing proprietary copyrights on a collective basis shall be also obliged to pay the owner of the copyright and/or neighboring rights the remuneration due received from users in accordance with the earlier signed license agreements, and to submit the relevant report [44].

[44] *"The International Comparative Legal Guide to: Copyright 2016." Kyriakides Georgopoulos Law Firm. Kyriakides Georgopoulos Law Firm, April 25, 2016. https://kglawfirm.gr/the-international-comparative-legal-guide-to-copyright-2016/.*

2.3. Freedom of Expression

2.3.1 Freedom of Expression in International Documents.

The modern understanding of human rights emerged after the Second World War. Before the attitude of the state to its citizens was considered an internal affair of each country and there was no concern of the international community.

For a long period of time Human Rights sees as falling exclusively within national laws. Establishment of the United Nations Organization in 1945 declared a new era for the development of International Law and, especially, Human Rights law. It was the first time in the history of human beings when universal organization to promote Peace, Security and Human Rights was created. Even though, the UN Charter only talks about the Human Rights in general terms in 1948 Universal Declaration of Human Rights was adopted[45].

The main achievement of the United Nations was the development of new universal Human Rights standards. UN Human Rights documents are the foundation universal Human Rights norms covering all areas of government policies.

However, even today remains a serious problem the necessity to persuade States to follow in practice these standards that included in the regional and international human rights instruments. Each of the main documents provides for a mechanism of its application. The rights to freedom of opinion, expression and information are included in all international conventions. (There were few unsuccessful attempts in 1950th to try to develop special agreement on freedom of information.)

These international instruments not only proclaim the right to freedom of expression but also set the only legal grounds on which the government can restrict this right. The key question is always the justification of such restrictions. In the

[45] *Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.*

event that the establishment of arguable it must be assessed by the court and not the executive. Visual evidence that a particular restriction is necessary in a democratic society must be represented. That is to oversee the actions of the government and the laws establishing limits is a crucial role of the court in the application of both domestic and international legal guarantees of Freedom of Expression.

The French Declaration of the Rights of Man and of the Citizen 1789 gave particular importance to the freedom of speech: "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."[46]

Both universal and regional International instruments have set the same standards by limiting the freedom of speech.

The Universal Declaration of Human Rights, which was proclaimed on 10 December 1948, recognized that *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*[47]

Much attention to freedom of expression is paid in Council of Europe. Resolution of the Parliamentary Assembly of the Council of Europe, the European ministerial conference on the media to help governments, communities become aware of the importance of freedom of speech. Among these documents: the Political Declaration, resolutions and decisions of the Fourth European Conference on ministerial level in the field of the media, "The media in a democratic society" (1994), resolution of 820th Parliamentary Assembly of the Council of Europe "On the relation of the parliaments of at media "(1984), Resolution number 1 of the fourth European conference on policy Ministers in the field of mass communication" The Future of public Service broadcasting "(1994), Declaration of the fourth European

[46] *The French Declaration of the Rights of Man and of the Citizen Approved by the National Assembly of France, August 26, 1789.*
[47] *Article 19 Universal Declaration of Human Rights.*

conference on policy Ministers of the mass media" about violations of journalistic freedoms (1994).

The right to freedom of expression is recognized in two the most significant Human Rights treaties: the Universal Declaration of Human Rights[48] and the International Covenant on Civil and Political Rights[49].

UDHR and the ICCPR guarantees the right to freedom of expression. It is also widely recognized that freedom of expression is significant not only as itself but also necessary to exercise other human rights. At the national level, freedom of expression is a mandatory precondition for good governance and socioeconomic development of the country.

For all these reasons, the international community has come to the recognition of freedom of expression as a fundamental right. In lane howling session of UN General Assembly Resolution 59 (I) was adopted in 1946, which states that *"fundamental right of freedom of expression encompasses the freedom to "to seek, receive and impart information and ideas through any media and regardless of frontiers".*[50]

African Charter[51] entered into force in 1986. Its distinguishing feature is that it recognizes the rights of the peoples of the same value as for individual rights. The text of the Charter does not say about the protection of freedom of opinion. Also, it does not directly say about the right to seek and impart information.

Article 9 of the Charter reads as follows:

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law[52].

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[48] *Art 19 Universal Declaration of Human Rights. 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III).*

[49] *Art 19, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.*

[50] *UN General Assembly, Calling of an International Conference on Freedom of Information, 14 December 1946, A/RES/59.*

[51] *Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).*

[52] *ibid.*

American Convention[53], adopted in 1950, is developing the American Declaration on the Rights and Duties of Man. Created by the Commission and Court of Human Rights. In Article 13 of the Convention provides robust and convincing wording that defines the freedom of speech:

Article 13. Freedom of Thought and Expression.

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of

[53] *Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969.*

race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The Helsinki Final Act[54] is referred to as the final document of the Conference on Security and Cooperation in Europe, 1975. Document does not have a status of treaty and not binding. Final Act proclaims ten principles which should guide States in their mutual relations, and provides three "packages" of specific intents including the "cooperation in humanitarian and other fields." The pact contains sections on the promotion of contacts between people on improving the dissemination of information of all kinds and on the improvement of working conditions for journalists. The Helsinki Final Act served as the basis for the development of an entire network of non-governmental initiative groups that control the observance of its states. Members of the Helsinki Federation publish regular reports and carry out lobbying at the CSCE[55] conferences.

2.3.2. Freedom of Expression in Kazakhstan.

After the collapse of the Soviet Union collapse in 1991, the newly independent Central Asian republics Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Turkmenistan are still on a largely experimental path of democracy. All countries have sought to establish itself as a law-abiding member of the international community by acceding to international organizations - such as the UN and the OSCE - and the ratification of international treaties for the protection of human rights.

The Constitution of the Republic of Kazakhstan contains the basic international standards of freedom of expression. Article 1 of the Constitution of the Republic of Kazakhstan adopted at the national referendum on 30 August 1995 stipulates that the Republic of Kazakhstan proclaims itself a democratic, secular,

[54] *Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki, 1 August 1975.*
[55] *Conference on Security and Co-operation in Europe.*

legal and social state whose highest values are an individual, his life, rights and freedom. According to article 12 of the Constitution, in the *"Republic of Kazakhstan recognizes and guarantees human rights and freedoms in accordance with the Constitution and human rights and freedoms belong to everyone from birth, they are recognized as absolute and inalienable, and define the contents and implementation of laws and other normative legal acts."*[56]

Article 20 of the Constitution is about the Freedom of Expression and creativity. According to her, the Freedom of Speech and creativity is guaranteed. Censorship is prohibited. Everyone has the right to freely receive and disseminate information by any means not prohibited by law. The list of information constituting state secrets of the Republic of Kazakhstan shall be determined by law.

Also, Article 18 of the Constitution of the Republic of Kazakhstan stipulates the right of citizens to protection of honor and dignity, privacy, personal and family secrets, the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications. This is obviously also include other protected by the rules of civil law personal non-property rights such as the right to free choice of residence, freedom of movement and the copyright.

Thus, Kazakhstan Constitution guarantees freedom of the press to receive, transmit and disseminate information.

However, all is not well in the application of norms of the Constitution in practice. Unfortunately, in practice there are many cases of harassment of the media and journalists for the publication of opinions, attitudes and value judgments - while the Constitution provides for freedom of opinion, judgment and the right to freely distribute them, as the law provides only responsible for the publication of false information.

Human Rights Watch "World Report 2015: Kazakhstan"[57] states:

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[56] *Constitution of the Republic of Kazakhstan [Kazakhstan], 6 September 1995*

[57] *"World Report 2015: Rights Trends in World Report 2015: Kazakhstan." Human Rights Watch, January 25, 2016. https://www.hrw.org/world-report/2015/country-chapters/kazakhstan.*

"Kazakhstan heavily restricts freedom of assembly, speech, and religion. In 2014, authorities closed newspapers, jailed or fined dozens of people after peaceful but unsanctioned protests, and fined or detained worshipers for practicing religion outside state controls. Government critics, including opposition leader Vladimir Kozlov, remained in detention after unfair trials.

Despite widespread calls to decriminalize libel and amend the overbroad criminal offense of "inciting social, national, clan, racial, or religious discord," authorities increased sanctions for these offenses in the new criminal code. The government also adopted implementing legislation in January that excessively restricts freedom of expression during states of emergency. In April, the government also introduced criminal charges for "spreading false information."

Media watchdog AdilSoz reported an increase in civil and criminal defamation cases in the first half of 2014.

Websites, including LiveJournal.com, was blocked at times in 2014."

Given that the right to freedom of expression is recognized as being of primary importance, mankind has also recognized that this right is not absolute. Certain private or public interest may justify government actions that interfere with this right and its limits. Since the interference with the right to freedom of expression is regarded as a very serious action, it is permitted only under clearly defined conditions. Freedom of speech - is the general rule, and its limitation is exclusion. Any exceptions should not affect the substance of the law itself.

Further, chapters provide case studies in different jurisdictions including cases where the right to freedom of expression was intervened.

Breach of the freedom of expression can be justified under 3 conditions. Governmental intervention should be established by law. Secondly, imposed restriction should reach the aim that is legal under international law, and, third, the restriction must pursue a legitimate aim.

Intervention in accordance with the law means that the interference with the right to freedom of expression can not be a mere whim of a public official. There

must be a corresponding law. In other words, only those interventions are legitimate that officially accepted and approved by those endowed with legislative powers. The relevant legislation must meet certain standards of clarity and precision. This requirement will not meet legislation with vague wording or unclearly defining the scope of the law.

The second requirement for intervention to the freedom of expression is the pursuit of legitimate aim. List of the legitimate aims set out in Art. 19 (3) of the ICCPR. The pact establishes only those aims are legitimate: the respect of the rights or reputations of others, protection of national security, public order, health and morality.

No single reason raised by the public authorities can restrict freedom of expression. For example, the desire to protect the government from criticism never justifies restrictions of freedom of speech.

Even if the limitation quite clearly established by law and there is a legitimate aim it still violates the right to freedom of expression if it is not truly necessary for this purpose. The intervention measure is justified only when the state does not act because it would be profitable but meets the urgent needs of society. The measure should limit the freedom of speech as little as it possible and not restrict it indiscriminately or too widely. Also, the result of the intervention should be proportionate to its objective - that is, harm to freedom of expression can outweigh the benefits to the protected interests. In other words, the benefit of any limitation must be greater than its price.

3. Contradictions between the laws

3.1. Clash between Copyright and Freedom of Expression

Before discussing the relations between Copyright and Freedom of Expression it is quite meaningful to consider relations between Human Rights and Intellectual Property rights in general. Two domains of law share their origin and take their beginning from Western European societal developments of 18-19th centuries. Those developments are the rapid industrialization and economic growth, growing segregation between the states and growth of international commerce. There is also an opinion that Intellectual Property Law and Human Rights Law not share similar origin but developed simultaneously[58].

However, despite the fact that two laws shares their origin there was not much interaction between them.

There are two dominant confronting views on relations between them. The conflict view that maintains Intellectual Property law and Human Rights law are in fundamental conflict. In this concept, Human Rights considered as a legal instrument to countervail Intellectual Property. Intellectual Property negatively impacts on such rights as Freedom of Expression or Access to Medicines. Therefore, Human Rights are seen in hierarchical perspective as prevailing over Intellectual Property Rights. The computability model of relation between two laws proposes that both laws are pursuing the same aim and Intellectual Property Rights embodied within the Human Rights.

In order to see the actual position of both laws it is vital to consider their status in the actual international regulations.

The evolution of intellectual property law can be divided into three periods: the territorial period, the international period and the global period[59]. Modern

[58] *Grosheide, Willem. Intellectual Property and Human Rights: a Paradox. Cheltenham: Elgar, 2010.*
[59] *The first is the territorial period characterized by an absence of international protection. The second,*

Intellectual Property developed out of economic considerations driven by policy and made for doing business. That primary economic character of the Intellectual Property Law widely emphasized in TRIPs Agreement. As to other important Intellectual Property agreements, including the Berne Convention, the Paris Convention and the WIPO Copyright Treaty they are silent on Human Rights. All existing Intellectual Property norms are incorporated into trade rules[60]. In general, it can be said that there is no direct reference to Human Right in any biding Intellectual Property agreements and the same picture is with the national legislation in this area.

On the other hand the main Human Rights documents do deal with Intellectual Property rights in their texts. Article 27.2 of the Universal Declaration of Human Rights, 1948 states that *"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*[61]

Article 27.1 states that *"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."*[62] These two articles contain the main rules of Intellectual Property Law, balance between protection of creators' rights and assurance of accessibility to their works and inventions. In addition to this, article 17 recognizes interests of authors by the proclamation of a general right of property convention. Article 17 states that: *"Everyone has the right to own property ... No one shall be arbitrarily deprived of his property"*[63]

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the international period, begins in Europe towards the end of the 19th century with some countries agreeing to the formation of the Paris Convention for the Protection of Industrial Property, 1883 (the Paris Convention) and a similar group agreeing to the Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention). The third period, the global period, has its origins in the linkage that the United States of America (the U.S.A) made between trade and intellectual property in the 1980s, a linkage which emerged at a multilateral level in the form of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement), The Universality of Intellectual Property Rights: Origins and Developments 1999.

[60] *Torremans, Paul. Intellectual Property Law and Human Rights. Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law & Business, Daniel J. Gervais "How Intellectual Property and Human Rights: Can Live Together: An Updated Perspective", 2015.*

[61] *Article 27.2, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).*

[62] *ibid, Article 27.1*

[63] *ibid, Article 17*

Article 15 of the International Covenant on Economic, Social and Cultural Rights in states that: *"The States Parties to the present Covenant recognize the right of everyone:…(b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."*[64]

It can be seen that the mentioned provisions obligate states to recognize and reward human creativity and innovation and, at the same time, to guarantee public access to the outcome of those efforts[65]. However, all this mentions of Intellectual Property law in Human Rights instruments are very indirect.

Taking into account the different characteristics of two laws important to remember that both laws aim at enhancing welfare and benefit for society.

Copyright could be justified as a Human Right on a few bases. The first one is the fact that copyright is a property right and property rights, as it was mentioned in the previous chapter, protected by number of Human Rights documents. The other basis can be formulated as "human being can claim their rights by the facts of their creation".[66]

Just like the intersection between intellectual property rights and human rights academic interest on the issue of intersection between copyright and freedom of expression is a fairly recent phenomenon. Just like intellectual property law and human rights law copyright law and free speech laws were previously regarded as separate legal regimes[67].

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[64] *Article 15, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3*

[65] *Helfer, Laurence R., and Graeme W. Austin. Human Rights and Intellectual Property Mapping the Global Interface. Cambridge: Cambridge University Press, 2012.*

[66] *Peers, Steve. The EU Charter of Fundamental Rights: a Commentary. Oxford, United Kingdom: Hart Publishing, 2014.*

[67] *Yin Harn Lee, with preface and summary by Emily Laidlaw and Daithi Mac Sithigh "Copyright and Freedom of Expression: A Literature Review", CREATe Working Paper, May 2015.*

Statement that "*Human rights law is intellectual property's new frontier*" could be justified by the fact of expansion of intellectual property[68]. Similarly, tension between copyright law and freedom of expression become vastly apparent in the face of the dramatic expansion of copyright law. Copyright became stronger than it was ever before. Rights accorded to authors become broader and stronger, their duration has been extended[69].

In addition, copyright enforcement facing serious challenges because of the Internet. With digitalization many daily activities has transferred to the digital environment. Copyright law had to adapt to keep pace with digital technology and now affects all these activities more than ever before, and as the public domain keeps enclosing, it becomes clearer that Freedom of Expression is affected. Ancillary protection measures made Copyright available in the digital environment.

The dilemma and main paradox of relations between Copyright and Freedom of Expression is that copyright has potential both to promote and to restrict Freedom of Expression. By giving authors protections of their properties copyright can restrict access of expression. On the other hand, copyright viewed as an "engine of free expression".

Thus, just like Intellectual Property and Human Rights is general interaction between copyright and Freedom of Expression can be described by two major approaches: co-existence and co-operation and conflict[70].

The conflict between two rights can be described by the nature of Copyright. Copyright is property right that protects the medium of expression of certain ideas or information and gives holders of the copyright exclusive rights by excluding others from using their works. Copyright limits others' ability to express. Person who wants to express himself by using protected expression must obtain Copyright

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[68] *Helfer, Laurence R. Intellectual Property and Human Rights. Cheltenham, UK: Edward Elgar Publishing Limited, 2013.*

[69] *Birnhack, Michael D., The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up. 43(2) IDEA: Journal of Law & Technology, 233-298 (2003). Available at SSRN: https://ssrn.com/abstract=329040*

[70] *Torremans, Paul L. C. Intellectual Property and Human Rights. 3rd, Rev. Ed. Den Haag: Kluwer Law International, 2015.*

owner's permission first. This limits Freedom of Expression creates tension between two legal regimes[71].

The conflict arises particularly in cases where copyright is deliberately invoked in order to suppress dissemination of information and/or publication of a work[72].

As it was already mentioned, there is an opposite view saying that copyright is an engine of free expression. This ascertains position that two laws are not in conflict but rather coexist and cooperate. Another arguments supporting coexistence and co-operation approach is that values and concepts of freedom of expression are already included to the copyright.

The famous metaphor "copyright is an engine of freedom of expression" was taken from Harper & Row, Publishers, Inc., et al. v. Nation Enterprises et al. United States Supreme Court decision. Judge O'Connor stated *"... it should not be forgotten that the Framers [of the Constitution] intended copyright itself to be an engine of freedom of expression"* [73]. The concept that copyright promotes freedom of expression grounds on the proposition that copyright encourages creativity and both copyright and freedom of expression share the same goals. This is called "shared-goal argument" - saying that copyright and freedom of expression sharing the same goals of promoting learning and dissemination of the information[74].

Another argument contradicting the conflict approach is that Intellectual Property rights are themselves Human Rights. All conflicts between two laws are not bigger than any possible clashes between other Human Rights.

Coexistence and co-operation approach in relations between copyright and freedom of expression states that even if there exists a potential clash between two

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[71] *Birnhack, Michael D., Acknowledging the Conflict between Copyright Law and Freedom of Expression Under the Human Rights Act (2003). 2003 Entertainment Law Review, 24-34. Available at SSRN: https://ssrn.com/abstract=368961*

[72] *Griffiths, Jonathan, and Uma Suthersanen. Copyright and Free Speech: Comparative and International Analyses. Oxford: Oxford University Press, 2008. p.5 – 6*

[73] *Harper & Row Publishers v Nation Enterprises471 US 539, 558*

[74] *Birnhack, Michael D., Copyright Law and Free Speech after Eldred V. Ashcroft (2003). 76 University of Southern California Law Review, 1275-1330, 2003.*

laws, it can be settled by the use of exceptions and limitations available in modern copyright law.

Copyright has a claim to human rights status and the basis for such a claim can be found in the international human rights instruments. However, important to notice that Copyright is not defined in detail in those Human Right instruments. Therefore, there is no straightforward relationship between copyright and freedom of Expression but the presence of principles of reciprocity and balancing of rights in the Copyright can not be denied and supports the point of view which claims its status of a Human Right.

Copyright, due to the existence of embedded exceptions and limitations leaves individuals plenty of space to express themselves freely by using the ideas and information from protected work. Nevertheless, there is an acknowledgment that real conflict may occur because of excessive intellectual property protection[75].

Copyright law is a legal instrument called to find the balance between stimulus necessary for the author's productiveness and public interest in access to and distribution of copyrighted works. Article 9.2 of the TRIPs Agreement and Article 2 of the WIPO Copyright Treaty, limits the scope of the copyright protection by saying:

"Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

It means that copyright doesn't protect the ideas embodied in works but only expression of those ideas. Therefore, no matter how novel author's ideas they are not subject to copyright protection[76]. Copyright law does not prohibit use or repeating of the ideas and information but prevents copying of the form of expression that is not anyhow harmful for Freedom of expression.

This called the idea/expression dichotomy doctrine. The idea/expression

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[75] *Derclaye, Estelle, Intellectual Property Rights and Human Rights: Coinciding and Cooperating. Common Market Law Review, 2008.*

[76] *The doctrine of originality that refers to "coming from someone as the originator/author" "original," here does not mean novel as unlike in Patent law novelty is not a requirement of copyright.*

dichotomy doctrine has an instrumentalist view that copyright law restrict the scope of the author's right in light of the public domain[77].

Certainly, it doesn't mean that the exact words used by an author are protectable. In that case copyright interests would be badly served and anyone could use author's work by making a few changes in wording or paraphrasing the entire work.

Nevertheless, point of view that idea/expression dichotomy of the copyright can sufficiently protect freedom of expression being criticized on the grounds that restrictions on the form of expression considered as a substantial limitation to exercise the right of freedom of expression and vagueness of the idea/expression dichotomy.

There can be some trespassing upon freedom of expression by abridging the right to reproduce the expression of other authors which justified by the copyright encouragement of creative works. At the same time, it possibly invades author's right for ideas but it is justified by the greater necessity of the public to free access to ideas and information. The idea/expression dichotomy doctrine introduces an acceptable balance in interaction between copyright and free expression interests[78].

Another ground of criticism is that for some copyrightable works there can be no peculiar distinction between idea and expression. It can be obvious in case of representational copyright works such as artistic works, photography, movies and broadcasts, compilations of tables, television listings or historical documents. Emerging technologies have occasionally created situations where expression intimately connected with its content. Thus, in this type of situation, the idea/expression dichotomy cannot resolve the conflict between the Copyright and Freedom of Expression[79].

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[77] *Drassinower, Abraham, A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law. Canadian Journal of Law and Jurisprudence, Vol. 16, January 2003.*

[78] *Nimmer, Melville B. "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press". 17 UCLA L. Rev. 1180 (1969-1970).*

[79] *Leslie Ann Reis, The Rodney King Beating: Beyond Fair Use: A Broadcaster's Right to Air Copyrighted Videotape as Part of a Newscast, 13 J. Marshall J. Computer & Info. L. 269, 1995.*

"Fair dealing" and "fair use" are related concepts pertaining to users' rights under copyright law. However, fair dealing and fair use are not synonymous terms since their meaning and scope are defined by different legal systems.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors[80].

The Fair use doctrine has been portrayed as an addition to the idea/expression dichotomy in protecting freedom of expression[81].

On the other hand, function of the fair use doctrine as a sufficient safeguard of the First Amendment interests has been criticized on grounds of vagueness of the doctrine itself and the inability of each of its statutory factors[82].

Chapter III of Part I of the Copyright, Designs and Patents Act 1988 provides for a number of situations when infringement will not incur liability.

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[80] *Circular 92, Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code, The Constitutional Provision Respecting Copyright, 2011, p. 19.*
[81] *Greg A. Perry "Copyright and the First Amendment: Nurturing the Seeds for Harvest:Harper & Row, Publishers v. Nation Enterprises", 105 S. Ct. 2218 (1985) University of Nebraska College of Law*
[82] *Pierre N. Leval "Toward a Fair Use Standard", 103 Harv. L. Rev. 1105, 1990..*

(i) fair dealing for the purposes of non-commercial research and private study;

(ii) fair dealing for the purpose of criticism or review;

(iii) fair dealing for the purpose of reporting current events;

(iv) fair dealing for the purpose of non-commercial instruction[83].

Some authors identified Fair dealing defenses as a tool to accommodate freedom of expression within copyright and described it as *"designed in part to safeguard the economic benefits flowing from copyright ownership while promoting access to information necessary for freedom of expression".*[84]

3.2. Case studies in specific jurisdictions

Previous chapter considered possible clash between copyright and freedom of expression in theory. However, real conflicts can be faced in judicial practices in different jurisdictions more often. This chapter considers cases involving contradictions between two laws.

Despite the fact that due to recent referendum results and decision to leave European Union UK will face many changes in its legislation including Intellectual property and copyright in particular there are several cases crucial to how Copyright and Freedom of Expression coexist currently in UK jurisdiction. One of the landmark cases in relation between copyright and freedom of expression in the UK was the Court of Appeal's judgment in Ashdown v Telegraph Group.

The claimant, Mr. Ashdown has written private diaries and started arranging publication after retirement. The Sunday Telegraph published extensive extracts from those records. Published information included minutes of secret political meetings at the Prime Minister's office where possible coalition between the Labor Party and the Liberal Democrats been discussed. Telegraph's defense based on the

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[83] *Part I – Copyright, Ch. III – Acts Permitted in relation to Copyright Works, Copyright, Designs and Patents Act, 1988.*

[84] *Torremans, Paul. Intellectual Property Law and Human Rights. Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law & Business, 2015.*

freedom of expression provisions and fair dealing was dismissed by the High Court. In the frame of the fair dealing concept copying won't occur liabilities as a part and for the purpose of criticizing and reviewing. However, there was no criticism or review of the minute but the actions of political figures. Even though, the Court of Appeal dismissed an appeal the question about the conflict between copyright and freedom of expression was raised and important principle that the Human Rights Act can override the Copyright Act was established.

The real importance of this case can be seen in comparison. Analysis of the judicial practice of the post soviet countries showed that there were no yet any substantial cases involving conflicts between freedom of expression and copyright protection occurred. It can be said that neither Kazakh nor Russian copyright laws are ready to adequately resolve similar cases. However, precedents like that could be a good accelerator for development of the national copyright legislation and incorporation of the exceptions that could accommodate freedom of expression and avoid future clashes.

The European Commission of Human Rights has adopted a few decisions of value to the conflict between copyright and freedom of expression.

France 2 v. France[85]. France 2 made a TV broadcast about the reopening of the Theatre des Champs Elysees in Paris. While filming the theatre camera focused on the frescoes of the French painter Edouard Vuillard. Right holder of the frescoes successfully demanded and obtained indemnity for copyright infringement. However, the Tribunal de Grande Instance de Paris dismissed the claim based on the provision of the French copyright that allows short quotation.

However, the Cour d'Appel reversed decision and ruled that France 2 could not refer to the statutory right for quotation from a copyright work for informational purposes as the whole work but not the part of it was presented to the public through broadcast. Decision was confirmed by the Court of Cassation. France 2 argued

[85] *Graber, Christoph B., Copyright and Access - A Human Rights Perspective. Digital Rights Management: The End of Collecting Societies, Christoph Beat Graber, Carlo Govoni, Michael Girsberger, Mira Nenova, eds., Bern: Staempfli Publishers, pp. 71-110, 2005.*

decision before the European Commission of Human Rights. Commission held that *"under the circumstances of the case the French courts had good reason to take into account the copyrights of the author and the right holders in the works that were otherwise freely broadcast by the applicant"*[86]

The whole time of broadcast of the copyrighted works didn't exceed 50 seconds but TV channel was obliged to pay royalties to the right holders. This could be an example of the argument supporting that statutory exceptions to the copyright law can not always accommodate freedom of expression. Despite that theoretically there are no grounds for the conflict.

Both in Kazakh and Russian copyright laws there is a provision allowing short quotations. However, absence of related case practice makes it unclear how the legal provision will be interpreted and if it will advocate right of the copyright holders or public interest.

Decision more interesting for this work as it includes Internet, Ashby Donald v France[87]. In this case, the applicants 3 fashion photographers accredited by the French designers' federation "Federation Francaise de la couture" for different fashion publications. Applicants were convicted for copyright infringement by publishing on the Internet photographs that had been taken at fashion shows in Paris. Taken photographs were published online without license or permission of fashion houses. As the consequence, designers' federation and several fashion houses lodged a complaint with the Central Industrial and Artistic Copyright Infringement Brigade. The applicants were ordered to pay fines and damages to the fashion houses. According to court's observations Article 10 of the ECHR Guarantees freedom of expression and information covering posting on the Internet including photographs with no regard to the type of its message and its content and regardless if there was

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[86] *European Commission of Human Rights, France 2 v. France, App. No. 30262/96 (1997), Hudoc REF00004351, Report of the Commission of 15 January 1997.*

[87] *"Ashby Donald and others v. France" European Convention on Human Rights, Art. 10; French Intellectual Property Code, Art. L. 122-5 9° – Ashby Donald and others v. France, Judgment of the European Court of Human Rights (Fifth Section) 10 January 2013 – Case No. 36769/08, Decision, Copyright Law Europe, First Online: 21 March 2014, DOI: 10.1007/s40319-014-0180-4.*

pecuniary objective pursued.

Therefore, it was concluded that Internet publication of the photographs from fashion shows and presenting them to the public for free or with charge or even for sale is an exercise of the right to freedom of expression. Limiting of this right breaches Article 10 of the ECHR unless it was *"prescribed by law and are necessary in a democratic society"*[88]. In this case legal pursue aimed protection of the copyright of fashion hoses[89].

Another example when copyright outweighed freedom of expression. Quite significant in this case the findings of the court that the article 10 of the European Convention on Human Rights covering exercising of freedom of expression not only in analogue world but online.

However, the complicacy of the Internet is in its nature - absence of borders and almost impossibility of control. Court can rule that posting of copyrighted content is illegal but it is impossible to stop from further spread of the content through the digital dimension. Even if existing law still can be interpreted in some cases so it can still regulate interrelations between copyright and freedom of expression on the internet soon it will be not enough and creation of the new legal instruments will be necessary.

Neij v Sweden[90]. During 2005 - 2006 applicants run the website called "The Pirate Bay", one of the largest file sharing services in the world. Users of the website could exchange information including content protected by copyright. In 2008 on the grounds of copyright infringement applicants were charged for violation of the Copyright Act. The applicants were held jointly liable for damages of about five million Euros and sentenced to ten and eight months' respectively.

Applicants argued that decision breaches their right to freedom of expression

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[88] *Art. 10.2, ECHR.*

[89] *The three-step test set out in article 10(2) of the ECHR – namely, it had to be 'prescribed by law', pursue one or more of the legitimate aims referred to in article 10(2), and be 'necessary in a democratic society' for the achievement of such aims.*

[90] *The European Court of Human Rights (Fifth Section), sitting on 19 February 2013 Application no. 40397/12 Fredrik NEIJ and Peter SUNDE KOLMISOPPI against Sweden.*

based on the Article 10 of the ECHR, emphasizing that convention secures right to *"to receive and impart information and ideas without interference by public authority and regardless of frontiers*[91]*"*

The European Court held that *"since the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, (..) there were weighty reasons for the restriction of the applicants' freedom of expression"*[92]. Court concluded that the limitation of the right of freedom of expression was necessary in a democratic society and followed the aim of protecting the right of others, namely copyright holders of the infringed materials.

In Kazakhstan there were no copyright trials involving file-sharing Internet services. However, the biggest file-sharing service in Russian language www.kaztorka.kz widely popular among users not only from Kazakhstan but neighboring countries was hosted on Kazakh digital space. Service enabled users to share files by using peer-to-peer file sharing technology. Content included movies, music, software and other works protected by copyright.

In 2009 Law that equates all internet resources to traditional media was adopted. Law applied all criminal, civil and administrative liabilities applicable to the traditional media publications for illegal content on the websites, chat rooms, blogs, online shopping, electronic libraries and etc. After the law was enacted most of the file-sharing services disappeared. Moreover, there was a substantial decrease in uploading of the illegal copyrighted content, many online video services suspended their activities.

Originally law pursued the aim to prevent spreading of the information contradicting the national law. But tightening of the legislation led to reduce online piracy. These consequences can be seen as positive with the exception of the significant breach of the right guaranteed by the provision of freedom of expression.

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[91] *Art. 10 ECHR.*
[92] *Neij and Sunde Kolmisoppi v. Sweden (dec.) - 40397/12 Decision 19.2.2013.*

The strain between freedom of expression and copyright was an issue in the United States in many cases. The Supreme Court has noted that copyright and the First Amendment essentially share one goal: wide dissemination of expression and ideas.

American courts systematically turned in their refusal to acknowledge the existence of the conflict between copyright and free speech. This culminated in Harper & Row Publishers v Nation Enterprises[93]:

"In our haste to disseminate news, it should not be forgotten that the framers intended copyright itself to be the engine of free expression".

Harper & Row brought a short hiatus to the discussion of the copyright law and Freedom of Expression relationship for sometime. However, drastic expansion of Copyright protection including harsher criminal liabilities, circumventing technological measures, extension of protection terms emerged new issues in the area. The question is especially acute in the digital environment. Internet brought more cases that show readiness of the courts to deal with Free Speech issues in copyright cases.

Universal City Studios v Reimerdes[94], case addressed the constitutionality of Circumvention of copyright protection systems[95] provision.

Movie studios including Universal and DVD players producing companies used coding system called Content Scramble System (CSS) preventing playing DVD on not licensed DVD players in order to avoid copying of the content. Somewhere about in October 1999 there created a software so-called DeCSS. Software enabled users to break CSS code protection and copy the content of the DVDs. Court defined DeCSS as a piracy tool. Judge of the case concluded that prohibition of the DeCSS doesn't breach the First Amendment. Court held that it would be difficult to calculate the damages. Case was appealed, the Appellate Court held that

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[93] *Harper & Row, 471 US 539, 558.*

[94] U*niversal City Studios, Inc. v. Reimerdes 111 F.Supp.2d 294 (S.D.N.Y. 2000) aff'd 273 F.3d 429 (2d Cir. 2001).*

[95] S*ection 1201(a) of the US Copyright Act.*

Circumvention of copyright protection systems doesn't violate the First Amendment. The US Court of Appeals ruled that publishing DeCSS online or provide links to the software is illegal.

DMCA states: *"No person shall circumvent a technological measure that effectively controls access to a work protected under this title*[96]*"*

Parties of the WIPO Copyright Treaty required by the Article 11 of "Obligations concerning Technological Measures" to: *"...provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.*[97]*"*

Article 12 of the Treaty "Obligations concerning Rights Management Information" obliges member states to: *"...provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:*

(i) to remove or alter any electronic rights management information without permission;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.[98]*"*

Existence of the anti-circumvention provisions in laws of many jurisdictions and International Instruments says of its importance, especially in the digital era. However, in Kazakhstan Law on Copyright and Related Rights there is circumvention mentioned only once in the context of the definition to the pirated

[96] *Section 103 (17 U.S.C Sec. 1201(a)(1).*
[97] Art 11 WIPO Copyright Treaty.
[98] Art 12 WIPO Copyright Treaty.

copy of copyright and (or) related rights object "...illegal use of devices that enable circumvention of technical protection of copyright and (or) related rights:..[99]". Also, there is no provision prohibiting the use of the circumvention software. Nevertheless, it can be said with certainty that absence of similar provisions doesn't justified with concerns on possible breach of the freedom of expression in case of using of this copyright protection tool.

The next case opened a new chapter in the relations copyright law and freedom of speech, Eldred v. Ashcroft[100], 2003.

Congress passed CTEA, law that extended copyrights by 20 years. Online publisher Eric Eldred sued the government, arguing that extending copyright terms violate the requirements of the Copyright Clause of the constitution. Clause empowers Congress to: *"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"*

The Supreme Court ruled against Eldred and asserted the constitutionality of the Copyright Term Extension Act by a 7–2 margin. Court concluded that there was no conflict between copyright and freedom of speech stating that "*the Framers intended copyright itself to be the engine of free expression.*" However, it did recognize that the DC Circuit "*spoke too broadly*" by saying that "*copyright is categorically immune from challenges under the First Amendment."*[101]

Case law does not apply in Kazakhstan or Russia. Hence, judicial practice does not have the right to form copyright norms[102].

Not to mention the fact that there are no related cases fixed in Judicial records of both countries.

Yet, some events could have made a basis for such judicial cases. Merely a

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[99] *Law No. 6-I "On Copyright and Related Rights" of June 10, 1996 (as amended up to Law of No. 419-V of November 24, 2015).*
[100] *Eldred v. Ashcroft :: 537 U.S. 186 (2003).*
[101] *Birnhack, Michael D., Copyright Law and Free Speech after Eldred V. Ashcroft (2003). 76 University of Southern California Law Review, 1275-1330, 2003.*
[102] *Art. 4 of the Law of the Republic of Kazakhstan "On regulatory legal acts" March 24th, 1998; Constitution of the Russian Federation, December 12th, 1993.*

decade ago, there was a resonance in Russian media about audits in the editorial offices of regional newspapers Novaya Gazeta in Nizhny Novgorod and Novaya Gazeta in Samara in 2007. Russian newspaper is famous for its criticism towards Russian government and journalism investigations for political and social affairs in the country. In both cases, newspaper editorial's computers were seized under the pretext of audit. The core difference was that audit was not to verify directory's financial or tax statement but the software licensing check up. Since the computers were confiscated with all the archives and tested for quite a long time the Novaya Gazeta in Samara had to be closed. Some controversial articles[103] claim that in both cases intellectual property law was used in order to cover for political motives, i.e. from a legal point of view, the question concerned freedom of speech, and not the legality of computer programs. However, no trial was involved.

The plaintiff asks to disprove the false information, defaming the plaintiff's business reputation, by posting relevant information on the Website. Despite the case "had it all" including posting on the website, claim on copyright infringement, involving of the Article 10 of the European Convention on Human Rights and Article 29 of the Russian Constitution[104].

None of the sides claimed that Copyright infringement should be justified by the Freedom of expression or intellectual property rights somehow depraves the right for Free speech[105].

As the most typical examples of judicial practice on the issues of Digital Copyrights decisions of the Federal Arbitration Court of Moscow District will be considered. Court checks the legality of court decisions by arbitration courts of Moscow and the Moscow region.

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[103] *"Самара. Работа Редакции 'Новой Газеты' Полностью Парализована." Новая газета - Novayagazeta.ru. Accessed January 19, 2020. https://novayagazeta.ru/news/2007/11/08/21246-samara-rabota-redaktsii-novoy-gazety-polnostyu-paralizovana.*

[104] *Art. 10 of the European Convention on Human Rights provides the right to freedom of expression and information; Article 29th of the Russian Federation's Constitution "Freedom of expression, Freedom of opinion/ thought/ conscience", 1993 (amend.2008).*

[105] *Decision of the Moscow Arbitration Court in the Case of LLC "CDCOM NAVIGATION" K "Rating CLUB" LLC, case number A40-41472 / 10-110-333, August 5th, 2010.*

This choice stems from the fact that arbitration is the most consistent with the Intellectual Property law enforcement. Federal Arbitration Court of Moscow District is high enough to compile and more accurately characterize the judicial experience of the lower courts, and its regional attachments most corresponds to the problem of the study, given that taking into account the nature of the Russian economy is Moscow and Moscow region.

Decision of the Federal Arbitration Court of Moscow District on 27 January 2011 N KG-A40 / 16509-10-1,2 (Case N A40-75669 / 08-110-609).

Ltd. "News Media-Rus" applied to the Moscow Arbitration Court with a claim against OJSC "TV and Radio Company of the Armed Forces of the Russian Federation "Star" seeking for the recovery of 5 000 000 RUB for breach of the copyrights. Moscow Arbitration Court Partially satisfied the claim. On November 24, 2011 decision of the Court of First Instance was set aside by the Ninth Arbitration Court of Appeal. The lawsuit was denied. Judicial act was motivated by the fact that the audiovisual work was taken by the plaintiff to the public domain for free. The defendant while using a product fragment (video) referred to the original source and saved plaintiff's logo, therefore, the defendant has fulfilled all the mandatory requirements of Art. 1274 of the Civil Code and can not be held liable for infringement of exclusive rights of the plaintiff. In the appeal the applicant asked to cancel the decision of the appellate court and uphold the decision of the Court of First Instance.

That was a typical example of the free use of the intellectual property that has occurred upon publication of the work the copyright in the public domain.

This audiovisual work has been taken by the plaintiff in the public domain on the website lifenews.ru the defendant referred to the original source and saved the logo of the plaintiff.

Despite the fact that there is no direct reference to the Freedom of Expression in this case, this is a standard relationship to be followed on the Internet. As Internet has been seen as it was created to disseminate information, not for its concealment

or intentional creation to provoke by the publication of the works in order to further prosecution of persons that spread information to the public.

The Decision the Ninth Arbitration Court of Appeal of 24.11.2010, on the N A40-91447 / 10-12-585 case remain unchanged, the cassation appeal of "News Media-Rus" - not satisfied.

Decision of the Federal Arbitration Court of Moscow District dated April 1, 2010 N KG-A40 / 2382-10 (Case N A40-69677 / 09-27-553).

One of the most massive copyright infringements on the Internet today is borrowing of the fragments of journalistic texts. This doesn't cover news reports, excluded from the list of objects of copyright: reports on events and facts, which have a purely informational character (daily news reports, television programs etc).

Ltd. "Sports Today" claimed to the Moscow Arbitration Court against CJSC "sport-Express" and demanded obligation to cease the violation of the exclusive right and remove the article, containing fragments of the articles of the claimant with posting on the site sport-express.ru and violation and recover in the order of Art. Art. 1252, and 1301 of the Civil Code compensation in the amount of 10 000 RUB. Moscow Arbitration Court decision of 20.11.2009 satisfied the claim.

In the appeal of CJSC "Sport-Express" claimed to dismiss decision, citing the fact that Egorov IV and VM Goncharenko were not in labor relationship with the plaintiff and therefore these articles can not be considered a work of joint service task order.

In US Copyright Law this case would be ruled based on the DMCA provision[106] limiting the liability of the providers of online services for copyright infringement by their users. Absence of the similar provisions in Russian and Kazakh Copyright laws makes it more complicated to solve similar cases. Moreover, as it was previously mentioned, in Kazakhstan all Internet sources are equal to traditional mass media. This makes providers of the online services liable for illegal actions of

[106] *Title II, the "Online Copyright Infringement Liability Limitation Act," creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities, DMCA, 1988.*

the users of the web suites on the same level as newspaper can be liable for the content of their news.

Copyright and Freedom of expression may clash online but rarely face each other in court. Moreover, both rights certainly haven't yet confront in Russian Federation or Republic of Kazakhstan. However, it can be possible that more often cases involving two laws appear in other jurisdictions will lead to emergence of similar judicial practice in post soviet countries.

3.2.1. Reformation of Kazakh Copyright law.

Degree of protection of intellectual property rights characterizes the degree of civilization of the country's market and the level of state of law and order. There is an efficiently functioning global system of intellectual property protection. Authority and influence of this system on the development of the relevant domestic legislation of the Republic of Kazakhstan can not be underrated. On April 2006 Kazakhstan has been excluded from all lists of the Special Report 301 of the Office of the US Trade Representative. With the adoption of the Law of the Republic of Kazakhstan "On Copyright and Related Rights," copyright related legal relations in the country have changed dramatically. "General Provisions", "Copyright" and "Related Rights" were added to the Kazakh Civil Code[107].

The load on Kazakhstan courts on copyright disputes increases exponentially.[108] Even more copyrights are being infringed in the country every year. Cases of violation of the Law on Copyright and Related Rights occur almost every day but often copyright holders do not see the point of going to court to prove their authorship. Main reason is that the legal costs often exceed the amount of compensation. According to the existing laws, copyright infringer shall compensate

[107] *Chapters 49 "General Provisions", 50 "Copyright" and 51 "Related Rights" of the Civil Code of the Republic of Kazakhstan, 1994.*

[108] *In 2015, 119 cases of this category were considered, in 2016 - 592 (A summary of the judicial practice of considering cases on the protection of violated copyright and related rights, performed by the judicial board for civil cases of the Supreme Court of the Republic of Kazakhstan, May 2017 // Bulletin of the Supreme Court of the Republic of Kazakhstan . 2017. No. 9. P. 87.*

the author for moral damages and losses including lost profits. Nevertheless, the fact of lost profits is very difficult to prove in courts under current legislation and judicial practice.

Compensation amount is determined by the court (within ranges set by the law. Up to date, there are only a few notable cases.

Cases of copyright infringement do not reach the court because Kazakhstan does not have well organized copyright market. For example, singers earn mainly on concerts or private performance and not on albums. Meanwhile, in many other countries like the USA, Great Britain or South Korea artists can generate high incomes by selling their music in hard copies and online. In fact, per capita income in countries with well-developed property rights is about 21 times higher than per capita income in countries with weak protection measures, which emphasizes the impact of intellectual property rights[109].

Even in neighbour Russia there are more cases where copyright holders have defended their copyrights than in Kazakhstan because there is a larger music market and there is something to fight for. For starters, Kazakhstan needs to have a market formed and as many copyright protection cases as possible. Those few large copyright proceedings that took place in the country were mainly initiated by the claims of foreign corporations against Kazakh companies. In other cases[110] cable companies and mobile operators that are not related to the purchase or production of content become defendants in the courts for copyright infringement claims.

Existing judicial practice shows that copyright law needs reform. It is necessary to introduce the concept of the Information Mediator that clearly defines and divides the functions of content relay service providers and content providers.

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[109] *From the Open Letter of the Property Rights Alliance to the Director General of the World Intellectual Property Organization (WIPO), Dr. Francis Gurry. Copy: UN Secretary-General Anthony Guterres and WHO Director-General Dr. Tedros Adhanom Gebreyesus (commemorating International Intellectual Property Day) dated April 26, 2018.*

[110] *In 2016, a claim of 1.7 billion tenge for allegedly infringed copyrights was brought against Kazakh internet and cable operator iDTV. The trials lasted almost two years and ended in the Supreme Court in favor of the operator. In 2018 DL Construction LLP brought claims to the mobile operator Kcell and its partner Terraline LLP reaching a total of more than 40 billion tenge.*

Concept of the information mediator was comprehensively evaluated in Russian judicial practice:

"Provider as well as the owners of social and file-sharing Internet resources are not responsible for the transmitted information if they do not initiate its transfer, do not select the recipient of the information, do not affect its integrity, and also take preventive measures to prevent the use of objects of exclusive rights without consent copyright holder."[111]

Important to note that mediators actions to remove, block illegal content or access to the site by the violator upon receipt of a notice from the copyright holder about the fact of violation of exclusive rights.

Prerequisites for such reforms are already exist in Kazakhstan. The legal structure of the information intermediary in the field of intellectual property law was first drawn up by the Enhanced Partnership and Cooperation Agreement between the European Union and Kazakhstan back in 2016[112].

Agreement sets forth conditions for the release of the information intermediary from responsibility for the transfer and storage of content.

-intermediary does not initiate the transfer but the end user always takes the initiative;

-intermediary does not select recipient of the transfer;

-intermediary does not select or change the information contained in the transfer;

-intermediary complies with the conditions for access to information;

-intermediary complies with the rules for updating information;

-intermediary does not interfere with the legitimate use of generally recognized technologies;

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[111] *Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation dated November 1, No. 6672/11, 2011.*

[112] *Council Decision 2016/123 of: Enhanced Partnership and Cooperation Agreement between the European Union and the Republic of Kazakhstan, Oct. 26, 2015.*

-intermediary immediately deletes the information or terminates access to it upon receiving a notice of intellectual property rights infringement.

In the vast majority of cases Kazakh Supreme Court confirms the above conditions for exemption from liability for claims for the protection of copyright and related rights.

This definition if introduced as a statutory provision into the Kazakh copyright law can also enhance the entire market. But not only undeveloped market is a reason for poor copyright culture. Acts regulating public relations in the field of copyright with the development of scientific and technological achievements requires constant change. Analysis of legal acts shows that legislation of the Republic of Kazakhstan is morally obsolete and focused on issues there were actual in the 90s. The biggest issue is that the Law of the Republic of Kazakhstan "On Copyright and Related Rights" does not regulate Internet content in any way.

Europe and the United States was tailoring legislation[113] to protect authors online for more than 20 years.

Kazakhstan, on the other hand, doesn't have similar practices, hence the law that regulates copyrights on the Internet is yet to be developed. Due to a bigger market cases of copyright infringement in Russian Federation are happening more often. It could be more logical to adopt the experience of a neighboring state. Legal systems of Kazakhstan and Russia belong to the same legal family, sources of their formation are typical on top of that there are similar economic factors. However, Russian legislator did not come up with the solution yet either. Russia simply blocks torrent trackers and related websites but new one appear every day.

In the United States under the DMCA copyright infringing website pages or the entire site can be removed from the Google search engine. But this can only be done after a notice has been sent to the website owner pointing to the infringing content. In case if the content that violates copyright is not removed despite notice

[113] *Digital Millennium Copyright Act in the USA; Directive on Copyright in the Digital Single Market in EU.*

Google will be required to promptly remove the material or access to it.

In Kazakhstan entire sites are often blocked without prior notification in case of copyright infringement. Even despite the fact that according to the existing laws Internet sites can not be blocked without a court order.

Director of the Department of Intellectual Property Rights of the Ministry of Justice, have mentioned[114] that Kazakhstan is considering US experience in protecting copyright on the Internet.

The Senate of Kazakhstan is considering a draft law "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Improvement of Legislation in the Field of Intellectual Property".

Considering significant difference between Kazakh and American legal systems direct adoption of US norms may only worsen the situation with copyright protection in general and regulation of the digital copyrights in particular.

South Korea is known for its highly developed digital infrastructure and recognized as being most connected online market with Internet penetration of 95.9% as in 2018[115]. In addition, just like Kazakhstan Korea is a Civil Law country. Following the signing of the United States–Korea Free Trade Agreement, Korea adopted significant copyright provisions related to Copyright term extension, temporary copying, technological protection measures, ISP liability and statutory damages and introduced them into national Copyright Law. Despite controversial background of adopting of the new copyright regime during trade agreement negotiations between Korea and USA Korean copyright proved itself as being very apropos and pat. Kazakh legislator may need to take in a closer consideration Korean experience on adopting Three step test and Fair use from US law.

In conclusion, despite obvious advance of Korean approach to digital

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[114] *Zakon.kz. "Казахстан Рассматривает Опыт США в Вопросе Защиты Авторских Прав в Интернете." [Protection of copyright and related rights on the Internet: problems and prospects "Director of the Department of Intellectual Property Rights of the Ministry of Justice Meirzhan Tulepov] Zakon.kz. zakon.kz, October 16, 2019. https://www.zakon.kz/4990572-kazahstan-rassmatrivaet-opyt-ssha-v.html.*

[115] *Statista Research Department. "South Korea: Internet Penetration 2018." Statista, November 12, 2019. https://www.statista.com/statistics/255859/internet-penetration-in-south-korea/.*

copyright protection it would not be recommended to follow Korean example and trying to adopt anything similar to infamous three strikes law. Unfortunately, Kazakh realities are that giving the government significant powers and opportunities to limit citizens' access to the Internet may catalyze a conflict between copyright and free speech. If applied incorrectly, such a law may allow government to deprive internet users on sharing and accepting information and opinions under the guise of digital copyright protection.

3.3. Freedom of expression vs. Other laws in Kazakhstan

According to its Constitution, Kazakhstan proclaims itself democratic, secular, legal, and social state whose highest values are individuals, their lives, rights, and freedoms[116].

Main law declares people of the Republic of Kazakhstan and their rights and freedoms as the highest values. Moreover, the Constitution guarantees freedom of expression and creativity, right to freely receive and disseminate information and prohibits censorship[117]

Although, Constitution guarantees freedom of expression Kazakh authorities restrict the right and influence the media using a variety of means, including laws, prosecutions, licensing requirements, Internet restrictions and criminal and administrative offenses.

Judicial actions against journalists and some publications including civil and criminal libel suits led to the suspension of certain publications and wide spread of self-censorship.

Since many international organizations are concerned about the situation

[116] *Constitution of the Republic of Kazakhstan, Sept. 1995.*
[117] *Art 20, Constitution of the Republic of Kazakhstan, Sept. 1995.*

with freedom of speech in Kazakhstan it is already known around the world.

Number of rankings and reports by various independent international organizations[118] clearly shows that country faces serious problems exercising the right to freedom of expression. State does not fulfill its obligations to protect this basic human right to the global community. Despite being part of many international documents that enshrine these rights.

Freedom of Expression is not an absolute right and may be subject to certain restrictions as provided by Article 19 of the International Covenant on Civil and Political Rights:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals[119].

One of the main aspects of national security in Kazakh legislation is information security. Protection of the information security ensures safety and stability of the state in the sphere of information[120].

According to Kazakh law Information Security aiming at prevention of: information dependence of the country; information expansion and blockade; informational isolation of the President, the Parliament, the Government and the forces for national security; prevention and suppression of legally protected information leakage; information influence on social and individual consciousness, associated with spoliation and spread of misinformation to the detriment of national security. Law also authorizes government agencies to monitor the activities of organizations managing and operating trunk lines including communication networks owned or managed by foreign participation. Distribution of the content

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[118] *Roth, Kenneth. "World Report 2019: Rights Trends in Kazakhstan." Human Rights Watch, January 17, 2019. https://www.hrw.org/world-report/2019/country-chapters/kazakhstan.; "No Free Press Means No Free Elections in Kazakhstan: Reporters without Borders." RSF, March 21, 2016. https://rsf.org/en/news/no-free-press-means-no-free-elections-kazakhstan; "Classement Mondial De La Liberté De La Presse 2019: Reporters sans Frontières." RSF. Accessed January 19, 2020. https://rsf.org/ranking.*

[119] *Article 19.3 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171*

[120] *National Security Law of the Republic of Kazakhstan № 527-IV ', Jan 8th, 2012.*

which undermines national security and disclosure of legally protected information are prohibited. Network providers may be given instructions to suspend the provision of communication services in case of anti-terrorist operations and curbing riots[121].

In coup with ambiguous mechanism of implementation Kazakh National Security law provides authorities with unlimited power to restrict free speech and access to the information in the country.

Not only national security laws justifies limitation of freedom of expression in Kazakhstan. To suppress open criticism of the authorities more laws were introduced.

State limits the ability of citizens to criticize the country's leadership. Law prohibits insulting the president or members of his family[122].

Kazakh Criminal Code [123] punishes "disseminating knowingly false information" in the form of a fine of up to $40,000 and imprisonment for up to 10 years[124].

Since the beginning of 2019, there were brought 33 criminal, 52 civil and 15 administrative charges, to the media and citizens in connection with the exercise of their right to freedom of expression, access to and dissemination of information. Including 45 claims for the protection of honor, dignity and business reputation[125].

Kazakhstan is actively fighting the threat of terrorism and extremism, severely suppressing all attempts to destabilize the situation inside the country. Because of its geographical location security concerns should not be underestimated. On the other hand, often this struggle violates the human right to freedom of speech

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[121] *Art. 23, National Security Law of the Republic of Kazakhstan № 527-IV ', Jan 8th, 2012.*

[122] *The Constitutional Law of the Republic of Kazakhstan "On the First President - the Leader of the Nation", N 83-II, July 20, 2000.*

[123] *Article 274. Dissemination of knowingly false information. Criminal Code of the Republic of Kazakhstan dated 3 July 2014 No. 226-V.*

[124] *Kazcommerz Banc vs. Nakanune.kz: June 2015, the Medeu Court of Almaty decided to remove publication "New steps in the Marlezon ballet of Kazkom Bank" and to collect 20 million tenge in favor of Kazkommertsbank from the owner of the domain name of the site Guzyal Baydalinova.*

[125] *International Foundation for Protection of Freedom of Speech "Нарушения Свободы Слова в Казахстане' [Violations of Freedom of Speech in Kazakhstan] Adil Soz International Foundation for the Protection of Freedom of Speech. September 2019. Accessed January 20, 2020. http://www.adilsoz.kz/monitoring/show/id/202.*

and belief[126].

The Criminal Code[127] provides for a sentence of imprisonment of up to 20 years for incitement of social, national, generic, racial, class or religious discord[128].

There is no difference between inciting ethnic, religious, social discord and expressing personal opinion on certain issue or event in the legislation and judicial practice of the country. When considering criminal cases on above charges investigators and judges are guided by their ordinary ideas about incitement to hatred. Hence, any discussions on issues of inter ethnic, interfaith, social relations are interpreted as incitement to hatred and are punishable by long terms of imprisonment:

From 2010 to 2018 there were 204 criminal cases by the above mentioned article with only 5 of them had verdict “not guilty”[129].

Kazakhstan is ranked 158th out of 180 countries in the 2019 Reporters Without Borders (2019) press freedom index[130].

Strengthening of the censorship in Kazakhstan has begun a while ago and is reaching new levels today. It is fair to mention that journalists in Kazakhstan are not openly oppressed. They are not sent to prisons or threatened with violence nether mass media representatives being killed like in some other countries. Pressure most often occurs through editorial offices and so-called "editorial policy." The lever of pressure is state orders and grants: there are practically no publications independent of government orders and budget money.

The fight against disloyal publications has been won by the Ministry of

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[126] *Kaleeva T.M. "Обзор ситуации в области свободы СМИ Казахстана после Саммита в Астане в 2010 году" [Overview of the situation in the field of media freedom in Kazakhstan after the Summit in Astana in 2010], January 2018, https://www.osce.org/representative-on-freedom-of-media/403052?download=true*

[127] *Art. 174. Criminal Code of the Republic of Kazakhstan, No. 226-V, 3 July 2014.*

[128] *On July 15, 2016, Zhanat Yesentaev, who was accused of inciting ethnic hatred on the social network Facebook, was sentenced to two years and six months in prison; By the decision of the Saryarkinsky District Court No. 2 of Astana, civil activist Bolatbek Blyalov was sentenced to three years of restraint of liberty on charges of inciting hatred. The activist was charged under Article 174 of the Criminal Code. The reason for initiating the case was some Blyalov’s interviews posted on the Internet, in which the authorities saw signs of “inciting hatred”.*

[129] *The Committee for Legal statistics and special accounts of the Prosecutor General's Office of the Republic of Kazakhstan, https://qamqor.gov.kz/portal/page/portal/POPageGroup/Services/Pravstat*

[130] *“2019 World Press Freedom Index.” RSF. Accessed January 19, 2020. https://rsf.org/en/ranking_table.*

Information and Social Development of Kazakhstan in 2017 with the adoption of the new Media Law[131].

The 25-page document limits journalism and freedom of expression, imposes additional duties of website operators and telecommunications operators, including the obligation to collect and store users' data. There was a ban on "the disclosure of information constituting state secrets," under which, due to vague concepts, everything can be summed up, including corruption and lawlessness of power structures.

3.4. Case studies on Freedom of Expression vs. other Laws in Kazakhstan

Respublica Case.

Respublica was one of very few analytical opposition Kazakhstani media known for critical articles addressed to the leadership of Kazakhstan and about corruption in the highest echelons of power.

The prosecutor of the city of Almaty filed a lawsuit with the court to stop "Respublica" (media outlet consisting of 8 newspapers and 23 internet sources)[132] Its activity.

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[131] *Law on Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Issues of Information and Communication, No. 128-VI, 28 December 2017.*

[132] *«Голос Республики – калейдоскоп событий недели», Республика. Деловое обозрение – дубль»», «Моя Республика. Факты, события, люди», «Республика - NEW – информационноаналитический еженедельник», «Вся Республика», «Мой дом – Республика. Обзор событий недели», «Республика2030 – Деловая газета», «Республиканские вести – деловое обозрение» [«Golos Respubliki – kaleydoskop sobytiy nedeli», Respublika. Delovoye obozreniye – dubl'»», «Moya Respublika. Fakty, sobytiya, lyudi», «Respublika - NEW – informatsionnoanaliticheskiy yezhenedel'nik», «Vsya Respublika», «Moy dom – Respublika. Obzor sobytiy nedeli», «Respublika2030 – Delovaya gazeta», «Respublikanskiye vesti – delovoye obozreniye»], www.facebook.com/RESPUBLIKA.kz, www.facebook.com/respublika.kaz, www.twitter.com/#/respublika_kaz, www.respublikakz.blogspot.com, www.plus.google.com/117818551347405307 35, www.respublika-kaz.info, www.respublika.yvision.kz, www.respublikakaz.liveiournal.com, www.respublika-kaz.biz, www.respublika-kaz.ya.ru, www.respubliki.net, www.respublikakaz.info, www.respublika-kz.com, www.respublika-d2.com,www.respublika-d2.info, www.respublika-kz.info, www.respublika-kaz.net,www.respublika-kaz.ya.ru/index_blog.xm, www.youtube.com/user/ForumRespubliki, www.pressa.ru/izdanie/49968, www.o53xo.oisxg4dvmiwgs23bfvvxultjnztg6.xorod/ru, www.respublikakz.wordpress.com]*

Lawsuit was justified by the fact that these newspapers and Internet resources despite having various formally independent owners and publishers are in fact a form of dissemination of the same media source and a number of publications contained in newspapers and Internet resources duplicating it. Moreover, mentioned media sources are aimed at inciting social discord and propaganda of a violent seizure of power and undermining the security of the state which contradicts the norms of the current legislation.

According to the conclusion[133] of a comprehensive psychological and philological examination, excerpts from published articles contain signs of inciting social discord and propaganda of the violent overthrow of power. Despite the fact that Respublika questioned the validity of the expert decision court ruled against defendant stating that the latter failed to prove that the expert opinion was made in violation of the Kazakh laws. Court also ruled that Respublika is a single entity. Following, all Prosecutor's claims were satisfied by the decision[134] of the District Court. Appeals were dismissed[135] and the decision of the Medeu District Court of Almaty dated December 25, 2012 in this case left unchanged.

Both Article 19 of the ICCPR[136] and Article 20 of Kazakh Main Law[137] states that ordre public can prevail over Freedom of Expression. In this case freedom of expression was limited because certain articles were found guilty in breaching and incited social strife and called for a government overthrow. However, controversy over court's reliance on an opinion of a committee created by the Ministry of Justice to analyze Respublika's content for extremism leaves questions about this case.

Pravdivaya Gazeta Case.

Weekly sociopolitical newspaper "Pravdivaya Gazeta" known as rather

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[133] *Conclusion of a comprehensive psychological and philological examination No. 2054 of June 1, 2012, conducted by the regional scientific-production laboratory of forensic examination in Almaty of the Ministry of Justice of the Republic of Kazakhstan.*

[134] *Decision of the Medeu District Court of Almaty, Case No. 2-8197 / 12, 25 December, 2012,*

[135] *Appellate Judicial Board of Civil and Administrative Cases of the Almaty City Court, chaired by Judge R. Adilbaeva February 22, 2013.*

[136] *UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.*

[137] *Art 20 of the Constitution of the Republic of Kazakhstan, 6 September 1995.*

liberal started publishing in April 2013. Circulation of the first issue was confiscated because the newspaper did not publish the frequency of publication. In August 2013 newspaper was suspended for three months because it has published a circulation that was 1,000 copies more than stated. Despite given suspension “Pravdivaya Gazeta” was distributed on November 20th, 2013, i.e. two days before the expiration of the suspension by court order, besides indicating the false release date - November 22nd, 2013th. As a result, On February 24, 2014, the judge of the Bostandyk District Court of Almaty announced the decision to close the newspaper for having violated administrative orders. Newspaper appealed on April 18, 2014, however, appellate court upheld[138] lower court’s decision[139].

According to some sources[140] "Pravdivaya Gazeta" has been persecuted for political reasons. One of the reasons may be rumors that the newspaper is run by Mukhtar Ablyazov[141]. Another reason for the persecution by the authorities of Pravdivaya Gazeta may be the publication of the chapters of the book of Zamanbek Nurkadilov, who died under mysterious circumstances in November 2005 and was the biggest opponent and critic of Kazakh ex President Nursultan Nazarbayev at that time.

In this case freedom of expression was limited for breaching the Law "On Mass Media" by violation of the procedure for announcing the publishing data and the Code of Administrative Offenses[142].

Havas Worldwide Case.

In summer 2014, Kazakh advertising agency Havas Worldwide presented a

[138] *Appellate Court's Decision Board of Appeals for Civil and Administrative Cases of the Almaty City Court, 2A-2479/2014, 18 April, 2014.*
[139] *Decision of the Bostandyk District Court of Almaty, case No. 2-1080 / 14, February 24, 2014.*
[140] *Toguzbayev K.”Правдивая Газета’ Продолжит Не Выходить.” [The True Newspaper’ Will Continue Not to Go Out] ”Radio Azattyk. Radio AzattykAugust, 22, 2013. https://rus.azattyq.org/a/delo-po-pravdivoi-gazete/25083146.html.*
[141] *Politician and oligarch, leader of the prohibited in Kazakhstan political movement.*
[142] *Art 342 of the Code of Administrative Offenses: Distribution of mass media products, as well as messages and materials of an information agency without registration or after a decision has been made to suspend, discontinue their release (broadcast) or recognize the registration certificate as invalid.*

poster with images of Russian and Kazakh classics[143] at the international festival Red Jolbors Fest. The work, according to its creators, was intended exclusively for the festival, but the image hit the Internet and caused a wave of disturbances in social networks. The presence on the visual of two classics is explained by the fact that the specified night club is located in Almaty at the intersection of streets named after them.

As a result, the kissing Pushkin and Kurmangazy became the occasion for the trials. On September 24, 2014, the Almaty Administrative Court ordered the director general of Havas Worldwide Kazakhstan and her agency to pay a fine of 170 MCI ($1,700). After that, 34 people sued the advertisers - teachers and students of the Kazakh National Conservatory named after Kurmangazy together with musicians of the Kazakh Academic Orchestra of Folk Instruments. The plaintiffs claimed to recover 34 million tenge ($186,000) in their favor as compensation for non-pecuniary damage. The court upheld the claim. Decision[144] says that the agency violated Part 1 of Article 349 of the Code of Administrative Offenses, which provides for liability for the production, distribution, placement and use of advertising of goods (works and services) prohibited for advertising in Kazakhstan.

Court's decision relied on an expert opinion by the Ministry of Internal Affairs of the Mayoral office of Almaty. Opinion stated that the poster was unethical, however, neither court nor the expert explained what standard of ethics was applied in the case. In addition, there is no administrative liability for unethical advertising in Kazakh law. Moreover, according to paragraph 3 of Article 1040 of the Civil Code of the Republic of Kazakhstan if a person has already passed away only heirs have the right to act with the protection of his honor and dignity and accordingly receive money.

Homosexual acts between consenting adults are legal in Kazakhstan, and Almaty is unusually considered as liberal city by Central Asian standards.

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[143] *Alexander Pushkin, a Russian poet, and Sagyrbaiuly Kurmangazy, a Kazakh musician.*
[144] *Court decision of Almaty District Court No.2, Almaty, 28 October, 2014.*

Ruslan Ginatullin Case.

A resident of Pavlodar, Ruslan Ginatullin, accused of "creating a transnational criminal group" and "inciting hatred", was sentenced to six years in prison with a sentence in a maximum security penal colony. The verdict[145] against 34-year-old Ginatullin was pronounced on December 14, 2016 by Pavlodar City Court No. 2. The offense against him is that on March 11, 2016 he posted his personal page of the VKontakte network links to videos[146] publicly available on YouTube. The accusation is based on the conclusion of an expert of the Center for Forensic Expertise of the Ministry of Justice of the Republic of Kazakhstan, who considered that "*the semantic component of the words in the two videos has signs of inciting ethnic hatred and discord*."

According to defense, Ruslan Ginatullin advocates inter ethnic consent and placed a link to reprehensible videos to draw fellow citizens to the reprehensibility of such actions. Court assumed that sharing such content on social media always intended to incite hatred without consideration that videos were shared to counter it.

During the first half of 2019 courts of the Republic of Kazakhstan completed 24 cases for incitement of social, national, generic, racial, class or religious discord[147]. The number of accused was 26 people. Of these, 19 people were convicted and only 3 were acquitted[148].

The above cases showing a trend of outcome of judicial proceedings when freedom of expression confronts various other laws in Kazakhstan. Despite being a basic human right enshrined in a number of international documents which Kazakhstan is a part to and country's Constitution Freedom of expression can be limited not only by the needs and importance of ordre public but even the norms of

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[145] *Decision of the Court No. 2 of the city of Pavlodar, Pavlodar region, Pavlodar, Case No. 1141, December 14, 2016.*

[146] *«Россия Кто не скачет тот ЧУРКА (Русские нацисты)», «Украина, война, груз 200» ["Russia Who does not ride that is Churka (Russian Nazis)", "Ukraine, war, cargo 200"]*

[147] *Article 174. Criminal Code of the Republic of Kazakhstan, No. 226-V, 3 July 2014*

[148] *The Committee for Legal statistics and special accounts of the Prosecutor General's Office of the Republic of Kazakhstan, https://qamqor.gov.kz/portal/page/portal/POPageGroup/Services/Pravstat.*

Administrative and Civil laws. There is no single case in Kazakh judicial practice where Freedom of speech was confronting norms of Copyright law. However, based on the existing precedents it can be assumed that Freedom of speech can be limited by any contracting law if that piece of information is alien or opposite to the existing regime.

4. Internet

4.1. Digital Copyright in Specific Jurisdictions.

4.1.1 Worldwide

The Internet is a universal information space where the objects of intellectual property expressed in the digital domain and easily cross the Border States unlike material objects in traditional ways.

Due to the globalization of the world economy, facilitation of financial transactions and simple procedure for concluding of inter-border contracts, the wide dissemination of the English language as a universal language of international communication the author can in a single day to register a domain name related to the national domain zone of the other country. Moreover, the author can pay and get hosting for a site in a third country, then contact a web developer in the fourth state and use it to publish on its website his new work then pay for advertising in a multinational company that owns a global search engine.

This example shows that the legal relationships on the Internet are not just a cross-border in nature but universal and can cover the whole world in a very short period of time with minimum expenses.

Borders are no longer required to be crossed they have become invisible they don't exist on the Internet. The great advantage and benefit to mankind is that the parties involved do not carry significant overhead for remote communication and transportation or overcoming the bureaucratic formalities at the border. In this sense, the role of private international law in the regulation of copyright on the Internet is of utmost importance.

National legislation have to develop their copyright in accordance with international agreements otherwise they will put themselves in isolation which is unacceptable in the world united by the Internet. Dramatically accelerated in the XX century trend towards unification of the law has received even greater impetus to the development with the transition to the digital world.

The main regulatory act of the United States in respect of copyright on the Internet is the law of copyright in the digital age - Digital Millennium Copyright Act[149] (DMCA). DMCA increases the liability for copyright infringement on the Internet but at the same time protects providers and hosters from liability for the actions of the users and content they may post.

For the time of its existence the DMCA has been repeatedly criticized by the US and international lawyers for serving corporate interests at the expense of civil rights. Important to highlight DMCA procedure called Take down Notice. It is a procedure for pretrial settlement of legal disputes by means of notification.

Similar in many respects to the US DMCA law is currently operating in European Union - European Union Copyright Directive[150] (EUCD). Among the features of the Directive is the recognition of the differences between the "reproduction right" - playback act (Article 2) and right of "communication to the public" - «the right of communication to the public" and "making available to the public "(Article 3). -"communication to the public". The last two are the legacy of the Directive of the WIPO Copyright Treaty[151] and the WIPO Performances and Phonograms Treaty[152] of 1996 (from Articles 8 and 10 respectively)

UK significantly tightened government policies regulating copyright relations on the Internet by the adoption in 2010 of the Digital Economy Bill[153] (DE

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[149] *To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes. Digital Millennium Copyright Act, Enacted by the 105th United States Congress Effective October 28, 1998 Public Law 105–304.*

[150] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the Information Society Directive or the InfoSoc Directive.*

[151] *The World Intellectual Property Organization Copyright Treaty adopted by the member states of the World Intellectual Property Organization in 1996. Signed 20 December 1996.*

[152] *The WIPO Performances and Phonograms Treaty signed by the member states of the World Intellectual Property Organization was adopted in Geneva on 20 December 1996. Came into effect on 20 May 2002.*

[153] *An Act to make provision about the functions of the Office of Communications; to make provision about the online infringement of copyright and about penalties for infringement of copyright and performers' rights; to make provision about internet domain registries; to make provision about the functions of the Channel Four Television Corporation; to make provision about the regulation of television and radio services; to make provision about the regulation of the use of the electromagnetic spectrum; to amend the Video Recordings Act 1984; to make provision about public lending right in relation to electronic publications; and for connected purposes. The Digital Economy Act 2010 (c. 24)*

Bill). The law is aimed to simplify the procedures for identifying and punishing copyright violators on the Internet (primarily through peer to peer networks).

Copyright in the EU is now governed by the rules[154] adopted back in 2001, when the Internet was in its infancy. However, on March 26th, 2019 European Parliament passed the copyright directive in a vote with 348 votes in favor, 274 against, and 36 abstentions[155].

Adopted directive aims to ensure that the longstanding copyright law also apply to the internet matching with realm of time and technologies.

At least two articles have raised controversies involving lots of criticism and opposition[156]. The first is in the 11th article (Article 15 of the directive), according to which, Internet platforms should pay to the publication, even if they publish a part of its publication in the form of snippets. The second is from the 17th article. In the case of copyright infringement, it provides for the responsibility of the owner of the Internet platform for the posted content from the moment it is downloaded. And in order to prevent the downloading of unlicensed content, special filters shall be installed (Upload Filter).

Critics of this innovation point to many controversial points including that the above filters are not able to recognize quotes, memes and parodies. Secondly, only large concerns have the ability to install such filters; for small enterprises, access to the Network will actually be limited. Chancellery of the Prime Minister of Poland called new directive *"...disproportionate measure that fuels censorship and threatens freedom of expression."*[157]

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is an Act of the Parliament of the United Kingdom.

[154] *Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, 22 May 2001.*

[155] *"European Parliament Approves New Copyright Rules for the Internet: News: European Parliament." European Parliament approves new copyright rules for the internet, European Parliament, 26 March, 2019. http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet.*

[156] *Reynolds, Matt. "What Is Article 13? The EU's Divisive New Copyright Plan Explained." WIRED. WIRED UK, May 24, 2019. https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban.; Browne, Ryan. "What Europe's Copyright Overhaul Means for YouTube, Facebook and the Way You Use the Internet.", CNBC, March 29, 2019. https://www.cnbc.com/2019/03/28/article-13-what-eu-copyright-directive-means-for-the-internet.html.*

[157] *Chancellery of the Prime Minister of Poland. "Tomorrow Morning #Poland Will Bring a Case*

If the member states accept the text adopted by the MEP it will take 2 years to implement it. implementation of the new directive can become a new chapter of the clash between Freedom of Expression and Copyrights on the internet.

4.1.2. Russia.

Initially, there were two main engines of copyright development in Russian Federation. Those are International Agreements and the requirements of foreign right holders and their governments. However, recently domestic participants in the information and media market start to gain significant interest in such development.

The part 4 of Russian Civil Code was the subject of discussion for several legal scientific researches and various articles[158]. Notwithstanding, purely legal comments do not take into account the specifics of Internet relations and the Internet economy. Existing attempts to take specifics of online copyrights into account are very rarely catching up with modern computer science and rapidly developing information technologies.

Many of the problems distinct to international agreements apply to the part 4 of the Civil Code of the Russian Federation in addition to some more specific issues.

Part 4 of the Civil Code logically consists of two main parts - general and special.

General part attempts to bring together all those concepts and norms that unite such different objects as works, computer programs, patents, trademarks and

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before the #CJEU against the Copyright Directive, a Disproportionate Measure That Fuels Censorship and Threatens Freedom of Expression. #Article13 #Article17 #ACTA2 Pic.twitter.com/2VmQV8nFWu." Twitter. Twitter, May 23, 2019. https://twitter.com/PremierRP_en/status/1131567904120557569.

[158] *Commentary on the Civil Code of the Russian Federation (part four) (itemized): in 2 tons. T. 2 / S.A. Gorlenko, V.O. Kalyatin, L.L. Kiriy [et al.]; rep. ed. L.A. Trachtengerc; Institute of legislation and comparative law under the Government of the Russian Federation. - 2nd ed. - M .: INFRA-M, 2016; Comments to Federal Law "On information, informatization and information protection" (itemized) V Pogulyaev, E Morgunva; Commentary to the fourth part of the Civil Code of the Russian Federation (main) / G.E. Avilov, K.V. Vsevolozhskiy, V.O. Kalyatin and others; by ed. A.L. Makovsky. M .: Statute, 2008; Commentary to the fourth part of the Civil Code of the Russian Federation (main) / G.E. Avilov, K.V. Vsevolozhskiy, V.O. Kalyatin and others; by ed. A.L. Makovsky. M .: Statute, 2008; White Book: History and Problems of Codification of Intellectual Property Law, Lopatina VN Moscow, Edition of the Council of the Federation, 2007. 280 p.*

etc. This makes it difficult to highlight one general concept.

It is also difficult to distinguish parts that solely relates to the Internet and new information technologies. Almost the entire general part and some chapters [159]of the special part can be associated with the use of objects online.

Part 4 of the Civil Code of the Russian Federation provides:

- concepts of the author and objects of intellectual rights;

- exclusive right and agreement on its alienation;

- powers on the use of objects and the license agreement on their transfer;

- ways and conditions of free use of copyrighted works (without permission of the copyright holder);

- ways to protect intellectual property rights (within civil law);

- features of the regulation of certain types of objects (copyright, related rights, industrial property).

Recent amendments in force[160] to Part IV of the Civil Code significantly tightened free use of copyrighted works.

For example, , Art. 1273 "Free reproduction of work for personal purposes," in which the permission to freely use a work without paying to authors was supplemented with the words "if necessary" and "exclusively" (for personal purposes).

Important thing is that in fact free use actually ceased to exist with the introduction of the clause 2 to the article.

"In the case when the reproduction of phonograms and audiovisual works is carried out exclusively for personal purposes, authors, performers, manufacturers of phonograms and audiovisual works are entitled to remuneration as provided in Article 1245 of this Code." [Civil Code]

In addition, damages for violation of the technical means for copyright protection became allowed even when free use is permitted.

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[159] *In particular, chapters 77 "Copyright" and 78 "Rights Related to Copyright".*

[160] *Federal Law "On Amendments to Part Four of the Civil Code of the Russian Federation", N 259-FZ, 4 October, 2010.*

Here is the highlight to free use of copyrighted works (online) as it introduced in Russian Civil Code[161].

Free irrevocable license: *"Rights Holder can publicly make a statement of providing anyone with the opportunity to use his/her copyrighted work free of charge under the terms and conditions specified by the holder. During this period, any person is entitled to use this intellectual property on the specified conditions. The term of five years considered if there is no other specified by rightholder. Application cannot be withdrawn during the period of validity, and the conditions of use stipulated therein cannot be changed."*[162]

"Information intermediary"[163] in Article 1253.1 of the Civil Code is an analogy to DMCA's safe-harbour provision. Law setting specifics of the responsibilities of the internet provider for carrying out activities on the transmission of material on the Internet or on the placement of material on the network. Unlike the DMCA provision, Russian Law intends to guarantee right holder with an effective tool for preventing violations of his rights, since the provider will be obliged to promptly respond to his claims under the threat of being held accountable for violating the exclusive right; despite the clause that at the same time, the provider will be adequately protected against making unfounded claims against him, since the actions that he must take will be known to him in advance[164].

The current at the time of this writing, the revision of the Civil Code does not expressly mention Internet site among the objects of copyright. Although the draft of the Federal Law No. 47538-6 on amendments to the Russian Civil Code provides for the inclusion of an Internet site as a copyright object[165]. There may be

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[161] *Section VII. Rights to the results of intellectual activity and means of individualization, Civil Code of the Russian Federation (Part Four)", N 230-FZ, 18 December, 2006 (as amended on December 27, 2017).*

[162] *Article 1233. Disposition of exclusive right, Civil Code of the Russian Federation (Part Four), ibid.*

[163] *Introduction of the article was envisaged by the bill adopted as the Law of 2014 N 35-FZ, however, this proposal was implemented not by the Law, but ahead of it by theFederal Law No. 187-FZ of July 2, 2013 "On Amendments to Certain Legislative Acts of the Russian Federation on the protection of intellectual rights in information and telecommunication networks.*

[164] *Commentary to article 1253.1 of the Civil Code of the Russian Federation, 8 December, 2006 (as amended on December 27, 2017).*

[165] *In accordance with the Resolution of the State Duma of the Federal Assembly of the Russian*

terminological confusion, since Law No. 149-FZ says about the website on the Internet[166]. Meanwhile, if the amendments are adopted in their current form the term "Internet site" will be fixed in the Civil Code. The draft amendment to the Civil Code of refers Internet site to an object of copyright as a composite work. Accordingly, definition of the Internet site as given in Law No. 149-FZ and the definition proposed by project No. 47538-6 do not coincide in its core. In the first case, the emphasis is on the technical side of the Internet site. On the other hand, in draft amendment Internet site is meant only as an object of copyright, the technical side passed over in silence. Adoption of amendments will allow to apply the norms of Part 4 of the Civil Code to Internet sites.

Currently, the general trend is similar to those in the US and Europe: society understands the inconsistency of copyright provisions in the Civil Code of the Russian Federation in the modern world. However, attempts to liberalize the norms meet with the resistance of the right holders.

In addition to part 4, there are many provisions in the Civil Code of the Russian Federation, which are also affected when talk about copyrights and new information technologies[167].

In addition to Civil law provisions protecting copyright and related rights Administrative and Criminal law changing and developing in order to catch up with modern technologies and Internet realities.

Certain articles of the Russian Criminal Code can be found interesting in the context of the iInternet.

Article 138. Violation of the Secrecy of Correspondence, Telephone

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Federation dated November 16, 2012 No. 1150-6 "On the order of consideration of the draft federal law No. 47538-6,, On introducing amendments to the first, second, third and fourth parts of the Civil Code of the Russian Federation and separate legislative acts of the Russian Federation.

[166] *Federal Law On Information, Information Technologies and on Protection of Information, N 149-FZ, 27 July, 2006 (as amended on 18.03.2019).*

[167] *Parts 1-3: Article 7: Civil law and the norms of international law; Article 128: objects of civil law. Information was excluded from this article but the results of intellectual activity and intangible benefits remain; Article 150: Intangible benefits including the right of authorship and personal and family privacy; Article 152.1: Protection of the image of a citizen including the cases when permission to use is not required and other, Civil Code of the Russian Federation, 8 December, 2006 (as amended on December 27, 2017).*

Conversations, Postal, Telegraphic and Other Messages;

Article 146. Violation of Copyright and Neighbouring Rights;

Article 242. Illegal Making and Distribution of Pornographic Materials or Objects;

Article 242.1. Making and Distribution of Materials or Objects with Pornographic Pictures of Minors;

Article 272. Illegal Access to Computer Information.

Article 146 provides for punishment only in the event of damage on a large or very large scale.

The note to this article indicates the following: "Acts stipulated by this Article shall be deemed to have been committed on a large scale if the value of the copies of the works or phonograms or the value of the rights for the use of the objects of copyright or neighbouring rights exceed 100 thousand roubles, and on an especially large scale - one million roubles"[168].

The cases of the first part of Article 146 are considered as criminal cases of a private-public prosecution[169]. Cases shall not be initiated except upon the application of the victim or his legal representative, but shall not be terminated due to the reconciliation of the victim with the accused[170].

Part 1 of Art. 7.12 of the Russian Administrative Code states: "Infringement of copyright and related rights, inventive and patent rights" establishes administrative responsibility for any violation of copyright and related rights "for the purpose of deriving income".

In addition, an exception is made in this article for those offenses that fall under unfair competition[171].

The main document in all aspects of information as a legal object is the Federal Law on Information, Information Technologies and Information Protection

[168] *Art. 146 The Criminal Code Of The Russian Federation, No. 63-Fz , 13June 13, 1996.*
[169] *Art. 20, part 3: Criminal cases of the private-public prosecution, Criminal Procedure Code*
[170] *Artt. 25, ibid.*
[171] *Art. 14, 33, ibid.*

is the main document. The law establishes that it does not affect relations in the field of intellectual property rights.

However, copyrighted objects are inherently information. In addition, the concept of access to information is to unite copyright and information law.

On April 2019, judges of the Supreme Court of the Russian Federation and the chairman of the Court for Intellectual Property Rights presented to the Supreme Court plenum a 92-page draft resolution “On the application of part four of the Civil Code of the Russian Federation”, explaining the procedure for applying the rules on intellectual property. Many of the provisions are related to the protection of Intellectual Property on the Internet, which reflects the tendency for civilian traffic to move to the online world.

According to the law, the site owner of the internet site independently determines the use of the site[172]. Therefore, the burden of proving that the material including intellectual property is placed on the site by third parties and not the site owner. In the absence of such evidence, it is presumed that the site owner is a person who directly uses the relevant intellectual property.

Draft[173] explains that photo quotation without the consent of its author is possible for informational, scientific and other purposes as long as the conditions set by the Civil Code of the Russian Federation are observed[174]. Articles reproduced online without the consent of their authors but for the same purposes also fall under the free use of work[175].

The use of a work of science, literature and art by any means regardless of whether the relevant actions are carried out with a view to making profit or not l, is allowed only with the consent of the author or other copyright holder with the

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[172] *Clause 17 of Article 2 of the Federal Law “On Information, Information Technologies and Protection of Information”, No. 149-ФЗ,27 July, 2006.*

[173] *Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application of the fourth part of the Civil Code of the Russian Federation", N 10, 24 April, 2019.*

[174] *Art. 1274, Free use of a work for informational, scientific, educational or cultural purposes. Civil Code of the Russian Federation (part four)", N 230-FZ, 18 December 2006 (as amended on December 27, 2017)*

[175] *Art. 2. Mass media. Main Terms, Law of the Russian Federation, N 2124-1, 27 September, 1991 (as amended on 06.06.2019).*

exception of cases when the Civil Code of the Russian Federation allows the free use of the work.

Article 1276 of the Russian Civil Code states that:

"1. It is allowed without the consent of the author or other right holder and without paying a fee to reproduce and distribute produced copies, to transmit on air or through a cable, to bring to public knowledge works of fine arts or photographic works which are permanently located in a public place, except if the image of the work is the main object of use or the image of a work is used for the purpose of deriving profit.

2. It is allowed to freely use by way of reproduction and distribution of produced copies, transmission on air or through a cable, bringing to public knowledge in the form of images the works of architecture, town-planning and landscape arts located in a public place or visible from that place."[176]

The draft specifies that when applying the above article courts should take into account that Internet and other information and telecommunication networks do not belong to a public place.

Following the discussion, the project has received positive assessment but was sent for revision as it mostly happens after the initial hearing. The final version of the decision will be submitted for a second vote later[177].

4.1.3. Kazakhstan

Kazakh copyright law follows developed in the XX century universal principles of copyright protection. As a continental law country Kazakhstan has accepted the Western theory of copyright without any significant differences.

The participation of Kazakhstan to the international conventions on copyright objectively restricts the freedom of creative self-determination in this area.

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[176] *Art. 1276. "Free Use of a Work Which Is Permanently Located in a Public Place", Civil Code of Russian Federation.*

[177] *Rayskiy Andrey "Верховный Суд Вошел в Интернет." [The Supreme Court Entered the Internet], Kommersant, April 11, 2019. https://www.kommersant.ru/doc/3940404.*

As in other countries copyright law in the state is reluctant to allocate the internet as a separate application or tending to ignore its specificity or to equalize with other technical means of information dissemination.

Currently, the regulation of digital copyright in Kazakhstan is mapped and completely subject to the regulatory framework governing copyright in general. There is no specific law relating to copyright on the Internet like the DMCA in Kazakh legislation.

Constitutional law guarantees the freedom of scientific, technical and artistic creativity through a wide deployment of scientific research, invention and innovation work, the development of literature and art.

The Constitution of the Republic of Kazakhstan provides:

1. The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited. [Article 20]

2. Each has the right to participate in cultural life and use cultural establishments and to have access to cultural values.

3. Citizens of the Republic of Kazakhstan must care for the protection of historical and cultural heritage, and preserve monuments of history and culture. [Article 37]

Constitutional rights confirmed by the Law "On Copyright and Related Rights"[178]

The level of protection of intellectual property rights depends primarily on the appropriate regulatory and legal framework and how effective it will be. As it was already mentioned Kazakhstan is only on the beginning of its way to form proper Intellectual Property legislation. The need to improve the legislation is extremely high due to accession of Kazakhstan to the World Trade Organization and the formation of the Common Economic Space[179].

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[178] *[dated June 10, 1996 № 6-I, zakon.kz/Document/?doc_id=1005798]*

[179] *[The Eurasian Economic Space or Single Economic Space is a single market that provides for the free movement of persons, goods, services and capital within the Eurasian Economic Union. The Single Economic Space was established in 2012 with the goal of creating an integrated single market. It is inspired by the European Internal market and the European Economic Area. The Eurasian Economic Space initially consisted of Belarus, Kazakhstan, and Russia, and was enlarged to include Armenia and Kyrgyzstan from 1 January 2015. The Economic Space was established after Belarus, Kazakhstan and*

Illegal use of intellectual property rights and combating piracy, the spread of counterfeit products are among the urgent problems faced by almost all the Central Asian states today. That is the reason why Central Asian countries are in the process of improving the whole set of international agreements, harmonization of national legislation and law enforcement in the field of intellectual property practice. But all these events have little impact on increasing innovation activity yet.

Situation in the region is similar to the rest of the world Copyrights protection on the Internet is the weakest point of the national Intellectual Property legislation. The existing provisions of the law not able still satisfy the interests of all participants in the process of information consumption. Meanwhile, in Kazakhstan copyright and intellectual property products are becoming more vulnerable.

Within the framework of the state order for the budget program "Scientific and / or scientific and technical activities on the basis of the National Center for Scientific and Technical Information there was created database called "Bank of innovations and patents". Database represents specialized automated information system that accumulates and analyzes information on patents, scientific and technological development and innovation projects with the ability of access for all interested parties *[www.nauka.kz]*

Database allows forming unified catalogue of the results of scientific and technological activities of Kazakhstan science and to identify projects that are not secured by copyright. In 2013, a database of "Bank of innovations and patents" obtained a copyright certificate.

There is a question that gives the author of copyright registration?

Copyright registration gives number of benefits. Created work becomes a presumption of the author so there won't be need to prove an exclusive right to this work in the court by using expensive calligraphic, philological and other forensic examinations. Also, registered copyrights are legally competent in dealing with

Russia had removed all customs borders in July 2011 through the Eurasian Customs Union].

contractors in case of making licensing and other copyright agreements.

Kazakh law on online copyright protection is still emerging and has lots of loopholes.

One of the listed by the law uses of copyrighted works and objects of related rights provided for in the areas of collective management listed in paragraph 3 of Article 43 of the Copyright Law is a message to the public by cable.[180]

Meanwhile, communication for general information (making available for public) via cable means communication of the work for general information via cable, wire, optical fiber or with the help of similar means[181].

Therefore, organizations that manage the property rights on collective basis are not entitled to collect remuneration for authors, performers, phonogram producers for using their rights on the Internet. Unless the authors (or right holders) transferred the rights to manage copyright and related rights on the Internet and if management of such category of rights is covered by the Statue of this organization[182].

The Republic of Kazakhstan needs a global reform of the judicial system. A separate issue is the problem of the consideration and resolution of intellectual property rights disputes in civil proceedings. One of the problems is the efficacy and judicial competence to hear cases related to intellectual property rights. Based on the expected in the near future increase in creative, inventive and patent activity, declared by a public authority, increase in the number of civil disputes in the field of intellectual property can be assumed. This makes the problem of justice in these cases particularly relevant.

Disputes in the field of intellectual property rights based on the creative and artistic, scientific and technical matters, therefore, require specific expertise and experience of the judges. For example, in cases in the field of the invention the judge

[180] *Paragraph 3, Art. 43, Law of the Republic of Kazakhstan "On Copyright and Related Rights, 10 June, 1996*
[181] *Paragraph 15, Art. 2, ibid.*
[182] *Art.44, ibid.*

must have a significant amount of knowledge specific level of expertise in Patent Office procedures, in particular in the field of the methodology for determining the patentability of products for qualified and proper consideration of the controversial relationship.

For this purpose it is rational to implement relevant foreign experience. Many countries, taking into account all the shortcomings of dispute resolution in the field of intellectual property in the framework of a civil trial. This problem finds solution in specialization of judicial proceedings one aspect of this is the existence of 'technical' judges with the appropriate scientific and technical education. At the same time, in some countries there is a special procedural Intellectual property law governing IP litigation. It would probably be useful to develop the Kazakhstani model of proceedings in intellectual property rights cases. New model should be developed with consideration of both positive foreign experience and taking into account the historical development of national IP legislation.

In Kazakhstan, long-term neglect by the law of the digital copyright protection brought to the underdeveloped judicial practice in this area. The law has traditionally left without defining the emerging conflicts, attributing them to the scope of morals and customs. That in turn tends to the primacy of the right to receive and disseminate information on the private-legal and commercial interests of individuals.

In accordance with Kazakh law “The results of intellectual creative activities and of the means of individualization, which may be the subject of exclusive rights (intellectual property), may be used by third persons only with the consent of the holder of the right.”[183]

All the use of objects of copyright and related rights in any form should be carried out with the relevant permission of the author or copyright holder[184].

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[183] *Clause 2, Article 125. Intellectual Property, Enforced by the Decree of the Supreme Council of the Republic of Kazakhstan, Civil Code of the Republic of Kazakhstan, 27 December 27, 1994.*

[184] *Article 978 of the Civil Code, Article 16 of the Law of the Republic of Kazakhstan of June 10, 1996 "On Copyright and Related Rights", Berne Convention for the Protection of Literary and Artistic Works (1886), WIPO Performances and Phonograms Treaty (1996).*

Therefore, any actions on the non-contractual use of the objects of copyright and related rights, including on the Internet, with the exception of cases provided by the Copyright Law[185], entail a violation of the exclusive property rights of the author or copyright holder.

Kazakh Criminal and Administrative codes specify responsibility of people creating Internet resources for the purpose of further access to illegal (without the consent of the author or copyright holder) downloading, posting and distributing works on the Internet. Users that illegally place protected works on the Internet in order to provide access to an unlimited number of people violating the rights of authors who create intellectual property with their creative work, and also violate the rights holders of rights to which these rights are transferred by the authors[186].

However, Criminal and Administrative codes do not provide for the legal responsibility of Internet users who listen to music, watch movies, read e-books, articles, information and other protected works online. Thus, current legislation does not restrict users from accessing information.

Law, in fact, comes from the recognition of the development of society interests above self-profit. Thus, the Internet is technically designed as a universal field of free intellectual cooperation enshrined in that capacity and morality. Any legal conflicts in this field have traditionally settled out of court, which was built on a common recognition of the rights of the author on the results of their work and the need to stop any of its use by third parties at the request of the copyright owner. The only exceptions are those disputes, which involved business entities and subject of the proceedings is the profit resulting from the use of someone else's intellectual property.

One of the proposals of this work is to incorporate to the Kazakh Copyright legislation similar to the DMCA Takedown Notice mechanism of-court settlement

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[185] *Articles 18-26 of Law on Copyright and Related Rights of the Republic of Kazakhstan, 10 June, 1996*

[186] *The Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Intellectual Property", 12January 2012.*

of disputes concerning the unplaced online content, but in order to avoid the mistakes of US legislators and to provide a way to confirm their right to object, the use of which is contested.

Due to the fact that the fair use doctrine was born in common law countries, there is no such legal institution in most of the civil law countries (including Kazakhstan). The only analogue existing is a - free use of the work. The main difference between "fair" and "free" use is that in the first case (the United States) are allowed absolutely any use of the product where such use is in good faith; and in the second (Kazakhstan) - There are only a few strictly defined exceptional cases where the product can be used without permission of the author, and payment of remuneration to him.

Free use of works is regulated by Copyright Law without consent of the author or owner of the right.

• Free reproduction of works for private purposes

• Free use of the work in informational, scientific, educational or cultural purposes

• Free public performance of lawfully disclosed musical works

• Free reproduction of works for law enforcement purposes

• Free entry works by broadcasting organizations for short-term use

Despite the fact that there was no actual legal proceedings in this case the possible scenarios that similar articles can be banned on the grounds of Copyright infringement while the real target of the injunction could be unwillingness to raise socially important topics. There is a high possibility of violation of the Freedom of Expression by the means of the Copyright law if current Copyright legislation won't be adjusted with the requirements of time and societal changes and developments.

Since the case-law is not applicable in Kazakhstan the judicial practice has not the right to form the rules of copyright. However, decisions of higher courts can show weak points of the existing Copyright legislation and points where Copyright and Freedom of Expression clashes on the internet in Kazakh jurisdiction.

4.2. Trends on digital copyright protection in Kazakhstan

In July 2009 Kazakh legislator followed Russian[187] example and enshrined the norm on expanded representation in the fourth chapter of the Law on Copyright and Related Rights[188] in addition to the current model of limited representation[189]. Since then, organizations that manage collective rights in the republic have been able to represent the interests of authors and holders of related rights without their consent.

According to paragraph 4 of Article 43 of the Law "On Copyright and Related Rights" "*The powers to collective management of property rights are transferred directly by the owners of copyright and related rights voluntarily on the basis of written agreements, as well as under relevant agreements with foreign organizations managing similar rights* ...". The following is a reservation: "... *subject to the provisions of paragraph 2 of Article 46-1 of this Law*." The clause to which the reference is made fixes the right of an accredited collective management organization (CMO) to collect remuneration for those copyright holders with whom it has not concluded rights management agreements. CMO should receive prior accreditation by the authorized body. In Kazakhstan, this is the Committee on Intellectual Property Rights of the Ministry of Justice.

Before introducing copyright collective management organization the most copyright infringement claims in Kazakhstan were filled by Microsoft, Meloman, and Adobe companies. Most courts decisions were very 'gentle' and the amount of payments did not exceed 5 thousand US dollars. Then new players appeared on the market and claims began to be estimated in millions of dollars.

In neighbor Russia only one organization is accredited collect remuneration

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[187] *Subparagraph 1 of paragraph 3 of Art. 1244, Russian Civil Code, 21 October, 1994.*
[188] *Part 3 of paragraph 2 of Article 46-1, Law on Copyright and Related Rights of the Republic of Kazakhstan.*
[189] *Clause 4 of article 43 of the Law, clause 1 of article 984 of the Civil Code of the Republic of Kazakhstan.*

for copyright holders in each area of copyright. So the so-called principle of "one-stop shop" has been put into effect. Hence, each user knows who can collect royalties from him and each author knows where to ask his remuneration. Meanwhile, there are 8 accredited CMOs in Kazakhstan[190] with each organization is free to enter into a contract in absolutely all types of copyright that exist in the world.

Kazakh Ministry of Justice received recommendations from the World Intellectual Property Organization that existence of such numerous CMOs per population of 18 million people are not rational.

Kcell JSC is a Kazakh major mobile operator. In 2016, Kcell launched three products that offer online music, movies and book access. Muzlife Ltd distributed music videos of foreign artists using of those services (Mobi TV - mobile television). DL Construction represented by Kazakhstan Intellectual Property Rights Management Society, an organization representing the interests of DL Construction in the courts, filed a lawsuit against the mobile operator in which it accused Kcell and its partner Terraline of illegally using music and video content without copyright holders consent. The claim amount was 1 billion tenge.

Like any Internet operator. KCell receives money for ensuring the smooth operation of the communication channel. International standards and Kazakh law states that if operator only ensures correct delivery without changing the content without being able to control and choose what to broadcast company cannot be accused of copyright infringement.

Specialized Inter-District Economic Court of Almaty ordered[191] Kcell and its partner Terraline to pay plaintiff monetary compensation in the amount of 672 million 197.5 thousand tenge)over 1,7 million USD) and in state revenue of the state duty in the amount of 20 million 162 thousand 925 tenge (over 52 thousand USD).

Almaty City Court of Appeals Board of Civil Cases canceled overturned the

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[190] *List of organizations that manage property rights on a collective basis and have received accreditation certificates; Published June 27mx, 2016, Updated December 21 2016. Ministry of Justice of the Republic of Kazakhstan* http://www.adilet.gov.kz/en/node/127948

[191] *Decision of the specialized inter-district economic court of Almaty, 13 June , 2018.*

decision[192]. The Supreme Court did not consider the cassation appeal of the company.

However, even if Kcell or Terraline had concluded an agreement with one of existing CMO then there would have been no lawsuit. Collective management organization work in three areas including broadcasting via TV, cable, and broadcasting in public places. There is no separate direction for collecting remuneration for broadcasting on the Internet or via cellular communication. Even if the music channel has an agreement on TV broadcast and Terraline has rights to share content via cable chain remains unprotected in the face of mobile operators.

For the country that was just recently excluded from all Special 301 Report lists[193] the fact that copyright holders started more actively fight for their rights is a significant change in a positive direction. If a decade ago authors would not bother to claim anything nowadays the load on Kazakh courts on copyright disputes increases exponentially.

According to the Committee on Legal Statistics and Special Records of the Prosecutor General of the Republic of Kazakhstan in 2018 for consideration of the civil court on copyright protection 837 case applications were received 790 of which were initiated. For comparison there were only 119 cases of this category in 2015 and 592 in 2016[194].

According to Forbes Kazakhstan is the third cheapest country for one gigabyte of data with the average cost in U.S. dollars in the world[195] with 77% of the entire population uses Internet.

Summing up the trends of the digital copyright protection in Kazakhstan it can be seen that country is making efforts to comply with international standards.

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[192] *Judgment of the Judicial Collegium for Civil Cases of the Almaty City Court of July 30, 2018]*

[193] *Kazakhstan was excluded from the Special 301 Report in 2006.*

[194] *Supreme Court Bulletin: Summary of Judicial Practice: A summary of the judicial practice of considering cases on the protection of violated copyright and related rights, performed by the judicial board for civil cases of the Supreme Court of the Republic of Kazakhstan, May 2017 // Bulletin of the Supreme Court of the Republic of Kazakhstan. 2017. No. 9. P. 87; hereinafter referred to as a synthesis of 2017.*

[195] *McCarthy, Niall. "The Cost Of Mobile Internet Around The World [Infographic]." Forbes. Forbes Magazine, March 5, 2019. https://www.forbes.com/sites/niallmccarthy/2019/03/05/the-cost-of-mobile-internet-around-the-world-infographic/#31887dfd226e.*

Especially for the documents and organizations which Kazakhstan is a part to. However, it is clear that despite the high level of internet access and raising awareness of copyrights the there are still some holes in national laws in regard to the regulation of copyright protection on the Internet.

4.3. Trends on Freedom of Expression on Internet in Kazakhstan

Internet helps in all volume to execute one of the fundamental human rights "to seek, receive and impart information and ideas through any media and regardless of frontiers" - the right of freedom of expression.

Unlike traditional media Internet doesn't have an owner and can not be absolutely controlled. On the Internet states lose their monopoly to generate, spread and control information. Internet places freedom of expression on the new level by changing the social conditions in which people express their ideas and share information[196].

However, it should be said that freedom of speech on the Internet should not be unlimited. The right of the individual to freedom of expression exists until it is not contrary to the rights and interests of other people. Therefore, the implementation of the principle of "absolute" freedom of speech can easily wrap arbitrary negative consequences for society and the individual.

Along with legitimate and useful information spreads on the Internet content that potentially dangerous to society or illegal easily accessible online too.

Therefore, it must be recognized that some restrictions on freedom of speech on the Internet is quite justified and necessary, on the condition that those are based on the principle of a reasonable balance between the freedom of expression and guaranteed protection of personal, national and public interests.

Many countries are trying to solve this problem through legislation but meet

[196] *William Fisher "Freedom of Expression on the Internet", The Berkman Klein Center for internet and Society at Harvard Uni. (Last Updated June 14, 2001) available at: http://cyber.law.harvard.edu/ilaw/Speech/*

resistance of the Internet users.

On the one hand, there is an urgent need for the legal limit of reprehensible information, on the other - the executive power of the state can abuse these restrictions, citing the need to ensure "information security", and thus will limit freedom of expression. While in most countries, there is no censorship on the Internet there are countries where the government blocks the offending public morals or endanger national security posts. These countries traditionally limited the access of its citizens to any information sources, both printed and electronic exciting contempt or hatred for the government or containing "defamation of public institutions".

Freedom House[197] makes annual report and ranking on Internet freedom in the world. The report says that governments in various countries “are increasingly using technology in favor of digital authoritarianism to control their citizens and to manipulate elections.”

The history of Kazakh Internet space has its start in September 1994 when the national top-level domain (kz.) been officially registered. Corresponding segment of the global network is called Kaznet. One of the largest telecommunications companies Kazakhtelecom was founded the same year. Since the same year government fully regulates internet-providers in the country.

Since 2011, Kazakhstan has never been mentioned in the Freedom House report as a “free Internet” country. Only in 2014, Kazakhstan was classified as a “partly free Internet” state. In 2015, Kazakhstan worsened its position and ended up in the category of countries with a “non-free Internet”, in which it remains to this day. This subchapter provides details on how status of the Internet was changing in Kazakh laws during the past few years forming current trends in online freedom of expression in the country.

Originally blocking of internet sites was possible only by decision of the court, in connection with a violation of the law. In December 2016, Kazakh

[197] *Independent watchdog organization dedicated to the expansion of freedom and democracy around the world; https://freedomhouse.org.*

parliament adopted amendments to the bill that regulates measures to combat terrorism and extremism, including in the ICT field. According to the bill, agencies that are engaged in operational-search are allowed to suspend communications and networks in the event that online actions may entail serious crimes including the use of networks for criminal purposes detrimental to the interests of individuals, society and the state, as well as for disseminating information that violates the laws of the Republic of Kazakhstan on elections, containing calls for extremist and terrorist activities, riots, as well as participation in mass (public) events held in violation of the established procedure that promote the sexual exploitation of minors and child pornography[198].

According to Kazakh laws, all Internet resources: websites, chats, blogs, online stores, digital libraries and others are equated to the traditional media with corresponding criminal, civil and administrative responsibility that traditional media bears[199].

In 2017, Kazakh government initiated amendments to the Law on the Media. New version of the law obliges readers of electronic media to make a written agreement with the site in order to leave a comment to any news or publication. Contract can be concluded through a mobile device, however, the media itself will be required to store the personal data of the commentator for the entire period of the agreement and for another three months after its termination. Commenting under a pseudonym is allowed, however, at the conclusion of the contract, the subscriber is obliged to provide his real data. As a result, most private online portals closed comments, and discussions switched to social networks.

According to the Freedom House's 2018th report Kazakhstan was in the group of states with the worst indicators and took the 46th place out of 65. Given assessment was influenced by several factors including barriers to Internet access

[198] *Law of the Republic of Kazakhstan on introducing amendments and additions to some legislative acts of the Republic of Kazakhstan on countering extremism and terrorism*

[199] *The Law of the Republic of Kazakhstan "On Amending Certain Legislative Acts of the Republic of Kazakhstan on Information and Communication Networks", No. 178-IV, July 10, 2009.*

(infrastructural and economic barriers, legal control and control of Internet providers) content restriction[200] (blocking sites and content censorship) and violation of user rights (tracking online activities, privacy breach)[201]. Kazakhstan is in the list of countries where the Internet, social networks and communication platforms are often blocked, political, social or religious content is limited, bloggers, human rights activists, network users or critical authorities are harassed and attracted to responsibility.

In 2019 situation became even worse due to unexpected departure of long-term president Nursultan Nazarbayev and an election confirming the powers of his chosen successor brought the level of domestic discontent in the country to a boiling point. Government temporarily cut Internet access, blocked more than a dozen local and international news sites, and limited access to social networks in an attempt to silence activists and prevent digital mobilization. Government's attempts to monopolize the mobile communications market and introduce real-time electronic surveillance have also contributed to a decrease in the level of Internet freedom in Kazakhstan.

So on May 9, 2019 providers restricted access to popular social networks, instant messengers and Internet resources, including many independent media outlets, as well as the website of the Kazakhstan International Bureau for Human Rights and the Rule of Law. During the day, users could not open foreign platforms like Facebook, Instagram, YouTube and Telegram.

In July 2019 a message requiring installation of a security certificate on each device with Internet access came to smartphones of the residents of the Kazakh capital city. Telecom operators warned: if the certificate is not installed, then there may be problems with access to the network. And they supported the requirements

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[200] *"Internet and Streaming Services Blocked in Kazakhstan on Election Day." NetBlocks, June 11, 2019. https://netblocks.org/reports/internet-and-streaming-services-blocked-in-kazakhstan-on-election-day-dAmOP7y9.*

[201] *"Freedom on the Net 2018: The Rise of Digital Authoritarianism." The Rise of Digital Authoritarianism | Freedom House, November 8, 2019. https://freedomhouse.org/report/freedom-net/freedom-net-2018/rise-digital-authoritarianism.*

by referring to Section 26 of the Law "On Telecommunications". According to the law: "Long-distance and (or) international phone operators are required to pass all traffic using protocols that support encryption using a security certificate with the exception of traffic encrypted using cryptographic protection information on the territory of the Republic of Kazakhstan. "[202]

Being installed on the device certificate embedded in all browsers and applications, replaces other trusted certificates and gets access to all incoming and outgoing information even before it was encrypted. Moreover, the certificate allows to precisely block the ability to visit specific sites and even view specific videos and posts on individual sites.[203]

To protect citizens of Kazakhstan from having their online communications intercepted by the government, Google and Mozilla have blocked the root Certificate Authority Kaznet Trust Network from Chrome and Firefox. [204]

After a flurry of criticism from international organizations and protests in the country Kazakh authorities refused mentioned certificate saying[205] that they only tested it in the framework of the National Cyber Shield program.

Apparently, unlike with digital copyright protection freedom of speech in the online world is showing less promising trends both in legal documents and in judicial cases in Kazakhstan.

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[202] *Kovalev, George. "Что Не Так с Сертификатом Qaznet Trust Network." ["What's Wrong with Qaznet Trust Network Certificate."]. Kursiv - Kazakhstan business news July 30, 2019. Accessed January 19, 2020. https://kursiv.kz/news/obschestvo/2019-07/chto-ne-tak-s-sertifikatom-qaznet-trust-network.*

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5. Conclusion

Increasing interest in the question of interactions between copyright and freedom of expression based on two major factors. The first one is an expansion of the copyright law and the second is the transfer of those interactions to the online dimension. Already controversial relations between two laws got more complicated with the emergence of the digital environment. Technological and digital revolutions made it more complicated to enforce copyright and protect exclusive rights of the authors. As it was shown in the work, pecuniary interest of the right holders and need to promote creativity was a great engine for copyright expansion since the time when the printing press was invented. Responding to the changes and challenges brought by the Internet states and have taken measures to strengthen copyright protection in domestic laws and international instruments. However, there were no many efforts in the direction of broadening statutory exceptions and limitations in order to accommodate freedom of expression within copyright provisions. Moreover, strengthening of the copyright protection across numbers of jurisdictions was not counterbalanced with any similar intensification of the measures to secure the right of freedom of expression.

Nevertheless, advances in technologies not only changed the way in which copyrighted content can be accessed, copied or disseminated but also brought significant changes to the democratization of the society and enabled Internet users to overuse their right to freedom of expression. Case studies showed that not always breaching of the right of freedom of expression means depriving someone of the right to express his or her opinion, seek and impart information but often indispensable measures to protect the rights of the others.

Not only states with advanced copyright legislation facing the problem of tension between two laws with bigger emphasis in online world. More and more cases arises in jurisdictions where copyright law is only starting its development and getting into line with international standards.

Answering the questions set in introductory part it can be concluded that the

internet by changing the approach to the copyright and freedom of expression aggravating controversy between two laws. There is no yet definite answer if existing statutory instruments are enough to regulate and settle conflicts between copyright and freedom of expression for the moment but it is obvious that those measures won't be enough in the near future due to complexity and uncontrollability of the internet.

Copyright met Freedom of expression many times in various jurisdictions. However, that collision never happened in Kazakhstan or neighbouring countries. What will be possible scenario if it happens. It is clear, that despite being one of basic human rights, free speech can be limited by any existing criminal, civil and even administrative norms if content is alien or contradictory to existing government regime, views and beliefs. It will be fair to conclude that copyright protection will restrict any type of sharing, publishing or accessing to political or ideological information freedom of expression most likely to be on the losing side.

Considering how weak is free speech shows itself in Kazakh judicial practice it is very unlikely that it can become a tendency to justify infringement of somebody's copyright by the right to disseminate and access to information.

Complicated with outdated internet related laws, digital copyright protection still needs significant improvement. However, in the current state of things rights of the authors are not endangered by the free speech in Kazakhstan.

Can it be said that copyright works as an engine of free speech in Kazakhstan? For the country that is ranked 158th out of 180 countries in 2019 World Press Freedom Index it is obvious that there is no basic respect to the right.

As to referring to the foreign experience in order to improve Kazakh copyright legislation it is important to consider implementation of the statutory exceptions and limitations to copyright in order to accommodate freedom of expression within its norms. Also, there is a need to adopt new law considering specific of the Internet including reassessment of the liabilities of the internet service providers and anti-circumvention law.

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7. Abstract in Korean

저작권과 표현의 자유, 그리고 아날로그에서 디지털 세계로의 전이 사이의 논쟁적인 관계는 두 법의 충돌이 인터넷에 등장하기 이전보다 온라인에서 더 큰 문제인지, 특정 관할권이 어떻게 새로운 환경에서 충돌.

최신 저작권법을 보유한 국가의 경험은 판권 관행에 저촉 된 저작권법과 부족한 국가에 대한 좋은 예가 될 수 있습니다.

서구의 저작권은 그 출현으로부터 국가의 통제와 검열과 관련하여 계속 발전하고 독립적이되었습니다. 소비에트 시대에 서유럽과는 달리 카자흐스탄의 저작권법은 추가적인 침체와 함께 진행되었다. 오늘날 법 자체뿐만 아니라 국가 사회의 법적 문화는 소비에트 정권의 유산입니다.

현대 저작권법은 주로 국제 협약의 산물입니다. 저작권은 국가의 법률 제정 기관에서 비롯되었지만 국제 협약은 이제 저작권 규칙의 주요 소스가되었습니다.

언론의 자유와 언론의 자유는 다양한 국제기구에 포함되어있을뿐만 아니라 헌법 적 차원도 가지고 있습니다

국제 저작권법은 수이 제네시스 시스템으로 기능합니다. 국제 프레임워크의 관점에서 볼 때 국제 저작권법은 최소 표준, 국가 치료 및 가장 선호되는 치료의 세 가지 기본 원칙에 의해 유발되는 비정상적인 현상입니다.

국제기구는 표현의 자유에 대한 권리를 선포 할뿐 아니라 정부가이 권리를 제한 할 수있는 유일한 법적 근거를 설정합니다. 국제 및 지역 국제 악기는 언론의 자유를 제한함으로써 동일한 표준을 설정했습니다.

표현의 자유에 대한 권리가 가장 중요하다고 인식되면, 인류는이 권리가 절대적이지 않다는 것도 인식했습니다. 표현의 자유의 침해는 3 가지 조건에서 정당화 될 수 있습니다. 정부의 개입은 법에 의해 확립되어야합니다. 둘째, 부과 된 제한은 국제 법상 합법적 인 목표에 도달해야하며, 셋째, 합법적 인 목표를 추구해야합니다.

인터넷의 복잡성은 본질적으로 경계가 없으며 통제가 거의 불가능합니다. 법원은] 저작권 콘텐츠의 게시가 불법이라고 판결 할 수 있지만 디지털 차원을 통해 콘텐츠가 더 이상 확산되는 것을 막을 수는 없습니다. 기존 법률이 여전히 어떤 경우에는 해석 될 수 있어도 인터넷상에서 저작권과 표현의 자유 사이의 상관 관계를 여전히 규제 할 수는 있지만 충분하지 않을 것이며 새로운 법률 문서를 작성해야합니다. 기존 미디어와 달리 인터넷에는 소유자가 없으며 절대적으로 제어 할 수 없습니다.

카자흐스탄 공화국은 올해 독립 29 주년을 맞이할 것입니다. 소비에트 연방 법률 시스템의 후손 인 카자흐스탄은 불과 몇 년 전 세계 무역기구(World Trade Organization)의 회원국이되었으며, 이는 최근에 국가가 최근 TRIPs 협약에 가입하여 세계 지적 재산권 사회의 일부가됨을 의미합니다.

현재 카자흐스탄의 디지털 저작권 규제는 일반적으로 저작권을 규제하는 규제 프레임 워크를 따릅니다. 카자흐 법안의 DMCA와 같이 인터넷의 저작권에 관한 특정 법률은 없습니다.

논란의 여지가 많은 언론의 자유와 인터넷 활동의 자유에 대한 논쟁은 디지털 관점에서 저작권의 표현과 표현의 자유의 공존을위한 성공적인 솔루션 경험의 적용에 필요함을 보여줍니다.

이 지역의 상황은 다른 국가와 유사하며 인터넷의 저작권 보호는 국가 지적 재산권 법의 가장 약점입니다. 법률의 기존 조항은 여전히 정보 소비 과정에서 모든 참가자의 이익을 충족시킬 수는 없습니다. 한편 카자흐스탄에서는 저작권 및 지적 재산권 제품이 점점 취약 해지고 있습니다.