

LEGAL DEVELOPMENTS

THE WCT AND THE KAZAKHSTAN COPYRIGHT LAW:  
PUTTING THE CART IN FRONT OF THE HORSE?

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## **I. Introduction**

The famous contemporary Kazakh poet Mukhtar Shakhonov construed the “Formula of a Modern Man-Like Person” as follows: “And nowadays a know-all young generation, especially the one that lacks high spiritual and moral ideals, with its mercantile talent, is becoming frighteningly unprincipled, cynically smart, purposefully adroit, as if it has a computer with a shining display-eye instead of the head on its shoulders” (from “Delusions of Civilisation”). This is a fear, which threatens to materialise in the age of information technologies, and copyright law is one of the primary areas where this threat is imminent.

Therefore, “recognising the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works”,<sup>1</sup> Kazakhstan ratified the WIPO Internet Treaties in early 2004 and half a year later implemented them in the national copyright legislation.

What was the purpose of this harmonization of the national copyright law with the Internet Treaties? Did the implementation of the WCT and WPPT achieve the desired “harmony”? What is the perspective for further developments of copyright law and practice with regards to the digital agenda?

To answer these questions (albeit solely with respect to the WCT), we will first look at the history of copyright protection in Kazakhstan dating back to the Soviet times. Then we shall turn to the analysis of copyright law as it is currently in force. Finally, we shall scrutinize the WCT-related amendments themselves and examine the adequacy of such changes relating to the law.

## **II. Copyright Law in Soviet Kazakhstan: a Nexus with Mother Russia**

Before Kazakhstan joined the USSR in 1920, many works created by legendary Kazakh composers and poets had only occasionally been fixed due to the nomadic lifestyle of the Kazakhs. Songs and poems were composed with the sole aim to disseminate ideas throughout the vast territories of the Kazakh steppe — those ideas pertaining to social injustice, idealisation of khans, appeal to unity, urge for education, hatred of the enemy, etc. Thus, earnings of a material nature had never been a motivation for creation. “Pirate” intentions did not appear in anyone’s mind even with relation to scientific and literary works, which were embodied in a material form, as, in that time, there was no widespread demand of the industry for those works.

The notion of authorship was first brought to Kazakhstan during the time of the Russian empire but was mostly developed in the Soviet period. Before the Soviet times, education in Kazakhstan was of a religious Islamic nature, while the Soviet period brought European and civic knowledge to the country. Among these was the concept of authorship. Therefore, the Russian influence on the emergence of copyright protection in Kazakhstan could not be underestimated.

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<sup>1</sup> WCT Preamble, the third recital.

The history of Soviet copyright law can be traced back to 1917-1919, the period of the Bolsheviks' establishment of power.<sup>2</sup> In those times, several governmental decrees declared that all scientific, artistic, literary and musical works, including unpublished ones, belonged to the State. Furthermore, these decrees terminated all previously concluded contracts between authors and publishers.<sup>3</sup> The idea behind this "expropriation" was the education of soldiers and peasants, the main force of the 1917 Revolution.

The next stage of this copyright law development was the adoption of the "Fundamentals of Copyright Law" in the 1925-1928 period. The Fundamentals contained basic provisions, along the lines of which the Soviet Republics were to draft their own laws. Obviously, national laws were mainly merely an echo of the Fundamentals. The Russian Republic adopted its Copyright Law in 1928. The Kazakh Autonomous Soviet Socialistic Republic (Kazakh ASSR) at that time was part of Russia and, thus, the 1928 Law was directly applicable in Kazakhstan as well.

The 1925 Fundamentals granted a 25-year term of protection after the publication of the work, while the 1928 Fundamentals instituted a life-long protection, except for certain categories of works. The scope of rights was extremely limited, and the list of free use cases was very broad. Nevertheless, both the 1925 and the 1928 Fundamentals were still much more progressive than the "expropriation" acts of the previous period.

The 1960s were the period of codification of the Soviet legislation. In December 1963 the Kazakh Soviet Socialistic Republic (Kazakh SSR) adopted its Civil Code, which contained a chapter on copyright law and followed the principles established by the 1961 "Fundamentals of the Civil Legislation of the USSR and the Union Republics". In brief, the provisions of the Kazakh Civil Code set forth the following:

- 1) works created by foreign authors were protected only on the basis of international treaties to which the USSR was a party;
- 2) the sole economic rights expressly granted to authors were reproduction, publication, distribution and translation rights. The right to remuneration was a separate right which implied that no presumption of payment existed;
- 3) the list of exceptions to author's rights was very broad;
- 4) the term of protection was fixed at 15-year *post mortem auctoris* and later, in 1973, extended to 25 years;
- 5) the state had the right to carry out a forced buy-out of any economic right of the authors.

The last Soviet copyright act was the "Fundamentals of the Civil Legislation of the USSR and Union Republics" adopted by the USSR President on May 31, 1991. Its provisions were

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<sup>2</sup> In this article, we do not consider the history of Russian pre-revolutionary copyright law.

<sup>3</sup> Resolution of the Council of People's Commissioners dated November 26, 1918 "*On Recognition as State Domain of Scientific, Literary and Musical and Artistic Works*", Decree of the All-Russia Central Executive Committee dated May 21, 1919 "*On State Publishing*", Decree of the Council of People's Commissioners dated July 29, 1919 "*On Abolishing the Private Ownership on Archives of Deceased Russian Writers, Composers, Artists and Scientists Whose Archives are Stored in Libraries and Museums*", Resolution of the People's Commissariat on Enlightenment dated August 16, 1919 "*On Nationalisation of Musical Works of Certain Authors*", Decree of the Council of People's Commissioners dated October 10, 1919 "*On Abolishing the Contracts for Acquisition of Literary and Artistic Works*", Resolution of the People's Commissariat on Enlightenment dated January 18, 1923 "*On Announcement of the State Monopoly over Publication of Works of Certain Writers*".

applied directly in the Kazakh SSR. The most progressive provisions of the 1991 Fundamentals were the following:

- 1) computer programmes and databases were expressly mentioned as protected subject matter;
- 2) term of protection was extended to 50 years *post mortem auctoris*;
- 3) the list of economic rights was augmented and made non-exhaustive;
- 4) the wide-encompassing nature of free-use cases was abolished and a free use exception for private purposes was introduced;
- 5) a presumption of remuneration for the authors was established;
- 6) provisions on neighbouring rights were included;
- 7) a provision, though limited in scope, on collective management of rights was included.

As far as international treaties are concerned, the USSR had only joined the Universal Copyright Convention (the text of 1952<sup>4</sup>) on May 27, 1973, which was also the date of entry into force of this Convention in the Kazakh SSR.

To sum up, Kazakhstan copyright law emerged and developed under the direct influence of Russia and the Soviet Union. Therefore, even after the collapse of the Soviet Union, it seemed somehow natural that, when drafting its own new copyright legislation, the Kazakhstan legislator followed the example of the Law of the Russian Federation “On Copyright Law and Neighbouring Rights” dated July 9, 1993.

### **III. Current Copyright Legislation: Fitting and Right on Paper, yet Untested in Practice**

#### **1. Digital Agenda in the Pre-WCT Copyright Law: Adequate for Domestic Purposes**

The Law on Copyright and Neighbouring Rights (hereinafter Copyright Law) that is currently in force in Kazakhstan, was adopted on June 10, 1996.<sup>5</sup> Prior to its adoption, Kazakhstan was applying the 1991 Fundamentals. Kazakhstan ratified the Berne Convention on November 10, 1998.

The Copyright Law has been amended only once, on July 9, 2004. The change of the national legislation was necessitated by Kazakhstan’s adherence to the WIPO Internet Treaties, which were ratified by Parliament on April 16, 2004. It is worth noting that no discussion had preceded both the ratification and implementation of the WCT and WPPT, except for some brief reports in the printed media.

We will first look at what the Kazakhstan copyright landscape was like before the WCT-generated amendments were introduced. After that we shall try to analyse whether these amendments were well implemented. The basic provisions of the Copyright Law stipulate the following:

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<sup>4</sup> A.P. Sergeyev. *Law of Intellectual Property in the Russian Federation*. Moscow, 2001, p. 401.

<sup>5</sup> Although the legislative work on drafting the Copyright Law started already in 1993, some members of the working groups and experts took the view that, to avoid contradictions, the Copyright Law could not be enacted until the Civil Code (Special Part) setting out the general principles of copyright law was adopted. Finally, the working group managed to persuade the Parliament that no contradictions would be made since the same people were drafting both the Copyright Law and the chapter of the Civil Code on intellectual property.

- 1) national treatment of works which are located in a material form in Kazakhstan;
- 2) term of protection: 50 years *post mortem auctoris*;<sup>6</sup>
- 3) open-ended list of protected subject matter, including, *inter alia*, computer programmes (independent from literary works) and databases;
- 4) criteria for protection: originality and fixation;
- 5) moral rights include right of paternity, right to protection of author's reputation and right of withdrawal (The July 2004 amendments added the right of disclosure);
- 6) economic rights include reproduction, distribution, importation, public display, public performance, communication to the public, communication for broadcasting, communication by cable, translation and adaptation, and right of rental belonging to authors of musical works in the form of sheet music, works embodied in phonograms, audiovisual works, databases and computer programmes. The amendments of July 2004 made the list of economic rights non-exhaustive;
- 7) free use cases cover:
  - reproduction for private use (except for certain subject matter such as computer programmes, databases or reprographic reproduction of whole books or sheet music);
  - quotations;
  - reproduction for teaching purposes;
  - reproduction, broadcasting and other communication to the public for information purposes;
  - reproduction by special methods for the disabled;
  - reprographic reproduction by libraries and archives;
  - display of works;
  - reproduction for official ceremonies, administrative or court proceedings;
  - adaptation and decompilation, and making of back-up copies of computer programmes and databases;
  - short recording of authorised works by broadcasting organisations.

As far as the digital agenda is concerned, it has not raised much practical concern in Kazakhstan so far. There are at least several reasons for that. *First*, national rightholders are still not much involved in creation, treatment of or dealing with their works by means of the Internet, and thus they do not seem to be much aggrieved by Internet users. As a result, Kazakhstan courts do not hear cases relating to infringement in a digital context. *Second*, the number of Internet users in Kazakhstan is still relatively small. The approximate figures are as follows: 10000 in 1996,<sup>7</sup> 70,000 in 2000<sup>8</sup> and 250,000 by the end of 2002.<sup>9</sup> Although the growth may seem to be dramatically rapid, it should be mentioned that 250,000 people constitute only 1.7 to 2 % of the Kazakh population.<sup>10</sup> *Third*, collective administration is not well developed in Kazakhstan's history and tradition and therefore the country lacks a powerful instrument for the enforcement of authors' rights. Taking the above into

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<sup>6</sup> Neighbouring rights of performers, phonogram producers and broadcasting organisations last for 50 years after the first performance, publication and broadcasting respectively.

<sup>7</sup> <http://www.bisnis.doc.gov/bisnis/bisdoc/030220KzEcommerce.htm>

<sup>8</sup> <http://www.internetworldstats.com/asia.htm>

<sup>9</sup> At <http://www.internetworldstats.com/asia.htm> 250,000 people are quoted as of December 2002, and, at <http://www.internetworldstats.com/stats3.htm#asia>, 250,000 people are again referred to as of February 5, 2005. We believe that the updated information on regular Kazakhstan visitors of the Internet is still not available.

<sup>10</sup> <http://www.internetworldstats.com/asia.htm>, <http://www.indexmundi.com/g/g.aspx?c=kz&v=118>, <http://66.102.9.104/search?q=cache:I8eZFcEMCAcJ:hdr.undp.org/statistics/data/cty/cty+f+KAZ.html+internet+users+in+kazakhstan&hl=en>.

consideration, one could ask the legitimate question whether the ratification and implementation of the 1996 WIPO treaties were necessary, if at all, or at least at this particular moment in time.

At the same time, prior to the WCT-related amendments, there had been some theoretical concerns about certain issues arising in connection with the Internet and the digital environment in general. These concerns included (1) whether caching and browsing were subject to the author's consent; (2) which authors' rights granted by the Copyright Law could qualify for the right to authorise the use of works on the Internet; (3) what the effect of "internetisation" would be on free use cases; and (4) whether new measures were needed to counter piracy in the Internet.

- (1) With respect to the first question, the Copyright Law recognised any temporary storage in an electronic (including digital) format as reproduction. Therefore, already before the "Internet" amendments were introduced, the Copyright Law appeared to have given the answer that caching and browsing were subject to the author's consent, save for the free use cases.
- (2) Regarding the second issue, the situation was the following. On the one hand, the definition of "publication" in the Copyright Law expressly covered "granting an access to the work or phonogram by means of electronic information systems." Thus, it seemed that "publication" included the use of works on the Internet. "Communication" was defined as including any act which made the work "available for aural and (or) visual perception regardless of whether it was actually perceived by the public". Therefore, it could be concluded that the right of communication to the public either directly covered the right to authorise the use of works on the Internet, or it covered the right of publication which in turn included "granting an access to the work or phonogram by means of electronic information systems".
- (3) As for the limitations and exceptions in the Internet context, the biggest concerns were the free use cases provided for libraries, archives and educational institutions. The exception was granted only with respect to reprographic reproduction. Therefore, digitisation and document delivery services by and for the said establishments would not be covered by the said exception. As a result, a specific exception in relation to digital reproduction of works by libraries, archives and educational institutions was truly needed.
- (4) In relation to legal remedies, the Copyright Law provided for a non-exhaustive list which contained remedies of a compensating nature only: recognition of rights, restitution, termination of infringing acts (or acts threatening to infringe rights), compensation for damages, recovery of profits obtained as a result of infringing acts and payment of compensation at a fixed rate. The Copyright Law did not provide for preventive measures and the rightholders could not apply other measures different from those specifically introduced by the law. As such, the existing measures against "digital" counterfeiting seemed insufficient and, theoretically, new measures of counteracting Internet 'free-riders' appeared to be necessary.

It should however be taken into consideration that these concerns were of a more theoretical than practical nature. Therefore, it could be assumed that, for Kazakh purposes, the digital agenda was already adequately addressed, but for a few exceptions, by the Copyright Law

prior to the amendments. However, it is difficult to assess said adequacy in the current circumstances given that cases involving Internet users have not yet been officially reported in Kazakhstan.

Therefore, the fair answer to the question whether the “Internet” amendments were needed at this particular moment in time should imply that the need came more from the international pressure and Kazakhstan’s will to align its laws with the international standards, than from the practical necessity to protect Kazakh authors.

## **2. WCT-aligned Copyright Law: for the Sake of Foreign Rightholders?**

Let us now look at some of the amendments of July 9, 2004 to see how the situation with respect to the digital agenda has changed.

### *(1) Temporary Reproduction*

Although, as it has been discussed above, temporary reproduction was already dealt with in the original version of the Copyright Law, the amendments have rendered the definition of “reproduction” “timeproof” (or, “futureproof”, as Reinbothe and von Lewinski put it<sup>11</sup>). The definition has been modified in a way as to remove the limitation to certain kinds of media and to introduce the expression “any material form”. According to the current Copyright Law, “reproduction” means “making one or more copies of a work or subject matter of neighbouring rights by any means or in any form whatsoever, entirely or partly, directly or indirectly. Types of reproduction shall include the making of sound or visual recording; the recording of one or more samples of two- or three-dimensional work *as well as any permanent or temporary storage of works or subject matter of neighbouring rights in any material form*” [emphasis added].

If we compare the way the EU Information Society (InfoSoc) Directive<sup>12</sup> and the Kazakhstan Copyright Law address the issue of temporary reproduction, we will notice that the Directive exempts temporary acts of reproduction from the reproduction right and sets out the conditions for that exemption, while the Copyright Law includes temporary reproduction in the reproduction itself, but all free use cases still apply to temporary reproduction. The result is that temporary reproduction under the Kazakhstan Law is not subject to the “technological” test like in the InfoSoc Directive.

The only test of the Copyright Law would be whether a temporary reproduction falls under a free use exception. This approach seems reasonable: if an act of temporary reproduction is done and falls into one of the exceptions, no “technological” test is needed. However, if the act is done in commercial interests, a freerider will not only reproduce but will definitely proceed with either communication, distribution, rental or other act with the work. Therefore, when the freerider will be found violating the relevant right, no sophisticated discussion of the technological process of the reproduction will be needed. Such solution proposed in the

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<sup>11</sup> Jörg Reinbothe and Silke von Lewinski. *The WIPO Treaties 1996. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Commentary and Legal Analysis*. Butterworths 2002. p. 39.

<sup>12</sup> Directive of the European Parliament and of the Council 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L 167/10* of June 22, 2001).

Copyright Law might seem simplified but at least it will not let technical arguments encroach the public interest or personal use exemptions.

### *(2) Making Available Right*

The 2004 amendments have introduced the “making available right” and defined it as “communication of the subject matter of author’s rights and (or) neighbouring rights by wire or wireless means in such a way that the public may access them from any place and at any time individually chosen by it (in an interactive regime).” Nonetheless, for some unknown reason, the making available right has been expressly granted only to holders of neighbouring rights but not to authors. In addition, the definition of “communication”, referred to above, has been deleted. This definition included any act that makes the work “available for aural and (or) visual perception regardless of whether it was actually perceived by the public.” As such, it allowed to interpret the right of communication to the public as including the right to authorise the use of the work on the Internet. The definition of “publication” has also been modified to the effect that it no longer includes “granting access to the work or the phonogram by means of electronic information systems.”

However, the problem has to be solved somehow, as the authors may not be left without a relevant right. Therefore, we believe that the right of communication to the public has to be interpreted in such a way as to include a right similar to the making available right. This seems to be possible also because the new amendments have made the list of economic rights open-ended by providing authors with the right “to carry out any other acts which do not contradict the laws of the Republic of Kazakhstan.”

### *(3) Free Use Cases*

Unfortunately, no amendments were introduced with regard to free use exceptions although that had been one of the theoretical issues discussed prior to the adoption of the July 2004 modifications. While this does not seem to affect the interests of the beneficiaries of other exceptions, it considerably harms the public interest as far as the exceptions related to libraries, archives and educational establishments are concerned. These free use cases are still limited to reprographic reproduction. The failure to adapt the exception to the needs of the digital environment will not allow libraries and archives to restore lost or damaged copies of works or deliver electronic copies of works to readers for the latter’s studying or research purposes.

This situation is in contradiction with the spirit of the WIPO Treaties urging to recognise “the need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information”.<sup>13</sup> At the same time, given the current situation and looking at the near future, it does not seem that Kazakhstan libraries, archives and educational institutions will soon be affected by the aforementioned omission, simply because of the poor technical conditions of the vast majority of these establishments, which makes the discussions on digitisation of works quite premature.

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<sup>13</sup> WCT Preamble, last recital.

#### (4) Preventive Legal Remedies

##### a) Obligations Concerning Technological Protection Measures

A technological measure is defined as “any device, product or its component being a part of the technology, device or product intended for prevention of infringement or obstructing the infringement of any author’s or neighbouring rights protected hereunder” The amended definition of the “counterfeit copy” qualifies acts against technological measures as unlawful: “counterfeit copies shall mean the subject matter of copyright and neighbouring rights which contain removed or altered rights management information, without the rightholder’s consent, *or which are manufactured with the help of unlawfully used devices enabling to circumvent the technological measures for protection of the subject matter*” [emphasis added]. It follows from the part of the provision in italics that it is unlawful to use, for circumvention purposes, the device which, even if not specifically designated for circumvention, can be used for such purpose.

At the same time, the provision concerning technological protection measures will be applied in Kazakhstan mainly with regards to foreign works and other protected subject matter because technological protection measures are too expensive a remedy for national rightholders. However, it is more important to ensure that this newly introduced provision does not overshadow the exceptions and limitations allowed by the law. Hence, it maybe desirable to clearly stipulate in the law that the free use provisions prevail over the provisions on protection of technological protection measures that may have been applied by the author. In other words, circumvention of the technological protection measures must be permitted if the circumvention is done in the context of one of the free use cases enshrined in the Copyright Law.

##### b) Obligations Concerning Rights Management Information

Rights management information is another novelty in the Copyright Law and is defined as “the information which identifies the work, its author, performer, its performance, producer of the phonogram, the phonogram, the rightholder of any right on the work, performance or phonogram or the information concerning the terms and conditions of use of the work, performance or phonogram”. “The rights management information shall also include any number or code which represents such information when any of these items is attached to the copy of the work, recorded performance or phonogram or appears in connection with communication of the work or communication and (or) making available the recorded performance or phonogram.” The acts considered as manipulation with the rights management information are found in the definition of the “counterfeit copy” cited above. Such manipulations are the removal or alteration of the rights management information without the rightholder’s consent, and distribution or any other use of the subject matter with the removed or altered rights management information on it.

In contrast to Article 12 of the WCT where liability is imposed for removal and alteration of only *electronic* rights management information, the Copyright Law covers any rights management information. Such a difference with the WCT is needed indeed in the Copyright Law for the benefit of national rightholders who would not have the possibility to put electronic rights management information on their works.

## IV. Conclusions

The reader should not be left with the impression that the author is not in favour of Kazakhstan complying with its international obligations or is against the enforcement of the rights of foreign rightholders. Nonetheless, in practical terms, the WCT-related amendments are looking more into the future of Kazakhstan than responding to the current needs of the Kazakhstan people. Certainly, the incorporation of the WCT is today a question of our country's international prestige, which is of itself a valid reason for the incorporation.

Since harmonisation has already taken place, it may be worth asking whether harmony has been achieved. The results should be assessed from two sides: first, whether the WCT's letter and spirit have been complied with, and, second, whether the letter and spirit of the national law have not been violated. As to the first question, the 2004 amendments, brought, on the whole, consistency of the Copyright Law with the WCT. Concerning the integrity of the Copyright Law, the latter does not seem to be much affected by the amendments. However, public interests do not seem too well ensured against abuse in the digital environment and the Copyright Law may, to a certain degree, look disbalanced, as long as the limitations and exceptions remained untouched by the digital agenda, whereas the brand-new provisions on technological protection measures and management rights information "stick out" by their applicability in the new environment.

The last question to be answered is whether the Copyright Law, as far as its latest amendments are concerned, would not remain a "dead letter"- law and whether it would represent an adequate legal framework for new developments. Apart from the number of factors of material and legal nature, required for the stability and efficiency of any law, let us look at the specificities of the material circumstances in Kazakhstan with respect to copyright legislation. The first difficulty for the effective operation of the law in the digital environment is the under-use of new technologies, including the Internet in all spheres and for all purposes, be it research and study, e-commerce or banking. The reasons behind that are the lack of computers and Internet connection in research and educational institutions, absence of laws securing participants from fraud, state control over access to certain web-sites or encryption technologies. At the same time, the state is undertaking steps to facilitate the use of the Internet in different fields. For instance, in 2003, the Kazakhstan Government issued an action plan for 2003-2005<sup>14</sup> according to which modern lines of communication should be introduced throughout Kazakhstan. As per the enthusiastic estimate of the Government, the number of Internet users should reach 500,000 in 2005. All these facts suggest that the adaptation of the Copyright Law is anticipating the prospective developments rather than satisfying vital current problems of society, which in itself is an objective which should be respected and commended. Thus the renewed Copyright Law is unlikely to remain a 'dead' or inadequate law.

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<sup>14</sup> Resolution of the Government of the Republic of Kazakhstan dated February 18, 2003 No. 168 "On Approval of the Programme for Development of Telecommunications of the Republic of Kazakhstan for 2003-2005".