PROTECTION OF THE SUBJECTIVE COPYRIGHTS (ON EXAMPLE OF LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN, RUSSIAN FEDERATION AND GERMANY)

Madi Elyubayev, Kokshetau Abai Myrzakhmetov University
Tanat Kanatov, Kokshetau Abai Myrzakhmetov University
Gulden Seisembaeva, Kokshetau Abai Myrzakhmetov University
Daniyar Nurmukhanbet, Kokshetau Abai Myrzakhmetov University
Marat Zholumbaev, Kokshetau Abai Myrzakhmetov University
Laura Satybaldi, Kokshetau Abai Myrzakhmetov University
Erbol Baizhanov, Kokshetau Abai Myrzakhmetov University
Dinara Mussipova, Kokshetau Abai Myrzakhmetov University
Inara Kuanyshpekova, Kokshetau Abai Myrzakhmetov University

ABSTRACT

Copyright is an integral part of human rights and freedoms. Currently, copyright is being actively developed in developing countries, such as the Republic of Kazakhstan. This process is conditioned primarily by the fact that the existing legislation is not able to resolve all possible legal situations related to copyright. Thus, research is devoted to the protection of copyrights (on example of the legislation of the Republic of Kazakhstan, Russian Federation and Germany). Such a comparison will allow us to consider how the copyright has developed in the post-Soviet space and to compare the result with the European law. The methodological basis involves a set of complementary research methods, including: methods of logical and system analysis, historical-legal and comparative-legal analysis. We also used modern achievements in the field of civil legal science. The analysed sources involved the local and international legislative acts in the sphere of copyright regulation.

Thus, we have considered the main provisions on the copyright of Kazakhstan, Russia and Germany. We have determined the similarities between the legal provisions of Russia and Kazakhstan, largely based on the legacy of the Soviet Union. This article necessitates the reforms in the sphere of copyright on the example of Russia and Germany.

Keywords: Copyright, Subjective Right, Legal Liability, Intellectual Property Protection, Copyright Infringement.

JEL Classifications: K11, K12, K19.

INTRODUCTION

Welfare and safety of all citizens of Kazakhstan, the protection of citizen's rights, intellectual property protection is a priority task, developed by the President of the Republic of Kazakhstan N. Nazarbayev (1997) in a national program of prosperity of the people of Kazakhstan *"Kazakhstan 2030"*, in item 1.5 Address of the President of Kazakhstan N. Nazarbayev of Kazakhstan people "*Kazakhstan on the threshold of a new leap forward in its development Strategy of Kazakhstan's joining the top 50 most competitive countries in the world",* states that:

> *"The strengthening of Kazakhstan's reputation as a tough guarantor of protection of copyrights and trademarks will enable us to actively develop and diversify new sectors of economy" (Nazarbayev, 2006).*

The abovementioned excerpts from the President's Address to the Republic of Kazakhstan N. Nazarbayev (2006) only in general emphasize the relevance of the research of subjective protection of copyrights. In the objective reality of the Republic of Kazakhstan the following features of the state of society exist in the field of copyright, which make indispensable the research of subjective protection of copyrights:

First, in practice in the Republic of Kazakhstan subjective copyrights are violated routinely. These include the manufacture and sale of counterfeit goods, plagiarism, translation and processing of artworks without permission of the author and other violations of subjective copyrights (Sverdlyk & Strauning, 2002; Rystina et al., 2017);

Second, some measures that are used or proposed to apply to eliminate violations of the subjective copyright, both patricians and theorist lawyers, in our opinion, are wrong and unjustifiable, which may give rise other legal problems. For example, the tightening of criminal responsibility for crimes against intellectual property, in our opinion, does not meet the primary objectives of punishment, in particular: the restoration of justice, the proportionality of measures of responsibility, rehabilitation, etc.

Third, the institutions, which were designed to protect the subjective copyrights, cannot manage its functions, whereas the subjective copyrights continue to be violated in the Republic of Kazakhstan (Milgram, 2001);

Fourth, one of the conditions of accession to the WTO, to which Republic of Kazakhstan certainly aims to, is a significant protection of the subjective copyrights (International Bureau of WIPO, 2017);

Fifth, to achieve the goals of the Republic of Kazakhstan, highly skilled research and experts are required. However, some violation of subjective copyrights of the Republic of Kazakhstan is experiencing shortage of qualified scientists and specialists, which certainly is a deterrent to the development of the Republic of Kazakhstan;

Sixth, the scientific and technical progress in the field of copyright (reproduction, sound and video recordings, computer technology, global computer network) which grows rapidly, opening new horizons for both the creators of spiritual values and for their consumers. Need for detailed regulation of issues of protection of subjective copyrights is becoming more urgent against the backdrop of rapid development of show business, where the objects and subjects of

copyrights are involved. In the leading countries fabulous cash are drawn in this sphere. For example, in the U.S. all kinds of copyright industries, such as the software industry, cinema, publishing and many others provide an average 325 billion dollars of value added, or approximately 5.5% of GDP. This exceeds the export earnings of many leading sectors, except for aircraft and agricultural production (Belov et al., 1997).

Copyright compliance is low because:

1. Most figures are not sufficiently aware of their copyright (Joyce et al., 2016; Stokes, 2014; Stamatoudi & Torremans, 2014).
2. Legal regulation is insufficient and the field of Internet technologies are weakly protected (Tushnet, 2017; Bleistein, 2017; Depoorter & Walker, 2015).

So far in the science of the Republic of Kazakhstan the research of subjective protection of copyrights was not required, whereas firstly scientific knowledge on some key issues of copyrights were necessary. After conduction of a lot of research on copyrights issues and the adoption and enforcement of regulations on management of copyrights relations there is a need for a research of subjective protection of copyrights. On such issue as how to provide protection of copyrights depends on the subjective level of practical implementation of decisions on various issues of research on copyright and these regulations, which accepted on this basis.

It should be added that Kazakhstan is a party to the World Copyright Convention of 1952 and the Berne Convention for the Protection of Literary and Artistic Works (1886), which defines a significant need to examine issues relating to protection of subjective rights of the copyrights of authors and other copyright holders. Mechanisms of protection of the subjective copyrights must be brought into compliance with international legal standards of legal protection of results of creative activity (International Bureau of WIPO, 2017; Meek, 2015).

Comparative analysis of protection of the subjective copyrights in considered countries is also useful by the fact that it is an independent scientific value, because it allows to use the results of conducted research, to examine the legal systems of Russia and Germany and then to use the positive experience of these countries in the Republic of Kazakhstan.

The object of research is the legal regulation of relations in the field of intellectual property, arising from the creation and use of scientific, literary and artistic works (copyright).

The Subject of the Research is legal norms in the sphere of the protection of subjective copyrights in the Republic of Kazakhstan, Russia and Germany.

Scientific novelty of the research is:

First, we held a comprehensive scientific research of protection of subjective copyrights in the Republic of Kazakhstan for the first time (on example of the legislation of the Republic of Kazakhstan, Russia and Germany);

Second, for the first time we summarize the results of separate researches on some matters of protection of subjective copyrights in the Republic of Kazakhstan, which undoubtedly contribute to the further investigation of protection of the subjective copyrights and copyrights in general;

Third, for the first time we comprehensively investigate the protection of the subjective

copyright in the Republic of Kazakhstan through the use of comparative legal methods on the example of Russia and Germany, which reveal a positive experience for the protection of subjective copyrights;

Fourth, newly obtained and presented by us research findings on the protection of the subjective copyrights;

Fifth, some early scientific results, which so far apply only to certain issues of protection of the subjective copyrights, received development from the author;

Sixth, the provisions for the protection.

The aim of research is to develop a proposal to improve the protection of subjective copyrights in the Republic of Kazakhstan, as a rule, on the basis of detection of the positive experience of Russia and Germany to the protection of the subjective copyrights.

In the framework of goal the following tasks of the research stand out:

1) To describe the general clauses of the subjective copyrights, to identify their nature and legal nature on the basis of comparative analysis of legislation of the Republic of Kazakhstan, Russia and Germany.
2) To consider legislative international legal conceptual basis of the protection of subjective copyrights of the in the Republic of Kazakhstan, Russia and Germany.
3) To describe ways of protection of the subjective copyrights in the Republic of Kazakhstan, Russia and Germany.
4) To characterize the form of protection of subjective copyrights in the Republic of Kazakhstan, Russia and Germany.
5) To hold a comparative analysis of the activities of special authorities and individuals in implementation of protection of the subjective copyrights of authors and other right-holders, its specificity and variations.
6) To identify major problems in the protection of the subjective copyrights and to propose scientific and practical ways to resolve them.
7) To develop recommendations for improving the legislation of the Republic of Kazakhstan on copyrights.

DATA ANALYSIS AND RESULTS

In Germany, the development of copyright proceeded mainly with the introduction of legal acts regulating copyright and legal relations, which include: Law on the protection of property rights to works of art and science dated 1837, Law on copyright for literary works, images, musical compositions and dramatic works dated June 11, 1870; Law, dated January 9, 1876 relating to copyright for works of fine arts, Law relating to copyright for works of literature and music dated June 19, 1901; Law relating to copyright for works of fine arts and photography dated January 9, 1907. In Germany Law "*On Copyright and Related Rights"* dated September 9, 1965 currently acts (Isupova, 2008).

In Russia, copyright law began to develop with the adoption of the "*Clause on copyright"* dated March 20, 1911. For this period, it was a very high levelled law from legal technology. It had been secured all exclusive rights of the author and the term of protection was 50 years after the death of the author. If you look at the history of formation of the law of copyright in Kazakhstan, it is closely connected with the Russian legislation, as it was created by the USSR,

which included the Kazakh SSR. With the formation of the USSR in 1925, copyrights were regulated, three years later the Law of the RSFSR dated October 8, 1928 "*On Copyright*" began to operate as "*Fundamentals of Copyright".* After another 33 it had been adopted *"Principles of Civil Law of the USSR and Union Republics*" dated 1961, where the copyright were regulated in more detail in section IV of the Civil Code. Since independence in the Russian Federation it was adopted the Law "*On Copyright and Related Rights*" dated July 9 (Russian Federation Law, 1993), a similar law in the Republic of Kazakhstan was adopted dated July 10, 1996. From this moment in Kazakhstan starts a new era of copyright, which continues to this day.

In the legislation of the Republic of Kazakhstan, Russian Federation and Germany, the term "*copyright*" is usually understood in two meanings:

1) In the objective-a set of legal norms, regulating the relations, which arose in connection with the creation and use of works of literature, science and art.
2) In the subjective-a set of subjective rights that arise from the author in connection with the creation and use of works of literature, science and art.

Subjective copyrights enable the author or other right-holders to meet their property and non-property (moral) rights, i.e. to dispose of their rights and legal interests. The state in turn provides guaranteed protection of the rights and legal interests of copyright subjects.

The problem of protection of subjective copyright and interests protected by law requires consideration of some general theoretical aspects, which by themselves are ambiguous and debatable, but have great practical significance for this thesis. Therefore, in order to fully disclose the concept and content of the forms of protection of civil rights, it is necessary to understand the essence of the subjective copyright, which is more fully discussed in the doctrines and laws of the considered countries.

Copyright is basically a legal expression for the state of awareness of the importance of cultural preservation, conservation and development of society. Supports and protects of creation, protection of intellectual activity are directly related to the protection of individual freedoms and human rights.

Subjective copyrights are divided into property and moral non-property rights. The Republic of Kazakhstan belongs to the Roman-Germanic legal family and accordingly has spread "*monistic theory*". This theory assumes that the relationship between personal and property interests is mutually agreed. Subjective copyright is a mixture of personal and property rights. And the question that which one is the most important (personal or property) rights by far is the discussion in scientific circles. Based on the research in this section, we concluded that the division of the copyright for personal and property in its legal nature is formal, because one cannot exist without the other and if we talk about preservation and protection of the subjective copyrights (personal and property) it should be noticed that they must be provided at the same legislative level.

Personal non-property rights of the author largely affect the rights of a particular person-the author. Personal non-property rights arise because of the intangible benefits, which have no economic substance and inseparable from the personality. Personal non-property rights are absolute. Hereof we see that the personal non-property subjective copyrights have character of inviolable rights in contrast to the property.

The right of authorship is the most important authority of the author, it effects throughout the author's lifetime and after his death-it is indefinitely. In the Law of the Republic of Kazakhstan "*On Copyright and Related Rights*", there is no concept of *"authorship on the title of the work"*, although in practice this aspect is of great importance. We offer the example of the Law of France dated 1957, *"On Literary and Artistic Property",* Article 5 to include the concept: *"the right of authorship on the title*" if it has an original character, it is to protect and defend the title as the work itself (for example, a novel by Victor Hugo "*The Man Who Laughs*").

The right to copyright name is a personal non-property right of author, it is inalienable. The last assertion that the name is inalienable is controversial. There are hundreds of cases of transmission of the name for promotional purposes. In Japan, for example, new institution of intellectual property rights was created-the right to advertise. In France, a country where for the first time in the world, the name of Brigitte Bardot had been alienated for selling, perfume line later bore her name. And there are many examples where the name becomes the object of property turnover and not only personal non-property rights. And on the basis of research, we concluded that the right of author's name can have a double meaning and apply in two ways: as personal non-property rights for the individualization of a person and as a property right for the promotion of any product on the market. And to assert that the right for author's name is purely personal non-property right in our view is not entirely accurate and does not reflect its true meaning as a subjective copyright.

Another point on the right to author's name is using pseudonym, i.e. fictitious name. The Law of the Republic of Kazakhstan "*On Copyright and Related Rights"* (1996) allows authors to use a pseudonym, but is not required by all legal relations arising in this connection that, in practice often leads to disputes and non-uniform interpretation. For example, if pseudonym is the same as the true name? Or the possibility of use of discordant or misleading nickname (which coincides with the name of a famous person or some other pseudonym). We propose to solve this problem and follow the path of Europe, Germany, Sweden, where the Law "*On copyright in literary and artistic works"* dated 1960, in art. 50 say that: "*literary and artistic works cannot become available to the public under a pseudonym or signature, if the author would have been easily confused with other authors of previously published work"* (Law, 2013). Or the registration of pseudonyms. This opinion is shared by the representative of the Russian legal science Romovskaya (1979).

The publication of works anonymously causes strong interest in the practice. Anonymously published works do not entail the absence of the right of authorship. However, this is a problem-to prove his authorship. We propose to use the register to solve this problem, for example, in the collective copyright societies.

Signature of person is a component of the name. It has no less important and moreover has a material value. For example, the autograph of Elvis Presley is estimated at 3500 USD, Mother Teresa's 1500 USD. In this regard, we propose to make amendments and additions in the legislation of the Republic of Kazakhstan and give the "*signature*" status of personal non-property rights.

Name is used also for malicious purposes. The most common phenomenon is the publication on the Internet materials incognito. Such a violation of personal non-property rights can cause irreparable damage to the author. However, the concept of *"falsification of*

authorship" is not reflected in the Republic of Kazakhstan Law *"On Copyright and Related Rights".* We propose to introduce in a legislative framework this concept and the responsibility for it, which will ultimately enhance the protection of the subjective copyrights.

Author's right to inviolability of the work is defined as:

> *"The right to make changes and additions to his work and to protection of work, including its name, from making the changes and additions in the publication, public performance or other use of the product by someone without the author's consent".*

Hereof, from this definition of product integrity, we see that there is a parallel of two powers: the right to inviolability and right to protect the reputation of the author. The right to inviolability of the work means that no one has the right to modify or convert works without the permission of the author. The right of protection of the reputation of the author is a personal non-property right and its purpose is to prevent distortion of the content of the product, processing of which the author gave permission. They are identical in their purpose, but differ in their orientation. If the right to inviolability includes the protection of author's rights and the protection of the rights of the author reputation assumes greater extent as a warning. We offer on the basis of the above mentioned, to separate these two personal non-subjective copyrights to: *"the right to inviolability of the work*" and "*the right to protect the author's reputation",* it will reinforce the guarantees of the rights of the author and facilitate their use in practice.

The right to disclosure of a work belongs to the author and it is named as the right to open access to the product for the indefinite number of persons. Right of disclosure occurs only once, after this work goes in a different legal status. It should be noted that this right does not exist in *"the Berne Convention on Protection of Literary and Artistic Works*" (1979). Although it should also be noted, it was proposed to make this right under the title: "*the right to release of the work*", but unfortunately it was not included in the text of the convention, although this right would have increased the protection of the subjective copyrights. We offer for the full and clear understanding of the rights of the author as: to replace the text of the Law of the Republic of Kazakhstan "*On Copyright and Related Rights*" from "*the right to disclosure of the work" to "the right to release of the work".*

Huge challenge for today is to distinguish the concept of "*plagiarism*" and "*quotation*". Under the meaning of the quotation refers to the inclusion of one or more excerpts from the works of one author in the works of other author. Quotation is limited, but today in the Republic of Kazakhstan there is no criterion of limited conscientious quotation. Often in practice the concept of "*plagiarism*" and "*quotation*" is confused. In Germany have developed a clear dividing line between plagiarism and a free quote. The main of this is the condition for the indication of the author and the source of borrowing. Purpose of the quotation is the favouring of cultural development in the broadest sense. On the basis of the decision of the Federal Court of Germany to quote means to establish contact with the works of other authors, through the complete or partial transfer of his works within his own work. We propose to introduce the German experience by making the norms of right in the Law "*On Copyright and Related Rights"*, which will be clearly spelled out the concept of "*quotation*" and limits of its use.

Right of consecution also raises a number of refinements. In the Law of the Republic of Kazakhstan "*On Copyright and Related Rights*" is not a mechanism of implementation of the

subjective copyrights, for example, how the author will receive information about transactions with his works of art, etc. We propose to introduce amendments into the Law of the Republic of Kazakhstan *"On Copyright and Related Rights*" concerning the mechanism of realization of the right route.

A huge problem today is the lack of the Law of the Republic of Kazakhstan "*On Copyright and Related Rights*" of the following subjective rights: for the individual image (picture) and voice. The authority to use their individual shape is the ability to obtain material and (or) intangible benefits through their appearance, to consent or prohibit the use of his appearance to others. The right to vote has the powers to use own voices, as well as on the order of his recordings. Authority on the use of voice is the ability to receive material and (or) intangible benefits through individual voices, to give consent or deny the use of your voice to other persons (including death). In our opinion it should be as soon as possible to resolve these powers in law to legal protection and to protect them from misuse.

It is necessary by law to resolve the issue, *"charges for the public domain"* in mind of the successful use of international experience (Argentina, Mexico, France and Portugal) of this institution, as well as to encourage creative activity, to ensure the cultural development of society, recognition and enforcement, cultural rights as human rights in the Republic of Kazakhstan.

Author, unlike other civil legal relationships inherent a unique property of the following nature: to the personality of the author, law does not impose any special requirements regarding age, gender and disability. It follows therefore that the main feature of the author is his creation (literary, art and science). But the Law does not provide and accurately set forth the powers of use and disposal, which hampers civil turnover in the practice. It is proposed to solve this problem, to apply the institute of representation of Civil Law, namely legal representation. This will more accurately determine the subjective rights of the authors of these categories, which finally will increase the guarantee for the protection of subjective copyright.

Concerning co-authorship in our view it should be concluded an agreement on co-authorship, in order to subsequently resolve the disputes. It must be at the legislative level to fix the norm that non-written form of agreement on co-authorship shall be considered as invalid for the person who claims co-authorship. In practice, it often occurs occasions of filing a claim to the court on a violation of subjective copyrights to authorship and the presented evidence is based on the plaintiff's claim, which is not confirmed by any other data, which implies a certain amount of dangler for both the author and for court.

In the Law *"On Copyright and Related Rights"* it should also make a special addition of co-author as an "*interview*". Interviews-one of the genres of journalism. It is a special kind of works, which created in co-authorship. Copyrights for interview belong to the person who gives interviews and as well as to the interviewer. Generally these individuals are regarded as co-authors. As a result of joint creative activities in this case it is created a work, characterized by unity of form and content or with necessary connection between two or more forms, provided with a single content.

With regard to legal entities, some points should be clarified at the legislative level legal entity cannot be recognized as the author. A legal entity shall enter into legal relationship with the authors on the basis of copyright agreements. Although there are many examples in practice

when the team of authors-a legal entity creates some work. We consider it is legally necessary to fix a legal entity-as a team of authors and to include as subjects of copyright. As today in public circulation by legal entities are dominated, who seek to generate revenue and the Republic of Kazakhstan declared a new path of development-innovation. This involves embedding of large investments in human capital. Today legal entities possess the necessary infrastructure for the development of innovative capacity, especially in the development sector of creativity. For example, in Japan, the individual or legal entity recognizes as the author. Japanese companies having in "*arsenal*" copyrights on these or other works most effectively dispose them in the economic and legal sense.

Renter (the employer) of service work author has the exclusive rights to the work. It raises several issues regarding the legal basis for service work. The publishing agreement is governed by civil law legislation and labour relations-by labour legislation. To solve the complexity of this relationship emerging over the service work, we propose to introduce amendments into the Law of the Republic of Kazakhstan *"On Copyright and Related Rights"* as follows:

> *"The service work-a work that is created by an employee in connection with labour relations, based on agreement of author's order."*

This will strengthen the guarantee, of the customer, as well as of the author of the work in the implementation of the subjective copyrights.

Article 27 of the Universal Declaration of Human Rights (UDHR) states that:

> *"Every person has the right to protect their moral and material interests that results from the creation of scientific, literary or artistic work of which he is the author" (1998).*

This right is linked to other clauses of Art. 27:

> *"Every person has the right to participate freely in cultural life, to enjoy art, to take part in the development of science and to use the results achieved".*

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)-article 15 (1) (c), states parties, which ratified the treaty, are obliged to recognize the right of everyone to use

> *"The protection of the moral and material interests that result from any scientific, literary works, of which he is the author (1966)."*

Covenant attributes to the States-parties to undertake a series of measures, including such which are *"necessary for the conservation, development and dissemination of science and culture".*

The Berne Convention includes clauses on the protection of copyright. In particular, it provides for seizure of copies of musical works, which without permission imported into another country (Article 13), copies of works from copyright infringement, i.e., counterfeit copies (Article 16). All members of the Berne Union agree to take necessary measures to ensure the rights to objects of copyright (Article 36). Paris and Berne Convention contain the following

general clauses:

> *"Each country, which is the party to this Convention, undertakes to adopt, in accordance with its Constitution, the necessary measures to ensure the use of this Convention (1886)."*

U.S. did not agree with the documents of WIPO and decided to publish the document called TRIPS. The appearance of this document has led to friction between the WTO and WIPO (1996), which was in some measure eliminates after the adoption of a special agreement on co-operation. The main difference of this document is that the intellectual property right flows from private law to the public. They explain this by saying that not court should resolve disputes and protect the rights of authors but government bodies in the face of law enforcement. This is done in the TRIPS agreement with measures to ensure (enforcement) with intellectual property. Specially authorized persons for the post (ex officio), who decide without court, that infringement of intellectual property rights happened (subjective copyrights) and take steps to prevent them.

In accordance with the second part of Article 45 of the Constitution of the Russian Federation "*everyone has the right to defend his rights and freedoms by all means not prohibited by law"*. Protection of civil rights guaranteed by article 9 CC of RK. Method of protection of civil rights is a specific fixed or authorized by law the law enforcement measure, by which it is produced the elimination of violations of law and the offender (Sukhanov, 1998).

Effect of copyright is available only by law enforcement component. On justly remarks of Gribanov V.P.:

> *"The subjective right, granted to a person, but not secured from the breach by the necessary means of protection, is only a declaratory law"* (Gribanov, 1992).

In the legal literature the concept "*protection*" and "*protection*" distinguishes (Sverdlyk & Strauning, 2002).

Protection on the basis of copyright is primarily one of the methods of stimulating the creation, enrichment and dissemination of national cultural heritage. Development of the country largely depends on the creativity of people. The stimulation of creative activity is an important engine of progress (Bromberg & Rozov, 1998).

Restore of the clauses, prevailing till to the violation of law and cessation of actions, which violate the right or threatening to infringe, is one of the ways of protection of the subjective copyrights. This method provides protection as long as two steps simultaneously: the restoration of right and the cessation of the violation. This method of protection is implemented through specific measures (seizure of counterfeit goods from the free sale, its destruction or transfer of the right-holder, the seizure of audio, video and other equipment, confiscation of products etc.).

Compensation for damages, including lost profits, is also one of the ways to protect the subjective copyrights. This method of protection is rarely used because of the complexity of evidence of the amount of losses, incurred by the author, right-holder. We propose to solve this problem, to recourse to the Law of Russia and Japan, where in the article 114 of the Law "*On Copyright"* (Russian Federation Law, 1993) the calculus the size of the losses is given. Losses

are recognized amount corresponding obtained by the right-holder, coming in the implementation of his rights. This definition of the norm of the Law, we believe is applicable in our Law of the Republic of Kazakhstan *"On Copyright and Related Rights".*

An enforcement duty in the nature and the recovery of damages is one of the specific measures to protect the subjective rights provided by civil legislation of the Republic of Kazakhstan. It is used in violation of an obligation, for example, contract of author's order.

Compensation for moral damages is also one of the methods to protect the subjective copyrights. But in practice, proof of moral damages is in serious difficulties. The burden of proof lies on the victim. In our opinion it is necessary to shift the burden of proof on the defendant. Another problem is determination of the amount of compensation for moral damage. Lack of definition of the amount of compensation for moral damage in the Republic of Kazakhstan leads to a situation in which courts are established unreasonably symbolic compensation. To resolve this problem, we propose to take into account the proposal of Gavrilov E.P. (2002), but with some reservations. He offers in intentional fault of the causer of moral damages in favour of the victim to recover the full amount claimed in the lawsuit. If gross negligence it is possible to reduce the amount of compensation, but not less than 50% from the amount of the claim. In cases where the causer of damages has committed wrongful acts of negligence, it is possible to reduce the amount of compensation to 20%. We believe the extent of the compensation for moral damage is fair, which suggested by Gavrilov, but one of nuance, namely the compensation of the total sum claimed by victims in the lawsuit, we offer the sum on the example of England. In England, from 1994 the tariff compensation scheme operates in which the detailed terms for compensation is described, as well as its size is determined depending on the type of harm. In our opinion, applications in the symbiosis of compensation for moral damage compensation is perfectly applicable in the territory of the Republic of Kazakhstan, in particular the issues of damage regarding violations of the subjective copyrights of authors and other right-holders. Based on the research we believe it is necessary to fix legally the compensation of moral harm on subjective copyrights in the Republic of Kazakhstan proposed above in the text of the thesis.

Technical method of protection the subjective copyrights. This method is relatively new. In the legal literature there is the controversy regarding this method of protection, in particular, some authors believe that the technical means to copyright infringement must be extracted from the Civil Law. Almost all of the technology in public circulation today have the potential copyright infringement in the future when they are used, for example, illegal copying. But we do not have the powers to confiscate these technologies because this will affect the broader population. The interests of consumers and producers of technology may hurt. Therefore, the assertion that it is necessary to withdraw these technologies from the civil circulation has no merit. We propose in this matter to make *"a reasonable balance between the interests of authors and technology industry".* Another matter of technology pests, based on the objective data it is necessary to withdraw technology from the civil circulation. These requirements are stated in Article 11 of the WIPO Copyright Treaty (2017) and in Article 18 of The WIPO Performances and Phonograms Treaty. Technological measures of protection of subjective copyrights in the world are mostly used on the Internet. Since the Internet is the most susceptible to violations by unscrupulous users because of certain properties. Technological measures of protection of

subjective copyrights, call any action to impede the illegal use of copyright. However, engineering controls are often expensive and therefore not available to our right-holders. In this case, in our opinion it is necessary to create the state body consisting of professional technicians, who at the beginning provide free of charge installation of equipment and technology, aimed at protection of the subjective copyrights and the establishment in judicial system the department consists of special technicians, who could in time prevent such violations and more to bring to justice. Informative method of protection of subjective copyrights is one of the ways to protect the subjective copyrights. This method of protection is one of the most effective because of its focus-the identification of the work, the author or other right-holder, or information about conditions of use of work, contained in the original (copy) of the work, attached to it, which is reported to the broadcast (on cable) or by bringing works to the public and information providing access to works in the form of codes, numbers, etc. Modern information methods to protect the subjective copyrights can be divided into three main categories: 1) identifiers (numbers and other identifiers); 2) digital signatures (direct identification); and 3) digital stamp (watermark). Based on the research of this issue, we propose in the Law of the Republic of Kazakhstan *"On Copyright and Related Rights"* to enter the information method of protection as one type of methods of protection of subjective copyrights of authors and other right-holders.

DISCUSSION

Institute of ombudsman for Human Rights is new to the Republic of Kazakhstan. However, in the world practice it occupies an important place in the system of bodies, which supervise the activities of administrative staff that effectively protect human rights. Its content and activities are related to the fact that it opens a new milestone in the relations between state and citizen. This institute is designed to strengthen the legitimacy and legal basis in the activities of the executive branch. In different countries it is called differently: the ombudsman, the provedor, the mediator, the commissioner, etc. Ombudsman-an independent person authorized by Parliament to protect the rights of citizens and exercising indirect parliamentary control over all public officials. Office of the Ombudsman does not belong to one branch of government (legislative, executive and judicial), has the status of supreme organ of state. The Ombudsman promotes the protection of violated rights by taking complaints, audit submitted by citizens. On the result of the audit Ombudsman may initiate the following documents: (1) representation; (2) recommendations; (3) complain to the courts of the Republic of Kazakhstan. Practice of activities of Ombudsman shows that worldwide there is their specialty. We believe that this world experience is necessary to implement and in the Republic of Kazakhstan, namely to introduce the post-the ombudsman for copyright. The introduction of ombudsman for copyrights, resolves many problems with the protection of the subjective copyrights of authors and other copyright holders. It is necessary to legislate the proposal on the introduction of ombudsman for copyrights.

Self-defence as a form of subjective protection of copyrights the forms of protection is analysed as a "*self-defence*"

This is one of the main forms of protection of the subjective copyrights which is non-jurisdictional, i.e., without recourse to the courts and other bodies. Under the self-defence it is understood *"committed by empowered person the actual effect of the order that is not prohibited by law, to protect his personal or property rights and interests*" (Sukhanov, 1993). This approach was enshrined in the Civil Code of the Republic of Kazakhstan in paragraph 3 of Article 9, which states that

> *"In the cases expressly stipulated by the legislation, protection of civil rights may be implemented by direct factual or legal actions of the person whose right is violated (self-defence)".*

Self-defence is recognized by the legal doctrine of a particular way of protecting civil rights, in which the subject is protected not through the jurisdictional activity, but independently (Illarionova et al., 1998).

Form of self-defence is self-help. Its use is permitted in circumstances when emergency measures are required to take and the possibility to resort to the jurisdictional protection is absent. To the advent of the category of self- help world's civil law is obliged to German scholars, whose views are reflected in the codification of Civil Law the end of XIX century. The first-ever detailed definition of the right of self-defence contained in the N178 SSU: self-defence was defined as a reflection of unlawful assault on a person or property and helping others in similar cases; confiscation of belongings or forcing the debtor to perform duties in the absence of the possibility of recourse to the authorities and the real feasible danger (self-help) (Sarbash, 2003).

In the countries of the "*common law*" self-help is a very common form of extra-judicial protection of rights, so the law of Great Britain and the United States does not contain a clear distinction between self-defence and self-help, combining their in term "*extra judicial remedies".*

Self-help includes self-execution of court decisions and settlement agreement (in fact those approved by the reference tribunal) (Rozhkova, 2004).

At the conclusion of the thesis the resume of the research is summarized, the basic theoretical conclusions and the development of this area of protection of the subjective copyright are formulated in general.

Thus, subjective copyrights are a solution for possible behaviour of authors and other right holders when using any work within the framework of legal monopoly. This solution implies general prohibition to third parties against using the work without the right holder's consent, unless the work is in a public domain (Belov et al., 1997). In order to secure the status of an author as the creator, there were a number of personal/non-property rights established by law:

1. By content, the "*right of authorship"* is a claim to be *recognized* as a creator of any work of science, literature and art, imposed by the holder of such a right on the third parties (Walter & Von-Lewinski, 2010).
2. *"Author's right to a pen name"* means the author's ability to use or allow using a work under an author's original name, a pen name (pseudonym) or without any name, anonymously (Ginsburg, 2002).
3. *"The right to inviolability"* is a general prohibition to third parties, but the author, against making changes,

shortenings and additions to the work and filling the work with illustrations, foreword, afterword, comments or any explanations (Ricketson & Ginsburg, 2005).

4. *"The right to publish"* is a solution for behaviour performed by the author himself or after death of an exclusive right holder, performed by the publisher after the unpublished work enters the public domain, performed in a way of expression through the presentation of the work to the public (Belov et al., 1997).

CONCLUSION

Thus, copyright is an important component of the legal field of the subject of law. At this stage, Kazakhstan's copyright legislation continues to evolve.

This article considered the main gaps of Kazakhstan's copyright legislation. The ways of solving these problems were proposed, in particular, through the experience of Germany and Russia.

The practical significance of the research is the obtained and presented results of scientific research of protection of subjective copyrights, including clauses for the protection may be used for development and improvement of the legislation of the Republic of Kazakhstan, as well as in improving the practical implementation of the protection of subjective copyrights in the Republic of Kazakhstan.

The subject of the research has been investigated thoroughly, completely and objectively, as well as the scientific and practical clauses for the protection of the subjective copyrights have been studied and summarized, which makes it possible to use this research to persons whose copyrights have been infringed, to the courts, the authorities for the protection of the subjective copyrights and other individuals in the implementation of the protection of subjective copyrights, as well as in teaching courses on the legal regulation of intellectual property rights.

REFERENCES

Belov, V.V., Vitalyev, G.V. & Denisov, G.M. (1997). *Intellectual property.* Legislation and its enforcement.

Berne Convention. (1886). The Protection of Literary and Artistic Works.

Berne Convention. (1979). The Protection of Literary and Artistic Works. Retrieved from http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

Bleistein, B. (2017). *The problem of aesthetic progress and the making of American copyright law.*

Bromberg, G.V. & Rozov, V.S. (1998). Intellectual property: The validity of the transitional period and market prospects.

Depoorter, B. & Walker, R. (2015). The dangerous undertaking: How courts should approach aesthetic judgments in copyright law. *Northwestern Law Review, 109*(2), 343-382.

Gavrilov, E.P. (2002). Commentary on the copyright law and related rights. *Judicial practice, 350*(1), 45-79.

Ginsburg, J.C. (2002). From having copies to experiencing works: The development of an access right in us copyright law. *Journal of Copyright Society USA, 50*(1), 113.

Gribanov, V.P. (1992). The limits of the implementation and protection of civil rights.

Illarionova, T.I., Gongalo, B.M., & Pletnev, V.A. (1998). *Civil Law.* Publishing Group Norma Infra.

International Covenant on Economic, Social and Cultural Rights. (1966). *993 UNTS (Entered into force on January 3, 1976). G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (№ 16) At 49, U.N. Doc. A / 6316 (966).*

International Bureau of WIPO. (2017). *International grention rs rn for tne nevelopm: Nt And luitukal promotion of Nations. WIPO.*

Isupova, I.V. (2008). *Personal non-property rights of the author in Germany: The historical and legal aspects.* Diss. Ph.D. Nevinnomyssk.

Joyce, C., Ochoa, T.T., Carroll, M.W., Leaffer, M.A. & Jaszi, P. (2016). *Copyright law.* Carolina Academic Press.

Law of the Republic of Kazakhstan. (1996). *No. 6-I on copyright and related rights.* Retrieved from Electronic Recourse: http://www.wipo.int/wipolex/en/details.jsp?id=7974.

Law. (2013). On copyright in literary and artistic work. Retrieved from Electronic Recourse: http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf.

Meek, M.R. (2015). International copyright and musical compositions. *DePaul Law Review, 3*(1), 52-81.

Milgram, B. (2001). *Case Betamaks: Twelve years later.* Intellectual property.

Nazarbayev, N. (2006). *Address of the president of Kazakhstan Nursultan Nazarbayev of Kazakhstan people Kazakhstan on the threshold of a new leap forward in its development.* Astana, Elorda.

Ricketson, S. & Ginsburg, J.C. (2005). *International copyright and neighbouring rights: The Berne convention and beyond.* Oxford Univ. Press.

Romovskaya, Z.V. (1979). *The right of authorship. Problems of the soviet copyright law.* Moscow.

Rozhkova, M.A. (2004). On some issues of enforcement of the settlement agreement, approved by the Reference tribunal. *Journal of RF, 20*(9), 168-176.

Russian Federation Law. (1993). On copyright and neighbouring rights. Retrieved from Electronic Recourse: http://orwell.ru/info/unesco.html.

Rystina, I., Sadu, A., Bulegenova, B., Onuchko, M. & Kozhakhmetova, A. (2017). The State Service Of The Republic Of Kazakhstan At A New Stage Of Development. *Journal of Legal, Ethical & Regulatory Issues*, *20*(3), 1-11.

Sarbash, S.V. (2003). Lien as a way to ensure fulfilment of obligations.

Stamatoudi, I.. & Torremans, P. (2014). *EU copyright law: A commentary.* Edward Elgar Publishing.

Stokes, S. (2014). *Digital copyright: Law and practice.* Bloomsbury Publishing.

Sukhanov, E.A. (1993). *Civil Law.* A Textbook. Moscow.

Sukhanov, E.A. (1998). *Civil Law*. A Textbook. Moscow.

Sverdlyk, G.A. & Strauning, E.L. (2002). *Protection and self-defence of civil rights: The manual*. The program of the President of Kazakhstan Nursultan Nazarbayev Kazakhstan 2030.

The Universal Declaration of Human Rights. (1998). G.A. Res 217A (III), U.N. GAOR (Resolutions, part I) at. 71, U.N. Doc. A1810 (1948).

Tushnet, R. (2017). Copyright law, fan practices and the rights of the author. Fandom: Identities and communities in a mediated world.

Walter, M.M. & Von-Lewinski, S. (2010). *European copyright law: A commentary*. New York: Oxford University Press.

WIPO. (1996). Agreement between the world intellectual property organization and the world trade organization, *Geneva*.