
Official commentary on the employee works and copyright

12 questions – 12 answers

INTRODUCTION

The following official commentary in a question-and-answer format has been prepared on the basis of the official response from the Intellectual Property Agency of the Republic of Azerbaijan to the inquiry from the Caspian Legal Center regarding the Law of the Republic of Azerbaijan “On Copyright and Certain Related Rights” (the ‘Law’):

1

*According to Article 13 of the Law, the regulation of the relationship between **the employer** and **the employee** concerning an **employee work** (a work created in the course of performing the duties of one’s employment, or a task assigned by the employer) is governed by contract. Does the concept of “contract” in this article also include an **employment contract**?*

Yes, the term “contract” in the second paragraph of Article 13 of the Law also includes an “employment contract”. However, it should be noted that an employment contract is a special type of contract; it has features that distinguish it from a copyright agreement and other civil law contracts. In this regard, the interpretation of the concept of “contract” in paragraph 2 of the aforementioned article of the Law depends on the matters it regulates.

2

*Is an employment contract sufficient to regulate the relationship concerning an employee work, or must a separate **copyright agreement** be entered into?*

Provided that all necessary conditions regarding copyright matters are included in accordance with the provisions of Article 13 (e.g., the amount of remuneration, the method of payment, conditions for use of the work, etc.) the relationship between the employer and employee regarding the creation and use of the employee work can be regulated within the framework of an employment contract. This does not conflict with the provisions of the Law. The crucial point here is that the elements necessary for an author's agreement are reflected in the relevant clauses of the employment contract.

However, as is common in international practice, it is considered more appropriate to conclude a separate copyright agreement between the employer and employee in respect of the creation and use of the employee work.

3

According to Article 13, the methods of use of a work include the republication, translation, adaptation, etc., of the work. How should the concept of "use of a work" be interpreted?

The forms and methods of use listed in the second sub-paragraph of paragraph 2 of Article 13 of the Law are not an exhaustive list. That is to say, alongside those specified in the said article, other methods of use are also possible.

For this reason, the concept of "use of a work" must be understood in a broad sense: the employer may use the work for the purposes of the service in any form and by any means permitted by law, including the methods listed in paragraph 2 of Article 15 of the Law (making copies, distribution, hire, public performance, etc.).

4

*Does the **use** (making copies, distribution, etc.) of an employee work (in this question, a computer program) within the enterprise at the employer's initiative, without generating revenue, fall under the concept of "use" as defined in Article 13? In this case, does paragraph 3 of Article 13 (the return of exclusive rights to the author after three years of non-use of the work) apply?*

If the contract between the author of a work created under a work assignment (a computer program) and the employer does not provide otherwise, the exclusive rights to use the work (the computer program) belong to the employer (Article 13.2 of the Law). Therefore, the employer may use the said work at their discretion, anywhere, including within the enterprise they manage, in various forms and by any means (including for non-

commercial use). **As can be seen, the concept of “use” here also includes the non-commercial use of the work (the computer program) within the enterprise.**

Although Article 15 of the Law envisages various forms and methods of use of the work (making copies, distributing the original or copies by sale, renting, etc.), none of them is considered an absolute requirement. The application of a work (computer programme) within an enterprise for an economic or functional purpose is already considered use, and such use excludes the application of Article 13.3 of the Law.

5

In accordance with Article 24.1 of the Law, a person who has lawfully acquired a computer programme may exercise a number of rights without the author’s consent and without paying royalties. Sub-paragraph “a” of the same article includes the right to perform any action relating to the working of the computer programme in accordance with its intended purpose, including storing it on a computer’s memory. Does the phrase “storing on a computer” here cover the employer loading a computer programme (employee work) onto the company’s computers?

Yes, a computer programme created by an employee on behalf of the employer and for internal use may be loaded onto servers and onto employees’ computers for their official use. These operations are considered to be “storing in the memory of a computer”.

Therefore, an employer who has lawfully acquired the computer program may store it on a computer’s memory without the consent of the employee or other owner and without paying royalties.

6

Can the list of rights in sub-paragraph (a) of paragraph 1 of Article 24 of the Law be extended with the agreement of the author and the employer?

Yes, the list of acts set out in sub-paragraph “a” of Article 24.1 of the Law may be extended, provided that the use of the computer programme in any form and by any means does not interfere with its normal use for its intended purpose. Provided that the use of the computer programme in any form and by any means does not prejudice its normal exploitation; does not unreasonably restrict the legitimate interests of the employer and the author (the employee); and does not infringe upon the author’s personal (non-property) and property (economic) rights.

7

Do the processes of “upgrading” or “updating” a computer programme fall under any of the concepts of “reworking” the work? Do the acts in Article 24.1(a) of the Law constitute an “update” or an “upgrade”?

The concepts of “upgrade” and “update” of a computer programme have different meanings. An “upgrade” is understood to mean the creation of a new and more advanced version of a computer programme, where the programme’s core purpose is retained, but its functions are expanded and its internal structure is improved. The term “update”, on the other hand, refers to correcting errors and making minor changes to the existing version of a computer programme, and is primarily of a technical nature.

This process can be compared to reworking and improving a literary work. For example, the re-publication of a novel, short story, or play by the author themselves, with additions or alterations. However, the addition of an extra chapter or section to an literary work for the purpose of improvement, as well as the addition of new paragraphs and sentences, is of a creative nature. In the case of computer software, these changes (additions) are of a technical and functional nature and are carried out in accordance with relevant standards. In creativity, however, there are no standards.

As can be seen, although there are some similarities between the “upgrade” and “update” processes of software and the reworking of a literary work, there are also significant differences. For this reason, the revision of a literary work does not correspond to either the upgrade or update processes of a computer programme.

8

Under Article 13, the author of a work is entitled to a remuneration for the use of the work. If the author voluntarily waives this remuneration, how should this be reflected in the contract?

The author’s voluntary waiver of royalties must be stated separately in the contract.

Firstly, the absence of a clause regarding author’s royalties in the contract is not construed as a waiver of royalties. Thus, Article 15.4 of the Law establishes the author’s right to receive a remuneration for every mode of use of the work and, with the exception of the limitations provided for in the said Law, the payment of an author’s remuneration for the use of the work is considered an imperative norm. Therefore, if the author (employee) voluntarily waives their royalty for the creation of an employee work, however, if there is no provision to this effect in the employment contract, then the contract must

be amended or a separate authors' agreement must be entered into, confirming the author's (employee's) waiver of the fee for the creation of the work.

At the same time, we note that indicating the fee as '0' in the contract is not considered to be in violation of the requirements of Article 15 of the Law. However, as this wording does not clearly express the author's intention to waive the fee, the contract must state this in a clear and unambiguous manner, for example, 'no fee is payable for the creation of the employee work with the author's consent' or 'the author does not claim a fee for the creation of the employee work', or one of the following clauses is recommended: 'Matters concerning remuneration for the use of the employee work are governed by the copyright agreement between the employer and the employee.'

Furthermore, where the relationship concerning the creation of an employee is governed **by an employment contract, the requirements of Article 31 of the Law, which determines the terms and form of an author's contract, must be observed.**

9

Is it in accordance with the provisions of the article for the said fee to be added to the salary/paid as part of the salary?

A fee for the creation and use of an employee work may be added to and paid in addition to the salary (tariff (post) salary). Provided that the employment contract clearly specifies the amount of the fee for each type of use of the work, the payment procedures and deadlines, and the terms and conditions for deducting mandatory payments (such as income tax, social security contributions, etc.) from the fee as required by law.

However, it should be noted that in legislation, the concepts of "salary" and "author's remuneration" have different meanings. According to the content of Article 154.1 of the Labour Code, "**salary**" means 'the amount established by an employment contract for performing the labour function during the relevant working time, the total of the daily or monthly amount, as well as any additions, bonuses and other payments made to the employee by the employer in cash or in kind for the work performed (services rendered), as defined in Article 154.1 of the Labour Code. The term "**author's remuneration**" denotes a reward paid to an author (or other rights holder) in cash for the creation or use of a work, or a sum paid as a fee for the creation of a work, as distinct from a regular salary.

It should also be noted that, in accordance with Article 124.1 of the Tax Code, income from royalties is subject to withholding tax at a *rate of 14 per cent* when it is obtained

from a source in Azerbaijan in accordance with Article 13.2.16 of the same Code. Article 14.5.4 of the Law of the Republic of Azerbaijan “On Social Insurance” stipulates that mandatory state social insurance *contributions of 15 per cent* of the calculated royalty amount are to be withheld at source by legal entities and individuals paying the author’s royalty.

As can be seen, the rates for mandatory contributions (income tax, mandatory state social insurance contributions) deducted from author’s remuneration (royalties) are different from the rates for mandatory contributions deducted from salaries. **Therefore, although including author’s royalties in the salary base would not conflict with Articles 13 and 15 of the Law and the provisions of the Labour Code, it is not considered advisable in order to ensure the author’s right to receive fair remuneration and to guarantee transparency in this area.**

10

Can an author contractually waive the right to object (to any distortion, mutilation, modification, or other derogatory act in relation to the work that would prejudice the author’s honour or reputation (right of integrity))? Is the absence of a clause in the contract regarding this considered a waiver of that right?

No, that is not correct. In Article 14.1(v) of the Law, the author’s right to object is established. Paragraph 2 of the said article states that ‘moral rights are indivisible and inalienable, belong to the author independently of the property rights, and remain with the author even when the property right has been transferred to another’.

As is evident from the provisions of Article 14 of the Law, the author’s right of attribution is independent of their property rights. Furthermore, under the principles of the Roman-Germanic (continental) legal system, an author cannot waive their personal (non-property) rights. This principle is consistent with Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works of the World Intellectual Property Organisation. Furthermore, it should be noted that in current practice in Azerbaijan, there are no examples of an author waiving their moral (non-property) rights, including the right of attribution. The absence of a clause in the contract waiving the “right to object” does not, in itself, constitute a waiver of this right by the author. However, in the Anglo-Saxon legal system (for example, in the United Kingdom and in some cases in the USA), an author can waive their personal (non-property) rights, either in whole or in part. In such cases, the waiver must be formalised in a written agreement.

11

After the author's exclusive rights in an employee work have passed to the employer, does the right of refusal (to refuse disclosure of the work) in paragraph 3 of Article 14 remain with the author?

It is a controversial issue, and it is difficult to give a definitive answer. Although the exclusive (property) rights to use the employee work belong to the employer, the author retains the right to refuse a previously given consent to the disclosure of the work, in accordance with the provisions of Article 14 of the Law. This is because this right is part of the author's personal (non-proprietary) rights, which remain with them even when the proprietary rights have been transferred to another party. Failure by the employer to fulfil the obligations set out in the contract or in the Law, including the non-payment of remuneration, also constitutes grounds for the author of an employee work to revoke a prior decision regarding the disclosure of the work as provided for by law.

However, the author's right of refusal may be exercised if doing so does not conflict with the legitimate interests of the employer, or if there are no compelling legal grounds for refusal (for example, if the author's right of attribution has not been infringed as a result of the work's disclosure, or where no act (or omission) has occurred which could be detrimental to his honour and dignity, etc.), the court may refuse to grant an injunction to enforce the author's right of refusal. **Therefore, in anticipation of such disputes, the conditions for the author (employee) to waive the right of disclosure for an employee work must be clearly specified in the contract (including an employment contract).**

12

Can an author contractually waive their right of refusal? Can the income the user will earn from the work and the damages payable in the event of refusal be agreed upon or determined in advance by contract?

It is clear from the answer to question 11 that, in accordance with Article 14 of the Law, the author can always exercise the right of refusal. Regarding the pre-agreement/determination of the user's income from the use of the work or the damage they may incur, we wish to inform you that the following provisions may be included in the contract in advance:

- regarding the obligation to substantiate with documents the reasonable expenses incurred or to be incurred by the user for the preparation, transport, sale, etc., of the work;

- the methods of use of the work (taking into account the tariffs for each method of use), including the fixed sale price and the number of copies;
- the obligation to provide the author with information on the amount of funds remaining after deducting expenses and mandatory payments prescribed by legislation from the total revenue.



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office@caspianlegalcenter.az

+994 50 289 89 73

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