

SPECIFICITY OF PROOF IN CASES OF INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS ON SITES ON THE INTERNET

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ABSTRACT

In recent years, the rapid development of both technical progress and activities on the Internet, including the economic one, could not but affect the improvement of existing and the emergence of new mechanisms for violating the rights of intellectual property subjects, gives rise to various disputes between participants in the relevant relations, and such disputes is no exception, since each category of court cases has its own peculiarities of consideration.

However, analyzing the judicial practice, a number of procedural problems related to evidence and proving in the field of intellectual property rights protection on Internet sites were identified.

Object of Research: What is the key of proof?

– Where? and Who? need to collect evidence?

– What is meant by belonging and admissibility of evidence?

– What are the ways of securing facts as means of proof on the Internet?

Investigated problem: to give a legal assessment not only to the norms of national and international legislation, but also to the practical experience of using the institution of proof in the protection of intellectual property rights raised on sites on the Internet.

The main scientific results: the procedural nuances of proving the violation of intellectual property rights on sites on the Internet are highlighted, problematic points are identified, and the proposed optimal ways to overcome them, both in pre-trial and in court.

The area of practical use of the research results: fixation, preservation of the evidence itself, their assessment, both in pre-trial and in court.

Innovative technological product: an algorithm (technical and legal) securing factual data from the Internet site for submitting them to court.

Scope of application of the innovative technological product: the application of the algorithm for securing factual data from the Internet site when protecting intellectual property rights should be carried out in accordance with the rules of the current Economic Procedure Code of Ukraine, namely Chapter 5 "Evidence" of Section 1.

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1. Introduction

1.1. The object of research

In recent years, the rapid development of both technical progress and activities on the Internet, including the economic one, could not but affect the improvement of existing and the emergence of new mechanisms for violating the rights of intellectual property subjects, giving rise to various disputes between the participants in the relevant relations.

However, analyzing the judicial practice, a number of procedural problems related to evidence and proof in the field of intellectual property rights protection on Internet sites were identified, and the following objects of research were identified:

- What is the key of the proof?
- Where? and Who? need to collect evidence?
- What is meant by belonging and admissibility of evidence?
- What are the ways of securing facts as means of proof on the Internet?

1.2. Problem description

Our society is developing rapidly through the creation of new information technologies in order to further simplify our lives. The emergence and development of the Internet has become the

most effective solution to the problems of our time, contains a lot of information on one platform and allows all users to save their time – to find certain information.

Today, the Internet has become a virtual repository for all the results of intellectual activity that require protection in case of violation, but the legislation does not clearly regulate the protection mechanism, the issue of proving violated rights is especially acute.

This problem arose due to the fact that each category of court cases has its own peculiarities of consideration, and cases on the protection of intellectual property rights are no exception.

So, the Civil Procedure Code of Ukraine, the Economic Procedure Code of Ukraine contains norms that are the same for all categories of court cases within the relevant type of legal proceedings and/or type of proceedings.

At the same time, cases on the protection of intellectual property rights have a certain specificity of their consideration, including the evidence and the process of proving.

However, in the current legislation of Ukraine, few legal norms are directly devoted to defining the features of judicial proceedings in cases of this category, and these norms are not without flaws.

There are problematic aspects of proving on the Internet:

- fixation;
- preservation of the most evidence;
- their assessment.

Since evidence on the Internet lies in the “transience” and modification of information at any given time, as a rule, in most cases, information that is disseminated on network sites can be deleted, modified or edited by both the site owner and its distributor.

1. 3. Suggested solution to the problem

In the scientific literature, there are no detailed studies on the procedural features of proof in cases of violation of intellectual property rights on sites on the Internet, but a lot of attention is paid to the substantive aspects of copyright protection.

The study of evidence and proof in procedural law aims to study the general positions of evidence and proof in the legal system. Scientifically, there is a wide range of views on the industry of evidence.

So, Ya. Farkhtdinov calls the institutions of evidence in the procedural branches the same, because all procedural legislation provides for a noticeable similarity in this procedure [1]. Yu. Osipov believes that the institution of evidence is general and intersectoral [2]. A similar position is defended by the Polish process theorist [3, 4].

In turn I. Reshetnikova develops the concept of proof as an intersectoral complex institution, substantiating it by the fact that proof is regulated by various branches of law. And also believes that, within the framework of procedural law, evidence is of a complex nature, due to the placement of norms both in the general and special parts of the procedural legislation of Ukraine and in substantive law [5].

Along with this, in science there is an opinion about the advisability of considering evidence and proof in criminal and civil proceedings within the framework of one generalized theory [6].

However, this is possible at the level of a methodological approach to the study of evidence. After all, evidence and proof, both in civil and in the economic process for the protection of violated intellectual property rights on sites on the Internet, should be clearly regulated, and especially the process and procedure for their protection.

The aim of research is to highlight the procedural nuances of proving the violation of intellectual property rights on sites on the Internet, identifying problematic points, and suggesting optimal ways to overcome them, both in pre-trial and in court.

2. Materials and methods

Research carried out in modern Ukrainian legal science does not create a holistic view of the procedural mechanisms for collecting and fixing evidence, especially the use of the institution of proof in the protection of intellectual property rights raised on Internet sites, but disclose only certain aspects of the institution of proof, and therefore the existing today the level of scientific development of this issue is not enough.

The empirical basis of the study was the materials of domestic and foreign judicial practice and legislation.

The methodological basis of the research is a complex of general scientific and special methods of cognition. *The dialectical method* of cognition was used, in particular, in the study of the process of collecting and fixing evidence. *The formal legal method* was applied to study the terminology used in the context of consideration of economic disputes in the field of intellectual property protection. During the study of the content and essence of the evidence, methods of analysis and synthesis were used. With the help of *the system-structural method*, the sources of evidence, the amount of evidence, the subject of proof, the limits of proof are determined. The use of the comparative legal method made it possible to carry out a comparative analysis of the mechanism for collecting, fixing, researching evidence in the pre-trial order and in court proceedings. With the help of *the scientific generalization method*, the general features of the means of proof are highlighted. As a result of the use of the legal hermeneutics method, the interpretation of certain norms of the current legislation governing the institution of proof was carried out.

3. Results

Procedural legislation (Code of Civil Procedure of Ukraine and Code of Commercial Procedure of Ukraine) contains requirements that each party is obliged to prove the validity of their claims and objections that is, it is about the obligation to prove.

Evidence is any factual data on the basis of which the court establishes the presence or absence of circumstances substantiating the claims and objections of the parties, and other circumstances relevant to the resolution of the case. Let's believe that the legislator's approach to defining the concept of proof is correct. Evidence is, first of all, factual data, on the basis of which the court, in the manner prescribed by law, establishes the presence or absence of circumstances on which the claims and objections of the parties are based, as well as other circumstances that are important for the correct resolution of an economic dispute (Article 76 of the Code of Civil Procedure of Ukraine, article 73 of the Code of Commercial Procedure of Ukraine) [7, 8].

In the scientific literature, the following signs of evidence (means of proof) are distinguished: the list of means of proof is exhaustive; the means of proof must be simultaneously considered in two aspects as the list is precisely defined in the legislation and their admissibility for proof in a particular case; evidence by elements of evidence, which can be of informational, material or mixed nature and must meet the admissibility requirements for evidence in a particular case and belonging to this case, and also be obtained in accordance with the requirements of procedural regulations [9, 10]. It is worth agreeing with such signs of evidence, since they reflect their main characteristics. Moreover, these signs of evidence should be taken into account when considering cases on the protection of intellectual property rights rose on sites on the Internet.

In addition, the court accepts only those evidences that are of great importance for the given case. The circumstances of the case, which, in accordance with the law, must be confirmed by certain means of proof and properly, can't be confirmed by other means of proof.

That is, in every copyright protection case, the ownership and admissibility of this evidence should be taken into account. This is emphasized in paragraph 2.5 of the Resolution of the Plenum of the Supreme Economic Court of Ukraine No. 12 "On some issues of the practice of resolving disputes related to the protection of intellectual property rights" dated October 17, 2012 [11] where it is stated that any evidence presented by the participants in the process (including, in particular, and regarding information on the Internet) are subject to assessment by the court for relevance and admissibility. When deciding on evidence, the courts must take into account the institution of admissibility of means of proof, according to which the circumstances of the case, in accordance with the law, must be confirmed by certain means of proof, can't be confirmed by other means of proof.

Also, the court accepts only that evidence that is relevant to the case. The circumstances of the case, which in accordance with the legislation must be confirmed by certain means of proof, can't be confirmed by other means of proof. That is, in each copyright protection case, the ownership and admissibility of evidence should be taken into account.

At the same time, the evidence presented can't be rejected by the court on the grounds that they are not provided for by the procedural law [11].

An example is the case for the protection of copyright, which is quite common, and consists in the fact that illegal copying and use of text without the author's permission and without attribution is a violation of its personal non-property and property rights. Therefore, this fact can be proved only thanks to properly executed and confirmed material evidence.

Although the procedural legislation contains the same norms for all categories of cases within the relevant type of court proceedings, however, cases on the protection of intellectual property rights have not only a certain specificity of their consideration, but also the process of proving.

The specifics of the process of proving in cases of infringement of intellectual property rights on sites on the Internet is not only part of the evidence in the procedural sense, but also has a close intersectoral connection with all material branches of law, since the correct solution of such a category of disputes is possible only when the subject of proof is clearly defined.

Based on the peculiarities of the law enforcement practice existing in European countries, as well as national, it is possible to single out problematic issues and difficulties arising in the process of collecting evidence that can confirm or deny the existence of a violation of intellectual property rights on sites on the Internet. It should be emphasized that the main problem lies not in proving the fact of the use of intellectual property rights, but in proving an action or inaction that entails violations or creates conditions for violation of intellectual property rights.

Thus, the Internet is based on three "pillars", which are: communication channels, IP addresses and the domain name system. In this case, it is necessary to take into account the fact that the parties to the disputes about the violation of intellectual property rights on the Internet sites are the plaintiff and the defendant, which have their own characteristics, in particular. The plaintiff is the owner of the intellectual property object, who must prove that it is the copyright holder of the intellectual property object located on the Internet; an object that was placed by the defendant and such actions were committed without proper legal basis; the defendant takes actions regarding the infringement of the plaintiff's intellectual property rights. The defendant must prove that: it is not involved in the illegal placement of the intellectual property object on the Internet and/or that the object was placed with the permission of the copyright holder or the user independently owns the property rights and its actions are within the legal framework.

Since this offense is committed on the Internet, which is not stable, and public information can be changed at any time, the person who has identified violations of its rights and is a plaintiff in this area has the right to take all permitted actions in order for these facts to become valid evidence in the case. It should be noted right away that the algorithms for protecting intellectual property rights are diverse.

In this connection, there are a number of practical methods of securing facts, as means of proof, on the Internet, in particular.

Firstly, the owner of whose rights have been violated must record the content of the website by video recording with the preparation of a properly executed protocol signed by at least three people who must be present during the video recording of this offense on the network, including an independent representative of the organization, specializes in servicing telecommunications computer systems that will be able to confirm the ownership of the evidence, and, if necessary, that this video evidence is targeted.

In this case, the recorded video evidence must indicate the time and date of the video filming, for the subsequent establishment of the primacy of the publication of authorship, as well as the corresponding domain address of the offender's website. If the opportunity to make video recording does not have the person, then the person can take a photograph (Web-screenshot) of the offense.

However, in accordance with clause 46 of the Resolution of the Plenum of the Supreme Economic Court of Ukraine No. 12 [11], printouts of Internet pages (web pages) in themselves can't serve as evidence in the case. These documents must be issued or certified by an institution or a specially authorized person within their competence in the prescribed form and affixed with an official seal on the territory of one of the member states of the Commonwealth of Independent States, in accordance with Article 6 of the Agreement on the procedure for resolving disputes related to the implementation of economic activities of March 20, 1992 have the evidentiary force of official documents on the territory of Ukraine [12].

Together with the specified fixing method, the method of instant fixing of web pages using private online services is used. This fixation fixes not only the visual display, but also the source

code, the URL of the web page, and the time of the fixation. A variation of the previous method is to capture a cached copy of a web page in search engines using private online services. However, on the ownership of this evidence, discussions are underway and the court may not always accept them as it should be in the form of evidence.

The second method is to use the InternetArchive service. WaybackMachine, which captures the content of individual web pages both offline and at the user's request. The specified service has the status of a library and is subject to US law. This method assumes the existence of certain technical limitations of such fixation of the content of the web page. As it turned out in practice, the use of this method of fixing entailed such consequences as storing objects larger than 10 MB, and pages with limited access are not saved.

In addition, at the request of the site owner, the data on this web archive is deleted, resulting in the loss of evidence.

The judicial practice of our state in disputes on infringement of intellectual property rights on the Internet testifies to the involvement of forensic materials as evidence, where the subject of research, in particular, is the mentioned service, and not as separate evidence.

So, in the decision of the Economic Court of the city of Kyiv in case No. 59/230 of September 24, 2012 [13], it was established that the plaintiff did not agree with the conclusion of the complex forensic commission in the field of intellectual property, since it believed that the information received by the expert on the materials of the site www.archive.org is inaccurate, unreliable and may not be accurate.

At the same time, the plaintiff did not provide the court with evidence to prove that the information about the defendant's website, according to the site www.archive.org, is untrue and unreliable.

Also noteworthy is the decision of the Economic Court of the city of Kyiv in case No. 910/11186/16 of October 17, 2016.

This decision states that according to the expert opinion, within the framework of which the content of the web pages of the Internet archive "The Wayback Machine", including the corresponding website, was investigated and recorded, and it was confirmed that by the time the infringement of the content on this site was not recorded [14].

That is, an expert study of telecommunication systems (equipment) and means was assessed, within the framework of which the content of the web pages of the Internet archive "The Wayback Machine" was investigated and recorded.

Today, the issue of obtaining notarization of web pages on the Internet remains debatable, since notaries of Ukraine only provide for the procedure for certifying the correctness of copies of documents and extracts from them.

However, a person whose rights have been violated has the right to apply to a notary or local government official to draw up a protocol of inspection site and receive notarized printouts of its pages [15, 16].

Such a protocol contains:

- date, time (hours, minutes) and location of the inspection;
- information about the person carrying out the review (its last name and initials, status (notary), name of the notary district);
- information about the persons present during the examination;
- content of the application of the person who applied for the notarial act, indicating the reasons due to which the presentation of evidence will subsequently become impossible or difficult;
- sequence of actions of the notary regarding the review of such information.

The protocol may also include images of information published on the pages of an information resource printed on paper, as well as images on paper, reflecting the sequence of actions taken by a notary to access this information. And if images of information printed on paper are involved in the protocol, the time (hours, minutes) when this information was printed is indicated in the protocol. A person who has applied to perform a notarial act of its own free will has the right to ask for the inclusion of an electronic version of the examined evidence in the inspection protocol.

Simultaneously with these actions, the person should apply to the Cyber Police Department of the National Police of Ukraine to record the corresponding offense on the Internet and enter the

information into the Unified Register of Pre-trial Investigations. These actions will help to fix violations in the network, and in the future to stop the illegal actions of the site owner.

After receiving the aforementioned evidence of violation, the person has the right to contact the owner of the host server (host server) on which the site is hosted, with the certification of the printout of the disputed web page. This can be done through a special network protocol based on the TCP (Transmission Control Protocol), that is, it is possible to ask the owners of the WHOIS site in order to determine the owner of the domain zone, IP address, or autonomous system number on the Internet and get domain zones of the offending site. In this case, it is possible to get a refusal to obtain evidence.

If the defendant in a copyright infringement case denies access to the necessary information or does not provide it within an acceptable timeframe, interferes with the implementation of judicial procedures, or in order to preserve the relevant evidence of the alleged offense, the court has the right to apply interim measures at the request of the applicant before filing a claim or before the start of the consideration of the case with the participation of the other party (the defendant) [17].

From the analysis of the above, it follows that a person whose rights have been violated, for a more effective result, can directly apply to the court with a properly substantiated statement of claim against the domain name owner and at the same time submit an application for securing evidence in this case and after five days receive a court decision on securing evidence. After issuing an order on securing evidence, the court directly sends a request to the provider for obtaining a certificate (log files), which may contain information about the actions of users regarding the placement of this information.

However, the content of such information may differ depending on the hosting settings. Moreover, such files only record the name of the file, not its content.

At the stage of preliminary court proceedings, the court also considers the ownership of evidence and in accordance with the provisions of Article 82 of the Economic Procedure Code of Ukraine [7], examination of material, written and electronic evidence that can't be delivered to the court is examined at its location. This consists in the fact that the court, on its own initiative or at the request of a participant in the case, can inspect a web page, other places of data storage on the Internet in order to establish and record their content, and, if necessary, involve a specialist. The protocol, which will be drawn up by the judge after the above actions have been performed, will automatically become evidence in the case.

A separate method of fixing is provided for in paragraph 7 of part 1 of article 20 of the Law of Ukraine "On the Bar and Advocacy" [18], which provides that a lawyer has the right to draw up a protocol on the inspection of the website, which, on the basis of its professional right to collect information about facts can be used as evidence.

The fourth step will be to order an expert study of intellectual property objects that are posted on the site, and also attention will be paid to the evidence of the violation and to the author's way of writing the text. These actions may not be performed by a person if a specialist is involved in the court and this evidence is sufficient for the internal conviction of the court.

Violation of intellectual property rights on the Internet is too widespread, but not all persons whose rights have been violated are ready to fight for their restoration, cessation of violations, or for compensation for losses and/or moral (non-property) harm.

This is due to the fact that the algorithm for establishing the relevance of evidence is too complicated for a simple Internet user, who does not have special knowledge of proof, but in general faced this problem for the first time.

At the same time, the procedure for securing evidence is not always effective, because this type should contain the ability of factual data on information regarding the circumstances included in the subject of proof, serve as arguments in the process of establishing objective truth, since the question of ownership of evidence is finally decided by the court.

Therefore, persons possess intellectual rights, in case of violation, they must adhere to the following algorithm of actions to collect evidence of such a violation, namely:

- 1) record the content of the website by video and photographic recording with the preparation of a properly executed protocol signed by at least three people who must be present during the video recording of this offense on the network, including an independent representative of an

organization specializing in the maintenance of telecommunication computer systems, which will be able to confirm the ownership of evidence;

2) duly recorded evidence should be notarized as soon as possible by an appropriate person who has the authority to do so in accordance with the legislation of the state, so that the given factual data become adequate evidence to convince the court;

3) the fact of violation must be reported to the Cyber Police Department of the National Police of Ukraine in order to properly record the corresponding violation on the Internet and enter information into the Unified Register of pre-trial investigations;

4) after performing these actions and obtaining proper evidence, the person must apply to the court with a properly substantiated statement of claim and at the same time submit an application for securing evidence in this case, to obtain help (log files), from the owner of the host server, includes information about the actions of users regarding the placement of this information;

5) order an expert study of intellectual property objects, which will properly confirm the fact of a real violation of the plaintiff's rights.

5. Conclusions

An in-depth study of the practice and resolution of disputes on infringement of intellectual property rights on sites on the Internet in order to develop scientific recommendations on the problems of proof in resolving this category of disputes is a primary task not only for judges, but also for the copyright sub-industry.

Until scientists have developed a comprehensive legal mechanism for collecting evidence in support of the violation of intellectual property rights on sites on the Internet, individuals believe that their rights have been violated, must adhere to the following algorithm of actions to collect evidence of such a violation, namely:

1) record the content of the website by video and photographic recording with the preparation of a properly executed protocol signed by at least three people who must be present during the video recording of this offense on the network, including an independent representative of an organization specializing in the maintenance of telecommunication computer systems, which will be able to confirm the ownership of evidence;

2) duly recorded evidence should be notarized as soon as possible by an appropriate person who has the authority to do so in accordance with the legislation of the state, so that the given factual data become adequate evidence to convince the court;

3) the fact of violation must be reported to the Cyber Police Department of the National Police of Ukraine in order to properly record the corresponding violation on the Internet and enter information into the Unified Register of pre-trial investigations;

4) after performing these actions and obtaining proper evidence, the person must apply to the court with a properly substantiated statement of claim and at the same time submit an application for securing evidence in this case, to obtain help (log files), from the owner of the host server, includes information about the actions of users regarding the placement of this information;

5) order an expert study of intellectual property objects, which will properly confirm the fact of a real violation of the plaintiff's rights.

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