

Examination of Evidence as Preliminary Provisional Measure is Effective Way to Prove Copyright Infringement

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This article is dedicated to one significant problem which has place in the current Russian court practice on copyright infringement in the field of software, movies and other similar objects. It usually happens that after a copyright infringer has received a warning letter (or a court suit) from copyright owner in which the owner claims to stop infringing, the infringer destroys all evidences of the copyright infringement in question. This destruction of the evidences implies, in particular, deleting illegal copies of software, of movies or of sports live-coverage, etc.

This development considerably complicates collection of evidences for the purpose to prove infringement.

In our view, effective solution of this problem lies in examination of the computers and web-sites by bailiffs within the framework of preliminary provisional measures as the bailiff can be instructed to perform. For the purpose of this article “preliminary provisional measures” mean all pre-litigation actions aimed at protection of the interests of the plaintiff or at securing performance of the future final court decision, such as interim injunction, arrest of the defendants assets, etc., and also aimed at protection/collection of evidences, but sanctioned by the court **before** the plaintiff brings the legal action. This article outlines Russian legal regulations on examination of evidence by bailiffs at the execution of such preliminary provisional measures; the key question is whether or not the duty to examine evidence can be imposed on a bailiff and how this duty can be performed.

Under art. 99 of the Arbitration Procedural Code preliminary provisional measures can be sanctioned by a court upon separate pre-litigation request of the claimant/plaintiff. It is supposed that the claimant will file the relevant legal action in the near future after the claimant has requested the preliminary provisional measures.

Russian arbitration courts (i.e. courts dealing mostly with disputes between commercial entities) have adopted the view that examination/collection of evidences may be a preliminary provisional measure or a part of preliminary provisional measures. Hence, duty to make the examination may be placed on a bailiff. However, collection of evidences shall be carried out with participation of an expert. Moreover, according to art. 50 (1) of the Federal Law On Enforcement Procedures the claimant or their representative has also a right to participate in the collection and examination of evidence.

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The special legal device of preliminary provisional measures (art. 99 of the Arbitration Procedural Code) has an important advantage: unlike usual preliminary measures adopted within the framework of the already started court dispute, the preliminary procedural measures come unexpectedly for the infringer thus, as collection of evidences is at stake, depriving the latter the chance (or at least making any chances considerably smaller) to destroy the evidences of infringement.

Despite of all the opportunities which preliminary procedural measures open for the purpose of collection of evidences, it is submitted that at present examination of evidences (as part of preliminary procedural measures) is not very widely used.

However, there are examples when Russian arbitration courts approved examination within the framework of preliminary procedural measures. Thus, in 2009 a state-owned TV channel "All-Russia State TV and Radio Company" (VGTRK) applied to the Arbitration Court of Moscow Federal District for an examination of the web-sites owned by a company "SUP Fabrik" as a preliminary procedural measure. VGTRK stated that these web-sites illegally provided sports live-coverage the rights to which belonged to VGTRK.

In its resolution dated 21.12.2009 the Arbitration Court satisfied the application and placed the duty to inspect the web-sites (with participation of an IT specialist) on the bailiff. The screen shots obtained during the examination of the web-sites were successfully documented as an evidence of the infringement.

However, the Bailiff Service complained to the upper court. The position of the Bailiff Services was that, before and outside the framework of a litigation, collection and protection of evidence shall be carried out by notaries: The legislation does not provide for bailiffs' assistance in collection of evidences at the stage before formal filing a legal action.

However, the position of the Bailiff Service did not find support in the Supreme Arbitration Court. Sections 17 and 18 of the Information Letter dated 07.07.2004 no. 78 "Review of Arbitration Courts Practice on Preliminary Provisional Measures" talk that placing a duty of collection of evidence on bailiffs (as a preliminary procedural measure) shall be regarded as lawful.

This Information Letter contains also the following example. A foreign company applied to Arbitration Court with an application for collection of evidences (as a preliminary procedural measure) by way of examination of personal computers used in a third party Internet center in order to reveal the counterfeit software installed on hard disks. The company intended in the future to bring a claim before the Arbitration Court on recovery of damages incurred from the infringement.

The company stated that collection of the evidences was necessary to prove the copyright infringement. Moreover, the suspected infringer could destroy the evidences (by way of deletion of the software from the computers) before the relevant litigation starts. The Arbitration Court upheld the application of the company.

In that case the examination of the computers was actually conducted by a bailiff with participation of an IT specialist for the sole purpose to reveal illegal copies of software (on hard disks) copyright to which belonged to the company. During the examination the technical information on the installed software was printed out and attached to the examination report. Absence of relevant licenses was also recorded to serve in the future as an evidence of the infringement.

It is also important that preliminary provisional measures can be approved by a judge of the arbitration court without informing the target entity and without the target entity to be heard by the court. This shall guarantee that the examination is unexpected by the suspected infringer.

To summarize, Russian legislation and court practice make possible for copyright owners to collect and protect evidences of copyright infringement with a help of a bailiff at the stage preceding formal litigation against the infringer. This can be done within the framework of preliminary provisional measures which shall be sanctioned by a court upon separate application of the copyright owner.