УДК 347.91/.95

THE FACT IN PROOF IN CASES ARISING FROM COPYRIGHT RELATIONS IN UKRAINIAN THEORY AND PRACTICE OF CIVIL PROCEEDING

Shtefan O. O.,
Candidate of Legal Sciences, Docent, Senior Researcher of the Division of Jurisdictional Forms of Legal Protection of Private Law, Judiciary and Proceedings of the Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of NALS of Ukraine (Kyiv)

This practical scientific article is devoted to the fact in proof (subject of proof) in cases arising from copyright relations. The definition of the fact in proof in civil cases is among the most controversial issues of the Ukrainian theory of civil procedural law.
The author analyzes the formation and development of modern Ukrainian concept of evidence and proof in civil litigation in which the fact in proof holds one of the key places. The subject of proof on a particular civil case is important not only for the theory of civil procedure law, but also for litigation because the proper establishment of the fact in proof in a particular case directly impact on the result of the proceedings - the sustaining or dismissal of claims.

Keywords: proof, copyright, civil procedure, facts.

During the last decade the representatives of the science of civil procedural law are increasingly turning their attention to the study of procedural features of hearing of different categories of civil cases.

The current laws of Ukraine regulating private-law relations are too complex, often inconsistent with each other, contain certain provisions that significantly individualized procedural peculiarities of hearing of civil cases in definite categories in comparison with the general procedure provided by the Civil Procedural Code of Ukraine (hereinafter – CPC of Ukraine).[1] In this regard, this study helps to ensure practical unity of substantive law and civil procedure, to determine the procedural problems of the substantive rules application by a court, to suggest ways to improve civil procedural law.

Apart from the characteristics of review of different categories of cases arising from civil, family, labor relations, that partially were studied by the scientists of civil procedural law, at the monographic level, peculiarities of litigation in cases arising from the copyright actually stayed out of sight of the science of civil procedural law.

Peculiarities of the impact of substantive law on civil procedural law in court proceedings of certain categories of cases are mostly embodied in the evidential activity of interested persons.

1 The Civil Procedural Code of Ukraine № 1618-IV, 18.03.2004 // Vidomosti Verkhovnoyi Rady Ukrayiny, 2004, № 40-41, 42, st.492

The evidence is the tool of evidence-based activities of persons involved in cases with disputable copyright relations. These evidence-based activities (proof) aimed at knowledge of circumstances which determines the presence or absence of circumstances that establish the denial and claims of the parties, and other circumstances relevant to solving the case (Article 57 of CPC of Ukraine) and are the fact in proof (subject of proof). The fact in proof is a legal category, which is aimed at learning all the evidence by people involved in the case.[1]

In any civil case that is being ruled by the court, it is necessary to define the fact in proof. The fact in proof is the circumstances that must be established by the court for ruling the legitimate and justified court's decision. According to the fact in proof the division of the obligation to proof between the parties takes place. Based on the fact how well the subject in proof is defined and how true are the established facts of the case, the court may be considered to be correct and justified.

The fact in proof in all civil cases has its own features because in each particular case, there are different sources of definition of the fact in proof. Before proceed to the review of the subject of litigation on claims arising from the disputable copyright relationships, initially the "fact in proof" notion must be defined.

The questions about the fact in proof in the theory of civil procedural law belong to the most controversial.

Thus, according to M. Treushnikov[2] the traditional view is to define the fact in proof as a combination of circumstances (legal facts), causes of action and denials to it, where there is an indication of the substantive law to be applied. This view also had its development in the works of S. Kuryliov[3] who believed that the subject of proof is the facts relevant to the case. These facts are determined on the grounds of the substantive law to be applied.

It's necessary to note that M. Treushnikov and S. Kuryliov shared the view that the demands and denials of the parties don't have a crucial importance, and that is why they do not form the fact in proof but only allow the court to determine the norms that are relevant to the case and the facts to be established by the court[4].

This view in the middle of the XX century got support among Soviet legal process specialists. Straightforward it was supported by A. Kleynman, J. Shtutin[5].

In general, maintaining the indicated position, L. Smyshliayev, in turn, pointed out that the facts on which the parties refer in justifying their demands and denials are the basis of the factual aspect of the case but in the most cases margins of the investigations are not limited by them. In his opinion, circumstances that may prove the reasonableness or insufficiency of the demands, regardless of whether the party referred to these circumstances, are to be studied[6].

In the eye of K. Yudelson, the fact in proof is determined by the data constituting the cause of an action that is why for determination of the subject of proof it is necessary to establish what facts in particular are to be stated as the ground of the action. According to the researcher, the aim is the

---

[1] *Штефан М. Й.* Цивільне процесуальне право України: академічний курс, К.: Ін Юре, 2005, p. 253.

[2] *Треушников М. К.* Судебные доказательства, М.: Городец-издат, 2005, p. 15

[3] *Курылев С. В.* Основы теории доказывания в советском правосудии, Минск: Изд-во БГУ, 1969, pp. 38–39

[4] *Треушников М. К.* op.cit, p. 17; Курылев С. В. op.cit, p. 39

[5] *Клейнман А.Ф.* Основные вопросы теории доказательств в советском гражданском процессе, М., Л.: Изд-во АН СССР, 1950, p. 33; *Штутин Я. Л.* Предмет доказывания в советском гражданском процессе, М.: Госюриздат, 1963, p. 6

[6] *Смышляев Л. П.* Предмет доказывания и распределение обязанностей по доказыванию в советском гражданском процессе, М.: Изд-во Моск. ун-та, 1961, pp. 6-10

establishment of the facts of the grounds (demands or denials)[1]. Consequently, the fact in proof is determined by the causes of action and counter-pleas. At the same time, K. Yudelson's position in determining the composition of the fact in proof implicitly is consistent with the above-stated positions because the researcher judges from the fact that the cause of the action is determined by the relevant norm of the law[2].

It can be noted that legal process specialists of Soviet era in identifying the fact in proof were not original, since similar approach to the definition of the subject of proof can be found in the civil procedure literature of the prerevolutionary times (up to 1917). For example, V. Gordon believed that the cause of action and the circumstances in proof coincided. At the same time the researcher determined the fact in proof not through the grounds of the action but vice versa he proposed to determine the cause of the action through the facts pointed by the plaintiff which are be proved that one could apply the norm which is relevant to the case according to the court.[3] Videlicet V. Gordon believed that the court must first determine based on the rules applicable in the particular case, what are the facts that must be proved, that these facts exactly are the grounds of the action. Apart from the above stated vision, the position of K. Yudelson is that he pointed out the discrepancy between the fact in proof and the cause of the action because some of the facts constituting the cause of the action may not be the fact in proof (generally recognized facts, facts found by the other party, presumed and prejudicial facts).[4]

In the early 80-ies of XX cen. in the theory of civil procedure the general approach was the approach according to which the fact in proof as a source of formation has the hypothesis and the disposition of the law norm or number of law norms. Hence, the general position of procedural law specialists was that the fact in proof is determined by the court on the basis of substantive law because the parties in their reference to the facts may be wrong, pointing out facts that are legally insignificant[5]. One should consider that in Soviet times the powers of the court were much wider than now. Also, in the literature another widespread view can be found. According to it the facts constituting the cause of action or cross-opposition were called the subject of proof, while under the cause of an action lawyers understood facts determined by the plaintiff or defendant on the basis of the relevant norm[6].

At the same time, the points of view that are given in the late 90's were criticized by many legal procedure specialists.

For example, I. Tsvetkov criticizing the first concept of the definition of the matter of an action, pointing to the court practice, noted that some judges believed it wrong to annul a judgment in cases where the court did not took the initiative and suggested that the process did not provide additional documents or information relevant to the case. In turn, complement of the subject of proof with

---

[1] *Юдельсон К.С.* Проблема доказывания в советском гражданском процессе, М.: Госюриздат, 1951, pp. 148, 149, 179

[2] *Рогожин С. П.* Процессуальные особенности доказывания по делам, возникающим из таможенных отношений, М.: Волтерс Клувер, 2010, p. 48

[3] *Гордон В. М.* Основание иска в составе изменения исковых требований, Ярославль: Тип. Губ. правления, 1902, p. 247

[4] *Юдельсон К. С.* op.cit, p. 163

[5] *Рогожин С. П.* op.cit, p. 83

[6] *Абова Т.Е., Гуреев П.П., Добровольский А.А., Мельников А.А.* и др. Курс советского гражданского процессуального права: Теоретические основы правосудия по гражданским делам, Т. 1, М.: Наука, 1981, p. 393

the facts on which the plaintiff did not cite, contradicted with the procedural law norm – the cause of an action could be changed only by the plaintiff.[1] It should be taking into account that a similar provision is contained in the current CPC of Ukraine (part 2 of Article 31 of CPC of Ukraine). At the same time, in order to maintain a balance between the initiative of the court and the plaintiff's right G. Osokina proposed the concept of "clarifying the cause of action".[2]

However, in the middle of the XX century F. Fatkulin pointed out that any circumstances (facts) to be proved in criminal or civil proceedings, is the fact in proof in the case, since any fact should be learned and confirmed both by the investigation body and the court in a way provided by the law. All that has to be proved must be called a subject of proof.[3] In turn, I. Reshetnikova said that the fact in proof is a set of circumstances of substantive and procedural nature which are to be established for the proper judgment of the civil case.[4]

Hence, at the turn of the XXI century, on the one hand, among legal procedure specialists placing of the substantive facts to the subject of proof was accepted, and, on the other, the content of the fact in proof remained disputable. Regarding the composition of the substantive facts that can be considered as the subject of proof there are several major approaches. Thus, D. Chechot, in cases of action proceedings, considered as those only the facts that substantiate the claims and cross-opposition of the parties[5]. This point of view got its development in J. Osipov's works who believed that the subject of proof was the legal facts which constitute the cause of an action; legal facts that constitute a counter-case and the grounds and conditions of any dispute or misdemeanor[6].

According to I. Reshetnikova to the subject of litigation also must be refered the circumstances of substantive law, relevant to the proper judgment.[7]

The abovementioned view received a strong support among modern Ukrainian legal procedure specialist such as V. Komarov[8], V. Kroytor, A. Luspenyk and others.

The necessity of referring to the subject of proof the facts of the substantive nature is confirmed by the judicial practice. For example, a claimant filed a lawsuit in court to the "Naddnipryanochka" private enterprise, the "Askaniya Nova" Biosphere Reserve named after Friedrich von Falz-Fein of Ukrainian Academy of Agrarian Sciences (hereinafter – Askania Nova reserve) for recovery of the compensation for moral damages for infringement of his copyright. At the court session the counsels of the respondent objecting the charges against them also asked the court to apply the limitation period. The court found that in the printed edition – "The Collection of Animals of the 'Askaniya Nova' Zoo – a

---

[1] *Цветков И. В.* Процессуальные особенности дел по налоговым спорам, "Вестник Высшего Арбитражного Суда Российской Федерации" М.: ЮРИТ-Вестник, 1999, № 6, p. 69

[2] *Осокина Г.Л.* О праве суда выйти за пределы исковых требований, "Российская юстиция", 1998, № 6, p. 40

[3] *Фаткуллин Ф. Н.* Общие проблемы процессуального доказывания, Казань: Изд-во Казан. ун-та, 1973, pp. 48, 55

[4] *Решетникова И. В.* Курс доказательственного права в российском гражданском судопроизводстве, М.: Норма, 2000, p. 133

[5] *Гражданский* процесс, под ред. В. А. Мусина, Н. А. Чечиной, Д. М. Чечота, М.: ПРОСПЕКТ, 1998, p. 193

[6] *Гражданский* процесс, 8-е изд, ред. В.В.Ярков, М.: Издательство Инфотропик, 2012, p. 179

[7] *Арбитражный* процесс, под ред. В.В. Яркова, 4-е изд., М.: Инфотропик Медиа, 2010, p. 127

[8] *В. В. Комаров, В. А. Бигун, В. В. Баранкова,* Проблемы науки гражданского процессуального права, Харьков: Право, 2002, p. 172; *Гражданский* процесс, под ред. В. А. Кройтора, Изд. 5-е, Харьков: Эспада, 2010, 272 p., *Луспеник Д. Д.* Судочинство у справах про захист честі, гідності та ділової репутації, автореферат дисертації, Харків, 2003, 20 pp.

national domain of Ukraine" – the photos were published, the author of which was the plaintiff, and this was not disputed by the parties and was seen from the text of the mentioned books, copies of which were available in the case file. The designated photos were the result of the creative activity of the author. At the same time the parties did not dispute the absence of copyright agreement concluded in writing, in accordance with the Law of Ukraine "On Copyright and Related Rights"[1]. Using of the works via their publication in the edition took place without the consent of the author of the works that is why it was a violation of copyright law, this, according to § a of the Article 50 of the Law of Ukraine "On Copyright and Related Rights", gave grounds for a recognition of the copyright infringement.

However, the court found that the publication of the author's works was in 2006, the plaintiff in the lawsuit stated that he had been practicing the professional photography since 1998, throughout the period of professional activity repeatedly collaborated with the Askania Nova reserve. The director of the Askania Nova reserve said that the mentioned brochure came for sale in 2006 and was realized by the price of the prime cost in the kiosk of the Askania Nova reserve. Moreover he stated that he personally handed a copy of the brochure to the claimant within the specified time period. Questioned at the court session, the witness pointed that the plaintiff himself in 2009 told her about the awareness of the publication of the mentioned book.

According to Article 256 of Civil Code of Ukraine (hereinafter – CC of Ukraine)[2] limitation of an action is a term within which a person may go to the court to demand the protection of their civil rights or interests.

The Article 257 of CC of Ukraine stipulates that the general limitation of an action shall be set at three years.

According to Article 261 of CC of Ukraine the limitation of an action starts from the date on which the person became aware or should have known about the violation of their rights or about the person who violated them.

According to the Article 267 of CC of Ukraine the expiration of the limitation of an action, the use of which is claimed by the party in litigation is the ground for the denial of the claim.

Thus, taking into account that since the plaintiff awareness about the violation of his rights and filing a claim the three-year limitation period had passed, and the defendants entered a motion to impose the consequences of the expiry of the limitation of an action, the court dismisses the claim.[3]

As it can be seen from the given example of litigation, in the court hearing were established the facts of substantive legal nature – the illegal use of the copyright object and the gap of limitation period. Herewith the latter influenced over the ultimate judgment of the court – dismissal of the claim.

Recently one concept has received its development among legal procedure specialist, according to which the amount of facts that need to be proved are recognized much wider than the subject of proof, because the parties prove also the facts with procedural and legal value – evidential facts and other facts on

---

[1] Law of Ukraine "On Copyright and Related Rights" № 3792-XII, 23.12.1993 // Vidomosti Verkhovnoyi Rady, 2001, No 43, Art.214

[2] The Civil Code of Ukraine№ 435-IV, 16.01.2003 // Vidomosti Verkhovnoyi Rady Ukrayiny (VVR), 2003, №№ 40-44, Art. 356

[3] Decision of the Suvorovskyi District Court in Kherson, 31 July 2013, Case No. 668/4200/13-ц, proceedings № 2/668/1609/13 available at http://pravoscope.com/act-rishennya-668-4200-13-c-gontar-d-o-31-07-2013-spori-pro-pravo-intelektualno-vlasnosti-spori-pro-avto-s

which the resolution of procedural and legal issues depends.[1] In his monographic work the scientist G. Zhilin concludes that the general rules of proving may also be used in determining of the procedural facts. At the same time, the researcher notes that there are certain situations in hearing the case when the obviousness and unambiguousness of the facts do not need the developed procedure of proof to confirm the presence or absence of circumstances that are relevant to the proper case resolution.[2] Modern Ukrainian legal procedure specialists supported this concept, for example, Y. Sadykova proposed to include to the subject of proof not only the substantive law facts that are relevant to the proper resolution of the case but the facts of procedural legal nature as well[3]. It should be noted that this idea was not supported by all legal procedure specialists. Thus, according to V. Komarov the facts of procedural and legal significance are covered with the borders of proving of evidence or with the margins of the scope of judicial investigation. As a result, the amount of court investigation is much broader, than the subject of proof, and embodies the circumstances in proof, the facts that include the type of protection required, proving facts and means of proof[4].

The problem of the incorporation or non-incorporation of the facts of procedural legal significance to the subject of proof clarified the legislator who gave statutory definition of proof. Hence, according to part 1 of Article 179 of CPC of Ukraine the facts that justify filed demands or objections or have other value for the solution of the case (causes of skipping the term of claim duration, etc.) and are subject to defining when enacting a court decision are the subjects of proof at a judicial consideration. So, based on the legal definition of the subjects of proof and the use of the legislator phrase "the facts that... have other value for the solution of the case", it includes not only the facts of substantive legal character, but procedural and legal as well which are important for the proper solution of civil case.

For example, the defendant pleading the claim, citing the existence of barriers to the commencement of the proceedings, qualifies as the subject of proof the circumstances that are procedural in nature and entail legal procedural consequences. In this regard, I. Reshetnikova points out that if there are facts of the procedural nature, which indicate the absence of the plaintiff's right to sue or the reason to discontinue the proceedings, to leave a claim undecided, their ignoring entail the illegality of the decision. Consequently a proof goal would not be reached because the court did not establish the facts relevant to the case[5].

That is to say, in the theory of civil procedural law to the facts of procedural legal nature it is decided to attribute the facts to be proved, because of the necessity of carrying out the procedural actions that affect the movement of the case in court (the facts of the right to sue, the security for the entered claim, the

---

[1] *Гражданский* процесс, отв. ред. проф. В. В. Ярков, 5-е изд. М.: Волтерс Клувер, 2004, p. 214

[2] *Жилин Г. А.* Правосудие по гражданским делам: актуальные вопросы, М.: Проспект, 2010, p. 265

[3] *Садикова Я. М.* Місце та роль фактів процесуально-правового значення в предметі доказування за цивільним процесуальним законодавством України, "Право і Безпека", 2012, № 3, pp. 318–322, http://nbuv.gov.ua/j-pdf/Pib_2012_3_71.pdf

[4] *В. В. Комаров, В. А. Бигун, В. В. Баранкова.* op.cit, p. 172

[5] *Решетникова И. В.* op.cit, pp. 132-133

termination of proceedings, etc.)[1]. These facts, according to the theory of civil procedural law, constitute "the local subject of proof"[2].

For example, the plaintiff applied for securing a claim to the "Center of the Educational Literature" Publishing LLC about the termination of actions that violate copyrights, and payment of monetary compensation. The court reviewed the circumstances of the case, found that there are circumstances testifying that failure to take action may hinder or make impossible the execution of court decision (Article 151 of CPC of Ukraine), in the case of the claim approval. At the same time, the court granted the application partially – within the frames of the amount of compensation and court fees. Failed to meet the requirements of the statement of claim securing in the part of the arrest of the funds and other accounts of the defendant because this was not specified by the applicant, the court denied the opportunity to seize money without identifying accounts where they were[3].

The quite different result occurred in the application on the claim securing that was submitted by the author of the disputed work to the "Industrial Group and Co" private enterprise and the co-defendant. Considering the application for the securing a claim by providing the arrest of the property of the defendants, the court found that the plaintiff did not specify what kind of property should be seized, at the same time with a statement on evidence securing, provided by Articles 133-134 of CPC of Ukraine, for requesting the information about the presence of the defendants' property, the plaintiff did not apply to the court.

Also, the plaintiff filed claims for damages, i.e. of material nature, so the requirement for the security for the claim via preventing the copyright infringement, which was not in dispute, was inappropriate according to the court.

Under the part 3 of Article 152 of CPC of Ukraine, the types of claim securing should be corresponding to the alleged plaintiff demands. The court found no such correspondence.

All this gave the reason to the court to consider the statement on the claim as that that does not meet the requirements of Article 151 of CPC of Ukraine and provides grounds for its returning to the applicant to correct the deficiencies of this statement[4].

The above given examples of judicial practice confirm the correctness of the position of O. Baulin who considers that for the decision on the composition of the subject of proof, the limits of proof and division of the duty of proof, the source reflecting legal fact (area of substantive or procedural law) is not essential, but the fact what significance (substantive or procedural law sphere) it has[5].

Exploring the various doctrinal approaches to defining the subject of proof particular attention should be paid to the view of M. Vikut and I. Zaytsev. According to the mentioned legal procedure specialists, in the content of the subject of proof the facts necessary for the prevention of crime should be restored separately. Based on these facts the court may have the separate

---

[1] *Н. М. Коршунов, Ю. Л. Мареев.* Гражданский процесс, 2-е изд, М.: Эксмо, 2007, p. 223

[2] *Д. Б. Абушенко, В. П. Воложанин, С. Л. Дегтярев* и др., Гражданский процесс, 7-е изд., Москва: Волтерс Клувер, 2009, p. 224

[3] *Ruling* of the Podolsk District Court in Kyiv, 28 February 2013, Case No 758/2505/13-ц, available at: http://pravoscope.com/act-uxvala-sudu-758-2505-13-c-vojtenko-t-v-28-02-2013-pro-zabezpechennya-pozovu-s

[4] *Ruling* of the Kiev District Court in Simferopol, 08 February 2013, Case No 123/1424/13-ц, proceeding No 2/123/1379/2013, available at: http://pravoscope.com/act-uxvala-sudu-123-1424-13-c-tonkogolosyuk-o-v-08-02-2013-spori-pro-vidshkoduvannya-shkodi-33914675

[5] *Баулин О. В.* Бремя доказывания при разбирательстве гражданских дел, М.: Городец, 2004, p. 64

rulings[1]. This proposal did not receive its development among the legal procedure specialists. At the same time, according to §e of Article 50 of Law of Ukraine "On Copyright and Related Rights" the ground for give judicial protection are actions that pose a threat of infringement of copyright and (or) related rights. Such actions, based on the rule of law are qualifying as copyright infringement. Thus, the basis for the legal copyright protection can be not only direct, straight violation of copyright, which was manifested in the illegal use of copyrighted works, but also the creation of the conditions for its violation. However, on the basis of the judicial practice, usually interested persons take legal recourse when there was illegal use of copyrighted works. Although it should be noted that in recent years has become widespread to appeal of the plaintiffs with the demands of how to stop copyright infringement and prevent fraud in the future as well. Usually with such requirements the interested persons go to the law in cases where there is an illegal posting of a work on the Internet, or selling counterfeited copies of works there. Under this condition, the subject of proof will include the facts on what the plaintiff grounds their claim for copyright infringement including the facts that prove the defendant's actions that threaten copyright infringement in the future. On the grounds of these facts, the court may judge a decision, for example about the security of evidence.

It must be noted that not in every substantive law relationship is permitted to go to court with a claim for such prevention of violation of rights. It follows that the facts necessary to the court for the prevention of violations as a subject of proof cannot be isolated as its part.

Certainly, the normative definition of the fact in proof cannot be called perfect, but it encouraged a new stage of development of the theory of national civil procedural law. At the same time, the modern Ukrainian researchers, guided by the normative definition of proof, defining it, draw special attention to the persons of formation of the fact in proof. So, T. Ruda directly defines the subject of proof as a set of facts justifying claims, made by the plaintiff on the matter in dispute or by a third party with the independent requirements; justifying the denial of the defendant against the alleged claim demands or the demands alleged in a counter-claim; that have another significance for the case resolution (e.g., causes of the skipping of the limitation period, the reasons that encouraged to the dispute, etc.) and are needed to be established in a judgment[2]. One can agree with a specification on the subjects of formation of the fact in proof because according to the part 1 of Article 34 of CPC of Ukraine third parties claiming separate requirements on the subject of the dispute are equivalent in their procedural rights to the plaintiff.

However, as F. Fatkulin pointed out in the middle of the XX century, on the basis of Article 60 of CPC of Ukraine, under the proof are to be the circumstances to which the parties refer as the basis of their claims and objections, that is why a point of view according to which the fact in proof includes any conditions that are the subject of knowledge in civil proceedings, is inaccurate[3].

In every definite case on copyright relations, the fact in proof is determined in accordance with the norms of the substantive law governing the relevant legal disputes that indicate the circumstances entailing their appearance, changing and termination. Therefore, in considering the cases on the affiliation of

---

[1] *Викут М.А., Зайцев И.М.* Гражданский процесс, Саратов: СГАП, 1998, p. 141

[2] *Руда Т. В.* Докази і доказування в цивільному процесі України і США: порівняльно-правовий аналіз, автореферат дисертації, Київ., 2012, p. 9

[3] *Фаткуллин Ф. Н.* op.cit., pp. 65

authorship under the proof comes the circumstance that the disputed work is subject to copyright, i.e. that the Article 8 of the Law of Ukraine "On Copyright and Related Rights" is extended to it. After that, it may be necessary to establish its creator, i.e. to determine the authorship.

The fact in proof in copyright cases may be the judicial fact of existence of a contract about the use of the work between the parties, and also the fact of its use (in accordance with the terms of the contract or against them or without the contract at all), the circumstances of compliance of the certain terms of the contract (terms, the content of the work, understanding of the content, etc.), writing of the work in accordance with the plan of the scientific institution, the absence of obstacles to the republication of the work and other circumstances that confirm the demand.

The different approaches to the characterization of the fact in proof encouraged the appearance of the concept of definition of the fact in proof in broad and narrow senses, which is supported by modern national legal procedure specialists[1]. However, it is impossible to agree with this approach because the researchers identifying the subject of proof in civil cases differently treated the composition of facts that are the part of the subject of proof. Therefore one can not speak about the wide or narrow understanding of the subject of proof, and only the different views of researchers regarding the composition of the facts that they include into the subject of proof can be stated.

Guided by the dialectical method of cognition – from general to specific and vice versa – it is seemed to be more appropriate to range the facts that are the circumstances in proof into those having the substantive legal and those having procedural legal nature. To the facts that are of substantive legal nature may be included the demands and denials of the parties and third parties claiming separate requirements for the matter in dispute, and other evidentiary facts that are provided by the substantive legislation and relevant to solution of the case. To the facts that are of procedural legal nature may be included the facts that influence the development of specific proceedings in court.

The fact in proof in cases arising from copyright relations has multiple sources of formation:

- The cause of action and objections to it;
- The hypothesis and the disposition of the norms of the substantive law to be applied.

Thus, the subject of proof in cases arising out of copyright relations is a legal set of circumstances (facts) that are relevant to the solution of the case and to be established during the court consideration of a particular civil case.

In the theory of the civil procedural law it is accepted to classify the evidentiary facts into positive and negative, depending on their relationship to the reality[2].

According to I. Zaitsev and M. Fokina positive facts show the existence of any factual circumstances, the presence of something, someone's implementation of certain actions, such as the contract conclusion, harm-doing, violation of law, etc. Such circumstances form the basis of the fact in proof and the most civil cases are exhausted by them. In turn, the negative facts will be the lack of anything, failure of fulfillment of any action, failure to comply with certain obligations, e.g. untimely execution of the contract conditions, the

[1] *Садикова Я. М.* op.cit.
[2] *Н. М. Коршунов, Ю. Л. Мареев.* op.cit., p. 219

absence of circumstances precluding the liability of a person, etc.[1] However, the researchers acknowledge that this classification is relative (non-existent facts may not be included into the subject of proof), since they reflect the division of the responsibility of proving[2]. Procedural law sets no difference between the positive and negative facts as well as both can be proven if they are identified and unambiguous[3]. The negative facts are attributed to the duty of their denial, and therefore are being proved with a help the establishment of the positive facts associated with them[4]. In many cases, their presence in the subject of proof is the result of evidence presumptions displaying the shift of the duty of proof of the party to the duty of refutation of the other party[5].

The relations of positive and negative facts with the realization of the competition principle by the parties, and also between the definition and allocation of responsibilities for proof were pointed by prerevolutionary legal procedure specialist P. Tsytovych. The scientists also believed that negative facts were positive for the defendant because on the plaintiff's claim they gave the facts that refute them and in turn the defendant was forced to give other facts that would refute the objection of the defendant, while these facts the plaintiff must prove with a positive attributes of their composition[6].

Notably that the view of the prerevolutionary legal procedure specialist is confirmed by modern jurisprudence. For example, the three plaintiffs sued a claim to the "Oranta" LLC for damages caused by the infringement of copyright. Substantiating their claims, the plaintiffs stated that via bookstores and Internet in Ukraine was carried out the realization of the edition which contains 286 works of a famous Ukrainian master lady of naive painting, and the publisher and manufacturer of the layout original was the defendant. The plaintiffs also indicated that they were the only painter's heirs and they didn't give the permission to use the works in the art album. Thus, the plaintiffs believed that there was the misuse of works resulted in numerous violations of their property rights: 1) the right to reproduce works; 2) the inclusion of these works as components to the album; 3) the right to charge for use.

In turn, the defendant objecting the charges against him pointed that the direct relation to the album realization had the director of the All-Ukrainian Charitable Foundation named after the painter who was the author of the idea of the album publication, the complier and the author of the articles, and the president of the Foundation, who was the author of articles as well. In the process of making the layout of the album, the president got from the still living painter the reproductions of paintings, and also it was given the commission to sell paintings that she painted, with all rights to them.

The defendant's counsel raised the question concerning the plaintiffs' origin. As a result in the hearing the court found that the heirs of the painter were her son and daughter-in-law (one of the plaintiffs). Herewith, two of the plaintiffs (daughter's-in-law children) in accordance with the donation agreement passed by 1/3 each of the rightful property of copyright for works of

---

[1] *Зайцев Н., Фокина М.* Отрицательные факты в гражданских делах, "Российская юстиция", 2000, № 3, pp. 19–20

[2] *Н. М. Коршунов, Ю. Л. Мареев.* op.cit., p. 220

[3] *Абрамов С.Н., Чапурский В.П., Шкундин З.И.* Гражданский процесс, М.: Юрид. изд-во МЮ СССР, 1948, p. 188

[4] *Зайцев Н., Фокина М.* op.cit., p. 20. 19

[5] *Н. М. Коршунов, Ю. Л. Мареев.* op.cit., p. 220

[6] (Tsytovich Civil PP process, lecture notes, cheat. Un in th St. Vladimir (Fall. Semester 1887 g) / PP Tsytovich. - Kiev: Tipo-lytohr. Kushnereva, 1887. - (110 c.) P. 46

the national painter of Ukraine, which at the time of signing of the contract belonged to the donor on private economic rights. However, the court with sensitivity to the arguments of the defendant, acknowledged such agreement as voidable because it contradicted with the letter and meaning of the law, which provides a certain procedure for acquisition of property copyrights. Therefore, the court found the two plaintiffs improper.

The court also verified the defendant's argument on the fact that it provided only printing services and had no concern to the violation of economic copyrights. Based on the initial data of the collection of reproductions of paintings of the famous master from private collections, the layout and printing of this publication was realized by "Oranta" LLC, i.e. the defendant. The defendant "Oranta" LLC in accordance with its Statute carried out, *inter alia*, the editorial and publishing activities and provided printing services. According to the agreement signed between the customer – "TAS INVESTBANK" JSC and the contractor – "Oranta" LLC, the customer ordered and the contractor pledged to carry out a printing operation for the manufacture of the copies of the art album of the famous painter. Under the agreement conditions the customer agreed with the contractor the required material videlicet the image captures and approved the texts.

The plaintiff's counsel drew the court's attention to the fact that the arguments of the defendant's representative regarding the transfer per procurationem of powers by the author of art works to the president of the Foundation who was defined as the compiler of the album, not only did not correspond to the actual content of the proxy, but could not be a ground for dismissal of the defendant from liability considering the fact that that did not certify the fact of the justifiable use of works without the consent of the copyright holder. In accordance with the proxy presented to the court, the painter entrusted to sell paintings drawn by her with all the rights to them. On this issue the court supported the views of the counselor of the plaintiff, that this procuration should not be considered as the transfer agreement of economic copyrights to the pictures or of the use of the pictures in any manner.

So the court perceiving the arguments of the parties concluded that the defendant had infringed the copyright property of the plaintiff, who was the holder of economic copyright by issuing the reproductions of the works without permission of the copyright holder, and therefore the plaintiff filed a claim for protection of rights by choosing a way to recover it in the form of recovery from the defendant the amount of compensation for infringement of economic copyrights to the controversial works.

At the same time, the court deciding the issue of compensation for infringement of copyright took the arguments of the defendant. The court took into account that the controversial art album was released with the noble intentions – to promote the cultural heritage, to which the figure of the painter belonged, and without the occurrence of any negative consequences for the plaintiff. The circulation of the edition was only 1000 copies that were fully delivered to the customer, and the defendant didn't receive the income from the distribution of the album.

Under the circumstances pointed by the plaintiff, relating to calculation of the size of the compensation, and the motives of grounding of such size, the court shared the position of the defendant, who drew the attention to the fact that the plaintiff and their counsels didn't give convincing arguments and not provided adequate evidence on which they based applying to court for the recovery of the compensation.

So based on the very fact of the violation and its level, the method and the amount of improper use, i.e. free reproduction of works of the famous painter and including them as components to the album that was together grounding on the specifics of violations the set of actions on the publishing of the album, which the court recognized as one violation, and in a greater degree was lost profit, which the plaintiff would had been able to get for the use of the named works, the court determined the compensation of 10 minimum wages at the time of decision.

Thus, the compensation for violation of copyright, the court reduced from alleged 88 800 UAH to 9 600 UAH.

As for compensation for moral damages, in justification of their demands the plaintiff's representatives referred to the fact that the name of the artist in the album was indicated incorrectly and that was a fundamental infringement of moral right to the name of the person, and moral copyright to the author's name of the folk artist. However, the court accepted the argument submitted by the defendant – certificate from V. Yatsiy, the scientific secretary of the Ukrainian Language Institute of the National Academy of Sciences of Ukraine, – two variants of the surnames of painter were the graphic variants of the very same surname and from the linguistic point of view they could be considered identical. Moreover in the Decision of the Supreme Administrative Court of Ukraine of 18.08.2010 it was established that there was an ambiguity in the use of the surnames of the painter and the usage in two meanings.

Under such circumstances, taking into account that the art album was issued to commemorate the memory of the outstanding Ukrainian artist on the occasion of her 100th anniversary, the indication of one of the variants of the painter's surname was not its disfigurement, identified her as the author of the works included in the album and did not refute her authorship.

In addition, the claimant requested within one month after the decision entered into force the publication of the information about violations of copyright and judgment on these violations in the mass media. But this motion was not satisfied by the court because the plaintiff did not described the reasons and justification for the use of such measure and did not specify of what content should be information and how it affected the renewal of their rights or that there was a threat of infringement, on the assumption that basically it was a mean of preventing new wrongdoings[1].

The abovementioned example of judicial practice demonstrates the conventionality of the classification of facts that are the subject of proof to the positive and negative. Thus, such positive evidence as contracts that the parties submitted to the court that would have confirmed the existence of certain relations (the relations of a gift, relations regarding the use of pictures) as a result of their investigations by the court turned to negative facts – the recognition of two plaintiffs inadequate, the lack of trustee's rights to the use of copyrighted works. At the same time, the given example demonstrates the connection of positive and negative facts with the realization of the competition principle by the parties, as well as the definition and separation of the responsibilities of proof.

Summarizing the research of the subject of proof in cases arising from copyright relations the author suggests that the fact in proof under this category of civil cases forms the facts that are substantive legal and procedural in nature.

---

[1] *Decision* of the Solomyansky District Court in Kyiv № 21640/10, 11 April 2011, Case No 2-71 / 11 available at: http://pravoscope.com/act-rishennya-2-1640-10-kalinichenko-o-b-04-05-2011-spori-pro-pravo-intelektualno-vlasnosti-spori-pro-av-14872606

All these facts that are the subjects of proof depending on the time of their incipience belong to the facts-event (occurred in the past) or the facts-state (which is lengthy and can be directly perceived by the court). The facts that are the subject of proof belong to the legal facts. The court examining all the circumstances of the case aims to establish the real existence of facts which are the subject of the litigation rather than the assumption of their existence. The proper establishment of the fact in proof in a particular case impact directly on the result of the proceedings - the sustaining or dismissing the claim.

СФЕРА ДОКАЗІВ У СПРАВАХ, ЯКІ ВИНИКАЮТЬ З ВІДНОСИН АВТОРСЬКОГО ПРАВА, В УКРАЇНСЬКІЙ ТЕОРІЇ ТА ПРАКТИЦІ ЦИВІЛЬНОГО ПРОЦЕСУ

Штефан О. О., кандидат юридичних наук, доцент,
старший науковий співробітник відділу юрисдикційних
форм правового захисту суб'єктів приватного права,
судоустрою та судочинства Науково-дослідного
інституту приватного права і підприємництва
імені академіка Ф. Г. Бурчака НАПрН України (Київ)

Ключові слова: доказ, авторське право, цивільний процес, факти.

Ця практична наукова стаття присвячена фактам доказування (предмету доказування) у справах, що виникають з авторських прав. Визначення факту доказування в цивільних справах є одним з найбільш суперечливих питань української теорії цивільного процесуального права.
Автор аналізує формування та розвиток сучасної української концепції доказів та доказів у цивільних справах, в яких один із ключових місць - це доказ. Предметом доказування конкретної цивільної справи є важливе значення не тільки для теорії цивільного процесуального права, але і для судочинства, оскільки належне встановлення факту, який є доказом у конкретній справі, безпосередньо впливає на результат судового розгляду - задоволення або відмові у вимогах.