

Research on "Impeding" in Pre-litigation conduct preservation provision of the Copyright Law

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Abstract. Article 56 of the current Copyright Law provides for the preservation of pre-litigation acts. Compared with Article 50 of the Copyright Law before the amendment, the main modification lies in the increase of the applicable circumstances of "Impeding the realization of its rights". This amendment extends the scope of application of pre-litigation copyright protection to the acts that impeding copyright owners from realizing their rights. However, the current law, relevant regulations and judicial interpretations do not provide for the meaning of "Impeding", and there is little discussion in the academic community. The vagueness of the term may create difficulties in its application. Therefore, the author analyses the meaning of the term "Impeding", taking into account the content and characteristics of the Civil Code and the Copyright Law. In the author's view, "Impeding the realization of its rights" shall mean that the actor has committed an act that endangers the copyright owner or the relevant right holder's enjoyment of both full ownership and the limited carrier of the copyrighted work. The judicial interpretation or relevant regulations should be made to further explain the provisions of the act of preservation.

Keywords: copyright, pre-litigation conduct preservation, Impeding the realization of its rights.

1. Introduction

Compared with Article 50 before the amendment, the main modification of Article 56 of the current Copyright Law is to add the application of "obstructing the realization of rights", so that the scope of application for pre-litigation preservation of copyright-related disputes is extended to infringement of rights and acts that obstruct the realization of rights of the right holder. However, there is no clear provision in the existing legal provisions on "obstructing the realization of rights", and there is no unified terminology in the legislation for the words of obstruction, hindrance and infringement, and there is no unified understanding in the academic circles, thus it can be seen that the meaning of "obstruction" in the new application is not clear yet. The meaning of "obstruction" in this new application is not yet clear. According to article 103 of the civil procedure law, the parties to apply for pre-litigation behavior preservation need to provide security; if no security is provided, the court will rule to reject the application. The expression "hinder the realization of their rights" blurs the boundary of the applicable conditions, will make the parties cannot predict the success rate of the application for security and cannot judge whether to prepare security in advance, invariably increase the difficulty of the parties to apply for pre-litigation behavior preservation. Article 1167 of the Civil Code, as a preventive civil liability mode, is associated with Article 50 of the Copyright Law before the amendment, and the Leading Group for the Implementation of the Civil Code of the Supreme People's Court has requested that Article 1167 of the Civil Code be seamlessly connected with the relevant litigation system, including preservation measures, especially behavior preservation [1]. If the application of pre-litigation behavior preservation of the related law articles cannot be clear, it is difficult to achieve a seamless connection with the provisions of the civil code. Therefore, in order to improve the pre-litigation behavior preservation system as well as to improve the connection between laws, it is necessary to clarify the meaning of "hinder its realization of rights" in Article 56 of the current Copyright Law.

2. Problems of the existing "Copyright Law" pre-litigation behavior preservation provisions

Compared with the pre-litigation act preservation measures stipulated in Article 50 of the Copyright Law before the amendment, there are two main changes in Article 56 of the current Copyright Law: firstly, "acts that hinder the realization of rights" are added to the circumstances for applying for preservation, and secondly, the original "order to stop the relevant acts" is refined to "ordered to make certain acts or prohibit the making of certain acts". The problem of the first amendment is that the meaning of "obstructing the realization of its rights" is unclear, and the recognition standard of the corresponding "difficult to make up" is unclear. This will lead to different standards applied by the court in dealing with copyright pre-litigation act preservation applications, which in turn makes the preservation applications with the same content not get the same treatment results and undermines the authority of justice. The second amendment makes more detailed provisions on "ordering to stop the relevant acts", that is, in addition to the original prohibitive provisions on acts, it also adds mandatory provisions on acts (ordering to make certain acts). This amendment is derived from the content of Article 100 of the Civil Procedure Law on the pre-litigation behavior preservation of civil litigation, and the language of the pre-litigation behavior preservation provisions of the Copyright Law is consistent with the Civil Procedure Law, which is conducive to a more systematic and perfect preservation system.

Therefore, the main problems of Article 56 of the current Copyright Law are: the unclear meaning of "hinder the realization of its rights" and the corresponding "irreparable damage to its legitimate rights and interests if not stopped in time". The standard of "irreparable" is not clear. This article only discusses the first problem.

(1) The addition of "obstructing the realization of rights" may easily cause confusion about the attributes of copyright

Article 56 of the current Copyright Law reads "The copyright owner or the right holder related to copyright has evidence to prove that another person is committing or about to commit an act that infringes his or her rights and prevents him or her from realizing his or her rights". Since the law does not specify what rights are "impeded" by the acts of others, it is easy to think that the rights "impeded" are the same as the rights in the aforementioned "infringement of their rights", but in fact this is not the case.

In the light of the preceding article of the law, the "right" in the aforementioned "infringement of its rights" refers to copyright (including neighboring rights), and copyright itself is only a right of prohibition, i.e., the right to prohibit others from carrying out acts controlled by the exclusive right without permission without legal provisions. The copyright itself is only a right of prohibition, i.e., the right to prohibit others from performing acts controlled by the exclusive right without the law. If the right in "preventing the realization of its right" refers to the copyright, then the expression means "preventing the copyright owner from carrying out the act of prohibiting others from infringing its copyright". In this case, if the perpetrator has the subjective intention, he/she is helping others to commit infringement, which constitutes indirect infringement of copyright, and the previous provision of "committing infringement of his/her rights" can be directly applied. The subjective attitude of the perpetrator is relatively easy to judge. If the perpetrator is not subjectively at fault and will generally stop the obstructive act after being informed by the copyright owner; if the perpetrator does not stop in time after knowing that the consequence of his obstructive act is to help others to commit copyright infringement, it is sufficient to consider that the perpetrator has subjective malice and thus constitutes indirect infringement. Therefore, if the "right" in "obstructing the realization of the right" here refers to the copyright as a prohibited right, it is not meaningful in practice. If the "right" refers to the copyright that includes the attributes of the right of self-use and the right of prohibition, then it seems to be established.

Assuming that copyright includes both the right of self-use (i.e., the right holder has the right to publish, distribute, disseminate, etc., the object to which he or she has exclusive rights) and the right of prohibition, then "preventing him or her from realizing his or her rights" includes "preventing the

right holder from benefiting from the use of copyright". This understanding. In disputes related to the copyright object, "preventing the realization of its rights" can be understood as an act committed by the perpetrator that prevents the copyright owner or other right holders from enjoying or enjoying the object protected by copyright, or prevents the right holder from benefiting from the use of the object. This new provision is reasonable only when "right" means the right of self-use, but copyright itself does not contain the meaning of "right of self-use". Long before the Copyright Law was enacted, authors could exploit their works through publication, distribution and dissemination on their own, in accordance with the civil liberties granted by the Constitution. The Copyright Law was enacted not to confirm the aforementioned freedom rights, but to prohibit others from exploiting works in a specific manner. Therefore, if the meaning of "prevent the realization of the right" is not clarified, it may be easily misunderstood that the legislation tacitly includes the meaning of the right of self-use [2].

(2) Confusion over the usage of the terms "hinder", "obstruct" and "infringe

The new definition of "obstructing the realization of rights" in the current Copyright Law expands the scope of application of pre-litigation preservation in copyright disputes from "infringement" to include "obstruction", with the purpose of the purpose is to improve the efficiency of the copyright owner or the relevant right holder in realizing the purpose of litigation [3]. However, the Copyright Law and related regulations and judicial interpretations cannot find provisions that can be used to clarify the meaning of "obstructing the realization of its rights", making the meaning of the use of the situation unclear and the application of the elements of judgment unclear, and the rulings made by judges in copyright pre-litigation preservation cases are more controversial. In order to ensure the correct judgment, judges may raise the threshold of application of pre-litigation preservation in the process of hearing cases, increasing the difficulty for copyright owners or interested parties to apply for pre-litigation behavior preservation, resulting in the actual narrowing of the scope of application of copyright preservation, which is contrary to the purpose of the initial amendment. Therefore, only when the relevant regulations, judicial interpretations or guidelines are clarified, the court will facilitate the specific application in the case of copyright pre-litigation behavior preservation [4-6].

3. Modification suggestions

3.1. Understanding "obstruction" in the context of the provisions of the Civil Code

The "exclusion of obstruction" in the Civil Code belongs to both tort liability and absolute rights. According to the relevant interpretation, "removing obstruction" is one of the responsibilities of infringement cessation, which means that when the normal exercise of the absolute right of the right holder is obstructed by the behavior of others, the right holder can request the infringer to remove the obstruction to the proper exercise of the right according to the exclusivity of the right. In the Tort Liability Law, "removing obstruction" is stipulated as tort liability, and the civil liability in the General Principles of Civil Law also includes removing obstruction, therefore, "removing obstruction" is both one of tort liability and absolute right. Moreover, since China's Tort Liability Law does not adopt the traditional tort liability system of the civil law system, therefore, the "exclusion of obstruction" in Article 1167 and Article 179 of the Civil Code, which correspond to the two aforementioned laws, does not necessarily refer to the tort that causes "damage". It is also possible that the right holder may exclude obstacles and impediments to the proper exercise of the right when others impede the exercise of the absolute right.

First of all, the "exclusion of obstruction" in the Civil Code belongs to both tort liability and absolute rights. According to the relevant interpretation, "removing obstruction" is one of the responsibilities of infringement cessation, which means that when the normal exercise of the absolute right of the right holder is obstructed by the behavior of others, the right holder can request the infringer to remove the obstruction to the proper exercise of the right according to the exclusivity of the right. In the Tort Liability Law, "removing obstruction" is stipulated as tort liability, and the civil liability in the General Principles of Civil Law also includes removing obstruction, therefore,

"removing obstruction" is not only one of tort liability but also a proper meaning of absolute right. Moreover, since China's Tort Liability Law does not adopt the traditional tort liability system of the civil law system [7], therefore, the "exclusion of obstruction" in Article 1167 and Article 179 of the Civil Code, which correspond to the two aforementioned laws, does not necessarily refer to the tort that causes "damage". It is also possible that the right holder may exclude the obstruction and impediment to the proper exercise of the right when others obstruct the exercise of the absolute right.

Secondly, if the object of "remove obstruction" is to cause "damage" to the tort, it will be empty "stop infringing" this way of responsibility. If the "obstruction" is considered to be an unreasonable obstacle to the exercise of the rights of others, which may or may not actually cause damage, in the case of causing damage, the "removal of obstruction" can completely replace. In the case of causing damage, "stopping the infringement" is a perfect substitute for "stopping the infringement" and stopping the continuation of the infringement. And, according to Article 179 of the Civil Code, "the ways of assuming civil liability provided for in this Article ----- may also be applied in combination." This means that the eleven forms of civil liability are juxtaposed, and the content of liability is different and there is no relationship of inclusion and inclusion, otherwise, the content of the included liability would not have the need to be combined. Therefore, if you think that the "removal of obstruction" for the actual cause of damage and no actual cause of damage, then only for the "actual cause of damage" behavior of "stop infringement". This is inconsistent with Article 179 of the Civil Code, which states that "eleven forms of civil liability may be applied together."

Finally, "excluding obstruction", which only means "not causing damage", is conducive to the dovetailing of Article 56 of the Copyright Law with Article 1167 of the Civil Code. Article 1167 of the Tort Liability Division of the Civil Code, which is linked to Article 50 of the Copyright Law before the amendment (corresponding to Article 56 of the current Copyright Law), is a provision on the way to assume preventive civil liability. According to the interpretation of the Supreme Court, this type of infringement liability bearing mode mainly includes stopping infringement, removing obstruction and eliminating danger, and the infringing acts targeted are infringing illegal acts that have occurred and are continuing, obstructing acts that actually exist or are bound to appear in the future, and acts that may cause real damage, etc. Before the amendment, Article 50 of the Copyright Law only had the act of "infringement of its rights being committed or about to be committed", which could only correspond to the aforementioned infringement liability modes of stopping the infringement and eliminating the danger, while the "obstructing the realization of its rights" added by Article 56 of the current Copyright Law. The "obstruction to the realization of the right" added to Article 56 of the current Copyright Law has the meaning of "actual or inevitable future obstruction", which can correspond to another way of infringement liability, i.e. the exclusion of obstruction, so that the two existing laws can be better dovetailed.

3.2. Understanding of the right to be "hindered"

The object of "hindrance" can only be a tangible object as the carrier of the work, not an immaterial object such as intellectual achievement or body and freedom.

First of all, the object of intellectual property is mainly immaterial intellectual achievements, and the major difference between it and the object of property rights is that intellectual achievements can be possessed and used by more than one subject at the same time without affecting each other [8]. When others enjoy and use a certain beautiful musical work, it does not affect others who play the same musical work at the same time or place. Therefore, the object of the impeded right cannot be the intellectual achievement.

Secondly, the meaning of copyright only includes the right of prohibition i.e., the right to prohibit others from performing acts controlled by the exclusive right, and does not include the right of self-use i.e., the right holder's exploitation of the work. Therefore, if another person prevents the copyright owner or the relevant right holder from using the work by blocking, intercepting or restricting personal freedom, such as illegally preventing the author from publishing or publishing his work through legal means; illegally preventing the author from signing his name on his work; illegally

preventing or preventing the author from modifying his work; illegally preventing or preventing the author from freely using his work by various means according to his will; illegally preventing or preventing the author or The acts of obstruction which unlawfully prevent the author from receiving remuneration; unlawfully prevent the author from transferring his copyright [9] are not acts of imposing copyright regulation on the work. At the same time, the aforementioned acts such as obstruction may violate personal rights, which can be regulated through the Public Security Management Punishment Law or even the Criminal Law, and its regulation effect is better than the effect of pre-litigation act preservation under Article 56 of the Copyright Law. Therefore, the immaterial object or body and freedom cannot be used as the object of the right of "being obstructed" stipulated in Article 56 of the Copyright Law.

Finally, the object of the right to be "interfered with" is the carrier of the work. Others may obstruct the enjoyment and use of the work by others through possession, hiding, refusing to return, etc., and require that the owner of the work has the right in rem to the carrier of the work, otherwise, it does not enjoy the basis of the right to "exclude obstruction".

The copyright owner or the related right holder must independently enjoy full ownership of the physical object that is the object of the infringement. If co-author A, who jointly enjoys the ownership of the carrier and copyright of the work, obstructs co-author B from exercising his rights other than transferring, licensing or pledging the exclusive use of the work without infringing the copyright of the co-author's work as a whole, B cannot destroy A's right in rem on the ground that he has the copyright of the work on the carrier. And only when co-author B independently enjoys complete ownership of the material carrier of the collaborative work, he can demand A's return of the original property based on the right to claim the return of the original property. Therefore, the copyright owner must independently enjoy complete ownership of the material carrier of the work.

In general, the direct consequence of the destruction of the carrier of a work is the destruction and loss of the "tangible objects" rather than the destruction and loss of the "intangible works". Even after the loss of all carriers, most of the "intangible works" can still exist and their copyrights will not be lost [10]. For example, even if all the paper materials and electronic materials related to "Spring Water of the Star" are destroyed and lost, Bing Xin as the author and other copyright holders will never lose their copyrights on the poem. As "Spring Water on a Star" is a recommended book for elementary and junior high schools and is required to be memorized in junior high schools, there are many people who can recite the work in its entirety and it is very likely that the work will be "reproduced" through complete mime. Therefore, in general, it is possible to recover a work in an objectively perceivable way after its carrier has been destroyed.

The situation is quite different when it is not possible or difficult to recover the work in tangible form. For example, if the original sculpture is not reproduced in any form, the carrier is the sculpture material itself, and once the carrier is destroyed, there is no possibility of full restoration, and the author cannot profit from the sculpture. Similarly, if the carrier of the work is very limited, for example, if there are only ten originals and copies of the aforementioned sculpture scattered in all corners of the world, once the original or the copy of the sculpture to which the copyright owner has independent and complete ownership is destroyed and lost, the cost of money and time to collect other copies will be very high, so that it is difficult for the copyright owner to make profits from the work. In the latter case, even if the carrier is not destroyed or lost, it is still difficult for the copyright owner to obtain a replacement copy of the work in case of emergency. Therefore, allowing the copyright owner or the relevant right holder to apply for pre-litigation behavior preservation under such circumstances is of great significance to protect the copyright owner to utilize the work.

If the number of work carriers is large enough, even if the carrier owned by the copyright owner is destroyed or lost or possessed by others, hidden and refused to be returned, the copyright owner can also obtain the carrier again by purchasing or leasing, etc. so as to realize the utilization of the work on the carrier. In this case, there is no "urgency" or "irreparable damage", and the copyright owner can be compensated for the damage and the increased cost to remove the obstruction through arbitration, prosecution or mediation afterwards.

Therefore, once the actor causes obstruction or hindrance to the copyright owner or the relevant right holder in using the limited work carrier, resulting in the right holder being unable to use the work normally and reasonably, it may cause irreparable damage to the interests of the right holder, and the right holder should be allowed to stop the actor's infringement and illegal acts in time by applying for pre-litigation preservation.

4. Conclusions

To sum up, the key to clarify the meaning of "obstructing the realization of its rights" is, firstly, to determine that the "rights" are the complete property rights of the carrier of copyrighted works, not the rights related to the body, freedom and immaterial carriers such as intellectual achievements; secondly, the Secondly, the object of the right must be "limited" to the extent that the actor's obstruction of the "limited" work carrier is likely to cause "irreparable damage" and trigger the application and commencement of pre-litigation preservation. The application and initiation of pre-litigation preservation. Finally, the clear meaning of "hindering the realization of its rights" is conducive to better play the function of copyright pre-litigation preservation.

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