

Beijing Intellectual Property Court
Handbook for Evidence Presentation of Parties in Civil Cases Involving Computer Software
Copyright

Civil cases involving computer software copyright include three types of causes of action, namely, disputes over ownership of computer software copyright, disputes over infringement on computer software copyright and disputes over computer software contracts. In order to guide the parties to better participate in litigation and fulfill the presentation of evidence, this Handbook for Evidence Presentation is formulated in light of the characteristics of civil cases involving computer software copyright.

I Cases Involving Disputes over Ownership of Computer Software Copyright

1. How can the party concerned prove the ownership of computer software copyright?

Answer: In general, the software copyright belongs to the software developer.

Without contrary evidence, the natural person, legal person or other organization whose name is stated on the software is the developer.

Where the plaintiff claims that it owns the computer software copyright, it can provide the following evidence:

- (1) the signature on the computer software;
- (2) the signature contained in the source code, notes and website address of the computer software;
- (3) the registration certificate of copyright of the computer software;
- (4) certificate from a certification agency;
- (5) contract on which the right is obtained; and
- (6) right owner declaration in line with the industry practice.

Where the defendant opposes the plaintiff's computer software copyright, it can provide the following evidence:

- (1) other signatures inconsistent with that on the computer software;
- (2) certificate indicating other ownership issued by a certification agency;
- (3) copyright registration certificate indicating other ownership issued by the work registration organization;
- (4) statement indicating other ownership issued by the right owner; and
- (5) objections to the plaintiff's entitlement to the software ownership are raised on the basis of the nature and type, form of expression, industry practice, public cognitive habits and other factors of the software.

2. How can the party concerned prove the ownership of the copyright of the computer software developed upon entrustment?

Answer: Where a party concerned claims its copyright of the software when there is a entrusted development contract, it can provide the following evidence:

- (1) the agreement in the entrustment contract on the ownership of the software copyright; and
- (2) where there is no provision or explicit provision in the entrustment contract, the trustee may submit the entrustment contract and claim copyright pursuant to laws.

3. How can the party concerned prove the ownership of the software developed as a task assigned by government?

Answer: Where the party concerned claims its entitlement to the copyright of the software developed as a task assigned by government, it can provide the following evidence:

- (1) provisions of the project assignment document or contract; and
- (2) where there is no explicit provision in the project assignment document or contract, the legal person or non-legal person that accepts the task may submit the project contract and claim copyright pursuant to laws.

4. How can the party concerned prove the ownership of work for hire?

Answer: Where the party claims that the case-related Software is work for hire, it can provide the following Evidence:

(1) Evidence of software development by using material and technical conditions, including funds, equipment, drawings, materials and technology.

(2) The evidence of work activities shall include business license, the legal person certificate of public institution, relevant administrative examination and approval formalities, labor contract, personnel relation certificate, tax payment certificate, etc.

II Cases Involving Computer Software Copyright Infringement Disputes

5. What types are included in the cases of disputes over computer software copyright infringement?

Answer: Computer software infringement disputes include disputes over infringement upon computer software copyright and disputes over confirmation of non-infringement upon computer software copyright.

6. How can a party claim the content of rights and types of infringement act and present evidence?

Answer:

6.1. Plaintiff's Claims

If a plaintiff claims that the defendant infringes the copyright of its computer software, it can clarify the specific content (right items) of the copyright infringed by the defendant. If there are more than one versions of the computer software over which rights are claimed by the plaintiff, the plaintiff can specify the name and version of the software over which rights are claimed and provide evidence to prove it, and may choose the most similar version of the computer software as the basis for the claims.

The plaintiff can distinguish different conditions according to the features of infringement acts, for instance pure dissemination, end-user, plagiarism, damaging technical measures, or leasing, and provide its evidence.

6.2. Evidence Presented by the Plaintiff

The plaintiff who claims that the defendant has infringed its computer software copyright may submit the following evidence:

- (1) Evidence proving that the defendant has touched the claimed software and the alleged infringing software is substantially similar to the claimed software.
- (2) Target programs of the parties' software and source programs of the claimed software.
- (3) The source programs of the alleged infringing software shall be generally provided by the defendant. If the defendant refuses to provide the source programs or the source programs provided by the defendant are not accepted, the plaintiff may assert to compare the target programs of the claimed software with those of the alleged infringing software.

6.3. Comparison Process

- (1) The party concerned can submit the CDs, USBs or portable hard disks that are installed with the computer source programs, seal them up and submit them to the court in encrypted form.
- (2) The comparison of the source programs and the target programs may be conducted by an authentication institution or by both parties concerned organized by the court. When the court organizes the parties concerned to make the comparison, the party concerned may also apply for its technical personnel to jointly participate in the comparison.
- (3) Before comparing the source programs, the correspondence between the source programs and the target programs of the plaintiff's and the defendant's computer software need to be determined.
- (4) The party concerned may request that the other party can not retain the source program submitted by such party. If one party need to issue cross-examination opinions on the source program, it may request the other party to make a confidentiality undertaking, or the court may make a confidentiality maintenance order, and then copy the source program submitted by one party to the other party.

7. How can the parties concerned claim and adduce evidence in cases of end-user infringement?

Answer:

7.1. The plaintiff's claims

If the plaintiff alleges that the defendant is the end-user and has infringed upon the software reproduction right, it can provide evidence to prove that the defendant uses the software for commercial purpose and has no legal source. Specifically, the following facts may be adduced:

- (1) The defendant has copied and installed the plaintiff's software for commercial use without permission or beyond the scope of permission;
- (2) Although the defendant does not reproduce the plaintiff's computer software, it knows or should have known that others have reproduced the plaintiff's computer software without permission or beyond the scope of permission, and that the defendant's use of such computer software is within the scope of its normal business operation;
- (3) The defendant hopes to obtain commercial benefits through the use of the software. If the defendant uses the software for personal study and research, it shall not be deemed as commercial use.
- (4) Regarding the fact that the defendant "knows" or "should have known" that the claimed software is the infringing copy, the plaintiff can provide evidence to prove the following facts: firstly, whether the price paid by the defendant for purchasing the relevant software is reasonable; secondly, the information about the purchasing channel and the distributor of the software purchased by the defendant; thirdly, the cognitive ability of the defendant on the relevant software.

7.2. The plaintiff's evidence

The plaintiff who alleges that the end-user has infringed upon its computer software copyright may provide the following preliminary evidence:

- (1) Administrative penalty decision;
- (2) Testimony of the employee of the defendant, or testimony of the witness who has contacted the computer system of the defendant;
- (3) Advertisement produced by the defendant specifying that the defendant has used the claimed software;
- (4) Recruitment information issued by the defendant, which requires job applicants to be proficient in the claimed software;
- (5) Product manual or product produced by the defendant specifying that the defendant has used the claimed software;
- (6) Photos or videos of the claimed software running in the computer used by the defendant;
- (7) Type, version and quantity of the computer software used by the defendant.;
- (8) Other preliminary evidence.

Having provided the above preliminary evidence, the plaintiff may apply for investigation to collect evidence or evidence preservation regarding the fact that the defendant has used the claimed software. During investigation and evidence collection, if the number of computers to be inspected is too large to be inspected, a random inspection may be conducted with the consent of both parties concerned, and both parties concerned shall confirm in writing that the inspection result is applicable to the entire inspection scope. In some cases, remote evidence collection may be adopted.

8. How can a party concerned assert and produce evidence regarding the case of destroying technical measures?

Answer: Where the plaintiff alleges that the defendant has intentionally circumvented or sabotaged the technical measures adopted by the copyright holder for protecting its software copyright, which constitutes infringement, the plaintiff can provide evidence about the following facts:

- (1) The plaintiff has adopted technical measures;
- (2) Ordinary users are generally unable to avoid or decode the technical measures;
- (3) The defendant has destroyed or avoided the technical measures.

9. How can a party concerned present evidence to prove the defense of software transplantation?

Answer: With respect to the alleged infringement act, if the defendant pleads that the allegedly infringing software has been rewritten by the defendant with other programming software based on the plaintiff's technical solution after the defendant studied the technical solution of the plaintiff's computer software, evidence can be provided about the following fact: the plaintiff and the defendant respectively used programming software with significant differences, and the computer software of the parties has substantive differences in terms of expression, etc.

III Cases Involving Computer Software Contract Disputes

10. What evidence can the parties submit relating to the content of the contract?

Answer:

The parties can provide complete evidence of the content of the contract, including the text of the contract, appendices and supplementary agreements, as well as the modified and additional content agreed by the parties in written or oral form during performance of the contract.

11. How can the parties adduce evidence to prove the effectiveness of the contract?

Answer: If a party claims that the contract is null and void due to violation of the mandatory provisions of laws and administrative regulations, it can specify the particular terms of the mandatory provisions of laws and administrative regulations, and adduce evidence to prove that the contract has violated the provisions of the aforesaid particular terms.

12. How can the parties claim and adduce evidence on performance of the contract?

Answer:

12.1. The plaintiff's claim

The plaintiff may claim the following facts regarding performance of the contract:

- (1) The defendant's mode of performance does not conform to the contract;
- (2) The defendant's late performance;
- (3) The software delivered by the defendant is unqualified;

- (4) The corresponding payment has not been received, or the payment condition has not been met;
- (5) Other situations related to performance.

12.2. The plaintiff's evidence to present

- (1) Adduce the evidence regarding the inconformity of means of performance

Where the plaintiff alleges that the other party, in the course of actual performance, fails to perform in accordance with the ways agreed upon in the contract, or changes the ways of performance or delivery, it can adduce the corresponding evidence. For example, it is agreed in the contract that the delivery shall be by CD-ROM or USB flash disk, and a written acceptance report shall be signed for acceptance, while in the course of actual performance, the delivery is made by WeChat, E-mail and other means.

- (2) Adduce the evidence of rescission of a software development contract due to the delay of performance of the contract

Where the entrusting party claims rescission of the contract for the developer's delay of performance of its obligations of software development or delivery, the entrusting party can provide evidence to prove the facts including the agreement in the contract, the reason for the delay, whether any reminder has been given, and the purpose of the contract frustrated due to such delay.

- (3) Adduce the evidence of the quality of the software delivered in a software development contract

Where the entrusting party claims that the software delivered by the developer is unqualified, while the developer claims that the software quality conforms to the quality requirements as agreed upon in the contract, the entrusting party can provide evidence to the following facts about the functional requirements and the acceptance procedure agreed upon by both parties in the contract:

Where the entrusting party raises an objection on the quality of the development results delivered by the developer, the entrusting party may, if the requirements are met, apply for on-site examination or joint examination by technical surveyors, according to the agreements on the functional requirements and quality standards in the contract.

If the parties have signed the acceptance report, but the entrusting party does not accept the report on the ground that the acceptance personnel have no authorization, evidence can be provided according to the circumstances including the acceptance method agreed in the contract, the position of the acceptance personnel, their work contents and roles in the actual performance of the contract and the trading practice between the parties.

- (4) Adduce evidence of client's failure to receive payments and failure of payment condition

If the subject matter under the contract is part of the project taken over by the entrusting party from the third party not involved in the case, and both parties agreed in the contract that the payment depends on the third party's payment of corresponding amount, the entrusting party can burden proof on the following facts:

When signing the contract, the developer has been aware of the commercial risks in such terms of the contract and is willing to bear the consequences;

The actual payment of the third party, the reason for non-payment, whether any collection has been made to the third party, payment condition was not met, and no fault is on the entrusting party;

The entrusting party, if necessary, may apply to the court to investigate the third party.

12.3. Defense by the Defendant

The defendant may defend the following facts regarding the performance of the contract:

- (1) The performance of the plaintiff does not conform to the contract;
- (2) The plaintiff fails to perform on time;
- (3) The software delivered by the plaintiff is unqualified;
- (4) The corresponding payment has not been received, or payment condition has not been met;
- (5) Other performance-related circumstances.

12.4. Evidence by the Defendant

- (1) Defense against the inconformity of means of performance

Where the plaintiff claims that the other party, during actual performance, fails to perform in the mode agreed upon in the contract, or changes the way of performance or delivery, the defendant may defend that the plaintiff accepted the way of performance without objection, and can provide evidence, such as relevant WeChat and email records, etc.

- (2) Defense against rescission of contract based on claim of delay in performance of software development contract

Where the entrusting party claims rescission of the contract for the developer's delay in performance of its obligations of software development or delivery, the developer may provide different evidence in the following different circumstances:

When the functional requirements were not clear at the time of conclusion of the contract, the Parties further communicate to clarify the development requirements, and the time used for the communication is

reasonable, such circumstance shall not be deemed as delay in performance by the developer;

Where the developer's performance is delayed due to the entrusting party's new increase or change in demand, and the parties otherwise agree to extend the development time, or extend the development time within a reasonable period, such circumstance shall not be deemed as delay in performance by the developer;

Where the developer's delay in performance does not make the entrusting party's purpose of the contract unable to be realized, and the entrusting party directly claims rescission of the contract without sending any reminder;

Where the developer's delay in performance occurs, and after sending any reminder and grace period, the entrusting party finally accepts the results delayed by the developer.

(3) Defense against quality conformance of software delivered in a software development contract

Where the entrusting party claims that the software delivered by the developer is unqualified, while the developer claims that the software quality conforms to the requirements as agreed upon by both Parties, it can prove the following facts according to the functional requirements and the acceptance procedure agreed upon by both parties in the contract:

Where the developer submitted the application for acceptance in the course of performance, but the entrusting party fails to raise the objection on quality or fails to raise the objection within reasonable time, the developer may claim that the entrusting party shall be deemed to have accepted and confirmed the developed results.

13. How can the parties claim and prove rescission of the contract?

A:

(1) In claiming for rescission of the contract, the plaintiff can specify whether the right of rescission is based on agreed rescission or statutory rescission and produce evidence focusing on the reasons and facts for rescission and the time when the rescission notice reached the defendant;

(2) The Breaching Party's right to rescind the contract

Where the breaching party requests rescission of a contract, it needs to prove the existence of the circumstances provided for in Article 580 of the Civil Code.

(3) Claim for rescission of contract after expiration of period of validity or performance of contract

Where the Party claims rescission of a contract upon the expiration of the duration of validity or performance of the contract, it must clearly define the grounds for the rescission and present evidence about the facts of rescission.

Where the period of validity of the contract is different from the period of performance, a party may claim rescission of the contract after the expiration of the period of performance of the contract.

IV Procedural Matters of Civil Cases Involving Computer Software Copyright

14. How can the parties concerned adduce and cross-examine electronic evidence?

A: Where a party concerned submits electronic data evidence such as screenshots of chat records of social software such as WeChat etc., and email screenshots, it can explain the identity of the chatter or the email sender or recipient, as well as the corresponding relationship between the specific chat contents and the facts to be proved.

Where a party raises objects to the authenticity of the electronic evidence submitted by the other party, it can make claims and produce evidence on the following facts: whether the original carrier of the evidence can be provided, whether the evidence is complete and coherent or only the interception of part of the content, whether the identity of the personnel can be confirmed, and the habits of performance by both parties, and may apply for the court to conduct an in-court inquest if necessary.

15. What requirements need a plaintiff meet when applying for evidence preservation?

A: The plaintiff who applies for preservation of infringement evidence can provide evidence on the following facts:

- (1) the copyright ownership of the computer software involved in the case;

- (2) The plaintiff submits preliminary evidence proving the defendant uses the claimed computer software, such as the evidence concerning the type and scale of the claimed computer software used by the defendant in its website or publicity materials, for example: the defendant claims that it can provide software design services for house decoration, website design services and online electronic trading platform services; the defendant has sent out recruitment information, requiring the job applicants to be familiar with the claimed computer software ;

- (3) According to the records from the plaintiff and its agent, the defendant has not purchased the claimed computer software, or although it has purchased the claimed computer software, the model and quantity thereof are quite different from the defendant's own statement on the use of computer software;

The plaintiff who applies for evidence preservation can put forward targeted, scientific and effective suggestions on the steps of evidence preservation.

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