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Exceptions to copyright in Russia and the "fair use" doctrine

EUROPEAN AUDIOVISUAL OBSERVATORY

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Exceptions to copyright in Russia and the “fair use” doctrine

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Foreword

Anyone who wishes to comment on, criticise or make a parody of a copyrighted work may quote a portion of it without the author's permission. This principle is grounded in the notion that without this freedom any author could prevent the expression of possible negative comments about his or her work, with a clear impact on freedom of expression and pluralism of information. Considered from a different perspective, this freedom to quote is an exception to an exclusive right of a rightsholder: what would in principle qualify as an infringement, namely the use of another author's work without prior consent to do so, would under these circumstances be considered legitimate.

This tension between copyright and freedom of speech, which are both recognised as fundamental rights in various international treaties, explains why copyright laws are accompanied by a set of limitations. This encapsulates the US "fair use" doctrine, and is also the rationale of the exceptions to copyright in European countries and of the so-called "free use" principle applied in the Russian Federation.

According to the US Constitution, the very purpose of copyright is "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".[1] As copyright includes a limitation on the right to copy or replicate a work, one could be lead to believe that rather than fostering creativity, it represents an obstacle for other people to create and to build on other people's creation. However, it is exactly thanks to the "transformative" use that is allowed by the exceptions and limitations to copyright that a new work might be created.

Under the fair use doctrine, a "transformative use" – as distinct from "derivative work", which also implies a certain degree of transformative effect – makes a new, original work. Absent this transformative effect, the result would be plagiarism, namely a copyright infringement.[2] A long time before these concepts were translated into modern law, Martial wrote about his rival poet Fidentinus, who had performed one of his works in public pretending he was the author, that "*Quem recitas meus est, o Fidentine, libellus: sed male cum recitas, incipit esse tuus*"[3] (the little book you are reciting is one of mine, Fidentinus, but you are reciting it so badly, it's turning into one of yours). This epigram clearly exemplifies the author's perception of ownership of the initial creation, but also his disclaimer when the transformative effect is so evident (in this case negatively so) that the result is a new work, of which the initial author rejects his ownership.

The purposes of fostering creativity become evident when the effect of a legitimate transformative use is a new work. Nevertheless, this should happen within clearly defined perimeters, otherwise the effect would be quite different; namely the violation of the exclusive

[1] US Constitution, Article 1, Section 8, Clause 8, www.senate.gov/civics/constitution_item/constitution.htm#a1_sec8.

[2] See Cabrera Blázquez F.J., "Plagiarism: an original sin?", European Audiovisual Observatory, Strasbourg, 2004, www.obs.coe.int/documents/205595/2408826/FCabrera_Plagiarism_EN.pdf/4e9b299b-383b-4193-929a-cba887d33bd0

[3] Martialis, *Epigrammata*, 1.38.

rights of rightsholders and, consequently, an infringement of copyright rules. This is the reason why limitations and exceptions to exclusive rights are allowed in certain special cases, provided that they do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightsholders, according to the so-called 'three-step' test provided for by the WIPO Copyright Treaties.

In summary, the rule is that copyright is an exclusive right, whereas the exceptions to it may be allowed in certain special cases in the name of potentially conflicting freedoms, such as those of expression and information, or of education and research, or in order to safeguard certain environments, such as prisons or hospitals, or people, such as persons with disabilities. These exceptions, to be interpreted restrictively, are intended to provide some flexibility to certain uses of a copyrighted work.

The distinction between copyright infringement and legitimate copy of parts of a copyrighted work for the purposes of commenting and/or criticising or of parodying the work is at the centre of the following article. The author, Margarita Sobol, discusses the notion of fair use under US law and its equivalent under Russian law, and describes those exceptions to copyright that aim at balancing copyright with other fundamental rights in both countries, referring to relevant case-law.

With a structure that considers the US and the Russian landscape in parallel, she first explores the main concepts underpinning the two notions of fair use and free use, with a separate chapter devoted to the very specific case of parody. An extensive part of the article explores the influence that the DMCA (the US Digital Millennium Copyright Act) has had on Russian legislation, and touches upon Digital Rights Management (DRM), takedown notices, social issues in the audiovisual media and user-generated content (UGC). Despite these influences, this article demonstrates that Russian copyright legislation remains more anchored in the continental principles of exceptions to copyright than in those deriving from the US practice under the fair use doctrine.

The case-law developed around these concepts is often called upon in the current debate on how to adapt the existing EU regulatory framework to the online environment. This article highlights similarities and differences between the two approaches and helps clarify why a transposition of the fair use doctrine into European legislation, as is requested by many freedom of expression activists, is likely to be a complicated exercise.

Strasbourg, April 2016

Maja Cappello

IRIS Coordinator

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1.1. General introduction

The universal principles of author's rights are enshrined in international law. However, there are two dominant copyright legal traditions in the world: the Anglo-Saxon copyright model and the continental-European model of authors's rights. The first approach prevails in the common law countries and author's rights approach dominates in continental Europe and in South American countries. An important difference lies in the approach to copyright exceptions and limitations and the rationale of fair use legislation. The Anglo-Saxon copyright tradition in this question relies on the common law doctrine of 'fair use' in the US or 'fair dealing' in the UK originally born in the English case law of the 18th century.[4]

In the US legal system fair use exists as a general clause covering exceptions and limitations to copyright, while the continental-European systems provide for a detailed list of limitations and exceptions to droit d'auteur or author's rights.

In the US statutory recognition of this doctrine took place in 1976 when it was introduced in the US Copyright Act following the accession of the US to the Berne Convention. The Russian Federation´s copyright system belongs to the continental legal system.

1.2. The "free use" approach under Russian law

Section IV of the Civil Code of the Russian Federation (hereinafter CC)[5] contains a set of exceptions and limitations under law. It includes the use of protected works for personal purposes, education and research, news reporting, storing copies in libraries and archives, the needs of blind people, perfomance during official or religious ceremonies, law-enforcement purposes etc. Some of these options are considered "free use" which means that protected works may be used without the authorization of the rightsholder and without payment of compensation but under the condition of

[4] Deazley R. On the origin of the right to copy: charting the movement of copyright law in eighteen-century Britain (1695-1775). — London. — 2004. — p. 54.

[5] Гражданский кодекс Российской Федерации от 18 декабря 2006 г. N 230-ФЗ Часть четвертая (Civil Code of the Russian Federation, Section IV), Ros. Gaz., N4255, 22 December 2006, entered into force on 1 January 2008. Available in English at: http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf. Available in Russian at: https://www.consultant.ru/document/cons_doc_LAW_64629/.

indication of the author/rightsholder and source of the material.[6] Free use is usually quite limited in scope and means.

At the same time there is an exception to copyright under Russian law which requires fair compensation. Article 1326 CC stipulates that the public performance or the broadcasting of a sound recording published for commercial purposes is possible without the permission of the rightsholder "but with a fee being paid thereto". The fee is collected by the collective management organisations (hereinafter CMOs) except in cases when the rightsholder declines their services: the opt-out system. Such limitation to copyright cannot be considered free use as it requires payment of the fee.

Also a special levy of 1% of value is imposed upon on sales of all devices capable of storing or reproducing/playing audiovisual works for personal purposes. Such levy compensates rightsholders for the losses caused by private copying, and is payable to them by the manufacturers and importers of the equipment and blank media used for the reproduction/playback; the so-called right to renumeration under Article 1245 CC.

Article 1274 of the CC allows "quoting in the original and in a translation for scientific, discussion, critical or information purposes" only of "legally published works within a scope justified by the purpose of quotation". For example, the use of works as illustrations is legal only in publications, radio and television broadcasts, and sound and video recordings of *educational* nature and purpose.

Reproduction of articles and audiovisual works in different news media is allowed only within reporting on "current economic, political, social, and religious matters". This means that using archive stories and articles or any works to report on unrelated topics is not allowed.

At the same time several exceptions are considered as crucially important for the purpose of news reporting by the media: free use of works seen or heard in connection with current events and works permanently located at a place open for public, for example in streets, squares – or seen from such places. This rule does not apply when such work is the basic object of the reproduction or when the image of the work is used for commercial purposes.

Since 2008 (when Section IV of the CC entered into force) it has also been possible to use copyrighted material for the purpose of parody/caricature in literary, musical or other works. This highly important legal novelty allows parodists to use protected works without rightholders' authorization. However, if the author of the original work considers the parody offensive she or he may seek to protect his or her honor, dignity and business reputation in court (according to Article 152 CC).

While applying free use exceptions, the law provides that "[r]estrictions of exclusive rights to works of science, literature or art, as well as to objects of neighbouring rights shall be established in certain special cases, provided that such restrictions are not at variance with the normal use of the works or objects of allied rights and do not infringe without a good reason upon lawful interests of the rightsholders" (paragraph 5, Article 1229 CC).

This provision was included in the CC as required by Article 10 of the World Intellectual Property Organization (hereinafter WIPO) Copyright Treaty[7] and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights,[8] but provisions of Article 1229 CC are widely

[6] In the US, the term "free use" has a different meaning: it refers to the use of the work from public domain. See Wilson L., "Fair use, free use and use by permission : How to handle copytights in all media". Allworth Press, New York, 2005. – p. 12.

[7] http://www.wipo.int/treaties/en/text.jsp?file_id=295166.

[8] https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

separated from provisions regulating free use as such. As a result, this key aspect is almost forgotten and rarely used in case law.

Until 2014 the CC had no provisions regulating free use in online media (except for citations). Such legal loophole caused misinterpretation of other provisions of the CC in court practice. For example, judges (up to and including the Supreme Court[9]) sometimes misrepresented the Internet as an open-air place, accessible to the public in the same respect as parks, squares, and open-air exhibitions.[10]

1.3. The fair use doctrine in the US

A different approach is taken in the US. There is a statutory fair use provision in Section 17 of the US Code (§107) that stipulates a mere principle from the common law tradition of fair use adjudication. Congress wished courts to consider four factors: the purpose and character of use; the nature of a copyrighted work; the amount and substantiality of the portion taken; and the effect of such use upon the potential market. Many researchers point out that §107 is merely a "statutory recognition" of the fair use doctrine in a form that references some of the criteria previously developed by the courts. These four factors, or tests, are not binding. Courts are free to come to fair use determination based entirely on other factors.[11]

Notably Judge Pierre Leval described the first factor as "the soul of fair use".[12] He underlined that careful evaluation was needed "whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations". In his opinion, the latter almost certainly is not a fair use.

Such approach found its way into the case law on fair use in the audiovisual media. Judges declaring the use in question as unfair noted that fair use is "not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance". In the case of *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*,[13] the Court noted that the rights to information and to access culture or cultural heritage, protection of which is at the core of the fair use doctrine, are "fully assured by the law's refusal to recognize a valid copyright in facts", i.e. ABC could use any factual information instead of taking parts of the film about the future Olympic champion.

However, the media usually use copyrighted material in a transformative way due to its specifics: news reporting, parody, criticism and comment,[14] or sometimes fortuitous and incidental use, could happen during live streaming or live reports.[15]

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[9] "Internet cannot be considered as a place open for public for the purposes of law. Internet is a media space…" - Ruling of the Supreme Court of 8 December 2011, N 34-G11-16. But two years later the Supreme Court made just the opposite decision: "…the Court found that photograph of the cityscape was published on Mr. Fedin's website in the Internet. The access to the website is not restricted and possible without sign-on i.e. the photograph is situated in the place open for public" - Ruling of the Supreme Court of 06.09.2013, N86-APG13-10.

[10] Richter A. Legal foundation of journalism. - Moscow: VK, 2009, p. 234. (Рихтер А. Г. Правовые основы журналистики. — М.: ВК, 2009. - с. 234).

[11] Patry, William F. Patry on fair use, WEST. — 2012. — p. 64-65.

[12] Pierre N. Leval, Toward a Fair Use Standard 103 Harv. L. Rev. 1105 (1990), http://docs.law.gwu.edu/facweb/claw/LevalFrUStd.htm.

[13] Iowa State University Research Foundation, Inc. v. American Broadcasting Co., 621 F.2d 57, 1978, http://law.justia.com/cases/federal/appellate-courts/F2/621/57/184925/.

[14] Video-Cinema Films, Inc. v. CNN, Inc. 60 U.S.P.Q.2d (BNA) 1415, 1422. S.D.N.Y. 2001, https://casetext.com/case/video-cinema-films-inc-v-cable-news-network-inc-2.

As the number of Internet users has grown significantly in the US and in the Russian Federation, the digital shift in media consumption that followed (and related copyright issues) became a major concern of the respective governments. In 1998 the Digital Millennium Copyright Act (hereinafter DMCA) came into force in the US. It was taken as a model for the most recent legislation in the Russian Federation: amendments to the Federal Law "On Information, Information Technologies and Information Protection"[16] and the Civil Procedural Code of the Russian Federation (hereinafter CPC),[17] if taken together known as the "Anti-piracy law".

[15] Italian Book Corp. v. ABC, 458 F. Supp. 65 (S.D.N.Y. 1978), http://law.justia.com/cases/federal/district-courts/FSupp/458/65/1875667/.

[16] Federal Law "On Information, Information Technologies and Information Protection" of 27.07.2006 N149-FZ (ed. 31.12.2014) «Об информации, информационных технологиях и о защите информации», http://old.svobodainfo.org/en/node/441.

[17] http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru081en.pdf.

2. Parody as a special exception in the audiovisual media

2.1. Parody under the fair use in the US system

The US Supreme Court understands parody as a form of criticism or comment where copyrighted material is used in a transformative way. Parody is always a derivative work since it involves a (humorous) comment on an earlier work in the context of a new work.[18] It usually exploits both form and content of the original work to mimic it enough to make a certain point. The US Supreme Court noted that parodies might even harm or destroy the commercial value of the criticised work: "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act".[19] Parody is not included in the preamble to Section 17 and §107 does not even try to define either fair use or parody.

Judges have insisted that a parodist does not have the right to take more material than necessary to recognise the object of the parody and commercial nature of parody rendered it unfair.[20] However the tendency changed after the case *Campbell v. Acuff-Rose Music Inc*[21] Acuff-Rose Music sued rap musicians "2 Live Crew" because of a musical parody of Roy Orbison's "Pretty Woman. The US Supreme Court made several significant conclusions. It noted: the more transformative the derivative work is, the less significance other factors shall have (e.g. commercialism that may weigh against a finding of fair use). It further noted that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness".[22] Also, there is no derivative market for critical works and a parody usually poses no harm of market substitution.

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[18] For a comparative study of the parody exception in the US, France and Germany see Cabrera Blázquez F., "Plagiarism: an original sin?", http://www.obs.coe.int/documents/205595/2408826/FCabrera_Plagiarism_EN.pdf/4e9b299b-383b-4193-929a-cba887d33bd0.

[19] Campbell v. Acuff-Rose Music, Inc. 510 U.S., p. 591-592, http://caselaw.findlaw.com/us-supreme-court/510/569.html. Here the US Supreme Court quotes the case of Fisher v. Dees, in which the court explained the difference between criticism and copyright infringement: "Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable." See Fisher v. Dees 794 F.2d 432 (9th Cir. 1986), http://mcir.usc.edu/cases/1980-1989/Pages/fisherdees.html.

[20] See, for example, *Walt Disney Productions v. Air Pirates*, 1978 ("other courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire").

[21] Campbell v. Acuff-Rose Music, 510 U.S. 569. 1994. – p. 584.

[22] In such cases courts frequently quote *Mattel Inc. v. Walking Mountain Productions* and *Art Rogers v. Jeff Koons*. In Mattel artist Tom Forsythe made photo-project "Barbie Food Chain" featuring Barbie dolls in sexual poses and culinary utensils ("grilled Barbie" etc.). The district court granted him summary judgment saying that photographs were fair use: Forsythe's parodic message… is about Barbie and the values she represents… Finally, the benefits to the public in allowing such use — allowing artistic freedom and expression and criticism of a

Nevertheless, blunt commercial exploitation of a copyrighted work in advertising a product "will be entitled to less indulgence… than the sale of a parody for its own sake"[23] and is not very welcome in court. For example, in *D.C. Comics, Inc. v. Crazy Eddie, Inc.*[24] the judge ruled against fair use of the fictional character Superman in advertising of electronic equipment company "Crazy Eddie" ("Look! . . . Up in the sky! . . . It's a bird! . . . It's a plane . . . It's . . . Crazy Eddie!"). Judge Pierre Leval called it "unjustifiable appropriation of copyrighted material for personal profit". In another law suit regarding Superman character the court pointed out that "it is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor".[25]

It is also an interesting question whether non-infringing parody may be legally vulgar or obscene. The answer is "yes" if the original work is vulgar too. The case *Brownmark Films, LLC v. Comedy Partners*[26] might be the best example here. Defendants created a parody in the South Park cartoon show of a viral music video entitled "What What (In the Butt)" (hereinafter WWITB) in an episode of "Canada on Strike". The original video features an African American adult dancing and repeating sexually suggestive phrases. In the episode one of the characters (naive 9-year-old boy in children's outfits) copies his movements in pursuit of easy "Internet money". The video becomes viral but not profitable. The district court held that "the South Park episode transforms the original piece by doing the/[sic]seemingly impossible – making the WWITB video even more absurd… The South Park "take" on the WWITB video is truly transformative, in that it takes the original work and uses parts of the video not only to poke fun at the original, but also to comment on a bizarre social trend, solidifying the work as a classic parody".

2.2. The exception for parody under the Russian Federation system

Parodies and caricatures received legal protection in 2008 when Section IV of the CC entered into force. Amendments to Section IV of the CC introduced in 2014 substantially broadened the range of parodies and caricatures and left the list of examples open ("in the genre of literary, musical *or other* parody or caricature" – emphasis added).

It is worth noting that no attempt to provide a legal definition of the parody or caricature or to list their differential peculiarities was made therein. Russian researchers noted the imitative and conflictive nature of a parody in relation to the original work and suggested that a parody transforms the content of the original work more than it transforms the form and adds new (usually funny) points.[27] Parody or caricature is protected "regardless of its merits".[28]

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cultural icon — are great. Allowing Forsythe's use serves the aims of the Copyright Act by encouraging the very creativity and criticism that the Act protects". Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792, 9th Cir. 2003.

In *Art Rogers v. Jeff Koons* defendant tried to present his interpretation of photograph "Puppies" in a sculpture "String of Puppies" as a parody. The court found that "satire need not be only of the copied work and may, as appellants urge of "String of Puppies," also be a parody on modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work". Art Rogers v. Jeff Koons. 960 F2d 301. 2d Cir. 1992.

[23] Campbell v. Acuff-Rose Music, Inc. 510 U.S., p. 585.

[24] D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177. S.D.N.Y. 1979.

[25] Warner Bros. Inc. v. American Broadcasting Companies. 720 F.2d 231; 1983.

[26] Brownmark Films, LLC v. Comedy Partners, 800 F. Supp. 2d 991 (E.D. Wis. 2011).

[27] Sherstoboeva, Elena. The problem of legal status of parody on Russian TV // Mediascope, N 1. — 2011, http://www.mediascope.ru/node/714.

Some researchers point out that parody shall not violate the moral rights of the authors (for example, the integrity and inviolability of the work), i.e. parody should not include legally significant parts of the work (such as fictional characters or the title of the work) and should be based on a strong association between the parody and the original work.[29] If fully recognized, such associative approach could mean in practice an important restriction for parodists as they usually use characters or titles to make their point. However, the court decision in *Business Contact v. Channel One and Producing Company "Sreda"*[30] rejected this approach and became almost standard. Rightsholders of the feature film "Обитаемый остров/Obitayemyi ostrov" ("Habitable Island") sued "Channel One" TV company after its broadcast of the parody on the film in an episode of the evening comedy show "Большая разница/Bol'shaya raznitsa" ("A big difference").

During the litigation process, the plaintiff alleged that such derivative work was not a parody but an unlicensed use of parts of the film and an exploitation of its characters.

The Court did not agree with the plaintiff who claimed that defendants illegally used part of the film without underlay (sound) and made editing of its videotape. The Court pointed out that although parts of an audiovisual work may be considered independent works, this was not the case. Defendants had created a parody of the whole film and not of its part. It held that creation of a parody is a legal use of copyrighted material and the rightsholder cannot prohibit such use "on the grounds that only a part of the work is changed".

Another recent decision related to the right to personal image that is of interest in the context of free use. Popular singer Stas Michailov sued TV channel "TNT-Teleset'" for using his "individual image" in the parody character Michail Stasov in "Дублер/Dubler" ("Backup") movie.[31] The plaintiff lost the lawsuit, as the Court pointed out that the filmmakers used his "stage image" for creating a parody.

A New-Year episode of the parody show "Мульт-личности/Mult-lichnosti" ("Cultoon of Personality") previously became a point of dispute between "Объединенное музыкальное издательство/Objedinennoe muzikalnoye izdatel'stvo" (United Musical Publishing House) and film company "Красная студия/Krasnaya studiya" ("Red Studio"). The episode featured two songs with transformed lyrics. The plaintiff claimed copyright infringement.[32] The Court held that a comic effect was produced by using popular music and transformed images of famous singers as well as new visual imagery and humorous lyrics. The Court sided with the defendants and held that "in absence of even one of these components the comical effect would disappear".

Russian and US courts follow similar lines of reasoning in similar cases. For example, arguments of the Supreme Arbitration Court of the Russian Federation in a recent case (regarding the parody show "Стиляги/Stilyagi", or "Hep-cats") match the judgment of the US Supreme Court on *Campbell*: "The purpose of a parody is to create both a comic effect and critical perception by means of intentional copying and transforming parts of original work… Parody is always a new work that

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[28] Volfson V. Copyrightability paradox of citation, allusion and pastiche. // Intellectual property & copyright and related rights journal. 2003. N 10. - p. 11.

[29] Bliznets I., Leontiev K. Copyright and related rights. — Moscow, "Prospect", 2015, p. 123.

[30] Case N A40-125210/09-110-860: Ruling of Ninth Arbitration Appeal Court, 14/07/2011, http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=MARB;n=238004.

[31] Case N 4g/4-4420: Writ of Moscow City Court, 27/04/2015, http://docs.cntd.ru/document/423339922.

[32] Case N A4060254/2012: Ruling of the Ninth Arbitration Appeal Court, 12/06/2013, http://sudact.ru/arbitral/doc/2gzEjKTgOFbu/?arbitral-txt="пародия"+%2B+"свободное+использование"&arbitral-case_doc=&arbitral-doc_type=&arbitral-date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-judge=&arbitral-participant=&_=1436900161203&snippet_pos=1454#snippet.

changes some part of the original (adds new sense or message)… the original work must be at the heart of the parody and not on the sidelines". Like the US Supreme Court, the Supreme Arbitration Court of the Russian Federation underlined that "the more original a parody is, the less weight should other factors gain (such as the amount of a portion used, or the effect upon the potential market or commercial value of the work)".[33] However, the Supreme Arbitration Court ordered to submit the case to its Presidium for supervisory review[34].

In this case the rightsholders of three *songs* sued the TV channel for using the song in the "Стиляги/Stilyagi" parody TV show (its main objective was to make the best dancing/musical parody of a video clip, a movie etc.). The defendants were cleared on several judicial levels because courts held that *musical clips* (and also stage images and performance) were the sources for the parodies in question. In this case the Supreme Arbitration Court pointed out that both songs and musical clips were the sources of copyrighted material. But it held that the law does not set bounds as to the amount of the parts or artistic means used and submitted the case to its Presidium for further review.

The Presidium questioned what exactly the object of the parody was: 1) audiovisual works; 2) artists' performance; or 3) musical works. It stated that musical works could be used independently or as a component of audiovisual works and – in case of creating any derivative work – "rights of authors must be respected if the musical work in question is not changed". The Presidium of the Supreme Arbitration Court sided with the songs' rightsholders, holding that audiovisual works and artists' delivery were parodied but not the musical works overruling all previous court decisions and awarding compensation for copyright infringement.[35]

This decision leaves many questions unanswered, such as how an effective and recognizable parody on a musical clip can be created without using the song. Whilst a song can be independent from the musical video, a musical video does not exist without music and that is why such works cannot be divided into independent parts.

The Court additionally held that a legal parody should transform all parts of an original work. Consequently a "family" of parodies lands beyond the bounds of law, for example, lip sync parodies popular both in Russian Federation[36] and in the US.[37]

[33] Case N A4038278/2012: Writ of the Supreme Arbitration Court, 09/09/2013, http://sudact.ru/arbitral/doc/2gzEjKTgOFbu/?arbitral-txt="пародия"+%2B+"свободное+использование"&arbitral-case_doc=&arbitral-doc_type=&arbitral-date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-judge=&arbitral-participant=&_=1436900161203&snippet_pos=1454#snippet.

[34] See above, case N A4060254/2012.

[35] Ruling of Presidium of Supreme Arbitration Court of the Russian Federation Russian Federation N 5861/13 of 19/11/2013, http://www.arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_21de7ed4-5c93-4a0b-b554-7561358cb5d8.

[36] For example, watch the popular parody song "Kap-kap-kap" featuring cast of a Soviet era comedy "Ivan Vasil'evich changes his profession" here (in Rus.): http://www.youtube.com/watch?v=rU7rQNtvTXw.

[37] For example, Lip Sync Battle: famous artists lip sync other's songs. The comic effects is produced by the contrast between appearance and delivery style of parodists and singers of original songs (pop-singer J. Bieber lip syncs rock-star Ozzy Osborne's song etc.).

3. DMCA in the US and Anti-piracy law in the Russian Federation

3.1. Copyright exceptions and limitations and digital rights management (DRM)

3.1.1. Fair use and DRM in the US system

The 1998 US Digital Millennium Copyright Act (hereinafter DMCA) greatly limited the criteria of application for fair use of copyrighted material that were promulgated in the Copyright Act of 1976. This happened due to the provisions that allowed for technical protection of works[38] (including those in the public domain), and outlawed the production and distribution of technologies developed to bypass such technical protection of copyrighted works.[39]

Two decades later, some exceptions to this norm were recommended by the Library of Congress. It issued a formal document explaining cases when circumvention of technical protection shall not be considered a violation of the law. The list of such cases includes the possibility of ripping DVDs and Blu-rays for making fair use remixes and analyses[40].

3.1.2. The use of DRM under the Russian Federation system

Section IV of the CC contains rules on the use of technical means of protection, such as Article 1299. However, despite the proposals made by legal experts in the course of the public discussion of the draft of the Section IV of CC, the adopted version does not feature any provisions that would state that the application of technical protection means should not harm the normal use of copyrighted

[38] In 1996, the WIPO Copyright Treaty (hereinafter WCT) and the WIPO Performances and Phonograms Treaty (hereinafter WPPT) included provisions that oblige Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g., encryption) used by authors, performers or phonogram producers in connection with the exercise of their rights, and against the removal or altering of information, such as certain data that identify works or their authors, performer, performance, producer of the phonogram and the phonogram itself necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights ("rights management information").

[39] Congress Records. E2137, 144 (1998).

[40] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies // Library of Congress, https://www.eff.org/document/library-congress-2015-dmca-1201-rules.

material; the responsibility for bypassing such means is not differentiated with regard to the purpose of circumvention, evidence and nature of consequences.

The previous edition (replaced in 2014) of paragraph 3 of Article 1299 of the CC had essentially declared a so-called principle of non-intervention, meaning that the circumvention of technical protection was prohibited. On the other hand, if it was done with the purpose of exercising an exception to copyright, a user was not to be persecuted in accordance with paragraph 1 of Article 273 of the Criminal Code ("Creation, use or dissemination of malicious software").[41]

To replace this removed provision another attempt to implement exceptions to copyright was made in paragraph 4 of Article 1299 CC. It provides that "if paragraph 1-3 of Article 1274 and Article 1278 of the Civil Code allow for a free use of the work, but the execution of this right is prevented by the means of digital rights management, the potential user may request the rightsholder to remove these restrictions or provide an opportunity for such use (upon the choice of the rightsholder), if this is technically feasible and does not require significant costs."

However, this is now contrary to the general principle of exceptions and limitations to copyright where the prior authorization of the rightsholder to make use of a work does not apply. Moreover, the law does not stipulate that an author is obliged to respond to such requests.

3.2. Takedown notices

3.2.1. Fair use and takedown notice under the US system

Title 17 section 1201 (a) of the US Code relieves providers of a liability for copyright infringement by online users of various Internet sites, but only if they promptly remove content at the request of the rightsholder. Enforcement companies generally identify files automatically with a basic search algorithm, or such claims are sent by employees who do not perform any preliminary legal analysis of the pattern of use[42]. According to the law, the provider must remove content as soon as possible, but if the user submits a counter-notice within the 10-day period, then the provider can restore access to the content[43].

On the one hand, rightsholders have an effective instrument to withdraw alleged pirated content while the liability of the providers for copyright infringement by their users was limited.

On the other hand, some researchers are of the opinion that overly aggressive copyright claims under the DMCA have inappropriately stifled political speech on the Internet during recent political campaigns in the US.[44] Candidates John McCain and Sarah Palin wrote an open letter to Google after a series of their videos had been removed during a political campaign in 2008 because of copyright claims. They pointed out that "10 days can be a lifetime in political campaign" and such

[41] Para. 3 of Art. 1299 previously read as follows: "In case of violation of the provisions stipulated by para. 2 of this Article, the author or other copyright holder may demand from the infringer, at the holder's option, to be held liable either for material, or for moral damages <...>, with the exception of the cases where the use of the work without the consent of the author or copyright holder is permitted by this Code".

[42] Quilter L., Heins M., Intellectual property and free speech in the online world, http://www.fepproject.org/policyreports/quilterheinsreport.pdf.

[43] 17 U.S.C. § 512(c)(1)(A)(iii); id. § 512(d)(1)(C).

[44] Campaign takedown troubles: how meritless copyright claims threaten online political speech, https://cdt.org/files/pdfs/copyright_takedowns.pdf.

steps deprived "the public of the ability to freely and easily view and discuss the most popular political videos of the day".[45] Nothing changed 5 years later when President of the US (and candidate) Barack Obama faced this situation himself: following takedown notices from the music publisher BMG, YouTube blocked Mitt Romney's campaign video (it included footage of President Obama singing Al Green's "Let's stay together") and soon after – original footage of Obama singing.[46] Researchers also indicate that content may be withdrawn from universal access for at least 10 days after a single appeal, in which the claimant does not have to prove his or her copyright to the work in question, or to argue why this use cannot be considered fair.[47]

3.2.2. Takedown notice under the Russian Federation system

The above-mentioned DMCA provisions set an example for Russian legislators. The first set of amendments to the Federal Law "On Information, Information Technologies and Information Protection" and the Civil Procedural Code of the Russian Federation constituting the so-called "Anti-Piracy law"[48] came into force on 1 August 2013. In this act the legislator tried to work out the model for a pre-trial communication between the rightsholders and the users, hosting services and Internet service providers who have placed potentially illegal content (movies only).[49] Various associations of rightsholders have supported the law, as it gives them the possibility to enforce their rights, by obliging the media to attend their requests for removal of illegal content.

The implementation of the most recent amendments[50] significantly expanded the area of protection: the law now regulates online circulation not only of movies, but of all copyright protected works (with the exception of photographs and similar works).

First, the legislator failed to establish a mandatory pre-trial stage of the dispute settlement, although made the site owners disclose personal data and publish contact information. For some experts in the field, the requirement to disclose personal data is just an "excuse for making life easier for rightsholders, facilitating the process of finding the administrator of the website in order to sue them".[51] It should be noted that in the United States, for example, a preliminary appeal to remove content helps the rightsholder prove that their intentions are *bona fide*; if they have not sent such a letter before going to court, the user can contest their good faith in court and win the lawsuit.

Second, while demanding from the provider the removal of the disputed content, the rightsholder and/or exclusive license holder only needs to *point out* that the work *is copyrighted* and

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[45] https://www.publicknowledge.org/pdf/mccain-letter-20081013.pdf.

[46] Hasse L. President or pirate? The DMCA takedown war of the presidential campaigns // http://www.cilawyers.com/president-or-pirate-the-dmca-takedown-war-of-the-presidential-campaigns/

[47] Heins M., The Brave New World of Social Media Censorship, http://harvardlawreview.org/2014/06/the-brave-new-world-of-social-media-censorship/.

[48] Federal law of 02.07.2013 N187-FZ «О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам защиты интеллектуальных прав в информационно-телекоммуникационных сетях», "On amendments to the several laws of the Russian Federation on intellectual property protection in the information and telecommunications networks", http://www.rg.ru/2013/07/10/pravo-internet-dok.html.

[49] Эксперты подробно обсудили антипиратский закон (Experts have discussed the Anti-piracy law at great length), http://www.copyright.ru/news/main/2014/9/8/antipiracy_law/.

[50] The latest amendments to the Federal Law, dated July 13, 2014 T264-FZ, came into force on September 1, 2015.

[51] Тарасов Д. А. Изменения в антипиратском законе 2015 (Tarasov D.A. Amendments to the Anti-piracy law of 2015), http://lexdigital.ru/2015/112/#more-1569.

the rightsholder's permission to post the content online *is absent* (subparagraph 4 and 5, paragraph 2, Article 15-7 of the Anti-Piracy Law). The rightsholder is not required to prove that he or she owns copyright on the works in question. After receiving the warning, the owners of the site (or its administrators) are required to remove the content at issue within 24 hours. They may not demand a confirmation of the exclusive rights to the work, and may only ask the rightsholder to clarify the information, if it is incomplete, inaccurate or erroneous. Such clarification may be asked one time only. In the latter case, the period is extended by 48 hours, after which the content must be removed (no further postponements are possible, even if the rightsholder does not eliminate inaccuracies and errors in the response). If the website owner is certain that the posting of the content was lawful, it is to gather evidence and send it to the rightsholder *within 24 hours*. Only in such a case are they allowed to keep the disputed content until they receive a Moscow City Court[52] order or a demand from Roskomnadzor[53] to take it down. However, even after the explanatory letter containing the necessary evidence sent, nothing protects the owner of the site from their resource being blocked, which the rightsholder may demand as an injunction (see below).

Note that some researchers also criticise the DMCA[54] for its provisions that state that the rightsholder is not required to prove the existence of the rights to the product. However, in contrast to Russian law, the DMCA spells out important conditions: "A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law",[55] as well as the condition that the provisions of this law should not interfere with the fair use of the work. Compared to the DMCA, the latest edition of the Russian Federation "Anti-piracy law" does not mention any exceptions from or limitations of copyright.

The complex coordination mechanism, operating under stringent deadlines, is also mostly a Russian innovation: in the United States the user has the right to send a counter-notice to the provider, the hosting service provider or the owner of the website (including a statement that the product is used fairly) who can take down the content and simultaneously receive immunity from prosecution and blocking within 10 days. Thus, as emphasized by some legal experts,[56] the mechanism of pre-court settlement "by and large just presents a lever of pressure" on websites and users and leaves plenty of room for abuse: unscrupulous individuals under the guise of rightsholders can disrupt the work or online projects, create problems for *bona fide* website owners, or even require them to disclose commercially valuable information, including confidential documents.

Third, the "Anti-Piracy Law" continues to use blocking mechanisms as an injunction, however, they still do not meet the standards of interim measures (Article 139 of the Criminal Procedural Code), as their adoption does not require a legal basis (they are to be introduced by the

[52] The only court in Russia granted the right to decide the cases based on Anti-piracy law.

[53] The Federal Service for Supervision of Communications Information Technology and Mass Media, a federal executive body under the Ministry of Communications and Mass Media of the Russian Federation. Richter A., Richetr A. Regulation of online content in the Russian Federation IRIS extra, Strasbourg 2015,

http://www.obs.coe.int/en/shop/prodfamily?p_p_id=carousel_WAR_obsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=3&_carousel_WAR_obsportlet_struts_action=%2Fobs%2Fcarousel%2Fview&_carousel_WAR_obsportlet_cmd=details&_carousel_WAR_obsportlet_articleId=8235153&_carousel_WAR_obsportlet_displayBackUrl=%2Fen%2Fshop%2Fprodfamily.

[54] Heins M., The Brave New World of Social Media Censorship, http://harvardlawreview.org/2014/06/the-brave-new-world-of-social-media-censorship/.

[55] § 512 (c)(3)(A)(v). The full text of the DMCA is available at: https://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf.

[56] Тарасов Д. А. / Tarasov D.A., op. cit.

court at the request of the copyright owner even before the lawsuit is filed[57]), their cancellation without a court decision is impossible and, therefore, "the appeal for a judicial act is just a cover of a primitive emergency blocking mechanism".[58] In addition, the blocking of the Internet address in question may lead to third-party websites being inadvertently blocked because of a common IP address.[59]

Fourth, the law introduces the concept of "eternal blocking" in the case of its owner losing two lawsuits in court filed by the same rightsholder. However, neither the court nor Roskomnadzor is required to consider who has posted disputed content or links to it and for what purpose, what kind of website it is, etc. This is an unprecedented sanction of great potential commercial risk for website owners.[60]

As noted in the annual report of the Lomonosov Moscow State University Faculty of Journalism, the almost automatic gratification of appeals for interim measures against suspected pirate sites may lead to abuse by unscrupulous rightsholders. Market players have also considered that the complete blocking of the site for two violations of intellectual property rights is too harsh a punishment.[61] The report echoes a negative assessment of the "Anti-piracy law" made by the Presidential Human Rights Council, the main human rights watchdog in Russia. According to the Council, new amendments "impose unwarranted restrictions to content sharing while hampering cultural exchange in Russian society" and "do not take into account public interests and constitutional right to access information and cultural heritage".[62]

Fifth, the law allows banning access to the so-called "information essential for obtaining information containing objects of copyright and/or related rights", which obviously includes hyperlinks to third-party resources which may contain potentially illegal content. The rightsholder has the right to demand their removal as well.

[57] As the lawyer P. A. Domkin clarifies, the court issues a blocking order and allows the applicant 15 days to file a lawsuit. If the claim has not been filed, the block is lifted by Roskomnadzor, and the aggrieved party may gather evidence of incurred losses and file a lawsuit. See the interview with the lawyer: Law against the Internet (Закон против Интернета), http://www.advodom.ru/practice/interv-yu-s-advokatom-zakon-protiv-interneta.php#ixzz3bdew0liS. If, however, the copyright holder has filed a lawsuit, the website will remain blocked until the final decision of the court, as, for example, during the case of CJSC "SBA MyuzikPablishing" v. "Tsyfrovaya Laboratoriya" LLC.,

http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=SIP;n=12118.

[58] Тарасов Д. А. / Tarasov D.A., op. cit.

[59] The "Garant" notes that "as of today, more than 30 thousand websites have been blocked, but only 1% of them legally, the rest just have the same IP-addresses". Горовцова М. "Антипиратский" закон: первые итоги реализации и перспективы (Gorovtsova M. Anti-piracy law: first results and perspectives), http://www.garant.ru/article/495804/#ixzz3bvwmRpmI.

[60] FAQ. What's going to happen when Anti-piracy law enter into force? (FAQ. Что будет после принятия антипиратского закона?),

http://volna.afisha.ru/context/chto-budet-posle-prinyatiya-antipiratskogo-zakona/.

[61] Television in Russia: state, tendencies and perspectives (Телевидение в России: состояние, тенденции и перспективы развития // Доклад под ред. Е. Вартановой, В. Коломийца. - М.: Факультет журналистики МГУ, 2014). – p. 23.

[62] HRC proposes to list unblockable works in public domain (СПЧ предлагает создать список неблокируемых произведений),

http://izvestia.ru/news/572996#ixzz3x6ouTMJ5.

3.3. Exceptions to copyright and pressing social issues in the audiovisual media

3.3.1. Fair use and public interest in the US system

In court, public interest is often seen as an important factor in favour of acknowledging fair use. If the news media intend to inform the public, present news of the day, offer views and comments, or provide new data for public debate on important issues, the US courts may recognize such use of the copyrighted material as fair even if all other factors speak against such a decision.[63]

For example, there was a case of the works by two organizations, part of the "pro-life" (anti-abortion) movement, which had been promulgated through blogs and websites and widely discussed in the media, and eventually pronounced parodies by the court. The authors took two videos made by the supporters of the movement defending women's right to abortions, and overlaid them with a video depicting an actual abortion in progress. Although the judge did not find the resulting works to contain anything that would present the original in a humorous light, he pronounced them parodies, as the works effectively commented on and criticized the original videos, thus making an important contribution to the public debate on this issue.[64]

Another interesting example of the fair use of copyrighted material is a documentary "Going Clear: Scientology and the Prison of Belief" by Alex Gibney, commissioned by HBO, a US cable channel, and based on the book by Lawrence Wright.[65] The film, as well as the book, reveals that the Church of Scientology hires private investigators to spy on those of their followers who show the inclination to abandon it, and collects compromising information on them for subsequent blackmail and threats. According to Gibney, this film could not have been made if not for the doctrine of fair use, because the Church of Scientology aggressively punishes any criticism of its teachings and has enormous media resources at its disposal. According to him, rightsholders who own the rights to various newspaper and magazine articles, interviews with former members of the church and videos from various activities of the Church, would not have issued the license to the film director because of the pressure from the Church of Scientology. As Gibney emphasized, broadcasters even "encouraged" his desire to appeal to the doctrine of fair use. According to him, "…fair use was the key to overcoming Scientology's pull on the major networks, whose news and public affairs footage, as well as film clips, were essential to telling the story visually".[66] As the Supreme Court described in *Campbell v. Acuff-Rose Music, Inc.*, fair use provides a guarantee of "breathing space within the confines of copyright."[67]

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[63] See, for instance, the case of SwatchGrp. Mgmt. Servs. Ltd. v. Bloomberg L.P. No. 12-2412-cv. 2014, http://caselaw.findlaw.com/us-2nd-circuit/1655777.html.

[64] Northland Family Planning Clinic v. Center for Bio-Ethical Reform, SACV 11-731 JVS. C.D. Cal., 2012, https://h2o.law.harvard.edu/cases/5079.

[65] Aufderheide P., Fair Use Success Stories: Going Clear, http://www.cmsimpact.org/blog/fair-use/fair-use-success-stories-going-clear-0.

[66] Horn J., Alex Gibney on Going Clear, His Scientology Documentary That's the Talk of Sundance, http://www.vulture.com/2015/01/alex-gibney-on-his-new-scientology-documentary.html.

[67] 510 U.S. 569 (1994). at 579, https://www.law.cornell.edu/supct/html/92-1292.ZO.html.

3.3.2. Exceptions for public interest under the Russian Federation system

Emergency blocking mechanisms were introduced quite recently, and there are still very few relevant precedents. There were several reports on a brief blocking of the Russian-language RT (Russia Today) YouTube channel on 18 March 2014 (the error message stated that the account had been blocked due to numerous or gross violations of YouTube's policy against spam, fraud and inappropriate content), and then again in early July 2014 due to the complaint of copyright infringement by a Ukrainian user.[68] Furthermore, in August 2014 the YouTube channel of LifeNews, a booming TV and media conglomerate in Russia, was blocked - also allegedly due to a copyright infringement, despite the fact that LifeNews had acquired the license to use the disputed video from the roofer who painted the star on the top of a Moscow skyscraper in the colors of the Ukrainian flag.[69]

3.4. User-generated content (UGC)

3.4.1. UGC under the fair use doctrine in the US system

It should be mentioned that the DMCA contains a provision stating that in case of abusive demands to remove content, the party pronounced guilty by the Court is liable for damages, costs and attorney expenses of the injured party (§512 (f) of the DMCA).

However, there are two pitfalls. First, judges disagree on the issue of what constitutes abuse in this case: bad faith, or simply ignoring the fair use. If it is the latter, the main argument of rightsholders is that the majority of the thousands of content takedown claims are sent automatically, and examining each individual case would be too costly.[70]

Secondly, the law refers only to the compensation for losses (and not for moral damages), and it is usually hard for the injured party to collect enough evidence. If there was a violation of the freedom of expression, which did not cause any direct economic damage, seeking justice in court would be extremely difficult. The case of *Lenz v. Universal Music*[71] can serve as a striking example.

Stephanie Lenz recorded a home video (lasting 29 seconds) with her son dancing to the song "Let's Go Crazy" by Prince, and posted it on YouTube. At the request of the Universal Music that referred to DMCA, YouTube removed the video. Lenz, having consulted with her lawyers, succeeded in getting the video restored. Soon the Universal Music issued a statement on behalf of Prince, claiming that the artist considers it a matter of principle that any Internet website that posts a work containing his music should do so only with the authorization of the author, otherwise he has the legal right to request the removal of such content. In the lawsuit against Universal Music, Lenz

[68] YouTube temporarily blocked the RT TV channel due to "fraud and spam", https://tjournal.ru/p/youtube-rt-ban.

[69] YouTube blocked the LifeNews channel due to copyright infringement, https://tjournal.ru/p/lifenews-youtube-blocked-kidala. Four base-jumpers seen jumping off the building on the same morning were detained on charges of vandalism and hooliganism, but later acquitted. Another roofer, Vladimir Podrezov, who accompanied them to the roof, is serving a term of 2 years and 3 months in prison for vandalism. The prosecutor's office appealed against the base-jumpers' acquittal in the "skyscraper case". See more in Russian at: http://zona.media/news/bez-opravdatelnyh/.

[70] ROSSI (dba Internet Movies.Com) v. Motion Picture Association of America, 2004.

http://caselaw.findlaw.com/us-9th-circuit/1308565.html.

[71] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150. N.D. Cal. 2008. See also the ruling of the US Court of Appeals for the Ninth Circuit at: https://www.eff.org/document/9th-circuit-opinion-lenz. Universal Petitioned for Rehearing En Banc:

https://www.eff.org/files/2015/10/20/lenz_motion_for_rehearing_en_banc.pdf.

stated that the company's demand to remove her video was based on personal preferences and principles of the singer, and not on the features of this particular video or a *bona fide* belief that the video violates copyright. She stated that fair use is recognized by law and is an integral part of the copyright system, and that rightsholders cannot claim that they acted in good faith if they had not taken into account the number of exceptions to copyright before demanding to remove the content.

Universal Music filed a counterclaim alleging that rightsholders are not required to consider fair use, because it is "nothing more than a forgivable copyright infringement, not a lawful way to use copyrighted material"; moreover, the doctrine supposedly was not mentioned in the DMCA. According to the company, even if the rightsholders have to take into account fair use, they are not obliged to do so *before* demanding to take down the material, but only after receiving the refusal by the user, when they start to collect evidence for a lawsuit.

The Court finally supported Lenz's position and decided that she was entitled to damages. Moreover, the Court pointed out that "there's no meaningful financial payday at the end of this road": Lenz will receive reimbursement for legal advice (a little over a thousand dollars) and the expenses for electricity, internet and telephone. The main achievement of this trial was that the Court obliged rightsholders to consider the possibility of fair use before sending a takedown notification.[72]

The US researchers Heins and Goldman[73] state that section 512 (f) of the DMCA has lost its functionality not only because of court interpretations of this kind. According to them, rightsholders have found ways to seek the removal of content without sending takedown notices that can be challenged during the pre-trial period or in court, in particular through the direct agreement concluded with the Internet intermediaries and social media in question, to track and take down disputed content with the help of databases comprised of so-called "fingerprints" of audio and audiovisual material. For example, YouTube automatically checks all videos uploaded by users and blocks those that contain copyrighted content present in the YouTube database. Heins and Goldman consider that users often do not have the means to challenge the blocking because of the conditions of the "Terms of Service" established by private companies, "and despite their good intentions and their claims to a free speech-friendly philosophy, these companies employ "terms of service" that censor a broad range of constitutionally protected speech",[74] - writes Heins.[75]

3.4.2. Russian Federation

In Russia, a somewhat different problem has arisen. Roskomnadzor started the practice of "blacklisting" various Internet resources, without the Moscow City Court having issued any injunctions compelling the blockings.[76] For example, the Moscow City Court decided to block a certain online resource due to the repost of the trailer of the TV show called "Method" from the

[72] Perl J., The obligation to consider fair use, http://merlin.obs.coe.int/iris/2015/10/article29.en.html.

[73] Heins M., The Brave New World of Social Media Censorship, http://harvardlawreview.org/2014/06/the-brave-new-world-of-social-media-censorship/. Goldman E. 17 USC 512(f) Is Dead - Lenz v. Universal Music, http://blog.ericgoldman.org/archives/2013/01/17_usc_512f_is_1.htm.

[74] Heins M. op.cit.

[75] Ammori M., The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter, http://harvardlawreview.org/2014/06/the-new-new-york-times-free-speech-lawyering-in-the-age-of-google-and-twitter/.

[76] «Метод» Роскомнадзора: превращение закона в беспредел (Roskomnadzor's "methods": law driven into a chaos), http://rublacklist.net/13259/.

website of Channel One (which, it should be mentioned, had offered an embedding code for the trailer on its page for those who would like to make a repost), after which Roskomnadzor sent hundreds of demands for blocking the content on different sites. In less than a day providers blocked various pages and entire resources (thus violating the law), before receiving explanatory letters from website owners. Some did not receive any notification at all.

According to the lawyers of the NGO "Roskomsvoboda", they are receiving reports of numerous violations of procedural rights. Earlier in 2015 Moscow City Court issued a decision to permanently block several sites (most of them torrent trackers). Administators of these resources complained that rightsholders did not use the mechanism of pre-trial communication (no new takedown notices received while previous requests were complied with), procedural defects took place (with no request for summons to the court received).[77] Recently they have decided to challenge the "Anti-piracy law" provisions concerning the permanent blocking of the websites in court, as they consider they may be contrary to the essential principles of legal liability - the proportionality of the punishment, the legal equality of the parties in the trial and constitutional human rights and freedoms, including the right to disseminate and access information.[78] Later 7000 users of "permanently blocked" resources made a collective complaint against blocking the sites in question[79], including a music band which used RuTracker to distribute their albums.[80] Campaigners from "Битва за Рунет/Bitva za Runet" ("Fight For Runet") hope to fight this issue in the Constitutional Court and Supreme Court of the Russian Federation.[81]

[77] Internet resources will fight « eternal blocking » in the Moscow city Court (Интернет-порталы оспорят «вечную» блокировку в Мосгорсуде), http://rublacklist.net/13198/.

[78] Roskomsvoboda appeals a decision to block torrent-trackers forever, http://rublacklist.net/13452/#more-13452.

[79] The Moscow city court received a collective complaint against « eternal blocking » of internet sites (В Мосгорсуд подана коллективная жалоба от имени 7 тысяч пользователей интернета в отношении нормы о «вечной блокировке»), http://rublacklist.net/14045/.

[80] Musical band appealed « eternal blocking » of RuTracker (Музыканты подали апелляцию по «вечной блокировке» Рутрекера), http://rublacklist.net/14092/.

[81] Available in Russian at: http://zarunet.org/.

4. Fair use in the US: right or affirmative defense?

The nonselective nature of the mailing of takedown notices has been considered a critical issue in the USA as well as - in recent months – the Russian Federation. The main criticisms addressed to this procedure rely on the assumption that these takedown requests are often sent out by rightsholders in disregard of the users' rights.

These developments raise the question of the definition and the scope of the fair use concept. Is fair use a user's right that rightsholders must respect and ensure compliance with? Or is it just "an affirmative defense"[82] that only comes into play in court?

Some researchers, for example William Patry, believe that fair use is both an affirmative defense and an affirmative right.[83] Patry cites, in particular, the court decision in the case of *Oulette v. Viacom,*[84] where the judge writes that the fair use doctrine is a right that arises only during the proceedings as a method of protection, but cannot be the basis for filing a lawsuit. Also, the judges themselves cannot propose fair use *ex officio*; it can only be done by the defendant, who bears the burden of proving fair use availability. As Patry explains, this doctrine is only triggered if (and after) the plaintiff has made out a *prima facie* analysis. He cites two decisions by the US Supreme Court: the decision in the case of *Harper & Row v. Nation* (1985, where the Supreme Court, casually touching upon the subject, quoted a monograph by Patry[85] as a ground for the decision), and the abovementioned case of *Campbell v. Acuff-Rose Music*,[86] a decision which relied heavily on the outcome of the *Harper & Row* case. Here Patry notes that the copyright system would benefit from fair use becoming an affirmative *right*, like, for example, freedom of expression, enshrined by the First Amendment to the US Constitution.

However, some researchers noted that "in fact, almost all positive rights have to be treated as affirmative defenses in litigation".[87] Calling fair use a right, Professor Kevin Smith refers to Title 17 of the US Code, §108, (f)4[88] ("...in any way affects the *right* of fair use as provided by §107...."

[82] In the American civil and criminal law "affirmative defense" is a practice of putting forward arguments which do not deny the charges, but still justify the actions of the defendant. An example of this is the doctrine of fair use in the civil law system and self-defense in the field of criminal law.

[83] Patry, William F., Patry on fair use, WEST. — 2012. — p. 67.

[84] Oulette v. Viacom, WL 1882780. 2011,

https://scholar.google.com/scholar_case?q=Ouellette+v.+Viacom&hl=en&as_sdt=2,5&case=3753744983787595468&scilh=0.

[85] Patry, William F., The Fair Use Privilege in Copyright Law, 477 n.4. 1985.

[86] Campbell v. Acuff-Rose Music, op.cit.

[87] Smith K., Free speech, fair use, and affirmative defenses, http://blogs.library.duke.edu/scholcomm/2014/11/03/fair-use-affirmative-defense/.

[88] See 17 U.S. Code § 108 - Limitations on exclusive rights, https://www.law.cornell.edu/uscode/text/17/108.

[emphasis added]), as well as to a number of decisions by the Supreme Court, which, referring to other aspects of the use of disputed material, have repeatedly addressed fair use as a right.

Still, it is clear that there is currently no unanimous agreement on this topic among US lawyers and judges.

Some Russian researchers on the other hand call for construction of the right to free use of works, including eligibility to claim from rightsholders capability to use works protected by DRM. In their view, such types of free use could serve the cultural needs of people, personal enhancement and balancing personal and public interests which is in the nature of privity of free use.[89][90]

[89] Бородин С. С. Свободное использование произведений в аспекте системного взаимодействия принципов авторского права: дис. ... канд. юрид. наук. — М., 2014. — С. 13-14. (Borodin S.S. Free use as an aspect of system interaction of the principles in the copyright : PhD paper, p. 13-14).

[90] Соболь М. Н. Справедливое использование произведений в журналистике США: право или позитивная защита? // Перспективы науки. — 2015. — № 1 (64). (Sobol M. Fair use in the US media: right or affirmative defense?). Соболь М.Н. Свободное использование произведений в СМИ США и России: дис. ... канд. филол. наук. — М., 2014. – p.12-14. (Sobol M. Fair use and free use in the media of the US and Russia. PhD paper, p.12-14),

http://vernsky.ru/pubs/6007/Svobodnoe_ispolzovanie_proizvedeniy_v_SMI_SSHA_i_Rossii.

5. Conclusions

Exceptions and limitations to copyright play an important role in the work of the media in the United States and the Russian Federation. Media usually use copyrighted material in a transformative way due to its specifics: news reporting, parody, criticism and comment or sometimes fortuitous and incidental use could happen during live streaming or live reports which is clearly fair - and free - use under both US and Russian laws.

Russia is increasingly inclined to apply the free use doctrine based on the public interest through the introduction of exceptions and limitations to statuary provisions, for example when it comes to parodies as special cases of free use.

However, development of the Internet with its free exchange of the information and works, including illegal dissemination of pirated content, was followed by more restrictive laws. The Digital Millennium Copyright Act (hereinafter DMCA) of 1998 was taken as a model for the most recent legislation in the Russian Federation (amendments known as the "Anti-piracy law"). Russian lawmakers implemented DMCA-style instruments of pre-trial settlement of disputes between rightsholders and users (takedown notices) and the US approach to DRM. They pursued the goal to fight pirated resources with the most effective instruments available.

But some of the critics received against the DMCA in the USA arguing that the tools for the pre-trial settlement of disputes between rightsholders and users may lead to some abuses and end up limiting the dissemination of information and freedom of expression, may have a different impact in the Russian context. In particular, some experts point out that almost automatic gratification of appeals for interim measures against suspected pirate sites may lead to abuse by unscrupulous rightsholders[91] and may have a negative impact on human rights, as outlined by the Presidential Human Rights Council, the main human rights watchdog in Russia.[92]

[91] Television in Russia: state, tendencies and perspectives (Телевидение в России: состояние, тенденции и перспективы развития // Доклад под ред. Е. Вартановой, В. Коломийца. - М.: Факультет журналистики МГУ, 2014). – p. 23.

[92] HRC proposes to list unblockable works in public domain (СПЧ предлагает создать список неблокируемых произведений), http://izvestia.ru/news/572996#ixzz3x6ouTMJ5.