

2012-1

Answers to Internet Piracy

LEAD ARTICLE

Fighting Internet Piracy in Russia: the Legal Framework and its Development

- Trends in the development of the market for copyrighted content
- Regulatory principles applying to the Internet and interpretation of legislative acts
- The controversial practice of Russian courts
- Initiatives of concerned parties
- Review of draft legislation regulating copyright protection on the Internet
- President Medvedev's initiative to reform worldwide intellectual property rights on the Internet

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Answers to Internet Piracy

Foreword

Internet piracy is a curse to rightsholders and anyone interested in the viability of the creative industry. The latter includes not only governments and representatives of the audiovisual sector but also consumers who like to enjoy a rich offer of audiovisual content but who might have to cope with less diversity if generating content doesn't pay for the efforts of content creators.

Looking to the US, we witness determination to act. US authorities closed down the website of "Megaupload.com" and at the former place of the sharehoster's home page now features the FBI anti-piracy warning that "This domain name associated with the website Megaupload.com has been seized pursuant to an order issued by a U.S. District Court" and that "A federal grand jury has indicted several individuals and entities allegedly involved in the operation of Megaupload.com and related websites charging them with the following federal crimes: Conspiracy to Commit Racketeering (18 U.S.C. § 1962(d)), Conspiracy to Commit Copyright Infringement (18 U.S.C. § 371), Conspiracy to Commit Money Laundering (18 U.S.C. § 1956(h)), and Criminal Copyright Infringement (18 U.S.C. §§ 2, 2319; 17 U.S.C. § 506)."

It seems, we are entering times where governments are considering the adoption of more radical means for blocking the illegal dissemination of content than those which the prosecution of individual copyright infringers seems to offer. The French HADOPI, for example, currently seeks dialogue with platform providers and sites involved as to the best ways of expanding its mission to also counter the illegal streaming and downloading of content. It is worth remembering that the legislation underlying HADOPI caused intense debates about the limits of fighting piracy up to the level of the European Parliament. More recently headlines were made by two US anti-piracy bills, the Stop Online Piracy Act (Sopa) and the Protect Intellectual Property Act (Pipa) both aiming to increase obligations of Internet service providers. Whereas today Internet service providers must take down illegal content hosted on their networks upon notice, they may be mandated tomorrow with blocking access to entire Internet sites if these sites contain any illegal content. Both bills would prevent US-based Internet service providers, payment processors and advertisers from entertaining business relationships with alleged pirates. If Sopa were to be adopted, even search engines could become part of this toughened scheme to combat piracy. Both bills, however, are being met with loudly voiced fundamental rights concerns.

The discussion about stepping up legal measures against copyright piracy reflects how big a challenge it is for all institutions, be they legislators, courts or administrations, to firstly separate the good from the bad and secondly to root out the bad. It also demonstrates that

any attempt to play down copyright piracy as a trivial offence stands no chance. While there is far reaching consent in favour of better protecting copyrights, the actual discussion focuses on the legitimacy and risks of some of the means proposed to win the piracy battle: where are the safeguards against the possible misuse of anti-piracy measures? How can one ensure that these means won't serve to unlawfully curtail the freedom of information? And even if misuse can be excluded, how may one generally balance the interests of copyright holders with those of users and other stakeholders?

This IRIS *plus* centers around these questions. Focusing on Russia, the Lead Article, illustrates the dimension of the piracy problem. It explains the current legal framework of which state institutions in Russia dispose to combat piracy and how courts apply it in practice. The article underlines that in particular the liability of access and hosting services remains an issue, especially in the context of video content posted on the Internet. It also looks into arguments on how to improve anti-piracy measures and in particular how to work towards solutions that take the global dimension of piracy into account. The Related Reporting section picks up on these issues with examples of legislative projects, policy recommendations and court decisions taken from the past months and from across Europe, including the European institutions. The ZOOM section details the legal instruments of the Council of Europe which illustrate one level of international agreement concerning policies and actions against piracy. It will be worthwhile to monitor actions on other international levels such as WIPO, WTO or the OSCE and those of the European Union but we will leave this to other publications. The Observatory will stay on the ball and you may always legally link into our results by reading our free-of-charge IRIS newsletter (<http://merlin.obs.coe.int/newsletter.php>).

Strasbourg, January 2012

Susanne Nikoltchev

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Fighting Internet Piracy in Russia: the Legal Framework and its Development

Dmitry Golovanov
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I. Introduction and background: trends in the development of the market for copyrighted content in the Russian segment of the Internet

Over the past years in Russia, news concerning intellectual property has occupied the front lines of media reporting. The Supreme Court in the preamble to its Resolution dealing with authors and neighbouring rights issued in 2006 prophetically noted that “the unlawful placement of works and phonograms in telecommunication networks, in particular, the Internet and mobile companies’ networks is becoming one of the major threats for rightholders’ activities”.¹

In February 2010, Russia’s largest BitTorrent tracker torrents.ru ceased functioning; its domain name was withdrawn by the domain registration company Regional Network Information Center pursuant to the order of 16 February 2010 of the Chertanovo District prosecutor’s office in Moscow. The Central Investigative Department of the Russian Federation (the chief office of the prosecution structure) provided comments on this prosecutor’s decision to the press.² The order was issued as part of an investigation in a criminal case involving copyright infringement. According to the files of the case a resident of Moscow downloaded on a disc a pirated copy of the software product “Autodesk AutoCAD” and then disseminated it via the torrent tracker. Representatives of the prosecutor’s office emphasized that the website torrents.ru was repeatedly used in order to disseminate malicious software and pirated copies of works. Such actions violated the economic interests of Autodesk AutoCAD, “1C” (one of the major suppliers of software products for business and bookkeepers) and other rightholders because they caused damages on a very large scale (i.e. more than RUB one million – approximately EUR 24 000). Later, the torrent tracker resumed its functioning in the international domain zone .org under a new name.

1) Resolution of the Plenary Session of the Supreme Court of the Russian Federation of 19 June 2006 N 15 “О вопросах, возникших у судов при рассмотрении гражданских дел, связанных с применением законодательства об авторском праве и смежных правах” (“On questions that arose with courts in civil cases proceedings in application of legislation on author’s rights and neighbouring rights”), published in “Российская газета” (official gazette) 28 June 2006, available in Russian at http://www.vsrp.ru/vscourt_detale.php?id=4349

2) See Russian daily newspaper Kommersant report at <http://kommersant.ru/doc/1326138?isSearch=True>

In November 2010, the Recording Industry Association of America (RIAA) added the social network "VKontakte" (vkontakte.ru), which is very popular in Russia and the CIS,³ to its "black list" for the illegal dissemination of music content.⁴ In July 2010, this online resource had been held liable for the illegal posting of the film "Hunting Piranha" by the St. Petersburg Arbitration Court of Appeal,⁵ which handed down a judgment in which a violation of copyright was established. VKontakte was obliged to pay compensation of RUB one million. This decision was later reversed by the rulings of both competent higher courts.⁶

In January 2011, for the first time in the practice of law enforcement authorities a user of the social network VKontakte became a suspect in a criminal case. According to information released by the press office of the Ministry of Interior of the Russian Federation the recording label "Nikitin" accused an Internet user of illegally uploading audio files.⁷ On a personal page this user had posted 18 music recordings. Nikitin assessed the damages in the form of foregone benefits to be RUB 108 000. However, no further steps in investigation proceedings were publicly announced.

In March 2011, VKontakte along with the BitTorrent tracker Rutracker entered the list of the world's largest sites to spread infringing products, prepared by the Office of the U.S. Trade Representative, headed by U.S. Trade Representative Ron Kirk, chief advisor on trade issues to President Barack Obama.⁸

In 2011, Internet Copyright Management LLC, a company aiming at the protection of copyrighted materials from illegal use and distribution in the Russian-language segment of the Internet, published a report analyzing Internet piracy.⁹ According to the report, Russia is the world leader in functioning online pirate resources. VKontakte accounts for 77% of the entire content pirated from online video resources in the Russian-speaking segment of the Internet.

The last, but not less important, event in the chronology of counteracting piracy was a collective letter of rightholders participating in the Association of Television and Cinema Producers ("Ассоциация теле- и кинопродюсеров") that was addressed to top managers of VKontakte and included the call to delete more than 500 units of content (produced by members of the Association) from the website of VKontakte. This letter containing an ultimatum was delivered to VKontakte in December 2011. It states that should the social network not comply with the rightholders' request, the Association of Television and Cinema Producers will initiate civil, administrative and criminal proceedings against VKontakte.¹⁰

Another important trend of this period concerning content consumption was the emergence and development of licensed online video services. The video-on-demand services financed by advertising zoomby.ru, tvigle.ru, and ivi.ru as well as the pay-per-view on-demand services omlet.ru and now.ru started their activities between the years 2008 and 2011. Rightholders and content distributors have become more interested in fighting Internet piracy in order to secure the development of their own online business models.

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- 3) In mid-November 2011 according to the research of ComScore, the social network "VKontakte" was the first in Europe in time spent on a single site: on average its visitors used the site 7.1 hours per month. The site recorded more than 110 million users; more than 30 million people visit the site daily.
 - 4) <http://www.cnews.ru/news/top/index.shtml?2010/11/13/415723>
 - 5) Text of the St. Petersburg Thirteen Arbitration Court of Appeal judgment N 13АП-9839/2010 of 23 July 2010 available in Russian at http://www.rb.ru/dop_upload/file_2010-07-30_10.18.17_29072010.pdf
 - 6) Cassation ruling of the Federal Arbitration Court of North-West District N Ф07-10112/2010 of 25 October 2010 available in Russian at: http://kad.arbitr.ru/data/pdf/bfa8bb67-c5be-43ec-b38e-2b0ab08e23e6/A56-44999-2008_20101025_Postanovlenie+kassacii.pdf; Ruling of Supreme Arbitration Court N ВАС-18116/10 of 11 March 2011 available in Russian at http://kad.arbitr.ru/data/pdf/7c48c0f9-b55d-4a4f-995e-9b67564fe8f0/A56-44999-2008_20110311_Opredelenie.pdf
 - 7) See website of the Ministry of Interior of the Russian Federation http://www.mvd.ru/news/show_80899
 - 8) See <http://www.ewdn.com/2011/03/02/two-leading-russian-sites-blacklisted-by-us-government-for-piracy/>
 - 9) Available in Russian at: http://ruprotect.com/static/news_pdf/ICM_research_Piracy_3.pdf
 - 10) See "Кино не идет 'VKонтakte'" publication of Gazeta at <http://www.gazeta.ru/business/2011/12/21/3936798.shtml>

Online video providers and rightholders initiated a number of discussions in different forums aimed at improving mechanisms for protecting intellectual property rights in Russia and using legal instruments as well as joint actions of key players of the market.

This report aims at providing an analysis of the applicable Russian legislation regulating the Internet and how this legislation is enforced in practice in cases of Internet piracy. It also contains a review of the vision that the parties concerned have of the reforms needed to more successfully fight Internet piracy.

II. Regulatory principles applying to the Internet and interpretation of legislative acts

Like most countries today, the national legislation of Russia lacks a comprehensive special law on the protection of intellectual property rights on the Internet as well as regulation of the Internet itself. There are general principles of regulation and protection of intellectual property and a number of provisions scattered over different statutes concerning the dissemination of information and protection of copyright on the Internet. In order to enhance coherence in the practice of law enforcement, the Supreme Court of the Russian Federation issues resolutions that provide courts with explanations of legal provisions.¹¹ This power of the Supreme Court is laid down in Article 126 of the Constitution of the Russian Federation.¹² There is no direct provision in Russian legislation (statutory acts) stipulating that the Supreme Court's resolutions are mandatory for lower courts; however, the Court itself has repeatedly pointed out that the Russian courts are obliged to take into consideration resolutions of the Plenary Meetings of the Supreme Court when they interpret statutory law provisions.¹³ The Supreme Arbitrary Court (the highest court for resolving business (economic) disputes) disposes of a similar competence. According to legislative provisions, all resolutions of the Plenary Meetings of the Supreme Arbitrary Court are binding for the Russian arbitrary courts.¹⁴ Several resolutions of the Plenary Meetings of the Supreme Court and the Supreme Arbitrary Court include important provisions for practice in Internet law cases.

I. Constitution of the Russian Federation

According to Article 29 of the Constitution of the Russian Federation everyone shall be guaranteed the freedom of ideas and speech (paragraph 1), and everyone shall have the right to freely search, receive, transmit, produce and disseminate information in any legal way (paragraph 4). Article 44 stipulates: "Everyone shall be guaranteed the freedom of literary, artistic, scientific, technical and other types of creative activity, and education. Intellectual property shall be protected by law."

Article 71 of the Constitution of the Russian Federation contains another important rule because it establishes the exclusive competence of the Federation's governmental bodies over regulation of copyright issues. According to this rule only federal statutes may regulate intellectual property. For that reason the regions of Russia have no statutory acts providing for the regulation of copyright protection on the Internet.

11) According to the Federal Constitutional Statute "О судах общей юрисдикции в Российской Федерации" ("On courts of general jurisdiction in the Russian Federation"), explanations introduced by the Supreme Court provide unification of law enforcing practice by the courts (Articles 9, 14 of the Statute).

12) The Constitution was adopted by popular vote on 12 December 1993. See <http://constitution.ru/> for the official translations of the Constitution into English, German and French.

13) See, for example, para 4 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 19 December 2003 "О судебном решении" ("On a court judgment"), available in Russian at: <http://www.rg.ru/2003/12/26/sud.html>

14) Article 127 of the Constitution, Articles 9, 10, 13, 14 of the Federal Constitutional Statute of 28 April 1995 "Об арбитражных судах в Российской Федерации", published in "Российская газета" (official gazette) 16 May 1995, available in Russian at: <http://www.arbitr.ru/law/139>

2. Civil Code

On 18 December 2006, President Vladimir Putin signed into law Part 4 of the Civil Code.¹⁵ According to its Consummation Statute,¹⁶ the Code entered into legal force on 1 January 2008. Part 4 integrated the regulation of all possible intellectual property relations, including authors' rights and neighbouring rights.¹⁷ Only very few of its provisions, however, concern the use of copyright protected works in digital format.

Article 1270 of the Civil Code determines how works may be used by a holder of the exclusive right.¹⁸ Paragraph 1 subparagraph 11 of the article authorizes the rightholder to reproduce a work, i.e. to make one or more copies of a work or a part of it in any, including electronic, form. Making a copy on the computer memory is also considered as reproduction, unless such recording is temporary and an integral and essential part of the technological process, which has the sole purpose of lawful use of the recording or lawful making available of the work to the public. The latter rule is interpreted by Russian courts as excluding liability of Internet providers that carry out services of transmission of content without interference with such content. However, what remains uncertain in the interpretation of this provision aimed to resolve Internet disputes is what person (or persons) shall be liable for unlawful reproduction of a work on a website (especially in the case of user-generated content websites). Courts often do not have a common approach when defining whether it is the user or the website owner, or hosting provider, or domain administrator, or information provider, or any other person who initiates, produces, controls and knows about the illegal making of a copy of a work for the computer memory of a web server.

Article 1270 paragraph 1 subparagraph 11 of the Civil Code stipulates that the rightholder shall enjoy *inter alia* the right of making available to the public a work in such a way that any member of the public may access the work from a place and at a time individually chosen by this member of the public. This provision of Russian law is very similar to the wording of Article 8 of the WIPO Copyright Treaty.¹⁹ However the national law does not provide for express and direct clarification similar to the one to be found in the Treaty, namely that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the Treaty. Again, as was the case for the copying of a work to the computer memory, it remains uncertain how to define what person (or persons) initiates, provides, controls and knows about the making available to the public of a work from a website.

Unlawful use of works shall be considered as a tort. The term "unlawful" includes using a work in any way without obtaining the prior consent of the rightholder, provided the Civil Code does not allow for an exemption from the consent requirement.

The Civil Code provides for protection of intellectual property rights measures: according to Article 1301 Part 4 of the Civil Code an author or another holder of exclusive right shall have special means to seek redress for the violation of his/her rights in addition to the general civil law remedies. The holder of an exclusive licence also has the right to specific means of protection in cases where a violation of the author's rights (i.e. a violation of the economic rights) interferes at

15) Гражданский кодекс от 18 декабря 2007 года Часть четвертая (Civil Code of 18 December 2006 Part Four), published in "Российская газета" (official gazette) on 22 December 2006, available in Russian at: <http://www.rg.ru/2006/12/22/grazhdansky-kodeks.html>

16) The Consummation Statute is a special act that includes rules and terms for the entering into legal force of a statutory act and the annulment of preceding legislation.

17) For more information on the reform of intellectual property legislation in Russia see D. Golovanov, "Transformation of Authors' Rights and Neighbouring Rights in Russia", IRIS *plus* 2008-2, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2_2008.pdf.en

18) In Russian copyright law, the "exclusive right" of a person refers to her/his right to use a work at her/his own discretion and it covers the right of reproduction, distribution and making available. These economic rights that among others form "the exclusive right" also include the right to allow or prohibit other persons to use a work. See IRIS *plus* 2008-2, pages 4 and 5.

19) Adopted in Geneva on 20 December 1996, available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P80_10269

the same time with the rights granted by the licence (Article 1254). Suits for protection may be filed with the courts of general jurisdiction, arbitration courts, and in private mediation courts. A plaintiff shall have the right to either claim damages (as a common civil law remedy), or demand compensation in an amount ranging from RUB 10 000 (approximately EUR 240) to RUB 5 million (approximately EUR 120 000); or demand compensation in the amount of twice the price of either the infringing copies of the work or the copyright fee for the right to use the work.

Finally, it is important to mention that according to the Civil Code a person who unlawfully uses a work without being personally at fault shall not be liable for the violation, but shall be obliged to perform actions in order to restore the violated right, including inter alia actions to prevent further infringing use (for instance, taking off illegal content from a website) and publication in the media of the court's judgment at the defendant's expense (Article 1250 paragraph 3 Civil Code). The Civil Code provides different criteria for identifying liable persons depending on their status. A person is considered to lack fault, if he/she has taken all measures for the proper performance of an obligation with the degree of care and diligence, which was required of such a person by the nature of the obligation and the customs of the market (Article 401 paragraph 1 Civil Code). The burden of proof of not being liable for breaking an obligation shall be laid on the person that breached the obligation. If a person is a businessman, he/she shall be liable for any violation of an obligation except if the violation was caused by force majeure (Article 401 paragraphs 2 and 3 Civil Code). Article 1064 paragraph 2 Civil Code finally stipulates that a person may be obliged to pay damages even if they result from actions for which he/she is not liable if the obligation in question is directly provided for by the law.

3. Supreme Court Resolution of 19 June 2006

The Supreme Court interpreted some of the provisions mentioned above in its Plenum Resolution "On questions that arose with courts in civil case proceedings in application of legislation on author's rights and neighbouring rights".²⁰ Interestingly, in the Resolution the Court did not pay a lot of attention to the Internet aspects of using copyrighted works. There is only one provision in the whole document, namely point 25, devoted to the Internet. In this paragraph the Court takes the position that placing works (including audiovisual works), which are subject to author's rights and neighbouring rights, on telecommunication networks, including the Internet, is considered to be a form of use of such works. Copying a work onto the memory of a computer device shall be considered as using such a work provided that (i) the public obtains access to the work and (ii) public access is possible because of the initiative of the person who copied the work. If a person makes a copy by infringing the law, the copy is considered to be illegal, and the person a wrongdoer. The Supreme Court stipulated that the owner of a website containing illegal content may be, among other persons, considered liable for the infringing content. This interpretation is problematic in that the notion of "owner of website" as a legal category is unclear. It is not specified whether the person who owns the computer devices (servers hosting the website) or the software providing availability of the content to users or the domain name of the website is included in this category. It is easy to find who the infringer is in cases where a single person holds all those assets. However, more often the situation is much more complex. For instance, one person holds the domain name, another owns the servers for uploading information and provides software, and a third one provides the content and gets income from the website. There are no concrete criteria for finding the owner of a website among these persons in the Supreme Court Resolution.

4. Supreme Court Resolution of 15 June 2010

Another important act related to the interpretation of legal provisions concerning the Internet, and more precisely the procedures for proving the unlawful use of works on the World Wide Web, is the Resolution of the Plenum of the Supreme Court of the Russian Federation of 15 June 2010 "On

20) See Footnote 1.

the practice of application by the courts of the Statute of the Russian Federation 'On Mass Media'.²¹ Point 7 of the Resolution inter alia discusses how to prove the dissemination of information in the case of alleged violations of the law occurring on the Internet. It points out that notary offices are allowed to provide assistance with securing the necessary proof to persons who intend to sue for violation of their copyrights on the Internet before they file the lawsuit. The notary offices may provide assistance in particular by certifying the content of an Internet site if there are grounds to believe that it will become impossible or difficult to furnish proof in the future. The Supreme Court instructs the judges that they have the right to admit such proof in cases relating to the online dissemination of information.²²

The Resolution also recalls that in such cases – because the range of proof that can be provided is not limited by law – evidence may additionally be secured by the judge. When adjudicating the question of whether or not it is necessary to secure additional proof, the judge shall take into account the following aspects: the nature of the petition made to the court and in particular the case's subject-matter, the circumstances that require to secure evidence and the motivation of the claim for securing proof. In pressing cases, when preparing the court hearing and during the hearing itself, the court (judge) has the right to examine the proof by providing access to a work illegally posted online from the courtroom.

These directions in the Supreme Court Resolution seem to be of great importance in guiding the application of the law by the courts. Before the Resolution was adopted, judges often refused to protect rightholders because of a lack of proof that their works were unlawfully used on the Internet. Screen shots of the content placed illegally on a website certified by notary offices could be rejected as inadequate evidence.

5. Criminal Code and the related Supreme Court Resolution of 26 April 2007

The Criminal Code of the Russian Federation²³ also contains provisions concerning infringements upon author's rights and neighbouring rights. Article 146 of the Criminal Code stipulates a penalty for the unlawful use of objects of copyright or neighbouring rights, as well as the acquisition, storage or carriage of pirated copies of works or phonograms committed for the purpose of sale carried out on a large scale. The Plenum of the Supreme Court in its Resolution "On courts' practice in criminal cases relating to infringement of copyright, related, and patent rights, as well as the unlawful use of trademarks"²⁴ provided several interpretations of the Criminal Code provisions, which are important for the application of the law with respect to the Internet. Firstly, the Court ruled that the unlawful use of a work (the use of a work without obtaining prior permission from the author or rightholder) can be committed inter alia by actions as the dissemination of the work via the Internet (point 4 of the Resolution). Secondly, the Court interpreted the notion of "sales of pirated copies" of works or phonograms. According to the Court's position, sales include the provision to others of works by any

21) Resolution of the Plenum of the Supreme Court of the Russian Federation of 15 June 2010 "О практике применения судами Закона Российской Федерации "О средствах массовой информации"" ("On the practice of application by the courts of the Statute of the Russian Federation "On Mass Media"), published in "Российская газета" (official gazette) on 18 June 2010, available in Russian at: <http://www.rg.ru/2010/06/18/smi-vs-dok.html>

22) For more information on the Resolution see "Russia's Modern Approach to Media Law" by Andrei Richter, IRIS *plus* 2011-1, available at:

http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus1LA_2011.pdf.en. The entire IRIS *plus* 2011-1 "A Landmark for Mass Media in Russia" is available at the European Audiovisual Observatory, see http://www.obs.coe.int/oea_publ/iris/iris_plus/2011-1.html

23) Criminal Code of the Russian Federation (Уголовный кодекс Российской Федерации) of 13 June 1996, published in "Российская газета" (official gazette) 18 June 1996, available in Russian at: <http://base.garant.ru/10108000/>

24) Resolution of the Plenum of the Supreme Court of the Russian Federation of 26 April 2007 "О практике рассмотрения судами уголовных дел о нарушении авторских, смежных, изобретательских и патентных прав, а также о незаконном использовании товарного знака" ("On courts' practice in criminal cases relating to infringement of copyright, related, and patent rights, as well as the unlawful use of trademarks"), published in "Российская газета" (official gazette) 5 May 2007, available in Russian at: <http://www.rg.ru/2007/05/05/sud-prava-dok.html>

means (e.g. by sale, rental, free distribution for promotional purposes, gift, and placing works on the Internet) with or without payment. The offender's purpose of sale may be confirmed, not only by proving the actual sale to third parties of pirated copies of works but also by finding pirated copies at commercial locations, rental premises, warehouses, etc. belonging to the offender.

6. Federal Statute "On information, information technologies and protection of information"

Some general rules concerning the dissemination of information over the Internet are provided in the legislation regulating information exchange. Article 15 paragraph 5 of the Federal Statute of the Russian Federation "On information, information technologies and protection of information"²⁵ states the principle that the transmission of information using information and telecommunication networks shall be carried out without restrictions, subject to the requirements established by federal law on the dissemination of information and the protection of intellectual property.

Article 17 paragraph 3 of the Federal Statute contains the following provision:

"If the distribution of certain information is restricted or prohibited by federal law, civil liability for the dissemination of such information shall not be imposed on a person providing the following services:

1. transferring information without changes and corrections provided by another person
2. any storage and access to information, provided that the person could not know about the illegality of the dissemination of the information."

At the same time, Article 1 paragraph 2 of the Federal Statute stipulates that the provisions of this Statute shall not apply to the relations arising from the legal protection of intellectual property.

7. World Trade Organization

Finally, in the very near future the development of intellectual property regulation will inevitably focus on the implementation of the rules agreed upon by the World Trade Organization (WTO). At the time of preparation of this report, Russia was still not a member of the WTO, and, hence, was not bound by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). However, according to WTO official information, on 16 December 2011 the WTO members adopted Russia's WTO terms of entry at the Eighth Ministerial Conference in Geneva.²⁶ Russia will have to ratify the deal within the next 220 days and will become a fully-fledged WTO member 30 days after it notifies the ratification to the WTO. Once the entry will be finalised, Russia will start the process of bringing national legislation in line with WTO international agreements including TRIPS. As part of the accession accord, Russia has agreed to undertake a series of important commitments, inter alia in the sphere of protection of trade-related intellectual property.²⁷ The Russian Federation declared that it would fully apply the provisions of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights, including the provisions on enforcement, without recourse to any transitional period. The government would continue to take action against the operation of websites (with servers located in the Russian Federation) that promote illegal distribution of content protected by copyright or related rights. The Russian Federation would investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet. By the time of its accession, the Russian Federation would apply all rules of the Berne Convention for the Protection of Literary and Artistic Works.

25) The Federal Statute of the Russian Federation of 27 July 2006 "On information, informational technologies and protection of information" published in "Российская газета" (official gazette) on 29 July 2006, available in Russian at: <http://www.rg.ru/2006/07/29/informacia-dok.html>

26) See WTO annotation at http://www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm

27) For more information about the commitments see http://www.wto.org/english/news_e/news11_e/acc_rus_10nov11_e.htm

III. The controversial practice of Russian courts in cases involving Internet sites

The decisions of Russian courts in disputes about alleged copyright violations on the Internet quite often contradict one another. Russian Internet companies and rightholders criticise the powerlessness of the judiciary: generally, they complain that the courts do not know how to resolve disputes that concern the industry and that sometimes for similar factual settings courts make decisions with diametrically opposing reasoning.

1. Case law focusing on the posting of video content

An illustration of contradictory court decisions is given by two cases concerning the posting of video content. In the first case, the Federal Arbitration Court of the Moscow District sustained a lawsuit against the "Rambler" portal.²⁸ A user of this website posted a video of the pop group Lyapis Trubetskoy's "Capital" on the rambler.ru web portal. The rightholder of the video, the "First Musical Publishing House", brought a lawsuit against Rambler, the owner of the Rambler website, and demanded compensation of RUB 100 000.

The defendant claimed that he was not the proper defendant in this case, because the user and not the Rambler website had engaged in illegal use of content. Rambler directed the court's attention to the user agreement published at rambler.ru that was binding for all users of the website. Its provisions prohibited users from uploading illegal content and informed them about their liability should they not comply with this prohibition. Furthermore, the defendant invoked the argument that the plaintiff had not notified Rambler about the alleged violation of intellectual property rights; because the defendant lacked knowledge of the infringement, he was not able to take the content in question off his server.

The court rejected Rambler's arguments. The court established that the company Rambler Internet Holding was the domain administrator of the website located on the Internet at www.rambler.ru and the owner of this resource. It further held that the defendant disposed of the right and the resources to remove any video and comment that violated the terms of the regulations adopted by Rambler as well as to block user access to the service and act without having received prior notice of a violation. The court underlined that there was no evidence that the audiovisual work "Capital" had been posted by a third party, including users of the Rambler portal. The defendant did not provide any information about a user that could have committed the infringement, although it had the means to identify such user. For these reasons in the court's opinion Rambler was the person that had illegally used the work in the way specified in Article 1270 paragraph 1 subparagraph 11 Civil Code. The court did not consider the absence of a preliminary notification by the rightholder as a sufficient ground to exempt the defendant from liability in this case.

The second case became one the most known disputes concerning Internet piracy. The dispute arose in 2010 between the Russian State Television and Radio Broadcasting Company and VKontakte, a very popular social network. The St. Petersburg Court of Appeal (court of second instance)²⁹ imposed on VKontakte a fine of RUB one million for the fact that one of its users had placed on the social network's website an illegally made copy of the movie "Piranha" ("Hunting Piranha"). Two courts of superior jurisdiction, which considered this case in third and fourth instance, came to

28) Judgment of the Federal Arbitration Court of the Moscow District N КГ-А40/3891-10 of 11 May 2010, available in Russian at: http://kad.arbitr.ru/data/pdf/f647d128-e0be-4b7e-a1b3-3345ccbedfaf/A40-89751-08_20100504_Reshenija+i-postanovlenija.pdf

29) Available in Russian at: http://www.rb.ru/dop_upload/file_2010-07-30_10.18.17_29072010.pdf

the exactly opposite conclusion³⁰ stressing that VKontakte only provided users with a platform for publishing content and therefore lacked liability. This final result in the VKontakte case is also in contrast to the decision in the Rambler case.

The Federal Arbitration Court of the North-West District (cassation instance) reasoned that according to the user agreement participants of the online community vkontakte.ru are responsible for the legality of the content that they upload onto the website. The court also ruled that the website operator may not be held responsible if someone uses his services for illegal purposes provided that the operator does not know that the content is illegal. The Court applied Article 17 paragraph 3 of the Statute "On information, information technologies and protection of information" as, in the Court's opinion, providing that a person shall not be responsible for the dissemination of illegally uploaded works if this person provides services for the transmission of information without changing the information, or services for the storage and distribution of information. The Court used an additional requirement to exclude an application of the clause, namely: "that the person could not know about the illegality of the dissemination of the information".³¹ When applying the above mentioned rules the Court did not take into consideration Article 17 paragraph 2 of the Statute "On information, information technologies and protection of information".

The defendant had argued in the court that he "could not have known" about the illegal content posted on his website. The St. Petersburg Court of Appeal had dismissed this argument on the grounds that the social network was "innocently liable" for the illegal uploading of the film onto its websites, referring to Articles 401 and 1064 Civil Code. On cassation appeal, the defendant had argued that it was impossible to control the respect of copyrights in social networks, where many users communicate with each other and exchange content units. Both courts of higher jurisdiction agreed with this argument submitted by VKontakte and therefore denied liability.

The case of VKontakte demonstrates that the lack of a clear rule concerning the limitation of liability of web operators leads to a contradiction: on the one hand, the provisions of the applicable laws do not require Internet companies to monitor the legality of the conduct of their users, but, on the other hand, the law does not prevent the courts from holding them liable for not doing so.

2. Case law focusing on access and hosting services

Court decisions concerning activities of Internet service providers (i.e. telecommunication operators providing hosting services and access to the Internet) are controversial as well. One of the key disputes was the case "Content and Law" Company v. Internet service provider "Masterhost". The plaintiff filed a lawsuit claiming that Masterhost hosted the website www.zaycev.net, which offered musical content. Among others www.zaycev.net offered seven popular songs, for which the "Content and Law" Company held the copyrights and for which the website operator had failed to obtain a licence to make them available on his site.

The dispute was finally decided in last instance by the Ruling of the Presidium of the Supreme Arbitrary Court (the court of highest instance in economic disputes).³² In this Ruling the Court analyzed the contract between Masterhost and the company "MetKom" (the owner of www.zaycev.net) and concluded that the defendant was merely hosting the website as its Internet service provider. Masterhost was found to perform only technical duties such as providing and maintaining

30) Cassation ruling of the Federal Arbitration Court of the North-West District N Ф07-10112/2010 of 25 October 2010, available in Russian at: http://kad.arbitr.ru/data/pdf/bfa8bb67-c5be-43ec-b38e-2b0ab08e23e6/A56-44999-2008_20101025_Postanovlenie+kassacii.pdf; Ruling of the Supreme Arbitrary Court N BAC-18116/10 of 11 March 2011, available in Russian at: http://kad.arbitr.ru/data/pdf/7c48c0f9-b55d-4a4f-995e-9b67564fe8f0/A56-44999-2008_20110311_Opredelenie.pdf

31) Thus Russian courts (consciously or not) while enforcing Russian law use criteria similar to those in the US Online Copyright Infringement Liability Limitation Act (part of the Digital Millennium Copyright Act).

32) Ruling of the Presidium of the Supreme Arbitrary Court Постановление Президиума Высшего Арбитражного Суда РФ of 23 December 2008 N 10962/08, available in Russian at: http://www.eurolawco.ru/practicenews/arbcourt/cases_371.html

the hosting service used by MetKom. The Court further reasoned that when providing such services, the provider did not have access to the hosted content of MetKom. Therefore, the agreement between Masterhost and MetKom had stipulated that the consumer (MetKom) was solely responsible for ensuring compliance of the content posted on the Internet site with the legislation in force. In the case of receipt of claims from third parties, the company Masterhost had the right to suspend the provision of hosting services to MetKom.

To conclude the Court ruled that an Internet service provider shall not be held responsible for the transmission of information, unless he initiates the transmission, selects the recipient of the information or affects the integrity of the information. This position facilitated courts' future decisions that protected hosting providers that only provide clients with technical services.

A contradictory judgment was issued in 2010 by a court from the Khabarovsk Territory (region) of the Russian Federation. On 16 July 2010, the Central District Court of Komsomolsk-on-Amur ordered that local users be prevented from accessing youtube.com, the largest video hosting site worldwide, and other international websites.³³ The local prosecutor had unearthed on YouTube and other websites the extremist video "Russia for Russians" and had brought a lawsuit against Internet access providers in the interests of the regional population. The judge found that the video was "undermining state security, incited hatred ... and violated the constitutional rights of citizens". Therefore, the judge decided that access had to be limited not just to the one specific extremist video hosted on YouTube, but to the entire "extremist" source, namely the YouTube platform, irrespective of potential concerns as to the adequacy and proportionality of such a limitation. In addition, the judgment obligation to block the access of Internet users to YouTube was imposed on the providers of Internet access, not upon the owner of the YouTube website. Two of the three local Internet access providers appealed the decision in a higher court. In its Cassation ruling of 3 September 2010,³⁴ the Khabarovsk Territory Court affirmed the position of the Central District Court of Komsomolsk-on-Amur in principle; however the decision was narrowed down to limit access only to extremist materials, but not the entire websites.

IV. Initiatives of concerned parties aimed at legislation reforms or development of law enforcement practice

The protection of intellectual property on the Internet does not seem to be part of the political agenda of the parties represented in the Russian Parliament. No party of the State Duma (the lower house of the Russian Parliament) proposed any reforms to the existing intellectual property legislation during the latest State Duma election campaign.

In the absence of any discussion in Parliament, non-commercial organisations, the associations of rightholders and Internet companies argue with each other and publish declarations and statements, in which they present their views on the current legislative framework and the way the courts apply the law.

1. The open letter of companies providing Internet related services

On 14 October 2010, the leading companies in Russia (Google Russia, Rambler and Yandex search engines, Mail.Ru email service, VKontakte social network, Afisha lifestyle portal) that operate websites aggregating user-generated content published a letter addressed to the legislators and rightholders in which they present their view on the threat of copyright piracy on the Internet.³⁵

33) The text of the judgment in Russian is available for downloading at: <http://www.amurnet.ru>

34) The text of the judgment in Russian is available at: <http://gcourts.ru/cases/904/958/2010/9/313979.asp?t=Youtube>

35) The text of the letter is available in Russian at: http://www.rambler.ru/doc/company_news/1556

In the introduction to the letter, the companies noted that the Internet not only in Russia but all over the world is actively developing; a steadily growing amount of users enjoy Internet services that allow anyone to store and disseminate information. The dissemination services include services that help users place their own (very diverse) content on the Internet. Sometimes the content that users make available on the Internet does not comply with legislative requirements. This problem is attracting more and more attention because of the Internet's growing importance.

The authors of the letter emphasized that, unlike Europe and the USA, Russia does not have legislation containing any systematic description of who should be held liable for violating the rightholders' interests in cases where pirated copies of works protected under intellectual property law are placed on the Internet and under what conditions. In summarising their view of the situation, the Internet service providers underlined that in Russia rightholders prefer to sue the companies providing Internet access or hosting or related services rather than those posting the illegal content. This ignores the fact that companies that provide their services to millions of users have neither a legal basis nor the technical capacity to monitor every action of each user and to assess its legality or illegality.

The companies announced their position in respect to the protection of intellectual property rights. They emphasized that they provide users with the technical ability to communicate, store and search for information. In order to be able to upload and store content on their servers, users accept a user agreement, under which they undertake not to create or place illegal content. The companies take all reasonable steps to stop the committing of offences, of which they become aware. In order to do this, they accepted the following scheme to respond to complaints about violations of the rights of third parties on their websites. Upon receiving a motivated request, containing the exact URL of the content under question, the relevant services of an Internet portal suspend access to the content within a reasonable time. It is within the company's discretion whether to inform a user about the fact of having received a claim of breach of copyright. If the user disagrees with the claim concerning the content posted by him/her, he/she sends a counter notice. In that case, the user ceases to be anonymous because he/she provides his/her contact information. Thus, a rightholder receives information about the proper defendant and has enough information to bring an action to court. If a company makes the decision not to notify a user or the user does not give a counter notice, the content will be blocked or deleted.

The companies proposed to rightholders to use the existing mechanisms in order to end any violation of copyright or related rights. They judge these mechanisms to be adequate in comparison to the solutions used in the global information markets. The companies affirmed their readiness to participate in a constructive dialogue in order to improve these mechanisms, if needed.

Finally, the authors of the letter proposed to the Russian legislature to introduce a law that would define clearly who is liable for violations of intellectual property rights on the Internet while securing a balance between the rights of all stakeholders: users, rightholders and operators of Internet services.

2. Reactions by online video portals to the open letter

On 22 October 2010, the top managers of the Russian online video portals providing users access to professional legal video content (tvzavr.ru, zoomby.ru, tvigle.ru) reacted to the publication of the above-mentioned open letter. The response letter was published in the newspaper "Vedomosti".³⁶

From the point of view of the video portals the national online content market should be developing in line with the regulations and customs of international and national law, including the laws on protection of copyright. The video portals declared that they would provide strict and mandatory observance of intellectual property legislation. In particular, they would poste only

36) Available in Russian at:

http://www.vedomosti.ru/tech/news/1130245/videosajty_vystupili_protiv_krupnejshih_ploschadok_runeta

licensed content, comply with all requirements of rightholders regarding copying and distribution, and pay fees and royalties to the rightholders. They claim that the principles laid down by companies providing Internet related services in their open letter provoke a misbalance in the media and Internet sphere. On the one hand, the approach taken by these companies would lead to the development of legal nihilism among Russian Internet users; on the other hand, it would render all businesses along the chain of production and distribution of legal content unprofitable. The pressing need would be to have clear rules that allow consumers to obtain a high-quality product, and the producers and distributors to work for the benefit of consumers. Otherwise, according to the top managers of the online video portals, the Russian digital media industry would become uncompetitive in the light of the general globalization and worldwide developments.

The main point made by the online video portals consists of the idea that reducing piracy fighting measures to the sole action of removing audiovisual works that violate intellectual property rights from the sites would not be an effective means of protection. The authors of the letter insisted that only the application of a whole package of measures would suffice to contribute to the formation of a civilized market for Internet video content. Therefore the online video portals proposed:

1. To stop the indexing by search engines of online sources that have been found to violate intellectual property law;
2. To introduce the mandatory obligation for advertisers of services providing users with copyrighted content to confirm compliance of the advertised services with intellectual property law requirements when placing advertisements;
3. To require that the search engines of websites refuse advertising of pirated content as well as of products unrelated to the search query;
4. To substitute illegal user-generated content (UGC) on websites with licensed content;
5. To introduce a limit of 7-10 minutes for the length of uploaded UGC video.

3. The point of view of rightholders

The rightholders also brought their point of view to the discussion. On 27 October 2010, the Association of Television and Cinema Producers published its own programme for counteracting Internet piracy ("Address to Internet companies").³⁷ The key point of the Association's initiative was the presentation of the Open Catalogue of Rights to Audiovisual Works. This catalogue includes information about audiovisual works produced by the members of the Association starting from 1990, including contact information of rightholders, and is available at the website of the initiative "No to the thief" ("Вору нет").³⁸ In order to make the Open Catalogue effective, the Association declared the following principles:

1. The content specified in the Open Catalogue may only be used on websites that have licence agreements with the relevant rightholders. The "Address to Internet companies" contains both the names of 17 websites considered by the Association as "legal" (including the online video portals mentioned in section IV.2.) and a list of 299 websites considered as pirating ones.
2. The Association proposes that websites that do not have licence agreements with rightholders shall either delete the illegally offered content or enter into agreements with rightholders. The date of 31 January 2011 is indicated as the "point of no return" in the sense that the Association reserves the right to sue any source providing content illegally after this date
3. The Association welcomes the initiative of the companies operating popular websites (see section IV.1.) to participate in a constructive dialogue in order to improve the mechanisms for protecting intellectual property rights. From the point of view of the Association, this means that these companies should take one of the steps indicated in point 2 above. The Association emphasizes that according to its position, users uploading content are not themselves violating copyrights because the technologies and equipment that enable them to make content available to the public are in the possession of the Internet services providers. Therefore, the latter are liable for any illegal making available of content.

37) Available in Russian at: <http://www.piratu.net/news/article8/sozдание-otkrytogo-reestra-prav-na-audiovizualnye->

38) Available for downloading at: <http://www.piratu.net/news/article8/sozдание-otkrytogo-reestra-prav-na-audiovizualnye->

4. The Association supports the request of online video portals that search engines and web sources advertising copyrighted content services get involved in the process of fighting piracy.

The Association threatened pirate websites with the prospect of massive legal pressure after the 31 January 2011 deadline. However, no consolidated actions were taken up to the time of writing this article (see Introduction to this report).

4. Views of the Russian Pirate Party

Another participant in the public discussion concerning the perspectives for the regulation of intellectual property is the Russian Pirate Party, which in fact is not a party, but a non-formal association of activists proposing reform of intellectual property law. In March 2011, the leaders of the "Pirate Party" wanted to register the party officially as a political organisation, but their application for registration was refused by the Ministry of Justice of the Russian Federation because piracy (an act of robbery or criminal violence at sea) "under the law is a criminal act against public safety". The Ministry of Justice specified that in accordance with Article 277 Criminal Code of the Russian Federation, the penalty for committing this type of crime can be up to 15 years imprisonment.³⁹

Despite the failure to establish the Pirate Party as a political organisation, its founders continued to perform activities aimed at fostering the reform of intellectual property law. The initiatives of the Pirate Party mainly consist in promoting on the Internet the idea that a reform of the intellectual property law is needed.

The Pirate Party published the Declaration "Copyright in the Digital Age",⁴⁰ which includes the following points concerning the dissemination of information over the Internet:

1. All restrictions on the non-commercial sharing of information should be abolished.
2. The term of copyright protection for works should be significantly reduced.
3. Articles 146 and 147 Criminal Code should be annulled. Disputes concerning copyright and patent rights should be settled only by civil courts.
4. State authorities should be obliged to respect the presumption of innocence of citizens, in particular, they should abolish the hard media tax and prevent the introduction of other taxes of this kind, inter alia a tax on dissemination of information imposed on Internet service providers.⁴¹
5. Internet is the territory of freedom of information; it is unacceptable to introduce censorship of any kind in the World Wide Web. Formal causes for censorship are the dissemination of political extremist materials, the distribution of materials created illegally (such as child pornography or videos of violent crimes) and copyright infringement. None of these reasons from the point of view of the Pirate Party justify censorship. Discussions about political extremism often conceal a desire to eliminate political opponents or those who can discover crimes of governmental officials. Criminal acts can be fought only in one way: by finding and bringing to justice those who commit them.
6. It is useless to remove information from the Internet, as it is impossible to make a man forget what he saw.

39) See Russian electronic gazeta.ru article "Минюст отказал Пиратской партии России в регистрации, перепутав с морскими пиратами" (Ministry of Justice refuses Pirate Party registration to prevent confusion with buccaneer.), available in Russian at: http://www.gazeta.ru/news/lenta/2011/03/21/n_1755897.shtml

40) Available in Russian at: <http://pirate-party.ru/page.php?id=280>

41) The concept of such tax forms is that all Internet service providers would be obliged to pay a fixed percentage of their income to copyright collecting societies. Those who pay the tax would be considered as posting the content (including UGC content) online legally. The introduction of such a tax would inevitably cause the prices of Internet services for users to rise. The opponents of the proposed tax raise the objection that the users would be presumed "guilty" of violation of intellectual property rights. The issue of introducing the tax is only discussed within the professional community, no draft laws have been initiated yet.

7. The free exchange of cultural ideas and products is not a crime, but a resource for society. If authors or publishers want to make a profit, their objective should be to offer people something for which they are willing to pay and not to destroy opportunities provided by the Internet.
8. Free licences are to be introduced in the law.

The final resolution of the document, which functions also as the party's programme, includes requirements to respect freedom of speech and freedom to disseminate information, to avoid censoring the Internet under the pretext of fighting the spread of unwanted information and protecting copyright, to guarantee free access to computer networks, to avoid disconnection from the Internet as a punishment for piracy, extremism and similar "quasi crimes", and to not allow to hold providers liable for the information posted by users.

V. Review of draft legislation regulating copyright protection on the Internet (Amendments to Part 4 of the Civil Code)

Many proposals and results of the public discussion were taken into account in the process of preparing a complex reform in order to modernise civil law legislation. This reform started in 2008 as a project to radically review the whole regulation of economic activities in Russia. The Decree of the President imposed upon the President's Council on Codification and Renovation of the Civil Legislation the duty to develop and provide follow up revisions of the civil law statutory acts.⁴² The Council is obliged to draft new versions of the legislative acts and to arrange public consultations on these drafts. As one of the steps on the way to a modernization of the legislative acts, the Council drafted a law amending Chapter 4 of the Civil Code. Inter alia, the amendments would introduce the additional options to dispose of the exclusive right. The draft law was published in the official gazette ("Российская газета") on 14 September 2011.⁴³

The draft provides for a number of amendments that would have an impact on the regulation of the Internet. In accordance with the proposed amendments to Article 1233 Civil Code, the rightholder would have the right to make the public statement that any person is free to use the result of his/her intellectual activity in the ways precisely defined by the rightholder and for the period specified by him/her. Should a rightholder choose not to indicate any period in his/her statement, it shall be considered that the use is permitted for five years. During the term for which a use is permitted, the rightholder may neither withdraw his/her statement nor alter the conditions of use. This provision would provide a legal basis for the introduction of free licences (similar to Creative Commons) into the Russian legal system.

The draft law introduces the notion of "website", which refers to content "provided in the form of an objective set of independent materials ordered in such a way that these materials could be posted on the Internet." The draft stipulates that the website is protected by copyright with regard to the selection or arrangement of materials.

One of the most important innovations of the proposed draft is the introduction of conditions for civil liability of a (natural or legal) person transferring data over the Internet or placing material on the Internet (the so called "Internet intermediary").

It is established that the Internet intermediary, carrying out the transfer of the material on the Internet, shall not be held responsible for violations of intellectual property rights that occur as a result of such transfer, subject to the following conditions:

42) Decree of the President of the Russian Federation of 18 July 2008 N 1108 "On improvement of the Civil Code of the Russian Federation" ("О совершенствовании Гражданского кодекса Российской Федерации"), published in "Российская газета" (official gazette) 23 July 2008, available in Russian at: <http://www.rg.ru/2008/07/23/kodeks-dok.html>

43) Available in Russian at <http://www.rg.ru/2011/09/14/gk-izm-site-dok.html>

1. the Internet intermediary does not modify such material after it is received, except for changes made to ensure the process of transferring the material;
2. the Internet intermediary neither knows nor should have known that the use of the copyright protected work by the person who initiated the transmission of the material containing such work, is illegal.

It is envisaged that the Internet intermediary who provides the service that allows users to post material on the Internet is not liable for infringements of intellectual property rights that occur as a result of the actual posting by the customer (or according to the customer's order), under the following conditions:

1. the Internet intermediary does not know nor should have known that the use of a copyright protected work that is included in uploaded material is illegal;
2. if the Internet intermediary has been notified in writing by a third party about the violation of intellectual property rights by placing the copyright protected work on the Internet, the Internet intermediary undertakes actions to neutralize the violation of intellectual property rights according to the procedure provided for by the Federal Statute "On information, information technologies and protection of information".

The project seeks to establish a balance between the interests of the Internet intermediary and the copyright holder.

VI. President Medvedev's initiative to reform worldwide intellectual property rights on the Internet (proposal to amend the Berne Convention)

The Russian President Dmitry Medvedev has sent a message to the heads of government of the "Group Twenty" states. This message includes new ideas concerning the regulation of the use of the results of creative activities in the global network.⁴⁴

In the President's opinion, the current principles for protecting intellectual property were established in a completely different technological context and are not adapted to the practical needs of today. The current situation requires the introduction of a new conceptual framework for international regulation of creative activities on the Internet.

In order to ensure that the use of intellectual property through the means offered by today's technology is effectively regulated, in Medvedev's view, the international community needs to:

1. define the limits of fair use of intellectual property by Internet users;
2. change the method of obtaining the consent of the rightholder to use his/her work;
3. introduce means to control compliance with copyright and related rights by intermediaries placing content on the Internet, but not with regard to common users of the Internet.

The President's concept for the use and protection of the results of creative activity on the Internet includes the following positions:

1. The state should establish a certain level of legal protection of copyright and related rights on the Internet and provide the rightholder with the opportunity to choose a model of legal protection for his/her activities that suits his/her interests best.
2. The key element of the new approach to the protection of copyright and related rights would be to introduce a legal presumption that the use of works protected by copyright and related rights on the Internet may be considered authorised and free unless the rightholder declares otherwise. At the same time, a minimum level of copyright protection shall be provided for the rightholder.

44) Available in Russian at: <http://news.kremlin.ru/news/13329>, in English at: <http://eng.kremlin.ru/news/3018>

3. If found guilty, information intermediaries on the Internet (communications service providers, Internet website and domain name owners, etc.) should be held responsible for violation of copyright and neighbouring rights on general grounds, except for specifically established cases (for instance, if they did not know or did not need to know of the illegality of the content that is made available with the help of their services).

The above-mentioned approach requires the introduction of legal, economic and technological mechanisms, which would be useful to all parties interacting in the Internet sphere (users, rightholders and information intermediaries).

In order to implement these proposals President Dmitry Medvedev sees the necessity of amending the Berne Convention for the Protection of Literary and Artistic Works. He therefore presented a plan to reform the Berne Convention, which is aimed at adapting the existing international standards of legal protection of copyright and related rights to the process of partial abandonment of the traditional physical (material) copies of works in favour of the transition to electronic copies of the products.

During the preparation of a new version of the Berne Convention, experts of participating countries should examine national regulation of intellectual property on the Internet, as well as the practice of dispute settlement in the area concerned. Likewise, the review should include the way the provisions of the WIPO Performances and Phonograms Treaty of 1996 and the WIPO Copyright Treaty of 1996 have been implemented into national legal systems.

The key points to be addressed in the amendment process of the Berne Convention according to President Medvedev should include the following:

1. *Adding a new category of "Content" (object of intellectual property that has no tangible medium and exists only in electronic form) to the list of works covered by the concept of "literary and artistic works" (Article 2 Berne Convention).* Nowadays the legislation in the countries bound by the Berne Convention includes provisions stating that literary and artistic works or any of their specific categories shall not be protected if they are not fixed in any tangible form. Thus, the present version of the Berne Convention lacks explicit provisions that not only tangible goods but also works in electronic form should be subject to the protection.
2. *Adapting the concept of "publication of the work" to relations on the Internet, where in fact publication means the posting of an electronic copy and the making available of it to the public (Internet users).* Currently, the Convention uses the expression "published works" which it defines as "works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work" (Article 3 Berne Convention).
3. *Changing the Convention's criteria for determining the country of origin of a work (Article 5 Berne Convention).* The existing criteria should not be applied to Content, because, due to the Internet's transfrontier infrastructure, it is impossible to establish the place of publication. Consensus should be reached on ways to improve the concept of "country of origin" with regard to Content, which was first published (posted) on the Internet.
4. *Introducing the notion of "electronic reproduction" (digitization) as a form of reproduction of works for the purposes of the Berne Convention.*
5. *Providing permission to special subjects (primarily digital libraries) to carry out digitization of intellectual property works free-of-charge and without prior consent of the rightholder under the condition that these special subjects provide users with access to these works in a way that precludes subsequent uncontrolled dissemination of the works over the Internet.* There is a need to expand the list of cases of free use of works for humanitarian purposes (Article 10 Berne Convention).
6. *Introducing the "quasi-free" personal use of the Content by users on the Internet.* Legally, such a model could be realized by establishing a presumption that the rightholder consents to the use of the Content for personal aims by the user. The indication of consent could be "withdrawn" by a notice from the rightholder to the user. For the rightholder to be able to give such a notice one could imagine various technical means, including the introduction of electronic tags.

7. *Introducing a new provision in the Berne Convention stipulating that posting Internet hyperlinks to Content does not in itself constitute a form of use of such Content.*
8. *Standardising the existing free licences (like Creative Commons, etc.) and adapting new models of Content distribution to the requirements of both Anglo-Saxon and Continental law.*
9. *Establishing in the Berne Convention special protection measures for rightholders in case of violation of their rights such as removing illegally placed Content from the Internet.* Currently, pirated copies of works are subject to seizure in any country bound by the Berne Convention, where the work enjoys legal protection (Article 16 Berne Convention). Pending any potential revision of the Berne Convention, the concept of “infringing copy” is difficult to apply as regards illegally placed Content for the following reason: the Content always exists on a physical medium (hard disks, servers, etc.). In case of a dispute between the owner of a server and a rightholder about illegally placed Content, the latter has the right to demand confiscation of the server as the storage place of pirated Content. If, for instance, only one unit of the Content were to be posted on the website illegally (copied in the server’s memory) while thousands of units of the Content were posted lawfully, the confiscation of the computer equipment would, however, be a disproportionate measure that may violate the rights of persons performing activities in compliance with the law.
10. *Providing a model for the liability of information intermediaries in connection with the illegal dissemination of Content on the Internet by users (requires a separate article of the Berne Convention).* Due to the cross-border infrastructure of the Internet, information intermediaries and rightholders need uniform rules governing their relationships and taking into account the public interest. Information providers should not be held responsible for providing access to the user and thereby opening the opportunity for sharing Content illegally posted by third parties, under the condition that such providers did not possess knowledge of the copyright violation. A mechanism that would allow the Internet service provider to respond to the notice given by a third party about copyright piracy by blocking access to the illegally posted Content should be introduced.

VII. Conclusions

The Russian legal framework for intellectual property has been tightened in order to provide adequate regulation of the dissemination of copyright protected works. Among other factors, the provisions adopted in 2006 as Part 4 of the Civil Code of the Russian Federation boosted the development of a market for “legal” consumption of audiovisual content in the Russian segment of the Internet. Today, rightholders are willing to grant licences to the video portals that adhere to the legal framework, and the latter are interested in the development of a transparent and profitable market

At the same time, the development of the legal content sector started when the turnover of illegal content had become enormous and the parties concerned faced the pressing need to counteract intellectual property piracy. The attempts of rightholders to obtain protection of their rights by Russian courts often still fail. An analysis of pertinent judicial judgements shows that the level of protection of intellectual property rights is possibly not as high as it should be in order to meet the requirements of rightholders. Russian law lacks clear rules for the distribution of liability between the operators of Internet sites, Internet service providers and users for content illegally posted on the Internet. Current (contradictory) enforcement practices mirror this situation. The Russian judges of ordinary courts have trouble establishing a balance of interests of rightholders and Internet intermediaries.

However, the situation is changing very dynamically. We can witness an actual trend in Russian state policy to develop legal instruments aimed at guaranteeing intellectual property rights protection on the Internet. This trend may be illustrated by both the repeated recent efforts of the high courts to form unified law-enforcing practice and the presentation of initiatives aimed at reforming the national system of intellectual property law, namely the recent draft law amending the Civil Code of the Russian Federation. The decision-making process is influenced by increasingly intensive public discussions of interested parties (Internet intermediaries, rightholders, video

portals, NGOs) concerning the level and means needed to protect intellectual property rights on the Internet. These discussions are putting pressure on governmental authorities to resolve the problem of Internet piracy more actively.

Another important factor likely to contribute to a change of the situation is Russia's involvement in the international discussion on the evolution of intellectual property law. Both the participation of Russia in the WTO and the presentation by President Medvedev of his ambitious plans for bringing international intellectual property law into line with the Digital Age requirements may also improve the effectiveness of intellectual property law protection under the national system. Members of the international community would hardly consider a country as one of the leaders of the reform of international intellectual property law if that country were unable to provide effective mechanisms for counteracting Internet piracy on the national level. This reason undoubtedly will boost the Russian authorities' efforts to achieve the breaking point in their fight with Internet piracy in the nearest future.

Steps towards Solving Piracy Issues

The first step in solving a copyright piracy issue is to be crystal clear about what works are to be protected. In a recent Swedish case, the court clarified that a company producing the live streaming of ice hockey games on the Internet held a copyright with the result that an unauthorised deep link to a streaming service could represent an infringement. In contrast, a copyright holder who consented to a specific use may not seek protection against the use agreed upon. But it may be an issue whether or not consent was given. This is the topic of the next report, which deals with tacit agreements and thumbnails. We obviously don't have a piracy problem if a work is in the public domain. The European Commission is currently working very actively to clarify the ins and outs of the public domain, as is reported in the third article.

The second step is certainly to avoid that copyright protected content be pirated, something that might be achieved with appropriate technical measures. This aspect will be considered by HADOPI as to the feasibility of such means as the fourth article explains, and it played a role in a recent judgment of the Court of Justice of the European Union. As is reported in the next article, the Court had to decide whether online intermediaries might be obliged to undertake such measures.

But what happens if technical means prove insufficient? This leads us to the third step and the question of what kind of illegal actions might trigger legal measures to protect copyrighted works. Deep linking has kept Spanish and French courts on their toes as summarized by the two following articles.

Finally, the most clear case might go nowhere if the potential plaintiff cannot identify the infringer of his copyrights. The disclosure of user data is therefore an important topic, recently addressed by a German court in a case concerning YouTube. This is described by the last contribution.

Sweden

Direct Linking to Streamed Broadcasts of Ice Hockey Games is Copyright Infringement (Appeal)

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The Court of Appeal for Southern Norrland has tried an appeal regarding criminal liability for direct linking to the streamed broadcasts of ice hockey games. The perpetrator was found guilty of violating the Swedish Copyright Act (CA) and was accordingly ordered to pay a fine and damages to C More Entertainment AB. Although the outcome of the Court of Appeal's decision is similar to that of the decision of the District Court (see IRIS 2011-1/47), many interesting issues were judged differently.

During autumn 2007 Swedish TV channel Canal + broadcast ice hockey games on a pay per view basis, inter alia, through live streaming on the Internet. The broadcasts were produced by the company C More Entertainment AB and the rights to the transmissions were owned by the same company.

In October and November 2007 a person published links to the broadcasts of the games on his website, an unofficial fan site of his favourite Swedish ice hockey team. By following hyperlinks visitors were granted direct and free access to the games on their computers.

C More Entertainment AB filed charges and the perpetrator was prosecuted for violating the CA. The claims were based on the grounds that the broadcasts constituted works of art as well as being protected by the neighbouring rights granted to the producers of recordings of sounds and images.

The defence disputed all charges invoking, amongst others, that the broadcasts were not subject to copyright and that the alleged actions did not amount to any relevant exploitation within the meaning of the CA. Nonetheless, the perpetrator was found guilty by the District Court and held liable to pay fines and damages.

The defence appealed and continued to dispute all charges. C More Entertainment AB on their side sought full compensation for their alleged loss. The Prosecutor wanted the perpetrator to be found guilty of premeditated violation of the CA.

As opposed to the District Court, the Court of Appeal did not recognize that the commentary on the ice hockey games was original and of a personal character and thus protected by copyright. In the Court of Appeal's view, the commentary essentially seemed to follow the events of the game and could not significantly be distinguished from other commentary performances. Neither could the commentator's personal comments and opinions be regarded as distinctive. In summary the Court of Appeal did not consider the commentary on the ice hockey games to be individual and original performances to be deserving of copyright protection.

The Court of Appeal also made a different assessment regarding the broadcasts in their entirety, i.e., the coordination by the technical producer, choice of focus, timing etc. In this regard the Court of Appeal considered the camerawork to be neither individual nor original to the extent that it should be given copyright protection. The camerawork and its coordination were accordingly not unique and could not be considered to enhance or increase the drama or specific features of the game.

C More Entertainment AB and the Prosecutor had also claimed that replays in the broadcasts were protected by neighboring rights. For such rights there is no requirement of individuality or originality under the CA.

As did the District Court, the Court of Appeal also found that replays and slow-motion sequences of goals and other highlights that occurred during the game are protected as neighboring rights. Only C More Entertainment AB had the right to distribute the replays. The latter was something that was not disputed by the defense.

By granting users direct and free access to the games through links on his website (direct linking) the perpetrator had communicated the replays to the public. The Court of Appeal noted that whether direct linking is seen as transferring to the public is not dependant on how many people actually watch the broadcast by the link. Instead, what is vital for the assessment is the possibility for the public to view the transmission.

Furthermore, the Court of Appeal stated that C More Entertainment AB could not be considered to have contributed to the linking by not having effective counter-measures in place against linking. The fact that the game was offered on a pay per view basis and the link was not available through any ordinary search engines was considered an indication that C More Entertainment AB had tried to protect the replays from infringement.

In conclusion, the perpetrator was found guilty of violating the CA. Therefore, he was ordered to pay a fine and damages to C More Entertainment AB for having made the replays available to the public without the company's consent.

- *Hovrätten för Nedre Norrlands dom den 20 juni 2011 i mål nr B 1309-10* (Judgment of the Court of Appeal of Southern Norrland of 20 June 2011 in Case No. B 1309-10)

IRIS 2011-9/33

Germany

BGH Rules Again on Thumbnail Admissibility

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On 19 October 2011, the *Bundesgerichtshof* (Federal Supreme Court – BGH) issued another ruling on the admissibility under copyright law of Google's online image search engine.

Google's image search engine enables users to search for specific images posted online by third parties by typing in a search item. In the subsequent search result list, the images are shown in thumbnail form.

In the case at hand, the plaintiff was a photographer, one of whose photographs had appeared in thumbnail form in the results of a Google image search. The search engine had stated that the image had been found on two Internet sites whose operators had not been granted usage rights by the plaintiff. The plaintiff argued that this breached his copyright and demanded, *inter alia*, that Google stop showing his photograph in thumbnail form.

The BGH rejected this claim, referring to a decision it had taken in 2010, in which it had ruled that a copyright holder who posted an image of his work online without taking technical measures to block access to it via an image search engine should be assumed to have no objection to thumbnail versions of it being made publicly available (see IRIS 2010-6/18). The same applied if the image was posted on the Internet (without technical protection) by a third party with the copyright holder's permission.

Although the plaintiff in this case had not granted the right to use the image of his work to the operators of the websites mentioned, he had granted such a right to a third party. His consent to the online publication of the image in thumbnail form was not limited to copies that he had expressly permitted. This was evident from the fact that automatic search engines could not distinguish between legal and illegal copies.

In this case, the copyright holder was still entitled to take legal action for breach of copyright against the parties who had posted the images on the Internet without his consent.

- *Pressemitteilung des BGH zum Urteil vom 19. Oktober 2011 (Az. I ZR 140/10)* (BGH press release on the ruling of 19 October 2011 (case no. I ZR 140/10))
<http://merlin.obs.coe.int/redirect.php?id=15566>

IRIS 2012-1/17

European Commission

Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation

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On 28 October 2011 the European Commission adopted a Recommendation on the digitisation and online accessibility of cultural material and digital preservation. The Recommendation follows up on a similar Recommendation from 2006, updating for new developments such as the launch in 2008 of Europeana, the publication of the "New Renaissance" Report by the *Comité des Sages* and the adoption of the Commission's proposal for a Directive on orphan works in May 2011. The Recommendation acknowledges the importance of digitisation for making Europe's cultural productions more widely available and thereby boosting the growth of Europe's creative industries. It accordingly challenges member states to step up their digitisation efforts.

On an organisational level, the Recommendation invites member states to set clear and quantitative targets for the digitisation of cultural material. To help manage the high costs of digitisation, public/private partnerships should be encouraged. The EU Structural Funds may also be used for this purpose.

In response to the recent trend among European cultural institutions to assert new rights over digitised versions of public domain works, not always with a solid legal basis, thus impeding their re-use, the Commission declares that material in the public domain should remain in the public domain after digitisation. Intrusive watermarks and other visual protection measures that reduce usability of digitised public domain material are also discouraged.

With regard to material that is still copyright-protected, the Commission concentrates on orphan and out-of-commerce works. It encourages the rapid and correct implementation of the Directive on orphan works as soon as that is adopted. It also promotes the creation of a legal framework conducive to licensing mechanisms that enable the large scale digitisation and cross-border accessibility of out-of-commerce works. Finally, it supports the development of European-level databases of rights information, such as ARROW, which contribute towards uncovering the information necessary to remedy the orphan status of a work or establish the expiry of copyrights.

Finally, the Recommendation addresses the question of digital preservation. [...]

- Recommendation on the digitisation and online accessibility of cultural material and digital preservation, C2011 7579 final
<http://merlin.obs.coe.int/redirect.php?id=11391>

IRIS 2012-1/4

France

New HADOPI Legislation soon to Combat Streaming?

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On 18 November 2011, the French President Nicolas Sarkozy announced during a forum on culture in the digital era his desire to extend the fight to combat illegal downloading to the streaming of musical and audiovisual works. "If technology allows us further evolution, then the law will be adapted," he said. It should be recalled that the Decree of 5 March 2010 authorising the HADOPI to process the data transmitted to it by rightsholders and access providers currently only refers to peer-to-peer activity. As a result, and despite the fact that it is increasingly frequent, the HADOPI does not currently include streaming in the "graduated response" system and the efforts to combat illegal downloading. Following on from the President's speech, the HADOPI announced that it intended to embark on a "new stage in the protection of copyright on the Internet that was fully part of its duties, in addition to the possibilities already open to rightsholders under Article L336-2 of the Intellectual Property Code". To achieve this, three areas of action will be implemented consecutively, starting from now. Firstly, the HADOPI will carry out a clear, precise evaluation of what is involved, particularly with regard to technical and economic aspects. It will also assess existing legal and technical measures, and their limitations. This work will be based on experimentation carried out on an ad hoc basis in the HADOPI's "labs" (research workshops entrusted to independent experts, operating in an open collaborative mode). Everyone concerned (rightsholders, IAPs, service providers, etc) is invited to take part straight away. Secondly, the HADOPI announced the start of intensive dialogue with the sites and platforms concerned by the phenomenon, and with all the middlemen contributing to their operation, and more particularly the banks, payment agents and advertising authorities, in order to assess the situation and the ways in which they could help remedy the situation. Lastly, on the basis of earlier work, and according to an assessment of the limitations of the existing legal tools, the HADOPI will make proposals for adaptation of any kind, including in the field of legislation, the better to achieve the objectives that have been set. The HADOPI has set itself the objective of obtaining the first significant results in each of these three areas by the end of the first quarter of 2012 – right in the middle of the presidential election campaign.

- *Communiqué de presse de l'Hadopi du 25 novembre 2011, « Streaming » et téléchargement direct de contenus illicites : l'Hadopi s'engage dans une nouvelle étape de sa mission de protection des droits* (HADOPI press release of 25 November 2011: "Streaming and the direct downloading of illegal content – the HADOPI embarks on a new stage in its mission to protect rights") <http://merlin.obs.coe.int/redirect.php?id=15560>

IRIS 2012-1/28

Court of Justice of the European Union

Ruling on the Obligations of Online Intermediaries

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On 24 November 2011 the European Court of Justice delivered its long-awaited judgment on the legality of injunctions obliging ISPs to install filtering systems on their networks for reasons of copyright enforcement. The case involved a dispute between Scarlet Extended SA, an Internet

access provider operating in Belgium, and the Belgian collective management organisation *Société d'Auteurs Belge – Belgische Auteurs Maatschappij* (Society of Authors, Composers and Publishers – SABAM). SABAM initiated the proceedings alleging that Scarlet (formerly Tiscali) has knowingly permitted the illegal downloading by third parties of its protected works through peer-to-peer file-sharing on its networks. The *Tribunal de Première Instance de Bruxelles* (Brussels Court of First Instance) granted SABAM's request for the imposition of an injunction obliging the ISP to install content management and identification fingerprint-based software so as to prevent the unauthorised exchange of protected material by its subscribers (see IRIS 2011-6/2 and IRIS *plus* 2009-4). Scarlet appealed the decision and the Cour d'appel submitted a request for a preliminary ruling to the Court of Justice, asking whether EU law permits member states to authorise national courts to order ISPs to install, on a general basis, as a preventive measure, at their own expense and for an unlimited period, a system for filtering all electronic communications in order to identify illegal file downloads.

The Court began by pointing out that, under the both the Copyright Directive and the Enforcement Directive, courts and administrative authorities may impose injunctions ordering service providers to terminate already committed or prevent future copyright infringement. Although the rules governing such injunctions are a matter for national law, national rules must be in conformity with limitations arising from EU law, such as the prohibition of general monitoring obligations as set out in Article 15 E-Commerce Directive. The Court established that the requirement that an ISP install a filtering system would violate this prohibition.

The Court then went on to examine the compatibility of a filtering injunction with the EU's fundamental rights framework. The Court noted that, although the protection of intellectual property is enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union, nothing in the wording of the provision suggests that the right is inviolable and must be absolutely protected. On the contrary, the protection of intellectual property must be balanced against the protection of other fundamental rights.

In this regard, the Court found that the sweeping and costly nature of the injunction under discussion, which would require the monitoring of all electronic communications made through the network of the ISP without limitation of time and at the ISPs expense, would result in a serious infringement of Scarlet's freedom to conduct business. In addition, adverse effects would also accrue for the ISP's customers: firstly, the injunction would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent, which constitute protected personal data. Secondly, since filtering systems cannot adequately distinguish between lawful and unlawful content, their introduction could lead to the blocking of lawful communications, undermining freedom of information. Consequently, according to the Court, the imposition of an injunction ordering an ISP to install filtering systems on its networks cannot be said to strike a fair balance between the rights of the intellectual property holders on the one hand and the rights of internet access providers and their customers on the other.

In light of this reasoning, the Court reached the conclusion that an injunction requiring the installation of a filtering system by an ISP is precluded by EU law.

- Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24 November 2011
<http://merlin.obs.coe.int/redirect.php?id=15552>

Spain

File-Sharing Administrators Jailed For Linking To Copyright Works

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On 27 September 2011, the Provincial Court of Vizcaya sentenced the website managers of the web pages Fenixp2p and MP3-es to imprisonment and payment of a fine for the infringement of intellectual property rights. It is the first case that has convicted administrators of websites that actively link to content protected under copyright law in Spain.

In common with many similar sites, FenixP2P.com and MP3-es.com carried no content of their own, but instead linked to other locations where content was hosted. Breaking a long run of operators being acquitted for similar activities, the Spanish court decided that the act of linking constituted a for-profit communication to the public. A negative ruling against their operators had seemed unlikely, as Spanish courts have continually acquitted defendants running similar sites. It therefore comes as quite a surprise to hear that the Provincial Court of Vizcaya has sentenced the operators of both sites not only to fines, but a year in jail.

After the original acquittal, an appeal in the case was brought by the *Asociación Española de Distribuidores y Editores de Software de Entretenimiento* (Spanish Association of Distributors and Publishers of Entertainment Software – ADESE), and Promusicae, the recording industry outfit.

While the court agreed that neither site actually hosted any infringing content, it noted that the defendants organised and made available links that enabled the free download of copyright works, from which they intended to profit via advertising.

Crucially, the Court of Vizcaya viewed linking very differently to other courts handling similar cases in the past, as it described the act as constituting communication to the public and not an exchange between individuals.

- *Sentencia A.P. Bilbao 530/2011, de 27 de septiembre* (Case Fenixp2p & MP3-es, Sentencia de la Audiencia Provincial de Vizcaya, Sección 1ª, núm. 530/11, de 27 September 2011)
<http://merlin.obs.coe.int/redirect.php?id=15542>

IRIS 2012-1/23

France

M6 Appeal against Online Guide to Catch-up TV Rejected

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On 27 April 2011 the court of appeal in Paris rejected the appeal brought by the M6 group against the company operating the TV-replay.fr site, an online guide to catch-up TV sites that offers summaries and links to the programmes of most of the major French channels that are available as catch-up TV. In doing so, the court upheld the judgment delivered in the initial proceedings (see IRIS 2010-8/29). The television group, which operates the channels M6 and W9 together with their catch-up TV services M6replay and W9replay, complained more particularly that TV-replay.fr

was providing direct access to its programmes, without first directing viewers to the home pages of M6replay and W9replay. M6 claimed this was a violation of the general conditions for using its catch-up TV services, an infringement of its copyright protection as the creators and producer of a database, and considered that TV-replay's action constituted unfair competition and parasitic behaviour.

Deliberating firstly on the alleged infringement of the exploitation rights of M6 and W9's production subsidiaries, the court of appeal warned that it was not up to that court to deliver a general judgment on the lawful or unlawful nature of systematically making audiovisual works available to the general public using deep hyperlinks. It recalled that it was required to deliberate on the merits of an application for a court order for the payment of a sum of money in compensation for prejudice suffered. However, since M6's production subsidiaries had failed to identify the works they claimed they held rights for, they had not furnished proof of either an infringement of specific rights or quantifiable prejudice. The judgment was therefore upheld in that it rejected the applications based on such an infringement. M6 was also claiming infringement of its rights as a producer of a database. Article L. 341-1 of the Intellectual Property Code (*Code de Propriété Intellectuelle* – CPI) provided that “the producer of a database, to be understood as the person taking the initiative and the risk of the corresponding investment, has the benefit of protection of the content of the database where its constitution, verification or presentation demonstrates a substantial financial, material or human investment”. As the court confirmed, in order to put a daily selection of programmes on its catch-up TV services, M6 devised a search tool for its programmes classified by genre, date, time and title, links to bonus material, and an RSS feed updating the programmes available by date and title, including the associated deep hyperlinks. The court held that this information met the definition of a database in accordance with Article L. 112-3 of the CPI. However, the documentary evidence M6 produced for infringement of its rights as the producer of the database, referred to the expenditure incurred in listing the programmes and operating the proposed catch-up TV services, but contained no indication of the expense connected with organisation and updating, “which constituted the essence of a databank”, according to the court. M6's application on this point was therefore rejected. The court also confirmed that M6 had not produced proof of the alleged prejudicial parasitic behaviour on the part of TV-replay, i.e. that it had deliberately concealed its intention to constitute and commercialise a parallel competitor on-demand video portal. On the other hand, and contrary to the court's finding in the initial proceedings, the court of appeal awarded TV-replay EUR 15 000 in damages, holding that M6 had, without giving sufficient notice, broken off their established commercial relationship. TV-replay has more than 2 million single visitors per month and an offer of free on-demand programmes that is constantly increasing; this judgment facilitates the continuation of its development.

- *Cour d'appel de Paris (pôle 5, ch. 1), 27 avril 2011 – Métropole Télévisions SA, M6 Web et a. c. Sbds Active* (Court of appeal in Paris (section 5, chamber 1), 27 April 2011 – *Métropole Télévisions SA, M6 Web et al. v. Sbd Active*)

IRIS 2011-6/17

Germany

OLG Rejects Claim against YouTube for Disclosure of User Data

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According to media reports, the *Oberlandesgericht München* (Munich Appeal Court – OLG) decided in an urgent procedure on 17 November 2011 that YouTube was not obliged to disclose data identifying a user who had uploaded copyrighted material to the copyright holder.

In the case at hand, a YouTube user had published film material, which he had obviously created by filming a cinema screen, on the video portal. The film distributor concerned claimed that this breached its rights and demanded that YouTube remove the material and provide it with information about the user's identity. YouTube immediately complied with the first request, but refused to disclose the user data.

The *OLG München* has now also rejected the data request, confirming the decision of the lower-instance court. Although it was true that copyright had been breached, the commercial nature of the unlawful action required under Article 101 of the *Urheberrechtsgesetz* (Copyright Act) to justify the disclosure of information was not apparent in this case. The relevant information provided by the claimant was insufficient and there was, in particular, no evidence that the user had intended to profit financially from his actions.

According to reports, the film distributor is considering pursuing its claim in the main proceedings.

- *Beschluss des Oberlandesgericht München vom 17. November 2011 (Az. 29 U 3496/11)* (Decision of the Munich Appeal Court of 17 November 2011 (case no. 29 U 3496/11))

IRIS 2012-1/21

The Council of Europe on Copyright Protection on the Internet

Declaration by the Committee of Ministers on Internet governance principles

*(Adopted by the Committee of Ministers on 21 September 2011
at the 1121st meeting of the Ministers' Deputies)*

1. The Internet is an aggregate of a vast range of ideas, technologies, resources and policies developed on the assertion of freedom and through collective endeavours in the common interest. States, the private sector, civil society and individuals have all contributed to build the dynamic, inclusive and successful Internet that we know today. The Internet provides a space of freedom, facilitating the exercise and enjoyment of fundamental rights, participatory and democratic processes, and social and commercial activities.

2. The above has inspired a shared vision of Internet governance which was put on record in the Declaration of Principles enunciated in the Geneva phase of the World Summit on the Information Society in December 2003. The Tunis Agenda, adopted at the second phase of the World Summit on the Information Society in November 2005, defined Internet governance as the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of the Internet.

3. The Internet governance discussions taking place in different national and international fora are a tangible result of this vision. They have fostered dialogue among state, private sector and civil society actors and contributed to shape common views on Internet policies and, more broadly, Internet governance. Seeking to preserve and consolidate this approach, Internet communities, international organisations and other actors have engaged in efforts to pronounce the core values of the Internet and have developed guidelines on various aspects of Internet governance.

4. The Council of Europe has participated in these processes and its 47 member states have supported, in a number of standard-setting instruments, measures aimed at ensuring a maximum of rights on the Internet subject to a minimum of restrictions, while offering the level of security that people are entitled to expect. This stems from the Council of Europe member states' undertaking to secure to everyone within their jurisdiction the rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

5. In order to ensure a sustainable, people-centred and rights-based approach to the Internet, it is necessary to affirm the principles of Internet governance which acknowledge human rights and fundamental freedoms, democracy and the rule of law, as well as the basic tenets of Internet communities as they have been developed in the processes mentioned above.

6. As a contribution to this ongoing, inclusive, collaborative and open process, the Committee of Ministers of the Council of Europe:

- affirms the principles set out below, which build on Internet governance principles progressively developed by stakeholders and Internet communities;
- declares its firm commitment to these principles and underlines that they should be upheld by all member states in the context of developing national and international Internet-related policies;
- encourages other stakeholders to embrace them in the exercise of their own responsibilities.

Internet governance principles

1. Human rights, democracy and the rule of law

Internet governance arrangements must ensure the protection of all fundamental rights and freedoms and affirm their universality, indivisibility, interdependence and interrelation in accordance with international human rights law. They must also ensure full respect for democracy and the rule of law and should promote sustainable development. All public and private actors should recognise and uphold human rights and fundamental freedoms in their operations and activities, as well as in the design of new technologies, services and applications. They should be aware of developments leading to the enhancement of, as well as threats to, fundamental rights and freedoms, and fully participate in efforts aimed at recognising newly emerging rights.

...point 2. omitted

3. Responsibilities of states

States have rights and responsibilities with regard to international Internet-related public policy issues. In the exercise of their sovereignty rights, states should, subject to international law, refrain from any action that would directly or indirectly harm persons or entities outside of their territorial jurisdiction. Furthermore, any national decision or action amounting to a restriction of fundamental rights should comply with international obligations and in particular be based on law, be necessary in a democratic society and fully respect the principles of proportionality and the right of independent appeal, surrounded by appropriate legal and due process safeguards.

4. Empowerment of Internet users

Users should be fully empowered to exercise their fundamental rights and freedoms, make informed decisions and participate in Internet governance arrangements, in particular in governance mechanisms and in the development of Internet-related public policy, in full confidence and freedom.

...points 5. to 10. omitted

Parliamentary Assembly

Recommendation 1906 (2010) Rethinking creative rights for the Internet age

(Text adopted by the Standing Committee, acting on behalf of the Assembly, on 12 March 2010)

1. The Parliamentary Assembly notes that the extraordinary development of the digital society has significantly upset the balance between the copyrights of authors of intellectual works, investors and the general public, and raises questions and issues as to the functioning of democracy, the protection of human rights and the viability of the rule of law. It also raises ethical questions and questions relating to property, particularly intellectual property.

2. The possibility of sharing written documents, music, photographs and films without respecting copyright, as well as plans for electronic libraries, are examples of this development. The consequences are manifold. The drastic decline in sales of musical and cinematographic works is a reality and the same tendency could be seen in publishing with the advent of electronic libraries. Moreover, some governments are considering enacting laws to allow for the surveillance of digital exchanges between individuals.

3. The international instruments for the protection of copyright no longer seem capable of guaranteeing creators and investors a fair return on their respective activities while ensuring the public's access to information and respect for privacy. On one hand, the very survival of creative professions is at stake; on the other, there is a danger of the emergence of police states controlling all information exchanged by their citizens.

4. "Pirate parties" are springing up throughout Europe and worldwide, rebelling against any state control over Internet communication and calling for the safeguarding of privacy and the right to information and to share music, films and other products of artistic, scientific or literary creation free of charge. The Swedish Pirate Party has a member in the European Parliament, and the German Pirate Party, until the recent elections, had a member in the Bundestag.

5. There would not appear to be any threat to the public's right of access to information and no justification for the provision of music, films and literary or scientific works free of cost. The Assembly considers that unrestricted and free access to information by no means presupposes cost-free access to the products of artistic, scientific or literary creation, even if the freedom to copy for private use must remain. The relevant exceptions in the spheres of education and research would appear to be properly safeguarded.

6. It is incumbent on the public authorities to work towards restoring the balance between the rights of the various players in the process of intellectual creation while guaranteeing respect for privacy. The Council of Europe, whose fundamental values are precisely democracy, human rights and the rule of law, has a duty to be involved in assessing foreseeable developments and in framing the standards required at European level.

7. The Committee of Ministers of the Council of Europe has stated its position in its Recommendation Rec(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment. The Assembly focused on two questions related to these matters in its Recommendations 1586 (2002) on the digital divide and education and 1833 (2008) on promoting the teaching of European literature. The European Union considered the question in several directives from 1991 to 2006. However, at this stage no satisfactory solution has yet been proposed.

8. Consequently, the Assembly recommends that the Committee of Ministers:

8.1. initiate a future-oriented study on copyright in the digital environment and give thought

to the changes required to guarantee a flexible legal apparatus, enabling copyright to be protected despite technical, economic and social changes;

8.2. initiate reflection on the system of exceptions and limitations by opening a transparent public debate, enabling each interested group to express its point of view in order to identify the exceptions and limitations essential for freedom of expression and information in a democratic society and ensure that these are fully effective, as well as identifying the exceptions and limitations which are merely incidental to this objective and propose a differentiated approach;

8.3. assist and encourage – for example by drawing up model clauses – contractual initiatives to provide improved access to works of a creative nature and their content, particularly in the fields of education and research, and verify their effectiveness and implementation by means of empirical studies;

8.4. initiate reflection on the legal status of certain Internet stakeholders (access providers, content-sharing platforms, search engines) with regard to compliance with copyright rules;

8.5. investigate what arrangements and mechanisms might help rights holders to receive fair and equitable remuneration, on which the economic operators concerned have been consulted, for access to protected works;

8.6. explore the possibility of introducing compulsory collective management systems, especially where exclusive rights are very difficult to enforce and could have adverse effects on access to information (for example, in the case of “orphan” works, which are still covered by copyright but whose owners cannot be identified or located);

8.7. facilitate and propose a framework for interdisciplinary work (economic, philosophical, sociological, historical, psychological and technical) on copyright.

Committee of Ministers

Recommendation Rec(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment

(Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Welcoming the profound improvement in the field of communication and dissemination of data leading towards the information society;

Noting that the development of new information technologies facilitates access to and the exploitation of works, contributions and performances protected by intellectual property rights;

Concerned by the emergence of new forms of piracy as a result of the possibilities offered by information networks, digitisation and data compression;

Noting that this phenomenon seriously affects many sectors within the area of copyright and neighbouring rights;

Aware of the considerable and increasing harm that a lack of protection, on the one hand, and new piracy practices in the digital environment, on the other hand, cause to the interests of authors, publishers, performers, producers and broadcasters, as well as to the cultural professions and related industries as a whole;

Recognising that this situation also has detrimental effects on consumer interests and for the development of the information society, in particular in that it discourages cultural creativity and thereby prejudices both the diversity and quality of products placed on the market;

Reaffirming the significance of the protection of copyright and neighbouring rights as an incentive for literary and artistic creation;

Bearing in mind the losses suffered by national budgets as a result of insufficient protection and of piracy;

Noting the links between trade in pirate material and organised crime;

Bearing in mind the work carried out in other fora towards strengthening the protection of intellectual property rights and towards better enforcement of rights, serving the purpose of fighting piracy, in particular within the framework of the World Intellectual Property Organisation (WIPO), the European Union, Unesco and the World Trade Organisation;

Acknowledging the importance of the standard-setting activity of the World Intellectual Property Organisation in this area at the Diplomatic Conference in 1996, which provides a specific international framework for the systematic protection of works and other material disseminated in digital form;

Recalling its Recommendations:

- No. R (88) 2 on measures to combat piracy in the field of copyright and neighbouring rights;
- No. R (91) 14 on the legal protection of encrypted television services;
- No. R (94) 3 on the promotion of education and awareness in the area of copyright and neighbouring rights concerning creativity;
- No. R (95) 1 on measures against sound and audiovisual piracy,

Recommends that governments of member states take account of the provisions in the appendix to this recommendation when developing their anti-piracy policies and adapting their legislation to the technical developments.

Appendix to Recommendation Rec(2001)7

Recognition of rights

1. Member states should ensure that authors, performers, producers and broadcasters possess adequate rights in respect of the new forms of exploitation and use of their works, contributions and performances to defend their interests and to combat piracy in the field of copyright and neighbouring rights. In particular, to the extent that they have not already done so, member states should:

- grant to authors, performers and producers of phonograms the rights contained in the WIPO Copyright Treaty (WCT, Geneva 1996) and in the WIPO Performances and Phonograms Treaty (WPPT, Geneva 1996);
- increase the protection provided to broadcasters, producers of databases and audiovisual performers as regards their fixed performances, notably in the environment of information networks and digitalisation.

Remedies and sanctions

2. Member states should ensure that their national legislation provides remedies which enable prompt and effective action against persons who infringe copyright and neighbouring rights, including those involved in the importation, exportation or distribution of illegal material. Proceedings, respecting Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, should not be unnecessarily complicated, lengthy or costly.

- criminal law

3. In cases of piracy, member states should provide for appropriate criminal procedures and sanctions. Over and above action based on complaints by the victims, member states should provide for the possibility of action by public authorities at their own initiative.

4. Provision should be made for powers to search the premises of legal or natural persons reasonably suspected of engaging in piracy activities and for the seizure, confiscation or destruction of pirated copies, their means of production, materials and devices predominantly used in the commission of the offence, as well as devices designed or adapted to circumvent technical measures which protect copyright and neighbouring rights. Consideration should also be given to the possibility of introducing powers for securing and forfeiting financial gains made from pirate activities. These measures should be subject to supervision by the competent authorities.

5. Sanctions should include imprisonment and/or monetary fines sufficient to act as a deterrent, consistent with the level of penalties applied for offences of corresponding gravity.

- civil law

6. In the field of civil law, the possibility should exist for judicial authorities to grant injunctions whereby a party is ordered to stop infringing copyright or neighbouring rights.

7. The judicial authorities should also have the possibility to order provisional measures in order to prevent an infringement or to preserve relevant evidence in regard to an alleged infringement of copyright and neighbouring rights. These measures may be taken *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a risk of evidence being destroyed.

8. In case of trial, judicial authorities should, upon claim by the right holder, be able to order evidence to be produced by the defending party, and member states may consider the possibility of introducing provisions to the effect that conclusions may be drawn from the silence of the defending party.

9. Judicial authorities should have the authority to order the infringing party to pay the right holder adequate damages to compensate for losses suffered.

10. Member states may provide that the courts shall have the authority to order the infringing party to inform the right holder of the identity of third persons involved in the illicit activity, unless this would be out of proportion to the seriousness of the infringement.

- customs involvement

11. Member states should closely involve their customs authorities in the fight against piracy and empower such authorities, *inter alia*, to suspend the release into free circulation of suspect material.

Technological measures and rights management

12. Member states should encourage the development of technological measures which protect copyright and neighbouring rights, and the development of systems of electronic rights management information, in particular by granting them specific protection in national law.

13. Member states should study the possibility of taking measures, with regard to enterprises which have optical media mastering and manufacturing facilities, such as the obligation to use a unique identification code, so that the origin of their masters and finished products may be determined.

Co-operation between public authorities and between such authorities and rights owners

14. Member states should encourage co-operation at national level between police and customs authorities in relation to the fight against piracy in the field of copyright and related rights, as well as between these authorities and rights holders. Co-operation within the private sector between rights holders should also be encouraged.

15. Member states should also, in the appropriate fora, encourage co-operation in the fight against piracy between the police and customs authorities of different countries.

Co-operation between member states

16. Member states should keep each other fully informed of initiatives taken to combat piracy in the field of copyright and neighbouring rights.

17. Member states should offer each other mutual support in relation to such initiatives and envisage, where desirable and through appropriate channels, undertaking joint action.

Ratification of treaties

18. Member states should adhere as soon as possible to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), taking into account that an effective protection of rights holders is increasingly dependent on the harmonisation of such protection at the international level.

19. Furthermore, member states should become parties, where they have not already done so, to:
- the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (1971);
 - the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961);
 - the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (Geneva, 1971);
 - the European Agreement on the Protection of Television Broadcasts (Strasbourg, 1960) and its protocols;
 - the European Convention relating to Questions on Copyright Law and Neighbouring Rights in the framework of Transfrontier Broadcasting by Satellite (Strasbourg, 1994);
 - the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994).

ETS 185 : Convention on Cybercrime, 23 November 2001

Preamble

The member States of the Council of Europe and the other States signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recognising the value of fostering co-operation with the other States parties to this Convention;

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, *inter alia*, by adopting appropriate legislation and fostering international co-operation;

Conscious of the profound changes brought about by the digitalisation, convergence and continuing globalisation of computer networks;

Concerned by the risk that computer networks and electronic information may also be used for committing criminal offences and that evidence relating to such offences may be stored and transferred by these networks;

Recognising the need for co-operation between States and private industry in combating cybercrime and the need to protect legitimate interests in the use and development of information technologies;

Believing that an effective fight against cybercrime requires increased, rapid and well-functioning international co-operation in criminal matters;

Convinced that the present Convention is necessary to deter action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems, networks and data by providing for the criminalisation of such conduct, as described in this Convention, and the adoption of powers sufficient for effectively combating such criminal offences, by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international co-operation;

Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy;

Mindful also of the right to the protection of personal data, as conferred, for example, by the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;

Considering the 1989 United Nations Convention on the Rights of the Child and the 1999 International Labour Organization Worst Forms of Child Labour Convention;

Taking into account the existing Council of Europe conventions on co-operation in the penal field, as well as similar treaties which exist between Council of Europe member States and other States, and stressing that the present Convention is intended to supplement those conventions in order to make criminal investigations and proceedings concerning criminal offences related to computer systems and data more effective and to enable the collection of evidence in electronic form of a criminal offence;

Welcoming recent developments which further advance international understanding and co-operation in combating cybercrime, including action taken by the United Nations, the OECD, the European Union and the G8;

Recalling Committee of Ministers Recommendations No. R (85) 10 concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters in respect of letters rogatory for the interception of telecommunications, No. R (88) 2 on piracy in the field of copyright and neighbouring rights, No. R (87) 15 regulating the use of personal data in the police sector, No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services, as well as No. R (89) 9 on computer-related crime providing guidelines for national legislatures concerning the definition of certain computer crimes and No. R (95) 13 concerning problems of criminal procedural law connected with information technology;

Having regard to Resolution No. 1 adopted by the European Ministers of Justice at their 21st Conference (Prague, 10 and 11 June 1997), which recommended that the Committee of Ministers support the work on cybercrime carried out by the European Committee on Crime Problems (CDPC) in order to bring domestic criminal law provisions closer to each other and enable the use of effective means of investigation into such offences, as well as to Resolution No. 3 adopted at the 23rd Conference of the European Ministers of Justice (London, 8 and 9 June 2000), which encouraged the negotiating parties to pursue their efforts with a view to finding appropriate solutions to enable the largest possible number of States to become parties to the Convention and acknowledged the need for a swift and efficient system of international co-operation, which duly takes into account the specific requirements of the fight against cybercrime;

Having also regard to the Action Plan adopted by the Heads of State and Government of the Council of Europe on the occasion of their Second Summit (Strasbourg, 10 and 11 October 1997), to seek common responses to the development of the new information technologies based on the standards and values of the Council of Europe;

Have agreed as follows:

Chapter I – Use of terms

Article 1 - Definitions

For the purposes of this Convention:

- a “computer system” means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data;
- b “computer data” means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;
- c “service provider” means:
 - i any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and
 - ii any other entity that processes or stores computer data on behalf of such communication service or users of such service;
- d “traffic data” means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication’s origin, destination, route, time, date, size, duration, or type of underlying service.

Chapter II – Measures to be taken at the national level

Section 1 – Substantive criminal law

Titles 1 - 3 omitted

Title 4 - Offences related to infringements of copyright and related rights

Article 10 - Offences related to infringements of copyright and related rights

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.
2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.
3. A Party may reserve the right not to impose criminal liability under paragraphs 1 and 2 of this article in limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party's international obligations set forth in the international instruments referred to in paragraphs 1 and 2 of this article.

... remainder of treaty omitted



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