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Russia's New Anti-piracy Law. Throwing the Baby out with the Bath Water?

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On 1 May 2015 a new, second, 'anti-piracy' law [1] will take effect in Russia. This law amends the provisions on preliminary interim blocking injunctions for intermediaries introduced by the first anti-piracy law, which took effect on 1 August 2013.

In the opinion of this blogger, the new law, like its predecessor, will barely affect internet piracy in Russia. It is not a secret that both providers and consumers of pirated content are well equipped to circumvent the injunctions. But what about the ordinary internet users, i.e. innocent website owners? The provisions of both anti-piracy laws are so ambiguous, and procedures for introducing and enforcing injunctions are so straightforward and formalistic, that they may easily lead to the blocking of legal content and over-blocking.

The new law makes two important changes: it extends the scope of copyright works that can be protected by the injunctions, and introduces an option to order the internet access provider to block a website with illegal content forever. Other provisions do not make significant changes, or they lack teeth, and for these reasons will not be discussed here.

To make it clear from the outset, the term 'intermediaries' in the context of the anti-piracy laws includes: (i) a hosting provider or other person ensuring placement of the information resource in the IT network, including the Internet (in this blogpost, both are for simplicity referred to as the 'hosting provider'); and (ii) network communications providers, including providers of internet access.

The first anti-piracy law concerned only illegal video content and the information necessary for obtaining it via the Internet. The second one stretches its tentacles much further. It covers all illegal content and the information necessary for obtaining it via the Internet, except for photographs and works created by methods similar to photography.

Why video content was privileged before, and photographs are being differentiated now, is unclear. What hides behind the vagueness of 'information necessary for obtaining' illegal content via the

Internet is also yet to be discovered. The main concern, though, is whether this term includes hyperlinks.

The first anti-piracy law gave copyright and related rights holders (the 'right holders') of video content an opportunity to seek preliminary interim injunctions (*predvaritel'nye obespechitel'nye mery*) against intermediaries, without suing the infringer in the first place. This type of injunction was unknown in Russian civil procedural law and was introduced exclusively for this type of case.

In accordance with the first anti-piracy law, preliminary interim injunctions are granted by Moscow city court (*Mosgorsud*), which has exclusive jurisdiction in such cases. *Mosgorsud* has to make a decision on the basis of the right holder's application within one day, without an adversarial procedure. The court's decision granting an injunction takes effect immediately. The court is not required to, and normally does not, specify the exact blocking measures to be taken by intermediaries.

To be fair, the right holder is still obliged to sue the infringer within a maximum of 15 days. Otherwise, the injunction is revoked. However, the whole injunction enforcement procedure takes no more than ten days. Thus, access to content can be limited for at least five days before court proceedings on copyright infringement even start. Having brought a lawsuit, the rightholder can request extension of the preliminary interim injunction as an interlocutory injunction.

The newly adopted anti-piracy law, in the opinion of this blogger, reaffirmed the previous approach of giving *Mosgorsud* a *carte blanche* in granting preliminary interim injunctions without considering any other rights, except for the ones of the right holder and intermediaries – a *carte blanche* in choosing the means of limiting access to illegal content. This conclusion, however, goes beyond the image officially assigned to the new law.

According to the first law, the subject-matter of the preliminary interim injunction was an information resource with illegal content as a whole. Even though this term is not defined anywhere, it may imply both a website and a webpage.

The main marketing point of the second law, as the one taking account of internet users' rights, is the provision requiring internet access providers to limit access *only to illegal content*. Access to the information resource as a whole can be limited only if the first is not technically possible. Given that one webpage on the website can only be blocked by URL (which is, by the way, the most expensive way of blocking), this provision can also be seen as protecting owners of innocent websites, who can be affected where the whole website with illegal content is blocked by IP address.

Unfortunately, this is nothing more than a bone thrown to the internet community. 'Not technically possible' is a very vague term, so the effectiveness of the provision depends solely on its future interpretation. The legislator could, at least, clarify whether we are dealing here with an objective (not reasonably possible) or subjective (not possible for this particular provider) criterion. Besides, there are no negative consequences for ignoring this provision.

Interestingly, the first anti-piracy law contained an explicit provision exempting hosting providers from liability to users and right holders for limiting access to information and/or limiting its distribution in accordance with the anti-piracy law. The second law also exempts from such liability communications services providers, including internet access providers.

Thus, striking a fair balance between such conflicting rights as (i) copyrights and related rights, (ii) the freedom to conduct a business, and (iii) the freedom of information of internet users, the importance of which was underscored by the CJEU in its *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*judgment *(Case C-314/12*, discussed here), does not seem to be important. Russian internet users do not get a *locus standi* before a Russian court, even if the method of blocking illegal content chosen by the intermediary has violated their rights.

Perhaps in response to a common argument that, after its removal, illegal content quickly appears on the same website again, the second anti-piracy law introduces permanent injunctions against internet access providers with respect to websites on which illegal content was published repeatedly and unlawfully.

The law, again, does not give any guidance as to the factors which should be taken into account in considering this measure, such as the volume of illegal content on the website (is a hyperlink to illegal content enough?), a user's right to seek and receive information, or the availability of means to block the infringing content without affecting innocent websites. Moreover, *Mosgorsud* must consider the introduction of this measure irrespective of the request of the right holder.

All in all, it looks like the benefits (if any at all) to the right holders, whose interests underlied the provisions of both first and second anti-piracy laws, will hardly overcome the overall negative effects of these laws.

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[1]Federal Law of 24.11.2014 No. 364-FZ 'On Amending Federal Law On Information, Information Technologies and Information Security' and Code on Civil Procedure of the Russian Federation'

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