

Russia Practice

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Extrajudicial banning of access to websites and liability of information intermediaries

The Russian Ministry of Culture is currently in the midst of preparing a draft law aimed at strengthening the rights holders' abilities to protect themselves on the Internet. Soon they will be able to send claims directly to Roskomnadzor (the authority responsible for supervision over communications, information technologies and mass communications) to demand the restriction of access to websites that are infringing their copyrights. This means essentially the blocking of a website without recourse to the courts. What possibilities does this open up for rights holders to protect their rights and how can you protect your rights right now?

Draft law

The draft law is intended to make it easier for rights holders to fight back against violators of their copyrights and neighbouring rights on the Internet. This has to do, first and foremost, with websites that unlawfully host films, animated films and other audio-visual works; websites that illegally host images of certain characters from audio-visual works or computer games; and websites that illegally host computer programmes, audio recordings, databases, etc.

Pursuant to the text of the draft law (<http://regulation.gov.ru/projects#npa=78461>), when a copyright infringement is discovered on a website, the rights holder can send a demand to the owner of the website and the hosting provider to have certain content deleted. In this regard, the draft law contains a clarification of the regulation of the website's contact information or "imprint", the mandatory legal disclosure of information on the website's owner and its contact details, so that the rights holder will know who to contact. For legal entities this includes their name and address, as well as their e-mail address. For individuals this includes their name, surname and patronymic (if any), address and their e-mail address.

If the rights holder sends its claim to the hosting provider, the latter is required to immediately forward it to the owner of the website.

If the owner of the website does not respond to the claim or has not duly indicated its contact details, the hosting provider is required to restrict or completely ban access to the website.

If the provider does not respond to the claim, the draft law entitles the rights holder to file a claim on restricting access to the website with the supervisory authority (Roskomnadzor) directly. That being said, the rights holder must give evidence that attempts to protect its rights by contacting the website's owner or hosting provider

were not crowned with success. To do so, the rights holder must present a copy of the statement on the copyright infringement and confirmation that it was sent to the website's owner or hosting provider, or confirmation that it could not be sent (for example, because the website's owner did not provide its contact details).

The regulatory impact of the draft law is currently being analysed.

Liability of information intermediaries

Meanwhile, a rights holder of copyrighted objects or neighbouring rights can already effectively protect its rights by sending a claim to a so-called information intermediary instead of the owner of a website. If an information intermediary is notified this way of an infringement, it cannot avoid the corresponding liability. This is why information intermediaries try not to allow disputes to escalate into conflicts and satisfy the claims of the rights holder.

Pursuant to the law, information intermediaries include:

- parties engaged in the transfer of materials on the Internet (e.g. a communications operator);
- parties allowing the placement of material or information required for its receipt on the Internet (e.g. example, hosting providers, YouTube);
- parties providing access to materials on the Internet (e.g. example, search engines¹).

Thus, in addition to communications operators and hosting providers, information intermediaries include news aggregators,² video hosting services,³ search engines,⁴ social networks⁵ and others.

How can a hosting provider be held accountable?

Pursuant to Clause 3 of Article 1253.1 of the Civil Code, a hosting provider is not liable if it both:

- did not know that the use of the materials was unlawful, and
- promptly took the necessary and sufficient measures to terminate the infringement of intellectual property rights at the request of the rights holder.

Accordingly, to protect its rights the rights holder must file a claim with the hosting provider, which will serve as a notice on the unlawful use of materials.

After receipt of the claim, the hosting provider must eliminate the infringement through timely, necessary and sufficient means. All three of the indicated criteria are a matter of judgment and, ultimately, it is up to the courts to determine whether they have been met.

¹ Minutes No. 10 of the meeting of the working group of the Expert Advisory Board of the Intellectual Property Court on 22 April 2015.

² Court Ruling No. S01-491/2017 dated 6 July 2017 on case No. A40-216998/2016.

³ Court Ruling No. S01-524/2015 dated 22 June 2015 on case No. A40-66554/2014.

⁴ Court Ruling No. S01-729/2014 dated 16 March 2015 on case No. A40-118714/2013.

⁵ Decision of the Moscow Municipal Court dated 17 May 2017 on case No. 3-92/2017.

Pursuant to existing court practice, hosting providers must take the following measures to prevent an infringement of the rights of rights holders:

- contact the website administrator to prevent an infringement of the rights of a rights holder;
- delete or block the contested content;
- block the violator's access to the website;
- restrict the violator's rights to use the services of the hosting provider, etc.

In this regard, it should be noted that this set of measures will differ depending on the specific circumstances. For example, in relation to an online store the application of the first measure (contacting the administrator) will meet the criteria of timeliness, necessity and sufficiency. However, for a website that is not engaged in commercial activity, simply contacting the administrator will be insufficient. In this situation, the contested content must be blocked.

As regards the issue of the hosting provider's liability, the courts also consider the good faith actions of the hosting provider. If, for example, the hosting provider has established restrictions on hosting certain information in its terms of use or uses special programmes to prevent, track and delete counterfeit works on the website, it is acting in good faith,⁶ which the court will take into account when considering whether to impose liability against the hosting provider.

The largest Russian hosting providers are well aware of this position of the Russian courts. For example, REG (one of Russia's largest domain name registrars) also provides hosting services. In its contract on hosting services, REG retains the right to immediately suspend the work of a website if the aforementioned notice is received.⁷ Another major hosting provider has set forth a ban on infringing copyrights and the possibility to suspend or refuse to provide hosting services in Clause 5 of its terms of use of hosting services.

Therefore, the actions of a violator will breach not only the rights of the rights holder, but also the terms of its relationship with a specific hosting provider.

If the hosting provider does not respond to a claim from the rights holder and does not perform any of the aforementioned actions to prevent infringement, it may itself be liable for the infringement of intellectual property rights.

How do you determine the hosting provider of a website? The procedure in practice

The hosting provider can be determined using various services on the Internet. In any case, it should be no problem for any system administrator to determine the hosting provider of a website.

To do so, the IP address of the domain in question must first be estab-

lished. Then this IP address is checked using the Whois service.⁸ As a result, we learn the name and contact details of the hosting provider.

These data may be used to send the corresponding claim to the hosting provider. We recommend that the address be checked against the data from the Unified State Register of Legal Entities before doing so.

Enforcement measures

If the attempts at regulation without recourse to the courts do not yield results, the rights holder can turn to the courts. The hosting provider will act as the respondent in court.

The competent court for this type of case will always be the Moscow Municipal Court.

Even before the statement of claim is filed on the main issue of the dispute, the rights holder can file a motion in the same court for the application of pre-action remedies aimed at the immediate interim protection of copyright and neighbouring rights. If this motion is satisfied, Roskomnadzor and other parties will in effect be required to block the website.⁹

Since a fairly high percentage of motions on the application of pre-action remedies are dismissed, the motion must be prepared carefully. In all circumstances the following must be taken into account:

- the applicant must prove that it holds a copyright or neighbouring right;
- screenshots of the website confirming the placement of the contested copyrighted material must be attached;
- information on the hosting provider of the website from the Whois service must be indicated;¹⁰
- the data received from the Whois service should make it possible to establish the mailing address of the party responsible for the infringement of exclusive rights.

If the rights holder's motion for pre-action remedies is satisfied, the court will establish a deadline of no more than 15 days during which the rights holder must submit a statement of claim on the main issue of the dispute against the hosting provider, to prohibit the creation of technical conditions that lead to an infringement of rights.

In summary, it can be stated that if the draft law is adopted, copyright protection on the Internet will be strengthened. The very fact that the executive authority has the right to independently preclude infringement will speed up the process of blocking websites and reduce the amount of red tape.

Should you have any issues concerning the protection of your rights on the Internet, we are always ready to provide you with professional support.

⁶ See the position of the RF SCC expressed in the rulings of the Presidium No. 10962/08 dated 23 December 2008 and No. 6672/11 dated 1 November 2011; Minutes No. 16 of the meeting of the Expert Advisory Board of the Intellectual Property Court dated 28 April 2017.

⁷ https://www.reg.ru/hosting/agreement_offer

⁸ For example, <https://www.whois.com/whois/>

⁹ Clause 53 of the "Overview of Court Practices on Cases Involving Resolution of Disputes on Protecting Intellectual Property Rights" (approved by the Presidium of the Supreme Court of Russia on 23 September 2015).

¹⁰ For example, see Judgment No. 2i-0109/2018 of the Moscow Municipal Court dated 25 January 2018.



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