

New Legislation on Online Copyright Enforcement in Russia: Anti-piracy Law 187-FZ¹



Ruslan Nurullaev

Legal counsel ,Yandex LLC. Address:16, Leo Tolstoy St., Moscow 119021, Russian Federation.
E-mail: rusnur@gmail.com



Abstract

On 2 July 2013, the Russian legislature adopted the first Russian law² which specifically addresses the issue of online copyright enforcement (Anti-piracy Law).

The new Anti-piracy Law introduced three groups of legal mechanisms aimed at preventing online copyright infringements: (1) a website blocking regime, (2) liability of information intermediaries, and (3) safe harbors for information intermediaries.

(1) Under the new website blocking regime, a person who owns the rights to a film can apply to the Moscow City Court for an interim injunction in order to force Internet service providers to remove infringing content or block access to a website, which is allegedly involved in copyright infringing activity.

(2) The Anti-piracy Law introduces the legal term “information intermediary” without providing a clear definition. Instead, the law identifies several types of activity which could make a person an “information intermediary”: transmission of content over the Internet; content hosting; offering access to content made available online; and hosting of information which is necessary to access content online.

(3) Some of these information intermediaries are able to claim safe harbors if they comply with certain requirements.

These mechanisms are similar to copyright enforcement frameworks contained in the Digital Millennium Copyright Act and E-Commerce Directive. However, the Anti-piracy Law represents one of the first steps toward Internet copyright enforcement in the Russian Federation.



Keywords

Intellectual property; copyright; copyright enforcement; Anti-piracy Law; 187-FZ; website blocking; information intermediaries; Internet service providers; Internet access providers; DMCA; E-Commerce; Internet; safe harbors.

Introduction

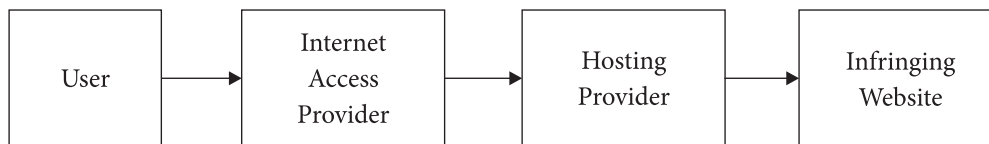
Enforcement of intellectual property rights on the Internet is a long-standing and particularly difficult issue in any country. It is a problem for a number of reasons: the sharing of

¹ The views expressed in this article belong entirely to the author and should not be attributed to the author's employer or any other entity.

² Federal law 187-FZ, dated 2 July 2013, “On amendments to certain legislative acts of the Russian Federation concerning the protection of intellectual rights in information-telecommunication networks”.

content on the Internet is incredibly easy; geographical boundaries on the Internet are blurred-into non-existence; users and online service providers are frequently protected by anonymity; governments often cannot use familiar “offline” enforcement means like physical searches and seizures; and the regulation of the Internet requires sophisticated technical knowledge. But, most importantly, there are many actors on the Internet, and there is always a decision to be made as to which one is responsible for online copyright infringement.

To illustrate, when a user downloads an infringing copy of a music file from a rogue website, at least four parties are involved (Figure 1). Firstly, a **user** actively searches, locates and downloads an infringing file. Secondly, an **Internet access provider** allows a user to connect to the Internet in the first place and can potentially monitor or control all users’ activity on the Internet. Thirdly, a **hosting provider** allows a website owner to host content on its website and *de facto* hosts the infringing content. Fourthly, an **owner of an infringing website** selects, uploads, and makes infringing content available for downloading.



Any of these parties can potentially be made legally responsible for online copyright infringements.

Different countries have slightly different approaches to online copyright enforcement. In the US, right holders use mass (or volume) copyright litigation to sue hundreds and even thousands of users in a single lawsuit.³ Right holders, on the other hand, do not sue Internet access providers. Instead, right holders have managed to persuade major US Internet access providers to cooperate voluntarily. Together, right holders and Internet access providers have introduced a graduated response system⁴ to prevent users from downloading infringing content. These major Internet access providers notify and warn subscribers who download infringing content and take “mitigation measures”⁵ if subscribers persist in their copyright infringing activity. Hosting providers have to remove infringing content when they receive DMCA takedown notices from right holders or risk legal liability if they fail to comply.⁶ US authorities spend a lot of resources targeting owners of infringing websites. They go so far as to persuade foreign governments to extradite owners of infringing websites into the US to be tried before US courts and under US laws.⁷

In the EU the approach is slightly different. Mass copyright litigation is less successful and can lead to claims of professional misconduct against lawyers who practice it.⁸ Distinctly from

³ For more details, see Ben Depoorter, Alain van Hiel & Sven Vanneste, “Copyright Backlash,” (2011), 84 S Cal LR 1251, 1256.

⁴ Centre for Copyright Information, <http://www.copyrightinformation.org/about-cci/>.

⁵ Copyright Alert System FAQs, <http://www.copyrightinformation.org/resources-faq/copyright-alert-system-faqs/>.

⁶ 17 USC §512(c).

⁷ For example, the US government sought extradition of Richard O’Dwyer, the founder of TVShack.net and British national, and is still seeking extradition of Kim Dotcom, founder of Megaupload.com and German national.

⁸ For example, see “Law firms investigated over copyright cash demands,” <http://www.zdnet.com/law-firms-investigated-over-copyright-cash-demands-3040072976/>.

the US, Internet access providers located in the EU are often ordered by courts to block access to infringing websites⁹. In some EU countries, there are graduated response systems. The difference is that such systems are usually imposed by law and are not created through voluntary cooperation between right holders and Internet access providers.¹⁰ Like in the US, EU hosting providers have to remove infringing content when notified by right holders¹¹, but contrary to the US DMCA, there is no standardized form for such notices.¹² Finally, owners of infringing websites can also be sued in EU countries, although judgments are sometimes not enforced if the owners are located abroad or cannot be found.¹³

In Russia it is still too early to talk about a comprehensive system of Internet copyright enforcement. A small number of court cases were decided against users and hosting providers,¹⁴ but the new Anti-piracy Law is probably the first piece of legislation ratified by the Russian parliament which specifically addresses the issue of copyright enforcement online. The new Anti-piracy Law¹⁵ introduced three groups of legal mechanisms aimed at combatting copyright infringements online: (1) a website blocking regime,¹⁶ (2) liability of information intermediaries¹⁷ and (3) safe harbors for information intermediaries.¹⁸

1. Website Blocking Regime

The new Anti-piracy Law introduces a new procedure for blocking websites which are involved in online copyright infringement. Under the Anti-piracy Law, a person who owns rights to a film¹⁹ can apply to the Moscow City Court for an interim injunction that can force Internet access providers²⁰ to block access to a website, which is allegedly involved in copyright infringing activity. Following the right holder's application²¹ to the Moscow City Court, the Court

⁹ For example, the Pirate Bay website is blocked in Belgium, Denmark, Finland, Germany, Greece, Italy and the UK.

¹⁰ For example, in the UK, website blocking injunctions are available under s 97A of the Copyright, Designs and Patents Act 1988.

¹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

¹² 17 USC §512(c)(3).

¹³ For example, in *Twentieth Century Fox Film Corporation et al vs. Newzbin Limited* [2010] EWHC 608 (Ch), [2012] 3 CMLR 15 owners of the infringing website did not suffer legal liability because the court was not able to identify them.

¹⁴ For more information on such court cases, see Daria Kim, *Special Report Russia's Enforcement Against Online Copyright Infringement*, <http://www.ip-watch.org/2012/12/03/special-report-on-russia-enforcement-against-online-copyright-infringement/>.

¹⁵ Federal law 187-FZ, dated 2 July 2013, "On amendments to certain legislative acts of the Russian Federation concerning the protection of intellectual rights in information-telecommunication networks".

¹⁶ Federal law 149-FZ, dated 27 July 2006, "On information, information technologies and protection of information," section 15.2.

¹⁷ Russian Civil Code, section 1253.1.

¹⁸ *Ibid.*

¹⁹ Including TV series, etc.

²⁰ For avoidance of doubt, an Internet access provider is a business which offers its users access to the Internet. Examples of Internet access providers are AOL (US), British Telecom (UK) and Telefónica (Germany).

²¹ Conveniently, the application can be submitted using an online form on the Moscow Court's website.

considers the application on the same day without notifying the other party (the website owner or the Internet service provider). The right holder has to provide documents confirming his rights to a film and showing evidence which proves that the film was made available or otherwise used on the website in question. If the Court is satisfied with the evidence, it may, at its own discretion, issue an interim injunction. The contents of an injunction are published on the Court's website.

If the injunction is granted, a right holder is able to apply to Roskomnadzor, the governmental body responsible for regulation of mass communications.²² Roskomnadzor then identifies and notifies the hosting provider offering its service to the website in question. The notification — in Russian and English — has to be sent within three working days from the date of the right holder's application to Roskomnadzor. Upon the receipt of the Roskomnadzor notification, the hosting provider has one working day to notify the website owner. Finally, the website owner has to remove the allegedly infringing content from the website within one day. If the website owner does not remove the content in question, the hosting provider has to block access to the content within three days of the receipt of the initial notice from Roskomnadzor.

However, it is entirely possible that the hosting provider and/or website owner fail to cooperate (for example, if the hosting provider is located abroad and is not subject to Russian legal enforcement). In case of non-compliance, Roskomnadzor forwards information about the website to Internet access providers which have one day to block access to the infringing website or section of a website. As such, it is possible to block access to a website within 14 days of the court order.

In order to contextualise the Russian Anti-piracy law, it is useful to compare the new Russian website blocking regime with website blocking measures available in the European Union. There are no specific EU regulations dealing with website blocking measures. On the other hand, EU directives contain general provisions which allow injunctions against Internet service providers.

Article 11 of the EU Intellectual Property Rights Enforcement Directive enables “injunctions against intermediaries whose services are used by a third party to infringe an intellectual property right”²³ Such injunctions must not amount to “a general obligation [...] to monitor the information which [Internet service providers] transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”²⁴ and must be imposed by “national authorities in accordance with national legislation”²⁵ A number of EU member states interpret these provisions in a way which allows the blocking of websites which host or otherwise facilitate the sharing of copyright infringing content. For example, the Pirate Bay BitTorrent index was (and still is) blocked in Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Sweden and the United Kingdom. Judicial comments on website blocking and content filtering measures can be found in the English cases of *Newzbin2*²⁶ and *Scarlet vs. SABAM*²⁷, argued before the Court of Justice of the EU.

Despite their different origins, website blocking measures in Russia and the EU have certain similarities. The courts in both jurisdictions allow the blocking of entire websites, rather than specific blocking of copyright infringing content. Internet access providers have to pay for the

²² Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications.

²³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/16.

²⁴ E-Commerce Directive, art.15(1).

²⁵ E-Commerce Directive, recital 47.

²⁶ *Twentieth Century Fox Film vs. British Telecommunications* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806.

²⁷ Case C-70/10 *Scarlet Extended SA vs. Societe Belge des Auteurs, CompositeursetEditeurs SCRL (SABAM)* [2012] ECDR 4.

implementation of website blocking injunctions. These aspects of website blocking appear to be very problematic. Websites can (and often do) contain a mixture of infringing and legitimate content. For example, any user can upload videos to YouTube without a right or authorisation to do so. On the other hand, right holders maintain channels on YouTube and upload many videos to promote their products. Blocking infringing content on YouTube is justifiable, but preventing access to the entire YouTube website (including content uploaded by right holders) will certainly be excessive. However, under the Anti-piracy Law there is little to prevent the blocking of YouTube's entire website.

It is also difficult to justify Internet access providers having to pay for website blocking when they are not liable for copyright infringement, have no connection to or control over infringing websites, and do not profit from copyright infringing activity. Compliance with the Anti-piracy Law can impose significant burdens for Internet access providers.

The adopted website blocking regime in Russia poses additional problems. Firstly, there is no obligation on the part of a right holder to notify a hosting provider or website owner about infringing activity. This means that there is no incentive to reach an out-of-court settlement. Secondly, the time frames for voluntary compliance are extremely short. A hosting provider has only one working day to notify a website owner and a website owner has only one day (any day) to remove infringing content. Together, these two issues create potential for procedural abuse and can lead to blocking of websites even when there is no real need for such drastic measures. During the first two and a half months following the introduction of the Anti-piracy Law, the Moscow City Court issued 54 website blocking injunctions. Forty-six website owners removed infringing content, while nine failed to comply and were blocked.²⁸

2. Liability of Information Intermediaries

The Anti-piracy Law extends beyond website blocking. It also — for the first time in Russia — specifically regulates the liability of online intermediaries for infringement of intellectual property rights and introduces exemptions from liability (safe harbors).²⁹

With regard to liability, the Law states that the following intermediaries can be found liable for online copyright infringements:

1. Intermediaries who transmit content;³⁰
2. Intermediaries who offer to host content;
3. Intermediaries who offer access to content made available online;³¹
4. Intermediaries who offer to host information which is necessary to access content online.³²

The first and second categories are offered liability exemptions if they comply with certain requirements (safe harbor provisions). However, there are no safe harbors for intermediaries in the third and fourth categories — intermediaries who offer access to content made available

²⁸ Anastasiya Golitsina, "Zakon o bor'be s internet-piratstvom ne otmenyat," <http://www.vedomosti.ru/tech/news/17485591/ne-otmenyat-no-dorabotayut>.

²⁹ Safe harbors have been introduced earlier in the USA (Digital Millennium Copyright Act) and the EU (E-Commerce Directive).

³⁰ This safe harbor is arguably aimed at Internet access providers, since they transmit information to and from their users.

³¹ This section arguably covers intermediaries who provide links to infringing content. Internet search providers are a primary example of such intermediaries.

³² This category arguably covers BitTorrent trackers and indexers, since torrent files facilitate sharing of content — they are "necessary to access content online"; Article 1253.1 of the Russian Civil Code.

online and intermediaries who offer to host information which is necessary to access content online. This may mean that search engines and BitTorrent trackers are in a worse position than hosting providers. It is difficult to say what explains or justifies this special treatment. Such an approach may create a technology-averse policy and hinder the emergence of innovations.

It is not surprising that Internet companies which provide search services (Google, Yandex and Mail.Ru Group) have made public statements against the Anti-piracy Law while Parliament was still considering its adoption.³³In particular, Yandex, a major Russian web search provider, commented on the vague and potentially wide definition of information intermediaries. Yandex argued that any user providing a link to online content can be considered an information intermediary who offers access to content made available online and can thus be found liable for online copyright infringement, since he or she “offer[s] access to content made available online.”³⁴

3. Safe Harbors for Information Intermediaries

The Anti-piracy Law creates safe harbors for two types of information intermediaries.

1. An intermediary who transmits content will avoid liability if it (1) does not initiate transmission and does not select the receiver of the transmission; (2) does not modify the transmitted content (more than technologically necessary); and (3) did not know nor had to know that the user who initiated the transmission infringed intellectual property rights.

2. An intermediary who hosts content will avoid liability for infringing content hosted on behalf of a user if (1) the intermediary did not know nor had to know that the use of hosted content was infringing intellectual property rights, and (2) after receiving a written notice from a right holder alleging infringement of intellectual property rights, the intermediary took necessary steps to stop the infringement. Such notice must mention a section of a website and/or contain a URL identifying the location of the infringing content.

These safe harbors are remarkably similar to provisions contained in the EU E-Commerce Directive and the US Digital Millennium Copyright Act. Like its EU and US counterparts, the Anti-piracy Law provides exemption not only from copyright infringement, but also from any intellectual property right infringement. Despite protecting Internet service providers from monetary claims, the Anti-piracy Law also allows injunctions prescribing the removal or blocking of access to infringing content. However, there is one minor difference. The EU-Commerce Directive creates safe harbors for “mere conduits” (Internet access providers), caching and hosting providers. The US DMCA allows exemptions for transitory digital network communications (Internet access providers — similar to “mere conduits” in the EU), caching, hosting, and search providers. In comparison, the Anti-piracy Law provides safe harbors only for intermediaries who transmit content (similar to “mere conduits” in the EU and transitory digital network communications in the US) and hosting providers. There are no safe harbors for search providers.

4. Reaction to the Anti-piracy Law

It should not be surprising that the Anti-piracy Law was treated with skepticism and caution by Internet service providers and Internet users. Google, Yandex, Mail.ru Group, Wiki-

³³ Victor Nehezin, “Runet bastuyet protiv ‘antipiratskogo zakona,’” http://www.bbc.co.uk/russian/russia/2013/08/130801_piracy_law_runet_strike.shtml.

³⁴ See the post on Yandex’s official blog, http://clubs.ya.ru/company/replies.xml?item_no=71041.

media and Ozon signed an open letter against the draft Anti-piracy Law.³⁵In many ways these companies define the Internet in Russia. Understandably, these Internet service providers are concerned with business threats which the Anti-piracy Law may potentially present.

In particular, these providers are concerned that there is potential for abuse within the new Law which may result in unfair competition. Websites can be blocked by interim injunctions. This means that blocking measures can be implemented without a website owner receiving sufficient notification, executed merely on suspicion of a copyright infringement. Even when a website owner receives an order from Roskomnadzor, this notice need only include the name of the infringing film, its author and right holder. This information is hardly sufficient to comply with the terms of the order and remove infringing content. Yandex provided a hypothetical example.³⁶ Suppose a person hums a tune and records it with his smartphone. This recording is then uploaded to a website. The person who hummed a song applies for an interim website blocking injunction. Upon the receipt of the Roskomnadzor notice, the website owner has to locate the recording using only its name and the name of its author. Owners of websites which host large quantities of user-generated content may be presented with substantial difficulties in complying with the Anti-piracy Law.

Internet service providers doubt the effectiveness of the new Law. It is not very difficult for a moderately experienced user to circumvent the block. However, legal entities whose conduct is closely scrutinized by governmental agencies (for example, the media) will not be able to use such circumvention instruments. Effectively, persistent infringers will be able to continue their activity, whereas entities who strive to maintain a clean record will be heavily affected. It is difficult for Internet service providers to agree with a copyright enforcement model which places the burden of enforcement (and the costs associated with it) on the Internet industry and Internet service providers.

Many Internet users are also dissatisfied with the Anti-piracy Law. More than 100,000 people signed an online petition against the Anti-piracy Law. In response, the Russian government promised to take into account relevant issues when drafting the law, but refused the outright repeal of the Anti-piracy Law.³⁷

Internet users provided similar arguments to those offered by Internet service providers. Users can also be affected by the scope of website blocking injunctions. There is no requirement for website blocking measures to be minimal. It is possible to block access to an entire website, although infringing content may be contained only in one of its sections. Moreover, if a website's IP address is blocked, there may be significant collateral damage since one IP-address may host many legitimate websites in addition to any infringing websites.

5. Future of the Anti-piracy Law

The new Anti-piracy Law can be considered the Russian government's first significant attempt to stop online copyright infringement. In a sense, this is a pilot experiment, which is why website blocking applies only to films, despite the significant scope of Internet music piracy. The government limited the scope of the new Law to test its effects on the Internet and Internet

³⁵ Anastasiya Golitsina, "Krupneyshie internet-kompanii Rossii vystupili protiv antipiratskovo zakona," http://www.vedomosti.ru/politics/news/13559111/antipiratskiy_zakon_privedet_k_zloupotrebleniyam_schitayut.

³⁶ See the post on Yandex's official blog, http://clubs.ya.ru/company/replies.xml?item_no=67696.

³⁷ Anastasiya Golitsina, "Antipiratskiy zakon otmenyat' ne budut," <http://www.vedomosti.ru/tech/news/17468101/antipiratskiy-zakon-otmenyat-ne-budut>.

users in Russia. Will the Law be abused, causing excessive blocking, or will it be used reasonably, curtailing online piracy while maintaining the Internet infrastructure?

During the first two and half months following the adoption of the Anti-piracy Law, nine websites were blocked,³⁸ including a BitTorrent tracker (rutor.org) and a video hosting website (turbofilm.tv).³⁹ Turbofilm.tv is an interesting example of website blocking and, more generally, online copyright enforcement. Turbofilm.tv specializes in hosting Russian and foreign TV series. Turbofilm.tv operators upload new episodes as soon as they have aired, providing subtitles or voice-over translation for foreign TV series. Few legitimate services (if any) can successfully compete with turbofilm.tv in terms of the number and speed of new releases, as well as in terms of user experience quality. This is understandable, considering that only a limited number of foreign TV series are licensed for broadcasting in Russia. Even for TV series which are licensed, professional translation can take a substantial amount of time, compared with amateur community-sourced translations on turbofilm.tv. Given the fact that foreign TV series are becoming more and more popular among Russian Internet users, who want to keep up with the latest episodes of the Game of Thrones and the Walking Dead, turbofilm.tv has satisfied growing demand and connected Russian viewers with foreign culture. By blocking access to turbofilm.tv the government has cleared the field for legitimate services. On the other hand, right owners have fewer incentives to compete and provide quality service.

Despite the widespread opposition to the Anti-piracy Law, the Russian government is inclined to keep it in force, and parliament is debating new amendments which would increase the scope of the Law. Once these new amendments pass, the Anti-piracy Law will apply to different types of copyrightable content shared online – films, music, computer programs, eBooks, etc. The burden of proof in online copyright infringement cases will be reversed — alleged copyright infringers will have to prove that they are innocent instead of right holders having to establish a copyright infringement. On the other hand, it will not be necessary to block entire websites. Internet access provider will have the option to block a particular webpage containing infringing material if there is a “technical capacity”.⁴⁰

Internet service providers have been able to lobby new provisions into the proposed list of amendments: search providers will escape liability on the condition that they remove links to infringing websites following the receipt of notices from copyright owners. This approach is similar to the one outlined in the US Digital Millennium Copyright Act. Google, a US-registered company, receives thousands of notices from right holders and removes allegedly infringing links from its search results. Another huge victory for Internet service providers is the fact that information intermediaries will not be compelled to introduce pre-screening of content. This amendment is consistent with the EU approach — the Court of Justice of the European Union has recently ruled against imposing a general monitoring obligation on Internet service providers.⁴¹ Right holders will also have to send notifications regarding infringing content to website owners and hosting providers, giving them 48 hours to comply.

Whilst these modifications will improve the situation for Internet service providers and users, a number of issues will still remain. Even if these amendments are introduced, Internet service providers will still have to bear the costs of online copyright enforcement. Blocking of

³⁸ Ibid.

³⁹ Anastasiya Golitsina, “Sud priznal piratami rutor.org i turbofilm.tv,” <http://www.vedomosti.ru/companies/news/17767921/sud-priznal-piratami-rutororg-i-turbofilmtv>.

⁴⁰ “Popravki v antipiratskiy zakon pozvolyatneblokirovat’ ves’ sait,” <http://ria.ru/society/20131014/969773360.htm#13841081453974&message=resize&relto=login&action=removeClass&value=registration>.

⁴¹ Case C-70/10 Scarlet Extended SA vs. Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) [2012] ECDR 4.

entire websites will remain possible because new amendments will not include an obligation to keep website blocking to a minimum. However, the most important problem with website blocking is the fact that it is introduced through interim injunctions. An interim injunction is granted when no final legal decision has been established regarding whether particular content is considered infringing — there is only an allegation of infringement.

Conclusion

One may say that the Russian Federation is late in introducing online copyright enforcement measures. But Russia's late entry into legislating copyright enforcement also means that the Russian legislature could take into account existing foreign experiences and make every effort to avoid known mistakes. This opportunity should not be squandered. Russian Internet service providers, website owners, Internet users and right holders deserve a well-balanced and well-thought-out piece of legislation.



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