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**Civil responsibility
of internet providers for violation of
copyright and allied rights in terms of
intellectual property legislation development**

According to the concept of civil legislation development in the Russian Federation one of the most crucial issues that provides effective protection of intellectual activity results in information and communication networks, is a determination of responsibility stipulations for providers [1], people who give access to information and communication network, provide network resources functioning and presenting corresponding objects there [2].

There are certain basic services among those given by providers that have special interest for us: Internet access providing; granting free disc space on a server for the third party's (hosting) site placement.

It is necessary to note that a provider does not choose a content of transmitted information and its recipient, he does not influence on information content, but keeps information for the time, stipulated by technical standards; he has technical means to interfere with Internet relations at any

time by Internet access limitation and removal of information placed.

Stated multidimensional character of relations caused the creation of civil responsibility institute for providers [3].

The definition problem of holding providers responsible is majorly formed by specific nature of Internet relations, difficulty of control over use of placed objects and their variety [4], defining who exactly is a rights violator and what is illegal usage scope.

The current legislation suggests the following protection and punishment measures for a violator of copyright and (or) allied rights (including Internet network sphere): suppression of unlawful acts; indemnification; compensation for moral damages (in case of personal non-property rights violation); issue of court decision on existing violation; seizure upon the court decision and amortization of

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equipment, devices and materials, mostly used or intended for exclusive rights violation, at violator's expense; indemnity payment; seizure of subject's commercial activity upon the court decision in case of multiple or gross violation of exclusive rights [5].

On the basis of existing Russian legislation norms it is possible to hold providers liable only in case of civil violation in their acts, including parameters of guilt and cause-effect relations [6].

Presently international practice uses three major approaches for holding providers liable: a provider is liable for all users' actions; a providers is not liable for users' action in case if he or she follows certain conditions determined by the service provision method and interaction with information exchange subjects and parties whose rights are violated by users' actions; a provider is not liable for users' actions.

Current Russian legislation does not have provisions that oblige providers to control users' actions that violate copyright and (or) allied rights of titleholders. Hence, it is necessary to admit the absence of civil offence (misdeed) in providers' actions.

Court practice analysis allows us to talk about existing duality of decisions making on this subject. For a long time courts assumed a position of the Supreme

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Arbitration Court of the Russian Federation as of February 23, 2008 [7] that believes a provider not to perform any actions concerning public disclosure of information, since his or her functions are limited by technical services of video materials placement for any properly registered user. Therefore, any illegal actions are deemed to be made by a user. In turn a provider is not liable for transferred information if he or she does not initiate its transfer, does not choose information recipient and is not involved in transmitted information completeness.

We totally subscribe to this point of view that corresponds to the European approach to determination of providers' civil responsibility.

Other position was created by the Federal Arbitration Court of the Moscow District on May 11, 2010 [8], mainly being based on the conclusion that a provider did not give any evidence of user's copyright violation; therefore, the court believes the provider to use controversial materials by disclosing them to

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the public. Also the court decided the titleholder is not obliged to institute legal procedures for defining a real rights violator, since a server administrator shall personally prove his or her innocence concerning existing technical advances.

We believe citation of counter-evidence for false nature of the abovementioned position made by the appellate institution to be inappropriate concerning earlier listed characteristics of relations between providers and Internet users and materials titleholders.

The most practical for us is to state the necessity of detailed regulation of Internet relations with Internet providers by exact defining of liability terms for the stated parties.

It is worth to note that in spite of the fact that the Constitution determines providers' liability issues settlement as the first group of problems discussed in the preparation process of the Civil Code of the Russian Federation, but for some reasons the decision making was postponed, also notwithstanding the position of Anton Ivanov, the Chairperson of the Supreme Arbitration Court of the Russian Federation, on this subject [9], neither existing edition of

the forth part of the Civil Code of the Russian Federation, nor a joint ruling of the Supreme Judicial Institutions of the Russian Federation on application of the forth part of the Civil Code of the Russian Federation [10], including the project of this ruling, do not define a procedure for settlement of the stated problem.

We think it is the most appropriate step to offer the following summarized procedure for a provider to use in case of copyright and (or) allied rights violation:

1. determination of the site owner or definite user who caused materials to be disclosed to the public;
2. provider's request to an identified user for explanation concerning the incident, provision of documents proving the rights for a placed object;
3. concerning the first two stages provider's decision to institute procedures in order to user's violation removal; to offer parties (a titleholder and a user) conflict settlement via court including provision the parties with all necessary information; to refuse a person requesting the fixing of rights violation. From our standpoint this stage and the purpose of minimizing cases of rights abuse and unfair competition do

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not entitle a provider to institute certain procedures against a user if there are data deserving an additional examination.

Hence, the suggested amendments in the sphere of intellectual property shall be based on the principle that holds a provider liable for quality of information, presented on his or her server, in case if this information was placed on his/her initiative and (or) at his/her expense and (or) was altered by him/her; if a provider did not take any necessary measures prescribed by the law in order to prevent intellectual rights violation.

Thus, a titleholder will have guaranteed prevention means for his/her rights violation, since a provider will be obliged to respond immediately to all his/her claims, being at risk of liability for exclusive right violation. At the same time a provider will have sufficient protection in case of inconsistent claims, since he or she will already know what measures shall be taken in this respect [11].

1. Note. Providers are called differently: ISP, ASP, owners of information announcement services (from newsboards to Internet auctions), European legislation uses the term "intermediary service providers", American practice has on-line providers, provider of access, provider of the informational content.

2. See: cl. 2.5 of the section VII in the Development Concept of Civil Legislation of the Russian Federation (approved by the decision of the Russian Federation President Council on Codification and Improving of Civil Legislation of 07.10.2009)// Herald of the Supreme Arbitration Court of the Russian Federation, N 11, November 2009 (Hereinafter – the Concept).

3. Rassolov I.M. Law and Internet. Theoretical Problems. 2nd edition, additional. Moscow. Norma Publishing House 2009 – p. 310-315.

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4. See: articles 1259, 1303, 1304 of the Civil Code of the Russian Federation. Part Four as of 18.12.2006 N 230-FZ; statutory wording as of 24.02.2010 N 17-FZ// Law Code of the Russian Federation, 25.12.2006, N52 (part 1).

Art. 5496; Law Code of the Russian Federation, 01.03.2010, N9, art. 899 (hereinafter – Civil Code of the Russian Federation).

5. See: articles 1252, 1253, 1301 of the Civil Code of the Russian Federation.

6. Fedoskina N.I. Terms of Internet Providers' Civil Responsibility for Copyright and Allied Rights Violation// Pravo i Ekonomika (Law and Economy) Journal, 2007, N 9, p. 12-17.

7. See: Decree of the Supreme Arbitration Court Presidium of the Russian Federation from 23.12.2008 N 10962/08 on the case N A40-6440/07-5-68// Herald of the Supreme Arbitration Court of the Russian Federation, 2009. N 5. P. 34-36.

8. See: Decree of the Federal Arbitration Court of Moscow District as of 11.05.2010 № KG-A40/3891-10 on the case № A40-89751/08-51-773. URL: <http://kad.arbitr.ru/?id=0179B902-1255-46A3-AAD3-A6A2A9525E7A>

9. See: Kozubenko Yu.V. Copyright Protection for Computer Programs in Criminal, Administrative and Civil Legal Procedures. Monograph. Moscow Wolters Kluwer Publishing House. 2009. P. 137.

10. On Some Questions Arisen from the Execution of the Forth Part of the Russian Federation Civil Code: Plenary Session Decree of the Russian Federation Supreme Court N 5, Plenary Session Decree of the Russian Federation Supreme Arbitration Court N 29 as of 26.03.2009// Herald of the Supreme Arbitration Court of the Russian Federation, 2009. N 6. P. 3-36.

11. Note. Our position is reflected in the Concept.

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