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# The infringer's intermediary

## Ilya Goryachev of Gorodissky & Partners discusses liability for social media in Russia

Social media have acted as digital spiders might, spinning their webs outward so their reach can be felt almost everywhere.

As a result, they have had an impact on the modern way we communicate, exchange goods, and, of course, how we use intellectual property rights

Russia is no exception, with international social media and large domestic market players emerging. This has posed new challenges for IP rights protection, requiring new approaches in judicial practice and changes in legislation.

### Social media as the defendants in IP disputes

Rights owners have increasingly had to deal with situations where users of social media were publishing content without permission. Users of social media may also be engaged in commercial activity (for example, operating an online shop through the social media account), registering third-level domains, or creating communities that give concern to rights owners.

Due to the inherent difficulty in identifying users, rights owners have brought complaints against the social media operators themselves.

For instance, in one case (No A56-57884/2010), the plaintiff, a copyright owner of phonograms, found that several users of a social media site published phonograms on their personal pages without consent. Courts found the social media operator liable and awarded compensation to the plaintiff based on the following reasons:

- The necessity of registration on the site cannot be considered a restriction of access to the published phonograms
- No information on special software allowing the prevention of copyright infringement was submitted to court
- No effective measures to prevent infringement were taken and the disputed content was available online
- The defendant, taking account of the mass media publications, should have taken active measures to prevent infringement
- Although there was no evidence of direct profit for the defendant due to the activities of users who published the phonograms, technical capabilities that are offered by the site to its users point to the attractiveness of the site not only to the users, but to advertisers, allowing to them to gain profit

### Legislative amendments concerning information intermediaries

In light of the previous cases on imposing liability on social media and other information intermediaries, legislative amendments began to take shape, resulting in new legislative provisions on the information intermediary's liability and new enforcement practices (fast-track preliminary injunction for copyright infringements).

The amendments to the Russian Civil Code established liabilities for information intermediaries for infringing all types of IP assets, including trademark rights.

That said, under the currently effective Article 1253.1 of the Russian Civil Code, the information intermediary is the person:

- Transmitting content on the internet
- Enabling the publishing of content or the information necessary to obtain the content on the internet
- Enabling access to the content on the internet

Information intermediaries are liable under general conditions of IP liability, when their guilt is proven. However, liability is not imposed in cases where the following conditions are simultaneously proven for the information intermediaries transmitting content on the internet:

- The information intermediary does not initiate transmission of the content and is not aware of the recipient of the content
- The information intermediary does not change the content while rendering communication services, except for the changes required by the technological process of transferring the content
- The information intermediary does not know and should not have known that use of the IP asset by the person who initiated transmission of the content was illegitimate

Information intermediaries publishing the content or the information necessary to obtain the content on the internet are not liable for IP infringements when the following conditions are met:

- The information intermediary did not know and should not have known that use of the IP asset is illegitimate
- The information intermediary took necessary and sufficient measures to cease infringement upon receipt of the rights owner's claim in the written form with indication of the web-site and/or web address of the infringing page

Nevertheless, information intermediaries in the above cases may face claims to delete the information or IP rights infringement (for example, offers of counterfeit products), or to restrict access to it. The same rules apply to those who provide access to the content or the information on the internet.

### Social media in business reputation lawsuits

It should be noted that in cases of business reputation protection, provisions relating to the liability of social media are different.

In one case (No A56-22461/2014), the plaintiff found a social media site operated by third parties that published information allegedly hurting its reputation.

The plaintiff sued the social media site, claiming removal of the information and/or blocking the site, as well expulsion from search engine systems and disclosure of the identities of its operator and its members, if technologically possible.

The plaintiff argued that the social media site created a system that allowed anyone, under fake names, to register an account and



disseminate harmful information. Since the contact pages of users did not contain full names and addresses, the plaintiff asserted that its constitutional rights of court protection were breached, because a lawsuit cannot be filed without indication of the full name and address of the defendant.

Based on the evidence submitted, the court noted that the disseminated information did not refer to the plaintiff.

The court also specifically noted that the liability of the social media site in this case was restricted under Article 17 of the Information Law. This provision provides that liability for disseminating prohibited information (in this case, the information hurting the business' reputation) is not imposed on the persons rendering services:

- On transmission of the information submitted by another person on condition of no changes and correction to the information
- On storage of the information and provision of access to it on condition that the person could not know the illegitimacy of such information

The court also indicated that the social media site was not obliged to identify each user based on passport details. Access to the website is possible only after registration with the use of personal cell phone number, thus allowing subsequent identification of the user for liability purposes.

### **A social media site may not qualify as an information intermediary in all cases**

In another case (No 3-513/2016), the plaintiff was a translator of several books. Having found unauthorised publications of his translations on the website (online library), the plaintiff filed an infringement lawsuit against the hosting provider of the website and the owner.

The owner of the website objected to the lawsuit by indicating that the website was in fact a legal online library and social media site and that the rights to the majority of books were purchased from authors, publishing houses and other right owners. An insignificant

number of books were downloaded to the website directly by the users, while the owner of the website only provided a technical service platform for publication. While registering on the website and downloading the content, the users, by accepting terms and conditions, guaranteed they had the appropriate rights. The website owner had no grounds to consider activities of the users as bad faith and the owner had no obligation and technical capability to review the downloaded materials. Therefore, the website owner considered itself to be an information intermediary. The website, as a good faith company, took measures to delete the infringing content.

The court disagreed that in the present case the owner of the website acted as an information intermediary. The court based that conclusion on the terms published on the website, as per which the users were allowed to publish their materials by downloading files, containing literary works. The users also provided the website with the licence to make the works publicly available.

The court noted that the website owner, while obtaining a licence, created conditions and provided to an unrestricted number of people the opportunity to use the published works, and made those works publicly available.

Therefore, the court held the website owner directly liable for the infringement and noted that the website owner's role did not fall within the information intermediary status.

The bottom line is that the major Russian social media sites have provisions in their policies allowing rights owners to file shutdown complaints and the practice of their consideration is generally in favour of right owners.

Legislation and judicial practice also offer effective enforcement options, and cases may result in peaceful settlements.

However, practical issues regarding searches for individuals (users) behind the infringing sources remain, triggering the question of how to find a balance between personal data protection, freedom of information and protecting IP rights. **IPPro**

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