

EXPANDING INTERNET USE TO DISSEMINATE INFORMATION RAISES LEGAL QUESTIONS ABOUT PROPERTY RIGHTS AND COPYRIGHT BOUNDARIES. THE U.S. AND EU HAVE DEVELOPED THEIR OWN APPROACHES TO THESE QUESTIONS, AND NOW RUSSIA IS TAKING STEPS TO DO THE SAME.

# Providers' Liability

By **Victor Naumov**, Partner, Salans, and **Anastasia Amosova**, Associate, Salans

**I**NTERNET SERVICE PROVIDERS (commonly referred to as ISPs) are companies that provide their customers with access to the Internet and other Internet-related services such as e-mail and hosting (including collocation and virtual servers). For most services, the very nature of ISPs is seen as that of being merely intermediaries that pass data from one Internet user to another, or that of creating opportunities for users to search and exchange data, for instance by operating message boards and forums. Since there are users who utilize Internet access to illegally download music and films or spread discrediting or prohibited information, the issue of ISP liability for users' actions involving intellectual property rights infringement, unfair competition, defamation, and violation of privacy comes into question. As copyright infringement takes the lead, this article shall focus accordingly.

## The United States' Approach

The liability of service providers in the U.S. is based upon legal theories of secondary (indirect) liability: vicarious liability, in which a person has the right and ability to control infringement and has a direct financial interest therein, and contributory liability, in which a person is aware of the infringement and materially contributes thereto. Historically, service providers' liability for copyright infringement is connected in the first instance with the cases of *Playboy vs. Frena* (1993) and *RTC vs. Netcom* (1995). While both dealt with

users illegally posting copyrighted materials on bulletin boards, in the first case the court held the bulletin board operator liable, while in the second the claim was dismissed. At the initiative of the providers urging for clarity on the matter, the Online Copyright Infringement Liability Limitation Act (OCILLA) was enacted in 1998 as part of the Digital Millennium Copyright Act. Title II of the act established the following four separate limitations to provider liability (known as "safe harbors") barring monetary damages and limiting injunctive measures. These are: a) transitory network communications (a provider being a passive conduit of information at the request of a third party); b) system caching; c) online storage, with a condition that a provider does not receive financial benefit from the infringement, is not aware of the infringement, and promptly removes the infringing material upon notice from the right-holders; and d) information location tools (which offers exemption for linking users to online locations that contain infringing material [take-down procedures apply if infringement is discovered]).

## The EU's Experience

The EU's approach to providers of information society services liability is described in Directive 2000/31/EC (known as the "E-commerce Directive"); and common features with the U.S. Digital Millennium Copyright Act are certainly to be found. A provider is not liable for: a) information transmitted when a provider serves as a "mere conduit" (i.e.,

transmits information provided by a recipient of service or provides access to communication network) (Article 12); b) automatic temporary storage of information on the provider's equipment for efficient onward transmission (caching) (Article 13); or c) information stored at the request of a service recipient (hosting) (Article 14). Under the Directive, a provider may enjoy the "safe harbor" of the exemptions described above, provided that certain conditions specific to each type of service are met by the provider. Namely, the latter must neither initiate the transmission or select its receiver, nor should it select or modify the information to be transmitted in order for the "mere conduit" concept to apply. A provider offering hosting services does not bear the risk of information stored on its servers being illegal or infringing third-party rights provided that the provider has no actual knowledge of illegal activity or information, and having obtained such knowledge acts expeditiously to remove or disable access to such information. Non-modification and expeditious action, combined with the requirement to abide by the technical rules common in the industry, form the conditions for liability exemption in connection with caching activities.

It is important to note that Article 15 of the E-commerce Directive prevents EU members from imposing the general obligations "to monitor the information which they transmit" or to actively "seek facts or circumstances indicating illegal activity" on providers. With the rapid development of technology and the increasing popularity of file-sharing,

right-holders in various EU member states have begun lobbying for providers to become more involved in copyright protection by introducing such technical measures as content filtering and blocking access to the web sites that are known to facilitate infringing activities.

The right-holders' lobby has in fact been successful: in the past two years, European courts have taken several decisions upholding their position. In June 2007, a Belgian court ordered Scarlet (one of Belgium's largest ISPs) to install filtering software in order to prevent illegal file-sharing that infringes upon the rights of authors and composers represented by the SABAM rights management association from occurring in its network. A similar law suit was filed in March 2008 by major record labels EMI, Sony, Universal, and Warner against Eircom, an Irish ISP. In January 2008 the German copyright society GEMA asked the court to order RapidShare to take action to prevent copyright infringement on its file-sharing website. It is interesting that the German court admitted that in view of the fact that RapidShare at the time hosted over 15 million music files, filtering would be nearly impossible from a technical standpoint, and RapidShare might have to cease operations.

In defending their position, ISPs appeal to privacy protection in the first instance, comparing their functions with those of the postal service, and arguing that it is against the law to open a letter and decide whether it can be delivered or not. Additional arguments are that the increase in providers' costs will inevitably be

passed on to the user, the possibility of over-blocking, and the slower Internet connection that would result.

The issue remains a hot topic, yet it is too early to say that the matter is finally resolved. Scarlet has appealed the Belgian court decision, claiming that the software offered by SABAM has proved incapable of performing the filtering functions and that the court had been misled by SABAM. The initial ruling was therefore overturned and the case is awaiting final resolution in October 2009. Rapid-Share, the decision against which was largely based upon the SABAM vs. Scarlet decision, was also determined to appeal. Parties to the Eircom case arranged a settlement under which Eircom agreed to introduce a three-step procedure to deal with copyright infringement: 1) inform its customer that its IP address has been identified as infringing copyright; 2) warn the customer that unless the illegal activity is terminated the customer will be disconnected; and 3) terminate the provision of service to its customer if the latter fails to comply after the warning.

It appears that this may ultimately become a European compromise solution that will release ISPs from having to monitor their users' activity while at the same time targeting persistent violators; and it will allow the right-holders to stop the infringement of their rights without going through costly and time-consuming court procedures.

### Russia: First Steps

Russian legislative provisions on ISP liability are quite scarce. Internet providers are operators rendering telematic communication services, and their activities are subject to the provisions of the Communications Law and the relevant "Rules of rendering telematic communication services" (hereinafter the "Rules"). Clause 68 of the latter simply states that a communications operator is not liable for the content of information that is sent (received) by the user in the course of using telematic services. However, there have been

discussions with respect to the status of hosting providers; many of them do not hold an operator's license. In addition, under the Communications law a communications service is rendered for a fee. Thus, free online services, including social networks, blogs, and entertainment services are not considered communication services, do not require a license, and therefore are not subject to telecom regulations.

At the same time, Article 17 (3) of the Law on Information, Information Technologies, and Protection of Information (hereinafter the "Information Law") contains a provision that on the one hand is broader than that in the Rules, as it also covers

“

Since there are users who utilize Internet access to illegally download music and films or spread discrediting or prohibited information, the issue of ISP liability for users' actions involving intellectual property rights infringement, unfair competition, defamation, and violation of privacy comes into question.

”

persons that do not have the status of communications operators, and on the other hand is more specific, as it lists conditions that allow a subject to be released from liability. Namely, if the distribution of certain information is limited or prohibited by federal law, a person that renders services in the following areas shall be exempt from civil liability:

1. The transmission of information received from another person, provided that the transmission does not involve modification or correction; or
2. The storage of information and facilitating access thereto, provided that the person was not aware and could not have been aware of the

illegal character of the distribution of such information.

However, it must be kept in mind that Article 1 of the Information Law explicitly excludes intellectual property matters from its scope, thus complicating the matter for ISPs that are mostly facing claims with respect to copyright issues.

As the issue of ISP liability is primarily connected with intellectual property protection, relevant provisions in the Russian Civil Code cannot be disregarded. Under Article 1250 (3) of the Civil Code, the innocence of the infringer does not excuse him or her from the obligation to stop infringement, and does not

today is rather outdated with regard to the Internet and the opportunities it offers, as well as to the threats it poses. The Council for Codification and Advancement of Civil Legislation attached to the office of the President of the Russian Federation has been working on a strategy for improving Section VII of the Russian Civil Code ("Rights to the results of intellectual activity and means of individualization"). The suggestion of interest to ISPs is the concept that unless an ISP complies with a right-holder's requirement to prevent violation, the ISP will itself be held liable for intellectual property infringement. The authors insist that all conditions of ISP liability be clearly set forth by law. Should this concept be adopted as a guide for legislative action, we shall probably see an analogue of "notice-and-takedown" procedures known to have been implemented in the United States.

As the problem of ISP liability in Russia has become the subject of close attention only relatively recently, consistent court practice has yet to be formed. One of the earliest decisions was that of *Troyka Stal' vs. Megasoft* in March 2004. The claimant asserted that the respondent had distributed defamatory statements on its website. In fact the website invited Internet users to express their opinion on the claimant and share their business experiences regarding the company. While initially dismissing the claim, the court later took the opposite position after the case had been returned for re-trial by the cassation court. Rejecting the respondent's argument that the comments were posted by anonymous users, the court stated that as the website administrator, the respondent had created the technological possibility for defamation.

Perhaps one of the most prominent cases today is the law suit filed by LLC "Kontent i pravo" (Content and law) against hosting-provider CJSC "Masterhost," which was resolved in November 2007. "Kontent i pravo" claimed that it owned the copyright to several music pieces that were found at a website that was hosted on a server belonging to

exclude the application of measures required for right-holders' protection. Interpreting this provision of law, the Supreme Arbitration Court and the Higher Court clarified that liability (in the form of payment of compensation or damages in the first place) can only be imposed based on guilt. This position certainly favors the ISPs.

Given the pace of technological development and the ever-growing role of telecommunications nowadays, it is important to ensure that the legislation in force correlates with the level of technical progress and offers adequate protection to the results of intellectual activity, while maintaining a balance of interests of all parties involved. We have to admit that Russian legislation on intellectual proper-

Masterhost. The latter responded that it rendered collocation and telematic services to MetKom, while MetKom, being the owner of the web site, uploaded the music works that infringed the copyright. While the court of first instance dismissed the claim, both the appellate and cassation courts took the opposite position, stating that there was no evidence that the services agreement between MetKom and Masterhost was actually performed or that the website was placed on Masterhost's server by MetKom and not by Masterhost itself. Masterhost took its case to the Supreme Arbitration Court, which ruled that the lower courts had unlawfully imposed on Masterhost the burden of proving its innocence, pointing out that the fact of illegal use of copyrighted works has to be proved by the right-holder. What is interesting here is that in substantiating its opinion, the Supreme Arbitration Court stated that a provider is not liable for information transmitted if it does not initiate transmission, select the addressee, or have control over modification of such information. No reference to a legal provision was made, but the wording very much resembles that of the E-Commerce Directive in the EU. The case was returned back to the first instance court in December 2008, yet no information on the retrial is publicly available.

Other court cases involve copyrighted video hosting allowed by various Russian internet portals. While one of the cases has been resolved through an amicable agreement, the other is still in progress. The outcome of the latter, as well as that of Masterhost case, will undoubtedly serve as guidance in future disputes on ISP liability.

Russian legislation clearly needs further development to create a transparent legal environment for business operations involving modern technologies. Hopefully, relevant foreign experience, both positive and negative, will be given due regard in finding an adequate solution and striking the balance of interests of right-holders, users, and service providers. ■



NEW IMPROVEMENTS IN GEODETIC TECHNOLOGY CAN SAVE DEVELOPERS TIME AND MONEY, WHILE IMPROVING THE QUALITY OF THE END PRODUCT.

## Modern Technologies in Building-site Layouts

By V.V. Nikonorenkov, Trimble Moscow Representative Office

**T**HE SCOPE AND ACCURACY of geodetic work on construction projects is based on a number of interrelated factors: project specifications and documentation as well as construction norms, rules, and technical regulations. The scope of these works is rather large, but the most important are referred layout and setting out works in horizontal and vertical projections and onsite surveys of what is actually being built.

Setting out works are conducted on the basis of layout drawings as part of the project documentation. In some cases, layout drawings are independently developed, on a project basis, by experts onsite. A layout drawing consists of the horizontal and vertical positions of the main axis and structural elements of a building, which should be brought out and monumented by geodetic methods. Layout works are conducted during the whole construction period and are one of the main kinds of geodetic work on a building site.

After construction or any important stage of it has been completed, it is necessary, as a rule, to perform a post-construction survey in order to control the accuracy of the particular horizontal and vertical elements and of the structure as a whole.

In spite of the fact that in the last 15-20 years project documentation has been commonly developed using CAD technology, which creates digital versions of a project, layout drawings and onsite surveys are still mostly presented on paper plans.

This creates not a few problems: accidental development errors, poor drawing legibility after work has commenced, incomplete registration of changes introduced during construction, etc. Problems also arise when the results of the onsite survey are being transmitted to the design organization, especially if the project needs changes.

Today's design bureaus commonly employ 3D simulation, but if layout works and onsite surveys are based on the above-mentioned technology, then 3D stimulation does not make sense, since a layout drawing on ground paper is

2D. Thus, the usefulness of geodetic works decreases, which can result in delays.

This article provides an overview of the newest technology for transmitting data electronically from an architectural bureau to the construction site in order to conduct layout works, and then transmitting the new data, including onsite survey results, back to the designer.

For example, in November 2008, my company Trimble Navigation Limited (USA) concluded an agreement with Tekla Corp. (Finland) and Vico Software, Inc. (USA) on the integration of these companies' 3D simulation solutions with our

