

ARTICLE 19

# Russia: Federal law on amendments of several acts on the protection of intellectual property rights in information and telecommunication networks

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Legal analysis



# Executive summary

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On 1 August 2013, Russia's new legislation on online copyright enforcement came into force. Federal Law of the Russian Federation No. 187-FZ amends a number of legislative acts of the Russian Federation on the protection of intellectual property rights in information and telecommunication networks. It aims to strengthen online copyright enforcement in Russia, and provides for new intermediary liability rules. Although, in the first instance, the Law only deals with "exclusive film rights, including movies and TV shows, in information and telecommunications networks, including the Internet," it is expected to be expanded over time to include other forms of online content.

In this analysis, ARTICLE 19 examines the new legislation for its compliance with international standards on freedom of expression. We conclude that whilst the procedures to obtain injunctive relief provide some safeguards for freedom of expression, serious concerns remain as to the way in which the provisions will be applied in practice. This is especially so given that implementation of court orders falls under the jurisdiction of a government body rather than the courts or independent adjudicatory bodies.

ARTICLE 19 further considers that the new intermediary liability provisions represent a missed opportunity to establish clear rules in this area. Rather than learning from the best practices in other countries, Russian lawmakers have adopted notice-and-takedown rules that are unclear, unnecessary and fall short of international standards on freedom of expression.

## Recommendations

1. The courts or independent adjudicatory bodies should avoid the making of overly broad blocking orders that would be in breach of international standards of freedom of expression. When issuing such orders, they should address themselves to the following
  - Any blocking order should be as targeted as possible;
  - No blocking order should be granted unless the rights holder seeking the order has established copyright in the works which are said to be unlawfully accessed;
  - No blocking injunction should be granted beyond the works in which copyright has been established by the rights holders;
  - Whether the blocking order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
  - Whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
  - The overall effectiveness of the measure and the risks of over-blocking
  - Whether the blocking order should be of limited duration;
2. The blocking of entire domain names should be prohibited;
3. The execution of orders issued by courts or independent adjudicatory bodies should be supervised by the courts themselves rather than a government agency.
4. The liability of intermediaries should not be based on constructive knowledge but actual knowledge obtained by a court order;

5. The 'notice-and-takedown' provisions should be repealed. If, however, the notice-and-takedown provisions remain, the procedure should be amended to incorporate the minimum due process safeguards developed by ARTICLE 19.

## About the Article 19 Law Programme

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, please contact Gabrielle Guillemin, Legal Officer at [gabrielle@article19.org](mailto:gabrielle@article19.org). For more information about ARTICLE 19's work in Russia, please contact Nathalie Losekoot, Head of Europe at [Nathalie@article19.org](mailto:Nathalie@article19.org).

Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org) or call us at +44 20 7324 2500.



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# Introduction

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On 1 August 2013, Russia's new online copyright enforcement legislation came into force. Its full title is the Federal Law of the Russian Federation No. 187-FZ on amendments to a number of legislative acts of the Russian Federation on the protection of intellectual property rights in information and telecommunication networks (the Law).<sup>1</sup>

Combating "online piracy" has long been on the agenda of Russian copyright holders and Russia's international trading partners.<sup>2</sup> As recently as May 2013, the US Trade Representative's Office included Russia on its Priority Watch List of countries with a poor record of intellectual property rights enforcement. The Law, adopted in July 2013, therefore seeks to strengthen copyright enforcement in the digital environment, as well as provides rules for intermediary liability. Although the Law only deals with video content in the first instance, it is expected to be expanded over time to include other forms of online content.

The Law has already been sharply criticised by freedom of expression activists; among other things, it has been said that the new procedures were unnecessary, subject to abuse and ran against the logic of the way in which the Internet works.<sup>3</sup>

In this analysis, ARTICLE 19 examines the new legislation for its compliance with international freedom of expression standards.

This legal analysis is divided into two parts. Part 1 sets out relevant international standards on freedom of expression on the Internet. Part 2 contains our analysis of the Russian law. The analysis itself focuses on three key issues. First, we review the interim measures procedure. Secondly, we examine the procedure to restrict access to copyright material online. Thirdly, we review the intermediary liability provisions and notice-and-takedown procedure. Recommendations on how these issues should be addressed are included throughout the analysis.

ARTICLE 19 hopes that this analysis will be considered by Russian legislators to improve the Law. We also call on Russian civil society and other stakeholders to continue their efforts to persuade the Federal government and legislature to adopt the legislation on copyright in line with international standards on freedom of expression.

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<sup>1</sup> This analysis is based on the unofficial translation of the Law from Russian to English. ARTICLE 19 takes no

<sup>2</sup> For further information about Russia's international commitments to strengthening its legal framework on intellectual property, see IP Watch, Russia's Enforcement Against Online Copyright, 03/12/2012, available at: <http://www.ip-watch.org/2012/12/03/special-report-on-russia-enforcement-against-online-copyright-infringement/>

<sup>3</sup> See IP Watch, Russia adopts measures against online video piracy, 24 July 2013, available at: <http://www.ip-watch.org/2013/07/24/russia-adopts-measures-against-online-video-piracy/>

# International standards on freedom of expression

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## The protection of freedom of expression under international law

The *International Covenant on Civil and Political Rights* (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the Universal Declaration on Human Rights, including the right to freedom of expression. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.<sup>4</sup> Russia ratified the ICCPR on 16 October 1973 and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR:

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

In September 2011, the UN Human Rights Committee (HR Committee), as treaty monitoring body for the ICCPR, issued General Comment No 34, which constitutes an authoritative interpretation of the minimum standards guaranteed by Article 19 ICCPR.<sup>5</sup> Importantly, General Comment No 34 states that Article 19 ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.<sup>6</sup> In other words, the protection of freedom of expression applies online in the same way as it applies offline.

As a state party to the ICCPR, Russia must ensure that any of its laws attempting to regulate electronic and Internet-based modes of expression comply with Article 19 of the ICCPR as interpreted by the HR Committee and that they are in line with the special mandates' recommendations.

The right to freedom of expression is also protected under the *European Convention on Human Rights* (ECHR), which was ratified by Russia in 1998. Article 10 ECHR provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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<sup>4</sup> Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

<sup>5</sup> See, CCPR/C/GC/3 available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>6</sup> UN Human Rights Committee General Comment No.34, para. 12.

## The protection of intellectual property under international law

With the sole exception of Article 17 (2) of the EU Charter of Fundamental Rights, intellectual property is protected only indirectly under international human rights law. In *Anheuser-Busch Inc. v. Portugal*<sup>7</sup>, for example, the European Court of Human Rights (European Court) recognised that intellectual property fell within the scope of Article 1 of Protocol No. 1 to the ECHR (protection of property).

At the same time, the value of a diverse array of ideas and information has been recognised under international law. For example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>8</sup>

In addition, intellectual works are extensively protected by a number of international treaties that are administered by the World Intellectual Property Office (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and the WIPO Copyright Treaty.<sup>9</sup>

## Permissible limitation on the right to freedom of expression

While the right to freedom of expression is a fundamental human right, it is not guaranteed in absolute terms. We recall that Article 19(3) of the ICCPR permits the right to be restricted in the following terms:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals

Thus, restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put into jeopardy the right itself. In order to determine whether a restriction is sufficiently narrowly tailored, the criteria of Article 19(3) of the ICCPR need to be applied. Any restrictions on freedom of expression must be (i) prescribed by law; (ii) pursue a legitimate aim, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and (iii) should be necessary to secure the legitimate aim and meet the test of proportionality.<sup>10</sup> It is important to note that this same test is incorporated in all regional human rights treaties and applied by international and regional human rights bodies.<sup>11</sup>

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<sup>7</sup> *Anheuser-Busch Inc. v. Portugal*<sup>7</sup> [GC], no. 73049/01, 11 January 2007

<sup>8</sup> The Committee on Economic, Social and Cultural Rights has published General Comment nos. 17 and 21 in respect of Article 15 ICESCR. The Committee's General Comments provide authoritative guidance on the meaning of Article 15; available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. See also Article 27 of the Universal Declaration on Human Rights which is drafted in very similar terms to Article 15 ICESCR.

<sup>9</sup> A full list of the treaties and other international agreements administered by the WIPO is available at: <http://www.wipo.int/treaties/en/>

<sup>10</sup> See HR Committee, Communication No 1022/2001, *Velichin v Belarus*, Views adopted on 20 October 2005.

<sup>11</sup> See, for example, the European Court in the case of *The Sunday Times v UK*, Application No 6538/7426, Judgment of April 1979, para 45.



### **Website blocking and filtering**

One of the measures used by States to restrict access to copyright infringing material is website blocking. However, in his report of 16 May 2011, the UN Special Rapporteur on freedom of expression summarized the key concerns as follows:<sup>12</sup>

States' use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. **Firstly**, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. **Secondly**, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. **Thirdly**, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal. **Lastly**, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body. [our emphasis]

The Special Rapporteur concluded by recommending the following:

As such, the Special Rapporteur calls upon States that currently block websites to provide lists of blocked websites and full details regarding the necessity and justification for blocking each individual website. An explanation should also be provided on the affected websites as to why they have been blocked. Any determination on what content should be blocked must be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences.

The four special mandates on freedom of expression thus held in their June 2011 Joint Declaration on Freedom of Expression and the Internet that:<sup>13</sup>

- a. Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.
- b. Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression. (...)

Similarly, the OSCE concluded in the 2011 report on Freedom of Expression and the Internet that:

Blocking measures are not always provided by law nor are they always subject to due process principles. Furthermore, blocking decisions are not necessarily taken by the courts of law and often administrative bodies or Internet hotlines run by the private sector single handedly decide which content, website or platform should be blocked. Blocking policies often lack transparency and administrative bodies (including hotlines) lack accountability. Appeal procedures are either not in place or where they are in place, they are often not efficient. Therefore, increasingly, the compatibility of blocking with the fundamental right of freedom of expression must be questioned.

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<sup>12</sup> See UN Special Rapporteur on freedom of expression, A/HRC/17/27, 16 May 2011, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

<sup>13</sup> See Joint Declaration on Freedom of Expression and the Internet, *op. cit.*

In addition, based on international best practices, ARTICLE 19 – in cooperation with international experts on human rights, freedom of expression and copyright - has developed a set of international principles on the balance between freedom of expression and copyright in the digital age, *the Right to Share Principles: Principles on Freedom of Expression and Copyright in the Digital Age* (the Right to Share Principles).<sup>14</sup> In particular, Principle 9 deals with website blocking in the context of copyright and, in its relevant parts, reads as follows:

- 9.3 Insofar as website blocking may already be permitted by law, this measure should only be imposed by courts or other independent adjudicatory bodies. In determining the scope of any blocking order, the courts or adjudicatory bodies should address themselves to the following:
- (a) Any blocking order should be as targeted as possible;
  - (b) No blocking order should be granted unless the rights holder seeking the order has established copyright in the works which are said to be unlawfully accessed;
  - (c) No blocking injunction should be granted beyond the works in which copyright has been established by the rights holders;
  - (d) Whether the blocking order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
  - (e) Whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
  - (f) The overall effectiveness of the measure and the risks of over-blocking;
  - (g) Whether the blocking order should be of limited duration;
  - (h) Website blocking orders to prevent future copyright infringements are a form of prior censorship and as such are a disproportionate restriction on freedom of expression.
- 9.4 Because of their potential adverse effect on internet users' right to freedom of expression, there should be procedures in place allowing consumer groups or other interested parties to intervene in injunction proceedings in which a blocking order is sought.
- 9.5 Knowingly submitting a court application for blocking of content without copyright should be penalised and those harmed by such applications should be compensated. The same applies to overbroad and negligent blocking applications.

### ***Intermediary liability and content removal under international standards***

International bodies have also commented on the compliance with international standards on freedom of expression of 'notice-and take-down' procedures, which have been adopted in a number of countries for web hosting services to remove allegedly unlawful material.<sup>15</sup>

For example, a recent OSCE report on Freedom of Expression on the Internet highlights that:<sup>16</sup>

Liability provisions for service providers are not always clear and complex notice and takedown provisions exist for content removal from the Internet within a number of participating States.

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<sup>14</sup> *The Right to Share Principles: Principles on Freedom of Expression and Copyright in the Digital Age*, ARTICLE 19, 2013; available at <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

<sup>15</sup> See, for example the E-commerce directive in the EU and the Digital Copyright Millennium Act 1998 in the USA.

<sup>16</sup> OSCE report, Freedom of Expression and the Internet, July 2011, p 30, available at: <http://www.osce.org/fom/80723>.

Also, the UN Special Rapporteur on freedom of expression recently noted:<sup>17</sup>

42. [W]hile a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by overcensoring potentially illegal content. Lack of transparency in the intermediaries' decision-making process also often obscures discriminatory practices or political pressure affecting the companies' decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.

Accordingly, the four special rapporteurs on freedom of expression recommended in their 2011 Joint Declaration on Freedom of Expression and the Internet that:

- (i) No one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;
- (ii) Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;
- (iii) ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.<sup>18</sup>

Similarly, the UN Special Rapporteur on freedom of expression has stated that:

Censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf.<sup>19</sup>

He has further recommended that in order to avoid infringing the right to freedom of expression and the right to privacy, intermediaries should:<sup>20</sup>

[O]nly implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved.

Finally, the Special Rapporteur has emphasised the need for effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.<sup>21</sup>

Based on these international standards and comparative best practices, ARTICLE 19's *Right to Share Principles* recommend the following:

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<sup>17</sup> See UN Special Rapporteur on Freedom of Expression report, cited above at n 38, para. 42.

<sup>18</sup> See UN Special Rapporteur on Freedom of Expression report, *op. cit.*

<sup>19</sup> *Ibid.*, para. 43.

<sup>20</sup> *Ibid.* para 47.

<sup>21</sup> *Ibid.*

- 10.3 Intermediaries should not be required to monitor their services to prevent copyright infringement.
- 10.4 Laws governing the liability of intermediaries in respect of infringing content must contain due process safeguards sufficient to protect freedom of expression and the right to privacy. In principle, intermediaries should only be required to remove infringing content if the measure is provided by law and ordered by a court, tribunal or other independent adjudicatory body in accordance with the rule of law.
- 10.5 Intermediary liability provisions, known as ‘notice-and-takedown’, which give an incentive to hosting services to remove content without proper notice or evidence of actual infringement, have a chilling effect on freedom of expression. Insofar as such provisions are already in place, they should be interpreted in a way that is maximally compatible with the requirements of the right to freedom of expression, including:
- (a) Only copyright owners or their authorised representatives should be allowed to file notices of alleged infringement;
  - (b) Copyright in the allegedly infringing content must be established;
  - (c) The notice of complaint must be specific, including details of each act of infringement, location of the infringing material and date and time of the alleged infringement;
  - (d) The alleged infringer should be informed of the copyright notice;
  - (e) A right of counter-notice should be provided and clearly explained;
  - (f) Effective remedies should be available to challenge improper takedowns, including through clearly accessible internal appeals mechanisms and/or through the courts;
  - (g) A abusive or negligent copyright notices should be penalised and compensation paid to the injured party.
- 10.7 Because unjustified content removals affect the public’s right to receive information as well as the right of individuals to express themselves, takedown requests and decisions should be transparently documented and available to challenge by both the content publisher and members of the public.
- 10.8 Consideration should be given to adopting rules, such as notice-and-notice, which only require intermediaries to pass on complaints about copyright infringement to the alleged infringing party without taking down the material at issue upon notice.

# Analysis of the Federal Law No. 187-FZ

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Under the Law, copyright holders have two main remedies at their disposal where they believe their rights have been infringed by online content:

- *First*, copyright holders can apply to the court to seek injunctive relief (both interim and permanent injunctions), whose implementation is supervised by a government agency, *Roscomnadzor* (the Federal Executive Agency for Supervision of Telecommunications, Information Technology and Mass Communications).
- *Second*, copyright holders can file a notice with information intermediaries. The intermediaries must then choose between taking “appropriate and necessary measures” to remove the allegedly infringing material, or face being stripped of their immunity from liability.

We examine both procedures in more detail below.

## Interim measures

Under Article 2 of the Law - which amends the Civil Procedure Code by introducing a new Article 144 - copyright holders can apply to the Moscow City Court in order to obtain an interim injunction to protect their video content.

If copyright holders fail to submit documents establishing their entitlement to copyright in the work at issue and the fact that unauthorised use of the work has taken place, the Court can refuse their application. If the copyright holder fails to launch a proper lawsuit within 15 days of the court ordering the interim measures, the order is lifted. *Roscomnadzor* supervises execution of interim orders. In addition, individual users whose rights have been violated by the interim measures have a right to claim damages if the claimant fails to file a lawsuit within the 15-day time-limit or if the copyright claim is ultimately dismissed by the courts.

## Positive aspects

ARTICLE 19 recognises that, on its face, the procedure for interim relief contains some positive elements, in particular:

- In line with the recommendations of the UN Special Rapporteur on freedom of expression (outlined above), interim measures restricting access to information online are ordered by the courts – the Moscow City Court - rather than a government body.
- The conditions that copyright holders must fulfil in order to obtain an interim order - namely submitting evidence of (i) their entitlement to copyright in the work in question; and (ii) the fact that unauthorised use of the work has taken place – provide a degree of protection against abusive requests to block or remove access to content online.
- Individual users or organisations whose rights have been violated by the interim measures are afforded some level of protection since, under Article 144 of the Civil Procedure Code, they are entitled to claim damages for the harm caused to their interests by the interim measure.

## Negative aspects

However, ARTICLE 19 considers that the above safeguards are not sufficient to provide proper protection for the right to freedom of expression online. ARTICLE 19 recalls that restrictions on

freedom of expression must comply with the three-part test in order to be compatible with international law.

In this instance, ARTICLE 19 considers that several aspects of the interim procedure lack clarity in breach of the first limb of that test, in particular:

- In order for an interim blocking order to be made, the courts are only required to take into account the evidence submitted by copyright holders. There is no corresponding requirement to consider the impact that blocking orders may have on freedom of expression.
- It is unclear what evidence is required to establish that unauthorised use of the work has taken place, in particular whether copyright holders should only establish one occurrence of their rights being infringed or if evidence of each act of infringement for each particular work is required with identification of the particular location where the infringing act has occurred.
- The Law fails to specify the precise measures that may be ordered by the courts. For instance, there is nothing in the law to prevent a court from ordering a wholesale (and therefore disproportionate) ban on access to domain names contrary to international standards on freedom of expression.<sup>22</sup>
- The government agency responsible for mass communications, *Roscomnadzor*, is effectively entrusted with the implementation of interim injunctions. ARTICLE 19 is seriously concerned however that the law provides insufficient safeguards against abuse in the implementation of these measures. We explain our concerns in more detail further below since *Roscomnadzor* is also responsible for the execution of permanent injunctions.

### Recommendations:

- Before granting interim blocking orders, and in line with Principle 9.3 of the *Right to Share Principles*, the courts – or independent adjudicatory bodies - should be required to take the following additional factors into account:
  - whether the interim blocking order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
  - whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
  - the overall effectiveness of the measure and the risks of over-blocking;
- The Law should specify that (i) no interim blocking injunction should be granted beyond the works in which copyright has been established by the rights holders; and (ii) the blocking of an entire domain name is never permitted as it disproportionately impacts the right to freedom of expression.
- The Law should provide safeguards against abuse in the implementation of interim blocking measures (see also further below).

### Injunctive relief for restricting access to infringing material

Article 3 of the Law amends Federal Law no. 149-FZ of 27 July 2006 on Information Technologies and Protection of Information by introducing a new Article 15 entitled “procedure for restricting access to information disseminated in violation of exclusive film rights, including

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<sup>22</sup> See European Court, *Yildirim v Turkey*, no. 3111/10, 18 December 2012.

movies and TV films”. Article 15 does not specify whether the procedure in question is applicable to interim injunctions only.

ARTICLE 19, therefore, proceeds on the basis that the procedure must be broadly followed once either an interim or a permanent injunction has been obtained by a copyright holder.

In outline, the procedure is as follows:

- Once a copyright holder has obtained a valid court order, he or she may apply to *Roscomnadzor* requesting that it adopts “measures” to restrict access to the video content at issue. It is not clear what information must be provided by the copyright holder at this point but Article 15 provides that *Roscomnadzor* is to approve the application form that must be filled out in order to request execution of the court order.
- Upon receipt of the application, *Roscomnadzor* is tasked with identifying the Internet service providers that hosts the allegedly infringing content. It then sends them a copyright infringement notice in both Russian and English containing information about the content that must be removed, including the film’s title, author, copyright owner, domain name and IP address as well as indexes of pages of internet sites allowing identification of that content.
- Upon receiving notice from the government agency, the hosting provider must pass on the information to the website owner within one working day.
- If the latter fails to remove the material within one working day, hosting providers are required to take steps to remove the content at issue no later than 3 working days from receipt of the notification sent by *Roscomnadzor*.
- Failure to act on the part of the hosting provider triggers a further notice to internet access providers which are then required to block access to the domain name or website containing the infringing material within the next 24 hours.

In ARTICLE 19’s view, this procedure fails to comply with international standards on freedom of expression for the following reasons:

- **Proportionality:** the sanctions for failing to remove the allegedly infringing material are disproportionate. Under the new law, entire domain names and/or IP addresses could be blocked if hosting providers fail to remove infringing material within 3 days of being notified by a government body. This effectively means that instead of blocking access to the infringing material at issue, legitimate material could be blocked as well, in clear breach of the international standards on freedom of expression outlined above.
- **Due process:** the amendment to Law no. 149-FZ makes no reference to the possibility of judicial review against overbroad blocking orders of the type described above. More generally, in the absence of safeguards against potential abuse of its powers, ARTICLE 19 considers that execution of court orders should not be entrusted to *Roscomnadzor*, a government agency. We further believe that the courts are generally best placed to oversee execution of their judgments or orders. Moreover, this would simplify the procedure by removing the additional procedural step of applying to *Roscomnadzor* in order to enforce the order.
- **Transparency:** ARTICLE 19 notes that the blocking measures supervised by *Roscomnadzor*, presuppose the existence of lists of “pirate” sites that must be blocked. Although the law makes references to an “interaction system of information” which presumably contains this

information, no provision is made for making access to such blocking lists available to the wider public. It is therefore extremely difficult to assess whether access to a particular site is being restricted on copyright grounds or for some other purpose. Given that the use of blocking measures almost inevitably leads to innocent sites being blocked, it is vital that blocking lists are published to allow public oversight and for mistakes to be rectified. This is especially important given the need to ensure that government agencies act within the law and comply with fundamental rights.

### Recommendations:

- As a matter of principle, website blocking should never be available as a means by which to enforce copyright online.
- If provided by law, however, this measure should never include domain name blocking which is always a disproportionate measure.
- The courts or independent adjudicatory bodies, not *Roscomnadzor*, should oversee execution of court orders. If, however, *Roscomnadzor* continues to oversee implementation of the copyright enforcement law, any website blocking measure should be amenable to judicial review.
- A full list of blocked sites should be made public and regularly updated.

### Intermediary liability provisions

In addition to the above, Article 4 of Law no 187-FZ amends the Civil Procedure Code by adding a new article 1253 dealing with intermediary liability. The intermediary liability provisions distinguish between “mere conduit” type of service providers that facilitate the transmission of information (Article 1253 (2)) and hosting providers that allow information to be posted online (Article 1253 (3)).

#### ***Mere conduit***

‘Mere conduit’- type of services are granted immunity from liability if: (i) they did not initiate the transmission of information; (ii) they did not select the receiver of the transmission; (iii) they did not modify the information transferred except insofar as necessary for technical purposes; (iv) they “did not know or ought to have known” that the transferred data contained information that was unlawful.

ARTICLE 19 is deeply concerned that constructive knowledge is sufficient for “mere conduit” service providers to be stripped of their immunity from liability. This essentially amounts to imposing on them a duty of care in respect of preventing the transmission of unlawful material. As such, they are given a strong incentive to actively monitor and filter information on their services in order to locate infringing material. In this way, “constructive knowledge” clauses are deeply inimical to freedom of expression and the free flow of information on the Internet.

ARTICLE 19 further notes that best practice standards in this area dictate that ‘mere conduits’ should be almost fully insulated from liability for third-party content except where required to comply with a court order and as long as they do not interfere with that content.<sup>23</sup> This is also consistent with the recommendations of the 2011 Joint Declaration on Freedom of Expression and the Internet (see above). Accordingly, we strongly recommend that the “constructive knowledge” clause should be entirely removed.

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<sup>23</sup> See for example, Article 12 of the E-Commerce Directive, *op.cit.*



### **Hosting providers- constructive knowledge clause**

Article 1253 (3) (1) of the Law provides that hosting providers are not liable for third-party content unless they “knew or ought to have known” that infringing material was being used illegally on their service. In other words, article 1253 also contains a “constructive knowledge” clause. As already explained above, these types of clauses are inimical to free speech since they effectively require intermediaries to monitor their services in order to locate “illegal” material.

ARTICLE 19 believes that as a matter of principle, hosting providers should only be required to remove material on the basis of “actual knowledge” obtained by a court order. However, we recognise that this may not always be possible in practice. For this reason, we accept that a sufficiently specific user notice may be sufficient for the purposes of “actual knowledge” in the context of a notice and takedown procedure already provided by law.

### **Notice-and-takedown procedures**

Under new article 1253 (3) (2) of the Civil Procedure Code, hosting service providers can also lose immunity from liability if they fail to “promptly” take “necessary and appropriate” measures to stop the violation of intellectual property rights upon notice by rights holders. In other words, article 1253 provides the basis for a ‘notice-and-takedown’ procedure.

ARTICLE 19 has long condemned notice-and-takedown procedures on the ground that in the vast majority of cases, they lack a clear legal basis and fail to provide for minimum due process safeguards. The new Russian provisions are no exception:

- **Lack of clarity:** Although Article 1253 provides the basis for a notice-and-takedown procedure, the procedure itself is not properly laid down, something which is likely to lead to inconsistent practices and ultimately legal uncertainty for Internet intermediaries. In particular, as examined further below, Article 1253 fails to provide minimum due process safeguards.
- **Lack of due process safeguards:** the procedure laid down by Article 1253 lacks fairness. In particular, there is no requirement that the alleged infringer is notified of the copyright notice; no provision is made for a right of counter-notice; there is no requirement that copyright in the work at issue must be established; abusive or negligent takedown requests are not penalised. In short, the procedure falls well below the minimum due process safeguards that are necessary to protect the right to freedom of expression of Internet users. ARTICLE 19’s *Right to Share Principles* clearly set out what we consider to be the minimum due process safeguards required in order for notice-and-takedown procedures to comply with international standards on freedom of expression. We deeply regret that in this instance the Russian authorities did not heed our call for fair procedures when enforcing intellectual property online.

In addition to the above, **notice-and-takedown procedures have a chilling effect on freedom of expression** since intermediaries tend to err on the side of caution by over-censoring potentially unlawful content.<sup>24</sup> Although the practical operation of the Law remains to be seen, there is no reason to expect that Russian Internet service providers will prove more fearless than their European counterparts.

In ARTICLE 19’s view, Article 1253 should grant broader immunity to hosting providers so that they should only be required to remove unlawful material following a court order. In the alternative, Article 1253 should be amended to incorporate the minimum safeguards recommended by ARTICLE 19 in the *Right to Share Principles*. That would at least render the

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<sup>24</sup> See UN Special Rapporteur on Freedom of Expression report, *op.cit.*

notice-and-takedown procedure more compatible with international standards on freedom of expression.

More generally, we question the necessity of a notice-and-takedown procedure given that copyright holders already have a remedy under Article 2 (3) and article 3 of Law no. 187, which provides greater guarantees of procedural fairness since Internet intermediaries are required to restrict access to infringing material following a court order.

**Recommendations:**

- The constructive knowledge clause in relation to “mere conduit” service providers should be repealed;
- The liability provisions concerning hosting service providers, i.e. the constructive knowledge clause and the basis for the notice-and-takedown procedure, should be entirely repealed
  - Instead, as a matter of principle, hosting service providers should only be required to remove access to content following a court order; or
  - Alternatively, Russian lawmakers should consider a notice-and-notice procedure such as the one in place in Canada, which is generally regarded as best practice in this area.
- If, however, the notice-and-takedown provisions remain, the procedure should be amended to incorporate the minimum due process safeguards laid down in ARTICLE 19’s Right to Share Principles.

# Annex – Federal Law of the Russian Federation number 187-FZ of 2 July 2013

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## **On amendments to a number of legislative acts of the Russian Federation on the protection of intellectual property rights in information and telecommunication networks**

Published: July 10, 2013 in "Rossiyskaya Gazeta", Federal issue No. 6124  
Comes into force: August 1, 2013

**Adopted by the State Duma on 21 June 2013**

**Approved by the Federation Council on 26 June 2013**

### **Article 1**

Article 28 of the Arbitration Procedural Code of the Russian Federation (Collection of the Russian Federation Laws, 2002, number 30, art. 3012) shall be amended by adding the words "except for the cases tried by the Moscow City Court in accordance with part 3 of article 26 of the Civil Procedural Code of the Russian Federation".

### **Article 2**

The following amendments to be introduced into the Civil Procedural Code of the Russian Federation (collection of the Russian Federation laws, 2002, N 30, art. 4532; 2005, N 30, art. 3104; 2006, N 1, art. 8; 2007, no. 41, art. 4845; 2008, N 24, art. 2798; 2009, N 14, art. 1579; 2010, no. 18, art. 2145; N 50, art. 6611; 2011, N 49, art. 7066):

1) Article 26 to be amended by adding part 3<sup>1</sup> to read as follows:

3. The Moscow City Court as a court of primary jurisdiction (lower court) tries civil cases dealing with protection of exclusive film rights, including movies and TV films, in information and telecommunication networks, including the Internet, which had interim measures issued against them, in accordance with Article 1441 of the present code.";

2) part one of article 140 shall be amended, by adding paragraph 3 to read as follows:

"3<sup>1</sup>) charging the defendant and other persons with duties to commit certain acts relating to the subject matter of the dispute on the infringement of exclusive film rights, including films and TV movies, in information and telecommunication networks, including the Internet;";

3) to be supplemented by article 144<sup>1</sup> to read as follows:

**"Article 144 1. Interim measures to protect exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet"**

1. The court is entitled to impose interim measures to protect exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, following a written application from an organisation or an individual. Such an application may also be filed in court by completing the form posted on the court's official Internet website, and signed with a qualified electronic signature in accordance with the federal law.

2. Interim measures provided for in this Article shall be adopted by the court under the rules established by this chapter, as modified by this Article.

3. Application for interim measures to protect exclusive film rights, including movies and TV films, in the information and telecommunications networks, including the Internet, is filed at the Moscow City Court.

4. When applying for interim measures to protect exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, the applicant submits to the court documents certifying the use of items covered by exclusive rights and the entitlement of the applicant to such items, in the information and telecommunications networks, including the Internet. Failure to submit these documents to the court is grounds for a refusal to provide interim measures to protect exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, in which the Court explains the right to resubmit the application with the executed requirements of the present part, as well as the right to file an action pursuant to the general procedure. When applying for interim measures to protect exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, in accordance with this article, by filling out the form posted on the official site of the Moscow City Court in the Internet, documents confirming the fact of using items of exclusive rights in information and telecommunication networks, including the Internet, and the rights of the applicant to these items, may be submitted in electronic form.

5. The court determines interim measures for the protection of exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet.

This verdict establishes a limit, not exceeding fifteen days from the date of the verdict, for the filing of the statement of claim, in connection with which the court had taken measures to ensure the applicant's interests. This verdict is posted on the official Internet website of the Moscow City Court, no later than one day following the date of the verdict.

6. If the court adopts interim measures provided for by this article, a claim for the protection of exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, is filed by the applicant in the specified court.

7. If the applicant fails to file a claim in the period, set by the court verdict on the interim measures to protect exclusive film rights, including movies and television films, in information and telecommunications networks, including the Internet, such interim measures are revoked by the same court. A ruling is made to revoke the interim measures.

This verdict to revoke interim measures is posted on the official website of the Moscow City Court no later than one day following the date of the said verdict.

Copies of the ruling are sent to the applicant, to the federal executive body, performing control and supervision functions in the area of mass media, mass communications, information technologies and communication, and to other interested parties no later than one day following the date of the verdict.

8. In the case of an applicant's claim on demand, in respect of which the court adopted interim measures to protect the exclusive film rights, including movies and television films, in the information and telecommunications networks, including the Internet, these measures act as remedies to secure the claim.

9. An organisation or an individual, whose rights and/or legitimate interests have been violated by the adoption of interim measures for the protection of exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, shall have the right, before the commencement of the action, to claim damages of their choice from the applicant, in accordance with article 146 of the Code, if the claimant has failed to file a claim on demand, pursuant to which the court adopted the said interim measures, in the period set by the court, or if the claim has been dismissed by a valid court ruling. ";

4) Article 3201 to be amended by adopting paragraph 5, to read as follows:

5) By the Appeals Court of the Moscow City Court - to the rulings of the present court on civil cases dealing with protection of exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, and in relation to which interim measures have been adopted, in accordance with article 1441 of the present code. ";

5) part 1 of article 428 to be amended, by adding a paragraph, to read as follows:

"A verdict to impose interim measures to protect exclusive film rights, including movies and TV films, is issued to the claimant no later than one day after the date of such verdict."

6) article 429 to be amended by adding part 3, to read as follows:

3. Based on the definition of the interim measures for the protection of exclusive film rights, including movies and TV films, in information and telecommunications networks, including the Internet, the court issues the claimant with a writ obligatory, and upon the claimant's application forwards the writ to the federal executive body which performs control and supervision functions in relation to mass media, mass communications, information technologies and communication. "

### **Article 3**

The Federal Law of 27 July 2006 number 149-FZ "On Information, Information Technologies and Protection of Information" (Collected Legislation of the Russian Federation, 2006, number 31, art. 3448; 2010, number 31, art. 4196; 2011, number 15, art. 2038; number 30, art. 4600; 2012, number 31, art. 4328; 2013, number 14, art. 1658; number 23, art. 2870) to be amended as follows:

1) part 2 of article 1 shall be amended, by adopting the words "except in cases provided for in this federal law";

3) to be supplemented by article 15<sup>2</sup>, to read as follows:

**"Article 15<sup>2</sup>. Procedure for restricting access to information disseminated in violation of exclusive film rights, including movies and TV films**

1. The rights holder who has come across films, including movies and TV films, or information necessary to obtain them, by using information and telecommunications networks, in information and telecommunication networks, including the Internet, which are distributed without his permission or other legal grounds, may apply to the federal executive body which exercises control and supervision functions in relation to mass media, mass communications, information technologies and communication, with a request to adopt measures to restrict access to the information resources, distributing such movies or information, on the basis of a valid court ruling. The application form shall be approved by the federal executive body which performs control and supervision functions in relation to mass media, mass communications, information technologies and communication.

2. Based on a valid court ruling, the federal executive body which performs control and supervision functions in relation to mass media, mass communications, information technologies and communication, within three business days:

1) shall determine the hosting provider or any other person providing the posting of the said information resource, in information and telecommunications networks, including the Internet, which provides Internet services to the website owner, hosting information containing films, including movies and TV films, or information necessary to obtain them with the help of information and telecommunications networks, without permission of the copyright owner or other lawful grounds;

2) shall send the hosting provider or other person specified in paragraph 1 of this part, a notification in digital format, in English and Russian, of the violation of exclusive film rights, including movies and TV films, containing the item's name, its author, copyright owner, its domain name and network address which allow to identify the Internet site that hosts the information containing films, including movies and TV films, or information necessary to obtain them, by using information and telecommunications networks, without the authorization of the copyright holder or other legitimate grounds, as well as indexes of pages of Internet sites which allow to identify such information, and demanding that steps be taken to remove such information;

3) shall record the date and time of the notification of the hosting provider or other person specified in item 1 of this part, in the relevant information system.

3. Within one working day from the receipt of the notification referred to in paragraph 2 of part 2 of this article, the hosting provider or other person described in paragraph 1 of part 2 of this article, must inform the information resource's owner, who they provide a service for, notifying them of the need to immediately remove illegally posted information and (or) take measures to restrict access to it.

4. Within one working day from the receipt of the notification from the hosting provider or other person referred to in paragraph 1, part 2 of this article, instructing them to remove illegally posted information, the owner of the information resource must remove such information. In the case of refusal or inaction by the information resource's owner, the hosting provider or other person referred to in paragraph 1, part 2 of this article, must restrict access to the said information

resource, no later than three working days from the receipt of the notification referred to in paragraph 2, part 2 of this article.

5. In the case of the hosting provider or other person specified in paragraph 1, part 2 of this article and (or) information resource's owner's failure to take the necessary measures referred to in parts 3 and 4 of this article, the site's domain name in the Internet, its network address, webpage indexes that allow users to identify information that contains films, including movies and TV films, or information necessary to obtain them through information and telecommunications networks and posted without the authorization of the rights holder or other legitimate grounds, as well as other data and information about this site, are sent via the interaction system to the service providers to take measures limiting access to this information resource, including the website, or the information posted on it.

6. Following a valid judicial act, the federal executive body which exercises control and supervision functions relating to mass media, mass communications, information technologies and communication, within three working days of the receipt of the judicial act abolishing access restriction to the information resource containing films, including movies and TV films, or information necessary to obtain them by means of information and telecommunication networks distributed without permission of the rights owner or other legal grounds, shall notify the hosting provider or other person referred to in paragraph 1, part 2 of this article about the lifting of measures restricting access to this information resource.

7. Within 24 hours from the receipt via the interaction system of information on the information resource, containing films, including movies and TV films, or information necessary to obtain them via the information and telecommunications networks, which are distributed without the permission of the rights owner or other legal grounds, the telecoms operator who acts a service provider to provide access to the Internet must restrict access to this information resource, including the Internet website or the site's page.

8. The operation procedure for the information interaction system is determined by the federal executive body which performs control and supervision functions relating to mass media, mass communications, information technologies and communication.

9. The procedure provided for by this article, does not apply to the information to be included in the register in accordance with article 15<sup>1</sup> of the present federal act. ";

3) article 17 to be amended by adding part 4, to read as follows:

4. Hosting provider and the Internet website owner are not responsible to the rights holder and the user for restricting access to information and (or) restricting its distribution in accordance with the requirements of the federal law. ".

#### **Article 4**

The following amendments to be introduced into the Civil Procedural Code of the Russian Federation (Collection of the Russian Federation Laws, 2002, number 30, art. 5496; 2008, number 27, art. 3122; 2010, number 41, art. 2870):

3) to be amended by adding article 1253<sup>1</sup> to read as follows:

## **"Article 1253<sup>1</sup>. Specifics of information intermediary's liability**

1. An individual performing a transfer of material in the information and telecommunications network, including the Internet, a individual providing the possibility of posting material or information necessary to obtain it by using information and telecommunications network, an individual providing the opportunity to access the material on the network is an information intermediary and is liable for the violation of intellectual property rights in information and telecommunications network on general grounds, stipulated by the present code, in the case of fault, with reference to specifics according to paragraphs 2 and 3 of this article.

2. An information intermediary carrying out a transfer of material in information and telecommunications networks, is not responsible for the violation of intellectual property rights which occurred as a result of such transfer, provided the simultaneous compliance with the following conditions:

1) he or she is not the initiator of this transfer and does not specify the recipient of the said material;

2) he/she does not change the said material in the process of the provision of telecommunications services, except for the changes implemented for the purposes of enabling the technological process of material transfer;

3) he/she neither knew nor ought to have known that the use of the appropriate results of intellectual activity or means of individualisation by the person who initiated the transmission of material containing the appropriate result of intellectual activity or means of individualization, is unlawful.

3. An information intermediary that provides the possibility of posting material in the information and telecommunications network, shall not be liable for the violation of intellectual property rights due to the posting of material by a third party or following his/her instructions, in information and telecommunications network, provided the information broker/intermediary has met the following conditions:

1) he/she neither knew nor ought to have known that the use of the relevant result of intellectual activity or means of individualization contained in such material is unlawful;

2) in the case of receiving a written statement by the rights holder concerning violation of intellectual rights, with an indication of the site's webpage and (or) Internet network address where this material is posted, he promptly took the necessary and appropriate measures to stop the violation of intellectual property rights. The list of necessary and appropriate measures and their implementation procedure may be provided by law.

4. Requirements to protect intellectual property rights (paragraph 1 of article 1, item 1250, 1251, 1252, para. 1, of the present Code) may be applied to the information intermediary who, pursuant to this article, shall not be liable for the violation of intellectual property rights not related to the application of civil penalties, including deleting information which violates exclusive rights or limiting access to it.

5. The rules of the present article shall apply to persons who provide access to the material or information necessary to retrieve it, by using information and telecommunications networks. ";



2) article 1302 to be amended by adding paragraph 3, to read as follows:

3. In order to ensure action related to cases of violations of exceptional film rights, including movies and TV films, when they are posted on the information and telecommunication networks, including the Internet, interim measures established by the civil procedural legislation and aimed at limiting access to information violating the exclusive rights, may be applied to resources, where there has been a presumed violation of exclusive rights. Procedure for limiting access to information is set by the Russian Federation legislation on information."

#### **Article 5**

This federal law enters into force on 1 August, 2013.

#### **President of the Russian Federation**

V. Putin