ARTICLE 19

Russia: Changes in the Sphere of Media and Internet Regulation 2015-6

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Introduction

The Internet is an important tool to facilitate the free exchange of views and ideas. It can enable people to access and receive a vast amount of information, helping to realise the universal right to freedom of expression.

The issue of legislation regulating online content is a topic of great interest to both governments and Internet users. Under international law, online content may legitimately be subject to some narrow restrictions, for example, to prevent the dissemination of child pornography; however, any content regulation must not undermine freedom of expression, and must be necessary and proportionate to their aim.

Since 2013, Russian legislation relating to the Internet has become extremely dynamic. Notable amendments in 2013-4, for example, have led to the extrajudicial blocking of websites, including independent media, and increased regulation of bloggers. Roskomnadzor – the body responsible for monitoring and controlling Russian media – both on and offline – has seen its powers increasingly extended.

Affecting Internet users more broadly, they also impact upon online media, journalists and bloggers more concretely. This focus on media, both on-and-offline, is further illustrated with the introduction at the start of 2016 of tighter controls regarding foreign funding for media outlets.

Non-compliance with any of these changes can result in severe sanctions, including heavy fines.

This legal analysis reviews some of the most recent changes that have taken place since the start of 2015, either through amendments to existing legislation or the introduction of new laws – such as the 'right to be forgotten'.

1. The 'Right to be Forgotten'

In 2016 a so-called "right to be forgotten" law came into force. During summer of 2015 the Law "On information, information technologies and information security" was amended (to include Article 10.3). These legislative amendments grants any citizen (including foreign citizens), who reside in Russia as of January 1, 2016, the right to demand that search engine companies stop listing links in search results if they contain specific information about such persons. In practice, as only links to websites are meant, and not the information itself, formal "deletion" does not take place.[i]

Requests to de-list links shown by search engines to information on websites, may be filed when the information is:

- Inaccurate;
- Distributed in violation of legislation; or
- Outdated, having lost its relevance due to subsequent events or actions.

Exceptions include: information about committed crimes for which conviction was not removed from official records, and information about events which contain elements of crimes, for which the period of limitations has not expired.[ii]

While the law contains some welcome safeguards for the protection of freedom of expression (such as the exclusion of information about criminal proceedings) the question of whether personal information is 'relevant' is an unduly broad measure by which to decide whether information should remain genuinely accessible. In particular, it assumes that personal information is only relevant in the eye of the person making the "right to be forgotten" application. However, information about a person may be both personal and public - it may be relevant to the person seeking the information, and may be relevant insofar as it concerns a matter of public interest. In other words, there is no such thing as an *objective* conception of relevance.

The requirements of the new law cover search engine companies. A search engine is understood to be a system, which enables search for information on Internet sites of third persons. Therefore Internet sites with internal search possibilities are not considered to be search engines. Exceptions include systems used for provision of state and municipal functions and services, as well as for other public authorizations determined by federal laws.[iii]

In requiring search engines to determine the 'relevance' of information, lawmakers and courts put private operators in the position of having to decide matters, involving a complex balance between the rights to privacy, data protection, and freedom of expression, which should be properly determined by the courts or at the very least by an independent adjudicatory body.

More generally, while the Bill broadly seeks to replicate the more limited right which was recognised by the European Court of Justice (CJEU) in the *Google Spain* case, it fails to provide the crucial safeguards for the protection of the right to freedom of expression that the CJEU had identified. In particular, the Russian law fails to include an explicit reference to the public interest, and the special interest for the public in receiving information when the data subject plays a role in public life.[iv]

The law sets out the following general procedure for citizens to exercise the 'right to be forgotten':

- A claimant has a right to apply with a request to the search engine operators in question, and demand that they de-list information about them, on grounds that he or she believes to be valid in line with the Russian law;

- The applicant's claim must include specific information, which the search engines subsequently verify. In case the information is found to be incomplete, the search engine operators *have the right* to ask the claimant to add particular missing pieces of information to the initial request.

It appears unclear, however, whether the operators are actually exonerated from the responsibility to undertake any actions in cases where the original claim is found incomplete.

Nevertheless, should the applicant receive a request to complement the initial claim, he or she is obliged within 10 working days to update it and send it back to the search operators, who must then, within the same time period, either accept the claim, or reject it and subsequently notify the applicant.

Such a refusal may be appealed in court if citizens consider the refusal to be unfounded, by filing a lawsuit about discontinuation of listing contested links. Legislators specifically provided the possibility of filing lawsuits about removal of information locally at the plaintiff residence; a foreign entity may be defendant in such cases. It is also permissible for a lawsuit against Google, registered in California to be considered by any Russian court.[v] It is worth noting, the law obliges the search engines not to disclose any information regarding the claim whatsoever.

The law does not include any provisions to ensure transparency and accountability regarding the handling of 'right to be forgotten' requests and does not specify what information on this should be made publicly available.

The law came into force very recently, and how it will be applied remains to be seen. However, so far it is unclear if citizens are entitled to demanding removal from search engines of links to accurate information only on the grounds of it being outdated or having lost relevance for the citizen. Theoretically, based on the wording of the legal provision it is possible. However, removal of such accurate information may infringe upon the right of society to receive this information, regardless of it having lost its relevance for the citizen, it may have relevance and importance for society as a whole, and for some members of society, in particular.

For instance, important information in public interest (e.g. links to documents released by whistleblowers) could be delisted in response to a 'right to be forgotten' request if the names of military commanders are mentioned in those documents. Moreover, if the laws in question are unduly broad, there is a risk that access to vast swathes of legitimate information may be prevented.

2. Toughening of penalties for abuse of freedom of the media

Extremism cases occupy a special place in the list of offences of abuse of freedom of the media, in particular inciting national, religious enmity, offending feelings of believers and Nazi propaganda. More often so called verbal extremism is incriminated to editorial boards of mass media outlets, journalists and bloggers, that is, extremism related to calls for extremist activity, aimed at inciting hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of gender, race, nationality, language, origin, attitude to religion and social background.

The most serious issue of law enforcement is connected with expertise of materials disseminated by the media as containing extremist attitudes; such expertise is performed by staff of regulatory bodies independently without involvement of relevant experts and consideration of their competent opinion. Thus, it is difficult to discuss justifiability and legitimacy of such expertise. When materials are addressed to the general public, when media outlets are held responsible by regulatory bodies, the attitude of the general public to the information published by the media is not taken into consideration at all. Therefore, an arbitrary assertion of public danger of such materials and its negative influence over population takes place.

Law enforcement practice of holding mass media liable for abuse of freedom of the mass media has specific features, as oversight and control functions regarding enforcement of provisions of Article 4 of the Mass Media Law and use of relevant law enforcement measures when these provisions are violated by editorial boards of mass media outlets, editors in chief and journalists rests with relevant executive agencies, primarily with Roskomnadzor, as well as with law enforcement bodies (the police, public prosecution office). Also there is a large number of legal mechanisms ranging from a warning to blocking resources, which permit these bodies to curb offences and held perpetrators responsible.

In recent years, legislative initiatives, with increasing frequency, tightened responsibility for public statements, publications or dissemination of extremist materials.

a. Fines of millions of rubles for publication of extremist materials and other offences related to abuse of freedom of the media

In the middle of 2015 provisions were introduced prohibiting "production or dissemination of mass media products, containing public calls to terrorism, materials which publicly justify terrorism and other materials, which call to extremist activities, or give reasons or justifications for engaging in such activities",vi as well as for mass distribution of extremist materials, which are part of the federal List of extremist materials, as well as their production or storage for the purposes of mass distribution.

The amendments introduced tougher penalties in the form of administrative fines. The maximum amount of fine increased from one 100,000 rubles to one million rubles, while the 100,000 rubles became the minimum amount of fine. Clearly, these fines cannot but cause concern and appears excessive.

Under Article 4 of the Mass Media Law, distribution of extremist materials is treated as abuse of freedom of the media. The long list of offences under Article 4 entail differentiated responsibility: either a warning citing inadmissibility of violating the law, or drafting an administrative offences

protocol with subsequent transfer to courts for imposition of administrative penalty in the form of a fine, or both measures simultaneously.

Warning as a penalty is extremely undesirable for editorial boards of mass media outlets, as two warnings issued by Roskomnadzor to a mass media outlet within a year allow the regulator to initiate termination of activities of such mass media outlet. Administrative fines entail quite serious amounts.

Article 13.15 of the Code of the Russian Federation on Administrative Offences lists offences, which amount to abuse of freedom of the media and the corresponding amounts of administrative fines for commission of such offences:

> i) Dissemination of information about a public association or another organization, entered into the list of public and religious associations and other organizations, regarding which court decision about liquidation or ban of activities came into force according to provisions of the Law "On countering extremist activities", failing to indicate that said public association or another organization or their activities are banned – ***four to five thousand roubles*** *fine imposed on officials,* ***forty to fifty thousand rubles*** *fine imposed on legal entities.*
>
> ii.) Illegal dissemination of information about a minor – victim of unlawful acts (failure to act) or violation of requirements for dissemination of such information – *thirty thousand to fifty thousand rubles fine imposed on officials;* ***four hundred thousand to one million rubles*** *fine imposed on legal entities.*
>
> iii) Public dissemination of claims clearly demonstrating contempt to society about days of war glory and commemorative days of Russia related to defence of the Fatherland, or public desecration of symbols of military glory of Russia, including using mass media outlets and (or) information and telecommunication networks (including the Internet) – ***four hundred thousand to one million rubles*** *fine imposed on legal entities.*
>
> iv) Dissemination via mass media outlets as well as on the information and telecommunication networks of information, containing instructions for production of homemade explosive substances and explosive devices - ***eight hundred thousand to one million rubles*** *fine imposed on legal entities.*
>
> v) Production or distribution of mass media materials, containing public calls to terrorist activities, materials, publicly justifying terrorism and other materials inciting to engage in extremist activities, or giving reasons or justifying the need to engage in such activities – ***one hundred thousand to one million rubles*** *fine imposed on legal entities.*

b. Propaganda and/or display of Nazi symbols

Federal Law of July 25, 2002 "On countering extremist activities" defines one of the types of extremist activities as propaganda and public display of Nazi symbols and attributes, or symbols and attributes confusingly similar to Nazi symbols and attributes.

However, Article 20.3 of the Code of the Russian Federation on Administrative Offences provides liability for offence, which includes propaganda or public display of Nazi symbols and attributes, or symbols and attributes confusingly similar to Nazi symbols and attributes, or symbols and attributes of extremist organizations, or other symbols and attributes propaganda and public display of which are prohibited by federal laws.

A seemingly minor contradiction of the conjunctions "and" and "or" in practice creates a serious law enforcement problem. That is, the wording of Article 20.3 of the Code of the Russian Federation on

Administrative Offences owning to the coordinating conjunction "or" enables holding perpetrators liable both for propaganda and display, and just for display of Nazi symbols, regardless of the purposes of such display: scientific, artistic, informational, educational etc. This issue with the legal norm resulted in the Russian court practice having a large number of cases covering entirely innocent situations (for instance, a still from a film where the character gets a swastika tattoo, or dissemination of archive photographs on the social media, where a city is documented at the time of fascist occupation, with a flag with swastika in the background etc.)

On April 15, 2015 Roskomnadzor posted on its Internet site clarifications stating, that display of Nazi symbols without the purpose of propaganda may not be considered as an extremist manifestation, therefore, it is not subject to penalties. Public statement of the regulator's position was very relevant and important for the mass media, but the issue with skewed law enforcement was not resolved fully. Law enforcement bodies continue to have powers which permit them to initiate administrative cases under Article 20.3 of the Code of the Russian Federation on Administrative Offences, and they continue doing it quite successfully. The number of cases initiated in connection with display (without purposes of propaganda!) of Nazi symbols by citizens beats all statistical records. Many of these cases are peculiar and have nothing to do with justice system. Clarifications given by Roskomnadzor are treated by law enforcement bodies as an non-binding recommendation.

The law establishes the following penalties for display and /or propaganda of Nazi symbols in the form of an administrative fine:

- for citizens in the amount of one to two thousand rubles with confiscation of object of administrative offence, or administrative arrest for the term of up to 15 days with confiscation of object of administrative offence;
- for officials in the amount of one thousand to four thousand rubles with confiscation of object of administrative offence;
- for legal entities in the amount of ten thousand to fifty thousand rubles with confiscation of object of administrative offence.

Below the full clarification given by Roskomnadzor on April 15, 2015 is quoted for information:

> *"Before celebration of the 70 Years of Victory in the Great Patriotic War Roskomnadzor considers it necessary to state the legal opinion of the Agency regarding public display of Nazi symbols. Federal Law "On countering extremist activities" considers as extremist activities: propaganda **and** public display of Nazi symbols or attributes, or symbols and attributes confusingly similar to Nazi symbols and attributes, or public display of symbols and attributes of extremist organizations."*

The quote from the law does not highlight the conjunction "and" by accident. Legal force may be contained in one letter. Previously Roskomnadzor commissioned specialized legal linguistic expertise. Specialists of the Department of Forensic Inquiry of the O.E. Kutafin Moscow State Law University issued the following opinion. When drafting the federal law legislators used for connecting concepts a coordinating conjunction "and". That is the concepts are not simply enumerated, they are grammatically linked. Their usage is such that "propaganda" has the strong, priority position in relation to the concept "public display".

In linguistic terms it means, according to the experts, that in and of itself display of Nazi symbols and attributes without purposes of propaganda is not a manifestation of extremism.

According to the experts, using Nazi symbols and attributes and symbols and attributes confusingly similar to Nazi symbols and attributes in historic, scientific etc. purposes is considered permissible. Nazi symbols may not be used with the purpose of insulting the Soviet people and memory of the victims of the Great Patriotic War, for popularization of Nazi ideas, theory of rational supremacy and justifying war crimes of fascists.

A series of resolutions of the Constitutional Court of the Russian Federation, connected to the enforcement of anti-extremist legislation endorses this position.

In its document the Constitution Court consistently determines, that "an obligatory characteristic of the indicated type of extremism is the evident or covert contradiction of the relevant actions (documents) to the constitutional prohibition on incitement of enmity and propaganda of social, racial, national, religious or language supremacy".

Presence of this characteristic "must be determined with consideration of all relevant circumstances of each specific case: form and content of activities or information, their addressees and goal, social and political context, presence of a real threat, caused by calls to unlawful encroachments on values protected by the Constitution, or justification of such actions etc."

This is the interpretation of the relevant provisions of the Law "On countering extremist activities" Roskomnadzor is determined to use in its law enforcement practice.

c. Separatism[vii]

On May 9, 2014 the Criminal Code of the Russian Federation was amended to include a new Article 280.1, which establishes liability for public calls to actions aimed at violation of territorial integrity of the Russian Federation.

Calls disseminated in mass media outlets or on the Internet are penalized with compulsory community service of up to 480 hours or deprivation of freedom for up to 5 years. Journalists or editors are held liable in a private capacity, as individual persons.

Publications containing appeals to any group of citizens in any form (spoken, written, pictorial, illustrative (posters, photographs, caption), using technical means, which express commitment to unifying citizens with the purpose of influencing their consciousness, will and behaviour and to impel them to actions (not necessarily violent!) aimed at violation of territorial integrity of the country are understood to be calls to separatism.

Only calls for the partition of Russia entail liability, not that of other countries and territories. It is entirely irrelevant if any actions were committed as a result of such calls: liability is incurred by the fact of publishing a text (a video) containing such call. The calls in themselves may have no addressees and be absurd; what is important is that partition of Russia into various parts or transfer of some of its territory to another state are the goal of such calls.

It appears that any publication, criticizing or questioning the rationale of maintaining Russia in its current border, support of opinion regarding separation of the Caucasus or even expressing doubts concerning annexation of Crimea by Russia, may be potentially dangerous and entail risk of criminal liability. Unfortunately, the Criminal Code article regarding separatism is formulated in broad terms, which leaves room for abuse in its enforcement by law enforcement bodies and officials.

3. Offending feelings of believers

Previously the Criminal Code of the Russian Federation contained Article 148, which provided liability for actions hindering activities of religious organizations or administration of religious rites by believers. However, later the content of the Article was radically changed, and since 2013 it is in force in a new version. Amendments stipulate criminal liability for actions taken publicly, aimed at offending feelings of believers and expressing open disrespect to members of society.viii

However, at the time when the new version of Article 148 of the Criminal Code of the Russian Federation was enacted, an administrative liability for offending religious feelings of citizens already existed. Nevertheless, in 2013 the provision was toughened and liability was upgraded from administrative to criminal.

Recently, offences in the sphere of inciting religious enmity and offending feelings of believers are becoming increasingly more "popular." However, the regulatory body, overseeing activities of mass media outlets, Roskomnadzor, in case it discovers mass media publications, which contain signs of offending religious feelings, considers them more often as abuse of freedom of the mass media, as such publications, according to the regulator's opinion, incite religious enmity and offend specific religious groups.

Issues with law enforcement also arise due to the very vague wording of the legal provision, stipulating liability for offending feelings of believers. It is very difficult to determine what religious feelings are. The term "offending" is also ambiguous, even linguistic experts do not agree about what constitutes an offence.

A particular upsurge of holding Internet media liable for inciting religious enmity and offending feelings of Russian Orthodox and Muslim believers took place after terrorist attack on the headquarters of the French magazine Charlie Hebdo. Roskomnadzor even published clarifications, which deal with possible future publication by the Russian media of caricatures from the well-known magazine. On January 16, 2015 the clarification was posted on the regulator's website and stated the following:

> "Due to multiple publications in the media and discussion of acceptability of publishing in the Russian Federation of caricatures depicting sacred sites and objects of various religions, affecting feelings of believers Roskomnadzor in the framework of its prevention activities issues additional clarification."
>
> <...>
>
> "Dissemination in the media or caricatures with religious subject-matter may be considered by Roskomnadzor as offensive or humiliating dignity of representatives of religious confessions and associations and may be qualified as inciting national and religious enmity, which is in direct violation of the Law "On Mass Media" and the Law "On countering extremist activities."

<...>

> "Roskomnadzor, expressing unconditional solidarity with those opposing any extremist and terrorist acts, request the media of the Russian Federation to abstain from publication of caricatures, which may be considered to be in violation of provisions of the Russian legislation."

Essentially, before caricatures were published in the Russian Federation a ban to publish them was introduced by the regulator. Clarifications by Roskomnadzor did not simply provide information about its position regarding the publication of the caricatures. They were not a recommendation, but an active warning to anyone who published the caricatures from Charlie Hebdo, that they will be held liable for abusing the freedom of the media.

This warning was followed up rigorously by Roskomnadzor. All Internet-media that published the news about the publication of the first issue of Charlie Hebdo after the terrorist attack and used the magazine's cover to illustrate the news item received a warning from Roskomnadzor. In total 10 Russian Internet publications were held liable.

4. The latest novelty: requirement for mass media outlets to notify Roskomnadzor about foreign funding

On January 1, 2016 another law came into force, which strengthens state control over activities of the media.

The Law "On mass media" was amended to include Article 19.2, which requires editorial boards of mass media outlets, as well as broadcasters or publishers to report to Roskomnadzor receipt of monetary funds from foreign states, informational organizations, from non-profit organizations, which, according to the legislation of the Russian Federation, performs functions of a foreign agent, from foreign citizens, stateless persons, as well as from Russian organizations, members and or founders of which include such persons.

Responsibility to provide information listed above, does not extend to cases of receipt of funds by editorial boards of mass media outlets, broadcasters or publishers in the following cases:

1. from founder of the relevant mass media outlet;
2. from advertiser;
3. for distribution of the relevant mass media outlet;
4. for an amount below fifteen thousand rubles, received by editorial board of mass media outlet, broadcaster or publisher non-recurrently.

Legislators also introduced liability for failure to report such information or failure to report it in a timely manner. Officials will have to pay an administrative fine in the amount of thirty to fifty thousand rubles, legal entities – one to two amounts of the monetary funds received by editorial board of mass media outlet. In case of a repeated failure to report such information fines are increased manifold.

References

i A. Tolkachev and K. Yegelev, "Pravo na zabvenie v Runete. Analiz I posledstvia" (Right to be forgotten in Ru-Net. Analysis and Consequences), date, http://www.atplaw.ru/useful/articles/pravo-na-zabvenie-v-runete-analiz-i-posledstviya.html

ii Ibid.

iii Ibid.

iv ARTICLE 19, The "Right to be Forgotten" Bill, Aug 2015, p.2, available at: https://www.article19.org/data/files/medialibrary/38099/Full-Analysis---Russia---RTBF-Final-EHH.pdf

v A. Tolkachev and K. Yegelev, "Pravo na zabvenie v Runete. Analiz I posledstvia"

vi Code of the Russian Federation on Administrative Offences of December 30, 2001 #195-FZ (as amended on December 30 with amendments introduced on February 17, 2016) with amendments enacted on January 15, 2016) Part 6, Article 13.15.

vii Mass Media Defence Centre,"Otvetstvennosty za prizyvy k separatizmu" (Liability for calls to separatism), available at: http://www.mmdc.ru/consulting/common/otvetstvennost_za_prizyvy_k_separatizmu/

viii "Chto po zakony yavlyaetsa oskorbleniem chuvstv veruyuschikh?" (What does the Law Consider to Amount to Offending Feelings of Believers?) http://sovetnik.consultant.ru/pravila_povedeniya/chto_po_zakonu_yavlyaetsya_oskorbleniem_chuvstv_veruyuwih/