

# ONLINE MUSIC PIRACY AND FILE-SHARING IN RUSSIA

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<p>Abstract</p> <p>Internet piracy became a very prominent issue in the Recording Industry after MP3 technology was introduced. Nowadays more and more Internet users in the Russian Federation download pirated materials, and so the rights holders have sounded the alarm about the subsequent financial losses the music industry must bear. The opponents of file sharing maintain that indiscriminate Internet copying significantly reduces music sales revenues, while the supporters of piracy argue that the practice is harmless, and may even increase music sales. The problem is that most Russians do not consider file-sharing (even if they are sharing products that are clearly protected by copyrights) illegal and are willing to battle in legal forums to protect their interests.</p> <p>The main goal of this study was to provide an overview of the different positions and different attitudes in the Russian Federation to online piracy and to develop and propose solutions that would satisfy all of the stakeholders in the conflict: consumers, rights holders and the lawmakers as representatives of society. In order to develop new ideas and solutions, the existing anti-piracy laws and regulations worldwide were analyzed as well as non-legal methods of fighting online piracy and illegal file-sharing. Specific attention was focused on these same aspects in Russian contexts.</p> <p>This study focused first on an in-depth and extensive review of the existing studies, industry reports, and governmental reports that were then compared and contrasted with the perspectives provided by interviews with the key representatives from the music industry and lawyers (who were) directly engaged with anti-piracy programs in the Russian Federation. According to the results, modern anti-piracy policy in Russia is incoherent and lacks a holistic approach, and only a combination of legislative and non-legislative measures may cause considerable change and reduce the effects of piracy.</p>		
Keywords Peer-to-peer file-sharing, online music piracy, counterfeit, copyright infringement		
Miscellaneous Appendixes: Interview with Sergey Zamyatin, Interview with Vladimir Kravchenko, Interview with Victor Malyukov, Interview with Anna Sharafeeva		

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## 1 INTRODUCTION

This research project focused on the global, industry-wide problem of piracy in the music business, and on the situation pertaining to Internet music piracy and file-sharing in Russia. This country has been an object of critics in the field of Internet piracy for the last few years but no exhaustive research has yet been undertaken to study this problem. Indeed, the piracy issue is fully covered in the media and attracts the attention of the authorities but the number of copyright infringements in Russia is still extremely high. Nevertheless, the lawmakers and rights holders are trying to improve the situation. One of the essential conditions of finding the remedy that would help to decrease the level of piracy and, in the long run, to eliminate it is to define the reasons for the widely spread of piracy amongst the Internet users and the factors that allow its existence and even growth. In order to fulfill this condition, the study examined primary and secondary data coming from all the sides of the conflict – the consumers, rights holders and lawmakers as well as pirates. Research has shown that the piracy issue is really controversial, and yet no common opinion about the lawfulness of copying and sharing copyrighted materials has been found. File-sharing and its relation to piracy has also been a topic for discussion among the rights holders and lawmakers. Their opponents – consumers and pirates, on the other hand, have been raising their voices to protest the lawmakers' statements and initiatives. Pirates' parties have been created to defend and advocate the interests of those who, as they think, do not infringe any right and just exercise their lawful right to access, use and share the information which has free access. The contradiction of these two sides was in the focus of this study. It aimed to find the arguments for both theories and to create a theory “in the middle” that would be appropriate for both sides and would satisfy the opponents and supporters of file-sharing.

The study broadly examines the literature on piracy as well as experts' opinions given in interviews; it explains the terminology and the main issues that prominently feature in the field; and makes recommendations about novel new approaches that may be developed by various stakeholders in order to help the industry prevent financial losses related to piracy.

The main goal of this research project was to provide an overview of different positions and different attitudes to online piracy and to find solutions that would help the sides of the conflict to find a common ground and start a constructive dialogue. In addition, in order to find such solutions the study analyzed the existing anti-piracy laws and regulations worldwide as well as non-legal methods of fighting online piracy and illegal file-sharing.

## **2 LITERATURE REVIEW**

### **2.1 Piracy**

According to the International Federation of the Phonographic Industry (IFPI), the term piracy is generally used to describe the deliberate infringement of a copyright either by an individual and for an individual's benefit or for profit on a large scale (IFPI, 2010a). Compact disc piracy became a global problem in the 1990s because the technology used to duplicate vast numbers of CDs had created a quicker, easier, and cheaper product to duplicate than all the previous forms of sound recording. When counterfeited, these products are shipped around the world through complicated and often invisible distribution and sales channels, making the place of origin difficult to determine. The sales of these pirated copies not only infringe upon the rights of the artists involved, but also create unfair competition at every level of the industry supply chain. As of 1998, counterfeit sales have comprised 33% of the global music sales. According to statistic presented by the Copyright Computer DJ Summit, nowadays it is a worldwide problem worth U.S. \$4.3 billion (2007).

In its 2006 report, the International Federation of the Phonographic Industry, IFPI, states that piracy is sometimes referred to as a "victimless crime". This is clearly wrong. The economic losses due to piracy are enormous and are felt throughout the music value chain. The victims include the artists whose creativity may not be fairly rewarded; governments who may be deprived of significant tax revenues; economies that are deprived of new investment; consumers who suffer from less diversity and choice in music; and record producers who are forced to reduce their artist rosters

because it is impossible to compete against theft. Governments and public authorities such as the police, customs, prosecutors and the judiciary are the primary policy makers and enforcers of laws designed to protect all those who are involved in the music cycle of creation, production, distribution and sales.

There are three types of physical piracy:

- ***Simple piracy*** - the packaging of a pirate copy is typically different from the original. These products often appear in the form of compilations, such as the "greatest hits" of a specific artist, or a collection of a specific genre, such as dance tracks.
- ***Counterfeits*** - the packaging of the pirate copy resembles the original more closely. The record companies' trademarks are reproduced in order to mislead the consumer into believing that they are buying an original product.
- ***Bootlegs*** - comprise the unauthorized recordings of live or broadcast performances (MIPI, 2010).

## **2.2 Internet piracy**

Presently, one of the prominent types of piracy is Internet music piracy (music being compressed, posted and transmitted globally across the Internet through peer-to-peer networks without payment to those who invested in the creation). Internet piracy became a more prominent issue after MP3 technology was introduced, and has become a major business problem for corporate music entities that must somehow deal with "pirated" songs on the Internet. "MP3" has replaced "sex" as the most searched-for word on the Internet (Copyright Computer DJ Summit, 2007). According to Angsuman Chakraborty (2007), online piracy is assuming alarming proportions and will continue to do so with the popularization of the Internet and better bandwidth availability to customers.

Online music piracy has had serious effects on the music industry. IFPI estimates that almost 20 billion songs were illegally downloaded in 2005. This is based on consumer research in 10 music markets (including the United States, Germany, the United Kingdom and Brazil) and third party surveys (IFPI, 2006). The growth of illegal file-sharing has been a major factor in the decline in legitimate music sales over the last

decade, with global industry revenues down around 30 per cent from 2004 to 2009 (IFPI, 2010b). In virtually every country of the world, spending on recorded music has continued to fall ever since illegal file-sharing became widespread. While this shows an extremely high piracy rate for online music, it also illustrates the vast potential for legal digital music. Record company revenues from digital music tripled in 2005 to US\$1.1 billion and continued to grow strongly in 2006 (IFPI, 2006). Music companies and legitimate music services are trying to build their online business in a market deluged by unauthorized free content (IFPI, 2010b).

### **2.3 Conflicting claims and the impact of piracy on sales**

Undoubtedly, the Russian authorities have taken measures designed to control the situation. In February 2010 the major Russian Internet domain provider RU-Center froze the domain of the biggest Russian torrent tracker service Torrents.ru. The investigation committee explained that it was done due to the site's violation of copyright law and illegal distribution of software that was developed by "1C" and Autodesk firms. However, soon afterwards the Web site was moved to a new location in the .org domain zone and now all the files are available at rutracker.org.

The problem is that most Russians do not consider file-sharing (even if they are sharing the information protected by copyrights) illegal and are willing to battle for their interests even on a legal level. In April 2010 the All-Russian Pirate Party took part in an international meeting in Brussels where the delegates from 22 countries created the Pirate Parties International organization (PPI, 2010). According to the All-Russian Pirate Party, the law needs to change to match the realities of life in the 21st century: non-commercial file sharing should be legalized and the excessive length of copyright protection should be reduced (RPP, 2010).

The impact of digital file sharing on the music industry is passionately debated. According to Norbert J. Michel's (2006) research, the relationship between computer ownership and music purchases (in the CEX) weakened after Internet file sharing became a viable option for music purchasers. He declares that no similar negative change exists in the data prior to the initiation of the first file-sharing service. Furthermore, Michel presents evidence that this weakened relationship is concentrated



among the heaviest music purchasers, and finds no evidence that file sharing has led to a widespread increase in music purchases.

On the other hand, the right holders sound the alarm about the losses the music industry bears. The opponents of file sharing maintain that indiscriminate Internet copying decreases music sales, while the supporters of free file sharing argue that the practice is harmless at its worst, and may even increase music sales. Numerous research studies have shown that Internet piracy has had a negative impact on music sales. Zentner (2005) finds that cross-country aggregate data supports a 14 to 23 percent reduction in CD sales (in the U.S.) from file sharing. An NPD study in the US among internet users aged 13+ suggests that a quarter (26%) of the decline in CD units in 2005 was replaced by music consumption via illegal file-sharing. The NPD estimates that one million consumers dropped out of the CD purchasing market in 2007, a flight led by younger consumers. In fact, 48 percent of U.S. teens did not purchase a single CD in 2007, compared to 38 percent in 2006 (NPD, 2007).

A study by IFPI/Jupiter conducted among European Internet users in November 2005 found that more than one third (35%) of illegal file sharers were buying fewer CDs as a result of their downloading (IFPI, 2006). A 2009 Jupiter study conducted in five European countries among 5,000 Internet users aged 15 and over found that most illegal file sharers “do not buy music and are nearly half as likely as music buyers to buy CDs in a physical store or from an online store.” The study also found that the net effect of illegal file-sharing was negative. “Although it is possible that file-sharing functions as some sort of discovery tool for those digital music buyers that also file-share, it is reasonable to assume that their expenditure would be higher if they were not file-sharing. The overall impact of file-sharing on music spending is negative” (IFPI, 2010b).

There are two distinct sides to the MP3 issue: Firstly, the conflict that exists between the rights of illegal file-users and sharers and the companies or individuals that support them. The question is if these people actually have the “rights” to acquire these products illegally. Secondly, we must consider the interests and concerns of those musicians and record companies that desire to control and regulate the profits of their music. While new technologies advance, the musicians and the record companies face new challenges for protecting the copyright of their music, since file sharing “pirates” continue to find new ways to steal music from them. Ever more advanced data compression techniques (MP3 format) have been freely distributed across the

Internet so that high quality music can continue to be easily available to anyone on the Internet.

The IFPI's 2004 report on piracy states that Russia is one of the major sources of pirated discs found across Europe, and has a lamentable record of prosecuting the criminals behind this trade in only one in four cases. At the same time, the country is host to a large number of copyright-infringing websites, such as [allofmp3.com](http://allofmp3.com), that sell music around the world without the permission of, or payment to, the appropriate rights holders.

## **2.4 Anti-piracy battle**

Today the predominant method of stopping online piracy is through legal means.

Litigation has produced some success as exemplified by the high profile case of Napster, but has also gained considerable infamy in some cases when "ordinary" consumers found themselves in court. There are numerous problems with the legal approach. Pursuing legal methods requires significant resources on an ongoing basis. While bigger sites can be easily tracked and sued cost-effectively, the same cannot be said of teenagers downloading illegally on their computers at home. Furthermore, pursuing common people in court often results in bad publicity for the stakeholders and authorities involved. In addition, it can be hard, if not impossible, for U.S. or European companies to sue sites across national borders, as in the case of Russia. Thus, the reality is that legal means alone cannot serve as an effective deterrent, because their overall impact on piracy is limited at best. Moreover, legal methods should be grounded on technological realities for them to be effective (Angsuman Chakraborty, 2007).

On the other hand, it is impossible to employ technological methods without a strong legal base. Nowadays online piracy and illegal file-sharing is not directly regulated by any specific law in Russia and courts have to base their decisions on legislations which are not originally intended for these purposes. It goes without saying that the law should be updated to reflect the present-day reality. Most European countries have already recognized the importance of anti-piracy regulation on a legal level and introduced new laws and amendments to the existing acts. The Russian Federation is only now taking its first steps in this direction and has to draw on the experiences of

other countries, including the European Union members in order to make use of successful novel approaches.

The responsibility for finding effective ways of fighting piracy is laid on the lawmaker and the authorities. However, they cannot achieve significant results in the fight against counterfeiting and piracy without the help of the right holders themselves. This co-operation is the most effective weapon and as such must be strengthened.

### **3. RESEARCH IMPLEMENTATION**

#### **3.1 Research problem**

During the last few years Russia has continually appeared in IFPI reports and International Piracy watch lists. Piracy has a devastating impact on investment in the local industry and on local artists as well as foreign investment. Legal measures, the new restrictions that the entertainment industry has implemented, have essentially failed under the rough reality of corruption and illegal plants existing in Russia today.

#### **3.2 Research questions**

The current research seeks to answer the following questions:

- What are the reasons behind the existing high level of music piracy in Russia?
- What legal means and approaches have been taken by the Russian government to stop or reduce piracy and what new ways of solving the piracy problem in Russia can be developed, promoted and activated?

In order to answer these questions the study also provides an overview and comparison of new European trends in the field of anti-piracy activities in different countries, the new concepts are then analyzed on their applicability in Russia.

### **3.3 Research objectives**

The objective of the proposed research is to identify the factors affecting piracy in Russia, to probe for regularities in those, and to conceptualize recommendations of methods and measures to reduce the effects of or even eliminate the problem.

### **3.4 Method**

A qualitative method, based on “distinct methodological traditions of inquiry” (Creswell, 1998) that explore a social or human problem, was used to achieve the research objectives. The main goal was to build a complex, holistic picture, to analyze words, to report the detailed views of the informants and to conduct the study in a natural setting. This suited best to the main research objective – to identify the causes and consequences related to the phenomenon of music piracy – due to the nature of the research questions and research topic, and because of the fact that the patterns cannot be easily identified and none of the existing theories can explain the behavior of the targeted participants or their populations (Creswell, 1998). The qualitative method approach helped to identify deeply the underlying causes of the existing problem and to create and develop potential strategies for decreasing the levels of piracy.

### **3.5 Methodology**

First, a substantial expansion of the literature review was needed in order to develop a broader and deeper understanding of the phenomenon. This study provides an in-depth and extensive review of the existing studies, industry reports, and governmental reports. A historical approach was used to describe the development of music piracy in a global context and particularly in the Russian contexts. Primary and secondary data were utilized in the research process. The secondary data came from Internet sites, books, journals and other publications. The literature review introduces the subject and shows the importance and necessity of the study. The literature analysis, which was incorporated in the body of the study, was used to reveal diverse theories

and approaches and the strengths and weaknesses they had when put into the Russian reality in order to form a proposition that would be more applicable in this country. The results of the literature exploration were then compared with those of the primary data analysis in order to find out the difficulties and obstacles of applying the theory into practice. The primary data was collected through in-depth interviews with the key people directly engaged with anti-piracy programs, and with representatives of the music industry and lawyers. Interviews were conducted with the following individuals:

1. Sergey Zamyatin. Representative of a Russian Anti-piracy organization in the Northwestern Federal District
2. Vladimir Kravchenko, A&R and PR manager, KAPKAN company – record label and concert agency, member of a band called Millions of Years
3. Anna Sharafeeva, Lawyer, “Uskov and Partners” company
4. Victor Maluykov, The head of the legal department, “Klimov” public corporation

Subsequently the entire corpus of data was synthesized and analyzed, so that theories were generated about the underlying causes related to the development of piracy in Russia. Finally, based on these theories, recommendations of measures and potential solutions that may be employed to improve the situation of music piracy in Russia were developed and presented.

#### **4. CONSUMERS' PERSPECTIVE**

The copyright system works by providing privileges and thus benefits to publishers and authors; but it does not do this for their sake. Rather, it does this to modify their behavior: to provide an incentive for authors to write more and publish more.

In effect, the government spends the public's natural rights, on the public's behalf, as part of a deal to bring the public more published works. Legal scholars call this concept the “copyright bargain” (Stallman, 2010). However, the problem is that the

bargain, as it exists, is considered unfair from the consumer's point of view. The initial cause of piracy in general and Internet piracy in particular cannot be found without a proper analysis of consumers' opinions and motives. Thus, a consumer-oriented analysis is an essential and indispensable condition of finding appropriate measures to decrease piracy.

One of the recent surveys carried out by the Russian sociologist Evgeniy Negrov has revealed that the majority of respondents would rather download information illegally than pay for the licensed materials (TV100, 2010). In Figure 1 we can see that 52 per cent of the respondents...

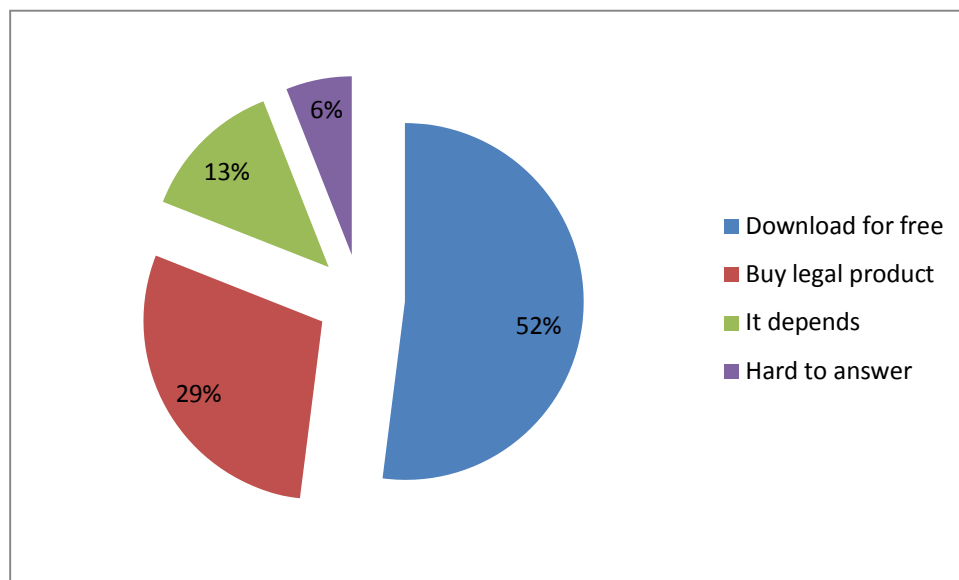


Figure 1. Would respondents rather buy a legal product or download for free?

This result leads us to think of the reasons for such a wide popularity of file-sharing as well as of the factors that make the consumers unwilling to pay to the rights holders.

#### 4.1. The factors affecting consumer's behavior

The factors affecting Internet piracy may be classified as psychological and material. The rights holders and lawmakers, who advance arguments that piracy is stealing, fail to take into consideration that judgments of this kind are rather relative and depend on the world outlook and morals of each particular person. The laws also depend on the country and the people's attitude to them, and laws considered unjust are most likely

not obeyed. On the other hand, the economic interests are to be taken into account as well.

#### **4.1.1. Psychological aspect**

##### **4.1.1.1. Historical background**

From the rights holder's perspective file-sharing is viewed as a loss of profit. The attitude to this loss may vary depending on the country and its people. This difference is constantly discussed in blogs, forums and social networks. Very often people connect the current situation in the field of piracy in Russia with the Soviet Union historical background and the values that were taught and promoted in that period. Such a view can be found, for instance, on Habrahabr which is one of the most popular collective blogs and social networks web-sites dedicated to Internet, economic and business issues in Russia. Modern music, films and other products of industries closely associated with intellectual property are for the most part created, formed and directed by U.S. companies. The morals and views of the Americans are quite different from those of the Russians. The American psychology is based on the primacy of private interest and personal success that is mostly expressed in material welfare. Actions depriving someone of the opportunity to gain from the use of their assets are viewed as immoral and intolerable. These views are alien to the Russian society and the majority of it does not share it. Stealing is perceived only in a material sense as taking something tangible from someone, and copying, therefore, does not fall within this definition. In the Soviet period the idea that "art is for people" was propagated by the authorities and public organizations, thus it was naturally presumed to be free, and people are still holding on to this opinion that separates piracy from stealing and makes it rather acceptable. (Habrahabr, 2010).

Vladimir Prozorovskiy, head of the legal department in BMG Russia, also considers Soviet background as one of the possible explanations to the high level of piracy in Russia and explains that the problem was not only in the ideology or mentality and morals, but also in the customs. Artists were viewed as ordinary Soviet workers serving philharmonic societies, theatres, educational institutions etc. They were forced to participate in labor unions where artists of genius were equalized in rights with

museum keepers. The remuneration of labor for artists was analogous to the wage rates distribution for workers: artists were divided in categories and paid accordingly – without regard to popularity and record sales. This approach was considered to be fair and democratic. A labor union of artists never existed in the Soviet Union and it was yet another proof of the public monopoly of art.

The situation with the record industry was even more transparent. The public company Melodia became a vertically integrated holding company including record companies, publishing houses, warehouses and stores. The whole system operated according to the plans approved by the government. Artists and their creations were censored, and prohibited performers had to record their songs and albums illegally and then the records were copied by the public: fans shared records and copied cassettes with the aid of consumer recorders. Naturally, this way of duplication did not affect the artists' income in any way.

The situation changed only in the late 80s with the appearance of joint enterprises, cooperatives and other forms of enterprise independent from the government. The first private gramophone recording companies were only slightly concerned about the official registration of their relations with the rights holders – artists and songwriters - because, in fact, there was no legislative base for that. The first instance of copyright protection in the Soviet Union legislations appeared only in 1991- a few provisions in the Fundamentals of Civil Law that were only adumbrating the author's right protection regime (Fundamentals of Civil Legislation of the USSR and Union Republics, 1991); and the first Law on Copyright and Neighboring Rights was adopted two years later - only after the disintegration of the USSR (Law on Copyright and Neighboring Rights, 1993). In this environment of unsettled legislations music industry professionals were guided by more or less their common sense and disembodied information on the Western experience in this area. Surprisingly, this situation was quite satisfactory to all the sides of the process, especially for the artist who finally obtained the opportunity to perform what they wanted and record as much as they wanted. However, naturally, soon enough they became concerned about the payment issue. On the other hand, record companies denied the fact that artists should receive royalties from the record sales. In their consideration buying the master tape included all the rights.



#### 4.1.1.2. Justification

Another factor affecting public conscience and morals is the failure to prove that piracy causes losses to the rights holders. The famous figures used literally for decades by rights holders and the government, say that 750,000 jobs and up to \$250 billion a year could be lost in the US economy thanks to IP infringement. These figures can be found cited by the U.S. Department of Commerce, Customs and Border Patrol, and the U.S. Chamber of Commerce, among others. Quite the contrary, recent research has shown that the most piracy estimates presented by the industry are unfounded (FGI, 2010). For instance, in April 2010 the General Account Office (GAO) issued the results of its year-long study. The researchers there found that many of the claims copyright owners have made about piracy's effects on their businesses were based on unreliable research. Loren Yager said in an interview with the CNET that the GAO received a great deal of pressure from the Congress to conduct its own study but the leaders concluded it was not feasible. They focused on mining the available research for answers. According to Yager, the GAO was concerned that many of the most widely used numbers about the size of piracy in the United States were “wildly inaccurate.”

“I think you can do a pretty good job of measuring piracy on a product basis,” Yager said. “But from there to go to an industry wide problem you have to make assumptions. And from there to go to a national number...I think that may be impossible.”

The GAO said: “the great minds in Europe have become concerned of the problem of quantifying piracy over multiple industries across broad geographic boundaries as well: the Paris-based Organization for Economic Cooperation and Development attempted doing its own research and was thwarted. They've got a lot of top economists and, frankly, they came up pretty empty”(CNET, 2010).

The Russian Pirate Party advances the following arguments in support of piracy and file-sharing:

- Rights holders say that users need their permission to share, upload or download copyrighted materials but this statement contradicts the information right declared in the Russian Constitution. People have a right to receive and share information and do not have to

ascertain whether the information they are sharing is copyrighted or not (RPP, 2010).

- Lawyers claim that file-sharing of copyrighted materials is illegal. But according to the principle “Law exists for the people”, the legislations that declare file-sharing outside the law are antisocial because the majority of people do not support them. It is necessary to follow the law, but it is even more important to free the legislative system from this kind of antisocial propositions of law.(RPP,2010).

- Rights holders say that if you download illegally you deprive the artists of gain, and as a result artists’ creativity is not motivated. Nowadays, the artist are focused on making profits and it affects the quality and artistic value of their work, they simply create a product that sells well (RPP,2010). On the other hand, the history shows that free competition creates incentives for the producers.

These arguments are quite sufficient for salving the conscience of users involved in file-sharing.

#### **4.1.2. Material aspect**

##### **4.1.2.1. Financial factor**

The above mentioned survey on the public opinion has also revealed that the reasons why people are inclined to use pirated materials or P2P file-sharing instead of buying copyrighted materials are mostly economical. 48% of the respondents said that they simply could not afford to pay the price set up by the rights holders and 33% did not like overpaying for the licensed product when they could obtain it for free (100TV, 2010).

The prices set up by the rights holders are usually considered by the consumer as overestimated. If in the presence of such a difference between the price that the users are willing to pay and the price charged by the rights holders, there is an opportunity to satisfy a want for free, naturally enough, the consumers conceive a wish to do so. Furthermore, the bigger the difference is (that is, the bigger the potential demand is)

the more strangers want to supply the demand. The fact that it may be illegal does not stop anyone. Illegality increases business risk but does not affect the economical component.

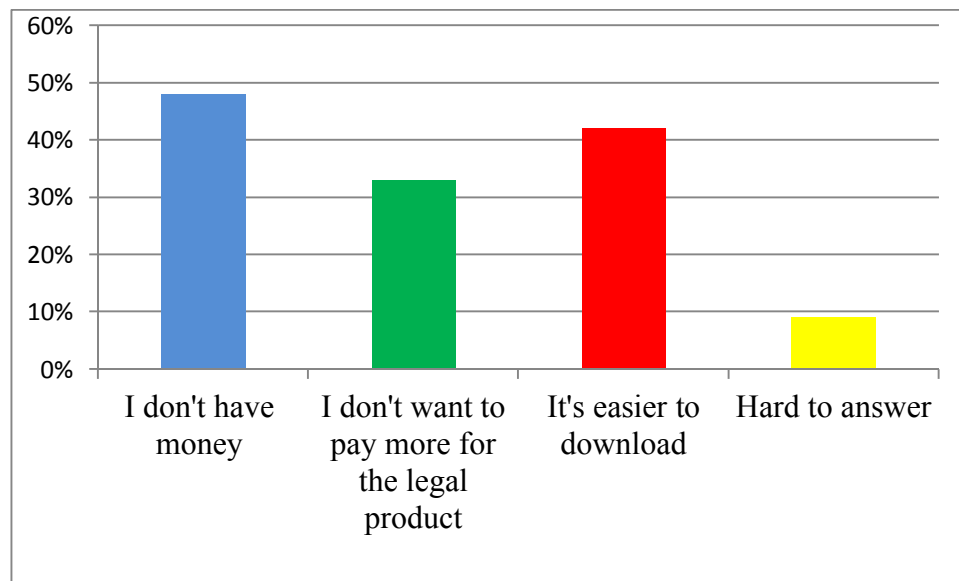


Figure 2. What are the reasons for the respondents to download for free instead of buying?

The other argument in support of piracy is that there is a demand for products that are not supplied by the rights holders at all. The products presented on the legal web-sites go a-begging and the consumers' needs are not satisfied.

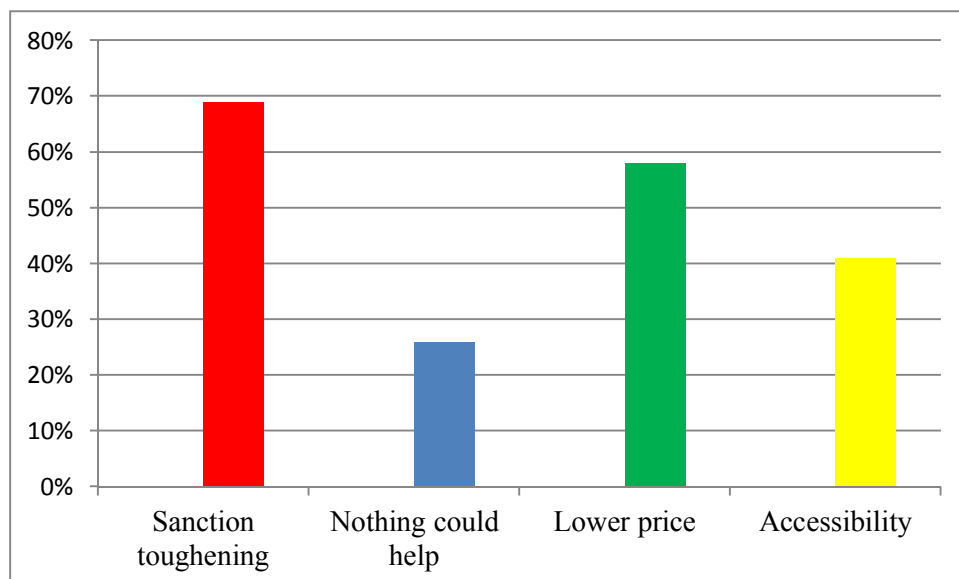


Figure 3. What kind of measures would be most effective to reduce piracy?

Generally speaking, piracy is an impartial economic process caused by the consumers' wish to satisfy their needs and the unwillingness or inability of rights holders to do that (Habrahabr, 2010). Negrov's survey also reveals the possible solution for this problem. 58% of the respondents say that they would pay for the copyrighted content

if the price was lower. Hence, the rights holders should make an analysis of the market and find out what price would be fair and affordable for the consumer.

#### **4.1.2.2. Availability**

Figure 2 shows that the economic interest is not the only reason for people to download and share information (music, movies etc.) instead of buying. 41% of the respondents say that it is easier to find pirated materials. For instance, when one types “download for free” in Google, Yahoo or other search engines, one is immediately provided with a long list of links where it is actually possible to download the materials one is looking for and most of the time the materials are pirated. In addition to this, illegal web-sites usually have convenient search tools and a wide selection of materials.

Another aspect of this problem is that even if the consumer wants to buy a licensed product, it is sometimes impossible because the particular product is unavailable in the desired format, language etc. Pirates are always prompt and attentive to the audiences’ wishes and it is more likely to find a pirated album or film rather than a licensed copy.

#### **4.1.2.3. Method of payment**

Another weighty argument against downloading legally is the method of payment. The download links have been posted all over the Internet and some people would rather click on those directly, than go through the entire payout process just to send over a payment even though it might be not more than one ruble. It could be called the laziness or convenience argument for piracy.

Another explanation is that the payment processors that are used are not available in every country, so some people cannot pay even if they wanted to. In a similar vein, many people in the target audience are young and do not have access to a credit card.

These two payment restrictions are related to availability. Even if the consumer wants to buy something legally, he cannot do it because he does not have access to a credit card or is in a country where he is unable to use the required payment processors (TorrentFreak, 2010).

## 4.2. File-sharing exoneration

Over the past 200 years, most countries have developed their copyright regimes in one direction only: lawmakers have repeatedly strengthened the legal protections of authors and publishers, raising prices for the general public and discouraging consumption. According to Oberholzer-Gee & Strumpf, file-sharing is a unique experiment that has considerably weakened copyright protections. While file-sharing has disrupted some traditional business models in the creative industries, foremost in music, in their reading of the evidence there is little to suggest that the new technology has discouraged artistic production. Weaker copyright protection, it seems, has benefited society.(Oberholzer-Gee& Strumpf, 2009).

One of the most controversial issues today is the file-sharing problem. The data mentioned above shows that more and more people perceive copyright payment unjust and inconvenient. Pirate Parties established in most of the countries in Europe stand up for the file-sharing exoneration. The Russian Pirate Party claims that “home copying” (copying of copyrighted materials done for the private purposes without an intention to make a profit) even according to the current legislations is perfectly legitimate.

This right is institutionalized in the section 1273 of the Russian Civil Code: the user is allowed to create copies of the published materials with the exception of

1. Architectural design in the form of buildings and similar constructions
2. Data bases
3. Software
4. Reproduction of books and sheet music
5. Films during the demonstration or with professional equipment for commercial purposes.

Since the popularization of “copyright propaganda” the rights holders who are not quite aware of the current legislations have acquired a few misunderstandings caused by misinterpretations of the law. One of such misunderstandings consists of denying the very copying right. They are inclined to call such a behavior ‘stealing’. Another false conclusion is caused by the misinterpretation of the term ‘publishing’. Very often copyright propagandists insist that the section 1273 RCC gives a permission to copy information only from the licensed data media, thus pirate copies or

downloading for file-sharing servers is illegal. However, section 1268 RCC defines the publication right as a right to commit actions or give permission for such action that makes the creation accessible for the public use for the first time...”. Thus, “publication” is the very first use of the information. The law does not state if the copy should be made from the licensed or pirated medium (RPP, 2010).

According to RPP, the new amendments to the Civil Code will contradict the morals and convictions of the majority of Russians and, thereby, will not be legitimate. The rights holders should cease the victimization of file-sharers.

The Russian Pirate Party has a clear picture of what the future “information society” would look like. Less copyright, more Open Source software, no software patents, a neutral net, no three strikes, open access to science and last but not least - legalization of non-commercial file-sharing.

“Russian Pirate Party supports an active vision of the Web as a platform for the exchange of information, with peer-to-peer groups in which each user can upload or download content and applications of choice. The non-commercial use of the Internet must be excluded from all sanction systems”. According to RPP, the copyright should be designed to countenance and reward the rights holders but with due respect to the users’ rights. The Russian legal system should acknowledge internationally recognized free licenses such as Creative Commons.

The RPP opposes any systematic surveillance of the net, because it is incompatible with the right to privacy. It should be permissible only in criminal cases and has to be court-ordered (RPP, 2010).

Basically, what RPP wants is weaker copyright. Indeed, it is unambiguously desirable if it does not lessen the incentives of artists and entertainment companies to produce new works. According to Oberholzer-Gee and Stumpf, to appreciate the impact of file-sharing, we first need to know whether the technology has, in fact, reduced the profitability of creating, marketing, and distributing new works. Weaker property rights can undermine industry profitability if consumers who would have purchased a recording obtain a free copy instead. The critical question is then whether consumers perceive protected and freely shared works as close substitutes (products that meet similar consumer demands). For two substitute goods, a price decline for one leads to a decline in the demand for the other. For example, if we allowed mash-up artists to

freely copy parts of an original song, consumers who regard the derivative work as a close substitute would be less likely to buy the original. However, if consumers learned to better appreciate the original through the mash-up, demand for the original work might actually increase. In this case, the two versions of the song are complements, two goods for which a decrease in the price of one leads to an increase in the demand for the other. A well-known example for two complements is music and iPods. As file-sharing eroded the effective price of music for a large group of consumers, demand for mp3-players soared, allowing Apple to benefit from consumers' increased willingness to pay for its line of products. In practice, it is often surprisingly difficult to predict whether new products and technologies are complements or substitutes. As a result, we can often not be certain how changes in copyright will influence demand and industry profitability (Oberholzer-Gee & Strumpf, 2009). Hence, in theory, file-sharing legalization may or may not lead to bigger losses for the music industry.

However, even the opponents of file-sharing legalization on a point of principle state that it might be even helpful in the piracy fight. Here is a possible scenario of file-sharing legalization consequences:

1. File-sharing is legalized
2. People download more information
3. People pay less for the information
4. Rights holders receive less payments
5. Rights holders cut off their expenses
6. The quality of the information drops
7. People see that the quality has deteriorated
8. People realize the correlation of quality and payments they make for the information
9. People realize that if they start buying instead of downloading for free, the quality will improve
10. People start paying more for the information
11. Information becomes more expensive and the quality improves

Thereby, file-sharing legalization will cause a temporary recession in the rights holders' activity and product quality deterioration, but then the situation will improve. The consumers will learn from experience that they have to pay for the information. Thus, file-sharing legalization will not eliminate the production, but quite the

opposite: it will lead to the natural understanding that rights holders deserve to be paid (Habarahabr, 2010). This is an ideal model, but it might take tens of years for people to understand the advantages of buying licensed products, or this understanding might never come.

## **5. RIGHTS HOLDERS' PERSPECTIVE**

### **5.1. Conflicting opinions**

In the previous chapter we already tackled the problem of rights holders' view on piracy and file-sharing. The current chapter discusses positions taken by rights holders and reveals new trends and tools that may be used by them in order to reduce piracy.

The most popular point of view among the rights holders is that Internet Piracy brings losses to the music industry. We often hear that piracy is an infringement of copyright and that the people involved in file-sharing of the copyrighted materials are simply stealing from the artists and songwriters. This is a widespread view, and it used to be an unquestionable doctrine generally recognized by the music industry. Nowadays, this postulate is being reappraised, and new essentially different ideas and points of view appear. Undoubtedly, physical piracy such as counterfeiting and bootlegging will always remain outside the law, but the perception of Internet piracy and file-sharing becomes more and more ambiguous.

Thus, for example, Dmitry "Sid" Spirin (Russian rock-band "Tarakani"), considers Internet and MP3 technology to be effective tools for opening up the new ways of promotion and distribution without national boundaries. In his opinion, rights holders should not be daunted by piracy; instead they should find the ways to use it for their own benefit. It is not a threat but a challenge: due to the high level of piracy, artists have to concentrate on active touring, expansion of merchandizing catalogs, sponsorship and other kinds of cooperation. "On the other hand, the very notion of piracy is quite confusing" says Spirin in his interview to the anti-piracy web-site Nofake, "It's not quite clear who should be called "pirates" today. Back in the 90s it was obvious: if you see a CD produced not by your record-label it is a "pirated" copy. And the person selling it is a pirate. Nowadays, a boy who bought my CD, came



home, converted into MP3 format and uploaded it on some file-sharing server and posted a link at some forum – is he a pirate? I perceive him as a moron.” (Nofake, 2010).

At the same time, there are cultural workers who strongly object to piracy and file-sharing. The Russian songwriter Alexandr Dolskiy agrees that “piracy doesn’t affect creative work because it lies in a totally different sphere of the social life”, but he adds that “It has an influence on artists’ and songwriters’ morals and affects their incomes negatively”. Dolskiy claims that piracy and illegal files-sharing forces talented musicians and songwriters to turn down offers from different record companies because they cannot guarantee a sufficient copyright protection. He considers Internet piracy and file-sharing of copyrighted materials to be an enormous problem that, nevertheless, can be defeated. The way out of the situation, in his opinion, can be found in the technical control reinforcement and educational activities: “there are a plenty of brilliant computer specialists who could detect Internet pirates in exchange for a fee or salary. At the same time the state should promote the idea that people who download illegal versions of songs are taking part in stealing which is a crime”

(Nofake, 2010). Elena Kanter, Russian songwriter and performer, supports the idea of cultural education and states that the people involved in Internet piracy and file-sharing should not be called to order or intimidated. They should be educated and cultivated to respect artists’ work. The idea that unlawful use of someone’s intellectual property is inappropriate and wrong should be fostered in people from childhood.

Some of the rights holders express conflicting opinions. For example, Sergei Galoyan, a Russian songwriter especially famous for the songs he wrote for Tatu, says that he is against the fact that artists no longer earn money from music. Talented people stop publishing their creations because they do not get paid. Thereby, the level of music scholarship drops. Low-budget and low quality authors and musicians who agree to work for smaller money appear. They might be trend-oriented young artists whose work is basically used for ring-tones. This leads to the intellectual degradation of youth. On the other hand, Galoyan is not against people having an access to art. Users should have a free access to the content such as music – singles, albums etc. but only in the form of online streaming with no possibility of downloading it. He says that the rights holders should become proactive to make their IP rights be respected. For example, he suggests an interesting model of how the new materials should be

released: just as film distributors, who make so much money during the first weeks after the official release in cinemas, artists should not publish their albums straight away (neither on Internet nor on CDs or DVDs). Instead they should organize concerts and tours. Thus, during the first weeks or months people would be able to hear the new songs only at live concerts and they would be more interested and willing to attend such events. This would be similar to a movie release – the first three months it can be watched only in cinemas and only after that it is made available on the Net and in shops. Galoyan admits, that the concert might be illegally filmed and uploaded to a file-sharing server, but the quality would be so poor that people would not be interested in downloading it. Thereby, customers would be attending concerts much more often and artists would start earning much more than they do now (Echo Moscvii, 2010).

## **5.2. Implementation of anti-piracy measures by rights holders and businesses**

### **5.2.1. Principal trends**

Faced with various methods of piracy and file-sharing of copyrighted materials, rights holders acknowledge the importance of their active participation in the anti-piracy battle. Frequently, campaigns are launched, organized by the industry and non-governmental organizations, often in close cooperation with government authorities or intergovernmental organizations, to raise awareness among consumers of the negative impacts of piracy, and to encourage consumer support to efforts to stem the abuse of IP rights. These organizations and associations also undertake surveys and studies so as to better understand the social and economic interrelations and impacts of counterfeiting and piracy.

In the field of music, movie and software products, new business models are developed and deployed that offer consumers the possibility of obtaining content online at a competitive price or free of charge legally. In the latter case, the payments are collected from the third parties (e.g. advertisers) or in an indirect way as, for instance, the Warner Music record company that has recently launched a Chorus project designed to legalize file-sharing between American college students, including

P2P and torrent networks. A small fee will be included in rental payments (Shumeiko, 2009).

The launching of civil and/or criminal proceedings against large-scale infringers may, of course, always be another option for rights holders. While this avenue is frequently chosen by right holders in trademark counterfeiting cases, it now seems to gain ground also in the area of peer-to-peer file-sharing, as a number of major US copyright owners recently have brought suit against respective service providers for allowing software users to search for and exchange digital media files with other users over the Internet; a series of cases is pending in the US courts. In addition, the American recording industry has opened a new chapter in the battle against IP infringement by directly targeting the users of such services. Data on users and their online activities has been collected from service providers. The release of this data had been compelled by a court order. On this basis, subpoenas were distributed to users who were suspected of being heavily involved in illegal file swapping. These trends certainly indicate new developments, which will require adequate answers from the judicial and legislative authorities (WIPO, 2010)

One of the most pressing issues in the discussion of new methods to reduce piracy is pricing policy. One of the recent studies in this filed was presented by Marc F. Bellemare of Duke University and Andrew M. Holmberg of the Department of Justice in a working paper titled "The Determinants of Music Piracy in a Sample of College Students."

In determining willingness to pay, the students were asked if they would pay a random price for Flo Rida's "Right Round." The random price was the last two digits of the student's social security number. While those two digits are, indeed, random, each person places a unique value on that song. Some may love it, some may hate it. The average willingness to pay was \$0.68 and the range was \$0.11 to \$1.37. (Thus, the researchers estimated the students' willingness to pay for "Right Round," not for a song each student desired the most. Moreover, the random prices given by the students ranged from \$0.00 to \$0.98 - the standard \$0.99 price point was not used.)

For a \$0.01 increase in willingness to pay for digital music, the likelihood that the students' last song was obtained illegally increased by 0.3%. A 1% increase in the students' perceived likelihood of facing a lawsuit for piracy resulted in the likelihood of the last song being obtained illegally to fall about 0.4%. Lastly, a one-point

increase in the average student's 30-point morality score resulted in the chance of piracy to fall to 0.2%.

While "The Determinants of Music Piracy" does not put a firm number on the percent drop in purchases caused by file-sharing, it indicates that there are factors that cause people to choose file-sharing over purchasing. In this sense, file-sharing is viewed as a substitute for purchasing. However, there will be cases in which a student values the song sufficiently to buy it. Thus, just as there are times a student chooses file-sharing over purchasing, there will be some instances in which purchasing is chosen over file-sharing (Bellemare & Holmberg, 2010).

According to the Russian music critic Artemiy Troickiy, the licensed materials are overpriced. The prices do not correspond with the average salary in Russia. With such a price-salary ratio that exists in Russia, the average music album price would be 200-300 dollars in the UK or the USA. In the Russian Federation licensed albums cost approximately 9-10 Euros, but the adequate price would be - as set up by pirates – the maximum of 3-4 Euros (Troickiy, 2007).

### **5.2.2. The arrangements made by the Russian rights holders**

Following the modern trends in anti-piracy activities around the world, the Russian rights holders have become increasingly proactive in measures aimed at copyright protection. New awareness campaigns and web-sites (for example, nofake.org, copyright.ru, internet-law.ru) have appeared.

The rights holders have become more willing to cooperate and collaborate in order to decrease piracy. In 2009 the Russian branches of Universal Music, Sony Music and other rights holders as well as online-music distributors established an anti-piracy alliance. The main goals of this non-governmental organization (NGO) are lobbying for the rights holders' interest protection and the prosecution of pirates. "The First Music Publishing House" and the Russian Authors' Society became the cofounders of the organization. The CEO of Sony Music Entertainment, Leonid Agronov, considers consolidation of databases and joining of efforts to be highly efficient for detecting pirate resources. The goal of the anti-piracy alliance is to reduce piracy, thus it has called for the rights holders' assistance and serves their interests. (*Vedomosti*, 2009)

The NGO will promote forms of music content legalization on the Internet. The rights holders will try to persuade pirate web-sites owners to work legally; big Internet portals, for instance, could create online-streaming services or allow downloading in exchange for watching commercials. Such services may soon appear on Yandex (Russian search engine): the content will be available free of charge and the revenues will be collected from subscriptions and advertising. Another search engine, Yahoo, has already implemented this system and with the rights holders shares the revenues from advertising placed on the pages with music videos. According to the vice-president of Mail.ru (Russian e-mail server), Anna Artamonova, the advertising revenues division is the most reasonable partnership that can exist between the rights holders and web-servers providing copyrighted content, and their video hosting directory is already working in cooperation with Digital Access that represents the interests of Warner Music, Universal and other companies (*Evening Moscow*, 2009).

According to the “A-media” general manager, Anton Akopov, the Russian rights holders are trying to find a technical solution for Internet piracy: for instance, they are applying their joint efforts to launch a web-site that would automatically detect illegal content on video-hosting servers and create reports with links. These reports are planned to be sent to the infringers with a request to delete the content. Pirateplace is another Russian project that suggests a system that blocks torrent-traffic, and soon this system will be tested by service providers. However, the most interesting concept that has been developed so far is the idea of an interactive digital system as an anti-piracy tool: the content will be interactive and the users will communicate with artists and anchormen, vote and play TV games. In this case pirates will not be able to pirate this content because the actions of the users will not be accepted by the system. This means that the user will have to choose between real interaction with the people he is interested in or peeping at them from an illegal spot. (Akopov, 2010).

The public corporation “Systema Mass-Media” employs legislative tools to protect their copyrighted materials. The corporation tries to affect the infringers by launching civil and criminal proceedings against them. Pavel Katkov, the head of the corporation’s legal department, does not deny the fact that the current legislations are imperfect, but he suggests that rights holders should start combating piracy and not wait for the new amendments to come in force. (Mukhina, 2010).

Unfortunately, the majority of the Russian rights holders remain idle hoping for help from the government. The rights holders should recognize that in order to increase the

efficiency of anti-piracy measures taken by the government, they can employ different economic and psychological and other non-legislative measures to prevent piracy.

### **5.3. Potential non-legislative measures that can be employed by Russian rights holders**

The analysis of existing literature and interviews reveals following non-legislative measures to counteract piracy:

#### 1. Demand regulation measures.

##### a. Innovative business models.

At the present time, online resources with legal content are inferior to illegal web-sites because of the following shortcomings:

- lack of easy-to-use search tools
- the new materials are uploaded with a significant delay after CD or DVD release
- materials are usually presented only in one format and maybe incompatible with the user's software.

It is extremely important for the modern companies to widen supply of copyrighted materials and increase their accessibility and availability. The new business models should eliminate the advantages and incentives of file-sharing of copyrighted materials and downloading.

##### b. Pricing policy.

According to A. De Vanis and D. Walls, "it is necessary to find creative alternatives encouraging the consumption of original products instead of pirated products, for example, to introduce to the market affordable products for the general public." (De Vanis & D. Walls, 2007)

"High prices for the content conditioned by the rights holders' pricing policy hold economical growth and increase in turnover to a minimum" says Dmitry Gumen, general manager of Inform-mobil company which is the number 1 content and service provider in

Russia and CIS. The rights holders demand up to 85% from the end user price as a payment along with minimal price fixation and indemnity payments. Therefore providers have to invent different schemes resulting in price doubling for the consumer and forcing the latter to choose between buying at a high price and downloading for free. Content providers and rights holders should reach a compromise and revise their pricing policy, thereby encouraging the demand for legal music content and increasing music business profitability. (Inform-mobil, 2009).

Russian Producers' Guild is now taking steps in this direction. The organization is now designing a national web-portal where the rights holders would be able to place their copyrighted materials and sell it for a token payment. The Guild is currently forming the list of producers and partners who are willing to cooperate.

“Mosfilm” concern has already launched an Internet-cinema. The movies are available in the form of online streaming (25 rub=62 eurocents. per movie) and may be also downloaded (65 rub. per movie) (Mukhina, 2010).

c. Development of alternatives to the traditional intellectual property system. Alternatives, such as the online streaming alternative when the content is available for free but can be viewed only after a few commercials, provide an opportunity to eliminate the economic incentive for piracy. In this context, different initiatives aim to encourage legal use via substitution of pirated content for free content.

Open licenses such as the Creative Commons constitute another option, which conciliates the interests of creators and the general public. They satisfy cultural needs, which, without alternatives of free-of-charge access, could end up encouraging piracy. It is important to note that they also allow authors and artists to adapt the intellectual property contracts and the management of their rights to their needs.

## 2. Education and awareness-raising

Informal education of young people is to be particularly encouraged. The negative effects of digital piracy must be explained and presented in a

suitable and accessible manner. Moreover, rights holders should cooperate with educational institutions in order to develop policies and tools concerning the use of works protected by intellectual property designed for a school environment. This educational strategy should also be complemented by the use of all available opportunities, such as open licenses and public domain works, taking into account, among others, UNESCO Policy guidelines for the development and promotion of governmental public domain information (UNESCO; 2004).

### 3. Cooperation

a. It is important to develop cooperation between the rights holders in forms of partnerships and anti-piracy NGO. Such associations and organization would undertake survey and studies to find new promising ways to fight piracy.

b. The cooperation of internet service providers is indispensable. Access providers in particular are in a unique position with respect to both control over access to content and relationships with their subscribers, and are usually best placed to act promptly and effectively against infringements over their networks or services. There are a number of feasible and reasonable options that service providers can take to help address copyright infringements on their networks and that can in some cases be supported by technological solutions. For instance, one of the most effective steps an access provider could take is to warn infringing subscribers and thereafter to suspend services to those who continue to repeatedly abuse the service to infringe copyright. Such temporary suspension is proportionate, feasible and not technically burdensome. Other options open to ISPs include the application of filtering measures, including blocking access to specific protocols or to infringing sites (IFPI. 2010)

c. The rights holders should also cooperate with the search engines representative to make sure that pirated materials and illegal web-sites won't come up first in the search results list.

### 4. Technological Protection Measures

In general, technological protection measures are mechanisms recognized by the 1996 WIPO Internet Treaties, that aim to secure the exercise of



copyright and related rights through preventing acts not authorized by the right owners or not permitted by the law. (WIPO, 1996). For example, “digital watermarking has been proposed as an efficient solution for the protection of copyright and property of multimedia files, facilitating the identification of the source, author, owner, distributor or authorized consumer, of digital images, video or sound recordings. The main advantage of these systems is that the mark is inseparable of the file content.” Digital Serial Number (DSN) Systems are promoted as an alternative answer to digital piracy, like “physical serial numbers”, as they establish the origin and the ownership of the numbered article. DNS can be useful for the tracking of the content of an illegally shared file, but higher benefit can be derived from their use as a deterrent to piracy.

Another available option is the use of filtering technologies on websites providing usergenerated content, in agreement with the respective industries. While offering options for protecting content in the digital environment, these systems are criticized. It has been pointed out that, from a scientific and technological point of view, many problems remain to be solved. According to the Digital Watermarking Alliance, “DRM have been used with little success, and their flaws are both of technical and cultural nature. Technically DRM have been undermined via direct attacks of the technical barrier or simply by taking advantage of their fissures (...) Culturally, DRM systems have been perceived by many consumers as restricting and invading legitimate “fair” uses “. The dangers of excessive legal protection of technological measures have also been underlined as it may affect the development of new technologies or create barriers to competition. More specifically, the technical difficulty and the challenge involve the development of technologies that balance the protection of copyrighted content with the legal allowed use of this content and the facility of access to it. Another important challenge is to adopt appropriate legislation that protects access to public domain and allows balanced exercise of exceptions and limitations by legitimate users. (Digital Watermarking Alliance, 2010).

## **6. LAWMAKER'S PERSPECTIVE**

### **6.1. World experience and the modern trends**

The increase of unauthorized uses of protected works on the Internet over the last years has conditioned the development of new legislative approaches and models of protection. The solutions that legislatures have put forward are domestic in nature. The remedies that each EU member state has devised in order to enact the EU Enforcement Directive (2004/48/EC) could not be more different. While the directive requires remedies against IP infringements to be enforceable, effective and to provide a deterrent, interpretations of what this means and how it is to be achieved vary considerably between states. On the other hand, the countries outside the EU are seeking to invent their own legislative strategies taking notice of the EU experience in this field. In order to create an effective operational legislative system in Russia, the world experience should be adapted to the national features of the country. This chapter provides a short review of the modern legal approaches and trends in and outside the EU and describes the present situation in Russia from a perspective of the lawmaker. In general, these new models aim to monitor users' behavior in order to detect illegal activities. This has generated concern among consumers' associations and civil rights defenders.

#### **6.1.2. 'Three- strikes' law**

One of the most popular anti-piracy law approaches suggests that governments might want to mandate "three strikes" laws to punish repeat online infringers, and that Internet service providers should get involved in the battle. First introduced in France 'three strikes law' was later adopted in other countries like Spain and New Zealand. The French 'three strikes and you're out' rule against file-sharers involves sending a message to any user who is believed to have infringed copyright online, with a repeat message sent on the second instance. When the authorities are informed of a third transgression, the user's internet access could be closed down for a period of between two and 12 months - without judicial appeal. That aspect of the law has previously angered European officials, who recently ruled that any individuals accused of such

activities cannot be disconnected without the involvement of the courts (Johnson, 2009). But as the practice has shown, French anti-piracy law HADOPI was not able to help rights holders, quite the contrary it has decreased the level of illegal file-sharing. The survey held by researchers affiliated with the University of Rennes in France's Brittany region indicates that since 2009 when the law was passed, total infringing behavior has increased by 3%. In fact, proving what many critics of the law already pointed out, 2/3 of former P2P users have simply switched to alternatives like illegal streaming sites and HTTP-based download services (i.e. Rapidshare), both of which aren't covered by the 'three strikes' legislation. (Dejean, 2010).

The study showed that use of P2P services fell among those questioned 17.1% to 14.6% since October. By contrast, the use of sites and services not covered by the Hadopi law grew by 27% over the same period.

"This study casts light on the limits of Hadopi, which equates piracy with a protocol (P2P) and reduces piracy only among users of this protocol," say the researchers.

"Establishing an administrative authority that targets P2P networks largely seems to have the effect of exchanging piracy techniques for another set that circumvent Hadopi's provisions."

Another remarkable statistic uncovered by the researchers is that half of all P2P users who download copyrighted content also buy digital content online. This means that if these users were disconnected from the Internet under the new law, the music industry would lose customers and thus revenue (Torrent Freak, 2010).

The three-strikes rules have significant costs that can also question their efficiency. Case in point: the UK, where a BT spokesman told the Mirror that a proposed graduated response scheme could cost each Internet user in the country £24 a year—and cost the ISP industry £1 million a day. BT is fighting back with calculations of its own, this time suggesting that the yearly cost of implementing graduated response laws is actually greater than the major labels' alleged losses to file-sharing. (Anderson, 2009)

In Spain the new anti-piracy law presented by the government will allow judges to shut down websites offering illegal downloads of music, movies and other entertainment.

Swedish new law is quite similar to the 'three strikes' approach. It is based on the European Union's Intellectual Property Rights Enforcement Directive (IPRED),

allows copyright holders to obtain a court order forcing ISPs to provide the IP addresses identifying which computers have been sharing copyrighted material.

Figures from Netnod, a Swedish firm that measures internet traffic in and out of the country, suggest traffic fell from an average of 120Gbps to 80Gbps on the day the new law came into effect.

Speaking to the BBC, Christian Engstrom, vice-chairman of the Swedish Pirate Party - said the drop in traffic was a direct result of the new law, but that it would only be a temporary fall. "Today, there is a very drastic reduction in internet traffic. But experience from other countries suggests that while file-sharing drops on the day a law is passed, it starts climbing again. One of the reasons is that it takes people a few weeks to figure out how to change their security settings so that they can share files anonymously".

Mr Engstrom acknowledged that the new legislation would scare a number of file-sharing, and that the odds of getting caught had increased, but said that the risks to illegal file-sharers were still quite low. He claims that the new law was "a disaster", not just for file-sharers, but for Sweden as a whole.

The chairman of the Swedish Publishers Association Mr. Bohlund acknowledged that cracking down on illegal file-sharing was not a long-term solution. He considers that ultimately it is people's perception on file-sharing that should be changed. (BBC, 2009).

Spanish government has suggested another scheme: the new anti-piracy law presented by the government will allow judges to shut down websites offering illegal downloads of music, movies and other entertainment. So in this case it is web-sites and not the people who download that will be prosecuted. "A judge's order will always be needed to take this decision through a quick procedure which is taken within four days at the latest after the judge has heard all sides," Justice Minister Francisco Caamano told a news conference. However, bloggers and other Internet users who argued that it could be used by the government to censor websites. A manifesto against the draft law was signed by tens of thousands of people in Spain, which has one of the highest rates of illegal downloads. Prime Minister Jose Luis Rodriguez Zapatero said his socialist government would introduce a new version of the draft law which addressed these concerns. (Independent, 2010).

### 6.1.3. Civil law remedies in Germany

In contrast, Germany lags behind in the protection of copyrighted works on the Internet. This may be partly indicative of a difference in attitude towards copyright piracy.

An inspection of the existing measures against illegal file-sharing in Germany reveals them to be ineffective, slow and arbitrary. Before September 1 2008, when the Copyright Reform Act came into force implementing the EU directive, the only means to obtain information on file-sharers was through criminal prosecutors. Soon after the act's adoption, the criminal investigation authorities could no longer handle the number of criminal complaints lodged by rights holders every week and the number of prosecution bureaux refusing to initiate investigations and provide rights holders with the data needed to identify infringers began to rise steadily.

To mitigate this problem, the act provided for a new civil law remedy in such cases whereby the rights holder was able to file a petition to obtain data on an individual infringer which was admissible with the court residing at the seat of the relevant access provider. Once such a petition was granted, the access provider communicated the data to the rights holder (or its attorney) directly, and the rights holder itself would then enforce its rights against the infringers.

While the intention of this statute was to help rights holders to protect their work against unwanted dissemination over the Internet, a number of obstacles arose. Courts generally introduced further unwritten requirements to be satisfied before the provider was compelled to turn over data on an individual infringer. For example, rights holders had to prove that the infringement was on a commercial scale. While Recital 14 of the EU directive merely seeks to exclude acts by end consumers that have acted in good faith, the act defines 'commercial scale' of an infringement as a "particularly intense violation or repeated acts". As a consequence of this vague statutory definition, there has been considerable disagreement among the courts. Some courts have decided in the rights holder's favour after they were able to prove that an entire musical work, film or computer game was shared, while other courts deemed the threshold of commercial scale to be surpassed only in the event of more than 3,000 works being offered by a single user.

The case law that each competent court has developed already diverges so substantially that a situation in which courts are considered either cooperative or non-cooperative has arisen. The situation is essentially the same with regards to providers. After a decision of the Federal Constitutional Court, the rules on data retention as set forth in EU Directive 2006/24/EC and implemented into German law were limited to criminal prosecution in severe cases. Thus, providers have often refused to share data from their database with rights holders for the prosecution of copyright piracy. Most providers now password-protect data stored for data retention purposes, making this same data inaccessible to rights holders. Very few providers share their information for all user data for seven days after storage, since no statutory obligation exists to retain the data for a limited period.

According to a recent decision in a preliminary injunction proceeding before the District Court of Hamburg, access providers must not delete data once they become aware of an infringement. However, in the case before the court the provider refused to supply rights holders with any workable mechanism with which to process the data, resulting in several thousand faxes arriving at the provider's offices during the time that the respective infringer was still online and the data was still fresh. The obstacles in enforcing the right to information are therefore substantial, and in certain geographical areas the enforcement of copyright claims against internet piracy is virtually impossible (Reber, 2009).

#### **6.1.4. Global license**

According to this system, Internet account holders would pay a monthly charge to their Internet service provider in exchange of unlimited access to digitized works. Internet service providers would then be in charge of distributing the “royalties” to right owners, through a collective management body or another relevant entity. While this system has not yet been introduced in any national copyright legislation, the current debate in Belgium between supporters of the global license model and the graduated response system is a good illustration of the diversity of models, perspective and approaches.

### 6.1.5. 'Fair use' limitations

Finally, the improvement of the system of exceptions and limitations to copyright is an essential element of a global strategy to fight piracy. Appropriate legal definitions of exceptions will allow to take into account the interests of the parties involved, in particular interests that aim to protect fundamental rights such as education, access to works for disabled persons etc. Moreover, differences between national legal systems should be reduced in order to enhance awareness-raising and respect of copyright.

In the United States copyright law is subject to certain limitations found in sections 107 through 118 of the copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of "fair use." The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law. Current fair use law is ambiguous by design; instead of laying out specific use cases, the law relies on the famous "four factors":

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. This can be confusing in many situations, because it is impossible to know in advance if a particular use qualifies. In the paragraph that comes just before the four factors, Congress provides a nonexclusive list of fair uses: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." The new Copyright Reform Act project, proposed by Public Knowledge affiliated with the Cyberlaw Clinic at Stanford and the Technology & Public Policy Clinic at UC-Berkeley, suggests that this list is not sufficient and suggests a few changes to bring fair use into the 21st century. (Urban, 2010).

The first of the reform ideas focusing on the principle of fair use propose the additions to the list of items in the fair use preamble: "incidental uses, non-consumptive uses,

and personal, non-commercial uses." Incidental uses "involve capturing copyrighted works, where the copyrighted work is not the primary focus of the use—for example, capturing music playing over radio when filming a family moment." Incidental use is hugely important to documentary filmmakers, for instance, who routinely capture copyrighted photographs hanging on walls or copyrighted shows playing on televisions in the backgrounds of their shots.

The second category, non-consumptive uses, "do not directly trade on the underlying creative and expressive purpose of the work being used." In other words, a non-consumptive use might take the complete text of the novel, make a copy of it, but use it only as the input for a lexicographical analysis of style, not to produce a free e-book.

"Because they do not trade on the expressive or aesthetic aspects of copyrighted works," says the report, "they pose little threat to the core market interests of copyright holders that copyright endeavors to protect."

The third proposal might be the most controversial. "Personal and noncommercial uses" are said to "have little chance of harming copyright holders. At the same time, they are ubiquitous: every day we timeshift television shows via TiVo, create mix CDs for the car and iPod playlists to the gym, backup up our computer hard drives, and read books to her children before bed."

But the point where the 'non-commercial use' becomes 'commercial' is not yet clear. This issue has been raised in both of the infringement cases against Jammie Thomas-Rasset and Joel Tenenbaum, the first two people to take RIAA-backed P2P infringement cases to trial. In both cases, the labels have insisted (repeatedly) that no easy distinctions can be drawn between commercial and non-commercial activity; though sharing copyrighted files with others may be "non-commercial" in the sense that no one is charging money for access, it also seems to be quite clearly "commercial" in the sense that a major purpose is to avoid paying for music that could easily be obtained from stores like iTunes.

Copyright Reform Act does draw the line here. While they want to ensure that deference is given to things like time-shifting, the report notes that the four factors still apply, and any non-commercial personal use that "sufficiently harms the copyright holder's market would not be fair."



Instead, personal and noncommercial copying would gain the presumption of legality—but if copyright holders could show "either actual market harm or a likelihood of market harm," those uses would not be allowed. (Anderson, 2010)

## **6.2. The current situation in Russia and the new legislative initiatives**

### **6.2.1. Foreign assessments of the situation**

The U.S.-Russia IPR Agreement, signed in November 2006, provides a mutually agreed upon roadmap for effective enforcement of intellectual property rights. It is imperative that Russia work expeditiously to fulfill its obligations under the Agreement. The Congressional International Anti-Piracy Caucus acknowledges that the Russian government has taken some positive steps, including enforcement actions against retail establishments and warehouses. There has been a decline in enforcement actions over the past years, however, and much remains to be done. In particular, the Caucus is "disappointed with the inadequate progress in addressing Internet piracy and the ongoing lack of deterrent penalties. To tackle this problem, Russia needs to amend its Civil Code to provide for meaningful cooperation from ISPs, and to establish a specialized Internet IPR Unit within the Ministry of Interior. Russia also should adopt updated and uniform procedures for investigation and prosecution of copyright infringement" (The Congressional International Anti-Piracy Caucus, 2010).

Russian collecting societies continue to pose a threat to U.S. creators. Those societies should be able to operate only within the scope of the mandate that they receive from rights holders. The requirement of state accreditation should have ensured the observance of this limitation. However, two years have passed since this accreditation requirement went into force and many rogue collecting societies, and commercial online and physical entities that purport to operate under such "licenses," continue to operate without any interference from the state. The Russian Government also has not taken steps to ensure that accredited societies operate in an open and transparent manner that is fair to foreign rights holders. The Caucus urges the Russian government to implement appropriate reforms. (The Congressional International Anti-Piracy Caucus, 2010).

This opinion is extremely important for the Russian's government since the authorities are striving for entering WTO and the piracy issue is one of the biggest obstacles on their way. U.S. business groups say they hope President Barack Obama's pledge to help Russia join the World Trade Organization soon meant Moscow will finally honor promises it made more than three years ago to crack down on piracy of American goods.

"We all want Russia to be in the WTO, but we don't want to give them a free pass," said Mark Esper, executive vice president at the U.S. Chamber of Commerce's Global Intellectual Property Center. "This affects (movies, music, books), business software, pharmaceuticals, you name it." (MSNBC, 2010)

A spokeswoman for the U.S. Trade Representative Ron Kirk confirmed that implementing the 2006 pledges was "a big piece of the remaining work" Russia needs to do.

In addition to making the necessary legislative changes, Russia must also improve its enforcement of intellectual property rights, the spokeswoman said.

Vice President Joe Biden unveiled a national strategy to protect U.S. intellectual property that included using trade agreements to achieve that goal and going after foreign websites that sell pirated music.

It would be unrealistic for Washington to expect "perfection" from Russia since the United States also has problems with copyright theft, said Dan Griswold, director of the Cato Institute's Center for Trade Policy Studies.

"The important question is will the accession agreement be on commercially meaningful terms," and not just done for diplomatic or political purposes, Griswold said. (Palmer, 2010).

### **6.2.2. Russian legislations and legislative initiatives**

At the present time Russian copyright law suffers from grave shortcomings, there is no sufficient legislative base for fighting the piracy in Russia. Pirates pass ahead of the lawmaker creating more and more advanced methods and schemes of evading the law using the existing gaps in the legal system. Anna Sharafieva, Uskov and partners tort firm lawyer believes that the lawmaker has taken measures to control the

counterfeit market, but when it comes to Internet piracy there is no effective tools to confront it. Russian government has to invent the law for the each type of piracy and especially for Internet piracy and file-sharing of copyrighted materials. Nowadays, there are lots of cases when rights holders try to address the court through a lawyer and the lawyer doesn't have adequate means to protect their clients' interests. There should be concrete normative acts rights holders and lawyer would be able to consult.

As for the liability for Internet piracy, it should be laid upon the people who crack and then disseminate copyrighted materials and not upon the final users who download it from different web-site or share it through various file-sharing servers. (Sharafëeva, 2010).

The legal advisor of the Producers' Guild Sergey Semenov agrees that at the present time the Russian legal system has no provisions about liability of the Internet service providers for the actions of their subscribers meaning file-sharing of copyrighted materials and downloading. But the new amendments to the Civil Code that are now debated by the Interagency Council (inclusive representatives from the Ministry of Culture, Ministry of Economic Development, Ministry of Telecom and Mass Communications and Ministry of Internal Affairs) are designed to change it. The maximal penalty for the copyright infringements according to the section 146 of the Criminal Code is 6 years of imprisonment. This penalty may be applied only to the providers' top-managers. But before that the rights holder whose rights are being infringed should send a notice to the provider that the copyright has been infringed and only if the illegal activities continue the sanction will be imposed.

Any law must have sufficient tools for its implementation and control. In this particular case the lawmaker should ensure the technical feasibility of illegal dissemination detection and suppression of it online, but at the present time "even the biggest provider is not capable of this" says the representative of the major file-sharing servers Rutraker.org; "torrent-trackers which are presumed to be responsible for complicity in piracy, control only 20-30% of the traffic between the users. And the traffic control is, in fact, nothing but shadowing, interference with users' privacy" he adds.

The chairman of the board of directors of Souyz company Alexandr Menn declares for the Civil Code amendments, however, he considers it necessary to create a governmental or public executive body that would keep a register of the online

resources providing copyrighted materials illegally, otherwise these amendments may be used as a tool for unfair competition (BaltInfo Agency, 2010).

One of the latest proposals has come from Yandex, Google Russia, Mail.ru, Rambler and VKontakte companies that published an open letter to rights holders and the powers that be asking them to exempt them from the liability for the users' content. They appeal to the fact that they are only providers of uploading and storage services, the liability for the content should be laid upon the people who uploaded it. The companies contend that they do not have a possibility to track activities of every single user. They propose the following solution: rights holders should address themselves to the provider if they find any illegal content, the provider will undertake measures to block that content and will send a letter about the copyright infringement to the user; if the rights holder's claim is legitimate the illegal content will stay blocked or will be deleted. The authors believe that this procedure should be fixed in the law. (Vesti, 2010). As we can see, this proposal has a lot in common with the 'three-strikes law'. The weak point of this proposal is that users' content (inclusive of illegal files) is an advantage of network resources. Even though the portal is not liable for the content of uploaded videos, still they get money every time when these videos are viewed. Thus, it is not quite fair to lay all the responsibility upon the users and saddle the rights holders with the trouble of searching pirated materials.

Igor Shegolev, Russian Minister of Telecom and Mass Communication, considers that it is not only the authorities that should be concerned with finding online piracy remedies. "Technologies are developing so fast that now people prefer to download files to their phones, computers and players directly from the Net. And this is the time when the rights holders should find a business-model that would be attractive for a wide audience and that would, on the other hand, make the use of pirates' services disadvantageous, when people would be able to buy music for a token payment and would have a clear conscience because they do not download illegally" he says.

### **6.3. Ways of ameliorating the situation**

The concerns of the foreign and internal analysts basically reveal the major tasks to be fulfilled:

1. The experience of the EU countries and the USA should be analyzed and used in order to improve the Russian legislations
2. The lawmaker should make a decision whether it is the provider or the users (or both of them) that should be penalized for the copyright infringements, the specified procedure for that should be established at the legislative level
3. Using the experience of the USA, the Russian lawmaker should define the 'fair use' of the copyrighted materials, thus including proper limitations to the copyright law to ensure a balance between the rights holders' interests and the users' rights to access the information. File-sharing legalization suggested by RPP merits consideration.
4. The new amendments to the Civil Code based on these decisions should be corrected and probably modified and enter into force.
5. An effective technical base and tools should be developed to make the Russian copyright law feasible. Special governmental bodies and special service units should be established if needed.
6. The lawmaker should cooperate with the rights holders to ensure and increase the efficiency of the legislations.

## **7. DISCUSSION**

It is evident that today file-sharers (alias pirates), rights holders and authorities (alias the lawmaker) represent nothing other than three opposing factions. The rebel faction - file-sharers - manifests dissatisfaction with the current policy pursued by the powers that be. The rights holders and authorities, in their turn, assert claims to file-sharers, who are considered to be infringers. However, the arguments they provide are usually

insufficient to convince the users about the truth of the statement that the rights holders should be paid. Available statistics provided by both pro-piracy oriented parties and piracy and file-sharing opponents, unfortunately, are spotty.

The interviewees were chosen so that it would be possible to reproduce the existing conflict of interests in the course of the interview: the interviewees represent the legal position and rights holders' point of view, and the questions were asked from the perspective of the consumer.

The research revealed a few most controversial and discussed points of the piracy and file-sharing debate. One of these points is the question of legality of file-sharing. As it was found out in the chapter 5, file-sharing defenders claim that according to the current legislations (RCC) P2P file-sharing is purely legal regardless of the fact what kind of information is being shared – copyrighted or not.

Viktor Maluykov confirms that P2P file-sharing doesn't offend against any law and the arguments produced in the chapter 5 correspond to the facts. Another question is whether the law should remain in this condition or should be changed. But for now it is true – Russian rights holders are not fully protected by the existing legislations. Should they bring a civil action against a particular file-sharer who, for instance, shared a song with a hundred or even a thousand users, the claim won't be redressed.

Sergey Zamyatin opposes weaker copyright and takes the view that it will have an obvious negative impact on sales.

Sergey Zamyatin and Anna Sharafeeva concurred that the current state of affairs doesn't meet the requirements of the jural society and therefore should be changed. They stand up for the new amendments to RCC that would make the legislations more defined and strict to service providers and users involved in sharing of copyrighted materials.

Vladimir Kravchenko, quite the opposite, doesn't suggest legislations toughening and says that, generally speaking, he feels for file-sharers and admits that some of them wouldn't buy legal product even if file-sharing was impossible. He has recently started a new band and all the new songs they have recorded are now available on social networks in the form of online streaming for free. He admits that users may download the songs from there using different software but he fully relies on touring and thinks that online materials available for free can be an effective tool to attract bigger audience to their gigs. Kravchenko thinks that P2P file-sharing will soon

become totally legal and acceptable but the profit from file-sharing service should be rearranged so that rights holders will finally start receiving their share. Any torrent-tracker may now position itself as a label and artists will address themselves directly to the best of such portals in order to get their product published and distributed.

According to Kravchenko, this is already happening.

Speaking about Internet piracy with a purpose of profit extraction, all the interviewees have agreed that it is illegal and unacceptable and rights holders and authorities should combine efforts in order to reduce the level of it.

The current penalty stipulated by law consists in reparation of losses. According to Sharafeeva, the losses-proving process is usually quite complicated and takes a lot of time and efforts. They think that the lawmaker should provide for another punishment.

The interviewees have also agreed that the optimal solution of piracy problems lies in the combination of legislative and non-legislative measures, rights holders and authorities should cooperate in order to make these measures more efficient. However, as it was already mentioned, Kravchenko doesn't support legislation toughening as to P2P file-sharing and considers it as a natural development of music industry in general and distribution systems in particular. The term 'label' itself will stand still in the music industry as a uniting factor for artists but the definition will be in the constant process of evolution.

According to Malyukov, the legal regulation of copyright is evolving. The stability is not yet reached, because it presupposes continuous operation of the legal system in general and specific legislations in particular, while Russian copyright law is in the blueprint stage. As for the non-legislative measure, according to Zamyatin, the music industry in Russia is now making its baby steps in this direction and it will take long before we can see the first results of those, but fortunately, the rights holders have acknowledged the importance of such measures. Similar to Malyukov, Zamyatin states that the situation is gradually but steadily improving.

## 8. CONCLUSIONS AND RECOMMENDATIONS

Diversity of standpoints and the diversity of situations and measures adopted, proves it important and urgent to foster dialogue between rights holders and users, with the participation of government authorities, in order to fill the gaps of the existing instruments and methodologies and to allow for an evaluation of piracy and its effects, taking into account the interests of all stakeholders, as well as the level of development and the specific situation in Russia.

This would make it possible to achieve a sustainable compromise in the digital environment and to adjust and reinforce the balance between the interests of creators and users, inherent to the copyright system.

The conflict between the interests of rights holders to obtain a fair retribution for their work, and the consumers' desire to use new technologies the way they choose and to access information for free is central to this topic.

The reasons behind the popularity of piracy and file-sharing should be taken into consideration by the lawmaker and rights holders when looking for a sustainable solution of the problem. Historical background of attitude to the copyright in Russia that can be described as a private property denial makes it harder to implement the certain legislative methods already employed in Europe and the USA. In this context, education and awareness-raising, in conjunction with a balanced legal framework, seem to be among the most appropriate measures to be recommended.

Illegal access to copyrighted content is facilitated by the increase of Internet penetration rates. The online legal market should remain abreast of pirates developing new business models. The creation of such models should be perceived as a great opportunity by rights holders. The improvement of the legal offer, through various distribution channels, will undoubtedly influence the current tendencies and will generate higher levels of legal purchases of cultural products. In order to increase the demand for the legal product, rights holders should eliminate the disadvantages of online legal services that they have in comparison with illegal ones. In this regard, pricing and availability are the key words for rights holders to focus on.

The legislative methods or counteracting piracy should be developed in a course of a productive dialogue between Pirate Parties and other pro-piracy protesting circle, rights holders and the lawmaker. This communication can be established in a form of



interagency committees, diverse forums and conferences may be used to reach mutual understanding between the stakeholders.

Analyzing the world and national experience in the field of counteraction to piracy and file-sharing of copyrighted materials, it seems appropriate to give priority to the following policies and measures:

1. Legislative measures

The copyright regulations as it exists now are vague and ambiguous. The new amendments to the Civil Code enclosing commentaries on and limitations to the current legislations are indispensable condition of successful legal regulation. On the other hand, the authorities should not introduce excessive limitations for it could have a chilling effect on businesses that host content on behalf of users and thus frustrate many lawful uses of such technologies.

2. Non-legislative measures

- Education and awareness-raising activities aimed at users, as well as at rights holders and public authorities' representatives. The users should be informed on the negative effects of piracy and file-sharing of copyrighted materials and on the exercise of exceptions to copyright and on alternatives of access to works via flexible licenses or public domain. The public authorities should be trained on the rationale of the protection of intellectual property; protection measures, legislative or not; the context and importance of an appropriate enforcement of the law and its effects, including exceptions and limitations as parts of the solution to piracy. Public authorities, in their turn, should promote the awareness of the rights holders on the importance to develop new pricing policies that encourage the purchase of legal goods; the necessity to improve the legal offer and to create new business models and new distribution systems that would make legal product easy of access and advantageous in comparison with pirated materials.
- Cooperation between the interested stakeholders. Authorities, cultural industries, authors and artists, collective management organizations, telecommunications and Internet services providers companies, should

aim to reach a consensus essential for putting in place equitable system of copyright protection in the context of an “information society”.

- The rights holders should take a proactive stand in the piracy counteraction. Civil and criminal proceedings should not be viewed as the only possible remedy. Pirates should be considered as competitors and appropriate market strategies, such as new business models and ways of distribution, should be developed in order to win the consumer.

The practice has shown that both authorities and rights holders have tried to approach the problem from different sides and perspectives. When one method or scheme proves to be inefficient they abandon it and turn to another option. Modern anti-piracy policy in Russia is incoherent and lacks a holistic approach. Only the combination of aforesaid legislative and non-legislative measures may cause a considerable change and reduce the effects of piracy.

## **9. LIMITATIONS**

It goes without saying that the situation in the field of intellectual property and piracy in Russia is constantly changing and the numerous researches undertaken to reveal the reasons and nature of this subject are becoming out of date quite soon. The present research is not an exception and it has a very limited term of validity. However, the revealed weaknesses and disadvantages of the modern anti-piracy methods constitute a valuable material that might be used in the next ensuing studies of the subject.

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**APPENDIX A: INTERVIEW WITH SERGEY ZAMYATIN (RUSSIAN ANTI-PIRACY ORGANIZATION).**

**Legal and non-legal methods of anti-piracy activities, what have been done during the last years in this field, amendments to civil and criminal codes, pricing policy as an anti-piracy tool, file-sharing issues.**

S.Z. = Sergey Zamyatin

E.P. = Elena Petko

E.P.: Здравствуйте, Сергей Владимирович!

S.Z.: Здравствуйте.

E.P.: В настоящее время я провожу дипломное исследование на тему «Пиратство в РФ: поиск компромиссного решения». В ходе поиска информации по этой теме, я часто находила материалы, где упоминалось название Вашей организации в связи с проводимыми мерами по борьбе с пиратством. Как я знаю, Ваша организация существует уже больше 10 лет. Что было сделано за эти годы?

S.Z.: Сделано немало. Если говорить о законодательстве, очень многое сделано с помощью нашего лоббирования. В том числе через посольство США, например, перед переговорами Буша с Путиным. На данный момент, законодательство фактически готово к борьбе с пиратством. Но вопрос эффективного правоприменения остаётся открытым. Одна из проблем, которую РАПО только пытается решить, это коррупция. Уровень коррупции в правоохранительных органах на данный момент просто поражает. И это было и является самой большой проблемой. Тем не менее, число рейдов на заводы растёт, мы их проводим постоянно. Раньше вывезти кого-то на завод было почти невозможно, рейды заканчивались только изъятием продукции и остановкой линии на некоторый срок, а сейчас уже есть первые дела.

E.P.: Борьба с пиратством в РФ напоминает борьбу с ветряной мельницей – сколько бы мы не бились, результата всё нет. В чем причина, на Ваш взгляд?

S.Z.: Причина, в первую очередь, в менталитете наших людей. Дело в том, что об авторском праве мы впервые стали говорить, и это поразительно, только с 96 года прошлого века. То есть до этого понятия авторского права практически не существовало. Затем были приняты новые законы, и государство обратило своё

внимание на защиту. Все мы прекрасно помним те времена в 90 годы, когда контрафактная продукция продавалась в каждом ларьке.

Е.Р.: Вы затронули тему законодательства. Как вы сказали, оно «фактически готово к борьбе с пиратством». Как же быть с распространенным мнением о том, что Российское законодательство сильно отстаёт от Европейского?

S.Z.: Во-первых, законодательство в сфере защиты интеллектуальной собственности постоянно совершенствуется. К положительным изменениям можно отнести, например, ужесточение ст. 146 Уголовного кодекса. Наказание по третьей части статьи теперь предусматривает до шести лет лишения свободы... Казалось бы, пять или шесть лет – разница небольшая, но на самом деле это не так. Третья часть – это когда изъято пиратской продукции более чем на двести пятьдесят тысяч рублей, это самая тяжкая часть. Раньше 146 статья была средней тяжести, и все случаи попадали под амнистию. А у нас таких случаев – тысячи. Тяжкие статьи, напомню, под амнистию уже не попадают. Кроме того, немаловажный момент – у тяжких преступлений нет срока давности, и теперь такие дела не закрываются. Таким образом, третья часть стала очень серьезной и отношение к ней совершенно иное, чем прежде. Количество дел по этой третьей части у нас значительно увеличилось. В прошлом году по заявлениям РАПО было возбуждено 960 дел. Причем все они дошли до суда и ни одного мы не проиграли. Только в Москве и Подмоскowie наш юрист участвовал в 230 делах. Если же говорить о том, что еще не достигнуто, то скажу, что девяносто пять процентов приговоров по ним – условные.

Е.Р.: Вы считаете, что надо быть жестче?

S.Z.: Да. Уже насчитывается несколько десятков случаев, когда люди получали реальные сроки. В качестве примера – суд в Ростове-на-Дону. Мать и сын организовали производство у себя на дому. У них были собственные киоски, поставлена продажа. По результатам рейдов в квартире, в палатках все было изъято, дело доведено до суда. Каждый получил по четыре с половиной года. Это очень серьезный срок, но если бы их судили сейчас, то он был бы гораздо больше. Кроме того, в связи с предстоящим вступлением в ВТО на Россию стали оказывать большое давление. Как бы ни говорили, что это не так – это связано напрямую! Мы просто это видим. В прошлом году РАПО получила более пяти тысяч запросов из милиции по поводу изъятия пиратской продукции.



Мы как-то подсчитывали, что на каждого сотрудника приходится в месяц 30-35 запросов.

Возвращаясь к теме десятилетней работы РАПО, можно упомянуть о том, что на протяжении всех этих лет мы занимались обучением экспертов из экспертно-криминалистического центра МВД. С ними мы сотрудничаем постоянно.

Совместно с IFPI проведено уже четыре семинара в Подмоскowie. Собрали экспертов со всей России. Каждый раз приезжает примерно по 350-400 человек. Мы оплачиваем им дорогу, проживание, то есть для этого выделен специальный бюджет. Начинаем с элементарного: что такое DVD, какие линии, как работать... Даем базу данных, показываем, что такое экспертиза. Рассказываем, что должно быть на легальном диске: номер лицензии и так далее. Участникам семинаров сообщаются все признаки контрафактности.

Также мы ежемесячно отправляем по всей России сканированные обложки с подробными описаниями. Как найти РАПО, также известно. Поэтому нам уже не надо присутствовать везде физически. Где-то проходит рейд милиции, изъяты диски. Эксперт просто открывает базу данных РАПО, которую мы постоянно пополняем, и ищет нужное название. Нам присылают данные об обнаруженном контрафакте только для того, чтобы мы проверили, подготовили необходимый пакет документов. Из всех поступивших отбираются, конечно, только наши компании, члены РАПО. И уже затем на основании всего этого возбуждается уголовное дело. В прошлом году их было больше трех тысяч. А еще пять лет назад было только около двухсот дел.

Е.Р.: Как Вы оцениваете работу Правительственной комиссии по интеллектуальной собственности?

S.Z.: Комиссия собирается раз в три месяца, теперь более узким кругом, чем раньше. Обсуждаются проблемы связанные с пиратством, возможности улучшения законодательства в этой сфере. Через Правительственную комиссию нами были пролоббированы изменения в законе об авторском праве. Например, тот же public domain: благодаря РАПО в августе прошлого года это понятие было откорректировано.

С сентября этого года вступает в силу поправка к закону об охране Интернета, регламентирующая Интернет. Если, конечно, не будет проблемы, возникшей совсем недавно, которая коснется всей нашей индустрии: и кино, и компьютерных программ, и многого другого. Эта проблема — четвертая часть

ГК, которая, как это часто бывает, разрабатывалась очень скоропалительно и без ведома индустрии. Написана она группой юристов во главе с Яковлевым, бывшим председателем Верховного суда. Глава очень «сырая» и не регулирует все в полной мере. При этом в ней сказано, что все прежние законы об авторском праве ликвидируются.

Е.Р.: По поводу этой части руководству страны было направлено огромное количество коллективных критических писем. В том числе такое письмо на имя Дмитрия Медведева отправила и Гильдия продюсеров России...

S.Z.: Да, было и такое письмо. Сейчас мы собираем новые подписи для письма, в котором четко и подробно объясняется, чем грозит принятие четвертой главы всей индустрии. Главу передали на заключение профессору Сергееву, заведующему кафедрой интеллектуальной собственности петербургского университета. Он сделал очень грамотное заключение на 200 страницах.

В связи с вводом четвертой главы ГК мы не сможем провести подготовленные поправки — так как сам закон об авторском праве автоматически будет отменен. То есть мы будем отброшены назад на несколько лет! Потому что все суды, милиция и органы прокуратуры привыкли работать с законом об авторском праве, который все эти процессы регулировал. Введение новой части ГК парализует все минимум на два-три года. Придется вырабатывать новую тактику, вносить в новую часть поправки и изменения. И это при том, что во всем мире авторское право регулируется законами, которые не сконцентрированы в одном месте. Они разрабатывались веками.

Гражданский Кодекс может задавать только общее направление, а не заниматься жесткой регламентацией каждого шага.

Е.Р.: Сейчас, когда 4я часть Гражданского кодекса уже введена, разгораются ожесточенные споры насчет введения поправок. Какова Ваша позиция по данному вопросу?

S.Z.: Изначально, как и другие индустрии, мы были против принятия четвертой части Гражданского кодекса, потому что государство решило защитить правообладателей, не посоветовавшись с ними. В администрации Президента решили сделать четвертую часть сами. А нас поставили перед фактом: через две-три недели будет готово заключение. Естественно, все были возмущены. До этого на протяжении более десятка лет существовал закон об авторском праве.

Как высказался по этому поводу Владимир Досталь: «Вы поймите, мы посадили в 93-м году дерево и его выращивали. Мы добавляли, меняли законы об авторском праве. Дерево росло, появлялись новые ветки, а теперь вы хотите его просто срубить. И вместо прежнего закона об авторском праве вы даете нам четвертую часть, которую мы только стали читать...». Правительство же в ответ на это предложило нам работать над 4ой частью, предоставив возможность «сделать идеальный закон».

В дальнейшем был создан специальный совет по четвертой части ГК. Придя к выводу, что избежать изменений в законодательстве об авторских правах нельзя, мы использовали возможность участия в совете, чтобы активно отстаивать наши позиции. И, в отличие от других индустрий, которые в это время выступали в прессе против принятия новой части ГК, мы добились определенных результатов. Мы тщательно работали над поправками. Новый закон был рассмотрен фактически постатейно, но сферы, касающиеся, например, музыки или товарных знаков, нами затронуты не были.

Одной из проблем были общества по коллективному управлению правами, такие, например, как Межрегиональное авторское содружество. В старом законе об авторском праве записано, что в случае, если трудно найти автора и просить его разрешения на издание или продажу, то права могут давать подобные общества. Затем они собирают деньги, находят автора и возвращают их ему. Но это касается музыки, с кино – совсем по-другому. Так вот, теперь эта проблема исчезнет. Видимо, будет по одному такому обществу в каждой индустрии, с государственной лицензией. Скорее всего, лицензироваться они будут министерством культуры, то есть, вопрос этот будет решен.

Е.Р.: Как я поняла, вы считаете законодательные методы борьбы с пиратством приоритетными.

S.Z.: Конечно.

Е.Р.: А как насчет самих правообладателей? Могут ли они сами предпринять какие-либо действия для того, чтобы защитить свои права? Если бы вы были руководителем компании- правообладателя, какие бы действия вы предприняли?

S.Z.: Мы работаем в области защиты авторских прав уже 13 лет, и понимаем, что одними репрессиями дело не решить. Нужно людям объяснять, говорить, вести антипиратскую пропаганду. Мы ушли от стандарта VHS, перешли к

формату DVD и переходим к формату Blue-Ray, который не соизмерим по качеству с тем, что выкладывается в торрентах и продаётся с лотков у метро.

Е.Р.: То есть пропаганда и образование потребителя, а еще?

S.Z.: Я считаю, что государство, а не легитимный участник индустрии, должно заниматься уничтожением пиратства. Однако есть и методы по борьбе с пиратством, которые могут быть использованы самим правообладателем – например, проведение кампаний с целью увеличения осведомленности и грамотности потребителей в области интеллектуальной собственности и авторских прав.

Е.Р.: А ценовая политика? Может ли она быть орудием борьбы с пиратством?

S.Z.: Существует распространенное мнение, что лицензионный продукт должен стоить дешевле. Нонсенс. Постарайтесь представить, сколько людей, работы и средств стоит за каждым фильмом, за каждым альбомом. И тогда стоимость 300-400 рублей за диск не покажется вам такой уж огромной.

Е.Р.: Из чего вообще складывается стоимость лицензионного продукта?

S.Z.: Есть авторские отчисления. Есть налоги. Есть затраты на производство, дизайн, мастеринг, ремастеринг, создание дополнительных материалов. Складывая все это и добавляя магазинную наценку, мы получаем цену лицензионного DVD. А сама стоимость куска пластика очень невысока.

Е.Р.: Вы считаете, что пиратов можно победить, даже не снижая цены на диски?

S.Z.: Как я уже говорил, бороться с пиратством должно, прежде всего государство. И я не говорю о принятии новых законов или усовершенствовании старых. Законодательство у нас уже на высоком уровне. Просто данный вид бизнеса очень сильно коррумпирован. В нем нет уголовных авторитетов, его покрывает правоохранительная система. Поэтому все разговоры об измене законодательства беспочвенны. Законодательство прекрасное, правоприменение отвратительное.

Е.Р.: Тогда у меня такой вопрос – как тогда быть с файлообменом? В соответствии с текущим законодательством файлообмен – это абсолютно законная деятельность, даже если материалы, которыми обмениваются пользователи, обременены копирайтом.

S.Z.: Интернет-пользователи, скачивающие контрафактные фильмы с таких ресурсов, сами становятся распространителями контрафактной продукции. Проблема сетей становится очень острой. Сети опасны тем, что образуют сеть сетей. Скачивая фильмы с ресурса, вы сами становитесь распространителями этой продукции среди других пользователей. Но не столько важна борьба с файлообменными сетями, сколько с так называемыми релизерами. Важнее бороться с теми, кто ворует, чем с теми, кто распространяет. Примеры такой борьбы тоже есть. Летом прошлого года правоохранные органы возбудили уголовное дело против владельцев сайта Interfilm.ru. Он тоже работал как торрент-трекер, но, при этом, выкладывал фильмы, только появившиеся в прокате.

Е.Р.: Каковы планы РАПО на ближайшее будущее?

S.Z.: Мы планируем запустить новую PR-программу, которая будет стимулировать потребителей покупать качественную лицензионную продукцию. Поскольку люди становятся обеспеченнее и считают себя более цивилизованными, то приобретать «пиратку» теперь просто стыдно и противно. Особенно если ты считаешь себя достойным покупать настоящие, а не ворованные фильмы. Очевидно, что мышление наших людей постепенно трансформируется и свою будущую PR-программу РАПО намерена построить именно на этих положительных изменениях российского общества.

**APPENDIX B: INTERVIEW WITH VLADIMIR KRAVCHENKO  
(MUSICIAN, MILLIONS OF YEARS BAND; A&R MANAGER, KAPKAN-  
RECORDS)**

**Content: Current situation in the field of intellectual property in Russia, file-sharing – legal or illegal activity, file-sharing as a marketing tool for upcoming artists and record companies, cooperation between lawmaker and rights holders in order to increase the level of piracy.**

E.P. = Elena Petko

V.K. = Vladimir Kravchenko

E.P.: Привет, спасибо, что согласился дать интервью!

V.K.: Привет!

E.P.: Дело в том, что в настоящее время я провожу дипломное исследование по теме «Пиратство в России» и хотела бы узнать твое мнение по ряду вопросов.

V.K.: Буду рад помочь!

E.P.: Какова твоя оценка ситуации относительно пиратства и интеллектуальной собственности в РФ (ситуация ухудшается, улучшается или стабильна, как можно оценить ситуацию в сравнении с ситуацией в странах Европы)

V.K.: Я думаю в РФ ситуация стабильна. Но она, конечно же, хуже чем в Европе. Хотя скачивают альбомы также бесплатно по всему миру. Можно сколько угодно продавать музыку через iTunes и другие магазины и позиционировать этот рынок как основной, но скачки не прекратятся.

E.P.: Как ты думаешь – почему?

V.K.: Людей всегда будет привлекать возможность получить то, что они хотят, бесплатно. Это неизбежно. В 90е ситуация с пиратством была иная – пиратские записи обычно были в плохом качестве. Если говорить о фильмах, то кассеты и диски были с отвратительной озвучкой, музыка была записана в кустарных условиях. Потом ситуация стала налаживаться, пиратская продукция начала выходить в хорошем качестве, и иногда обложка, дополнительные материалы и прочие удовольствия, которыми раньше могла похвастаться «лицензионка», стали появляться и на пиратских носителях, иногда даже в большем многообразии. То есть пиратство не стоит на месте, постоянно эволюционирует. Интернет-пиратство – это на сегодняшний день последняя версия этих

«апгрейдов». Любой альбом можно найти за считанные секунды и в любом качестве. Да еще и бесплатно! Мало кто может от такого отказаться только потому, что это нарушает какие-то там права каких-то авторов...

Е.Р.: Ты сказал «бесплатно». Значит, пиратам их деятельность уже не приносит деньги?

В.К.: По крайней мере не так, как раньше, когда контрафактная продукция продавалась с прилавков. Потребитель выбирал «пиратку», так как она была дешевле. Сейчас же скачать трэк из Интернета можно и вовсе не заплатив ни копейки. Например, закачать с помощью всем известных торрентов...

Е.Р.: Кстати, о торрентах. Очевидно, отношение к пиратству у всех исполнителей и авторов песен негативное. Всё-таки пираты делают деньги на чужой собственности – деньги, которые могли бы заработать сами правообладатели. То есть действуют в коммерческих целях. А к торрентам у всех отношение неоднозначное. Что ты лично об этом думаешь?

В.К.: Я нормально к этому отношусь. Я вообще считаю, что рано или поздно это станет вполне себе правомерно, когда начнется естественное перераспределение прибыли от этих порталов. Кстати, и на данный момент в России файлообмен абсолютно легален.

Е.Р.: На данный момент – да, но существует ряд проектов поправок к 4 части ГК, которые «исправят» ситуацию, и тогда файлообмен будет поставлен в жесткие рамки. А вот Пиратская партия наоборот добивается полной легализации файлообмена. Каково твоё мнение по этому поводу?

В.К.: Как я уже сказал, я не противник файлообмена. И в принципе за свободный доступ к музыке. Надо сказать, что Интернет может быть не только угрозой для артиста, но и эффективным инструментом маркетинга. Недавно мы основали новую группу, так вот первые песни мы выложили в «В Контакте» для всеобщего ознакомления. Таким образом можно привлечь большую аудиторию на концерты. Это уже распространенная практика – размещать музыку для ознакомления в социальных сетях. Вывешивается она там не в лучшем качестве, как я уже сказал – для ознакомления, чтобы потом народ захотел потратить деньги на «лицензионку». Что касается файлообмена. Тут тоже надо найти положительные стороны и придумать схему, по которой правообладатели всё же будут получать плату за своё творчество. Любой торрент-трекер сейчас уже

может себя позиционировать как лейбл и артисты буду стремиться обращаться к самым лучшим. Это уже происходит.

Е.Р.: То есть со временем звукозаписывающие лейблы в их нынешнем варианте канут в лету?

В.К.: В нынешней их форме – да. Но я так скажу: лейбл так или иначе будет всегда актуален как объединяющий и позиционирующий новых артистов фактор, в том или ином виде - на физических или цифровых носителях.

Е.Р.: Если лейблы реинкарнируются в торрент-трекерах, решит ли это проблему пиратства?

В.К.: Смотря как будет решен вопрос с извлечением прибыли. Скачивание может остаться абсолютно бесплатным, а средства на отчисления правообладателям могут приходиться из других источников, например, с рекламодателей. Уже есть схемы, по которым за бесплатное прослушивание или скачивание музыки или кино пользователь должен просмотреть энное количество рекламных роликов. Но не берусь заявлять, что всё это может привести к полному искоренению пиратства.

Е.Р.: Тогда какие меры, на твой взгляд, могут быть наиболее действенными для регулирования уровня пиратства - ужесточение правовых норм или же непосредственные действия правообладателей (снижение цен, внедрение новых бизнес-моделей и способов дистрибьюции)?

В.К.: Я не стремлюсь никогда находить меры борьбы или ужесточения. Людей насильно покупать не заставишь. Новых моделей дистрибьюции очень много сейчас. Посмотрим, что будет более актуальным со временем.

Е.Р.: То есть, на твой взгляд, людей нужно не запугивать, а заинтересовать?

В.К.: Именно... необходимо выявить, какие преимущества имеет пиратская продукция перед лицензионной, и постараться добиться того, чтобы ситуация стала прямо противоположной, то есть чтобы пиратские записи покупать и качать стало невыгодно.

Е.Р.: Большое спасибо, было очень интересно пообщаться.

В.К.: Взаимно. Желаю успехов в исследовании.



**APPENDIX C: INTERVIEW WITH VIKTOR MALYUKOV, “KLIMOV”  
PUBLIC CORPORATION, LEGAL MANAGER.**

**Content: the current state of Russian anti-piracy legislation – the quality changes, application of legislation and its effectiveness in the era of technical progress, business measures and pricing policy for fighting piracy in Russia, the perspectives of intellectual property legislations.**

E.P. = Elena Petko

V.M. = Viktor Malyukov

E.P.: Здравствуйте, Виктор Анатольевич!

V.M.: Здравствуйте!

E.P.: Виктор Анатольевич, в настоящее время я провожу дипломное исследование по теме «Пиратство в России» и хотела бы узнать Ваше мнение по ряду вопросов.

V.M.: С радостью отвечу.

E.P.: Не могли бы Вы для начала охарактеризовать ситуацию в России в области охраны интеллектуальной собственности по сравнению с тем, что на данный момент происходит в Европе? Есть ли улучшения по сравнению с той ситуацией, которая сложилась в 90е годы?

V.M.: По сравнению с Европейскими странами, мы, конечно, отстаём. Причем ничего удивительного в этом нет, это вполне закономерно. Процесс законодательного урегулирования прав на интеллектуальную собственность и их защиты в Европе длится уже около века, в то время как у нас первый закон об авторских и смежных правах был принят только незадолго до распада Советского Союза. В Европе и Америке уже были испробованы разные подходы и схемы борьбы с пиратством и незаконным файлообменом, а мы только делаем первые шаги в этом направлении. Недавно слышал, что в Евросоюзе пообещали 1 млн. евро тому, кто придумает всеобъемлющий и устраивающих правовые системы всех членов Евросоюза термин "интеллектуальная собственность"; у нас в России к этому вопросу подошли проще: написали в ГК РФ определения - и все!

По сравнению с прошлым периодом существования российского законодательства в области интеллектуальной собственности ситуация

однозначно улучшается! Стабильность еще не наступила, поскольку стабильность предполагает регулярность и бесперебойность действия и правовых норм, и правовой системы в целом, а у нас сейчас - стадия сбора информации правоприменения 4 части ГК. По истечении 2010 года, я думаю, будет обобщение практики и, возможно, внесение каких-то корректировок в законы.

Е.Р.: А что Вы думаете по поводу проектов поправок к 4ой главе ГК, касающихся интеллектуальной собственности?

В.М.: Как я уже сказал, сначала необходимо разобраться с тем, что уже есть. И только после обобщения и анализа практики можно будет уже думать о внесении корректировок и поправок.

Е.Р.: Какие меры, на Ваш взгляд, могут быть наиболее действенными для регулирования уровня пиратства - ужесточение правовых норм или же непосредственные действия правообладателей (снижение цен, внедрение новых бизнес-моделей и способов дистрибьюции)?

В.М.: Как всегда, оптимальное решение посредине: нужно и ужесточение, нужны и дополнительные бизнес-меры. В части ответственности - желательно усилить гражданско-правовую (в настоящее время речь идет только о возмещении убытков, а это с точки зрения доказывания весьма непросто и долго); в свою очередь, бизнес пытается предотвратить нарушение своих прав, но если это связано с обращением в правоохранительные органы, это порождает массу некачественных и злоупотребительных действий, а если это связано с технической защищенностью продукта, это легко подделывается пиратами, так как рынок сбыта такой продукции - народ, который не обладает нужными знаниями и, самое главное - априори готов платить за контрафакт, но меньше, чем за "ля натюрель", но больше. Все зло - от отсутствия денег.

Е.Р.: Пиратство всегда называют злом, а еще очень часто – воровством. Вот скажите пожалуйста, является ли скачивание, использование нелицензионной продукции по сути дела воровством?

В.М.: Мне кажется, что использование данного термина неоправданно. Воровство – это синоним кражи, а кража в соответствии с Уголовным Кодексом РФ – это тайное хищение чужого имущества. Покажите мне, пожалуйста, кого-

нибудь кто тайно скачивает и использует нелегальную продукцию? Как правило, на любом из рынков можно приобрести CD и DVD, в Интернете полным полно сайтов, где музыку и фильмы можно скачать бесплатно. Это делается явно, без всяких на то зазрений совести, как по субъективным причинам, так и по объективным. Поэтому, я бы говорил не про воровство, а про нарушение прав на объекты интеллектуальной собственности.

Е.Р.: Пиратство – то есть незаконное копирование и распространение информации, обремененной копирайтом, в коммерческих целях – является правонарушением, это давно и всем известный факт. А P2P файлообмен? В последнее время правообладатели начали предъявлять иски пользователям торрентов, которые закачивали фильмы с целью домашнего использования, то есть просто, чтобы посмотреть фильм или послушать музыку дома. Будут ли такие иски удовлетворены?

В.М.: Не знаю, как будет складываться ситуация в дальнейшем, но если мы рассматриваем подобный иск в рамках настоящей правовой базы, то нет, такой иск не будет удовлетворен. В соответствии с текущим законодательством файлообмен не является противозаконной деятельностью – причем не важно, какая информация передается: обремененная копирайтом или нет.

Е.Р.: То есть пользователи, которые обмениваются музыкой и фильмами, не могут подвергаться судебному преследованию. Но получается, что в этом случае правообладатели не получают причитающихся им отчислений. Какие пути выходы из данной ситуации существуют, на Ваш взгляд?

В.М.: Одним из решений сложившейся проблемы могла бы стать новая схема выплаты вознаграждения правообладателям, основанная на абонентской плате за пользование трэкерами. Подобная перспектива в последнее время все чаще и чаще рассматривается правоведами и экономистами. Для этого необходимо установить, какое количество денежных средств готовы потратить пользователи в год в качестве абонентской платы за использование объектов авторского права в результате файлообмена. В обмен на абонентскую плату, уплаченную в адрес администратора ресурса, пользователь получает возможность безлимитного доступа к контенту.

Одна из проблем, с которыми сталкивается потребитель – это покупка товара ненадлежащего качества, или, просто, товара, который будет не соответствовать

его ожидание. Зачастую фильмы и музыкальные альбомы так разрекламированы, что потребитель ожидает, что покупает шедевр, а прослушав или просмотрев запись, понимает, что купил нечто посредственное, обладающее низкими художественными характеристиками. Очевидно, что до момента покупки потребитель не может оценить данные качества товара. В данном случае правообладатель должен получать долю от абонентской платы прямо пропорциональную количеству скачиваний и в зависимости от объема произведений. Также возможно введение системы выставления оценок пользователями, согласно которым будет повышаться или понижаться доля вознаграждения правообладателя из общей суммы авторского вознаграждения, собранной в качестве абонентской платы. Выставление оценок должно быть добровольным, благодаря чему пользователи получают возможность поощрять или карать правообладателя информации за обнародование и публичный оборот объектов авторского права.

Е.Р.: Виктор Анатольевич, огромное Вам спасибо за интервью. В заключение хотелось бы узнать Вашу точку зрения по поводу будущего в области защиты интеллектуальной собственности. Пациент скорее жив, чем мертв?

В.М.: Я бы не сказал, что в данный момент ситуация критична. Прослеживаются улучшения. Одно то, что Вы выбрали для своей дипломной работы эту тему говорит о том, что люди стали задумываться о том, что проблема существует и что с ней надо бороться. Хотя не исключено, что в будущем в обществе произойдет переоценка ценностей, и, действительно, то, что сейчас пропагандируют пиратские партии, станет совершенно нормальным и приемлемым. Поживем – увидим.

Е.Р.: Еще раз спасибо.

В.М.: Не за что. Надеюсь, что рассказал что-то полезное!

Е.Р.: Безусловно. Было очень приятно пообщаться.

В.М.: Взаимно! Успехов Вам в Вашем исследовании.

**APPENDIX D: INTERVIEW WITH ANNA SHARAFEEVA, LAWYER,  
“USKOV AND PARTNERS” COMPANY)**

**Content: the current state of Russian anti-piracy legislation – the quality changes, application of legislation and its effectiveness in the era of technical progress, business measures and pricing policy for fighting piracy in Russia, the perspectives of intellectual property legislations.**

E.P. = Elena Petko

A.S. = Anna Sharafeeva

E.P.: В настоящее время жестко стал вопрос нехватки законов для эффективной борьбы с пиратством. С точки зрения юриста, это действительно так?

A.S.: Ну, говоря о законодательной базе, нужно сказать, что законодательство в нашей стране, в Российской Федерации в последние годы, в частности с 2008 года, усовершенствованно, нормы кодифицированы, есть новеллы, которые, скажем, значительно совершенствуют правовое регулирование в данной сфере, чему юристы, безусловно, рады. Но, если говорить конкретно, отвечая на вопрос «Есть ли работающие законы, которые могли бы эффективно бороться с контрафактом, ну, судя потому, какой объем контрафактной продукции существует, на этот вопрос, видимо, следует ответить «нет». Следует сказать, что пираты значительно опережают законодательство. То есть те, схемы, которые применяются для распространения нелегальных копий произведений, постоянно совершенствуются. Рынок DVD контрафактной продукции падает. Правительством Российской Федерации предпринимаются меры по тому, чтобы ликвидировать торговлю с лотков, эта мера уже конкретная, о которой можно говорить. Но, скажем, борьба с Интернет-пиратством, к сожалению, законодательством в полном объеме не охватывается, и мы на практике сталкиваемся с тем постоянно, что авторы обращаются за помощью, а реально законов нет.

E.P.: На Ваш взгляд, каким образом можно усовершенствовать нынешнее законодательство? Какие способы борьбы с пиратством должны быть приоритетными?

A.S.: Тысячелетиями уже известен принцип, что закон работает не когда он жесток, а когда он устанавливает именно неотвратимое наказание за правонарушение. Поэтому, конечно же, в отношении различных видов

пиратства нужны свои нормативные акты, они нужны в самых разных сферах, то есть это нормативные акты, касающиеся сети Интернет... Для того, чтобы юристам было проще проводить определенную защиту обратившихся к ним авторов, правообладателей, для того, чтобы можно было обратиться к конкретной норме закона, и чтобы она была однозначно ясной и точной.

Е.Р.: Какие санкции меня ожидают, если я куплю с лотка нелегальный диск, а потом, придя домой, еще и скачаю какой-нибудь альбом из Интернета?

А.С.: Ответственность, на наш взгляд, всё-таки должна наступать для тех лиц, кто неправомочно пользуется авторскими правами, кто создаёт так называемую контрафактную продукцию, а не у потребителей. И эта позиция полностью подтверждается практикой всех стран мира.

Е.Р.: То есть ответственность следует возложить на продавца?

А.С.: Да, ответственность следует возложить на релизеров, то есть тех, кто незаконно копирует лицензионные материалы и выкладывает их впервые в Интернете, или же записывает на различные носители и продает в магазинах или с лотков у метро. Дело в том, что человек – будь он жителем Парижа, Лондона или Санкт-Петербурга, он везде одинаков. То есть он всегда будет стремиться приобрести там, где дешевле или же и вовсе бесплатно. Поэтому наказывать непосредственно потребителя в данном случае было бы неразумно. Хотя, надо сказать, что нормы права Европейских стран показывают, что у них законодатель всё-таки возлагает ответственность и на потребителя в том числе. Например, уже достаточно хорошо известное правило «трех ударов», когда после трех письменных уведомлений о нарушениях, пользователь затем просто отключается провайдером и не может в дальнейшем получать услуги Интернета. В соответствии с Российским законодательством, не пользователь, а релизёр будет ответственным за конкретное правонарушение.

Е.Р.: Большое спасибо за интервью.