Mass Media Regulation and the Internet

May 7, 2002

Responses to Questions from the Information Policy Committee of the
State Duma of the Russian Federation

In many countries, the question is being asked: What is the proper legal framework for the Internet? In particular, it is being asked: Should the Internet be regulated under the laws applicable to the mass media (radio, television or printed periodicals)? If the Internet is not to be treated as a mass medium, does that mean it is unregulated?

This memorandum addresses many aspects of those questions. It concludes that the statutory framework applicable to traditional mass media is not suited to the Internet. In particular, a registration or licensing system for Web sites is both unnecessary and incompatible with the Internet's unique characteristics: open, global, not dependent on scarce spectrum, and presenting very low barriers to potential publishers. Any country that tries to apply to the Internet registration requirements designed for the traditional mass media will likely impede the development of the Internet and restrict the participation of its people in the information economy and other aspects of the information society.

This does not mean that content on the Internet is unregulated. Laws applicable to defamation, child pornography, copyright, and other subjects are applicable to the Internet just as they are to traditional media.

This memo is in the form of answers to questions from the Information Policy Committee of the State Duma of the Russian Federation.

- **What is the legal status of Internet sites in European and North American legislation? (How are they defined in terms of legislation, courts and regulatory bodies?) Do any of the same rules that apply to the press and TV/radio stations also apply to Internet sites? Compare: Article 2 and Article 24 of the Law on Mass Media.**

Internet sites are not specifically regulated as such under European or North American legislation. However, many laws that relate to speech apply equally to traditional media (such as printed publications, television and radio) and to new media such as the Internet. For example, defamation laws apply with equal force to the Internet, and there is a large body of developing law in North American and European courts applying traditional defamation rules to the Internet. Copyright and other intellectual property rights on the Internet are enforced by courts in both North America and Europe under the same laws that apply to traditional media.

However, laws that specifically regulate television and radio have not been applied to the Internet in North America or Europe. The only exception is Italy, in which a recent law would require Internet sites to register with the government. In all other European and North American countries, it has been recognized that mass media regulatory laws cannot be applied to the Internet. In the United States, the Internet is classified as neither a broadcast medium nor as a telecommunications service. Instead, a new legal term – "information service" – was created for Web sites and Internet Service Providers. Therefore, in the US, the special public interest rules applicable to broadcast media do not apply to the Internet, nor do the common carrier rules applicable to providers of telecommunications services.

It is recognized under international freedom of expression principles and under the constitutional free expression protections of many countries that regulation of any medium must be based on the specific characteristics of the medium. Broadcasting is licensed because it depends on scarce spectrum (which means that only a few of those who would wish to operate a broadcast facility will be able to obtain licenses, requiring the government to develop a system for allocating them), to prevent signal interference, and because over-the-air free television and radio are available to children flipping the channels on a TV or turning the dial on a radio. Because of these factors, it is accepted that broadcast media may be licensed and that the content of broadcast media may be narrowly regulated to serve specific state goals.

The Internet, in contrast, does not have the characteristics that support such regulation. The Internet is not limited by scarcity of spectrum and thus opportunities to speak are not limited. Anyone who wishes to speak on the Internet may do so. There is no issue of technical interference. And the access of children to potentially inappropriate Internet sites can be most effectively controlled by families, librarians and school teachers and by the use of technical measures such as software filters. Broadcast regulation is premised upon the need to regulate those few entities that have obtained scarce licenses. In contrast, on the Internet, everyone can be a publisher. It is thus inappropriate and could violate both the Russian Constitution's guarantee of freedom of expression and treaties such as the European Convention for the Protection of Human Rights for the Internet to be regulated as pervasively and under the same rules as broadcast media have been regulated.

Consistently, the EU has recognized that content regulation must be determined by the characteristics of the medium being regulated. The European Union recognized this principle last year in reviewing its Television without Frontiers Directive. In revising that directive, the European Commission again determined that its TV content regulations would be applied only to traditional broadcast media and not expanded to the Internet. (COM (2001) 9, Brussels 15.1.2001.) In similar fashion, in its new series of telecommunications directives, the EU has determined that all electronic telecommunications media should be regulated regardless of platform under similar rules – but rules that are different from the rules applicable to radio and TV and that do not require prior authorization or licensing.

Articles 2 and 24 of the 1991 Law of the Russian Federation on Mass Media do not require that the Internet be regulated the same as radio and television. Article 2's definition of "mass media," in the context of the 1991 time frame in which it was adopted, clearly refers to

television, radio, newspaper and periodical publishing. Article 24 extends regulation to new media that would have the same characteristics as Article 2 media. The first paragraph of Article 24 clearly refers to publications printed on paper and distributed in physical copies; it should have no applicability to the Internet. Although it would theoretically be possible to read the second paragraph of Article 24 to include the Internet by its use of videotext and teletext systems as examples of new media that would be regulated in the same manner as radio and television, this would be a mistake. Article 24 refers to other emerging mass media that are subject to central control by a publisher and that could be regulated in the same manner as radio and television. The Internet, however, is entirely decentralized. Unlike the case with videotext and teletext, there is no central publisher that can carry out the duties required under Russian radio and television law.

An attempt to apply media regulations to the Internet would require hundreds of thousands of creators of Web sites to register with the government and comply with complex regulations. The application of the Act's mass media regulations to the Internet in this manner would prove to be futile and counterproductive -- Russian citizens would still have access to millions of pages of Web content created in Europe or the United States. Meanwhile, burdensome registration requirements on creators of Web content in Russia would only discourage the creation of content in the Russian language for Russian citizens.

- **Is there a distinction made in the legal status of "informational" Internet sites (i.e. sites intended to distribute information) and "commercial" Internet sites (e-shops, on-line brokerages, Internet auction sites and other sites whose main goal is trade, not the dissemination of information)?**

Laws generally apply with equal force to "informational" and "commercial" Web sites. It would be difficult to draw a distinction along those lines because many, if not most, commercial Web sites have both informational and commercial aspects. For example, Yahoo.com provides discussion areas as well as auction and commerce features. Even media sites such as Washingtonpost.com carry commercial advertising and may have e-commerce features such as direct payments to obtain access to archived stories. Certain legal requirements may apply to commercial transactions, whether the transaction relates to the sale of information or the sale of tangible items. For example, for consumer protection purposes, the EU Directive on electronic commerce requires Web site operators to provide certain notices before entering into contracts online; but this applies equally to contracts involving information and contracts involving other goods and services.

- **Which government agencies have responsibility for regulating and controlling the lawfulness of the content of "informational" Internet sites?**

We know of no government agencies in North America or Europe that are set up solely to regulate the content of Internet sites. The lawfulness of media content is controlled by consumer protection agencies and trade regulatory agencies of general jurisdiction, as well as to prosecutors and the courts, which act case-by-case to enforce laws of general applicability to both online content and off-line content. Certain types of commercial content, such as advertising, for example, are regulated by the Federal Trade Commission in the United States.

That agency applies the same rules to online and offline content, but these rules do not include licensing or the other types of regulation applicable to broadcast media (see answer to next question).

- **Is the distribution of Internet-based advertising regulated (controlled) in the same way as it is in print and television?**

The way in which advertising is regulated varies from country to country. In the United States, laws against deceptive and misleading advertising are enforced by the Federal Trade Commission. The FTC's jurisdiction extends to television and radio advertising, and the FTC has applied its laws to Internet advertising as well. In addition, several States have laws regulating "truth in advertising" that are enforced by State officials with respect to all media, including the Internet.

- **Have there been cases in which a government body (including the courts and executive branch organs) has determined that (1) the content of an Internet site contradicts the law or violates the rights and interests of other individuals or organizations, and (2) that the given content of the given Internet site must be changed?**

- **Have there been cases in which government bodies or other organizations, on the basis of overtly illegal content (connected with child pornography, the drug trade, and so forth), have tried to stop the distribution of information through an Internet site and have attempted to shut it down completely?**

As to both questions, the answer is "yes," but these cases do not involve licensing or any form of prior approval. They are handled not by the broadcast regulatory agencies but by prosecutors or consumer protection agencies of general jurisdiction, acting through the regular judiciary, which must find that existing laws have been broken by Internet sites. For example, the FTC has required Internet sites that have violated laws against deceptive advertising to change the content of their sites. Those who are subject to such orders can appeal them to neutral federal courts. The issue of illegal content most often arises in civil lawsuits or prosecutions. In such actions, a court may decide, after a full and fair hearing, that Internet content violates the law and must be changed. For example, courts finding that laws against the theft of intellectual property have been broken by Internet sites have required that those Internet sites be taken down. Similarly, courts finding that Web sites have published illegal child pornography have required those materials be taken down.

- **What government body or other organization handles the execution of such decisions (or oversees their execution)? What is the actual mechanism by which such decisions (including court decisions) are executed?**

It is important that independent courts determine these questions of whether certain content is permissible. In the U.S., Canada and most European countries, independent courts determine both whether a Web site has liability for content offenses and oversee the execution of any orders requiring content to be changed.

- **Do the creators of any types of informational Internet sites enjoy the rights of journalists? Could they, for example, be accredited at the US Congress or in other government bodies where accreditation has in the past only been provided to journalists and TV or radio correspondents? On the basis of what legal statutes have the creators of Internet site become able to enjoy such rights? Aside from accreditation, what is the full extent of the rights that such people enjoy?**

Yes, online journalists have qualified for rights to cover significant sporting events, such as the Olympics, and U.S. government events, such as White House press briefings. There are very few rights reserved by statute to journalists under U.S. law, and those rights typically involve questions of neutral and fair access to government-sponsored events where there may not be sufficient resources for all journalists to attend. For example, press conferences can often accommodate only a certain number of journalists. U.S. law provides that those who would seek to attend such press conferences be dealt with in a neutral and reasonable manner. Now that Internet news organizations do provide information to a significant proportion of the population, online journalists have been granted press credentials to such events.

It is important to recognize, however, that, with the exception of administrative rules or practices giving journalists special access to government office buildings, there are no "special rights" available to journalists in the United States. Freedom of information laws, for example, apply to all people, not just journalists, and the freedom of expression rights in the Constitution apply to all citizens equally. Journalists are not licensed, and freelance journalists are free to practice their craft whether their work will be printed in magazines, online or not at all. There are a few state "shield" laws that permit journalists to protect confidential sources, and those laws typically would permit reporters working for online publications to take advantage of their provisions. In some cases, however, freelance journalists that are not employed by news outlets have been denied rights to protect confidential sources.

- **Is there any difference in the legal status (in terms of rights and responsibilities) between "commercial" and "informational" sites?**

No. It is difficult to draw any such distinctions because Web sites so often have both informational and commercial aspects.

- **Which country's law could be applied, for example, to a French-language Web site with a .de domain hosted by an American provider?**

The answer would depend on all the facts involved in the case. The two most important factors are where the creator of the content resides (or in the case of a business, where it is established) and what country the content was targeted towards. There is also a distinction between what country's law applies and what country's courts have jurisdiction over the content provider. More than one country may have jurisdiction over the creator of online content. In both Europe and North America, the emerging rule for Internet jurisdiction focuses on the totality of contacts the creator of the Web site has with the country that seeks to exercise jurisdiction over the Web site. The country in which the creator of the content resides is most

often found to be the country whose law should apply. Under the European Union's E-Commerce Directive, for example, the presumption is that the law of the country of origin should apply to any disputes concerning the Web site. As the preamble to the EU Directive states, "the place of establishment of a company providing services via an Internet Web site is not the place at which the technology supporting its Web site is located or the place at which the Web site is accessible but the place where it pursues its economic activity." Under both European and U.S. law, the issue of the language of the site is seldom a determining factor, although it may be considered along with a range of other factors in determining whether a Web site has targeted a particular population. The issue of the nationality of the domain name would be considered in evaluating the question of "targeting," but would be less important than the issue of who created the content.

- **Are there cases in which the creators of an Internet site post a proviso that the site is not intended for use by citizens of a certain country, since its content violates the laws of that state (for example, an American site containing Nazi information which indicates that the site is not intended for German or French citizens)?**

Yes. The question refers to the *Yahoo!* case in Paris, in which a French court required a warning to be posted on the Yahoo.fr site that was intended for French consumers that certain searches on the global Yahoo.com site could lead to material that would be illegal under French law. In addition to specific warnings such as these, Web sites often limit the countries in which they will do business. E-commerce sites, for example, will determine which countries they will serve and will attempt to take orders only from consumers in those countries. The issue is more difficult as to Internet publishers that seek to convey information (such as online newspapers and magazines) because there is less of an opportunity for them to limit their Internet distribution to only certain countries.

- **Are there any states that provide "legal asylum" for unlawful sites?**

We know of no state that officially provides a haven for sites that would be illegal elsewhere. But the laws of countries differ, and companies operating Web sites typically must comply with the laws of the country in which they are located and in which the content for the site is located. Some sites that could violate European laws on the discussion of Nazi merchandise may be located in the United States, where the content of those sites would be constitutionally protected. Gambling sites that would be illegal in the United States often are run off-shore in countries such as Liechtenstein or Antigua, where they are legal. Certain activities are illegal in virtually all countries or are made illegal by treaties (child pornography, theft of intellectual property and the like). It will be difficult or impossible for companies to evade laws that are generally uniform around the world.

- **How is the problem of national jurisdiction resolved in relation to sites that are located abroad? If a site located outside the territory of a North American or European state violates the laws of that state (child pornography, drugs, terrorism, copyright, etc.), how can the authorities of that state proceed: do they try to apply laws to that foreign site which could hold the creators of such sites responsible?**

The most successful cross-border enforcement actions have involved cooperation between law enforcement agencies in the different countries at issue. For example, child pornography is prohibited in all members of the United Nations due to the Convention on the Rights of the Child, as well as other laws and treaties. Countries often cooperate in breaking rings for the distribution of child pornography across borders. In this way, the state is not seeking to extend the provisions of its laws into the territory of another state -- rather, each state is enforcing its own domestic law, but the states are cooperating to prevent criminals from being able to evade arrest.

The same is true of copyright. Due to the WIPO and GATS treaties requiring the protection of intellectual property, a baseline of protection exists in some 160 countries around the world. Law enforcement agencies often cooperate to ensure that copyrighted goods are not produced in one country and shipped to another for sale.

In cases where a particular act is against the law in one country and a perpetrator resides in another country, there may be treaties between the countries that would permit the second country to assist the first in enforcing its laws. Again, this approach permits the objective to be met without the intrusion of one country extending its laws into the territory of another country. Countries do try to extend their own laws to content hosted outside their borders where they believe that the content has effects inside their borders. The challenge, however, is in enforcing such judgements: unless the defendant is physically returned to the country claiming jurisdiction, or has assets in that country, the country may be unable to enforce its judgement without filing a second action in the country where the defendant resides.

The Council of Europe has recently drafted a Convention on Cybercrime that includes provisions on cross-border cooperation in investigation and prosecution of criminal matters. And the Hague Conference on Private International Law has been drafting a convention on jurisdiction in civil and commercial matters. But so far, there is no definite international resolution of questions of jurisdiction regarding matters arising online or offline.

- **Please describe the extent to which a unified legal environment exists in relation to Internet regulation (in part, European and international conventions). What international means does the European Community, for example, undertake in order that the Internet sites located in the territory of any EC state are subject to a unified laws?**

The European Union does have a relatively unified set of laws that regulate Internet-related disputes, but these are generally the same laws that regulate other disputes having cross-border implications. The EU has adopted an E-Commerce Directive that governs the purchase and sale of goods online. It also has passed a Data Protection Directive that governs the collection, processing and transfer of personally identifiable data on the Internet and elsewhere. It has adopted a new Copyright Directive making clear that materials made available online are protected by copyright.

The process of implementation of directives ensures that the laws of the EU Member States will be relatively uniform. Under this process, the EU passes a “directive,” which requires

a certain standard to be met in the domestic laws of each of the 15 EU member states. Each member state is then required to pass a new law to implement the directive. Accordingly, the laws of each state are made relatively uniform. There is thus no need for one country to impose its laws on another country; rather, the laws of all of the EU member states are harmonized in areas in which the EU has legislated. Still, questions arise as to which country's courts have jurisdiction over a matter.

As mentioned, there are other international agreements, notably those in the case of child pornography and copyright protection. The COE draft Convention on Cybercrime represents another effort to harmonize national law on cybercrime.

- **Please describe in detail (i.e. methods and procedures) how it is proven in court that a certain piece of information actually appeared on an Internet site, if the creators of the site already managed to delete it? Are creators of Internet sites required to keep an archive on information that appeared on the site and provide it upon the request of government bodies?**

There are no archival requirements mandated by law in Europe or North America. Such schemes are seen as burdensome and very expensive for industry.

However, both private corporations and law enforcement agencies have mastered several techniques under which it can be proved that certain content existed on Internet sites even if it is later deleted. Holders of intellectual property, such as software companies, constantly search the Web with automated programs and typically take an image or otherwise make a copy of the content of a Web site that is offering stolen software for sale. Law enforcement agencies use the same techniques for prosecuting purveyors of child pornography or other illegal materials. In addition, there are web-crawling services that often maintain archives of large amounts of Web site material, and requests can be made for copies of archived material. For example, the Google search engine (www.google.com) maintains an archived image of sites that it has catalogued for search purposes, and those searching for particular sites can access those sites via the Google archive even after the owners of the sites have taken the content down. Numerous online newspapers operate archives as well.

- **Is there a practice of publishing retractions (according to court decisions) of unreliable information that was hosted on Web sites? Have any court rulings been issued regarding the publication of retractions on Internet sites?**

We are not aware of any country that has a practice or policy of requiring the publication of retractions on a Web site for false or defamatory information. Some states in the United States, however, do have a practice of requiring that a request for a retraction be made before a lawsuit to recover for defamation begins. It is not always clear that an online retraction is sufficient to satisfy these provisions. In *It's In The Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wisc. App. 1995), the court held that an online retraction was not sufficient. In California, on the other hand, online retractions have been a part of libel litigation. When materials are published only online and not in print, a retraction published online should be sufficient.

- **What industry organizations exist for self-regulating the activities of Internet content providers; what functions do they fulfil? Are they able to discipline the creators of unlawful or unethical sites able in any way?**

There are industry self-regulatory organizations concerning advertising, maintenance of consumer privacy, the use of direct marketing information and business practices on the Internet. Participation in these groups is voluntary. These groups generally fulfil an important function. Consumers visiting a Web site that displays, for example, the TrustE logo know that the Web site will treat confidential information in the manner required by the TrustE organization. By the use of these sorts of self-regulatory bodies, consumers can give their business only to companies that have committed to a set of responsible business practices with which the consumers agree. These self-regulatory bodies have the ability to discipline members who do not comply with their obligations. Typically, the organization can dismiss a member and require it to cease displaying its logo. In more extreme cases, an organization can sue a member that has been dismissed but is still displaying its logo for trademark infringement or fraud.

The European Union Action Plan on promoting safer use of the Internet supports the creation of various self-regulatory entities such as Internet Watch in the UK and other self-regulatory measures such as providing filtering tools to end users and increasing awareness among parents and teachers. See http://europa.eu.int/ISPO/iap/decision/en.html

- **Is there any special regulation that applies to erotic or pornographic media?**

The restrictions against obscenity and child pornography that apply to off-line activities also apply to online activities. In addition, there are particular efforts in North America and Europe to limit the access of children to materials that would be harmful to them. In the United States, Congress has passed legislation attempting to limit online pornography; in one case, the Communications Decency Act was struck down by the Supreme Court as unconstitutional. In another case, the Children's Online Protection Act has been declared unconstitutional by the Supreme Court. In Europe, the focus has been on encouraging industry to take self-regulatory actions to limit the availability of pornography to minors online. In virtually all countries, however, child pornography is illegal.

- **Are there any requirements that creators of Internet sites must post their names, address and so forth?**

Under the EU directive on electronic commerce, providers of e-commerce services for remuneration must render easily, directly, and permanently accessible to the recipient of the service and competent authorities certain information, including the following: the name of the service provider; the geographic address at which the service provider is established; the details of the service provider, including his electronic mail address, which allow him to be contacted directly; and whether the service provider is registered in a trade or similar public register. There are no such requirements in the U.S., although anyone registering a domain name must provide certain information to the domain name registrar. This information is typically available to law enforcement agencies and others seeking to locate identifying information for a Web site that has engaged in criminal activities.

- **If some form of unlawful information is disseminated on a Web site, how is it determined which specific individual or corporation bears responsibility for it? (the person who has registered the domain name; the person who owns the IP address where the site is located; the Internet service provider; the person who concluded the contract with the provider; others?)**

The creator of the content is always liable. Beyond that, the answer to this question depends upon the specific law that is broken and on the actions taken by the people who are in the chain of events that the question describes. In some cases, any entity that knowingly contributed to the posting of the information on the Web site may be held liable. Entities that did not knowingly contribute to the information being posted on line -- for example, the telecommunications operator that provides access to a site but has no control over the content of the site -- may not be held liable. Generally, Internet service providers are only held liable if they have actual knowledge that illegal material is being maintained on their servers; and it is recognized that it is unreasonable for ISPs to be required to know the content of every Web site that is hosted on their servers. However, under laws such as the Digital Millennium Copyright Act in the United States and the E-Commerce Directive in the European Union, procedures have been established under which ISPs can be notified of material on their servers that may violate the law; if the ISPs take down the information within a reasonable time after receiving notification, they can avoid liability.

U.S. law specifically states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The EU Directive on electronic commerce has a three tiered approach: (1) ISPs are not liable for content where they serve only as a conduit for transmission of, or access to, the information, so long as the service provider does not initiate the transmission, does not select the recipient of the transmission, and does not select or modify the information contained in the transmission. (2) ISPs are not liable for "caching" information – storing it automatically and temporarily. (3) Service providers who host information are not liable if they do not have actual knowledge of illegal content and, if they do obtain such knowledge, act expeditiously to remove or disable access to the information.

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