

# A Landmark for Mass Media in Russia

The following article:

## *Russia's Modern Approach to Media Law*

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## Foreword

When on 15 June 2010 the Supreme Court of the Russian Federation adopted Resolution No. 16 "On the Judicial Practice Related to the Statute of the Russian Federation 'On the Mass Media'", the first international voice applauding this step was that of Dunja Mijatovic, the OSCE Representative on Freedom of the Media, who called it a "landmark resolution" and "a commendable effort to bring Russian court practice in line with international media freedom standards".<sup>1</sup>

In addition to its paying tribute to international standards, the Resolution merits recognition as it shows how Russian Media Law may be adapted to the changed media environment, a task that the Russian legislator has not explicitly handled and that therefore has become an issue for the courts. In several of the 38 points contained in the Resolution, the Supreme Court instructs lower courts as to how to interpret and apply the Statute on the Mass Media of 1991 to digital and Internet based services in today's market. Through these instructions, as well as via its comments on other areas relevant to the media, the Supreme Court fills in the gaps in the overall legal framework applicable to mass media.

The Resolution provides more than simply guidance for Russian courts. It offers an approach to a more modern legal framework that Russia might provide for the audiovisual sector. For this reason, the content of the Resolution needs to be made accessible to a much wider audience than Russian courts. This requires translating the original Russian text into other languages, on the one hand, and explaining its meaning and context to readers who lack education in the Russian legal system, on the other hand.

This IRIS *plus* does both. Its lead article highlights the most important commentaries of the Resolution and pinpoints to which provisions of the Statute on Mass Media or other legal texts they relate. The ZOOM-part contains the translation of the full text of the Resolution into the language of this publication. It should be noted that translating the Resolution was a comparative legal study in itself given that a significant part of the Russian legal terminology and concepts have no equivalent in many other countries and their respective languages. This is certainly true for English, German and French, the official working languages of the European Audiovisual Observatory. In case of doubt we recommend also consulting the original Russian version of the Resolution, which is available at: <http://merlin.obs.coe.int/redirect.php?id=12489>

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1) See Press Release of the OSCE Representative on Freedom of the Media of 16 June 2010, available at <http://www.osce.org/fom/66479>

Drawing the circle to a close, the related reporting of this IRIS *plus* focuses on international media freedom standards set by the European Court of Human Rights in more recent decisions that might guide the Russian Supreme Court when it makes pronouncements on future issues concerning the mass media.

Strasbourg, February 2011

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# Russia's Modern Approach to Media Law

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## **I. Introduction to the procedure for the adoption of resolutions by the Supreme Court**

In June 2010, Russia's highest court adopted for the first time in its history a coherent interpretation of relevant case law in relation to the mass media, editors and journalists.

To recall some of the background, according to the Constitution of the Russian Federation (Art. 126)<sup>1</sup> the supreme judicial body for civil, criminal, administrative and other cases under the jurisdiction of common courts is the Supreme Court of the Russian Federation (hereinafter "the Supreme Court"), which among other duties shall "provide explanations on the issues of court practice". According to the Statute "On the Judicial System of the RSFSR",<sup>2</sup> which is still in force, explanations introduced by the Plenary Meeting of the Supreme Court are binding for both the courts of law and other state bodies, as well as for state officials<sup>3</sup> who apply the law. The binding nature of the explanations is stipulated by Art. 56 ("Powers of the Supreme Court of the RSFSR") of the Statute.

According to V.V. Demidov, at the time Secretary of the Plenary Meeting of the Supreme Court of the Russian Federation and meanwhile retired, such explanations represent a "specific form of court precedent". They generalize on the approaches and current trends developed by the case law for a specific category of civil or criminal cases and are based upon the experience and knowledge of the judges, practicing attorneys and legal scholars. Styled as precise explanations, they differ from commentaries published by legal scholars and experts inasmuch as the latter are mostly based on the commentator's personal vision of how a particular norm should be interpreted. "Explanations that the Supreme Court adopted in its plenary meetings as resolutions become a guide that must be applied in order to rule in a lawful, well-grounded and just way", said Judge

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1) The Constitution was adopted by popular vote on 12 December 1993. See <http://constitution.ru/> for the official translations of the Constitution into English, German and French.

2) RSFSR stands for Russian Soviet Federative Socialist Republic. Statute of the RSFSR of 8 July 1981 (last amended on 7 May 2009) "On the Judicial System of the RSFSR" (О судебной системе РСФСР) / "Vedomosti VS RSFSR", 1981, N 28, st. 976.

3) According to Russian law an official means a person who exercises the functions of a public officer on a constant or temporary basis, or is vested with special authority, that is, a person who is vested, pursuant to the procedure established by law, with managerial powers in respect of persons who are not officially subordinated to him, as well as a person exercising organisational-and-managerial or administrative-and-economic functions in state bodies, bodies of local self-government, governmental and municipal organisations, in the Armed Forces of the Russian Federation, or in other troops and military regiments of the Russian Federation (see, e.g. Art. 2.4 of the The Code of Administrative Offences of the Russian Federation (No. 195-FZ of 30 December 2001) in English translation at <http://www.russian-offences-code.com/SectionI/Chapter2.html>)

Demidov.<sup>4</sup> These recommendations, although they are highly persuasive, are, however, not law *per se*. Therefore, the Supreme Court sees no collision between Art. 56 of the Statute “On the Judicial System of the RSFSR” and the Constitution, which stipulates that “judges shall be independent and submit only to the Constitution and the federal law” (Art. 120, para. 1).

The draft of the Resolution *О практике применения судами Закона Российской Федерации «О средствах массовой информации»* (On Judicial Practice Related to the Statute of the Russian Federation “On the Mass Media”) was developed since 2009 by a working group of the Supreme Court of the Russian Federation headed by deputy Chief Justice Vladimir Nechaev, with Vyacheslav Gorshkov serving as Judge-Rapporteur. In December 2009, five “external” experts in media law were brought into the group.<sup>5</sup> The expanded team met about a dozen times to discuss amendments to the draft.

In spring 2010 the final draft was approved by the working group, then by the Council of legal scholars and experts (a permanent body of the Supreme Court), and thereafter sent out to the regional courts, interested public bodies (the Prosecutor-General, the Administration of the President of the Russian Federation, the Ministry of Justice, the Ministry of Communications and Mass Communications, and the Federal Service for Supervision of Communications, Information Technologies and Mass Media), legal research institutions and colleges, key mass media outlets, etc. Their representatives were invited to participate in the discussion of the draft held on 20 April 2010 at the Plenary Meeting of the Supreme Court. At the Plenary Meeting the text was approved by a formal vote, but – in order to take into account a number of suggestions presented by speakers at the session – an editorial group was formed comprising the speakers and the key working group members. This group was assigned to find a consensus. After about another dozen meetings of the group the consensus was found and at the Plenary Meeting, on 15 June 2010, all 78 judges of the Supreme Court, who were present, unanimously approved in a point-by-point vote the final text of the Resolution that was subsequently published in the official gazette *Rossiyskaya gazeta* on 18 June 2010.<sup>6</sup>

## II. Foundations of the Media Regulation

The Resolution of 15 June 2010 No. 16 “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’” (hereinafter – the Resolution), adopted by the Supreme Court, sets out the important political and legal principle that the “freedom to express opinions and views and the freedom of mass information are the foundations for developing a modern society and a democratic state”, thus underlining the place and role of the free media in the system of institutions and values of the Russian State. Courts should take this principle into consideration in all cases in which this freedom is challenged in the name of values that are not exactly the foundations for developing democracy in the Russian Federation, such as public morals or the reputation of citizens and companies.

Limitations on the freedom of mass information, as the Resolution reminds, are admissible exclusively if imposed by a federal statute of the Russian Federation and cannot be introduced

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4) Interview of judge V.V.Demidov to correspondent of journal “Advokatskie vesti” (Адвокатские вести) K. Lisukova (publication date unclear, most likely released in 2004). See the official website of the Supreme Court at:

[http://www.supcourt.ru/print\\_page.php?id=740](http://www.supcourt.ru/print_page.php?id=740)

5) Dr. Yury Baturin; Dmitry Golovanov, Viktor Monakhov, Dr. Mikhail Fedotov and this author. Incidentally, two of the five are correspondents of IRIS, the monthly legal publication of the European Audiovisual Observatory, see [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/index.html](http://www.obs.coe.int/oea_publ/iris/iris_plus/index.html).

6) Постановление Пленума Верховного суда Российской Федерации “О практике применения судами Закона Российской Федерации «О средствах массовой информации»” No. 16. (Resolution of the Plenary of the Supreme Court of the Russian Federation “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’” No. 16.) See the Russian text at <http://merlin.obs.coe.int/redirect.php?id=12489>. An official English translation is available on the website of the Supreme Court at: [http://www.vsrfr.ru/vscourt\\_detale.php?id=6786](http://www.vsrfr.ru/vscourt_detale.php?id=6786) and [http://www.vsrfr.ru/vscourt\\_detale.php?id=6787](http://www.vsrfr.ru/vscourt_detale.php?id=6787). A clearer unofficial translation into English by this author is included in the Zoom section accompanying this article.

by any other legal act. The Supreme Court refers here to the provisions of Art. 55 para. 3 of the Constitution of the Russian Federation, which stipulates that the rights and freedoms of a person and citizen may be limited only by a federal statute to the extent necessary to protect the foundations of the constitutional system, morals, health, rights and legal interests of other persons, and to defend the country and the security of the state.<sup>7</sup> Therefore, if judges are adjudicating on the question whether or not media professionals may be exposed to liability charges, the judges are instructed to verify possible limitations on the right to freedom of information of the media professionals are indeed covered by a federal statute (and not solely, for example, by regional statutes, decrees of the President or governmental resolutions).

The Resolution enumerates international covenants that regulate freedom of expression and freedom of mass information and are binding for the Russian Federation. In this regard the Resolution steps out of routine by referring the Russian courts not only to the relevant provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights but also to the rarely recalled Final Act of the Conference on Security and Cooperation in Europe (CSCE) and the CIS Convention on Human Rights and Fundamental Freedoms.<sup>8</sup>

### III. Censorship

An important place in the Resolution is taken by the Supreme Court's commentary on the provisions in the Statute of the Russian Federation "On the Mass Media"<sup>9</sup> (hereafter – Statute on the Mass Media) that refer to the ban on censorship (point 14<sup>10</sup>). Although in general the Resolution's statement is trivial the text provides some curious nuances.

The courts are reminded that according to Art. 3 para. 1 of the Statute on the Mass Media censorship is the demand made by officials, state bodies, or local self-government bodies, organizations or public associations that the editorial office of a mass medium or its representatives (in particular the editor-in-chief or his/her deputy) obtain from them prior approval for the publication of messages and materials (except for cases when the official is an author or interviewee), as well as for the suppression of the dissemination of messages and materials<sup>11</sup> or separable parts thereof.

The Supreme Court notes that officials have indeed the right to demand that their prior approval be given, when the subject matter to be disseminated consists of their own materials or interviews given to journalists. By contrast, the law does not foresee a corresponding obligation of the journalist to obtain prior approval for disseminating this type of information. Therefore, the Supreme Court's message is that while such a demand is not an act of censorship, a journalist's refusal to provide the transcript for an advance agreement on it is not punishable. This is important for court cases on the content of media materials disseminated on the basis of interviews because the Supreme Court's reading of the provision allows the editorial offices to edit interviews independently (under the condition that they do not violate copyright law). This rule is even more evident if a journalist makes his own story based on the interview without "distortion of its meaning and the words of the interviewee" (point 14).

According to the Supreme Court it is a different question under what conditions the founders of the mass medium (whose status resembles in many ways that of owners of the media outlet)<sup>12</sup>

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7) This article of the Constitution in its turn follows the official Russian translation of the European Convention on Human Rights where the word "law" (e.g. in Articles 5-12) was interpreted as "закон", or "statute".

8) See "Commonwealth of Independent States: Convention on Human Rights" by Andrei Richter in IRIS 1995-6: Extra, available at: <http://merlin.obs.coe.int/iris/1995/6/article100.en.html>

9) Statute of the Russian Federation "On the Mass Media" No. 2124-1 of 27 December 1991 as of 8 December 2003 (in English): <http://merlin.obs.coe.int/redirect.php?id=12475>

10) Unless otherwise stated point numbers in brackets hereinafter refer to the points of the Resolution.

11) The law does not define what it understands by "messages" and "materials". It appears, however, that messages are meant to be texts or speeches while materials can be visual and therefore refer to videos, photos etc.

12) For further details on the nature of founders see IRIS Special, "The Regulatory Framework for Audiovisual Media Services in Russia", European Audiovisual Observatory, Strasbourg, 2010.

may lawfully demand that its editorial office or its editor ask for their prior approval on messages and materials that they intend to disseminate. The answer depends on whether or not the editorial charter or a separate agreement between the founder and the editorial office (that under certain circumstances replaces the editorial charter) foresees this possibility. The Supreme Court concludes that, in the absence of such a provision, any interference by the founder with the professional independence of the editorial office and the rights of a journalist is illegal.

The Resolution explains that despite a general ban on censorship stipulated by Art. 29 of the Constitution of the Russian Federation, Arts. 56 and 87 of the Constitution allow for a possibility of limiting freedom of mass information as a temporary measure in case of a state of emergency or the martial law (although these articles do not specify that censorship is indeed such a measure). In these cases censorship can be imposed and enforced following the procedure established by the Federal Constitutional Statutes<sup>13</sup> "On the State of Emergency" and "On the Martial Law".

#### IV. Title of the media

The Resolution indicates that the title of a media outlet is not a statement as such, since "its function is essentially to identify the given media outlet for its actual and prospective audience" (point 10). Therefore the title may not be evaluated in court as to whether or not it reflects the "real state of affairs". Thus a refusal to register a media outlet based on the fact that its title does not reflect the "real state of affairs" is illegal. This clarification closely follows the judgment of the European Court of Human Rights in the case of *Dzhavadov v. Russia* (Application no. 30160/04, 27 September 2007).

The Supreme Court adds that a court may still evaluate the title of a media outlet regarding the presence or absence of an abuse of the freedom of mass information in the terms of Art. 4 para. 1 of the Statute on the Mass Media. For example, the title shall not contain appeals to exercise terrorist activities, advertising for pornography or the cult of violence and cruelty (all listed in Art. 4 as abuse).

It goes on to discuss cloning of titles of mass media (i.e., titles of channels and the programmes within a channel's schedule) and in particular court cases where the plaintiff argues that his media outlet was denied registration on the grounds of Art. 13 para. 1 subpara. 4 of the Statute on the Mass Media (when a mass medium with the same form of dissemination of mass information has already been registered under the same name). The Supreme Court reminds the judges that the statute refers to cases in which the titles are identical. Therefore a refusal to register the media outlet on the grounds that the new title is confusingly similar to a title already registered is illegal. Thus Roskomnadzor,<sup>14</sup> the registration body of the executive branch, is denied the right to rule on similarity of titles.

The Supreme Court also addresses the problem of similar titles, which is quite widespread in the Russian media. It confirms that the use of mass media titles that are similar to the extent that they can be confused with each other may mislead the audience. In that case the protection of the persons holding the rights to the title of the mass media is enforced by the means foreseen by the existing legislation. Thus, without being explicit, the Supreme Court most likely refers to Part 4 of the Civil Code of the Russian Federation<sup>15</sup> dealing with the regulation of intellectual property and to the Federal Statute "On Protection of Competition".<sup>16</sup>

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13) Federal Constitutional Statutes have a higher status than Federal Statutes, they are adopted following a more complex procedure and may not be vetoed by the President.

14) Roskomnadzor is a Russian abbreviation for the Federal Service for Supervision of Communications, Information Technologies and Mass Media under the Ministry of Communications and Mass Communications.

15) Part 4 of the Civil Code of the Russian Federation of 18 December 2006 N 230-FZ. See more on the law in "Transformation of Authors' Rights and Neighbouring Rights in Russia" by Dmitry Golovanov in IRIS *plus* 2008-2.

16) Federal Statute "On Protection of Competition" of 26 July 2006, N 135-FZ.

## V. Regulation of online media

The Supreme Court made a bold step and tailored the norms of the Statute on the Mass Media, which was adopted in 1991 and hence before the phenomenon of the Internet had come to Russia, to the social relations that characterise the virtual world and that require a legal framework. Neither has the text of the Statute on the Mass Media been amended to take into account these new relations, nor was a special statute addressing Internet-related legal issues ever adopted. As a result the legal framework for interactive and online services was quite unclear and allowed for different interpretations of the potentially applicable norms. The Supreme Court proved its courage in applying the logic of the Statute on the Mass Media to the relations between the providers and users of online services.

Art. 24 para. 2 of the Statute on the Mass Media allows for “the rules established for radio and television” to be applied “to periodical dissemination of mass information via teletext and videotext systems and other telecommunications networks”. The Supreme Court says that in doing so the courts shall take into account the peculiarities of disseminating mass information online (point 6). According to the Resolution, the main peculiarity is that there is no mass media product (in the sense of Art. 2 of the Statute on the Mass Media) in the online process of dissemination of mass information. Without a physical product, dissemination of a product is impossible, and therefore online sites are not to be considered as a form of mass media *per se*. This disputable logical construction leads the Supreme Court to important legal conclusions. The main one is that websites are not subject to mandatory registration as they would be if they were to be considered mass media outlets. Thus the Resolution confirms the legal tradition that has emerged in Russia in the absence of clear rules, namely that the registration of websites can be done on a voluntary basis only.<sup>17</sup> If the registration takes place then the authors of online services acquire the status of journalists with all the rights and privileges foreseen by the Statute on the Mass Media. Many websites seek such registration because they want to receive accreditation with state bodies for their reporters. Now registration will become easier because point 6 of the Resolution stipulates as follows:

“According to Article 1 of the Statute of the Russian Federation *On the Mass Media*, freedom of mass information includes the right of any person to found a mass media outlet in any form that is not prohibited by the law. Starting Internet websites and using them to periodically disseminate mass information is not banned by the law. Considering this and based on the comprehensive list of grounds to refuse state registration of a mass media outlet set out in part 1 of Article 13 of the mentioned Statute, the registration authority has no right to refuse the registration of an Internet website as a mass media outlet should its founder express the wish to obtain such a registration.”

In other words, registration is not necessary but if requested it should always be provided.

On the other hand, if a website is registered as a mass media its staff bears the same responsibilities as journalists. The site itself is subject to the system of warnings from Roskomnadzor or a public prosecutor in cases of abuse of the freedom of mass information. Such warnings may eventually lead to the site being forced to close down as a media outlet (the procedure is described below in the section on “Abuse of the freedom of mass media”), although in such a case it would probably be able to continue to operate as a regular website. These consequences deter many website operators who therefore refrain from requesting registration. The Resolution acknowledges that those who violate the law when disseminating information through Internet websites not registered as mass media outlets shall be subject to penal, administrative, civil, and other liability under the legislation of the Russian Federation. However, they may not be subjected to the specific provisions foreseen by the legislation on the mass media (point 6) among which are stricter penalties for dissemination

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17) See further reasoning in IRIS Special, “The Regulatory Framework for Audiovisual Media Services in Russia”, 2010, p. 7.

in the mass media of extremist calls, insult or slander (Arts. 129 and 130 of the Criminal Code of the Russian Federation).

The Resolution provides a vital clarification on the issue whether there is a need to obtain a broadcasting licence to disseminate audiovisual programming online. If Art. 24 para. 2 of the Statute on the Mass Media were applicable to the Internet, then the rules established for broadcasting including the need to obtain a licence would also have to be applied. The Supreme Court recalls that a broadcasting licence is necessary if technical means for over-the-air, wire, or cable television and radio broadcasting are used to distribute the mass media output (Art. 31 of the Statute on the Mass Media). It then considers that such technical devices are not used for disseminating mass information through websites. As a consequence, the Supreme Court concludes, a person who disseminates mass information online does not need to acquire a broadcasting licence. This explanation removes the threat for online broadcasters that performing online commercial or non-profit activities without a licence might lead to administrative liability, which would have been the case had a licence been deemed obligatory by law (Art. 14.1 and Art. 19.20 of the Administrative Code of the Russian Federation).

This explanation, which is important for the freedom of the audiovisual media, disregards, however, that at the time when the Statute on the Mass Media was adopted online broadcasting did not exist. But one might also argue that the Russian legislator failed to regulate the issue in this statute or adopt a special broadcasting statute during all these years.

Further on the Resolution reiterates that the provisions of Art. 24 para. 2 of the Statute on the Mass Media refer to the applicability of the rules established for radio and television, but only where such rules are established by the Statute on the Mass Media. As the latter refrains from the regulation of advertising, the rules established by the Statute "On advertising"<sup>18</sup> in relation to commercials in television and radio broadcasting do not apply to the Internet. This had been open to question with regard to the norms relating to the amount and time of advertising and bans or restrictions on advertising of certain types of goods and services (such as tobacco, alcohol or medical services). At the same time the Resolution mentions that general rules on dissemination of advertisements in the mass media established by the Statute "On advertising" shall be applied to those websites registered as mass media outlets. Because there are no such general rules (with a minor exception for advertising to raise funds for shared construction of real estate), the Supreme Court probably refers to such basic principles of advertising as fairness and credibility of information.

The Resolution discusses the acute issue of who has the burden of proof in the case of alleged violations of the law occurring on the Internet (point 7). It points out that notary offices are allowed to provide assistance to those who intend to sue on online offences (but before they actually file a lawsuit) in securing the necessary proof. The notary offices may do so in particular by certifying the content of an Internet website at a specific moment in time if there are grounds to believe that it will become impossible or difficult to furnish proof in the future. The Supreme Court instructs the judges that they have the right to accept such proof in cases relating to the dissemination of information online.

The Resolution also recalls that in such cases evidence may additionally be secured by the judge because the range of proof that can be provided is not limited by law (Arts. 64-66 of the Civil Procedural Code of the Russian Federation). The question of when it is necessary to secure proof is a matter to be adjudicated while taking into account the following aspects: the nature of the petition made to the court and in particular the case's subject-matter, the circumstances that require to secure such evidence and the reasons of the applicant for requesting provision of proof. In pressing cases, when preparing the court hearing and during the hearing itself, the court (judge) has the right to examine (view) the proof on the spot.

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18) See "Russian Federation: New Advertising Statute" by Andrei Richter in IRIS 2006-4/34, available at: <http://merlin.obs.coe.int/iris/2006/4/article34.en.html>

An issue dealt with in the Resolution that enjoyed intense attention by the media is the liability of the “editorial offices” of registered Internet sites for statements made by readers/viewers on the website’s fora and chat pages. If this section of the website is not pre-moderated the editorial office of such an outlet can become liable only if it receives a complaint from Roskomnadzor or a public prosecutor that the content of a communication presents an abuse of the freedom of the mass media (Art. 4 of the Statute on the Mass Media) and subsequently fails to amend (or delete) the communication and the communication has been judged to be illegal by a court. Here the Resolution draws a parallel between such fora and live broadcasts that do not make broadcasters liable in accordance with Art. 57 (“Absolution from Responsibility”) of the Statute on the Mass Media.

At the stage of editing the draft resolution representatives of Roskomnadzor strongly objected to this reasoning. Their position was based on the argument that registration as a mass media outlet assigns the editorial office of an Internet site certain responsibilities. Among such responsibilities, the basic one is editing the information disseminated by the media outlet. The way in which this duty is performed directly relates to potential liability for violations of the Statute on the Mass Media, and in particular for dissemination of extremist speech. Roskomnadzor was worried about a possible hike in extremist materials, as well as materials that propagate pornography and the cult of violence and cruelty under the disguise of comments on the websites registered as mass media.

Soon after the adoption of the Resolution, on 6 July 2010, the head of Roskomnadzor issued Order No. 420 which approved “Rules for addressing requests concerning the prohibition of abuse of the freedom of mass media by material sent to the mass media and disseminated through information telecommunication networks, Internet included”. The Rules have been drafted in accordance with the Statute on the Mass Media, Regulations on Roskomnadzor, and the Resolution.

According to the Rules, if comments that appear on websites registered as mass media seem to abuse the freedom of mass media a Roskomnadzor official makes a screenshot of the questionable material and prepares a report, to which it adds a copy of the screenshot. Immediately thereafter Roskomnadzor sends to the mass media outlet a request suggesting to remove or to edit the material. The request is signed by the head of a Roskomnadzor department and is registered and formulated following standard internal rules.

The request is to be sent to the editorial office of the online media via e-mail to the Internet address announced on their website (with a marker of notification of delivery), as well as via fax. The fact and time of the dispatch of the request must be documented. Compliance with the action suggested is checked one working day after the dispatch. In case the demand to remove the questionable material is not met or the performed editing does not result in the removal of the elements of abuse of the freedom of mass media, an official warning to the editorial office is issued. The Rules have already been used on a number of occasions.

One may doubt the legality of some of the provisions of the Rules. To begin with, the 24-hour deadline is set neither in the Statute on the Mass Media, nor in the Resolution. The absence of any time reference in the law made it impossible for the Resolution to find a requirement for the mass media outlet to act “immediately” or “as soon as possible”. Moreover, there is no obligation for a mass media outlet to indicate its e-mail address on its website, to check its e-mails every day, or to have a facsimile device. In response to this criticism raised by this author in an interview to the *Deutsche Welle* radio, the broadcaster received an inquiry from an assistant to the head of Roskomnadzor as to the time limits that exist in Germany for reacting to official complaints. In reply the station provided Roskomnadzor with a memo published on the website of both *Deutsche Welle* and Roskomnadzor.<sup>19</sup> It indicated in particular that the normal practice in Germany for website operators was to have a grace period of a week in controversial situations when consulting lawyers might be necessary to come to a conclusion.

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19) See the websites of *Deutsche Welle* (<http://www.dw-world.de/dw/article/0,,5915106,00.html>) and Roskomnadzor (<http://rsoc.ru/press/publications/news12554.htm>).

The Resolution abstains from giving guidelines on situations in which the editorial office of an online media are addressed not by public bodies and officials but by individuals who believe that their rights and legal interests were violated in comments disseminated via Internet fora and chats. Will the media outlet that ignores such a complaint be still exempt from responsibility? The discussion in the editorial group showed that the majority believed that the persons defamed should make use of their right to a refutation of the defamatory statements in the same fora and chats.

## VI. Guarantees for access to information

The Resolution clarifies some issues concerning the access of journalists to information that is of public interest. The Supreme Court reiterates that information inquiry by the editorial office of a mass medium (Art. 39 of the Statute on the Mass Media) is a legal means to seek information on the activities of state bodies, bodies of local self-government, state and municipal organizations (commercial and non-commercial), public associations, and their officials (point 15). The novelty of the explanation is that it explicitly puts both commercial and non-commercial public organisations under the obligation to provide information, while earlier the former were typically excluded for reasons of commercial secrecy.

One important instruction to the courts in relation to information requests is based on Art. 38 of the Statute on the Mass Media, which stipulates that providing data requested by the editorial office of a mass media outlet is a form of satisfying citizens' rights to promptly receive information from the mass media on activities of public bodies and their representatives. Taking into consideration "that after a long period of time the requested information may lose its currency", the Resolution instructs the courts "to examine and adjudicate such cases as quickly as possible" (point 15).

In the context of access to information the Resolution deals with the issue of accreditation of journalists (point 21). It discusses Art. 48 of the Statute on the Mass Media, which is the only article in Russian law that concerns accreditation. The Resolution contains several conclusions:

1. Accreditation provides journalists with additional possibilities of seeking and obtaining information in comparison with those who are not accredited.
2. Rules concerning accreditation by state bodies, bodies of local self-government, state and municipal organizations may not impose limitations on the rights and freedoms of accredited journalists other than those foreseen in the federal statutes (for example, the suspension of an accreditation would not be a permissible measure as it is not stipulated by a federal statute).
3. There are no grounds to refuse accreditation or to cancel it other than those listed in Art. 48 (these are: violation of the rules of accreditation and/or a court decision holding that the accredited journalist defamed the accrediting organisation).

Thus the Supreme Court in fact says that a public body may not legally deny accreditation to a mass medium previously not accredited at that body, and it instructs the courts to assist journalists who sue against such a denial.

## VII. Transparency of court proceedings

Somewhat separately, the Resolution discusses several norms that are not related to the Statute on the Mass Media, or at least not directly. The norms in question are from the Federal Statute "On the Provision of Access to Information on the Activity of Courts in the Russian Federation" that was only about to enter into force when the Resolution was adopted.<sup>20</sup> In point 17 of the

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20) The Federal Statute "On the Provision of Access to Information on the Activity of Courts in the Russian Federation" entered into force on 1 July 2010. See "Russian Federation: Transparency of Courts to Be Strengthened" by Andrei Richter in IRIS 2009-3: Extra, available at: <http://merlin.obs.coe.int/iris/2009/3/article101.en.html>

Resolution, the Supreme Court recalls that judges have no right to deny journalists access to court proceedings or to stop them from covering a particular case unless such a possibility is directly foreseen by law. Such a possibility is provided for by the procedural law related to closed sessions or in the situation where a person may be expelled from the courtroom for violation of the order of the court proceeding. Journalists may not be denied access, for example, because of a shortage of seats in the courtroom. The Resolution explains that any "closed door session" of the court of law on grounds that are not directly stipulated by the federal statutes contradicts the constitutional provisions that examination of cases in all courts shall be open. It also represents a possible violation of the right to a fair and public hearing as stipulated by point 1 of Art. 6 of the European Convention on Human Rights and also point 1 of Art. 14 of the International Covenant on Civil and Political Rights.

In point 16 of the Resolution, the Supreme Court explains under what conditions a request for information on activities of the courts may be denied. Among the circumstances foreseen by the Federal Statute "On Provision of Access to Information on the Activity of Courts in the Russian Federation" features "obstruction to justice", which is described in the following way:

"The information that may be refused according to paragraph 5 part 1 of Article 20 of the mentioned Federal Statute (the requested information presents an obstruction to justice) includes such information whose dissemination can create obstacles for execution of a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (for example, it may jeopardise the equality of the parties, the adversarial nature of the proceedings, the presumption of innocence and reasonable terms for a case examination)."

The Resolution further explains the procedures for the use of recording equipment in the courtroom. It reminds that according to the procedural law anyone (including journalists) when present at a court hearing may record the court proceedings in writing or by using audio recording equipment. The law does not oblige the person that makes the audio recording to notify the court of his doing so. At the same time the recording of a hearing by film, photo or video, or via television or radio broadcasting is allowed only with the court's (judge's) permission and the reporter is obliged to make his intention known to the court (judge). The Supreme Court provides an important reference point for judges when deciding whether or not to allow such audiovisual recording or broadcast: they shall balance the right of everyone to freedom of information, on the one hand, with the right of everyone to protect one's private life, personal and family secrets, honour and good name, secrecy of correspondence, telephone, mail, telegraph and other communications, and one's image, on the other. Thus for the first time the courts are recommended to consider in such situations the necessity to observe the right to information.

## **VIII. Protection of journalists' privileges**

Like elsewhere in the world Russian journalists, editors and media outlets enjoy certain privileges that under particular circumstances protect them from the need to check the truthfulness of the information that they disseminate and from related accusations of violating the law. They are all listed in Art. 57 of the Statute on the Mass Media, and each of them is discussed in the Resolution.

According to Arts. 57 and 35 of the Statute on the Mass Media, the editorial office, editor-in-chief and journalists of a mass medium are exempt from liability for disseminating information that is part of so-called "obligatory reports", that is statements that an editorial office is obliged to publish by law or pursuant to a court order. The Resolution (point 22) adds to the very few narrowly defined cases when the law speaks of an obligation to disseminate specific information (e.g. under the martial law) the case of broadcasting or publishing (free of charge) material for election or referendum campaigning according to the rules of the relevant legislation. Such an obligation exists, for example, for state but also private broadcasters that agree to provide airtime for campaigning and therefore must comply with the conditions set in the Federal Statute "On basic guaranties of the electoral rights and the right to participate in a referendum of citizens of

the Russian Federation".<sup>21</sup> The Resolution also includes in the list of exemptions the obligations imposed on the national state-run broadcaster by the Federal Statute "On Guarantees of Equality of Parliamentary Parties as to the Coverage of their Activities by the State-Run General TV and Radio Channels".<sup>22</sup> By doing so the Supreme Court makes a bold step towards protecting the media from liability for the contents of the campaigning messages that they disseminate. Such dissemination typically occurs without real possibility for the editors to amend the content as any attempt of interference could be considered a violation of the electoral rights of candidates. From now on all liability for pre-election statements lies with the politicians who make these statements.

The editorial office, the editor-in-chief and journalists are also exempt from liability in case the information that they disseminate is obtained from a news agency. In addition, the Statute on the Mass Media stipulates that when a media outlet is disseminating information received from a news agency it is mandatory to make a reference to the news agency which made the information available. The Supreme Court does not make the exemption from liability dependent on compliance with the reference requirement because it stipulates that in any case the outlet should prove that the disseminated information comes from a news agency (point 22).

The Supreme Court gives a crucial explanation with regard to the exemption from liability for information contained in interviews with representatives of state and local self-government bodies, state and municipal organisations, institutions, enterprises, bodies of public associations, and the official representatives of their press services. The Resolution (point 23) instructs judges that the contents of such interviews shall have a legal nature equal to that of an official response of such organisations to an information request by the mass media outlet (and in the case of disseminating the latter the media are also exempt from liability). Thus the media are now free from having to verify information provided by a variety of interviewed persons – from politicians and officials to press spokesmen. Earlier the practice of holding journalists liable for the content of interviews was quite common.

Further on the Resolution discusses a privilege related to official speeches and statements made by public officials as well as by delegates to the meetings of public associations such as political parties. There was a certain legal ambiguity as to which speeches can be considered "official". The Supreme Court held that they include, for example, speeches by an official at a scheduled meeting, held in the presence of journalists, in specially allocated premises of a building of the corresponding body, organisation or public association and in accordance with the approved agenda (point 23).

Because the media are exempt from liability only if they reproduce the words of the officials "literally", the Supreme Court explains that the Statute on the Mass Media does not necessarily require verbatim reproduction as the courts believed was the case. The Resolution states that literal reproduction is "a form of quotation that does not change the meaning of the statements, reports, materials and their fragments and where the author's words are quoted without distortion". At the same time, the Supreme Court notes that it is important to consider that every so often exact fragments of statements, reports or materials, when quoted out of context, can appear to have a different meaning to the original meaning of the statement, report or material. Thus the Resolution's interpretation of literal reproduction becomes very favourable for responsible media outlets.

Art. 57 of the Statute on the Mass Media also makes media outlets immune from liability for literal reproduction of materials taken from other mass media "which can be ascertained and called to account for a breach of the legislation of the Russian Federation on mass media". When considering the norm, the Supreme Court recalls that the "other mass media" do not need to be

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21) See e.g. "Russian Federation: Electoral Campaigning Rules Modified" by Dmitry Golovanov in IRIS 2007-1/30, available at: <http://merlin.obs.coe.int/iris/2007/1/article30.en.html> and "Russian Federation: Changes in Election Law Concern Broadcast Media" by Natalie Boudarina in IRIS 2002-8/20, available at: <http://merlin.obs.coe.int/iris/2002/8/article20.en.html>

22) See "Russian Federation: Equal Rights Law Passed" by Andrei Richter in IRIS 2009-7/32, available at: <http://merlin.obs.coe.int/iris/2009/7/article32.en.html>

necessarily outlets registered in Russia. According to the provisions contained in paragraphs 2 and 3 of Art. 402 of the Civil Procedural Code of the Russian Federation, a foreign outlet can be held liable in Russia, if the defendant organisation, its administrative body, branch or representative office are on the Russian territory or if the defendant citizen resides in Russia or if the defendant has property on Russian territory, or (even more importantly) – in defamation cases – if the plaintiff resides in Russia.

## IX. Public interest

The Supreme Court notes that there are three norms in the federal law related to mass media activities that refer to “the public interest”:

1. Art. 49 para. 1, sub-para. 5 of the Statute on the Mass Media stipulates a ban on the dissemination of information concerning the private life of citizens in the mass media without their prior consent or the prior consent of their legal representatives unless disseminating the information is necessary for the protection of public interests.
2. Art. 50 para. 1 sub-para. 2 of the same statute allows for dissemination of reports and materials produced with the assistance of hidden audio- and video recording, film recording and photography if this is necessary for the protection of public interests and provided that measures against possible identification of outsiders have been taken.
3. Art. 152<sup>1</sup> of the Civil Code of the Russian Federation specifies that the divulging and further use of the image of a citizen is allowed only with the consent of the citizen. His consent is not needed, however, if the use of the image is in state, social or other public interests.

Because the notion of public interest is not legally defined, courts are in a difficult position when adjudicating on conflicts based on different interpretations of public interest. Providing such a definition turned out to be a difficult task, especially because the laws of other European countries rarely provide examples.<sup>23</sup> Therefore the Supreme Court relies for its definition on the case law of the European Court of Human Rights.

The Resolution notes that “public interest shall be understood not as any interest expressed by the audience but as, for example, the need of the public to reveal and expose a threat to the democratic state governed by the rule of law and to civil society, to public safety, and to the environment”. The Supreme Court does not limit the notion to clear-cut examples but goes further by instructing the courts to “make a distinction between reporting facts (even controversial ones) capable of contributing in a positive way to a debate in society, concerning, for example, officials and public figures in the exercise of their functions, and reporting details of the private life of an individual who does not exercise any public functions. While in the former case the mass media exercises its public duty by contributing to imparting information on matters of public interest, it does not do so in the latter case” (point 25).

With this reasoning the Russian Supreme Court clearly follows the arguments of the European Court of Human Rights in its famous judgments concerning the cases of *Observer and Guardian v. the United Kingdom* and *von Hannover v. Germany*.<sup>24</sup> If the media disclose aspects of private life with the aim to uncover corruption or other offences of politicians and officials such an endeavour establishes circumstances that grant the editorial office immunity from lawsuits aimed at protection of private and family life. This needs to be distinguished from cases when the disclosure of private

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23) See, e.g. the Statute of the Republic of Moldova on Freedom of Expression described in “Moldova: Freedom of Expression Act Enters into Force” by Andrei Richter in IRIS 2010-9/32, available at: <http://merlin.obs.coe.int/iris/2010/9/article32.en.html>

24) Cases of *Observer and Guardian v. the United Kingdom* (Application no. 13585/88); *von Hannover v. Germany* (Application no. 59320/00).

information is done for the sake of sensation or seeks to cater to lowbrow interests of the audience. In these cases the law shall not grant protection.

This position of the Supreme Court is extremely important for the sake of political discussion in the Russian media because it allows journalists to widely use the rights provided to them by the Statute on the Mass Media and the Civil Code of the Russian Federation.

## X. Protection of confidential sources

The Supreme Court discusses another important issue for political journalism: the conditions for disclosure of confidential sources of information. The Resolution reminds the courts that they shall be guided by Art. 41 of the Statute on the Mass Media, which stipulates that the editorial office is obliged to keep the source of information secret and has no right to name the person who has provided the information with the proviso that his name not be divulged. The Resolution states that the personal data of the person making the proviso is “secret information, which is specially protected by the federal statute” (point 26). An exception applies, if the demand for disclosure is made by a court of law in connection with a case pending before that court.

By providing this explanation the Supreme Court confirms that there is no contradiction between Art. 41 of the Statute on the Mass Media quoted above and Art. 56 of the Criminal Procedure Code of the Russian Federation adopted after the Statute on the Mass Media. Art. 56 provides a list of persons who may not be called to testify in court as witnesses (attorneys, clergymen, etc.). The list does not mention journalists or editorial workers, which does not exclude in principle that there may be other groups enjoying relief from the duty to witness in court. This is confirmed by the Constitution (Art. 51 para. 2) which declares: “A federal statute may envisage other cases of absolution from the obligation to testify”. The importance of the explanation of the Supreme Court lies in reminding prosecutors and investigation bodies that are more accustomed to work with the Criminal Procedure Code than the Statute on the Mass Media which norm to apply – and that is the norm of the Statute on the Mass Media on confidentiality of sources.

And even though a court of law may still demand such a disclosure at any stage of the case deliberations, the Supreme Court makes an important clarification for the freedom of the media in this regard. The Resolution stipulates that such a demand is allowed only after “all other means to learn about relevant circumstances, which are important for the just examination and adjudication of the case, are exhausted and the public interest in disclosure of the source of information overrides the public interest in keeping it a secret” (point 26). Here again the Supreme Court follows the case law of the European Court of Human Rights.<sup>25</sup> It is clear that the Resolution obliges the courts from now on to provide reasons for why the public interest in disclosure would outweigh the necessity to keep the source secret.

## XI. Moral damages

Three months after the final adoption of the Resolution, two more points were added to the text. Both relate to the issue of moral damages and reveal the Supreme Court’s concerns over the high damages awarded by courts. Point 37 of the Resolution reminds judges of the relevant provisions of the Civil Code of the Russian Federation. According to these provisions, the violation of personal non-property rights (such as life, health, dignity, privacy, freedom of movement and freedom of residence) or other immaterial benefits (such as business reputation of legal entities or copyright) of a person by dissemination of information in the mass media, and the infliction of moral damage (physical or moral sufferings) upon a person, entitle the person concerned to claim damages. Point 38 of the Resolution is more specific insofar as it states that compensation for moral damages shall serve the specific purpose for which it was established by the law – that

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25) E.g. judgment on the case of *Goodwin v. the United Kingdom* (Application no. 17488/90).

is to compensate the injured person for his physical or moral sufferings (Art. 151 of the Civil Code of the Russian Federation). In this regard the Resolution calls upon courts to ensure that the compensation is not used for other purposes. In particular courts shall not establish circumstances that will actually limit the right to freedom of expression, including the freedom of opinion and the freedom to obtain and to disseminate information and ideas without any interference by public authorities. To underline this statement, the Resolution refers again to Art. 29 of the Constitution of the Russian Federation and Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It also refers to Art. 10 ("The Limits of Exercising the Civil Rights") of the Civil Code of the Russian Federation, which forbids *inter alia* that citizens and legal entities perform actions with the express purpose of inflicting damage on another person, and that bans any abuse of civil rights in other forms.<sup>26</sup> In this context the Supreme Court notes that the amount of compensation granted as moral damages in order to be reasonable and just (Art. 1101 para 2 of the Civil Code of the Russian Federation) "should not lead to the violation of the freedom of mass information".

These two points of the Resolution develop further the ideas that the Supreme Court reiterated in earlier resolutions such as its Resolutions "On issues of application of the law on compensation of moral damages" (20 December 1994), "On a court decision" (19 December 2003), and "On judicial practice related to disputes on the protection of honour and dignity of citizens, as well as of the business reputation of citizens and legal entities"<sup>27</sup> (24 February 2005).

## XII. Abuse of the freedom of mass media

An abuse of the freedom of mass information (Art. 4) leads to written warnings issued by authorised bodies and public officials to the editorial office of a mass media outlet (editor-in-chief) or its founder (for example, according to Art. 16 of the Statute on the Mass Media, Art. 8 and 11 of the Federal Statute "On counteracting extremist activity").<sup>28</sup> It is to be remembered that under the Federal Statute "On counteracting extremist activity" the activities of a mass media organisation may be terminated if the warning is not appealed, or deemed illegal by the court, and if the infringements are repeated within twelve months from the date when the warning was issued or if new facts are discovered that prove the carrying out of an extremist activity by the mass media organisation. The Statute on the Mass Media tolerates two repetitions of the infringements (followed by warnings) before a court order for the termination of the activity of the mass media outlet is issued and not just one as is the case under the anti-extremism act. The court shall thus impose a ban on the production and dissemination of the mass media to stop an abuse of the freedom of mass information (according to Art. 16 and 16<sup>1</sup> of the Statute on the Mass Media, Art. 11 of the Federal Statute "On counteracting extremist activity").

A case concerning the closure of a media outlet should be dealt with only by the top court of the particular subject (region) of the Russian Federation where the dominant part of the dissemination of the media outlet takes place (that is, the second instance court) (point 31). This explanation reportedly helped a media outlet, which had been shut down for extremism on the very day of the Resolution's adoption, to successfully appeal this decision of a Moscow district court.

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26) See the text of the Civil Code of the Russian Federation (Part I) in English at: <http://www.russian-civil-code.com/PartI/>

27) See "Russian Federation: Supreme Court on Defamation" by Andrei Richter in IRIS 2005-4/32, available at: <http://merlin.obs.coe.int/iris/2005/4/article32.en.html>

28) See its text in English at [http://medialaw.ru/e\\_pages/laws/russian/extrimist.htm](http://medialaw.ru/e_pages/laws/russian/extrimist.htm). See also "Russian Federation: How to Prevent Extremism in Mass Media" by Natalie Boudarina in IRIS 2002-8/15, available at: <http://merlin.obs.coe.int/iris/2002/8/article32.en.html>, "Russian Federation: Electoral Campaigning Rules Modified" by Dmitry Golovanov in IRIS 2007-1: 16, available at: <http://merlin.obs.coe.int/iris/2007/1/article30.en.html>, "Russian Federation: Anti-extremism Amendments" by Nadezhda Deeva in IRIS 2007-9/19, available at: <http://merlin.obs.coe.int/iris/2007/9/article27.en.html>, and "Russian Federation: Warning to Broadcaster Annulled" by Andrei Richter in IRIS 2009-8: 18/28, available at: <http://merlin.obs.coe.int/iris/2009/8/article28.en.html>

The Supreme Court explains that the warnings issued by the authorised bodies<sup>29</sup> or their officials represent an authoritative declaration that leads to legal consequences for the founder/co-founders of the mass media outlet and/or its editorial office (editor-in-chief). Earlier in a substantial number of cases<sup>30</sup> the authorised body would attempt to prevent court deliberations on the legality of warnings by claiming that they just forewarned a person to refrain in the future from illegal activity, and to prevent offences. Thus, so was the argument, their letters of warning had no direct or negative influence on the activity of the person. Therefore they could not be disputed in court. Disagreeing with this reasoning, the Supreme Court stresses that disputes about warnings are susceptible to judicial examination in accordance with the procedure stipulated in Chapters 23 and 25 of the Civil Procedural Code of the Russian Federation (point 27).

These two chapters are part of Subsection III of the Code ("Proceedings on Cases Arising from Public Legal Relations"): Chapter 23 describes the general provisions, whereas Chapter 25 determines the procedure for disputing decisions and actions (inaction) of state bodies, officials and governmental employees.

Russian judges have also received a number of additional reference points on how to deal with disputes concerning the legality of warnings (point 28). When determining whether indeed an abuse of the freedom of mass information took place (and the warning is therefore legal) the courts shall now

"take into account not only the words and phrases (wording) in the article, television or radio programme but also the context in which they were delivered (such as aim, genre and style of a publication, a programme or a part of it, whether they can be considered as an expression of opinion in the sphere of political discussions or as an attempt to draw attention to the discussion of socially important matters, and what is the attitude of the interviewer and/or the representatives of the editorial office of the mass media outlet towards the expressed opinions, judgments or statements), as well as take into account the social and political situation in the country at large or in one of its parts (depending on the area of dissemination of the particular mass medium)".

Again the Supreme Court follows the position of the European Court of Human Rights expressed in its judgments in *Jersild v. Denmark*,<sup>31</sup> *Leroy v. France*<sup>32</sup> and other cases. It seems that not only the courts but also the authorised bodies (Roskomnadzor and the public prosecutor's office) and their officials will have to take the above quoted points into consideration when substantiating to the editorial offices their demands relating to an abuse of the freedom of mass information.

Without making it explicit, the Resolution seems to suggest that the courts when adjudicating on a possible abuse of mass information clarify whether or not the editor-in-chief aimed at such an abuse. It is the editor-in-chief who according to the Statute on the Mass Media takes the final decisions on the production and issue of a mass medium and it is he who bears responsibility for respecting the conditions that the Statute on the Mass Media and other legislative acts of the Russian Federation (para 10 part 1 Art. 2 and part 5 Art. 19) impose on the activity of a mass medium.

When adjudicating on the attitude of the interviewer and/or editors to statements made by the participants of live broadcasts, the courts shall "take into account the peculiarities of television and radio broadcasting which limit the possibilities of journalists and editors to correct, clarify, interpret or comment" (point 28). It appears that the explanation does not refer only to the so-

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29) That is Roskomnadzor and any office of the public prosecutor.

30) Like in the case of the *South Park* cartoon series, see Russian Federation: "Warning to Broadcaster Annulled" by Andrei Richter in IRIS 2009-8/28, available at: <http://merlin.obs.coe.int/iris/2009/8/article28.en.html>

31) Case of *Jersild v. Denmark* (Application no. 15890/89).

32) *Arrêt de la Cour européenne des Droits de l'Homme (cinquième section), affaire Leroy c. France, requête n° 36109/03 du 2 octobre 2008.*

called live “author’s programmes” where broadcasters benefit from an exemption from liability concerning the content (Art. 57 para. 1 point 5 of the Statute on the Mass Media).

In this context, the Resolution directly quotes point 5 of the Declaration on freedom of political debate in the media of the Council of Europe’s Committee of Ministers (2004):<sup>33</sup> “The humorous and satirical genre, as protected by Article 10 of the [European] Convention [on Human Rights], allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts”. This reference, which can also be found in earlier resolutions of the Supreme Court,<sup>34</sup> helps to establish a more enabling environment for the dissemination of political cartoons, satirical shows, etc., in the media. Exaggeration and provocation in these genres are now considered permissible in the media and shall not serve as grounds for liability in defamation lawsuits.

Further on the Supreme Court notes that Art. 4 para. 1 of the Statute on the Mass Media considers it to be an abuse of the freedom of mass information if mass media are used for committing penal offences. At the same time, courts have exclusive jurisdiction to rule on criminal cases (part 1 of Art. 8 of the Criminal Procedural Code of the Russian Federation). Therefore neither Roskomnadzor, nor the prosecutor are entitled to decide whether the mass media has indeed been used for committing a penal offence. Thus the legality of a warning on this type of abuse shall be determined with consideration of whether an enforceable conviction or any other judicial decision on the criminal case exists (point 28).

### **XIII. Suspension of activity, suspension of coverage**

The Resolution recalls that according to the Statute on the Mass Media the legal nature of the suspension of media activity is to temporarily prohibit the production and/or distribution of the output of the mass media outlet.

The Supreme Court stipulates that suspending the activity of a media outlet represents an exceptional interim measure in support of a claim. Courts shall only use it to the extent that they may rule on a request for a preliminary decision in cases concerning the termination of the mass media activity directly foreseen by the Statute on the Mass Media or the Federal Statute “On counteracting extremist activity” (points 29 and 30). This leads the Supreme Court to two important conclusions. The Resolution points out that in other civil cases concerning the activity of the mass media, media activity may not be suspended on application for interim measures. Along with this guidance, the Supreme Court denies (but only in civil cases) courts the right to ban editorial offices from preparing and disseminating new materials on certain events or persons. A different court decision would not meet the aims set in Art. 139 (“Grounds for Interim Measures”) of the Civil Procedural Code and “will not be necessary to secure the authority and impartiality of justice” (point 30). Such a ban would also compromise justice because, as is mentioned in point 17, the court (judge) may not prevent mass media representatives “from covering a particular court case, with the exceptions foreseen by statute”. The Supreme Court aims at cases where plaintiff files a request for a preliminary injunction with the court to stop the media outlet from publishing any new materials that concern him.

The explanations of the Supreme Court on this matter expand the freedom of expression beyond the limits set in Art. 10 of the European Convention on Human Rights by brushing away any possibility to limit such freedom by banning the coverage of certain subjects. The explanations are related to the recent (2009) judgment of the European Court of Human Rights in the case of *Obukhova v. Russia*,<sup>35</sup> but at the same time go far beyond what was said in the judgment.

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33) See <https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en>

34) For example in the Resolution “On judicial practice related to disputes on the protection of honour and dignity of citizens, as well as of the business reputation of citizens and legal entities” (24 February 2005), see “Russian Federation: Supreme Court on Defamation” by Andrei Richter in IRIS 2005-4/32, available at: <http://merlin.obs.coe.int/iris/2005/4/article32.en.html>

35) Case of *Obukhova v. Russia* (Application no. 34736/03).

In this judgment, the Strasbourg-based European Court of Human Rights referred to a request of a plaintiff (a judge) to a Russian court to order interim measures, and notably an interlocutory injunction against a newspaper to prevent publication of “any articles, letters or materials about the factual circumstances of the traffic accident of 22 September 2001, as well as about the court proceedings concerning that accident until they [had] finished”. While the European Court of Human Rights ruled that such a measure was not “necessary in a democratic society” (27), it did not contest that the interference was “prescribed by law”, namely the provisions of the Code of Civil Procedure of the Russian Federation governing application of interim measures. Moreover, as regards the legitimate aim of the interference, the Court was prepared to accept that the injunction envisaged “maintaining the authority of the judiciary” as one of its legitimate aims. The Court did so because this phrase includes the protection of the rights of litigants and because the purpose of the injunction was to enable the defamation action to be heard without the plaintiff’s rights in the meantime being prejudiced (21).

The Supreme Court made another major remark concerning the discussion on interim measures in civil cases where a mass media outlet is the defendant. In order to comply with the requirements of Art. 140 para. 3 of the Code of Civil Procedure of the Russian Federation (“measures granted in response to a claim shall be proportional to the plaintiff’s claim”) the courts shall consider the nature of the offences that took place (particularly, whether they can be regarded as cases of abuse of the freedom of mass information or if they represent other violations of the mass media law), but also assess the negative consequences for the freedom of mass information which can be caused by imposing such measures (point 30).

## XIV. Conclusion

The Resolution is unique and a long-awaited and important event in the legal regulation of Russian mass media. By analysing its text one remarks the extraordinary character of its essential content.

The Resolution’s approach to various norms is also important for the neighbouring countries where the same or similar norms exist in the media law because their top courts are attentive to such acts of the Supreme Court of the Russian Federation. The Resolution was welcomed by international institutions such as the OSCE Representative on Freedom of the Media<sup>36</sup> and was positively reviewed in the Western press.<sup>37</sup>

In our view the significance of the Resolution is not only to set uniform rules for court practice. Adopted at a critical stage in national journalism, it pushes the editorial offices to provide an honest service aimed at truthfully and critically informing the public on issues of common interest, and most of all, on political developments in Russia. At the same time, journalism as mass entertainment for the sake of ratings and maximum profits now gets less protection in courts.

The Resolution allows Russian media to engage in socially responsible journalism without being threatened by illegal pressure in the courtroom, extreme demands by state bodies and excessive bureaucratic procedures. By adopting it the Supreme Court in fact instructs the judges to stand guard of a professionally honest quality journalism in Russia.

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36) See [http://www.osce.org/fom/item\\_1\\_44628.html](http://www.osce.org/fom/item_1_44628.html) and [http://www.osce.org/fom/item\\_1\\_46159.html](http://www.osce.org/fom/item_1_46159.html)

37) See e.g. Richter A, “Russian media granted greater freedom”, *The Guardian* (London), 22 June 2010, p. 30, available at: <http://www.guardian.co.uk/commentisfree/2010/jun/21/russia-court-mass-media-freedoms-journalism#start-of-comments>