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Piracy Spat Unfit for Courts

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In 2004, Mark Zuckerberg founded Facebook in his Harvard University college dorm when he was 19. It has attracted more than 500 million users and has more visitors than Google.

Facebook, worth more than $15 billion, has become one of the world's fastest-growing businesses. This commercial and cultural phenomenon is the product of insight, creativity, perfidy and greed — a common blend needed to start a successful business. Zuckerberg's former friends, Cameron and Tyler Winklevoss, claim that Zuckerberg stole their idea when they asked for his assistance with a site called HarvardConnection that they had been working on. The argument has been in court for six years, and although a settlement reportedly worth $65 million was eventually reached, the Winklevoss brothers are still suing.

In 2006, Pavel Durov, then a 21-year-old student at St. Petersburg State University, founded VKontakte, now one of the most popular web sites in Russia. It looks, operates and makes money very much like Facebook. The resemblance is so striking that if VKontakte had been launched in the United States, it would have been surely buried under a barrage of legal actions.

In an ironic twist of events, the outcome of the battle for the Russian market between Facebook and its clone depends to large extent on the result of a legal wrangle in which VKontakte seeks to invoke a legal instrument that exists in the United States but not in Russia.

VKontakte makes it easy to watch and upload movies. In a way, the site is a mash-up of Facebook and YouTube, with 90 million users uploading videos — many of which are pirated. VKontakte, like almost all social networks, is packed with stolen content.

In 2008, the Russia State Television and Radio Company — or

VGTRK, which owns 10 national and dozens of regional television and radio stations, as well as RIA-Novosti — discovered its movies on the VKontakte site. At that stage, the social network should have sought a settlement but refused to do so.

The media giant sued and after several setbacks won an important case in the St. Petersburg-based Northwest Federal Arbitration Court. "According to the court's logic," VKontakte CEO Pavel Durov said, "the copyright owners can shut down any project by uploading their content and then raising legal action without giving prior notice to the site."

On Oct. 18, the court ruled in favor of the Internet company. The Russian legal community is divided over this decision. Some say it is wrong, while others believe that the court was right in following the "notice and take down" approach common in the United States and Europe that rules that Internet companies do not have to monitor the activity of every user. They are not required to prevent the misuse of their services proactively, but when notified of pirated material, they must remove it "expeditiously." If it were not for this rule, there would probably be no Facebook, YouTube, Blogger, Wikipedia, Flickr or MySpace — and maybe not even Google. No investor would want to touch them.

The notice-and-take-down rule is not a product of case law. In the United States, it was introduced by the Online Copyright Liability Limitation Act; in Europe, by the Electronic Commerce Directive. In either case, it is not a new interpretation of an old law. It comes from a statute adopted by the legislature. There is no such law in Russia. In this sense, the web is no different from a bookstore. The owners of sites that host pirated content can be called to account even if they were unaware of it.

The dispute is likely to end up in the Supreme Court, pushing the judges to a choice they may be unwilling to make. If they rule in favor of VKontakte, they would be overstepping their authority and creating law rather than interpreting it. Russia would be the first country where the notice-and-take-down legislation was established by the courts and not by parliament.

Ruling in favor of VGTRK is no better. The decision would cast the Russian Internet into a legal netherworld and destroy the fragile advantage that domestic companies have over their U.S. rivals.

An obvious way out would be a law adopted by the State Duma. It appears, though, that this is not what VKontakte wants. Maybe its main goal is to demonstrate the power that social networks wield in our lives.

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