

Jurius

Operator not Liable for Copyright Infringements

ECJ – The operator of a shop who offers a Wi-Fi network free of charge to the public is not liable for copyright infringements committed by users of that network. However, such an operator may be required to password-protect its network in order to bring an end to, or prevent, such infringements. (Judgment C-484/14)

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[Rz 1] Mr Tobias Mc Fadden runs a lighting and sound system shop in which he offers access to a Wi-Fi network to the general public free of charge in order to draw the attention of potential customers to his goods and services. In 2010, a musical work was unlawfully offered for downloading via that internet connection. The Landgericht München I (Regional Court, Munich I, Germany), before which the proceedings between Sony and Mr Mc Fadden were brought, takes the view that he was not the actual party who infringed the copyright, but is minded to reach a finding of indirect liability on the ground that his Wi-Fi network had not been made secure. As it has some doubts as to whether the Directive on electronic commerce¹ precludes such indirect liability, the Landgericht has referred a series of questions to the Court of Justice.

[Rz 2] The directive exempts intermediate providers of mere conduit services from liability for unlawful acts committed by a third party with respect to the information transmitted. That exemption of liability takes effect provided that three cumulative conditions are satisfied: (i) the provider of the mere conduit service must not have initiated the transmission; (ii) it must not have selected the recipient of the transmission; and (iii) it must neither have selected nor modified the information contained in the transmission.

[Rz 3] By judgment of 15 September 2016, the Court holds, first of all, that making a Wi-Fi network available to the general public free of charge in order to draw the attention of potential customers to the goods and services of a shop constitutes an «information society service» under the directive.

[Rz 4] Next, the Court confirms that, where the above three conditions are satisfied, a service provider such as Mr Mc Fadden, who provides access to a communication network, may not be held liable. Consequently, the copyright holder is not entitled to claim compensation on the ground that the network was used by third parties to infringe its rights. Since such a claim cannot be successful, the copyright holder is also precluded from claiming the reimbursement of the costs of giving formal notice or court costs incurred in relation to that claim.

[Rz 5] However, the directive does not preclude the copyright holder from seeking before a national authority or court to have such a service provider ordered to end, or prevent, any infringement of copyright committed by its customers.

[Rz 6] Lastly, the Court holds that an injunction ordering the internet connection to be secured by means of a password is capable of ensuring a balance between, on the one hand, the intellectual property rights of rightholders and, on the other hand, the freedom to conduct a business of access providers and the freedom of information of the network users. The Court notes, in particular, that such a measure is capable of deterring network users from infringing intellectual property rights. In that regard, the Court nevertheless underlines that, in order to ensure that deterrent effect, it is necessary to require users to reveal their identity to be prevented from acting anonymously before obtaining the required password.

[Rz 7] However, the directive expressly rules out the adoption of a measure to monitor information transmitted via a given network. Similarly, a measure consisting in terminating the internet connection completely without considering the adoption of measures less restrictive of the connection provider's freedom to conduct a business would not be capable of reconciling the abovementioned conflicting rights.

Judgement of the ECJ C-484/14 of 15 September 2016 in case Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH

Source: Press release of the ECJ Nr. 99/16 of 15 September 2016