

Jurius

Tobias Mc Fadden versus Sony Music Entertainment Germany GmbH

CJEU – According to Advocate General Szpunar, the operator of a shop, hotel or bar who offers a Wi-Fi network free of charge to the public is not liable for copyright infringements committed by users of that network. (Judgement C-484/14)

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[Rz 1] Although an injunction may be issued against that operator in order to bring the infringement to an end, it is not possible to require termination or password protection of the Internet connection or the examination of all communications transmitted through it.

[Rz 2] In the present case the Court of Justice is called on to clarify whether and to what extent a professional who, in the course of business, operates a Wi-Fi network that is accessible to the public free of charge may be held liable for copyright infringements committed by users of that network.

[Rz 3] Tobias Mc Fadden operates a business selling and renting lighting and sound systems near Munich, in which he offers a Wi-Fi network accessible to the public. 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 commerce precludes such indirect liability, the Landgericht has referred a series of questions to the Court.

[Rz 4] The Directive limits the liability of intermediate providers of mere conduit services for unlawful acts committed by a third party with respect to the information transmitted. That limitation of liability takes effect provided that three cumulative conditions are fulfilled: (i) the provider of the mere conduit service must not have initiated the transmission; (ii) he must not have selected the recipient of the transmission; and (iii) he must not have selected or modified the information contained in the transmission.

[Rz 5] The Landgericht München I believes these three exhaustive conditions are met in the present case, but is uncertain as to whether Mr Mc Fadden really is a provider for the purposes of the Directive.

[Rz 6] In his Opinion of 16 March 2016, Advocate General Maciej Szpunar takes the view that that limitation of liability also applies to a person such as Mr Mc Fadden who, as an adjunct to his principal economic activity, operates a Wi-Fi network with an Internet connection that is accessible to the public free of charge. In his view, it is not necessary for the person in question to present himself to the public as a service provider or that he should expressly promote his activity to potential customers.

[Rz 7] The Advocate General goes on to state that that limitation precludes the making of orders against intermediary service providers not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to copyright infringements committed by third parties.

[Rz 8] The Advocate General nevertheless adds that, whilst the Directive does so limit the liability of a provider of mere conduit services, it does not shield him from injunctions, non-compliance with which is punishable by a fine.

[Rz 9] National courts must, when issuing such an injunction, ensure: (i) that the measures are, in particular, effective, proportionate and dissuasive; (ii) that they are aimed at bringing a specific infringement to an end or preventing a specific infringement and do not entail a general obligation to monitor; and (iii) that a fair balance is achieved between the applicable fundamental rights, in particular, freedom of expression and information and the freedom to conduct business, as well as the right to the protection of intellectual property.

[Rz 10] The Advocate General further states that the Directive does not, in principle, preclude the issuing of an injunction which leaves it to the addressee to decide what specific measures should be taken. It nevertheless falls to the national court hearing an application for an injunction to ensure that appropriate measures do indeed exist that are consistent with the restrictions imposed by EU law.

[Rz 11] The Advocate General adds, however, that the Directive precludes the issuing of an injunction against a person who operates a Wi-Fi network with Internet access that is accessible to the public, as an adjunct to his principal economic activity, where the addressee of the injunction is able to comply with it only by: (i) terminating the Internet connection; or (ii) password-protecting the Internet connection; or (iii) examining all communications transmitted through it in order to ascertain whether the copyright-protected work in question is unlawfully transmitted again.

[Rz 12] The Advocate General considers that the imposition of an obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, would not be consistent with the requirement for a fair balance to be struck between, on the one hand, the protection of the intellectual property rights enjoyed by copyright holders and, on the other, that of the freedom to conduct business enjoyed by providers of the services in question. By restricting access to lawful communications, the measure would also entail a restriction on freedom of expression and information. More generally, any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders.

Advocate General's Opinion in Case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH of 16 March 2016

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