

CJEU: A free Wi-Fi provider is entitled to rely on the mere conduit defence but can be ordered to set-up a password protection and identify its users.

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On 15 September 2016, the CJEU gave its decision in *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*¹ (C-484/14), clarifying the liability of Wi-Fi providers under Article 12 of Directive 2000/31/EC (the 'E-Commerce Directive') as well as the type of injunctions which can be issued against Wi-Fi providers.

Background

Tobias Mc Fadden, owner of a business selling and leasing lighting and sound systems, was providing open and free access to his shop's Wi-Fi network, as a marketing tool for attracting new customers.

Using this network, an unidentified third party committed a copyright infringement: a song was made available on a peer-to-peer sharing platform without the consent of the rightholder concerned, Sony Music.

After having received a formal notice from Sony Music, Mc Fadden brought a declaratory action. Sony Music made several counterclaims which were upheld in first instance: Mc Fadden was held directly liable for copyright infringement and was ordered to pay damages, to stop the infringement and to reimburse Sony Music's legal costs.

In appeal, Mc Fadden invoked that he may not be held liable under German law transposing Article 12 of the E-Commerce Directive. In its defence, Sony Music asked the referring court to uphold its first decision and, in subsidiary order, to hold Mr Mc Fadden indirectly liable for failing to have secured his network (in accordance with German case law concerning '*Störerhaftung*').

Although the referring court was inclined to hold Mc Fadden indirectly liable on the basis of '*Störerhaftung*', it asked the CJEU to answer a long list of questions concerning the interpretation of Article 12(1) and (3) of the E-Commerce Directive, which can be categorised as follows.

Interpretation of Article 12(1): the mere conduit liability exemption

Article 12(1) of the E-Commerce Directive provides that, "*where an information society service is provided that consists of (...) the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:*

¹ CJEU 15 September 2016, C-484/14, ECLI:EU:C:2016:689, *Mc Fadden v. Sony Music*, par. 39.

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission".

The CJEU decided that Mc Fadden is entitled to this exemption of liability when providing free Wi-Fi.

In doing so, the Court touched upon three interesting issues.

First, the CJEU addressed the requirement that an "*information society service*" is "*normally provided for remuneration*"². The Court had previously held that services provided free of charge may nevertheless constitute an "*information society service*" under specific circumstances. For example, in the *Papasavvas* case³, the Court held that the provider of a free information website is an information society service provider when it is remunerated by income generated by advertisements posted on a website.

Although Mc Fadden was providing the Wi-Fi access free of charge, the Court held that Mc Fadden was an information society service provider because the free Wi-Fi was provided "*for the purpose of advertising the goods sold or services supplied by that service provider*".

This means that, if an ISP is performing services for advertising purposes, promoting the goods and/or services (normally) provided by it, such services could fall within the aforementioned definition, considering that the costs of the 'advertising' services is already included in the price of the goods and/or services (normally) performed.⁴

Second, the CJEU held that, as long as the three conditions set forth in Article 12(1) of the E-Commerce Directive are fulfilled or in other words as long as the access is provided within "*the boundaries of a technical, automatic and passive process for the transmission of the required information*", the exemption of liability will apply: "*there are no further conditions to be satisfied*".

In particular, the access provider has no obligation to act expeditiously upon obtaining knowledge of illegal information. This obligation rests upon the hosting providers under Article 14(1) of the E-Commerce Directive and not upon the access providers under Article 12(1).

Finally, the Court held that once all the conditions set forth in Article 12(1) of the E-Commerce Directive are fulfilled, there can be absolutely no liability imposed on the access provider. The access provider can obviously not be held directly liable, for example, for copyright infringements committed by third parties using its internet access. The access

² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services, *OJ L* 204, 21 July 1998, p. 37.

³ CJEU 11 September 2014, C-291/13, ECLI:EU:C:2014:2209, *Papasavvas*, par. 30.

⁴ CJEU 26 April 1988, C-352/85, ECLI:EU:C:1988:196, *Bond van Adverteerders and Others*, par. 16; CJEU 11 April 2000, C-51/96 and C-191/97, ECLI:EU:C:2000:199, par. 56.

provider cannot be held indirectly liable either, for example on the basis of the German theory of '*Störerhaftung*'.

The exemption of liability also implies that the access provider may not be held liable to reimburse the court fees or the costs of the cease and desist letter, which the CJEU considers to be "*ancillary claims*".

However, if the rightholder obtains against an access provider an injunction allowed under Article 12(3) (see below), Article 12(1) of the E-Commerce Directive does not prevent a court from ordering the access provider to reimburse the costs of giving formal notice and the court costs in relation to that particular injunction.

Interpretation of Article 12(3): the injunctions against access providers

Article 12(3) of the E-Commerce Directive recalls that Article 12 shall not affect "*the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement*".

In relation to copyright infringements, the Member States' legal systems are harmonized by Article 8 (3) of Directive 2001/29, which ensures and that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

However, such injunctions are at the crossroads of several fundamental rights.

On the one hand, the copyright owners have a fundamental right to prevent the recurrence of an infringement to their rights. Protection of intellectual property is a fundamental right forming part of the right to property under Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

On the other hand, an injunction against an access provider will affect its economic activity and thus its right of freedom to conduct a business, protected under Article 16 of the Charter. In addition, such injunction will also restrict the users' freedom to access to the Internet, and thus their freedom of information, the protection of which is provided for by Article 11 of the Charter.

According to the CJEU, it is for the national courts to ensure that a "*fair balance is struck between those rights*" and to do so, the CJEU had already provided some guidance.

In the *Scarlet Extended* case⁵, the Court held that an internet service provider may not be ordered to install a system for filtering all electronic communications, as a preventive measure, exclusively at its expense and for an unlimited period.

In the *UPC Telekabel Wien* case⁶, the Court held that an internet service provider may be ordered to take all necessary measures to prevent its customers from accessing a particular website that infringes copyright, provided that the measures do not unnecessarily deprive internet users of the possibility of accessing lawful information (i.e. are proportionate) and

⁵ CJEU 24 November 2011, C-70/10, ECLI:EU:C:2011:771, *Scarlet Extended*.

⁶ CJEU 27 March 2014, C-314/12, ECLI:EU:C:2014:192, *UPC Telekabel Wien*.

(ii) those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve (i.e. are effective).

In the *Mc Fadden* case, neither the filtering, nor the blocking of a particular website were considered. The referring Court only asked the CJEU to consider three injunctions that, according to the referring court, could prevent infringement using Mc Fadden's open Wi-Fi: to terminate the open Wi-Fi access, to monitor all communications coming through it or to password-protect it.

First, according to the CJEU, the injunction to terminate the open Wi-Fi access would not strike a fair balance between the fundamental rights at stake as it would cause a too serious infringement of Mc Fadden's freedom to conduct business.

Second, an injunction to monitor all communications coming through the open Wi-Fi access must be excluded from the outset as it would contradict Article 15(1) of the E-Commerce Directive⁷.

Finally, the third option, i.e. the injunction to implement a password protection on the Wi-Fi, was held acceptable by the CJEU, provided that the users are required to reveal their identity in order to obtain the required password and may therefore not act anonymously.

The Court added this requirement that the users may not to act anonymously in order to ensure that the injunction remains effective to dissuade the users from infringing copyright.

Conclusions

By ruling that the mere conduit defence applies to shop owners and other businesses offering the public open and free access to their Wi-Fi networks, the CJEU remains in line with its previous decisions.

The Court clearly emphasised that in order to benefit from this exemption, no conditions or duties other than those listed in Article 12(1) need to be fulfilled. This is particularly important for Germany whose laws used to require the Wi-Fi providers to make their network secure by means of a password in order to avoid indirect liability (*Störerhaftung*). However, a few days after the AG's Opinion was published, the German legislator decided, after a long debate, to remove this obligation⁸. Critics of this obligation argued that Germany has far fewer open Wi-Fi than other countries because businesses are afraid to take on the legal risk.

Finally, the most controversial aspect of this decision is the possibility for a Court to order an open Wi-Fi operator to implement a password protection and to require the users to reveal their identity.

⁷ *Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity."*

⁸ See §8(3) Telemediengesetz.

In this regard, it may be noted that the Advocate General Szpunar was of a radically different view. In his opinion, he observed that the obligation to register users and retain their private data was "*disproportionate in the case of persons who offer their customers and potential customers access to the Internet via a Wi-Fi network as an adjunct to their principal activity*". The AG also observed that such measure could undermine the business model of offering Internet access as an adjunct to other services. In addition, such measures would be effective in limiting the amount of users, but not actually in preventing copyright infringements. AG Szpunar concluded that allowing courts to impose such measures on Wi-Fi operators such as Mc Fadden "*could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders*", and is therefore not in line with EU law.

These conflicting views perfectly illustrate how complex it is to strike the balance between the fundamental rights at stake.

Let us hope that this decision will not have any chilling effect on the Wi-Fi offering, certainly after the wise words of President Juncker's 2016 State of the Union address, which were pronounced a few days before the decision : "*We need to be connected. Our economy needs it. People need it. And we have to invest in that connectivity now.*"⁹

⁹ http://europa.eu/rapid/press-release_IP-16-3008_en.htm, announcing also proposals to accelerate public access to Wi-Fi for Europeans.