Client Alert

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Copyright: Europe Explores Its Boundaries

What's the Cost of Free Wi-Fi?

By Mercedes Samavi and Sue McLean

Free Wi-Fi may come with more strings attached than anyone previously thought – at least in Europe. A recent copyright ruling of the highest European Union court may prove to be a double-edged sword for entities that offer their customers free Wi-Fi. And it shows, once again, that modernization of copyright law to suit the digital age is a key area of focus for the EU.

The question before the Court of Justice of the European Union (the CJEU) was whether a retailer (in this case, an electrical store – although the practice is common among cafes, restaurants, and coffee shops) providing its customers with free use of an unprotected Wi-Fi network can be held liable for IP infringements by a third party. The question was raised on referral from the German courts, which have looked at similar issues before and ruled that operators of Wi-Fi access points are not liable for rights infringements by users. But the CJEU went further and provided guidance that may reassure and concern free Wi-Fi providers in equal measure.

In the case on which the CJEU ruled, *Tobias McFadden v Sony Music Entertainment GmbH*, the court confirmed that a Wi-Fi provider can rely on the "mere conduit" defence under the EU Electronic Commerce Directive. However, it was not all good news for Wi-Fi providers. The CJEU also suggested that, in the event of infringement conducted via an open Wi-Fi network, the provider could be required to password-protect the network in order to stop or prevent that IP infringement. Although this decision will no doubt give some comfort to rights-holders, it raises logistical issues for any entity that provides Wi-Fi in a business setting.

"MERE CONDUIT" DEFENCE

The *McFadden* case revolved around the interpretation of the "mere conduit defence" under Article 12(1) of the EU E-Commerce Directive (Directive 2000/31/EC). Under this defence, information society service (**ISS**) providers who either transmit information on behalf of a service recipient or ***provide access to*** a communications network are not liable for information transmitted where they did not: (i) ***initiate*** the transmission, (ii) ***select*** the receiver of the transmission, and (iii) ***select or modify*** the information contained in the transmission.

Article 12(1) does not dictate whether each national court or administrative authority must require the ISS provider to prevent the infringing act from happening; it's up to the national court to decide this.

THE CASE

Mr. McFadden is a retailer in Germany – selling and leasing sound systems, if you're interested. As a way of attracting the clientele of nearby shops, passers-by, and neighbours, Mr. McFadden permitted free and anonymous access to his Wi-Fi network. To make his network even more appealing, he opted to keep the Wi-Fi network open and unsecured.

In 2010, Mr. McFadden's Wi-Fi network was used to make a recording of a musical work available on the Internet for free, without the rights-owner's consent. Sony Music (which owned the recording of the musical work) brought a claim against Mr. McFadden for copyright infringement – claiming damages, an injunction to stop the infringing act, and costs. Sony's reasoning was that Mr. McFadden was "*indirectly liable*" on the grounds that his Wi-Fi service had not been made secure.

In the first instance, the German court sided with Sony Music. Mr. McFadden appealed, arguing that he was exempt from liability by virtue of the mere conduit defence under Article 12(1). The German court suggested that Mr. McFadden would not be directly liable for the infringement, but paused the proceedings and sought a preliminary ruling from the CJEU on the question of whether Article 12(1) precluded the court from finding Mr. McFadden indirectly liable.

THE CJEU JUDGMENT

In coming to its decision, the CJEU focused on the following issues.

1. Is an entity an ISS provider if it delivers ***free*** Wi-Fi services?

Unhelpfully, the E-Commerce Directive does not define an "information society service" (ISS). For assistance, the CJEU looked to the Technical Standards Directive, which considers an ISS as "any service normally provided for *remuneration*, by electronic means and at the individual request of the service recipient". The CJEU concluded that Mr. McFadden's provision to his customers of a free Wi-Fi network could be classified as an ISS because it was performed for the purposes of advertising his goods and services.

2. When does an ISS provider "provide access to" a communication network?

The CJEU held that an ISS provider falls within the remit of Article 12(1) if the activity is of a technical, automatic and passive nature. To that end, providing access to a communication network must not go beyond the boundaries of such technical, automatic and passive process for the transmission of the required information.

3. Can a rights-owner claim remedies from a Wi-Fi provider whose services are used by a third party to carry out IP infringement?

The CJEU agreed that a Wi-Fi provider can rely on the mere conduit defence under Article 12(1) and so (if they fulfil the right criteria) will not be liable for IP infringements committed via their network. Accordingly, a rights-holder would not be entitled to claim from the ISS provider damages for the third-party infringement or for the costs relating to the infringement claim. This was consistent with a non-binding opinion given by the CJEU's Advocate General Szpunar in March 2016 which stated that 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*".

However, significantly, the CJEU went on to state that Article 12(1) does *not* preclude the rights-owner from claiming from the ISS provider injunctive relief against any continuation of the infringing act and the payment of costs of giving formal notice and court costs (where such costs are accrued as a result of obtaining injunctive relief). The CJEU acknowledged that the rights-owner's ability to claim injunctive relief against the ISS provider depends on whether the national court has the power to grant such relief – but that was not a decision for the

CJEU to make. The CJEU stressed that national courts, when making such injunctions, would need to strike a fair balance between the protection of rights-holders and the right to freedom of information and freedom to conduct a business.

The CJEU discussed the three potential measures that the referring court had suggested that a Wi-Fi provider (or any other ISS provider) may be required to take in response to an injunction. It ruled out two of those suggested remedial measures but kept open the possibility of the third.

With respect to the first measure ("examining all communications passing through an internet connection"), the CJEU held that this measure must be excluded as a general monitoring obligation was contrary to Article 15 of the E-Commerce Directive. With respect to the second measure ("terminating the Internet connection"), the CJEU held that this measure was incompatible with ensuring a fair balance struck between fundamental rights.

However, the CJEU held that the third measure ("using password protection and requiring users to reveal their identity before they could obtain the password") was capable of striking a fair balance between the right of the rights-holders to protect their intellectual property and the rights of Wi-Fi providers and users.

This approach was a departure from the Advocate General's opinion which stated that requiring Wi-Fi networks to be secure in order to protect copyright infringement would not strike a fair balance between rights-holders and Wi-Fi providers and, therefore, should be precluded.

WHAT DOES THIS MEAN GOING FORWARD?

Rights-owners will be comforted by the outcome in *McFadden,* which provides them with the possibility of a form of recourse against ISS providers in Europe who permit the continuation of infringing acts over open and unprotected Wi-Fi networks. Given the challenge of pursuing individual infringers, having greater rights to pursue business operators who have greater resources will certainly be welcomed.

Of course, these measures will not prevent infringements from occurring in the first place, nor will password protection enable rights-holders to identify the infringing third parties if false details are used to access the network.

However, for business owners, particularly small businesses such as shops and cafes, the decision raises logistical questions. Faced with an injunction, how would you require Wi-Fi users to provide user information before being granted access to a password-protected network? Will a simple login-form, e.g. requiring only the user's e-mail address, be sufficient? How will Wi-Fi operators ensure that the identity information provided is accurate? The only way to validate that information would be to require users to provide formal IDs before accessing the network. That doesn't seem practical.

EuroISPA, a trade group representing European Internet service providers, broadly welcomed the ruling but noted, "It is essential that national courts follow the finely-balanced reasoning of the CJEU, and order such injunctive relief only in those instances where there is demonstrable and serious risk of repeat infringements".

The case also raises questions on the importance of balancing rights. Requiring Wi-Fi users to submit personal information (particularly if that involves providing formal IDs) clearly raises question of users' rights to privacy, which were not discussed in the case.

Lastly, the CJEU's approach in this case is difficult to square with the European Commission's recent proposals to invest €120m in promoting access to free Wi-Fi in public places. In light of this new ruling, there is certainly a risk that businesses may put off participating in this initiative if they fear that they could face potential legal action as a result of the actions of their Wi-Fi users.

Given all of these issues, we expect that this case will not be the last word on this issue.

WIDER CONTEXT

In May 2015, the European Commission announced its Digital Single Market Strategy to accelerate the creation of a digital single market (DSM) across the EU. The EU's aim is to broaden access to e-commerce, media and entertainment, telecoms, and online services and to ensure that the optimum conditions exist to allow these sectors to grow, ultimately for the benefit of Europe's consumers and the wider economy. By mid-2016, the Commission had begun progress on most of its digital initiatives.

One of the Commission's 16 "Key Actions" relates to the creation of a modern, more European copyright law. In one sense, the Commission is doing no more than play catch-up with the European courts which – as reported in our on-going series "Copyright: Europe Explores Its Boundaries" – have been very active over the past few years in re-shaping EU copyright law for the 21st century.

Read previous Alerts in our series "Copyright: Europe Explores Its Boundaries":

EU Expands Principle of Pan-European Jurisdiction over Copyright to Online Materials

No Resale of Digital Content Except for Software? How Does the European Court of Justice Decision on Exhaustion of the Distribution Right upon First Sale Impact the Resale of Digital Copies?

"Meltwater" – EU rules that browsing does not need a licence – a victory for common sense (or for pirates)?

New UK Infringement Exceptions - The Ones That Got Away (and Came Back Again)

The Umpire Strikes Back: European Court Rules That ISPs Can Be Forced to Block Pirate Websites

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Contacts:

Mercedes Samavi
+44 (020) 7920 4170
msamavi@mofo.com

Susan McLean
+44 (20) 7920 4045
smclean@mofo.com

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