

Anonymous Wi-Fi Services and Copyright Infringement

A recent [decision](#) of the EU's highest court has confirmed that a Wi-Fi service provider is not responsible for copyright infringement that took place using the Wi-Fi services provided by them. However, the court said that the Wi-Fi service provider could be subject to an injunction which requires it to password-protect the internet connection, provided that users are required to reveal their identity in order to obtain the required password and may not act anonymously.

The Facts

Tobias McFadden runs a business selling and leasing lighting and sound systems in Germany. He also operates an anonymous access wireless local area network, free of charge in the vicinity of his business. Access to the network was intentionally not protected. Mr. McFadden is a strong proponent of the protection of personal data and against excessive state surveillance.

A musical work was made available on the Internet free of charge to the general public without the consent of the rights owner, Sony Music. Mr. McFadden clearly asserted that he did not commit the infringement but did not rule out the possibility it was committed by one of the users of his network.

Sony Music sent a formal demand to Mr. McFadden with respect to its rights. On receipt of the notice McFadden brought an action for a declaration of non-infringement. In reply Sony Music counterclaimed for damages against McFadden on the basis of direct liability for infringement and an injunction to prevent continuing infringement.

The action proceeded in the courts of Germany and consideration was given to case law on the indirect liability of wireless local area network operators to pay damages for not having taken measures to protect their wireless local area networks and prevent

third parties from using it to infringe. Since the matter involved general matters that applied across the EU, a reference was made to the Court of Justice.

The court considered the effect of the directive that applied to the operation of information society services. Article 12 of the directive provides that when an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, EU members shall ensure that the service provider is not liable for the information transmitted. However, the article does not affect the possibility of a court, in accordance with a specific EU country legal system, requiring that the service provider terminate or prevent an infringement.

The court said that Article 12 must be interpreted as precluding a person harmed by infringement from claiming compensation from a provider of access to a communication network. However, the article does not preclude such person from claiming injunctive relief against the service provider to prevent the continuation of that infringement.

With respect to the ability of a court to issue an injunction, the court said that the grant of an injunction was not precluded in a case of this nature. The injunction could require the service provider, on payment of a fine, to prevent third parties from making a particular copyright-protected work available to the general public from an online exchange platform via the Internet connection available in the network. The provider could choose which technical measures to take in order to comply with the injunction even if a choice was limited to a single measure consisting in password protecting the internet connection so long as the users were required to reveal their identity in order to obtain the required password and could not act anonymously. In practice it appears that only password protection is possible.

The Canadian Position

The directive of the European Union was intended to implement the provisions of the WIPO Copyright and the WIPO Performances and Phonograms Treaties. The treaties provide that authors of literary artistic works and performances and phonograms owners shall enjoy the exclusive right to authorize any communication to the public of their works by wireless means. However, neither treaty provides that the mere provision of physical facilities for enabling or making a communication by itself amounts to a communication.

Canada has implemented these same treaties as have many other countries. As a result, the determination of the highest court of one country is of interest in other countries.

Section 31.1 of the Canadian *Copyright Act* provides that the person who in providing services related to the operation of the internet or another digital network, provides any means for the telecommunication or reproduction of works or other subject matter through the internet or that other network does not, solely by reason of providing the means infringe copyright in that work or other subject matter.

There is no Canadian provision which, in this context, would require a service provider to terminate or to prevent an infringement unless the service provider was providing the service primarily for the purposes of enabling acts of copyright infringement.

Section 41.25 of the Act provides that an owner of the copyright in a work or other subject matter may send a notice of claimed infringement to the provider. The recipient, or in this case the WiFi provider, must forward the notice electronically to the person to whom the electronic location identified by the location data set out in the notice belongs and inform the claimant of its forwarding or, if applicable, any reason why it was not

possible to forward it. In addition, there is an obligation to retain records that will allow the identity of that person to be determined for a prescribed period. If a service provider fails to perform its obligations under the section, the claimant's only remedy against a provider who did not perform its obligation under the section is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

There have been no cases that have considered whether a WiFi service provider who operates on the basis of anonymous access has any obligations under this section.

Comment

While the statutory provisions involved in the *McFadden* case are substantially different than those of the Act the result is very interesting. It remains to be seen whether in a similar factual situation the provider, has any obligations under section 41.25.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.