

Client Alert

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Operators of WiFi Access Points not Liable for Right Infringements by Users

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In a decision dated 12 May 2016, the German Federal Court of Justice (*Bundesgerichtshof – BGH*) narrowed the scope of liability of WiFi access operators for rights infringements of users of WiFi access points. The court ruled that the operator of a private WiFi access point is not generally required to inform or warn adult users about the illegality of the internet file sharing of copyright-protected content if there are no concrete indications of intended illegal use of the internet connection by such users. The court's decision points in the same direction as a current legislative initiative which grants publicly accessibly WiFi access points the same liability privileges as internet access providers.

DECISION OF THE GERMAN FEDERAL COURT OF JUSTICE ON 12 MAY 2016

The BGH addressed the question of liability of operators of WiFi access points for the copyright infringements of users of such access points. The plaintiff is the owner of the exclusive exploitation rights to the film "Silver Linings Playbook." She claimed from the operator of a WiFi access point the reimbursement of the legal costs of a warning notice (*Abmahnung*) against illegally making the work publicly accessible. The defendant argued that her Australian niece and her niece's life partner had committed the infringing act while using the password-protected WiFi of the defendant. Whereas the local court dismissed the action in the lower instance, the regional court ordered the defendant to pay in favor of the applicant.

The BGH has reinstated the local court's judgment and dismissed the case. Contrary to the opinion of the court of appeals, the BGH found that the defendant was not liable as a co-liable party (*Störer*) for breach of duty of care on account of copyright infringements committed by her niece and her niece's life partner. The only reason taken into consideration for liability in the present case was the fact that the defendant had not instructed her niece and her niece's life partner concerning the illegality of participation in the internet file sharing of copyright-protected content. It was not reasonable to expect the defendant to issue corresponding instructions without there being concrete indications of the illegal use of the WiFi access point. The operator of a WiFi access point who enables the adult members of his household, his adult visitors, or guests to gain access to his internet connection is not under an obligation to instruct or supervise without specific reason.

BACKGROUND

In Germany, the coverage of public WiFi access points has been moderate compared to other European countries, with an average of 1.87 WiFi access points per 10,000 inhabitants (compared to the UK: 28.67; Sweden: 9.94). One of the reasons for this is that providers of WiFi internet access are concerned about the liability risks involved. They fear that claims or legal warning notices for injunctive relief will be issued against them as a co-liable party (*Störer*) for rights violations committed by users of their WiFi. This is why

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especially smaller enterprises, such as cafés or hotels, often refrain from offering WiFi internet access despite the competitive disadvantages this involves, thus losing potential customers: Surveys show that 59% of the business users and private users shy away from providing hotspots due to liability risks and 43% due to security concerns.

LEGISLATIVE INITIATIVE TO REMOVE LIABILITY RISKS

In order to create more legal certainty and to facilitate the use of public WiFi for citizens, earlier this month the Federal Government adopted the Draft Second Act amending the Telemedia Act (*Telemediengesetz – TMG*). According to Sec. 8 para. 1 of the Telemedia Act, internet access providers (IAP) are not liable for acts of their users, as the IAPs only 'pass through' the users' information into a communications network. The draft bill specifies, *inter alia*, that this privilege shall now also apply to WiFi operators. This means that anyone who releases WiFi for use by others enjoys the same liability privileges as IAPs. No distinction is made between large and small WiFi operators or between commercial and private operators.

The draft bill is currently taking the final steps in the parliamentary process. The German Federal Council (*Bundesrat*) submitted a motion for amendment on 6 November, 2015, to which the Federal Government reacted on 18 November by submitting a response. The Economic Committee of the Parliament of Germany (*Bundestag*) conducted an expert hearing on 16 December, 2015. Since this date there have been *rapporteurs'* discussions between different groups in the Parliament. On 11 May, they agreed on important amendments to the Telemedia Act. This brings the legislative procedure considerably closer to achieving a fast and increased distribution of WiFi in German cities. The law could enter into force in autumn 2016.

CONSEQUENCES FOR WIFI OPERATORS AND FOR CONTENT OWNERS

The BGH decision and the new statutory liability privilege remove the liability risks from operators of WiFi access points. Provided that the legislature will enter into force, as is currently expected, new WiFi coverage will spread more rapidly, and in densely populated urban areas, WiFi connectivity provided by public or private operators will soon always be in constant reach. While this will certainly help mobile phone users to save their monthly data volume, the development comes with great concerns for the owners of exclusive content and, not least also, of mobile phone providers. Without liability exposure, the operators of WiFi access points have no incentive to contain or trace the potentially illegal activities of their users, and basically everyone can bring third-party usage as a defense against liability claims by content owners. In the end, content owners and their business models are left without any weapon to enforce the rule of law against illegal activities in the internet. Without the right to hold the WiFi operator co-liable for an infringement, they would have to identify the specific user of the WiFi who committed the infringement. This will be practically impossible, as tracing the illegal activity will only lead to the IP address of the WiFi router, without visibility of the users.

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