

# CJEU rules on whether password protection of an open Wi-Fi network can be ordered

Can a merchant who in the course of doing business offers customers free and open access to a Wi-Fi network, be held liable for copyright infringements committed by a customer through that Wi-Fi network? Can a merchant be subject to an injunction that requires that Wi-Fi network to be accessed with a password or to exercise control over the content transmitted through it? In this article, Barbara Sartori and Letizia Tomada of CBA Studio Legale e Tributario explore these questions, which were recently answered by the Court of Justice of the European Union ('CJEU') on 15 September 2016, following the opinion delivered on 16 March 2016 by Advocate General Szpunar, in case C-484/14 *Tobias McFadden v. Sony Music Entertainment Germany GmbH*.

The request for a preliminary ruling came from the German Court of Appeal, called to review a first degree judgment, which upheld a shopkeeper - Mr McFadden - liable for copyright infringement for the illegal download of a musical work, copyrighted by Sony Music, committed by an anonymous customer through the Wi-Fi network made available free of charge to the customers by said shopkeeper.

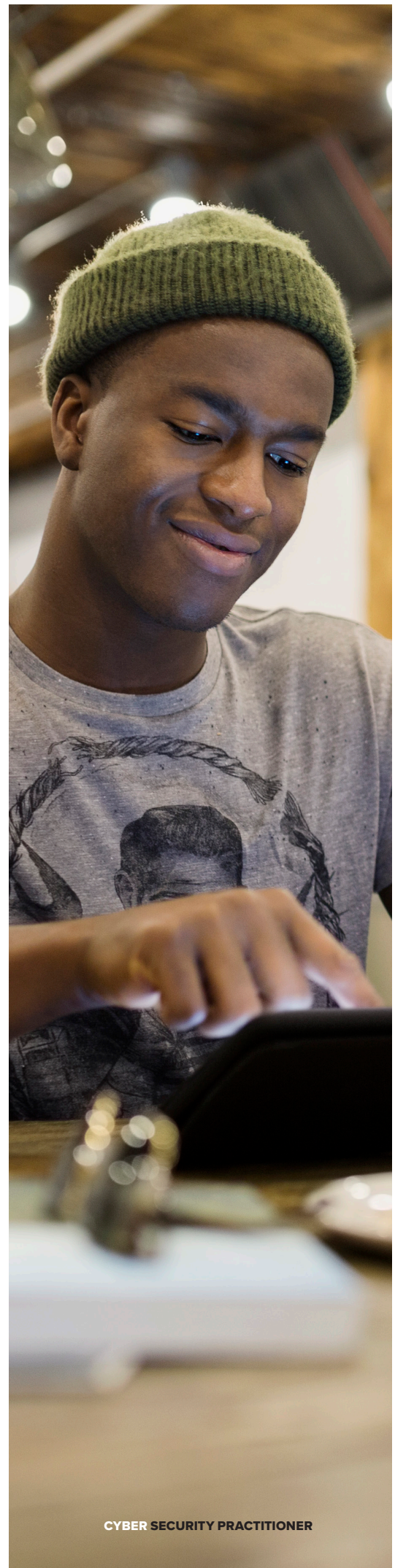
By means of the ruling dated 16 January 2014, the first degree Court confirmed Mr McFadden's liability for direct infringement and ordered him to refund damages and related legal costs to the owner of the copyright, Sony Music.

The Court of Appeal, which was invested with the case further to the first degree decision being challenged by Mr McFadden, was inclined, on the one hand, to exclude any liability for direct infringement and on the other to ascertain the appellant's liability for indirect infringement, based on the fact that the Wi-Fi network provided was not made secure by imposing a system of access via a password.

The Court of Appeal's reasoning can be justified in view of the fact that under German copyright law (pursuant to its paragraph 97) as interpreted by the

national courts, liability for infringements of copyright may arise not only directly, in relation to the person who committed the copyright violation, but also indirectly, in relation to the person who, without being the perpetrator of the illegal conduct or the accomplice, contributed in some way to the infringement, either deliberately or with a sufficient degree of causation. Based on the above-mentioned provision, the Bundesgerichtshof (German Federal Court of Justice) stated in 2010 that an individual operating a Wi-Fi network may be held liable for indirect infringement in case of a failure to protect that network by means of a password, thereby enabling a third party to infringe copyright through that Wi-Fi connection.

Going back to the *McFadden* case, the competent Court of Appeal was persuaded that the indirect liability for absent protection of the Wi-Fi connection, as confirmed by the Bundesgerichtshof in the above-mentioned ruling, should apply *a fortiori* in the case of a professional individual operating, within their business, a Wi-Fi network available to the public. Nevertheless, the German Court of Appeal suspected that such a finding of indirect infringement liability may be in conflict with Article 12 of Directive 2000/31, concerning the limitation





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of liability of intermediary service providers, which in Germany has been transposed by paragraph 8 (1) of the Law on electronic media dated 26 February 2007, and subsequent amendments.

In other words, the referring Court of Appeal pondered whether a merchant who, in the course of their business, operates a free and public Wi-Fi network, equates to a 'provider of a service consisting in the provision of access of a communication network,' within the meaning of Article 12(1) of Directive 2000/31, and therefore benefiting from the limitations of liability of intermediate providers as 'mere conduit services' and addressed the question to the CJEU.

As already highlighted by Advocate General ('AG') Szpunar's Opinion, the CJEU maintains that the concept of 'services' mentioned in Directive 2000/31 is the same as Directive 98/34 as follows: i.e. 'any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.' The provision of internet access is usually a service provided for remuneration, even when it concerns a free Wi-Fi network. Consequently, an enterprise, which, in the course of business, offers internet access to the public, even if it is free of charge, constitutes a service of a pecuniary nature, even if it is ancillary to the core business.

In conclusion, a commercial provider of a paid or free Wi-Fi network, in accordance with Directive 2000/31, cannot be held liable for the information transmitted or stored by a third party via the internet, if the service provider merely conducted technical, automatic and passive nature activities, with no knowledge or control over the information that is transmitted or stored.

These limitations of liability preclude both damages and costs relating to copyright infringements committed by third parties.

Conversely, a provider of mere conduit services may encounter an injunction, provided that such injunction: i) is proportionate and dissuasive, ii) is focused on bringing ongoing infringements to an end or preventing a threatening infringement and does not entail a general obligation to monitor; and (iii) achieves

a fair balance between the freedom of expression and to provide information, and the freedom to conduct business, on the one side, and the right to the protection of intellectual property, on the other. In particular, according to the AG, the Directive prohibits: any order to block the internet connection; or to submit access to it via a password; or any obligation which would impose upon the provider the requirement to examine the content of the information transmitted through it and ascertain whether the copyright-protected work in question is unlawfully transmitted.

An injunction regarding the monitoring for similar content would be extremely burdensome for providers and would represent an unjustified restriction of the freedom to conduct business as well as of the freedom of expression and of information, imposing a disadvantage on society as a whole and one that could outweigh the potential benefits for rightsholders.

It is however interesting to see that the above conclusions have not been fully followed by the CJEU. On one side, indeed, the Court confirms the applicability of Directive 2000/31 to an individual who, as an ancillary service, offers a Wi-Fi connection with no direct monetary remuneration. On the other, as opposed to the position of the AG, the Court observes that the order to password-protect the internet connection, although in principle capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right of freedom of communication of the consumers, does not damage the essence of the right to freedom to conduct its business of a communication network access provider "in so far as the measure is limited to marginally adjusting one of the technical option open to the provider in exercising its activity" and does not either undermine the essence of the right to freedom of information of the recipients of an internet network access service "in so far as it is limited to requiring such recipients to request a password." The Court confirms the importance of guaranteeing a fair balance between the protection of intellectual property rights and the freedom to conduct business and to access information.