Court of Justice EU, 15 September 2016, Mc Fadden v Sony

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Providing free access to a communication network is an 'information society service', if the activity is performed by the service provider in question for purposes of advertising.

- **In the light of the foregoing, the answer to the first question referred is that Article 12(1) of Directive 2000/31, read in conjunction with Article 2(a) of that directive and with Article 1(2) of Directive 98/34, must be interpreted as meaning that a service such as that at issue in the main proceedings, provided by a communication network operator and consisting in making that network available to the general public free of charge constitutes an 'information society service' within the meaning of Article 12(1) of Directive 2000/31 where the activity is performed by the service provider in question for the purposes of advertising the goods sold or services supplied by that service provider.**

Providing access to a communication network has been provided when that access does not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, without further conditions to be satisfied

- **In the light of the foregoing, the answer to the second and third questions is that Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied.**

Notice and take-down condition for hosting (Article 14 (1)(b) of Directive 2000/31) does not apply by analogy to providing access to communication network (Article 12 (1))

- **In the light of the foregoing, the answer to the sixth question is that Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive does not apply mutatis mutandis to Article 12(1).**

Provider of access to a communication network not liable for damages because access had been used to infringe rights

- **However, this does not preclude a claim against a provider of access to a communication network prohibiting the continuation of the infringement**

In the light of the foregoing, the answer to the fourth question is that Article 12(1) of Directive 2000/31 must be interpreted as precluding a person harmed by the infringement of its rights over a work from claiming compensation from a provider of access to a communication network on the ground that such access was used by a third party to infringe its rights and the reimbursement of the costs of giving formal notice or court costs incurred in relation to its claim for compensation. However, that article must be interpreted as meaning that it does not preclude such a person from claiming injunctive relief against the continuation of that infringement and the payment of the costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement where such claims are made for the purposes of obtaining, or follow the grant of injunctive relief by a national authority or court to prevent that service provider from allowing the infringement to continue.

A member state may require that a provider of access to a communication network prevents that third parties make copyright-protected work available to the general public

- **The provider may choose which technical measures he uses to comply with this injunction, even if the measure takes away the anonymity among users**

Consequently, the answer to the fifth, ninth and tenth questions referred is that, having regard to the requirements deriving from the protection of fundamental rights and to the rules laid down in Directives 2001/29 and 2004/48, Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, must be interpreted as, in principle, not precluding the grant of an injunction such as that at issue in the main proceedings, which requires, on pain of payment of a fine, a communication network access provider to prevent third parties from making a particular copyright-protected work or parts thereof available to the general public from an online (peer-to-peer) exchange platform via the internet connection available in that network, where that provider may choose which technical measures to take in order to comply with the injunction even if such a choice is limited to a single measure consisting in password-protecting the internet connection, provided that those

users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.

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Court of Justice EU, 15 September 2016
(L. Bay Larsen, D. Sváby, J.Malenosvký (Rapporteur), M. Safjan, M.Vilaras)
JUDGMENT OF THE COURT (Third Chamber)
15 September 2016 (*)
(Reference for a preliminary ruling — Information society — Free movement of services — Commercial wireless local area network (WLAN) — Made available to the general public free of charge — Liability of intermediary service providers — Mere conduit — Directive 2000/31/EC — Article 12 — Limitation of liability — Unknown user of the network — Infringement of rights of rightholders over a protected work — Duty to secure the network — Tortious liability of the trader)
In Case C‑484/14,
REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht München I (Regional Court, Munich I, Germany), made by decision of 18 September 2014, received at the Court on 3 November 2014, in the proceedings
Tobias Mc Fadden
v
Sony Music Entertainment Germany GmbH,
THE COURT (Third Chamber),
composed of L. Bay Larsen, President of the Chamber, D. Šváby, J. Malenovský (Rapporteur), M. Safjan and M. Vilaras, Judges,
Advocate General: M. Szpunar,
Registrar: V. Tourrès, Administrator,
having regard to the written procedure and further to the hearing on 9 December 2015,
after considering the observations submitted on behalf of:
– Mr Mc Fadden, by A. Hufschmid and C. Fritz, Rechtsanwälte,
– Sony Music Entertainment Germany GmbH, by B. Frommer, R. Bisle, M. Hügel, Rechtsanwälte,
– the Polish Government, by B. Majczyna, acting as Agent,
– the European Commission, by K.-P. Wojcik and F. Wilman, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 16 March 2016,
gives the following
Judgment
1. This request for a preliminary ruling concerns the interpretation of Article 12(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).
2. The request has been made in proceedings between Mr Tobias Mc Fadden and Sony Music Entertainment Germany GmbH ('Sony Music') concerning the potential liability of Mr Mc Fadden for the use by a third party of the wireless local area network (WLAN) operated by Mr Mc Fadden in order to make a phonogram produced by Sony Music available to the general public without authorisation.
Legal context
EU law
Directive 98/34
3. On 22 June 1998, the European Parliament and the Council adopted Directive 98/34/EC 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 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18, 'Directive 98/34').
4. Recitals 2 and 19 of Directive 98/48 state:
'(2) Whereas a wide variety of services within the meaning of Articles 59 and 60 [TEC, now Articles 46 and 57 TFEU,] will benefit by the opportunities afforded by the Information Society of being provided at a distance, electronically and at the individual request of a recipient of services;
...
(19) Whereas, under Article 60 [EC, now Article 57 TFEU,] as interpreted by the case-law of the Court of Justice, "services" means those normally provided for remuneration; whereas that characteristic is absent in the case of activities which a State carries out without economic consideration in the context of its duties in particular in the social, cultural, educational and judicial fields ...'
5. Article 1 of Directive 98/34 provides:
'For the purposes of this Directive, the following meanings shall apply:
...
(2) "service", 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.
...'
Directive 2000/31
6. Recitals 18, 41, 42 and 50 of Directive 2000/31 are worded as follows:
'(18) Information Society services span a wide range of economic activities which take place online ...; Information Society services are not solely restricted to services giving rise to online contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data; Information Society services also include services consisting ... in providing access to a communication network ...
...

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.
(42) The exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored.
...
(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the Information Society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.'

7. Article 2 of that directive, headed 'Definitions', provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:
(a) "Information Society services": services within the meaning of Article 1(2) of Directive 98/34;
(b) "service provider": any natural or legal person providing an Information Society service;
...'

8. Section 4, headed *'Liability of intermediary service providers'*, of Chapter II of the directive is comprised of Articles 12 to 15.

9. Article 12 of Directive 2000/31, headed *'Mere conduit'*, provides:

'1. Where 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, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
(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.
...

3. This Article 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.'

10. Article 13 of Directive 2000/31, headed 'Caching', provides:

'1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;
(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.'

11. Article 1 of that directive, headed 'Beneficiaries', provides:

'1.Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
2.Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
3. This Article 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, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

12. Article 15(1) of Directive 2000/31, headed 'No general obligation to monitor', provides:

'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 illegal activity.'

Directive 2001/29/EC

13. Recital 16 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) states:

'Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive [2000/31], which clarifies and harmonises various legal issues relating to Information Society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.'

Directive 2004/48/EC

14. Article 2 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum in OJ 2004 L 195, p. 16), headed 'Damages', provides:

'...

3. This Directive shall not affect:

(a) ... Directive [2000/31], in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

...'

German law

15. Paragraphs 7 to 10 of the Telemediengesetz (Law on electronic media) of 26 February 2007 (BGBl. I, p. 179), as last amended by the Law of 31 March 2010 (BGBl. I, p. 692) ('Law on electronic media'), transpose Articles 12 to 15 of Directive 2000/31 into national law.

16. Paragraph 7 of the Law on electronic media is worded as follows:

'(1) Service providers shall be liable for their own information which they make available for use in accordance with the general law.

(2) Service providers within the meaning of Paragraphs 8 to 10 shall be under no duty to monitor the information which they transmit or store, or actively to seek facts or circumstances indicating illegal activity. The absence of liability on the part of the service provider under Paragraphs 8 to 10 shall be without prejudice to general statutory obligations to remove, or disable the use of, information. ...'

17. Paragraph 8(1) of the Law on electronic media provides:

'*Service providers shall not be liable for information which they transmit over a communication network or to which they provide access for use provided that service providers:*

1. do not initiate the transmission;

2. do not select the receiver of the transmission; and

3. do not select or modify the information contained in the transmission.

The first sentence shall not apply where a service provider intentionally collaborates with a user of its service in order to undertake illegal activity.'

18. Paragraph 97 of the Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Law on copyright and related rights) of 9 September 1965 (BGBl. I, p. 1273), as last amended by the Law of 1 October 2013 (BGBl. I, p. 3728) ('the Law on copyright and related rights'), provides:

'(1) Any person who unlawfully infringes copyright or any other right protected under this law may be the subject of an action by the injured party for an injunction ordering the termination of the infringement or, where there is a risk of recurrence, for an injunction prohibiting any further commission of the infringement. The right to seek a prohibitory injunction shall exist even where the risk of infringement arises for the first time.

(2) Any person who intentionally or negligently commits such an infringement shall be obliged to indemnify the injured party for the harm arising therefrom. ...'

19. Paragraph 97a of the Law on copyright and related rights provides:

'(1) Before instituting judicial proceedings for a prohibitory injunction, the injured party shall give formal notice to the infringer, allowing him an opportunity to settle the dispute by giving an undertaking to refrain from further commission of the infringement, coupled with an appropriate contractual penalty.

...

(3) Provided that the formal notice is justified, ... reimbursement of the costs necessarily so incurred may be sought. ...'

National case-law on the indirect liability of information society service providers (Störerhaftung)

20. It appears from the order for reference that in German law a person may be held liable in the case of infringement of copyright or related rights for acts committed either directly (Täterhaftung) or indirectly (Störerhaftung). Paragraph 97 of the Law on copyright and related rights is interpreted by the German courts as meaning that liability for an infringement may be incurred by a person who, without being the author of the infringement or complicit in it, contributes to the infringement intentionally (the Störer).

21. In this connection, the Bundesgerichtshof (Federal Court of Justice, Germany) held, in a judgment of 12 May 2010, Sommer unseres Lebens (I ZR 121/08), that a private person operating a Wi-Fi network with internet access may be regarded as a Störer where he has failed to make his network secure by means of a password and thus enabled a third party to infringe a copyright or related right. According to that judgment, it is reasonable for such a network operator to take measures to secure the network, such as a system for identification by means of a password.

Facts of the main proceedings and the questions referred for a preliminary ruling

22. Mr Mc Fadden runs a business selling and leasing lighting and sound systems.

23. He operates an anonymous access to a wireless local area network free of charge in the vicinity of his business. In order to provide such internet access, Mr

Mc Fadden uses the services of a telecommunications business. Access to that network was intentionally not protected in order to draw the attention of customers of near-by shops, of passers-by and of neighbours to his company.

24. Around 4 September 2010, Mr Mc Fadden changed the name of his network from 'mcfadden.de' to 'freiheitstattangst.de' in reference to a demonstration in favour of the protection of personal data and against excessive State surveillance.

25. At the same time, by means of the wireless local area network operated by Mr Mc Fadden, a musical work was, made available on the internet free of charge to the general public without the consent of the rightholders. Mr Mc Fadden asserts that he did not commit the infringement alleged, but does not rule out the possibility that it was committed by one of the users of his network.

26. Sony Music is the producer of the phonogram of that work.

27. By letter of 29 October 2010, Sony Music gave formal notice to Mr Mc Fadden to respect its rights over the phonogram.

28. Following the giving of formal notice, Mr Mc Fadden brought an action for a negative declaration (*'negative Feststellungsklage'*) before the referring court. In reply, Sony Music made several counterclaims seeking to obtain from Mr Mc Fadden, first, payment of damages on the ground of his direct liability for the infringement of its rights over the phonogram, second, an injunction against the infringement of its rights on pain of a penalty and, third, reimbursement of the costs of giving formal notice and court costs.

29. In a judgement of 16 January 2014, entered in default of Mr Mc Fadden's appearance, the referring court dismissed Mr Mc Fadden's action and upheld the counterclaims of Sony Music.

30. Mr Mc Fadden appealed against that judgment on the ground that he is exempt from liability under the provisions of German law transposing Article 12(1) of Directive 2000/31.

31. In the appeal, Sony Music claims that the referring court should uphold the judgment at first instance and, in the alternative, in the event that that court should not hold Mr Mc Fadden directly liable, order Mr Mc Fadden, in accordance with the case-law on the indirect liability (Störerhaftung) of wireless local area network operators, to pay damages for not having taken measures to protect his wireless local area network and for having thereby allowed third parties to infringe Sony Music's rights.

32. In the order for reference, the referring court states that it is inclined to regard the infringement of Sony Music's rights as not having been committed by Mr Mc Fadden personally, but by an unknown user of his wireless local area network. However, the referring court is considering holding Mr Mc Fadden indirectly liable (Störerhaftung) for failing to have secured the network from which its rights were infringed anonymously. Nevertheless, the referring court wishes to know whether the exemption from liability laid down in Article 12(1) of Directive 2000/31, which has been transposed into German law by the first sentence of Paragraph 8(1) of the Law on electronic media, might preclude it from finding Mr Mc Fadden liable in any form.

33. In those circumstances, the Landgericht München I (Regional Court, Munich I, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the first half-sentence of Article 12(1) of Directive 2000/31, read in conjunction with Article 2(a) of that directive and Article 1(2) of Directive 98/34, to be interpreted as meaning that the expression "normally provided for remuneration" means that the national court must establish:

a. whether the person specifically concerned, who claims the status of service provider, normally provides that specific service for remuneration,

b. whether there are on the market any providers at all who provide that service or similar services for remuneration, or

c. whether the majority of these or similar services are provided for remuneration?

2. Is the first half-sentence of Article 12(1) of Directive 2000/31 to be interpreted as meaning that the expression "provision of access to a communication network" means that the only criterion for provision in conformity with the directive is that access to a communication network (for example, the internet) should be successfully provided?

3. Is the first half-sentence of Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, to be interpreted as meaning that, for the purposes of "anbieten" ("provision") within the meaning of Article 2(b) [of that directive], it is sufficient for the Information Society service to be made available, that being, in this case, the making available of an open [wireless local area network] WLAN, or is "advertising", for example, also necessary?

4. Is the first half-sentence of Article 12(1) of Directive 2000/31 to be interpreted as meaning that the expression "not liable for the information transmitted" precludes as a matter of principle, or in any event in relation to a first established copyright infringement, any claims for injunctive relief, damages or the payment of the costs of giving formal notice or court costs which a person affected by a copyright infringement might make against the access provider?

5. Is the first half-sentence of Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, to be interpreted as meaning that the Member States may not permit a national court, in substantive proceedings, to make an order requiring an access provider to refrain in future from enabling third parties to make a particular copyright-protected work available for electronic retrieval from an online exchange platform via a specific internet connection?

6. Is the first half-sentence of Article 12(1) of Directive 2000/31 to be interpreted as meaning that, in circumstances such as those in the main proceedings,

the rule contained in Article 14(1)(b) of Directive 2000/31 is to be applied mutatis mutandis to an application for a prohibitory injunction?
7. Is the first half-sentence of Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive to be interpreted as meaning that the requirements applicable to a service provider are limited to the condition that the service provider be any natural or legal person providing an Information Society service?
8. If the seventh question is answered in the negative, what additional requirements must be imposed on a service provider for the purposes of interpreting Article 2(b) of Directive 2000/31?
9. Is the first half-sentence of Article 12(1) of Directive 2000/31, taking into account the existing protection of intellectual property as a fundamental right forming part of the right to property (Article 17(2) of the Charter of Fundamental Rights of the European Union) and the provisions of Directives 2001/29 and 2004/48, and taking into account the freedom of information and the fundamental right under EU law of the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union), to be interpreted as not precluding a national court from deciding, in … proceedings in which an access provider is ordered, on pain of payment of a fine, to refrain in the future from enabling third parties to make a particular copyright-protected work or parts thereof available for electronic retrieval from an online (peer-to-peer) exchange platform via a specific internet connection, that it may be left to the access provider to determine what specific technical measures to take in order to comply with that order?
[10.] Does this also apply where the access provider is in fact able to comply with the court prohibition only by terminating or password-protecting the internet connection or examining all communications passing through it in order to ascertain whether the particular copyright-protected work is unlawfully transmitted again, and this fact is apparent from the outset rather than coming to light only in the course of enforcement or penalty proceedings?'

Consideration of the questions referred

The first question

34. It appears from the order for reference that, by its first question, the referring court seeks to determine whether a service, such as that provided by the applicant in the main proceedings, consisting in making available to the general public an open wireless communication network free of charge may fall within the scope of Article 12(1) of Directive 2000/31.
35. In those circumstances, it must be understood that, by its first question, the referring court is asking, in essence, whether Article 12(1) of Directive 2000/31, read in conjunction with Article 2(a) of that directive and with Article 1(2) of Directive 98/34, must be interpreted as meaning that a service, such as that at issue in the main proceedings, provided by a communication network operator and consisting in making that network available to the general public free of charge constitutes an 'information society service' within the meaning of Article 12(1) of Directive 2000/31.
36. From the outset, it is important to note that neither Article 12(1) of Directive 2000/31 nor Article 2 of that directive defines the concept of an *'information society service'*. However, the latter article refers for such purposes to Directive 98/34.
37. In that regard, it follows, first, from recitals 2 and 19 to Directive 98/48 that the concept of a 'service' used in Directive 98/34 must be understood as having the same meaning as that used in Article 57 TFEU. Under Article 57 TFEU, 'services' are to be considered to be services normally provided for remuneration.
38. Second, Article 1(2) of Directive 98/34 provides that the concept of an 'information society service' covers any service normally provided for remuneration, by electronic means and at the individual request of a recipient of services.
39. Under those conditions, the Court finds that the information society services referred to in Article 12(1) of Directive 2000/31 cover only those services normally provided for remuneration.
40. That conclusion is borne out by recital 18 of Directive 2000/31 which states that, although information society services are not solely restricted to services giving rise to online contracting but extend to other services, those services must represent an economic activity.
41. Nonetheless, it does not follow that a service of an economic nature performed free of charge may under no circumstances constitute an 'information society service' within the meaning of Article 12(1) of Directive 2000/31. The remuneration of a service supplied by a service provider within the course of its economic activity does not require the service to be paid for by those for whom it is performed (see, to that effect, **judgment of 11 September 2014, Papasavvas, C‑291/13, EU:C:2014:2209, paragraphs 28 and 29**).
42. That is the case, inter alia, where the performance of a service free of charge is provided by a service provider for the purposes of advertising the goods sold and services provided by that service provider, since the cost of that activity is incorporated into the price of those goods or services (judgment of 26 April 1988, Bond van Adverteerders and Others, 352/85, EU:C:1988:196, paragraph 16, and of 11 April 2000, Deliège, C‑51/96 and C‑191/97, EU:C:2000:199, paragraph 56).
43. In the light of the foregoing, the answer to the first question referred is that Article 12(1) of Directive 2000/31, read in conjunction with Article 2(a) of that directive and with Article 1(2) of Directive 98/34, must be interpreted as meaning that a service such as that at issue in the main proceedings, provided by a communication network operator and consisting in making that network available to the general public free of charge constitutes an 'information society service' within the meaning of Article 12(1) of Directive 2000/31 where the activity is performed by the service provider in question for the purposes of advertising the

goods sold or services supplied by that service provider.

The second and third questions

44. By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must only be made available or whether further conditions must be satisfied.

45. In particular, the referring court wishes to know whether, in addition to providing access to a communication network, it is necessary, first, for there to be a contractual relationship between the recipient and provider of the service and, second, for the service provider to advertise the service.

46. In that regard, in the first place, it is clear from the wording of Article 12 of Directive 2000/31, headed 'Mere conduit', that the provision of the service referred to in that article must involve the transmission in a communication network of information.

47. Furthermore, the provision states that the exemption from liability laid down in that provision applies only with regard to information transmitted.

48. Finally, according to recital 42 of Directive 2000/31, the activity of 'mere conduit' is of a mere technical, automatic and passive nature.

49. It follows that providing access to a communication network must not go beyond the boundaries of such a technical, automatic and passive process for the transmission of the required information.

50. In the second place, it does not appear either from the other provisions of Directive 2000/31 or the objectives pursued thereunder that providing access to a communication network must satisfy further conditions, such as a condition that there be a contractual relationship between the recipient and provider of that service or that the service provider use advertising to promote that service.

51. The Court recognises that it may appear from the use in Article 2(b) of Directive 2000/31 of the verb anbieten in its German language version that that article refers to the idea of an "offer", and thus to a certain form of advertising.

52. However, the need for uniform application and accordingly a uniform interpretation of the provisions of EU law makes it impossible for one version of the text of a provision to be considered, in case of doubt, in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages (**judgment of 9 June 2011, Eleftheri tileorasi and Giannikos, C-52/10, EU:C:2011:374, paragraph 23**).

53. The other language versions of the Article 2(b), inter alia those in Spanish, Czech, English, French, Italian, Polish or Slovak, use verbs which do not imply the idea of an 'offer' or of advertising.

54. In the light of the foregoing, the answer to the second and third questions is that Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied.

The sixth question

55. By its sixth question, which it is appropriate to consider in the third place, the referring court asks, in essence, whether Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive applies mutatis mutandis to Article 12(1) of the directive.

56. In that regard, it follows from the very structure of Directive 2000/31 that the EU legislature wished to distinguish between the regimes applicable to the activities of mere conduit, of the storage of information taking the form of 'caching' and of hosting in so far as those activities are governed by different provisions of that directive.

57. Against that background, it appears from a comparison of Article 12(1), Article 13(1) and Article 14(1) of the directive that the exemptions from liability provided for in those provisions are governed by different conditions of application depending on the type of activity concerned.

58. In particular, Article 14(1) of Directive 2000/31, headed 'Hosting', provides, inter alia, that, in order to benefit from the exemption from liability laid down in that provision in favour of internet website hosts, such hosts must act expeditiously upon obtaining knowledge of illegal information to remove or to disable access to it.

59. However, Article 12(1) of Directive 2000/31 does not subject the exemption from liability that it lays down in favour of providers of access to a communication network to compliance with such a condition.

60. Moreover, as the Advocate General has stated in **paragraph 100 of his Opinion**, the position of an internet website host on the one hand and of a communication network access provider on the other are not similar as regards the condition laid down in Article 14(1) of Directive 2000/31.

61. It appears from recital 42 of Directive 2000/31 that the exemptions from liability established therein were provided for in the light of the fact that the activities engaged in by the various categories of service providers referred to, inter alia providers of access to a communication network and internet website hosts, are all of a mere technical, automatic and passive nature and that, accordingly, such service providers have neither knowledge of, nor control over, the information which is thereby transmitted or stored.

62. Nevertheless, the service provided by an internet website host, which consists in the storage of information, is of a more permanent nature. Accordingly, such a host may obtain knowledge of the illegal character of certain information that it stores at a

time subsequent to that when the storage was processed and when it is still capable of taking action to remove or disable access to it.

63. However, as regards a communication network access provider, the service of transmitting information that it supplies is not normally continued over any length of time, so that, after having transmitted the information, it no longer has any control over that information. In those circumstances, a communication network access provider, in contrast to an internet website host, is often not in a position to take action to remove certain information or disable access to it at a later time.

64. In any event, it follows from paragraph 54 above that Article 12(1) of Directive 2000/31 does not provide for any further condition other than for the service at issue to provide access to a communication network which does not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information.

65. In the light of the foregoing, the answer to the sixth question is that Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive does not apply mutatis mutandis to Article 12(1).

The seventh and eighth questions

66. By its seventh and eighth questions, which it is appropriate to consider together and in the fourth place, the referring court asks, in essence, whether Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are conditions other than the one mentioned in that provision to which a service provider providing access to a communication network is subject.

67. In that regard, Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, expressly provides for only one condition as regards such a service provider, namely that of being a natural or legal person providing an information society service.

68. In that regard, it appears from recital 41 to Directive 2000/31 that, by adopting that directive, the EU legislature struck a balance between the various interests at stake. It follows that that directive as a whole, and in particular Article 12(1) read in conjunction with Article 2(b) thereof must be regarded as giving effect to the balance struck by the legislature.

69. In those circumstances, it is not for the Court to take the place of the EU legislature by subjecting the application of that provision to conditions which the legislature has not laid down.

70. To subject the exemption laid down in Article 12(1) of Directive 2000/31 to compliance with conditions that the EU legislature has not expressly envisaged could call that balance into question.

71. In the light of the foregoing, the answer to the seventh and eighth questions is that Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are no conditions, other than the one mentioned in that provision, to which a service provider supplying access to a communication network is subject.

The fourth question

72. By its fourth question, which it is appropriate to consider in the fifth place, the referring court asks, in essence, whether Article 12(1) of Directive 2000/31 must be interpreted as meaning that it does not preclude a person harmed by the infringement of its rights over a work from claiming injunctive relief against the recurrence of that infringement, compensation and the payment of costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement.

73. In that regard, it should be noted that Article 12(1) of Directive 2000/31 states that the Member States must ensure that service providers supplying access to a communication network are not held liable for information transmitted to them by the recipients of that service on the threefold condition laid down in that provision that such providers do not initiate such a transmission, that they do not select the receiver of that transmission and that they do not select or modify the information contained in the transmission.

74. It follows that, where those conditions are satisfied, a service provider supplying access to a communication network may not be held liable and therefore a copyright holder is, in any event, precluded from claiming compensation from that service provider on the ground that the connection to that network was used by third parties to infringe its rights.

75. As a result, a copyright holder is also, in any event, precluded from claiming the reimbursement of the costs of giving formal notice or court costs incurred in relation to its claim for compensation. In order to be well founded, such an ancilliary claim requires that the principal claim is also well founded, which is precluded by Article 12(1) of Directive 2000/31.

76. Nevertheless, Article 12(3) of Directive 2000/31 states that that article is not to affect the possibility, for a national court or administrative authority, of requiring a service provider to terminate or prevent an infringement of copyright.

77. Thus, where an infringement is perpetrated by a third party by means of an internet connection which was made available to him by a communication network access provider, Article 12(1) of the directive does not preclude the person harmed by that infringement from seeking before a national authority or court to have the service provider prevented from allowing that infringement to continue.

78. Consequently, the Court considers that, taken in isolation, Article 12(1) of Directive 2000/31 does not prevent that same person from claiming the reimbursement of the costs of giving formal notice and court costs incurred in a claim such as that outlined in the preceding paragraphs.

79. In the light of the foregoing, the answer to the fourth question is that Article 12(1) of Directive 2000/31 must be interpreted as precluding a person harmed by the infringement of its rights over a work

from claiming compensation from a provider of access to a communication network on the ground that such access was used by a third party to infringe its rights and the reimbursement of the costs of giving formal notice or court costs incurred in relation to its claim for compensation. However, that article must be interpreted as meaning that it does not preclude such a person from claiming injunctive relief against the continuation of that infringement and the payment of the costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement where such claims are made for the purposes of obtaining, or follow the grant of injunctive relief by a national authority or court to prevent that service provider from allowing the infringement to continue.

The fifth, sixth and seventh questions

80. By its fifth, ninth and tenth questions, which it is appropriate to consider together and in the sixth place, the referring court asks, in essence, whether, having regard to the requirements deriving from the protection of fundamental rights and to the rules laid down in Directives 2001/29 and 2004/48, Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, must be interpreted as precluding the grant of an injunction such as that at issue in the main proceedings, which requires, on pain of payment of a fine, a provider of access to a communication network allowing the public to connect to the internet to prevent third parties from making a particular copyright-protected work or parts thereof available to the general public from an online (peer-to-peer) exchange platform via an internet connection available in that network, where, although that provider may determine which technical measures to take in order to comply with the injunction, it has already been established that the only measures which the provider may in practice adopt consist in terminating or password-protecting the internet connection or in examining all communications passing through it.

81. As a preliminary matter, it is common ground that an injunction, such as that envisaged by the referring court in the case at issue in the main proceedings, in so far as it would require the communication network access provider in question to prevent the recurrence of an infringement of a right related to copyright, falls within the scope of the protection of the fundamental right to the protection of intellectual property laid down in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

82. In addition, in so far as such an injunction, first, places a burden on the access provider capable of affecting his economic activity and, second, is capable of restricting the freedom available to recipients of such a service from benefiting from access to the internet, the Court finds that the injunction infringes the former's right of freedom to conduct a business, protected under Article 16 of the Charter, and the right of others to freedom of information, the protection of which is provided for by Article 11 of the Charter.

83. Where several fundamental rights protected under EU law are at stake, it is for the national authorities or courts concerned to ensure that a fair balance is struck between those rights (see, to that effect, **judgment of 29 January 2008, Promusicae, C‑275/06, EU:C:2008:54, paragraphs 68 and 70**).

84. In that regard, the Court has previously held that an injunction which leaves a communication network access provider to determine the specific measures to be taken in order to achieve the result sought is capable, under certain conditions, of leading to such a fair balance (see, to that effect, **judgment of 27 March 2014, UPC Telekabel Wien, C‑314/12, EU:C:2014:192, paragraphs 62 and 63**).

85. In the present case, it appears from the order for reference that the referring court envisages a situation in which there are, in practice, only three measures that the addressee of the injunction may take, namely examining all communications passing through an internet connection, terminating that connection or password-protecting it.

86. It is therefore on the sole basis of those three measures envisaged by the referring court that the Court will examine the compatibility of the envisaged injunction with EU law.

87. As regards, first, monitoring all of the information transmitted, such a measure must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31, which excludes the imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit.

88. As regards, second, the measure consisting in terminating the internet connection completely, it must be found that so doing would cause a serious infringement of the freedom to conduct a business of a person who pursues an economic activity, albeit of a secondary nature, consisting in providing internet access by categorically preventing that provider from pursuing the activity in practice in order to remedy a limited infringement of copyright without considering the adoption of measures less restrictive of that freedom.

89. In those circumstances, such a measure cannot be regarded as complying with the requirements of ensuring a fair balance is struck between the fundamental rights which must be reconciled (see, to that effect, as regards an injunction, **judgment of 24 November 2011, Scarlet Extended, C‑70/10, EU:C:2011:771, paragraph 49**, and, by analogy, judgment of **16 July 2015, Coty Germany, C‑580/13, EU:C:2015:485, paragraphs 35 and 41**).

90. As regards, third, the measure consisting in password-protecting an internet connection, it should be noted that such a measure is 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 to freedom of information of the recipients of that service.

91. Nonetheless, it must be found, in the first place, that such a measure 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 options open to the provider in exercising its activity.

92. In the second place, a measure consisting in securing an internet connection does not appear to be such as to 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, it being clear furthermore that that connection constitutes only one of several means of accessing the internet.

93. In the third place, it is true that, according to case-law, the measure adopted must be strictly targeted, in the sense that it must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting the possibility of internet users lawfully accessing information using the provider's services. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued (**judgment of 27 March 2014, UPC Telekabel Wien, C‑314/12, EU:C:2014:192, paragraph 56**).

94. However, a measure adopted by a communication network access provider consisting in securing the connection to that network does not appear to be capable of affecting the possibility made available to internet users using the services of that provider to access information lawfully, in so far as the measure does not block any internet site.

95. In the fourth place, the Court has previously held that measures which are taken by the addressee of an injunction such as that at issue in the main proceedings when complying with that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorised access to the protected subject matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject matter made available to them in breach of that fundamental right (**judgment of 27 March 2014, UPC Telekabel Wien, C‑314/12, EU:C:2014:192, paragraph 62**).

96. In that regard, the Court finds that a measure consisting in password-protecting an internet connection may dissuade the users of that connection from infringing copyright or related rights, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.

97. In the fifth place, it should be recalled that, according to the referring court, there is no measure, other than the three measures that it referred to, that a communication network access provider, such as the applicant in the main proceedings, could, in practice, take in order to comply with an injunction such as that at issue in the main proceedings.

98. Since the two other measures have been rejected by the Court, to consider that a communication network access provider need not secure its internet connection would thus be to deprive the fundamental right to intellectual property of any protection, which would be contrary to the idea of a fair balance (see, by analogy, **judgment of 16 July 2015, Coty Germany, C‑580/13, EU:C:2015:485, paragraphs 37 and 38**).

99. In those circumstances, a measure intended to secure an internet connection by means of a password must be considered to be necessary in order to ensure the effective protection of the fundamental right to protection of intellectual property.

100. It follows from the foregoing that, under the conditions set out in this judgment, a measure consisting in securing a connection must be considered to be capable of striking a fair balance between, first, the fundamental right to protection of intellectual property and, second, the right to freedom to conduct the business of a provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service.

101. Consequently, the answer to the fifth, ninth and tenth questions referred is that, having regard to the requirements deriving from the protection of fundamental rights and to the rules laid down in Directives 2001/29 and 2004/48, Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, must be interpreted as, in principle, not precluding the grant of an injunction such as that at issue in the main proceedings, which requires, on pain of payment of a fine, a communication network access provider to prevent third parties from making a particular copyright-protected work or parts thereof available to the general public from an online (peer-to-peer) exchange platform via the internet connection available in that network, where that provider may choose which technical measures to take in order to comply with the injunction even if such a choice is limited to a single measure consisting in password-protecting the internet connection, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.

Costs

102. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 12(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce'), read in conjunction with Article 2(a) of that directive and with Article 1(2) of 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a service such as that at issue in the main proceedings, provided by a communication network operator and consisting in making that network available to the general public free of charge constitutes an 'information society service' within the meaning of Article 12(1) of Directive 2000/31 where the activity is performed by the service provider in question for the purposes of advertising the goods sold or services supplied by that service provider.

2. Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied.

3. Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive does not apply mutatis mutandis to Article 12(1) of Directive 2000/31.

4. Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are no conditions, other than the one mentioned in that provision, to which a service provider supplying access to a communication network is subject.

5. Article 12(1) of Directive 2000/31 must be interpreted as meaning that a person harmed by the infringement of its rights over a work is precluded from claiming compensation from an access provider on the ground that the connection to that network was used by a third party to infringe its rights and the reimbursement of the costs of giving formal notice or court costs incurred in relation to its claim for compensation. However, that article must be interpreted as meaning that it does not preclude such a person from claiming injunctive relief against the continuation of that infringement and the payment of the costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement where such claims are made for the purposes of obtaining, or follow the grant of injunctive relief by a national authority or court to prevent that service provider from allowing the infringement to continue.

6. Having regard to the requirements deriving from the protection of fundamental rights and to the rules laid down in Directives 2001/29 and 2004/48, Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, must be interpreted as, in principle, not precluding the grant of an injunction such as that at issue in the main proceedings, which requires, on pain of payment of a fine, a provider of access to a communication network allowing the public to connect to the internet to prevent third parties from making a particular copyright-protected work or parts thereof available to the general public from an online (peer-to-peer) exchange platform via an internet connection, where that provider may choose which technical measures to take in order to comply with the injunction even if such a choice is limited to a single measure consisting in password-protecting the internet connection, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.

[Signatures]

OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 16 March 2016 (1)

Case C‑484/14

Tobias Mc Fadden

v

Sony Music Entertainment Germany GmbH

(Request for a preliminary ruling from the Landgericht München I (Regional Court, Munich I, Germany))

(Request for a preliminary ruling — Free movement of information society services — Directive 2000/31/EC — Article 2(a) and (b) — Concept of 'information society services' — Concept of 'service provider' — Services of an economic nature — Article 12 — Limitation of liability of a provider of 'mere conduit' services — Article 15 — Exclusion of general obligation to monitor — Professional making a wireless local network with Internet access available to the public free of charge — Infringement of copyright and related rights by third-party users — Injunction entailing an obligation to password-protect an Internet connection)

I – Introduction

1. Is a professional who, in the course of business, operates a wireless local area network with Internet access (a 'Wi-Fi network' (2)) that is accessible to the public free of charge providing an information society service within the meaning of Directive 2000/31/EC? (3) To what extent may his liability be limited in respect of copyright infringements committed by third parties? May the operator of such a public Wi-Fi network be constrained by injunction to make access to the network secure by means of a password?

2. Those questions outline the issues raised in a dispute between Mr Mc Fadden and Sony Music Entertainment Germany GmbH ('Sony Music') concerning actions for damages and injunctive relief in connection with the making available for downloading of copyright-protected musical works via the public Wi-Fi network operated by Mr Mc Fadden.

II – Legal framework

A – EU law

1. Legislation relating to information society services

3. Directive 2000/31, as is apparent from recital 40 thereof, is intended, amongst other things, to harmonise national provisions concerning the liability of

intermediary service providers, so that the single market for information society services can function smoothly.

4. Article 2 of Directive 2000/31, entitled 'Definitions', provides:

'For the purpose of this directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC [(4)] as amended by Directive 98/48/EC; [(5)]

(b) "service provider": any natural or legal person providing an information society service;

...'

5. Three categories of intermediary services are covered by Articles 12, 13 and 14 of Directive 2000/31. They are, respectively, 'mere conduit', 'caching' and 'hosting'.

6. Article 12 of Directive 2000/31, entitled 'Mere conduit', provides:

'1.Where 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, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(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.

...

3. This Article 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.'

7. Paragraph 1 of Article 15 of Directive 2000/31, which is entitled 'No general obligation to monitor', provides:

'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 illegal activity.'

2. Legislation relating to the protection of intellectual property

8. Article 8 of Directive 2001/29/EC, (6) headed 'Sanctions and remedies', provides, in paragraph 3 thereof:

'Member States shall ensure 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.'

9. A substantially identical provision concerning infringements of intellectual property rights in general is laid down in the third sentence of Article 11 of Directive 2004/48/EC, (7) entitled 'Injunctions'. According to recital 23 thereof, that directive is without prejudice to Article 8(3) of Directive 2001/29, which already provided for a comprehensive level of harmonisation in so far as concerns the infringement of copyright and related rights.

10. Article 3 of Directive 2004/48, entitled 'General obligation', provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

B – German law

1. Legislation transposing Directive 2000/31

11. Articles 12 to 15 of Directive 2000/31 were transposed into German law by Paragraphs 7 to 10 of the Law on electronic media (Telemediengesetz). (8)

2. Legislative provisions relating to the protection of copyright and related rights

12. Paragraph 97 of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz) (9) provides:

'1. Any person who unlawfully infringes copyright or any other right protected under this law may be the subject of an action by the injured party for an injunction ordering the termination of the infringement or, where there is a risk of recurrence, for an injunction prohibiting any further commission of the infringement. The right to seek a prohibitory injunction shall exist even where the risk of infringement arises for the first time.

2. Any person who intentionally or negligently commits such an infringement shall be obliged to make good the damage arising from it. ...'

13. Paragraph 97a of the Law on copyright and related rights in force at the time when the formal notice was issued in 2010 provided:

'1. Before instituting judicial proceedings for a prohibitory injunction, the injured party shall give formal notice to the infringer, allowing him an opportunity to settle the dispute by giving an undertaking to refrain from further commission of the infringement, coupled with an appropriate penalty. Provided that the formal notice is justified, reimbursement of the costs necessarily so incurred may be sought.

2. In straightforward cases involving only a minor infringement not committed in the course of trade, reimbursement of the costs incurred in connection with the instruction of a lawyer for the purposes of a first formal notice shall be limited to EUR 100.'

14. Paragraph 97a of the Law on copyright and related rights in the version currently in force provides:

'1. Before instituting judicial proceedings for a prohibitory injunction, the injured party shall give formal notice to the infringer, allowing him an opportunity to settle the dispute by giving an

undertaking to refrain from further commission of the infringement, coupled with an appropriate penalty.

...

3. Provided that the formal notice is justified ... reimbursement of the costs necessarily so incurred may be sought. ...

...'

3. Case-law

15. It is apparent from the order for reference that, in German law, liability for infringements of copyright and related rights may arise either directly ('Täterhaftung') or indirectly ('Störerhaftung').

16. Paragraph 97 of the Law on copyright and related rights has been interpreted by German courts as meaning that liability for an infringement may be incurred by a person who, without being the author of the infringement or complicit in it, contributes to the infringement in some way or other, either deliberately or with a sufficient degree of causation ('Störer').

17. In this connection, the Bundesgerichtshof (Federal Court of Justice) held, in its judgment of 12 May 2010 in Sommer unseres Lebens (I ZR 121/08), that a private person operating a Wi-Fi network with Internet access may be regarded as an indirect infringer ('Störer') where he has failed to make his network secure by means of a password and thus enabled a third party to infringe a copyright or related right. According to that judgment, it is reasonable for such a network operator to take measures to secure the network, such as a system for identification by means of a password.

III – The dispute in the main proceedings

18. The applicant in the main proceedings operates a business selling and renting lighting and sound systems for various events.

19. He is the owner of an Internet connection which he uses via a Wi-Fi network. On 4 September 2010, a musical work was unlawfully offered for downloading via that Internet connection.

20. Sony Music is a phonogram producer and the holder of the rights in that musical work. By letter of 29 October 2010, Sony Music gave Mr Mc Fadden formal notice concerning the infringement of its rights.

21. As is apparent from the order for reference, Mr Mc Fadden argues in this connection that, in the course of his business, he operated a Wi-Fi network, accessible to any user, over which he exercised no control. He deliberately did not password-protect that network so as to give the public access to the Internet. Mr Mc Fadden asserts that he did not commit the infringement alleged, but does not rule out the possibility that it was committed by one of the users of his network.

22. Following the formal notice, Mr Mc Fadden brought before the referring court an action for a negative declaration ('negative Feststellungsklage'). Sony Music brought a counterclaim, seeking an injunction and damages.

23. By judgment of 16 January 2014, given in default of appearance, the referring court dismissed Mr Mc Fadden's application and upheld the counterclaim, granting an injunction against Mr Mc Fadden on the ground of his directly liability for the infringement at issue and ordering him to pay damages, the costs of the formal notice, and costs.

24. Mr Mc Fadden brought an appeal against that judgment in default. In particular, he has argued that he cannot be held liable by reason of the provisions of German law transposing Article 12(1) of Directive 2000/31.

25. In the appeal, Sony Music asks the court to uphold the default judgment and, in the alternative, to issue an injunction and order Mr Mc Fadden to pay damages and the costs of the formal notice on the ground of his indirect liability ('Störerhaftung').

26. The referring court states that, at this stage, it does not believe that Mr Mc Fadden is directly liable, but is minded to reach a finding of indirect liability ('Störerhaftung') on the ground that his Wi-Fi network had not been made secure.

27. In this connection, the referring court states that it is inclined to apply, by analogy, the Bundesgerichtshof's ruling of 12 May 2010 in Sommer unseres Lebens (I ZR 121/08), taking the view that that judgment, which concerned private persons, should apply a fortiori in the case of a professional person operating a Wi-Fi network that is accessible to the public. According to the referring court, such a finding of liability on that ground would not, however, be possible if the facts of the dispute in the main proceedings fell within the scope of application of Article 12(1) of Directive 2000/31, transposed into German law by Paragraph 8(1) of the Law on electronic media of 26 February 2007, as amended by the Law of 31 March 2010.

IV – The questions referred for a preliminary ruling and the procedure before the Court

28. It was in those circumstances that the Landgericht München I (Regional Court, Munich I) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is ... Article 12(1) of Directive [2000/31], read together with Article 2(a) of [that directive] and Article 1(2) of Directive [98/34], as amended by Directive [98/48] to be interpreted as meaning that the expression 'normally provided for remuneration' means that the national court must establish whether

(a) the person specifically concerned, who claims the status of service provider, normally provides this specific service for remuneration, or

(b) there are on the market any persons at all who provide this service or similar services for remuneration, or

(c) the majority of these or similar services are provided for remuneration?

2. Is ... Article 12(1) of Directive [2000/31] to be interpreted as meaning that the expression 'provision of access to a communication network' means that the only criterion for provision in conformity with the directive is that access to a communication network (for example, the Internet) should be successfully provided?

3. Is ... Article 12(1) of Directive [2000/31], read together with Article 2(b) of [that directive] to be interpreted as meaning that, for the purposes of

'provision' within the meaning of Article 2(b) … it is sufficient for the information society service to be made available, that being, in this case, the making available of an open-access WLAN, or is 'active promotion', for example, also necessary?

4. Is … Article 12(1) of Directive [2000/31] to be interpreted as meaning that the expression 'not liable for the information transmitted' precludes as a matter of principle, or in any event in relation to a first established copyright infringement, any claims for injunctive relief, damages or the payment of the costs of giving formal notice or court costs which a person affected by a copyright infringement might make against the access provider?

5. Is … Article 12(1) of Directive [2000/31], read together with Article 12(3) of [that directive] to be interpreted as meaning that the Member States may not permit a national court, in substantive proceedings, to make an order requiring an access provider to refrain in future from enabling third parties to make a particular copyright-protected work available for electronic retrieval from an online exchange platform via a specific Internet connection?

6. Is … Article 12(1) of Directive [2000/31] to be interpreted as meaning that, in circumstances such as those in the main proceedings, the provision contained in Article 14(1)(b) of [that directive] is to be applied mutatis mutandis to an application for a prohibitory injunction?

7. Is … Article 12(1) of Directive [2000/31], read together with Article 2(b) of [that directive] to be interpreted as meaning that the requirements applicable to a service provider are limited to the condition that a service provider is any natural or legal person providing an information society service?

8. If Question 7 is answered in the negative, what additional requirements must be imposed on a service provider for the purposes of interpreting Article 2(b) of Directive [2000/31]?

9. (a) Is … Article 12(1) of Directive [2000/31], taking into account the existing protection of intellectual property as a fundamental right forming part of the right to property (Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter')) and the provisions of [Directives 2001/29 and 2004/48], and taking into account the freedom of information and the fundamental right under EU law of the freedom to conduct business (Article 16 of the [Charter]), to be interpreted as not precluding a national court from deciding, in substantive proceedings in which an access provider is ordered, on pain of payment of a fine, to refrain in the future from enabling third parties to make a particular copyright-protected work or parts thereof available for electronic retrieval from an online exchange platform via a specific Internet connection, that it may be left to the access provider to determine what specific technical measures to take in order to comply with that order?

(b) Does this also apply where the access provider is in fact able to comply with the court's injunction only by terminating or password-protecting the Internet connection or examining all communications passing through it in order to ascertain whether the copyright-protected work in question is unlawfully transmitted again, and that fact is apparent from the outset rather than coming to light only in the course of enforcement or penalty proceedings?'

29. The order for reference, dated 18 September 2014, was received at the Registry of the Court of Justice on 3 November 2014. Written observations were submitted by the parties to the main proceedings, the Polish Government and the European Commission.

30. The parties to the main proceedings and the Commission also attended the hearing on 9 December 2015.

V – Assessment

31. The questions referred for a preliminary ruling may be grouped together by reference to the two specific issues they raise.

32. First, the referring court seeks, by questions 1 to 3, to establish whether a professional person, such as the appellant in the main proceedings, who, in the course of business, operates a free, public Wi-Fi network, falls within the scope of application of Article 12 of Directive 2000/31.

33. Secondly, in the event that Article 12 of Directive 2000/31 does apply, the referring court asks this Court, in questions 4 to 9, to interpret the limitation of the liability of intermediary service providers laid down in that provision.

A – The scope of Article 12 of Directive 2000/31

34. By its first three questions, the national court asks, in essence, whether a professional person who, in the course of business, operates a free, public Wi-Fi network, is to be regarded as the provider of a service consisting in the provision of access to a communication network, within the meaning of Article 12(1) of Directive 2000/31.

35. The national court raises two concerns in this regard: first, the economic nature of the service in question and, secondly, the fact that the operator of the Wi-Fi network may simply make the network available to the public, without specifically holding himself out to potential users as a service provider.

1. A service 'of an economic nature' (first issue)

36. In so far as concerns the concept of 'services', Article 2(a) of Directive 2000/31 refers to Article 1(2) of Directive 98/34, (10) which refers to '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'.

37. The condition that the service in question must 'normally' be 'provided for remuneration' is taken from Article 57 TFEU and reflects the principle, which is well established in the case-law, that only services of an economic nature are covered by the provisions of the FEU Treaty relating to the internal market. (11)

38. According to settled case-law, the concepts of economic activity and of the provision of services in

the context of the internal market must be given a broad interpretation. (12)

39. In this connection, the national court queries the economic nature of the service at issue, whilst expressing the view that the making available of access to the Internet, even if not against payment, is an economic activity, since the provision of Internet access is normally a service that is provided for remuneration.

40. I would observe that, as the national court and the majority of the parties and interested parties, with the exception of Sony Music, have contended, the provision of Internet access is normally an economic activity. That conclusion applies equally to the provision of Internet access via a Wi-Fi network.

41. In my view, where, in the course of his business, an economic operator offers Internet access to the public, even if not against payment, he is providing a service of an economic nature, even if it is merely ancillary to his principal activity.

42. The very operation of a Wi-Fi network that is accessible to the public, in connection with another economic activity, necessarily takes place in an economic context.

43. Access to the Internet may constitute a form of marketing designed to attract customers and gain their loyalty. In so far as it contributes to the carrying on of the principal activity, the fact that the service provider may not be directly remunerated by recipients of the service is not decisive. In accordance with consistent case-law, the requirement for pecuniary consideration laid down in Article 57 TFEU does not mean that the service must be paid for directly by those who benefit from it. (13)

44. Sony Music's argument, by which it disputes the fact that the service in question is 'normally' provided for consideration, fails to convince me.

45. Admittedly, Internet access is often provided, in a hotel or bar, free of charge. However, that fact in no way contradicts the conclusion that the service in question is matched with a pecuniary consideration that is incorporated into the price of other services.

46. I see no reason why the provision of Internet access should be viewed differently when it is offered in connection with other economic activities.

47. In the present case, Mr Mc Fadden has stated that he operated the Wi-Fi network, initially under the name 'mcfadden.de', in order to draw the attention of customers of near-by shops and of passers-by to his business specialising in lighting and sound systems and to encourage them to visit his shop or his website.

48. In my opinion, the provision of Internet access in such circumstances takes place in an economic context, even if it is offered free of charge.

49. Moreover, even though it appears from the order for reference that, at around the time of the relevant facts in the main proceedings, Mr Mc Fadden probably changed the name of his Wi-Fi network to 'Freiheitstattangst.de' (freedom, not fear) so as to show his support for the fight against State surveillance of the Internet, that fact in itself has no bearing on the definition of the activity in question as 'economic'. The change in the name of the Wi-Fi network does not seem to me to be decisive, since, in any event, the network was operated from Mr Mc Fadden's business premises.

50. Furthermore, given that Mr Mc Fadden operated the publicly accessible Wi-Fi network in the context of his business, there is no need to consider whether the scope of Directive 2000/31 might also extend to the operation of such a network in circumstances where there is no other economic context. (14)

2. The service of 'providing' access to a network (second issue)

51. In accordance with Article 12(1) of Directive 2000/31, the concept of 'information society service' includes any economic activity that consists of making a communication network available, which in turn includes the operation of a public Wi-Fi network with Internet access. (15)

52. In my opinion, the term 'to provide' simply means that the activity in question enables the public to have access to a network and takes place in an economic context.

53. Indeed, the classification of a given activity as a 'service' is an objective matter. It is therefore not necessary, to my mind, for the person in question to hold himself out to the public as a service provider or that he should expressly promote his activity to potential customers.

54. Moreover, in accordance with the case-law relating to Article 8(3) of Directive 2001/29, the provision of an intermediary service must be understood in the broad sense and is not conditional upon the existence of a contractual bond between the service provider and users. (16) I would observe that the question of whether or not a contractual relationship does exist is a matter purely of national law.

55. Nevertheless, it is clear from the seventh question referred for a preliminary ruling that the national court entertains doubts regarding that last point, for the reason that the German version of Article 2(b) of Directive 2000/31, which defines 'service provider' ('Diensteanbieter'), refers to a person who 'provides' a service using a German word ('anbietet') that might be understood as implying the active promotion of a service to customers.

56. However, such a reading of the expression 'to provide [a service]', in addition to not being supported by the other language versions, (17) does not seem to me to be justified by the case-law relating to Article 56 TFEU, which assumes a broad interpretation of the concept of services and does not include any requirement of active promotion. (18)

3. Interim conclusion

57. In light of the foregoing, I consider that Articles 2(a) and (b) and 12(1) of Directive 2000/31 must be interpreted as applying to a person who, as an adjunct to his principal economic activity, operates a Wi-Fi network with an Internet connection that is accessible to the public free of charge.

B – Interpretation of Article 12 of Directive 2000/31

1. Preliminary remarks

58. I should like to organise the rather complex issue raised by questions 4 to 9.

59. Questions 4 and 5, which I propose to examine together, concern the delimitation of the liability of a provider of mere conduit services which results from Article 12(1) and (3) of Directive 2000/31.

60. The national court questions, in particular, whether it is permissible to penalise an intermediary service provider by way of an injunction and an award of damages, pre-litigation costs and court costs in the event of a copyright infringement committed by a third party. It also seeks to ascertain whether a national court is entitled to order an intermediary service provider to refrain from doing something which would enable a third party to commit the infringement in question.

61. In the event that it is not possible to envisage any effective action against an intermediary service provider, the national court asks whether it might be possible to limit the scope of Article 12 of Directive 2000/31 by applying, by analogy, the requirement laid down in Article 14(1)(b) of that directive (question 6) or by means of other unwritten requirements (questions 7 and 8).

62. Question 9 concerns the limits on any injunction that may be granted against an intermediary service provider. In order to provide a useful answer to that question, it will be necessary to refer not only to Articles 12 and 15 of Directive 2000/31, but also to the provisions on injunctive relief which are set out in Directives 2001/29 and 2004/48 with reference to the protection of intellectual property and to the fundamental rights which inform the balance that is established by all of those provisions as a whole.

2. The extent of the liability of an intermediary service provider (questions 4 and 5)

63. Article 12(1) of Directive 2000/31 limits the liability of providers of mere conduit services for unlawful acts committed by a third party with respect to the information transmitted.

64. As is apparent from the preparatory work for that legislative act, the limitation of liability in question extends, horizontally, to all forms of liability for unlawful acts of any kind, and thus to liability under criminal law, administrative law and civil law, and also to direct liability and secondary liability for acts committed by third parties. (19)

65. In accordance with Article 12(1)(a) to (c), this limitation of liability takes effect provided that three cumulative conditions are fulfilled: the provider of the mere conduit service must not have initiated the transmission, must not have selected the recipient of the transmission and must not have selected or modified the information contained in the transmission.

66. According to recital 42 of Directive 2000/31, the exemptions from liability solely cover activities of a merely technical, automatic and passive nature, which implies that the service provider has neither knowledge of nor control over the information that is transmitted or stored.

67. The questions referred by the national court are based on the assumption that those conditions are fulfilled in the present case.

68. I would observe that it is clear from a combined reading of paragraphs 1 and 3 of Article 12 of Directive 2000/31 that the provisions in question limit the liability of an intermediary service provider with respect to the information transmitted, but do not shield him from injunctions.

69. Equally, according to recital 45 of Directive 2000/31, the limitations of the liability of intermediary service providers do not affect the possibility of injunctive relief, which may, in particular, consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement.

70. Article 12 of Directive 2000/31, read as a whole, therefore makes a distinction between actions for damages and injunctions which must be taken into account when it comes to identifying the delimitation of liability prescribed in that provision.

71. In the present case, the national court asks whether it is permissible to penalise an intermediary service provider, on grounds of indirect liability ('Störerhaftung'), by way of:

– an injunction, non-compliance with which is punishable by a fine, designed to prevent third parties from infringing the rights in a specific protected work;
– an award of damages;
– an award of the costs of giving formal notice, that is to say, the pre-litigation costs relating to the formal notice which is a necessary pre-condition of bringing a legal action for an injunction, and
– an award of the court costs incurred in an action for an injunction and damages.

72. The national court itself considers that, pursuant to Article 12(1) of Directive 2000/31, Mr Mc Fadden cannot be held liable toward Sony Music in so far as any of the abovementioned penalties are concerned because he is not responsible for the information transmitted by third parties. In this connection I shall analyse, first of all, whether it is permissible to make pecuniary awards, those being, in this case, an award of damages, pre-litigation costs and court costs and, secondly, whether it is permissible to grant an injunction non-compliance with which is punishable by a fine.

a) Claims for damages and other pecuniary claims

73. I would recall that Article 12(1) of Directive 2000/31 limits the civil liability of intermediary service providers and precludes actions for damages based on any form of civil liability. (20)

74. In my opinion, that limitation of liability extends not only to claims for compensation, but also to any other pecuniary claim that entails a finding of liability for copyright infringement with respect to the information transmitted, such as a claim for the reimbursement of pre-litigation costs or court costs.

75. In this connection, I am not convinced of the relevance of Sony Music's argument that it would be fair if the 'person who has committed the infringement' were required to bear the costs resulting from it.

76. Pursuant to Article 12 of Directive 2000/31, a provider of mere conduit services cannot be held liable for a copyright infringement committed as a result of the information transmitted. Therefore, he may not be ordered to pay pre-litigation costs or court costs incurred in connection with that infringement, which cannot be imputed to him.
77. I would also observe that the making of an order to pay the pre-litigation costs or court costs relating to such an infringement could compromise the objective pursued by Article 12 of Directive 2000/31 of ensuring that no undue restrictions are imposed on the activities to which it relates. An order to pay pre-litigation costs or court costs could potentially have the same punitive effect as an order to pay damages and could in the same way hinder the development of the intermediary services in question.
78. Admittedly, Article 12(3) of Directive 2000/31 provides for the possibility of a court or administrative authority imposing certain obligations upon an intermediary service provider following the commission of an infringement, in particular by means of an injunction.
79. However, given the provisions of Article 12(1) of that directive, a judicial or administrative decision imposing certain obligations on a service provider may not be based on a finding of the latter's liability. An intermediary service provider cannot be held liable for failing to take the initiative to prevent a possible infringement or for failing to act as a bonus pater familias. He may incur liability only after a specific obligation contemplated by Article 12(3) of Directive 2000/31 has been imposed on him.
80. In the present case, in my view, Article 12(1) of Directive 2000/31 therefore precludes the making of orders against intermediary service providers not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to copyright infringements committed by third parties as a result of the information transmitted.

b) Injunctions

81. The obligation for Member States to make provision for injunctions against intermediary service providers arises under Article 8(3) of Directive 2001/29 and under the substantially identical provisions of the third sentence of Article 11 of Directive 2004/48.
82. The possibility of granting an injunction against an intermediary who provides Internet access and whose services are used by a third party to infringe a copyright or a related right is also clear from the case-law relating to those two directives. (21)
83. Directive 2001/29 is, as stated in recital 16 thereof, without prejudice to the provisions of Directive 2000/31. Notwithstanding, pursuant to Article 12(3) of Directive 2000/31, the limitation of the liability of an intermediary service provider does not in turn affect the possibility of bringing an action for a prohibitory injunction aimed at requiring the intermediary to bring an infringement to an end or to prevent an infringement. (22)
84. It follows that Article 12(1) and (3) of Directive 2000/31 does not preclude the granting of an injunction against a provider of mere conduit services.
85. Moreover, the conditions and detailed procedures relating to such injunctions are matters for national law. (23)
86. I would nevertheless reiterate that, in accordance with Article 12(1) of Directive 2000/31, the grant of an injunction cannot entail a finding of civil liability against an intermediary service provider of any kind whatsoever for infringement of copyright resulting from the information transmitted.
87. Moreover, Article 12 of that directive, read together with other relevant provisions of EU law, prescribes certain boundaries for such injunctions, which I shall examine in the context of my analysis of the ninth question referred for a preliminary ruling.

c) Penalties attaching to an injunction

88. In order to provide a useful answer to the questions referred, it is still necessary to establish whether Article 12 of Directive 2000/31 limits the liability of intermediary service providers with regard to penalties for non-compliance with an injunction.
89. It is apparent from the order for reference that the prohibitory injunction which the court envisages in the main proceedings would be backed by a fine of up to EUR 250 000 which could be converted into a custodial sentence. That penalty could only be imposed in the event of failure to comply with the injunction.
90. I am of the view that, whilst Article 12(1) of Directive 2000/31 precludes any finding of liability against an intermediary service provider in connection with an infringement of copyright resulting from the information transmitted, it does not limit a service provider's liability for non-compliance with an injunction granted in connection with such an infringement.
91. Given that that is a ground of accessory liability ancillary to the action for an injunction and that its purpose is purely to ensure the effectiveness of the injunction, it is covered by Article 12(3) of Directive 2000/31, which provides that courts are entitled to require intermediary service providers to bring an infringement to an end or to prevent an infringement.

d) Interim conclusion

92. In light of the foregoing, I consider that Article 12(1) and (3) of Directive 2000/31 precludes the making of any order against a provider of mere conduit services that entails a finding of civil liability against that service provider. Article 12 therefore precludes the making of orders against intermediary service providers not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to copyright infringements committed by third parties as a result of the information transmitted. It does not preclude the granting of an injunction, non-compliance with which is punishable by a fine.

3. Possible additional requirements relating to the limitation of liability (questions 6 to 8)

93. I would observe that, with questions 6, 7 and 8, the national court appears to proceed on the premiss that

Article 12 of Directive 2000/31 excludes any action being taken against an intermediary service provider. Consequently, it asks about the compatibility of such a situation with the fair balance between the various interests at stake to which recital 41 of the directive refers.
94. That therefore appears to be the reason for which the national court asks this Court whether it is permissible to limit the scope of Article 12 of Directive 2000/31 by means of the application, by analogy, of the condition referred to in Article 14(1)(b) of Directive 2000/31 (question 6) or by the addition of other conditions not stipulated in that directive (questions 7 and 8).
95. I am not sure that those questions will remain relevant if the Court decides, as I suggest, that Article 12 of Directive 2000/31 does, in principle, permit the grant of an injunction against an intermediary service provider.
96. In any event, I consider that these questions, in so far as they envisage the possibility of limiting the application of Article 12 of Directive 2000/31 by means of certain additional requirements, should immediately be answered in the negative.
97. Article 12(1)(a) to (c) of Directive 2000/31 makes the limitation of the liability of a provider of mere conduit services subject to certain conditions that are cumulative and also exhaustive. (24) The addition of further conditions for the application of that provision seems to me to be ruled out by its express terms.
98. As regards question 6, which refers to the possibility of applying, by analogy, the condition mentioned in Article 14(1)(b) of Directive 2000/31, I would observe that that provision stipulates that the provider of a hosting service is not liable for the information stored, provided that he acts expeditiously to remove or to disable access to that information as soon as he becomes aware of illegal activity.
99. I would reiterate in this connection that Articles 12 to 14 of Directive 2000/31 relate to three distinct categories of activity and make the limitation of the liability of providers of the relevant services subject to different conditions, account being taken of the nature of each of the activities in turn. Since the application of those conditions by analogy would have the effect of making the conditions for liability in relation to each of those activities — which the legislature clearly differentiated — the same, it would be incompatible with the general scheme of those provisions.
100. That is especially true in the case in the main proceedings. As the Commission observes, the ‘mere conduit’ activity referred to in Article 2000/31, which consists purely in the transmission of information, is different in nature from the activity referred to in Article 14 of the directive, which consists in the storage of information provided by a recipient of the service. The latter activity implies a certain degree of involvement in the storage of the information and thus a certain degree of control over it, which explains the hypothesis referred to in Article 14(1)(b) of Directive 2000/31, which contemplates the possibility that the provider of the storage service may learn of circumstances that indicate an unlawful activity, whereupon he must, of his own initiative, take action.
101. As regards questions 7 and 8, the national court wonders whether the conditions laid down in Article 12(1) of Directive 2000/31 and those flowing from the definitions set out in Article 2(a), (b) and (d) of the directive may be supplemented by other, unwritten requirements.
102. It appears from the order for reference that one such additional requirement might be, for example, the existence of a close relationship between the principal economic activity and the provision of free Internet access in the context of that principal activity.
103. I would repeat that it is clear from the wording of Article 12(1) of Directive 2000/31 that the three conditions for the application of that provision are exhaustive. In so far as the present questions concern the interpretation of the concepts of services and economic activity, I would refer to my analysis relating to the first three questions. (25)
104. In the light of those observations, I consider that the conditions referred to in Article 12(1)(a) to (c) of Directive 2000/31 are exhaustive and leave no scope for the application, by analogy, of the condition laid down in Article 14(1)(b) of that directive or for the imposition of any other additional requirements.

4. The scope of injunctions (question 9)

105. By its ninth question, the national court asks this Court whether Article 12(1) of Directive 2000/31, taking into account other provisions of EU law relevant to its application, precludes a national court from ordering an intermediary service provider to refrain in the future from enabling third parties to infringe the rights in a particular protected work via the service provider’s Internet connection where the court leaves it to the service provider to determine what specific technical measures should be taken (question 9(a)). It also asks whether such an injunction is consistent with the provision in question where it is established from the outset that the addressee is in fact able to comply with the court’s injunction only by terminating or password-protecting the Internet connection or examining all communications passing through it (question 9(b)).

a) Limits on injunction

106. As I made clear in my analysis of questions 4 and 5, Article 12 of Directive 2000/31 does not, in principle, preclude the granting of injunctions, such as those referred to in Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, against providers of mere conduit services.
107. When adopting such a measure, however, a national court must nevertheless have regard to the limitations which flow from those provisions.
108. The measures provided for in Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48 must, having regard to Article 3 of the latter directive, be fair and equitable and must not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays. They

must also be effective, proportionate and dissuasive and be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. (26) When granting a court injunction, it is also necessary to weigh the interests of the parties concerned. (27)

109. Moreover, since the application of Directive 2001/29 must not affect the application of Directive 2000/31, when granting an injunction against a provider of mere conduit services, a national court must have regard to the limitations flowing from the latter directive. (28)

110. In this connection, it is clear from Articles 12(3) and 15(1) of Directive 2000/31 that the obligations imposed on such a service provider in the context of injunctive relief must be aimed at bringing an infringement to an end or preventing a specific infringement and may not include a general observation to monitor.

111. When those provisions are applied, account must also be taken of the principles and fundamental rights that are protected under EU law, in particular, freedom of expression and information and the freedom to conduct business, enshrined in Articles 11 and 16 of the Charter respectively. (29)

112. Since those fundamental rights are restricted in order to give effect to the right to the protection of intellectual property enshrined in Article 17(2) of the Charter, it is necessary when restricting them to strike a fair balance between the fundamental interests involved. (30)

113. The mechanisms which make it possible to strike that balance are contained in Directives 2001/29 and 2000/31 themselves, in that they provide for certain limits on measures taken against intermediaries. They must also flow from the application of national law, (31) since it is national law that determines the specific detailed procedures which relate to actions for injunctive relief.

114. In this connection, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with the directives in question, but also make sure that they do not rely on an interpretation of those directives which would be in conflict with relevant fundamental rights. (32)

115. In the light of those considerations, national courts must, when issuing an injunction against an intermediary service provider, ensure:

– that the measures in question comply with Article 3 of Directive 2004/48 and, in particular, are effective, proportionate and dissuasive,

– that, in accordance with Articles 12(3) and 15(1) of Directive 2000/31, they are aimed at bringing a specific infringement to an end or preventing a specific infringement and do not entail a general obligation to monitor,

– that the application of the provisions mentioned, and of other detailed procedures laid down in national law, achieves a fair balance between the relevant fundamental rights, in particular, those protected by Articles 11 and 16 and by Article 17(2) of the Charter.

b) The compatibility of injunctions formulated in general terms

116. The national court asks whether Article 12 of Directive 2000/31 precludes injunctions which contain prohibitions formulated in general terms and leave it to the addressee of the injunction to determine what specific measures should be adopted.

117. The measure envisaged in the main proceedings consists in an order requiring the intermediary service provider to refrain in the future from enabling third parties to make a particular protected work available for electronic retrieval from an online exchange platform via a specific Internet connection. The question of what technical measures are to be taken remains open.

118. I would observe that a prohibitory injunction that is formulated in general terms and does not prescribe specific measures is potentially a source of significant legal uncertainty for the addressee thereof. The fact that the addressee will be entitled, in any proceedings concerning alleged failure to comply with such an injunction, to show that he has taken all reasonable measures does not entirely remove that uncertainty.

119. Moreover, given that determining what measures it is appropriate to adopt entails striking a fair balance between the various fundamental rights involved, that task ought to be undertaken by a court, rather than left entirely to the addressee of an injunction. (33)

120. Admittedly, the Court has already held that an injunction addressed to a provider of Internet access which leaves it to the addressee to determine what specific measures should be taken is, in principle, consistent with EU law. (34)

121. That solution was based, in particular, on the consideration that an injunction formulated in general terms had the advantage of enabling the addressee to decide which measures were best adapted to his resources and abilities and compatible with his other legal obligations. (35)

122. However, it does not seem to me that that reasoning can be applied in a case, such as the case in the main proceedings, in which the very existence of appropriate measures is the subject of debate.

123. The possibility of choosing which measures are most appropriate can, in certain situations, be compatible with the interests of the addressee of an injunction, but it is not so where that choice is the source of legal uncertainty. In such circumstances, leaving it entirely to the addressee to choose the most appropriate measures would upset the balance between the rights and interests involved.

124. I therefore consider that, whilst Article 12(3) of Directive 2000/31 and Article 8(3) of Directive 2001/29 do not, in principle, preclude the issuing of an injunction which leaves it to the addressee thereof to decide what specific measures should be taken, it nevertheless falls to the national court hearing an application for an injunction to ensure that appropriate measures do indeed exist that are consistent with the restrictions imposed by EU law.

c) The consistency with EU law of the measures contemplated in the present case

125. Next, the national court questions whether the three measures referred to in question 9(b), namely the termination of the Internet connection, the password-protection of the Internet connection and the examination of all communications passing through that connection, may be regarded as consistent with Directive 2000/31.

126. While the application of the restrictions flowing from Directives 2001/29 and 2000/31 and the requirement for a fair balance to be struck between the various fundamental rights involved are, for the specific case, matters for the national court, the Court of Justice may nevertheless provide useful guidance in that regard.

127. In its judgment in Scarlet Extended, (36) the Court held that the relevant provisions of Directives 2001/29 and 2000/31, having regard to the applicable fundamental rights, precluded the issuing of an injunction against a provider of Internet access which required it to install a system for filtering all electronic communications that applied to all its customers, as a preventive measure, exclusively at its own expense and for an unlimited period.

128. In its judgment in SABAM, (37) the Court held that those provisions of EU law precluded the issuing of a similar injunction against a hosting service provider.

129. In its judgment in UPC Telekabel Wien, (38) the Court held that those provisions did not, in certain circumstances, preclude the adoption of a measure requiring a provider of Internet access to block users' access to a specific website.

130. I consider that, in the present case, the inconsistency with EU law of the first and third hypothetical measures mentioned by the national court is immediately evident.

131. Indeed, a measure which requires an Internet connection to be terminated is manifestly incompatible with the need for a fair balance to be struck between the fundamental rights involved, since it compromises the essence of the freedom to conduct business of persons who, if only in ancillary fashion, pursue the economic activity of providing Internet access. (39) Moreover, such a measure would be contrary to Article 3 of Directive 2004/48, pursuant to which a court issuing an injunction must ensure that the measures imposed do not create a barrier to legitimate trade. (40)

132. In so far as concerns a measure requiring the owner of an Internet connection to examine all communications transmitted through that connection, that would clearly conflict with the prohibition on imposing a general monitoring obligation laid down in Article 15(1) of Directive 2000/31. Indeed, in order to constitute a monitoring obligation 'in a specific case', (41) such as is permitted under Article 15(1), the measure in question must be limited in terms of the subject and duration of the monitoring, and that would not be the case with a measure that entailed the examination of all communications passing through a network. (42)

133. The debate thus focusses on the second hypothesis, that is to say, whether the operator of a Wi-Fi network can be obliged, by way of injunction, to make access to his network secure.

d) The compatibility of an obligation to make Wi-Fi networks secure

134. The matter here at issue forms part of the ongoing debate in several Member States concerning the appropriateness of an obligation to make Wi-Fi networks secure in the interests of protecting intellectual property. (43) That debate is of particular concern to subscribers to Internet access services who make that access available to third parties by offering the public access to the Internet via their Wi-Fi network.

135. It is also one of the issues under discussion in a current legislative procedure in Germany that was initiated in the context of the government's 'Digital Agenda', (44) which is aimed at clarifying the system of liability applicable to operators of public Wi-Fi networks, with a view to making that activity more attractive. (45)

136. While that debate is centred upon the concept of indirect liability under German law ('Störerhaftung'), the issues raised are potentially of wider significance, given that the national legal systems of certain other Member States also contain instruments under which owners of Internet connections may incur liability as a result of their failure to take appropriate security measures in order to prevent possible infringements by third parties. (46)

137. I would observe that an obligation to make access to such a network secure would potentially meet with a number of objections of a legal nature.

138. First of all, the introduction of a security obligation could potentially undermine the business model of undertakings that offer Internet access as an adjunct to their other services.

139. Indeed, some such undertakings would no longer be inclined to offer that additional service if it necessitated investment and attracted regulatory constraints relating to the securing of the network and the management of users. Furthermore, some users of the service, such as customers of fast-food restaurants or other businesses, would give up using the service if it involved a systematic obligation to identify themselves and enter a password.

140. Secondly, I would observe that imposing an obligation to make a Wi-Fi network secure entails, for persons who operate that network in order to provide Internet access to their customers and to the public, a need to identify users and to retain their data.

141. In this connection, Sony Music states in its written observations, that, in order to be able to impute an infringement to a 'registered user', the operator of a Wi-Fi network would need to store the IP addresses and the external ports through which registered users have established an Internet connection. Identifying users of a Wi-Fi network essentially corresponds to the

allocation of IP addresses by an access provider. The operator of the Wi-Fi network could therefore use a computer system, which would not be very costly, according to Sony Music, to enable it to register and identify users.

142. I would observe that obligations to register users and to retain their private data fall within the scope of the regulations governing the activities of telecoms operators and other Internet service providers. The imposition of such administrative constraints seems to me to be clearly disproportionate, however, 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.

143. Thirdly, although an obligation to make a Wi-Fi network secure that is imposed in a particular injunction is not the same as a general obligation to monitor information or actively to seek facts or circumstances indicating illegal activities, such as is prohibited by Article 15 of Directive 2000/31, any general obligation to identify and register users could nevertheless lead to a system of liability applicable to intermediary service providers that would no longer be consistent with that provision.

144. Indeed, in the context of prosecuting copyright infringements, network security is not an end in itself, but merely a preliminary measure that enables an operator to have a certain degree of control over network activity. However, conferring an active, preventative role on intermediary service providers would be inconsistent with their particular status, which is protected under Directive 2000/31. (47)

145. Fourthly, and lastly, I would observe that the measure at issue would not in itself be effective, and thus its appropriateness and proportionality remain open to question.

146. It must also be observed that, given the ease with which they may be circumvented, security measures are not effective in preventing specific infringements of protected works. As the Commission states, the use of passwords can potentially limit the circle of users, but does not necessarily prevent infringements of protected works. Moreover, as the Polish Government observes, providers of mere conduit services have limited means with which to follow exchanges of peer-to-peer traffic, the monitoring of which calls for the implementation of technically advanced and costly solutions about which there could be serious reservations concerning the protection of the right to privacy and the confidentiality of communications.

147. Having regard to all of the foregoing considerations, I am of the opinion that the imposition of an obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, would not be consistent with the requirement for a fair balance to be struck between, on the one hand, the protection of the intellectual property rights enjoyed by copyright holders and, on the other, that of the freedom to conduct business enjoyed by providers of the services in question. (48) By restricting access to lawful communications, the measure would also entail a restriction on freedom of expression and information. (49)

148. More generally, I would observe that any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders.

149. First, public Wi-Fi networks used by a large number of people have relatively limited bandwidth and are therefore not particularly susceptible to the risk of infringement of copyright protected works and objects. (50) Secondly, Wi-Fi access points indisputably offer great potential for innovation. Any measures that could hinder the development of that activity should therefore be very carefully examined with reference to their potential benefits.

150. In view of all the foregoing considerations, I am of the opinion that Articles 12(3) and 15(1) of Directive 2000/31, interpreted in the light of the requirements stemming from the protection of the applicable fundamental rights, preclude the issuing of an injunction in which an obligation is imposed upon a person who operates a public Wi-Fi network as an adjunct to his principal economic activity to make access to that network secure.

VI – Conclusion

151. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Landgericht München I (Regional Court, Munich I) as follows:

1. Articles 2(a) and (b) and 12(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') must be interpreted as applying to a person who, as an adjunct to his principal economic activity, operates a local wireless network with Internet access that is accessible to the public free of charge.

2. Article 12(1) of Directive 2000/31 precludes the making of any order against a provider of mere conduit services that entails a finding of civil liability against that service provider. That provision therefore precludes the making of an order against a provider of such services not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to an infringement of copyright or a related right committed by a third party as a result of the information transmitted.

3. Article 12(1) and (3) of Directive 2000/31 does not preclude the granting of a court injunction non-compliance with which is punishable by a fine.

National courts must, when issuing such an injunction, ensure:

– that the measures in question comply with Article 3 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights and, in particular, are effective, proportionate and dissuasive;

– that, in accordance with Articles 12(3) and 15(1) of Directive 2000/31, they are aimed at bringing a specific infringement to an end or preventing a specific infringement and do not entail a general obligation to monitor, and

– that the application of those provisions, and of other detailed procedures laid down in national law, achieves a fair balance between the applicable fundamental rights, in particular, those protected by Articles 11 and 16 of the Charter of Fundament Rights of the European Union and by Article 17(2) of that Charter.

4. Articles 12(3) and 15(1) of Directive 2000/31, interpreted in the light of the requirements stemming from the protection of the applicable fundamental rights, do not, in principle, preclude the issuing of an injunction which leaves it to the addressee thereof to decide what specific measures should be taken. It nevertheless falls to the national court hearing an application for an injunction to ensure that appropriate measures do indeed exist that are consistent with the restrictions imposed by EU law.

Those provisions preclude the issuing of an injunction against a person who operates a local wireless network with Internet access that is accessible to the public, as an adjunct to his principal economic activity, where the addressee of the injunction is able to comply with it only by:

– terminating the Internet connection, or

– password-protecting the Internet connection, or

– examining all communications transmitted through it in order to ascertain whether the copyright-protected work in question is unlawfully transmitted again.

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1 – Original language: French.

2 – The term ‘Wi-Fi’, which is now commonly used to designate wireless networks, is a brand name which refers to the most widely used wireless network standard. The general term for all types of wireless network is ‘WLAN’ (wireless local area network).

3– Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1).

4– Directive 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 (OJ 1998 L 204, p. 37).

5– Directive of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34 (OJ 1998 L 217, p. 18).

6– Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

7– Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

8 – Law of 26 February 2007 (BGBl. I, p. 179), as amended by the Law of 31 March 2010 (BGBl. I, p. 692).

9 – Law of 9 September 1965 (BGBl. I, p. 1273), as amended by the Law of 1 October 2013 (BGBl. I, p. 3728).

10– As amended by Directive 98/48. That definition is taken up in Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), which repealed Directive 98/34.

11– Judgments in Smits and Peerbooms (C‑157/99, EU:C:2001:404, paragraph 58) and Humbel and Edel (263/86, EU:C:1988:451, paragraph 17).

12– See the judgment in Deliège (C‑51/96 and C‑191/97, EU:C:2000:199, paragraph 52 and the case-law cited).

13– See, to that effect, regarding a service consisting in the provision of online information which is not paid for but is financed from revenue generated from advertisements posted on the Internet, the judgment in Papasavvas (C‑291/13, EU:C:2014:2209, paragraphs 29 and 30 and the case-law cited). It is apparent from the preparatory work for Directive 2000/31 that services which are not paid for by those who receive them are also covered if they are provided in the context of an economic activity (see the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM(1998) 586 final) (OJ 1999 C 30, p. 4, in particular p. 15)).

14 – The concept of ‘economic activity’, for the purposes of the FEU Treaty provisions relating to the internal market, calls for a case-by-case analysis in which the context in which the activity in question is carried on must be taken into account. See, to that effect, the judgments in Factortame and Others (C‑221/89, EU:C:1991:320, paragraphs 20 to 22) and International Transport Workers’ Federation and Finnish Seamen’s Union (C‑438/05, EU:C:2007:772, paragraph 70).

15 – As the Commission observes, a Wi-Fi network with an Internet connection is an ‘electronic communications network’ within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37).

16 – See, to that effect, the judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraphs 34 and 35).

17 – See, inter alia, the Spanish version (‘suministre [un servicio]’), the English version (‘providing [a

service]', the Lithuanian version ('teikiantis [paslaugą]') and the Polish version ('świadczy [usługę]')).

18 – See point 38 of this Opinion.

19– See the proposal for a directive COM(1998) 586 final, p. 27.

20 – See the proposal for a directive COM(1998) 586 final, p. 28.

21 – Judgments in Scarlet Extended (C‑70/10, EU:C:2011:771, paragraph 31), SABAM (C‑360/10, EU:C:2012:85, paragraph 29) and UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraph 26).

22– See also the proposal for a directive COM(1998) 586 final, p. 28.

23 – See recital 46 of Directive 2000/31 and recital 59 of Directive 2001/29, and the judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraphs 43 and 44).

24– See the proposal for a directive COM(1998) 586 final. p. 28.

25– See point 55 of this Opinion.

26 – See, to that effect, the judgments in L'Oréal and Others (C‑324/09, EU:C:2011:474, paragraph 139) and Scarlet Extended (C‑70/10, EU:C:2011:771, paragraph 36).

27 – See, with regard to this principle, Jakubecki, A., 'Dochodzenie roszczeń z zakresu prawa własności przemysłowej', in System prawa prywatnego (The System of Private Law), Volume 14b, Prawo własności przemysłowej (Intellectual Property Law), Warsaw, CH Beck, Instytut Nauk Prawnych PAN, 2012, p. 1651.

28 – Judgment in Scarlet Extended (C‑70/10, EU:C:2011:771, paragraph 34).

29 – See, on this point, recitals 1 and 9 of Directive 2000/31.

30 – Judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraph 47).

31 – See, to that effect, the judgment in Promusicae (C‑275/06, EU:C:2008:54, paragraph 66).

32 – Judgments in Promusicae (C‑275/06, EU:C:2008:54, paragraph 68) and UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraph 46).

33 – See, on this point, the Opinion of Advocate General Cruz Villalón in UPC Telekabel Wien (C‑314/12, EU:C:2013:781, points 87 to 90).

34– Judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraph 64).

35 – Judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraph 52).

36 – C‑70/10, EU:C:2011:771.

37 – C‑360/10, EU:C:2012:85.

38 – C‑314/12, EU:C:2014:192.

39 – See, a contrario, the judgment in UPC Telekabel Wien (C‑314/12, EU:C:2014:192, paragraphs 50 and 51).

40 – See, to that effect, the judgment in L'Oréal and Others (C‑324/09, EU:C:2011:474, paragraph 140).

41– See recital 47 of Directive 2000/31.

42 – In the context of the preparatory work, the Commission cited, as an example of a specific obligation, a measure entailing the monitoring of a specific website for a specified period of time, in order to bring to an end or prevent a particular illegal activity (proposal for a directive COM(1998) 586 final, p. 30). See also, on this point, the Opinion of Advocate General Jääskinen in L'Oréal and Others (C‑324/09, EU:C:2010:757, point 182).

43 – In addition to the legislative procedure which is underway in Germany, which I refer to below, I would mention the debate surrounding the enactment of the Digital Economy Act in the United Kingdom and the public consultation opened by Ofcom (the telecommunications authority) in 2012 concerning obligations imposed on Internet service providers and, potentially, operators of public Wi-Fi networks (see 'Consultation related to the draft Online Infringement of Copyright Order', section 5.52, at http://stakeholders.ofcom.org.uk/consultations/infringement-notice/). In France, since the adoption of the — extensively debated — Loi No 2009-669, du 12 juin 2009, favorisant la diffusion et la protection de la création sur internet (Law promoting the distribution and protection of creative works on the Internet) (JORF, 13 June 2009, p. 9666) and Loi No 2009-1311, du 28 octobre 2009, relative à la protection pénale de la propriété littéraire et artistique sur internet (Law on the protection under criminal law of literary and artistic property on the Internet) (JORF, 29 October 2009, p. 18290), Internet subscribers, including operators of Wi-Fi networks, have been required to make their Wi-Fi connections secure in order to avoid incurring liability for infringements by third parties of protected works and objects.

44 – One of the objectives of the German Government's 'Digital Agenda' is to improve the availability of Internet access via Wi-Fi networks (see http://www.bmwi.de/EN/Topics/Technology/digital-agenda.html).

45 – Entwurf eines Zweiten Gesetzes zur Änderung des Telemediengesetzes (Draft second law amending the law on telemedia) (BT-Drs 18/6745). In its opinion on this draft law (BR-Drs 440/15), the Bundesrat proposed the removal of the provision requiring Wi-Fi network operators to take measures to secure their networks.

46– See, in French law, Article L. 336-3 of the Intellectual Property Code, which lays down an obligation for Internet subscribers to ensure that their accounts are not accessed in order to infringe protected works and objects.

47 – See Van Eecke, P., 'Online service providers and liability: A plea for a balanced approach' in Common Market Law Review, 2011, Vol. 48, pp. 1455 to 1502, especially p. 1501.

48 – See, to that effect, the judgments in Scarlet Extended (C‑70/10, EU:C:2011:771, paragraph 49) and SABAM (C‑360/10, EU:C:2012:85, paragraph 47).

49 – See, to that effect, the judgments Scarlet Extended (C‑70/10, EU:C:2011:771, paragraph 52) and SABAM (C‑360/10, EU:C:2012:85, paragraph 50).
50 – See, on this point, the opinion of the Bundesrat (BR-Drs 440/15, p. 18) and the Ofcom consultation, sections 3.94-3.97 (see footnotes 43 and 45 to this Opinion).