McFadden case (C-484/14)

EuroISPA's assessment of the preliminary ruling **JAN 2015**

1. ***Is the first half-sentence 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'), in conjunction with Article 2(a) 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'), in conjunction with Article 1 point 2 of Directive 98/34/EC as amended by Directive 98/48/EC, to be interpreted as meaning that '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 providers at all who provide this service or similar services for remuneration, or c. the majority of these or similar services are provided for remuneration?***

   Article 12(1) and Article 2(a) of Directive 2000/31/EC of the Directive on electronic commerce, must be together interpreted as meaning that "normally provided for remuneration" covers the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, even when this service is provided without remuneration.

   The phrase "normally provided for remuneration" clearly includes cases where the particular service is not provided for remuneration, so narrowing this by reference to a specific provider is an unreasonable and inaccurate reading of the language of the Directive: if the legislator had intended this, it would have said "normally provided for remuneration by that provider".

   In estimating whether Internet access is a service that is "normally provided for remuneration", it is important to remember the wide variety of ways in which remuneration can be given. Provision "For remuneration" includes cases where the remuneration for the service is made not by the party receiving the service but by some third party (for example, advertising supporting services) and where remuneration is made by the party receiving the service indirectly (for example, where a hotel provides network access for its guests without making a separate charge).

   In Papasavvas (C-291/13, paragraphs 26 to 30), the CJEU already examined a similar question relating to hosting providers, and found that a hosting provider which is not

remunerated by the recipient of its service is nevertheless an information society service within the meaning of Article 2(a) of the directive.

Point 18 of the preamble of the e-commerce Directive explicitly confirms that "information society services […] 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 on-line information or commercial communications […]". It is argued that the information society service should also not be directly remunerated to the person who provides it (i.e., Mr. McFadden, to the extent that he can be regarded as a provider of an information society service – see answer to question 7 below). In any case, Mr. McFadden's ISP will be remunerated for providing access to a communication network.

2. ***Is the first half-sentence 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') to be interpreted as meaning that '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?***

Article 12(1) of Directive 2000/21/EC should be interpreted as meaning that "provision of access to a communication network" means that access to a communication network is provided, without any requirement that such access be continuous or of a particular quality. Article 12(1) specifies in unusual technical detail the criteria that need to be satisfied to qualify for the protection granted; it is not open to the court to create additional criteria.

To determine the scope of application *ratione materiae* of Article 12 (1) of the e-commerce Directive, the text itself merely requires that one of the following two information society services is provided: "transmission in a communication network of information provided by the recipient of the service" (i.e., mere conduit in the strict sense) or "the provision of access to a communication network" (i.e., access). The text does not specify that access should be successfully (or effectively) provided, but only that it is provided.

This interpretation is also supported by point 18 of the preamble of the e-commerce Directive (which confirms that information society services include "services consisting […] in providing access to a communication network" (emphasis added)) and point 42 of the preamble of the e-commerce Directive ("The exemptions of liability … cover only cases where the activity of the information society provider is limited to the technical process of … giving access to a communication network …"). The EU legislator has not restricted the activity to provide access to a communication network to a particular category of effective or successful access. What is essential is that access is provided/given to a communication network; whether that access is effective or successful is not material to determine whether a particular service can be qualified as the "provision of access to a communication network" within the meaning of Article 12 (1) of the e-commerce Directive.

Restricting the scope of application of Article 12 (1) of the e-commerce Directive to successful/effective access would arguably also be at odds with the objective of this Directive "to create a legal framework to ensure the free movement of information society services between Member States" (see point 8 of the preamble). The EU legislator wanted to include all information society services within the scope of the e-commerce Directive, and not only those information society services which are successfully provided or which should attain a certain (minimum) level of service. This is also reflected in point 7 of the e-commerce Directive, saying that it lays down "a clear and general framework to cover certain legal aspects of electronic commerce in the internal market" (emphasis added).

3. ***Is the first half-sentence 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'), in conjunction with Article 2(b) 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'), to be interpreted as meaning that, for the purposes of 'provision' within the meaning of Article 2(b) 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'), the mere fact that the information society service is made available, that is to say, in this particular instance, that an open Wireless Local Area Network is put in place, is sufficient, or must the service be 'actively promoted', for example?***

Article 12(1) specifies in unusual technical detail the criteria that need to be satisfied to qualify for the protection granted; it is not open to the court to create additional criteria, such as, for example, also requiring that the service be "actively promoted".

Nothing in the language of the e-commerce Directive suggests that the EU legislator wanted to limit the provision of information society services to particular categories of information society services, such as services which are actively promoted. Another interpretation would run counter the clear text of Article 2 (b) of the e-commerce Directive, which only requires that an information society service is provided ('interpretatio cessat in claris'). See also the other textual arguments raised in the answer to the previous question (points 18 and 42 of the preamble of the e-commerce Directive).

Another interpretation would also violate the objective of the EU legislator, according to whom, as can be read in point 18 of the recital of the e-commerce Directive, "[i]nformation society services span a wide range of economic activities which take place on-line". It follows that the EU legislator wanted to give a broad meaning to the concept of 'information society services' and that there is no need to limit that concept to services which are, for example, actively promoted. See also points 7 and 8 of the preamble of the e-commerce Directive (equally mentioned in the answer to the previous question).

It follows that in order to apply Article 12 (1) of the e-commerce Directive it should be verified whether the service to make available an open WLAN network can be qualified as

an (i) information society service (ii) that consists in providing access to a communication network. Whether that service has been actively promoted is without relevance to answer this question.

4. ***Is the first half-sentence 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') to be interpreted as meaning that '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 payment of the costs of the warning notice and court proceedings which the person affected by a copyright infringement pursues against the access provider?***

Article 12(1) states that an information society service is not liable for the information transmitted. This excludes all forms of civil and criminal liability. Such a strong and broad exemption demonstrates the legislator's intent that a mere conduit, as defined in the Article, is not to be considered the responsible party for the information transmitted or any consequences or harm caused by such transmission, no matter how serious. Accordingly, no action should be permitted against a mere conduit, as defined in the Article, where the gravamen of the complaint is that the applicant is harmed by the content of the information transmitted by users of the electronic communications service provided.

This applies to copyright even more strongly than it does to more serious matters, such as terrorist communications. In relation to copyright, the CJEU noted in Scarlet (C-70/10 at paragraph 43), "[t]here is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected".

Such a broad restriction does not prevent national governments, in accordance with national and European law, from regulating the use of electronic communications services and, in accordance with national law, to require the service provider to terminate the provision of service to a particular identified user to terminate or prevent an infringement. The exercise of this possibility must comply with the requirements set out in Article 1(3).

The breadth of the immunity from civil and criminal liability, no matter how serious the criminal offence or civil harm, demonstrates the importance the legislator attaches to the wide availability of electronic communications services and to preventing their provision being inhibited by theories of indirect liability. In order to give effect to this intention, the meaning of "liability" should not be restricted so as to undermine this intent. Accordingly, "not liable for the information transmitted" precludes, as a matter of principle, any claims for damages or the payment of costs, and the imposition of any form of injunctive relief that would have the effect of materially inhibiting the ability of the mere conduit from acting as a mere conduit, either as a matter of law or economic viability. Article 12 does not preclude (see point 45 of the preamble: "The limitations of the liability of intermediary service providers … do not affect the possibility of injunctions of different kinds")., as a matter of principle, all forms of injunctive relief, but it does limit the range of injunctive relief available. In particular, the injunctive relief must not prevent or significantly limit the

ability of the communications provider to provide their service, nor must it impose actual costs or significant opportunity costs. Certain forms of injunctive relief that would not otherwise satisfy this requirement will satisfy it if accompanied by an order against the applicant to pay the full economic costs incurred by the provider for satisfying the requirements imposed.

The nature of the injunctive relief that the national court may grant has since been further restricted by Article 1(3A) of Directive 2002/21/EC as amended by Directive 2009/140/EC ("the Telecoms Framework Directive"); see further our comments on question 5, below.

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

The e-commerce Directive makes clear that the injunctions to disable access (or to remove information) is a matter of national law. In relation to mere conduit, this appears clearly from Article 12 (3) of the e-commerce Directive, which stipulates that this provision does not affect the possibility for national courts or administrative authorities of requiring the service provider to terminate or prevent an infringement. The same appears also, in more general terms, in point 45 of the e-commerce Directive: the regime of limitations of liability of intermediary service providers "do not affect the possibility of injunctions of different kinds", such as disabling of access to illegal information.

Nevertheless, it also follows from the e-commerce Directive (and EU law, in general) that injunctions can only be issued provided that particular conditions are satisfied. The e-commerce Directive is a binding legal framework for issuing injunctions.

First, there should be a legal basis to impose such injunctions. This appears very clearly from point 46 of the recital of the e-commerce Directive: "the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level" (emphasis added). The same flows, more generally, from the Charter of Fundamental Rights of the European Union. To the extent that the blocking order would limit particular fundamental rights or freedoms (e.g. the freedom of information (Art. 11) and the freedom to conduct a business (Art. 16)), these limitations "must be provided for by law" (Article 52 (1) of the Charter).

The e-commerce Directive itself does not provide a legal basis for access blocking injunctions. Support for this point of view can be found in a concurring opinion in the ECHR's Yildirim v. Turkey case: "This framework must be established via specific legal provisions; neither the general provisions and clauses governing civil and criminal

responsibility nor the e-commerce Directive constitute a valid basis for ordering Internet blocking" (ECHR, Yildirim v. Turkey, 18 December 2012, application no. 3111/10).

Article 12(3) of the Directive on electronic communications does not grant a new, broad and unlimited right to national courts, it merely preserves part of an existing right, a right that is limited by Article 15 of the same Directive, and that has since been further restricted by Directive 2002/21/EC as amended by Directive 2009/140/EC ("the Telecoms Framework Directive").

Any order made by the national court must therefore satisfy both Article 12(1) and Article 15 of the Directive on electronic communications, and also Article 1(3A) of the Telecoms Framework Directive.

Article 15(1) of the Directive on electronic communications states

> "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."

National courts are therefore prohibited from imposing on mere conduits, for the purpose of giving effect to a measure intended to limit the availability of copyright-protected material or otherwise, any requirement that would have the effect of requiring the provider to monitor the information transmitted over their networks or to seek out facts or circumstances indicating illegal activity.

This prohibits, inter alia, the national court from issuing any order requiring the provider to prevent particular material from being transmitted over its network, as this would necessarily require the provider to monitor each and every item transmitted over its network so as to determine whether any particular item matched the criteria it had been given for items to be restricted. Similarly, it also prohibits the national court from issuing any order requiring the provider to prevent its users from communicating with a particular person or from accessing a particular location, as such orders would require the provider to monitor each and every person communicated with, and every location accessed, so as to determine whether any particular communication was made to a person or location on the list of proscribed persons and locations.

Article 1(3A) of the Telecoms Framework Directive states:

> "Measures taken by Member States regarding end-users access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.
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> Any of these measures regarding end-users access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation

shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."

Any measures taken in reliance upon exception to Article 12(1) of the Directive on electronic commerce set out in Article 12(3) of that Directive are, to the extent that they affect the use of the electronic communications service by end users, measures to which Article 1(3A) of the Telecoms Framework Directive applies.

Article 1(3A) grants rights to end users that must be complied with in any measures Member States may take regarding their access to or use of services and applications through electronic communications networks where those measures are liable to restrict their fundamental rights or freedoms. Amongst the rights granted to end users are the right of the end user affected to be heard in proceedings that must be conducted according to a fair and impartial procedure, and that must take place prior to the implementation of the measure that affects the user. Those proceedings must also have due respect for the principle of the presumption of innocence. From the requirement that the affected users have the right to be heard, and that the procedure must have due respect for the presumption of innocence, it is clear that the only permitted proceedings are proceedings that are directed towards the use of the electronic communications service by an identified user or users, whose "innocence" may be considered and who have the right to be heard in their own defense. Measures that affect an entire class of users, such as all customers of a particular electronic communications service provider, are prohibited by Article 1(3A) as this would amount to collective punishment and would not respect the presumption of innocence or right to be heard granted by Article 1(3A).

The effect of Article 1(3A) of the Telecoms Framework Directive is therefore to prohibit the national court from making an order requiring the access provider to refrain in future from enabling third parties to make a particular copyright-protected work available for electronic retrieval from online exchange platforms, except insofar as such an order would only affect the electronic communications of identified third parties that have first been the subject of proceedings that conform with the requirements set out in Article 1(3A) of the Telecoms Framework Directive.

6. ***Is the first half-sentence 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') to be interpreted as meaning that, in the circumstances of the main proceedings, the provision contained in Article 14(1)(b) of Directive 2000/31/EC is to be applied mutatis mutandis to a claim for a prohibitory injunction?***

Article 12(1) and Article 14(1) set out clear distinctions between the qualifying criteria for the protection afforded to mere conduits and the protection afforded to hosting providers. These distinctions are set out with unusually great technical detail. The services described are quite different, and so it the protection given to each. The legislator has determined that it is appropriate, given the permanency of stored communications, to expose hosting providers to the risk of indirect liability if they do not act expeditiously to remove or disable access to stored information once they have actual knowledge of it. Aware that information transmitted through a mere conduit network has no such fixed nature, and so cannot be removed, the legislator chose to immunize providers of mere conduit services from liability for the information transmitted, without any corresponding requirement to act. This distinction represents a clear legislative intent that reflects the very different nature of the particular services described. The court should respect the distinction set out in the Directive, and not seek to limit the protection granted to providers of mere conduit services in the way that the same protection has been limited in the very different case of hosting services.

Moreover, given the transitory nature of the transmission of data through a mere conduit network, it would be impossible in practice for any complainant to give the communications provider "actual knowledge" of a particular transmission by some third party, that the communications provider could then act upon; the transmission will have completed before any notice could be given. The circumstances giving rise to the limitation of immunity from liability for hosting providers would therefore never arise in the case of a mere conduit. The only way in which a similar limitation could be applied in the case of mere conduits would be to mutate the requirement for "actual knowledge" of infringing transmissions into generalized knowledge that all transmissions of a certain description were infringing, and requiring the communications provider to monitor its network to discover all transmissions matching that description. This is the sort of general obligation to monitor that is specifically excluded by Article 15 of the same Directive.

7. ***Is the first half-sentence 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') in conjunction with Article 2(b) 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') to be interpreted as meaning that the requirements applicable to a service provider are confined to the condition that a service provider is any natural or legal person providing an information society service?***

Yes. Any person that provides an information society service that consists in the provision of an electronic communications service satisfying the criteria set out in Article 12(1) of the Directive on electronic commerce is entitled to the protection from liability set out in that Article.

It is not sufficient, in relation to Article 12 (1) e-commerce Directive, to verify whether the service provider is a natural and legal person providing an information society service. It

must also be verified whether that person provides an information society service covered by that specific provision (i.e., the transmission in a communication network of information provided by a recipient of the service or providing access to a communication network). It must also be verified whether that person is an intermediary service provider.

The requirements to be qualified as a 'service provider' within the meaning of Article 12 (1) of the e-commerce Directive are the following (scope of application ratione personae).

First, the service provider must provide an "information society service". If a person does not provide an information society service, Article 12 (1) is not applicable.

Second, the information society service that is provided can consist in either "the transmission in a communication network of information provided by a recipient of the service" (= mere conduit, within the strict sense) or the "provision of access to a communication network" (= access provider). If the service provider provides other services than mere conduit and/or access services, Article 12 (1) e-commerce Directive is not applicable.

Third, the provider of the information society service must be an intermediary service provider. This appears clearly from the title of Section 4 of the e-commerce Directive ("Liability of intermediary service providers"). This also appears clearly from EU case law, where it has been emphasized that " it is … necessary that the conduct of that service provider should be limited to that of an 'intermediary service provider' within the meaning intended by the legislature in the context of Section 4 of that directive" (see, e.g., Joined cases C-236/08 to C-238/08, Google France and Google, ECLI:EU:C:2010:159, paragraph 112). In the Google France and L'Oréal cases, the Court of Justice has explained that it is necessary to examine whether, in accordance with point 42 of the preamble of the e-commerce Directive, the activity of the information society service provider is of a mere technical, automatic and passive nature, which implies that that service provider has neither knowledge of nor control over the information which is transmitted or stored'. To be checked whether this is also the case for Mr. McFadden. (It can be reasonably assumed that this will be the case for Mr. McFadden's ISP.)

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/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')?***

There are no additional requirements set out in the relevant legislation, and the court should not create new ones ex nihilo.

9. ***(a) Is the first half-sentence 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'), 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 the following directives on the protection of intellectual property, in particular copyright:***

- ***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;***

- ***– Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 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 meaning that it does not preclude a decision of the national court, in substantive proceedings, whereby the access provider is ordered, with costs, to refrain in future from enabling third parties to make a particular copyright-protected work or parts thereof available for electronic retrieval from online exchange platforms via a specific internet connection and it is left to the access provider to determine what specific measures he will 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 prohibition imposed by the court 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?

As highlighted in reply to question 5, Any such measures that involve the identification and blocking of information in transit are not compliant with Art. 12(1) of Directive 2000/31 and plainly contrary to the prohibition on general monitoring obligations set out in Article 15 of the Directive on electronic commerce.