

Why Negligence in Torrent Cases?

I. Introduction – Is it illegal to leave your wifi open?

For a while, I have been bringing anti-torrent cases against defendants who have been illegally distributing my client's movies. However, we recently began adding a negligence claim to the complaints – arguing that if you leave your wifi open, and someone uses it to pirate my client's materials, you are at least partially responsible.

In the wake of a recent judgment for \$10,401.00 against a defendant in one of these cases, where the \$10,000 was for the negligence claim, I have gotten quite a few inquiries from people asking if it is **illegal** to leave your wifi open. I am pleased to report that there are no laws on the books, which affirmatively **mandate** that you must lock your wifi.

However, there **are civil claims** that can make you liable for the infringements of others. That is what civil claims are for -- to privatize certain legal issues. When there is a car accident, we don't usually bring the police into it. The parties figure out who was negligent, and the negligent party pays the other party for its damages.

What it comes down to is whether the defendant had a part in the plaintiffs damages.

So the question is **not**: *"Is it illegal to have open wifi?"*

The correct question is: *"Can you be held liable for what others do with your connection if you leave your WiFi open?"*

The answer to that is "yes you can."

II. Negligence

The law of negligence has a long history, and it morphs over time. The unchanging elements of a negligence claim are:

- a. Duty – did the defendant have a duty?
- b. Breach – did the defendant breach that duty?
- c. Causation – was the breach the cause of the plaintiff's damages?
- d. Damages – were there damages, and if so, how much?

Whether or not there is a duty is where the most debate occurs. Whether or not there is a duty is a matter of law for the court to decide, and some courts have already endorsed the theory that there may be a duty to keep your wifi secured. In an ever-evolving legal landscape, legal duties are constantly updating with technology.

In law school, we are introduced to this concept by reading the case called “The T.J. Hooper.” In that case, the plaintiffs shipped two barges full of cargo, there was a storm, the barges sank and the cargo was lost. The defendants were the owners of the tugboats that were towing the barges. The plaintiffs claimed that since the tugboats did not have working radios that could have warned them about the storm, the tugboat operators were negligent. This was 1932, and radios were not required to be on the ships by any law. Furthermore, it was not common custom for commercial ships to have them at this point, and only one company on the whole Eastern Seaboard used them.

Judge Learned Hand wrote the opinion in this case, and he stated that it did not matter that there was no law mandating their use. It did not even matter that shipping companies generally did not have radios. Hand wrote that it is the province of the courts to decide whether a duty exists, and it is not up to the affected group to make that decision. In circumstances of evolving technology, the duty may change along with technology, even if common practice does not.

III. Application: Is leaving your wifi open “negligent”?

I believe that leaving your home wifi open is, indeed, negligent. Unlike the radios in the T.J. Hooper case, closed wifi connections are actually the norm. The vast majority of Americans recognize that leaving their wifi connection open is foolhardy and likely to lead to trouble.

I have heard other lawyers compare leaving your wifi open to leaving a loaded gun lying around. I think comparing open wifi to a loaded gun is overly melodramatic and hysterical. However, the point is well taken – you are leaving the instrumentality of an illegal act out there for anyone to use. While unlike leaving a gun around (nobody ever died from open wifi), I'd say leaving your home wifi open is more like leaving your keys in your car in your driveway. Someone might just steal it, in which case the only person who gets hurt is you, right?

Wrong.

The kind of person who would steal your car is probably the kind of person who would commit other crimes (or just do something stupid). So if you leave your keys in your car, and someone takes it and drives it into someone's fence, you're at least partially responsible for the damage. If the car thief runs off, who should pay for the damage? The fence owner or you? It would seem that between those two parties, you would be more responsible than the fence owner. You wouldn't say that the fence owner should have built a better fence, would you?

That's what negligence is: It is the law saying “You really should have seen that coming.” When you do something careless, and that carelessness costs someone else money, you pay the “carelessness tax” – Negligence.

And the kind of person who would steal wifi is more likely to steal something else, isn't he? So if you invite wifi theft by leaving your home network open, you're more likely than not also inviting more.

While there is no law requiring you to keep your wifi secured, the absence of a law is no refuge from the consequences of being careless. The existence of the duty is heightened by the fact that it is common knowledge that cyber criminals use open wifi networks to commit nefarious acts. Everyone has heard about the cases where purveyors of child pornography used open wifi connections to transmit their materials. Then, the poor saps who left them open are greeted by police raids.

Is your wifi open? I would bet it is not. Mine certainly isn't, and the reason why is not that I mind sharing with my neighbors. If my neighbor needs my wifi for some reason, I have a guest network that I would share with him if he asks. But, then if I get a subpoena for something he did, at least I know who to point the finger at. I'm not willing to take that risk for someone who might just be cruising around in a car looking for an opportunity to commit a crime.

IV. Other Benefits of Bringing the Negligence Claim

Bringing a negligence claim in a torrent case has some added benefits. It takes care of two classes of defendants: The "it was some other guy" case, and the "if I lie about open wifi, you can't get me" case.

The Some Other Guy Case: When pressing these cases, I frequently talk to the IP account owner, and he says "It was my roommate, not me." When someone gives me the "it was some other guy" defense, I would much rather go after the other guy. When the roommate gives up the other guy, I think that pressing a negligence claim against him is a bit mean-spirited, and I recommend dropping the negligence claim against a cooperative account holder.

However, if the account owner does not want to reveal the identity of the actual guilty party, then he is shielding the defendant and I have no qualms about making him a defendant too. In cases like that, I'm required to press the negligence claim, to get to the truth, and obtain proper compensation for my client. There is very little chance that a roommate will not know what is going on, and if they are supplying a connection to someone who is using that connection to steal from my client, then my client has a legal right to be compensated for its losses. If someone is concealing the direct infringer, then I find little wrong with holding that person responsible.

The Open Wifi Liar: The unfortunate fact is that a common meme among the "IANAL, but I play one on torrent boards," crowd is that any torrent suit can be won if you lie and tell the plaintiff that you had an open wifi. I've caught even real licensed lawyers dispensing this "advice." (which is unethical) There are even those who advocate leaving your wifi open on purpose, just so that you can have

plausible deniability about anything that happens on your network. I would say that one out of two defendants that I deal with initially claim "I had open wifi." That winds up being a lie about 95 percent of the time. If they were all telling the truth, there would be free wifi coast to coast, and the age of wifi Aquarius would be upon us.

So how do we move forward in these kinds of cases?

Step 1: A relatively mild investigation and questioning of the potential defendant. Most non-sociopaths are lousy liars and are easily tripped up. This step winds up shaking out a good percentage of the liars. Often telling the "some other dude" account holder that we will move forward with the negligence claim gives them pause and they get the roommate on the phone. This is effective most of the time, but not 100%. So what do we do then? Move on to the next two options:

Option A: We engage in discovery, seize all of the computers in the house, issue subpoenas to everyone the account holder knows, and start having depositions of everyone who lives in their home and neighborhood. By the time we're done, we not only will likely have gotten to the bottom of things, we would have flipped the defendant's entire life upside down. While that might get us somewhere, I prefer not to be that heavy-handed if I can avoid it.

Option B: Recognize that the open wifi story still leaves negligence liability on the table, so work with that. This gives us an avenue of liability with which to hold people responsible without turning their neighborhood upside down.

Ultimately, the negligence claim brings a lot of benefits. The downside is that occasionally, you catch someone who was simply merely careless. When that happens, my client is usually willing to use discretion and to settle rather lightly. Sometimes, when the defendant is particularly sympathetic, and it is clear that they are not lying, we have been willing to settle for little more than them filing a police report and agreeing to lock their wifi down.

V. Conclusion

I respect the perspective of those who don't like the negligence claim. They have every right to say that they disagree with the law. The owners of the T.J. Hooper didn't think it was fair that they were held to a standard, which neither law nor custom required them to live up to. But, the court understood that sometimes, when you can take a pretty easy and cheap route to preventing harm, you may very well have a duty to do so. You can keep your wifi open if you like, and if nobody ever uses it for evil purposes, then you won't ever be held negligent. Similarly, if the T.J. Hooper had only seen calm seas, its owners would have gotten away with not having radios.

Ultimately, it comes down to "what should you have done?" And, "if you don't do

it, and someone else loses, who should bear the cost?" It may seem unfair to some, but if you consider that my client is losing money, and the open-wifi-guy (even if he wasn't one of the liars) contributes to that loss, who should bear the cost? Between him and my client, I think it should be him.

Furthermore, this claim really helps to shake out some of the more dishonest people, who deserve to get sued. Therefore, I stand behind bringing negligence claims against people with open wifi, when that open wifi was an instrument of my client's loss.