

# Internet BROWSING

FREE OPEN ACCESS WIRELESS NETWORKS OFFER NO PRIVACY.

WRITTEN BY PIERRE GROSIDIER

**DEFENDANT RANDALL DE WITT SIMONS  
LEARNED THE CONSEQUENCES OF ABUSING  
A FREE THIRD-PARTY WIRELESS NETWORK.<sup>1</sup>**

Simons habitually connected to the free network of a fast-food restaurant within range of his apartment. Access was subject to an agreement that prohibited illicit use and warned users that the restaurant might report such use to authorities. The network's logs exposed a user that downloaded contraband images. Alerted authorities traced the signal to Simons and, as an

additional precautionary measure "to say with '100 percent' certainty" they had identified the right person, used a packet sniffer—without a warrant—to confirm that the illicit signal emanated from his apartment.<sup>2</sup> Authorities obtained a warrant, searched his apartment, found contraband on his laptop, and indicted him on 15 felony counts. The trial court denied his motion to suppress and found him guilty in a bench trial. On appeal, Simons argued that he "had a constitutionally protected privacy interest in his internet browsing history," and that the system manager violated his privacy rights under Article I, Section 9

of the Oregon Constitution and under the Fourth Amendment.<sup>3</sup>

Oregon law takes a different path to protecting privacy than its federal counterpart. Its constitution protects "the privacy to which one has a *right*," not the one that a person reasonably expects.<sup>4</sup> A search, under Article I, Section 9, occurs when authorities invade a "protected privacy interest," which is "an interest in freedom from particular forms of scrutiny." This interest is assessed "in light of the particular context in which the government conduct occurred."<sup>5</sup>

Accepting that the network's manager acted as state agent, the court rejected Simons' argument that the government breached his privacy by monitoring his internet browsing history. It reasoned that Simons connected to a third-party network and repeatedly agreed to its terms, which cabined use and warned that misuse might be reported to authorities. Simons then recurrently violated the user agreement by downloading contraband. The



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court also refused to analogize internet access information to cell site location information (CSLI), as Simons argued it should. The Oregon Court of Appeals held elsewhere that obtaining CSLI requires a warrant, in part because CSLI “achieves near perfect surveillance” and cellphones “have become ‘necessary for participation in modern life.’”<sup>6</sup> Here, access to a third-party guest network, no matter how convenient, was not such a necessity.<sup>7</sup> The court concluded that, in this particular context, Simons had no right to privacy in his internet browsing history and, therefore, the government did not conduct a search under Article I, Section 9. The court likewise held, for essentially the same reasons, that Simons had no reasonable expectation of privacy under the Fourth Amendment.<sup>8</sup> Accordingly, the court affirmed this part of the trial court’s denial of Simons’ motion to suppress.

Separately, Simons argued that authorities performed a warrantless search when they used the packet

sniffer to confirm his laptop’s location. The trial court had denied Simons’ motion to suppress on this issue because it concluded that, even after excising the sniffer information, the warrant application contained enough incriminating evidence to establish probable cause for a search warrant.<sup>9</sup> The appellate court agreed with Simons that the trial court used the wrong standard. Shortly after Simons’ trial, the Oregon Supreme Court held that excising was no longer the correct standard. It held instead that “the focus of the inquiry is on ‘the effect that the prior illegality may have had on the authorized search.’” The court of appeals, applying the current law, reversed and remanded to the trial court to reconsider under the new standard its denial of that part of Simons’ motion to suppress.<sup>10</sup> **TBJ**

#### NOTES

1. *State v. De Witt Simons*, 540 P.3d 1130 (Or. Ct. App. 2023), rev. allowed, 550 P.3d 396 (Or. 2024).
2. The packet sniffer consisted of Kismet software and a directional antenna to locate where the wireless signal

was the strongest.

3. *Id.* at 1135.
4. *Id.* at 1135–36 (emphasis in original).
5. *Id.* at 1136.
6. *Id.* at 1138–40 (citing *State v. Hawthorne*, 504 P.3d 1185 (Or. Ct. App. 2021), rev. den., 512 P.3d 445 (Or. 2022) (citing *Carpenter v. United States*, 585 U.S. 296 (2018))).
7. The state did not argue that Simons waived his privacy rights pursuant to the third-party doctrine. *Id.* at 1137 n.3.
8. *Id.* at 1140–41.
9. *Id.* at 1135, 1141 (citing *State v. Binner*, 877 P.2d 642 (Or. Ct. App. 1994), rev. den., 883 P.2d 1303 (Or. 1994)).
10. *Id.* at 1141 and n.6 (citing *State v. DeJong*, 497 P.3d 710 (Or. 2021); *State v. Cannon*, 537 P.3d 182 (Or. Ct. App. 2023)).



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