

JANUARY/FEBRUARY 2020

VOLUME 26 NUMBER 1

DEVOTED TO
INTELLECTUAL
PROPERTY
LITIGATION &
ENFORCEMENT

*Edited by Gregory J. Battersby
and Charles W. Grimes*

IP *Litigator*®



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Internet Radio Streams and the Communication to the Public Right in the *TuneIn* Case

If the Court of Justice of the European Union's case law on the communication to the public right were to be likened to a building, it might be a pack of cards. Sometimes it seems like the foundations are a little shaky. In *Warner Music & Sony Music v. TuneIn*, [2019] 11 WLUK 6: LTL 4/11/2019, the UK High Court undertook a detailed examination of some of this case law and attempted to reconcile some of the seemingly conflicting aspects of it.

The Facts

TuneIn Inc. operates an online platform which enables users to access the streams of tens of thousands of Internet radio stations around the world. Through TuneIn's apps or website users can search, browse and playback audio content (there is also a TuneIn Radio Pro app which enables relevant users to pause, rewind and record radio streams). Although users of TuneIn's service are connected directly to third party radio station's streams, they are not re-directed to the station's website. Instead they remain on a TuneIn page and are shown advertisements provided by TuneIn whilst the stream plays.

Warner Music and Sony Music (who own or hold exclusive licences to copyright in sound recordings of music) claimed that TuneIn requires a licence from them to operate its service. TuneIn disputed the claim on the basis that it does not transmit or store any music itself, but merely provides users with hyperlinks to works which have already been made freely available on the Internet without any geographic or other restrictions.

Due to the large number of stations accessible through TuneIn's service, the trial was conducted by reference to four categories of sample stations, namely:

- Category 1: radio stations licensed in the UK;
- Category 2: radio stations not licensed in the UK or elsewhere;
- Category 3: radio stations licensed in a territory other than the UK; and
- Category 4: premium radio stations created for TuneIn and made available exclusively for TuneIn's subscribers.

The Ruling

The High Court's ruling covers many areas. It can be summarised as follows:

1. TuneIn was targeting UK Internet users. This was evident in TuneIn's bespoke advertising with currency denominations in pound sterling, its engagement of UK specific advertising sellers, its assistance in the

targeting of ad campaigns to particular demographics in the UK as well as its activities and relationships with UK-based radio stations. So even where an overseas Internet radio station had been put on the Internet by its operator on the operator's own website and not targeted to the UK by that operator, TuneIn's acts in respect of the same station could be targeted to the UK. Accordingly, acts were taking place in the UK which may (or may not) be restricted acts.

2. Upon analysing those acts, the judge (Mr Justice Birss) found that, for purpose of section 20 of the Copyright Designs and Patents Act 1988, the provision of TuneIn's service amounted to an act of "communication" of the relevant works which was made "to the public" in the sense of being to an indeterminate and fairly large number of persons. In reaching this decision, the judge rejected TuneIn's position that its service provided nothing more than a search engine, akin to Google or similar Internet search engines. This was, in particular, because TuneIn aggregates audio streams rather than links to some other form of content and because of the ability for its users to search for stations that are currently playing songs by a particular artist (such results could not be returned by a search engine).
3. The judge then considered the individual categories of sample stations:
 - Category 1: These were all licensed in the UK. The judge found that these stations had already been made freely available in the UK without access restrictions and that was, on the

facts, sufficient to find that TuneIn's subsequent act of communication to the public was therefore not to a "new public". Accordingly, there was no infringement of the communication to the public right.

- Category 2: Either these stations could not be in better position than those in Category 3 (*see below*) or the initial placing on the Internet of the works in the streams was unlicensed and, in the judge's words "not a relevant act of communication to the public at all" meaning that TuneIn was linking to those works within the terms of *GS Media*. Applying the test in *GS Media*, the judge found that there was an infringement of the communication to the public right.
- Category 3: The judge noted these stations presented a scenario which was not considered in *Svensson* (where the right-holder was taken to have given broad consent) or *GS Media* (where no consent had been given at all). The relevant question was whether the public to whom TuneIn's acts were directed were covered by any consent in the earlier communication to the public. The judge concluded that such consent could be deemed, notwithstanding that the rights may differ between different countries, but the scope of that deemed consent could not be taken to extend to cover acts targeted to the UK. As a result, TuneIn's acts of communication targeted

to towards the UK were to a new public and therefore an infringement of the communication to the public right.

- Category 4: These Internet radio streams were created exclusively for TuneIn and had not been made available prior to them doing so. TuneIn targeted those streams to the public in the UK but were unlicensed and therefore infringed the communication to the public right.
4. The recording function on the TuneIn Radio Pro app effectively converted the Internet radio station's streaming service into a permanent download on demand service and as such constituted a new and different "technical means" of communication (of the kind referred to in *TV Catchup*). Accordingly, for the time the Pro app had been available to UK users and when considered as part of the overall service it offered, TuneIn had infringed the communication to the public right, at least in relation to Categories 1, 2 and 3 where there had already been a prior communication.
 5. Individual users of the Pro app who had used the recording function committed acts of infringement of the reproduction right under section 17 of the CDPA, although some of those users would have benefitted from the so-called time-shifting exception in section 70 of the CDPA if the recordings were made in "domestic premises" for the purpose of time-shifting.
 6. The providers of Internet radio stations in Categories 2, 3 and 4 also infringed the

communication to the public right when their streams were played to a UK user through TuneIn's service, which is targeted to the UK. This is because the communication to the public right in section 20 of the CDPA is (*GS Media* aside) a tort of strict liability under UK law so station providers would be infringing regardless of whether they actively signed-up to TuneIn's directory or were included as a result of TuneIn's Web-crawler.

7. TuneIn had authorised infringements in respect of the Category 2, 3 and 4 Internet radio stations. It had directly intervened to provide streams to users in the UK and, for Category 4 and those stations in Categories 2 and 3 with which TuneIn had a bespoke contract, it was directly responsible for the stations being listed on its service. TuneIn had also authorised the infringements carried out by users making recordings using the "Pro" app. In addition, to infringement by authorisation, the judge also decided that TuneIn was liable as a joint tortfeasor for these infringements.
8. Although it was not in dispute that TuneIn was an "information society service" within the terms of the Electronic Commerce (EC Directive) Regulations 2002, it was not open to it to rely on the safe harbor defenses. TuneIn was not hosting the recordings made by the users of the Pro app as they were stored on the user's device, none of the infringing acts involved caching and TuneIn could not be considered a mere conduit because the stations' streams did not pass through TuneIn's servers.

Comment

The judge went to some lengths to explain and reconcile apparent inconsistencies between the CJEU decisions in *Svensson* and *GS Media* and in *Svensson* and *Renckhoff*. Those explanations are too detailed and nuanced to sensibly address here but are certain to be referenced in future cases.

The judge concluded that in determining whether there has been an infringing communication to the public, in addition to looking at the various elements - such as “communication”, “public”, “new public” and so on—it is necessary to make an assessment as a whole. This includes considering the nature of any subsequent/intervening act of communication to understand the nature of the initial act of “communication”—a sort of retro-fit analysis which largely reflects the Europeanization of copyright law in the UK.

The judge also gave an exposition of the role of targeting in the communication to the public right, as well as elaborating on the presumption of knowledge under *GS Media* (i.e., the rebuttable presumption of knowledge of the illegal nature of a published work which is attributed to a person operating for financial gain and who posts a hyperlink to that work).

One curious aspect of the judgment is the approach to website terms and their effect on the scope of any licence. This is a feature of UK law which the judiciary has thus far not really grappled with in any meaningful way. The judge was not convinced that the answer to questions posed by communication to the public right was to be found in detailed contract terms between TuneIn and Internet radio stations on the basis that such an approach would create real practical problems for the functioning of the Internet. The critical thing, he said, was whether the act which

makes the stream to which TuneIn links publicly accessible is licensed. While that approach of “expediency” might be justifiable in the context of considering the scope of any copyright licence per se, it seems less credible if those terms are bound up in a contract (i.e., rather than merely a bare licence without a contract having been formed) as it simply ignores the contract.

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