

UK users can TuneIn to overseas radio, but TuneIn needs a UK licence

TuneIn, the operator of an online platform that allows UK users to link to internet radio stations around the world, has been found to infringe copyright by communicating recordings to the public.¹ In a test case on the role of online link aggregators, the judge distinguished between the activity of a service such as TuneIn and the necessary function that a search engine performs. The case also expands on the definition of “communication to the public” and is instructive in the way that the High Court has applied the principles of leading CJEU decisions.

Facts

The claimants, Warner Music UK and Sony Music Entertainment UK, and the groups that they represent, own or control copyright in sound recordings of music. Together, the two groups account for more than half the market for digital sales of recorded music in the UK and about 43% globally. Traditional radio broadcasts, simulcasts of those and webcasts all require a licence from the claimants, assuming that the sound recordings played fall within the claimants’ repertoire.

The defendant in this case, TuneIn, is a US technology company. It provides an online service, TuneIn Radio, which provides users with access to links to over 100,000 radio stations around the world. TuneIn Radio is available via a website and via apps for use on mobile devices. The free versions of the service carry advertising, and there are paid-for, “premium” versions without adverts.

The claimants contended that TuneIn required a licence from them, and that TuneIn Radio was communicating their copyright-protected sound recordings to the public without their permission, in contravention of section 20 of the Copyright, Designs and Patents Act 1988. TuneIn argued that it did not transmit or store any music, and merely provided users of TuneIn Radio with links to works that had already been made freely available on the internet, without any geographic or other restriction.

Targeting of UK audience

As an initial point, it was necessary for the court to establish whether TuneIn targeted the UK and so whether UK copyright law was engaged. Relevant facts included that UK users accounted for about 10% of TuneIn’s user base, and that the UK accounted for more than 10% of TuneIn’s annual indirect advertising revenue, with adverts on the service, many of which had prices denominated in sterling and so were plainly targeted at the UK market. Besides, there was clear evidence that TuneIn had engaged the services of advertising sellers specifically for the UK, and that it assisted in the targeting of advertising campaigns to particular demographics within the UK. TuneIn had also entered into partner agreements with UK-based radio station groups such as Bauer and Global Radio, and an agreement with the BBC, which provided for geo-restriction of the BBC’s stations to the UK and the Republic of Ireland. These, among other factors, led the judge to conclude that TuneIn Radio was plainly targeted at the UK.

Communication to the public – legal principles

Mr Justice Birss noted that CJEU case law concerning the right of communication to the public, as at November 2013, had been summarised by Arnold J in *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd*,² to the effect that:

- “Communication to the public” should be interpreted broadly. It covers any transmission or retransmission of a work to the public not present at the place where the communication

¹ *Warner Music UK Ltd v TuneIn Inc.* [2019] EWHC 2923 (Ch).

² [2013] EWHC 3479 Ch.

originated by wire or wireless means and does not include any communication that is carried out directly in a place open to the public by means of public performance or direct presentation of the work.

- There is no “communication to the public” where viewers have no access to an essential element that characterises the work.
- “Communication” includes any retransmission of the work by a specific technical means different from that of the original communication.
- Using mere technical means to ensure or improve reception of the original transmission in its catchment area is not a “communication”.
- There will be an act of “communication” when members of the public are given access to a work where they could not enjoy the work without that intervention.
- For there to be “communication”, it is sufficient that a work is made available to the public in such a way that such public can access it, regardless of whether they actually do so.
- Merely providing physical facilities does not as such amount to “communication”, but the installation of physical facilities that distribute a signal and so make public access to works technically possible constitutes “communication”.
- The “public” refers to an indeterminate number of potential recipients and implies a fairly large number of persons, and the cumulative effect of making the works available to potential recipients should be taken into account.
- In considering whether there is a “communication to the public”, it is not irrelevant that the communication is profit-making.
- There is no communication to “the public” where sound recordings are broadcast by way of background music to patients of a private dental practice.
- Where there is a communication that does not use a different technical means, it is necessary to show the communication is to a “new public”, i.e. a public that was not considered when the original communication was authorised.
- For instance, there is a communication to a new public where: (a) TV broadcasts are transmitted to a public that goes beyond owners of TV sets within a private and family circle, such as customers of hotels and public houses; or (b) a provider of satellite packages expands the circle of persons with access to the relevant works.
- Where a communication uses different technical means, there is no need to consider whether the communication is to a new public.

Birss J summarised the relevant CJEU decisions that had been made since *Paramount*, from which he considered the following further principles could be drawn:

- (a) Whether a party's actions amount to a "communication to the public" is a case-specific assessment, which must be carried out as a whole.

- (b) Merely providing a link to a work available at another location on the internet can itself be an act of communication (a principle derived from *Svensson v Retriever Sverige AB*³ and *GS Media BV v Sonoma Media Netherlands BV*⁴).
- (c) There is an important distinction to be made between a work placed online with the relevant rights-holder's consent and a case where there has been no such consent. If the work was initially posted with consent, then it is itself an act of communication, and any subsequent alleged act of communication has to be analysed with that in mind. For a second act of communication online to be an infringement, there must be a new public (or new technical means). For a new public to be determined, it is necessary to establish the public taken into account when the first act of communication took place.
- (d) The question of the public taken into account for the first communication cannot be answered without knowing the nature of the subsequent act of communication. So, if a photograph is taken from one website and reposted on a second site, visitors to the second site may well not have been taken into account at the time of consent to the posting on the first site. If, however, there is a link on one site to a photograph on another, it might well be the case that the visitors to the site on which the link appears would have been taken into account at the time of consent to the original posting, on the basis that the internet includes such linking as a matter of course (*Svensson and Land Nordrhein-Westfalen v Renckhoff*⁵).
- (e) Where a work is posted initially without the rights-holder's consent, it will not have been a relevant act of communication to the public at all. So re-posting the work on another site would be an infringement, but if a defendant has only linked to the first post, there will only be an infringement if the poster of the link knew (or ought to have known) that the original posting was without consent.
- (f) Where the initial communication was without consent and the knowledge of the person posting the link is material, persons acting for financial gain will be presumed to have the requisite knowledge, but can rebut that presumption. For persons that are not acting for financial gain, they will be presumed not to have the requisite knowledge unless the contrary is proved (*GS Media*).

Tuneln submitted that, to be an infringement, the provision of a link had to make the work available on demand. But the judge considered that the CJEU was not using "making available" in the sense of focussing on the difference between a link that makes a work available instantly and one that makes available a stream in which the work will appear in due course, even though the user cannot control exactly when that will be, or which work it will be. "Making available" is part of the communication right by definition; providing a link, which is not itself the work but is something that makes the work available (by selecting the link), is itself an act of communication.

Decision

Tuneln's position was that its service was simply a specialised search engine: instead of indexing and linking to websites generally, it indexed and linked to radio station streams. The judge, however, considered the features of the Tuneln Radio service, such as aggregation of streams, categorisation of

³ Case C-466/12.

⁴ Case C-160/15.

⁵ Case C-161/17.

content, curation of stations and personalisation of content, and concluded that it could be distinguished from a conventional search engine.

Ultimately, Birss J found that TuneIn intervened directly in providing links to streams in a way in which neither conventional search engines nor links on conventional websites did. So TuneIn's activity amounted to an act of communication to the public. This determination was then applied to the claimants' repertoire available via TuneIn Radio.

Repertoire categories

Given the volume of content and number of radio stations available via TuneIn, the parties had agreed to conduct the trial by reference to a sample of stations, split across four categories:

- Category 1 – music radio stations licensed in the UK;
- Category 2 – music radio stations not licensed in the UK or elsewhere;
- Category 3 – music radio stations licensed for a territory other than the UK; and
- Category 4 – premium music radio stations.

Category 1 – Those stations were licensed within the UK and were available to the public without access restrictions. TuneIn's act of communication was a different kind of activity from that of the radio station operator, but it was directed to the users in the same territory. So there was no new public and therefore no infringement.

Category 2 – Those stations were, by contrast, unlicensed within the UK. Alternatively, they could be analysed in accordance with the principles in *GS Media*: as the placing of works in streams in Category 2 was unlicensed, that initial act was not a relevant act of communication to the public at all. So TuneIn would infringe by linking to streams with actual or presumed knowledge that the works had been placed on the internet without permission. It was reasonable to expect that TuneIn, as a commercial operator, would carry out the requisite checks to ensure the linked works were uploaded with the relevant consents.

Category 3 – Those stations had already been communicated to the public, before any intervention by TuneIn. So whether TuneIn infringed turned on whether its activities constituted a second act of communication to the public, which depended on whether there was a new public. The judge held that the public addressed by TuneIn's communication could not be said to have been taken into account for the first act of communication. So TuneIn's communication was to a new public and was unlawful unless licensed by the UK rights-holder.

Category 4 – The premium radio streams were created exclusively for TuneIn. TuneIn's provision of those amounted to an act of communication to the public. Since it was targeted at the UK but unlicensed, it was an act of infringement.

Recording function in the TuneIn Radio Pro app

The paid-for iteration of the TuneIn app allowed users to record content, before the function was removed in April 2017, thus converting the service into a permanent download service on demand. Birss J found that this functionality resulted in a different technical means from that by which the original station was provided, which meant that for Categories 1, 2 and 3, section 20 of the Act was infringed. The individual users of this function were also found most likely to have committed an act of infringement under section 17 of the Act, unless they had recorded the works in domestic premises for private and

domestic use to be listened to at a more convenient time (i.e. they were protected by the exception under section 70 for “time shifting”).

Liability of providers of Category 2, 3 and 4 stations

As breach of section 20 is a tort of strict liability, the Category 2, 3 and 4 providers themselves committed an act of communication to the public under section 20 when the station stream was played to a UK user through TuneIn Radio and so targeted at the UK. This was so even for a provider whose streams were on TuneIn Radio as a result of a web crawler and who never signed up to TuneIn’s service.

Authorisation and joint liability

The judge also held that TuneIn had authorised the infringing acts of communication under Categories 2, 3 and 4 and infringing recordings made via the TuneIn Radio Pro app. TuneIn’s activity made the radio stations available to the public in the UK, and did not extend to mere enablement, assistance or even encouragement (per Kitchin J in *Twentieth Century Fox Film Corp v Newzbin Ltd*⁶). Further, the infringement by users of the recording function was authorised by TuneIn, as it had made that feature available and had control over it: only internet radio stations provided by TuneIn could be recorded, and TuneIn could disable the recording function at a station-by-station level.

Safe harbours

The exceptions under the Electronic Commerce (EC Directive) Regulations 2002 relating to caching, mere conduit and hosting were not found to have provided a defence for TuneIn, as the Regulations did not apply to TuneIn’s activities or the infringing acts.

Comment

This case is unlikely to “break the internet”, as TuneIn sought to argue. The judge was careful to balance the general freedoms that have been intrinsic to the flourishing of the internet with the rights of copyright holders. It was clear to the judge that TuneIn’s service was more than just a link aggregator: it provided a large-scale service that served as a platform for infringing content to be streamed by millions of UK users.

Further, this case helpfully summarises and clarifies the principles outlined in three important CJEU decisions on linking (*Svensson*, *GS Media* and *Renckhoff*). The judge’s careful consideration of each category of radio station (in terms of licensing regime and consent) provides an explanation of the approach to be taken in various scenarios under which a stream may be provided. His reasoning seems likely to be followed in future cases.

Yet the decision makes it clear that whether an act can be determined to be a “communication to the public” is ultimately fact-specific. The various elements that make up this definition must be explored in turn and assessed as a whole.

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⁶ [2010] EWHC 608 (Ch).