

Stay tuned for insight into the CJEU's approach to 'communication to the public'- when does an internet radio service infringe copyright?

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The recent decision in *Warner Music & another v Tuneln Inc* [2019] EWHC 2923 (ch), was the first time the English Courts have forensically assessed the implications of CJEU decisions such as *GS Media* and *Svensson* on communication to the public over the internet. Many of us have been left bemused by the concepts the CJEU has imported into the communication to the public right, which to be fair depend on the factual situation being considered at that time by the court. This judgment makes an attempt to reconcile the approaches taken by the CJEU's rulings on the subject.



The judgment is a lengthy 212 paragraphs from Mr Justice Birss, who essentially found that:

- Providing hyperlinks to radio stations which are already licensed to play music in the UK to UK users, is not an act of communication to the public and therefore not copyright infringement; however,
- Providing links to radio stations which are not licensed in the UK (or anywhere else) is an act of communication to the public and as such is an infringement of copyright.
- The radio station itself also infringes despite the fact it was not involved in the acts which turned the original broadcast into a targeted broadcast. This finding has potential for wide implications on all manner of third parties and it will be interesting to see if any appeal on this point is made.

Background

Tuneln is an internet radio service, available online and via an app, which has both free and premium versions. It provides users access to over 100,000 radio stations which are broadcast by third parties from across the world. The case was one of significant importance for Tuneln as UK users represent about 10% of their user base and stream 9.8 million hours of audio content per month.

The music companies involved in the case control approximately 43% of the sound recordings in the global market between them. They sued Tuneln for copyright infringement in these recordings, with the main issue centering around whether the links Tuneln provide to radio stations broadcasting from various countries all around the world were communications to the public and therefore infringing.

Warner & Sony argued that Tuneln is required to take a licence from them (or PPL, one of the UK's music licensing bodies) to provide their service. Tuneln disagreed, arguing that their services are similar to an internet search engine. They do not transmit or store any music themselves and only provide users with hyperlinks to content which is already freely available without any geographical restriction - although this argument was ultimately rejected because Tuneln's service does more than a search engine. It has additional features which allow users to easily find music they may like, and the app collects and stores metadata about the content which is being transmitted. This information is then used to help with search optimisation. In addition, when listening to the content, users remain on Tuneln's site and are not directed to that particular station's website. During the stream they are shown adverts provided by Tuneln.

The decision

Targeting

Tuneln was held to be targeting the UK due to their substantial UK user base and ad revenue. The service was priced in pounds sterling and the content of adverts played to users was clearly targeted at UK customers. Due to Tuneln's acts, overseas radio stations available on Tuneln's site which would not ordinarily be considered targeted at the UK were considered to be in the circumstances.

Communication to the public

Section 20 of the Copyright, Designs and Patents Act 1988 confirms that communication to the public is an infringing act. A communication to the public under this section includes either the broadcasting of the work or making it available by electronic transmission to the public in such a way that they can access it at a time and place of their choosing.

Having analysed Tuneln's acts, the judge found that their service provision amounted to an act of communication made to the public, which he considered was an indeterminate and fairly large number of persons.

Of critical importance was whether the original streaming was done with the copyright owner's consent:

- If no, then any subsequent communication was potentially an infringing communication to the public and the court would need to consider the *GS Media* presumptions (i.e. should Tuneln be presumed to have the requisite knowledge that the original communication was without the right holder's consent?)
- If yes, any subsequent act of communication had to either be a communication to a new public or using a new technical means for the act to be infringing.

The stations available on Tuneln's site fall into four categories and the judge conducted a different assessment of infringement for each:

- **Category 1: UK licensed radio stations** (e.g. Classic FM)
 - These stations are already freely available in the UK without any access restrictions so Tuneln's subsequent act of communication to the public was therefore not to a new public or by a new technical means.
 - No infringement.
- **Category 2: radio stations unlicensed anywhere in the world** (e.g. Capital FM Bangladesh and Country 104 in Canada)
 - These stations are unlicensed either because no licence has been granted or because the countries in question do not have a rights regime.
 - There is infringement in this category for one of two reasons, either:
 - for the same reasons as for Category 3 (amounting to a communication to a new public) (see below); or
 - the initial placing on the internet of the works was unlicensed, so there was an unauthorised first communication along the lines that *GS Media* envisages and Tuneln has linked to this content with actual or presumed knowledge that the streams were unauthorised. The judge considered that Tuneln had such knowledge because it was profit-making, it would not be burdensome to check the licensing position for the stations it links to, and it had taken a haphazard approach to seeking warranties from its radio partners that they had the appropriate licence.
- **Category 3: Radio stations licensed for a territory other than the UK** (e.g. Deutschlandfunk in Germany)
 - These stations are already communicating to the public, so it could be said at that point the works have been communicated to the public (being the whole internet). However, Birss J held that the UK public were not taken into account for that first act of communication, so Tuneln's services led to communication of the works to a new public.
 - No UK rights holder had given a licence for such a communication, and so Tuneln infringed by providing access to these foreign licensed radio stations.
 - This scenario covers one which was not considered in *Svensson* or *GS Media* (where the rights holders were respectively taken to have given broad consent or no consent at all). Therefore, the judge had to consider whether the public to whom Tuneln's acts were directed were covered by any consent in the earlier communication to the public. He held that in spite of differences between rights regimes in different countries, consent could be deemed, however, the scope of that deemed consent could not be taken to extend to cover acts targeted to the UK.
- **Category 4: Premium stations created for Tuneln** (available exclusively for Tuneln's subscribers)
 - These stations are based in the USA and are not licensed for the UK at all.
 - Tuneln targeted these streams to the public in the UK.
 - There has been no prior act of making them available to the public, meaning that the provision of those streams by Tuneln amounts to an act of communication to the public and is an act of infringement.

Additional points

The Pro version of the Tuneln app had a recording function allowing users to record from the radio. Users were able to convert the stream into a permanent download on their device. Tuneln's intervention made this feasible and constituted a new and different 'technical means' (as per the CJEU decision in *TV Catch Up*) of communication to the public and was therefore copyright infringement.

In a finding that has wide reaching implications, radio stations from categories 2, 3 and 4 were found to infringe copyright by communicating to the public when their streams were played to a UK user. These radio stations did not have licences for the UK market and the original broadcast was not for UK users but for the 'home' market. It was Tuneln's intervention which led to the stations being targeted at the UK - the radio station itself took no steps. The judge said an infringing communication to the public right is a strict liability tort, so these stations infringed regardless of whether they actively signed up to be part of Tuneln's directory or not.

Tuneln sought to rely on the safe harbour defences - caching, hosting and mere conduit - in the E-Commerce Directive, but none applied as Tuneln was not actually providing such services.

Comment

Birss J has made a real effort to explain and reconcile seeming inconsistencies between the CJEU decisions in *Svensson* and *GS Media* and in *Svensson* and *Renckhoff*. Those explanations are extremely detailed and so we have not summarised them here, but they are certain to be referenced in future cases.

Most of the decision seems logical, but the judge's approach to the radio stations themselves is undoubtedly an issue for further consideration. The case law on targeting is clear - merely having an accessible site or platform online does not mean your acts are infringing acts in a territory - there needs to be targeting. In this case, it was solely the acts of Tuneln that turned some streams (targeted solely at the domestic market for the origin of the stream) into streams targeting UK consumers. It is the act of the targeting that turns the act into an infringing one, so in circumstances where a party has not done any act solely or jointly to target, it seems very rigid to find them liable too. Consider the situation where a new website is created that frames the underlying work and it is the new website that has all the material targeting UK consumers - the

underlying work has nothing to do with the UK nor was it intended. A third party could then create liability for a totally innocent party.

Interestingly, both sides are calling the ruling a victory. Tuneln announced that they had won on the most important claim, and that the Court confirmed that "music radio stations licensed in the UK can be made available through the Tuneln services to Tuneln's UK users." Sony Music's spokesperson said that the "judgment confirms what we have long known to be true: that Tuneln is unlawfully redistributing and commercialising links to unlicensed music on a widespread scale."

However, the judgment does potentially set some interesting precedents regarding the application of copyright rules to innovative digital set-ups that deliver previously territorial services to a global audience. Tuneln (and other similar services) will now need to obtain licences from the music industry to continue making non-UK radio stations available to a UK subscriber base.