

Kluwer Copyright Blog

TuneIn for more about the ‘communication to the public right’ with a Brexit angle

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Recently, the Court of Appeal in *TuneIn v Warner Music UK Ltd & Anor* confirmed the continued application of “retained EU law” in the UK on the thorny issue of communication to the public and clarified the assessment of the “new public” in TuneIn appeal. The UK approach for now remains in line with the EU. Recently promoted judge Lord Justice Arnold did not disappoint copyright aficionados, with another comprehensive judgment summarising the morass of Court of Justice (“CJEU”) legal principles, though other panel members (the Master of the Rolls and Lady Justice Rose) were less enthusiastic about the need for summaries of principles from the CJEU.



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Background and first instance decision

Warner Music and Sony Music (together the “Claimants”) own exclusive licences for copyright in sound recordings of music and together control approximately 43% of the sound recordings in the global market and more than half of the market for digital music sales in the UK.

TuneIn is a US technology company that provides internet radio services, available online and via a mobile app (“TuneIn Radio”). TuneIn Radio provides users access to over 100,000 radio stations which are broadcast by third parties from across the world. The premium version of TuneIn Radio also allowed listeners to record the radio stream.

The Claimants sued for copyright infringement, with the core issue centring around whether hyperlinks to radio stations broadcasting from various countries all around the world (including the UK) constituted communications to the public and infringed the Claimants' copyright contrary to s.20 Copyright, Designs and Patents Act 1988 ("CDPA").

The radio stations available through TuneIn Radio generally fell into the following four categories:

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

You can find a more detailed analysis of the first instance judgment in a previous post ([here](#)), but to summarise the core findings, Justice Birss held that hyperlinks to radio stations in Categories 2, 3 and 4 constituted communications to the public and infringed the Claimants' copyright. In contrast, links to Category 1 stations did not amount to communications to a "new public" as the stations were already freely available in the UK and TuneIn was targeted at the UK. That said, Birss J did conclude that the premium TuneIn Radio links to Category 1 stations did infringe because the recording function available in the premium version constituted a new technical means (applying *TVCatchup*).

Interestingly, the judge also concluded that the foreign radio stations were separately liable for copyright infringement and that TuneIn was liable for authorising the infringements by the foreign radio stations (and was also a joint tortfeasor for the same reasons).

On appeal, TuneIn raised numerous grounds of appeal and was actually criticised for the way it approached the appeal. We do not cover all grounds of appeal here and instead focus on the more pertinent arguments and how the Court of Appeal dealt with those arguments.

Targeting

At first instance, Birss J found that both TuneIn Radio and the individual hyperlinks to foreign radio stations targeted the UK. On appeal, TuneIn argued that Birss J erred in his analysis, principally by confusing the question of whether TuneIn Radio targeted the UK with the distinct question of whether the individual hyperlinks to the foreign radio stations targeted the UK.

Arnold LJ rejected the appeal, finding that Birss J had not erred in his analysis and was correct to find that TuneIn Radio and the hyperlinks targeted the UK.

Notably, Arnold LJ also confirmed that foreign radio stations not originally targeted at the UK became targeted at the UK through the intervention of TuneIn Radio and, consequently, the providers of the foreign radio stations themselves infringed the Claimants' copyright at the point when the stations became targeted at UK consumers.

Departing from CJEU case law post-Brexit

TuneIn argued that post-Brexit the Court of Appeal should depart from the entire body of CJEU jurisprudence on communication to the public, or alternatively should at least depart from the hyperlinking cases of *Svensson* and *GS Media*. Arnold LJ resoundingly rejected TuneIn’s argument for the following, paraphrased, reasons:

- The power to depart from CJEU jurisprudence is based on the power of the Supreme Court to depart from previous Supreme Court (or House of Lords) decisions and the Supreme Court has consistently ruled that this is a power to be exercised with great caution.
- Post-Brexit there has been no legislative change to s.20 CDPA 1988 nor any change to the international copyright framework.
- The CJEU has unrivalled experience dealing with the difficulties of interpreting the right of communication to the public and has developed and refined a body of jurisprudence over time.
- There is academic support for the decisions on hyperlinking, i.e., *Svensson* and *GS Media* and the academic criticism did not justify a departure from the case law.
- It did not make sense to depart only from *Svensson* and *GS Media*, but not other hyperlinking cases and despite TuneIn’s criticisms of *GS Media* there is academic support for the decision.
- Contrary to TuneIn’s submissions, minimal assistance can be taken from decisions outside of the EU (i.e., Australian, US and Canadian jurisprudence).
- Departing from the principles established by the CJEU would create considerable legal uncertainty and the interpretation advanced by TuneIn would not have provided a defence.

CJEU jurisprudence and the “new public” – reconciling *Svensson* and *Renckhoff*

At first instance, Birss J provided a lengthy analysis of the CJEU case law. TuneIn was critical of the judge’s analysis, principally how the judge resolved the obvious tension between *Renckhoff* and *Svensson*. The judge was able to reconcile the decisions by effectively importing targeting considerations to understand the scope of consent and the public envisaged by the initial communication in those decisions.

In contrast, TuneIn argued that *Svensson* established a more general principle that when works are posted on a website without restriction or with the consent of the right holder, the public targeted by the initial communication was “all Internet users”. TuneIn argued that *Renckhoff* could be distinguished on its facts to avoid inconsistency and that the CJEU confirmed *Svensson* in *VG Bild* and established that technical restrictions are the only means for rights holders to limit access to copyright works made freely available online.

Arnold LJ recognised the merit in TuneIn’s interpretation of *VG Bild*, but refused to accept that the finding could be generalised beyond the circumstances of the case. Instead, Arnold LJ stressed that *VG Bild* was essentially an intra-German dispute and concluded that the CJEU’s statement on the use of technical measures to limit consent needed to be understood within the confines of the case, rather than as a broader principle.

Additionally, TuneIn argued that Birss J’s reasoning wrongly confused the concepts of targeting and new public, which according to TuneIn are concepts designed to deal with discrete legal issues. Arnold LJ disagreed, endorsing the analysis of Birss J, with reference to the similar reasoning from the Opinion of AG Szpunar in *VG Bild* ([here](#)), and accepting a degree of overlap between the two concepts, specifically in cases where the territorial limits of copyright licensing

are central to the dispute.

The legal principles applied to TuneIn Radio

Arnold LJ rejected TuneIn's argument that TuneIn Radio was analogous to a search engine, agreeing with Birss J that the features of the platform went beyond merely providing users with links. Thus, Arnold LJ echoed and emphasised Birss J's finding that (i) TuneIn materially intervened to give the UK users of TuneIn Radio access to foreign internet radio stations' streams incorporating the claimants' repertoire; and (ii) the UK users of TuneIn Radio constituted an indeterminate and fairly large number of persons.

Moreover, after rejecting TuneIn's broad interpretation of *Svensson*, Arnold LJ confirmed that Birss J was correct to find that the original communications of the foreign radio stations in Categories 2 and 3 were limited to local audiences, since none of those stations were authorised for the UK. Consequently, the public contemplated at the time of the original communication was confined to the local audiences and did not encompass the UK public targeted by TuneIn Radio so the judge was correct to find the links amount to a communication to a "new public". Further, in respect of the Category 2 stations, Arnold LJ rejected TuneIn's challenge to the application of *GS Media*, confirming that the rebuttable presumption of knowledge applied as TuneIn Radio operates for profit and the steps taken by TuneIn to verify the radio stations had necessary licences and permissions for the stations to be added to TuneIn Radio were insufficient to rebut the *GS Media* presumption.

There was, however, a pyrrhic victory for TuneIn as Arnold LJ allowed the appeal against the judge's finding of infringement in relation to the Category 1 stations in the premium version of TuneIn Radio, concluding that the judge was wrong to find that the record function was a new technical means as per *TVCatchup*.

Practical significance

The outcome of the Court of Appeal decision strongly suggests that we are unlikely to see a hasty departure from CJEU jurisprudence on communication to the public, and perhaps more generally in areas where domestic law is derived from EU law and international treaties. Moving forward, the decision also illustrates post-Brexit CJEU case law will continue to be applied under section 6(2) of the [European Union \(Withdrawal\) Act 2018](#) ("Withdrawal Act"), at least in the area of communication to the public.

Looking more specifically at the communication to the public right, Arnold LJ endorses the pragmatic resolution of the tension between *Svensson* and *Renckhoff* achieved by Birss J at first instance. The reasoning adopted by Birss J highlights the relevance of targeting considerations to assessing whether a communication is to a new public, and that approach has now been endorsed by the Court of Appeal. Moreover, Arnold LJ appears to have limited the seemingly broad finding in *VG Bild*, so it is arguable that technical restrictions are *not* actually the only means for rights holders to place limitations on first publication of copyright works.

One aspect of the decision that could have wider, perhaps unintended consequences, is the finding

that the foreign radio stations (whose original broadcast never targeted the UK) also infringed the Claimants' copyright by virtue of TuneIn Radio. Wider application of this principle could have far ranging implications for innovative businesses that utilise digital platforms to provide previously territorial services to global audiences.

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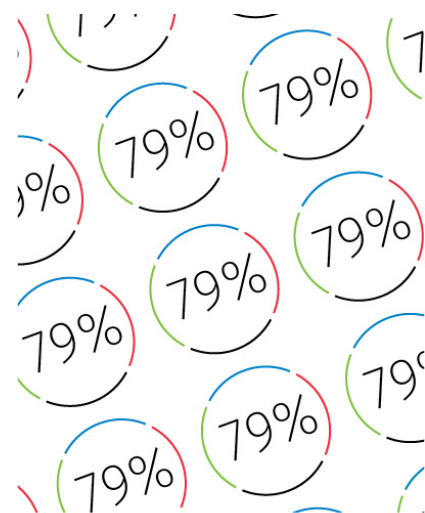
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