



Neutral Citation Number: [2021] EWCA Civ 441

Case No: A3/2020/0091

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS, INTELLECTUAL PROPERTY LIST (CHANCERY DIVISION)

Birss J

[2019] EWHC 2923 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LADY JUSTICE ROSE

and

LORD JUSTICE ARNOLD

Between :

TUNEIN INC

- and -

(1) WARNER MUSIC UK LIMITED

**(2) SONY MUSIC ENTERTAINMENT UK
LIMITED**

Appellant

Respondents

Robert Howe QC and Jaani Riordan (instructed by Bird & Bird LLP) for the Appellant
Edmund Cullen QC and Amanda Hadkiss (instructed by Wiggin LLP) for the Respondents

Hearing dates: 22-24 February 2021
Further written submissions: 16 March 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 26 March 2021

Lord Justice Arnold:

Introduction

1. The Claimants, and the groups of companies they represent, own, or hold exclusive licences to, copyrights in sound recordings of music. Between them, they account for more than half of the market for digital sales of recorded music in the United Kingdom, and about 43% globally. The Defendant (“TuneIn”) is a US technology company which operates an online platform called TuneIn Radio that enables users in the UK easily to access radio stations from around the world which broadcast on the internet. The Claimants contend that TuneIn has thereby infringed their UK copyrights. More specifically, the Claimants contend that TuneIn has committed the restricted act of “communication to the public”, alternatively that TuneIn has authorised, or is jointly liable for, the commission of that restricted act by the operators of foreign radio stations. The Claimants also claim that TuneIn has authorised, or is jointly liable for, the reproduction of sound recordings by users of one of TuneIn’s apps prior to the disablement of the relevant feature of that app.
2. The case was originally tried before the late Henry Carr J over six days in May 2019, but unfortunately he passed away before he was able to give judgment. The parties sensibly agreed to the case being re-heard by Birss J on the basis of the written evidence and the transcripts of the oral evidence before Henry Carr J. Birss J assimilated all of this material and promptly delivered a comprehensive judgment dated 1 November 2019 ([2019] EWHC 2923 (Ch), [2020] ECDR 8) in which he substantially, although not entirely, upheld the Claimants’ claims.
3. TuneIn now appeals with permission granted by the judge. The appeal raises significant issues of copyright law, in particular as to the scope of the right of communication to the public.
4. It is therefore regrettable that the clarity of those issues has been blurred by the approach adopted by TuneIn in its grounds of appeal. On 4 June 2020 Floyd LJ made an order that TuneIn’s original grounds of appeal be struck out unless amended so as to comply with Practice Direction 52C paragraph 5. On 17 June 2020 TuneIn served amended grounds of appeal in purported compliance with Floyd LJ’s order running to no less than 44 paragraphs. Even that was not the end of the matter, since one ground was subsequently elaborated by re-amendment as explained below. I acknowledge that counsel for TuneIn adopted a somewhat more focussed approach in his oral submissions, but even so it remains TuneIn’s case that the judge erred in numerous respects.

The facts

5. The following account of the facts is taken largely verbatim from the judge’s judgment, although I have collected the material together and re-ordered it slightly.

Internet radio stations

6. A traditional radio station (i.e. a radio station broadcasting by radio waves using FM, AM etc.) which wishes to play recorded music to its listeners needs a licence from the Claimants if the music is within the Claimants’ repertoire. One source of these licences

in the UK is the collecting society Phonographic Performance Ltd (“PPL”). Today radio stations are available on the internet. That includes “simulcasts” and “webcasts”. The internet signal is received as a stream by the listener. A simulcaster is a traditional radio station which also simultaneously transmits its signal over the internet. A webcaster simply transmits its signal over the internet and does not also broadcast by radio waves. These can be referred to together as internet radio stations. They may also require a licence if they are going to play the relevant music recordings, depending on the applicable law.

TuneIn Radio

7. TuneIn Radio is available via a website, and also via apps which may be downloaded from the relevant app stores for use on mobile devices. The services are available without charge to unregistered users. There is also a free service for registered users which allows them to save “favourites”, and there is a paid-for “Premium” service without advertisements. In terms of apps, there is a free app called TuneIn Radio and a paid-for app called TuneIn Radio Pro which allows users to stream content without advertisements and has other functions. TuneIn’s apps are also pre-installed on devices such as those supplied by Bose, Sonos and Sony PlayStation pursuant to partnership agreements entered into with TuneIn. As a result, TuneIn Radio is now available on over 200 connected devices, including: smart phones; tablets; televisions; car audio systems; smart speakers; and wearable technologies.
8. TuneIn is a commercial operation which operates for gain. TuneIn Radio generates income through both advertising and subscriptions to the paid-for services.
9. TuneIn Radio has links to over 100,000 radio stations broadcast by third parties from many different geographic locations around the world. TuneIn Radio provides its users in the UK and elsewhere with access to tens of thousands of music radio stations. (On the appeal it was common ground that there are around 70,000 music stations.) TuneIn Radio also provides access to other content, such as podcasts, but that aspect of its operation is not relevant for present purposes.
10. To facilitate searching, browsing and playback of audio content, TuneIn collects and stores metadata about content being transmitted by internet radio stations (e.g. the artist, track and album names) from data provided by the stations. This metadata is collected via an application programme interface, known as AIR API, or from “in-stream” metadata bundled with the audio content (which is only provided if a TuneIn user is connected to the stream). This metadata is used to assist with search optimisation, to display stations to browsing users and to display during playback.
11. TuneIn does not, however, collect, transmit or store any third party audio content. It connects the users to – and therefore relies upon – third party radio stations’ streams.
12. When a user accesses the TuneIn Radio website or app, one way or another the user will be presented with one or more icons representing various internet radio stations which TuneIn Radio is offering that user: TuneIn may recommend stations; users can browse based on different categories; or users can enter search terms which can be matched to station name, to tags (from the operator or TuneIn) and/or to stream metadata (when available).

13. If available, the user will also be presented with information about what artist and song is playing on the station at the time. A search by artist will produce a collection of stations which are playing music from that artist at the time.
14. The user selects the icon and, after a “pre-roll” audio advertisement lasting about 15 seconds (unless the service is ad-free), the internet radio station starts playing on their device. The page on the user’s screen remains a TuneIn page. The user has not been taken to the internet radio station's website. Again assuming the user is not paying for an ad-free service, while the stream plays the user will see visual advertisements on the screen. These will have been put there by TuneIn’s service. They are not the advertisements which the internet radio station’s own website would have provided if the user had gone to or been taken to the radio station’s site. Similarly, TuneIn’s pre-roll advertisement replaces any pre-roll advertisement of the radio station.
15. It is common ground that, at a technical level, TuneIn Radio operates by indexing and providing hyperlinks to users. More specifically, it operates by what the judge called “a kind of framing”. Once it starts playing, the underlying stream URL of the internet radio station is not obviously visible to the user. The user is unlikely to appreciate that the audio content is coming directly from the third party station’s website (which is what is in fact happening), rather than from TuneIn Radio. Thus from the user’s point of view content is provided to them at the TuneIn site.
16. In many cases the first time that a recording of a song which is actually in the Claimants’ repertoire is played in the stream selected by a user will be many minutes or even longer after they have started listening.
17. Significant features of TuneIn Radio are the following:
 - i) *Aggregation*: TuneIn Radio collates and provides access to a vast array of international radio station streams. It essentially acts as a “one-stop shop” for users, who are easily able to browse, search for and listen to stations in one place. The alternative for users would be to use a standard internet search engine to locate an internet radio station by using tailored search terms, and then click-through to their website to listen to the specific stream. One aspect of the difference is that in the latter case the advertising targeted to the user once they access the stream would be entirely distinct.
 - ii) *Categorisation*: TuneIn Radio enables users to browse by categories of music, such as location, genre and language, including sub-categories within those categories. This is the most commonly used method for users to find audio content. Music stations are placed in categories based on information provided by the stations and factors such as geographical location.
 - iii) *Curation of station lists*: In addition to categorising stations, TuneIn Radio curates lists of radio stations and programmes to present them to users as part of the browsing experience on its website and via the apps. These stations are collated by factors such as location and language or themed around current events. For example, TuneIn promotes lists of stations to users, such as “Spin the Globe” (comprising international music stations) and “Editor’s Choice – Music” (a hand-curated list of music stations). Certain stations are also listed in

a “Featured” section, which is frequently updated by TuneIn to keep content relevant and non-repetitive.

- iv) *Personalisation of content:* TuneIn Radio provides a personalised service to users, which facilitates their ability to find and listen to radio stations. TuneIn recommends stations to users based on their location, the reliability of audio streams and (in respect of registered users) the user’s listening history. Registered users are also able to view their listening history and tag their “favourite” stations and/or artists, which enables them to quickly access radio stations they have previously listened to via TuneIn Radio or their favourite stations and artists.
 - v) *Search functionality:* Users are able to search TuneIn Radio for specific radio stations and artists by name. The search functionality prioritises *inter alia* reliable station streams and stations which are popular at that time. Another search function which TuneIn formerly provided, but has stopped providing, was by song.
 - vi) *Station information:* TuneIn Radio collates information about music stations, which is presented on individual station pages. This includes the genre of the station and, where available, the artist and track currently playing, the station’s show timetable and related podcasts or featured shows.
 - vii) *Artist information:* TuneIn Radio also collates information about artists on dedicated artist pages, which can be accessed by searching for the particular artist. The artist pages include a list of stations which play the particular artist (based on metadata provided by the stations) and a list of the artist’s albums. Users are also able to click-through to each album page, which displays the individual tracks on each album.
18. TuneIn advertises the platform as being widely available, on any device, and emphasises that “TuneIn empowers people to hear exactly what they love the moment they want it, and discover a universe of audio, all in one place”. The judge found that a fair description of TuneIn Radio was that it provides users with a user-friendly, browsable and searchable platform of radio stations and other audio content, which enables users easily to select and listen to music radio stations.
19. Spotify and Amazon Prime Music are competitors of TuneIn because all three are, from the point of view of the user, providers of audio content.
20. Until April 2017, when it was disabled for UK users, TuneIn’s Pro app allowed users to record what they were listening to on their phones and, as a result, to replay, pause and fast forward it as the users saw fit. If sufficient metadata was provided by the stations, users could also use an “intelligent-skip” function, which allowed them to skip to the start or end of specific audio tracks and/or skip in-stream advertisements.

Connections with the UK

21. TuneIn’s website (tunein.com) had well over 1 million unique UK visitors per month in 2017 and 2018. In January 2019, it had over 5 million UK users of its free service. Figures for the service do not distinguish between the website and the apps. UK users

represent about 10% of TuneIn's user base and they stream 9.8 million hours of audio content per month. The UK accounts for more than 10% of its annual indirect advertising revenue.

22. TuneIn provides local radio categorisations and search options specifically by reference to the UK and to towns and cities within the UK. Much of the advertising experienced by UK users is denominated in pounds sterling.
23. The targeting of the visual advertising at UK users is the result of the effect of automated advertising platforms rather than due to TuneIn selecting individual advertisements. The TuneIn service also carries bespoke advertising aimed at the UK such as the pre-roll advertising. There was also evidence that TuneIn engages the services of advertising sellers specifically for the UK and that it assists in the targeting of advertising campaigns to particular demographics within the UK. It has a UK-based employee who is responsible for contributing ideas on promotional activity arising out of events taking place in the UK and Europe.
24. TuneIn enters into partner agreements with UK-based radio stations such as Jazz FM, Bauer and Global Radio. There was evidence that it has procured at least some partner broadcasters in the UK to promote the TuneIn service. TuneIn has entered into an agreement with the BBC which provides that its stations will only be made available in the UK and the Republic of Ireland. This is called "geo-restriction". TuneIn can and does geo-restrict other stations so that they too are only available in the UK.
25. TuneIn's paid-for advertisement-free services (the Premium services on the website and the Pro app) are priced in sterling to UK-based customers.

The four categories of station

26. The parties sensibly agreed that the trial would be conducted by reference to a sample of internet radio stations available via TuneIn Radio. Four categories of sample station were agreed, and each side was directed to nominate five sample stations in each category.
27. The categories are as follows:
 - (1) music radio stations which are licensed in the UK;
 - (2) music radio stations which are not licensed in the UK or elsewhere;
 - (3) music radio stations which are licensed for a territory other than the UK; and
 - (4) Premium music radio stations.
28. The descriptions of categories 2 and 3 needed to be treated with a degree of caution for reasons I will explain.
29. The category 1 stations are all based in the UK and are all licensed in the UK by PPL. They include BBC Radio 2, Heart London, Classic FM and Jazz FM. Save for a point on BBC Radio 2, all are freely available to UK users without having to go through access restrictions or register as users. The Claimants argued that BBC Radio 2 was only available to registered users. The judge accepted that an ordinary user, who did

not make a special effort to avoid it, would think they had to register to access BBC Radio 2 on the internet. The judge also accepted, however, TuneIn's evidence that the stream to which it links is one freely provided by the BBC and which can be accessed without signing in.

30. The category 2 stations divide into two sub-categories. The first, which I will call sub-category (a), contains two stations: Capital FM Bangladesh and Urban 96.5 Nigeria. These are in states with exclusive rights regimes akin to the UK regime and for which the judge found that no licence had been granted by the relevant rights holders.
31. The second, which I will call sub-category (b), consists of stations in countries which do not have exclusive rights regimes akin to the UK regime, but rather have statutory remuneration rights systems. They are: Canada with station Country 104; Kazakhstan with station Gakku FM; Luxembourg with stations Radio Dudelange and RTL Radio Lëtzebuerg; Malta with station XFM 100.2 Malta; and Montenegro with City Radio.
32. There was a dispute before the judge as to whether these stations should be treated as unlicensed – i.e. in category 2 – rather than as being licensed in the foreign state – i.e. category 3. That was partly because the relevant remuneration scheme was not yet up and running in the relevant state and also because no remuneration was being paid. There was no detailed evidence about the laws of these states or how the schemes were supposed to work.
33. The judge concluded that this dispute did not matter for the purposes of determining liability: either the stations were acting within the relevant regime or they were not. If they were not, then they were the same as the first sub-category within category 2. If they were, then they were the same as category 3.
34. Although the judge said that the category 3 stations were all “licensed” in their local territories, it can be seen from what he went on to say that he did not mean that they benefited from consensual licenses granted by the rights holders (or an appropriate collective management organisation acting on their behalf). The stations are VRT Studio Brussel in Belgium, Deutschlandfunk in Germany, Mix Megapol in Sweden, Drechtstad FM, Sky Radio Hits and Shout FM in the Netherlands, and MavRadio.FM in the USA. For the stations outside the USA, the countries operate various kinds of remuneration rights regimes and the stations are paying remuneration under those schemes. The USA operates a statutory licence scheme conditional on paying royalties and MavRadio.FM pays those royalties. In all of these cases the relevant body has not granted reciprocal rights for the UK, whether or not it had the power to do so.
35. Thus all of the category 3 sample stations were examples of stations that benefited from statutory schemes that can be regarded as akin to compulsory licences in their home territories (they are not true compulsory licences because the relevant states do not grant exclusive rights of communication to the public to phonogram producers in the first place, not being obliged to do so by international law for the reasons explained in paragraphs 44-45 and 49-50 below). There was no example of a station that benefited from a consensual licence in its home territory. During the hearing of the appeal we asked the parties whether they wished this Court to consider the position with respect to such stations. Both parties agreed that it was desirable for the Court to do so, although counsel for TuneIn rightly pointed out that it would only be possible for the Court to consider the matter at the level of principle and not by reference to any concrete facts.

36. The category 4 stations are Premium stations created for TuneIn and made available exclusively to TuneIn's subscribers. They are not licensed for the UK at all. Each is based in the USA. None of them pays the statutory US licence fee. TuneIn withdrew this service for UK users in or around December 2017, not long after this dispute arose.

Incorporation of internet radio stations into TuneIn Radio

37. In the early days of TuneIn Radio's operation, internet radio stations were found by TuneIn's web crawler software and added to the directory without any intervention by those internet radio stations. Since 14 February 2014 all new stations have been required to fill in a "New Station Form". Since 2016 other stations have been required to fill in a "Station Update Form" if they change anything. The relevance of these forms is that, at least in some cases, they contained warranties by the operator of the internet radio station that appropriate licences had been obtained. In addition, certain stations had bespoke agreements with TuneIn, but those contained warranties in substantially equivalent form.
38. Save for the bespoke agreements, the manner in which the internet radio stations were requested to indicate their acceptance of the relevant terms was by ticking a box on one of the forms on a webpage. The judge found that tens of thousands of stations had never ticked such a box. The judge also found that TuneIn indexed and made stations available regardless of whether they had accepted the terms and that there were in fact stations indexed and available on TuneIn's service for which TuneIn knew there had been no acceptance of any relevant terms.
39. Accordingly, the judge found that a substantial number of stations indexed by TuneIn had given no warranty and that TuneIn was aware of this. That included some sample stations, for example Shout FM (category 3) and Radio Dudelange (category 2).
40. In addition, for a number of stations, the terms were not in fact a warranty that appropriate licences had been obtained, but rather were statements that sole responsibility for obtaining licences relating to public performance in the relevant territory rested with the station. These included the agreement with Global Radio Services (which included Heart, Classic FM and Smooth) and the Jazz FM agreement, both in the UK; the agreement with SBS Radio AB (Mix Megapol) in Sweden (category 3); the agreement with Radio 538 BV (Sky Radio) in the Netherlands (category 3); the agreement with Corus (Country 104) in Canada (category 2); and the agreement with Deutschlandradio (Deutschlandfunk) in Germany (category 3). Furthermore TuneIn's agreement with the BBC contained an express clause excluding any warranties.

The judge's conclusions

41. The judge summarised his conclusions at [213], so far as relevant to the appeal, as follows:
- "i) TuneIn's service (web based or via the apps), insofar as it includes or included the sample stations in Categories 2, 3, and 4, infringes the claimants' copyright[s] under s20 of the 1988 Act.

- ii) TuneIn's service (web based or via the apps), insofar as it includes the sample stations in Category 1, does not infringe the claimants' copyright under s20 of the 1988 Act.
 - iii) TuneIn's service via the Pro app when the recording function was enabled infringed the claimants' copyright[s] under s20 of the 1988 Act insofar as it included the sample stations in Categories 1, 2, 3, and 4.
 - iv) Individual users of the Pro app who made recordings of sound recordings in [the] claimants' repertoire will themselves have committed an act of infringement under s17 of the 1988 Act. Some but not all will have fallen within the defence in s70.
 - v) The providers of sample stations in Categories 2, 3, and 4 will (or did) infringe when their station was targeted at the UK by TuneIn.
 - vi) TuneIn is liable for infringement by authorisation and as a joint tortfeasor."
42. There is no appeal by the Claimants against the judge's conclusion that there was no infringement in relation to category 1 except by virtue of the Pro app recording function. Nor is there any appeal by TuneIn against the findings of infringement in relation to category 4.

The legislative framework

The Berne Convention

43. Articles 11(1), 11*bis*(1) and 11*ter*(1) of the International Convention for the Protection of Literary and Artistic Works signed at Berne on 9 September 1886 (Paris Act of 24 July 1971 as amended on 28 September 1979, to which the UK is a party) provide, so far as relevant:

“Article 11

- (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

...

- (ii) any communication to the public of the performance of their works.

...

Article 11bis

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

...

Article 11ter

- (1) Authors of literary works shall enjoy the exclusive right of authorizing:

...

- (ii) any communication to the public of the recitation of their works.

...”

The Rome Convention

- 44. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations agreed at Rome on 26 October 1961 (to which 96 states, including the UK, were party as at 15 September 2020) does not require Contracting States to grant an exclusive right of communication to the public to producers of phonograms. Article 12 provides:

“Secondary Uses of Phonograms

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.”

- 45. Article 16 permits Contracting States to make reservations in respect of Article 12, including the option of not applying it at all.

The WIPO Copyright Treaty

- 46. Article 8 of the WIPO Copyright Treaty adopted in Geneva on 20 December 1996 (to which 109 states, including the UK, were party as at 25 January 2021) provides:

“Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

47. It can be seen that Article 8 generalises, and fills gaps in, the rights of communication to the public contained in the Berne Convention in a way that is intended to be juridically and technologically neutral. It can also be seen that Article 8 includes within the scope of the communication to the public right the making available right, which is concerned with on-demand communication (and hence “pull” technologies as well as “push” technologies). For these reasons, it was referred to during the negotiating process as the “umbrella solution”.

48. An agreed statement concerning Article 8 reads, so far as relevant:

“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. ...”

The WIPO Performances and Phonograms Treaty

49. Like the Berne Convention, the WIPO Copyright Treaty applies to literary and artistic works (authors’ works), but not to other subject matter such as phonograms. The WIPO Performances and Phonograms Treaty (to which 108 states, including the UK, were party as at 25 January 2021) was adopted at the same time as the WIPO Copyright Treaty. It does not require Contracting Parties to grant an exclusive right of communication to producers of phonograms. Instead, Article 14 provides that they shall have the making available right:

“Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”

50. Article 15 provides that performers and phonogram producers shall enjoy the right to a single equitable remuneration from any communication to the public of phonograms published for commercial purposes, but permits Contracting Parties to make a reservation, including the option of not applying it at all. In practice, the majority of Contracting Parties to the Rome Convention and the WIPO Performances and Phonograms Treaty have not made any reservation with respect to the right of equitable

remuneration, but some have made a reservation, although few have gone so far as not to apply it at all.

The Information Society Directive

51. Article 3 of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”) provides, so far as relevant:

“Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - ...
 - (b) for phonogram producers, of their phonograms;
 - ...
3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

52. Among the 61 recitals to the Information Society Directive, the most pertinent for the purposes of the appeal are the following:

“(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the ‘WIPO Copyright Treaty’ and the ‘WIPO Performances and Phonograms Treaty’, dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called ‘digital agenda’, and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive

also serves to implement a number of the new international obligations.

- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
- (27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive."

53. It is clear from these recitals that Article 3(1) of the Information Society Directive gives effect to Article 8 of the WIPO Copyright Treaty, while Article 3(2)(b) of the Information Society Directive gives effect to Article 14 of the WIPO Performances and Phonograms Treaty.

The Rental Right Directive

54. European Parliament and Council Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) ("the Rental Right Directive") does not require Member States of the European Union to grant an exclusive right of communication to the public to phonogram producers. Article 8(2) provides:

"Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them."

The Copyright, Designs and Patents Act 1988

55. The Information Society Directive was transposed into UK law by the Copyright and Related Rights Regulations 2003, SI 2003/2498. Article 3 was implemented by Regulations 6 and 7, which, amongst other things, amended section 20 of the Copyright, Designs and Patents Act 1988.

56. Section 20 of the 1988 Act provides, so far as relevant:

"(1) The communication to the public of the work is an act restricted by the copyright in—

- (a) a literary, dramatic, musical or artistic work,

- (b) a sound recording or film
 - (c) a broadcast.
- (2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—
- (a) the broadcasting of the work;
 - (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”
57. The Information Society Directive required the UK to grant the Article 3(1) right of communication to the public in respect of authors’ works and to grant the Article 3(2) right of making available in respect of phonograms (in the terminology of the Treaties and the Information Society Directive), that is to say, sound recordings (in the terminology of the 1988 Act). In fact, the 2003 Regulations went further and extended the Article 3(1) right to sound recordings. The same is true of films and broadcasts. In *ITV Broadcasting Ltd v TVCatchup Ltd (No 2)* [2011] EWHC 1874 (Pat), [2011] FSR 40 at [49]-[79] Floyd J rejected an argument that the amendment was *ultra vires* the power to make the 2003 Regulations conferred by section 2(2) of the European Communities Act 1972 in so far as it introduced section 20(1)(c) (broadcasts). In *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] RPC 27 (“*Dramatico*”) at [52] and [64] I held that his reasoning applied equally to section 20(1)(b). The Court of Justice of the European Union held in Case C-279/13 *C More Entertainment AB v Sandberg* [EU:C:2015:199] that this extension of the Article 3(1) right by Member States was permissible as a matter of European law.
58. The result is that the CJEU’s jurisprudence with regard with Article 3(1) of the Information Society Directive is applicable to section 20(1)(b) (and (c)) as well as section 20(1)(a) of the 1988 Act: see *ITV v TVCatchup, Football Association Premier League Ltd v QC Leisure (No 3)* [2012] EWHC 108 (Ch), [2012] FSR 12 and *Dramatico*.

Targeting

59. Given that the Claimants allege infringement by TuneIn and/or the foreign internet radio stations of their UK copyrights by communication to the public, the Claimants must establish (i) the commission by TuneIn and/or the foreign stations of that restricted act (ii) in the UK. In the circumstances of the present case the judge found it convenient to consider issue (ii) before issue (i) in his judgment. I shall adopt the same approach.
60. As the judge explained, the internet is global and users in the UK can, in the absence of geo-restriction, access websites hosted, and content posted on or streamed from such websites, from anywhere in the world. Intellectual property rights, however, are territorial. At least in the case of copyright and similar rights and trade marks, the CJEU has held that accessibility of a website from a Member State is not sufficient to give rise to an infringement of rights conferred by the law of that State, and that the relevant

act must be targeted at that State: see Case C-324/09 *L'Oréal SA v eBay International AG* [2011] ECR I-6011 (trade marks), Case 5-/11 *Donner* [EU:C:2012:370] (copyright) and Case C-173/11 *Football Dataco Ltd v Sportradar GmbH* [EU:C:2012:642] (database right). This case law has been applied in this jurisdiction to communication to the public: *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [2013] Bus LR 884 (“*EMI v BSKyB*”). The law has twice been reviewed by this Court in the trade mark context: *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834, [2018] ETMR 10 and *Argos Ltd v Argos Systems Inc* [2018] EWCA Civ 2211, [2019] Bus LR 1728.

61. The judge summarised the applicable principles in a passage which both sides accepted as correctly stating the law as follows:

“16. The legal principles are:

- i) the mere existence of a website and its accessibility by local consumers is never enough to establish a territorial link, see Kitchin LJ in *Merck v Merck* [168] and *L'Oréal v eBay* [64];
- ii) the issue of targeting is to be considered from the perspective of the public in the relevant state (i.e. the UK), see *Merck v Merck* [169] and *L'Oréal v eBay* [65]. The trade mark cases refer to consumers or average consumers because that is the relevant person in trade mark law. For cases about communication to the public, the question focusses on the public, see *EMI v BSKyB* and my decision in *Omnibill (Pty) Ltd v Egpsxxx Ltd* [2014] EWHC 3762 (IPEC), [2015] ECDR 1;
- iii) the test is objective in the sense that a party's subjective intention cannot turn a website or page which is objectively not targeted at the UK into one which is (*Argos v Argos* [51]). However that does not mean evidence of intention is irrelevant. On the contrary such evidence is relevant and possibly determinative in an appropriate case (*Merck v Merck* [169]–[170] and *Argos v Argos* [51]);
- iv) the court must carry out an evaluation of all the relevant circumstances, see *Merck v Merck* [169] and *L'Oréal v eBay* [65]; and
- v) it may be appropriate to treat a website as a whole, but in another case it may be appropriate to conduct a more fine grained analysis. Depending on how a website is organised, not all pages are necessarily targeted at the same place(s), see *Argos v Argos* [51] and *Omnibill* [15].

17. The following is a non-exhaustive summary of factors which may be considered, the weight they bear necessarily varying from case to case:
 - i) the appearance of the web pages themselves, which can include explicit statements of an intention to provide goods or services to the public in the UK and the highlighting of the UK in lists or maps;
 - ii) other aspects of the web pages such as language(s), currency(ies), telephone numbers, and the use of national top level domain names; and
 - iii) the nature and size of the service provider's business, the characteristics of the goods or services offered and provided, and the number of visits made by the public from the UK.
18. Where the apps provide services akin to those provided by a website, as they do in this case, the considerations must be the same.”
62. TuneIn accepted before the judge that the TuneIn Radio platform targeted the UK, but disputed that any individual communication to the public of the foreign internet radio stations it made was targeted at the UK. The judge held at [27]-[33] that the acts complained of were targeted at the UK. His reasoning, in summary, was that TuneIn Radio targeted the foreign internet radio stations at the UK by presenting icons of possible stations to select to UK users and certainly by providing UK users with links to the streams from such stations. This was particularly clear in the case of the services with advertising, since both the pre-roll advertisement prior to a stream playing and the visual advertisements which accompanied it were advertisements directed at UK consumers. He held that it was not necessary to analyse targeting at the level of individual sound recordings within the Claimants' repertoire that were played in the selected stream; but that, even if it was, such recordings were targeted at the UK. The judge noted at [34] that the effect of his analysis was that foreign internet radio stations which were not targeted at the UK became targeted at the UK as a result of the actions of TuneIn.
63. TuneIn's first four grounds of appeal challenge the judge's reasoning and conclusions with respect to targeting. In oral argument counsel for TuneIn's principal submission was that the judge's reasoning involved a *non sequitur*: it did not follow from the fact that the TuneIn Radio platform was targeted at the UK that each of the foreign internet radio stations available on TuneIn Radio, or even each station to which UK users linked, was targeted at the UK. The judge, he argued, had wrongly conflated the question of whether TuneIn Radio targeted the UK with whether the links to the foreign stations targeted the UK and thus had failed to apply principle (v) in his summary. The foreign stations targeted their local audiences: for example, a Mongolian station targeted Mongolian listeners. It made no difference that TuneIn Radio provided users in the UK with links to streams emanating from those stations, not least because TuneIn Radio provided information about the foreign stations including their name, location, telephone number and place of broadcast and a link to the station's website which

would show its top-level domain. Nor did the advertising make any difference since that was provided by TuneIn Radio and not by the streamed station, and moreover was largely automatically targeted at the UK by the use of standard geo-location techniques.

64. I do not accept this argument. I agree that the correct question is whether the foreign internet radio stations available on TuneIn Radio, and more specifically the streams emanating from those stations to which TuneIn Radio provides links, are targeted at UK users. I do not agree, however, that the judge conflated this question with the question of whether TuneIn Radio targeted the UK. He correctly focussed on the consequence of TuneIn Radio being targeted at the UK, which is that the foreign stations presented to UK users by TuneIn Radio become targeted at the UK.
65. Contrary to the submission of counsel for TuneIn, the facts that the bulk of listening among TuneIn Radio's UK users is of a small number of UK radio stations and that foreign stations account for a small percentage of listener hours are irrelevant to this question (although they would be highly relevant to the amount of any royalty payable by TuneIn).
66. Counsel for TuneIn's secondary submission was that the judge was wrong to say that it was not necessary to consider the position at the level of individual sound recordings in the Claimants' repertoire and wrong to say that the analysis was the same if one did. Again, I do not accept this submission. In the context of this case, which is concerned with communication to the public of sound recordings by streaming, I agree with the judge that it is not necessary to consider the question of targeting at the level of individual sound recordings. Whether the foreign internet radio stations are targeted at the UK cannot depend on whether a sound recording in the Claimants' repertoire is being played at any particular moment. Moreover, I agree with the judge that, even if one did descend to the level of individual sound recordings, it would make no difference to the analysis: the consequence of TuneIn Radio being targeted at the UK is that, as and when sound recordings in the Claimants' repertoire are played on a foreign station to whose stream UK users have linked using TuneIn Radio, any communication to the public of those sound recordings is targeted at the UK.

Communication to the public

The case law of the CJEU: a summary

67. The meaning of the expression "communication to the public" has so far been considered by the CJEU in a series of 25 judgments (including four Grand Chamber judgments) and reasoned orders spanning over 14 years: Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519 ("SGAE"); Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia* [2010] ECR I-37 ("Organismos"); Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971 ("Bezpečnostní"); Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083 ("FAPL"); Joined Cases C-431/09 and C-432/09 *Airfield NV v Belgische Vereniging van Auteurs, Compositoren en Uitgevers CVBA (SABAM)* [2011] ECR I-9363 ("Airfield"); Case C-283/10 *Circul Globus Bucuresti (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*

[2011] ECR I-12031 (“*Circul*”); Case C-135/10 *Società Consortile Fonografici (SCF) v Del Corso* [EU:C:2012:140] (“*SCF*”); Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* [EU:C:2012:141] (“*PPIL*”); Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [EU:C:2013:147] (“*ITV*”); Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76] (“*Svensson*”); Case C-348/13 *BestWater International GmbH v Mebes* [EU:C:2014:2315] (“*BestWater*”); Case C-351/12 *OSA - Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* [EU:C:2015:110] (“*OSA*”); Case C-151/15 *Sociedade Portuguesa de Autores CRL v Ministério Público* [EU:C:2015:468] (“*SPA*”); Case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* [EU:C:2015:764] (“*SBS*”); Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [EU:C:2016:379] (“*Reha*”); Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [EU:C:2016:644] (“*GS Media*”); Case C-301/15 *Soulier v Premier Ministre* [EU:C:2016:878] (“*Soulier*”); Case C-138/16 *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* [EU:C:2017:218] (“*AKM*”); Case C-527/15 *Stichting Brein v Wullems* [EU:C:2017:300] (“*Filmspeler*”); Case C-610/15 *Stichting Brein v Ziggo BV* [EU:C:2017:456] (“*Pirate Bay*”); Case C-265/16 *VCAST Ltd v RTI SpA* [EU:C:2017:913] (“*VCAST*”); Case C-161/17 *Land Nordrhein-Westfalen v Renckhoff* [EU:C:2018:634] (“*Renckhoff*”); Case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* [EU:C:2019:1111] (“*Tom Kabinet*”); Case C-753/18 *Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) v Fleetmanager Sweden AB* [EU:C:2020:268] (“*Stim*”); Case C-637/19 *BY v CX* [EU:C:2020:863] (“*BY*”); and Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* [EU:C:2021:181] (“*VG Bild*”).

68. Although some of these cases concerned Article 8(2) of the Rental Right Directive rather than Article 3(1) of the Information Society Directive, the CJEU has held that the concept of “communication to the public” should be interpreted in the same way in both contexts: see in particular *Reha* at [28]-[34]. *Airfield* concerned Article 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasts and cable retransmission, but the CJEU held that the concept of “communication to the public” should be interpreted in the same way in that context as well. (I have not included Case C-641/15 *Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH* [EU:C:2017:131] since it concerned Article 8(3) of the Rental Right Directive.)
69. It should be noted that four of the judgments listed in paragraph 67 above were given after the date of the judge’s judgment in the present case: *Tom Kabinet*, *Stim*, *BY* and *VG Bild*. Furthermore, the last of these four was handed down after 31 December 2020. I shall return to the significance of this below. (In addition, two references are pending at the time of writing in which Advocate General’s opinions have been delivered, but the judgment of the CJEU is still awaited: Joined Cases C-682/18 and C-683/18 *Peterson v Google LLC* [EU:C:2020:586] and Case C-597/19 *Mircom International Content Management & Consulting (M.I.C.M.) Ltd v Telenet BVBA* [EU:C:2020:1063]).

70. The judge quoted and applied a summary of the CJEU's case law down to *ITV* which I set out in *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), [2014] ECDR 7 ("*Paramount*") at [12]. I would update that summary (so far as possible in the CJEU's own words) as follows:
- (1) "Communication to the public" must be interpreted broadly: *SGAE* at [36]; *Bezpečností* at [54]; *FAPL* at [186]; *ITV* at [20]; *Svensson* at [17]; *OSA* at [23]; *SPA* at [12]; *SBS* at [14]; *Reha* at [36]; *GS Media* at [30]; *Soulier* at [30]; *Filmspeler* at [27]; *Pirate Bay* at [22]; *Renckhoff* at [18]; *Tom Kabinet* at [49]; *VG Bild* at [26].
 - (2) "Communication to the public" covers any transmission or retransmission of the work to the public not present at the place where the communication originates by wire or wireless means, including broadcasting: *ITV* at [23]; *SPA* at [24]; *Pirate Bay* at [30]; *VCAST* at [40]; *Tom Kabinet* at [49], [62]; *VG Bild* at [26]. It does not include any communication of a work which is carried out directly in a place open to the public by means of public performance or direct presentation of the work: *FAPL* at [200]–[203]; *Circul* at [35]–[41].
 - (3) There is no "communication to the public" where the viewers have no access to an essential element which characterises the work: *Bezpečností* at [57].
 - (4) "Communication to the public" involves two cumulative criteria: first, an "act of communication" of a work, and secondly, the communication of that work to a "public": *Svensson* at [16]; *SBS* at [15]; *Reha* at [37]; *GS Media* at [32]; *AKM* at [22]; *Filmspeler* at [29]; *Pirate Bay* at [24]; *VCAST* at [41]; *Renckhoff* at [19]; *Tom Kabinet* at [61]; *Stim* at [30]; *BY* at [22]; *VG Bild* at [29]. Nevertheless, it is necessary to carry out an individualised assessment in the light of several factors which are complementary, interdependent and may be present in widely-varying degrees both individually and in their interaction with each other: *SCF* at [79]; *PPIL* at [30]; *Reha* at [34]; *GS Media* at [34]; *Filmspeler* at [30]; *Pirate Bay* at [25]; *Stim* at [31]; *VG Bild* at [33]–[34].
 - (5) "Communication" refers to any transmission of the work, irrespective of the technical means or process used: *FAPL* at [193]; *OSA* at [25]; *SPA* at [13]; *SBS* at [16]; *Reha* at [38]; *AKM* at [23]; *VCAST* at [42].
 - (6) Every transmission or retransmission of the work by a specific technical means must, as a rule, be individually authorised by the right holder: *ITV* at [24]–[26]; *SBS* at [17]; *Reha* at [39]; *AKM* at [23]; *VCAST* at [43].
 - (7) A mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a "communication": *SGAE* at [42]; *FAPL* at [194]; *ITV* at [28]; *SPA* at [16].
 - (8) A user makes an act of "communication" when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the work, or would be able to do so only with difficulty: *SGAE* at [42]; *FAPL* at [194]–[196]; *Airfield* at [72], [79]; *SCF* at [82]; *PPIL* at [31]; *OSA* at [32]; *Reha* at [46]; *GS Media* at [35]; *Filmspeler* at

[31]; *Pirate Bay* at [26], [36]-[39]; *Renckhoff* at [44]; *Stim* at [32]; *BY* at [23]; *VG Bild* at [30].

- (9) It is sufficient for there to be “communication” that the work is made available to the public in such a way that the persons forming that public may access it, whether or not those persons actually access the work: *SGAE* at [43]; *Svensson* at [19]; *Filmspeler* at [36]; *Pirate Bay* at [31]; *Renckhoff* at [20]; *Tom Kabinet* at [63]-[64].
- (10) Mere provision of physical facilities does not as such amount to “communication”: *SGAE* at [46]-[47]; *Organismos* at [33]; *Airfield* at [74]; *Filmspeler* at [39]; *Stim* at [33]. Nevertheless, the installation of physical facilities which distribute a signal and thus make public access to works technically possible constitutes “communication”: *SGAE* at [46]-[47]; *Organismos* at [39]-[42]; *Filmspeler* at [40].
- (11) “The public” refers to an indeterminate number of potential recipients and implies a fairly large number of persons: *SGAE* at [37]-[38]; *SCF* at [84]; *PPIL* at [33]; *ITV* at [32]; *Svensson* at [21]; *OSA* at [27]; *SPA* at [19]; *SBS* at [21]; *Reha* at [41]; *GS Media* at [36]; *AKM* at [24]; *Filmspeler* at [32]; *Pirate Bay* at [27]; *VCAST* at [45]; *Renckhoff* at [22]; *Tom Kabinet* at [66]; *BY* at [26]; *VG Bild* at [31]. “Indeterminate” means not restricted to specific individuals belonging to a private group; and “a fairly large number of people” indicates that the concept of “public” encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant: *SCF* at [85]-[86]; *PPIL* at [34]-[35]; *Reha* at [42]-[43]; *Filmspeler* at [44]; *Pirate Bay* at [41]; *Tom Kabinet* at [68]; *BY* at [27].
- (12) For that purpose, the cumulative effect of making the works available to potential recipients should be taken into account, and it is particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively: *SGAE* at [39]; *SCF* at [87]; *PPIL* at [35]; *ITV* at [33]; *OSA* at [28]; *Reha* at [44]; *Filmspeler* at [44]; *Pirate Bay* at [41]; *Tom Kabinet* at [68].
- (13) Where there is a communication of works by the same technical means as a previous communication, it is necessary to show that the communication is to a new public, that is to say, a public which was not considered by the right holder when it authorised the original communication: *SGAE* at [40]; *Organismos* at [38]; *FAPL* at [197]; *Airfield* at [72]; *ITV* at [38]; *Svensson* at [24]; *BestWater* at [14]; *OSA* at [31]; *SPA* at [21]; *Reha* at [45]; *GS Media* at [37]; *AKM* at [25]; *Filmspeler* at [33]; *Pirate Bay* at [28], [44]; *Renckhoff* at [24]; *Tom Kabinet* at [70]; *VG Bild* at [32]. Where there is a communication using a different technical means to that of the original communication, however, it is not necessary to consider whether the communication is to a new public: *ITV* at [39]; *BestWater* at [14]; *GS Media* at [37]; *Filmspeler* at [33]; *Pirate Bay* at [28]; *VCAST* at [48]-[50]; *Renckhoff* at [24]; *Tom Kabinet* at [70]; *VG Bild* at [32].
- (14) In considering whether there is a communication to “the public”, it is not irrelevant that the communication is of a profit-making nature: *SGAE* at [44];

FAPL at [204]–[206]; *Airfield* at [80]; *SCF* at [88]–[90]; *PPIL* at [36]; *ITV* at [42]; *SPA* at [26]; *Reha* at [49]–[52]; *GS Media* at [38]; *Filmspeler* at [34]; *Pirate Bay* at [29]. A profit-making nature is not necessarily an essential condition for a communication to the public, however: *SGAE* at [44]; *ITV* at [42]–[43].

- (15) In order to establish whether the fact of posting, on a website, hyperlinks to protected works which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public”, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed: *GS Media* at [39]–[55]; *Filmspeler* at [49].

71. Applying these principles, the following have been held by the CJEU to constitute “communication to the public”:

- (1) The transmission of television and radio broadcasts, and sound recordings included therein, to the customers of hotels, public houses, spas, café-restaurants and rehabilitation centres by means of television and radio sets: *SGAE*; *Organismos*; *FAPL*; *PPIL*; *OSA*; *SPA*; *Reha*.
- (2) Where a satellite package provider expands the circle of persons having access to the relevant works: *Airfield*.
- (3) The retransmission of works included in a terrestrial television broadcast by an organisation other than the original broadcaster by means of an internet stream made available to the subscribers of that other organisation, even though those subscribers are within the area of reception of the terrestrial television broadcast and may lawfully receive the broadcast on a television: *ITV*.
- (4) The provision by a website operator for profit of hyperlinks to files containing copyright photographs which had been posted on another website without the consent of the copyright owner and which the operator of the first website was aware had been posted without the consent of the copyright owner: *GS Media*.
- (5) The sale of a multimedia player on which there are pre-installed add-ons containing hyperlinks to websites that are freely accessible to the public on which copyright-protected works have been made available without the consent of the right holders: *Filmspeler*.
- (6) The making available and management on the internet of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network: *Pirate Bay*.
- (7) The provision of a cloud computing service for the remote video recording of copies of protected works: *VCAST*.

- (8) The posting on one website of a copy of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website: *Renckhoff*.
- (9) The supply to the public by downloading, for permanent use, of an e-book: *Tom Kabinet* (and see also *Soulier*).
72. By contrast, the following have been held by the CJEU not to constitute “communication to the public”:
- (1) Television broadcasting of a graphic user interface of a computer program: *Bezpečnosti*.
- (2) The communication of musical works to the public in the context of live circus and cabaret performances: *Circul*.
- (3) The broadcast of sound recordings by way of background music to patients of a private dental practice: *SCF*.
- (4) The provision on one website of a hyperlink to works which are freely available on another website with the consent of the right holder: *Svensson*; *BestWater*; *GS Media*; *Filmspeler*; *Renckhoff*; *VG Bild*. It makes no difference if clicking on the link results in “framing” of the works on the first website: *Svensson*; *BestWater*; *VG Bild*. But it does make a difference if the link circumvents technical measures put in place on the second website to restrict access to the latter site’s subscribers or to prevent framing: *Svensson*; *VG Bild*.
- (5) The transmission by a broadcasting organisation of programme-carrying signals exclusively to signal distributors without those signals being accessible to the public, where those distributors then send those signals to their respective subscribers so that the latter may watch the programmes, unless the intervention of the distributors in question is just a technical means: *SBS*.
- (6) The simultaneous, full and unaltered transmission within the national territory by the operator of a cable network of programmes broadcast by a national broadcaster: *AKM*.
- (7) The supply of a radio receiver forming an integral part of a hired motor vehicle, which makes it possible to receive, without any additional intervention by the leasing company, the terrestrial radio broadcasts available in the area in which the vehicle is located: *Stim*.
- (8) The transmission by electronic means of a protected work to a court as evidence in judicial proceedings between individuals: *BY*.

Should this Court depart from the jurisprudence of the CJEU?

73. The departure of the UK from the EU on 31 January 2020 and the end of the implementation (or transitional) period under the UK-EU Withdrawal Agreement at 23:00 GMT on 31 December 2020 do not affect “EU-derived domestic legislation” such as section 20 of the 1988 Act as amended to implement the Information Society

Directive: section 2(1) of the European Union (Withdrawal) Act 2018. Such legislation remains in effect unless and until it is repealed or amended.

74. Furthermore, 24 of the 25 judgments and orders of the CJEU listed in paragraph 67 above constitute “retained EU case law” (section 6(7) of the 2018 Act), meaning that they continue to form part of domestic law post-Brexit and continue to bind lower courts: section 6(3) of the 2018 Act. The Court of Appeal and the Supreme Court have power to depart from such judgments and orders, but only on the same basis that the Supreme Court has power to depart from one of its own precedents or of one of the House of Lords in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234: section 6(5A) of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).
75. In the domestic context both the House of Lords and the Supreme Court have consistently stated that this is a power to be exercised with great caution. As Lord Bingham of Cornhill said in *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307 at [29] in a passage cited as continuing to be applicable by Lord Wilson in *Peninsula Securities Ltd v Dunnes Stores Ltd (Bangor) Ltd* [2020] UKSC 36, [2020] 3 WLE 521 at [49] (two decisions in which the power was exercised):
- “Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors.”
76. By a re-amendment to ground 21 of its grounds of appeal dated 30 November 2020, TuneIn contends that this Court should exercise this power in the present case. In its grounds of appeal TuneIn stated that the Court should depart from “the decisions of the CJEU on hyperlinking ... including *Svensson* and *GS Media*.” In his oral submissions counsel for TuneIn explained that TuneIn’s primary contention was that this Court should depart from the entire body of case law of the CJEU on communication to the public, and that its alternative contention was that the Court should depart from *GS Media*. Despite the far-reaching and fundamental nature of these contentions, counsel for TuneIn relegated his arguments in support of them to the end of his submissions on communication to the public and spent little time developing them. He also explained that TuneIn accepted that it would only be possible for this Court to depart from the CJEU’s case law with effect from 1 January 2021, and thus the point would only be relevant to the continuing availability of an injunction from that date, not to financial remedies for infringements prior to that date.
77. In my judgment, this Court should not depart from the CJEU’s jurisprudence in the present case for the following reasons.
78. First, there has been no change in the domestic legislation. Now that the UK has left the EU, it will be open to Parliament to amend section 20 of the 1988 Act if it sees fit, subject to the UK’s international obligations. At present, however, the will of Parliament is that section 20 should remain in its current form.
79. Secondly, there has been no change in the international legislative framework. As noted above, Article 3(1) and (2) of the Information Society Directive give effect to Article 8

of the WIPO Copyright Treaty and Article 14 of the WIPO Performances and Phonograms Treaty. The CJEU has repeatedly stated in its case law on Article 3(1) of the Directive that it should so far as possible be interpreted consistently with the Copyright Treaty: see *SGAE* at [35]-[45]; *FAPL* at [189]; *SCF* at [52]; *Tom Kabinet* at [39]. (It has made similar statements with respect to the Berne Convention and the Performances and Phonograms Treaty.) Even if this Court was not bound by the CJEU case law, it would adopt the same approach to section 20 of the 1988 Act: *The Jade* [1976] 1 WLR 430 at 436 (Lord Diplock). Furthermore, given that the issue is regulated by international treaties, courts of the Contracting States should be striving for consistency of interpretation, rather than unilaterally adopting their own interpretations.

80. Thirdly, interpreting the concept of “communication to the public” is on any view a difficult task for two reasons. The first is the absence of guidance in the legislation (whether Article 8 of the WIPO Copyright Treaty, Article 3(1) of the Directive or section 20 of the 1988 Act). The second is the conflict between the broad nature of the right of communication to the public forming part of copyrights which are territorial rights exploited on a territorial basis on the one hand, and the global and interconnected nature of the internet on the other hand. The CJEU has unrivalled experience in confronting this issue in a variety of factual scenarios. Moreover, it has developed and refined its jurisprudence over time. The jurisprudence is not free from difficulty or criticism, but it does not follow that better solutions are readily to hand.
81. Fourthly, counsel for TuneIn prayed in aid academic criticism of the CJEU’s case law, and in particular criticisms of the key decisions on hyperlinking, *Svensson* and *GS Media*. The academic commentary is not all one way, however. On the contrary, there is distinguished academic support for the proposition that hyperlinking may amount to communication to the public at least in some circumstances: see e.g. Reinbothe and von Lewinski, *The WIPO Treaties on Copyright* (2nd ed, 2015) at §§7.8.17, 7.8.38 and Ginsburg and Budiardjo, “Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives” (2018) 43 *Columbia J. Law & the Arts* 153, especially at 155-160.
82. Fifthly, although TuneIn suggested in its skeleton argument that this Court could derive assistance from the case law of courts outside the EU, notably those in Australia, Canada and the USA, counsel for TuneIn did not pursue this suggestion in oral submissions. I consider that he was correct not to do so: the statutory framework differs in those countries and the case law cannot be said to offer settled or consistent guidance on the questions which confront the Court.
83. Sixthly, if we were to accept TuneIn’s primary contention that we should return to the drawing board and start all over again, that would create considerable legal uncertainty. Moreover, the interpretation of “communication to the public” advanced by counsel for TuneIn would not even provide TuneIn with a clear defence to infringement for the following reasons.
84. Counsel for TuneIn first submitted that “communication to the public” should be interpreted as requiring two distinct requirements to be satisfied, namely (i) a communication (ii) to the public, with no interdependency between them. For the reasons explained below, I do not accept that it is possible to separate these two requirements, but for the moment I shall disregard that point.

85. Next, counsel for TuneIn submitted that communication required a transmission or retransmission of the work to the public not present at the place where the communication originated by wire or wireless means, including re-broadcasting, but no other acts, as stated in recital (23) to the Information Society Directive. He accepted, however, that, given that communication to the public includes making available, actual transmission is not required and potential transmission is sufficient. He submitted that the provision of a hyperlink did not amount to communication, but once it is accepted that actual transmission is not required and that potential transmission is sufficient, it is difficult to see why the provision of a hyperlink should not be covered, particularly in cases of framing or in-line linking. Moreover, even if the provision of a hyperlink to a static webpage is not enough, it is even more difficult to see why the provision of a hyperlink to a continuous stream of content should not be covered, since in such a case there is actual transmission. There is room for debate as to which party or parties should be considered to be responsible for the act of communication in such circumstances, but that debate does not assist TuneIn for reasons that will appear.
86. Next, counsel for TuneIn submitted that “to the public” should be understood as meaning simply outside the private or family circle, as it does in other contexts in copyright law. This submission is not without its attractions. One of the most criticised aspects of the CJEU’s jurisprudence is the “new public” criterion. Moreover, one of the problems with the “new public” criterion is the difficulty of reconciling the way in which it was applied in *Svensson* with the no-exhaustion rule laid down in Article 3(3) of the Directive and with the CJEU’s subsequent decision in *Renckhoff* (as to which, see further below). But if this Court were to accept counsel for TuneIn’s submission, it would inevitably mean that TuneIn Radio satisfied the requirement for a communication “to the public”. (Nor would it assist TuneIn if this Court were to adopt the leading alternative to the “new public” criterion, namely the “by an organisation other than the original one” criterion.)
87. Seventhly, turning to TuneIn’s alternative contention that, even if it does not depart from the remainder of the case law, this Court should depart from *GS Media*, I do not see how it can be sensible to depart from *GS Media* and not later cases such as *Filmspeler*, *Pirate Bay* and *Renckhoff*. Nor would it necessarily assist TuneIn: the Claimants would still argue that the principles articulated by the CJEU in the latter three cases were sufficient to determine the issues in this case in their favour. Indeed, the Claimants would argue that the principles laid down in the earlier case law were sufficient.
88. Eighthly, the principal reason given by counsel for TuneIn for departing from *GS Media* was the mental element imposed by the CJEU in that case. He submitted that this confused primary liability for copyright infringement with accessory liability, and pointed out that accessory liability was not harmonised by the Information Society Directive or any other measure of EU law. This is another criticism of the CJEU’s jurisprudence which receives support from academic commentary. It is pertinent to observe, however, that in the UK the intellectual property statutes are, with the minor exception of authorising restricted acts in copyright (as to which, see below), silent with respect to accessory liability. The courts have filled this gap by applying the common law (that is to say, judge-made) doctrine of joint tortfeasance. Subject to the question of the CJEU’s competence, it would not be surprising if the CJEU were to adopt a similar approach to the Information Society Directive, and it may be the case that *GS*

Media is a first step in that direction. In any event, abandoning the CJEU's approach would not necessarily assist TuneIn. An alternative conclusion might be that linking to any content which had been posted without the requisite consent of the right holder would be an infringement, particularly by framing or in-line linking.

89. Accordingly, I conclude this case should be decided by reference to the principles established by the jurisprudence of the CJEU.

What weight, if any, should be given to VG Bild?

90. Judgments of the CJEU given after 31 December 2020 do not form part of "retained EU law" and thus are not binding on any UK court or tribunal. A UK court or tribunal may nevertheless "have regard to" such judgments: section 6(2) of the 2018 Act.
91. Accordingly, the question arises as to what weight, if any, this Court should give to *VG Bild*. In my judgment, it is highly persuasive for the following reasons. First, it is one of 25 judgments on the topic of communication to the public, the other 24 of which constitute retained EU case law and which I have already concluded that this Court should not depart from. Secondly, it builds upon and further refines the CJEU's previous jurisprudence. Thirdly, it is a decision of the Grand Chamber. Fourthly, it concerns hyperlinking and therefore is directly relevant to the issues in the present case. Fifthly, it addresses the relationship between the CJEU's earlier decisions in *Svensson* and *Renckhoff*, which, as discussed below, the judge perceived to be in conflict with each other.

Application of the principles established by the CJEU's case law: general points

92. TuneIn contends that, even if the applicable principles are those stated by the CJEU, the judge misapplied those principles. Some of TuneIn's grounds of appeal (grounds 5-10) are general in nature while others relate specifically to the judge's reasoning in relation to categories 1, 2 and 3 of the sample stations (grounds 11-20 and 22-35), although there is some duplication between the latter and the former. I shall begin with the general points.
93. Before turning to the detail of the legal analysis, it is important to address two factual assertions made by TuneIn which underpin a number of its grounds of appeal. TuneIn contends that: (i) all TuneIn Radio does is to provide hyperlinks to content which is freely (in that access is unrestricted) and lawfully (by virtue of either consensual licences or statutory schemes) available on the internet; and (ii) what TuneIn Radio does is no different in principle to a conventional search engine. The judge did not accept either of these assertions for the reasons he gave at [120]-[130], and neither do I. As the judge found, TuneIn Radio is not a conventional search engine, and it does much more than provide links to its users: it is a platform that provides audio content with the features listed in paragraphs 17-19 above. Even at the technical level, it is inaccurate to say that TuneIn Radio simply provides links: what it does is provide *framed* links to *streams* which incorporate recordings within the Claimants' repertoire together with *other information*, those streams and the other information being *organised and displayed using the metadata* in those streams *for so long as users choose to listen to the streams*.

94. In order to put TuneIn’s legal arguments in context, it is first necessary to consider a number of the CJEU’s decisions in more detail.

95. I explained the background to *Svensson in Paramount*:

“14. The claimants were four journalists who between them had written 13 articles published by the *Göteborgs-Posten* newspaper. Three of the journalists were employed by the newspaper, while one was freelance. All of the articles had all been published not only in print, but also online on the newspaper’s website. In the case of one of the articles, which was written by the freelance author, the online publication by the newspaper was not licensed by the author. In addition to publishing the articles online on its own website, the newspaper had licensed Mediarkivbolaget to make copies of the articles available from its Mediarkivet database. None of the claimants had licensed this. The defendant Retriever was a member of the same group of companies as Mediarkivbolaget which provided media monitoring and search services. The claimants brought proceedings before the Stockholm District Court claiming that Retriever had infringed their copyrights in the articles.

15. Retriever provided its services to about 3,000 subscribers. The media monitoring service involved Retriever searching the internet using agreed search words so as to inform the subscriber as to how it had been reported in the media or how specific issues had been handled. The results of the searches were sent by Retriever to the subscriber by an email which included links to relevant articles (that is to say hyperlinks to websites on which the articles were available) together with so-called ‘link tails’ which included a few words from the articles in question. The subscriber could also review the search results by logging onto Retriever’s website. If the subscriber so requested, and paid an additional fee, the search would include a search of the Mediarkivet database.

16. The search service comprised a search facility on Retriever’s website. The search included a search of the Mediarkivet database. The search result was presented to the subscriber in the form of lists of links. ...

18. The District Court ... considered the claimants’ claim that Retriever had made the articles available to the public by the provision of links in the results of its search service. (This claim did not extend to the media monitoring service.) ...

20. ... The District Court considered that the preponderant view amongst commentators was that ‘reference linking’ did not constitute communication to the public and shared this view. Since Retriever’s links were reference links, the District Court

concluded that there was no communication to the public in the instant case.

...

22. The claimants appealed. The Svea Court of Appeal referred ... questions to the Court of Justice ...”
96. I would add two points. First, all of the participants (the journalists, the newspaper, Mediearkivbolaget and Retriever) were Swedish. Secondly, at least by the time of the reference, the potential difference between the claims of the employed journalists and that of the freelance journalist did not feature in the case.
97. The Fourth Chamber of the CJEU recorded at [8] that it was common ground between the parties that the articles in issue were freely available on the *Göteborgs-Posten* website. The Court went on to hold at [17]-[20] that the provision of hyperlinks by Retriever was an act of communication and at [21]-[22] that the communication was to the public in the sense that it was to an indeterminate and fairly large number of recipients. It held, however, that the communication was not to a new public for the following reasons:
- “25. In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.
26. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.
27. In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.
28. Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.”
98. Although the Court quoted Article 3(3) of the Information Society Directive at [7], it did not mention that provision in its reasoning. In *BestWater*, where all the participants appear to have been German, the Ninth Chamber of the Court repeated that, as the Court had said in *Svensson* at [29]-[30], it made no difference if the hyperlink was made using

framing. On that occasion the Court did not even quote Article 3(3) in its reasoned order.

99. In *GS Media Sanoma*, the publisher of the Dutch version of *Playboy*, commissioned a photographer to take photographs of Britt Dekker, a Dutch television star, for publication in the December 2011 edition of the magazine. GS Media operated a website called *GeenStijl*. On 27 October 2011 *GeenStijl* published a report headed (in translation) “[Obscenity] leaked! Nude photos ... Dekker” which included a hyperlink to an Australian data-storage website called Filefactory.com. By clicking on the link and then clicking on a download button users could download a zip file containing copies of 11 photographs of Ms Dekker. When Sanoma demanded that GS Media removed the link, GS Media refused to do so, but Sanoma was successful in getting the photographs removed from the Filefactory.com website. On 7 November 2011 *GeenStijl* published a report about the dispute which included a hyperlink to the Imagashack.us website where further copies of the photographs could be found. Again Imagashack.us complied with Sanoma’s request to remove the photographs, but on 17 November 2011 *GeenStijl* published another report with a hyperlink to the photographs. Sanoma and Ms Dekker brought a claim for infringement of copyright. In due course the Hoge Raad (Dutch Supreme Court) referred questions to the CJEU.
100. It can be seen that in that case the claimants and defendant were Dutch, but the copies of the photographs were being hosted on Australian and US websites. This is not, however, a feature of the case which the Second Chamber of the CJEU commented on in its judgment.
101. The Court said at [41] that in *Svensson* and *BestWater* the Court “intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder” as leading to the conclusion that there was no communication to a new public. It went on in [42] to say that “as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public”. It then stated at [43] that it did not follow that hyperlinking to works which had been made freely available *without* the consent of the copyright owner was excluded from communication to the public:
- “Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder.”
102. The Court acknowledged, however, that holding that linking to works published on other websites automatically constituted communication to the public where the copyright owners had not consented to that publication would have undesirable consequences. Among the reasons it gave for this were the following at [46]:
- “... it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such

ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it.”

103. It therefore held that:

“47. ... it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder.

48. Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it ... does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet. In addition, where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention.”

104. The Court went on, however:

“49. In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.

50. The same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast (see, by analogy, ... *Svensson* ...).

51. Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such

circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”

105. The Court proceeded to hold that, since (i) GS Media operated *GeenStijl* for profit, (ii) Sanoma had not authorised the publication of the photographs on the internet and (iii) GS Media was aware of that fact, GS Media could not rebut the presumption that it had posted the links in full knowledge of the illegal nature of that publication and thus had effected a communication to the public.
106. The details of *Soulier* do not matter for present purposes, but what is of some significance is what the Third Chamber of the CJEU said about *Svensson* at [36] (emphasis added):

“... in a case in which it was questioned about the concept of a ‘new public’, the Court held that, in a situation in which an author had given *prior, explicit and unreserved authorisation* to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (see, to that effect, ... *Svensson* ...).”

107. *Filmspeler* concerned the sale by Mr Wullems of various models of a multimedia player consisting of standard hardware for connecting a television to the internet on which Mr Wullems had installed an open source graphic user interface called XBMC and add-on software files containing hyperlinks to third party streaming sites, many of which streamed content without the authorisation of the rightsholders. Mr Wullems promoted his products by means of advertisements which said that users could watch films, television series and sporting events for free. The Second Chamber of the CJEU held that Mr Wullems’ acts amounted to communication to the public.

108. For present purposes two features of the Court’s reasoning are pertinent. First, when holding that there was an act of communication, the Court said:

“41 ... it must be held that the present case does not concern a situation of the ‘mere’ provision of physical facilities for enabling or making a communication. ... Mr Wullems, with full knowledge of the consequences of his conduct, pre-installs onto the ‘filmspeler’ multimedia player that he markets add-ons that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders of those works — on streaming websites and enable those purchasers to watch those works on their television screens That intervention enabling a direct link to be established between websites broadcasting counterfeit works and purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those protected

works, is quite different from the mere provision of physical facilities In that regard, it is clear from the observations presented to the Court that the streaming websites at issue in the main proceedings are not readily identifiable by the public and the majority of them change frequently.

42. Consequently, it must be held that the provision of a multimedia player such as that at issue in the main proceedings enables, in view of the add-ons pre-installed on it, access via structured menus to links that those add-ons which, when activated by the remote control of that multimedia player, offer its users direct access to protected works without the consent of the copyright holders and must be regarded as an act of communication within the meaning of Article 3(1) of Directive 2001/29.”
109. Secondly, in holding that the communication was to a new public, and hence to the public, the Court applied its reasoning in *GS Media*. Since it was “common ground that the sale of the ‘filmspeler’ player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on the player gave access to works published illegally on the internet” ([50]), this requirement was satisfied.
110. *Pirate Bay* concerned the notorious website *The Pirate Bay* (“TPB”) which also featured in *Dramatico*. The Second Chamber of the CJEU held that TPB made an act of communication for the following reasons:
 - “34. It can ... be inferred from [*Svensson, BestWater, GS Media and Filmspeler*] that, as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.
 35. In the present case it must be found, first ... that it is not disputed that copyright-protected works are, by means of the online sharing platform TPB, made available to the users of that platform in such a way that they may access those works from wherever and whenever they individually choose.
 36. Second, it is true ... that the works thus made available to the users of the online sharing platform TPB have been placed online on that platform not by the platform operators but by its users. However, the fact remains that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect, without the aforementioned operators making such a platform available and managing it, the works could not be

shared by the users or, at the very least, sharing them on the internet would prove to be more complex.

37. The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.
 38. Finally, the operators of the online sharing platform TPB cannot be considered to be making a ‘mere provision’ of physical facilities for enabling or making a communication ... It is clear from the order for reference that that platform indexes torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform. Moreover, it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform’s operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content.”
-
111. In holding that the communication was to a new public, and hence to the public, the Court applied its reasoning in *Filmspeler*, and hence *GS Media*. Since it was clear that “the operators of the online sharing platform TPB could not be unaware that this platform provides access to works published without the consent of the rightholders” ([45]), this requirement was satisfied.
 112. In *Renckhoff* Mr Renckhoff was a professional photographer. He took a photograph of the city of Cordoba. He granted a licence to the operator of a travel magazine website called *Schwarz auf weiss.de* to publish his photograph on the website. A pupil at the Gesamtschule Waltrop (Waltrop Comprehensive School) in Land Nordrhein-Westfalen found the photograph and included a copy of it in her project for a Spanish class. Subsequently it was posted on the school’s website. Mr Renckhoff brought a claim for copyright infringement in respect of the posting of the photograph on the school website. All the participants in the case were German. In due course the Bundesgerichtshof (Federal Court of Justice) referred questions to the CJEU.
 113. The Second Chamber of the CJEU held that the posting on one website of a photograph which had previously been posted on another website without restrictions and with the consent of the copyright owner constituted communication to the public. The Court appears to have considered it plain that this was an act of communication. What required more consideration was whether it was a communication to a new public.
 114. Having noted that the right of communication to the public was “preventive in nature”, the Court said:

- “30. Such a right of a preventive nature would be deprived of its effectiveness if it were to be held that the posting on one website of a work previously posted on another website with the consent of the copyright holder did not constitute a communication to a new public. Such a posting on a website other than that on which it was initially posted might make it impossible or at least much more difficult for the holder of a right of a preventive nature to require the cessation of that communication, if necessary by removing the work from the website on which it was posted with his consent or by revoking the consent previously given to a third party.
31. Thus, it is clear that, even if the holder of the copyright holder decides no longer to communicate his work on the website on which it was initially communicated with his consent, that work would remain available on the website on which it had been newly posted. The Court has already held that the author of a work must be able to put an end to the exercise, by a third party, of rights of exploitation in digital format that he holds on that work, and to prohibit him from any future use in such a format, without having to submit beforehand to other formalities (see, by analogy, ... *Soulier* ...).
32. Second, Article 3(3) of Directive 2001/29 specifically provides that the right of communication to the public referred to in Article 3(1) of that directive is not exhausted by any act of communication to the public or making available to the public within the meaning of that provision.
33. To hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication.
34. In addition to the fact that it would be contrary to the wording of Article 3(3) of Directive 2001/29, that rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work, set out in recital 10 of that directive, even though, as the Court stated, the specific purpose of the intellectual property is, in particular, to ensure for the rightholders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an appropriate reward for each use of the protected subject matter (see, to that effect, [*FAPL*] ...).
35. Taking account of those elements, it must be held, in the light of [*Svensson*, *GS Media* and *Pirate Bay*], that the posting of a work protected by copyright on one website other than that on which the initial communication was made with the consent of the

copyright holder, in circumstances such as those at issue in the main proceedings, must be treated as making such a work available to a new public. In such circumstances, the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users.”

115. The Court went on to distinguish *Svensson* and *BestWater* for three reasons. First, those cases concerned hyperlinks whereas the instant case concerned the publication on a website without the authorisation of the copyright owner of a work which was previously communicated on another website with the consent of the copyright owner, which raised different considerations ([40]-[43]). Secondly, in the case of a hyperlink, it was open to the copyright owner to remove the work from the website on which it was initially communicated, thereby rendering the hyperlink ineffective, whereas posting the work on a different website could not be affected by action against the first website ([44]). Thirdly, in *Svensson* the administrator of the website in which the link was inserted had not played any role in allowing access to the works, whereas in the instant case the user who had posted a copy of the work on the second website had played a decisive role in the communication of the work to a public which had not been taken into account by the copyright owner ([45]-[46]).
116. *Tom Kabinet* concerned a “reading club” operated by Tom Kabinet which supplied members with “second-hand” e-books. All the participants in the case were Dutch. The Grand Chamber of the CJEU held that the supply of e-books constituted communication to the public. On the question of whether the communication was to a new public, the Court stated at [71]:
- “In the present case, since the making available of an e-book is ... generally accompanied by a user licence authorising the user who has downloaded the e-book concerned only to read that e-book from his or her own equipment, it must be held that a communication such as that effected by Tom Kabinet is made to a public that was not already taken into account by the copyright holders and, therefore, to a new public”
117. In *VG Bild* VG Bild-Kunst was a German collective management organisation which acted on behalf of visual artists. SPK was a German foundation which operated the Deutsche Digitale Bibliothek (DDB), a digital cultural library which provided both thumbnail images of, and links to, digitised content stored on the internet portal of participating German cultural institutions. VG Bild-Kunst refused to grant SPK a licence in respect of DDB save on terms that SPK implemented technical measures against the framing by third parties of protected works to which they linked. SPK brought proceedings for a declaration that VG Bild-Kunst was required to grant the licence without that requirement (it could not refuse to grant a licence at all for reasons that it is unnecessary to go into). In due course the Bundesgerichtshof referred a question to the CJEU asking whether the embedding of a work which was available on a website with the consent of the right holder constituted communication to the public

where it occurred through circumvention of protection measures taken or instigated by the right holder.

118. The Grand Chamber of the CJEU held that this did constitute communication to the public. Its reasoning, which is evidently intended to reconcile *Svensson* and *Renckhoff*, is not entirely easy to follow, however.
119. Having reiterated a number of general points concerning communication to the public made in its previous case law, the Court proceeded at [35]-[37] to recapitulate its conclusions concerning hyperlinks in *Svensson* and *BestWater*. It repeated at [38] what it had said in *Soulier* at [36]. It held at [39] that this reasoning did not apply where the right holder had implemented or imposed restrictive measures.
120. The Court then said:
 - “40. In particular, if a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place on the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to obtain access to the work transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly their authorisation is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is currently available on that site only to a restricted public, whereas it is accessible on another website without the copyright holders’ authorisation (... *Svensson* ..., paragraph 31).
 41. The main proceedings are precisely concerned with a situation where the copyright holder is seeking to make the grant of a licence subject to the implementation of measures to restrict framing in order to limit access to his or her works from websites other than those of his or her licensees. In such circumstances, that copyright holder cannot be regarded as having consented to third parties being able freely to communicate his or her works to the public.
 42. Therefore, in accordance with the case-law cited in paragraph 38 of the present judgment, by adopting, or by obliging licensees to employ, technological measures limiting access to his or her works from websites other than that on which he or she has authorised communication to the public of such works, the copyright holder is to be deemed to have expressed his or her intention to attach qualifications to his or her authorisation to communicate those works to the public by means of the Internet, in order to confine the public for those works solely to the users of one particular website.

43. Consequently, where the copyright holder has adopted, or obliged licensees to employ, measures to restrict framing so as to limit access to his or her work from websites other than that of his or her licensees, the initial act of making available on the original website and the secondary act of making available, by means of the technique of framing, constitute different communications to the public, and each such act must, consequently, be authorised by the rights holders concerned (see, by analogy, ... *VCAST*, ..., paragraph 49).
44. In that regard, it cannot be inferred either from ... *Svensson* ... or from ... *BestWater* ... that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders for those works, is not a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29. On the contrary, those decisions confirm the importance of such authorisation in the light of that provision, which specifically provides that each act of communication of a work to the public must be authorised by the copyright holder (see, to that effect, ... *GS Media* ..., paragraph 43).”
121. The Court then said:
- “46. It must be made clear that, in order to ensure legal certainty and the smooth functioning of the internet, the copyright holder cannot be allowed to limit his or her consent by means other than effective technological measures, within the meaning of Article 6(1) and (3) of Directive 2001/29 (see, in that regard, ... *Nintendo and Others*, C-355/12, EU:C:2014:25, paragraphs 24, 25 and 27). In the absence of such measures, it might prove difficult, particularly for individual users, to ascertain whether that right holder intended to oppose the framing of his or her works. To do so might prove even more difficult when that work is subject to sub-licences (see, by analogy, ... *GS Media* ..., paragraph 46).
47. Further, in such circumstances, as stated by the Advocate General in points 73 and 84 of his Opinion, the public which was taken into consideration by the copyright holder when he or she authorised the communication of his or her work on the website on which that work was initially published consists solely of the users of that site, and not the users of the website on which the work has been subsequently framed without the authorisation of the copyright holder, nor other internet users (see, by analogy, ..., *Renckhoff*, ..., paragraph 35).”
122. The Court went on to say, in summary, that, although hyperlinks contribute to the smooth operation of the internet and hence to freedom of expression, deeming consent on the part of the right holder, even though he or she had taken measures to restrict framing, to any communication to the public by a third party would amount to

exhaustion contrary to Article 3(3) of the Information Society Directive and would deprive the copyright owner of the opportunity to claim an appropriate reward for the use of his or her work, citing *Renckhoff* repeatedly. In this context the Court stated at [51] that “a copyright holder cannot be faced with the choice of either tolerating the unauthorised use of his or her work by a third party, or surrendering the use of that work, in some cases by means of a licence agreement”. It did not refer, however, to *Tom Kabinet*.

123. Returning to the present case, the judge considered *Svensson*, *GS Media*, *Soulier* and *Renckhoff* at [49]-[111]. TuneIn criticises the judge’s analysis of the case law in four respects which I will consider in turn.

124. First and most importantly, TuneIn takes issue with the way in which the judge sought to reconcile *Svensson* and *Renckhoff*. The judge considered that on the face of it the two were “flatly contradictory” for the reason he explained at [99]:

“In *Svensson* when a work is published on a website freely accessible by anyone all potential recipients are part of the public taken into account by the copyright owner when publication was authorised, whereas in *Renckhoff* the very same act by the copyright owner only takes into account users of the site and users of other sites (i.e. not the whole world).”

125. The judge’s answer to this conundrum at [100] was that “[o]ne can only answer the question about what public was taken into account [when the first communication was authorised] when one knows the nature of the latter act of communication”. As he explained:

“101. Putting it a different way – when a copyright owner consents to the work being published on a website targeted at a particular set of internet users but in practice freely available to all users one can rationally hold that:

- i) the owner took (or should be treated as having taken) into account all internet users as potential recipients of a hyperlink to that work; but
- ii) did not take (and need not necessarily have taken) into account any internet users, other than those to whom the site is targeted, as potential recipients of a posting of the work itself.

102. Looked at this way the two conclusions are consistent and thus, on the same facts, once a work has been published on a site, a reposting of that work on a second site may be an act of communication to a new public (*Renckhoff*) whereas a link to it may not be (*Svensson*).”

126. Having noted at [107] that “nowhere in the cases is there an attempt to consider the terms of any actual copyright licence applicable to the initial posting of a work on the internet”, the judge explained his analysis of this point further at [109] as follows:

- “ii) An important distinction is between a case in which a work has been placed on the internet with the consent of the relevant rights holder and a case in which there has been no such consent. If the initial posting of the work was done with the relevant consent then it is itself an act of communication to the public and any subsequent alleged acts of communication to the public have to be analysed with that in mind. For a second act of communication to the public on the internet to be an infringement in that case, there must be a new public (or new technical means) and for the former to be determined one must work out what public was taken into account when the first act of communication took place.
 - iv) However the question of what public was taken into account when a work was the subject of a first communication to the public cannot be answered without knowing the nature of the subsequent act of communication which is alleged to infringe (*Svensson* and *Renckhoff*). One does not simply ask – what public was taken into account? – rather one has to ask – were the public to whom the act of communication complained of is addressed taken into account in giving the consent to the first act of communication?
 - v) Approached that way, in a case in which a photograph is taken from one website and reposted on a second website, one asks: were visitors to the second website who will encounter the photograph posted on that website taken into account when the consent to the posting of the photograph on the first website was given? The answer may well be no because the rights holder should only be taken to have consented to the work appearing on the first website and being seen posted on that first site by visitors to that first site, and not be taken to have consented to the work being seen posted on a second website by visitors to that second website, who amount to a different class of visitors (*Renckhoff*).
 - vi) By the same token, in a case in which there is, on one website (A), a link to a photograph posted on another website (B), one asks: were visitors to website A who will encounter that link taken into account when the consent to the posting on the photograph on website B was given? The answer may well be yes because the rights holder should be taken to have understood that the internet includes that sort of linking and therefore to have consented to those links appearing on other websites and being seen by anyone on the internet (*Svensson*).”
127. Counsel for TuneIn submitted that this analysis was erroneous for three main reasons. First, *Svensson* was clear authority, which was not cast into doubt by any of the later cases and confirmed by *VG Bild*, that, where works were posted on a website without restrictions by or with the consent of the right holder, “[t]he public targeted by the initial communication” was “all Internet users” and thus there was no communication to a

new public when the works were communicated by the provision of a hyperlink to that website. Secondly, there was no contradiction between *Svensson* and *Renckhoff* because the two cases were to be distinguished for the three reasons given by the CJEU itself in *Renckhoff*. Thirdly, *VG Bild* established that the key consideration was whether access to the website had been restricted by technical measures.

128. While I acknowledge that these submissions have some force, I do not accept them. The judge is not alone in considering that *Svensson* and *Renckhoff* are in tension. Advocate General Szpunar took the same view in his Opinion in *VG Bild* [EU:C:2020:696], and sought to reconcile the two at [58]-[75]. Although the Court did not adopt all of the Advocate General's analysis in its judgment, it did endorse what he said at [73]:

“It is therefore necessary to conclude, as did the Court in the judgment in *Renckhoff*, that the public which was taken into account by the copyright holder when making a work available on a website is composed of the public which visits that site. Such a definition of the public taken into account by the copyright holder actually reflects, in my view, the reality of the internet. Although a freely accessible website may in theory be visited by any internet user, in practice the number of potential users likely to access it, while admittedly variable, is approximately determined. The copyright holder takes into account the extent of that circle of potential users in authorising the making available of his or her work. This is important in particular when the work is made available under a licence, since the potential number of presumptive visitors may be an important factor in determining the price of the licence.”

This analysis is similar to that of the judge.

129. TuneIn's strongest point is what the CJEU said in *VG Bild* at [46] (quoted in paragraph 122 above). Taken in isolation, this paragraph states that the only way in which a right holder can limit its consent is by means of effective technological measures. In my judgment, however, it must be understood in context. The dispute in that case was an intra-German dispute concerning the entitlement of right holders to insist upon technical measures to restrict access when granting licences (as the Court explicitly noted at [41], quoted in paragraph 121 above). Thus what the Court was saying was that, in that context, the only way in which right holders could limit consent was by technical measures.
130. I do not think that this statement can be extrapolated beyond that context for the following reasons. First, as noted above, the Court proceeded immediately to endorse what the Advocate General had said at [73]. Secondly, the Court also cited what it had said in *Renckhoff* at [35], and went on to cite *Renckhoff* three times more in the remainder of its analysis, yet that was a case in which *no* technical measures restricting access to the protected work on the original website had been imposed by the copyright owner. Thirdly, the Court accepted that copyright owners cannot be faced with the choice of either tolerating unauthorised use of their works or surrendering use of them, including by licences. Fourthly, if taken out of context, the Court's statement would conflict with what the Grand Chamber itself said less than 15 months previously in *Tom*

Kabinet at [71]. Fifthly, the Court’s statement cannot remove the need for an individualised assessment taking all of the relevant factors into account, as the CJEU has stated several times, including in *VG Bild* itself at [33]-[34].

131. In general, therefore, I do not accept that the judge made any material error in the way in which he sought to reconcile *Svensson* and *Renckhoff*, but it remains necessary to consider the way in which he applied the law to the categories of sample station in dispute with the benefit of the CJEU’s subsequent decisions.
132. TuneIn’s second criticism is that the judge wrongly elided the two limbs of communication to the public, and he should have kept the questions of “communication” and “to the public” separate. This criticism is directed to part of the judge’s analysis which he summarised at [109(i)] as follows:

“Although the individual dimensions of the question need to be considered, ultimately the assessment of whether a party’s actions amount to a ‘communication to the public’ is an individualised and case specific assessment which must be carried out as a whole.”
133. I do not accept this criticism. The judge’s statement of law is fully supported by the case law of the CJEU cited in the second sentence of paragraph 70(4) above. Moreover, the case law shows why it is not possible to keep “communication” and “to the public” in watertight compartments: the nature of the act of “communication” affects whether it is “to the public”, and in particular whether it is to a new public.
134. TuneIn’s third criticism is that the judge wrongly conflated the concepts of targeting and the new public. This criticism is directed at what the judge said at [101] and [109(iv) and (v)] quoted in paragraphs 125-126 above (although the point perhaps emerges more clearly from the discussion of category 3, as to which see below). Counsel for TuneIn submitted that the concept of the new public depended on the public which had been taken into account by the copyright owner when authorising the original communication, whereas targeting was purely concerned with identifying the jurisdiction(s) in which the public to whom the second communication was directed were located. As both the judge’s and Advocate General Spzunar’s analyses demonstrate, however, there is a relationship between the two questions. This is particularly true in a case such as the present, where the territoriality of copyright licensing is central.
135. TuneIn’s fourth criticism is that the judge wrongly failed to apply what it calls “the direct access requirement”. This criticism is based on what the CJEU said in *Svensson* at [27] (quoted in paragraph 97 above). TuneIn contends that this means that, in order to amount to an act of communication to the public, a hyperlink must afford direct access to the protected work. TuneIn goes on to argue that the hyperlinks in TuneIn Radio do not provide direct access to the Claimants’ sound recordings, but only to the broadcasts by the foreign radio stations.
136. I do not accept this argument. I do not read *Svensson* as laying down a requirement for direct access to the protected work as distinct from any communication within which it may be incorporated. On the contrary, the relevance of direct access in that case was it formed part of the Court’s reasoning for holding that there was no new public.

“Communication” and “the public”

137. Before turning to the individual categories of sample stations, the judge first considered at [120]-[131] whether, subject to the question of whether there was a new public, the acts of TuneIn complained of amounted to a “communication” which was to “the public”. He concluded that both requirements were satisfied. His reasoning, in summary, was that: (i) TuneIn intervened (I would add, in a highly material way and with full knowledge of the consequences of its actions) to give the UK users of TuneIn Radio access to foreign internet radio stations’ streams incorporating the Claimants’ repertoire (I would add, which such users would otherwise find it more difficult to access); and (ii) the UK users of TuneIn Radio constituted an indeterminate and fairly large number of persons. Although the judge did not put it in quite this way, a point which pervades his analysis is that TuneIn’s intervention had, and was designed to have, economic consequences.
138. TuneIn does not challenge conclusion (ii). It challenges conclusion (i), but only on grounds which I have already rejected. Thus the issue that remains is whether TuneIn communicated the streams to a new public. As counsel for TuneIn accurately submitted, this depends on the scope of the authorisation by the right holders of the original communication.

Category 3

139. The judge sensibly started his analysis of the four categories of sample station with category 3. For the reasons explained in paragraph 35 above, I shall consider under this heading both (a) stations which benefit from a statutory scheme in their local territory and (b) stations which benefit from a consensual licence, even though the judge only considered sub-category (a).
140. *Sub-category (a)*. The judge’s starting point was to hold at [134] that the relevant statutory schemes amounted to “a form of deemed consent”. The Claimants challenge this conclusion by a Respondents’ notice. I have to say that I am doubtful whether it is correct to regard such schemes as involving deemed consent for the reasons explained above, but nevertheless I will assume that the judge was right. In any event, the point which is emphasised by TuneIn is that category 3 stations operate lawfully (I would add, in so far as they target the audiences covered by the statutory schemes, that is to say, their local audiences).
141. The judge proceeded to consider whether TuneIn’s communication was to a new public, and concluded that it was for the following reasons:
- “137. The starting point in answer to this question must be the scope of the deemed consent. The most that this should be taken to be is a ratification of the work’s appearance on the internet in the radio station stream in a manner which gives rise to the obligation to pay royalties under the local law. In other words it should be seen as deemed consent to the work appearing on the internet in a manner aimed either at users of the local website in question or, at most, at users in the locality in question as a whole. In neither case does this involve ratification of an act targeted to the UK, albeit that one has to recognise that the

activity does in fact make the works freely available to internet users everywhere if they care to look for the relevant stream.

138. Accordingly, once the streams in the Category 3 stations are freely available on the internet, it is an inherent aspect of the function of the internet that they could be indexed by conventional search engines or linked to by publishers of conventional websites. The operation of conventional search engines and linking on conventional websites is something inherently taken into account when a work is placed on the internet.
139. Therefore it is appropriate to analyse the facts on the footing that the whole internet public, insofar as they encounter a link to a Category 3 station which is provided either by a conventional search engine or some other conventional sort of website, has been taken into account. It is an inherent aspect of making this material available on the internet that that sort of linking is likely to happen.
140. On the other hand, absent evidence to the contrary, there is no reason why the kind of public to whom TuneIn's system is addressed should have been taken into account. TuneIn's activity is a different kind of act of communication and is targeted at a particular public, i.e. users in the UK.
141. Putting this together, I hold that the public to whom TuneIn's act of communication complained of is addressed cannot be said to have been taken into account in relation to the first act of communication. Accordingly TuneIn's act of communication in relation to Category 3 is to a new public ..."
142. TuneIn challenges this conclusion on no less than nine grounds (grounds 11-19), but most of them traverse points I have already addressed. TuneIn's core argument is that the judge was wrong to treat the right holders' authorisation of the original communication as territorially restricted because that is contrary to *Svensson*, but I disagree. As the judge correctly stated, TuneIn Radio is a different kind of communication (in the sense that it has the features of aggregation, categorisation, etc discussed above) targeted at a different public in a different territory. Even assuming that the operation of a statutory scheme in a foreign territory amounts to a form of deemed consent on the part of the rights holders to the original communication to the public, including persons who access the streams via simple hyperlinks or conventional search engines, there is no reason to conclude that that authorisation extended to the UK public targeted by TuneIn Radio's communication. On the contrary, counsel for TuneIn accepted that TuneIn had never sought to defend this claim on the basis that targeting UK users (let alone targeting them by TuneIn Radio's communication) was licensed by virtue of the payments made by foreign internet radio stations in their local territories.
143. Two points remain to be considered. First, TuneIn contends that the judge wrongly reversed the burden of proof in [140]. I do not accept this. In saying "absent evidence

to the contrary”, the judge was merely being cautious about the possible existence of circumstances in another case which might lead to a different conclusion.

144. Secondly, TuneIn contends that the judge failed to strike a fair balance between the fundamental rights engaged (intellectual property on the one hand and freedom of expression on the other), contrary to the jurisprudence of both the CJEU and the European Court of Human Rights (and, indeed, recital (31) of the Information Society Directive). I do not accept this contention either. The CJEU has referred to the need to strike a fair balance between the fundamental rights engaged in a number of its recent decisions on communication to the public (as well as in other copyright cases): see *GS Media* at [31], [45]; *Renckhoff* at [41]-[43]; *BY* at [31]-[33]; and *VG Bild* at [49]-[54]. It is clear from these authorities that the Court considers that the principles it has established do strike a fair balance. Accordingly, in correctly applying those principles, the judge did not fail to strike a fair balance. Furthermore, striking a fair balance does not involve giving freedom of expression precedence over copyright, which is the effect of TuneIn’s argument. (I should make it clear, for the avoidance of doubt, that the EU Charter of Fundamental Rights is not part of retained EU law; but that does not matter for present purposes.)
145. *Sub-category (b)*. It is arguable that TuneIn stands in a better position with respect to sub-category (b) than sub-category (a) because stations in sub-category (b) benefit from the actual consent of the right holders in the territory of origin rather than (as the judge thought) deemed consent or (more probably) no consent. Even so, I consider that the judge’s reasoning and conclusion is equally applicable to sub-category (b). Absent evidence to the contrary (such as a licence whose terms have extra-territorial extent or effect), the public which the rights holders would have taken into consideration when authorising the initial communication to the public by the foreign stations will have been the local audiences for those stations, not the UK users targeted by TuneIn Radio’s links to the streams. Accordingly, TuneIn Radio’s communication is to a new public.
146. I therefore conclude that the judge was correct to hold that TuneIn has infringed the Claimants’ copyrights with respect to the category 3 stations.

Category 2

147. As the judge rightly held at [144], if TuneIn infringed with respect to the category 3 stations, it could not be in a better position with respect to the category 2 stations. Since I have concluded that the judge was correct to hold that TuneIn infringed with respect to category 3, it follows that TuneIn also infringed with respect to category 2.
148. In the alternative the judge also considered the position if he was wrong with respect to the category 3 stations. On that hypothesis, he found at [145] that the category 2 stations were “either actually unlicensed, or at least ... not in full compliance with the local rights regime[s]”. He went on at [146]-[160] to hold that TuneIn was not able to rebut what he described as “the *GS Media* presumption”, and therefore it had committed acts of communication to the public with respect to the category 2 stations.
149. TuneIn challenges the judge’s alternative analysis on no less than 14 grounds (grounds 20-33), although some of these I have addressed already. For completeness I shall address the remainder, although I will attempt to do so briefly. Having regard to the

arguments on the appeal, it is necessary to differentiate between sub-category (a) and sub-category (b).

150. *Sub-category (a)*. There is no challenge to the judge’s finding of fact that these stations did not have a licence from the relevant rights holders. Despite that, and despite the absence of any ground of appeal raising the point, counsel for TuneIn submitted that the judge had not decided whether the stations were operating unlawfully in the territory of origin. I do not accept this submission. Although the judge did not use the words “operating unlawfully”, that is in substance what he found at [115] and [145]-[146].
151. Next, TuneIn contends that the judge misapplied *GS Media*. As discussed above, the CJEU differentiated between the provision of links by persons who do not pursue a profit on the one hand and the provision of links by persons who do pursue a profit on the other hand. In the latter case the CJEU held that there is a rebuttable presumption which is explained in *GS Media* at [51] (repeated in *Filmspeler* at [49]). For convenience I will set this out again:
- “... when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”
152. In the present case there is no dispute that TuneIn provides TuneIn Radio, and hence links to the relevant streams, for profit. It follows that the rebuttable presumption described by the CJEU is applicable. TuneIn’s argument to the contrary is hopeless.
153. There was some debate between the parties as to precisely what the presumption was, and whether the judge had correctly characterised it. In my view the presumption is clear: “that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder”. I do not accept that the judge, who quoted [51] of *GS Media* in full at [81], said anything different: see [82]-[83] and [109(viii)].
154. It follows that the judge was correct to consider whether TuneIn had rebutted this presumption. The judge concluded at [149]-[158] that it had not. His reasoning, in summary, was as follows. TuneIn relied upon the fact that it required all internet radio stations to give a warranty that they had the necessary licences and that no further licences or payments were required for the stations to be added to TuneIn’s directory. The judge held that this did not rebut the presumption for three reasons. First, a substantial number of stations indexed by TuneIn had not given a warranty, including some sample stations, and TuneIn knew this. Secondly, in the case of a number of stations, the terms were not in fact a warranty that appropriate licences had been obtained, but rather were statements that sole responsibility for obtaining licences

relating to public performance in the relevant territory rested with the station. Even in the case of the stations for which a warranty has been given, the most that could be said was that the warranty amounted to a representation that the internet radio station was operating lawfully in its home state. It was not a representation about the position in the UK. Thirdly, the judge found that TuneIn did not regard the warranties as important anyway.

155. Counsel for TuneIn's principal criticism of this reasoning was that the judge had not made specific findings of fact as to what TuneIn (i) had actually known and (ii) ought to have known with respect to each sample station in category 2. Furthermore, although the judge referred to some category 2 stations, he also referred to some category 3 stations. TuneIn also contends that the judge erred in applying an "absolute", rather than "fault-based", standard of knowledge and that he treated the presumption as effectively irrebuttable. Finally, TuneIn challenges some of the judge's findings of fact.
156. I do not accept that any of these points undermines the judge's reasoning or conclusion. The judge approached the question systemically, and I consider that he was entitled to do so. I also consider that his findings of fact were open to him on the evidence. In those circumstances he was entitled to conclude that the checks undertaken by TuneIn were generally inadequate to rebut the *GS Media* presumption; he did not treat the presumption as irrebuttable. Furthermore, in the case of the two stations in sub-category (a), we were shown no evidence that TuneIn believed on reasonable grounds that those stations were licensed (or even operating lawfully), in the territory of origin. The furthest the evidence went was that TuneIn did not know that the stations were operating unlawfully; but that is not enough to rebut the *GS Media* presumption.
157. *Sub-category (b)*. I accept that sub-category (b) stands in a different position in that it was unclear from the meagre evidence available at trial whether the fact that the statutory schemes were not fully established in the relevant territories meant that these stations were operating unlawfully or whether they were in some legal limbo. The question which arises in those circumstances is whether the *GS Media* presumption applies at all.
158. The judge held that it did. His reasoning at [78], [110] and [158] was that what the CJEU meant by "illegally published" material in *GS Media* at [51] (elsewhere in *GS Media* it referred to "illegally posted" ([48]) and "illegally placed on the internet" ([49])) was material posted without the consent of the right holder. TuneIn contends that this is wrong, but I consider that the judge's interpretation represents the better view given the CJEU's emphasis on the consent of the right holder at [43]-[44], [46]-[47], [51] and [55]. The judge's interpretation is also supported by *Tom Kabinet*. In the case of the category (b) stations there can be no question of any consent, or even deemed consent, to the original communication by the right holders. Accordingly, the judge was correct to conclude that the *GS Media* presumption applied.
159. Given that the *GS Media* presumption applied, I consider that the judge was entitled to conclude that TuneIn had not rebutted it for the same reasons as in the case of sub-category (a). (The judge nevertheless held at [159] that there was no infringement in the case of Gakku FM for a different reason, namely that there was no evidence that Gakku FM had ever played any relevant sound recordings. There is no challenge to that conclusion by the Claimants.)

Category 1 and the Pro app

160. The judge concluded that, in general, TuneIn had not infringed the Claimants' copyrights in relation to the category 1 stations on the ground that there was no communication to a new public. As noted above, the Claimants do not challenge that conclusion.
161. The judge held, however, that TuneIn had infringed in relation to all four categories of stations, including category 1, by provision of the Pro app when the recording function was enabled. The judge concluded that the Pro app including the record function was a different technical means to the original communication, and thus there was communication to the public regardless of whether there was a new public (see paragraph 70(13) above), for reasons he expressed as follows:
- “175. I find that the inclusion of this feature makes a material difference to the nature of TuneIn's act of communication via the app, at least when one considers users contemplating its use (and there are a substantial number of those). When that sort of user selects and listens to an internet radio station using the app which includes the recording function it seems to me that one cannot describe TuneIn's service as nothing more than a form of linking, conventional or unconventional. A user who wants to create a library of music by a particular artist can use TuneIn's Pro app to search for internet radio stations playing that artist, listen to the streams and make recordings of the claimants' works on their device. It is TuneIn's intervention which makes feasible something which would be wholly impractical for a user otherwise.
176. TuneIn argued that the claimants case muddled up two rights, the right of communication to the public and the reproduction right. I do not accept that. Making the recording relies on the act of communication undertaken by TuneIn. In providing a user with an integrated means of finding internet radio stations, playing them through the TuneIn app and then recording and playing back individual works the subject of the claimant's rights, TuneIn has converted the internet radio station's streaming service into a permanent download on demand service.
177. Although of course it is true that the internet is the medium by which the stream is conveyed to the user's device, I find that the Pro app itself, containing the integrated function, running on the user's device is a new and different technical means from that by which the original internet radio station was provided. That finding applies to all three of Categories 1, 2 and 3.”
162. TuneIn contends that this reasoning confuses the communication to the public right with the reproduction right. With respect to the judge, I agree with this. The starting point is the stream simulcast or webcast by the foreign station. The act of communication is the provision by the Pro app of the link to that stream (in the context

described in paragraphs 17-20 above). That involves precisely the same technical means as the original communication. It makes no difference if the Pro app has the record function enabled. First, this cannot depend on whether the user activates the record function or not. Secondly, the mere potential for the user to record the stream does not affect the provision of the stream in any way. The communication remains the link to the stream.

163. The Claimants contend in the alternative by their Respondents' notice that, even if there was no new technical means, there was a new public because the rights holders would not have taken into account the possibility of users recording their repertoire. Although this argument was attractively put by counsel for the Claimants, I do not accept it. The presence or absence of the record function in the Pro app makes no difference to the public which was taken into account by the rights holders when they authorised the original communication by the category 1 stations: it remains the public in the UK. It is true that the right holders did not grant a licence which extended to reproduction of sound recordings by users, but the consequence of this is that users who recorded recordings within the Claimants' repertoire infringed the Claimants' rights unless those users could rely upon a relevant exception or limitation. I shall return to this point below.

Accessory liability

164. The Claimants contend that, if and to the extent that TuneIn is not primarily liable for infringement of copyright, it is liable as an accessory for infringements by the foreign internet radio stations and/or UK users of the Pro app who used the record function to record recordings within their repertoire. The Claimants put their case in two ways: authorisation pursuant to section 16(2) of the 1988 Act and joint tortfeasance. The judge upheld both ways of putting the case.

Authorisation: the law

165. The judge applied the following statement of the law by Kitchin J (as he then was) in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch), [2010] FSR 21 at [90] following consideration of *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013:

“... ‘authorise’ means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances.”

166. Counsel for TuneIn accepted that this was largely a correct statement of the law, but submitted that it was erroneous in so far as it suggested that it was material to consider whether it was inevitable that the means in question will be used to infringe. Counsel submitted that this was inconsistent with the speech of Lord Templeman in *CBS v Amstrad* at 1054H-1055D. I do not accept this submission. Lord Templeman did not say that it was not relevant to consider whether it was inevitable that the means will be used to infringe. Rather, what he said was that the fact that “it could be said” that the means would “almost inevitably” be used for the purposes of infringement did not lead to the conclusion that there was authorisation in the circumstances of that case.

Joint tortfeasance: the law

167. The law as to joint tortfeasance was reviewed by the Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229. Although the Court was divided as to the disposition of the appeal, there was no disagreement as to the law. Both Lord Neuberger (who was in the majority) at [55] and Lord Sumption (who was in the minority) at [37] stated that, in order for a defendant to be liable as a joint tortfeasor through assisting another, three conditions must be satisfied. These were articulated by Lord Neuberger as follows:

“First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and thirdly, the act must constitute a tort as against the claimant.”

168. Lord Sumption noted at [38] that “a person may incur liability as a joint tortfeasor ... by using the prospect of unlawfully downloading streamed copyright material to attract users to the defendant’s website: *Dramatico*”. He also noted at [43] that in *Metro-Goldwyn-Mayer Inc v Grokster* (2005) 545 US 913 “the creators of a file-sharing website were held liable for copyright infringement, even though the site was capable of lawful use, because it was found on the evidence that the defendants not only assisted the infringements but intended them as an effective way of increasing the use of its website”. It is clear from the context of the latter statement that he considered that, under English law, such acts would give rise to liability as a joint tortfeasor, as in *Dramatico*.

Foreign radio stations

169. *Primary liability of the foreign radio stations.* The first issue under this heading is whether the foreign radio stations in categories 2 and 3 which were incorporated in TuneIn Radio made acts of communication to the public in the UK. The judge held that they did for reasons he expressed in relation to category 3 as follows:

“193. As before I will start with Category 3. I take it the Category 3 internet radio stations are not targeted at the UK when they are published by the provider because if they were then the provider would already be committing an act of UK copyright infringement. The effect of TuneIn's service is that the internet radio station, assuming a UK user selects it, is targeted at the UK. In my judgment when that happens the provider now

commits an act of UK copyright infringement because the provider is, in the UK, communicating the work to the public.

194. For the providers who sign up to the TuneIn service, there is nothing surprising about this result. The fact the UK is one of the states targeted by TuneIn is no secret. However this result will be true even for a provider whose streams are on TuneIn's service as a result of a web-crawler and who never signed up to TuneIn's service since (aside from *GS Media*, which is looking at a different aspect of this) s20 is a tort of strict liability under UK law.”
170. TuneIn contends that the judge was wrong to hold that the foreign radio stations were primary infringers on the short ground that the communications by the foreign radio stations were not targeted at the UK, they were targeted at their local audiences.
171. I do not accept this contention. For the reasons explained above, the streams from the foreign radio stations selected by UK users of TuneIn Radio become targeted at the UK. I acknowledge that there is room for debate as to which party is primarily liable for the resulting act of communication to the public. The judge’s principal conclusion was that TuneIn was primarily liable, but it followed from his reasoning that the foreign radio stations were also primarily liable. There is nothing, however, to prevent two parties being primarily liable for a communication to the public in an appropriate case: see *EMI v BSKyB* at [46]. Although this might at first blush seem a surprising conclusion where the foreign station was indexed by TuneIn without the knowledge or consent of its operator, the judge was correct to hold that it follows from the fact that the streams become targeted at the UK as a result of TuneIn’s intervention. The foreign radio stations can avoid liability by requiring that they be removed from TuneIn Radio or that they be geo-blocked to UK users. That leaves the question of whether the judge was correct to conclude in the alternative that the foreign radio stations were primarily liable even if TuneIn was not. I consider that he was: even if TuneIn did not commit the act of communication because it merely provided links to the streams, it remains the case that the streams were communicated to the public in the UK.
172. *Authorisation*. The judge held that TuneIn authorised the infringements by the foreign radio stations for the following reasons:
- “200. Looking at the factors summarised by Kitchin J:
- i) Control – TuneIn has no control over the content included in the streams provided by Category 2 and 3 stations. ...
 - ii) Steps to prevent infringement – TuneIn contends that it goes out of its way to work with copyright owners and licensing bodies to avoid infringement by station operators and that it acts promptly to remove any operators reported to be unlicensed, and adopts and enforces a ‘three strikes’ policy against all operators. I do not accept this. TuneIn makes no effort to work with UK copyright owners or licensing bodies nor does it

make any effort at all to avoid infringement of UK copyright by Category 3 or 4 stations. The three strikes policy has no relevance to Categories 3 or 4.

- iii) Nature of relationship – TuneIn submitted that its relationship with an internet radio station is one of an information location service, in other words, a search engine. I reject that for all the reasons discussed above. Its position in the relationship with a given internet radio station is not that of a facilitator, it directly intervenes to provide the streams to users in the UK. As for the contracts, they are either bespoke or are on TuneIn’s standard terms and so under its control.
- iv) Means of infringement – the streams are supplied by the internet radio station but they are targeted to users in the UK by TuneIn. It is true that the streams would exist without TuneIn but from a user’s point of view, TuneIn’s intervention is an indispensable part of the way they experience the stream.
- v) Non-infringing uses – it is true that a large share of the internet radio stations provided by TuneIn do not involve infringement of the claimants’ rights. If that meant that the infringing activity was a minor part of TuneIn’s offering, then this might carry more weight. But it is not.
- vi) Knowledge of infringing stations – TuneIn suggested it was not indifferent to infringement. I would accept that insofar as the case was limited to Category 2 but it does not apply to Categories 3 and 4. TuneIn knows all it needs to know about those kinds of stations.

201. I find that TuneIn does authorise the infringements of the Category 2, 3 and 4 internet radio stations. It is TuneIn’s activity which makes them available to the public in the UK. That applies to all of Categories 2, 3 and 4. Furthermore, in all the cases in Category 4 and also those stations in Category 2 and 3 for which TuneIn has a bespoke contract, such as Country 104, Mix Megapol, Sky Radio Hits, Deutschlandfunk and VRT Studio Brussels, TuneIn is directly responsible for the stations being listed as part of the TuneIn service.”

- 173. TuneIn contends that all of the matters taken into account by the judge at [200] were either irrelevant or erroneous, and that the judge failed to consider other relevant factors.
- 174. I do not accept these contentions. All of the factors considered by the judge were relevant to the question of authorisation, and I do not accept that he fell into error in any respect. As for the suggestion that the judge failed to consider relevant factors, TuneIn alleges that the judge ignored the steps it took to avoid copyright infringement.

This is incorrect: as can be seen from [200(ii)] the judge considered these, but found as a fact that in reality TuneIn did not try to avoid infringement. TuneIn also alleges that the judge failed to consider the scale of the infringing uses of TuneIn Radio, but again this is incorrect as can be seen from [200(v)]. I would add that it is implicit in the judge's reasoning that infringement was an inevitable consequence of TuneIn's method of operation, which supports his conclusion. In short, contrary to TuneIn's contention, it did purport to grant UK users the right to link to the streams from the foreign stations using TuneIn Radio.

175. *Joint tortfeasance.* The judge held at [204] that TuneIn was liable as a joint tortfeasor for the same reasons as he gave in relation to authorisation. TuneIn contends that the judge was wrong to conclude that there was a common design between TuneIn and the operators of the foreign radio stations. Whatever might be said about stations which were indexed by TuneIn using crawler software, I consider that the judge was clearly correct in the case of operators which were required by TuneIn to sign New Station Forms and/or Station Update Forms. TuneIn thereby requested such operators to consent, and the operators did consent, to the inclusion of their stations in TuneIn Radio. Thus there was a common design between TuneIn and the operators that the streams from the foreign stations should be targeted at TuneIn Radio's users, including in the UK. The position is *a fortiori* in the case of operators with whom TuneIn had bespoke agreements.

UK users of the Pro app record function

176. *Primary liability of the users.* The judge held that, subject to the availability in some, but not all, cases of a defence under section 70 of the 1988 Act (timeshifting), UK users who used the Pro app record function to record sound recordings within the Claimants' repertoire infringed the reproduction right. There is no challenge to that conclusion.
177. *Authorisation.* The judge held that TuneIn authorised the infringements by UK users of the Pro app record function for reasons he expressed at [202] as follows:

“In terms of a user's use of the recording function which amounts to infringement, the claimants submitted that TuneIn was very different from the situation in *Amstrad*, which concerned the provider of a machine which could hold two cassette tapes and could be used easily to make copies of one cassette on another one. I agree. The Pro app is not just a recording device. It also includes a curated repertoire of a large number of music internet radio stations. The purchaser of the Pro app would, reasonably, understand that TuneIn had sold them the Pro app (with its built in recording function) in order to allow them to record audio content offered by the TuneIn Radio service. There is also a point on the degree of control exercised by TuneIn. Only internet radio stations provided by TuneIn can be recorded and TuneIn can disable the record function at a station by station level. With the recording function enabled in the manner it is by TuneIn, infringement is inevitable.”

178. Although TuneIn challenges this reasoning, I agree with it. Again, the upshot is that TuneIn purported to grant UK users the right to record the foreign radio stations, including the Claimants' repertoire.
179. *Joint tortfeasance.* The judge again held that TuneIn was liable as a joint tortfeasor for the same reasons as he gave in relation to authorisation. Formally TuneIn has not challenged this conclusion, although that may be an oversight. If and in so far as TuneIn contends that the judge was wrong to conclude that there was a common design between TuneIn and the users, I disagree. The common design was that users could record content including the Claimants' repertoire in the manner described by the judge.

Disposition of the appeal

180. For the reasons given above, I would allow the appeal against the judge's conclusion that TuneIn was liable for infringement by communication to the public in relation to the category 1 stations by virtue of providing the Pro app to UK users with the record function enabled. Otherwise, I would dismiss the appeal.

Lady Justice Rose:

181. I have read the judgments of Arnold LJ and the Master of the Rolls in draft and I agree that the appeal should be dismissed, save that I would also decide that TuneIn is not liable for infringement in relation to the category 1 stations where the stream was provided to UK Pro app users with the record function enabled. I also agree with the reasons set out in paragraphs [1] – [69] and [92]-[180] of Arnold LJ's judgment.
182. As to the observations made by the Master of the Rolls at [192] – [195], I would say this. The summary of the legal principles set out by Arnold LJ provides useful context for the issues that arise for decision in this appeal. Many of the principles so summarised, in covering the whole ground, cover issues that do not arise in the present appeal and which were not the subject of any submissions received by the court. Before 31 December 2020 the inclusion of such a list of principles in a judgment of this court could only ever be a snapshot of the current law. It would need to be updated by any subsequent refinement, qualification, or reversal of any of those principles by the CJEU because of the supremacy of the law made by that Court.
183. That is no longer the position. Although the judgments of the CJEU delivered before 31 December 2020 are retained EU law and continue in effect to the extent described by Arnold LJ in [74] above, the CJEU's judgment in *VG Bild* and any future judgments of the Court are not so binding. Section 6(2) of the 2018 Act provides, rather, that a court or tribunal "may have regard" to any such future judgments so far as they are relevant to any matter before that court or tribunal. My concern is that the ability of a court or tribunal in the coming years to have regard to such future CJEU judgments should not be hindered by the fact that the pre-existing, retained law has been described in a judgment of this court, even though a decision of this court would, in general, be binding on that court or tribunal. The application of section 6(2) of the 2018 Act has yet to be fully worked out by courts and tribunals. It would be better, in my judgment, to avoid restating the CJEU's principles in domestic judgments where they are not strictly on point since it creates a risk of confusing the status of such principles in our domestic law. So for example, in this rapidly evolving area of the law, it is entirely possible that a future judgment of the CJEU will revisit what was said in *Bezpečnostní*

about graphic user interfaces. The present appeal does not engage that case law. If the CJEU were to deliver such a judgment, a court or tribunal hearing a future case about such interfaces should not be discouraged from “having regard” to that later CJEU judgment by the fact that this court has stated the law as described in [57] of *Bezpečnostní* in this tour d’horizon of the law as it currently stands.

184. I agree that this is absolutely not a case in which this court should exercise its power to depart from the EU jurisprudence for the reasons given by Arnold LJ and the Master of the Rolls.
185. Finally I fully endorse what is said about the quality of Birss J’s judgment, particularly given the very sad circumstances in which he took over the case.

Sir Geoffrey Vos, Master of the Rolls:

Introduction

186. I have had the benefit of reading Arnold LJ’s judgment in draft, and I agree with his conclusions. Specifically I agree that the appeal should, in all except one small respect, be dismissed for the reasons the judge gave. I will adopt the abbreviations that Arnold LJ has used.
187. Had it not been for three matters, it would, I think, at least very nearly, have been sufficient for this court to have said just that: appeal dismissed on the grounds adumbrated by the judge.
188. The three matters are: (i) the afterthought submission from TuneIn that this court should make a wholesale departure from EU law, (ii) the promulgation (after the hearing before us) of the CJEU’s Grand Chamber decision on 9 March 2021 in *VG Bild*, departing in some ways from the opinion of Advocate General Szpunar of 10 September 2020, and (iii) Arnold LJ’s view, with which I agree, that the judge was wrong to conclude in relation to category 1 (UK) stations that, in providing its Pro app to UK users with the recording function enabled, TuneIn was liable for infringement by communication to the public.
189. I propose in this short judgment to say why I agree with the judge on the substance of his decision, and to deal briefly with the first of the three matters I have mentioned.

My reasons for agreeing with the substance of Arnold LJ’s judgment

190. As I have said, I concluded after three days of detailed argument that, subject to one point, the judge had been right. TuneIn’s extensive grounds of appeal sought, in effect, to re-run the arguments that they had advanced to the judge.
191. I agree with all that Arnold LJ says at [1]-[69] and [92]-[180]. So far as [70]-[91] are concerned, I would prefer to express myself more briefly.
192. I am not convinced that it is helpful to try to summarise wide-ranging areas of law in numbered principles. That is not really how the common law operates. The common law is at its best when cases are decided by the finding of the facts in the particular case and by the application of the law applicable at the relevant time to those facts.

193. I am conscious, of course, that what Arnold LJ has done is to summarise principles that he has extracted from 25 cases decided in this area by the CJEU, and that the CJEU is very far from a common law court. But that does not, in my view, affect the principles upon which the Court of Appeal and the High Court in England and Wales should operate.
194. Summaries of legal principles are, by their nature, never valid for long. The law is not static and is affected by every new decision on the topic. Indeed, that is why Arnold LJ has thought it necessary to update the summary he gave in *Paramount* in his judgment in this case. As he points out at [69], two more decisions of the CJEU are expected soon. This is why global summaries of the kind attempted here and in *Paramount* are, in my view, generally better undertaken by academic commentators rather than by judges deciding live cases.
195. Furthermore, as Arnold LJ's own judgment demonstrates, one can deal comprehensively with the issues in the case before the court by providing a specific analysis, as he has so persuasively done at [95]-[122], of the few authorities which directly affect the issues in the case before the court. In this case, the main authorities cited to us were *Svensson*, *GS Media*, *Soulier*, *Pirate Bay*, *Filmspelers*, *Tom Kabinet*, *Renckhoff* and *VG Bild*.

The submission that this Court should depart from the CJEU's jurisprudence

196. Arnold LJ has given 8 reasons at [78]-[88] for his unwillingness to depart from CJEU law in this case. I would prefer to confine myself to fewer. TuneIn's argument on this point was, I am afraid, half-hearted and inadequately thought through. The wholesale departure that it suggested would, in large part, not anyway have helped it. Only a few minutes of oral argument was devoted to it, notwithstanding that the departure suggested was only finally formulated at the hearing.
197. I do not exaggerate when I say that I regard this as a paradigm case in which it would be inappropriate for the Court of Appeal to exercise its new-found power to depart from retained EU law.
198. First, this is an area of law that derives, as Arnold LJ has said at [79], from international treaties. The courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony. The question of infringement of copyright by communication to the public in the context of the internet and hyperlinks is a difficult area of law that often has impacts, as in this case, across national borders. It gives rise to frequent issues and potential anomalies. The large number of cases dealt with by the CJEU in relatively few years is a testament to that. It would be undesirable for one nation to depart from the CJEU's approach without an exceptionally good reason.
199. Secondly, TuneIn suggested in its skeleton that the Court of Appeal should apply the Supreme Court approach of departing from its own decisions where the earlier ones "were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy" (see Lord Reid at page 966 in *R v. National Insurance Commissioner: ex parte Hudson* [1972] AC 944).

200. In *Knauer v. Ministry of Justice* [2016] AC 908, Lord Neuberger said this at [22]-[23] about the application of the Practice Statement (Judicial Precedent) [1966] 1WLR 1234:

“ ... it is well established that this court should not refuse to follow an earlier decision of this court or the House of Lords merely because we would have decided it differently: see per Lord Bingham of Cornhill in *Horton v Sadler* [2007] 1 AC 307, para 29. More than that is required, not least because of the desirability of certainty in the law, as just discussed. However, as Lord Bingham said in the same passage, while former decisions of the House are normally binding ... too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. ... This court should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement.”

201. In my judgment, the CJEU’s approach to the law of infringement of copyright by communication to the public is neither impeding nor restricting the proper development of the law, nor is it leading to results which are unjust or contrary to public policy.
202. It would, therefore, be both unnecessary and undesirable for this court to depart from retained EU law in this case. To do so would create legal uncertainty for no good reason.

Conclusion

203. In conclusion, I would like to reiterate Arnold LJ’s tribute to the judge. He picked this case up after the evidence had been heard, and upon the tragic death of Henry Carr J. It was truly a mammoth task, which he carried out with meticulous care and attention to detail in uniquely difficult circumstances. Both the parties and the court system owe him a debt of gratitude.