Neutral Citation Number: [2019] EWHC 2923 (Ch)

Case No: IL-2017-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 01/11/2019

Before :

MR JUSTICE BIRSS

- -

Between :

(1) Warner Music UK Ltd **(2) Sony Music Entertainment UK Ltd** (for themselves and as representative Claimants on behalf of the members of their respective corporate groups)	**Claimants**
- and -	
TuneIn Inc.	**Defendant**

- -
- -

Edmund Cullen QC and **Amanda Hadkiss** (instructed by **Wiggin**) for the **Claimants**
Robert Howe QC and **Jaani Riordan** (instructed by **Bird & Bird**) for the **Defendant**

Hearing dates: 26th and 27th September 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE BIRSS

Mr Justice Birss :

Topic	Paragraphs
Introduction	1
Targeting	12
Communication to the public – the law	35
The sample stations	112
Communication to the public - assessment	120
The TuneIn service	120
Category 3	132
Category 2	143
Category 4	161
Category 1	164
The recording function in the TuneIn Radio Pro app	172
Liability of users making recordings with the TuneIn Radio Pro app	179
Liability of the providers of Categories 2, 3 and 4 stations	192
Authorisation or joint tortfeasance	196
Safe harbours	205
Other issues	211
Conclusion	212

Introduction

1. The relationship between copyright and the internet is not always an easy one. This case is another example of that tension. It is a test case about infringement of copyright in sound recordings under section 20 of the Copyright, Designs and Patents Act 1988. Section 20 provides for the communication right in UK law. A balance has to be struck between the interests of the copyright owner in protecting its exclusive rights, and the interests of the public in freedom of access to the internet. The claimants say that a finding for the defendant will fatally undermine copyright. The defendant says that a finding for the claimants will break the internet.

2. Section 20 of the 1988 Act implements Article 3 of the Information Society Directive 2001/29/EC. The CJEU has set out general principles of interpretation of that provision. They are addressed below. In the end though it is for the national courts to determine where the balance lies in a given case. It is a fact-sensitive exercise.

3. The claimants, and the groups they represent, own or hold the exclusive licences to copyright in sound recordings of music. The two groups together account for more than half the market for digital sales of recorded music in the UK and about 43% globally. 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, assuming the music is within the claimants' repertoire. One source of these licences is the collecting society Phonographic Performance Limited (PPL).

4. 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 also require a licence if they are going to play the relevant music recordings.

5. The claimant (TuneIn) is a US technology company. It operates an on-line platform, providing a service which enables users to access radio stations around the world. The service is called TuneIn Radio. 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 for free to unregistered users. There is also a free service for registered users which allows users 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 a number of devices such as Bose, Sonos and Sony PlayStation pursuant to partnership agreements entered into with TuneIn. As a result, TuneIn Radio is now available on over 200 platform connected devices, including: smart phones; tablets; televisions; car audio systems; smart speakers; and wearable technologies.

6. 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. TuneIn Radio is monetised through advertising and subscriptions.

7. 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. 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.

8. When a user accesses the TuneIn website or app, one way or another they are presented with various internet radio stations. TuneIn may recommend internet radio stations, users can browse based on different categories or users can enter search terms. TuneIn curates categories of stations both manually and using algorithms. It uses the individual's listening history to direct them to recently played stations and to provide tailored recommendations. The search function is by keywords. These can be matched to station name, to tags (from the operator or TuneIn) and/or to stream metadata (when available). One search function is by artist. Another search function, which TuneIn stopped but may restart and needs to be considered, is by song.

9. One way or another the user will be presented with one or a group of icons representing various internet radio stations which TuneIn Radio is presenting to that user. 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.

10. The user selects the icon and, after a "pre-roll" advertisement (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 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.

11. The claimants' case is that TuneIn requires a licence from the claimants. This is strongly disputed by TuneIn, on the basis that it does not transmit or store any music, and merely provides users of TuneIn Radio with hyperlinks to works which have already been made freely available on the internet without any geographic or other restriction.

Targeting

12. The internet is international. Users accessing the world wide web from the UK can gain access to websites all over the world. This is routine. However unlike the internet, intellectual property rights are territorial. In what circumstances therefore does an act undertaken on the internet engage the laws, in particular the intellectual property laws, of a given state? The clear answer to that question is that for the rights in an EU member state to be engaged (at least as far as trade marks and copyright are concerned) the act must be targeted at the public in that member state (see e.g. ***Pammer v Reederei Karl Schulter*** Case C-585/03, ***L'Oreal v eBay*** Case C-324/09, ***Football DataCo v Sportradar*** Case C-173/11, applied in the UK to the communication right in ***EMI v BskyB*** [2013] EWHC 379 (Ch) (Arnold J)).

13. So an organisation providing services through the internet (by a webpage or an app) does not need to be concerned about UK copyright at all if it does not target the UK (ignoring irrelevant points about the location of servers). The fact that members of the public in the UK can and do access those services does not matter if they are not targeted at the UK. If access from the UK happens on an appreciable scale then it might be evidence from which targeting could be inferred (along with other evidence) but that is not the point. The fact that all internet users around the world have free access to the contents of a website does not amount to targeting all potential visitors to the site and does not amount to targeting the public in a particular member state.

14. Focussing on an internet radio, this principle means that an internet radio station operator playing sound recordings within the claimants' repertoire will, if it targets the UK, need a licence under the claimants' UK copyrights. And that is so irrespective of the physical location of the business premises of the internet radio station. On the other hand an internet radio station which does not target the UK, needs no such licence.

15. Although in argument the parties always put this point near the end, I will address it first because if TuneIn does not target the UK then UK copyright is not engaged at all.

Targeting - the law

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*** [2017] EWCA 1834 para 168 and ***L'Oreal v eBay*** para 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*** para 169 and ***L'Oreal v eBay*** para 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 v EGPSXXX*** [2014] EWHC 3762 (IPEC).

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*** [2018] EWCA Civ 2211 para 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*** paras 169-170 and ***Argos v Argos*** para 51).

iv) The court must carry out an evaluation of all the relevant circumstances, see ***Merck v Merck*** para 169 and ***L'Oreal v eBay*** para 65.

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*** para 51 and ***OmniBill*** para 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.

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.

Targeting – the facts

19. 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.

20. The user experiences advertisements in the TuneIn service in two ways – visual and audio. The visual advertisements appear as part of the TuneIn screens. The audio advertisement is the pre-roll which plays when a user clicks on the relevant icon to indicate they wish to start listening to a particular internet radio station. The pre-roll plays for about 15 seconds before the internet radio station audio stream starts. Both sets of advertisements are plainly targeted at the UK. Much of it is denominated in pounds sterling.

21. TuneIn also has a system for playing its own "in-stream" advertisements. Using this technique when an internet radio station starts playing its own advertisements, TuneIn's system recognises this and instead of the user hearing the advertisement which the internet radio station plays, the user hears a different advertisement put there by TuneIn. However apart from a glitch, which I accept was a one-off error, the in-stream function does not occur for users in the UK listening to music stations.

22. Also relevant is the way the audio stream from the internet radio station is presented to the user. Once it starts playing, the underlying stream URL is not obviously visible to the user. I find that 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.

23. TuneIn provides local radio categorisations and search options specifically by reference to the UK and to towns and cities within the UK.

24. TuneIn argued that the targeting of the visual advertising was the result of the effect of automated advertising platforms and that TuneIn did not select the individual advertisements. In my judgment that is irrelevant because from the point of view of the user – the public in the UK – it would still appear that they were being targeted. I doubt that the relevant UK public understand how advertisement targeting works (a point was made with a view to suggesting that people knew that it was not TuneIn itself which makes the choice) but nor do I accept that that would make a difference even if they did. The objective presence of UK targeted advertisements is what matters for targeting.

25. In any event the TuneIn service carries bespoke advertising aimed at the UK such as the pre-roll advertising. There was also clear 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. TuneIn enters into partner agreements with UK-based radio stations such as Jazz FM, Bauer, and Global Radio. There is 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 as well.

26. TuneIn also offers paid for ad-free services. These are the Premium services on the website and the Pro app. They are priced in sterling to UK based customers. The factors mentioned above which do not involve advertising, i.e. the user being unlikely to appreciate that the stream comes directly from the internet radio station, the UK specific categorisations and search options, and relationships with some UK based stations, are also relevant.

27. Overall, it is manifest that TuneIn's service – as a whole – provided by the website or the apps, is targeted at the UK. The UK is not the only country targeted by TuneIn but it is plainly one of them. In fact, by closing, TuneIn conceded that the TuneIn platform targeted the UK (*inter alia*) but contended that while this applied to the platform as a whole, it did not apply to the individual alleged acts of communication to the public. I do not accept that, for the reasons explained below.

28. From the user's point of view, the purpose of using the TuneIn platform is to be provided with access to the internet radio station streams. The service provides that access by serving up icons of possible stations to select. Up to that point, to UK based users, the service is and has been targeted at the UK. If it was necessary to do so I would hold that even if nothing relevant happened after that, this would be sufficient to mean that any act of communication to the public, which was not complete until later in the process, was targeted at the UK anyway. However, at least for the services with advertising, that is not the end of the matter.

29. When the user then selects a particular stream the TuneIn pages remain on the user's screen and display the visual advertisements targeted at the UK. Also the pre-roll advertisement which then plays to UK users is targeted at the UK. It is true that, at the moment a user selects a particular internet radio station, the audio stream will probably be in the middle of something – speech or a piece of music – but that is irrelevant. At the time the stream itself starts playing, the stream – and everything which follows within it – has, for a UK based user, been targeted by TuneIn at the UK. That is true whether the stream is a UK based internet radio station or a stream from an internet radio station which had not hitherto been targeted at the UK.

30. While the stream itself is playing, again the advertisements on screen for a UK user are targeting the UK.

31. 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. In my judgment it is not necessary to analyse targeting by focussing on individual recordings in this way, but even if it were, then I would hold that such a recording is targeted at the UK in the relevant circumstances. The targeting which occurred up to the selection of the stream is still relevant. The targeting of the service and the stream by TuneIn does not change during the time the stream is played. Also the visual advertisements on the TuneIn page which accompany the playing of the stream are UK targeted.

32. The fact that when an internet radio station is indexed by TuneIn and added to its database there is no decision by TuneIn to target the UK with such a stream is irrelevant. Even if the internet radio station actually provided to a UK user was an obscure station from a country on the other side of the world in a language the user did not understand, in which one would not *a priori* think a UK user would be

interested, that is irrelevant. When it is presented to a UK user by TuneIn, from the UK user's perspective it is targeted at them.

33. Overall, I find that for all relevant purposes the acts of TuneIn radio complained of are targeted at the UK.

Targeting – a reflection

34. This conclusion means that there will be internet radio stations based overseas which, when they are put on the internet by their own operator on the operator's own website, are not targeted at the UK and the operator need not pay a UK copyright licence. That remains true if a UK based person finds the internet radio station and listens to it from the UK. However as a result of the acts of TuneIn, the same internet radio station, when it is presented to a UK based listener by TuneIn, is targeted to the UK. Assuming sound recordings in the relevant repertoires are played, then that is an act restricted by copyright. While this does not prove that one way or another someone must be liable, it is striking nonetheless. TuneIn may or may not be committing acts restricted by copyright. That is what this case is primarily about. There are also allegations of authorisation and of joint liability. It may be that the analysis relating to those internet radio station operators who actively sign up to TuneIn means they must bear some responsibility for the targeting undertaken by TuneIn such that they are themselves liable if any infringement takes place. I will address that below.

Communication to the public – the law

35. A detailed account of the origins of the communication right and its implementation by EU and domestic legislation was provided by Arnold J in ***Dramatico Entertainment Ltd v British Sky Broadcasting Ltd*** [2012] EWHC 268 (Ch); [2012] 3 C.M.L.R. 14. The following is a summary of the relevant provisions.

36. Article 11bis of the Berne Convention (the International Convention for the Protection of Literary and Artistic works signed at Berne on 9 September 1886 (Paris Act of 1971 as amended in 1979)) provides that:

> "(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;
>
> (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

37. Article 8 of the World Intellectual Property Organisation Copyright Treaty agreed in Geneva on 20 December 1996 provides that:

> "**Rights of communication to the public**
>
> Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(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."

38. At the Diplomatic Conference at which the WIPO Copyright Treaty was adopted, a number of statements concerning its interpretation were agreed. These include the following statement in relation to Article 8:

> "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 . …"

39. Article 14 of the World Intellectual Property Organisation Performances and Phonograms Treaty, which was agreed at the same time as the WIPO Copyright Treaty, provides that:

> "**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."

40. These treaties provide a background to the Information Society Directive (2001/29/EC), which was intended, amongst other objectives, to give effect to them.

41. Counsel for TuneIn contended that the *travaux préparatoires* to the Information Society Directive emphasise the need for balance, clarity and the avoidance of barriers to cross-border digital transmissions:

i) The Commission *Green Paper* cites the WIPO Glossary definition of 'communication to the public', and emphasises the need for the information society to 'operate smoothly and without obstacle'.

ii) The European Parliament Resolution on the *Green Paper* explains that the communication right should be 'applicable to all interactive digital transmissions'.

iii) The ESC Opinion at [1.3.4] notes a requirement 'to balance the need to protect intellectual property rights against the rights of users and of the public at large'

and describes Article 3(1) as 'a very carefully drafted definition' of the communication right which should 'stand the test of changing technology'.

42. TuneIn relied upon the recitals 2, 5, 8, 16, 23, 25, 26, 27 and 31 to the Directive. Counsel for the claimants relied on recitals 2, 3, 4, 9, 10, 11, 12, 22 and 23. I will not set all of these out in this judgment.

43. The most significant point emerging from the recitals to the Information Society Directive is the need to balance a high level of protection for copyright holders against the rights of users in respect of protected material in a new electronic environment. This balance is reflected in the Directive, where the rights required to be conferred by Article 3 are balanced by the exceptions and limitations set out in Article 5. Since the Directive came into force guidance as to how this works has been provided in several key judgments of the CJEU, addressed below.

Article 3 of the Directive and section 20 of the 1988 Act

44. Article 3 provides as follows:

> "**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:
> (a) for performers, of fixations of their performances;
> (b) for phonogram producers, of their phonograms;
> (c) for the producers of the first fixations of films, of the original and copies of their films;
> (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
> 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."

45. The Information Society Directive was transposed into UK law by the Copyright and Related Rights Regulations 2003, SI 2003/2498 ("the 2003 Regulations"). Article 3 was implemented by Regulations 6 and 7, which, amongst other things, amended section 20 in Part I of the 1988 Act. Pursuant to section 20 of the 1988 Act:

> "(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, or
> (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."

46. Notably the amendment to section 20 has gone further than Art 3 required. To understand this one needs to know that "works" in the Directive refers to a narrower list of things than the term "the work" in the first words of the preamble to sub-section 20(1). In the Directive "works" means what are sometimes called Berne works, for example "musical works" in the 1988 Act – i.e. what a composer composes. Sound recordings, also known as phonograms, are within the compass of "the work" in the opening words of s20(1) of the 1988 Act but they are not Berne works.

47. Art 3 requires the communication right as such for Berne works (Art 3(1)). However all Art 3(2) requires for other rights such as phonograms/sound recordings is the right to authorise or prohibit making available to the public on demand. The term "on demand" refers to what is described in the Article as access "from a place and at a time individually chosen by" the member of the public. The making available on demand right is within the ambit of the general communication right (Art 3(1)) but the communication right is wider. In the UK, by section 20, the wider communication right is given to everything – i.e. including sound recordings.

The case-law of the CJEU

48. The case-law of the CJEU concerning the communication right, as of November 2013 was summarised by Arnold J in ***Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd*** [2013] EWHC 3479 (Ch) at para 12. At that time, there were nine relevant CJEU decisions. Although parts of it are concerned with aspects which do not matter in the present dispute, in my view, Arnold J's summary of the state of play at the time cannot be improved upon. He said:

> "12. The principles established by the CJEU case law can, I think, be summarised as follows:
>
> (1) "Communication to the public" must be interpreted broadly: *SGAE* [2007] E.C.D.R. 2 at [36], [54], *FAPL* [2013] E.C.D.R. 14 at [186], *ITV* [2013] E.C.D.R. 9 at [20].
>
> (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: *ITV* at [23].
>
> (3) "Communication to the public" 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: *Circul* (C-283/10) at [36]–[41], *FAPL* at [200]–[203].

(4) There is no "communication to the public" where the viewers have no access to an essential element which characterises the work: *Bezpecností* [2011] E.C.D.R. 3 at [57].

(5) "Communication" includes any retransmission of the work by a specific technical means different from that of the original communication: *ITV* at [24]–[26].

(6) 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], *Airfield* [2012] E.C.D.R. 3 at [74], *ITV* at [28].

(7) There is an act of "communication" when someone gives members of the public access to the work in circumstances where they would not be able to enjoy the work without that intervention: *SGAE* at [42], *FAPL* at [194]–[196], *Airfield* at [72], *SCF* [2012] E.C.D.R. 16 at [82], *PPIL* [2012] E.C.D.R. 15 at [31].

(8) 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].

(9) Mere provision of physical facilities does not as such amount to "communication": *SGAE* at [46].

(10) 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* (C-136/09) at [39]–[41].

(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].

(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].

(13) 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].

> (14) There is no communication to "the public" where sound recordings are broadcast by way of background music to patients of a private dental practice: *SCF* at [92]–[102].
>
> (15) Where there is a communication which does not use a different technical means to that of the original 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 authors concerned when they authorised the original communication: *SGAE* at [40], *Organismos* at [38], *FAPL* at [197], *Airfield* at [72], [76], *ITV* at [38].
>
> (16) There is a communication to a new public where television broadcasts are transmitted to an additional public (that is to say, additional to the public constituted by owners of television sets who receive broadcasts within their own private and family circle) such as customers of hotels and public houses: *SGAE* at [41], *Organismos* at [37], *FAPL* at [198]–[199].
>
> (17) There is also a communication to a new public where a satellite package provider expands the circle of persons having access to the relevant works: *Airfield* at [77]–[82].
>
> (18) Where there is a communication using a different technical means to that of the original communication, it is not necessary to consider whether the communication is to a new public: *ITV* at [39]."

49. Since this summary there have been further decisions from the CJEU including the two most important for this case: ***Svensson v Retriever Sverige AB*** Case C – 466/12 and ***GS Media BV v Sonoma Media Netherlands BV*** Case C – 160/15.

50. I turn to deal with ***Svensson***. This was published in February 2014. The applicants (claimants) had written press articles that were published in a Swedish newspaper. The articles were freely available on the paper's website. The defendant operated a website that provided its clients with hyperlinks to protected works published without any access restrictions on other sites, including the applicants' articles. The applicants alleged that the defendant had infringed their exclusive right to make their respective works "available to the public" under Article 3(1) the Information Society Directive. The Swedish Court of Appeal referred questions to the CJEU for a preliminary ruling on the interpretation of Article 3(1), and in the present case, the parties referred to the judgment of the CJEU in respect of the first three questions. These were:

> "(1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of article 3(1) of Directive [2001/29]?
>
> (2) Is the assessment under question (1) affected if the work to which the link refers is on a website on the Internet which can

> be accessed by anyone without restrictions or if access is restricted in some way?
>
> (3) When making the assessment under question (1), should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?"

51. The CJEU considered the first three questions together which it summarised as asking, in essence, whether Article 3(1) of the Information Society Directive must be interpreted as meaning that the provision on a website of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision where, on that other site, the works concerned are freely accessible.

52. At paragraph 16 the CJEU identified that the concept of communication to the public includes two cumulative criteria, namely, an "act of communication" of a work and the communication of that work to a "public". The court examined in paragraphs 17 to 20 whether the first criterion had been satisfied, i.e. had there been an act of communication. The court started by emphasising that "act of communication" had to be construed broadly in order to ensure a "high level of protection" for copyright owners. Then the court decided that the provision of a clickable link to a work published on another site afforded users of the first site "direct access to" that work. This was assuming there were no access restrictions. At paragraph 19 the court followed ***SGAE*** (also called ***Rafael Hotel*** Case C-306/05) on the point that it is sufficient if the work is made available in such a way that a person has the ability to access it irrespective of whether they avail themselves of the opportunity. Therefore making a hyperlink available, even if the user does not click on it, is itself an act of communication. That conclusion is reached at paragraph 20.

53. The CJEU then turned to consider the second criterion, i.e. whether the works had been communicated to "a public". The answer was yes because the term "public" means an indeterminate and fairly large number of potential recipients (paragraphs 21 to 23).

54. However since the communication in question concerned the same works which had already been the subject of another communication, the court followed previous decisions of the CJEU and found that one of two alternative further criteria has to be satisfied for the act to amount to a communication to the public. The alternative criteria are that a new technical means is employed (new as compared to the means used in the first communication) or that the communication is to a new public (see points (15) and (18) of Arnold J's summary). This approach is derived from ***SGAE***, ***Organismos*** (Case C-136/09) and ***ITV Broadcasting*** (Case C-607/11) and is explained in paragraph 24 of ***Svensson***. That paragraph also contains the holding in relation to the first alternative. The court found that since both communications in the present case are via the internet, no new technical means is employed. In other words, in ***Svensson*** the CJEU has treated "the internet" as a single technical means.

55. The court then focussed on the other alternative (the new public) and concluded that, in the circumstances of ***Svensson***, there was no new public. The conclusion is in paragraph 25 and the reasons are explained in paragraphs 26 to 28:

> "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."

56. The core of this reasoning is paragraph 26. The Court's approach is to find that the public targeted by the first site is "all potential visitors to the site concerned". That is for two reasons. One is that the relevant content on the first site is not covered by "any restrictive measures". That means technical access restrictions; the Court is not there referring to legal restrictions. The second reason is the undoubted truth that all internet users could "therefore" have free access to the content on the first site.

57. With an eye on the case I have to decide, notable by its absence is any reference to the territorial nature of copyright, the complexities which can arise from that and the way in which targeting is employed to allocate responsibility for activity on the internet under EU law from a territorial point of view. Of course in ***Svensson*** that problem did not arise because as far as one can tell both sites were Swedish. A further point is this. Aside from access restrictions, the reasoning treats availability as an all or nothing idea, when the world is not really like that. A book in a large library is available in one sense but might never be read if it is not correctly indexed. The act of correctly indexing such a book is a way of making it available to anyone who did not have the time or inclination to walk down every shelf looking at every book in turn. That is why it can make sense to regard linking as an act of making something available.

58. Sometimes one can gain an insight into the Court's thinking from an Advocate General's opinion, but the court in ***Svensson*** proceeded without one. It is not clear whether the Court had these points well in mind and was saying (implicitly) that they were irrelevant, or simply did not have them in mind.

59. Once one has taken the step of deciding that the first act of communication is targeted to all *potential* visitors to the site concerned (my emphasis) and that this means all internet users, then the rest of the logic follows because (paragraph 27) people accessing the second site are necessarily potential recipients of the first act of communication. So the court held that these people were taken into account by the copyright owners when the copyright owners authorised the first communication. Also, on its face this reasoning does not appear to be based on examining the actual terms of whatever copyright licence the rights holder actually entered into in fact. It appears to proceed on the basis that once a copyright owner has given permission for a work to be put on a website which is not subject to technical access restrictions, they must be taken to have targeted, and therefore taken into account, the entire world as the relevant "public".

60. The court then dealt with two further points. At paragraphs 29 and 30 the Court addresses the issue of framing raised in referred question (3). The court found that this makes no difference since there is no new public. That makes sense given the starting point of this reasoning in paragraph 26. The other point (paragraphs 30-31) is about technical access restrictions. If the hyperlink allows users to get around access restrictions on the first site, then that would mean there was a new public and the copyright holder's authorisation would be needed. Again this makes sense.

61. The relevant *dispositif* summarises the conclusion as being that "clickable links to works freely available on another website" does not constitute an act of communication to the public.

62. On 8th September 2016 the CJEU handed down ***GS Media***. The difference between this case and ***Svensson*** was that in ***Svensson*** the work had been posted on the first site with the copyright owner's consent, whereas in ***GS Media*** the first posting was without the copyright owner's consent. ***GS Media*** was about photographs of a television personality. They were going to be published in a magazine and the photographer had given an exclusive licence to the publisher. Before the magazine had published them it turned out the photographs were already present on an Australian data storage website. A major Dutch news website was tipped off and posted a hyperlink to the files on the Australian site. The publisher complained and the Australian site took down the files but by then the files had been copied onto other websites too. The Dutch news site then posted hyperlinks to these other sources. Only after all this were the photographs published by the publisher.

63. The Dutch court referred three questions to the CJEU. The Opinion of Advocate General Wathelet was against the rights holder. The Opinion was that the provision of the hyperlink on a second site to a work posted on a first site, on which it was freely available on the internet, should not be regarded as an act of communication to the public even though the publication of the work on the first site was not authorised by the copyright owner. In effect, the AG's opinion doubted that the ***Svensson*** approach to the act of communication itself was correct. Hyperlinking to works which are freely available ought not to be prohibited. The AG also suggested that since the initial posting had been without the copyright owner's consent, the concept of new public ought not to apply, and that the claimant's remedy ought to be against the operators of the site on which the files were actually posted, as intermediaries.

64. However the Court did not follow the AG's opinion.

65. The Court summarised the various questions referred as asking in what circumstances posting a hyperlink to protected works which are freely available on another website without the consent of the copyright holder amounts to an infringing communication to the public. The answer given in the *dispositif* was that Article 3(1) of the Directive must be interpreted as meaning that:

> "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' within the meaning of that provision,
>
> 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"
>
> [*organisation of the paragraphs added*]

66. In answering the questions in this way the Court introduced a new concept to the analysis. This is the idea that the state of knowledge of the person posting the hyperlink is relevant to the question of whether that person has committed an act of communication to the public. When analysing facts of this kind the tools available to a national court are likely to include concepts of accessory tort liability (such as joint tortfeasance in English law or *Störerhaftung* in German law). These usually do involve questions about the state of mind of the accessory. But that tool is not in the toolbox available to the CJEU since accessory liability is not harmonised at the European level. However odd it may seem to introduce such a concept to an act of primary liability, which hitherto might be thought to have been a tort of strict liability, the court has done so and the judgment speaks for itself.

67. The Court draws a distinction between those posting hyperlinks for a profit and those doing so for no financial gain. The idea that this was relevant is not new, but in ***GS Media*** the distinction between those that do or do not act for financial gain is employed to apply a presumption of knowledge in different ways (see below).

68. The judgment starts dealing with the two cumulative criteria of communication and public at paragraph 32. In paragraph 33 the court notes that communication to the public requires an individual assessment of several criteria which may be present to different degrees in different situations. At this stage the court is focussing on "communication" rather than on "public". At paragraph 35 the court referred specifically to one of the criteria, this is the "indispensable role played by the user and the deliberate nature of its intervention". The user in this context means the person posting the hyperlink. This seems to be the origin of the idea of bringing in consideration of knowledge.

69. After dealing with "public" itself in paragraph 36, at paragraph 37 the court mentions the alternatives of different technical means or a new public. Next at paragraph 38 the court refers back to earlier decisions which held that the profit making nature of what was done was relevant to whether there was a communication.

70. In paragraphs 39 – 41 the court held that the reasoning in ***Svensson*** was concerned with linking to works freely available on the internet with the consent of the rights holder. The court noted that in ***Svensson*** there was held to be no new public.

71. The Court in ***GS Media*** also took into account that the reasoning in ***Svensson*** had been followed in the reasoned order in ***Bestwater International GmbH v Mebes*** (Case C-348/3). There is no need for me to keep referring to ***Bestwater*** as well as ***Svensson*** in this context.

72. In paragraph 42 the court repeated what I have described as the core to the reasoning in ***Svensson***, stating:

> "Indeed, as soon as and as long as [*a*] 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."

73. From this the Court reasoned in paragraph 43:

> "43. Accordingly, it cannot be inferred either from [***Svensson*** or ***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 of those works, would be excluded, as a matter of principle, from the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. 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."

74. Counsel for the claimants submitted that this paragraph was an important step in the reasoning. I agree but its significance is best dealt with at the end.

75. Next, the court recognised the balance between effective protection of intellectual property and freedom of expression (paragraphs 44-45) and then the difficulty individuals who wish to post links may have in ascertaining whether the copyright holders have consented to the posting the individual wishes to link to (paragraph 46).

76. Therefore (paragraph 47) when carrying out the individualised assessment in a case of a person posting a hyperlink to a work freely available on the internet, which is not posted for a profit, the Court decided that it was necessary to take into account "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".

77. The Court then explained:

> "48. Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 18 to 23) 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."

78. In this paragraph the Court has started using the term "illegally posted". This is different language from referring to a posting being without the consent of the copyright owner. TuneIn contend that is significant. However I cannot read the paragraphs in ***GS Media*** as other than intended to regard the two as synonymous, which they were in ***GS Media***.

79. However in other cases they are not the same. The difference matters in a case like the present because sound recordings are treated differently in the laws of different states. In many states around the world the holder of the copyright in a phonogram/sound recording has no right to refuse to permit the public playing of the sound recording e.g. on the internet on an internet radio station. The rights holder may have a right to receive remuneration or there may be a statutory licence with a right to a royalty, but in either case the effect is that there will be sound recordings freely available on the internet which are not illegally posted in the sense intended by the CJEU, but are also not present with the actual consent of the copyright owner. There is no reason why the CJEU should have had this difference in mind on the facts of ***GS Media*** and no indication that they did.

80. Next, in paragraphs 49 and 50 the Court takes other examples. Paragraph 49 deals with the situation when the person is notified by the copyright owner that they have posted a link to a work illegally placed on the internet. In such a case providing the link (after notice was given) would be an act of communication to the public. And paragraph 50 deals with circumventing access restrictions, regarding them as constituting a deliberate intervention and therefore an infringement.

81. At paragraph 51 the Court deals with persons posting hyperlinks for profit:

> "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."

82. This means it is assumed that the profit making poster of links will make the necessary checks and so, if the work was "illegally placed on the internet", then the profit making poster of links is presumed to know that. Paragraph 53 explains that this approach provides the high level of protection for authors sought by the Directive.

83. In other words the act of infringement is to post the link with knowledge (actual or presumed) that the work to which the link connects was placed on the internet illegally. If it was not placed on the internet illegally then there is no infringement (***Svensson***). If it was posted illegally then there is still no infringement in linking to it unless the person posting the link has the requisite knowledge. Non-profit linkers will be presumed not to know until they are told. Profit making linkers will be presumed to know. If they can rebut the presumption then their initial posting will not have been an infringement.

84. The decision in ***GS Media*** has attracted some controversy among commentators but before I attempt to draw all the strands together, I will complete a run through of the relevant cases.

85. On 16th November 2016 the CJEU gave judgment in ***Soulier and Doke v Premier Ministre and Ministre de la Culture et de la Communication***, Case C-301/15. This case was about out of print books. France had passed a law creating a right to publish out of print books in digital form subject to a right of remuneration to the author or publisher. The CJEU held this law was contrary to Art 2(a) and 3(1) of the Info Soc Directive. One of the issues the Court in ***Soulier*** had to grapple with was the effect of any prior consent given by the author. At paragraph 34 the Court reaffirmed the idea that any restricted act carried out by a third party without the copyright owner's prior consent is an infringement. At paragraph 35 the court noted that consent need not be explicit but could be implicit. Then at paragraph 36 the court explained the reasoning in ***Svensson*** as follows:

> "36. Thus, 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, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 25 to 28 and 31)."

86. The Court then turned to examine implicit consent, holding in paragraph 37 that circumstances in which implicit consent could be found should be "strictly defined" so as not to negate the concept of the need for prior consent.

87. The claimants emphasise that in paragraph 36 the CJEU has characterised ***Svensson*** as a case in which the author had given "prior, explicit and unreserved authorisation" to the publication of the work on the first website.

88. Another aspect of the reasoning in ***Soulier*** as to why the law was contrary to the Directive was that the author of a work must be able to prohibit future use of their work and "put an end to" the exploitation of the work by a third party (paragraph 51).

89. Finally, on 7th August 2018 the CJEU gave judgment in ***Land Nordrhein-Westfalen v Renckhoff*** Case C-161/17. This was about a school website which carried a photograph which a student had downloaded from another website. The photograph had been taken by a professional photographer, who claimed that the posting by the school infringed the photographer's copyright. The issue in ***Renckhoff*** was about whether the posting by the school, which given the development of the law up to now was obviously an act of communication to the public, was to a new public. The Court held that the posting by the school did amount to infringement. That was so even though the original posting of the photograph – by the photographer – was without restrictive measures. In its reasoning (paragraphs 28-31) the Court emphasised the point made in ***Soulier*** (paragraph 51) that copyright owners, if they wish to stop communicating their work, ought to be entitled to take down a posting and prohibit future use. Thus the new posting had to be held to amount to an act of communication to a new public, otherwise the copyright owner's right to stop communicating would be ineffective.

90. A separate aspect of the reasoning in ***Renckhoff*** was about exhaustion. This is in paragraph 32-36. Art 3(2) of the Info Soc Directive provides the right of communication is not exhausted by an act of communication to the public. The Court held that a finding that a re-posting of a work previously posted with consent was not a prohibited act of communication would be contrary to Art 3(2). In terms of publics, the Court concluded that:

> "35. Taking account of those elements, it must be held, in the light of the case-law set out in paragraph 24 of the present judgment [*i.e. Svensson, GS Media and Ziggo*], 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.
>
> 36. It is irrelevant to the objective considerations set out in paragraphs 29 to 35 of the present judgment that, as in the case in the main proceedings, the copyright holder did not limit the ways in which internet users could use the photograph. The Court has already held that the enjoyment and the exercise of

> the right provided for in Article 3(1) of Directive 2001/29 may not be subject to any formality (see, to that effect, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 50)."

91. So here (see esp. the end of paragraph 35) the public taken into account is not all internet users but only the users of the first website. On the face of it this conflicts with the core of the reasoning in ***Svensson***. The Court in ***Renckhoff*** clearly recognised this (paragraph 37) and went on to hold that the case law on hyperlinking did not apply. Hyperlinks were to be treated differently (and so ***Svensson***, ***Bestwater*** and ***GS Media*** distinguished) on the basis that hyperlinking contributes to the sound operation of the internet (paragraph 40). I will come back to this at the end.

92. Finally the Court emphasised the need to balance rights to intellectual property and the rights of freedom of expression and information, all protected in the Charter of Fundamental Rights of the European Union (paras 41 – 43). Just on this latter point, recently in a trio of cases (***Funke Medien v Bundesrepublik Deutschland*** Case C-469/17; ***Pelham v Ralf Hütter*** Case C-476/17; and ***Spiegel Online v Volker Beck*** Case C-516/17) the CJEU has held that the balance between intellectual property rights and the other Charter rights is struck by the legislation (in this case the Directive) such that new exceptions to copyright not set out in the Directive cannot be created, but that the scope of these rights and exceptions has to be interpreted and balanced taking the fundamental Charter rights into account.

93. The other CJEU decisions after ***Svensson*** and ***BestWater*** are ***C More Entertainment AB v Sandberg*** Case C-279/13, ***Stichting Brein v Wullems (t/a Filmspeler)*** Case C-527/15 and ***Stichting Brein v Ziggo BV*** Case C=610/15. The ***Ziggo*** case is also known as "***The Pirate Bay***". These cases do not add anything relevant to the questions I have to decide.

94. In terms of national law, ***Svensson*** was addressed by Henderson J in ***Paramount Home Entertainment v British Sky Broadcasting*** [2014] EWHC 937 (Ch), noting that the case established more clearly than previous authority (the website blocking cases) that a hyperlink was an act of communication. In those web-blocking cases the sites provided hyperlinks to file sharing sites, some using peer to peer technology like BitTorrent, which themselves facilitated copyright infringement. Access to them was blocked.

95. I was referred to a number of decisions in other national courts but the only one focussed upon was a judgment of the German Bundesgerichtshof on 21st September 2017 in case I ZR 11/16, known as ***Thumbnails***. The case was concerned with an image search service which produced small format "thumbnail" images derived from photographs available on the internet. The operators of the search obtained the thumbnail images using the Google search engine which in turn had obtained them using automated web crawler software. The owners of copyright in the original photographs complained of copyright infringement. The crawler software could only obtain images which were posted on freely accessible sites. The full images were behind a paywall, but preview images were available to visitors to the original website via a search function. The case proceeded on the basis that the thumbnail images picked up by the crawler software had been posted on freely accessible sites without the consent of the copyright owner. The lower courts had held there was no

infringement. The BGH rejected the appeal. The language of the translation is not always easy to follow. What is clear is that the court placed weight on the special importance of automatic search engines for conveying information on the internet using hyperlinks, being well aware that such activity was done to generate a profit. When grappling with the presumption of knowledge in ***GS Media***, the court held that the operator of such a search engine cannot be expected to assure itself whether images found by search programs have been placed in a lawful manner on the internet before it reproduces them as thumbnails.

96. That completes the analysis of the cases.

97. Standing back, I want to make five points. First, I confess that when I first glanced at ***GS Media*** after reading ***Svensson***, I thought that the way the Court in ***GS Media*** had reasoned that the link in ***GS Media*** could amount to an act of communication to the public while the link in ***Svensson*** was not, had been because there was found to be a new public in ***GS Media*** whereas there wasn't one in ***Svensson***. However that is wrong. It is not how the court reasoned in ***GS Media*** at all. There is no mention of new public after paragraph 42 until paragraph 52, which comes as part of a reflection on the conclusion the court has already reached in paragraphs 47 to 51.

98. This is why paragraph 43 of ***GS Media*** is important. I believe what the court is saying there, aside from finding that ***Svensson*** does not preclude a finding in the rights holder's favour, is that because the initial posting of the work in ***GS Media*** was without consent, that initial posting is not a relevant act of communication to the public at all. Therefore a link to it is, inherently, capable of being a free standing act of communication to the public. There is no need to get into the approach derived from ***SGAE***, ***Organismos***, and ***ITV Broadcasting*** and investigate questions about new technical means or a new public. One does not need to find a new public because, if the initial act of posting was not an authorised act of communication to any public at all, then there was no initial public taken into account by the rights holder when they authorised the initial communication: contrast ***Svensson*** paragraph 27. After paragraph 43 the Court then draws back from that wide conclusion because of concerns about freedom of expression and information (***GS Media*** paragraph 44) and decides that only a linker with the requisite notice of the lack of consent (governed by presumptions) will commit an infringing act in such a case.

99. The second point is how to reconcile the approaches taken in ***Renckhoff*** and ***Svensson*** to assessing what public is taken into account by the copyright holder when they do consent to the communication of a work on a website. On the face of it the two approaches are flatly contradictory (***Svensson*** paragraphs 26/27 and ***Renckhoff*** paragraph 35). 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).

100. The argument from Counsel for the claimants was that the relevant difference was explained in ***Soulier*** on the basis that the particular factual circumstances in ***Svensson*** were that the copyright owner had given prior, explicit and unreserved authorisation on the first site. That observation is in ***Soulier*** but I do not believe that is how the CJEU looked at it in ***Renckhoff***, nor is it a convincing distinction in any event. In my

judgment the analysis is a different one. Putting ***Renckhoff*** and ***Svensson*** side by side shows that the CJEU is taking a holistic approach to communication to the public. The nature of the act of communication complained of has a bearing on the answer to the question of what public should be regarded as having been taken into account when the first communication was authorised. One can only answer the question about what public was taken into account when one knows the nature of the latter act of communication. In other words when considering whether an act of communication to the public has taken place, while individual elements need to be considered ("communication", "public", "new public" and so on) it is also necessary to look at the circumstances as a whole and it is a wrong approach to keep the nature of the putative act of communication in a silo, separate from the question of the public. That is, I think, what the CJEU has actually said in different words in paragraph 35 of ***Renckhoff***.

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***).

103. The distinction between the two is similar to the point made by the claimants, in that the nature and effect of the consent given in the two cases was different. However in my judgment the distinction between the two arises because the question which needs to be asked, about what the effect was of the copyright owner's consent, is different.

104. A factor in ***Renckhoff*** and ***Soulier*** which distinguished ***Svensson*** was the fact that re-posting deprives the copyright owner of the ability to bring their own act of communication to an end whereas linking does not. It is an important difference between linking and posting but it cannot be turned into a universal principle leading to the conclusion that any kind of cross-linking of any sort can never amount to communication to the public (or a new public) simply because the work to which the link cross-links could be taken away. For one thing, as this present case illustrates, a copyright owner may not have the right to take down an instance of their work albeit they do have a legally enforceable right to receive remuneration relating to its use.

105. Third, these first two points illuminate another principle arising from the cases as a whole, which the parties did not agree about. The question is how much of the analysis which a national court is required to perform is an individualised assessment? The submission of TuneIn was that the individualised nature of the assessment is focussed on the act of communication as distinct from the public. I do not agree. It is

not what the cases say. As explained already, there are various criteria and factors to take into account but they can and in important cases do interact.

106. Related to this is a further point. I do not read the cases as holding that for all acts of alleged communication to the public on the internet, there are two and only two simple categories – posting and linking – and that the national court's task is just to allocate any given case to one of those categories and then, once that has been done the relevant line of cases necessarily applies. That is not an individualised assessment.

107. Fourth, 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 closest is the reference in ***Soulier*** to ***Svensson*** being a case of explicit consent but even that does not go as far as examining any actual terms. I believe the court is looking at the matter in a different way and asking, given the existence of consent in fact: what is its practical effect? For example in ***Svensson*** I cannot imagine the court would have been impressed by an argument that the agreement consenting to the initial posting contained a clause buried in it whereby the copyright owner, while consenting to the posting, purported not to consent to hyperlinking to that posting. The practical effect of the posting, which was with consent and was without technical restrictions, was that the rights holder must have taken into account that others on the internet might link to it. The basis for this is consideration of Charter rights and the impact on the internet if it was not so.

108. Fifth and finally, there was some argument before me about classifying the presumption in ***GS Media***. TuneIn submitted that the claimants' case turned it into an irrebuttable presumption. I have not found it necessary to dwell on this. The right approach seems to me to be to treat the presumption as determining which party bears the evidential burden of proving a matter of fact, and that matter of fact is the linker's state of mind. The civil standard of proof, the balance of probabilities, applies. The fact a party in a given case cannot rebut it does not mean it is irrebuttable in principle.

109. Having dealt with these points I think the following further principles can now be summarised, in addition to the principles summarised by Arnold J in ***Paramount*** (above):

i) 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.

ii) Providing a link to a work is capable of being an act of communication to the public, even if no one actually selects the link or goes to look at or listen to the work, because a link to a work makes a work available. In other words merely providing a link to a work available at another location on the internet can itself be an act of communication (***Svensson***, ***GS Media***).

iii) 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***).

vii) Turning to cases in which the work was posted initially without the consent of any relevant rights holder, if that is what happened then it was not a relevant act of communication to the public at all. That means that any subsequent act of communication of that work risks being an act of communication to the public. Therefore re-posting the work on another site would be an infringement. However if all that a defendant has done is put up a link to the first posting of the kind in ***GS Media***, then that act of communication is only an infringement if the person posting such a link knew or ought to have known that the original posting was without any consent. This follows from striking a balance between the rights of the copyright owner and the freedoms of expression and information.

viii) In a case in which the initial communication was without consent and the knowledge of the person posting the link is material, persons acting for financial gain will be presumed to have the requisite knowledge but can call evidence to rebut that presumption, while for persons acting not for financial

gain the presumption is reversed and they will be presumed not to have the requisite knowledge unless the contrary is proved (***GS Media***). Either way, once the person posting the link is actually aware that the work was posted without the consent of the rights holder, they will commit an act of communication if they do not take down the link.

110. In stating the principles this way I have ignored "illegally posted" because I believe the CJEU in ***GS Media*** did not intend to use that language in a sense different from an absence of consent of the rights holder.

111. The cases so far have not focussed on a situation in which the link is to a stream in which the work in question will play in due course but not at the time of the internet user's choosing. On this point TuneIn submitted that to be an infringement the provision of a link had to make the work available on demand – i.e. at the time and place of the internet user's choosing. The argument proceeds from the references to a work being "made available". I do not agree. The CJEU was not using "making available" in the sense of focussing on the difference between a link which makes a work instantly available and one which makes available a stream in which the work will appear in due course albeit the user cannot control exactly when that will be (or which work it will be). Rather the point being made in the cases was a simpler one, that since "making available" is part of the communication right by definition, providing a link – which is not itself the work but is something which makes the work available (by selecting the link), is itself an act of communication.

The sample stations

112. Although the claimants rely on their full catalogue of repertoire in these proceedings, in the light of the large amount of content and large number of stations accessible via TuneIn Radio, the parties agreed that the trial would be conducted by reference to a sample of stations and a sample of recordings. In the end nothing turns on the sample recordings.

113. Four categories of Sample Station were agreed upon. These categories were intended to reflect points of distinction which it appeared from the pleadings might be relevant to the disputed issues. The claimants, and TuneIn, were directed to nominate 5 stations on each side in each category. The categories are:

i) music radio stations which are licensed in the UK (Category 1);

ii) music radio stations which are not licensed in the UK or elsewhere (Category 2);

iii) music radio stations which are licensed for a territory other than the UK (Category 3); and

iv) Premium music radio stations (Category 4).

114. 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 the others 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 and it is true 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. However TuneIn's evidence is that the stream to which it links is one freely provided by the BBC and which can be accessed without signing in. I accept that. I think it is right to say that another UK stream also tries to encourage users to sign in but if the user is persistent then they can get access without it.

115. The Category 2 stations divide into two classes. One class contains two stations – Capital FM Bangladesh and Urban 96.5 Nigeria. These are in states with exclusive rights regimes akin to the UK system and for which the claimants submit no licence has been given by the relevant rights holder. There was a point in the cross-examination of Mr Rechardt about the position of the licensing body COSON in Nigeria. But in any case I am satisfied that neither Capital FM nor Urban 96.5 station has a relevant licence.

116. The other class in category 2 are stations in countries which do not have exclusive rights regimes akin to the UK system, 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; and Montenegro with City Radio. The claimants say that 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 is because the specifics of the relevant remuneration scheme is not yet up and running in the relevant state and also because no remuneration is being paid. There is no detailed evidence about the laws of those states or how the schemes are supposed to work. The claimants contend that on the evidence I can infer that these stations are unlicensed, and it was for TuneIn to call evidence to prove they were licensed if that is what TuneIn wanted to do. TuneIn contends that it is not open to the claimants to take this point in this way because of the way the case was pleaded and the way the evidence was led. The claimants do not agree.

117. If I had to decide this matter on a pleading point, I would find in favour of TuneIn, having regard to the terminology used in the evidence (equating the term "licensed" with operating lawfully under a local legal regime). However bearing in mind this is a test case based on sample stations, deciding facts on a pleading point is not sensible. I will express my conclusion for the second class on either alternative as to the facts. It is simply this. Either the stations are acting within the relevant regime or they are not. If they are not then they are the same as the first class within category 2. If they are then they are the same as category 3. If the outcome for categories 2 and 3 differ then no relief could be granted at this stage relating to those particular stations but that is a small price to pay. If it matters, the true facts for those stations can be resolved along with any other issues relating to any of the other tens of thousands of stations not chosen as samples.

118. Category 3 stations are all licensed in their local territories. 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 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 pays those royalties. In all of these cases the relevant body has not granted reciprocal rights for the UK. Whether it had the power to do so in any given case does not matter since it has not happened.

119. The category 4 stations are Premium stations created for TuneIn and made available exclusively for TuneIn's subscribers. They are not licenced for the UK at all. Each is based in the USA. None of them pays the statutory US licence fee. This service was withdrawn for UK users in or around December 2017, not long after these proceedings began.

Communication to the public - assessment

The TuneIn service

120. I start by considering the nature of the alleged act of communication undertaken by TuneIn. TuneIn submits that TuneIn Radio provides nothing more than a directory or search engine which links users to websites containing relevant content, akin to Google or similar internet search engines. Its position is that TuneIn Radio is simply a more specialised search engine: instead of indexing and linking to websites generally, it indexes and links to radio station streams.

121. In argument neither party put it this way but it seems to me that when making a comparison with internet search engines it is necessary to identify the appropriate comparator. The relevance of the comparison is to illuminate where the balance lies between the functioning of the internet and the freedoms associated with that on the one hand, and the high protection to be afforded to intellectual property rights on the other. The issue is whether TuneIn does something different from the kind of search engine service which is a necessary part of the normal functioning of the internet. I call that a conventional search engine. A conventional search engine provides a service which the functioning of the internet depends on. It has a database with a search facility. It will no doubt have a prominent box for search on its home page. It will (internally) have structured indices of what is on the database. It may use fuzzy logic and automatic completion of text strings. When a search term is entered, the engine simply provides links to other websites in response to search terms. If a user selects the link then, at least from their point of view, the user is taken to that other website and the involvement of the search engine ceases. The search function is optimised in all sorts of ways to try and offer users what the search engine provider thinks the user really wants, nevertheless the search results provided are essentially neutral. Sponsored links (i.e. advertisements) may also be provided, reflecting a direct relationship between the search engine and particular websites or advertisers, but that sort of material is provided alongside the search results, not instead of them.

122. The comparison is with this sort of conventional search engine. The question is not necessarily answered by looking at particular services which may be offered by major internet search providers (such as Google or anyone else).

123. Significant features of TuneIn Radio are the following:

i) Aggregation: TuneIn 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 is to use a standard internet search engine to locate a webcast / simulcast station by using tailored search terms, and then click-through to their websites to listen to the specific stream. One aspect of the difference there is that in the latter case the advertising targeted to the user once they access the stream will be entirely distinct in the two cases.

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 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.

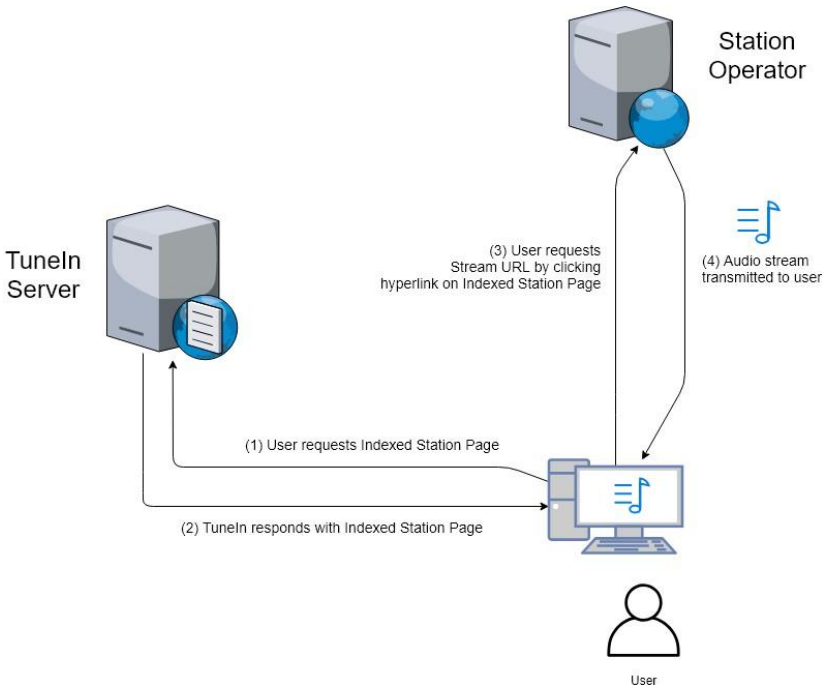
vi) Station information: TuneIn collates information about music stations, which is presented on individual station pages. This includes the genre of the station and, where available, the artist and track currently playing, the station's show timetable and related podcasts or featured shows.

vii) Artist information: TuneIn 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.

124. Before going any further, I will address a comparison between TuneIn's service and hyperlinking more generally. One of the submissions of Counsel for TuneIn is that a conclusion in favour of the claimants interferes with the freedom of those publishing materials on other websites, such as bloggers, to use hyperlinks at all. This is a

different point from the issue about search engines but the same logic applies. The comparison ought to be with a conventional sort of linking, which is the sort of linking seen in ***Svensson*** or ***GS Media***. These links tend to appear as cross-references embedded in other information published on a website. In any event what these websites do not do however is operate as aggregators of links on the scale of TuneIn. In my judgment aggregation provides a sufficient distinction between what TuneIn does as compared to the more conventional sort of linking all over the internet. Based on this difference I do not need to be concerned any further about conventional linking. On the other hand aggregation is exactly what search engines do and I will consider that next.

125. At a technical level, like any search engine, TuneIn's service operates by providing and indexing hyperlinks to users. Mr Godsay produced diagrams to show how TuneIn's process of linking a user to a station stream worked. One of them (fig 5) is this:



126. However while its technical accuracy is not in doubt, in my judgment this characterisation over-simplifies the service actually provided to users via TuneIn Radio.

127. 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". A fair description of TuneIn Radio is that it provides users with a user-friendly, browseable and searchable platform of radio stations and other audio content, which enables users to easily select and listen to music radio stations. While I accept many of the features of TuneIn Radio are provided by conventional search engines, and I accept that at its heart what TuneIn Radio provides is a link to a stream such that the stream, when played, comes from the internet radio station website rather than from TuneIn, nevertheless in my judgment it is not accurate to characterise TuneIn as providing a conventional search engine service. It is much more than that.

128. The most important features which, cumulatively, support this distinction are as follows:

i) The fact that TuneIn aggregates links to audio streams as opposed to links to some other form(s) of content is relevant. The audio streams carry music and as a result they engage various intellectual property rights, as TuneIn is well aware.

ii) The data collected and curated by TuneIn allows for searches of stations to be carried out by artist. Such a search returns internet radio stations which are playing music by the artist at that moment. As I understand it this is only possible as a result of TuneIn's own monitoring stream metadata and the AIR APIs. There was evidence about what a search for internet radio stations would produce on the commonly used Google search engine but, as far as I am aware, there is no evidence that a similar search on that search engine would produce results of the same kind as TuneIn.

iii) The fact that when a station is selected, although a hyperlink to the stream is provided at a technical level, from the user's point of view content is provided to them at the TuneIn site. In effect this is a kind of framing. The fact that framing was not relevant to answer the questions posed in ***Svensson*** (para 29) does not mean it is irrelevant to considering the nature of TuneIn's activity.

iv) The persistent nature of the content to which the user wishes to link. This is connected to (iii) but is a different point. One of the consequences of providing streams is that they persist over time as the user listens to them. In a conventional search engine, once a user has clicked on a link, they go to the new website and the involvement of the search engine is over. That is not how TuneIn's service works and if it was then TuneIn would not be able to provide its own visual advertisements while the user was listening.

129. It is not surprising that there is evidence that TuneIn regards its competitors as other providers of audio content like Spotify and Amazon. Counsel for the claimants made much of a TuneIn document which appeared to say that, and Counsel for TuneIn sought to show that the position was more complex and related to rival advertisers. That is true but it does not alter the fact that in truth Spotify and Amazon are competitors of TuneIn because all three are, from the point of view of the user, providers of audio content.

130. For all these reasons I find that TuneIn intervenes directly in the provision of the links to the streams in a manner which neither conventional search engines nor hyperlinks on conventional websites do. TuneIn's service is not the same as either a conventional search engine or the conventional hyperlinks considered in ***Svensson*** and ***GS Media***.

131. Before getting to individual categories, I find therefore that the activity of TuneIn does amount to an act of communication of the relevant works; and also that that act of communication is to a "public", in the sense of being to an indeterminate and fairly large number of persons (see Arnold J's summary at paragraph (11)).

Category 3

132. I will start with Category 3. Focussing on the manner in which the relevant works are first made available on the internet, Category 3 represents a circumstance which neither ***Svensson*** nor ***GS Media*** considered. ***Svensson*** was based on the idea that the rights holder had to be taken to have given wide consent and ***GS Media*** was based on the idea that no consent at all had been given.

133. Piracy is an emotive term but whatever its ambit, it would be absurd to analyse Category 3 on the footing that the presence on the internet of those works amounted to piracy or was an act of the same kind as the making available of illegal downloads seen in the UK web blocking cases or in the Pirate Bay cases (such as ***Ziggo***). Furthermore, it would also be wrong to treat the presence on the internet of the works in Category 3 as simply unlicensed or as lacking appropriate consent or as in any way unlawful. There will either have been explicit consent to make the works available in the local state (if it had laws similar to those in the UK) or else, as in many states, the local rights holder could never have prevented the work from being made available and is collecting the appropriate royalties and thereby obtaining all they are entitled to. In practice all the Category 3 stations are in the latter class.

134. The question to be answered is whether the works in Category 3 had already been the subject of an act of communication to the public, prior to the intervention of TuneIn. My answer to that question is yes. In effect this treats Category 3 as if the relevant consent exists. It is not too much of a stretch to do that. I recognise what was said in ***Soulier*** about implicit as opposed to explicit consent and the high level of protection to be afforded to intellectual property rights. I also recognise that the rights holder in one state may be different from the rights holder in another state. Nevertheless having regard to the balance of relevant rights and interests and the functioning of the internet, it is appropriate to regard this situation as a form of deemed consent (recognising that in some cases it may be actual consent).

135. Thus whether TuneIn infringes depends on whether its activities amount to a second act of communication to the public which in turn, and having made the other decisions up to now, depends on there being a new public.

136. The question therefore is: were the public to whom TuneIn's act of communication complained of is addressed, taken into account in the deemed consent to the first act of communication?

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 and so would be unlawful unless licensed by the UK rights holder. Since it is not, TuneIn's actions amount to infringement under s20 of the 1988 Act.

142. This conclusion does not "break the internet" because it depends on the combined effect of territory and the particular act of communication carried out by TuneIn. TuneIn's case on this is an attempt to keep the nature of its act of communication in a silo separate from the question of the public, but I do not believe that is the right approach.

Category 2

143. I deal with Category 2 in two ways.

144. First, having started from Category 3, it seems to me that a simple approach is legitimate. A Category 2 internet radio station cannot be in a better position than Category 3 by virtue of being unlawful in the sense of either actually being unlicensed, or not at least in accordance with the local rights regime. The best position they could be in would be for them to be in Category 3, in which case the analysis above would apply to them. There is no difference.

145. Second and in the alternative, if the previous approach is wrong then in any event Category 2 stations could be analysed along the lines of ***GS Media***. The analysis is this. The placing on the internet of the works in the streams in Category 2 is either actually unlicensed, or at least is not in full compliance with the local rights regime. Therefore that initial act is not a relevant act of communication to the public at all. Accordingly, irrespective of the details relating to TuneIn's intervention, on any view TuneIn is linking to those streams within the terms of ***GS Media***.

146. Therefore TuneIn will commit an act of infringement if it posts the links with knowledge, actual or presumed, that the works were placed on the internet without permission. That engages the ***GS Media*** presumptions.

147. The presumptions in ***GS Media*** are concerned with whether it is reasonable to expect that the linker would have carried out the necessary checks to verify whether the work was uploaded with consent.

148. In my judgment it would be reasonable to expect TuneIn to carry out the necessary checks, for a number of reasons. I turn first to profit. TuneIn plainly operates for gain and falls into the "for profit" class identified in ***GS Media***. The legal test is not concerned with the treatment of figures in financial accounts. TuneIn is a commercial operation and the linking in issue in this case is the core of that business. Second, for the reasons already explored, TuneIn is not a conventional search engine. Third, although this may simply be a dimension of the second point, music playing on internet radio stations has a particular importance to TuneIn. It is not unreasonable to expect TuneIn to pay particular attention to issues related to rights clearance associated with that. Fourth, I find that the number of internet radio stations indexed by TuneIn is not so large as to make the necessary checks unduly troublesome. Allied to that, I am not persuaded by the evidence of Mr Straley that the checks required would be difficult. They are really just the sort of checks an internet radio station which chose to target the UK would have to undertake, and after all TuneIn has chosen to target the UK. If the necessary information does not come from the internet radio station to which TuneIn links then TuneIn should either undertake the work for itself or not target that station to UK customers. I conclude that in terms of ***GS Media***, a presumption of knowledge arises.

149. TuneIn's general case that it can rebut the presumption is based on the submission that it requires all internet radio stations to give a warranty to TuneIn that they have the necessary licences and that no further licences or payments are necessary for the internet radio station to be added to TuneIn's directory. I do not accept this for a number of reasons.

150. First, there was a dispute about how internet radio stations came to be added to TuneIn's directory. In the early days of TuneIn'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. However TuneIn's position is that since 14 February 2014 all new stations were required to fill in a "New Station Form" and more generally since 2013/14 all other stations have been required to accept "Broadcaster Terms". The only exceptions are certain stations with bespoke agreements with TuneIn but those are in substantially equivalent form. This was the evidence of Ms Robinson and also to some extent Mr Straley. The significance of this from TuneIn's point of view is the presence of warranties in the terms.

151. The claimants submitted that this evidence did not reflect what had really happened for a number of reasons. First, save for the bespoke agreements, the manner in which the internet radio stations were to indicate their acceptance of the relevant terms was by ticking a box on a website form. However there was a dispute about when that was introduced. The claimants contended it was in September 2016 and did not apply beforehand. Ms Robinson said in cross-examination that it applied to the Station Update Form since 2011. The claimants contended that this must be doubted and was inconsistent with the pleadings. I am not satisfied it was introduced earlier than 2016. The claimants submitted this means tens of thousands of stations never ticked the box. I accept that.

152. Second, in cross-examination it was put to Ms Robinson that TuneIn indexes and makes stations available regardless of whether they have accepted the terms. Although she emphasised that in her view the majority of stations had accepted the terms and she maintained TuneIn relied on them, she accepted that the point put was true. I find that there are in fact stations indexed and available on TuneIn's service for which TuneIn knows there has been no acceptance of any relevant terms.

153. Therefore I find that a substantial number of stations indexed by TuneIn have no warranty associated with them and that TuneIn is aware of this. That will include some sample stations. For example Shout FM was marked by Mr Straley as a Category 3 station which had submitted a station update form but for which the relevant date is 8 March 2013. Radio Dudelange in Category 2 is in the same position (update form provided but relevant date before 2016).

154. Turning to the stations for which, on TuneIn's case, it has the benefit of a warranty, the claimants contended there were other problems. An important one was that for a number of stations, the terms were not in fact a warranty that appropriate licences had been obtained at all, 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 includes Heart, Classic FM, 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 contains an express clause excluding any warranties.

155. For the stations for which it can be said a warranty has been given, even assuming everything else in TuneIn's favour, the most that can be said is that the warranty amounts to a representation that the internet radio station is operating lawfully in its home state. It is not a representation at all about the position in the UK.

156. The evidence about the warranties as a whole sheds light on TuneIn's attitude to them. I find that from TuneIn's point of view, they are not important. There is no systematic attempt to ensure the internet radio stations indexed by TuneIn are covered by such a warranty. Even if a warranty by the internet radio station that they operate lawfully in their home state was capable of being relevant to the legal analysis, I am not satisfied that on the facts of this case that TuneIn takes them sufficiently seriously for them to be relevant to the analysis of the state of TuneIn's knowledge under ***GS Media***. This applies to TuneIn's activities as a whole. It is not concerned with any particular category of station.

157. Finally I will mention the effect of the warranties. Given my conclusion on Category 3, a warranty that an internet radio station operates lawfully in its home state cannot help. However I recognise that if I am wrong about Category 3 then such a warranty could be relevant if the giving of it was a true precondition to being indexed. Whether a tickbox on a webpage by reference to legal terms which had not even been read amounts to good notice to TuneIn that the internet radio station was making a considered representation, is not a matter I have to decide.

158. Therefore I conclude that TuneIn is not able to rebut the ***GS Media*** presumption and therefore, for those stations in Category 2 which are made available without any consent, TuneIn should be taken to know that.

159. Of course irrespective of the questions considered in this section of the judgment, no infringement will take place unless the internet radio station actually plays relevant sound recordings. There is no evidence that the Kazakhstan station Gakku FM has ever played any relevant sound recordings.

160. Therefore, assuming the stations actually broadcast relevant content, then TuneIn infringes s20 of the 1988 Act in relation to Category 2 stations by the application of the ***GS Media*** test.

Category 4

161. The internet radio station streams in Category 4 were created exclusively for TuneIn. For these streams, there is no prior act of making them available to the public. That means the provision of those streams by TuneIn amounts to an act of communication to the public and, since it is targeted at the UK but unlicensed, it is an act of infringement.

162. The most that can be said is that, in some cases, a provider of a Category 4 stream to TuneIn, which is ad-free, also makes other streams directly available to the public. At most that would make Category 4 the same as Category 3 if they were compliant with the regime in their home state, but I am not satisfied that the argument about Category 4 stations gets that far. That is because the streams made available to the public, to the extent they are, are not the same streams as the ones in Category 4. I hold that the fact that the same work may appear on one public stream at one moment and then on a different Category 4 stream to which TuneIn links at a different moment, does not turn the act of making the work available on the first public stream into a relevant act of communication to the public vis a vis the linking to the second stream in Category 4. The context in which the work appears the first time is materially different from the context in the second case.

163. There was some suggestion that providers created two versions of an otherwise identical stream, one with advertisements and one without. I am not certain that was the evidence but even if it were, I would not accept that the making available of a stream which included advertisements could be said to amount to a relevant first act of communication to the public vis a vis the linking to the second stream in Category 4. The contexts in which the works appear in these two streams is still materially different.

Category 1

164. The internet radio stations in Category 1 are all licensed under the relevant UK copyright. As I have already found, all are in fact available to the public without access restrictions, and, at the risk of repetition, that is something to which the rights holder for the UK has consented. That means that for each stream in Category 1 an act of communication to the public takes place logically prior to any link by TuneIn. Nevertheless the claimants contend that the intervention of TuneIn makes these stations available to a new public.

165. The question therefore is the same as for Category 3: were the public to whom TuneIn's act of communication complained of is addressed, taken into account in the deemed consent to the first act of communication?

166. The difference between Category 3 and Category 1 is that for Category 3 the answer to that question involves both the nature of TuneIn's act of communication and the territorial element whereas for Category 1 the territorial aspect does not apply.

167. I can see that there is scope for a different view but I have decided that the territorial difference is enough to mean that for Category 1 there is no new public whereas for Category 3 there is. The reason I reach that result is by considering where the overall balance ought to lie between giving high protection to intellectual property rights on the one hand and the freedoms of expression and information available via the internet on the other. To hold otherwise would be an unwarranted restriction on those freedoms in circumstances in which the copyright owners have the ability to exercise their rights in relation to the original internet radio station.

168. Contrasting the position in Category 3, it is obvious that the arrangements between the operator of the Category 1 internet radio station and the UK rights holder have taken into account the territorial feature of the public to whom TuneIn's system is targeted, since it is targeted at users in the UK. Although TuneIn's act of communication is a different kind of activity from that of the station operator, it is directed to the users in the very same territory. Moreover although I have characterised TuneIn's act as being different from the conventional linking, it is at its root a form of linking. The stream provided (subject to the pre-roll) is whatever is published by the original internet radio station. That aspect, allied with the targeting to the same territory, is enough to distinguish between Category 3 and Category 1 on these facts.

169. The claimants point out that the various licences contain detailed terms. The terms fall into two classes. One class of terms related to the programming of the content on the stream. These are unaffected by this analysis and are irrelevant, since the stream remains as it is. The other set of terms consist of various restrictions and exceptions, the most significant being terms in the PPL Traditional Radio Licence (clause 3.4), which relate to streaming of the licensee's transmission via "third party websites", which are defined as websites without a licence. TuneIn's service would be a third party website. The clause provides:

> "However:…
>
> (a) this shall not prevent Internet Simulcast Services from being accessed via a third party website by means of a hyperlink (or "click through") to a Licensed Website; and …
>
> (b) this shall not oblige the Licensee to prevent Internet Simulcast Services from being accessed via a third party website by means of so-called "deep linking" (i.e., where an Internet Simulcast Service is accessed from its server without recourse to a Licensed Website)".

170. TuneIn's service would fall within (b) above however in my judgment this is irrelevant. As already explained, I am not persuaded that the answer to the questions

posed by the communication right are to be found in these detailed contract terms between the claimants and the individual Category 1 internet radio station providers. To take such an approach would create real practical problems for the functioning of the internet. The critical thing in my judgment is that the act which makes the stream to which TuneIn links publicly accessible, is itself a licensed act.

171. Accordingly TuneIn's act of communication in relation to Category 1 is not an infringement under s20 of the 1988 Act.

The recording function in the TuneIn Radio Pro app

172. Until April 2017, when it was disabled for UK users, TuneIn's Radio Pro app allowed users to record content 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 users to skip to the start or end of specific audio tracks and/or skip in-stream advertisements. The claimants contend that making the sound recordings available via this app when it had that function enabled was an act of communication to the public even if, when that function was not enabled, there was no communication to the public.

173. TuneIn made a point that the ability to record sound which is playing on the radio has existed for years, which is undoubtedly true. It also relied on the fact that a record function exists on mobile devices such as the Apple iPhone. I do not believe any of this is relevant since the function under consideration is an integrated part of TuneIn's paid for app. The proper way to view the recording function in the app is as part of the overall service offered by TuneIn through the app. One aspect which bears that out is that TuneIn has the technical ability to disable its app based recording function at the level of individual internet radio stations. TuneIn also says that the interface presented to the user is essentially the same and so, from the point of view of a user not interested in using it, there will be no difference from the case when it is disabled. I accept that the function is only part of the app's interface but this argument does not help decide what the overall effect is of the app when the function is not disabled.

174. The line taken by the claimants is on the basis that the Pro app including the record function is a new technical means. The claimants cited the CJEU's decision in ***VCast*** (Case C-265/16). That case did involve recording technology however I do not read it as supporting the claimants. The recording function was not the new technical means, the new technical means in question was the internet itself which was used to make the works available (the first act of communication being a television broadcast). I do not believe the claimants' point is assisted by ***VCast***.

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.

178. Therefore in all three of those Categories TuneIn has infringed under s20 and would do so in future if the recording function was enabled. Also if, which I have rejected, Category 4 involved a prior act of communication then the same would apply.

Liability of individual users making recordings using the Pro app

179. There are two senses in which users make recordings. One sense is the recording function on the TuneIn Pro app. The other is a different kind of "recording", i.e. the technical caching activity which may take place in the memory system of a device when it plays a stream. That kind of temporary caching is not alleged to amount to infringement, as I understand the claimants' case. If it were it would be exempt under the exception in s28A of the 1988 Act (as TuneIn points out).

180. The use of the Pro app in the UK is substantial; there were over 150,000 UK users in January 2019. Although the recording function had been turned off by then, I take that as an indication that the app was used on a comparable scale while it had that function. It is a natural inference to draw that an appreciable number of TuneIn's UK users used the recording function on a scale which is more than trivial.

181. TuneIn relied on the "time shifting" exception in section 70 of the 1988 Act. The words of s70(1) are:

> "(1) The making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or in any work included in it."

182. This raises a point of law relating to the words "in domestic premises". Those words were inserted by the 2003 Regulations after the coming into force of the Information Society Directive (and came after the judgment of Peter Smith J in ***Sony Music v EasyInternetcafe*** [2003] EWHC 62). TuneIn submitted that the ambit of the defence should be construed without limitation to domestic premises because that limitation is not in Art 5(2)(b) of the Information Society Directive, and because that latter provision is the closest provision in the Directive to s70.

183. Art 5(2)(b) provides:

> "2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
>
> …
>
> (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;
>
> …"

184. Also relevant is Art 5(5) which brings in the Berne three step test (Art 9(2) of Berne) as follows:

> "5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

185. Although Art 5(2)(b) refers to financial compensation, as TuneIn noted, member states may enact exceptions which do not require such compensation when the prejudice to the rights holder is minimal (see recital 35 and ***Copydan*** Case C-463/12).

186. I reject TuneIn's submission seeking to broaden the exception beyond domestic premises. In my judgment the proper scope of the defence provided for by s70 is limited to activity on domestic premises. That is for the following reasons. I agree that the s70 defence is to be read as an exercise by a member state (the UK) of the ability to provide for exceptions within Art 5(2)(b). However neither Art 5(2)(b) itself nor the Directive as a whole prevents the member state from enacting a narrower exception as long as the narrower exception satisfies the Berne three step test provided for in Art 5(5). The fact the defence is limited to time shifting on domestic premises does not run counter to the considerations in Art 5(5). The defence is focussed on a well defined special case. It does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the copyright owner.

187. Therefore, to fall within the exception, the following elements need to exist:

i) A recording of a broadcast must be made;

ii) The recording must be made on domestic premises;

iii) The recording must be for private and domestic use; and

iv) The purpose of the recording must be to enable it to be viewed or listened to at a more convenient time.

188. If these elements are satisfied the recording does not infringe any copyright in the broadcast or in any work included in the broadcast. The burden of proof in making out the defence as applied to any given instance of recording relied on must be on the defendant (see also ***Sony Music v EasyInternetCafe*** paragraph 40).

189. Before me there was no argument about the status of the internet radio station as a broadcast.

190. Turning to the facts, no specific examples of a recording taking place are advanced by either party. I suppose most of them will have been for private and domestic use although no doubt there could be exceptions. I have not heard argument about whether one can take it that the users will necessarily have made recordings solely to enable listening at a more convenient time. TuneIn suggested that recording on domestic premises would be predominant. I am sure that of the recordings which must have been made, very many will have been made on domestic premises, either the user's home or I suppose a friend's house. However many others will not have been. They will have been made on business premises (e.g. when the user is visiting a café), at work or in the street. TuneIn advertises its service as something which enables users to "listen anywhere".

191. There can be no real doubt that a significant number of recordings will have been made by users of TuneIn's Pro app in the UK which could not take advantage of the exception.

Liability of the providers of Category 2, 3 and 4 stations

192. The issue is not whether TuneIn commit an act of infringement but whether the providers of the internet radio stations themselves are committing an act of communication to the public under s20 of the 1988 Act when the station stream is played to a UK user through the TuneIn Service and is therefore targeted at the UK. There are a number of different circumstances here.

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.

195. For the other Categories, their position is the same under this rubric as it is for the previous issues above. So providers of Categories 2 and 4 are infringing while the providers for Category 1 are not (save for the case relating to the Pro app with the recording function).

Authorisation or joint tortfeasance

196. I start with authorisation. Section 16(2) and 16(3) of the 1988 Act concern liability for authorisation as follows:

> "(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.
>
> (3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—
>
> (a) in relation to the work as a whole or any substantial part of it, and
>
> (b) either directly or indirectly;
>
> and it is immaterial whether any intervening acts themselves infringe copyright."

197. In ***Twentieth Century Fox Film Corp v Newzbin Ltd*** [2010] EWHC 608 (Ch) Kitchin J reviewed the law on authorisation at paragraphs 85 – 95, starting from ***CBS Songs Ltd v Amstrad Consumer Electronics plc*** [1988] A.C. 1013. Kitchin J explained (paragraph 90) that to "authorise" means the grant or purported grant of the right to do the act complained of, and does not extend to mere enablement, assistance or even encouragement. He went on in the same paragraph:

> "…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".

198. There are two sets of infringing activities in the UK which need to be considered. One is the acts of communication to the public undertaken by the internet radio station in Categories 2, 3 and 4, the other is the recording by users of the Pro app.

199. Taking the acts of communication to the public first, one point made by TuneIn relates to the terms on which TuneIn deals with the internet radio station providing the streams. The most TuneIn can say is that the terms mean that as between TuneIn and the internet radio stations, the stations are responsible for the permissions necessary for the streams to be published in their own locality. There is nothing in the terms to say that the station in Category 2, 3 or 4 is responsible for ensuring that a consent is in place to render lawful the playing of the stream targeted at users in the UK.

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. TuneIn suggested it has no control for Category 4 but I do not accept that.

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.

202. 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.

203. I find that TuneIn has authorised the infringements carried out by its users by recording using the Pro app.

204. I will deal with joint tortfeasance very briefly since on my findings it does not add anything to authorisation. In relation to the acts of the internet radio stations concerned, essentially the same considerations apply and I hold TuneIn are jointly liable for the infringements committed by the internet radio station providers. In relation to users who make copies, the same factors again apply.

Safe harbours

205. TuneIn relied on the so called safe harbour provisions as a defence to monetary liability. The Electronic Commerce (EC Directive) Regulations 2002 bring the safe harbour provisions of Directive 2000/31/EC (the E-Commerce Directive) into UK law. I will use the references in the Directive. These safe harbours are caching (Art 13), mere conduit (Art 12) and hosting (Art 14). For these to be relevant, TuneIn's service has to be an "information society service". That was not in dispute.

206. I can deal with these safe harbours fairly briefly. By the closing I believe caching had fallen away. I will say only that caching has nothing to do with the reasons why any of the acts in issue in this case infringe (that is the acts of TuneIn, the internet radio stations when the streams are directed at the UK, or users using the recording function in the Pro app). I have already noted that the caching which takes place on a device when playing a stream would be exempt from infringement (s28A).

207. The hosting safe harbour is said to be relevant to the recording function on the Pro app. I do not understand why. Hosting is the storage of information (Art 14(1)). When a user makes a recording of one of the claimants' sound recordings using TuneIn's Pro app software, that recording is not stored on any TuneIn servers, it is stored on the users' personal device. TuneIn is not hosting the infringing copy which was made at all. The fact that TuneIn authorises a user to commit an act of copyright infringement by making a copy of one of the claimants' works is irrelevant. That authorisation is not an act of hosting either. Therefore TuneIn is not within Art 14.

208. In terms of being a mere conduit (Art 12), the internet radio station provider itself is not a conduit on any view since it initiates (and then transmits) the stream to the user. As for TuneIn, as it is at pains to stress, it does not transmit the stream to a user at all. The stream does not pass through TuneIn's servers. One suggestion was based on treating a stream as a communication network so that, by providing its service, TuneIn was providing access to "a communication network". I reject that because a stream is not a communication network.

209. Finally, TuneIn argues that the transmission of the hyperlink URL to users is an act of transmission. I can see that the URL is sent (transmitted) by TuneIn to the user's device, but that does not fall within the exception either. To the extent that it is a transmission to a user, it is one which was initiated by TuneIn. The defence is only open to those who do not initiate a transmission (Art 14(1)(a)).

210. There was also an issue based on CJEU authority (***L'Oreal v eBay*** and ***Google France*** C-236/08 - C-238/08) about whether the safe harbours only apply if one can characterise the activities of the defendant as being of "*a mere technical, automatic and passive*" nature or whether this condition only applies to caching. However, it is not necessary to resolve this point.

Other issues

211. At trial TuneIn made further submissions directed to non-monetary liability and service provider injunctions following ***GS Media***. In the result I have reached, these points do not arise. At one time there may have been issues about consent, estoppel and waiver but they fell away as far as this trial is concerned.

Conclusion

212. This case was the last trial heard by my friend and colleague Henry Carr J before his untimely death. He was not able to produce the judgment. The parties were entitled to a full retrial but instead they agreed to an approach in which I read the materials, including the transcripts of the hearing, and then heard the parties for two days of argument. This was possible because there was no critical issue which depended on an assessment of the witnesses. It has been my sad task to produce this judgment in a case which I know Carr J found stimulating.

213. I find that:

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 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 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 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.

vii) TuneIn cannot rely on the safe harbour defences under Arts 12, 13 and 14 of the E-Commerce Directive.