

# Why the UK TuneIn judgments are a return to the dark ages

What happens when you let some old farts from the UK judiciary, fueled by a doomed Brexit, single-handedly decide the technological future, advances and boon to which UK users should have access to? Well, stupid business choices justified by perfectly elegant and intellectually stimulating legal decisions handed down by old timers on a rampage to make "Britain great again". I am sorry that TuneIn had to pay such a hefty price, on the UK market but, oh boy, it did.



As a daily jogger, I am an early adopter, and fervent user, of radio apps, such as Radio Garden and TuneIn, in order to listen to, in particular, Los Angeles' radio stations such as KCRW Eclectic 24 and KPFK, while I am

practising my daily and morning sport exercises. While at

home, I listen to French radio stations such as FIP or Nova, or to LA channels, via Tunein which is accessible on my Sonos home sound systems, software (installed on my two iphones) and speakers.

However, over the last year or so, I could not help but notice that European radio stations, such as FIP or France Inter, were no longer accessible from either TuneIn station or Sonos Radio station, while I am in the United Kingdom ("UK").

Well, now I know why. Indeed, I read today the 3 latest issues from Music Confidential published by Susan Butler on the "*TuneIn appellate decision*" (sic).

Intrigued, I decided to delve deeper into this case and gulped (there is no other word) the 47 pages of the Warner Music UK Ltd and Sony Music Entertainment UK Ltd versus TuneIn Inc decision handed down by the High court of justice of England & Wales on 1 November 2019, as well as the 56 pages of the TuneIn Inc versus Warner Music UK Limited and Sony Music Entertainment UK Limited judgment handed down by the Court of appeal on 26 March 2021.

Whilst I admire the intellectual virtuosity of the first degree judge, Justice Birss, displayed in the above-mentioned first degree decision, as well as the "strong hand in a velvet glove" approach favoured by the appeal judge, Justice Arnold, in the appellate judgment, I can only conclude that this exercise in intellectual masturbation by the judiciary has led, yet again, to another castration of a technological product full of creativity, advancement, connectivity to the world and fantastic ubiquity.

Am I therefore pissed off?

Yes. Here is why.

# **Are you actually saying that TuneIn should ditch internet radio stations which are unlicensed in the UK?**

The "*modus operandi*" of TuneIn is to operate an online platform, website and apps, which provide a service enabling users to access radio stations around the world. The service is called TuneIn Radio.

It is now available on over 200 platform connected devices, including smart phones, tablets, televisions, car audio systems, smart speakers such as Sonos, and wearable technologies.

TuneIn Radio has links to over 100,000 radio stations, broadcast by third parties from many different geographic locations around the world. It is monetised through advertising and subscriptions, although the subscription is free for many users of hardware products such as Sonos and Bose sound systems.

TuneIn Radio is awesome because, like Radio Garden, it allows users to save some radio channels as favourites, offers some curation services as well as some search functions, which a new user may use when he or she does not know what radio stations he or she may like. In addition, TuneIn Radio provides perks such as personalisation of content, collation of station information presented on individual station pages, and artist information set out on dedicated artist pages.

Even better, until a few years ago, TuneIn Radio offered a recording device, through its Pro app, which also included a curated repertoire of a large number of music internet radio stations.

As a user, you are therefore blissfully entertained, and your every musical needs catered for, when using the full gamut of TuneIn Radio's perks and services.

Well, such users' bliss was short-lived, however, since the High court decision, confirmed by the 2021 appellate judgment, found that by including internet radio stations which are either unlicensed, such as Capital FM Bangladesh and Urban 96.5 Nigeria, or not compliant with the local neighbouring rights regime, such as Kazakhstan station Gakku FM and Montenegro's City Radio, TuneIn Radio was infringing under section 20 of the 1988 Copyright, designs and patents act (the "Act") which provides:

**"20. Infringement by communication to the public**

*(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.***

So not only those unlicensed and non-compliant internet radio stations are in breach of the right to communicate to the public, but TuneIn Radio is too, since it provides links to those streams.

Had TuneIn Radio not obtained a warranty from those internet radio stations that they operated lawfully in their home state? God forbid, TuneIn Radio could not rely on such warranty, of course, and the onus was on TuneIn Radio to double-check that such internet radio stations were either licensed or compliant with their local neighbouring rights regime.

So what is the direct consequence of such stance, taken by the UK High court and Court of appeal? Well, all those internet radio stations become unavailable to the public, in the UK but also probably in other European countries such as the 27 member-states of the European Union ("EU"), via the TuneIn Radio platforms, websites and apps.

Indeed, all the reasoning made by Justice Birss, in the first degree case, as well as Justice Arnold, in the appellate case, revolved around article 3 of the EU Information Society Directive (the "**Directive**"), which was transposed into the above-mentioned section 20 of the Act, and the abundant, eye-wateringly complex and excruciatingly intricate related case-law of the Court of Justice of the European Union ("**CJEU**") on the right of communication to the public.

So, yeah, you bet, this TuneIn case is valid both for the UK (which has now exited the EU via its unwitty Brexit), and the 27 remaining member-states of the EU.

Therefore, users and customers lose because they cannot listen to all worldwide internet radio streams via TuneIn anymore, as a direct consequence of the UK decisions.

And it does not stop there! Perish the thought.

What about those music radio stations which are licensed for a local territory other than the UK, such as VRT Studio Brussel in Belgium, Mix Megapol in Sweden and MavRadio in the USA?

For these radio stations outside the USA, the countries operate various kinds of remuneration rights regimes and these stations are paying remuneration under these local schemes. The USA operates a statutory licence scheme conditional on paying royalties and the sample radio MavRadio pays those royalties. However, in all of these cases, the relevant body has not granted geographical rights for the UK.

Ahhh, the UK first degree judgement, confirmed in appeal says,

that's not my problem, my dear sir: TuneIn's act of communication in relation to those sample radio streams which pay royalties to a body that does not grant geographical rights for the UK, is unlawful, unless licensed by the UK rights holder. Since it is currently not, TuneIn's actions amount to infringement under above-mentioned section 20 of the Act.

Therefore, TuneIn has to now remove all this pool of internet radio stations from its platforms, apps and websites too, until it has figured out how to strike a deal with the UK rights holders.

Probably, TuneIn's best call is to reach out to the UK neighbouring rights collecting society, PPL, and start the licensing negotiations from there, immediately. Also, TuneIn better cooperate directly with labels Warner and Sony, to strike those licences, now that the UK first degree decision has been confirmed in appeal and since these two claimants *"account for more than half the market for digital sales of recorded music in the UK and about 43 percent globally"* (sic).

While I can understand that the UK courts would slam TuneIn for not proactively getting a UK neighbouring rights' licence for its own premium radio stations, made available exclusively to TuneIn's subscribers, I found it profoundly castrating to make TuneIn's liable for primary infringement of the right of communication to the public for merely providing streams to unlicensed and non-compliant third party internet radio stations and to third party internet radio stations which do not pay royalties in the UK.

What about the right of UK and EU users to have access to as much culture, musical experience and knowhow, as possible, even in a geopolitical context where most countries in the world do not care about, and probably don't even know what are, neighbouring rights?

This is directly discriminating UK and, probably, all EU listeners and users, because TuneIn will now have to geoblock all its links to non-compliant and unruly streams, which probably constitute at least 50 percent of the 100,000 internet radio stations available on its apps, platforms and websites.

So Justice Birss and Justice Arnold can now breathe a sigh of relief, at the thought of having saved European neighbouring rights in the face of barbarian non-British cultural invasion, but I am sure that most UK users of TuneIn only have a "fuck you" to respond in return, for their ill-advised, technologically-stiffling and Brexitist stance on the matter.

Now, by using TuneIn Radio, a UK user will only have access to music radio stations which are licensed in the UK by PPL, such as BBC Radio 2, Heart London, Classic FM and Jazz FM. Thank you very much, but we can already access those radio channels on our terrestrial radio sets or on their respective online platforms, from the UK, so what is the added value of TuneIn Radio in the UK now, pray tell?

## **So I can't use the recording service on TuneIn anymore?**

Of course, Justice Birss, and then Justice Arnold, went for the jugular with respect to the recording option by users of TuneIn's Pro app.

Indeed, in terms of a user's use of the recording function, the claimants contended that the Pro app was not just a recording device. It also included 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 was also a point on the degree of control exercised by TuneIn. Only internet radio stations

provided by TuneIn could be recorded and TuneIn could disable the record function at a station-by-station level.

While this TuneIn recording function was a very original, and unique, offered feature, in the competitive world of radio aggregators, the High court decision, confirmed in appeal, swiftly killed it, by finding that *"TuneIn had authorised the infringements carried out by its users by recording using the Pro app"* and therefore *"TuneIn's service via the Pro app when the recording function was enabled infringed the claimants' copyrights under Section 20 of the Act"*.

Even if Justice Arnold allowed the appeal, in his appellant judgment, against the conclusion drawn by the first degree judge, that TuneIn was liable for infringement by communication to the public in relation to the "category 1" stations (i.e. the internet radio stations which already are licensed in the UK via PPL) by virtue of providing the Pro app to UK users with the record function enabled, the outcome is the same: off with its head, with respect to the great recording function offered by TuneIn's Pro app.

As Susan Butler wisely wrote, in her Music Confidential's last three issues, *"in my view, however, that does not mean that (intellectual property) must be disruptive to digital innovation across national borders"*. *"(...) the bad kind of disruption – the costly and destructive kind – seems to occur most often when anyone tries to drag old business models or entities built around old business models into new multi-national digital marketplace. (...) Everyone must become more pliable to truly reshape the market to support true innovation"*.

Well, Susan, with the old farts who handed down the 2019 and then 2021 decisions (check them out on the audio-video recorded hearings here!), count on it.

Another example of UK splendid and backward looking isolation,

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