



Article

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The *TuneIn* case or communication to the public in the UK after Brexit: the status quo with targeting as a governance tool

<https://doi.org/10.1515/ijld-2022-2071>

Received June 23, 2022; accepted November 10, 2022

Abstract: TuneIn is a case dealing with a portal service on the Internet that allows users to listen to Internet radio stations from around the world and even to select stations that play their favorite music at any given moment in time. The UK courts had to decide whether TuneIn's activity amounted to a communication to the public of the music played by the radio stations. Because it is not authorized, it will constitute copyright infringement. The courts established that TuneIn did target the public in the UK and that on that basis, there was a communication to the public. In a Brexit context, the court refused to diverge from the caselaw of the Court of Justice of the European Union and put in place stringent requirement for future cases that may warrant any such divergence.

Keywords: Brexit; communication to the public; copyright; retained EU law; targeting

1 Introduction

You prefer a certain genre of music, see a certain artist or even a particular song, but rather than downloads or streaming services you have a penchant for radio. Then the service offered by TuneIn will interest you. Through their website, you will have real-time access to thousands of radio stations around the world and you will have the opportunity to pre-select radio stations that offer your favorite genre of music or that currently broadcast your favorite artist or song. If you do not want to pay for the service, you will have to live with TuneIn's advertising messages. As you can see, TuneIn's service is based entirely on the global offer of web radios and their

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metadata and looks like a portal. Even at first glance that makes it clear that it is necessary to continue the standardization of international copyright laws (particularly those for sound recordings), copyright law education for creators and musicians to rethink future artistic and management decisions (Mulhaney-Clements 2010).

But how could this system work in copyright? TuneIn's contracts with web radios confirm a rather lax attitude. In some contracts we do not talk about copyright, while in others we find more or less elaborate clauses that put the responsibility on the shoulders of web radios. In short, TuneIn hides behind web radios and assumes that the communication to the public of musical works is made solely by them and that they have a license for this communication to the public.

In this context, a preliminary question is of paramount importance. The English courts have indeed accepted that the mere fact that the website, in this case the site giving access to TuneIn's system, is accessible from the United Kingdom, is not sufficient for the application of United Kingdom copyright. It will also be necessary to demonstrate that the United Kingdom is targeted by the service. And then the main question that arises is whether there has been (in the UK) communication to the public and by whom. Since TuneIn does not touch the broadcast of web radios, can we deduce that any communication to the public is made by web radios alone? Or does TuneIn also communicate the musical works to the public? For the rights holders in the proceedings, Warner Music UK Ltd and Sony Music Entertainment UK Ltd,¹ there is a world of difference here. Finally, there is also a Brexit aspect to this case. Let us simply say that there is no universal approval of the case-law of the Court of Justice of the European Union concerning the concept of communication to the public and its key point in the existence of a new public and that (Breeze 2021: 69), above all, in the presence of a final judgment delivered after the transitional period, the VG Bild-Kunst judgment,² there was here an almost ideal first opportunity if the English judges wanted to diverge from the case-law of the Court of Justice, even if it was only in part.

2 Targeting the UK

The starting point is now very simple. The existence of a website and the fact that it is accessible from the United Kingdom by an audience of local users will never suffice,

1 *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441.

2 *Case C-392/19 Vg Bild-Kunst v. Stiftung Preußischer Kulturbesitz* ECLI:C:2021:181.

as such, for the establishment of a territorial link.³ It will also be necessary to demonstrate that the website targets the United Kingdom. This analysis is done objectively and from the perspective of the public⁴ in the UK. The analysis will take into account all relevant circumstances. We then think first of the appearance of the website. For example, is there any intention to deliver goods to the UK? Are we talking about service delivery in the UK? Or is the UK on lists or maps? In the same logic, the use of a local language, currency or telephone number is also important. The intention of the owner, although not determinative as such,⁵ will therefore also come into play here. Finally, we will look at the nature of the service made available to the customer, the volumes involved, as well as the number of visits made by the public in the United Kingdom.

2.1 Targeting: various approaches

As a preliminary point, one should point out that targeting is not an easy issue. The ideal place for a targeting rule is the jurisdiction stage. That is easily illustrated on the basis of the Hejduk case.⁶ In that case photographs of buildings by a certain architect had been licensed for an exhibition in the offices of a company. The litigation arose when the photographs were placed in the archive section of the website of that company after the exhibition had ended. The photographer relied on her copyright in the photographs to argue that such use went beyond the licence and therefore constituted copyright infringement. The company was based in Germany, but the photographer wanted to sue in her home courts in Austria. The Court of Justice of the European Union ruled that the Austrian courts had jurisdiction to hear the case on the basis of the second limb of Article 7(2) of the Brussels I Regulation, as damage would arise in Austria as a result of the fact that the website was accessible and could be opened in Austria. The Court of Justice relied on this purely factual analysis and restricted the jurisdiction of the Austrian court to the damage that would arise in Austria.⁷ The jurisdiction for local damage only principle is well established by the Court. In this case the application of the principle does little harm, as Germany and Austria are neighboring countries that share a language and as there was clearly no intention to sue anywhere else. But leaving the facts of this case aside, the principle potentially gives jurisdiction to any court anywhere

3 *Merck KGaA c. Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834, [2018] ETMR 10. And in European law: Case C-324/09 *L'Oréal SA v. eBay International AG* [2011] ECR I-6011.

4 For an example in copyright see *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) [2013] Bus LR 884.

5 *Argos Ltd v. Argos Systems Inc* [2018] EWCA Civ 2211, [2019] Bus LR 1728.

6 Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* HECLI:EU:C:2015:28.

7 *Ibid.*

in the world, since the website is accessible globally. A claimant with deep pockets could then harass the defendant by suing in (several) far away jurisdictions or by simply bringing a multitude of cases in different jurisdictions. At the very least, this would put such a claimant in a strong position to propose an unfavorable settlement to the defendant. Moreover, legal certainty and predictability, which are highly praised as jurisdictional values, can hardly be treated fairly.

What is also relevant for our current purposes is that the court of justice of the European Union, whilst using the local damage only principle as a regulatory tool, explicitly turned down the suggestion of the local court that referred the question to it to use the targeting principle in these kinds of cases. One has to agree with the court that article 7(2) Brussels I Regulation does not give it a hook for the application of a targeting approach, but this is nevertheless to be regretted. Despite the limitation to local damage, it means that cases with a very limited link with the country concerned will pass the jurisdiction stage and that the defendant will have to defend the case, even if its liability may turn out to be very limited or non-existent. In the logic of the Court of Justice of the European Union, it is unlikely that the claimant will bring such cases (Torremans and Fawcett 2017). That is correct when the defendant is bona fide and seeks damages for real infringement, but cases where that is not the case and where the claimant wants to harass the defendant or wants to force the defendant into an unfavorable settlement are unfortunately also a reality.

Faced with the restrictions of the Brussels I Regulation in terms of jurisdiction national judges have displayed a tendency to build a targeting element into the way they deal with substantive law. The defendant will have to defend the case, but the court will have a mechanism to throw out the case, which limits the risk of abusive proceedings being brought. In trade mark law, one sees the use of the requirement that there can only be infringement if the sign similar to the trade mark is used in the course of trade. Courts then define use in the course of trade as active commercial activity (Cheng and Wang 2019), typically in the form of online sales, in the jurisdiction and throw out case based on the mere accessibility of passive websites in the jurisdiction.⁸ And in copyright cases one could also place the *TuneIn case* in this category. After all, here reliance was placed on advertising that was directed at the UK customer to argue that communication to the public took place in the UK and that the UK market had been targeted.

An intermediate solution that falls in between these two extremes and that has the advantage that it operates at the jurisdiction stage and therefore stops the case from proceeding to the substantial law stage is to build in a quality threshold. One then uses the normal rules on jurisdiction, such as article 7(2) Brussels I Regulation (Torremans and Fawcett 2017), but the court will only accept it has jurisdiction if the

⁸ *Euromarket Designs Inc v Peters* [2001] FSR 20.

defendant can show that it has an arguable case on the merits. The claimant will therefore have to show that it is arguable that copyright infringement has taken place in the jurisdiction and that there is at least a minimum amount of damage that needs to be compensated.⁹ That will cut out a lot of the abusive cases. And by classifying the requirement that the claimant proves an arguable case as a rule of civil procedure one avoids a conflict with the rules on jurisdiction, especially if the latter have been harmonised as is the case in the European Union (Torremans and Fawcett 2017). This approach has never been tested in the Court of Justice of the European Union, but it is ‘arguable’ ...

All this brings me to the conclusion that, especially for copyright infringement cases on the internet, it would be much better to insert a targeting provision into the jurisdiction rules themselves in order to cut out cases that are really *de minimis* in an effective way that is predictable and gives the parties legal certainty at a minimal cost in terms of money and court time. This is effectively what we proposed with the CLIP group. In our Principles, the proposed rule took the following format:

Article 2:202: Infringement

In disputes concerned with infringement of an intellectual property right, a person may be sued in the courts of the State where the alleged infringement occurs or may occur, unless the alleged infringer has not acted in that State to initiate or further the infringement and her/his activity cannot reasonably be seen as having been directed to that State.

(Basedow et al. 2013: 69–84)

As can be seen here, targeting can, of course, take the form of direct allegedly infringing acts or activity in the relevant jurisdiction or the continuation of such activity. But in an internet age one can cover multiple jurisdictions from a single server located elsewhere. Targeting does then mean that activity is directed at the state where the court is alleged to have jurisdiction. In practice directing activity to a certain state can be demonstrated by means of use of the local language, specific advertising for the local public, local customer service telephone numbers, etc. In the absence of any of this, the jurisdiction has not been targeted and the local courts will not have jurisdiction to deal with the case. Courts in certain countries may be able to interpret the existing jurisdiction rules in this way, but in certain countries it may be necessary for the legislator to amend the jurisdiction rules in this way.

Even when a targeting rule is included, it still makes sense to limit the jurisdiction of the court to local damage if damage is the connecting factor that is relied on to give the court jurisdiction. The court is after all solely best placed to deal with the case

9 Compare Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* HECLI:EU:C:2015:28.

because it knows the local facts, i.e. the damage that arises locally, best. That rule is also based on the fact that the claimant always has the option to bring the global case against the defendant in the court of the domicile or habitual residence of the defendant. That pattern changes though in certain internet cases. When the alleged infringement takes place on the internet, it is simply not an option for the claimant to bring a case for the local damage in each and every jurisdiction around the globe where the public has access to the internet. For this reason, the CLIP group suggested that a court can in such a case deal with the global case and the damage at a global scale. The standard option is then the court of the habitual residence of the defendant, but that court is less well placed if there is no substantial effect in that jurisdiction. Deliberate infringers may also hide in exotic locations or in copyright havens where it is very difficult to bring an effective case. In those circumstances, one can give jurisdiction for the global case to a court that has a good connection with the facts and is therefore well placed to deal with the case. That good connection exists when substantial activities are carried out in the jurisdiction or when substantial damage occurs in the jurisdiction. In the Principles, this took the following format:

Article 2:203: Extent of jurisdiction over infringement claims

(1) Subject to paragraph 2, a court whose jurisdiction is based on Article 2:202 shall have jurisdiction in respect of infringements that occur or may occur within the territory of the State in which that court is situated.

(2) In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court whose jurisdiction is based on Article 2:202 shall also have jurisdiction in respect of infringements that occur or may occur within the territory of any other State, provided that the activities giving rise to the infringement have no substantial effect in the State, or any of the States, where the infringer is habitually resident and

(a) substantial activities in furtherance of the infringement in its entirety have been carried out within the territory of the State in which the court is situated, or

(b) the harm caused by the infringement in the State where the court is situated is substantial in relation to the infringement in its entirety. (Basedow et al. 2013: 85–95)

With these points clarified, it is now time to return to the issue of how the English courts dealt with targeting in the *TuneIn case*.

2.2 Targeting in the *TuneIn case*

TuneIn couldn't deny that its platform was targeting the UK. Everything was in English and there was a major effort to recruit users and customers who wanted to

use the platform to distribute their advertising messages. On the other hand, TuneIn denied targeting the United Kingdom in connection with the communication to the public of the broadcasts of a foreign web radio station. The argument was relatively simple, how could we target if we do not touch the programs and taking into account that they are programs designed for a foreign national audience? The trial judge, as well as the Court of Appeal, rejected this argument as simplistic. In the logic of the objective test, the courts accepted the fact that TuneIn presented icons of potentially interesting radio stations on the screens of its users in the United Kingdom and that TuneIn made available links to the broadcasts of these radio stations. And then, no doubt of paramount importance, there were these advertisements, tailor-made for an audience in the United Kingdom who were interested in a certain genre of music. In short, the public in the United Kingdom was offered products and services that they could buy or procure in the United Kingdom and in which they were supposed to be interested. And so, TuneIn's activities based on a radio station that did not target the UK as such, came out of the analysis as targeting the UK.¹⁰ Having resolved the preliminary question, the court could continue its analysis and turn to the question of whether there was indeed an act of communication to the public without the prior authorization of the rights holders.

3 Communication to the public

What is striking in paragraph 67 of the judgment of the Court of Appeal is the exclusive reference to the case law of the Court of Justice of the European Union! The 25 judgments dealing with the concept of communication to the public are reviewed and are analysed in detail. And the basis of the analysis is indeed a summary made by Arnold J.¹¹ in *Paramount Home Entertainment International Ltd v. British Sky Broadcasting*.¹² On 31 January 2020 the United Kingdom left the European Union and the transition period ended. But this has no influence on secondary national legislation, such as Section 20 of the Copyright, Designs and Patents Act 1988. The rather vague definition of the right of communication to the public therefore remains in force. And 24 of the 25 judgments are part of the European case law that is retained after Brexit and are binding on the courts of first instance.¹³ The important point here is to know that this does not automatically apply to the Court of Appeal.

¹⁰ *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, Paragraphs 62–66.

¹¹ Now Lord Justice Arnold, sitting on the Court of Appeal.

¹² *Paramount Home Entertainment International Ltd c. British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), [2014] ECDR 7, paragraph 12.

¹³ European Union (Withdrawal) Act 2018, section 6(3).

Indeed, the Court of Appeal and the Supreme Court may depart from these judgments.¹⁴ But in a purely British context, the Supreme Court (and previously the House of Lords) has always relied on prudence and restraint. The mere fact, for example, that a new generation of judges would have solved the case in a different way was never enough for the Supreme Court to diverge.¹⁵

4 Do we diverge or do we not diverge?

One must of course imagine that TuneIn’s lawyers have taken all the criticisms out of the case law of the Court of Justice of the European Union and have tried to convince the Court of Appeal by any means. All this has been in vain. Contrary to “legislative thinking”, “judicial thinking” can be understood as a chain of thoughts in a broad sense of judicial writing, representing how judges think, especially how they apply the principles and methods in judicial proceedings through adjudication including case entertaining, trial and decision making (Cheng 2010). The judgment of the Court of Appeal not to diverge explains why it has reached this conclusion, which may be surprising and at the same time gives an idea of what will be required in the future if in another dispute the parties wish to overturn this outcome. Lord Justice Arnold first explained that Parliament could have amended section 20 on communication to the public. The fact that no initiative has been taken argues in favour of the status quo. Secondly, this concept depends on international treaties and the Court of Appeal advocates a harmonious interpretation across national borders. And certainly, there are problems with the interpretation of the Court of Justice of the European Union, but in the absence of clear instructions in the Treaties it does not follow that a better alternative is available. In the absence of a consensus in the doctrine, it is therefore better to avoid creating confusion. Legal certainty is of value.¹⁶

But there is no doubt that the Court of Appeal could ignore the final decision in the VG Bild-Kunst case,¹⁷ because this judgment was delivered well after the end of the transition period. Well, no, the Court of Appeal explicitly uses the option to consider such a judgment. Lord Justice Arnold attaches great persuasive value to it,

¹⁴ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, section 6(5A) of the European Union (Withdrawal) Act 2018 and European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

¹⁵ *Horton v. Sadler* [2006] UKHL 27, [2007] 1 AC 307 in paragraph 29 and *Peninsula Securities Ltd v. Dunnes Stores Ltd (Bangor) Ltd* [2020] UKSC 36, [2020] 3 WLE 521 au paragraph 49. It must also be borne in mind that in these two decisions the judges did diverge from the existing case law before.

¹⁶ *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, paragraphs 73–89.

¹⁷ Case C-392/19 *Vg Bild-Kunst v. Stiftung Preußischer Kulturbesitz* ECLI:C:2021:181.

given the experience of the Court of Justice and the long line of judgments in which the latter judgment forms part (and from which the Court of Appeal does not diverge). And then, it is a judgment of the Grand Chamber that contains details regarding the approach and the case is particularly relevant to the decision concerning the TuneIn system.¹⁸ We are clearly very far from the Brexit demagoguery that is too often found in political circles.

And it will be necessary for the national or international legislator to act, unless unanimity reigns on the point that the solution in force is completely outdated and causes injustices that can be remedied by a generally accepted solution that does not ask the Court of Appeal to start legislating.

5 And so is there an act of communication to the public?

There is an interaction between illocutionary acts, meaning and intentions in court discourse (Li and Sun 2018), but it remains to be determined whether there is indeed an act of communication to the public on the part of TuneIn on the basis of the approach adopted by the Court of Appeal. TuneIn had raised a multitude of arguments against, but as in the first instance the court does not follow. In the judgment, each argument is analysed in detail.¹⁹ But for our current needs, it is not necessary to go into detail. Moreover, the Court of Appeal expressly regrets TuneIn's approach on this point.²⁰ Suffice it to point out that from the point of view of the Court of Appeal TuneIn is much more than a site that offers hyperlinks or a simple search engine. It is a platform that provides its customers with audio or music content made or selected to measure. In technical language, we could say that it is a system of framed links (deep linking) to streams. This goes much further than the communication to the public made by each individual radio station that serves a national audience instead. There is therefore indeed a new act of communication to the public on the part of TuneIn, because there is on the one hand an act of communication and on the other hand a new audience never envisaged by the web radio.²¹ And the consent of the rightholder cannot be inferred from the absence of

¹⁸ *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, at paragraphs 90–91.

¹⁹ *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, at paragraphs 92–162.

²⁰ *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, at paragraph 4.

²¹ See. Case C-160/15 *GS Media BV v. Sanoma Media Netherlands BV* EU:C:2016:644.

technical measures. This aspect of the VG Bild-Kunst judgment is limited to the specific context of that case where the rightholder wanted to be able to impose technological measures in its licences.²²

There is only small downside in the first instance: the judge had also considered the option of recording the streams in a version of the subscription offered by TuneIn in this context. “Any type of interaction suggests communication through discourse” (Krapivkina 2017: 21). The Court of Appeal does not follow, as it is an act of reproduction rather than an act of communication to the public.²³

6 By way of conclusion

The *TuneIn case* will go down in history, but perhaps not for the reasons that were expected. Of course, the time will come when UK copyright will distance itself from its big sister in EU law. But we should not expect it too quickly, and above all, we should not ask the judges to launch the initiative. The political demagoguery of wanting to distinguish oneself at all costs has not contaminated the judges and it will be necessary to turn one’s gaze to another social actor, that is, the legislator, in the way that Wagner and Matulewska (2020) describe law as a socially constituted system.

But here there is an interesting application of the concept of communication to the public in a particular and international context. And there is also the consecration of the concept of targeting, not only in trademark law, but also in copyright. Maybe the case should not be remembered for its Brexit scenario, but for its approach to targeting. It clearly puts the targeting approach back on the table. It is all well worth it.

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²² Case C-392/19 *Vg Bild-Kunst v. Stiftung Preußischer Kulturbesitz* ECLI:C:2021:181, at paragraph 46.

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