

TuneIn Tuned Out by Court of Appeal

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Whilst the internet provides the music industry with a new system for delivering the latest and greatest material to eager listeners, in doing so it creates significant new challenges in the world of copyright protected works.

Earlier this year in the UK, the Court of Appeal refused TuneIn Inc's appeal of a 2019 judgment finding that it had infringed the copyright of Warner and Sony by linking to online radio stations.¹ This case attracted a lot of media attention in 2019, particularly in the music industry, when TuneIn, a US-based digital radio aggregator, was found by the UK High Court to have infringed the copyright of Warner Music and Sony Music Entertainment (which, between them, account for about 43% of the global market for digital sales of recorded music).

TuneIn had argued that TuneIn Radio was nothing more than a directory or search engine, which indexed and aggregated links to digital radio stations which were already freely available online, and that a finding against it would "break the internet".

However, the Court considered that TuneIn was different from a conventional search engine as (amongst other things) users could stream music from the various radio stations directly on TuneIn's website (as a 'one-stop shop', rather than being forwarded on) and TuneIn played its own advertisements.

The High Court therefore found that TuneIn's links, which it had repackaged and commercialised, amounted to a "communication to the public" for the purposes of copyright infringement, and - where

the relevant radio station was not licensed in the UK - this was a communication to a "new public" which was not authorised by the copyright owner.

Only the links to radio stations which were licensed in the UK by Phonographic Performance Limited, which is the UK's music licensing company for over 120,000 performers and recording rightsholders (e.g. BBC Radio 2 and Classic FM) were found not to be infringing, as TuneIn was simply connecting UK users to licensed UK radio stations.

TuneIn appealed to the UK Court of Appeal, which handed down its judgment in March earlier this year essentially upholding the High Court's judgment, to the record labels' great relief.

This decision, although unsurprising, highlights to a certain extent the tension between music licensing, which is still carried out to a large extent on a territory-by-territory basis by local collecting societies, and the increasingly globalised music streaming landscape.

Impact for Australia

In the past, Australian courts' consideration of online copyright infringement focussed on third party services linking to content available online in circumstances where those third party services have not obtained the rights holders' consent. We saw this play out in *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* [2005] FCA 1242 (**Kazaa**) and *Universal Music Australia Pty Ltd v Cooper* (2005) FCR 1 (**Cooper**).

In Kazaa, over 30 copyright owners sued the companies and individuals involved in providing

Kazaa software. The applicants alleged that by providing P2P file-sharing software (and through all their other activities), the respondents authorised the copyright infringement by the users of the software. The Federal Court found that a number of the respondents did authorise infringement. However, they did not engage in other forms of infringement or illegality alleged by the applicants, for example, including direct infringement, conspiracy, misleading conduct under the *Trade Practices Act 1974* (now *Competition and Consumer Act 2010*) or unconscionable conduct.

In Cooper, the Full Federal Court upheld a ruling that the operator of a website that contained hyperlinks to unauthorised MP3 music files on third party websites had authorised the infringement of the copyright in those sound recordings. The company's internet service provider and one of its company directors were also found liable.

The challenge of the internet being used to facilitate mass copyright infringement is a global one. The two cases above demonstrate that Australian courts are most likely to approach liability by analysing whether or not the third-party service authorised the infringement, as opposed to whether or not it amounts to a secondary communication to the public of publicly available licensed material. Given that Justice Birss' reasoning focussed on decisions of the Court of Justice of the European Union, only time will tell whether the *TuneIn* decision will be considered and adopted here.

¹ *TuneIn Inc v (1) Warner Music UK Limited; (2) Sony Music Entertainment UK Limited* [2021] EWCA Civ 441