



Neutral Citation Number: [2023] EWHC 2875 (Ch)

Case No: IL-2017-000025

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

The Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 17 November 2023

Before :

DEPUTY MASTER RAEBURN

Between :

(1) WARNER MUSIC UK LIMITED

**(for itself and as representative Claimant on behalf of the members of its corporate group
as set out in the annex to the amended claim form)**

- and -

(2) SONY MUSIC ENTERTAINMENT UK LIMITED

**(for itself and as representative Claimant on behalf of the members of its corporate group
as set out in the annex to the amended claim form)**

Claimants

- and -

TUNEIN, INC

(a company incorporated under the laws of Delaware USA)

Defendant

**Edmund Cullen KC and Amanda Hadkiss (instructed by Wiggin LLP) appeared on
behalf of the Claimants**

**Hugo Cuddigan KC and Jaani Riordan (instructed by Bird & Bird LLP) appeared on
behalf of the Defendant**

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12pm on 17 November 2023.

Deputy Master Raeburn:

Introduction

1. This is my judgment arising out of disputes as to disclosure at the second CMC in these proceedings. The proceedings are an inquiry as to damages in a copyright infringement claim in which liability has been determined in favour of the Claimants.
2. These disputes raise certain points of principle on issues of case management with respect to the disclosure of comparable licences which may be relevant to damages inquiries in copyright infringement cases.
3. The Claimants are major record companies who brought their claims for themselves and as representatives of 137 other members of their corporate groups. They are the owners or exclusive licensees of the UK copyright in many hundreds of thousands of sound recordings (the “**Claimants’ Works**”) with an alleged combined market share of UK radio broadcasting revenues of approximately 43%.
4. The Defendant (“**TuneIn**”) owns and operates the TuneIn internet radio service (the “**Service**”). Certain aspects of the Service’s functionality in the UK have been amended or removed since the beginning of the period relevant to the Claimants’ damages claim, but for present purposes the operation and functionality of the Service can be summarised as follows:

- i) The Service is an online streaming service which aggregates and makes available radio stations and podcasts from around the world, including to users located in the UK. The Service is available via a website and via apps for use on mobile devices (namely, a free app called “**TuneIn Radio**” and a paid for app called “**TuneIn Radio Pro**”). The Service is also available on a number of platform-connected devices, including smart phones, smart speakers, tablets, televisions, and wearable technologies;
 - ii) The Service offers access via hyperlinks to approximately 120,000 radio stations which are broadcast by third party operators from many different geographical locations around the world. It provides its users in the UK and elsewhere with access to tens of thousands of radio stations. In addition to providing access to stations run by third party operators, the Service provided users of its Premium Service with access to content that is not available to other users, including a number of commercial free music stations;
 - iii) A significant proportion of the stations to which TuneIn provides access are music stations. Broadly speaking, the Service is monetised by TuneIn through advertising revenues and offering subscriptions to users.
5. By way of context, traditional radio stations (which broadcast using different types of modulation (e.g. FM, AM)) which wish to play recorded music to the public require a licence from the Claimants in relation to the copyright in that recorded music, assuming those rights are within the Claimants’ repertoire. In addition to direct licences from the Claimants, a further source of such licences

in the UK is the collecting society Phonographic Performance Limited (“**PPL**”) which administer a vast number of rights owned by rights holders.

6. Internet radio stations are now commonplace and include what are known as “simulcasts” and “webcasts” in which an internet signal is received as a stream by the listener. A simulcaster is a traditional radio station which simultaneously transmits its signal to recipients over the internet. A webcaster only transmits its signal over the internet and does not also broadcast by radio waves.

The Relevant Procedural Background

7. On 1 November 2017, the Claimants issued proceedings against TuneIn for copyright infringement. The Court ordered that there be a split trial as to liability and quantum. In view of the vast number of stations made available by TuneIn, the liability trial was determined by reference to a sample of stations. On 1 November 2019, Birss J (as he then was) handed down his judgment in the liability trial in which it was held that:

- i) TuneIn infringed the Claimants’ copyrights by communication to the public when it made Unlicensed Stations (i.e. music stations not licensed in the UK) available on the Service to users in the UK;
- ii) The operators of the Unlicensed Stations infringed the Claimants’ copyrights by communication to the public when their stations were included on the Service and made available to users in the UK;
- iii) TuneIn was liable jointly with the operators of the Unlicensed Stations for their infringements referred to in the preceding paragraph (i) by

reason of having authorised those infringements and (ii) as a joint tortfeasor;

- iv) TuneIn infringed the Claimants' copyrights by communication to the public when the Service was provided via TuneIn Radio Pro to users in the UK when the recording function was enabled in relation to Licensed Stations (i.e. music stations licensed in the UK) and Unlicensed Stations;
 - v) Individual UK users of TuneIn Radio Pro who made recordings of the Claimants' Works (whether from a Licensed Station or an Unlicensed Station) committed acts of copying within section 17 of the Copyright, Designs and Patents Act 1988 ("CDPA"), some of which fell within the defence provided by section 70 of the CDPA; and
 - vi) TuneIn was liable jointly with the individual UK users of TuneIn Radio Pro for their infringements as described in the preceding paragraph.
8. Following the liability trial an inquiry as to damages resulting from TuneIn's infringements of the Claimants' copyrights was ordered (the "**Inquiry**").
9. TuneIn appealed and, on 26 March 2021, the Court of Appeal ([2021] EWCA Civ 441) upheld the judgment and order consequent upon judgment, save in relation to one aspect of TuneIn's liability for communication to the public in relation to Licensed Stations by virtue of providing TuneIn Radio Pro to UK users with record function enabled. TuneIn applied for permission to appeal and on 4 April 2022, TuneIn's application for permission to appeal to the Supreme Court was refused.

10. At the first CMC, I set down a procedural timetable to take the Inquiry through to trial. Since the first CMC, the Claimants have served a Reply, and the parties have provided Initial Disclosure. The parties have also exchanged competing versions of the Disclosure Review Document (“**DRD**”) which I discuss further below.
11. This second CMC was part heard and will resume on 27 November 2023. It has been listed together with an application made by TuneIn for third party disclosure against PPL directly in respect of what are said to be related issues and documents to those considered at this second CMC. The parties agreed at the conclusion of the part-heard hearing that it would be advantageous to receive my judgment on certain disputes raised at the hearing prior to their consideration of the further issues in this case.

The Rival Approaches to the Damages Assessment

12. In essence, the rival approaches to the damages assessment in the Inquiry are as follows:
13. The Claimants contend that the appropriate approach to quantum is by reference to the published PPL rates for webcasters, which, they say, reflect their loss and damage based on the user principle as an amount they would have received and/or could have reasonably demanded by way of a licence fee for TuneIn’s infringing conduct. They say these rates would fall to be multiplied by the number of Unlicensed Stations and further multiplied by a percentage to produce a discount which reflects the proportion of the PPL repertoire which consists of the Claimants’ Works (namely 43%).

14. TuneIn's case is that a notional willing licensor and licensee would instead negotiate hypothetical licence terms which would be based on either: (i) a percentage of TuneIn's gross UK advertising and subscription revenue from each Unlicensed Station; or (ii) alternatively, a per-stream rate (or equivalent), resulting in a single licence being agreed in respect of all Unlicensed Stations.
15. In relation to the making of copies of the Claimants' Works by UK users of TuneIn Radio Pro, the Claimants contend that the damages should be assessed on a per-copy basis, or alternatively as a percentage of gross revenue from sales of the TuneIn Radio Pro app. TuneIn says that it should be a flat fee or a percentage of UK revenue from purchases of TuneIn Radio Pro.
16. The parties have variously referred to the concept of comparable licences, both directly and indirectly.
17. In this regard, TuneIn's Points of Defence state as follows in support of its primary case (i.e. "share of revenue" as the appropriate basis for assessment):

At paragraph 10.3 of its Points of Defence:

"The Claimants have not given disclosure of licences granted by either of them (or the entities they represent), or on their behalf, during the Relevant Period in respect of online radio, webcasting, simulcasting and music services, and in respect of online directory, search and social media services, but in the absence of such disclosure TuneIn infers that one or more of the Claimants has in fact granted such licences in the past covering the Claimants' Works."

At paragraph 23 of its Points of Defence:

“...the Claimants have been unable or unwilling to identify a reasonable comparable for the purposes of their negotiating damages claim. As a result, TuneIn’s primary case is that negotiating damages should be assessed by way of a split in the profits available to TuneIn as a result of the acts of infringement for which it has been held liable. In the circumstances of this case, those profits are most suitably approached by reference to TuneIn’s UK revenue.”

18. The Claimants’ Points of Reply plead as follows at paragraph 12:

“As to paragraph 10.3, the Claimants have given disclosure (in advance of the trial on liability and by way of Initial Disclosure in the Inquiry) of the PPL webcast licences, these being the only licences which are relevant to the Inquiry. It is admitted that the Claimants have not otherwise given disclosure of licences of the kind described in paragraph 10.3 (which appear effectively to embrace the entirety of the Claimants’ digital and online licensing activities). There is no obligation on the Claimants to provide such disclosure. There is no allegation in the Points of Claim or the Points of Defence that there is any service comparable to that provided by the Defendant (other than those licensed under the terms of the PPL webcast licences) whose licensing terms are or might be relevant to the assessment of the damages claimed. In particular, the Claimants have not entered into any licence with the operator of an aggregator service such as, or similar to, that operated by the Defendant.”

The Evidence

19. The parties' rival positions on the approach to disclosure are supported by the following evidence:
- i) the fifth witness statement of Rachel Lesley Alexander dated 28 June 2023 (the solicitor with conduct of the proceedings on behalf of the Claimants) which seeks to address certain aspects of TuneIn's Model C requests, including concerns that TuneIn seeks disclosure of licences which cannot inform how the Service may have been licensed in a hypothetical scenario;
 - ii) the third witness statement of Philip Nathan Sherrell dated 19 June 2023 (the solicitor with conduct of the proceedings on behalf of TuneIn) which largely focusses on the relevance of and interactions with PPL; and
 - iii) the fourth witness statement of Philip Nathan Sherrell dated 29 June 2023 which responds to the Claimants' requests for disclosure and seeks to confirm what documents are and are not held by TuneIn and the cost and burden of identifying them.
20. At the hearing before me, TuneIn sought to rely upon the first expert report of Mr. Wynn dated 29 June 2023 to support their submissions on the DRD. The Claimants objected to the report being adduced on the grounds that TuneIn needed permission and no permission had been given. TuneIn sought permission by way of application notice and in a brief *ex tempore* judgment dated 4 July 2023, I dismissed TuneIn's application.

The Relevant Legal Principles

21. The modern principles governing extended disclosure in Practice Direction 57AD are well known and have been helpfully clarified by judgments of Sir Geoffrey Vos in UTB LLC v Sheffield United Limited [2019] EWHC 914 (Ch) at [75] - [79] and McParland & Partners Limited v Whitehead [2020] EWHC 298 (Ch) at [3] - [4], [44] - [54] and [58].
22. The overarching principles were largely common ground between the parties and for the sake of concision, I do not propose to set out the detail of the Practice Direction, or the judgments to which I refer above.
23. I would however emphasise certain principles as apposite in this case:
 - i) Issues for Disclosure are:
 - a) the key issues in dispute, which the parties consider will need to be determined by the Court with some reference to contemporaneous documents;
 - b) issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim;
 - ii) Identifying Issues for Disclosure should not be a mechanical exercise based on identifying issues from the pleadings that will arise at trial; identification should arise from assessing the relevance of categories of documents that are in the parties' possession to contested issues;

iii) In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective, including the factors contained in paragraph 6.4 of PD 57AD:

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

iv) Of these factors, the third, fourth and seventh are likely to have particular importance in a complex and important case: UTB at [76].

- v) The parties should avoid an unduly granular or complex approach to the issues for disclosure, even in high value disputes: McParland at [4] and [57].
- vi) Clarity is of particular importance in relation to Model C requests; the guidance in PD 57AD states that where Model C is proposed for any Issue(s) for Disclosure, these should be limited in number, focused in scope and concise so that the responding party may be clear as to the particular document(s) or narrow classes of document relating to a particular Issue for Disclosure for which it is being asked to undertake searches; and
- vii) Requests should not be used in a tactical or oppressive way (PD 57AD para 10.4).

The Issues

24. The following issues emerged from the parties' written and oral submissions at this Second CMC, which I shall determine in turn.

A: Are PPL documents under the Claimants' "control"?

25. A discrete preliminary issue arose at the hearing as to whether it is appropriate for the Court to order the Claimants to disclose documents that are "PPL documents". The overarching question being that where Model C requests made by TuneIn refer to PPL documents, whether the Claimants' obligation to search for and disclose those documents should extend to the Claimants obtaining such documents from the third party, PPL.

26. TuneIn submits that the Court should look at this question in relation to each category of documents in issue and that the correct approach is to make orders for extended disclosure now, as is appropriate, and insofar as the documents are within the Claimants' control, that disclosure should be given.
27. I was taken to a number of authorities by Counsel for TuneIn as to the meaning of control and what is said to be the practical application of the test in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, however it would appear that the crux of TuneIn's submissions (whilst seeking to persuade the Court that the Claimants do indeed have control over PPL) was that the Court should not make any decision now as to what amounts to the Claimants' having "control" over PPL documents.
28. Counsel for the Claimants resisted TuneIn's submissions on the basis it would be wrong to order disclosure of documents which, on the evidence, are not the Claimants' documents and where there is no evidence that they have control. It was further submitted that the relevant test propounded by Males J (as he then was) in Ardila Investments NV v ENRC NV [2015] EWHC 3761 (Comm) at [10] (that an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party) is simply not made out on the evidence.
29. In my judgment, in line with the preliminary view I expressed at the hearing, it is entirely premature for the Court to make determinations now as to the extent of any "control" one party may or may not exercise as a matter of generality.

30. In my view, to make a determination now, prior to the parties conducting their searches and providing Disclosure Certificates would amount to prejudging the issue.
31. It is therefore inappropriate and unnecessary in the circumstances for me to make any determination now as to the extent of control or lack thereof exercised by the Claimants over PPL at this time.
32. I will deal with the reasonableness and proportionality of the specific requests for disclosure in turn, below.

B: The correct approach to Issue 1 of the Disclosure Review Document

33. The agreed formulation of the first issue for disclosure in section 1A of the DRD is as follows:

Issue 1: “Which of the stations indexed on TuneIn’s Service in the period since 1 November 2011 were Unlicensed Stations, and for what period were each of them made available in the UK on the Service? In relation to each such Unlicensed Station: (a) What labels and/or other categorisations were allocated or ascribed to the station on the Service (whether by TuneIn, the station itself or otherwise)? (b) What was the station’s geographic location?”

34. The parties agreed the proposed model for disclosure should be Model C for both parties. This issue for disclosure is clearly necessary, reasonable and proportionate in that its purpose is to ascertain the number of Unlicensed Stations at issue which will plainly be relevant to the Inquiry. The dispute on

this issue arises in relation to the scope of the searches to be conducted on both sides.

Searches to be conducted by TuneIn under Issue 1

35. The Claimants request:

(1) Data comprising a list of the stations indexed on the Service since 1 November 2011.

(2) Data which identifies the genre, call sign, station name, slogan, frequency, web URL, language, owner, and location of each such station (insofar as provided by the station operator or ascribed on the Service, whether by TuneIn or otherwise).

(3) Correspondence passing between D and PPL, documents, spreadsheets and data (whether internal or provided to D by PPL) evidencing the licensing status of the station for reception in the UK and/or used by D to assess whether the station was an Unlicensed Station.

36. The Claimants say that in order to identify the Licensed Stations, TuneIn must first identify and provide disclosure of all indexed stations on the Service since 1 November 2011 in the manner outlined.

37. TuneIn seeks to limit the extent of its search under this issue to certain internal databases; a restriction it says represents an appropriate constraint to ensure that any search is kept within proportionate bounds.

38. In particular, TuneIn proposes to restrict the scope of its searches as follows:

- i) in response to the request for data comprising a list of the stations indexed on the Service, TuneIn restricts its searches to “*data extracted from D’s operational MySQL database*”; and
- ii) in response to requests for data which identifies the genre, call sign, station name, slogan, frequency, web URL (amongst other attributes of stations insofar as provided by the station operator, or ascribed on the service), TuneIn proposes to search only “*data extracted from D’s Redshift analytics database which identifies the genre, call sign, station name, slogan, frequency, web URL...*”, amongst other attributes.

39. Counsel for TuneIn relies on Mr. Sherrell’s evidence which describes that the way in which TuneIn’s internal Redshift analytics database operates is that unless and until a station has been listened to by anyone in the UK, TuneIn will not hold information as to whether that station was indexed and available on the Service in the UK (my emphasis).

40. In reply, Counsel for the Claimants submit that the proposed limitations are inappropriate because:

- i) Any such proposed limitation should properly be in Section 2 of the DRD;
- ii) TuneIn’s own evidence in the form of Mr. Sherrell’s witness statement doesn’t support its proposed approach and actually identifies other data sources which might provide the Court with information. Specifically, Counsel for the Claimants makes reference to paragraph 11 of Mr. Sherrell’s statement which states:

“The Defendant does not hold any data recording the date on which a station was first indexed, as the data fields stored in Redshift do not include the date on which the station was added to the directory... This limitation does not apply in relation to information that has been logged separately by the Defendant for reasons other than monitoring listening hours...”; and

“...its records are tied to listening activity on the station. In other words, until the station has been listened to by anyone in the UK, the Defendant will not hold information as to whether that station was indexed and available on the Service in the UK”.

41. More generally, the Claimants say that a problem with the constraints suggested by TuneIn is that in order to ascertain when a station was first indexed, one will get a better guide to that from looking at listening activity anywhere in the world, because even if the relevant station was not listened to in the UK, if it is listened to somewhere else on the platform, at an earlier date, then it can be determined that the station was indexed on an earlier date.
42. In that sense, it is said that any search of listening activity must be conducted not by reference to the UK but listening anywhere, because that way information as to the first index date can be ascertained.
43. The principal difficulty which arises in the rival contentions outlined above is as a result of the imperfection in the availability or existence of evidence in any single, identifiable source which would indicate the date upon which Unlicensed Stations were made available in the UK.

44. As mentioned above, it is TuneIn's position (as evidenced in Mr. Sherrell's witness statement) that it "*does not hold any data recording the date on which a station was first indexed.*"
45. In light of that evidence, the Court is engaged with the task of determining which undisclosed documents in the hands of TuneIn are likely to be relevant and important for the fair resolution of the claim.
46. In my judgment, neither of the approaches suggested by the parties are likely to represent a reasonable and proportionate approach to disclosure, or indeed one that is fair.
47. Searches focussed on databases which only indicate when there has been listening activity in the UK do not accord with the findings in the liability trial that TuneIn infringed copyright by communicating the Claimants' Works to the public in the UK, which does not of course, require those works to have been listened to in the UK, but rather, that the Unlicensed Stations playing the Claimants' Works were made available in the UK via the Service in such a way that persons may access them, whether or not those persons actually access the works.
48. However, imposing upon TuneIn an open, unfocussed search for all data and documents, including emails over an extensive period of time (back to 2011) is not reasonable or proportionate in the circumstances and is unlikely to have probative value, particularly in light of specific evidence as to how data is structured, available and accessible to TuneIn.

49. At this stage of the proceedings and on the basis of present information, I would therefore endorse TuneIn's proposed constraints to the searches to be conducted under Issue 1 (i.e. data extracted from TuneIn's MySQL database and Redshift analytics database). Those limitations should properly be moved to section 2 of the DRD.
50. However, I also accept the Claimants' submissions that searches of those databases should not be limited merely to listening activity triggered by users in the UK. If and to the extent there is data or documents which indicate the date upon which stations were first listened to in other jurisdictions, that may be useful to the Court (and would be fair to order), particularly if such data is contained within other identifiable databases (or non-UK specific versions of Redshift and MySQL), meaning such a search is unlikely to be disproportionate, unreasonable or indeed, overly costly.

Searches to be conducted by the Claimants under Issue 1

51. TuneIn has made five numbered requests under this issue, which are as follows:
- (1) Direct licence agreements granted by Cs (or any of their represented group members) to the operator of a radio station which was indexed on the Service, the term of which encompasses any period since 1 November 2011.
 - (2) (Insofar as not disclosed by PPL) licence agreements granted by PPL to any operator of a radio station which was indexed on the service which cover the Cs' Works, the term of which encompasses any period since 1 January 2011.

(3) Licence agreements granted by any other Collective Management Organisation with a mandate to represent Cs (or any of their represented group members) to any operator of a radio station which was indexed on the Service which cover the Cs' Works, the term of which encompasses any period since 1 January 2011.

(4) (Insofar as not disclosed by PPL) reciprocal agreements between PPL and any other Collective Management Organisation which cover the Cs' Works in respect of acts of broadcasting or communication to the public, the term of which encompasses any period since 1 January 2011.

(5) Reports (whether in the form of royalty statements, lists of granted licences or mandated CMOs) which relate to the operation of any of the said agreements since 1 January 2011.

52. The first of TuneIn's requests was agreed by the Claimants on the proviso that TuneIn first supplies the Claimants with a complete list of stations that were indexed on the Service and that the scope of licences to be searched by the Claimants be narrowed to cover licences permitting the simulcasting, webcasting, broadcasting and/or communication to the public (excluding the making available right) of the Claimants' Works in the UK (my emphasis).

53. Counsel for TuneIn made the following submissions as to why these requests are appropriate (in summary):

i) It is said that the aim of these requests is to identify which stations actually held licences (i.e. in order to determine which are Unlicensed Stations);

- ii) The Claimants' proposed narrowing of the scope of searches to licences granted to UK operators only (and not also to licences granted to foreign broadcasters) is inappropriate because (a) foreign stations may also be licensed by the Claimants to broadcast in the UK, or globally licensed, or licensed in multiple territories; and (b) the terms on which foreign stations are in fact licensed by the Claimants may be revealing as potential comparables. It is submitted that disclosure will inform TuneIn as to what categories of licence agreement have been granted in respect of webcasting and broadcasting and the way in which those stations remunerate the claimants for that activity;
- iii) The Claimants have brought this action as representative Claimants for 137 worldwide record labels, each of which will have their own local Collective Management Organisations ("CMOs") to deal with the licensing of their repertoire and the Court cannot assume that the Claimants do not have control over those CMOs' documents (in the same way as is submitted with respect to PPL vis a vis the Claimants). It is said that these are particularly probative documents on the basis that all of the Unlicensed Stations are non-UK stations and TuneIn therefore wants to know whether the rates charged by the Claimants, to, for example, a Ugandan or Mongolian station are much lower than the rates charged to global or UK operators;
- iv) For similar reasons, TuneIn wants to know what mandate was granted by PPL to the foreign CMO in order to work out whether a licence granted by the foreign CMO was able to cover the UK;

- v) Royalty reports are requested in order to show what has been actually collected by the Claimants, in order to determine the total royalty paid by licensees.
54. In short, Counsel for the Claimants submits that all (apart from request 1) are wholly disproportionate and that this Issue for Disclosure simply requires knowledge of when and what stations were licensed and the identification of those that are licensed for the UK.
55. Counsel for the Claimants also refers to the scope of the injunction made at the liability trial, which operates through the provision of a mere list of licensed stations and that this approach is therefore appropriate. It is said that this list includes all of the PPL licensed stations including a list of stations licensed for the UK by CMOs in other territories. The Claimants therefore propose providing a similar historic list (to the extent such information is available).
56. The order at the liability trial included a direction in the following terms (in material part):
- “The parties shall each write to Phonographic Performance Limited (‘PPL’) by 30 January 2020 to request that PPL supply to the parties a list of all Stations that are licensed from time to time by PPL to webcast or simulcast that Claimants’ Works for reception in the UK”*
57. In my judgment, TuneIn has not shown that it is reasonable and proportionate for the Claimants to provide Model C disclosure of documents to the extent and in the manner requested. To accede to TuneIn’s request would result in the

search and disclosure of a vast quantity of documents which are insufficiently focussed on the Issue for Disclosure.

58. That approach does not accord with the Court's duty to deal with cases expeditiously and at proportionate cost.
59. I accept the Claimants' submission that the provision of a list of stations licensed pursuant to requests (1), (2) and (3) represents an appropriate approach to this Model C request which is sufficiently focused in scope, concise and clear.
60. That approach is consistent with the nature and operation of the injunction which has been in effect for some time. I would therefore direct that requests (1) to (3) are modified to limit the Claimants' disclosure to the provision of a list of stations licensed by or on behalf of the Claimants for reception in the UK. For the avoidance of doubt, this disclosure is to follow sequentially after TuneIn has given disclosure under Issue 1.
61. I direct that the Claimants' suggested limitation on request (1) (i.e. that a list of licences provided should exclude permissions granted with respect to the making available right) be removed.
62. In my judgment, no cogent reasons have been advanced by the Claimants which justify that restriction and it seems plainly appropriate to make a wider order for extended disclosure which includes reference to this right which is consistent with that which has been infringed by TuneIn.
63. Requests (4) and (5) do not represent proportionate searches for the Claimants to undertake; they are quite clearly insufficiently focussed on the Issue for Disclosure.

C: The correct approach to Issue 2 of the DRD

64. The agreed formulation of Issue 2 of the DRD is as follows:

“What were the PPL rates for webcasters and simulcasters for each calendar year from 1 November 2011 onwards under the Small Webcaster Licence and/or the Band 1 Linear Webcast Licence (as applicable)?”

65. Both parties rely on PPL rates. As mentioned at [13] above, the Claimants rely on them as the going rate for the licensing of webcasters in the UK. TuneIn relies on them in its Points of Defence (e.g. paragraph 13.2 of the Points of Defence), in which TuneIn relies on an alleged PPL unit rate-per-performance of £0.00058, and other PPL per play rates.

66. The Claimants (rightly, in my view) submit that any documentation relied upon by TuneIn in support of these alleged rates should have been provided by way of Initial Disclosure and the parties’ correspondence reveals that TuneIn would only agree to the inclusion of this issue in the DRD on the proviso that Issues 2A and 2B are accepted by the Claimants.

67. The Court will not countenance this approach to the Issues for Disclosure; the parties are expected to cooperate with each other such that the scope of disclosure can be agreed or determined by the Court in the most efficient way possible.

68. In my judgment, it is clear that this Issue for Disclosure is necessary, reasonable and proportionate and Model B is appropriate for both the Claimants and TuneIn. Tactical horse-trading of this nature will not be tolerated by the Court.

D: The correct approach to Issues 2A and 2B of the DRD

69. In broad terms, by the inclusion of these proposed Issues for Disclosure, TuneIn seeks the disclosure of comparable licences from the Claimants to inform its position in the Inquiry.

70. Counsel for TuneIn submits that there are two conceptual bases supporting the inclusion of these issues:

- i) because disclosure is necessary to test the Claimants' case as to what constitutes the closest comparable; and
- ii) it is fair and proper for TuneIn to have access to the Claimants' licences for the purposes of adopting them, if it chooses to do so, as part of its own defence.

71. The formulation of the Issues for Disclosure sought by TuneIn are as follows (disclosure is sought from the Claimants only, on a Model C basis):

“Issue 2A: What potentially comparable licences exist in relation to streaming and broadcasting of Cs’ Works which have been entered into by or on behalf of Cs and are those licencees’ services comparable?”

“Issue 2B: “At what rates and on what terms have Cs, their represented group members or agents granted licences of the Cs’ Works permitting acts of communication to the public or reproduction on the Internet?”

Submissions

72. In support of the propositions set out above, Counsel for TuneIn advanced the following submissions (in material part):

- i) These disclosure issues are intended to put before both parties the “universe of potentially comparable licences” so that they can be considered for the purposes of adoption within their pleaded cases. In oral argument, Counsel for TuneIn submits that the parties are likely to disagree about what constitute the best comparables and “*therefore in order to advance their chosen cases properly, they need to be able to review them all*”.
- ii) In this regard, Counsel for TuneIn relies on the dictum of Lloyd LJ in Smith Kline & French Laboratories Ltd’s (Cimetidine) Patents [1990] RPC 203, 236, which states:

“where close comparables exist, they provide by far the best and surest approach. There is no better guide to what a willing licensor and a willing licensee would agree than what other licensors and licensees have in fact agreed in comparable cases”.

and

“The reasonable royalty is to be assessed as the royalty that a willing licensor and a willing licensee would have agreed. Where there are truly comparable licences in the relevant field these are the most useful guidance for the court as to the reasonable royalty. Another approach is the profits available approach. This

involves an assessment of the profits that would be available to the licensee, absent a licence, and apportioning them between the licensor and the licensee.”

(per LJ Arnold in Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd [2023] EWCA Civ 11 at [16(viii)])

- iii) It is said that comparable licences are “fundamental” in order to place the parties on an equal footing in the sense that where key information concerning the value of the claim is held by one party, then it is desirable for that party to be required to disclose that information.
- iv) In this regard, reliance is placed upon Big Bus Co Ltd v Ticketogo Ltd [2015] EWHC 1094 (Pat) in which it is said Arnold J (as he then was) ordered pre-action disclosure of licences in order to “*quantify the value of the claim for patent infringement which has been intimated against it by Ticketogo*”; at [1]. It is submitted that the Judge ordered disclosure of “all” licences under the patent in suit that had been granted to third parties in the transport sector, it being held that they all fell within the patentee’s duty of standard disclosure and that disclosure was in accordance with the overriding objective.
- v) In order to further emphasise the importance of comparable licences, Counsel for TuneIn also refers to the judgment of Fancourt J in Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd [2020] EWHC 3701 (Pat) at [21]-[22] in which it is said that where there is an issue on the pleadings as to the appropriate basis on which a reasonable royalty

should be assessed, the Claimants' past licences will be relevant and are likely to be adverse documents:

“[21] There is clearly already an issue on the pleadings as to the appropriate basis on which a reasonable royalty should be assessed, and it is likely that the Party A licence is, to some degree at least, inconsistent with the case that the claimants have pleaded. It may well be that there are points that can be made as to the comparability or non-comparability of the Party A agreement ... but that, it seems to me, goes to the weight that can properly be put on that agreement, rather than to its relevance or to its categorisation as an adverse document.”

- vi) In this regard it is submitted that given the Claimants assert a particular position on reasonable royalties (i.e. that the PPL webcaster licences are the appropriate measure), they thereby implicitly reject all other licences in their possession which are inconsistent with that position. It is implicit in their rejection that those licences are inconsistent with their pleaded case and are therefore adverse documents;
- vii) In this case, it is submitted that the importance of comparables is magnified in the sense that:
 - a) the Claimants' business is licensing and *“forms the significant bulk of the commercial activity of the Claimants and their represented entities”* (as referenced in Ms. Alexander's statement at paragraph 7);

- b) it is common ground that the Claimants and PPL have entered into thousands of licences for the rights in issue and the Claimants have perused those and based their claim upon the PPL rates for webcasters and simulcasters, which have a fixed minimum annual fee;
 - c) that fixed minimum annual fee under that licence scheme amounts to some £60 million, which is several times TuneIn's turnover in the UK.
- viii) Counsel for TuneIn submits that the PPL rates for webcasters and simulcasters are also inappropriate as a measure on the basis that they give rise to a "sampling error" into the notional negotiation in the sense that even if there is a small amount of activity, the payment made under the licence is out of proportion to it.

73. Counsel for the Claimants resists the inclusion of Issues 2A and 2B in their entirety on the basis that they are not proper issues for disclosure. It is submitted that having regard to the statements of case, these issues are not capable of serving as Issues for Disclosure at all. In short, it is said that if comparables are to be relied upon they must be identified and pleaded.

74. In developing that submission, Counsel for the Claimants refers to the following authorities as supporting the Claimants' approach in requiring "comparables" to be specifically articulated on the basis of a pleaded case before disclosure can be properly ordered:

- i) Reliance is placed on the judgment of Mellor J in Interdigital Technology Corp v Lenovo Group Ltd [2023] EWHC 1583 (Pat) at [299], referring to the expert in that trial being instructed “...to analyse the financial terms of each of the pleaded patent licence agreements..” and at [608], “...Interdigital’s primary case remains that their pleaded selection of PLOs were the best comparables...” (my emphasis).
- ii) Counsel for the Claimants also rely on Ticketogo at [47] as indicative of the fact that the Judge was very careful to look at the different types of licences in issue and to order disclosure of some, but not all of the licences, by parsing the categories of licences that were deemed to be sufficiently comparable:

“...In my view it cannot be concluded at this stage that all 60 or so licences granted by Ticketogo under the Patent are sufficiently comparable that they would fall within Ticketogo’s duty of standard disclosure on an inquiry as to damages.

At this stage, and in the absence of any evidence from Ticketogo regarding the licences it has granted, I consider that the duty of standard disclosure would extend to all licences in the transport sector...I consider that these are sufficiently comparable to be disclosable...

By contrast, I am not satisfied at present that licences in the entertainment sector are sufficiently comparable”;

iii) Similarly, Counsel for the Claimants also relies upon the approach exemplified in the dictum of Fancourt J in Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd [2020] EWHC 3701 (Pat). Reference is made to [21] in which the Judge states “...on the basis of the pleadings as they stand and the evidence that I have read, the licence or other similar agreement in favour of Party A should be treated as an adverse document” and at [24], “*I am not persuaded that this category of licences has been shown to be sufficiently relevant to the royalty issue for there to be a need for early disclosure*”.

75. The Claimants take the position that this is not a case in which the Court can consider comparables given the current state of the pleaded cases. It is said that the Court cannot start considering disclosure on this issue because there is no pleaded basis upon which sufficient comparability can be determined.

76. The Claimants suggest that the correct approach is for TuneIn to plead what it regards as sufficiently comparable services (taken from, for example, the public domain, such as Spotify, amongst others) and that disclosure should then flow from that point.

Discussion

77. In my judgment, on the issue of whether Issues 2A and 2B should properly exist as Issues for Disclosure, it is plain that they are indeed “*key issues in the dispute*” (PD57AD, para 7.3) in the sense that the issues will need to be determined with reference to contemporaneous documents in order for there to be a fair resolution as to the appropriate basis for damages to be assessed in the Inquiry.

78. Whilst I accept that there is no specific point pleaded in the Points of Claim or the Points of Defence of reliance on a particular service or specific licence(s) (other than the PPL webcaster licences) which are comparable to the acts committed by TuneIn, it is nevertheless appropriate to include these issues as Issues for Disclosure for the following reasons:

- i) The Claimants have asserted that the PPL webcaster licences are the appropriate basis from which damages should be assessed; TuneIn clearly contest whether that licence is appropriate and has, on the pleadings, specifically inferred that there may be other licences of the Claimants' Works which could be relevant (an inference which is sound given the nature of the Claimants' activities is the licensing of its rights);
- ii) The notion of the "comparability" of the Claimants' licences to TuneIn's infringing conduct has therefore been put in issue by the parties' respective statements of case in a form which is sufficient under the Extended Disclosure regime pursuant to PD 57AD. It is important to recall that identifying Issues for Disclosure should not be a mechanical exercise and should constitute key issues in dispute which will need to be determined by the Court with reference to contemporaneous documents – PD57AD, para 7.6;
- iii) Ticketogo can be distinguished on the basis that it was clearly pre-action, involved a far smaller scope of potential documents and was not a decision made under the extended disclosure regime of PD 57AD;
- iv) Whilst Interdigital and Anan Kasei make reference to pleaded comparables, the dicta in those authorities do not deal with the proper

identification of Issues for Disclosure under PD 57AD and can be distinguished accordingly;

- v) Further, contrary to TuneIn's submissions, those authorities do not support the position that "the universe", or "all" potentially comparable licences must be disclosed in an inquiry where one party seeks to rely on a particular licence as the appropriate measure. Such an approach would be contrary to the scheme of PD 57AD;
- vi) A party is not required to "set its stake in the ground" as to its position on the comparability of licences at this stage in the proceedings in circumstances where it does not have sufficient information from which to properly consider its position. To deny any extended disclosure at all would be unfair and would constitute an overly granular approach to the pleadings. Whilst proper particularisation of TuneIn's case will be important as the case progresses to the Inquiry (if and to the extent its case on comparables is maintained), a lesser degree of particularisation at this early stage of the Inquiry is acceptable, particularly as TuneIn's ability to plead in greater detail is subject to its review of disclosure from the Claimants;
- vii) Where there is a dispute as to the appropriate licence to serve as a comparable for the purposes of a damages inquiry the parties should have some opportunity to test the appropriateness of the licence basis proffered by one party with reference to reasonable and proportionate disclosure of comparables. In this sense, I accept the general thrust of

TuneIn's submissions to the effect that comparables can be important in a complex and high value case of this nature.

79. I am satisfied that a focused and limited extent of disclosure in relation to Issues 2A and 2B is therefore important for the fair resolution of the inquiry and in my judgment, (subject to what I say below), Extended Disclosure on these issues is necessary, reasonable and proportionate. I agree with TuneIn's submission that Model C is also appropriate, in light of the large number of documents which could be encompassed within these issues, of which only a small proportion may be relevant or indeed utilised.

TuneIn's Extended Disclosure Requests under Issues 2A and 2B

80. However, Model C requests are subject to the requirement that the parties request "particular documents or narrow classes of documents".
81. The phrase "potentially comparable licences" in Issue 2A contains inherent uncertainty as to what the responding party is to properly regard as "potentially", "comparable" when undertaking its searches. Issue 2B refers to "rates and terms" upon which the Claimants have granted licences and is also potentially very wide and/or unclear absent additional clarity.
82. It is therefore of particular importance in the context of these Issues for Disclosure that the formulation of the Model C requests are focussed in scope and concise.
83. TuneIn's requests under Issues 2A and 2B are as follows:

(1) (Insofar as not disclosed by PPL) the terms and conditions for all licensing schemes offered or administered by PPL in each year since 2011 in respect of radio and online broadcasting or communication to the public.

(2) Licence agreements granted by Cs (or any of their represented group members) or (insofar as not disclosed by PPL), PPL or on their behalf, to:

(a) the operator of an online-only webcasting, simulcasting service;

(b) the operator of an online music streaming service (including Amazon Prime Music, Spotify, Apple Music, Deezer, Google Play Music, and YouTube Music),

(c) the operator of an online app or music store (including Apple iTunes Store, Amazon, and Google Play Store),

(d) the operator of an online platform, search engine, or social media service insofar as relates to music (including YouTube, Facebook, and Google),

(e) the operator of an online music directory or aggregation service (including Slacker Radio and iHeartRadio), the term of which encompasses any period since 1 January 2011.

(3) Agreements renewing, extending or varying such licences.

(4) Electronic communications sent or received by Cs in the course of discussions with such licensees, or prospective licensees, in which (i) either party ascribes a value to the act of streaming or making available the Cs' Works on the internet, or (ii) hyperlinking to the same.

(5) Licence agreements granted by Cs (or any of their represented group members), or on their behalf, to any licensee which cover within their scope acts of communication to the public by hyperlinking or embedding (including in the form of social media widgets or on websites) in respect of Cs' Works.

(6) (Insofar as not disclosed by PPL) licence agreements granted by PPL to any UK radio station which offers an online simulcasting or webcasting service, the term of which encompasses any period since 1 January 2011.

(7) Licence agreements granted by Cs or (insofar as not disclosed by PPL) PPL to any multi-station broadcaster which operates multiple radio stations (whether in the form of radio broadcasting, simulcasting, webcasting or otherwise), the term of which encompasses any period since 1 January 2011.

(8) (Insofar as not disclosed by PPL) licence agreements granted by PPL to any non-UK radio station since 1 January 2011.

(9) Invoices and royalty statements issued or received under any of the said agreements which show the sums payable to Cs in respect of exploitation of the Cs' Works by the licensee.

(10) Licensing proposals in which Cs have sought to charge any sum to a current or prospective licensee in respect of hyperlinking to or embedding the Cs' Works.

(11) The prospective licensee's response to such proposals.

(12) Any correspondence between Cs or (insofar as not disclosed by PPL) PPL and the services AccuRadio and/or MixCloud or any other radio aggregator or directory service which discuss licensing of such a service.

84. In my judgment, the nature of the requests made by TuneIn under Issues 2A and 2B are far too wide and are inappropriate for a Model C request. The requests are not limited in number, focused in scope or concise. In particular, there has been insufficient focus in constraining the effect of the words “potentially comparable licences” contained within the Issue for Disclosure. The overall effect of the requests is tantamount to a Model D or Model E exercise pursuant to which the Claimants would need to conduct entirely disproportionate searches.

85. For example, it is not immediately clear why many of these requests for documents would be particularly informative – the requests include within their scope, online music streaming services, online apps or music stores, online platforms, search engines, or social media services “insofar as relates to music” (a term which itself appears open to interpretation and therefore not clear), online music directories or aggregation services.

86. It is important to have regard to the context of the disclosure exercise and what the Judge in the inquiry will be required to do. As provided in para 2.1 of CPR PD 57AD, disclosure is important in achieving the fair resolution of civil proceedings and the Court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate in order to fairly resolve those issues, and specifically the Issues for Disclosure (para 2.4 CPR PD 57AD).

87. If and to the extent that an analysis of comparable licences is entertained at the Inquiry, there are a number of factors which may be relevant to the assessment of damages:
- i) The ultimate process is one of judicial estimation of the available indications – per Lord Wilberforce in General Tire & Rubber Co. v Firestone Tyre & Rubber Co. Ltd [1975] 1 W.L.R. 819 at 826;
 - ii) There may be wide diversity of terms in real agreements with many moving parts (see by analogy, Unwired Planet International Ltd v Huawei Technologies (UK) Ltd & Anr [2017] EWHC 711 (Pat) at [168] and Interdigital at [244]);
 - iii) The process of “unpacking” prior licence agreements involves significant uncertainties – Unwired at [191];
 - iv) By analogy, the court’s jurisdiction is not restricted to the binary question of assessing a given set of terms but extends to deciding between rival proposals and coming to a conclusion different from either side’s case on such a proposal – Unwired at [169].
88. In light of the above, it would clearly be disproportionate to order that “all” of the Claimants’ licences for the Claimants’ Works be searched and disclosed for the purposes of the Inquiry.
89. Whilst, as I have found at [78] above, TuneIn does not, at this stage of the proceedings, have to plead specific particulars as to its case on comparable licences in order to obtain extended disclosure, it does however need to properly engage with the requirements of CPR PD 57AD in order to focus the scope of

its requests such that they represent clear and narrow classes of documents which are reasonable and proportionate.

90. At this time, I do not have the necessary information to determine the appropriate scope of requests under Issues 2A and 2B. I therefore direct that the parties liaise on the nature of specific requests that are appropriate under Issues 2A and 2B. If the parties are unable to agree specific requests they shall provide a concise composite document (similar to Section 1B of the DRD) with their respective positions together with short explanations on their points of difference and I will determine the issue accordingly.