Translation

SUPREME COURT OF NORWAY

On 28 November 2018 the Supreme Court gave judgment in

HR-2018-2268-A, (case no. 2018/233), civil case, appeal against judgment,

Rikstv AS	(Advocate Andreas Bernt – his test case before the Supreme Court) (Assisting counsel: Advocate Rasmus Asbjørnsen)
v.	
TONO SA	(Advocate Camilla Vislie – her test case before the Supreme Court)

V O T I N G :

(1) Justice **Webster**: The case concerns claims for compensation for breach of the Copyright Act. The question is whether RiksTV AS' distribution of TV channels in the terrestrial network amounts to "making available to the public" within the meaning of the 1961 Copyright Act section 2 and the 2018 Copyright Act section 3. If so, the performance requires the consent of the authors.

(2) RiksTV AS – RiksTV – is a distributor of TV channels in the digital terrestrial network. The company is owned by NRK (Norwegian Broadcasting Corporation), TV2 and Telenor and runs a commercial business by offering customers all over Norway subscriptions for different channel packages. RiksTV buys programme content/channels from different broadcasters/producers of TV channels.

(3) TONO SA – TONO – is a cooperative enterprise that manages copyrights to works of music on behalf of rightholders. The management encompasses the rights of TONO's unit holders – often referred to as members. Additionally, TONO manages rights for members in similar organisations all over the world pursuant to reciprocal agreements of representation. TONO collects payments for public performances of the music and transfers the funds to the rightholders.

(4) Anyone wanting to make copyright-protected material available to the public needs the consent of the author or a management organisation like TONO. The obtaining of such consent is often referred to as "clearance".

(5) TV transmissions are distributed to Norwegian viewers in different ways, including via signals from transmitters on the ground – referred to as the terrestrial network. Until 2009, the terrestrial network in Norway was analogue. To obtain a good TV broadcasting service in Norwegian language with nationwide coverage, permitting a much higher number of channels than what the analogue terrestrial network could accommodate, a majority of the members of the Norwegian Parliament - the Storting - wanted to establish a digital terrestrial network. The project development was to "take place on the market's terms", see Report to the Storting no. 44 (2002–2003) On a Digital Terrestrial Network for Television, item 1.5. The project development was to be funded by viewers paying for access to TV channels.

(6) The terrestrial network, which consists of 430 transmitters, is owned by Norkring AS and is operated by Norges Televisjon AS. The terrestrial network has two lessees; NRK and RiksTV.

(7) RiksTV was established in November 2005. The company was to offer TV channels on a commercial basis, thus contributing to ensuring the Storting's condition that viewers were to cover the costs of developing the digital terrestrial network. RiksTV's main revenue comes from customers, who pay for access to programme packages. According to the information provided, RiksTV's market share amounts to 12-15 per cent. The company's payments for rent of capacity in the transmission network and payments to the broadcasters that produce the TV channels are among the company's largest expense items.

(8) The claims for compensation in the case concern RiksTV's distribution of foreign TV channels. It has been informed that the channels encompassed by the case are mainly produced in the United Kingdom. RiksTV claims that the use of copyright-protected material has been cleared with PRS – which is TONO's sister organisation in the United Kingdom. On its part, TONO claims that the material has not been cleared for being made available in Norway.

(9) In 2010, RiksTV filed a suit against the rights organisation Norwaco, demanding a judgment stating that RiksTV did not perform retransmission within the meaning of the Copyright Act section 34, and that as a consequence RiksTV had no duty to clear its distribution in Norway with Norwaco. On 8 June 2012, TONO filed suit against RiksTV in the instant case. A claim was submitted for compensation for lacking clearance pursuant to the 1961 Copyright Act section 2 in the case that the Court in the Norwaco case were to find that RiksTV did not perform retransmission. TONO wanted the case to be joined with the case between RiksTV and Norwaco, but this was rejected by the District Court. In November 2012, a writ of summons was also issued before Oslo District Court in a case

between Get AS and Norwaco regarding a question similar to that in the case between RiksTV and Norwaco. The case between RiksTV and TONO was suspended pending the outcome of the other disputes.

(10) In the case between RiksTV and Norwaco, RiksTV prevailed. Norwaco appealed, but later withdrew the appeal, rendering the District Court's judgment final and binding. The case between Get AS and Norwaco ended with a judgment by the Supreme Court, HR-2016-562-A, where the Supreme Court found that Get AS did not perform retransmission within the meaning of the 1961 Copyright Act section 34.

(11) The case between RiksTV and TONO was reinitiated in 2015. It was divided in such a way that the courts shall first decide the question of whether the conditions for compensation are fulfilled.

(12) On 14 June 2016, Oslo District Court gave judgment in favour of TONO. The conclusion of the judgment reads as follows:

> **"1. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channels in the digital terrestrial network from 8 June 2009 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: TV3, Viasat4, FEM, Discovery Channel, Animal Planet, Disney Channel and National Geographic Channel**
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> **2. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 8 June 2009 until 23 January 2012, plus interest on overdue payments from 8 July 2012 until payment is made: The Voice.**
>
> **3. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 8 June 2009 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: BBC World News**
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> **4. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 29 October 2009 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: Eurosport**
>
> **5. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channels in the digital terrestrial network from 14 September 2010 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: TLC,**

Disney Junior, and Disney XD

6. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 1 November 2010 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: MAX**

7. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 21 March 2011 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: FOX**

8. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 29 September 2011 to 30 September 2015, plus interest on overdue payments from 8 July 2012 until payment is made: TNT**

9. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 23 January 2012 until the time of judgment, plus interest on overdue payments from 8 July 2012 until payment is made: VOX**

10. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 1 November 2012 until the time of judgment, plus interest on overdue payments from 1 November 2012 until payment is made: BBC Brit**

11. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 1 November 2012 to 1 October 2015, plus interest on overdue payments from 1 November 2012 until payment is made: MTV**

12. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 21 November 2013 until the time of judgment, plus interest on overdue payments from 21 November 2013 until payment is made: TV6**

13. **RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 5 December 2013 until the time of judgment, plus interest on overdue payments from 5 December 2013 until payment is made: History Channel**

14. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 3 September 2015 until the time of judgment, plus interest on overdue payments from 3 September 2015 until payment is made: Eurosport Norge

15. RiksTV is liable for compensation of the loss caused to TONO as a consequence of distribution of the following TV channel in the digital terrestrial network from 1 October 2015 until the time of judgment, plus interest on overdue payments from 1 October 2015 until payment is made: Comedy Central

16. RiksTV shall reimburse TONO's legal costs in the amount of NOK 4,100,612 – four million one hundred thousand six hundred and twelve – Norwegian kroner - within 14 days from service of the judgment."

(13) RiksTV appealed the District Court's judgment to Borgarting Court of Appeal on grounds of the assessment of the evidence and the application of the law. Before the Court of Appeal, the case was expanded to include two additional channels. The Court of Appeal, which arrived at the same result as the District Court and essentially seconded the grounds of the District Court, gave judgment on 4 December 2017 with the following conclusion:

"**1. The appeal is dismissed.**

2. RiksTV is also liable for compensation of the loss caused to TONO SA as a consequence of the distribution of the TV channels Viasport+ and Viasport 1 in the digital terrestrial network from 5 September 2017 until the time of judgment.

3. RiksTV AS shall within two weeks pay 2,003,882.50 – two million three thousand eight hundred and eighty-two 50/00 - Norwegian kroner to TONO SA in costs before the Court of Appeal."

(14) RiksTV has appealed the judgment to the Supreme Court on grounds of the Court of Appeal's application of the law and one item in the Court of Appeal's assessment of the evidence. On 12 March 2018, the Supreme Court's Appeal Selection Committee decided to allow the appeal as regards the question of whether RiksTV makes available to the public works of music managed by TONO; see the Copyright Act section 2. Otherwise the appeal was not allowed.

(15) The Parties have submitted written presentations that form part of the basis for the ruling; see the Dispute Act section 30-10 second subsection, see also first subsection. Otherwise, the case is essentially unchanged from the Court of Appeal.

(16) The appellant – *RiksTV AS*– essentially contends:

(17) RiksTV is not a commercial player on a par with Get AS, but was established to ensure coverage of the costs of building the nationwide digital terrestrial network. The establishment of this terrestrial network was a central political means to protect media diversity. In the central documents providing the basis of the establishment of the current arrangement, it is not mentioned anywhere that distributors, like RiksTV, were to pay the rightholders for the broadcaster's use of copyright-protected material.

(18) Technically speaking, the TV signals never pass through RiksTV. RiksTV's only contribution to the making available is to give customers access to decryption. This cannot be equalled to making the work available to or communicating it to the public. RiksTV is more akin to a technical helper for the broadcasting companies' making available to the public of the works. Consequently, TONO must direct its claim against the broadcasting companies.

(19) The Broadcasting Act section 1-1 first subsection paragraphs (a) and (f) define what broadcasting is and who are broadcasters. The Act shows that it is the broadcasters who are responsible for the contents of their broadcasts, not a technical distributor like RiksTV.

(20) Both the 1961 Copyright Act and the new act of 2018 presuppose that it is the broadcasters that communicate to the public. Also the Copyright Directive – European Parliament and Council Directive 2001/29/EC – places the duty of clearance with the broadcasters. Reference is made to recital 23 in the preamble, Article 3 paragraphs 1 and 2 (d) and Article 2 (e).

(21) The broadcasters obtain the consent of the rightholders. RiksTV has no practical possibilities of obtaining such prior consent. Moreover, broadcasters consider RiksTV's distribution as part of their broadcasting and have assumed responsibility for clearance with the rightholders. There is no need for TONO to be able to demand compensation from RiksTV for the broadcasters' transmissions in the Norwegian terrestrial network.

(22) A market for free movement of broadcasting has been established within the EU/EEA. Central judgments of the European Court of Justice confirm that it is the broadcasters that make available. When the signals are sent as an uninterrupted chain av signals from the broadcaster, it is the broadcaster that is responsible for clearance. It is only when a distributor reaches a new public with its broadcasting that the distributor will incur an independent responsibility for clearance. RiksTV does not broadcast signals to a new public; consequently, clearance is to take place on the part of the broadcaster. TONO's sister organisation PRS in the United Kingdom has in any case performed the necessary clearance for broadcast in the Norwegian market, so RiksTV's broadcasting does not reach a new public.

(23) RiksTV has submitted the following prayer for relief:

> **"1. Judgment to be rendered in favour of RiksTV.**
>
> **2. RiksTV to be awarded costs before the District Court, the Court of Appeal and the Supreme Court."**

(24) The respondent – *TONO SA* – essentially contends:

(25) Authors are entitled to compensation when their protected works are made available to the public. RiksTV deals in commercial exploitation of the works of others and must pay a compensation to the authors for this.

(26) The Supreme Court's unanimous statements in the Get judgment, HR-2016-562-A, to the effect that Get AS has an independent duty to clear the use of copyright-protected material if the broadcasters have not cleared the use, apply similarly to RiksTV. There are no relevant differences between Get AS and RiksTV. Get AS – and consequently RiksTV – make works available to the public within the meaning of the 1961 Copyright Act section 2.

(27) RiksTV is not a broadcaster, and TONO accepts that RiksTV's business may be considered a part of the broadcaster's primary broadcasting. This does however not mean that RiksTV does not make works available to the public within the meaning of the Copyright Act.

(28) The fact that RiksTV must clear the use of the works if the broadcaster has not done so, also follows from the Copyright Directive and the case law of the European Court of Justice. In a case like the one at hand, there is no requirement that RiksTV distributes to a "new public" for a duty of clearance to arise.

(29) RiksTV cannot be considered a mere seller of technical support to the broadcasters, as contended by the company.

(30) It is not difficult for RiksTV to ensure clearance of rights. They can either make sure that broadcasters do so or clear the use on their own.

(31) TONO SA has submitted the following prayer for relief:

> **"1. The appeal to be dismissed.**
>
> **2. TONO SA to be awarded costs before the District Court, the Court of Appeal and the Supreme Court."**

(32) *I have arrived at the conclusion* that the appeal must be dismissed.

(33) The question is whether RiksTV has an independent duty to clear copyright-protected works that are distributed to RiksTV's subscribers, or whether the claim for clearance must be aimed at the broadcasters.

(34) The TV channels encompassed by the case at hand are mainly produced by broadcasters in the United Kingdom. The parties agree that the transmissions contain works of authorship, the use of which must be cleared with the authors. However, the parties disagree as to who has the duty of clearance – the broadcaster or the distributor RiksTV. They further disagree on the extent to which the works have actually been cleared for broadcasting in the Norwegian terrestrial network by TONO's British sister organisation PRS. As mentioned, the case has been divided, in such a way that this question – as an element in the assessment of the loss to be determined – shall be assessed only if TONO prevails with its claim that RiksTV has an independent duty of clearance.

(35) The author of a work of authorship holds an exclusive right to decide over the work, including an exclusive right to decide whether the work is to be made available to the public. This right was until 1 July of this year regulated by the 1961 Copyright Act section 2. On the said date, the 2018 Copyright Act entered into force.
The 2018 Act preserves a similar provision in section 3, but with a somewhat different wording. It is common ground between the parties that the new wording does not alter the legal issue in our case. I concur with that position.

(36) Since the substantive content of the 1961 Act has been continued in the new Act, I shall as a point of departure rely on the wording of section 3 of the 2018 Act.

(37) The relevant parts of the provision are of the following tenor:

> **"The copyright provides an exclusive right to dispositions regarding the work of authorship by**
>
> **…**
>
> **b) making the work available to the public.**
>
> **A work is made available to the public when**
>
> **…**
>
> **d) the work is communicated to the public, by wire or wirelessly, including the work being broadcast or made available to the public in such a way that each individual may choose the place and the time of access to the work."**

(38) The provision implements the Copyright Directive Article 3 paragraph 1 in Norwegian

law. In Danish, Article 3 paragraph 1 reads 1:

[*English language version quoted below, translator's remark:*]

> **"Member States shall provide authors with the exclusive right to authorise or prohibit any *communication to the public* of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."**

(39) The expression of "making available to the public" in the 2018 Copyright Act section 3 has been taken from the 1961 Act section 2. The preparatory works of the 1961 Act are thus of interest for the understanding of the current wording. In Proposition to the Odelsting no. 46 (2004–2005), amendments to the 1961 Copyright Act were proposed in order to, inter alia, implement the Copyright Directive in Norwegian law. It is stated on page 19 of the Proposition that section 2 of the 1961 Copyright Act was considered to fulfil the requirements in the Copyright Directive Article 3 no. 1. Sufficient protection of the author's rights in the case of "communication to the public" was already established in Norwegian law.

(40) The expression of making "available to the public" is further commented on in Proposition to the Odelsting no. 46 (2004–2005) pages 7 and 9. It is pointed out that development of the copyright provisions has always been linked to technical developments. New means of dissemination have led to new possibilities of mass exploitation of works of authorship. The concept of "making available" has turned out to be flexible enough to cover the new forms of communication of works:

> **"Despite the rapid technological development, there has been no need to introduce new concepts into the Copyright Act in order to adapt the Act to the new forms of exploitation. As mentioned, pursuant to section 2 of the Copyright Act, the author of a work has an exclusive right to produce copies of the work and to make it available to the public. Under applicable Norwegian law, making a work available to the public encompasses, inter alia, public performance, broadcasting and making works available upon request in networks. The concept of "making available to the public" has turned out to be flexible and has been able to absorb new forms of communication of works."**

(41) I perceive this to mean that the concept of "making available to the public" has been understood – and is to be understood – in a wide and flexible sense, and that it provides space for encompassing new forms of presenting works of authorship to the public. The technical solution is not decisive, but whether the act leads to the public obtaining access to copyright-protected material.

(42) Similarly, it follows from the preamble to the Copyright Directive that the author's rights are to be understood in a broad sense, see recital 23, which in Danish reads:

"**This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.**"

(43) This has been followed up by the European Court of Justice; see, inter alia, case of 19 November 2015 C-325/14 SBS para 14 with further references.

(44) In summary, I believe these sources of law suggest that the expression "making the work available" as a point of departure encompasses all communication of works of authorship, independently of the technical solution.

(45) The fact that the communication must be made to "allmennheten", or to "the public" as is stated in the English version of the Copyright Directive Article 3 paragraph 1, entails that a communication must be made to an indeterminate number of potential viewers, see the European Court of Justice's ruling in the case of 7 December 2006 C-306/05 *SGAE* para 37 with further references. Private or closed communications are not encompassed, see the SBS case para 21, also with further references. Since there is no doubt that RiksTV's subscribers amount to "the public" within the meaning of section 3, I shall not discuss this requirement in further detail.

(46) The facts and the sources of law I have reviewed so far, clearly suggest that RiksTV's distribution of channel packages to subscribers falls within the 2018 Copyright Act section 3 and the former Act's section 2.

(47) RiksTV has however argued that the Copyright Act must be read in light of the Broadcasting Act and other framework regulations of broadcasting activities. It is contended that it is the broadcasters who make the works available to the public; see the 2018 Act section 3 second subsection paragraph (d), and that as a consequence, broadcasters are responsible for copyright clearance. Amongst other things, reference has been made to provisions in the Broadcasting Act showing that communication to the public is a central part of broadcasting activities.

(48) In my opinion, this view cannot prevail. The Copyright Act section 3 second subsection paragraph (d) mentions broadcasting as an example of communication to the public. The list is not exhaustive; note the word "including". The provision provides no guidance on who it is that performs the broadcasting in a case like the one at hand.

(49) Individual provisions and the system in the Broadcasting Act and its appurtenant regulatory framework – to which RiksTV has made reference – are designed to address other issues than those pertaining to copyright. It is thus not very obvious that the said set

of rules should shed light on the understanding of section 3 of the 2018 Copyright Act.

(50) One of the objectives of the Copyright Act is to ensure authors a compensation for the use of their works; see for instance Proposition to the Odelsting no. 46 (2004–2005) page 7. To reach this objective, both the Norwegian preparatory works and the preamble to the Copyright Directive presuppose that the author's rights should be understood in a broad sense. This is an argument against a restrictive interpretation of the Copyright Act's wording on the basis of the Broadcasting Act's provisions and system.

(51) According to the agreements between RiksTV and the broadcasters producing the TV channels that RiksTV transmits, the broadcasters shall clear the use of copyright-protected material with the rightholders. RiksTV submits that these agreements entail that the authors have sufficient protection of their claims. It is furthermore submitted that the agreements entail that the rightholders may relate to the broadcasters only.

(52) It is clear that the agreement between RiksTV and the broadcasters cannot limit the statutory rights of third parties – the authors. Nor may RiksTV free itself from obligations under the law by referring to others having undertaken the task. The agreements mean that the broadcasters have a contractual obligation vis-à-vis RiksTV to procure clearance for RiksTV's distribution in Norway. If the broadcasters fulfil their obligation vis-à-vis RiksTV, the interests of the rightholders will be catered to. However, the possibility that RiksTV may be met with claims from the rightholders gives RiksTV an incentive to ensure that clearance is actually performed by the broadcasters. Consequently, it appears to be well in line with the objective of section 3 of the 2018 Copyright Act that the one who makes a work available has an independent duty of clearance even if others have undertaken the task.

(53) RiksTV also submits that their distribution of copyright-protected works is of a purely technical nature. It is pointed out that the TV signals at no point in time pass through RiksTV in such a way that it is logical to state that RiksTV makes the copyright-protected material available to the public.

(54) Technical assistance to the making available by others does not entail a duty of clearance vis-à-vis the author. This applies similarly to those who facilitate physical means for the making available by others . This presupposition is expressed in recital 27 in the preamble to the Copyright Directive:

> **"The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive."**

(55) This point of departure has also been followed up by the European Court of Justice, for example in joined cases of 13 October 2011 C-431/09 and C-432/09 Airfield paras 79 and

80 and the SBS case para 31. Both decisions emphasise the difference between "[the] mere provision of physical facilities", see Airfield para 79, and the communication of content in TV transmissions.

(56) In the Norwegian preparatory works in Proposition to the Odelsting no. 46 (2004–2005) page 140, a similar distinction is pointed out: Facilitating equipment for the public's interactive use of works cannot be considered as making works available to the public:

> **"In the fourth subsection [of section 2 of the 1961 Copyright Act] examples were given of what falls within the concept of public performance. Public performance includes, inter alia, broadcasting and communication to the public wirelessly or by wire, including making [content] available upon demand. The amendment is intended to provide some practical examples of the means of making content available that would fall within the concept of public performance, and it is not exhaustive. The Ministry however wants to specify that facilitating equipment for personal, interactive use as a general rule is not to be considered making available to the public any works of authorship and other copyright-protected material that the user himself chooses to consult. The fact that *the user here is not offered any specific content,* but must himself seek it out, leads to the conclusion that the one facilitating the equipment cannot be considered to make available to the public the content that is retrieved. In this situation *there is not a sufficiently close connection between the facilitation of equipment and the public's access to works of authorship and works that the users choose to consult . ...*" (emphasis added)**

(57) What is decisive for the offeror of the technical equipment falling outside of the scope of the concept "making available to the public" is thus that the user is not offered specific content.

(58) The quote concerns interactive use of works of authorship, for instance through Internet. It is nonetheless of interest to our case, since it illustrates the distinction between offering content and facilitating technical equipment that gives access to the content. I do not find it doubtful that RiksTV offers its customers "content" within the meaning of the concept as used in the Proposition to the Odelsting no. 46 (2004–2005). RiksTV's product is not "mere provision of physical facilities", in the wording of the European Court of Justice.

(59) It is true that the signal stream is organised such that the programme-carrying signals are sent from the broadcasters out into the Norwegian terrestrial network without the signals coming into the hands of RiksTV. The signals sent into the terrestrial network are however encrypted. For the public to obtain access to the TV channels from the broadcasters with whom RiksTV has agreements, they must subscribe to RiksTV's channel packages. RiksTV furnishes subscribers with a TV decoder, and as a result they can see the

programme contents of the signals. The encryption is the technical way in which the access block is organised. There is no doubt that RiksTV sells its customers channel packages and not only a technical decryption service. The exception for technical services and equipment referred to in recital 23 in the preamble to the Copyright Directive and in the Proposition to the Odelsting no. 46 (2004–2005) page 140, is thus not applicable to RiksTV's making available to the public.

(60) RiksTV further submits that it may be deduced from the European Court of Justice's ruling in the Airfield cases that a duty of clearance on the part of RiksTV arises only where their communication reaches a new public. It is claimed that since RiksTV's transmissions do not reach a public different from the one the broadcaster aimed at reaching, no duty of clearance exists for RiksTV.

(61) This submission makes it necessary to examine the case-law of the European Court of Justice in somewhat further detail.

(62) The Airfield cases concern the so-called SatCab Directive, Council Directive 93/83/EEC. This Directive regulates, inter alia, issues linked to satellite broadcasting of TV signals and the retransmission of such signals by cable. The Directive District rests on a country-of-origin principle in the sense that the communication to the public, on certain conditions, is considered to occur in the country where the signals are beamed up to the satellite, se Article 1 paragraph 2 (b).

(63) Airfield was a company that offered packages of channels transmitted by satellite. Technically, the transmission to subscribers was arranged in two different ways. In part, Airfield received programme-carrying signals in closed transmissions from the broadcasting companies. The signals were then encrypted and sent by satellite to Airfield's subscribers. In part, Airfield gave instructions to the broadcasting companies, which procured the encryption and the transmission by satellite to subscribers. In both cases, Airfield delivered means of decryption to subscribers, thus enabling them to access to the programme content in the signals. Subscribers paid Airfield, not the broadcasters, for access to the channels. Simultaneously, the TV channels where sent out to the public in other ways by the broadcasters themselves.

(64) The question to the European Court of Justice was whether these ways of organising the satellite transmissions gave rise to a duty for Airfield to clear the copyright-protected material in the transmissions. In para 79, the European Court of Justice points out that Airfield's transmissions reach a public which is additional to the public reached by the broadcasters through their broadcasts. In para 80 it is emphasised that Airfield's subscribers pay for the content of the transmissions and not for technical services. In addition, in para 81 it is noted that Airfield brings together TV channels from various broadcasters, thus creating a new audiovisual product. For the new public reached by Airfield's transmissions, the European Court of Justice concluded that Airfield had a duty to obtain clearance from the rightholders, unless the broadcasters had procured clearance also for this public; see paragraph 83.

(65) The ruling shows that distributors of channel packages may become liable for clearance of copyright-protected material if the channels are broadcast to a public beyond the one reached by the broadcasting company through its broadcast. One might claim that the ruling should be understood antithetically, so that the broadcaster has no duty of clearance if the distributor makes the TV channels available to the public which the broadcaster has aimed at reaching, which is the situation in our case. Subsequent case-law of the European Court of Justice does however show that there is no basis for such an antithetical conclusion.

(66) With regard to this, I make reference to the European Court of Justice's judgment in the so-called SBS case. The ruling concerns the Copyright Directive's Article 3. The Belgian broadcasting corporation SBS Belgium NV did not distribute programmes itself, but sent closed programme-carrying signals to the distributors, who in turn sent the signals to the public. The copyright organization SABAM contended that the broadcasters made a communication to the public; see the Copyright Directive Article 3 paragraph 1. SBS opposed this and took the view that it was the Belgian distributors who made the communication to the public. Consequently, it was the distributors who had to procure clearance with the rightholders, and not SBS.

(67) The European Court of Justice pointed out that since SBS sent the programme-carrying signals in a closed transmission to the distributors, the broadcasters' transmission did not entail a communication to the public; see paragraphs 20–23. The requirement of communication to a "new public" was not applicable, as the public of the broadcasts concerned consisted of the distributors' subscribers; see paragraphs 27 and 28. In paras 30 and 31, it is pointed out that the distributors held an independent commercial role, and that subscribers paid the distributors to gain access to the contents in the TV broadcasts. It is only if the distributors were to be considered merely a technical assistant of the broadcasters that the distributors' transmissions would be a communication to the public on behalf of the broadcaster; see also para 33.

(68) In the instant case, the programme-carrying signals are not sent in a closed transmission to RiksTV. RiksTV's presentation of the programme signals' route from the broadcaster to subscribers may at a general level be summarised as follows: The broadcasting companies transmit the signals by fibre to Norges Televisjon AS, which operates the terrestrial network. There, the signal stream is encoded into the format to be received by the subscribers. The signals are then sent by fibre to the network owner Norkring AS, which in turn ensures distribution in the digital terrestrial network.

(69) The technical differences between the SBS case and our case cannot lead to a different result for RiksTV than for the distributor in the SBS case. In the same way as the distributors in both the SBS case and the Airfield case, RiksTV has an independent commercial role; they put together a new audiovisual product in their channel packages. Subscribers pay RiksTV for access to the contents of the programme-carrying signals. In this way, RiksTV's subscription scheme makes the programme content available to the

public. Consequently, RiksTV has an independent responsibility for clearing the use of copyright-protected material with the authors pursuant to the 2018 Copyright Act section 3.

(70) Also in HR-2016-562-A, in the case between the copyright organisation Norwaco and Get AS, the Supreme Court found that the distributor had an independent duty of clearance. In that case, it was common ground between the parties that Get AS' distribution of TV channels amounted to making the works of authorship in the TV broadcasts available to the public; see the 1961 Copyright Act section 2, see para 31. In para 54, the Supreme Court highlights the following as a policy argument in favour of the result otherwise arrived at by the Court:

> **"It is viewers in Norway who are the target group of the channels. The fact that the channels are produced for the Norwegian market makes its logical that the broadcasting corporation – SBS – undertakes the clearing of copyrights on behalf of those who undertake the distribution initiated by the broadcaster. There is however no doubt that to the extent Get AS distributes TV channels that contain copyright-protected works, this requires Get AS to ensure that their use is cleared. In the agreements between SBS and Get AS it is presupposed that SBS is to clear all copyrights for the broadcasting by cable. Get AS has an independent responsibility and will be liable towards the authors if SBS fails to fulfil this duty."**

(71) The question of the distributor's duty of clearance has been in dispute and has been argued in the case at hand; however, I cannot see that this provides a basis for a different understanding of the 1961 Copyright Act section 2 than what was applied in the Get judgment. RiksTV does not hold a position different from that of other commercial operators.

(72) The parties have also pointed out some policy considerations and practical problems that point to different solutions. I cannot see that policy considerations can be decisive when the other sources of law show that RiksTV's distribution entails making works available to the public within the meaning of section 3 of the 2018 Copyright Act.

(73) Consequently, my conclusion is that the appeal must be dismissed.

(74) TONO has won the appeal case in its entirety and is awarded legal costs; see the Dispute Act section 20-2. The fee claim before the Supreme Court amounts to NOK 1,812,500 including value added tax. The amount seems high, especially considering that the same legal issues have been argued before two previous instances, and that the total costs are nearly MNOK 7.8. This total amount seems very high.

(75) The cost statement states that for the Supreme Court proceedings, 431 hours were used at

an average hourly rate in excess of NOK 4,200 including value added tax. I have arrived at the conclusion that the necessary costs before the Supreme Court are to be set to NOK 1,200,000 including value added tax. I do not attach decisive importance to the fact that also RiksTV's counsel has submitted a high cost statement.

(76) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. RiksTV AS shall pay to TONO SA costs before the Supreme Court in the amount of 1,200,000 – one million two hundred thousand – Norwegian kroner within 2 – two – weeks of the service of this judgment.

(77) Justice **Normann:** I agree with the justice delivering the lead opinion, in all material aspects and with her conclusion

(78) Justice **Bergh:** Likewise

(79) Justice **Bergsjø:** Likewise

(80) Justice **Indreberg:** Likewise

(81) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. RiksTV AS shall pay to TONO SA costs before the Supreme Court in the amount of 1,200,000 – one million two hundred thousand – Norwegian kroner within 2 – two – weeks of the service of this judgment.

True transcript certified: