SUPREME COURT OF NORWAY

J U D G M E N T

given on 12 June 2023 by a division of the Supreme Court composed of

Justice Kristin Normann
Justice Knut H. Kallerud
Justice Cecilie Østensen Berglund
Justice Knut Erik Sæther
Acting Justice Magni Elsheim

HR-2023-1077-A, (case no. 22-163505SIV-HRET)
Appeal against Borgarting Appeal's judgment 19 September 2022

TONO SA	(Counsel Magnus Hauge Greaker)
v.	
The Oslo Philharmonic Foundation	(Counsel Are Stenvik)

(1) Justice **Sæther:**

Issues and background

(2) The case concerns the compensation owed by Oslo Philharmonic to TONO SA for the performance of music in concerts.

(3) Composers who are authors of musical works have an exclusive right to dispose of the work, see sections 2 and 3 of the Copyright Act. Exceptions are possible, but in practice, all Norwegian composers are members of TONO SA, a cooperate society that manages the exclusive rights of its members to dispose of musical works by producing copies thereof and making them available to the public. TONO SA, hereafter referred to as TONO, has 62 employees and grants licences for public performance of protected music and collects fees to pay out to its members. The organisation has more than 35,000 Norwegian members and manages the rights of three million foreign rightholders through mutual agreements with similar organisations in other countries. In 2021, total payments to TONO amounted to approximately NOK 884 million, of which NOK 44 million came from concert revenues.

(4) The Oslo Philharmonic Foundation, hereafter Oslo Philharmonic, is a symphony orchestra of international renown, with 108 employed musicians and an administration of 20 persons. The orchestra's main venue is Oslo Concert Hall, where the orchestra holds 60–70 concerts each year in addition to touring in Norway and abroad. Oslo Philharmonic performs both copyrighted and non-copyrighted musical works. Its annual operating costs ranged between NOK 174 and 193 million from 2017 to 2021. Government grants during the same period amounted to between NOK 160 and 185 million, equalling between 80 and 94 percent of the orchestra's total income. Ticket revenues amount to approximately NOK 20 million per year.

(5) Public performance of copyrighted music requires an agreement with TONO. Normally, remuneration is determined according to the so-called concert tariff. The tariff is structured so that the concert organiser applies for a licence from TONO to perform protected music before the event, and – after the concert has been held – gives information about ticket revenues and attendance figures. Compensation is generally calculated based on gross box office takings per concert. For a long time, the amount of protected music featuring in the performances held no significance in determining the compensation, but in 2022 the terms were changed so that the compensation is reduced accordingly if parts of the concert programme is not protected. Moreover, following a change in 2021, the tariff stipulates that TONO may take into account economic support in the form of government grants when calculating the compensation. If no protected music at all is performed, no compensation is paid to TONO.

(6) The concert tariff is thus the standard model for calculating compensation for the performance of copyrighted music. For decades, however, TONO has had special agreements with Oslo Philharmonic, Bergen Philharmonic, Trondheim Symphony Orchestra & Opera, and Stavanger Symphony Orchestra in replacement of the concert tariff. An agreement was made in 1984 that these four orchestras, often referred to as "the big four", needed prior approval to organise concerts featuring TONO's repertoire in exchange for an annual fee based on a share of the orchestras' total income: 1.2 percent for each of Oslo Philharmonic and Bergen Philharmonic and 0.8 percent for the other two. In 1996, the parties abandoned a percentage-based model in favour of a fixed, indexed amount. For Oslo Philharmonic, this amount was NOK 663,753 in 1996, corresponding to 1.2 percent of the orchestra's total income in 1995.

The orchestra submitted annual reports on the works they had performed to give TONO a basis for distributing payments to the rightholders. The agreement was effective one year at a time and was automatically renewed unless terminated with 15 months' notice.

(7) TONO terminated the agreement with Oslo Philharmonic in 2014, with effect from 2016. The termination was due to TONO's wish to make more concert organisers convert to the same model as the big four, but negotiations failed. TONO and Oslo Philharmonic also failed to reach a new agreement. Since 2016, Oslo Philharmonic has paid fees according to the concert tariff, but TONO finds this compensation to be too low.

(8) In April 2021, TONO brought an action against Oslo Philharmonic demanding fair compensation for public performances of copyrighted musical works managed by TONO. TONO requested retroactive payment for the years 2018–2020 and that compensation going forward be calculated under a different model than the concert tariff. Oslo Philharmonic responded that the foundation is only obliged to pay fees according to the concert tariff, aligned with the amount of protected works performed.

(9) By judgment of 3 September 2021, Oslo District Court ruled in favour of Oslo Philharmonic both in TONO's main claim and in Oslo Philharmonic's counterclaim:

> "1. The District Court rules in favour of the Oslo Philharmonic Foundation in TONO SA's claim.
>
> 2. From the date of this judgment, the Oslo Philharmonic Foundation is to pay TONO SA's standard concert tariff for its own physical concerts, adjusted in accordance with amount of the performed musical works managed by TONO SA.
>
> 3. TONO SA is to compensate Oslo Philharmonic's costs of NOK 1,161,662.50."

(10) TONO appealed to Borgarting Court of Appeal, which, by judgment of 19 September 2022, dismissed the appeal and awarded costs to Oslo Philharmonic.

(11) TONO has appealed to the Supreme Court, invoking an error of law. The claim in the Supreme Court has been changed in accordance with the claim in the District Court and the Court of Appeal. Point 2 of the claim now includes a more detailed specification of how the compensation should be calculated. During the appeal hearing, an alternative claim was also made, seeking TONO's release from the counterclaim supported by the District Court and the Court of Appeal that Oslo Philharmonic is only obliged to pay compensation according to the concert tariff. Apart from that, the case stands as in the Court of Appeal.

The parties' contentions

(12) The appellant – TONO SA – contends:

(13) Oslo Philharmonic is obliged to pay fair compensation for the performance of copyrighted music. The concert tariff does not provide fair compensation, and the calculation model presented in point 2 of the claim must be applied instead. The calculation must take all income into account, including the government grant, which is a prerequisite for the concert activities.

(14) Provided that the government grant can be considered, TONO's claim for fair compensation is based on objective and non-discriminatory criteria as required by law. The criteria enable verification of whether the requirement of equal treatment is met, and the same criteria will be applied to licensing terms offered to concert organisers in the same position as Oslo Philharmonic. Therefore, there is no unjustified differential treatment.

(15) TONO SA asks the Supreme Court to rule as follows:

> "1. For the right to perform musical works managed by TONO SA at its own physical concerts from 1 January 2018 to 31 December 2020, the Oslo Philharmonic Foundation is, within two weeks of the service of the judgment, to compensate TONO SA by NOK 1,694,083 plus default interest from 30 June 2021 until payment is made.
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> 2. For 2021 and each year forward, the compensation owed by the Oslo Philharmonic Foundation for the right to perform musical works managed by TONO SA at its own physical concerts is set at an annual amount constituting 0.55 percent of the Oslo Philharmonic Foundation's ticket revenues and government grant awarded in the relevant year. The 0.55 percentage is based on the assumption that the Oslo Philharmonic Foundation's performances of musical works managed by TONO SA amount to 1800 minutes each year, constituting at least 1/3 of the Oslo Philharmonic Foundation's total performances of musical works in the relevant year. The 0.55 percentage is to be adjusted proportionally up or down if the performances of musical works managed by TONO SA amount to more or less than 1800 minutes. Furthermore, the 0.55 percentage at 1800 minutes is to be further reduced if the Oslo Philharmonic Foundation's performances of musical works in the relevant year exceed 5400 minutes, so that the 0.55 percentage is reduced by 0.01 percent for each interval of 100 minutes exceeding 5400 minutes (i.e. if the total performances fall between 5401og 5500 minutes, the percentage will be 0.54, if between 5501 and 5600 minutes, the percentage will be 0.53 percentage etc.).
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> 3. In the alternative (if point 2 does not succeed): The Court finds in favour of TONO SA in the Oslo Philharmonic Foundation's counterclaim that the Oslo Philharmonic Foundation from the date of the judgment is only to pay compensation calculated according to TONO AS's ordinary concert tariff.
>
> 4. TONO SA is awarded costs in the District Court, the Court of Appeal and the Supreme Court."

(16) The respondent – *Oslo Philharmonic* – contends:

(17) The Court of Appeal has based its ruling on a correct understanding of what constitutes fair compensation when the government grant is excluded from the calculation basis. The government grant is not influenced by the amount of protected musical works performed at the concerts, and there is no connection between the grant and the use of protected works.

(18) TONO's model for calculating compensation in point 2 of its claim does not meet the legal requirement of objective and non-discriminatory criteria and licensing terms. The percentage and adjustment factors are so discretionary that it is not possible to verify whether the equal treatment requirement is met. There is no reason to treat Oslo Philharmonic any differently than many other concert organisers receiving government grants.

(19) Oslo Philharmonic asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. Oslo Philharmonic is awarded costs in the Supreme Court."

My opinion

The law

(20) The parties are in dispute over the compensation owed by Oslo Philharmonic to TONO for the performance of copyrighted music in its concert activities. The question is whether the licensing terms meet the requirements in section 28 of the Collective Management of Copyright Act, stating that the terms must be based on objective and non-discriminatory criteria, and whether the compensation for licensed use is fair.

(21) According to section 2 subsections 1 and 2 (d) of the Copyright Act, the author of a musical work holds copyright to it. According to section 3 subsection 1 (b), the copyright gives an exclusive right to dispose of the musical work by making it available to the public, for example by performing it publicly, see subsection 2 (c). The copyright subsists during the author's lifetime and 70 years after year of the author's death, see section 11.

(22) The purpose of the Copyright Act is to regulate the author's rights to "maintain a fair balance between the rightholders' interests and the interests of the users and the public, so that literary, scientific and artistic works, and related performances and works, can be used where this is reasonable from a societal perspective", see section 1 (b). According to section 1 (c), the Act is also to "facilitate the entry into of agreements on the use of copyrighted works…". If such an agreement is entered into, the author is entitled to fair compensation from the acquirer, see section 69 subsection 1. The same follows from non-statutory principles. National legislation cannot interfere with the right to fair compensation, see Article 11 bis (2) of the Bern Convention for the protection of for the Protection of Literary and Artistic Works.

(23) In many areas, it is neither practically possible nor economically viable for a rightholder to manage the rights himself. The rightholder may therefore choose to have a collective management organisation manage the rights for him. Such *collective management* includes issuing licences and entering into agreement with the users, collecting fees for the use, distributing payments to the rightholders and enforcing any unlicensed use. Most countries have collective management organisations for musical works. In Norway, TONO has this task.

(24) Collective management of copyright is effective in reducing transaction costs and strengthening the rightholder's position. However, collective management organisations often assume a dominant position towards both rightholders and users. In Norway, the need of regulation arising from this is covered by the Collective Management of Copyright Act, adopted in 2021.

(25) The purpose of the Act is, according to section 1, to ensure that collective management of copyright "takes place in a responsible, effective and transparent manner towards both rightholders and users". The Act implements into Norwegian law Directive 2014/26/EU on collective management of copyright and related rights, often referred to as the CRM Directive.

(26) To mitigate the consequences of the dominant position of the management organisations, the CRM Directive and the Act codify competition law principles and create a legal framework for the licensing terms, see section 2.3 of the Directive proposal COM/2012/0372 and Proposition to the Storting 53 L (2020–2021), page 83. Sources of competition law, such as the case law of the EU Court of Justice (ECJ) related to Article 102 of the Treaty of the Functioning of the European Union regarding the prohibition of abuse of a dominant position and discriminatory terms, see Article 54 of the EEA Agreement, are therefore relevant to the interpretation and application of the law. As for the issues raised in this case, there is no case law from the ECJ directly applicable to the interpretation of the CRM Directive.

(27) The Collective Management of Copyright Act contains mandatory provisions for collective management organisations for the determination of licensing terms. Among them is section 28, which is central to the case at hand. The provision reads:

> "The licensing terms shall be based on objective and non-discriminatory criteria. The compensation for licenced use shall be fair. When assessing whether the compensation is fair, regard must be had to whether the tariffs are reasonable to, inter alia, the economic value of the use, taking into account the nature and scope of the use, and the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs."

(28) The provision implements parts of Article 16 (2) of the CRM Directive. Section 28 first sentence of the Collective Management of Copyright Act stipulates that the licensing terms – including the compensation required for the use – must be based on objective and non-discriminatory criteria. The compensation claimed by the collective management organisation for the use, must be fair, see the second sentence. The third sentence states which factors to consider in this assessment. By the users being informed under section 28 fourth sentence of the criteria for determining the compensation, they have a basis for assessing whether it is fair, see Proposition to the Storting 53 L (2020–2021), page 157.

(29) As mentioned, the right to fair compensation also follows from section 69 of the Copyright Act, which contains mandatory provisions on rights and revision for original rightholders, and from non-statutory principles. The parties agree that there is no contradiction between these legal bases.

(30) The parties disagree on what it takes for the compensation to be fair under section 28 the second sentence, and over whether TONO's new compensation model meets the requirements of objectivity and equal treatment in the first sentence. Like the Court of Appeal, I will base my assessment on section 28 first sentence.

The requirement of objective and non-discriminatory criteria and licensing terms

(31) Section 28 first sentence thus lays down two basic requirements for the criteria used to determine the compensation and other licensing terms: A requirement of objectivity and a requirement of equal treatment. To which I will return, there is a close link between them. The core of the assessments is nonetheless different.

(32) The objectivity requirement is explained as follows in the preparatory works, see Proposition to the Storting 53 L (2020–2021), page 156:

> "The requirement of objective terms implies that a collective management organisation, when drafting the licensing terms, must use criteria that are verifiable and relevant to the individual licence. For example, this applies to the calculation of the fee. The organisation is thus obliged under the provision to justify its licensing terms and fee mechanisms in an objective manner. If the fee is determined in a way that has no connection whatsoever with the use of the protected material, the terms can hardly be said to be based on objective criteria. For example, fee models based on general turnover may be considered to violate the provision if other more accurate methods for registering the use of works and the audience are available and usable without disproportionately increasing administrative costs."

(33) I gather from this that the objectivity requirement has two aspects: Firstly, the criteria on which the licensing terms are based must be formulated so accurately that they allow users and courts to *examine and verify* how the compensation is determined. This limits how abstractly and discretionary the criteria can be formulated, and it may be necessary to account for the method used for stipulating the fee. For example, if the management organisation requires a certain percentage of the turnover or applies a different specific fee, this must be justified, see the Proposition page 157.

(34) The second aspect of the objectivity requirement is that the criteria must be relevant. This means that there must be coherence between the economic value of the use and the determination of the fee. A compensation model may be unlawful if other and more accurate methods are available, provided that these do not lead to a disproportionate increase in the management costs. This is also supported by ECJ case law, see judgment of 25 November 2020 in Case C-372/19 SABAM paragraph 52.

(35) The requirement of equal treatment is specified as follows in Proposition 53 L (2020–2021), page 157:

> "The prohibition of non-discriminatory terms means that the organisation is obliged to offer similar licensing terms in equal agreement situations. It may also imply that various situations must be handled differently. Thus, the organisation cannot demand different fees from the users or give a user benefits that another user is denied, without a justifiable basis. Normally, a comparison must be made to determine whether there are differences between the agreement situations that may justify the use of different licensing terms."

(36) I understand this to mean that a three-part assessment must be carried out when deciding whether the requirement for equal treatment has been met. If so, the question is whether the organisation has applied criteria that differ from those now offered to the user and whether this constitutes a difference of significance. If so, it is required that the differential treatment be objectively justified.

(37) The approach recommended in the preparatory works is consistent with case law from the ECJ, for example judgment of 11 December 2008 in Case C-52/07 *Kanal 5 and TV4* and Case C-372/19 *SABAM*.

(38) The requirement of objectivity and the requirement of equal treatment are closely related: Objective – meaning verifiable – criteria are a prerequisite for determining whether the requirement for equal treatment is met, and any differential treatment must be objectively justified. In many cases, discriminatory criteria will also be in violation of the requirement of

objective criteria. These two fundamental requirements must therefore be considered in context.

Individual assessment

(39) I base my individual assessment on the concert tariff being the standard model for calculating compensation for the use of protected musical works in concert activities. According to its wording, the concert tariff applies as a starting point to all concert organisers, including those receiving government grants. In 2021, a footnote was added to the tariff stating that "[i]f the concert organiser receives financial support in the form of government grants, TONO may include this in the basis for calculating compensation".

(40) It has not been disclosed to the Supreme Court whether government grants after the 2021 amendment are included in the calculation of compensation for concert organisers other than Oslo Philharmonic. It is clear that the concert tariff as it read prior to the amendment has been used in transactions comparable to the one TONO wishes to complete with Oslo Philharmonic. Many other Norwegian concert organisers are also largely funded by government grants, see Proposition 1 S (2020–2021), page 78 et seq., and this tariff has then been used. TONO's services and costs of providing them are the same for Oslo Philharmonic as for many other concert organisers, which is also the case for this organiser's use of the licensed rights.

(41) It must also be assumed that the criteria behind the licensing condition in point 2 of TONO's claim differ from the concert tariff – in terms of the calculation basis, percentage and adjustment factors. The final sum is also different. The compensation under the licensing condition applicable to Oslo Philharmonic clearly exceeds the compensation according to the concert tariff. This is illustrated by point 1 of the claim, constituting the difference between the compensation paid under the concert tariff and what is required according to the calculation method on which point 2 of the claim is based. For 2018–2020, the difference amounts to nearly NOK 1.7 million.

(42) If, in this comparison, one considers the amendment to the concert tariff allowing government grants to be included in the calculation of compensation, the deviation from the criteria behind point 2 is likely to be smaller. However, whether there will be a difference and the significance thereof cannot be determined precisely – the footnote is too vaguely formulated. It does not meet the objectivity requirement and has no significance when comparing the criteria for the calculation of compensation.

(43) In my view, the Act cannot – as argued by TONO – be interpreted to mean that differences between calculation methods are only relevant if the criteria makes one party less favourable in *the competition* with other users. Based on the protective purpose behind section 28 it, it is sufficient that the inequality leads to a significant extra economic burden for the user for whom the compensation is being calculated. I refer to Proposition to the Storting 53 L (2020–2021) page 83, stating that although the Collective Management of Copyright Act codifies elements from competition law, we are dealing with two independent sets of rules.

(44) Against this background, I have concluded that TONO treats Oslo Philharmonic differently than other concert organisers. It is therefore decisive whether there is an objective justification for this differential treatment.

(45) TONO has stated that the criteria forming the basis for the licensing condition in point 2 of the contention relate to two factors: One must consider the government grant in addition to Oslo Philharmonic's box office takings, as the latter relate to the concert performances, and the compensation must be reasonably proportionate to the use of works managed by TONO.

(46) The concert tariff as it is drafted, primarily basing the compensation on box office takings, provides a more accurate calculation basis than a model that includes government grants, without resulting in disproportionately high administrative costs. As such, the concert tariff is generally better aligned with the guideline in the preparatory works that the most accurate calculation model is preferable.

(47) Nonetheless, it cannot be ruled out that a model including government grants can be justified to meet the requirements of section 28 first sentence. As set out in the ECJ judgment in Case C-52/07 *Kanal 5 and TV 4* paragraph 47, this must be assessed on an individual basis, considering the purpose of the user's services and the method of financing them. However, I see no reason to carry out such an assessment. The criteria forming the basis for the compensation that TONO is claiming from Oslo Philharmonic are in any case too general and discretionary to justify differential treatment.

(48) The only reason TONO gives for the differential treatment is that government grants should be emphasised in determining the compensation. However, this criterion does not indicate which types of government grants to include, how large the grant must be before it becomes relevant for other concert organisers receiving government grants, or which principles apply to the further calculation of compensation. The licensing conditions in point 2 of the claim are largely based on individual assessments related to particular aspects of Oslo Philharmonic's concert activities. Although the conditions are detailed, they do not give any reason for the differential treatment. I agree with the Court of Appeal that equal treatment is not achieved solely by deciding that government grants are to be included in the compensation model. This also requires explanatory and verifiable criteria for the government grant's effect on the calculation of compensation.

(49) Since I have concluded that the requirements of objectivity and equal treatment in section 28 first sentence are not met, the appeal must be dismissed. It is then unnecessary for me to consider whether the compensation claimed by TONO is fair, as required by section 28 second sentence.

(50) Against this background, point 3 of TONO's alternative claim can also not succeed. Thus, I will not consider whether the concert tariff may be modelled to include government grants. This presupposes that the tariff is modelled to meet the requirements of section 28. TONO has – within the framework of the law – the freedom to decide the manner in which the compensation should be calculated and its size.

Conclusion and costs

(51) I have concluded that the criteria forming the basis for the licensing terms that TONO claims should apply to Oslo Philharmonic instead of the concert tariff, do not meet the requirements of objectivity and equal treatment in section 28 first sentence of Collective Management of Copyright Act. The appeal must therefore be dismissed.

(52) Oslo Philharmonic is entitled to compensation for its costs in the Supreme Court according to the main rule in section 20-2 subsection 1 of the Dispute Act. I see no reason to make an exception. The foundation has claimed costs of NOK 689,312, including VAT. The costs appear necessary, see section 20-5 subsection 1 of the Dispute Act.

(53) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. TONO SA is to compensate Oslo Philharmonic's costs in the Supreme Court of NOK 689,312 within two weeks of the service of the judgment.

(54) Justice **Kallerud:** I agree with Justice Sæther in all material respects and with his conclusion.

(55) Justice **Østensen Berglund:** Likewise.

(56) Acting Justice **Elsheim:** Likewise.

(57) Justice **Normann:** Likewise.

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

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