



THE SUPREME COURT OF NORWAY

On 15 November 2017, the Supreme Court gave judgment in

HR-2017-2165-A, (case no. 2017/542), civil case, appeal against judgment

Kari og Kjell Aukrusts stiftelse -
Aukruststiftelsen [Kari and Kjell
Aukrust's foundation – the Aukrust
Foundation]

(Counsel Are Stenvik)

Hunderfossen Familiepark AS

(Counsel Aslak Runde, applicant for
permission to practice before the Supreme
Court)

v.

Caprino Filmcenter AS

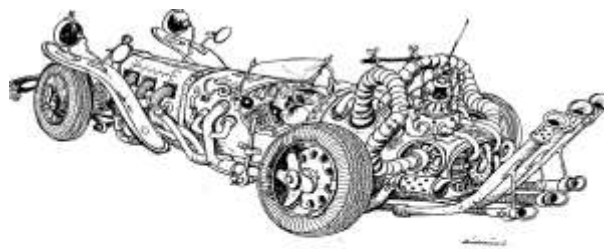
(Counsel Rune Ljostad
Counsel Tage Brigte A. Skoghøy, applicant
for permission to practice before the
Supreme Court)

V O T I N G :

- (1) Justice **Ringnes**: The case concerns the copyright in the fantasy car Il Tempo Gigante, which is used in the film *Flåklypa Grand Prix* [Pinchcliffe Grand Prix], and it raises issues in particular with regard to the protection of adaptation of works under the Copyright Act section 4 subsection 2.
- (2) Kjell Aukrust (1920-2002) was an artist and a writer. He was primarily an illustrator, and the interaction between text and drawing was a central aspect of his creative work. In the 1950s, he created what was later known as the *Flåklypa universe*, an environment of rich characters and burlesque humour. This universe was part of his artistic work through several decades.
- (3) Kari and Kjell Aukrust's foundation – the Aukrust Foundation – is a non-profit foundation that has acquired and manages the copyrights in Kjell Aukrust's work.

The Foundation's income is allocated to the operation of the Aukrust Centre, owned by the municipality of Alvdal.

- (4) Ivo Caprino (1920-2001) was a director, animator and producer of films, including stop-motion animation films. He made a number of puppet films, among them *Karius and Baktus* based on Thorbjørn Egner's tale, and films from the 1960s based on Norwegian folk tales. *Flåklypa Grand Prix* is regarded as his biggest success.
- (5) Caprino Filmcenter AS manages its own copyrights and the copyrights after Ivo Caprino.
- (6) Ivo Caprino and Kjell Aukrust met in 1969, and they agreed to cooperate on a TV series for NRK [the Norwegian Broadcasting Corporation]. The project was named *Flåklypa Radio Norway*, and the story was set to the Flåklypa universe. Aukrust was the scriptwriter. He reused drawings and other elements from his earlier artistic production, among them the drawing of a fantasy racing car, which had previously been published in *Adresseavisen* under the name Reodor V-20, and in *Mannskapsavisa* under the name Il Tempo Spontane. In the script, Aukrust named the car Il Tempo Gigante. In the case at hand, the drawing is referred to as *drawing A*. This version, which has the car's name under it, is taken from the script of *Flåklypa Radio Norway*:



(Reodor Felgens racerbil: "Il tempo Gigante")

- (7) During the production of the TV series, a model of the car was built by Bjarne Sandemose at Caprino Filmcenter at Snarøya, outside of Oslo. In the case at hand, the model is referred to as the *film car*. In connection with this work, Aukrust made several drawings of the car that were included in scenarios and scripts.
- (8) The film car was more or less finished in 1971 when it was presented in the NRK talk show *Lørdagskveld med Erik Bye* [Saturday Night with Erik Bye]. The finished film car looks like this:

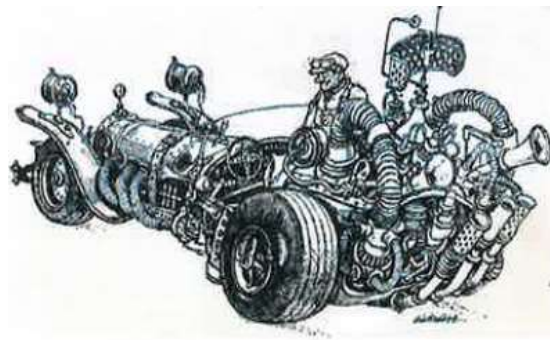


- (9) Bjarne Sandemose was employed at Caprino Filmcenter and is described as a virtuoso and a brilliant designer. He owned a stock of rarities that he used to recreate the car from Kjell Aukrust's drawing into a two-meter long model in brass. An article in *Fædrelandsvennen* from 1975 sets out:

"... And worst of all: Practically not a single part used to create this fierce vehicle was purchased when Sandemose, upon Kjell Aukrust's wild instructions, started the construction and building of it.

He just went down to his basement at home and found what he needed."

- (10) NRK was not satisfied with the TV series, and the project was cancelled. Caprino and Aukrust then agreed to make a full-length puppet film using the same puppets, models and even parts of the script made in connection with the TV project. The film was named *Flåklypa Grand Prix*. A production agreement was entered into under which Kjell Aukrust licensed Caprino Filmcenter "to use the Flåklypa universe and its characters as puppets in FGP [Flåklypa Grand Prix]".
- (11) Aukrust also drew the racing car in a form referred to as *drawing B* in the case at hand. The court of appeal has assumed that the drawing was made after the film car had been finished, and that it was drawn as a film prop. Later, drawing B was presented in Kjell Aukrust's book *Flåklypa Tidende 5. årgang* [Flåklypa News 5th edition], published in 1975.
- (12) A copy of drawing B, also including the character Reodor Felgen [Theodore Rimspoke], was donated to the National Gallery in 1987 as a gift from Aukrust.
- (13) Drawing B looks like this:



- (14) The filming commenced in the autumn of 1972. The credit title presents Ivo Caprino as the director, clipper and animator, Kjell Aukrust as the creator of the environment and the characters and Bjørn Sandemose as the constructor of the models and the wings and as the technical supervisor.
- (15) *Flåklypa Grand Prix* premiered in 1975 and became a tremendous success. It holds the record as the most seen Norwegian film of all time, selling about 5.5 million cinema tickets. *Flåklypa Grand Prix* has been translated into 13 languages and showed in 30 countries. The film was later digitalised and relaunched for cinema and DVD, and it comes in the form of a video game and as many spin-off products. For marketing purposes, a full-scale version of the movie car was also made.

- (16) In 1984, an extensive cooperation was initiated between the theme park Hunderfossen Familiepark AS and Ivo Caprino. Hunderfossen was originally a camping site with a playground. In close cooperation with Ivo Caprino, the area was developed into a fairytale park. Caprino was to be the artistic supervisor of tableaux and decorations and hold the copyright in trolls, sculptures, puppets, wings and tableaux. The right of ownership and the maintenance were to be shared equally between the parties. The full-scale version of *Il Tempo Gigante* was exhibited in a separate glass garage.
- (17) Caprino Filmcenter received a royalty from the ticket sales. Ivo Caprino was a minority shareholder of Hunderfossen and a board member until his death in 2001. Hunderfossen is one of the largest theme parks in Norway.
- (18) After the death of Ivo Caprino, his son Remo Caprino took his place on the board. It turned out that the parties no longer had common interests. In 2003, an agreement was entered into to terminate most of the cooperation, and the parties agreed that the full-scale version of *Il Tempo Gigante* was to be exhibited for a limited period time at Hunderfossen in return for a seasonal rent.
- (19) In 2008, Hunderfossen contacted Caprino Filmcenter expressing a wish to use *Il Tempo Gigante* as a more general attraction. Negotiations in this regard were held from the winter of 2008 until April 2011. The parties did not reach an agreement. From April 2011 until and including the summer season of 2013, the cooperation was limited to the seasonal renting of the full-scale version of *Il Tempo Gigante*.
- (20) In the winter of 2011, the cooperation with Caprino Filmcenter was approaching an end, and Hunderfossen contacted the Aukrust Foundation with a view to cooperate. This resulted in an agreement in September 2013, under which Hunderfossen was licensed, among other things, to "build an outdoor railway rollercoaster with an *Il Tempo Gigante*-inspired vehicle, based on KA's [Kjell Aukrust's] original drawings".
- (21) In November 2013, Hunderfossen notified Caprino Filmcenter of its plans for the attraction and of the cooperation with the Aukrust Foundation. Caprino Filmcenter opposed the plans for a rollercoaster, claiming that it would infringe Caprino Filmcenter's copyright in the film car.
- (22) The rollercoaster was produced in Germany and made ready for the opening of the theme park in the spring of 2014. It was named *Il Tempo Extra Gigante* and is a 13-meter long carriage with 14 seats:



- (23) Caprino Filmcenter brought an action against Hunderfossen in October 2014. A claim was made for declaratory judgment stating that Il Tempo Extra Gigante is an infringement of Caprino Filmcenter's copyright in the film car Il Tempo Gigante, and that Hunderfossen violated the Marketing Control Act section 30 and/or section 205 when marketing and selling the attraction. Compensation and damages were also claimed.
- (24) The Aukrust Foundation joined the proceedings as a party pursuant to the Dispute Act section 15-3.
- (25) On 16 October 2015, Sør-Gudbrandsdal District Court gave judgment concluding as follows:

- "1. Judgment is given in favour of Hunderfossen Familiepark AS.**
- 2. Kari and Kjell Aukrust's foundation – the Aukrust Foundation is the sole copyright holder of the said drawing B.**
- 3. Kari and Kjell Aukrust's foundation – the Aukrust Foundation is entitled to allow Hunderfossen Familiepark AS to manufacture and exhibit the attraction Il Tempo Extra Gigante without the consent of Caprino Filmcenter AS.**
- 4. Kari and Kjell Aukrust's foundation – the Aukrust Foundation is discharged from Caprino Filmcenter AS's claim.**
- 5. Caprino Filmcenter AS is to pay costs as follows:**

To Hunderfossen Familiepark AS: NOK 993,175

– ninehundredandninetythreethousandonehundredandseventyfive

To Kari and Kjell Aukrust's foundation – the Aukrust Foundation: NOK 1,769,094

– onemillionsevenhundredandsixtyninethousandandninetyfour

Time for performance is 2 – two – weeks from the serving of the judgment.
- 6. Caprino Filmcenter AS is to pay the court costs for expert judges."**

- (26) The district court had called expert lay judges. In the issue of infringement, the court concluded that the protected adaptation in the film car is related to the car's general artistic look and finish. In the district court's view, these features are not found on Il Tempo Extra Gigante. The district court also held that the title Il Tempo Gigante was created by Kjell Aukrust.
- (27) The district court concluded that Hunderfossen had not violated the Marketing Control Act, and that neither Hunderfossen nor the Aukrust Foundation had breached the duty of loyalty in contractual relationships.
- (28) Caprino Filmcenter brought an appeal to the court of appeal concerning the district court's application of the law and the assessment of evidence.

- (29) Eidsivating Court of Appeal gave judgment on 9 January 2017 concluding as follows:
- "1. **Il Tempo Extra Gigante is an infringement of Caprino Filmcenter AS's copyright in the film car Il Tempo Gigante from the film Flåklypa Grand Prix.**
 2. **Hunderfossen Familiepark AS is prohibited from selling and marketing the rollercoaster attraction named Il Tempo Extra Gigante without the consent of Caprino Filmcenter AS.**
 3. **Kari and Kjell Aukrusts Foundation – the Aukrust Foundation and Hunderfossen Familiepark AS are jointly and severally liable for compensation to Caprino Filmcenter AS for the use of Il Tempo Extra Gigante in the rollercoaster attraction.**
 4. **Drawing B is neither an independent work nor an adaptation of a work under the Copyright Act section 4.**
 5. **Kari and Kjell Aukrust's Foundation - the Aukrust Foundation and Hunderfossen Familiepark AS are jointly and severally and within 2 – two – weeks from the serving of the judgment to pay Caprino Filmcenter AS's costs before the court of appeal of NOK 2,310,064 – twomillionthreehundredandtenthsixtyfour.**
 6. **Kari and Kjell Aukrust's Foundation - the Aukrust Foundation and Hunderfossen Familiepark AS are jointly and severally and within 2 – two – weeks from the serving of the judgment to pay Caprino Filmcenter AS's costs before the district court of NOK 3,653,864 – threemillionsixhundredandfiftythreethousandandfiftyfour.**
 7. **Kari and Kjell Aukrust's Foundation – the Aukrust Foundation and Hunderfossen Familiepark AS are to pay costs for the expert lay judges in the district court."**
- (30) The court of appeal, which had not called expert lay judges, was split in its view on the infringement issue. The majority found that it is the film car's general appearance that constitutes the copyright in Bjarne Sandemose's adaptation of Aukrust's original work – drawing A, and that Il Tempo Extra Gigante is an infringement of this adaptation. The majority further concluded that Caprino Filmcenter had not suffered any economic loss from the infringement, but that the company was entitled to a royalty.
- (31) The court of appeal unanimously concluded that Aukrust's drawing B was not sufficiently original and that Caprino Filmcenter had acquired Bjarne Sandemose's copyright by virtue of the employment. The majority concluded that the Aukrust Foundation could not use the title Il Tempo Gigante without the consent of Caprino Filmcenter.
- (32) The minority concluded, on the same grounds as the district court, that Il Tempo Extra Gigante is not a copyright infringement. The minority further concluded that Il Tempo Extra Gigante could not be prohibited, neither under marketing law nor under contract law.

- (33) As regards the title, the minority held that *Il Tempo Extra Gigante* was not likely to cause confusion with *Il Tempo Gigante* pursuant to the Copyright Act section 46.
- (34) The Aukrust Foundation and Hunderfossen have appealed the judgment to the Supreme Court. The appeal concerns the application of the law.
- (35) The Supreme Court's Appeal Selection Committee granted leave to the appeal on 16 May 2017. However, the hearing before the Supreme Court was limited so that the alternative submissions in the respondent's claims, i.e. the claims based on contract law and violation of provisions in the Marketing Control Act, are not subject to hearing in the Supreme Court at this stage. If the appellants succeed in their claim that no infringement has taken place with regard to Caprino Filmcenter's rights under the Copyright Act, the court of appeal's judgment must be set aside in whole or in part, and a continued hearing of the alternative submissions must be held before the court of appeal.
- (36) The appellants – *Kari and Kjell Aukrust's Foundation – the Aukrust Foundation and Hunderfossen Familiepark AS* – have mainly contended:
- (37) The court of appeal's application of the law is wrong on three points: First, when identifying the protected adaptation in the film car, see the Copyright Act section 4; second, when assessing the transfer of the copyright from Bjarne Sandemose to Caprino Filmcenter; and third, when interpreting the rule on protection of title set forth in the Copyright Act section 46.
- (38) In a correct interpretation of the Copyright Act section 4, the legal conclusions will also be correct: *Il Tempo Extra Gigante* is not an infringement of the right in the adaptation of Kjell Aukrust's original work. The Aukrust Foundation is also the sole copyright holder of drawing B.
- (39) This result may be based on the court of appeal's findings of facts, and the appeal concerning the application of the law gives room for elaboration by use of facts from the district court's judgment.
- (40) What is protected for Sandemose's part in the film car is its artistic design – the film car's refined expression and high level of finish, as concluded by the district court and the minority of the court of appeal. These features are not found on *Il Tempo Extra Gigante*.
- (41) The court of appeal is also wrong when concluding that Caprino Filmcenter, by virtue of the non-statutory rule on assignment of copyright in employment relationships, has acquired all of Sandemose's economic rights under the Copyright Act section 2.
- (42) Finally, the court of appeal has wrongly concluded that Caprino Filmcenter can prevent the Aukrust Foundation from using the title *Il Tempo Gigante*.
- (43) *Hunderfossen Familiepark AS* has held that the company derives its right from, and holds the same legal position as, the Aukrust Foundation. The dispute regarding the copyright in drawing B does not concern Hunderfossen. In all other respects, Hunderfossen supports the submissions of the Aukrust Foundation.

- (44) Hunderfossen has supplemented the submissions by referring to the court of appeal's incorrect emphasis on the market position of Il Tempo Gigante and the rollercoaster's references to the film car. Thus, the court of appeal has focused on aspects that are not relevant under the Copyright Act, but relevant for determining whether a product has been copied within the meaning of the Marketing Control Act.
- (45) Kari and Kjell Aukrust's foundation – the Aukrust Foundation has submitted this prayer for relief:
- "1. The court of appeal's judgment is to be set aside.
 2. **Caprino Filmcenter AS is to cover Kari and Kjell Aukrust's foundation – the Aukrust Foundation's costs in the Supreme Court."**
- (46) Hunderfossen Familiepark AS has submitted this prayer for relief:
- "1. The court of appeal's judgment is to be set aside.
 2. **Caprino Filmcenter AS is to cover Hunderfossen Familiepark AS's costs in the Supreme Court."**
- (47) The respondent – *Caprino Filmcenter AS* – has mainly contended:
- (48) The appellants are basing their arguments on disputed facts from the district court's judgment. When the appeal only concerns the application of the law, this cannot be done.
- (49) The court of appeal's application of the law is correct.
- (50) When assessing Caprino Filmcenter's joint copyright in the film car by virtue of Bjarne Sandemose's adaptation, the film car must be considered as a whole – as the majority of the court of appeal has correctly done.
- (51) There are clear distinctions between drawing A and the film car, both with respect to its artistic look and to a number of details. Sandemose has made several creative choices in his design, placement and combination of new elements in the car and in his forming of the car's general appearance. The copyright in the adaptation comprises all of this.
- (52) Among other things, he has added the "Caprino touch" – national-romantic, family-friendly and consciously naïve – which is clearly distinct from the "Aukrustesque".
- (53) Il Tempo Extra Gigante is an infringement of Caprino Filmcenter's copyright in the film car. The rollercoaster is too similar to the film car in terms of its artistic look, and the elements protected by copyright – including the general appearance – are all recognisable.
- (54) Alternatively, based on Aukrust's contributions during the building, one must assume that the car is a collective work, and that it cannot be issued in an adapted form without the consent of all authors, see the Copyright Act section 6 subsection 2.

- (55) Drawing B is a copy of the film car, and the copyright therein is held jointly by the Aukrust Foundation and Caprino Filmcenter.
- (56) The court of appeal's conclusion on the issue of assignment is correct. There was never any disagreement between Sandemose and his employer, and the circumstances both during the making of the car and later show that the parties agreed that Caprino Filmcenter was to hold all economic rights pursuant to the Copyright Act section 2.
- (57) In the alternative, it is submitted that the film car was the result of an artistic cooperation between Bjarne Sandemose and Ivo Caprino, and that Ivo Caprino is the joint author in the capacity of adapter.
- (58) The title Il Tempo Gigante is inextricably connected to the film car, and it cannot be distinguished as a separate work. Flåklypa Grand Prix was the first publication of the work that included the title. Caprino Filmcenter is thus entitled to prevent the Aukrust Foundation and Hunderfossen from naming the rollercoaster Il Tempo Extra Gigante, a name likely to cause confusion, see the Copyright Act section 46.
- (59) Caprino Filmcenter AS has submitted this prayer for relief:

"Principally:

- 1. The appeal is to be dismissed.**

In the alternative:

- 2. The appeal is to be dismissed as concerns items 1., 2., 3., 5., 6. and 7. of the conclusion of Court Appeal's judgment.**
- 3. Kari and Kjell Aukrusts foundation – the Aukrust Foundation and Caprino Filmcenter AS have both copyright in drawing B as referred to in the case at hand.**

In both cases:

- 4. Hunderfossen Familiepark AS and Kari and Kjell Aukrust's foundation – the Aukrust Foundation are - jointly - to cover the costs in the Supreme Court."**

- (60) My view on the case
- (61) *The issue of infringement*
- (62) The court of appeal has assumed that Bjarne Sandemose used Kjell Aukrust's *drawing A* as a model when building the film car Il Tempo Gigante. The film car is not a direct copy of the drawing. The parties agree that it is an *adaptation* of drawing A – the *original work* under copyright law – and that Sandemose added elements that are protected as adaptation, see the Copyright Act section 4.
- (63) The disagreement between the parties relates in particular to *what* in the film car is regarded as adaptation, and thus protected by copyright.

- (64) I will first discuss the copyright protection for adaptations and I start with the Copyright Act section 1 subsections 1 and 2, reading as follows:

"Any person who creates a literary, scientific or artistic work shall have the copyright therein.

By such a work is meant in this Act a literary, scientific or artistic work of any kind, irrespective of the manner or form of expression, such as..."

- (65) Next, examples of various types of work are listed in 13 items. Kjell Aukrust's drawing A and other works by his hand to which I will revert, are placed in the category "pictorial works", which according to item 7 includes "paintings, drawings, graphic and similar pictorial works". The most suitable category for the film car is as an article of artistic handicraft in item 10. Of particular importance to our case is item 13, stating that "translations and adaptations of the above-mentioned works" may qualify as works.
- (66) The Act's wording "Any person who creates a literary, scientific or artistic work" alludes to the requirement that the work must be *sufficiently original* in order to enjoy copyright protection. This threshold implies that the work must be an expression of the author's original intellectual efforts; it must be a result of an individual achievement that must have generated something that appears to be original, see the Supreme Court judgment in Rt-2013-822 para 40 (the Ambassador judgment) with further references. I will add that the term "original" in this context does not entail a requirement for novelty, but the work must have a certain level of individuality and creativity.
- (67) When assessing the originality, one must consider both single elements in the work and the work as a whole, see the Supreme Court judgment in Rt-2007-1329 (the Huldre in Kjosfossen judgment) para 45. An original combination of known elements may also qualify as sufficiently original, see the ambassador judgment para 44.
- (68) In recent years, the European Court of Justice has developed a general doctrine of originality, among others, in connection with the application of Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Infosoc Directive). The wording is that the work must be "original in the sense that it is the author's own intellectual creation", see the EU Court of Justice's judgment of 16 July 2009 in case C-5/08 *Infopaq International A/S v. Danske Dagbladets Forening* para 37. In our case, it is not necessary to address the case law of the European Court of Justice any further.
- (69) *Adaptation* exists when a new author creates a new version of an older work, so that the work in its new form is the result of artistic intellectual efforts by both the new and the old author.
- (70) The Copyright Act section 4 governs the protection of adaptation as follows:
- "Any person who translates or adapts a literary, scientific or artistic work or converts it into another literary or artistic form shall have the copyright in the work in that form, but may not dispose of it in such a manner as to infringe the copyright in the original work."**

- (71) The requirement for originality for which I have accounted, applies likewise to adaptations protected by copyright under section 4. The adapter must, as expressed by Rognstad in *Opphavsrett* [Copyright law], Oslo 2009, page 123:

"... have added such independent intellectual creativity to the result that it appears to be a work also by her hand. The changes made in the original work must in other words be sufficiently original. If she herself has not created a work when working with the original work, no adaptation has been made within the meaning of copyright law, but merely a copy – with possible legally insignificant changes or variations."

- (72) Thus, on one end of the scale, copyright protected adaptations are delimited from copies and changes resulting from technical work and handicraft. An example is when a drawing is to be displayed in a three-dimensional form and deviations from the drawing are required for technical or functional reasons.
- (73) On the other end, adaptations do not comprise new and independent works, i.e. works "standing on their own feet" with a distinct expression – an identity – distinguished from the original. I refer to section 4 subsection 1:

"The author may not object to other persons using his scientific, literary or artistic work in such a manner that new and independent works are created. The copyright in the new and independent work shall not be subject to the copyright in the work that has been used."

- (74) What distinguishes an adaptation from an independent work is, as I have mentioned, that it is related to an original work in such a way that "... the adapter creates its work practically 'on top' or 'inside' of a work created by a different author – for example translating or dramatising his novel", see Stuevold Lassen *Sameie i opphavsrett og opphavsrettslige 'naboretter'* [Joint ownership of copyright and 'neighbouring rights' under copyright law] in *Tidsskrift for Rettsvitenskap* [Law Journal] 1983, page 329. This interaction with the original work raises particular issues when the object of the adapter's copyright is to be clarified.
- (75) The wording in section 4 is that the adapter has the copyright in the work "*in that form*". The wording is not easily accessible, but read in context with section 1, the meaning is clear: The adapter acquires, in the same way as other authors, a copyright only in the work he himself has created. The adapter's copyright is thus limited to *the result of his artistic intellectual efforts*. Consequently, it must be determined what in the adaptation constitutes his intellectual product, and in doing so, the adaption must be set aside from the original work.
- (76) I will revert more specifically to this in my assessment of the court of appeal's application of the law.
- (77) Since the work in its adapted form – in our case *the film car* – also comprises the original work, the adapter's exploitation of the adaptation is dependent on the consent of the original author, see Rognstad, *op. cit.* page 124:

"The complication is that she has created a part of a greater whole. She cannot produce a copy of what she has created, or make it available to the public, without also exploiting the rest, which the author has created and in which he holds a copyright. Because even if she has adapted the work, she has

not, as Knoph said, thus expropriated the right of the original author. The adapter's copyright is thus dependent on the original author's copyright; she cannot exploit her own work without his consent."

- (78) However, there is a dependence also the other way around. The author cannot make a copy of, or make available to the public, his own work in the form given to it by the adapter without the adapter's consent.
- (79) This is the background for Caprino Filmcenter's submission that the rollercoaster *Il Tempo Extra Gigante* is a copy of Sandemose's work.
- (80) Based on what I have now said about the adapter's copyright under section 4, I will now turn to discussing the court of appeal's application of the law. In its assessment of what must be regarded as an adaptation protected by copyright, the majority of the court of appeal held:

"In its judgment page 43, the district court assumes that the 'assessment [is to] be limited to the elements in the film car that are recognised in *Il Tempo Extra Gigante*, because only these are relevant in the assessment of infringement. On page 46 of the judgment, the district court holds that 'in order identify Sandemose's creative contribution to the film car, the court must first consider what was Kjell Aukrust's contribution, and make a deduction for this', and on page 58: 'After the court has made a deduction for Kjell Aukrust's contribution to the film car, and then excluded the details in the film car that are not used in *Il Tempo Extra Gigante*, the elements remain in the film car that are relevant to the court's assessment of originality by Sandemose's hand'.

In the majority's view, the district court's judgment is here based on an error of law.

As mentioned above, the majority finds that it is the general appearance of the film car that is protected by copyright in this adaptation of drawing A, like in the Supreme Court judgment in Rt-2012-1062 (the Tripp Trapp judgment) para 90, as quoted above.

In the majority's view, it is also not correct to make a 'deduction' for Kjell Aukrust's contribution to the film car, apart from the general appearance of the original work (drawing A). This applies both to single elements that Aukrust has used in earlier drawings and the ideas he gave to Bjarne Sandemose in connection with the building of the film car."

- (81) The court of appeal thus finds that the adaptation protected by copyright is the "film car's general appearance", and that the copyright in the original work, which is to be 'deducted', is limited to the general appearance of drawing A.
- (82) Here, the court of appeal's judgment is in my view based on an incorrect understanding of the Copyright Act section 4.
- (83) The correct approach in order to determine what is protected by copyright is to clarify which independent *changes and additions* the adapter has made to the original work, and then assess whether *those elements* meet the requirement for originality, individually or based on an overall consideration. In this assessment, the adaptation must be aligned with all elements of the original work that reflect the author's intellectual efforts – details as well as the whole.

- (84) Kjell Aukrust's copyright in drawing A is thus not limited to the "general appearance" of the drawing, as assumed by the court of appeal.
- (85) When the court of appeal in this respect assumes that the adaptation constitutes the "general appearance" of the film car, it seems to disregard the fact that Sandemose's ideas and handicraft alterations are not be protected, nor elements or artistic features that can be ascribed to Aukrust.
- (86) A consequence of the court of appeal's application of the law is that the copyright in the original work becomes limited and displaced by the adaptation. This is contrary to section 4 subsection 2, which states that the adapter cannot exploit the adapted work "in such a manner as to infringe the copyright in the original form." The same is set out – with a slightly different wording – in the Berne Convention for the Protection of Literary and Artistic Works Article 2 no. 3:

"Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works *without prejudice to the copyright in the original work.*"

- (87) I will now turn to considering *the specific application of the law* – the question of which elements in the film car are protected by copyright as adaptation.
- (88) First, I will point out that the parties disagree on the significance of the fact that that Aukrust Foundation and Hunderfossen's appeal only concerns the application of the law. I have the following remarks in this respect:
- (89) When an appeal is made concerning the application of the law, the Supreme Court must use the court of appeal's assessment of evidence, but the court of appeal's judgment can be supplemented by facts that are notorious or undisputed, see the decision of the Appeals Selection Committee in HR-2015-948-U para 5. In cases concerning copyright, the question is often which legal conclusions can be drawn from the facts. Such deliberations are not an assessment of evidence, but rather an application of the rules of law to the facts at hand. The distinction between the assessment of evidence and the application of the law to the facts is commented on in the Supreme Court judgment in HR-2017-971-A para 56:

"I note that it is the court of appeal's application of the law that has been appealed and referred to hearing before the Supreme Court. Thus, the Supreme Court must apply the facts that the court of appeal found proved, but the Supreme Court may draw other conclusions from the same facts. In practice, there may be a subtle distinction between the assessment of evidence and the legal assessment, the application of the law to the facts. The assessment of evidence may contain elements of a legal assessment that may have the result that a fact is interpreted differently. "

- (90) I add that the legal assessment in copyright cases also includes the aesthetic assessments that must be made to determine whether a work has been infringed.
- (91) Both the Aukrust Foundation and Caprino Filmcenter have gathered expert opinions, which have been given different weight by the district court and the court of appeal. In my view, none of these opinions contributes to determining which elements in the film car are protected as adaptation.

- (92) The court of appeal's majority has mainly based its decision on a statement from the company Brand Valley AS. In my view, this report has obvious flaws.
- (93) Brand Valley concentrates to a large extent on specific details in the film car and does not in a sufficient manner take into consideration the fact that many elements are taken from Aukrust's Flåklypa universe. Also, the significance of Aukrust's drawing A as an original work is toned down. It is referred to as an "idea and concept sketch", and it is assumed that drawing A and the film car are "based partially on the same original idea".
- (94) On the other hand, Professor Emeritus Gunnar Aune and PhD Sidsel Helliesen conclude that Sandemose's contribution is not sufficiently original. As I have already mentioned, the parties agree that Sandemose's effort has originality, but they disagree as to what the protection comprises. Based on that, I will not emphasise these opinions with regard to the issue of adaptation.
- (95) When assessing which elements in the film are protected by copyright, one must consider the single details, the combination thereof and the general appearance created by the elements added by Sandemose. The district court, with art professionals as lay judges, has made a thorough assessment in this respect:

"... that the film car does not have single details that are protected by copyright as adaptation as opposed to the attraction. The details must either be ascribed to the original author, they are ideas and technical solutions, or they are not used in Il Tempo Extra Gigante.

In the court's view, Sandemose's combination of the single details is also not sufficiently original. The court does not share the expert witnesses Øxtad and Herset's [Brand Valley] view that the film car has 'features recognisable from Caprino Filmcenter's earlier productions'; with a 'family-friendly and open appearance'... As the court sees it, Il Tempo Gigante's general appearance and combination of the many details are typically 'Aukrustesque'. It has an imaginative look, with unique details and colourful descriptions of the use of the various devices."

- (96) The district court's conclusion was that Sandemose has added an artistic touch to the film car that "is streamlined and elegant, and that it has a refined look with a high level of finish."
- (97) These views are mostly concurrent with mine, and I will also note:
- (98) A general aspect of the assessment of originality, which is relevant in the case at hand, is whether the author has had the opportunity to make independent and creative choices, see the Supreme Court judgment in Rt-2007-1329 (the Huldre in Kjosfossen judgment) para 44. Sandemose was to build a three-dimensional model of Il Tempo Gigante based on Aukrust's drawing for a film recreating Aukrust's Flåklypa universe. Upon these premises – as far as I can understand – Sandemose's freedom of creativity must have been limited, which reduced the possibility of creating something sufficiently original.
- (99) When making the specific comparison, it is significant that several of the single details in the film car distinguishing it from drawing A can be ascribed to Kjell

Aukrust's earlier drawings, as set out in the court of appeal's assessment of evidence:

"As mentioned, Aukrust's earlier drawings contain a number of details that are recognisable in the film car. Several of these details are found in different shapes, and they are more or less similar to the details in the film car. As pointed out in the Brand Valley report, several of these details contribute to the general appearance of the film car.

...

In the majority's view, it is also likely that Bjarne Sandemose – in addition to drawing A – has been familiar with several of Aukrust's earlier published drawings containing such details, and that these drawings have had an impact on the specific design of the film car and thus contributed to its general appearance."

- (100) The parties agree that this includes drawings of radar, peep sight, lamps with eyelids, rocket pipes and bumper, as used by Aukrust over the years in other drawings of cars and strange automobiles.
- (101) The idea of using these details in the film car is not protected by copyright, according to the legal principle that copyright protection does not include ideas, motives and functional solutions, see the Supreme Court judgment in Rt-2013-822 (Ambassador) para 49. Nor can Sandemose obtain copyright protection for details that are taken from Aukrust's drawings.
- (102) The parties disagree as to which other elements can be ascribed to Aukrust's contribution in the form of drawings and script. In its prayer for relief before the Supreme Court, Caprino Filmcenter has submitted that a part of Aukrust's script to Flåklypa Radio Norway from 1969 must have been written after the film car had been built, and then pasted into the original script. In the relevant passage, several elements in *Il Tempo Gigante* are described, such as extra tank with vet spirits, handbrakes with direct transfer to brake pad and blood bank.
- (103) The court of appeal's majority has not addressed this issue of evidence in its judgment.
- (104) Items in a respondent's prayer for relief concerning the assessment of evidence cannot be excluded even if the appeal is limited to the application of the law, see the Supreme Court judgment in Rt-2015-545 para 54 with further references. When the respondent exercises its right to assert such arguments in its prayer for relief, i.e. outside the scope of the appeal, the appellant must be able to object by presenting its view on this specific issue of evidence. In my view, this follows from the basic requirement for a contradictory process.
- (105) The Aukrust Foundation and Hunderfossen have contended that it is likely that Aukrust authored this part of the text before the film car was made.
- (106) I have noted that the particular passage in the script reflects Aukrust's imagination and universe to a large extent.
- (107) The minority of the court of appeal has given a summary of the circumstances I have now considered, which I endorse:

"In the minority's view, the film car consists of a number of details that are not original or that are pure ideas. This is partly because they are recognisable in various published Aurkrust drawings from before 1970. This concerns for instance the shape of the film car's bumper, its carbide lamps, peep sight, bodywork rivets, arched vacuum cleaner hoses, rocket function and radar on the hemispherical tank. Nor are the ideas of a blood bank, two-man cockpit, exterior hand brake with direct transfer to the brakepads on the rear wheels or the spirits tank sufficiently original. This is because these elements were described in Kjell Aukrust's script to the TV project Flåklypa Radio Norway version 2, which, as the minority sees it, was written before the building of the film car started.

The minority can also not see that the film car's single elements are combined in such a manner that their general appearance, compared to drawing A, is original."

- (108) I will add that the mentioned elements in the film reflect Aukrust's originality, irrespective of whether the descriptions in the script were written before or after the film car was built.
- (109) I have – like the district court and the minority of the court of appeal – concluded that the copyright in Sandemose's adaptation comprises the refined artistic look that he added to the film car: its streamlined, elegant shape and high level of finish.
- (110) In the alternative, Caprino Filmcenter has submitted that Ivo Caprino contributed to the adaptation in such a way that he is a joint author of the film car.
- (111) The court of appeal found that there is no evidential basis for this submission, and in my view, there is no apparent reason to deviate from this.
- (112) The next question is whether the rollercoaster Il Tempo Extra Gigante infringes Sandemose's copyright.
- (113) The scope of the protection depends on how original and distinctive the work is, and the protection reaches as far as the individual creative efforts, see the Supreme Court judgment in Rt-2012-1062 (the Tripp Trapp judgment) para 86. What matters is whether the individual protected features are displayed in such a manner that the work can be said to have maintained its originality, see Rognstad, *op. cit.* page 138.
- (114) In the Supreme Court judgment Rt-1962-964 (the Wegner's sowing table judgment) the question was whether the sowing table 'Björg' was an infringement of Wegner's copyright in his sowing table. The Supreme Court agreed with an expert opinion that "Wegner's table is a refined piece of form art, while 'Björg' is a robust piece of utility furniture without the same refinement. Wegner's table is on a completely different artistic level." The justice delivering the leading opinion added:

"When Wegner's copyright – as I have already mentioned – only comprises the artistic design of the table, I cannot see that his right has been infringed through the production of the sowing table 'Björg'. In my view, it concerns two different tables."

- (115) The assessment in the case at hand must follow the same principles.

- (116) Brand Valley has pointed out the following in its report:

"Il Tempo Extra Gigante appears exaggerated, largely because it visually gives the impression of being made in one large piece. It is painted in a way that makes it look like it is made of shining plastic. "

- (117) I will add that Il Tempo Extra Gigante has an industrial look and gives a completely different aesthetic impression than the film car's refined artistic look.
- (118) On these grounds, I conclude that Il Tempo Extra Gigante is not an infringement of the copyright in Sandemose's adaptation in the film car.
- (119) *The copyright in drawing B*
- (120) The court of appeal assumed that drawing B was made after the film car had been finished, and that it was made as a film prop. Later, the drawing was printed in Kjell Aukrust's book *Flåkløpa Tidende 5. årgang*, [Flåkløpa News, 5th edition] published in 1975, and a copy thereof is owned by the National Gallery.
- (121) The court of appeal concluded that drawing B could not be regarded as an adaptation of drawing A or the film car, nor as an independent work.
- (122) The question before the Supreme Court is whether drawing B is a copy or an adaptation of the film car, which includes the car's features protected by copyright. This assessment must include the similarities between the drawing and the features in the film car protected as adaptation, and one must determine whether the adaptation is visible in the drawing.
- (123) According to the expert opinion from Brand Valley, drawing B is "Aukrust's interpretation of the film car Il Tempo Gigante". It is stated that "the various elements such as shape, dimensions and details, as well as the whole, are so similar that the drawing must necessarily be regarded as an dependent work".
- (124) From the facts of the case, I cannot see that there is a basis for these conclusions. In my view, Professor Emeritus Aune and PhD Helliesen's aesthetic assessments are more striking in this regard. Aune states the following:

"If assuming Caprino Filmcenter's premise that Aukrust intended to copy the film car in 'drawing B', one would expect that the drawing was more similar to the film car. Despite Aukrust's organic drawing expression, the accurate presentation of every detail in an object is characteristic for his art."

- (125) Hellisen states this:

"Both the original drawing and the new one [drawing B], where elements are removed or added, are undoubtedly Aukrust's original work. Both the details and the whole in which they are a part are characterised by Aukrust's own drawing style and his particular image-creating skills."

- (126) The district court placed decisive weight on the following:

"... Drawing B is more 'Aukrustesque' and less handicraft-artistic than the film car. The design that was Sandemose's contribution to the film car is not recognisable in the drawing. On the contrary, the drawing is characterised by

Aukrust's imaginative and playful line and the numerous details that are typical for him."

- (127) I share this view and conclude that Kjell Aukrust alone is the author of drawing B. Thus, the Aukrust Foundation is the sole copyright holder of this drawing.
- (128) Considering my result, it is not necessary to address the respondent's submission that the film car is a collective work and jointly owned pursuant to the Copyright Act section 6. Nor do I find it necessary to address the appellants' alternative submission that Caprino Filmcenter has not acquired the necessary rights from Bjarne Sandemose.
- (129) *The issue of title*
- (130) In the script to Flåklypa Radio Norway from 1969, Aukrust named drawing A *Il Tempo Gigante*, and from the court of appeal's findings of facts it can be concluded that it was Aukrust who made this title.
- (131) The court of appeal concluded that naming the rollercoaster *Il Tempo Extra Gigante* was subject to Caprino Filmcenter's consent, and that the title must be regarded as inextricably connected to the film car.
- (132) It has not been contended before the Supreme Court that the title is protected as a copyright protected work. The question is whether Caprino Filmcenter may assert title protection pursuant to the Copyright Act section 46 with regard to the Aukrust Foundation and Hunderfossen's use of the title.
- (133) Section 46 reads:
- "A literary, scientific or artistic work shall not be made available to the public under a title, pseudonym, mark or symbol that is likely to cause confusion with a previously issued work or its author."**
- (134) The title protection under section 46 is related to trademark law and the rules in the Marketing Control Act on unfair exploitation of the efforts or results of another person, see sections 30 and 25. Prior to the inclusion of section 46 in the Copyright Act, the legal basis for protection of title was the predecessor of the Marketing Control Act – the Act relating to Unfair Competition, see Knoph, *Åndsretten* [Copyright law], 1936 page 69:
- "... On the contrary, he will, as we will revert to, enjoy a rather efficient protection in the Act relating to Unfair Competition, as a person exploiting another person's title often does so to create confusion or to exploit the good reputation gained by the first work. And both motives are contrary to the principle of fair competition."**
- (135) Knoph continues on page 186:
- "But with regard to both contents and premises, the title protection is closer to protection of trademarks. The authors are not requesting protection of the title's artistic intrinsic value. They wish to keep the title to the work for trademark purposes, to avoid confusion with other works that may damage their reputation or feed on them."**

- (136) In the draft new Copyright Act, Knoph's views were held as a basis for a new provision on title protection, and the ministry endorsed the proposal, see Proposal to the Odelsting no. 26 (1959–1960) page 103:

"The Ministry must note that a work's title may be formed in such a manner that it is protected either as a part of the work or as a special work, but in general the Copyright Act will not protect the creator of the title from others taking it. The situation could then be that an author, a film producer or a publisher, when a book or film is issued, seeks to exploit the title of a work that has been a success in the public.... The Ministry assumes that such a confusion will normally not be very harmful, and that a provision as the one proposed may create disputes that otherwise can be avoided. The Act relating to Unfair Competition of 7 July 1922 would in most cases also give protection against such unlawful use. However, as there might be a need for a provision as the one proposed by the delegates, and which is also found in other Nordic drafts, the Ministry adopts the proposal from the delegates."

- (137) According to what I have now quoted, the purpose of section 46 is to protect the author from another person's use of his title to benefit from the reputation attached to him or his work.
- (138) Caprino Filmcenter contends that it has the best priority of time, as the title *Il Tempo Gigante* was used in public for the first time as the name of the film car.
- (139) In my view however, the case at hand concerns a different situation than the one the lawmaker pictured.
- (140) I cannot see that it can be derived from the wording of the law or the preparatory works that the *adapter* enjoys title protection at the expense of the *original author's* right to use the title he has given to his work. Such an understanding of the law would have the effect that a translator can prevent the original author from publishing his work in its original language or in a new translation, if the translation has been published first.
- (141) My conclusion is that section 46 does not give Caprino Filmcenter a right to prevent the Aukrust Foundation from using the title *Il Tempo Gigante*.
- (142) The court of appeal's conclusion on this point is aimed at Hunderfossen. I will note that when the Aukrust Foundation is entitled to license the use of the title, then Hunderfossen's use is lawful.
- (143) Consequently, the court of appeal's judgment must be set aside in its entirety due to error of law.
- (144) The appellants have won the case and are entitled to compensation for costs pursuant the Dispute Act section 20-1 subsection 1. There is no reason for applying the exemption in section 20-2 subsection 3.
- (145) The counsel for the Aukrust Foundation has submitted a statement of costs before the Supreme Court of NOK 1,150,250. The counsel for Hunderfossen has submitted a statement of costs before the Supreme Court of NOK 302,099. The claims are exclusive of VAT. The court fee for the Supreme Court is extra.

- (146) Caprino Filmcenter has not had any comments to the statements of costs. I thus rely on the statements.
- (147) I vote for this

J U D G M E N T :

1. The judgment of the court of appeal is set aside.
2. In costs before the Supreme Court, Caprino Filmcenter AS will pay NOK 1,165,985 – onemilliononehundredandsixtyfivethousandninehundredandeightyfive – to Kari and Kjell Aukrusts foundation – the Aukrust Foundation within 2 – two – weeks from the serving of this judgment.
3. In costs before the Supreme Court, Caprino Filmcenter AS will pay NOK 317,834 – threehundredandseventeenthousandeighthundredandthirtyfour – to Hunderfossen Familiepark AS within 2 – two – weeks from the serving of this judgment.

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| (148) | Justice Høgetveit Berg: | I agree with the justice delivering the leading opinion in all material aspects and with his conclusion. |
| (149) | Justice Berglund: | Likewise. |
| (150) | Justice Matheson: | Likewise. |
| (151) | Justice Webster: | Likewise. |
- (152) Following the voting, the Supreme Court gave this

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