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	(Counsel Andreas Bernt) (Assistant counsel: Rasmus Asbjørnsen)
v.	
TONO SA	(Counsel Camilla Vislie)

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

(2) RiksTV AS – RiksTV – distributes TV channels in the digital terrestrial network. The company is owned by NRK, TV2 and Telenor, and its business activities consist of selling various channel packages to subscribers all over Norway. RiksTV purchases broadcast content/channels from various broadcasters/producers of TV channels.

(3) TONO SA – TONO – is a collection society managing the copyrights to musical works on behalf of the right holders. The management comprises the rights of TONO's interest holders – often referred to as members. Furthermore, TONO manages the rights of the members in similar organisations worldwide under reciprocal representation agreements. TONO collects fees for public performance of the music and passes on all revenues to the members.

(4) Anyone who wishes to make copyrighted material available to the public must do so with the consent of the author or of a collecting society like TONO. The obtaining of such authorisation is often referred to as "clearance".

(5) TV programmes are distributed to Norwegian viewers in various manners, including via signals from ground-based transmitters – the terrestrial network. Until 2009, the terrestrial network in Norway was analogue. To obtain a solid, nationwide, Norwegian-language television supply, with access to far more channels than what the analogue network could handle, the majority of the Storting voted for the development of a digital terrestrial network. The development was to "take place on market premises", see Report to the Storting No. 44 (2002–2003) On digital terrestrial network for TV, section 1.5, and be financed by the viewers paying for access to TV channels.

(6) The terrestrial network, consisting of 430 transmitters, is owned by Norkring AS and is operated by Norges Televisjon AS. The 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 and thus contribute to achieving the Storting's goal of having the digital terrestrial network funded by the viewers. RiksTV's main revenue is from the subscribers, who pay for access to channel packages. It has been stated that RiksTV's market share amounts to 12-15 percent. The lease of network capacity and fees to the broadcasters producing the TV channels are among the company's largest expenses.

(8) The claims in the case at hand concern RiksTV's distribution of foreign TV channels, stated to be produced mainly in the United Kingdom. RiksTV maintains that the use of copyrighted material has been cleared with PRS – TONO's British sister organisation. TONO, in turn, maintains that the material has not been cleared for communication in Norway.

(9) In 2010, RiksTV brought an action against the collecting society Norwaco requesting a judgment declaring that RiksTV did not retransmit within the meaning of section 34 of the Copyright Act, and that RiksTV was not responsible for obtaining clearance from Norwaco for its distribution in Norway. On 8 June 2012, TONO brought an action against RiksTV in our case, claiming damages for the lack of clearance under section 2 of the Copyright Act if the court in the Norwaco case should conclude that RiksTV did not retransmit. TONO wanted to consolidate the case with that between RiksTV and Norwaco, but the district court said no. In November 2012, another action was brought before Oslo District Court in a case between Get AS and Norwaco similar to that between RiksTV and Norwaco. The case between RiksTV and TONO was suspended pending clarification of the other disputes.

(10) In the dispute between RiksTV and Norwaco, judgment was given in favour of RiksTV. Norwaco appealed, but later withdrew the appeal rendering the district court's judgment legally binding. The dispute between Get AS and Norwaco ended with a judgment in the Supreme Court, HR-2016-562-A, in which the Supreme Court concluded that Get AS did not retransmit within the meaning of section 34 of the Copyright Act 1961.

(11) The case between RiksTV and TONO was reopened in 2015. It was split so that the courts are first to consider the question whether the conditions for compensation are fulfilled.

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

> **"1. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channels in the digital terrestrial network from 8 June 2009 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: TV3, Viasat4, FEM, Discovery Channel, Animal Planet, Disney Channel and National Geographic Channel**
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> **2. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 8 June 2009 until 23 January 2012 plus default interest from 8 July 2012 and until payment takes place: The Voice.**
>
> **3. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 8 June 2009 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: BBC World News**
>
> **4. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 29 October 2009 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: Eurosport**
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> **5. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channels in the digital terrestrial network from 14 September 2010 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: TLC, Disney Junior and Disney XD**
>
> **6. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 1 November 2010 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: MAX**
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> **7. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 21 March 2011 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: FOX**
>
> **8. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 29 September 2011 until 30 September 2015 plus default interest from 8 July 2012 and until payment takes place: TNT**
>
> **9. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 23 January 2012 until the date of the judgment plus default interest from 8 July 2012 and until payment takes place: VOX**
>
> **10. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 1 November 2012 until the date of the judgment plus default interest from 1 November 2012 and until payment takes place: BBC Brit**
>
> **11. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 1 November 2012 until 1 October 2015 plus default interest from 1 November 2012 and until payment takes place: MTV**

12. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 21 November 2013 until the date of the judgment plus default interest from 21 November 2013 and until payment takes place: TV6

13. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 5 December 2013 until the date of the judgment plus default interest from 5 December 2013 and until payment takes place: History Channel

14. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 3 September 2015 until the date of the judgment plus default interest from 3 September 2015 and until payment takes place: Eurosport Norge

15. RiksTV is liable for the loss TONO has suffered due to the distribution of the following TV channel in the digital terrestrial network from 1 October 2015 until the date of the judgment plus default interest from 1 October 2015 and until payment takes place: Comedy Central

16. RiksTV is to pay costs to TONO of NOK 4 100 612 – fourmilliononehudredthousandsixhundredandtwelve – within 14 days of service of the judgment."

(13) RiksTV appealed against the district court's findings of fact and application of the law. In Borgarting Court of Appeal, the case was extended to include two more channels. The court of appeal reached the same result as the district court, supported the majority of the district court's grounds and concluded the following on 4 December 2017:

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

2. Riks TV is also liable for the loss TONO SA has suffered due to the distribution of the TC channels Viasport + and Viasport 1 in the digital terrestrial network from 5 September 2017 and until the date of the judgment.

3. RiksTV AS is to pay costs in the court of appeal to TONO of NOK 2 003 882.50 – twomillionandthreethousandeighthundredandeightytwo 50/00 – within two weeks."

(14) RiksTV has appealed to the Supreme Court against the court of appeal's application of the law and against its findings of fact on one count. The Supreme Court's Appeals Selection Committee decided on 12 March 2018 to grant leave to appeal in the question whether RiksTV is making musical works managed by TONO available to the public, see section 2 of the Copyright Act. Apart from that, leave to appeal was refused.

(15) The parties have submitted written accounts that have been included in the basis for the ruling, see section 30-10 (2), cf. (1) of the Dispute Act. In most other respects, the case is similar to that before the court of appeal.

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

(17) RiksTV is not a commercial player like Get AS, but was established to finance the costs of developing the nationwide digital terrestrial network. The development of this terrestrial network was a central political means of maintaining media diversity. In the central documents forming the basis for the establishment of the current system, there is

no mention of any obligation for the distributors, like RiksTV, to pay for the broadcasters' use of copyrighted material.

(18) Technically, the TV signals never pass through RiksTV. RiksTV's sole contribution to the communication is to give its subscribers the possibility to decrypt. This is not the same as making the work available, or retransmitting it, to the public. RiksTV is more like a technical assistant for the broadcasters' communication. TONO should instead direct its claim against the broadcasters.

(19) Section 1-1 subsection 1 (a) and (f) of the Broadcasting Act defines broadcasting and broadcaster. The Act shows that the responsibility for the broadcast content lies with the broadcasters, and not with a technical distributor like RiksTV.

(20) According to both the Copyright Act 1961 and the new act of 2018, it is the broadcasters that communicate works to the public. Also, the Copyright Directive – Directive 2001/29/EC of the European Parliament and of the Council – places the clearance responsibility with the broadcasters, see recital 23 in the preamble, Article 3 no. 1 and 2 (d) and Article 2 (e).

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

(22) Within the EU/EEA, there is a market for free movement of broadcasting services. Significant judgments of the Court of Justice of the European Union (CJEU) confirm that the broadcasters make the communication. When the signals are transmitted in an uninterrupted chain from the broadcaster, the broadcaster must obtain clearance. Only when a distributor's transmission reaches a new public, the distributor will have an independent responsibility to obtain clearance. As RiksTV does not transmit signals to a new public, clearance must be obtained by the broadcaster. TONO's sister organisation PRS in the United Kingdom has in any case obtained the necessary clearance for broadcast in the Norwegian market, so RiksTV's broadcasting does not reach a new public.

(23) RiksTV has submitted this prayer for relief:

> **"1. Judgment is to be given in favour RiksTV AS.**
> **2. RiksTV AS is to be awarded costs in the district court, the court of appeal and in the Supreme Court."**

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

(25) Authors are entitled to compensation when their protected works are made available to the public. RiksTV exploits the works of others for commercial purposes and must compensate the authors for this.

(26) The unanimous statements by the Supreme Court in the Get judgment, HR-2016-562-A, stating that Get AS has an independent obligation to clear the use of copyrighted 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 thus RiksTV – makes works available to the public within the meaning of section 2 of the 1961 Copyright Act.

(27) RiksTV is not a broadcaster, and TONO accepts that RiksTV's activities may be seen as part of the broadcaster's primary communication. However, this does not mean that RiksTV does not make works available to the public within the meaning of the Copyright Act.

(28) RiksTV's responsibility to clear the use of the works if the broadcaster has not done so, also follows from the Copyright Directive and from CJEU case law. In the case at hand, RiksTV must obtain such clearance regardless of whether it distributes to a "new public".

(29) RiksTV cannot be seen as a mere seller of technical support to the broadcasters, as the company contends.

(30) It should not be difficult for RiksTV to ensure clearance. It can either make sure that the broadcasters do it, or obtain clearance itself.

(31) TONO SA has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
> **2. TONO SA is to be awarded costs in the district court, the court of appeal and in the Supreme Court."**

(32) *I have concluded* that the appeal must be dismissed.

(33) The question is whether RiksTV has an independent clearance responsibility for works distributed to RiksTV's subscribers, or whether such clearance must be obtained by the broadcasters.

(34) The TV channels concerned in this case are mainly produced by broadcasters in the United Kingdom. The parties agree that the transmissions contain works whose use must be cleared with the authors. However, the parties disagree as to who is responsible for obtaining such clearance – the broadcaster or the distributor, RiksTV. They also disagree to which extent the works have actually been cleared for transmission in the Norwegian terrestrial network by TONO's British sister organisation PRS. As mentioned, the case has been split in such a way that this question – as an element in the measure of damages – will only be assessed if TONO' claim that RiksTV has an independent clearance responsibility succeeds.

(35) The author of a protected work has an exclusive right to dispose of it and to decide whether it should be made available to the public. This right was regulated by section 2 of the 1961 Copyright Act until 1 July this year, when the 2018 Copyright Act entered into force. The 2018 Act has a similar provision in section 3, but with a slightly different wording. The parties agree that the new wording does not change the legal issue in the case at hand. I concur.

(36) Since the substantive content of the 1961 Act on this point has been continued in the new Act, I will focus primarily on the wording in section 3 of the 2018 Act.

(37) The relevant parts of the provision read:

> **"The copyright gives an exclusive right to dispose of the protected work by**
> **…**
>
> **b) making it available to the public.**
>
> **The work is made available to the public when**
>
> **…**
>
> **d) it is transmitted to the public, by wire or wireless means, including when the work is broadcast or communicated in such a way that members of the public may choose when and where to access it."**

(38) The provision implements Article 3 (1) of the Copyright Directive into Norwegian law. Article 3 (1) reads:

> **"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 section 3 of the 2018 Copyright Act is taken from section 2 of the 1961 Act. The preparatory works of the 1961 Act are thus relevant for the interpretation of the current wording. In Proposition to the Odelsting No. 46 (2004–2005), amendments were proposed to the 1961 Copyright Act, including the implementation of the Copyright Directive into Norwegian law. It is stated on page 19 that one considered section 2 of the Copyright Act 1961 to meet the requirements in Article 3 (1) of the Copyright Directive. Sufficient protection of the author's rights in connection with "communication to the public" was already established in Norwegian law.

(40) The expression is further discussed in Proposition to the Odelsting No. 46 (2004–2005) pages 7 and 9. It is pointed out that the copyright rules have always been developed along with the development of technology. New means of communication have fostered new ways of exploiting protected works. However, the concept of "making available" has turned out to be flexible enough to cover the new forms of communication of works:

> **"Despite the rapid development of technology, there has been no need to introduce new concepts in the Copyright Act to adapt it to the new forms of exploitation. According to section 2 of the Copyright Act, as mentioned, the right holder of a work has an exclusive right to produce copies of the work and make it available to the public. Under applicable Norwegian law, making a work available to the public means public performance, broadcasting and making it available on-demand in networks. The making available concept has turned out to be flexible and capable of absorbing new forms of communication of works."**

(41) I take this to mean that "making available to the public" has been interpreted – and must be interpreted – widely and flexibly, and that it makes room for new forms of transmitting protected works to the public. The technical means is not decisive, but whether the act enables the public to access copyrighted material.

(42) Correspondingly, the Copyright Directive's preamble instructs that the author's right

should be understood in a broad sense, see recital 23:

> "**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 CJEU, for instance in case 19 November 2015 C-325/14 *SBS* paragraph 14 with further references.

(44) In summary, I find that these sources of law suggest that "making the work available" covers all forms of transmission of protected works regardless of technical solution.

(45) The condition that the communication must be to the public, see Article 3 (1) of the Copyright Directive, means that is must be made to an indeterminate number of potential viewers, see the CJEU's ruling in case 7 December 2006 C-306/05 *SGAE* paragraph 37 with further references. This does not include private or closed "point-to-point" communication, see SBS paragraph 21, also with further references. Since RiksTV's subscribers undoubtedly constitute the "public" within the meaning of section 3 of the 2018 Copyright Act, I will leave this condition here.

(46) The facts and the sources of law I have reviewed thus far clearly suggest that RiksTV's distribution of channel packages to its subscribers is covered by section 3 of the 2018 Copyright Act and section 2 of the former Act.

(47) However, RiksTV argues that the Copyright Act must be interpreted in light of the Broadcasting Act and other regulations on broadcasting activities. It is contended that it is the broadcasters that make the works available to the public, see section 3 subsection 2 (d) of the 2018 Act, which means that the broadcasters are responsible for copyright clearance. In this respect, a reference is made to provisions in the Broadcasting Act showing that communication to the public is central in broadcasting activities.

(48) In my view, this cannot succeed. Section 3 subsection 2 (d) of the Copyright Act mentions broadcasting as an example of communication to the public. The list is not exhaustive, see the use of "including". The provision does not give guidance as to who is the broadcaster in a case like ours.

(49) The individual provisions and the system of the Broadcasting Act and related regulations – to which RiksTV has referred – are formulated to cover other issues than those concerning copyright. Hence, it is unlikely that these regulations should shed light on the interpretation of section 3 of the Copyright Act.

(50) One of the objects of the Copyright Act is to secure that the authors are compensated for the use of their works, see for instance Proposition to the Odelsting No. 46 (2004–2005) page 7. To fulfil this object, it is assumed in both the Norwegian preparatory works and in the Copyright Directive's preamble that the authors' rights must be interpreted in a broad sense. This speaks against a restrictive interpretation of the Copyright Act's wording based on the provisions and system of the Broadcasting Act.

(51) Under the agreements between RiksTV and the broadcasters producing the TV channels that RiksTV distributes, the broadcasters are to clear the use of copyrighted material with the right holders. RiksTV contends that the agreements provide sufficient protection of the authors' rights, and that the right holders are only to deal with the broadcasters.

(52) It is clear that the agreement between RiksTV and the broadcasters cannot restrict the statutory rights of third parties – the authors. RiksTV may also not free itself from legal obligations by referring to others having assumed the task. The broadcasters have a contractual obligation towards RiksTV to obtain clearance for RiksTV's distribution in Norway. If the broadcasters meet this obligation, the right holders' interests will be maintained. But the possibility of RiksTV being met with claims from the right holders, gives RiksTV an incentive to make sure that clearance is actually obtained by the broadcasters. Hence, it seems to be well in line with the object of section 3 of the 2018 Copyright Act that the party making the works available has an independent clearance responsibility even if others have assumed the task.

(53) RiksTV also contends that its distribution of copyrighted works is of a purely technical nature. It is emphasised that the TV signals do not at any point pass through RiksTV, which would have suggested that RiksTV makes the copyrighted material available to the public.

(54) Technical assistance to the communication by others does not entail a clearance responsibility towards the author. The same applies to the provision of physical facilities for enabling communication. This is expressed as follows in recital 27 in the Copyright Directive's preamble:

> **"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 principle has also been applied by the CJEU, among others in the consolidated cases 13 October 2011 C-431/09 and C-432/09 *Airfield* paragraphs 79 and 80 and in SBS paragraph 31. Both judgments emphasise the difference between "[t]he mere provision of physical facilities", see Airfield paragraph 79, and the communication of the broadcast content.

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

> **"Subsection 4 [of section 2 of the Copyright Act 1961] gives examples of what falls within the concept of public performance. Public performance includes broadcasting and wireless/wired transmission to the public, including communication on-demand. The amendment is intended to give certain practical examples of which communication manners will fall under the scope of public performance, and is not exhaustive. However, the Ministry would like to stress that the provision of equipment for personal interactive use will as a main rule not be regarded as communication to the public of possible copyrighted works and other protected material that the user chooses to access. The fact that *the user here is not offered any specific content,* but must find its way to it, indicates that the provider of facilities cannot be regarded as making the material the user chooses available to the public. In this situation, *the coherence between the provision of equipment and the public's access to copyrighted works and works that the user chooses to* consult is not sufficiently close…" (italics added)**

(57) Thus, for the provider of technical facilities not to be covered by the concept of "making available to the public", the user must not be offered a specific content.

(58) The quote concerns interactive use of copyrighted works, for instance via the internet. It is nevertheless relevant to our case since it illustrates the distinction between offering content and providing technical facilities to access it. In my view, it is clear that RiksTV offers its customers "content" as the expression is used in Proposition to the Odelsting No. 46 (2004–2005). RiksTV's product is not "mere provision of physical facilities" as the CJEU puts it.

(59) It is true that the signal flow is organised so that the programme-carrying signals are transmitted from the broadcasters into the terrestrial network without passing through RiksTV. However, the signals transmitted into the terrestrial network are encrypted. For the public to access the TV channels produced by the broadcasters with which RiksTV has an agreement, they must subscribe for RiksTV's channel packages. RiksTV provides decryption equipment to its subscribers that enables them to see the broadcast content in the signals. Encryption is the way in which the access block is organised. There is no doubt that RiksTV sells channel packages to its subscribers and not only a technical decryption service. Thus, the exception for technical services and equipment referred to in recital 23 in the Copyright Directive's preamble and in Proposition to the Odelsting No. 46 (2004–2005) does not apply to RiksTV's communication.

(60) RiksTV further argues that it can be derived from the Airfield cases that RiksTV is responsible for copyright clearance only when its transmission reaches a new public. It is contended that since RiksTV's transmissions do not reach an public other than the public targeted by the broadcaster, RiksTV has no clearance responsibility.

(61) This contention necessitates a closer look at CJEU case law.

(62) The Airfield cases concern the so-called SatCab Directive, Council Directive 93/83/EEC. This Directive regulates issues related to satellite broadcasting of TV signals and cable retransmissions. The Directive is based on the principle of a "transmitter state" in the sense that the act of communication on certain terms is regarded as occurring in the member state from where the signals are transmitted to the satellite, see Article 1 (2) (b).

(63) Airfield was a company offering satellite channel packages. The performance to the subscribers was technically arranged in two different manners. Partially, Airfield received programme-carrying signals by way of point-to-point communication by the broadcasters. The signals were then encrypted and sent via satellite to Airfield's subscribers. And partially, Airfield instructed the broadcasters carrying out the encryption and the satellite transmission to subscribers. In both cases, Airfield provided decryption equipment to its subscribers, which gave them access to the broadcast content in the signals. The subscribers paid Airfield, not the broadcasters, for the access to the TV channels. The TV channels were simultaneously distributed to the public through other means by the broadcasters themselves.

(64) The question before the CJEU was whether these manners of organising the satellite broadcasting meant that Airfield had to obtain clearance for the copyrighted material. In paragraph 79, the CJEU states that Airfield's broadcasts reach a public that is additional to the public targeted by the broadcaster concerned. In paragraph 80, it is emphasised that

Airfield's subscribers pay for the access to the communication and not for any technical services. Furthermore, in paragraph 81 it is emphasised that Airfield brings together a number of channels from various broadcasters in a new audio-visual product. As for the new public reached by Airfield, the CJEU concluded that Airfield was required to obtain clearance – or authorisation – from the rights holders, unless the broadcaster concerned had obtained authorisation also for this public, see paragraph 83.

(65) The ruling shows that the provider of channel packages may become responsible for clearance if the channels are distributed to an public that is not the public targeted by the broadcaster. One might say that the ruling should be read antithetically, so the distributor avoids responsibility for clearance if the TV channels are made accessible to the public the broadcaster has targeted, as in the case at hand. However, subsequent CJEU case law shows that there is no basis for such an antithetic reading.

(66) Here, I refer to the CJEU's judgment in the *SBS* case regarding Article 3 of the Copyright Directive. The Belgian broadcaster SBS Belgium NV did not distribute the programmes itself, but transmitted programme-carrying signals point-to-point to the distributors, which in turn transmitted the signals to the public. The collecting society SABAM was of the view that the broadcaster made a communication to the public within the meaning of Article 3 (1) of the Directive. SBS, on the other hand, held that it was the Belgian distributors that made the communication, and that they were responsible for obtaining copyright clearance.

(67) The CJEU pointed out that since SBS transmitted its programme-carrying signals point-to-point to the distributors, it did not make a communication to the public, see paragraphs 20–23. The requirement that the communication must be made to a "new public" was thus not applicable, as the recipients of the broadcast concerned were the distributors' subscribers, see paragraphs 27 and 28. In paragraphs 30 and 31, it is stated that the distributors played an independent commercial role and that the subscribers paid the distributors to gain access to the broadcast content. Only if the distribution service had been purely technical in nature, the distributors' transmission would be a communication to the public on behalf of the broadcasters, see also paragraph 33.

(68) In our case, the programme-carrying signals are not transmitted point-to-point to RiksTV. RiksTV's presentation of the signal flow from the broadcaster to the subscribers can be summarised as follows: The broadcasters transmit the signals through a fibre-optic cable to Norges Televisjon AS, the operator of the terrestrial network. There, the signal flow is encrypted to the format the subscribers receive. The signals are then transmitted through a fibre-optic cable to the network owner Norkring AS, which in turn ensures distribution into the terrestrial network.

(69) The technical differences between the SBS case and our case cannot have any other result for RiksTV than for the distributor in the SBS case. Like the distributors in both the SBS case and the Airfield case, RiksTV plays an independent commercial role; it puts together a new audio-visionary product in their channel packages. The subscribers pay a fee to RiksTV for access to the content of the programme-carrying signals. Through this subscription system, RiksTV makes the broadcast content available to the public. RiksTV has thus an independent responsibility under section 3 of the 2018 Copyright Act to obtain clearance for the use of copyrighted material.

(70) Also in its judgment HR-2016-562-A, in the case between the collecting society Norwaco and Get AS, the Supreme Court concluded that the distributor had an independent clearance responsibility. The parties agreed that Get AS's distribution of TV channels involved making copyrighted works available to the public, see section 2 of the Copyright Act 1961, cf. paragraph 31. In paragraph 54, the Supreme Court presents this as a policy consideration supporting the conclusion the Court had otherwise reached:

> **"The viewers in Norway are the target group for the channels. The fact that the channels are produced for the Norwegian market makes it likely that the broadcasting organisation - SBS - is responsible for clearance of the copyright on behalf of those who are responsible for the distribution that the broadcaster initiates. However, there is no doubt that insofar as Get AS distributes TV channels containing protected works, this requires that Get AS ensures that its use is cleared. Under the agreements between SBS and Get AS, SBS is to clear all the copyrights for the transmission by cable. Get AS has an independent responsibility and will be liable towards the authors if SBS does not fulfil this obligation."**

(71) Although the question of the distributor's clearance responsibility has been subject to dispute and reviewed in the case at hand, I cannot see that it forms a basis for an interpretation of section 2 of the Copyright Act 1961 different from the one applied in the Get judgment. RiksTV's position is thus not different from the position of other commercial players.

(72) The parties have also pointed at some policy considerations and practical issues suggesting different solutions. I cannot see that policy considerations are decisive when other sources of law demonstrate that RiksTV's distribution involves making works available to the public within the meaning of section 3 of the Copyright Act.

(73) My conclusion is thus that the appeal must be dismissed.

(74) TONO has succeeded on all grounds and is awarded costs under section 20-2 of the Dispute Act. The costs claim in the Supreme Court is NOK 1 812 500 including VAT. The amount is somewhat high, considering the fact that the same legal issues have been litigated in two earlier instances, and that the total costs amount to almost NOK 7.8 million. This total amount seems excessive.

(75) From the statement of costs it appears that 431 hours have been spent on the Supreme Court proceedings at an average hourly rate of more than NOK 4 200 including VAT. I have concluded that necessary costs in the Supreme Court should be set at NOK 1 200 000 including VAT. I have not attached decisive importance to the fact that RiksTV's counsel has also claimed a high amount.

(76) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. RiksTV is to pay costs to TONO SA of NOK 1 200 000 – onemilliontwohundredthousand – within two weeks of service of this judgment.

(77) Justice **Normann:** I agree with the justice delivering the leading opinion in all material respects 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 is to pay costs to TONO SA of NOK 1 200 000 – onemilliontwohundredthousand – within two weeks of service of this judgment.