SUPREME COURT OF NORWAY

O R D E R

issued on 11 September 2019 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Henrik Bull
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Erik Thyness

HR-2019-1725-A, (case no. 19-022475SIV-HRET)
Appeal against Borgarting Court of Appeal's order 13 December 2018

Fredrik Ljone Håkon Wium Lie	(Counsel Halvor Manshaus)
v.	
Stiftelsen Lovdata	(Counsel Jon Wessel-Aas)

(1) Justice **Thyness:** The case concerns a second-tier appeal against an interim measure prohibiting, among other things, the publication of Supreme Court rulings extracted from Lovdata's databases. The issue at stake is whether the freedom of expression entails restrictions on the protection of databases under the Copyright Act.

(2) *Background*

(3) Lovdata is a foundation established in 1981 by the Ministry of Justice and the Faculty of Law of the University of Oslo. Its objective, which is set out in Article 3 of the Articles of Association, is as follows:

> **"Lovdata is a non-profit organisation whose objective is to produce, maintain and operate legal information systems. The organisation may take on assignments from public as well as private institutions. The foundation may also contribute to research and development within the scope of its objective."**

(4) According to Article 6, Lovdata's board of directors is composed of five members with personal deputies. Each of the Ministry of Justice, the Faculty of Law of the University of Oslo, the Norwegian Bar Association, the Norwegian Judges' Association and the Storting (the parliament) appoints one board member together with a deputy. The Ministry of Justice appoints one of the board members as the chair of the board.

(5) According to Article 11, Lovdata is obliged to maintain a database of acts of law. Since 2001, in accordance with an agreement with the Ministry of Justice, Lovdata has been the official publisher of acts and regulations. According to Regulations of 21 June 1994 No. 664, the Ministry of Justice may enter into agreements with Lovdata regarding the use of Lovdata's databases. These databases are exempt from seizure by creditors, and the State is entitled to acquire them if Lovdata is dissolved or stops providing legal information services. Apart from that, Lovdata's databases are not subject to any special rules.

(6) Since the 1980s, Lovdata has published judicial rulings. In addition, Lovdata has carried out an extensive digitalisation of rulings that previously only existed in paper format in the publications *Norsk Retstidende* (Rt) and *Rettens Gang* (RG).

(7) In 1987, Lovdata entered into an oral agreement with the Supreme Court regarding the supply of judicial rulings. From 2000, the documents were transmitted electronically in encrypted form via a separate line. The rulings were sent without summaries and were not anonymised. Lovdata produced summaries. Lovdata was the sole recipient of Supreme Court rulings in this manner, while the editors of *Norsk Retstidende* received them on disks.

(8) For a long period, Lovdata passed the Supreme Court rulings on to other providers of legal information that had entered the market over time. However, this arrangement ceased in 2004. The other providers then wanted to receive the rulings directly from the Supreme Court, but this was rejected with reference to the inability of the Court's data systems to handle electronic transmission to multiple recipients. Since 2008, the Supreme Court has made its rulings available to the public by means of publication of the internet.

(9) Lovdata's database of acts and regulations is available free of charge at Lovdata.no, although with more limited search options and notes than for paid access. The same applies to the judicial rulings for a period of one year from publication. For access to Lovdata's other databases with associated search tools, one may subscribe to Lovdata Pro containing, in

addition to rulings from all instances, extensive materials including preparatory works, circular letters, administrative decisions etc. The annual fee of a one-user license is currently NOK 8,900. For multiple-users licenses, the fee per user decreases along with the number of users.

(10) Rettspraksis.no is a website created by the appellants Håkon Wium Lie and Fredrik Ljone.

(11) The following is stated on the front page of rettspraksis.no:

> **"Welcome to Rettspraksis.no**
> - ***A free resource for searches and insight in judicial rulings.***
> **The website currently has 68 244 pages"**

(12) The following is stated under the headline "About Rettspraksis.no":

> **"Rettspraksis.no is a free resource to search and find information in judicial rulings. Judicial rulings give insight into applicable law and historical legal development and are among our most important sources of law. Access to information is essential for the rule of law, and when the authorities fail their duty to inform the public, something must be done. We are a private initiative, a hard-working group of people, who develop and maintain this website in our spare time."**

(13) Rettpraksis.no is a non-profit project.

(14) The website was launched on 17 May 2018. At the time of the launch, the service included Supreme Court rulings from the period 1836–2005 taken from a DVD issued by Lovdata in 2005, as well as 740 Supreme Court rulings from 2006 and 2007 donated to Rettspraksis.no by a private individual. The Court of Appeal found that these rulings had been downloaded from Lovdata's online databases. Finally, Rettspraksis.no contained Supreme Court rulings from 2008 onwards taken from the Supreme Court's website. As concerns the rulings prior to 2002, the material on the 2005 DVD has later been deleted and replaced by materials taken from a CD issued by Lovdata in the autumn of 2002.

(15) After the managing director of Lovdata, Odd Storm-Paulsen, had told *Advokatbladet* [a magazine published by the Norwegian Bar Association] that he believed Rettspraksis.no had committed "theft of materials", Fredrik Ljone sent an email on 29 May 2018 to Storm-Paulsen in which he wrote:

> **"As we know, the debate on free sources of law has started, and much suggests that judicial rulings will now become freely available. We will therefore urge Lovdata to take the wheel, get in control of the inevitable, and publish the rulings itself, free of charge to the public.**
>
> **You have the best systems for this, and now you have the chance to get ahead of the Norwegian Courts Administration and avoid further escalation of the debate.**
>
> **Rettspraksis.no will then be shut down."**

(16) On 31 May 2018, Lovdata filed a petition for an interim measure against Fredrik Ljone and Håkon Wium Lie.

(17) Without a preceding oral hearing, Oslo County Court issued the following order on 1 June 2018:

> **"1. Fredrik Ljone and Håkon Wium Lie are to remove all judicial rulings on**

Rettspraksis.no that originate from Lovdata's database, and delete all files on Rettspraksis.no downloaded from Lovdata's database.

2. Fredrik Ljone and Håkon Wium Lie are not to transfer or contribute to the transfer of judicial rulings and/or files as mentioned in item 1 to third parties, and are not to publish or contribute to the publishing of the same via other digital platforms.

3. Fredrik Ljone and Håkon Wium Lie are not to delete information on the development, operation, publishing, use or extraction of information from Rettspraksis.no.

4. Håkon Wium Lie and Fredrik Ljone are to pay costs of NOK 102 825 to Lovdata within two weeks of the service of this order."

(18) Upon the request of Ljone and Lie, Oslo County Court conducted an oral hearing and issued the following order on 21 September 2018:

"1. Fredrik Ljone and Håkon Wium Lie are immediately to delete all Supreme Court rulings taken from a DVD issued by Lovdata in 2005, and Supreme Court rulings taken from Lovdata's online databases, including from 2006 and 2007, regardless of who the source of these rulings is. This also applies to the summaries of the Supreme Court rulings that are taken from these sources.

2. Fredrik Ljone and Håkon Wium Lie are not to transfer or contribute to the transfer of judicial rulings, summaries and relevant data as mentioned in item 1 to third parties, and are not publish or contribute to the publishing of the same in any manner on any digital platform.

3. Fredrik Ljone and Håkon Wium Lie are, in addition to deleting material under item 1, to delete summaries of Supreme Court rulings taken from Lovdata's databases, including a CD issued by Lovdata in 2002, to the extent it concerns summaries of rulings from 1945 or later. Fredrik Ljone and Håkon Wium Lie are not to transfer or contribute to the transfer of such summaries to others. Fredrik Ljone and Håkon Wium Lie are not to publish or contribute to the publishing of the same summaries in any manner on any digital platform.

4. In connection with deletion as ordered in item 1, Fredrik Ljone and Håkon Wium Lie may mirror the data on a storage medium to be handed to Lovdata for safekeeping. The mirroring must be carried out together with a representative from Lovdata or an enforcement officer, who will bring the relevant storage medium to Lovdata for safekeeping until it is clarified by means of agreement or judgment that the data must be deleted or returned.

5. The obligation to delete the summaries of the rulings covered exclusively by item 3 must be fulfilled before publication of the individual judicial ruling, but no later than 1 month after the service of this order.

6. Fredrik Ljone and Håkon Wium Lie jointly are to pay costs of NOK 370 000 to Lovdata within two weeks of the service of this order.

7. The court's order of 1 June 2018 in case 18-083936 is replaced in its entirety by this order."

(19) Ljone and Lie appealed the order to Borgarting Court of Appeal, which on 13 December 2018 issued its order with the following conclusion:

"1. The appeal against the Oslo County Court's order, items 1-5 and 7 of its conclusion, is dismissed.

2. Costs in the Oslo County Court are not awarded.

3. Fredrik Ljone and Håkon Wium Lie jointly are to pay costs in the Court of Appeal of NOK 66 000 – sixtysixthousand – within 2 – two – weeks of the service of this order."

(20) Ljone and Lie have appealed the order to the Supreme Court. The appeal concerns the interpretation of issues of law and the award of costs in respect of the matters dealt with by the Court of Appeal other than the use of the summaries of the Supreme Court rulings.

(21) Lovdata has responded by a derivative appeal with regard to costs in Oslo County Court, see item 2 of the conclusion of the order of the Court of Appeal.

(22) On 6 March 2019, the Supreme Court's Appeals Selection Committee referred the case to a division of five justices in accordance with section 5 subsection 1 second sentence of the Courts of Justice Act.

(23) The appellants – *Fredrik Ljone and Håkon Wium Lie* – contend:

(24) Lovdata has not substantiated the claim it wants to secure by an interim measure. The parties now agree that the 2002 CD is no longer protected under the Copyright Act. The parties also agree that the materials taken from the 2005 DVD and from Lovdata's online databases, at the outset, is protected under section 24 of the Copyright Act. However, section 14 of the Act – interpreted in light of the right to freedom of expression under Article 100 of the Constitution and Article 10 of the European Convention on Human Rights – provides exceptions from section 24 of the Copyright Act for the relevant use. If the Copyright Act, considered in isolation, should nonetheless be considered to prevent the use of the disputed materials, it must yield to the Constitution and the Convention.

(25) There is no basis for security, and the Court of Appeal has failed to make an individual assessment of whether an interim measure is necessary "to avert considerable loss or inconvenience" as section 34-1 subsection 1 (b) of the Dispute Act requires. Furthermore, the Court of Appeal should have considered the freedom of expression in its assessment of whether an interim measure constitutes a disproportionate interference.

(26) The Court of Appeal was correct not to award costs in Oslo County Court. It was not Lovdata, but Ljone and Lie, that essentially won the case in the County Court as Lovdata had claimed prohibition against publishing on Rettspraksis.no of all judicial rulings originating from Lovdata's databases, i.e. rulings from 180 different years, while the case now deals with only five. Notwithstanding the outcome in the Supreme Court, the Court of Appeal's order will be upheld in the matter of costs in the County Court.

(27) Fredrik Ljone and Håkon Wium Lie have submitted this prayer for relief:

"In the main appeal

1. The injunction is to be set aside.

Alternatively

The Court of Appeal's ruling is to be set aside.

In the derivative appeal

1. The appeal is to be dismissed.

In all events

2. Haakon Wium Lie and Fredrik Ljone are to be awarded costs in the County Court, the Court of Appeal and the Supreme Court."

(28) The respondent – *Stiftelsen Lovdata* – contends:

(29) Ljone and Lie are confusing the issue of whether the State has a duty to make historical Supreme Court rulings openly available on the internet with the issue of whether the private foundation Lovdata enjoys ordinary protection for its databases of Supreme Court rulings.

(30) The lower instances have applied the Copyright Act correctly. Lovdata enjoys protection for its databases regardless of whether they contain documents that by nature are not protected under the Copyright Act.

(31) Lovdata is not – at least not in the context at hand – a public authority, and even if it were, the database protection would apply. The Open Data Directive is based on the principle that the authorities have no obligation to allow free use of materials to which they have a copyright, even if the public has a right of access.

(32) Section 14 of the Copyright Act provides an exception for databases that in themselves constitute "proposals, reports and other statements concerning the exercise of public authority, and which are made by a public authority, a publicly appointed council or committee, or published by the public authorities." This is not the case here.

(33) As for the basis for security, Lovdata supports the reasoning of the County Court and the Court of Appeal.

(34) However, the Court of Appeal's ruling must be set aside in the matter of costs in Oslo County Court. The main question is whether Lovdata's databases of Supreme Court rulings are protected under the Copyright Act, not how many rulings have actually been published on Rettspraksis.no in violation of Lovdata's rights.

(35) Lovdata has submitted this prayer for relief:

"In the main appeal:

The appeal is to be dismissed

In the derivative appeal:

Fredrik Ljone and Håkon Wium Lie are jointly and severally to pay costs in the County Court of NOK 370 000 to Lovdata.

In all events:

Fredrik Ljone and Håkon Wium Lie are jointly and severally to pay Lovdata's costs in the Supreme Court."

(36) *Norsk Redaktørforening* and *Norsk Journalistlag* have made a joint written submission to highlight the public interests at stake, see section 15-8 of the Dispute Act.

(37) The submission states that the Supreme Court's rulings are the judiciary's fundamental contribution to the legal status of the individual, and to the legal system of our democratic society. It is pointed out that because of its market position, Lovdata is the sole provider of an overall catalogue of Supreme Court rulings. It must be assumed that when access to this material requires a paid subscription, it means that the media are in practice prevented from publishing material that would have been published if access were easier, and that the opportunity of the press to criticise the courts is reduced. Even if there should be no violation of the Constitution or the Convention, the right to freedom of expression should be given weight in the interpretation of the Copyright Act.

(38) *My view on the case*

(39) This is a second-tier appeal against an order, and the Supreme Court's jurisdiction is limited to reviewing the Court of Appeal's procedure and its interpretation of written legal rules, see section 30-6 subsection 1 (b) and (c) of the Dispute Act. However, as regards the application of the Constitution and the Convention, the Supreme Court may review the individual application of the law to the facts, see Rt-2007-404 paragraph 40 and subsequent rulings.

(40) The former Copyright Act of 1961 has been replaced by the Copyright Act of 15 June 2018 no. 40, which entered into force on 1 July 2018. The parties agree that the contents of the former and the present Copyright Acts are identical with regard to the issues in the case at hand. I will from now on refer to the present Copyright Act, but it follows from the submissions made that preparatory works and case law related to the Copyright Act 1961 are also relevant.

(41) By way of introduction, I will give a brief presentation of the Copyright Act's rules on database protection. The rules have emerged from the so-called copyright laws from the early 1960s. The catalogue rule in section 43 of the Copyright Act 1961 was amended upon the implementation into Norwegian law of Directive 96/9/EC on the legal protection of databases. The content of the special database protection is – in broad terms – that a person making a considerable investment in creating a database will have an exclusive right for 15 years to exploit all or substantial parts of the database in the form of extraction or reutilisation. Reutilisation means making the entire or substantial parts of the database available to the public, see Proposition to the Storting 104 L (2016–2017) page 323.

(42) The rules are provided in section 24 of the Copyright Act section 24, which reads:

> **"Section 24. The exclusive right to a database**
>
> **Anyone who creates a database, such as a formula, a catalogue, a table, a software or similar work, where the gathering, control or presentation of the content entails a considerable investment, has an exclusive right to the entire or parts of the database's contents through extraction from or reutilisation of the database.**
>
> **The exclusive right under subsection 1 applies correspondingly in connection with repeated and systematic extraction or reutilisation of insignificant parts of the database, if this constitutes acts that affect the normal use of the database or unreasonably set aside the legitimate interests of the creator.**
>
> **The exclusive right to a database as mentioned in subsection 1 lasts for 15 years after the expiry of the year in which the database was created. If the database is published during this period, the material is protected for 15 years after the expiry of the year in which the database was first published.**

If the said database is subject in whole or in part to copyright, this may also be asserted.

The provisions in sections 3 subsection 3, 4, 8 to 10, 14, 26 to 29, 33 to 36, 40, 41 subsection 4 and 5, 43 to 58 and 62 to 66 apply correspondingly.

An agreement extending the creator's right under subsection 1 to a published database may not be invoked."

(43) A database may also be a literary, scientific or artistic work (*åndsverk*) subject to copyright, and as set forth in section 24 subsection 4 of the Copyright Act, it will in that case be protected both as a literary, scientific or artistic work and as a database. The primary practical effect of database protection is consequently to protect databases that do not qualify as literary, scientific or artistic works.

(44) The purpose of the database protection is to protect considerable investments made during the creation of the database, in order to encourage investments that are assumed to have a great impact in a society with an increasing access to information. This is set out in item 4.8.1 of Proposition to the Storting No. 104 (2016–2017) and in paragraphs 7–12 of the preamble to the Database Directive.

(45) The parties before the Supreme Court agree that the protection period for the 2002 CD has expired, and that, as a starting point, extraction and reutilisation of the Supreme Court rulings from 2002 and throughout 2007 contained in the 2005 DVD and in Lovdata's online databases constitute an infringement of the database protection provided for in section 24. What is disputed is whether the use of materials from the 2005 DVD and Lovdata's databases is nonetheless excluded from protection under section 24 subsection 5, cf. section 14 of the Copyright Act, or under the freedom of expression provisions in Article 100 of the Constitution and Article 10 of the Convention, which prevail over ordinary Norwegian law.

(46) I will first consider the issue of whether the relevant databases are without protection under section 14 of the Copyright Act, which according to section 24 "apply correspondingly" to the database protection. The two first sentences of section 14 subsection 1 read:

"Acts, regulations, judicial rulings and other administrative decisions by public authorities are not protected by this Act. That is also the case with proposals, reports and other statements which concern the exercise of public authority, and which are made by a public authority, a publicly appointed council or committee, or published by the public authorities."

(47) According to this provision, Supreme Court rulings are not protected by copyright. However, that is not decisive with regard to the protection under section 24 against extraction from and reutilisation of Lovdata's databases. For the databases to be exempt from protection under section 14, they must be "proposals, reports and other statements which concern the exercise of public authority" and be "made by a public authority, a publicly appointed council or committee, or published by the public authorities."

(48) I do not consider it necessary to elaborate further on when a database can be regarded as a statement or similar, as it is clear to me that Lovdata's databases do not "concern the public exercise of power" and are not "made by a public authority, a publicly appointed council or committee, or published by the public authorities."

(49) In Proposition to the Storting 104 L (2016–2017), Act relating to copyright to literary, scientific or artistic works etc. (the Copyright Act), the Ministry of Justice stated the following regarding section 9 of the Copyright Act 1961, which corresponds to section 14 in the current Act:

> **The provision cannot be interpreted to mean that all documents made by public authorities are unprotected under the Copyright Act. Documents made by public authorities that do not concern the exercise of power, but the provision of a service, do not fall within the scope of section 9. On the other hand, the scope of the provision is not limited to documents made by public authorities. Reports or statements that have been ordered or financed by the authorities (on-demand research, consultants' reports etc.) may be more or less connected to a subsequent decision by the authorities. To fall within the scope of the provision, the documents must have been made by a publicly appointed council/committee or published by the authorities. Hence, either appointment or publication by a public authority is required."**

(50) During the work on the bill, players in the media industry held – with reference to Article 100 of the Constitution and Article 10 of the Convention on Human Rights – that all documents made by or on behalf of the authorities should be without protection under the Copyright Act, regardless of whether they related to exercise of public authority. The Ministry disagreed, holding that the right to freedom of expression and information could be maintained even if a document made by or on behalf of the public authorities were not excluded from copyright protection on a general basis. The Ministry also noted that questions could be raised as to whether such a broad exception would be compatible with, among others, the Bern Convention.

(51) When it comes to databases in particular, the Proposition sets out that the Ministry of Local Governments and Modernisation proposed that one should consider whether databases "made by public authorities or financed by public funds" should be without copyright protection. The Ministry of Justice found that this would not be a reasonable solution, and the proposal was rejected by the legislature.

(52) Lovdata is a foundation, and Lovdata's business is to be self-financing. Currently, it acts in competition with other providers of similar services. Although Lovdata early on received public funding to some extent, and – as mentioned – particularly during the period 2004–2007 had first-hand access to the Supreme Court rulings, Lovdata's databases of Supreme Court rulings cannot reasonably be said to have been created as part of the exercise of public authority.

(53) Ljone and Lie have emphasised that the right to freedom of expression is relevant when interpreting of the Copyright Act. This is clearly stated in the preparatory works and is not in itself disputed. The question is rather what relevance it has to the issue at hand.

(54) The objective of the Copyright Act is, according to section 1 (b), to "limit the rights to strike a fair balance between the right holders' interests on the one side and the interests of the users and the public on the other, to allow literary, scientific or artistic works and related achievements and works to be used where this is reasonable for societal considerations, such as use within the private sphere and in consideration of the right to freedom of expression and information". It is also set out in item 2.7 fourth paragraph of Proposition to the Storting 104 L (2016–2017) that "the Ministry finds that the proposed new Copyright Act maintains both the protection of copyright and other fundamental rights such as the right to freedom of expression".

(55) The way section 14 of the Copyright Act is worded, and in light of what I have highlighted from the preparatory works, I find it clear that the legal policy considerations invoked cannot justify an interpretation implying that Lovdata's databases are without protection under section 24.

(56) I will now turn to the question of whether the protection of Lovdata's databases under the Copyright Act must yield to the right to freedom of expression set out in Article 100 of the Constitution and Article 10 of the Convention. In the event of conflict, these provisions prevail over the provisions in the Copyright Act.

(57) Ljone and Lie have based their contentions on Article 10 of the Convention, and I find it expedient to do the same in my continued discussion. Article 10 of the Convention reads:

> **"Art 10. Freedom of expression**
>
> **1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**
>
> **2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."**

(58) The right to freedom of expression includes the right to "receive and impart information and ideas without interference by public authority". It is undisputed that this at the outset includes making materials taken from Lovdata's databases available on Rettspraksis.no, and, consequently, that any prevention thereof will constitute an interference with the right to freedom of expression. Here, I refer to the Court of Human Rights' ruling 19 February 2013 *Neij and Sunde Kolmisoppi v. Sweden* – the Pirate Bay case. The question is therefore whether the provisions in the Copyright Act are nonetheless applicable based on the limitations in Article 10 (2).

(59) The first criterion for permitting an interference with the right to freedom of expression is that it is prescribed by law. Based on my view on the interpretation of Copyright Act, this criterion is met in the case at hand.

(60) The second criterion is that the interference serves a legitimate purpose as set out in the provision. This criterion is undoubtedly met in our case, as the objective is "the protection of the … rights of others" – Lovdata's copyright under the rules on database protection.

(61) The remaining criterion is that the interference must be "necessary in a democratic society". The application of this criterion in a case where the freedom of expression is to be balanced against the copyright, is summarised in the Pirate Bay case, which concerned punishment for the contribution to illegal file sharing through the establishment and operation of the website The Pirate Bay. The Court stated the following on page 11:

> **"The test of whether an interference was necessary in a democratic society cannot be applied**

in absolute terms. On the contrary, the Court must take into account various factors, such as the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case. In the present case, the Court is called upon to weigh, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other, the interest in protecting the rights of the copyright-holders.

As to the weight afforded to the interest of protecting the copyright-holders, the Court would stress that literary, scientific or artistic property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention (see, for example, Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, section 72, ECHR 2007-I). Moreover, it reiterates the principle that genuine, effective exercise of the rights protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection (see, for example, Öneryıldız v. Turkey [GC], no. 48939/99, section 134, ECHR 2004-XII). Thus, the respondent State had to balance two competing interests which were both protected by the Convention. In such a case, the State benefits from a wide margin of appreciation

…

Since the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, the Court finds that there were weighty reasons for the restriction of the applicants' freedom of expression.»

(62) There are considerable differences between the Pirate Bay case, where the application was rejected by the Court of Human Rights as "manifestly ill-founded", and the case at hand. However, it is worth noting the importance the Court attributes to the fact that the Swedish authorities did not only have a right, but also a duty, to protect copyrights, which must be regarded as "property" under Article 1 of Protocol 1 to the Convention. The same must apply to the "sui generis" right relating to databases. In this regard, I confine myself to referring to Ole-Andreas Rognstad, Property Aspects of Intellectual Property, 2018 page 194.

(63) Although I agree that public access to Supreme Court rulings is important in a democratic society, and that the threshold for interference should generally be higher when it affects the press or other participants in the public debate than when it affects a player whose sole purpose is economic profit, I cannot see that Article 10 of the Convention has been violated in the case at hand.

(64) Like the Court of Human Rights in the Pirate Bay case, I take as a starting point that protection under the Copyright Act is a weighty argument for contravening Article 10. The rules regarding the protection of databases are justified by the need for investor protection and are assumed to have a great impact in the promotion of societally important investments. As I have already demonstrated, the legislature has in its drafting of the Copyright Act – including the provisions on database protection – balanced the right to freedom of expression against the considerations that form the legislative basis of exclusive right provided by the Copyright Act. Further, the database provisions are drafted in accordance on the Database Directive, which is based on a similar balancing made on a European level.

(65) This case illustrates well the justification of protecting rights under the Copyright Act. Great efforts have been made to bring Lovdata's legal information systems to their current state. Lovdata estimates that it has taken at least 52 man-years to build up the databases of Supreme Court rulings, and Lovdata has since its start-up in the early 1980s made investments and incurred overall operating costs of hundreds of millions of kroner. The funds have mainly been procured by means of licence fees and other operating income. Like Rettspraksis.no,

Lovdata is a non-profit project. Norway has, through Lovdata, an excellent legal information system. It is by no means evident that Lovdata, in the absence of its licence fees, would have received the necessary funding from the public authorities or from private donors, and it is unlikely that commercial players would have been interested in investing in such legal information systems without legal protection of the databases.

(66) Furthermore, I attribute considerable importance to the fact that the case does not concern access to information that would otherwise not have been available, or the possibility of invoking the information in court or in the public debate. The Supreme Court rulings are thus not protected by copyright, as they are publicly available by requesting access in accordance with relevant legislation, by purchasing a license from Lovdata or a competitor of Lovdata, and by visiting a library that has a Lovdata license or *Norsk Retstidende* in a book format. Rulings pronounced from and including 2008 are moreover, as mentioned, freely available on the Supreme Court's website. Our case thus differs from that in HR-2015-2536-A and those from the Court of Human Rights referred to therein, which concern information that is otherwise not available to the public.

(67) Against this background, I have concluded that the Court of Appeal's application of the Copyright Act does not constitute a violation of Article 10 of the Convention on Human Rights.

(68) During the proceedings, Article 100 of the Constitution has also been invoked. In particular the final part of the provision according to which "[t]he authorities of the state shall create conditions that facilitate open and enlightened public discourse" may be essential in cases concerning access to information. However, in light of the considerations I have already addressed, I cannot see that Lovdata's claim is in conflict with Article 100 of the Constitution.

(69) I thus find that the extraction of the Supreme Court rulings from the 2005 DVD and Lovdata's online databases, as well as the publishing of these rulings on Rettspraksis.no, interferes with Lovdata's exclusive rights to the databases under the Copyright Act. Consequently, Lovdata has a claim that can be secured by an interim measure if the general conditions in the Dispute Act are fulfilled.

(70) When it comes to the requirement of a basis for security under section 34-1 subsection 1 of the Dispute Act, the Court of Appeal has correctly presented the relevant conditions and assessed to which extent they are met. The individual assessment on this point cannot be reviewed by the Supreme Court.

(71) The Court of Appeal has not carried out any balancing of interests under Article 10 of the Convention as part of its discussion of the basis for security. I cannot see that this reflects any error of law. In connection with the assessment of whether the claim has been substantiated, the Court of Appeal had already concluded that the relevant interference with the freedom of expression is not disproportionate, and there is nothing to suggest that the use of an ordinary civil law remedy like an interim measure to secure the claim should in itself constitute a violation of the Convention.

(72) Against this background, there is also no basis for setting aside the Court of Appeal's order due to errors in the assessment of the basis for security.

(73) The appeal has been unsuccessful, and I have concluded that Ljone and Lie must cover

Lovdata's costs in all instances, see 20-2 subsection 1, cf. subsection 2 section of the Dispute Act. This is a deviation from the Court of Appeal's order where costs in Oslo County Court were not awarded. The Court of Appeal correctly assumed that, when an interim measure first takes place without an oral hearing and then after a subsequent oral hearing, the starting point must be the prayer for relief in the first petition considered in conjunction with the result. This means that the prayer for relief in Lovata's first petition before the County Court – which was decided without an oral hearing – must be compared with the result of the Supreme Court, which is identical to the conclusion of the Court of Appeal. However, unlike the Court of Appeal, I find that Lovdata has succeeded in all material respects, also when considering the prayer for relief in the first petition. The principal issue has all along been whether there was a basis for making exceptions from Lovdata's protection under section 24 of the Copyright Act, while the question of which rulings are affected, has been of minor importance.

(74) Lovdata was awarded costs of NOK 370 000 in Oslo County Court and of NOK 66 000 in the Court of Appeal. In the Supreme Court, Jon Wessel-Aas, Counsel to Lovdata, has claimed costs of NOK 337 200, all of which relates to legal fees. Considering the broad approach taken by Ljones and Lie in this matter, I find that the hours billed and the total fees are appropriate.

(75) I vote for this

O R D E R :

1. The appeal is dismissed.

2. Fredrik Ljone and Håkon Wium Lie are jointly and severally to pay costs to Lovdata in the County Court, in the Court of Appeal and in the Supreme Court of NOK 773 200 – sevenhundredandseventythreethousandtwohundred – within 2 – two – weeks of the service of this order.

(76) Justice **Arntzen:** I agree with Justice Thyness in all material respects and with his conclusion.

(77) Justice **Bull:** Likewise.

(78) Justice **Ringnes:** Likewise.

(79) Justice **Indreberg:** Likewise.

(80) Following the voting the Supreme Court gave this

O R D E R :

1. The appeal is dismissed.

2. Fredrik Ljone and Håkon Wium Lie are jointly and severally to pay costs to Lovdata in the County Court, in the Court of Appeal and in the Supreme Court of NOK 773 200 – sevenhundredandseventythreethousandtwohundred – within 2 – two – weeks of the service of this order.