Preliminary translation – not authorised

SUPREME COURT OF NORWAY

On 10 March 2016, the Supreme Court delivered the following judgment in

HR-2016-00562-A, (case no. 2015/1101), civil case, appeal against judgment.

Norwaco	(Advocate John S. Gulbrandsen)
vs.	
Get AS	(Advocate Rasmus Asbjørnsen)

V O T I N G :

(1) Justice **Webster:** The case concerns the question of retransmission of broadcasts, cf. section 34 of the Copyright Act, when a cable company distributes television channels, which it receives in a closed electronic transmission, but which are broadcast simultaneously via satellite and the terrestrial network.

(2) Norwaco is an umbrella organisation for the collecting societies, which was established in 1983. Norwaco collects remuneration on behalf of Norwegian and foreign rightholders for retransmission of copyrighted works in TV programmes, among other things. Norwaco has approval pursuant to section 38a of the Copyright Act to collect such remuneration.

(3) Get AS is a distributor of cable services and offers TV broadcasts, over the cable network, among other things. The company does not produce the contents of the TV broadcasts itself, but gains access to channels from producers of TV channels. Get AS then puts together channel packages that are offered to subscribers. Among the channels the company offers are TVNorge, which is produced by SBS Discovery AS in Norway and FEM, MAX and VOX, which are produced for the Norwegian market by SBS Discovery Media Ltd. in the UK. SBS Discovery AS was formerly TVNorge AS. For the sake of simplicity, I will hereafter refer to SBS Discovery AS and SBS Discovery Media Ltd. collectively as SBS.

(4) The TVNorge channel was originally distributed to viewers via satellite. As distribution capabilities developed in Norway, other platforms were also used. Today, TV channels TVNorge, FEM, MAX and VOX are broadcast via various distribution companies; over the terrestrial network, cable and satellite.

(5) The claim in this case is related to retransmission of music rights. The rightholders are organised in TONO, which is an organisation that protects the interests of Norwegian and foreign composers, lyricists and music publishers. Previously, retransmission of the music rights on TVNorge was cleared between TVNorge AS and TONO. In September 2004, TONO notified TVNorge AS that as of 1 January 2005, Norwaco was taking over clearance and collection of remuneration for the cable distributors' retransmission of TVNorge. At the same time, clearance of the retransmission of TVNorge was no longer included in the agreement TONO entered into with TVNorge AS.

(6) TV channels FEM, MAX and VOX are broadcast from the UK and therefore are not cleared through TONO, but through TONO's sister organisation in England, Performing Right Society, shortened to PRS. SBS Discovery Media Ltd. is responsible for this clearance.

(7) Prior to 2009, Get AS retransmitted to its subscribers the encrypted, but generally available satellite broadcasts by TV channels TVNorge, FEM, MAX and VOX. Get AS also received the signals for its cable broadcasts from the satellite broadcasts. Other companies than Get AS were responsible for the satellite broadcasting. After TONO stopped granting clearance for retransmission in 2005, the rights for the channels have been cleared by Norwaco.

(8) From 2009, the way in which Get AS received the signals for TVNorge was changed. The initiative for the change came from TVNorge AS, who wanted to improve the quality and availability to the viewers. Instead of receiving the signals from the same satellite broadcast that satellite viewers of TVNorge received, the signals were transmitted from TVNorge AS to Get AS in an encrypted fibre connection. Distribution via satellite and the terrestrial network continued as before. Subsequently, TV channels FEM, MAX and VOX were also transmitted to Get AS via the fibre connection.

(9) Following the technical change, Get AS stopped clearing with Norwaco for retransmission of TV channels TVNorge, FEM, MAX and VOX. Get AS believed that they no longer retransmitted the channels as set forth in section 34 of the Copyright Act, and therefore that no remuneration was to be paid to Norwaco.

(10) On 23 November 2012, Get AS issued a notice of proceedings before Oslo District Court against Norwaco with a statement of claim that Get AS is entitled to distribute TV channel TVNorge. Norwaco filed a counterclaim against Get AS and argued that Get AS must pay compensation for retransmission of TV channels TVNorge, FEM, MAX and VOX.

(11) On 31 December 2013, Oslo District Court served judgment with the following conclusion of judgment:

> **"Get AS is entitled to distribute TV channels TV Norge, FEM, MAX and VOX. The claim for compensation by Norwaco against Get AS is dismissed.**
>
> **Norwaco's claim against Get AS, submitted in claims 3a-3g, is dismissed.**
>
> **No legal costs are awarded."**

(12) Norwaco's claims 3a-3g, to which the conclusion of judgment refers, concern claims that Get AS has not been conferred the right to retransmit specified works. Norwaco appealed to Borgarting Court of Appeal, which served judgment on 8 April 2015 with the following conclusion of judgment:

> **"1. The appeal is dismissed.**
>
> **2. Norwaco shall pay Get AS costs for the Court of Appeal hearing of the case amounting to 987,700 – nine hundred and eighty-seven thousand seven hundred Norwegian kroner within two weeks of service of this judgment.**
>
> **3. Norwaco shall pay Get AS costs for the District Court hearing of the case amounting to 1,814,620 – one million eight hundred and fourteen thousand six hundred and twenty Norwegian kroner within two weeks of service of this judgment."**

(13) Norwaco has appealed to the Supreme Court.

(14) The appellant - *Norwaco* - has mainly argued:

(15) The author has the exclusive right to dispose of own works. This exclusive right also includes the right to decide on retransmission of works that have been broadcast. Therefore, retransmission must be cleared.

(16) Communication of TV channels to the public is retransmission of works when the transmission of the works is conducted by a different organisation than the original broadcaster and the same works are broadcast simultaneously. This does not include mere technical assistance to the transmission company. The activity Get AS engages in goes clearly beyond mere technical assistance to television companies. Get AS groups together channels that are offered to subscribers. Get AS must therefore obtain clearance from Norwaco to retransmit SBS' programmes, cf. section 34 of the Copyright Act.

(17) Section 34 of the Copyright Act deals with retransmission of works. It is the copyright to the works that requires clearance, not the signals as such. Communication through a closed signal transmission is retransmission when the same programmes are broadcast simultaneously. It follows from the legislative history of the provision that the decisive factor is not whether it is the same physical signal broadcast that is retransmitted via cable. The technical change made between Get AS and SBS cannot have any bearing on the rightholders' claims pursuant to section 34 of the Copyright Act. Communication of programmes is still retransmission of works, regardless of how the programmes have been transmitted to Get AS.

(18) This is in accordance with the EU's SatCab-directive 93/83/EEC, which is part of the EEA Agreement. The Court of Appeal misinterprets the premise of the Directive that there must have been an initial broadcast in order for the signal from an initial broadcast to be retransmitted. Such an interpretation is contrary to the purpose of the Directive.

(19) Get AS' communication of works must be cleared. Section 34 of the Copyright Act only applies to retransmission of TV programmes. If the Court of Appeal's decision is to be upheld, it will be very difficult, almost impossible, for the cable distributors to ensure

that all rights are cleared. To ensure clearance, they depend on there being an extended collective licence pursuant to section 34 of the Copyright Act.

(20) If the UK channels communicated in Norway by a Norwegian company are to be cleared by a broadcaster in the UK, this will pose major problems both for broadcasters and rightholders, and the rightholder will bear the losses. Few rightholders will be able to enforce their rights against a foreign broadcasting company. The Court of Appeal's ruling also allows programmes to be broadcast from Norway with a low level of protection for the author to reduce the costs of copyright clearance. Real considerations tilt heavily in favour of deeming Get AS' distribution of TV channels TVNorge, FEM, MAX and VOX to be retransmission pursuant to section 34 of the Copyright Act.

(21) Get AS must compensate Norwaco for the lost income as a result of failure to obtain clearance for retransmission pursuant to section 34 of the Copyright Act.

(22) Norwaco has submitted the following claim:

> **"1. Get AS' claim against Norwaco is dismissed.**
>
> **2. Get AS is ordered to pay compensation and / or payment to Norwaco of NOK 15,797,634.**
>
> **3. Get AS is ordered to pay Norwaco's costs for the District Court, Court of Appeal and the Supreme Court."**

(23) The respondent - *Get AS* - has briefly argued the following:

(24) Retransmission assumes that there has been a prior broadcast of the transmission. Broadcasting via Get AS' cable network is part of SBS mainstream broadcasting operations and therefore, Get AS does not retransmit TV channels TVNorge, FEM, MAX and VOX. There are therefore no grounds for Norwaco's claim regarding clearance and remuneration pursuant to section 34 of the Copyright Act.

(25) The author manages his own rights, both toward the primary broadcaster and the party who retransmits. Section 34 of the Copyright Act implies a limitation in the author's exclusive rights. Such limitations must remain within Norway's obligations under international law regarding protection of the author's rights. The interpretation Norwaco uses as grounds for its claim will be contrary to Article 11bis of the Berne Convention. Get AS makes intellectual work available to the public and is obliged to clear this pursuant to section 2 of the Copyright Act. Under the agreement between Get AS and SBS, as broadcaster, it is SBS that must ensure all the necessary clearances. There is no need for an arrangement with an extended collective licence from Norweco when the broadcaster can and wants to clear the rights directly with the rightholder.

(26) SBS broadcasts its channels on a variety of platforms; the terrestrial network, via satellite, cable and over the Internet. The infrastructure is owned and operated by other companies than SBS. These platforms are all primary. There is therefore no basis for arguing that Get AS' distribution is a retransmission of a broadcast that originally takes place on a different platform.

(27) Either way, there are a number of statements in the legislative history which show that section 34 of the Copyright Act aims at retransmission of the same physical signals that have originally been broadcast. As Get AS now receives the channels encrypted over the fibre network, there is no retransmission of the same signals that have been broadcast. Therefore, the broadcast from Get AS does not come under section 34 of the Copyright Act.

(28) Get AS has submitted the following claim:

> **"1. The appeal is dismissed.**
>
> **2. Get AS is awarded costs for the Supreme Court."**

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

(30) Section 2, subsection 1 of the Copyright Act states that the author has the exclusive right to dispose of intellectual work by "making it available to the public", among other things. Subsection 4 states that "public communication also includes broadcasting or other transmission by wire or wireless means to the public".

(31) There is no doubt - and the parties also agree - that Get AS' distribution of TV channels involves making the intellectual works in the TV broadcasts "available to the public", cf. section 2 of the Copyright Act. There is therefore no dispute that Get AS' transmissions must be cleared.

(32) The primary arrangement under the law is that clearance is agreed with the authors, cf. section 2. In certain cases, the law states that clearance shall or may be done in other ways. Section 34 of the Copyright Act is an example of this. The dispute between the parties concerns whether there are grounds for clearance under section 34 of the Copyright Act in this case. Subsection 1 and 2 of the provision read as follows:

> **"Work that is lawfully included in the broadcast may, through simultaneous and unaltered retransmission, be made available to the public when the party who retransmits meets the conditions of the extended collective licence pursuant to section 36, subsection 1.**
>
> **The author's exclusive right to retransmission may only be exercised through an organisation that has been approved pursuant to section 38a."**

(33) In other words, this provision will apply when there is a lawful broadcast of a work that is "simultaneously and unaltered" retransmitted to the public. Hence, "retransmission" assumes that there is simultaneously an original broadcast of the intellectual work. This original broadcast of the work must also be included in a broadcast transmission. The parties disagree on whether the concept of broadcasting under the Copyright Act has the same content as in broadcasting legislation. I do not need to consider this, but find that the term "broadcasting transmission" herein implies that the work must have been transmitted by TV or radio signals that have been intended for the public.

(34) Get AS argues that they do not "retransmit" in the legal sense, because they do not retransmit signals that are transmitted to the public, but instead receive the signals for retransmission encrypted over fibre optic cable. The wording of the provision does not

state that how the party who retransmits has received the signals is a decisive factor. However, the requirement of "simultaneous and unaltered retransmission" may indicate that it is the broadcast transmission and not a special transmission that must be redistributed.

(35) If distribution of a broadcast transmission is deemed to be retransmission pursuant to section 34 of the Copyright Act, it follows from subsection 2 that the author cannot exercise his exclusive right directly, but must do so through a collective arrangement. As mentioned, Norwaco is approved pursuant to section 38a of the Copyright Act to protect the author's rights pursuant to section 34. Section 34 thus limits the authors' right pursuant to section 2. This has also been concluded in the preparatory works for NOU 1984: 25 "Neighbouring countries TV stations through cable" page 38.

(36) The background for the provision is stated in NOU 1984: 25 "Neighbouring countries' TV stations via cable". At the beginning of the 1980s, it had been possible for many years to receive TV broadcasts from neighbouring countries in some parts of Norway. "Neighbouring country viewing" was usually organised through development of common antenna systems. Initially, the systems were small, connected to a housing cooperative, for example. Eventually smaller systems were linked together and an extensive cable distribution network was established. This made it possible for larger segments of the population to view neighbouring countries' TV stations. The programme signals transmitted in these cable networks were taken from the terrestrial network. Swedish TV transmissions could be received because there was an overspill of signals along the border with Sweden. In 1982, signals were obtained for the first time from a closed satellite broadcast and distributed through the cable network.

(37) A key problem in the NOU was to find a solution to protect the authors' rights when using television signals that were intended for a national market, but which were captured and distributed in neighbouring countries, see NOU 1984: 25 page 9-13. The NOU is based on a report from a Nordic working group. The report has been prepared as an annex to the NOU and is entitled: "Neighbouring countries TV via cable. Retransmission of foreign radio and TV programmes via cable, etc. in the Nordic countries".

(38) The Berne Convention for protection of literary and artistic works sets limits on the contracting countries' right to limit the author's rights. The Nordic Countries are Contracting States and the importance of the Convention has been discussed in the Nordic report. Article 11bis no. 1 of the Berne Convention addresses the authors' exclusive right of authorising. It follows from the provision that the authors have the exclusive right to dispose of the original broadcasting of their works. Furthermore, the authors have exclusive right to allow "any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one". The latter alternative includes cases where there is a mainstream broadcast and this is retransmitted by another organisation that the original one. Pursuant to Article 11bis no. 2, the Contracting States may determine the conditions under which the rights in no. 1 are exercised. This is what has been done on introduction of the regulation that subsequently became section 34 of the Copyright Act. Article 11bis of the Berne Convention thus provides a legal basis for handing over protection of the copyright to a collective organisation, such as Norwaco, at the expense of an individual protection, but only insofar as regards retransmission.

(39) Ensuring that the chosen solution was within the Berne Convention was essential to the Nordic working group. In this context, transmission of the signals from fixed satellite services was discussed, i.e, signals from a communication satellite. The signals are then not available to the public. The opinion of the working group was that transmission of signals to one or more specific recipients does not come under the broadcasting concept, see NOU 1984: 25 page 987.

> **"In principle, transmission of signals to one or more specific recipients falls outside the broadcasting concept. This type of transmission may be done using radio links (converters, etc.) or wire transmission or also with the help of satellite. In the latter case, a so-called fixed satellite service is used for the transmission."**

(40) It was therefore found that a party who receives signals from such satellites and retransmits these to the public, basically does not exercise retransmission that comes under Article 11bis of the Berne Convention. However, the Nordic working group envisaged an exception from this:

> **"In a special situation an exception from what has now been said is considered to apply. It is possible that simultaneously with the satellite transmission there is a broadcast of the material from the same originator, and according to the telecommunication provisions this authorises reception and distribution of the satellite transmission.**
>
> **Such a situation may exist if one of the Nordic radio companies wants their programmes to be received and retransmitted simultaneously with the broadcast in the home country via a fixed satellite service in another country. In the opinion of the group, transmission and retransmission in the receiving country should also concern a broadcast transmission. Consequently, Article 11bis of the Berne Convention should be applicable in the receiver country."**

(41) In other words, the Committee believed that it should be deemed to be retransmission when the material is broadcast in a country and the broadcaster simultaneously transmits the broadcast via a fixed satellite service to another country for retransmission in the receiver country. With the exception that our case does not concern transmission via satellite, but by cable, the description resembles in part the situation in our case. In both cases there is broadcasting simultaneously with signals being transmitted in a closed system, for retransmission by the recipient. However, the example cited shows that the Nordic working group still had neighbouring country television in mind. TV channels TVNorge, FEM, MAX and VOX are intended for broadcasting in Norway, and the problem in our case differs somewhat to the one in the example.

(42) The Norwegian committee agrees on a general basis with the Nordic working group's proposal. The copyright issues are discussed in chapter 6 of the NOU. Section 6.4 discusses the committee's proposed solution to the copyright issues. In accordance with the committee's mandate, the overall topic is transmission of neighbouring countries' programmes, i.e. retransmission of programmes, the primary market of which is in a neighbouring country.

(43) Satellite transmitted TV broadcasts, where the cable systems received signals from communications satellites, which were redistributed in the cable network or broadcast using slave transmitters - was a growing issue in 1984. The UK's Sky Channel was the first foreign satellite channel to be distributed in this way to Norway. At that time, it was not technically possible to broadcast via satellite, but the committee pointed out that

satellites which could transmit directly to each household would be available within a short time, see NOU 1984: 25 page 9.

(44) As long as the satellite transmission itself could not be deemed to be a broadcast, the committee argued that there was no retransmission when the cable distributors sourced programmes from communications satellites for further distribution in the cable network. For such transmission, it was found that the distributor could not prepare for the extended collective licence pursuant to section 34, cf. NOU page 39, which states the following:

> **"Programme distribution that takes place using communications satellites, such as Sky Channel, ... does not come under the Committee's proposed licence provisions. This does not concern transmissions that are intended to be received directly by the public. For such transmissions, the copyright clearance is assumed to take place through an agreement between the programme distributor, or via the cable network owner and the rightholder."**

(45) This is in accordance with the principle of the Nordic report. The special exception for simultaneous broadcasting and transmission via a fixed satellite, which the Nordic working group envisaged, is not mentioned.

(46) Proposition to the Norwegian Odelsting no.. 80 (1984–1985) page 26, states in the special commentary to what subsequently became section 34 of the Copyright Act, that:

> **"According to this, the broadcasts covered by the extended collective licence will be NRK and other Norwegian and foreign broadcasting organisations' broadcasts suitable for direct receipt by the public. It is therefore these signals that will be retransmitted simultaneously and unaltered, either by the retransmission taking place from an area where the signals are received directly or on the basis of long distance communication of the signals. In those cases where under the Broadcasting Act it is allowed to retransmit ether-transmitted broadcasting, it will also be possible to obtain the right to transmission with the help of the extended collective licence provisions. In addition, the provision will include retransmission of lawfully transmitted broadcast signals that are transmitted via a communications satellite also in cases where the signals cannot be received directly in Norway."**

(47) In other words, it is assumed here that retransmission of the broadcast signals comes under section 34 of the Copyright Act if the signals are also transmitted as lawful broadcasting. However, the addition "also in cases where the signals cannot be received directly in Norway" shows that satellite transmission of programmes which are broadcast in another country have also been envisioned - and which thus fall within the key issue of the legislative process, and which the legal amendment aimed at resolving. As mentioned, in this case, we are faced with distribution of programmes intended for Norway and the problem the provisions should have resolved does not exist in our case. Therefore, it is difficult, based on these statements in the legislative history, to conclude with any certainty on the legislator's intention for cases such the present case.

(48) The SatCab Directive lays down rules for the coordination of provisions relating to copyrights when broadcasting via satellite and cable. The Directive is part of the EEA Agreement and has been incorporated in Norwegian law through a legal amendment in 1995. The Directive's Article 9 no. 1 states that the States shall ensure that the author's right "to grant or refuse a cable operator permission to retransmit a broadcast

transmission via cable may only be exercised by a collecting society". Retransmission by cable has been defined in Article 1 no. 3. The provision reads as follows:

> **"For the purposes of this Directive, cable transmission means the simultaneous, unaltered and unabridged retransmission by cable or microwave systems for reception by the public of an initial transmission by another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public."**

(49) In accordance with the Berne Convention, the SatCab Directive assumes that there has been a prior "initial broadcast" so that redistribution by cable can be a "retransmission by cable" in the directive's sense. A Dutch Supreme Court ruling from 28 March 2014, ECLI:NL:HR:2014:735 found that the SatCab Directive must be interpreted in this way. The case concerned interpretation of the Dutch parallel of section 34 of the Copyright Act. The Dutch Supreme Court concluded that when transmission from the broadcasting organisation to the TV channel companies was not available to the public, the transmission could not be deemed as an initial broadcast. It was not considered relevant whether the broadcasting organisation simultaneously performed other broadcasting actions. I therefore find that Article 9 of the SatCab Directive does not imply that the clearance in a case such as this must take place through a collecting society.

(50) In my view, the sources of law indicate that the provision in section 34 primarily aims at regulating the rightholders' position when transmitting television broadcasts that have not be initiated by the broadcaster itself. The typical case where section 34 is applicable is where television broadcasts transmitted over-the-air, which are intended for one country are picked up in a neighbouring country.

(51) The signals that are retransmitted in our case have not been obtained from a broadcast that has been open to the public, and therefore can be identified as "primary broadcasting" as the provision relating to retransmission assumes. I cannot otherwise see that any of the broadcasting platforms in this case stand out as the primary broadcast.

On the contrary, both the transmission by cable, satellite and via the terrestrial network appear to be a part of the primary broadcasting of TV channels TVNorge, FEM, MAX and VOXs.
The Berne Convention also refers to retransmission as something other than the broadcast which is the "original one". It is difficult to see that in a situation with simultaneous distribution to several broadcasting platforms - terrestrial network, cable, satellite, internet, etc. - that one of these can be pointed out as "the original one" with the result that the broadcasting on other platforms is rebroadcasting.

(52) As section 34 limits the authors' rights pursuant to section 2, there is also reason to exercise caution when using the provision relating to extended collective licence over and above the area for which the legislative history shows that section 34 was intended. As mentioned, it follows from section 34, subsection 2 that if a distribution of intellectual works is deemed to be retransmission, the author loses the right to dispose of his work directly.

(53) In my view, there are also no other real considerations that weigh heavily against such a solution. When the provision currently set forth in section 34 of the Copyright Act was

introduced, several agreements were entered into between Swedish collecting societies and Norwegian cable operators, cf. NOU 1984: 25 page 24 and 38. However, the law committee assumed that the cable companies would not be able to obtain consent from all authors, and that the broadcasting organisations in other countries would not generally want to clear rights for cable transmission in Norway, and therefore that it would be necessary to have a legal provision that "Norwegian cable operators and network owners [shall] obtain assurance that when retransmitting they do not incur liability for infringement of the exclusive rights provisions", see NOU 1984: 25 page 38.

(54) The commercial development has meant that the prerequisites used in 1984, do not prove correct for the commercial TV channels. Unlike the key issue in the NOU, that the viewers in neighbouring countries watch TV channels that were not intended, and therefore not cleared for viewers in this neighbouring country, TV channels TVNorge, FEM, MAX and VOX are originally intended for Norway. The viewers in Norway are the target group for the channels. 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 their use is cleared. In the agreements between SBS and Get AS, it is assumed that SBS shall clear all the copyrights for the transmission by cable. Get AS has an independent responsibility and will be liable to the authors if SBS does not fulfil this obligation.

(55) In my view, the appeal must therefore be dismissed.

(56) Get AS has claimed 1,026,565 Norwegian kroner in costs. The costs appear necessary and are awarded in accordance with the general rule in section 20-2, subsection 1 of the Dispute Act.

(57) I vote for this

JUDGMENT:

1. The appeal is dismissed.

2. Norwaco is ordered to pay to Get AS 1,026,565 -
one million and twenty-six thousand five hundred and sixty-five Norwegian kroner - in costs for the Supreme Court within 2-two-weeks of services of this judgment.

(58) Justice **Arntzen:** I have concluded that Get AS' (hereafter Get) cable transmission of the broadcasts is retransmission in accordance with section 34, subsection 1 of the Copyright Act and consequently that the appeal succeeds.

(59) For the sake of context, I will discuss some factual and legal points of departure before discussing the relevant question of interpretation.

(60) The parties agree that SBS broadcasts TV channels TVNorge, FEM, MAX and VOX via satellite. The Supreme Court has not been informed of the contractual basis and the more detailed circumstances regarding the broadcast. The satellite broadcasting has been cleared with the rightholders in separate agreements.

(61) The current copyright clearance between SBS (then TVNorge AS) and TONO follows from the agreement entered into on 14 March 2008, which continues the agreement of 19 October 2006. When these two agreements were entered into, Get obtained the signals for the relevant channels from the satellite broadcast, and cleared the rights to retransmission through Norwaco in accordance with section 34, subsection 1 and 2. I find it difficult then to see that SBS's copyright clearance includes Get's cable distribution, which in this case would have been cleared twice. It has not been argued that SBS has entered into subsequent clearance agreement regarding Get's cable distribution.

(62) In the summer of 2009, Get stopped clearing the copyrights with Norwaco with reference to the agreement with TVNorge AS regarding transmission of the programme-carrying signals directly from the broadcasting organisation. The purpose is described as follows in clause 1 of the agreement.

> **"In this Agreement the Parties wish to establish a short term agreement for continuing of the existing distribution of GET`s linear analogue and digital distribution of the standard definition (SD) signal in the networks that are operated by Get".**

(63) The purpose was therefore to continue Get's existing cable distribution. The agreement has subsequently been continued in various distribution agreements.

(64) As the first voting justice also concluded, Get's cable distribution of the relevant TV channels is public communication that requires clearance in accordance with section 2, subsection 3, litra c) of the Copyright Act, cf. subsection 4. There are no exhaustion rules connected to this right of communication, which means that every public act of communication must be cleared. I refer to Rognstad, "Opphavsrett", 2009, page 186 regarding this.

(65) To the extent that the rights to the cable distribution have not already been cleared by SBS, Get is obliged to clear these. Get is a commercial company that sells various channel packages to its subscribers. The parties agree that Get's communication is not confined to providing SBS with technical broadcasting assistance. The agreements SBS and Get may have entered into about which company shall be responsible for copyright clearance is thus not decisive in the relationship between Get and the rightholders.

(66) In my view, Get is obliged to clear the rights with Norwaco in accordance with section 34, subsection 1 of the Copyright Act relating to retransmission. It has not been argued that Get performs the original cable distribution - so-called cable-born transmission - which in accordance with section 34, subsection 3 shall be cleared by the cable distributor in accordance with section 2 of the Copyright Act.

(67) When interpreting the term "retransmission", I consider that the rights are related to the intellectual work, which in this context would be the copyrighted content. This is reflected in the fundamental provision in section 2 of the Copyright Act, which gives the rightholders exclusive right to dispose of the "intellectual work". The same follows from the wording in section 34, subsection1 that retransmission must concern "works that are lawfully included in a broadcast", cf. subsection 3 of the provision. In other words, the copyright is technology neutral and the provisions in the Copyright Act must be interpreted against this background.

(68) Section 34 of the Copyright Act imposes no requirement that the physical signals which form the basis of the retransmitted broadcast, must originate directly from the broadcast, in our case from the satellite. As long as Get communicates TV channels transmitted in programme-carrying signals from SBS, linguistically speaking this concerns retransmission. I do not agree with the first voting justice that the requirement of "simultaneous and unaltered retransmission" indicates that it must concern the signals from the broadcast itself. On the contrary, the technical signals would have to be changed - i.e.be transformed or converted - before they are retransmitted from one transmission medium to another, such as from satellite to cable. Furthermore, the simultaneity requirement will be equally as well taken care of when the signals are transmitted directly from the broadcasting company. In my view, the decisive factor nevertheless is that from the point of view of *content* the broadcasts are the same, which would also be the case where the cable distributor receives the programme-carrying signals directly from the broadcasting company.

(69) I cannot see that such an interpretation is contrary to the legislative history of the Act. I perceive the discussion in the legislative history of retransmitted signals from over-the-air or satellite broadcast transmissions as being a description of the situation based on the technological "main rule" at that time rather than as a discussion of legal criteria. That the term "retransmission" is not confined to communication of the broadcast signals is evident in several places in the legislative history, as the first voting justice mentioned. I would like to remind of the special legislative history in Proposition to the Norwegian Odelting no. 80 (1984–1985), where on page 26, the following is stated following the discussion of retransmitted signals from broadcast over-the-air transmissions:

> **In addition, the provision will include retransmission of lawfully transmitted broadcast signals that are transmitted via a communications satellite also in cases where the signals cannot be received directly in Norway.!**

(70) What is discussed here is programme-carrying signals from closed transmissions - i.e. from transmission that are not available to the public. When interpreting the concept of retransmission, I see no real reason to discriminate between transmission of signals via closed communications satellites and transmissions via other closed transmission media. In this context, there is also reason to maintain that the copyright is technology neutral.

(71) Retransmission based on signals received through closed transmission - "fixed satellite services - is also discussed in the Nordic group's report that formed the basis for the Copyright Act, cf. NOU 1984: 25 page 87.

> **Such a situation may exist if one of the Nordic radio companies wants their programmes to be received and retransmitted simultaneously with the broadcast in the home country via a fixed satellite service in another country. In the opinion of the group, transmission and retransmission in the receiving country should also relate to a broadcast. Consequently, Article 11bis of the Berne Convention should be applicable in the receiver country."**

(72) The prerequisite that there will be a retransmission from signals received through such a closed transmission, is that a broadcast of the same material takes place *simultaneously*.

(73) The first voting justice points out that the statements in the preparatory works only describe retransmissions in neighbouring countries. For my part, I attach importance to the fact that section 34 is formulated in general terms and therefore the provision must be interpreted regardless of where the retransmission takes place.

(74) Retransmission via fixed satellite services has also been discussed in the NOU on page 37, where the following is stated:

> **"However, the transmission of the signals to a converter or to a cable network, such as long-distance transmission over a radio link is not a broadcast to the public and consequently falls outside the area of exclusive right . At the end point for long-distance transmission there will be a broadcast (to the public) via a converter or by wire. This retransmission must be considered as described above."**

(75) It is the retransmissions which require clearance that are described "above".

(76) The legislative history suggests that the cable broadcast from Get to the public is a retransmission, even though the transmission of the programme-carrying signals from SBS to Get are not available to the public.

(77) The question is then whether an interpretation of the retransmission concept is in accordance with the international agreements to which Norway is bound.

(78) I agree with the Nordic working group as I previously cited, in that is it not contrary to Article 11bis of the Berne Convention to regard cable transmission of signals received in a fixed satellite service as a retransmission. Section 1 (ii) to the provision defines retransmission as "rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one". The term "rebroadcasting" shows that there shall be a repeated or new (simultaneous) broadcast. The condition is that this broadcast is made by another company than the original broadcasting company. From where the technical signals originate has not been discussed. It is the rebroadcasting of the content - the work - that is relevant.

(79) The SatCab Directive Article 1 no. 3 the cross-border retransmission - in the Danish version referred to as "rebroadcasting" - is defined as follows:

> **"For the purpose of this Directive, 'cable retransmission,' means the simultaneous, unaltered and unabridged retransmission ... of an initial transmission from another Member State, ... , of television or radio programmes intended for reception by the public."**

(80) Here too the term "retransmission" indicates that this concerns a repeated or new (simultaneous) broadcast. It is not the signal transmission to the cable distributor that will be "intended for reception by the public", but the programmes that are included in "an initial transmission". This is even clearer in the French version of the Directive, where the use of the plural "destinées" necessarily refers to the programmes.

(81) I also conclude that signals for cross-border retransmission were also communicated through fixed-satellite services when the Directive was adopted in 1993, cf. 1984 the preparatory works discussion of communications satellites or fixed-satellite services,

which I have previously cited. It is difficult to suppose that the Directive intended to establish another clearance procedure for such performances without discussing this further.

(82) Article 9 of the Directive contains a provision corresponding to section 34, subsection 2 of the Copyright Act that exercise of the right to such "cable transmission" shall be cleared through clearing societies, such as Norwaco. The reason for the existence of a principle for compulsory collective administration of rights is that it would involve considerable practical problems if a cable company was to obtain authorisation from each rightholder before a broadcast transmission can be retransmitted "simultaneously and unaltered". The broadcasting organisations on the other hand will more easily be able to clear rights. This is the reason why the Directive's Article 10 and section 36, subsection 1, third sentence of the Copyright Act excludes the broadcasting companies' own broadcasts from compulsory collective administration of rights. I refer to Rognstad, "Opphavsrett", 2009, pages 281-282 regarding this, where the following is also stated regarding retransmission of broadcast transmissions:

> **"However, the prerequisite must reasonably be that there is a primary broadcast to retransmit. Distribution of the primary broadcast cannot be regarded as retransmission and fall under section 34. An obvious example is distribution of NRK and TV 2 in the digital terrestrial network, which replaces - and is not in addition to - the analogue broadcasts over-the-air. Fundamentally, the question is whether the rights to broadcast have been cleared back down the line - or not, the must be cleared for retransmission."**

(83) The prerequisite for the existence of a retransmission is that the "primary broadcast" is wireless, cf. section 34, subsection 3. As stated in the quote, the key question is whether the rights have been cleared. The "primary broadcast" will then be the wireless and cleared broadcast transmission. I cannot see that it is relevant to the definition of the term "retransmission" whether there are cleared "primary broadcasts" via various platforms. As this case stands, it is not necessary for me to discuss the situations where the rights in the wireless broadcast have not been adequately cleared.

(84) In Danish law there is also no requirement that technically speaking the signals which are retransmitted are signals from the primary broadcast transmission. This has been discussed in NIR, booklet 6 for 2009, page 556, with the following quote from the preparatory works for the retransmission provision in section 35 of the Danish Copyright Act of 1996:

> **"Moreover, it is immaterial in what way the signal which is used for retransmission, is received. In most cases, the signal is received wirelessly, but also retransmission of broadcasts on the radio or television, which take place through a closed long-distance communication, such as via long-distance cable or radio link, will come under the extended collective licence, assuming that such broadcasts are transmitted simultaneously wirelessly to the public here in Denmark or elsewhere",**

(85) As I have already discussed, the background for the arrangement of an extended collective licence - collective clearance - was to simplify the clearance system for simultaneous and unaltered retransmissions, cf. for example, the discussion in NOU 1984: 25 page 38. If the copyright has not already been cleared by the broadcasting company, this consideration manifests itself with the same strength whether the signals originate from a satellite or from the broadcasting company. Although extended

collective licence schemes mainly involve restrictions on copyright - especially for those rightholders who are not members of the organisation that manages the copyrights - in practice, the collective clearance system is in all the rightholders' interests. Non-member rightholders also have the same right to remuneration as rightholders affiliated with the clearance organisation, cf. section 37 of the Copyright Act.

(86) I believe that the term "retransmission" is not reserved for those cases where the signals technically speaking originate from the broadcast transmission. The decisive factor is that there is an unaltered retransmission of the programme-carrying broadcasting signals simultaneously with the broadcast. I cannot see that in this case there are grounds for establishing a new clearance procedure in addition to clearance of retransmission in accordance with section 34, subsection 1 and of cable-born broadcasts pursuant to section 2 of the Copyright Act, cf. section 34, subsection 3. Get's claim against Norwaco must therefore be dismissed and Norwaco must be awarded compensation as requested. In the event that there is a retransmission, neither the compensatory basis nor the extent of the claim for compensation have been disputed. I also believe that Norwaco must be awarded costs.

(87) Justice **Falch:** I am essentially and in effect in agreement the first voting justice, Justice Webster. However, I have found the decision sufficiently questionable that I vote that Get AS is not awarded any legal costs, cf. section 20-2, subsection 3 of the Dispute Act.

(88) Justice **Tønder:** I am essentially and in effect in agreement with the first voting justice, Justice Webster.

(89) Justice **Utgård:** Likewise.

(90) After voting, the Supreme Court pronounced the following

JUDGMENT:

1. The appeal is dismissed.

2. Norwaco pays to Get AS the costs for the Supreme Court hearing of the case amounting to 1,026,565 - one million twenty-six thousand five hundred and sixty-five - Norwegian kroner within 2-two-weeks from service of this judgment.

True transcript confirmed: