

Supreme Court finds something fishy in nudity scene broadcast

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On 25th March 2010 the Supreme Court ruled against NRK, the Norwegian state broadcaster NRK, in a lawsuit initiated by Norwegian actress Gørild Mauseth.

The Supreme Court confirmed an earlier ruling by the Oslo District Court which had awarded Mauseth compensation for economic and non-economic loss for the public performance of an excerpt from the 1997 Norwegian film *Burnt by Frost* in a talkshow on NRK. The scene depicts Mauseth's character engaged in sexual intercourse in a fishing vessel on top of a pile of freshly caught fish, and in the final two seconds she is seen naked from the front. The excerpt was shown on an NRK talkshow in connection with a review of the film *Kill Buljo*. The latter is a comedy containing parodies of a number of scenes from other films, including the nude scene from *Burnt by Frost*, but not the final frontal nudity part. It was clear that NRK had not obtained permission to broadcast the scene, and that there was a clause in Mauseth's contract for the film that the nude scene could not be used out of context (ie, it could be shown only in connection with the film). Mauseth had previously tried to stop NRK from using the scene as NRK had previously used the scene in an out-of-context setting, but the earlier use had not included the final two seconds of frontal nudity.

The Supreme Court case was limited to two legal issues. First, the Supreme Court considered whether Mauseth's performance was of such a nature that it was protected by Section 42 of the Copyright Code, which provides that performing artists have rights in their performances of works (eg, by making recordings of their performances available to the public). If this was the case, the Supreme Court then had to consider whether the public performance was legal under Section 22 of the Copyright Code (the right to quote from published works in accordance with fair practice and to the extent required by the purpose). The case concerned the legality of the public performance of the frontal nudity part of the scene only, as Mauseth had not contested the legality of the public performance of the whole scene as such.

Regarding Mauseth's performance, the Court of Appeal had found that the rights of a performing artist apply only if the work being performed is protected by copyright. NRK argued this before the Supreme Court, claiming that in order for the performance to be protected, the portion of the work being quoted must in itself satisfy the originality requirement in the Copyright Act. The Supreme Court did not agree and referred to, among other things, the fact that a performance of a work is protected regardless of whether the work itself is no longer subject to copyright protection due to the expiry of the copyright term. The Supreme Court stated that it is not a condition that the quoted part of the work in itself must enjoy copyright protection. Section 42 of the Copyright Code protects all performances which entail an experience of an artistic nature, including the frontal nudity scene.

In relation to the right to quote, NRK argued that the entire scene from *Burnt by Frost*, including the frontal nudity, was shown in order to "compare the beautiful and natural expression of the original with the dressed and unromantic copy in the parody". The Supreme Court did not agree with this explanation and emphasised, among other things, that in a letter sent after the frontal nudity scene was later censored from the online version of the talkshow, NRK had stated that "the censoring in this concrete case can be done without substantially reducing the purpose" of the excerpt.

Consequently, the Supreme Court found that NRK had taken an excerpt from the original film beyond what was required for the purpose, and that the broadcasting of the nude scene was therefore illegal. The Supreme Court stated that even if the courts should not fully re-examine all editorial considerations, it was clear that the broadcasting of the frontal nudity scene had no significance for either a further debate in society or an illustration of the excerpt from *Kill Buljo*, and the Supreme Court found it to be within its authority to make this distinction.

Finally, the Supreme Court noted that NRK had elected to broadcast the scene even though it was aware that Mauseth was opposed to the scene being used out of context. As a result, the Supreme Court asked whether, by broadcasting the scene, NRK has acted in accordance with fair practice. However, the Supreme Court found no reason to go further into this.

Therefore, the four-judge majority confirmed the previous ruling by the Oslo District Court. The single minority judge found that the broadcasting of the scene was a legal excerpt under Section 22 of the Copyright Code and that the frontal nudity scene was a natural part of the intercourse scene.



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NRK has indicated that it may bring the case before the European Court of Human Rights, but this remains to be seen.

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