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Additional submission

Application of Mr. Håkon Wium Lie and Mr. Fredrik Ljone v. Norway

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1. INTRODUCTION

1. The case concerns the right to publish Supreme Court Rulings, for the benefit of the public audience. Since 1987, the Supreme Court of Norway has supplied the entity *Lovdata* with all new Supreme Court rulings in an electronic version on an ongoing basis, free of any charge. The purpose has been to make the Supreme Court jurisprudence accessible for the public, a core task in a democratic society governed by rule of law.

2. The arrangement with *Lovdata* has been exclusive, as no other entities approaching the Supreme Court were able to obtain access to the Supreme Court rulings and the case-law in this manner. Instead, the Supreme Court referred all other parties to *Lovdata* in order to get the Supreme Court rulings from *Lovdata*. This was due to practical considerations on part of the Supreme Court. Hence, *Lovdata* was supposed to share all the Supreme Court rulings with other entities requesting access to the rulings in order to publish them. In line with this, *Lovdata* did in fact share the Supreme Court rulings until 2004.

3. However, for a period of time – starting in 2004 – *Lovdata* declined to share the Supreme Court rulings with others. However, at the same time, it became evidently clear that the differential treatment of *Lovdata* was not appropriate. The European Union Directive on the re-use of public sector information (2003/98/EF) explicitly banned any differential treatment and prohibited any exclusive arrangements (cf Articles 10 and 11). The same prohibition against

differential treatment was already in effect in Norway through case-law and established rules for government administration. *The Norwegian Courts Administration* (*Domstolsadministrasjonen*) appointed a commission that concluded that *Lovdata* did in fact enjoy a *de facto* exclusive position, and pointed out that this could not continue. As of 2008, the Supreme Court started to publish all Supreme Court rulings on the court's website, free for all to use.

4. The Applicants in this case are the two leading individuals fronting an idealistic democratic initiative working to make Supreme Court rulings available to the public. A private citizen cannot access the case-law and the collected jurisprudence of the Supreme Court without signing up for a subscription for *Lovdata*. The subscription cost as much as 16.000 NOK (more than Euro 1.600) pro anno – for one person alone. This was of course prohibitively expensive for any regular citizen. In practical terms, the jurisprudence of the Supreme Court was restricted to only the very wealthy private citizens. Hence, the applicants, *Mr. Wium Lie* and *Mr. Ljone*, established the non-profit website *Rettspraksis.no* – a website offering electronic access to the Supreme Court *case-law* free of charge for anyone. In the very early ages of internet, Mr. Wium Lie had already run a similar initiative making Norwegian legislation available on the internet for the public audience free of charge.[1]

5. As mentioned above, all Supreme Court rulings from the period after 2008 were available for *Rettspraksis.no* on the Supreme Court's website. Further, all rulings prior to 2003 were available from the repository of the Norwegian National Library, from a CD issued by *Lovdata*. The collection of rulings on this CD was undisputedly free for *Rettspraksis.no* to use, as the regular time-limitations on proprietary database rights is limited to 15 years. However, there was a gap between 2002 and 2008 (i.e. the 5 years of 2003-2007).

6. *The issue of this application* to the ECHR is the right to publish the Supreme Court rulings that *Lovdata* had received from the Supreme Court, and only from this limited period of the years 2003-2007. This gap was filled by *Rettspraksis.no* with Supreme Court rulings from *Lovdata*'s databases.

7. More precisely, what is at stake is the access to the *case-law* or the *jurisprudence* that *Lovdata* had received from the Norwegian Supreme Court on a *de facto* exclusive basis, under a common understanding that *Lovdata* should share the

[1] Cf. Exhibit 1, newspaper article from *Aftenposten*, "Norges lover kan leses gratis på PC", 19 December 1994. Prior to this initiative *Lovdata* charged 6 NOK each and every minute (more than 0,6 Euro), as well as 500 NOK in a monthly subscription fee (more than 50 Euro each month).

jurisprudence with other parties. The name *Rettspraksis* means case-law or court jurisprudence.

8. The applicants assert that the publishing of Supreme Court rulings, and the public access to the jurisprudence of the Supreme Court, lies at the heart of a democratic society based on rule of law according to ECHR Article 10. The threshold for banning such publications should be exceptionally high. However, in a case like this, where *Lovdata* has obtained the Supreme Court rulings on an exclusive basis – as a result of differential treatment, and clearly motivated by a common understanding that *Lovdata* should both perform its duties in favour of the common good and share the court rulings with others – *Lovdata* could not rightfully prevent *Rettspraksis.no* from re-using the electronic rulings that *Lovdata* had already received from the Supreme Court in the period from 2003 to 2007. Thus, when the Norwegian Courts banned *Rettspraksis.no* from re-using the Supreme Court rulings in order to make them available to the public on the internet free of charge, this was a breach of ECHR Article 10.

9. This is especially clear as Article 10 in the present case *should be construed in light of Article 14*. Due to the differential treatment of *Lovdata*, and due to the understanding that *Lovdata* ought to share the rulings with others, it can hardly be deemed necessary in a democratic society, based on the rule of law, for the Supreme Court to protect *Lovdata's* refusal to share the rulings with others by banning a non-profit initiative like *Rettspraksis.no* from re-using the electronic versions of the Supreme Court rulings.

10. Further, the differential treatment in itself constitutes a breach of ECHR Article 14, cf. Article 10. The differential treatment cannot be justified unless the Norwegian courts accept that *Lovdata* was obliged to share the rulings with others, which also was in line with the common understanding of the arrangement. However, as the Norwegian Courts quite contrary banned *Rettspraksis.no* from making the Supreme Court rulings available to the public, this differential treatment cannot be justified.

11. The Norwegian Supreme Court's main argument to impose the ban, is the protection of *Lovdata's* right to property. However, any legitimate expectation that *Lovdata* should have a proprietary right not to share the electronic versions of the Supreme Court rulings with others, would be very questionable. Arguably, as supported by the Norwegian rules of government and the EU ban on differential treatment and exclusive arrangements, the whole arrangement between *Lovdata* and the Supreme Court would be highly dubious, and even

illegitimate, where it not for the common understanding that the rulings ought to be shared with others. Further, any such expectation that *Lovdata* had acquired exclusive rights to the rulings, would run contrary to both ECHR Article 14 as well as the absolute core area of the right to freedom of speech and the right to receive information according to ECHR Article 10. Thus, even taking into account any proprietary rights for *Lovdata*, banning *Rettspraksis.no* from making the Supreme Court rulings from the period 2003-2007 available to the public would neither be necessary in a democratic society under Article 10, nor justifiable under Article 14.

12. Still, this is exactly what happened as the Norwegian Supreme Court 11 September 2019 upheld an injunction in favour of *Lovdata*, prohibiting *Rettspraksis.no* from making publicly available said Supreme Court rulings for the period 2003-2007.[2]

2. FACTS

2.1 The exclusive and privileged position of Lovdata

13. *Lovdata* is founded in 1981 by the Norwegian Department of Justice and the wholly state owned University of Oslo. The objective of *Lovdata* is to establish, maintain and run systems for legal information for the public benefit, and is controlled by the State who appoints the majority of the board of directors.[3] Hence, even if *Lovdata* was established as a foundation, *Lovdata* is intrinsically connected to the State itself. We will elaborate on this in section 2.2 below.

14. Since *Lovdata*'s inception in 1981, all Norwegian courts have acted systematically and directly in support of *Lovdata.* Importantly, this supportive treatment of *Lovdata* has been an *exclusive* arrangement for the benefit of *Lovdata*. No other parties have either gained access to court rulings from the courts or received the same services and benefits that *Lovdata* has.

15. In 1987 *Lovdata* entered into an oral agreement with the Norwegian Supreme Court, whereby the Supreme Court committed itself to automatically and directly supplying *Lovdata* with all new rulings, on an ongoing basis, free of any charge and without any need for prior identification of requested rulings. The rulings where transferred without any anonymization, even in cases where anonymization was required. This task was simply trusted to *Lovdata* as a sort of aide of the Supreme Court.

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[2] Cf exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019. The English translation by the Supreme Court of Norway, published on *Lovdata*, is attached as exhibit 26.

[3] Cf i.a. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019 §§ 3-4.

16. From the year 2000, all Supreme Court rulings were automatically transferred directly from the Supreme Courts official case handling system ("Høyrett") to *Lovdata,* by way of electronic and encrypted transfer especially customized for *Lovdata* through a separate and dedicated line of communication.[4]

17. It is common ground that this arrangement *de facto* was an exclusive arrangement for the benefit of *Lovdata*, and that no other entities received direct access to the electronic versions of the Supreme Court rulings from the Supreme Court. This is established by the Norwegian Court Administration itself: ".. *Lovdata* has a de facto exclusive position, as no others that have approached [the Norwegian Supreme Court] have gained access as *Lovdata* has".[5] According to the report, the same applies for rulings from the District Courts and the Courts of Appeal.[6]

18. Further, it is common ground that *Lovdata* did in fact for a long period honour its commitment to transfer the court rulings to other parties wanting to publish them.

19. However, *Lovdata* declined to continue to do this starting from 2004.[7] This prompted *Gyldendal Rettsdata* (a private supplier of legal information systems) to address the Norwegian Court Administration. *Gyldendal Rettsdata* stated that they had previously asked the Court Administration and the courts to supply all new rulings, but the courts had then simply referred *Gyldendal Rettsdata* to receive the court rulings from *Lovdata*'s transfer service ("*Lovdata*s videre-formidlingstjeneste"). As *Lovdata* had suddenly terminated this arrangement, *Gyldendal Rettsdata* now demanded access to the court rulings directly from the courts/the Court Administration.[8] Further, *Gyldendal Rettsdata* approached the Norwegian Supreme Court directly, and demanded the same access to the Supreme Court rulings as *Lovdata* had been given, stating that there was no legal basis for any differential treatment.[9] The Supreme Court asked for *Lovdata*'s explanation.[10] *Lovdata* confirmed that *Lovdata* "had assisted the courts" (including the Supreme Court) by transferring all court rulings to other "interested parties", including *Gyldendal Rettsdata*. Thus, one can conclude that there was a common understanding that *Lovdata* should assist the courts by

[4] Cf. exhibit 10, The Norwegian Court Administration, Report on supplying of awards and court orders to legal information systems, 14 June 2007, page 7 and 34-35.

[5] Cf. exhibit 10, The Norwegian Court Administration, Report on supplying of awards and court orders to legal information systems, 14 June 2007, page 7: "..., men slik situasjonen er i dag har *Lovdata* en faktisk eksklusivitet ved at andre som har rettet henvendelse ikke har fått tilgang på lik linje med *Lovdata*".

[6] Ibid p. 301.

[7] Cf. exhibit 2, letter from *Lovdata* to Gyldendal Rettsdata, 6 may 2004.

[8] Cf. exhibit 3, e-mail from Gyldendal Rettsdata/K. Skeie to the Court Administration, 7 June 2004.

[9] Cf. exhibit 4, letter from Gyldendal Rettsdata to the Norwegian Supreme Court, 13 October 2004.

[10] Cf. exhibit 5, letter from the Norwegian Supreme Court to *Lovdata*, 11 November 2004.

performing part of the courts task to provide information and access to court rulings. However, *Lovdata* explained that the court rulings received from the courts were sent to *Lovdata* without prior anonymization. On this basis, *Lovdata* now suddenly felt that – even if the Court had sent the rulings to *Lovdata* in this very state – *Lovdata* could not forward the rulings to others in the same state as they themselves received them.[11]

20. It was not explained why *Lovdata* – as the aide of the courts, with a de facto exclusive position as the only party with the privilege to receive court rulings – could not continue to supply the court rulings to others, if so needed after any necessary anonymization. And it was not explained how *Lovdata* could be in a position to perform what was really the courts duty – to anonymize the rulings – and at the same time deny others the same access to these rulings. One should bear in mind that if the courts had performed the anonymization themselves, and not trusted this to *Lovdata*, any other party would obviously have been entitled to the same and full access to the rulings as *Lovdata*.

21. In spite of this, the de facto exclusive position and the differential treatment in favour of *Lovdata* continued for several years until 2008, when the Supreme Court started to publish the Supreme Court's rulings on its own website.

22. In the meantime, the Supreme Court also turned down further demands for access to Supreme Court rulings from all other parties than *Lovdata*. Thus, even though the Supreme Court previously had made the effort to arrange for a customized solution for the transferral of rulings to *Lovdata*, other parties where now turned down on the basis that the Supreme Court's case handling system was not suited to provide transmission to more than one recipient. This fact is acknowledged by the Supreme Court in the ruling in our case.[12] It is also put in writing by the Supreme Court in its letters to *The Caselex Association* and *Gyldendal*, the first letter stating: "I can inform you that the electronic case handling system used by the Supreme Court is not made to allow electronic transferal of rulings to more than one addressee."[13]

23. Still, the Norwegian Supreme Court did not take any steps to ensure that *Lovdata* did in fact carry on with the task to provide other interested parties with access to the Supreme Court rulings.

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[11] Cf. exhibit 6, letter from *Lovdata* to the Norwegian Supreme Court, 19 November 2004.
[12] Cf. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019 § 8.
[13] Cf. exhibit 8, letter from the Norwegian Supreme Court to *The Caselex Association*, 2 January 2006, and exhibit 7, letter from the Norwegian Supreme Court to *Gyldendal*, 6 July 2005.

24. Nor did the Supreme Court take any steps to perform the task to anonymize the rulings itself, even if this task is by law a task for the court itself, and even if this perception was consistent with *Lovdata*'s own perception that *Lovdata* was acting as an assistant of the courts. One could suspect that the whole issue of anonymization was little else than a pretext for *Lovdata* to keep competitors at arms length, by enjoying a privileged position with the Supreme Court. In any event, if anonymization had been an actual obstacle that kept the courts from honouring the courts' duty to make the court's rulings available to the public in an non-discriminatory manner, then the Supreme Court should have ensured that this problem was solved. Either by performing the anonymization itself, or by trusting this job to *Lovdata* under its obligation to continue sharing the rulings with other parties, in line with the existing arrangement.

25. However, when *Rettsdata* approached the Norwegian Court Administration again in 2007 and complained about differential treatment in breach of EU Directive 2003/98/EF, the situation was still ongoing.[14]

26. Even the *Network of presidents of the supreme judicial courts of the European Union* where denied access. The Supreme Court and the Court Administration considered a solution whereby the rulings could be supplied by *Lovdata* on behalf of the Supreme Court, but this solution was turned down as it "would mean that we would also be obliged to offer the same arrangement to other parties". Hence, the *Network of presidents of the supreme judicial courts of the European Union* where asked to make a deal with *Lovdata* rather than receiving the rulings from the Norwegian Supreme Court.[15] Reading the letters, one can only speculate what sort of contact had taken place between the Court Administration, the Supreme Court and *Lovdata* in this respect. In any event, it seems evident from the letters that the Court Administration and the Supreme Court wanted *Lovdata* to treat this approach differently from any other party asking the courts or *Lovdata* for access to Norwegian court rulings. Still, this could not be expressed in plain writing.

2.2 Lovdata as a public service entity backed and controlled by the Government

27. Already from the above, it follows that *Lovdata* is intrinsically connected both to the Government and the courts. *Lovdata* was founded by the Department of

[14] Cf. exhibit 9, e-mail from Rettsdata/K. Skeie to the Norwegian Court Administration, 24 April 2007.

[15] Cf. exhibit 12, e-mail from the Norwegian Court Administration/E. Skjetne to the Norwegian Supreme Court/B. Lyngstad, 19 September 2007 and reply 25 September 2007, as well as exhibit 13, e-mail from the Norwegian Court Administration/E. Skjetne to the Network of presidents of the supreme judicial courts of the European Union, 8 October 2007.

Justice and the state owned University of Oslo, and the founding capital of NOK 600.000 was paid by the Justice department. The board consists of only 1 external member from the Bar Association – the remaining 4 members are appointed by the Justice Department, the University, the Parliament and the Courts.

28. The close and exclusive cooperation between the courts and *Lovdata* for many years is another tell-tale sign, where *Lovdata* has been perceived as a public service entity. It is symptomatic that the Agreement between *Lovdata* and the highest Court of Norway was not even put in writing. It is unimaginable that the Supreme Court of Norway would enter into such a long standing cooperation with any private party, without a meticulous written regulation of this collaboration, especially as public information and access to Supreme Court rulings lies at the core function of the Supreme Court. Further, due to its close connection with the Government, *Lovdata* was perceived as an entity established by law, and claimed to be exempted from requirements of a license for the Norwegian Data Protection Authority.[16] *Lovdata* also has a formal agreement with the Department of Justice, and regulated under a separate statute.[17] It is telling that no Norwegian legislation even acquires legal force without being published in *Lovdata*. Thus, *Lovdata* is entrusted with a privileged position as the official publisher of all legislation for the Government. Also, by a statute issued by the Justice Department, *Lovdata* is granted exemption from any creditor seizure of the databases on legislation.[18]

29. Through this close cooperation, the courts have significantly assisted *Lovdata* in ways that would not even be considered for any other party. The exclusive and differential access to court rulings is only part of this. The courts have even customized its case handling system in order to integrate the communication with *Lovdata*, with a "publish-to-Lovdata"-button, but at the same time using the technical design of the very same system as an excuse for not letting anyone else get the same access as *Lovdata*. Further, as part of their professional duty as a judge, all judges in the Court of Appeal has to write a summary of each and every court ruling in order for *Lovdata* to use this as a heading in their database. The Court of Appeals alone produce more than 3.000 such summaries yearly exclusively for *Lovdata*. It is worthy of note that the summaries do not have any

[16] The Personal Data Act makes it clear that no private entity can handle such information without a permit. It was stated by the Data Inspectorate in this period that *Lovdata* as public body did not require a permit, cf. exhibit 11 e-mail from the Norwegian Court Administration/A. Berg to the Norwegian Data Protection Authority, 17 August 2007.

[17] "Regulation concerning *Lovdata*" ("Forskrift om *Lovdata*").

[18] Cf. Statute on the statutory and regulatory law databases of Lovdata ("Forskrift om *Lovdatas lov- og forskriftsdatabaser*")

other use, and is not part of the ruling itself. This work by judges in their function as public servants has been performed solely for the benefit of *Lovdata*.

2.3 The ordinary citizens lack of any practical access to the jurisprudence of the Supreme Court

30. In spite of this – in spite of the close cooperation with the courts, and in spite of *Lovdata*'s objective to act as an entity for the public benefit – the ordinary citizen does not have practical access to one of the most fundamental sources of law – the case-law and the collected jurisprudence of the Supreme Court. As pointed out above – what is at issue is the private citizens' access to the collected case-law or jurisprudence of the Supreme Court. This access is vital in a democratic society ruled by law.

31. *Lovdata* seems to be tailored for the professional market, with very expensive subscriptions. Even if *Lovdata* is very profitable, with a capital of 40 MNOK/ 4 MEUR, *Lovdata* offers no subscription suited for the private citizen. The only alternative is to subscribe as a "company or entity not involved in legal business", with an annual fee of NOK 16.000/1.600 Euro.[19]

32. Contrary to the reasoning of the Norwegian Supreme Court ruling in our case, the need for private citizens to have practical access to the Supreme Courts jurisprudence cannot be satisfied by each and one of the citizens requesting the court to supply a copy of the ruling in each and every case.[20]

33. As a starting point, in order to form opinions about the law of the land, it is not sufficient to get access to one single court ruling – the public needs access to the collection of all Supreme Court rulings. It is access to the Supreme Court's jurisprudence or case-law that is at stake.

34. Further, in practical terms it would be quite unmanageable for all citizens to approach the courts to request *en bloc* access to all rulings. This approach would not even be allowed, ref section 2.6 below. Any request based on the legislation on Civil Procedure or Criminal Procedure would require the citizen to point out each individual case, which entails a prior knowledge to all the cases. Further, the case handling of such requests is only considered in relation to each individual document. Additionally, in criminal cases access will normally be

[19] Cf. exhibit 14, Prisliste *Lovdata*. The price for subscriptions are exclusive of VAT. Thus the price NOK 12.500 ex VAT equals NOK 16.000 as a private citizen have to pay 25 % VAT.

[20] Cf. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019 § 66: "… de er allment tilgjengelig ved å kreve innsyn etter rettergangslovene".

declined in cases older than 5 years. The Norwegian Court Administration has even stated in its report that this approach is not suitable for the purpose.[21]

35. Still, *Rettspraksis.no* has in fact *tried* to request access to a limited number of court rulings, both from the Norwegian Court Administration, the Norwegian Supreme Court and Agder Court of Appeals. The Court Administration declined to handle the request at all, and referred the request to the courts.[22] Agder Court of Appeal did not grant access. Quite to the contrary, the chief justice asked why access was requested as the rulings could be found on the *Lovdata*-service.[23] The Supreme Court replied that the request for access to all criminal law cases was denied due to the all the work involved in anonymizing the rulings. With regard to the civil cases requested, the Supreme Court informed that the work would take time and would not be granted very high priority.[24] Obviously, one can hardly blame the courts. But the point is that even this limited request, based on previously identified cases, took a lot of effort and only resulted in access to very few cases after a long time. Thus, the ECHR can safely exclude the possibility that what is at stake here – the private citizens' need to have practical access to the jurisprudence and the case-law of the Supreme Court – can be handled by individual requests of access to individual rulings.

36. Further, the Supreme Court has argued that the private citizen can buy a license from one of *Lovdata*'s competitors.[25] Obviously, this line of argument is not very helpful as the competitor's prices are just as high as *Lovdata*'s price. The Court should not adopt this view, that access to Supreme Court jurisprudence shall be a privilege of the most wealthy.

37. Only a very few public libraries in Norway had made the investment necessary to offer public access to *Lovdata*'s databases on its premises. Thus, for the majority of citizens in Norway there is simply no public access to the Supreme Court jurisprudence through public libraries. Hence, when the Supreme Court plainly states that the Supreme Courts jurisprudence *is* publicly accessible through the public libraries, this is at the very least not a very accurate statement. As a plain statement of fact, without any further information, it could even be

[21] Cf exhibit 10, The Norwegian Court Administration, Report on supplying of awards and court orders to legal information systems, 14 June 2007, page 10.
[22] Cf. exhibit 15, letter from the Norwegian Court Administration to Mr. Ljone, 24 April 2018.
[23] Cf. exhibit 16, e-mail from Mr. Ljone to Agder Court of Appeals, 26. April 2018 and reply e-mail from Agder Court of Appeals 30. April 2018.
[24] Cf. exhibit 17, e-mail from the Norwegian Supreme Court to Mr. Ljone, 11 May 2018.
[25] Cf. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019 § 66: "… ved å kjøpe en lisens fra *Lovdata* eller en konkurrent av Lovdata…".

misleading.[26] To limit the access to the Supreme Courts jurisprudence to the premises of a very few public libraries is in any event a very strong restriction on the Conventions right of access to information according to Article 10.

2.4 The efforts of Rettspraksis.no in order to secure public access to the Supreme Court jurisprudence

38. As described above, the Applicants unsuccessfully requested access to court rulings from various courts, including the Supreme Court of Norway. The Applicants applied to the repository of the main public library in Norway and received access to *Lovdata*'s CD-ROM for 2002 and a DVD-ROM for 2005. To extract the rulings, a box next to Supreme Court rulings on the CD was ticked, and then the "export" button was clicked to generate one single large text file comprising all the Supreme Court rulings from 1836 to 2002. The Applicants then did all the work to structure this information into separate rulings again, for publishing on their internet site.

39. The database protection period for the 2002-CD had expired and could be used without restrictions. Due to much greater speed from the DVD, the DVD was initially used to extract the relevant rulings. However, already before the final proceedings for the District Court, the applicants replaced he DVD-material with the material from the 2002-CD. *Lovdata* accepted that the copyright on the 2002-CD had expired, and this was uncontested before the Supreme Court.[27]

40. Consequently, the Applicants had free access to rulings from 1836-2002 (the 2002-CD), and from 2008 onwards (the Supreme Court website). This left the gap 2003-2007. This gap was partly filled with rulings from 2003-2005 from the 2005-DVD. The remainder of the gap was never completely filled, but an anonymous donor posted 740 rulings from 2006-2007 to the website. It is uncontested that the rulings from 2003-2007 originated from the rulings that *Lovdata* had received from the Supreme Court and which *Lovdata* then published in *Lovdata*'s databases. It is the re-use of these rulings that are the issue of this case. Separate issues on use of summaries and hyperlinks are not part of this complaint to the EHCR, only the use of the electronic text of the ruling.

41. In its ruling, the Supreme Court refers to the efforts of *Lovdata* in building its database (paragraph 65), stating that the case illustrates the need for protecting rights under the Copyright Act. It is true that *Lovdata* has scanned and organized countless Supreme Court Rulings going back to 1836, and spent large resources

[26] Cf. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019 § 66: "... ved å oppsøke et bibliotek som har Lovdatalisens...".

[27] Cf exhibit 25, Ruling of the Norwegian Supreme court § 45

on this work. The reward was the database protection – which in 2018 had expired for all material predating 2003. It is important to recognize that *Lovdata* for the period 2003-2007 was an exclusive receiver of the Supreme Court's rulings, and that the 52 man years referenced in building up this database was not directed at the 2003-2007 rulings which are relevant to our case. This limited number of rulings were received directly from the Norwegian Supreme Court, by electronic transfer customized for *Lovdata*, and under the common understanding that the rulings should be shared.

2.5 The ban and the injunction procedure

42. *Rettspraksis.no* opened its site 17 May 2018. *Lovdata* filed for a preliminary injunction shortly thereafter, on 31 May 2018. *Lovdata* demanded, inter alia, that all Supreme Court rulings from *Lovdata* should be deleted from *Rettspraksis.no*, and that the court should ban the Applicants from making available any of the Supreme Court rulings to any third party on any digital platform.

43. To ensure that the request was not granted, the Applicants shut down the site "www.rettspraksis.no". They then immediately contacted the court and explained that the facts of the injunction pleading were wrong, that there was no basis for an injunction, and asked to be contacted so that they could state their case before the court. However, the court ruling granting the injunction had already been made, ordering the deletion of all the relevant Supreme Court rulings from the website. No effective assessment was made under Article 10 of the convention, nor any other similar internal regulations regarding freedom of speech, discrimination or access to public court documents as such. Instead, the ruling was based on the application of database rights. The court did not know that the majority of the rulings, from 1836 to 2002, were not subject to database protection since the CD from 2002 had expired in this regard. An oral hearing was held 3 months later, upholding the injunction. The Court of Appeals also upheld the injunction, referring to the ruling of the District Court, again without any effective assessment of the Convention. The case was appealed to the Supreme Court, and the Norwegian Editors' Union and the Norwegian Union of Journalists filed amicus briefs. On 11 September 2019, the Norwegian Supreme Court issued an order that dismissed the appeal from the Applicants in the injunction case. By dismissing the appeal, the Supreme Court upheld the temporary injunction, effectively limiting the Applicants right to freedom of expression, hereunder their right to receive and impart information of public interest. This also had the effect of depriving the public from free access to the deleted Supreme Court rulings.

2.6 Relevant domestic law

44. In Norway, the access to court rulings is regulated under two applicable sets of rules, The Civil Litigation Act § 135 and The Criminal Procedure Act § 28. The request must identify the specific ruling requested (ref § 135 and § 28, both second paragraph). Each request for a specific ruling is assessed for each individual document (ref § 135 and § 28, both eight paragraph). In practice, this makes it very difficult to request even a single ruling if one do not already have the reference number. If the case is older than 5 years, the court can always deny access in criminal cases. The rules do not open for batch requests, even on a limited level. Still, Lovdata got all rulings automatically. Furthermore, court rulings are subject to rules concerning anonymity, and the courts can refuse to provide rulings in any great number where these must be anonymized. However, in our case, *Lovdata* received non-anonymized rulings directly from the Supreme Court.

45. The Freedom of Information Act entered into force in 2008. This Act codified established case law and legal doctrine. According to Article 6, first paragraph, first sentence, differential treatment and exclusive rights are prohibited: "... no discrimination may be made between comparable requests for access and no agreement may be made granting any person an exclusive right to information." Accordingly, it must be presumed that the Supreme Court never intended *Lovdata* to have exclusive rights to the Supreme Court rulings, contrary to this provision as well as the Convention Article 14, cf. Article 10. Rather, the rulings was supposed to be shared, just as *Lovdata* did until 2004.

46. An exception for exclusive agreements is made in the second paragraph of Article 6 if necessary for the provision of a service in the public interest, i.e. if no others would take on to impart the information. Even then, the prerequisite is that the validity for such agreements shall be reviewed every three years, and that the agreement must be made public. In this case, several others wanted access, and the Supreme Court made an oral agreement with Lovdata which was not made public. In any case, the third sentence reads: "No agreement may be concluded on exclusive rights to information to which the public have a statutory right of access pursuant to provisions of law or regulations."

47. The Copyright Act section 24 concerns database rights. This section establishes a sui-generis database right for the proprietor, but limited in time to 15 years. The Copyright Act itself does not specifically advise on the application of the Convention in general or in specific regulations. Instead, the preparatory works

specify that every case have to be decided on its merits, where the individual judge must apply the rules of the Convention where applicable.

3. THE LAW – COMPLAINT AND STATEMENT OF VIOLATION

3.1 Violation of ECHR Article 10

48. The effect of the injunction upheld by the Supreme Court ruling of 11 September 2019, was that *Rettspraksis.no* had to stop the use of the internet to make Supreme Court case-law from the period 2003-2007 available to the public. Further, *Rettspraksis.no* was ordered to delete the collection of court rulings from this period. The ban thus clearly constitutes an *interference* in the right to free speech according to ECHR Article 10. The Applicants accepts that the interference did pursue a legitimate aim, and had sufficient basis in domestic law. However, the ban was clearly *not necessary in a democratic society.*

49. The general point of departure is what the Court has previously held many times in cases concerning freedom of speech: "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."[28]

50. As such, the interference in *our case* strikes at the heart and the core of the right to free speech and the right to impart information in a democratic society ruled by law. Hence, according to the Court's case-law the level of protection is very high and the margin of appreciation correspondingly very narrow, just as stated in Baka v. Hungary § 159 concerning the functioning of the judiciary:

> "Moreover, as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (…). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary (…)".

51. The functioning of the judiciary is a core matter of a democratic society based on rule of law. Without rule of law, no democratic society exists. Hence, the public has a fundamental need to access information about the functioning of the courts, above all about the Supreme Court.

52. The need for easy access to the Supreme Court's rulings, and the right to impart information about the same, has multiple aspects: The rulings and the

[28] Cf. i.a. Baka v Hungary [GC], appl. 20261/12, 23 June 2016, § 158.

jurisprudence of the Supreme Court establish the law of the land, essential to any citizen in order to form any relevant opinion on legal questions and the way the democratic society is governed by rule of law. Further, anyone seeking to argue the need to amend the legislation, would have to consider the legal status as established by the jurisprudence of the Supreme Court. The legal order of the land, and any need to amend the legislation, is a primary issue for political debate in a democratic society ruled by law. Thus, the legal order established by the rulings of the Supreme Court is an issue at the heart of political speech and the debate on matters of public interest. In our case this aspect is clearly underscored by the fact that both the Norwegian Association of Editors and the Norwegian Association of Journalists intervened to support the Applicants for the Norwegian courts. What is at stake is also the legitimacy of the courts – public knowledge and effective public access to the courts' rulings are fundamental in this respect, above all with regard to the Supreme Court rulings and collected case-law.

53. The Applicants in this case have acted purely motivated by the very same fundamental values protected and enshrined in the Convention. Their sole aim has been to facilitate the effective rule of law in a democratic society fundamentally dependent on free public speech and debate about the legal order, the functioning of the judiciary and the highly political issue of how the law of the land ought to be construed and amended. No pecuniary interests are involved. Quite to the contrary, the Applicants have used considerable efforts and considerable means to establish the website *Rettspraksis.no*. Due to the injunction, and the Supreme Court ruling upholding the ban, these two private persons are even ordered to pay a huge amount of money as costs and expenses to *Lovdata*, NOK 773.200/Euro 80.000, in addition to their own legal expenses incurred.

54. The Court has previously held many times that the press holds a fundamental position in a democratic society, and that the public has a right to receive information of general interest. The most careful scrutiny on the part of the Court is called for in relation to press freedom which serves to impart information on matters of general interest, as the press is considered as one of society's watchdogs.[29] The Court has pointed out that the realisation of this function is not limited to media or professional journalists, but extends to others – as in this case – who acts with the purpose that includes an essential element of informed public

[29] Cf. i.a. Observer and Guardian v. the United Kingdom, 26 November 1991, § 59, Series A no. 216, Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 64, ECHR 1999-III.

debate. In these conditions the Court warrants a similar protection under the Convention to that afforded to the press.[30]

55. Hence, it follows from the case-law of the Court that any interference banning a non-profit initiative to impart information to the public audience about Supreme Court rulings, and the jurisprudence and the case-law of the Supreme Court, would have to be supported by very exceptional and weighty reasons.

56. Even if it goes without saying, according to the Court's case-law, it is fundamentally important that such exceptional and weighty reasons have to be established in each individual case.

57. At this point, the Norwegian Supreme Court ruling in our case has severe deficiencies. The starting point of the Supreme Court is a very abstract approach, arguing that the Court's admissibility decision in the "Pirate Bay"-case show that copyright holders may be protected by the right to property, cf. ECHR P1-1.[31] Hence, the Supreme Court has construed the case as an abstract issue of the protection of property against the freedom of speech. The Supreme Court's reasoning clearly reveals that the abstract issue of protection of copyright as property rights and the "Pirate bay"-case lies at the heart and core of the Supreme Court's reasoning concerning the Convention, cf §§ 61-64 of the ruling.

58. Most noteworthy, even if the Supreme Court itself admit that there are "considerable differences" – which has to considered as mildly put – between the "Pirate bay"-case and the case at hand, the Supreme Court failed to expand on those very significant differences. Rather, the Supreme Court sums up its conclusion in a telling way at the start of § 64: "Like the Court of Human Rights in the Pirate Bay case (sic), I take as a starting point that protection under the Copyright Act is a weighty argument for interfering in Article 10."

59. However, the Supreme Court did not perform *any* analysis on the weight of property *in this case*. That is: What weight could be attributed to *Lovdata's* legitimate expectation – if any – that the Norwegian courts should interfere in the core of Article 10 by banning all others from re-using the court rulings that *Lovdata* had received from the courts – even if the arrangement had been based on an common understanding that *Lovdata* should share the rulings with others,[32] and even if any exclusivity or differential treatment would both contravene

[30] Tarsasag a Szabadsagjogokert v. Hungary, appl. 37374/05, 14 April 2009, §§26-27.
[31] Neij and Sunde Kolmisoppi v. Sweden, appl. 40397/12, 19 February 2013.
[32] Cf. section 2.1 and 2.2 above, i.e. §§ 13-29.

ECHR article 14, cf Article 10 as well as the relevant EU Directive[33] and domestic law.[34] The Applicants assert that this is a major flaw in the Supreme Court's reasoning, and that a proper analysis would reveal that any legitimate expectation on *Lovdata's* side would be negligible compared to the fundamental importance of free speech and freedom of imparting information with regard to something as core in a democratic society ruled by law as the Supreme Court's rulings and the Supreme Court's jurisprudence.

60. Further, the Supreme Court's failure to distinguish this case from the "Pirate Bay"-case has resulted in another fundamental error in ECHR-law: The starting point is not that intellectual property rights are very weighty (in abstracto). The overall starting point is that Article 10 requires the Supreme Court to strike a fair balance taking into account all the circumstances of the case. Even more importantly: With regard to Article 10, the starting point is that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest", with "a high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation" (cf §§ 49-55 above). The Supreme Court's ruling does not reveal any sign that the Supreme Court shared this starting point. It only stated in § 63 – *en passent* during the presentation of the Pirate bay-case – that public access to Supreme Court rulings are important, and that "stronger reasons are required" to "interfere in the freedom of speech when it comes to the press or other participants in the public debate non-profit compared to a player whose sole purpose is economic profit". Hence, just as much as the Supreme Court has exaggerated the abstract weight of property rights (lacking the crucial assessment of the individual case), the Supreme Court has also failed to *both* accurately reflect the Court's case-law with regard to the general significance of the freedom of speech in this core area, *and* to perform a concrete analysis of the weight of the freedom of speech in the individual case at hand (compare §§ 50-55 above). The Supreme Court's approach has the effect of marginalizing the freedom of speech, leaving the Supreme Court without any possibility to strike a fair balance in conformity with the Court's case-law.

61. The distinction between our type of case and the "Pirate Bay"-case is even emphasised by the Court in that decision. The "Pirate Bay"-case concerned the non-legitimate spreading of enormous amounts of movies, computer games and

[33] EU Directive on the re-use of public sector information (2003/98/EF), Article 10 and 11, cf. §§ 3 and 25 above.

[34] The Act on Public Information Access ("Offentleglova"), cf i.a. § 45 above.

music, and the Court "underlined" that the safeguards of Article 10 "cannot reach the same level as that afforded to political expression and debate".

62. The purely abstract approach of the Norwegian Supreme Court is also revealed by the sweeping and general statement that *the legislator* has already balanced the right of *freedom of expression* against the *right to property* in the Copyright Act (cf the ruling § 64). This line of argument – purely *in abstracto* – runs contrary to the fundamental approach of the Court in any case like this.

63. It follows from the above that the Supreme Court failed to perform the "necessary"-test in conformity with the criteria laid down in the Court's case-law. This is due to the abstract approach, the lack of analysis of the facts and the interests at stake in the individual case, as well as taking the wrong legal approach and the wrong points of departures, and not stating the correct thresholds. Hence, there are no reason to allow a broad margin of appreciation. Rather, the Court should keep in mind its own case-law, stating that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest", "with the authorities thus having a narrow margin of appreciation".[35]

64. The Court has many times emphasised, as it did in the Magyar Helsinki Bizottsag-case, that "the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[36] The Norwegian Supreme Courts approach in this case is quite the opposite. The Supreme Court's reasoning in § 66 renders the freedom of speech and the freedom to impart information – in this very important area concerning the core of a democratic society – theoretical and illusory, and not practical and effective. As thoroughly demonstrated above (cf section 2.3, §§ 30-37), the private citizens' right to access to the Supreme Court's bulk of jurisprudence is not made practical and effective by referring each and every citizen to request access to each and every Supreme Court ruling according to the legislation on Civil and Criminal Procedure. Nor can it be required that all interested citizens of Norway should have to travel to the premises of one of the very few public libraries that hold a *Lovdata* license – this is not practical and effective. Further, the right to access to crucial information in a democratic society – and the freedom to impart such information to all those citizens who

[35] Cf. Baka v Hungary [GC], appl. 20261/12, 23 June 2016, § 159.
[36] Cf. Magyar Helsinki Bizottsag v. Hungary [GC], appl. 18030/11, 8 November 2011, § 121.

demands it – cannot be a right reserved for the few very wealthy that are able to pay an annual fee of NOK 16.000/Euro 1.600.

65. Rather, the Court should take as a starting point that the courts even has a positive duty to take every reasonable effort to secure court rulings being made effectively available to the public, especially rulings from the Supreme Court. This is what happened as long as *Lovdata* honoured the common understanding to share the rulings received from the Supreme Court. However, the opposite happened when *Lovdata* stopped sharing the rulings, and the Supreme Court then went on to ban the re-use of the rulings that the Supreme Court had transferred to *Lovdata*. This ban did not reflect any positive effort on the Supreme Court's side, but rather approved a differential treatment and an exclusive arrangement with *Lovdata*, which constituted a breach of Article 10, construed in the light of Article 14.

66. Further, there was no weighty need to ban *Rettspraksis.no*. The *Lovdata*-database is a comprehensive database that comprises all sorts of legal sources, including the legislator's preparatory works, legal literature, court rulings from all courts and much more.[37] *Rettspraksis.no,* however, did only publish Supreme Court rulings.. No professional users would quit *Lovdata* even if Supreme Court rulings was published elsewhere, and no loss of customers was demonstrated by *Lovdata*. The impact on *Lovdata* would thus be negligible. Further, all rulings prior to 2003 were undisputedly free of any rights and accessible on the 2002-CD. All rulings post 2008 were accessible at the Supreme Court's website. Thus, this case does only concern rulings from a very limited number of years – coinciding with the period that *Lovdata* started to deny others the rulings *Lovdata* themselves received from the Supreme Court.

67. The Court should finally take into account that the Supreme Court ordered Mr. Wium Lie and Mr. Ljone to pay as much as 80.000 Euro in costs to *Lovdata*. The chilling effect on any private initiative is considerable.

3.2 Violation of ECHR Article 14, cf Article 10

68. By banning *Rettspraksis.no* from publishing the same Supreme Court rulings that the Supreme Court itself previously had transferred to *Lovdata*, the Supreme Court of Norway violated ECHR Article 14, cf. Article 10.

69. Both *Lovdata* and *Rettspraksis.no* requested access to the Supreme Court case-law in order to publish the rulings. The only difference was that *Rettspraksis.no* wanted to do this free of charge. *Lovdata* was allowed to publish the Supreme

[37] Cf. exhibit 28, *Lovdata* content

Court rulings, while *Rettspraksis.no* was banned from publishing the very same rulings. Hence, there was a difference in treatment of persons in relatively similar situations within the ambit of ECHR Article 10.

70. This difference in treatment concerning a core Convention right cannot be justified. Even if the Applicants referred to the Convention Article 14 in their arguments before the Norwegian Supreme Court, the court did not even consider this aspect of the case. Hence, no reasons was given in order to justify the differential treatment caused by the ban. As the Supreme Court could not give *Lovdata* exclusive access to the Supreme Court rulings, and could not favour *Lovdata* with differential treatment in this respect, the Supreme Court could not be justified to ban *Rettspraksis.no* from publishing the very same rulings.

71. As the differential treatment strikes at the core of Article 10, the proportionality test should take into account the same arguments as mentioned above regarding Article 10: The very high threshold concerning the freedom to impart information on political speech or on debate on matters of public interest, the narrow margin of appreciation in this respect, the high impact for Rettspraksis.no and the public audience, Lovdata's lack of a legitimate expectation not to share the Supreme Court rulings with others, the negligible impact on Lovdata's business, the prolonged and extensive assistance from the Supreme Court to Lovdata, as well as the duty of the Supreme Court of Norway to assist all parties to access the jurisprudence and case-law of the Supreme Court in a non-exclusive and non-differential manner not compromising the legitimacy of the court.

4. EXHAUSTION OF DOMESTIC REMEDIES AND COMPLIANCE WITH THE TIME-LIMIT SET OUT IN ARTICLE 35 § 1

72. *Rettspraksis.no* is not considered a legal subject in its own right, and the ban in the Norwegian court rulings is directed at Mr. Wium Lie and Mr. Ljone. Hence they are the victims entitled to complain to the ECHR. All domestic remedies have been exhausted as the injunction has been tried in the Supreme Court of Norway.[38] The application has been filed within the time-limit of ECHR Article 35 § 1 as the ruling of the Supreme Court was delivered on 11 September 2019 and this application is filed and dispatched by postal carrier at 10 March 2020.

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[38] Cf. exhibit 25, Ruling of the Norwegian Supreme Court, 11 September 2019.