European Court of Human Rights: Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden

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Only a few weeks after the Strasbourg Court's judgment in the case of Ashby Donald and others v. France (ECtHR 10 January 2013, see IRIS 2013-3/1), the Court has decided a new case of conflicting rights, opposing copyright as intellectual property right under Article 1 of the First Protocol and freedom of expression guaranteed by Article 10 of the Convention. The case concerned the complaint by two of the co-founders of The Pirate Bay, that their conviction for complicity to commit crimes in violation of copyright law had breached their freedom of expression and information. During 2005 and 2006, Fredrik Neij and Peter Sunde Kolmisoppi were involved in different aspects of one of the world's largest file-sharing services on the Internet, the website The Pirate Bay (TPB). TPB made it possible for users to come into contact with each other through torrent files. The users could then, outside TPB's computers, exchange digital material through file-sharing. In 2008 Nej and Sunde were charged with complicity to commit crimes in violation of the Swedish Copyright Act. Several companies in the entertainment business brought private claims within the criminal proceedings procedure against the defendants and demanded compensation for the illegal use of copyright-protected music, films and computer games. In 2010 Neij and Sunde were convicted and sentenced to prison sentences of ten and eight months respectively, and ordered to pay damages of approximately EUR 5 million. Neij and Sunde complained under Article 10 of the Convention that their right to receive and impart information had been violated when they were convicted for other persons' use of TPB. They also alleged that they could not be held responsible for other people's use of TPB, the initial purpose of which was merely to facilitate the exchange of data on the Internet.

In its decision of 19 February 2013 the European Court affirmed that the applicants have put in place the means for others to impart and receive information within the meaning of Article 10 of the Convention and that consequently the convictions of Neij and Sunde interfered with their right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 §2 and was "necessary in a democratic society" to attain such aim or aims.

That the interference by the Swedish authorities was prescribed by law and pursued the legitimate aim of the protection of rights of others and prevention of

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crime, was not under discussion. Again the crucial question was whether this interference corresponded to a pressing social need, meeting the test of necessity in a democratic society. The Court argued that the Swedish authorities had a particularly wide margin of appreciation to decide on the matter - especially since the information at stake was not given the same level of protection as political expression and debate - and that their obligation to protect copyright under both the Copyright Act and the Convention had constituted weighty reasons for the restriction of the applicants' freedom of expression. Due to the nature of the information at hand and the balancing interest of conflicting Convention rights, the wide margin of appreciation the national authorities could rely on in this case, was therefore particularly important. The Swedish courts advanced relevant and sufficient reasons to consider that the activities of Neij and Sunde within the commercially run TPB amounted to criminal conduct requiring appropriate punishment. In reaching this conclusion, the European Court had regard to the fact that the domestic courts found that Neij and Sunde had not taken any action to remove the torrent files infringing copyright, despite having been urged to do so. Instead they had been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB. Therefore, the Court concluded that the interference with the right to freedom of expression of Neij and Sunde had been necessary in a democratic society. It rejected the application under Article 10 of the Convention as manifestly ill-founded.

Decision of the European Court of Human Rights (Fifth Section), case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. nr. 40397/12 of 19 February 2013

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