

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 40397/12
Fredrik NEIJ and Peter SUNDE KOLMISOPPI
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 19 February 2013 as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 20 June 2012,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr Fredrik Neij, is a Swedish national and the second applicant, Mr Peter Sunde Kolmisoppi, is a Finnish national. They were both born in 1978. The first applicant was represented before the Court by Mr J. Nilsson, a lawyer practising in Gothenburg, while the second applicant was represented by Mr P. Althin, a lawyer practising in Stockholm.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

During 2005 and 2006 the applicants were involved in different aspects in one of the world's largest file sharing services on the Internet, the website "The Pirate Bay" (TPB). The service used the so-called BitTorrent protocol. TPB made it possible for users to come into contact with each other through torrent files (which in practice function as Internet links). The users could then, outside TPB's computers, exchange digital material through file-sharing.

In January 2008, the applicants and two other persons were charged, *inter alia*, with complicity to commit crimes in violation of the Copyright Act (*Upphovsrättslagen*, 1960:729). According to the prosecutor, the defendants and another person had been responsible for the operation of TPB and, thus, had furthered other persons' infringement of copyright concerning music, films and computer games. The prosecutor submitted that the defendants had provided others with the opportunity to upload torrent files to TPB. He further claimed that they had provided others with a database linked to a catalogue of torrent files, provided the opportunity for others to search for and download torrent files and also provided the means to allow individuals wishing to share files to contact each other through TPB's tracker function.

Several companies in the entertainment business brought private claims within the criminal proceedings against the defendants and demanded compensation for illegal use of copyright-protected music, films and computer games. The claims amounted to several million Euros (EUR).

Before the District Court (*tingsrätten*) in Stockholm, the first applicant pleaded not guilty to the charges. He claimed that TPB had not been illegal. In his view, no criminal liability could be placed on him solely on the basis that TPB had received and provided information about torrent files. Moreover, there was no evidence that a crime had taken place, to which he might be an accomplice. TPB had only used information about torrent files received from Internet users. Neither TPB nor any of its representatives had handled any copyright-protected material or actively referred to such material. He further argued that the material in question had not passed through TPB's computers. In any event, he had not acted intentionally since he had not known about the existence of the files referred to in the indictment. In his opinion, it was the users of TPB who were responsible for the files that they supplied and shared with others. The first applicant further referred to the fundamental idea of the Internet, namely to link to various documents, which included a right to provide information regarding torrent files. Lastly, he was of the opinion that TPB must be regarded as a service provider in accordance with the Act on Electronic Commerce and Other

Information Society Services (*lagen om elektronisk handel och andra informationssamhällets tjänster*, 2002:562; hereafter "the Electronic Commerce Act"), namely a person who provides one of the services of the information society. He stressed that such a service provider cannot, under the provisions of the Electronic Commerce Act, be held criminally liable for an offence which relates to the content of the information. According to him, the purpose of the Act was to hold the person providing the information responsible, not the person who merely provides a means by which the information can be transferred.

The second applicant made the same defence as the first applicant and added, *inter alia*, that he had not been responsible for the measures involved in the operation of TPB.

As to the plaintiffs' claim for damages, both applicants referred to their defence and added, *inter alia*, that the plaintiffs had not suffered any damage since their sales had not fallen as a result of the alleged infringements of the Copyright Act. Moreover, there was no proximate cause between the alleged damages and the actions taken by the defendants. In any event, the applicants argued that they could only be held liable for damages for infringements committed in Sweden. Despite this, the plaintiffs had presented their claims for damages without specifying where the alleged actions had taken place. They further referred to the fact that the provisions of the Copyright Act prescribed liability to pay compensation for "the person" who unlawfully utilises a right, namely the perpetrator himself. Accordingly, accomplices to crimes committed in violation of the Copyright Act could not be held liable to pay damages. They further took the view that TPB had not initiated the transfer of the material in question, had not selected the recipient of the material or selected or altered the material. Thus, according to the provisions of the Electronic Commerce Act, they could not be held liable for damages. Any liability to pay compensation should, in any event, be adjusted with respect to the defendants' financial circumstances and the plaintiffs' need for compensation.

On 17 April 2009 the District Court convicted the applicants of complicity to commit crimes in violation of the Copyright Act and sentenced each of them to one year's imprisonment. The applicants were also held jointly liable for damages of approximately EUR 3,3 million together with the other defendants, also convicted for their involvement in TPB. The District Court considered that the users of TPB had committed crimes in violation of the Copyright Act and that the crimes had been committed in Sweden, noting that TPB's website and tracker had been in Sweden. Moreover, by making available its website with well-developed search functions, simple uploading and storing possibilities and through its tracker system, TPB had facilitated and furthered the crimes in violation of the Copyright Act and thereby, objectively been guilty of complicity to commit crimes in violation of the Act. The court further considered that the

defendants had been involved in TPB to such an extent that they were responsible for its organisation, administration, programming, financing and operation. Since the first applicant had been responsible for the technical and functional development of TPB and the second applicant had been TPB's press officer and involved in advertisement and development, the defendants had, in the opinion of the District Court, knowingly furthered crimes in violation of the Copyright Act committed by the users.

It further rejected the defendants' argument that in any event they should be acquitted with reference to the Electronic Commerce Act. In reaching this conclusion the court considered, *inter alia*, that TPB had provided the opportunity for others to share copyright-protected material. In the court's view, it must have been obvious to the defendants that TPB contained torrent files which related to copyright-protected material. However, none of them had taken any action to remove the torrent files in question, despite being requested to do so. Moreover, even assuming that the defendants had not been aware of precisely those works covered by the indictment they had, according to the court, at least been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB. For these reasons, and considering that it was a matter of intentional offences, the actions of the defendants did not enjoy freedom from prosecution under the Electronic Commerce Act.

The applicants appealed to Svea Court of Appeal (*Svea hovrätt*), maintaining their claims. Several plaintiffs also appealed, demanding full compensation in accordance with their claims.

On 26 November 2010 the Court of Appeal reduced the first applicant's prison sentence to ten months and the second applicant's sentence to eight months but increased their joint liability for damages to approximately EUR 5 million. The Court of Appeal agreed with the lower court's conclusion that the prosecutor had proved that crimes in violation of the Copyright Act had been committed in Sweden and, thus, that Swedish law was applicable. It also agreed with the District Court's conclusion that TPB had furthered illegal file-sharing in such a way that the persons responsible for it became criminally liable. However, the Court of Appeal rejected the lower court's conclusion that the defendants should be held collectively responsible for the actions committed. Instead, the Court of Appeal considered it necessary to assess the criminal liability of each person charged individually. Thus, each defendant was held liable for his own actions only. The first applicant was found to have been engaged in the programming, systematisation and daily operations of TPB. The second applicant was found to have contributed to the financing of TPB by collecting debts from two advertisers and, moreover, to have contributed in closing an advertising agreement. He had further contributed to the development of TPB's systematic tracker function and database. Lastly, he had configured a load balancing service for TPB.

As regards the defendants' argument that they should be granted freedom from criminal liability in accordance with the Electronic Commerce Act, the Court of Appeal noted that the defendants had committed the offences intentionally and that the provisions on freedom from criminal liability in the Act were not applicable under such circumstances. As for compensation for the plaintiffs, the court noted that TPB had created the possibility to upload and store torrent files, a database and a tracker-function. Thus, it had not merely offered transfer of data or *caching*, which was a precondition for freedom from indemnity liability under the Act. The Court of Appeal noted that the applicants had not taken any precautionary measures, and torrent files which referred to copyright-protected material had not been removed despite warnings and requests that they do so. According to the Court of Appeal, the defendants could not be granted freedom from criminal liability with reference to social adequacy.

Upon further appeal by the applicants, the Supreme Court (*Högsta domstolen*) refused leave to appeal on 1 February 2012.

B. Relevant domestic law

1. Constitutional guarantees

Freedom of expression and freedom of information are protected in the Swedish constitution, via the Instrument of Government (*Regeringsformen)*.

Chapter 2, Section 1, provides in relevant parts:

> "Every citizen shall be guaranteed the following rights and freedoms in his relations with the public institutions:
>
> 1. freedom of expression: that is, the freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way;
>
> 2. freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others."

According to Chapter 2, section 20, the rights of freedom of expression and information may be limited in law. However, such limitations must meet the requirements laid down in Chapter 2, sections 21 and 23.

Section 21 provides that limitations may be imposed only to satisfy the purposes acceptable in a democratic society. The limitation must never go beyond what is necessary with regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the fundaments of democracy. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.

In accordance with the first paragraph of section 23, freedom of expression and freedom of information may be limited with regard to the security of the Realm, the national supply of goods, public order and public safety, the good repute of the individual, the sanctity of private life, and the prevention and prosecution of crime. Freedom of expression may also be limited in business activities. Freedom of expression and freedom of information may otherwise be limited only where particularly important grounds so warrant.

The second paragraph of section 23 stipulates that, in judging what limitations may be introduced by virtue of the first paragraph, particular regard must be had to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters.

2. The Copyright Act

The protection of authors and right-holders is laid down in the Copyright Act, which, in relevant parts, reads as follows:

> **Chapter 1 Subject Matter and Scope**
>
> *Section 1*
>
> Anyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is
>
> 1. a fictional or descriptive representation in writing or speech,
>
> 2. a computer programme,
>
> 3. a musical or dramatic work,
>
> 4. a cinematographic work,
>
> 5. a photographic work or another work of fine arts,
>
> 6. a work of architecture or applied art,
>
> 7. a work expressed in some other manner.
>
> ....
>
> *Section 2*
>
> Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by making copies of it and by making it available to the public, be it in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical manner.

As the making of copies shall be considered any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part.

The work is being made available to the public in the following cases

1. When the work is being communicated to the public. This is deemed to include any making available of the work to the public by wire or by wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public includes also acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them.

....

As acts of communication to the public and of public performance shall be deemed also acts of communication and performance that, in the framework of commercial activities, occur to or for a comparatively large closed group of persons.

Chapter 5 Certain Rights Neighbouring to Copyright

Section 46

Subject to the limitations prescribed in this Act, a producer of recordings of sounds or of moving images has an exclusive right to exploit his recording by

1. making copies of the recording, and

2. making the recording available to the public.

...

The provisions of Section 2, second - fourth paragraphs shall apply to recordings referred to in this Article.

Chapter 7 on Penal and Civil Liability

Section 53

Anyone who, in relation to a literary or artistic work, commits an act which infringes the copyright enjoyed in the work under the provisions of Chapters 1 and 2 or which violates directions given under Section 41, second paragraph, or Section 50, shall, where the act is committed wilfully or with gross negligence, be punished by fines or imprisonment for not more than two years.

Anyone who for his private use copies a computer programme which is published or of which a copy has been transferred with the authorisation of the author shall not be subject to criminal liability, if the master copy for the copying is not used in commercial or public activities and he or she does not use the copies produced of the computer programme for any purposes other than his private use. Anyone who for his private use has made a copy in digital form of a compilation in digital form which has

been made public shall, under the same conditions, not be subject to criminal liability for the act.

The provisions of the first paragraph also apply if a person imports copies of a work into Sweden for distribution to the public, if such a copy has been produced abroad under such circumstances that a similar production here would have been punishable under that Paragraph.

...

Section 57

The provisions of Articles 53 - 56 shall apply also to rights protected by the provisions in Chapter 5.

3. The Penal Code

Chapter 23, section 4, of the Penal Code (*Brottsbalken*, 1962:700) stipulates that punishment provided for in the Penal Code for criminal acts shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or deed. The same shall apply to any other act punishable with imprisonment under another law or statutory instrument. Moreover, a person who is not regarded as the perpetrator shall, if he incited another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime. Each accomplice shall be judged according to the intent or the negligence attributable to him or her.

C. Relevant Council of Europe source

In its recommendation CM/Rec(2007)16 to member States on measures to promote the public service value of the Internet, the Committee of Ministers noted that the Internet could, on the one hand, significantly enhance the exercise of certain human rights and fundamental freedoms while, on the other, it could adversely affect these and other such rights. The member States were recommended to elaborate a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies.

COMPLAINT

The applicants 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. According to the applicants, Article 10 of the Convention enshrines the right to offer an automatic

service of transferring unprotected material between users, according to basic principles of communication on Internet, and within the information society. In their view, Article 10 of the Convention protects the right to arrange a service on the Internet which can be used for both legal and illegal purposes, without the persons responsible for the service being convicted for acts committed by the people using the service. In this connection, they referred to international frameworks, expressing a far-reaching right to receive and provide information between Internet users.

THE LAW

The applicants complained that their convictions interfered with their right to freedom of expression under Article 10 of the Convention, which provides:

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

A. Whether there was an interference with the applicants' freedom of expression

The Court notes from the outset that the applicants were convicted for their involvement in the running of a website which made it possible for users to share digital material such as movies, music and computer games, which were copyright-protected.

The Court has consistently emphasised that Article 10 guarantees the right to impart information and the right of the public to receive it (see, amongst other authorities, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59(b), Series A no. 216). In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the sharing and dissemination of information generally (*Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*,

nos. 3002/03 and 23676/03, § 27, ECHR 2009, and *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013 –not yet final).

Moreover, Article 10 applies not only to the content of the information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information (see, for example, *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI).

Furthermore, Article 10 of the Convention guarantees freedom of expression to "everyone". No distinction is made in it according to whether the aim pursued is profit-making or not (see, *mutatis mutandis*, *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, 47).

In the present case, the applicants put in place the means for others to impart and receive information within the meaning of Article 10 of the Convention. The Court considers that the actions taken by the applicants are afforded protection under Article 10 § 1 of the Convention and, consequently, the applicants' convictions 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.

B. Whether the interference was prescribed by law

The applicants' convictions were based on the Copyright Act and the Penal Code. The Court observes that the applicants were only convicted in respect of material shared through TPB which was protected by copyright in accordance with the Copyright Act. It follows that the interference was "prescribed by law".

C. Whether there was a legitimate aim

The Court is further satisfied that the interference pursued the legitimate aim of protecting the plaintiffs' copyright to the material in question. Thus, the convictions and damages awarded pursued the legitimate aim of "protection of the rights of others" and "prevention of crime" within the meaning of Article 10 § 2.

D. Whether the interference was necessary in a democratic society

The Court reiterates that the test of "necessity in a democratic society" requires it to determine whether the interference complained of corresponded to a "pressing social need" (Observer *and* Guardian, cited above, § 59).

The test of whether an interference was necessary in a democratic society cannot be applied in absolute terms. On the contrary, the Court must take into account various factors, such as the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case. In the present case, the Court is called upon to weigh, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other, the interest in protecting the rights of the copyright-holders.

As to the weight afforded to the interest of protecting the copyright-holders, the Court would stress that intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention (see, for example, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 72, ECHR 2007-I). Moreover, it reiterates the principle that genuine, effective exercise of the rights protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII). Thus, the respondent State had to balance two competing interests which were both protected by the Convention. In such a case, the State benefits from a wide margin of appreciation (*Ashby Donald and Others*, cited above, § 40; compare also to the Committee of Minister's recommendation, referred to above).

In this connection, the Court would also underline that the width of the margin of appreciation afforded to States varies depending on a number of factors, among which the type of information at issue is of particular importance. In the present case, although protected by Article 10, the safeguards afforded to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate. It follows that the nature of the information at hand, and the balancing interest mentioned above, both are such as to afford the State a wide margin of appreciation which, when accumulated as in the present case, makes the margin of appreciation particularly wide (*Ashby Donald and Others*, cited above, § 41).

Since the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, the Court finds that there were weighty reasons for the restriction of the applicants' freedom of expression. Moreover, the Swedish courts advanced relevant and sufficient reasons to consider that the applicants' activities within the commercially run TPB amounted to criminal conduct requiring appropriate punishment. In this respect, the Court reiterates that the applicants were only convicted for materials which were copyright-protected.

Finally, the Court reiterates that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of interference with the freedom of expression guaranteed

by Article 10 (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI, and *Skałka v. Poland*, no. 43425/98, § 41, 27 May 2003). In the present case, the Court considers that the prison sentence and award of damages cannot be regarded as disproportionate. In reaching this conclusion, the Court has regard to the fact that the domestic courts found that the applicants had not taken any action to remove the torrent files in question, 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.

In conclusion, having regard to all the circumstances of the present case, in particular the nature of the information contained in the shared material and the weighty reasons for the interference with the applicants' freedom of expression, the Court finds that the interference was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

It follows that the application must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President