

**APPEALED RULING**

Separate judgement by Stockholm District Court dated May 19, 2015 in case number B 6463-13, refer to Appendix A

**PARTIES**

**Appellant (Public Prosecutor)**

Public Prosecutor Fredrik Ingblad  
Swedish Prosecution Authority  
Internationella åklagarkammaren i Stockholm (the International Public Prosecution Office in Stockholm)

**Defendant**

The Internet Foundation in Sweden, 802405-0190

Attorneys: Attorneys at law Peter Dyer and Sara Malmgren  
Foyen Advokatfirma AB

**Plaintive**

F.N

Representative and public defender: Attorney at law Jonas Nilsson

**IN THE MATTER OF**

Separate application for forfeiture

**JUDGEMENT OF THE COURT OF APPEAL**

1. The Court of Appeal affirms the judgement of the District Court.

[...]

**REASONING OF THE COURT OF APPEAL**

*Outline of the Court of Appeal's reasoning*

As in the District Court, the case in the Court of Appeal pertains to the forfeiture of rights to the domain names: thepiratebay.se and piratebay.se. First, as background information, a brief description is provided of the domain name system and the Internet Foundation in Sweden's (hereinafter the "Foundation") role in this system. In connection with the above, the Court of Appeal presents certain considerations with regard to domain names and rights to domain names. In the Court of Appeal, F.N also questioned Swedish jurisdiction and, therefore, the Court has also addressed this question as well as the question of which country's law applies.

This is followed by the Court of Appeal's opinion as to whether any infringement of works protected by copyright has taken place via The Pirate Bay (hereinafter "TPB") in the manner asserted by the prosecutor. Thereafter, the Court of Appeal presents its assessment of whether the preconditions exist for forfeiture of the rights to the domain names: thepiratebay.se and piratebay.se as claimed by the prosecutor in the cases of the Foundation and F.N under Chapter 36, Section 3, Point 1 of the Swedish Penal Code and secondly, in accordance with Article 53 a of the Swedish Act on Copyright in Literary and Artistic Works.

Finally, the Court of Appeal addresses the question of whether any obligation exists to indemnify legal costs as well as the questions regarding fees to public defense counsel and any repayment obligations with regard to these costs.

*The domain name system and rights to the domain names*

It has been established through investigations conducted in the course of the case that the Foundation is the domain administrator for the top-level domain .se and that the two domain names relevant to the case, namely thepiratebay.se and piratebay.se, are located in the domain name system subordinate to this top-level domain.

Act 2006:24, the National Top-Level Domains for Sweden on the Internet Act (the Top-Level Domains Act) governs the technical operation of the country code top-level domains and the registration of domain names under these domains (Section 1). Under this Act, the domain administrator is responsible for the administration of such a top-level domain, in other words for its technical operation and for the allocation and registration of domain names under the top-level domain (Section 2). The domain name administrator should establish and make public its rules for allocating, registering, deregistering and transferring domain names under the top-level domain (refer to Section 7 of the same act). The rules should be designed to ensure the procedure is open and non-discriminatory (same section). Under Section 6 of the above Act, the register of allocated domain names should contain, inter alia, information about the domain name and the owner of the domain name. The Swedish Post and Telecom Agency is the supervisory authority under the Top-Level Domains Act and, in this capacity, supervises compliance with the Act and with provisions notified under the Act (§ 10). The Court of Appeal notes that existing legislation does not identify the legal entity entrusted with the task of being the domain name administrator.

It is evident from the registration conditions referred to in the case for the top-level domain .se – these conditions apply for all domain names registered under the top-level domain .se, and between, inter alia, the Foundation and the owner of the registered domain name – that the Foundation has the right to deactivate and deregister a domain name when holders do not provide complete and correct information about themselves. It is also evident that the Foundation likewise in certain other cases has the right to deregister or transfer the domain name to another party. This applies, for example, when the domain name is not renewed or when another party can demonstrate a better claim than the existing domain owner. Furthermore, under the terms and conditions, the Foundation has the right to immediately deactivate or deregister the domain name if the name or its use would be in obvious conflict with Swedish law or statutes.

The Court of Appeal notes that for a domain name to exist it must be registered under a top-level domain (see also Forsman and Söderlund Sause, *Domännamn, Strategier och juridiska överväganden*, 2014, p. 48). During the registration period, the registered holder has some kind of exclusive rights to the domain name in accordance with the registration conditions. This right is perpetual as long as the registration is renewed by the domain owner and that all other obligations under the registration conditions are fulfilled or if the domain name is transferred to another party following a dispute with regard to which party had the better right (see Edvardsson, *Domännamnsvister – Alternativ tvistelösning och grunderna för domännamnssystemet*, 2015, p. 77 onwards). The right entails, inter alia, that as a rule the party that owns the domain name is free to transfer its rights to the domain name to another party and domain name trading is a common practice (see Edvardsson, op. cit., p. 49). A domain name cannot therefore be regarded solely as an address to a specific domain. Instead, the assessment of the Court of Appeal is that the right to a domain name, which carries a possible economic value, comprises a form of intellectual property. In this context, the Court of Appeal notes that in a decision in 2007, the European Court of Human Rights made a corresponding assessment (see the judgement dated September 18, 2007 in the case *Paeffgen GmbH v. Germany*).

The opinion of the Court of Appeal is that the right to a domain name is comparable to that which the owner of a trademark has to a trademark, even if such a right, by virtue of its nature as a statutory exclusive right, has clearer and more highly developed protection. Accordingly, since the right to a domain name comprises a form of intellectual property, no purpose is served by assessing the right to a domain name in terms of rights of possession and of use (compare Levin, *Lärobok i immaterialrätt, Zeteo*, December 1, 2014, Section A “Rättsområdets avgränsning och terminologi”).

#### *Swedish jurisdiction and relevant law*

The Court of Appeal notes that the prosecutor's claim for forfeiture has been brought before the court as a separate action and no criminal prosecution initiated. Forfeiture is claimed both as a separate legal consequence of alleged infringements of the Act on Copyright in Literary and Artistic Works and irrespective of whether any crime has been committed. The forfeiture claims in question in this case relate to the right to domain names allocated by a Swedish domain administrator and which are registered in a register kept in this country under the supervision of the Swedish regulatory body, the Swedish Post and Telecom Agency. According to the assessment of the Court of Appeal, irrespective of where the crime was committed, in such circumstances the prerequisites must exist to try a question regarding forfeiture in Sweden through the application of Swedish law. (Compare with a

similar reasoning from the Supreme Court in NJA 2015 p. 798). However, it is also apparent for the Court of Appeal that the crimes in question according to the prosecutor's allegations were committed in Sweden and that Swedish law is applicable in this regard (compare Svea Court of Appeal's separate judgement dated November 26, 2010 in case number B 4041-09).

*TPB and infringement under the Act on Copyright in Literary and Artistic Works*

The investigation in the case shows that both prior to and during the periods addressed in this case, TPB served as a file-sharing service on the internet whereby, inter alia, music and films were made available to the general public, that this happened on a colossal scale, and that TPB was reached, inter alia, via the domain names thepiratebay.se and piratebay.se.

It is also apparent for the Court of Appeal that the films, musical compositions, music recordings, audio books and music reviews appurtenant to the case enjoy protection under the Act on Copyright in Literary and Artistic Works. The investigation also shows that the material has been available on TPB during the periods relevant to the case without the consent of the owners. Furthermore, the Court of Appeal has made the same of assessment as the District Court regarding the question of infringement of these works and recordings, namely that the prosecutor has substantiated the claim of infringement. Therefore, the question is a matter of unlawful copies as well as making these works available in an unlawful manner through transmission to the general public, which has been performed in such a manner as to enable individuals to gain access to these works or recordings from a location and at a time of their own choosing. The fact that part of the transfer was carried out using magnet links, and not torrent files, has no impact on the assessment. This is because the copyright regulation should be interpreted with a technology-neutral approach and that the investigation demonstrates that the effect of making the works and recordings accessible has been the same regardless of whether the technology used comprised torrent files or magnet links (compare Bill 2004/05:110, pp. 69 onwards and 378 onwards). As established by the District Court, infringement took place in the period from the end of 2010, in other words after the Court of Appeal's judgement of November 26, 2010, in which by virtue of his participation in TPB F.N was convicted for complicity in the infringement of the Swedish Act on Copyright in Literary and Artistic Works.

The arguments put forward mean that the Court of Appeal, in conformity with the District Court, finds that the domain names: thepiratebay.se and piratebay.se were used in connection with the infringement of the Swedish Act on Copyright in Literary and Artistic Works or to aid and abet such infringements as those that took place via TPB.

*Forfeiture under Chapter 36, Section 3, Point 1 of the Swedish Penal Code*

Under Chapter 36, Section 3, Point 1 of the penal code, forfeiture requires that the object subject to forfeit, due to its particular nature and the circumstances in general, is at risk of being used for criminal purposes. In other words, the provision does not require the object to have been used in a crime but is instead intended to prevent new crime.

In the above, the Court of Appeal made the assessment that the domain name comprises a form of intellectual property and found that the domain names: thepiratebay.se and piratebay.se were used in connection with infringement via the file-sharing service TPB. The domain names have an express and a functional link to this file-sharing service and thereby contribute to the continuation of that unlawful activity. Therefore, the assessment of the Court of Appeal is that these domain names are of such a particular nature and that the general circumstances are such that the prerequisites for forfeiture of the rights to the domain names has been met in this regard.

However, a prerequisite for forfeiture under Chapter 36, Section 3, Point 1 of the Swedish Penal Code is that the property subject to forfeiture can be considered an object in accordance with the intent of the provision. As also noted by the District Court, the linguistic meaning of the concept "an object" is narrower than that for the concept "property". Therefore, the question is whether it is possible to interpret the provision to allow the concept "object" to be assigned a wider interpretation as claimed by the prosecutor.

Initially, the Court of Appeal states that forfeiture comprises a restriction of the property rights protected in the constitution (refer to Chapter 2, sections 15 and 16 of the Instrument of Government). Restrictiveness should therefore be applied when interpreting the forfeiture provisions widely and outside of the letter of the law.

The use of the concept “object” in Section 3 – unlike the other provisions pertaining to forfeiture in Chapter 36 of the Swedish Penal Code where the concept “property” is used – has not been commented on in further detail in the legislative history. However, in relevant literature it has been clearly expressed that in this case “object” means exclusively movable property (see Almkvist, *Förverkande av egendom*, 2014, p. 49).

Within the framework of international legal collaboration, in which Sweden has participated, various international agreements have been reached governing, inter alia, questions regarding forfeiture. None of these apply specifically to the forfeiture of tools that have not been used in a crime and nor have the agreements led to any change in Chapter 36, Section 3 of the Swedish Penal Code. In other words, from a Swedish perspective, there is no support for referring to international undertakings to allow an interpretation of Chapter 36, Section 3 of the Swedish Penal Code that does not follow the letter of the law.

A forfeiture can be effected under the provisions in Chapter 27 of the Swedish Code of Judicial Procedure. In comparison with the forfeiture provisions, it is clearly stated that the concept “object” means solely movable property (see Fitger et al., the Swedish Code of Judicial Procedure, Zeteo, October 2015, comments to Chapter 27, Section 1). The assessment of the Court of Appeal is that this should be possible to set a precedent for the interpretation of the concept “object” in a forfeiture process, particularly when this agrees with the linguistic meaning of the concept.

According to the Court of Appeal, this argument leaves no space for interpretation of the concept “object” under Chapter 36, Section 3 of the Swedish Penal Code that differs from its linguistic meaning. Since intellectual property is not an object, no legal grounds exist for forfeiture of the rights to the domain names under this provision. The prosecutor’s forfeiture claims against the Foundation and F.N can therefore not win approval on this basis.

#### *Forfeiture under Section 53 a, second paragraph of the Swedish Act on Copyright in Literary and Artistic Works*

##### Legal basis

Under the second paragraph of Section 53 a of the Swedish Act on Copyright in Literary and Artistic Works, property that has been used as a tool in connection with a violation under this Act may be declared forfeited, where this is needed in order to prevent violations or where there are otherwise special reasons.

The Swedish Act on Copyright in Literary and Artistic Works corresponds to Chapter 36, Section 2 of the Swedish Penal Code. Unlike forfeiture under Section 3 of this chapter, it is a prerequisite that a crime has been committed. Furthermore, the provision in the Swedish Act on Copyright in Literary and Artistic Works expressly states that it is not limited to objects. Regarding the question as to whether it is possible to forfeit rights to intellectual property under this provision, the Court of Appeal is of the same opinion as the District Court and finds that prerequisites do exist under the second paragraph of Section 53 a of the Swedish Act on Copyright in Literary and Artistic Works to declare a domain name forfeit if it has been used as a tool to aid committing a crime. Such a tool is deemed to include any property used in connection with the crime taking place, which includes both property that comprises a prerequisite for committing the crime and property used in connection with committing the crime (see Olsson and Rosén, *Upphovsrätts lagstiftningen, En kommentar*, Zeteo, January 20, 2014, comments to Section 53 a).

Furthermore, confiscation under the second paragraph of Section 53 a of the Swedish Act on Copyright in Literary and Artistic Works requires this to be necessary to prevent violation or where there are otherwise special reasons. When determining whether confiscation is necessary to prevent crime, first and foremost, it should be considered whether the property has pronounced qualities as a tool for committing crime and the role these qualities have played in this. Secondly, it is primarily relevant to consider whether it would appear objectionable if the perpetrator were permitted to keep the property (see Olsson and Rosén, *Upphovsrättslagstiftningen, En kommentar*, comments to Section 53 a).

Chapter 36, Section 5 of the Swedish Penal Code states for which individuals forfeiture of property may be exacted. As reported by the District Court, forfeiture of property may be exacted, inter alia,

against the perpetrator and the individual on whose behalf the perpetrator acted (first paragraph). If the property did not belong to any of the individuals stated in the first paragraph, it is generally not subject to forfeiture (second paragraph). If a forfeiture proceeding is directed at more than one person and comprises forfeiture of an object, the declaration of forfeiture is directed at the individual/s who is/are the owner/s of the property or the holder/s of the rights (Fitger et al., op. cit., Comments on Section 5 of the Swedish Code of Judicial Procedure). Consequently, approval of a forfeiture claim against a person as referred to in the first paragraph presupposes that this individual has ownership of or holds the rights to the property.

If the prerequisites for forfeiture are met, the court has the right under Chapter 36, Section 6 of the Swedish Penal Code to order a measure aimed at preventing misuse. This possibility is intended to be applied when forfeiture of an object appears unreasonable or unnecessarily invasive, or when another measure is deemed more appropriate. Generally, those measures that can be taken to prevent misuse are tangible measures with the object that would otherwise be subject to forfeit. (Fitger et al., op. cit., Comments on Chapter 36, Section 6).

According to Chapter 36, Section 17 of the Swedish Penal Code forfeited property and corporate fines accrue to the State unless otherwise prescribed.

#### Forfeiture against the Foundation

From the above, it follows that a prerequisite for approval of a forfeiture claim – the claim against the Foundation – is that the Foundation can be deemed to be the holder of the rights to the domain name in question.

The Court of Appeal has previously described the role the Foundation has in the domain name system, namely responsibility for the operation of the top-level domain and the allocation and registration of domain names in its capacity as domain administrator, furthermore, the Court has also established that the right to a domain name arises on registration. No information to the contrary has been presented that would show that, since registration, any other party than the registered domain owner has the right of disposal over the domain name. It is true that the Foundation, in accordance with the Top-Level Domains Act, has responsibility within the framework of maintaining its register for taking actions to this effect. In addition, under its registration conditions, the Foundation has retained the right to deregister or deactivate a domain name if the domain name itself or its use conflicts with any law or statute. However, in the opinion of the Court of Appeal these conditions clearly imply that the Foundation has only an administrative role in the domain name system – a role that is under the supervision of a Swedish government agency. Accordingly, given these conditions, the Court of Appeal draws the conclusion that the Foundation has no such property rights in the form of the right of disposition over a registered domain name that would constitute a right of ownership as required by the forfeiture legislation. On these grounds alone, there is insufficient basis to find in favor of the prosecutor's forfeiture claim against the Foundation under Section 53 a, second paragraph of the Swedish Act on Copyright in Literary and Artistic Works.

[...]

The consequence of a valid ruling to confiscate the domain name is that the right to the domain name goes to the state. In this case, the state may choose not to pay the registration fee or request that the domain name be deregistered. It may then become possible for another party to register and thereby obtain the right to this domain name unless the Foundation, in accordance with its registration conditions, is of the opinion that the domain name itself or its use conflicts with the Swedish constitution. Even if, given this background, the Court of Appeal may have some understanding for the prosecutor's claim that an injunction against the Foundation is also needed, the Court of Appeal notes the absence of any legal support for such an injunction. In the opinion of the Court of Appeal, this follows from the fact that the Foundation is not involved in the case that addresses confiscation from F.N. Accordingly, the prosecutor's claim in this aspect cannot be sustained. However, the Court of Appeal presumes that questions relating to the Foundation's ability to deregister and cease with the allocation of domain names will be given further consideration by both the Foundation and the Swedish Post and Telecom Agency, in its regulatory capacity.

Altogether, this means that the judgement of the Court of Appeal is that F.N has forfeited the rights to the domain names: thepiratebay.se and piratebay.se.

**Summary of the Court of Appeal's opinion**

The Court of Appeal's opinion means that the rights of F.N to the domain names: thepiratebay.se and piratebay.se are forfeit, and that the prosecutor's claim for forfeiture of the Foundation's rights to the same domain names should not be sustained. Furthermore, no legal grounds exist that would allow, in conjunction with or instead of confiscation from F.N, an order requiring the Foundation to deregister and cease allocating the domain names. In other words, the District Court's judgement against the Foundation and F.N is affirmed.