

REASONS FOR JUDGEMENT**Is there an infringement of copyright?**

The prosecutor's motion is based on the alleged infringement by the Pirate Bay (TPB). It is clear that TPB's website is reached via the domain names piratebay.se and thepiratebay.se.

It is furthermore clear that this service can also be reached via other domains. It is, in the opinion of the District Court, of no significance whether the domain names are currently used or not.

As basis for the motion, the prosecutor has alleged violations of the Copyright Act which, according to the prosecutor, have been and are being committed by TPB. In support of this, the prosecutor has pointed to a number of specific infringement documents regarding a large number of films, music recordings, music pieces, literary pieces (audio books) and one music review. The prosecutor has in detailed specified the alleged infringements and produced and referred to evidence that shows that infringement has occurred and how these have been documented. It is noted that the prosecutor in this part, in addition to written support, also has adduced verbal evidence. The District Court does not consider it necessary to further account for the details of the District Court's assessment of the individual incidents of infringements but simply notes that the prosecutor here has been able to support his allegations in full. The investigation has reliably shown that the material that is covered by the prosecutor's allegation has been, and continues to be, available on the service TPB.

The District Court accepts the prosecutor's opinion that the technology used and the manner in which the material has been provided on TPB, i.e. by means of links, constitutes a transfer to the general public which means that the pieces are made available.

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It is the view of the District Court that the recordings/pieces in question are covered by copyright and that they have been made available through TPB. There is also no doubt that here is an issue of unlawful publications. It is the view of the District Court that this is an issue of violation committed in Sweden and that Swedish law applies.

Therefore, it is noted that the domain names piratebay.se and thepiratebay.se have been used in connection with a violation the copyright law, or in the assistance of such violations which have taken place and are taking place via TPB. This is an issue of very extensive violations. It is clear that these violations primarily have taken place from the end of 2010 – even if parts of these unlawful acts relate to a period prior to this (the Nox Arcana pieces) – and are still ongoing.

Forfeiture

The prosecutor has motioned the court that the rights to the domain names piratebay.se and thepiratebay.se shall be forfeited under the provisions of the Copyright Act as an instrumentalities in the violations of the Copyright Act in this present case as this is necessary in order to prevent violations or there are other special reasons for this. Alternatively, the prosecutor has motioned that a forfeiture should be declared under the provisions of chapter 36, S3(1) of the Criminal Code.

S53(a) of the Copyright Act states, inter alia, that property that has been used as instrumentalities in the committing of a violation under the Copyright Act may be confiscated if this is necessary in order to prevent crimes or if there are other reasons for this. Such confiscation may, under Chapter 36, S5 of the Criminal Code, take place at the location of the perpetrator and anyone acting on behalf of the perpetrator.

The rule in question in S53(a) of the Copyright Act was introduced as part of adapting Sweden's international obligations such as Council Framework Decision 2005/212/RIF of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (see bill 2004/05:135 p. 124 cont.). The said

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framework decision states, inter alia, that every member state shall take such measures as are necessary in order to confiscate, wholly or in part, instrumentalities and proceeds deriving from criminal acts punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds (article 2.1). It further states that as instrumentalities is to be understood all property used or intended to be used, tangible or intangible, in any way, wholly or in part, to commit a criminal act or criminal acts (article 1).

The District Court holds that a domain name, that can for example be transferred, should be considered a form of intangible property. It is under the provisions of said framework decision possible to confiscate such property. Therefore, under the provisions of the rule in the Copyright Act, it is possible to confiscate a domain name.

The prosecutor has motioned that, alternatively, the domain names should be confiscated under the provisions in Chapter 36, S3(1) of the Criminal Code. That provision regulates the confiscation of objects which, by their particular nature and by the circumstances as a whole can be suspected to be put to criminal use. This is matter of objects with a distinguished character of criminal tools. Examples of such objects are skeleton keys, fake coins and art objects with fake signatures. The term object must be held to be narrower in meaning than the term property (cf. G. Almkvist, *Förverkande av egendom [The Confiscation of Property]* Iustus, 2014, p. 49 cont.). In the opinion of the District Court, the wording in the rule in question does not provide sufficient scope for application to such property as intended here. The domain names in this present case can therefore not be held to constitute such property as intended in Chapter 36, S3 of the Criminal Code.

The remaining issues that the District Court has to consider are whether, in this case, a confiscation of the domain name should take place at F.N and at the foundation.

It is the opinion of the District Court that it is clear – and must be considered almost public knowledge – that the activities that have taken place through the file share service TPB systematically have entailed and still entail unlawful handling of copyright material.

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By acting as distinctive mark and search path for TPB's operations, the domain names enable and facilitate the use of the illegal file sharing service which means that the use of the domain names in itself must be considered to constitute a furtherance of crimes as is intended under chapter 36, S2 of the Criminal Code. The basis for this assessment by the District Court is that there is a clear risk that the domain names will be used for continued criminal acts.

The prosecutor has alleged that the crimes are being committed and have been committed by TPB's administrators and their users. The prosecutor alleges that F.N and the foundation have contributed to this criminality. The issue is therefore whether confiscation can take place at F.N and the foundation respectively due to assisting criminal activity.

F.N

The District Court notes that F.N has been the registered holder of the domain names, a so-called registrant, from 2004 onwards. F.N has not objected to the prosecutor's account of different registration information but he has stated that this has merely been an issue of leaving his name on for practical reasons and that this has been done without his co-operation. He claims that he has not been involved in the operations since the District Court judgment of February 2009. Thus, according to F.N, he has not been the registrant of the domain names and, in any event, since the transfer in 2012, S.T has been the registrant.

F.N has been interviewed in the matter and he has described how he early on, already in 2003, got involved with TPB when he provided assistance when G.S.W – who had set up the service – needed further capacity. Together, they moved the operations to F.N's server in Gothenburg.

He has furthermore said the following. At most, he was involved in the technical aspects and worked with trying to make the service as efficient as possible. He was active until sometime after the District Court trial, in early 2009.

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He then stopped managing the updating of the servers and handed over the passwords to others. With this, his involvement in the daily running stopped as well as contacts with the domain name registrator and he also stopped paying bills. Since then, he has not had any connection with the operations in TPB.

He has not been involved in the transfer to S.T. This is a transfer made by those responsible for TPB, those to whom he handed over the passwords. These persons, i.e. the new operators of TPB, also had access to his signature. In other words, he has not himself signed and also did not know that the domain names would be transferred by means of this specific act. From his point of view, he had already transferred everything by handing over the passwords etc. He does know who the new operators of TPB are but does not wish to divulge this information. If anyone is to be sued, it might just as well be him as he has already been fined considerable amounts. The idea was that they would manage the domain names going forward and he has already previously given them copies of his ID document and his signature.

S.T is not one of the persons who have been involved in TPB. He does not know who she are; perhaps a wife or girlfriend. He is the one who has registered the domain names that are being considered in this present case. Domains which have been registered after he concluded his involvement with TPB have been registered using his old information.

DCP Networks is one of his companies with ongoing operations. This is a holding company that holds IP addresses and AS numbers. The company that has had customers is called Soundwaves, a company that he has had until the middle of 2014. This is a company that operates so-called co-location (placing computers with someone), VPS (renting a virtual server) and VPN (renting broadband through someone else's server). He had about 10 customers in Soundwaves; these were customers who operated VPN-services, i.e. who operate services where they need hardware and online access. He has rented a cabinet at Portlane in Nacka that has been used, inter alia, for co-location for a customer who he does not wish to name.

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He cannot explain why TPB disappeared from the Internet when the connection from his cabinet was closed down. One of his customers may have resold space to TPB.

It is correct that in the film “*TPB AFK*”, he pointed to servers which belong to TPB and that those servers were then located at Portlane’s premises in Nacka. It might be DCP Networks that had an agreement to store the servers there.

Here, the District Court notes the following.

On 26 November 2010, F.N was sentenced by Svea Court of Appeal to 10 month’s imprisonment for assistance in crimes under the Copyright Act. He was found to have taken different measures as part of the programming, systematisation and the daily operations of TPB and was found to have committed these crimes deliberately. He has registered the domain names of this present case as well as a number of domain names with connections to TPB and for which he remains as registrant.

Already the information provided by F.N indicates that he, by way of his actions, has contributed to the ongoing operations of TPB with full knowledge of what the operations were and that it was done in his name. He has, according to what he has said, been completely indifferent as to how his actions thus contributed to the ongoing operations.

However, the prosecutor has adduced an extensive investigation indicating that F.N has remained as the actual registrant even after the formal transfer to S.T. In the review of the documentation, the District Court notes in particular the circumstance that F.N has continued to participate in the operation of TPB. This conclusion follows from evidence cited, in particular that which the prosecutor has displayed regarding the activities that F.N – also in accordance with his own information – has operated at the hosting company Portlane. It is the view of the District Court that it is proven that the server space that F.N disposed there was linked to TPB.

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The circumstance that it was no longer possible to access the file share service via the domain names in question once the connection to the servers had been cut off, and for a number of weeks thereafter, cannot in the view of the District Court be understood in any other way than that the content on these servers was vital to the functioning of TPB.

Based on this and an overall assessment of what the prosecutor has adduced, the District Court holds that F.N has, at least, participated in the copyright infringement in the manner in which the prosecutor has alleged. The District Court also holds that the investigation shows that the transfer to S.T must be considered a sham transfer and that F.N must be held to be the actual registrant of the domain names.

In summary, the District Court finds that the domain names constitute property that can be confiscated, that F.N has been complicit in the crimes which have been proven and that he is the actual registrant of the domain names. There are thus no impediments against confiscating the domain names from him. The prosecutor's primary motion in terms of F.N is therefore allowed and the domain names shall be confiscated from him under the provisions of S53(a) of the Copyright Act.

The Foundation .SE

Under the Act on National Top Level Domains for Sweden on the Internet (2006:24), the technical operation of national top level domains for Sweden on the internet and the allocation and registration of domain names under these top level domains are regulated. The task of operating these activities and administration is incumbent upon the foundation. PTS has a supervisory function.

The foundation is tasked with maintaining a register with certain content over the allocated domain names under the top level domains. According to S7, it is incumbent upon the foundation to set rules for the allocation, registration, de-registration and transfer for the domain names under the top level domains. The rules must be constructed so that the proceedings are open and non-discriminatory, giving particular consideration to the interests of the users and other public interests.

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The Foundation has accepted a registration condition from which it is clear, inter alia, that a domain name may not infringe on the rights of others, or otherwise be in breach of applicable statute, public order or intend of be offensive. The foundation has the power to de-register or block domain names. In summary, the District Court holds that the foundation has authority over the domain names. Thus, the foundation disposes of the domain names in a manner that in itself makes confiscation possible.

The confiscation of property due to a crime may, under Chapter 36, S5 of the Criminal Code be done against anyone who has been complicit in the crime or anyone acting on behalf of the complicit body. Legal bodies are included in the group under item b). A confiscation must therefore be considered possible provided that it is possible to establish actual complicity by the foundation. This does not require the imposing personal responsibility on an individual representative, which the prosecutor also has not alleged.

The prosecutor has specified that the foundation has been complicit in the crime by allocating the domain names, continuing to provide them and renewing subscriptions and charging for the service being offered, i.e. by administrating the operations etc. of the system. The District Court accepts the prosecutor's allegations as sufficiently specified.

In terms of the alleged criminal act, the District Court holds that in this present case, complicity – as it has not been proven that the foundation was aware of the relevant circumstances when the domain names were registered – must be based on how the foundation has acted, or failed to act, once they were aware of the fact that the use of the domain names have furthered ongoing criminal acts. The District Court holds that it is unavoidable that the foundation's continued provision of the domain names in linguistic terms means that the criminal activity at TPB is being furthered. Even if it cannot be held that the foundation has any supervisory responsibility, it applies that it has the ability to act and to prevent further use of the domain names. However, in the manner in which the prosecutor has alleged, the foundation has also continued to provide the domain names, renewed the subscriptions and charged annual fees for the service.

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It has been shown that different representatives of the foundation have in public expressed their view on the circumstances for the prosecutor's claim and the grounds for the opinion of the foundation. That which has been disclosed in terms of the foundation's publicly expressed opinion – given what has emerged for the rest – at the same time shows that its representatives have been aware of the fact that TPB's operations entail unlawful handling of copyright material and that the domain names have been used to promote these operations. The foundation has clearly taken the view not to intervene against the holding in question of domain names. In this regard, the foundation has thus acted with intent.

The District Court notes in summary that the activities that TPB have operated entail very extensive violations of the Copyright Act which have been done in a systematic fashion. It is furthermore clear that representatives of the foundation have been aware that this has been the case. It is furthermore clear that the foundation will not by its own accord act to de-register the holding of the domain names and prevent future use of them. The documentation has rather, with reference to previous decisions on the confiscation at registrant's of domain names, indicated that the foundation may again permit the registration of the domain names. It is clear that the risk for continued criminal activities is considerable. The importance of the domain names for this criminal activity can also not be considered insignificant. The reasons for confiscation would therefore appear strong. A confiscation would not entail any significant sacrifice or cost for the foundation.

On this basis, the requirements for responsibility, and therefore for allowing the motion for confiscation, appear fulfilled both objectively and subjectively.

However, in this case, the parties have in particular considered the issue of the limits of complicity and it has been questioned whether the foundation, through its actions, really can be considered as having furthered violations of the Copyright Act. Here, the District Court notes the following.

Complicity applies to copyright infringement in the same manner as for others types of crime and there is no need for the act of complicity being a necessary requirement for the crime.

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For liability under Chapter 23, S4 of the Criminal Code, it is required that it is a furtherance that has had a physical or psychological influence on the occurrence or performance of the crime (cf. e.g. NJA 2008 p. 697). The liability for complicity is fairly extensive in Swedish law and already an insignificant furtherance may suffice.

In the judgment against, inter alia, F.N (judgment 26 November 2010 in case No. B 4041-09) looking at jurisprudence theories on freedom from responsibility with a basis in social adequacy, the Svea Court of Appeal found that an act that entailed a conscious risk-taking for a harmful effect under certain circumstances may be permitted anyway given the circumstances around it:

If a search provider in its character is such that it primarily is a tool in a valuable lawful operation and it has general social benefits, if this legitimate use dominates but the dissemination and transfer of unlawful material, despite precautionary measures cannot be excluded, the operation of such a provision can, in objective terms, be deemed permitted with support in aforementioned theories (p. 24).

In the assessment by the Court of Appeal between the socially adequate interest of providing a service for the file-sharing of legally provided material and the risk that the operation would lead to infringement, it was held that the freedom from responsibility given unwritten rules on social adequacy and the lack of culpability could not come into play for the provision of TPB.

The law maker has, in different contexts, dealt with the issue of what applies to so-called intermediaries on the Internet. In bill 2001/02:150 (E-Trade Act) stated, inter alia, the following.

In general, it probably applies that intermediaries which provide any of the services of the information society very rarely have intent in relation to the content in the information passing through the service. In many cases, it is probably unreasonable to require that the intermediary checks the content, i.e. it cannot be held that the intermediary should have been aware of the content. Consequently, there is an essential limiting for the criminal liability of intermediaries in the general requirement for subjective inclusion (p. 90).

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In Bill 2004/05:110 (Copyright in the Information Society), it was stated that for assistance in copyright infringement, e.g. for an Internet Service Provider, as a rule there is probably a requirement for more than the provision and operation of the service provision (p. 339 cont.):

An example of a situation where complicity (at least in an objective sense) can be considered is when the “infringer” has made agreement with the intermediary on the right to use his server space and when the intermediary subsequently has had concrete indications that that server space has been used in a manner which has entailed copyright infringement. Such situations are, in the government’s assessment, examples of when an intermediary may through furtherance be considered as complicit, at least in an objective sense, in the disclosure to the public and therefore an example that there are opportunities to intervene against the intermediary with a fine under the provisions of S53(a) of the Copyright Act or with measures under the provisions of S55 of the said act when the services of an intermediary are used by a third party in order to commit copyright infringement. In other words, it is possible to intervene even if the intermediary thereafter cannot be held liable due to the subjective requirements for criminal liability (intent or gross negligence) not having been fulfilled, or because the rules on freedom from liability, penalty and punishment in S16-19 of the Act (2002:562) on Electronic Trade and Other Information Society Services apply.

In Bill 2008/09:67, the issue was raised within the context of the introduction of the possibility of an information injunction. It is clear from that that all statements are relevant, also in terms of commercial services, e.g. different types of anonymity services and wireless networks at, e.g., cafés and restaurants and that anyone that provides such services in general has an interest in ensuring that their services are not used for criminal purposes (said Bill, p. 141).

There is some degree of justification for the opinion that it is incumbent upon providers of services via Internet to react to concrete allegations of infringement (cf. J Axhamn, Något om ansvar för medhjälp till upphovsrättsintrång – särskilt ionlinemiljö [On the responsibility for assistance in copyright infringement - in particular online], NIR 1/2012 p. 26 cont).

The requirements for the assessment in this present case are specific, inter alia as the District Court has found that the foundation has acted with intent.

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There is, however, according to the District Court grounds indicating that the foundation's participation should not be held punishable.

Unlike, for example, an Internet Service Provider that provides a service for a financial gain, the foundation has acted on different premises. The foundation has publicly acknowledged and justified its opinion on the prosecutor's motion; i.e. that it has not had an obligation to act but rather an obligation not to act without any direct instruction from, for example, a law-upholding authority. As far as the District Court understands, this opinion is based on the concept that the assignment as the administrator of an important public function does not entail pronouncing judgment on what could be considered unlawful or not in each individual case. No other conclusion can be drawn than that the basis for the foundation's opinion are legitimate and motivated.

In its overall assessment, the District Court finds that the foundation's actions in this present case are permitted. There are therefore no grounds to allow the prosecutor's motion for confiscation at the foundation.

The District Court has understood that the foundation has been unable to act against the registrant of the domain name. In the view of the District Court, based on what has been stated above, measures for the prevention of misuse under Chapter 36, S6 of the Criminal Code may be considered. Under the provisions of that rule, a Court can, for example, order that a false signature is destroyed or order that a work of art shall be provided with a note that it is a fraud. However, the District Court has found that there are no grounds for issuing a relevant injunction – for example ordering the foundation to perform or refrain from performing a specific measure, such as registering and ceasing to allocate the domain names – with support in this rule.

Furthermore, the District Court also noted that the confiscation at F.N will mean that the rights to the domain names fall to the government. This should in the long term limit the foundation's ability to dispose of them, e.g. though the transfer to someone else.