

# Forfeiture of Pirate Bay domain names

March 05 2018 | Contributed by [Advokatfirman Lindahl](#)

## Background

## Decision

## Comment

The Supreme Court has confirmed (B 2787-16) that domain names are property which can be forfeited to the state, providing rights holders with another measure in their fight against online infringement.

## Background

The famous copyright infringement case against the founders of the Pirate Bay was finally decided by the Svea Court of Appeal in 2010 and resulted in prison sentences for the defendants. However, copyright infringements under the domain names 'piratebay.se' and 'thepiratebay.se' continued.

In 2013 the IP prosecutor initiated action against one of the founders of the Pirate Bay – who was also the registered holder of the Pirate Bay domain names – and the Internet Foundation in Sweden (IIS) – which is responsible under law for the Swedish top-level domain '.se' and provides the Pirate Bay domain names.

The Stockholm District Court and the Svea Court of Appeal found that the founder was guilty of copyright infringement and therefore the domain name could be forfeited to the state under the Copyright Act's rules on forfeiture.

However, the Svea Court of Appeal found that the IIS' administrative role in providing the domain name meant that it was not in possession of the domain name according to the meaning of the 'provisions on forfeiture'. It also found that it was not possible to order IIS to de-register the domain name instead of it being forfeited to the state. Upon forfeiture, the state could choose between paying the registration fee or de-registering the domain name, after which it could be registered by any third party.

The judgment was appealed by the founder. The Supreme Court granted leave to appeal regarding whether the right to domain names should be considered property that can be forfeited.

## Decision

The Supreme Court noted that the concept of 'property' is central for the rules on forfeiture. It referred to the European Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, which defines 'property' as property of any description and 'instrumentalities' as any property used or intended to be used, in any manner, to commit a criminal offence.

The court concluded that:

- a person who registers a domain name is granted an exclusive right to that domain name;
- the right to a domain name may be subject to dispute resolution and entitlement claims; and
- domain names can be transferred and may have significant financial value.

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It also noted that the European Court on Human Rights has found that domain names are protected under the right to property in the European Convention on Human Rights and Fundamental Freedoms. Thus, the court found that domain names were property for the purposes of forfeiture. It noted that this was in line with international case law. It also concluded that domain names could constitute instrumentality in copyright crime.

In light of this assessment, the court did not grant leave to appeal for the rest of the appeal, making the Svea Court of Appeal judgment in these parts final.

## **Comment**

The Supreme Court judgment is limited to the question of whether domain names are property for the purpose of forfeiture. The Supreme Court has yet to comment on whether it is possible to order the IIS to de-register domain names instead of ordering forfeiture and the practical consequences of domain name forfeiture. In this respect, the Svea Court of Appeal judgment remains the only higher-instance judgment.

Following the Svea Court of Appeal's conclusions, it appears that unless there is a change in the legislation, the state will have to pay the registration fees to keep forfeited domain names off the market. Thus, the forfeiture tool may be of little practical use when acting against copyright infringement, since it lies in the hands of the state whether the domain name will be kept off the market. Rights holders are urged to monitor forfeited domain names and when necessary take control of them once they re-enter the market.

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