



# SUPREME COURT OF NORWAY

## J U D G M E N T

given on 17 September by the Supreme Court composed of

Justice Hilde Indreberg  
Justice Arne Ringnes  
Justice Wenche Elizabeth Arntzen  
Justice Borgar Høgetveit Berg  
Justice Erik Thyness

**HR-2019-1743-A (case no. 19-057105STR-HRET)**  
Appeal against Borgarting Court of Appeal's judgment 22 January 2019

IMCASREG8

(Counsel John Christian Elden)

v.

The Public Prosecution Authority

(Counsel Elisabeth Harbo-Lervik)

- (1) Justice **Ringnes**: The case concerns confiscation of the right to use a domain name by reason of contribution to copyright infringement.
- (2) On 8 March 2016, after having conducted a search, Økokrim (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) seized the right to use the domain name popcorn-time.no.
- (3) The domain name is registered in Norid – the registry for Norwegian domain names. The registered holder of the right of use was Imcasreg8.
- (4) Imcasreg8 is established by Internet Marketing Consults AS, who registers domain names for customers. Internet Marketing Consults AS has established Imcasreg1, Imcasreg2 etc. and registered them as associations (*foreninger*) in the Register of Business Enterprises. This has made it possible to register more than 100 domain names, which is the maximum number allowed for one organisation according to Norwegian domain name rules.
- (5) One of the customers was Marcaria.com, a US company engaging in trademark protection, including registration of domain names for customers that wish to set up a website in Norway. The person in possession of the domain name – Marcaria’s principal – is unknown. Following Økokrim’s investigation and seizure, Marcaria.com contacted Internet Marketing Consults AS and requested that the registration of popcorn-time.no be deleted.
- (6) Imcasreg8 brought the question concerning a continuation of the seizure before the District Court. After several rulings, the seizure was upheld by an order of Borgarting Court of Appeal.
- (7) Next, on 13 September 2017, Økokrim issued a confiscation order against Imcasreg8 represented by the chair of the board.
- (8) The basis for the measure is an unknown offender’s violation of section 54 subsection 3 of the Copyright Act 1961, cf. subsection 1 (a), cf. section 2, cf. section 15 of the Penal Code. The facts of the case are described as follows:

**“An unknown offender has by the help of the domain name popcorn-time.no, during the period from IMCASREG8’s registration in NORID on 23 February 2015 until ØKOKRIM’s seizure of the right to use the domain on 8 March 2016, contributed to the communication of literary and artistic works (*åndsverk*) to the public without the consent of the rights holders. The contribution consists of the posting of links on popcorn-time.no to domains containing software for use of the service Popcorn Time, as well as instructions for downloading and news updates relating to the service. The service Popcorn Time makes literary and artistic works available to the public by facilitating searches, streaming and sharing of films and TV series over the Internet without the consent of the rights holders. At the time of the offence, this involved a large number of films and TV series.**

**The confiscation order is issued against IMCASREG8, as the owner of the right to use the domain, since the rightful owner is unknown.”**

- (9) Imcasreg8 refused to accept the confiscation order, which took the place of an indictment in accordance with section 268 of the Criminal Procedure Act.
- (10) By Follo District Court’s judgment 12 January 2018, Imcasreg8 was subjected to confiscation of the right of use in favour of the State.

- (11) Imcasreg8 appealed to Borgarting Court of Appeal, which handed down a judgment on 22 January 2019 with the following conclusion:

**“IMCASREG8 represented by the chair of the board is subjected to confiscation of the right of use relating to the domain ‘popcorn-time.no’ in favour of the State, see section 69 subsection 1 (c) of the Penal Code, cf. section 74 subsection 2 first sentence and section 75 subsection 1.”**

- (12) A minority of two lay judges found that the unknown offender’s use of the website popcorn-time.no did not amount to criminal contribution to copyright infringement, and that the condition for effecting confiscation in section 69 subsection 1 (c) of the Penal Code was therefore not met.
- (13) In the District Court and the Court of Appeal, Norsk Unix User Group and Elektronisk Forpost Norge acted as third-party interveners for Imcasreg8.
- (14) Imcasreg8 has appealed to the Supreme Court. The appeal is against the findings of fact, the application of the law and the procedure. The Supreme Court’s Appeals Selection Committee has granted leave to appeal on the issues of application of the law as well as procedure with regard to the court’s account of its assessment of the case.
- (15) The appellant – *Imcasreg8* – contends:
- (16) The website popcorn-time.no does not meet the requirements of contribution to copyright infringement. The computer software named Popcorn Time is legal and has many useful objectives. Moreover, popcorn-time.no does not contain links for direct downloading of the computer software, but it contains information on the technology as well as links to other websites, which in turn have links to the computer software. This connection is remote and derived, and differs materially from the situation in the Supreme Court judgment in Rt-2005-41 *Napster*.
- (17) Furthermore, it must be assumed that communication of literary and artistic works by the use of the software Popcorn Time ends once the work is uploaded to the Internet. The main act has thus ceased before the alleged contributory act. Contribution, if any, is at any rate not illegal, as the confiscation interferes with the right to freedom of expression under Article 100 of the Constitution and Article 10 (1) of the European Convention on Human Rights (the Convention).
- (18) In addition, the Court of Appeal has committed an error of law by concluding that culpability is not required on the part of Imcasreg8. Confiscation constitutes a penalty within the meaning of Article 7 of the Convention; thus, culpability is required also on the part of the person against whom the confiscation is effected.
- (19) Apart from that, the appellant finds that confiscation is a disproportionate measure under section 69 subsection 3 of the Penal Code.
- (20) Imcasreg8 has invited the Supreme Court to pronounce this judgment:

**“Principally:  
The confiscation order issued against Imcasreg8 is withdrawn.**

**Alternatively:  
The Court of Appeal's judgment is set aside."**

- (21) *The Public Prosecution Authority* contends:
- (22) The Court of Appeal's application of the law is correct when it comes to contribution within the meaning of copyright law. It concerns physical contribution, and the situation is analogous to the contributory act in the Supreme Court's *Napster* judgment. Case law handed down by the Court of Justice of the European Union (the CJEU) since that judgment also indicates contribution in the sense of section 54 of the Copyright Act.
- (23) The unknown offender's contribution is illegal, and the freedom of expression cannot be invoked in a case involving contribution to sharing of a literary or artistic work that has been made available on the Internet without the consent of the rights holders.
- (24) It is also correct, as the Court of Appeal states, that culpability is not required on the part of Imcasreg8, the holder of the right to use domain name. However, the Court of Appeal has wrongly concluded that culpability is required on the part of the contributor – the owner of the domain. Such a requirement is not laid down in the Penal Code, nor may it be read into Article 7 of the Convention or case law by the European Court of Human Rights. Confiscation in the case at hand is not a penalty under Article 7.
- (25) The requirement of proportionality under section 69 of the Penal Code is met.
- (26) The Public Prosecution Authority has invited the Supreme Court to pronounce this judgment:

**"The appeal is dismissed."**

- (27) *I have concluded* that the appeal should be dismissed.
- (28) Confiscation has taken place in accordance with section 69 of the Penal Code, which in subsection 1 (c) provides that "property" that "has been used or intended for use in a criminal act, may be confiscated".
- (29) The confiscated property is the right to use the domain name popcorn-time.no. Domain names are organisations' unique names on the Internet, and the letters "no" indicate the national top-level domain – Norway – which is administered by Norid. Upon registration in Norid, the applicant receives an exclusive right to use the domain name in line with the terms in Norid's name policy. In addition to being the name of a website, many domain names also function as signs. This is because domain names containing company names or trademarks are often perceived by the customers as an indication of commercial origin for products and services that are marketed or sold on the website.
- (30) The decision by the Appeals Committee of the Supreme Court in Rt-2009-1011 clarifies that the right to use domain names may be subject to seizure and confiscation. The case concerned seizure under section 203 subsection 1 second sentence of the Criminal Procedure Act, according to which "objects that are deemed to liable to confiscation", may be seized. In paragraph 27, the Supreme Court's Appeals Selection Committee stated the following:

**"Domain names' similarity with other assets such as trademarks, suggests that domain names can be seized. Added to this is the need to be able to put a domain name out of**

**function in order to stop a criminal act. Norid does not control the contents of websites, nor does it have any mandate to react towards websites that may seem to breach the law; that is the task of the police or the judicial system.”**

(31) Then, the following is stated in paragraph 29:

**“The Court of Appeal is also not wrong when assuming that domain names are ‘deemed to be liable to confiscation’ under section 203 of the Criminal Procedure Act, cf. section 35 and section 37b of the Penal Code [1902]. Although a website will be available through the IP address also after the domain name has been disabled, it follows from the argument for operating with domain names that the availability will be considerably reduced. It is therefore not unnatural to see the domain name’s connection to a website with criminal contents as a tool for a criminal act, as the appellants contend.”**

(32) I will now turn to assessing whether the domain name, and thus the website popcorn-time.no, “has been used in a criminal act”, as required in section 69 of the Penal Code.

(33) In the confiscation order, the criminal act is described as contribution to illegal communication of literary and artistic works to the public.

(34) At the time of the act, the Copyright Act of 12 May 1961 applied, and the confiscation is due to a violation of this Act, see section 3 of the Penal Code. The penal provision in section 54 subsection 1 (a) of the Copyright Act 1961 covers “[infringement of] provisions laid down for the protection of copyright in or in accordance with Chapters 1 and 2”. This includes violation of the provisions on exclusive rights in section 2. The relevant provision in the case at hand is the author’s exclusive right to make the work available to the public by transferring it “in such a manner that each user may choose the time and place for accessing the work”, see section 2 subsection 2 (c), cf. subsection 3. Culpability is established by intent or negligence. It follows from section 15 of the Penal Code that the penal provision in section 54 of the Copyright Act 1961 also covers persons who *contribute* to the violation.

(35) The Copyright Act 1961 has been replaced by the Copyright Act of 15 June 2018 no. 40, which entered into force on 1 July 2018. No significant amendments are made with regard to the issues at hand, apart from the fact that the penal provision in section 54 is only partially continued in section 79. Among other things, the maximum penalty is increased from three months to one year of imprisonment, and the culpability requirement is changed to only include intentional infringement. The amendments are discussed in Proposition to the Storting 104 (bill) (2016–2017) item 7.3.5. and in the special remarks on page 340 et seq.

(36) The question of liability for contribution to copyright infringement by the use of links on the Internet was reviewed by the Supreme Court in Rt-2005-41 *Napster*. The case concerned the website napster.no, where links were posted leading directly to music files that had been made available on the Internet without the consent of the right holders. The Supreme Court held that this amounted to contribution giving rise to liability for compensation. The legal basis was the provision on compensation in section 55 subsection 1 of the Copyright Act, stating that compensation for damage caused by infringement mentioned in section 54 can be claimed on the basis of generally applicable compensation rules. Until the Penal Code entered into force on 1 October 2015, contribution was punishable under section 54 subsection 2.

(37) In other words, liability for compensation was previously determined based on the penal provision in the Copyright Act. The Supreme Court’s statements regarding contributory

negligence are therefore relevant to the assessment of criminal contributory negligence in our case. I will revert to the specific implications of *Napster*.

- (38) I add that, since the Supreme Court’s judgment in *Napster*, several judgments have been handed down by the CJEU altering the overall case law when it comes to assessing the posting of links on the Internet. The links at issue in *Napster* would, today, have been evaluated in accordance with criteria developed by the CJEU for determining whether “communication to the public” has taken place in accordance with Article 3 of Directive 2001/29/EC of the European Parliament and of the Council - the Copyright Directive. Of particular relevance are the CJEU judgments 8 September 2016 in Case C-160/15 *GS Media* and 26 April 2017 in Case C-527/15 *Stichting Brein v. Jack Frederik Wullems*, also referred to as *Filmspeler*. However, I cannot see that this development of the law is of much significance to the issue of criminal contributory negligence in our case, and will therefore leave it at that.
- (39) Before I discuss the contributory act forming the basis for confiscation in the case at hand, I will present the Court of Appeal’s findings with regard to the main act:
- (40) Popcorn Time is a software or an application facilitating online streaming of films and TV series. The application has a browser specially adjusted for searches in third-party catalogues. These catalogues contain a large amount of films and TV series. The Court of Appeal found it proven that:

**“... the predominant part of the materials available in the catalogues are copyright protected. After assessing the evidence presented relating to the content and function of the application, the Court of Appeal also finds that the very purpose of Popcorn Time is to make copyrighted materials available by giving the users free access to films and TV series, which they otherwise would have had to pay for.”**

- (41) Video files are downloaded and uploaded with the help of the technology BitTorrent. This renders efficient file sharing possible via communication between computers in a larger network, also described as “peer-to-peer” file sharing. When a file – for instance a film – is downloaded to the user, an uploading of the file will start to other users in the network. The technology therefore implies that the users make the file available in connection with the streaming, with the effect that new copyright infringements may occur.
- (42) The Court of Appeal has described the *main act* as follows:

**“The main act in the case, to which the alleged contributory negligence relates, is by the Prosecution Authority during the preparations for the Court of Appeal specified to constitute the original uploading of source files that are made available via the service Popcorn Time, without the consent of the rights holders. The Prosecution Authority’s use of the term ‘service’ and not computer software or similar, is irrelevant.”**

- (43) The Court of Appeal then found that:

**“[t]he original uploading of the source file, which renders the individual film or TV series available to the users of Popcorn Time, are in the Court of Appeal’s view comprised as an integrated part of Popcorn Times’s facilitation of searches, streaming and sharing of copyrighted materials, as stated in the basis for the confiscation order.”**

- (44) It also follows from the Court of Appeal’s judgment that communication of copyrighted materials via Popcorn Time takes place in a large scale. The majority of new, popular and

sought-after films and TV series are uploaded to the catalogues. The Court of Appeal also found it to be “beyond doubt that the communication of copyrighted materials [had] caused considerable losses to the rights holders” – also in the Norwegian market.

(45) Imcasreg8 contends that the main act must be considered ended at the time of the uploading, and that the subsequent activity on popcorn-time.no must therefore be judged under the rules of receiving (*heleri*) and not as contribution to copyright infringement. I disagree.

(46) The same issue was addressed in *Napster*. The following is stated in paragraph 62:

**“The Court of Appeal has found that the uploader’s illegal acts had ceased the moment the music had been uploaded, and that there was thus no basis for establishing contributory negligence. I disagree. The penal provision concerns ‘infringement of provisions laid down for the protection of copyright’, and the uploaders’ violation in this regard is having made the music available. It cannot be derived from the wording that the violation ceases once the uploading is terminated in technical terms, and such an interpretation seems contrived to me. In my view, the copyright infringement continues for as long as the uploaders let the music remain on the Internet. I add that it would seem very odd if the limitation period for such an act should start already when the uploading ends.”**

(47) As long as the work is available on the Internet, the transfer to the public continues within the meaning of copyright law. I note in this respect that the copyright infringed by the uploading to Popcorn Time is the exclusive right to communicate work to the public by making it available “in such a manner that each user may choose the time and place for accessing the work”.

(48) This leads me to the *contribution act* in our case. The Court of Appeal has given a detailed account of the content on popcorn-time.no, summarising it follows:

**“After having studied the content on the website, the Court of Appeal finds that ‘popcorn-time.no’ does not in itself contain copyrighted materials. The website does not contain links to films or TV series, or to film reviews or similar. The website only contains information regarding the software Popcorn Time and similar software, including descriptions of advantages and disadvantages of the different versions, how downloading may be carried out and tips for how various technical problems may be solved on the various operating systems.**

**The Court of Appeal further finds that the site ‘popcorn-time.no’ also does not contain any direct link to downloading of one or several of the different versions of the software/application Popcorn Time, or to what is referred to on the website as clones of the software, including Flixtor, MoviePanda, Show Box etc. By proceeding via the links under the descriptions in the “download section”, however, the user is led directly to new websites where the software Popcorn Time or clones thereof can be downloaded from the homepage of the relevant domain.”**

(49) The Court of appeal continues:

**“From the evidence presented, a united Court of Appeal considers it proven beyond reasonable doubt that the owner of the domain name popcorn-time.no has ‘posted links to domains containing software to use the service Popcorn Time, as well as instructions for downloading and news updates’, cf. the description of the contribution act in the grounds for confiscation ...”**

(50) As stated in *Napster* paragraph 66, the main offender and the contributor must be judged according to their own actions. Whether or not the uploaders could be punished in the country from where they operated is not relevant.

- (51) Physical contribution – the issue dealt with in our case – requires a causal link between the contribution act and the main act, see Magnus Matningsdal, *Straffeloven 2005* [the Penal Code 2005], updated commentary, section 15 note 3.5, *Juridika* 1 January 2019:

**“It is not possible to state precisely how much is required, and the closest we get to complying with the guideline is that the crucial point seems to be whether a person’s act is of such a nature and scope that it is natural to consider criminal liability. Or as Andenæs states on page 326: The only thing it takes is ‘contributory causation’.”**

- (52) In *Napster* paragraph 63, it is set out that “[l]inking has amplified the effect of uploaders’ actions by making the music more easily accessible”. It may seem here as if the Supreme Court applies the requirement of causation in criminal law.

- (53) The Court of Appeal’s majority concluded, as mentioned, that the requirement of contributory causation is met, and noted the following:

**“The majority considers it to be proven beyond doubt that the establishment of the Norwegian domain has in fact influenced the main act by enabling use of the software through links and information on the website. In the majority’s view, the contribution has increased the use of Popcorn Time and the access to the copyrighted materials in the third-party catalogues. The establishment of ‘popcorn-time.no’ and the maintenance of the site has thus amplified the effect of the uploaders’ illegal communication.”**

- (54) Like the majority of the Court of Appeal, I find that the requirement of contributory causation is met. The Court of Appeal found it proven, from the evidence presented relating to the prevalence and popularity of Popcorn Time in Norway at the time of confiscation, that popcorn-time.no “has in fact increased the illegal communication, although the scope thereof is unclear”. In the assessment of contributory causation, it is essential that the links to other websites, combined with instructions for downloading and tips for solving technical problems, provided the users with quick and simple access to the computer software, and thereby the catalogues with illegally uploaded films and TV series. At the same time, the website marketed the advantages of using Popcorn Time as an alternative streaming service. I refer to this text:

**“Popcorn Time and its clones are simple software allowing you to watch films and series in high quality. The variety of the content is large, and you will find a broader selection than on Netflix, HBO and similar platforms. You may watch everything from the newest films to the old classics; you will find almost anything ...”**

- (55) The question is then whether the contribution is illegal, see *Napster* paragraph 65:

**“Whether or not the linking amounts to contributory negligence, must rely on an assessment of the individual circumstances. A line must be drawn based on a general requirement of unlawfulness. I refer to Andenæs page 154 et seq., and the statement that illegal may often be translated with ‘excessive’, ‘inappropriate’, ‘reprehensible’ or similar characteristics.”**

- (56) The Court of Appeal found it proven that the owner of the domain was well aware that much of the works that the user may access to from Popcorn Time are copyrighted, and that the use of the software often results in copyright infringement. The Court also found that the key purpose of establishing popcorn-time.no was to facilitate increased use of Popcorn Time. The Court of Appeal’s majority considered the set-up and maintenance of the website a “highly reprehensible act”, and I agree with that characterisation. These facts strongly suggest that the contribution was illegal.



- (57) However, Imcasreg8 contends that the confiscation of the domain name is an interference with the right to freedom of expression under Article 100 of the Constitution and Article 10 of the European Convention on Human Rights, and that the contribution cannot be considered illegal. Imcasreg8 also stresses that it is not necessary in a democratic society to “silence the messenger describing the services”.
- (58) In my view, it must be clear that the right to freedom of expression does not prevent confiscation in a case like the one at hand. Essential factors in the contribution act are that the links on popcorn-time.no made it possible by pressing a few buttons to download the software Popcorn Time and variants of the same, and that the information on the site had the appearance of “instructions for downloading”.
- (59) The right to freedom of expression in Article 10 (2) of the Convention must be balanced against the copyright, which is protected as property under Article 1 of Protocol 1 of the Convention. I refer to the Supreme Court order in HR-2019-1725-A *Lovdata* paragraph 57 et seq. and the European Court of Human Rights judgment 19 February 2013 *Neij and Sunde Kolmisoppi v. Sweden*. The latter concerned the conviction of those responsible for the file sharing website The Pirate Bay. The case has similarities with ours. The Court found that the right to freedom of expression had to yield to the right to protection of property, and the application was rejected as “manifestly ill-founded”. In its reasoning, the Court wrote, among other things, that:
- “... 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.”**
- (60) Against this background, I conclude that the objective criteria for contributory negligence are met.
- (61) The requirement in section 69 of the Penal Code that the confiscated property must have been used in a “criminal act”, means as a starting point that all conditions for punishment – objective as well as subjective – must be met. Section 69 subsection 1 third sentence, however, provides an exception from this starting point. Here, it is set out that section 67 subsection 1 third sentence applies correspondingly, and thus that “[c]onfiscation shall take place even though the offender was unaccountable, see section 20, or was not culpable”.
- (62) In other words, when it comes to confiscation of property under section 69 subsection 1 (c), it is, as the provision reads, sufficient that the objective substance of the offence is present.
- (63) However, the Court of Appeal has assumed that the exception for subjective guilt under section 69 cannot be practiced because it conflicts with Article 7 of the Convention:
- “However, the Court of Appeal finds that a culpability requirement must be read into it, out of consideration for the presumption of innocence in Article 7 of the Convention, cf. Article 6 (2) and the judgment by the European Court of Human Rights 28 June 2018 in *G.I.E.M. and others v. Italy* (Case 1828/06). This is also assumed by Professor Jon Petter Rui in *Tidsskrift for Strafferett* [publication of criminal law] no. 3/18 page 214.”**
- (64) This question requires a closer assessment of whether the penalty criterion in Article 7 of the Convention are met, see the Grand Chamber judgment 28 June 2018 *G.I.E.M S.r.l. and others*

v. *Italy* paragraph 210 et seq. I also refer to the Supreme Court judgment in Rt-2002-1271, which dealt with double punishment (*non bis in idem*). There, Supreme Court concluded that confiscation under section 35 subsection 2 of the Penal Code 1902 of property that has been used in a criminal act, cannot be regarded as a penalty within the meaning of Article 7 of the Convention.

- (65) However, I do find it necessary to consider this issue of principle. The Court of Appeal concluded based on the evidence presented that the owner of the domain – the contributor – acted with intent.

**“As set forth above, a culpability requirement must be read into the confiscation provision in section 69 subsection 1 of the Penal Code. In the majority’s view, there is no doubt that the owner of the domain acted with intent. It is clearly stated in the information on the website that the scope of copyright infringement when using the Popcorn Time application was known. The majority also finds it proven that the owner of the domain understood that the he, by setting up the website and keeping it up to date, contributed to the illegal communication of copyrighted materials by amplifying the effect thereof.”**

- (66) Based on this, it is sufficient for the outcome of the case that it can be concluded that a possible requirement of subjective guilt on the part of the offender is nonetheless met.

- (67) Another question, to which I will now turn, is *whether guilt is required also on the part of the holder of the right of use – Imcasreg8*.

- (68) Section 71 of the Penal Code regulates against whom confiscation may be effected. The liable party in connection with confiscation of property is the offender, alternatively the owner, see subsection 3:

**“Confiscation pursuant to section 69 shall be effected against the offender or the person the offender acted on behalf of. Confiscation as specified in section 69, first paragraph, c), or of an amount that wholly or partially corresponds to its value, may alternatively be effected against an owner who realised or ought to have realised that the property was to be used in a criminal act.”**

- (69) Section 74 regulates situations where the owner, and possibly also the offender, is unknown. Then, confiscation may be effected against the person in possession at the time of seizure, see subsection 2 first sentence, which states that “[w]hen the owner or rights holder is unknown or his whereabouts in Norway are unknown, confiscation may be effected in proceedings against the offender or the person who was in possession at the time of seizure, provided this is deemed reasonable in view of the owner’s circumstances.”

- (70) Confiscation fine in the case at hand is effected against Imcasreg8 in the capacity of *the person in possession* of the registered right to use popcorn-time.no in Norid at the time of the seizure. As I have demonstrated, Imcasreg8 has registered the domain name on behalf of an American customer – Marcaria – which, in turn, has acted for an unknown principal. The real owner of the domain – the “owner” in the Penal Code – is unknown. As set forth in my quotes from the Court of Appeal’s judgment, it must be concluded that the owner of the domain and the offender are the same person.

- (71) I have previously concluded that the criteria for effecting confiscation against the offender are met.

- (72) In my view, the contention that the holder of the right of use – Imcasreg8 – must have exercised guilt cannot be heard.
- (73) Such a criterion is not supported in the wording of the law, and it seems strained and unnatural to lay down a requirement of guilt on the part of the holder of the right of use, who must be presumed not to have any own interest in the property. According to section 74, his position in the case is merely procedural. The provision does not make any exception from the substantive criteria for confiscation in section 69, see the Supreme Court judgment in Rt-2015-1311 paragraph 14, which concerned the corresponding provision in section 37 (c) of the Penal Code 1902.
- (74) Nor can I see that a culpability requirement on the part of the holder of the right of use is reflected in Article 7 of the Convention – even when considering confiscation of the domain name as a “penalty” under the same Article. I mention here that the European Court of Human Rights, in *G.I.E.M.*, ascribes the culpability requirement to the offender – “the person who physically committed the offence”, see paragraph 242. As far as I can see, the European Court of Human Rights has not decided any case dealing with the issue arising in our case. It is also difficult to see that the principle of the presumption of evidence, referred to in *G.I.E.M.* paragraph 251, implies a culpability requirement on the part of the holder of the right of use. In this respect, too, it is essential that the status of the latter is of a formal and procedural nature, and that he is not a liable party in the confiscation process. In other words, a confiscation process against the offender or the owner does not require culpability on the part of the holder of the right of use.
- (75) Against this background, I conclude that, with regard to confiscation under section 69 in a case brought against a person who was “in possession at the time of the seizure” under section 74, it cannot be a requirement that this person has exercised guilt. The Court of Appeal arrived at the same conclusion.
- (76) I will now turn to question whether confiscation should be effected.
- (77) Section 69 subsection 3 provides the following:
- “In determining whether confiscation shall be effected, and the scope of the confiscation, particular weight shall be given to whether confiscation is necessary for the purposes of effective enforcement of the penal provision, and whether it is proportionate. In assessing proportionality, weight shall among other things be given to other sanctions that are imposed, and the consequences for the person against whom the confiscation is effected.”**
- (78) First, I refer to my discussion of the application of Article 10 of the Convention. And, with regard to the assessment of proportionality under section 69 subsection 3, I cannot see that Article 10 of the Convention precludes confiscation.
- (79) Apart from that, I agree with the Court of Appeal’s assessment:
- “Furthermore, the majority finds that confiscation is necessary for effective enforcement of the penal provision in section 54, cf. section 2, of the Copyright Act, cf. section 15 of the Penal Code. The relevant violation of the Copyright Act is contribution to extensive and systematic copyright infringement, to which, according to the majority, it should be reacted, also by use of confiscation. The majority does not consider it crucial that the rights holders could have tried to stop the use of ‘popcorn-time.no’ by other civil law measures, such as blocking etc.**

**Confiscation will in this case effectively stop the contribution in question. The majority agrees with the District Court that confiscation here is a suitable and necessary tool for enforcement of the penal provision in the Copyright Act, also in light of the unknown identity of the domain owner and of the fact that the criminal act is contribution.**

**Confiscation is also not disproportionate in this case. [...] The requirement of proportionality is part of the substantial criteria for confiscation, and must thus be assessed on the part of the domain owner. As the majority has referred to above, the criminal act is contribution to extensive and serious copyright infringement. The majority can also not see that the consequences for the domain owner are so serious that confiscation would be disproportionate and concludes, after an overall assessment, that confiscation should be effected."**

(80) Against this background, I conclude that the appeal should be dismissed. I vote for this

#### J U D G M E N T :

The appeal is dismissed.

- |      |                                |  |
|------|--------------------------------|--|
| (81) | Justice <b>Arntzen:</b>        | I agree with Justice Ringnes in all material respects and with his conclusion. |
| (82) | Justice <b>Thyness:</b>        | Likewise.  |
| (83) | Justice <b>Høgetveit Berg:</b> | Likewise.  |
| (84) | Justice <b>Indreberg:</b>      | Likewise.  |

Following the voting, the Supreme Court pronounced this

#### J U D G M E N T :

The appeal is dismissed.