

---

December 2012

## Deprivation of domain name - a new possibility to battle copyright infringement?

---

*For the first time a Swedish Court has considered whether a domain name is to be considered as a deprivable property according to the Swedish Copyright Act (the Copyright Act). The question at hand was tried in a case regarding violation of the Copyright Act in which the District Court deprived the defendants right to use the domain [www.p2ptv.se](http://www.p2ptv.se) (Halmstad District Court Case No. B 2672-11). The District Court's judgment has been appealed to the Court of Appeal for Western Sweden, which now inter alia has to take into consideration whether or not to deprive the domain name. While awaiting the Court of Appeals decision Fredrik Gustafsson and Sofia Karlsson in Delphi's TMT/Intellectual Property group report on the District Court's judgment and the new exciting perspectives on the notion of deprivation.*

### Deprivation of instrumentalities of copyright infringement

According to the Copyright Act, property used as an instrumentality of a criminal offence can be deprived in order to prevent a criminal offence (preventive purpose), as well as if special reasons apply (repressive purpose).

When assessing whether the property has been used as an instrumentality of copyright infringement the Court shall consider if the property has a marked characteristic as an instrumentality for the criminal offence at hand. In addition, the circumstances of the present criminal offence and how important the property was for the criminal offence to be committed shall be taken into account. The possibility to deprive property when special reasons apply mainly refers to situations where it would be inappropriate for the defendant to maintain possession of the property, i.e. if a property is not typically characterized as an instrumentality but has in a present case affected the committing of a criminal offence.

The applicable rule in the Copyright Act is based on a framework decision by the Council of the European Union (Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property). The Framework decision requires the member states as a minimum to adopt laws that correspond to the Framework decision. The implication of this is inter alia that each member state shall adopt the necessary means to deprive, either wholly or in part, property belonging to a person convicted of a criminal offence.

The Framework decision contains definitions of some important notions. Of particular interest in this context are the definitions of the notions property and instrumentalities.

---

---

**December 2012**  
**Deprivation of domain name - a new possibility to battle copyright infringement?**

**Property** includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

**Instrumentalities** means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

In general, instrumentalities include properties of any description that have been used in relation to a criminal offence. Instrumentality can be equipment, documents and tools as well as computers, photographic equipment and computer programs.

**Halmstad District Court's judgment in Case No. B 2672-11**

**Background**

The defendant in this case had registered the domain name www.p2ptv.se at .SE (The Internet Infrastructure Foundation). The abbreviation "p2p" stands for "peer to peer", a technique that among other things enables file sharing between users. The technology itself isn't illegal but is often actualized in copyright infringements on the internet. Through the domain, the defendant published links to live broadcasts of hockey and football that belonged to C More Entertainment AB (C More). After C More had notified the police the holder of the domain was prosecuted for violation of the Copyright Act, alternatively complicity thereto. Further, the prosecution claimed that the defendant's right to use or any other right to the domain should be deprived as an instrumentality under the Copyright Act. The defendant denied criminal liability and disputed the claim for deprivation.

**The District Court's judgment on the question of deprivation of the domain name**

The District Court stated that an agreement on the registration of a domain name gives the applicant, in exchange for payment of the registration fee, a right to use the domain name. Furthermore, the registration gives the applicant a right to offer internet users access to the domain name, as well as a right to transfer the right of use to the domain name to a third party on payment. Therefore, a domain name or a registration of a domain name holds an economic value which in some cases can be quite substantial. Under these circumstances, the District Court came to the conclusion that a registration of a domain name shall be considered as a right to use a property which, according to the definition in the Framework decision, can be deprived.

The District Court further stated that the right to use the domain name had in the present case been a decisive instrumentality of violation of the Copyright Act. Taking into account the meaning of the part of the domain name "p2p" and also the website's content, the District Court found it obvious that the domain name must have been created for the purpose to provide an instrumentality for violation of the Copyright Act. For preventive purposes and based on that it would be inappropriate for the defendant to retain the right to use the domain name, the Court decided to deprive the defendant's right to use the domain name.

---

**December 2012**  
**Deprivation of domain name - a new possibility to battle copyright infringement?**

**Comment**

The most interesting part of the District Court's decision is that a right to use a domain name is considered to be a deprivable property. As the District Court also states in its judgment the opinions on whether a domain name can be deprived are divided in doctrine. Some is of the opinion a domain name is an address and can therefore not constitute a property. Against this argument is the broad definition of property in the framework decision, which the District Court also refers to in its judgment. The District Court's grounds for its judgment are of special interest as it is the first time a Swedish Court considers if a domain name constitutes a property. Taken into consideration the importance and future implications of the case at hand, one could have wished for a more detailed line of reasoning in this part. As an example, is the type of the possessor's title to the domain name of relevance for the assessment (i.e. right of use in comparison to ownership) and of what importance is the domain names economic value? Furthermore, the judgment actualizes several other interesting reflections. Does the domain name in itself (i.e. if the domain name indicates criminal activity) effect the assessment in cases like this? What possible effects does it have to the Court's assessment if the domain name is considered to have been registered for criminal purposes?

The District Court's judgment has been appealed to the Court of Appeal for Western Sweden. While awaiting the decision from the Court of Appeal it is still uncertain if the right to use a domain name can be deprived. However, what can be said is that if the Court of Appeal affirms the District Court's judgment it would enable a new possibility to battle copyright infringement on the internet. We will observe the legal development carefully and look forward to get back on this interesting subject again after the Court of Appeal's decision.



Sofia Karlsson,  
Associate



Fredrik Gustafsson,  
Associate