## Metaphors and Norms

**Understanding copyright law in a digital society**

Stefan Larsson is a researcher in sociology of law, and a member of the research group Cybernorms, which studies norms in the digital society. This is a compilation thesis for a Ph D in the Department of Sociology of Law at Lund University.

Copyright regulation is facing serious challenges in the digital society. Why is that? Why is it that millions of people regard it as legitimate to commit "copyright infringement" online? Or, approached from the other perspective, why is it that legal regulation has shown such strong resistance towards adapting to changes in society that are connected to digitalisation? Why is there such a clear gap?

On the one hand, the thesis shows how the development of copyright, when faced with the digital challenge, has been resiliently path dependent. On the other, it also shows that the social norms corresponding to copyright are exceptionally weak among young people. Consequences of this gap are shown, for instance relating to an increased use of encryption technology, and in what way this gap relates to how digitalisation affects our language, mind and norms.

The thesis proposes a metaphor and conceptions theory to complement the study of norms, a common focus in sociology of law, by elaborating on findings in cognitive linguistics. It is argued that metaphors in law, and what underlying conceptions they relate to, are of vital importance for understanding the contemporary issues of copyright, especially in the transition from regulating an analogue situation to regulating a digital.

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*To Elis*

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# Foreword

Try to describe an abstract concept without using a metaphor. Try to describe the taste of a wine, the sound of a song or the feeling of a dream without using metaphors. Try to speak of a relationship without somehow referring to it as a journey. Try to speak of digital phenomena without using concepts already present in the "analogue" world. Try to speak of these "things" without seeing them as things.

When one starts to think about it, metaphors soon seem to be present everywhere, and to us this reification (objectification) of abstracts seems inevitable. The truth is that metaphors matter. In fact, cognitive linguists claim that metaphors are fundamental to our mind and our thinking and that, "abstract concepts are largely metaphorical".

Then think about the law. Some people claim that metaphors are not relevant to it, that they are merely figurative expressions used by poets, and that in the field of law they are to be closely watched, for though "starting as devices to liberate thought, they end often by enslaving it", and when they say this, such individuals are rarely aware that they are using "liberation" as well as "slavery" as metaphors to put forward their views. Not only are metaphors used for abstract concepts, but some also function in clusters, such as the fact that love often is conceptualised as a journey. Different ways of talking about a relationship, i.e., "we've reached a crossroads", "we've hit a dead end" etc. are meaningful when expressed in terms of a journey, and this is not only a figure of speech but also a figure of thought. Metaphors reveal how we conceptualise things, how we think of them and how they are meaningful to us.

Hence, metaphors matter greatly to the law too. Not least on account of the conceptions that they reveal, which accompany the particular choice of the metaphor that is employed. For example, in copyright law, which regulates the control and reproduction of *copies*, which can be seen as a specific key legal metaphor that comes from a period when this protection meant that of actual property, i.e., of physical artefacts. When it comes to the government of digital "things", the choice of legal metaphors to be used is decisive as to how this

digital "thing" is regulated. Sometimes conceptions from an analogue era conflict with those relating to digital conditions, which is so in the case of copyright in a digital society.

This book represents research into, and analysis of, copyright law and social norms in a digital society. It is a compilation thesis in the sociology of law, consisting of four peer-reviewed articles that are introduced and analysed in the thesis, where also theory and methodology is further developed. While conducting research for this thesis I become increasingly aware of how metaphors and conceptions that construct copyright, could explain aspects of its failure in terms of legitimacy issues in relation to social norms in an online context.

Digitalisation in relation to the law and social norms has raised a number of issues that are to be resolved in the relationship between analogue things and digital networks. How laws drafted under analogue conditions should be interpreted in changed circumstances, what values we choose over others, levels of privacy, versions of business models, different kinds of freedom—and all sorts of matters that have to be addressed. Some of the issues raised in these times have been more or less resolved, some are beginning to cool down, and others still remain highly controversial. Much has happened the last ten years or so, but many battles will still be fought. File-sharing habits change, the prevalence of file sharing increases and decreases, business models change, streaming alternatives are launched, encryption technologies brandish their two-edged sword, and the politicians, lobbyists, social scientists, lawyers, CEOs and net activists will all have their say in the process.

However, the change we observe in recent years is not merely related to tangible things such as infrastructure, smartphones and hard drives, nor to organisational processes such as virtual storage in cloud services, encrypted BitTorrent for streaming services or social networking. It is in our minds too.

It is in our language and understanding. These changes have given birth to an immense number of metaphors essential to our need to be able to speak of these new things, and to even be able to think about them. Just pay attention to a few of the words that I have used so far: "hard drives", "cloud", "streaming" and "networking". Their roots or some version of them all existed long before the Internet, but they are now used to target a domain of meaning other than the source from which they can be derived, and here we are rebuilding language because we have a pressing need to do so.

Each of these metaphors relates to something, to some ideal structure where it both thrives on and facilitates our ability to think, while at the same

time it restricts our ability to think about this in a different way. With metaphors we choose some aspects over others in order to represent a phenomenon. Nevertheless, in simple terms, how we conceptualise reality in a way also *shapes* reality. This is a fact that is very much relevant, not only to how the law is perceived, but also to how the law on copyright regulation is observed and enforced, and to how social norms emerge and persist. Although we cannot escape the use of metaphor (for our abstract concepts) we can sometimes make a conscious choice, in order to achieve a certain effect or to steer a debate in a certain direction. For example, you can choose to speak of "file sharing" or of "piracy", describe it as "copying" or "theft" or, to take an example from a different topic, try to gain argumentative advantage by either labelling the prohibition of abortion as "pro-life" or its legalisation as "pro-choice". The particular metaphor used will shape how the debate is perceived and conceptually framed, regardless of the fact that they are different ways of conceptualising the same issue. Furthermore, as the cognitive linguists state, literal meaning has no priority when we associate, as the associative paths that create meaning are present in any case. This means that we probably do not see the frames within which we are constrained, as a result of the metaphor presented to us. It is all part of the communicative and associative flow.

This is why it is also relevant to the law and how we experience it, and to social norms as well. As I will demonstrate, the law can be locked to some metaphors, which can be challenged as reality changes, for instance, when many everyday activities shift from an analogue mode of existence to a digital one. The reason why I think that it is important to examine this, in order to reflect on these processes, is primarily the mentioned aspect of that most of them happen without us even being aware of this. One day we just use this language, employ these terms and are not even aware that we are conceptualising reality in a different way than before. If we do not see these transitions, it will probably also be very hard to solve problems that have emerged as a result of them, for example, problems relating to copyright law and social norms in a digital society.

# Acknowledgements

At least two favourable things need to be said about my two supervisors when I was researching and writing this thesis. Without the openness to new issues and encouragement of almost any good or bad idea I have had through the years, on the part of Håkan Hydén, I am not sure I would have become a researcher in the first place. Håkan has continuously assisted me in lifting the gaze above the details in order to see the grander structures of things. Then Måns Svensson came along and brought with him stimulating injections of curiosity and creativity as well as much needed discipline. Further, many of the good aspects of the methodology and social scientific theory of this thesis owes a lot to Måns and Håkan and their exceptional ability to grasp and analyse in an instant whatever topic is thrown at them. Hence, significant importance is also to be attached to the quite unexpected but very much desired funding from the Knowledge Foundation for the project that we started in 2009. This has grown into the Cybernorms research group, whose members provide me with some of the necessary reason, challenge and encouragement for my being a social scientist. Part of that group is Johanna Alkan Olsson, whom read a draft of the thesis and provided with valuable comments. Additionally, I'd like to thank Peter Mezei for reading and giving valuable comments on some of the legal parts of the thesis.

I feel gratitude towards the PhD candidates and friends on the Department for Sociology of Law, such as Susanna Johansson, Helene Hansen, Karl Dahlstrand, Lina Wedin, Anna-Karin Bergman, Lars Persson, Ulf Leo, Rustam Urinboyev, Anna Piasecka, Marcin de Kaminski and the newer acquaintances who made this time worthwhile, stimulating and simply more fun. Per Wickenberg and Karsten Åström were especially supportive in my early days as a PhD candidate. Lars Emmelin should be mentioned here too, for his unspoken trust in my work, which has lead us to cooperate further on new projects. To Lilian Dahl go my thanks for always keeping a careful eye on us all and always lending me a hand whenever I get lost in administrative aspects of my work. I should also mention some of the good people I met as a student in

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Lastly, probably the most important person to thank is my Anna, the mother of our sunshine of a son Elis, because, in some ways, my work on this thesis has been hers too. My worries, and my deadlines, have also in a sense been hers too. Thank you for bearing with me.

# Abstract

This is a compilation thesis in the sociology of law which analyses copyright law in three steps; legal norms, social norms and the underlying conceptions in their metaphorical representation. These three assist in answering the overarching question of *how do legal and social norms relate to each other in terms of the conceptions from which they emanate or by which they are constructed, and what is the role played by the explicit metaphors that express these norms?* This question looks for the underlying conceptions that construct norms, and does so by their link to surface-based metaphors.

However the legal norms are studied explicitly in terms of examining the European trend concerning copyright in a digital society. This includes the most important legislation of the last 10 years, such as the Infosoc Directive, the Copyright Enforcement Directive also known as IPRED, relevant part of the Data Retention Directive, ACTA and the Telecoms Reform Package. This European trend in copyright law is found to be resiliently *path dependent* also when facing the challenges in a digital society. This trend is in the thesis contrasted to the measured social norm strength, SNS, of unauthorised file sharing before and after the implementation of IPRED in Sweden in 2009. The repeated survey was conducted with approximately one thousand respondents between fifteen and twenty-five years-of-age. The results show that although unauthorised file-sharing to some extent decreased, in line with the manifest purpose of the directive, the social norm that correspond to copyright remained extremely weak. These results supports an undeniable gap between the legal and the social norms of copyright, which in the thesis as mentioned is analysed and outlined in terms of metaphors embedded in regulation, and the conceptions these metaphors are based upon. The argument here is that how copyright is conceptualised controls how it is regulated and, in this case, leads to lock-in and dependence around certain metaphors that do not function well with the conditions found in a digital society. The metaphor of "copies", attached to a right to the control over reproduction, is here seen as a central metaphor that is analysed and related to, for example, metaphors of piracy, theft and trespassing.

These reveal a conceptualisation inherent in copyright of the immaterial stuff that is protected as, in fact, tangible objects.

The thesis consists of four articles, published in or submitted to international and peer-reviewed journals or anthologies, and an introduction including theoretical and methodological considerations as well as an analysis section. The thesis uses conceptual metaphor theory—the notion that some metaphors come in clusters—as well as developing a conception theory in order to analyse the lingual and conceptual patterns in law and mind and connect them to norm theory in the sociology of law.

*Keywords*: Norms, metaphor, conceptions, skeumorphs, path dependence, conceptual metaphor theory, paradigm, file sharing, copyright, IPRED, InfoSoc, Data Retention Directive, code as law, generativity, online anonymity.

# Part I – The book and the problem

# 1. Introduction. Conceptual battles in a digital age

The law is a practical thing. It is used to set up structures for action, to allocate power and to govern society. The everyday use of law does not call for philosophical or sociological questioning of its origin and purpose. Satisfied with its functions, thoughts about law hastily move on to straightforward queries on the direct application of law. That is, until the law's solution to societal issues fails to satisfy, i.e. when the legal norms do not match the social. This is such a time when it comes to copyright law in a digitalised society.

It is in this societal perspective relating to new technologies and forms for communication that copyright is of such vital interest. Copyright reveals how the regulation of the digitalised and networked society is both conceptualised and challenged. If this conceptualisation is erroneous or not properly adjusted, consequences may be grave for all—counter-productive for law and legitimacy, for culture and innovation, and for reliability in the online environment, not the least in terms of privacy. This means that this mismatch of law and social norms calls for an exposure of the conceptions that regulation is based upon, what drives its development and what it is that has made it malfunction or become incompatible with the social patterns of online behaviour. This calls not only for a legal external analysis of the internal intricacies of law, but also for an investigation of the social norms that challenge the law in the first place.

In this thesis it is argued that some of this conceptual clash can in its detail be revealed through the analysis of key metaphors in copyright. It is claimed that metaphor and conception analysis can explain the difference between the formalised conceptions of the law, often manifested through metaphor, and the socially embedded conceptions, often expressed in metaphor. Over time, and regarded as a process, the focus will then be on the differences between the "frozen" conceptions in law and the fluctuating conceptions in society, often wrestling with the same metaphors. But why is copyright law and its challenge in a digital society of such interest?

## Why copyright is of such vital interest

Copyright is, for several reasons, one of the most problematic areas at the intersection of new technologies and law (Lundblad 2007). The intensity of the debate from late 1990s up to the present day is an unquestionable sign of it. Copyright is also regarded as an important case on a societal level. For instance, the influential law professor James Boyle early on identified copyright as one of the crucial issues in the construction of the information society, in *Shamans, software and spleens: law and the construction of the Information Society* (Boyle 1996). Boyle has further emphasised the need of a collective flag under which so many seemingly disparate issues related to the new technologies and regulation could be collected, and has identified this as an "environmentalism for the Net" (Boyle 1997) or a "cultural environmentalism, an environmentalism for the mind" (Boyle 2008, p. 241). Further, Boyle argues that, in the last fifty years, copyright has expanded its protection and that this has been done "almost entirely in the absence of empirical evidence, and without empirical reconsideration to see if our policies were working." (Boyle 2008, p. 236). And this "evidence-free" development runs on "faith alone" and it is a faith that is based on a "cluster of ideas" that Boyle identifies in the public domain from 2008 (2008, p. 236). This "cluster of ideas", as will be demonstrated, is of relevance to the underlying conceptions of the copyright debate analysed in this thesis. Although the "cluster of ideas" leads to what professor Jessica Litman describes in terms of "choosing metaphors" in copyright development in her book Digital Copyright from 2001. Using this, probably her strongest contribution to the copyright debate, she outlines "an evolution in metaphors" that "conceal an immense sleight of hand":

> "We as a society never actually sat down and discussed in policy terms whether, now that we had grown from a copyright-importing nation to a copyright-exporting nation, we wanted to recreate copyright as a more expansive sort of control. Instead, by changing metaphors, we somehow got snookered into believing that copyright had always been intended to offer content owners extensive control, only, before now, we didn't have the means to enforce it." (Litman 2001, p. 86)

This transition, starting with the conception of mutual benefit for the creator and the public and ending up with the conception of copyright as a system of incentives, completely changes the arguments and rhetoric around it. This is also supported by the law professor William Patry, whom has focused on the

importance of metaphors in what he describes in terms of the "copyright wars" in *Moral panics and the copyright wars* (2009).

One of the American legal scholars who early on identified copyright as central to the understanding and regulation of the Internet and new digital technologies was Lawrence Lessig, a professor of law at Stanford University. He has written a number of knowledgeable publications on the interplay between regulation and what the Internet brings in terms of creativity, culture and innovative forces and thinking. Lessig stands out as one of the most novel and well-founded analysts of the nature of the Internet, especially in its relationship to law and regulation. He makes one of the most relevant analyses from a sociology of law point of view in *Code and other laws of cyberspace* (1999), which he updated in *Code version 2.0*, (2006). Here Lessig describes the programming code as law, as directing action and thus making the software architect a sort of lawmaker. Lessig's *REMIX - making art and commerce thrive in the hybrid economy* (2008) is also of relevance to the analysis of copyright and the social practices affected by it. Lessig's thoughts and analyses of conditions for creativity are relevant to any analysis of the purpose and outcome of copyright regulation, including the one in this thesis. Lessig has maintained a constant focus on culture and creativity, and the legal foundation that would best serve its preservation in a digitalised world. He drew attention to the potential harm of overregulation in *Free culture: how big media uses technology and the law to lock down culture and control creativity* (2004). In *The future of ideas: the fate of the commons in a connected world* (2002) Lessig expands his concern that too protective intellectual property regulation will not only stifle creativity in the sense of making new artwork in a remix culture, but also stifle the innovation that is otherwise propelled through the digital environment.

In addition to Lessig, Neil W Netanel, Said Vaidhyanathan and Tarleton Gillespie may be mentioned in this context. Netanel analyses the purpose of copyright in terms of its sometimes-contradictory practice in *Copyright's paradox* (2008). Siva Vaidhyanathan paints a bleak picture on the future and contemporary imbalance on how copyright functions as a regulative force in relation to creativity in *Copyrights and copywrongs: the rise of intellectual property and how it threatens creativity* (2001). Vaidhyanathan breaks down the conception of the creator as a solitary genius (so entrenched in copyright) and instead show how traditions and culture play an essential role. In doing so he depicts the traditions of American blues, jazz, hip-hop and rap, an example that is again examined in the analysis section of the thesis (2001, pp. 120f.). Tarleton Gillespie analyses the technological focus of the copyright battle in

*Wired Shut? Copyright and the Shape of Digital Culture* (2007). He shows, among other things, the implications of Digital Rights Management (2007, pp.181–185). Since the digital technology—code included—offers such opportunities for reshaping structures, architectures and conditions for action, its *generativity* is a relevant term, first coined by Jonathan Zittrain, a US professor of Internet law as well as of computer science, and developed for example in *The Future of the Internet and how to stop it* (2008).

These are merely a few examples of the growing body of literature on issues related to copyright in an online context, and it is a clear sign of legislation under great strain that has been challenged for a good few years and exists as one side of a gap that shows no comforting signs of being functionally negotiated over the course of the next few years. This means, all in all, that not only is copyright of vital importance when trying to understand the regulatory challenges of an intensely digitalised and networked society, it also includes aspects of global business, debates on incentives for creativity and culture, investment protection, privacy issues, issues of democracy and who is to determine the law. All of which, it is argued, amplify the importance of the metaphors and conceptions that are embedded in copyright development.

Lessig reaffirms the importance of studying law and "regulability" in relation to new technologies that are of importance for social norms connected to an online environment, however it is for example James Boyle, Jessica Litman and William Patry who support the continued and detailed analysis of metaphors and underlying conceptions in copyright. Further motivation for studying copyright from a metaphorical perspective comes from the functionality of the regulation compared to its purpose, which is often described in terms of stimulating creativity or "content production". Nicklas Lundblad, a Swedish IT debater, PhD in Informatics and Google employee, analyses the "noise society" in his thesis, of which copyright is major part:

> "The old idea, that policymakers needed to 'foster' or 'enable' or 'encourage' creativity, and that they would be addressing a caste of creators seems dead wrong. Creativity is everywhere. It is the default setting. The policy challenges and metaphors need to change. People create songs, web pages, blogs, videos and other material. They contribute to Wikipedia and chat rooms all over the web. Citizens live in a sea of creative havoc and in the age of 'user-generated content'." (Lundblad 2007, p. 128).

The picture of the analysts above is painted something like this: copyright is socially illegitimate in the digitalised society, the results of its increasingly

protectionist and lock-in methodology in terms of length and DRM have not been tested empirically, although they lead to increasing means of enforcement to the benefit of 'Big Media' and to the disadvantage of everyone else, along with that it places far too much focus on the conception of the 'solitary genius', and ultimately fails to fulfil its overall purpose of 'stimulating creativity'. All of these aspects are of relevance when analysing copyright, and they signal why the copyright issue has potential to be an interesting case both for understanding legal challenges in a digital society as well as the general issue of when there is a gap between law and social norms, when they deviate.

## The gap (and the gap problem)

The engine of this thesis lies in the gap between the social norms and the legal and to what extent the conceptions that construct these dissimilar norms differ. A fact well documented and widely discussed from several perspectives is the incompatible relationship between online behaviour and copyright regulation (Lessig, 2004; 2008; Litman 2001, 2010; Morris, 2008; Vaidhyanathan, 2001) including law and social norms (Altschuller & Benbunan-Fich, 2009; Feldman & Nadler, 2006, pp. 589-591; Jensen, 2003; Moohr, 2003; Schultz, 2006a, 2006b; Strahilevitz, 2003a, 2003b; Svensson & Larsson, 2009; Tehranian, 2007; Wingrove, Korpas, & Weisz, 2010). There is something about the metaphors of copyright that do not correspond to the conceptions of the corresponding social norms. The fact that this regulation is amazingly homogenous throughout the globe, as well as in Europe, due to international treaties and agreements between states and supranational "harmonisation" within the EU makes an analysis of the central metaphors in copyright valid for far more than any single country. How it is conceptualised and how it is formulated will likely affect patterns of creativity, even how we communicate in digital networks, and it definitely asks questions of privacy in terms of how much of our activities online may be justifiably monitored. This gap, and what is at stake following from it, is what makes metaphor and conception analysis in connection with legal and social norms both important and attractive.

The 'gap' may, however, be conceptualised in different ways. For instance, law professor Geraldine Moohr speaks of a "competing social norm" (2003) and Schultz (2006a) advocates the use of the concept of "copynorms" to analyse social norms in relation to copyright, as they "moderate, extend, and undermine the effect of copyright law". Strahilevitz (2003a) analyses the

influence of social norms in loose-knit groups or in situations where interaction is anonymous. He does this in comparison with the more close-knit groups of ranchers who raise cattle in an isolated California county that Robert Ellickson studied and wrote about in the famous *Order without law: how neighbors settle disputes* (1991). Strahilovitz (2003b) also analyses file-sharing software's ability to reinforce descriptive norms in themselves, as it creates the perception that unauthorised file sharing and distribution is a common behaviour, even more prevalent than it actually is. Strahilovitz made his claim in 2003, and file sharing has increased and developed in terms of technology and techniques since then. Feldman and Nadler (2006) made an experimental study on the influence of law on social norms regarding file sharing of copyrighted content, which bears a resemblance to the study of norms in Article IV in this thesis.

This 'gap problem' of legal norms in relation to social norms can be described as a classic in the field of the sociology of law, although criticised from time to time (Nelken 1981). The 'gap problem' has been around for quite some time, and has remained remarkably similar to the versions presented by Pound and Ehrlich a hundred years ago (Banakar 2011). There is an inherent risk in describing the discrepancy in terms of a gap—this figurative metaphor—that lies in the fact that it might lead associations towards interpreting the 'problem' of the gap from the perspective of law. The 'gap' does not have to be a problem at all, even though it is for law. The problem may depend on the type of gap at hand. The gap interpretations tends to be law-centred, as with Roscoe Pound's *Law in books and law in action*, and not as widely approached as in Eugene Ehrlich's *Living Law* (Ehrlich 1936; Pound 1910; see also Nelken 1984). Rather than speaking of law in action or even living law I would prefer to speak of norms. The reason for this is to avoid the Pound dependence in the risk of reducing digital practices to merely malfunctioning law, which would neglect the probable causes of the emerging norms, and to avoid the Ehrlich wide definition of law. It is preferable to resort to a wide definition of norms: law in books and norms (in action).

No matter what the details of the gap may be, there are still strong reasons for speaking of it, for conceptualising what is at hand concerning copyright and social practice in an online context as a gap between norms. In addition, the behaviour pattern of peer-to-peer file sharing is not likely to decline. For example, forecasts from Cisco's Visual Networking Index reveal that global peer-to-peer file-sharing traffic is predicted to double by 2015 as compared to 2010 (Cisco VNI 2011, p. 11). These social norms, for a number of reasons, cannot be limited to a geographical or administrative entity in that sense. Even

the law, which is often a stronghold of national limitations, cannot be demarcated successively to Sweden alone in this case. The reason that this overarching, socio-legal research interest is highlighted in this area naturally relates to the development of Internet, and similar digital technologies, which share a common denominator of connecting and organising society in a network structure. This is the reason that the copyright dilemma, with its unauthorised file sharing, is of interest; it can tell us more about the gap between legal and social norms than a conceptualisation of this as an all too simplified implementation dilemma can.

From a cognitive linguist perspective, one can conclude at least two things: we need a metaphor (the gap) to be able to speak and think about the abstract phenomenon (some kind of discrepancy between legal and social norms); and whatever metaphor we choose will likely control or at least affect our conceptualisation of the given phenomenon. Therefore, we must choose carefully, and reflect about the choice.

This thesis certainly addresses the file-sharers in that the social norms that possibly could explain file sharing form an important part of the underlying data of the analysis. However, there are strong reasons to focus attention not only on the file-sharers but also on the regulator, the law. In a sense, copyright is the conservative legal construction that bears elements that do not fit with emerging social norms of sharing content and cultural expression in a digitised era of networks, which several scholars have verified (for example, Boyle 2008, Jensen 2004, Larsson 2010, Lessig 2008, Litman 2001, Svensson & Larsson 2009, Vaidhyanathan 2001, Netanel 2008). Social changes are connected to technological development, enabling an digital environment, a "network society"[1], the interconnection of people, processes, applications, work tasks and leisure pursuits, which has lead to a globalised society, a 'one-world' context where "causes and effects can reverberate throughout the entire system", in the words of Robert Hassan (2008). The trends connected to human norms of conduct all have the potential to disseminate throughout the network. The case of Sweden can indicate what may happen in other parts of the world as well, if it is not already happening.

[1] The most influential text on the"network society" is likely Manuel Castells's trilogy on the information age, where the second volume is named *The rise of the network society* (1997).

## Metaphors we legislate by

Most people agree that figurative metaphors are linguistic decoration in language or are tools for communicating some kind of spectacular effect. There is likely a widespread notion of the metaphor as simply an ornament of words, bearing no deeper meaning for our thinking and our minds. Conceptual metaphor theory contradicts this. It accepts the figurative metaphors' place as surface-level expressions in language, but more importantly show how metaphor has a fundamental role in how our thinking and meaning-making is done, stating that abstract concepts largely are metaphorical (Lakoff & Johnson, 1999). Lakoff and Johnson, two central cognitive metaphor scientists, claim that "our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature" (Lakoff & Johnson, 1980/2003, p. 3). This means that unlocking the metaphors constantly present in our language, minds and—as is argued in the thesis—law, can reveal to us how they are connected, what values and associations they bring, on what conceptions they are founded. Metaphor is not just a figure of *speech*; it is a figure of *thought* (Lakoff 1986). The conceptual metaphors show that some metaphorical expressions relate to each other in a *metaphor cluster* where each expression both upholds the meaningfulness of the other expressions, while all are relating to the same basic conception.

When approaching an analysis of the metaphors of copyright, the research on metaphors in cognitive linguistics is a guide. Lakoff and Johnson were the early stimulus of a school of cognitive metaphor studies with their *Metaphors we live by* (1980). Their work has been followed by many, and used in other disciplines, including law (Berger, 2004; 2007; 2009; Blavin & Cohen, 2002; Cass & Lauer, 2004; Herman, 2008; Hunter, 2003; Johnson, 1987, 2007; Joo, 2001; Lakoff, 1987; Lakoff & Johnson, 1999; Lakoff & Turner, 1989; Reddy, 1979; Ritchie, 2007; Patry, 2009; Tsai 2004; Winter, 2001; 2007). This thesis does not use metaphor theory for the sole purpose of properly describing a process of social transformation. The thesis shows that there is not only a need for the label of it all, the top domain—"the information society", "the knowledge society", etc.—but also a need for naming or reconceptualising the actions that takes place under this top domain, the artefacts and processes that fill the "age". These change too, which naturally has much to do with the transformation from a non-digital to a digital existence. When familiar words in a material context are also to include actions in a digital environment, this challenges not only our understanding of computer-mediated behaviour, but

also the laws that seek to regulate us. Laws that have often been conceived in pre-digital circumstances.

### *Analysing the imperative in legal norms*

An essential aspect of any norm, legal or social, is its imperativeness (Svensson, 2008). Which is a fact that highlights the importance of how to study this imperativeness. If one is to outline how the explicit directions for actions functions, one has to be, which is argued for in this thesis, sensitive to how metaphors carry or communicate these imperatives and on what conceptualisations they are based. Similarly, an important aspect of metaphor research here lies in the dangers of metaphor not being perceived as metaphorical. When the metaphors are not perceived as metaphors, the conceptions behind will be perceived as the only possible alternative for the purpose of a given regulation. Any attempted revisionary arguments will then be framed within the prevailing conception, no matter what arguments are produced. This is so unless the conception is analytically unlocked and displayed via the metaphors that reproduce it. Metaphors in law can show on what conception a particular legal construction is founded. Copyright has its important and central metaphors that it is created around, which in turn reveal how it has been conceptualised during the processes of its creation and development.

There are two main perspectives that the analysis in the thesis will focus. The first relates to time, and how expressions in law can become more metaphoric—become *skeumorphs*—as the reality they regulate develops, expands or changes. This is especially relevant in relation to digitalisation in society. The second perspective regards how conceptual mappings, here described as forming *metaphor clusters*, between different metaphors in the same cluster relate to law, and what happens when one or more of these expressions is in law and others are outside.

### *Metaphors and law*

This thesis studies the norms in copyright by pointing out the most important metaphors therein, deconstructing them and analysing them in terms of the underlying conceptions they rest on. There is a growing field of research on the interpretation of legal metaphors. Studying the metaphors relevant to the understanding of law (or anything else) is, in short, understanding one thing in

the name of another. Metaphors are analogies which allow us to map one experience (the target domain) in the terminology of another experience (the source domain) and thus to acquire an understanding of complex topics or new situations. Since focus is on aspects in which the two domains differ—consider for instance the examples of transition from regular mail to e-mail and from photography to digital imagery—the concept of *skeumorphs* as used in technological studies (Cass & Lauer, 2004) is applied. Further, metaphors (and conceptions) are here regarded as *embodied*, meaning that they are based on our interaction with our physical and social environment, although not, and hence not complete, constructs of the social, as some extremes could argue (Berger, 2009, pp. 262-266; Lakoff 1993; Kövecses 2008; Winter 2001).

Many people, interested in legal analysis and influenced by this school of metaphor theory, begin their presentations with the conflicting perspective on metaphors in law. They often do this by citing the early American legal realist Justice Cardozo, who observed "metaphors in law are to be narrowly watched, for though starting as devices to liberate thought, they end often by enslaving it" (see Berger, 2004; Herman, 2008; Patry, 2009; Winter, 2008). Ironically enough, Cardozo's statement, which Loughlan points out, uses at least two important metaphors ('liberation' and 'slavery', see Loughlan 2006, pp. 215-216).

### *Conceptions and law*

The concept of *conceptions* used in this thesis is derived from, on the one hand the cognitive linguistics—conceptual metaphor theory and *idealised cognitive models* (Kövecses, 2010, Chapter 8; Lakoff, 1987)—and on the other hand concepts such as 'figures of thought' from social science with theorists like Asplund (1979), Foucault (2001) and the teaching and learning sciences that speak of conceptions as learners' mental models or display student thinking in term of "conceptual change" (Glynn and Duit 1995; Treagust & Duit 2008).

Conceptions, in the definition of this thesis, work as frames for thought, setting the boundaries of the surface phenomena, the outcome in terms of language, metaphors and other expressions. Conceptions relate to reality, and, consequently, may change as reality changes. The "conception" is singled out as a subsurface structure that can be revealed or searched for in the metaphors that are connected to it. The conception is, in this sense, not what is explicit in, for instance, a legal regulation but what the legal regulation implicitly emanates from.

## Detecting power through legal metaphors

I argue that conceptions and metaphors in law play a decisive role in transitional times in how the legitimacy of law is perceived. As concluded in Article III below, on path dependence, the appeal to tradition benefits those who have traditionally exercised power over distribution and production. This element of power is a major part of the copyright analysis of many scholars and writers such as Lessig, Vaidhyanathan and Patry, but is not as central to this thesis. This is not because the power structures are not considered to be important, but the tools used in this research have not focused on the lobbying of the media industry, the massive litigation strategies of Hollywood-centred multinational companies, the waves of cease and desist letters in countries like US, Denmark or France, or why the legislation of a small country like Sweden allocates so much power to an intellectual, property-owning elite in the US when Sweden's economy, to such a considerable degree, is dependent on the opposite party—the digital infrastructure, data traffic and innovation. All of these perspectives could form a research strategy of the more classic kind focusing on structures of power. My perspective, however, does not focus on power directly but will likely display an important part of the expressions of power. That is, power may have several expressions, the control of conceptions in law and the metaphors that categorise and label legality and illegality is one of these expressions, and the one on which I focus.

I have studied how the rules work, some of the detailed parts of language connected to mind, measured the social norms and focused on the battle of conceptions through metaphors in the debate. And, as a matter of fact, power plays an important role here too, but perhaps in a slightly more discrete manner. Although many of these processes pass us by, undetected by human consciousness, there is a clear element that those who consciously control the metaphors and conceptions that will rule a certain debate, or even legislative formulation, will gain benefit from this. Lakoff and Johnson expressed this as that "those who are in power get to impose their metaphors" (Lakoff and Johnson 1980/2003, p. 159f.). Law is formulated in some relation to the predisposition of technology, especially in the area of sound and images, and the distribution of such. Law adds the clear aspect of formal power to those who benefit from the metaphors and conceptions at hand. This legally-entrenched power struggle has been going on throughout the entire twentieth century, whenever a new recording device has been invented (Lessig 2004, pp. 53-61; Johns 2009, pp. 431-462; McLeod 2007, p. 270 ff.; Patry 2009, pp.

144-170). The really revolutionary boom of relevance to law and metaphors, it is argued here, comes with digitalisation. This means that the law, in many cases, moves from regulating analogue stuff to regulating digital stuff. This is when the clearest skeumorphs emerge.

# 2. Situating the book

The digitalisation and augmented reliance on network organisation in an "information society" in many respects means a revolutionary transformation of the preconditions for communication and the leading of everyday life. This thesis is concerned with what this change of preconditions does to copyright law and the social norms that control the handling of the very items protected by the law. The empirical data in the thesis is of three main types; a) survey-based data regarding social norms and file sharing; b) the depiction and analysis of European legal development of relevance to file sharing and copyright, and; c) metaphors in law and the closely-related debate. Copyright regulation, which is analysed both as a grand legislative process and as a selection of legal rules, is part of the metaphor and conceptions study.

## Why Sweden is of interest

There are a number of reasons that make the Swedish case interesting for policy-makers, the media, industry, Internet activists and academics both inside and outside Sweden. These reasons are both political/global and scientific. "Advanced practice" could be applied to Sweden in terms of there being strong reasons to believe that the country is a clear and early example of the evident clashes between social norms and legal norms in this context (See Wickenberg, 1999, p. 31-32; Gillberg, 1999). In this context, "early" should be understood in terms of the evolution of this issue, based partly on Sweden's well-developed Internet infrastructure as well as the very high percentage of computers with Internet access—which makes Sweden a case that may highlight the policy dilemmas of copyright legislation in relation to online practices, as well as the effects of a stronger and more active enforcement of legislation with at least a

few important issues related to the legitimacy of law (see also Andersson, 2011).[2]

This thesis is to a great extent about Sweden, it is Swedish youngsters between 15 and 25 who have answered the questions in the survey in Articles II and IV, and it is Swedish legislation that has contrasted the social norms measured in the surveys. However, at the same time much of the relevant Swedish regulation—as this study shows—is a result of the implementation of EU directives as well as international treaties, consequently many aspects of copyright are almost globally homogenous. This means that an analysis of bearing concepts and metaphors in copyright will reveal knowledge relevant to contexts other than the Swedish.

Further, the thesis is about file sharing, copyright and social norms. However the story of file sharing, authorised or unauthorised, can in no way be told without relating to the grander story of digitalisation, infrastructure development, software coding, new means of communication, the development of the network as an organisation of society, the place of multiple forms of media in our everyday lives, the deletion, collection, ordering of information and of conduct in this maelstrom of innovation that the "generativity" of Internet technologies offers.

## Sociology of law and norm research

This thesis is presented at the Department of Sociology of Law at Lund University. Many of the scholars emanating from the same department follow in the tradition of analysing both law and "social instructions for actions" in terms of norms. Håkan Hydén has scrutinised the relationship between legal science and the sociology of law (1998) and outlined a "norm science" (2002) closing in on the concept of norms in the sociology of law in cooperation with Måns Svensson (Hydén & Svensson, 2008). It is this definition that is used for the study of social norms in this thesis. Further, there are some contributions to this tradition that have added to this thesis of which the most important are Måns Svensson's dissertation thesis from 2008, and Ulf Leo's dissertation using the same norm definition as mentioned above (2010). Svensson studied the

[2] In 2010, approx. 86 per cent of all Swedes over 16 had Internet access in their homes. Of these, almost all had broadband access (Findahl 2010).

social norms in different areas of traffic behaviour, for which he developed a model and a method also used in the study on social norms regarding illegal file sharing in this thesis. Leo's studies were on the professional norms of headmasters in schools, and their relation to the democratic mission included in their work.[3]

Many of the studies that have been conducted in line with this concept of norms have mainly been qualitative and based on interviews or questionnaires (see for instance Leo, 2010; Bergman, 2009; Friberg, 2006; Hallerström 2006; Persson, 2010; Johansson, 2011). However, with the definition of norms presented by Hydén and Svensson (2008) and developed in Svensson's thesis (2008) combined with the quantitative method for measuring social norms developed in the latter publication, it is now possible to carry out a strict comparison of norm strength in various fields.

## The four parts of the thesis

Instead of explicitly going through the chapters of the book it is enough to mention the structure as being in four parts. There is an introductory *first part* where the primary problem is presented. This includes research issues,

[3] There are a few others to be mentioned that follow in the same scholarly tradition. Åström studies parallel processes of norm formation (1988). Wickenberg studies norm-supporting structures for environmental education in schools and states that the norms that are of interest are those that are expressed in a social context (Wickenberg, 1999, p. 292). Matthias Baier studies the relationship between social norms and law in a tunnel construction in the Hallandsås Ridge (2003), and there is an important track of research on aspects of education, much following from Wickenberg's account. These include Helena Hallerström's study on norms of headmasters, the above-mentioned Ulf Leo's study on similar theme but more theoretically developed. Included in research on education is Lars Persson's dissertation from 2010 focusing on the teachers' democratic task, studying aspects of democracy in Swedish education, including a quite extensive literature review. Staffan Friberg, inspired by Talcot Parson's theory on the social system, studies norm-building processes through consumer collaboration in the local municipality (2006), which he follows up (2011). Marie Appelstrand studies governance and control regarding the environmental goal in forestry (2007). Rustamjon Urinboyev studies social norms in the local mahalla institutions in Uzbekistan (2011). Anna Sonander studies those who are working with children that are victims of crime (2008), including a comparison of the correspondence between legal regulations and actions in this field. Anna-Karin Bergman studies norm-building processes though the case of Global Monitoring for Environment and Security (GMES) in a European context (2009), and Lina Wedin studies public procurement under environmental considerations, "green" public procurement (2009).

copyright regulation, a brief presentation of the four articles, why metaphors and conceptions are relevant to the study of copyright law, etc. (Chapters 1-3). The *second part* of the thesis plunges deeper into the particulars of science, building a bridge between norm theory on one hand and metaphor and conception theory on the other. It presents a model for how to conduct the research as well as the strengths and weaknesses of the methods used (Chapters 4-6). The *third part* is where the primary results of the articles are presented and elaborated upon. This is where research questions are answered and theories are activated in relation to the empirical data, especially when it comes to metaphors and conceptions. In fact, this is where everything is tied together and the book is concluded (Chapters 7-11). In *the fourth* and final part of the thesis there are the four articles as they were published or submitted. They provide the thesis with empirical data, parts of theory and method, and in general important parts of the story of copyright from different angles.

## Research purpose and questions

Legal developments are sometimes analysed in terms of path dependence, especially by American scholars, who often refer to the classic text *The Path of the Law* by Oliver Wendell Holmes. The path metaphor then signifies the relatively gradual or incremental progression inherent in much legal change, where predictability is an influential aspect in the sense of a normative past that control also future events. The inherent dilemma is then the risk of law becoming too path dependent in relation to non-legal and social development—for example related to the introduction of the Internet—that may lead to a challenged law, and a discrepancy between legal and social norms, which is a research topic central to the scholarly tradition of the sociology of law. Consequently, this includes the question of the extent to which legislative strategies can promote social change in terms of social norms, and the extent to which social change stimulates legal change, all in a dynamic blend. The twofold purpose of the thesis is therefore:

- To contribute to theory development in the sociology of law in order to better understand the relationship between the law and social norms, a relationship that in much of this thesis will be illuminated by the proposed theory of conceptions and metaphors.
- To contribute to a better understanding of what the digitalisation of so many societal processes means to us. This is an understanding that can be expressed in terms of collaboration, culture, sociality, anonymity, identity, privacy, conceptualisations of reality as well as a challenge to older, pre-digital conceptualisations etc.

Much of the theoretical framework can quite understandably be found in the four articles in the thesis, but as a wider picture has appeared through working with these articles, certain clarifications and the development of the theory have become necessary. As is common in the sociology of law, the theories of norms play an important role, but, as is not at all common in the sociology of law, a theory relating to metaphor and to underlying conceptions is also used here. The reason for this lies in the insight that it provides into the need to develop this theory in order to understand and explain how language controls and frames our thinking, and hence, our actions (especially as manifested through the law). Consequently, the specific and overarching research question is *how do legal and social norms relate to each other in terms of the conceptions from which they emanate or by which they are constructed, and what is the role played by the explicit metaphors that express these norms?*

A case that contains all necessary elements for conducting research into the relationship between both legal and social norms, metaphors and conceptions, as well as the challenges of a digitalising society, is that of copyright law. The following three research questions that are answered in the thesis have been formulated in order to contribute to an understanding of the more dynamic relationship outlined in the overarching research question.

1. Legal norms: What is the nature of the European regulatory trend in copyright in the face of the digital challenge?
2. Social norms: What is the strength of the social norms corresponding to copyright in an online context?
3. Conceptions and metaphor: What are the underlying conceptions upon which copyright law and its key metaphors are based?

As will be seen, the approaches used in the articles differ; some articles relate more closely to one of the specific research questions, while others relate to more than one question. The first question, which refers to legal norms, embodies the regulatory development i.e., the law in a process. The second deals with individuals and the social norms by which they live and reproduce. It is the third question that, to a greater degree than the others, has emerged while working on the articles. At an early stage, the results of the articles indicated that there is something about how the language is represented, in the law and in the mind, that is of significance when it comes to societal change, and perhaps especially in the gap between analogue and digital media forms. This requires the development of the theory on how these metaphors and conceptions relate to norms beyond the extent to which it has been expounded in the articles. I shall return to this in the theoretical section below, as well as in the analysis in the final part of the thesis.

## An epistemological stance

For example, breaking up the metaphor "copy" and replacing it with another for example a flow-like essence, easily leads to the question of which one is the most true (see Larsson, 2010). But instead of searching for a metaphor that is "truer" than another, metaphors that are closer to or fit better with socially embedded conceptions can be identified. This is especially important when analysing and proposing revisions of law and legal metaphors. The link to socially-embedded conceptions will likely reveal the metaphors that will be regarded as the most legitimate regulation, and can explain the measured strength or lack of strength in a social norm. The link is not to what is the most real but to what is mostly regarded as real. It is the conception that is central, how reality is conceptualised, not reality itself. Inspiration can be found in Foucault here, without digging very deep, whose notion of discourse centres on the study of discursive strategies without assuming an essential pre-existing truth. This notion of discourse sees each society as having its own "truth regime", its own pattern of what is considered to be true and false at a certain moment in history (Mottier 2008). The purpose here is then to ask what "truths" specific legal metaphors construct, their relationship to conceptions and what consequences this brings. Conceptions are therefore, in this thesis, regarded as (nonmaterial) "social facts" in a durkheimian sense, that is, empirical entities, which can be studied scientifically (see Durkheim, 1982).

This means that conceptions are here regarded as entities that for instance can be studied within the social sciences (compare with Asplunds "tankefigurer", 1979, p. 153).

When researching metaphors and conceptions and relying on the description of metaphors as a way of identifying a reality—on the intrinsically and fundamental cognitive mapping that the mind produces—the question relevant is no longer so much what a metaphor *means*, but how it does the *work* that it does. It is not a matter of how it describes reality but what reality it describes. As Lakoff and Johnson concluded: "What is at issue is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it." (Lakoff & Johnson, 1980, p. 157). When studying copyright law this means the extent to which it actually describes reality well as it is formulated in terms of copies rather than, for instance a stream, is of secondary importance to what it means to the activities it seeks to regulate.

## Delimitations of this thesis

The extent to which there are hidden aspects of international law-making processes is not really researched in this thesis. These could concern global politics related to trade and "strong" countries versus "weak" countries that shape regulatory formulation. This thesis does not explicitly study the early days of copyright, although this could be relevant for the origin of conceptions constructing the law in the first place. Others have done this, or closely related work (see for example Fredriksson 2009; Johns 2010; Litman 2001; Patry 2009).

Foucaultian strands of discourse theory generally refer to the macro-level of structural orders of discourse (Mottier, 2008, p. 189). It seeks to explore how specific discourses reproduce and transform relations of power as well as relations of meaning. This thesis does not aim directly at these discursive ways of power, although it does close in on what creates meaning in relation to language. This is not to say that power structures are not at play in the field studied, nor that they are not touched upon, it is rather that it is often hard to separate the two, they are intertwined and the focus tends to be on meaning-making in language rather than outlining power structures. Perhaps one way to put it is to state that true power constructs meaning, and that how meaning is constructed also allocates power.

The idea of narratives lies close to discourse analysis and especially metaphor analysis which can be used, for instance, to analyse court cases (as Berger has shown, 2009). Although narratives are at play in the field studied, narrative theory is not applied (see for instance Kang 2006). There are different views on how narratives should be observed. Mottier speaks of narratives as possible forms of discourse, while discourses include, but are not reduced to, narratives (Mottier, 2000). Following this view, narratives are "(possible) building-blocks of discourse, while metaphors are (possible) building blocks of both narratives and discourse" (Mottier, 2008, p. 192). This means that specific tools of storytelling "such as metaphors, are important narrative forms that contribute to broader, discursive constructions of identity".

Just to be clear, this thesis explicitly regards copyright, not intellectual property in general. This being said, some aspects of the thesis may of course be relevant over the entire IP spectrum.

### *Relationship to social constructionism*

Similarities are many and the relationship to a social constructionist analysis of law is close to this metaphor and conception analysis. My particular stance on metaphor theory, wedded with the idea of conceptions, has perhaps taken some inspiration from social constructionism but focuses on a few particular aspects that social constructionism does not seem to approach. For example, the idea of metaphors as embodied runs counter to at least the more extreme forms of social constructionism. The position that there is a source domain, a state where the concepts describe the objects, at least very closely, from which another domain is targeted creating the metaphor, is harder to vouch for from a social constructionist perspective.

However, regarding law, inspiration can be found in how law is dependent on discourse outside law, perhaps based on culture and other social discourses. The gender researchers Niemi-Kiesiläinen et al. (2007, p. 69) describe this as "the limit of the legal system is constructed and other social discourses participate in the construction of the concepts and limits of law". Legal gender research is a field that may inspire in the case of metaphor studies because of its language-based approach on how to unlock and portray the values often hidden in law, often in contexts supposed to be gender neutral. Heavily influenced by post-modern research, legal gender research has focused on the great significance of language for how we understand things. In Nordic legal gender research, this has often focused on limitations and adverse effects of language

use in law (Nousiainen 1995, Svensson 1997, Lundström 1999). The step to Linda Berger's study on Supreme Court cases on child custody disputes is short, as it reveals that narratives and metaphors affect the courts' decision-making when it comes to gender-related issues (Berger 2009).

According to Niemi-Kiesiläinen et al. (2007), feminist legal studies have taken up the challenge of the "linguistic turn" in social sciences, and the relationship between reality and language is a primary concern here. The constructionist approach sees reality and language as intertwined, assuming that reality cannot be approached independently of language (Niemi-Kiesiläinen et al., 2007). However, a short response to the question of not using social constructionism as a theoretical foundation for this thesis lies in the fact that metaphor and conception theory have been found to function so well as an appropriate instrument to measure change over time and distortions and paradoxes related to law and social change.

Social constructionism often takes a grander perspective than the conception and metaphor theory proposed in this thesis, and focuses more on the power structures attached to the discourse analysed, constructing social relationships. However, I totally agree with Niemi-Kiesiläinen, when she states that it is often hard to distance yourself from the lawyers' way of reading the texts. That the "objective" and neutral style of legal texts tend to mask "their discursive and constructive nature" (2007, p. 81). So, even if we might share the same epistemological stance on law, language and reality, the method of unmasking the legal texts used here, as well as conceptualising this unmasking in terms of metaphors and conceptions, is different to that of the social constructionists.

### *Relationship to semiotics*

As interest in metaphor theory developed, particularly the Lakoff and Johnson version, the question was asked why not take a semiotics perspective on law in this research? There are a number of reasons for this, however the main reason relates to the fact that metaphor places more emphasis on language than on semiotics, and initial interest was pretty much bound to the language—of law, and of other areas. Further, semiotics as a field of study can mean so much more than metaphors as a field of study. Semiotics could include "body language, art forms, rhetorical discourse, visual communication, media, myths, narratives, language, artefacts, gesture, eye contacts, clothing, advertising, cuisine, rituals—in a phrase, anything that is used, invented, or adopted by

human beings to produce meaning" (Danesi p. 4). The narrower approach of metaphor theory fits the research object of the thesis better. Another fact is that metaphors, when regarded in semiotics, tend to lean towards the interpretation of metaphors as figures of *speech*, as opposed to metaphors as figures of *thought*, in the conceptual metaphor theory (compare to Lakoff 1986).[4]

In conclusions, this means that a semiotics approach could have been just as fruitful as a conceptual metaphor theory, but it would have been slightly different.[5]

## A brief presentation of the four articles

The research issues do not necessarily fit the articles in the sense that the articles deal with them in consecutive order. The articles, however, follow four different themes or directions, where the first article focuses on copyright's metaphors in order to analyse them in terms of social paradigms; the second regards the consequences of implementing IPRED[6] in Sweden in terms of the use of online anonymity; the third regards the legal norms in terms of European copyright; the fourth regards social norm strength in terms of file sharing and copyright. Before moving on in the story, it is important to make a brief presentation of these articles.

### *Article I: Law, deviation and paradigmatic change: copyright and its metaphors*

The first article is co-written with Håkan Hydén (with me as first author) and was published in late 2010 as a chapter in an anthology by Garcia-Ruiz et al and entitled *Technology for Facilitating Humanity and Combating Social Deviations: Interdisciplinary Perspectives*. Drawing on debates in Sweden about Internet freedom, particularly those connected to copyright and file sharing, and on the European legislative trend of amending copyright, this article

[4] On the other hand, there are metaphor studies that focus on non-linguistic realisations of conceptual metaphors—for instance symbols (Kövecses 2010, p. 65-66) and pictures and multimodal representations (Forceville 2008).

[5] For a discussion on semiotics and norms, see Baier & Svensson (2009 p. 54f.) and Baier (2003 pp. 35-36, 177).

[6] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

analyses metaphors and conceptions in terms of a societal paradigmatic shift and the collision of mentalities.

The article is, to a great extent, searching for a framework to fit the legal and social changes that relate to digital technologies. Kuhnian paradigms are wedded with the mentalities of the French Annales School of historical research. The chapter argues that the "building blocks" of these mentalities and paradigms can be studied in metaphors, in public debates or in legislation, which may reveal the conceptions they emanate from. Although the article is co-written and we have, of course, both worked with all parts of the article, my contribution can generally be found in the parts dealing with mentalities, metaphors and conceptions, the Swedish case, legal cases, and Håkan Hydén's in the parts dealing with paradigms, structures of societal development and cognitive jurisprudence.

### *Article II: Compliance or obscurity? Online anonymity as a consequence of fighting unauthorised file-sharing*

The second article is co-written with Måns Svensson (with me as first author) and is published in Policy & Internet, a major peer-reviewed journal investigating the implications of the Internet and associated technologies for public policy. The article outlines the multitude of opportunities for enhanced anonymity and non-traceability online as well as measuring change in the use of online anonymity pay-services before and after the implementation of IPRED in Sweden. These services provide the user with the means to avoid having their IP numbers connected to their offline identity. The concepts "manifest functions" and "latent dysfunctions" are used in the article to analyse the consequences of the implementation. IPRED was implemented in Sweden on 1 April 2009, and was intended to be the enforcement necessary to achieve increased compliance with online copyright legislation. This, therefore, is the manifest function of the directive. There are several probable effects of its implementation, including manifest and latent functions as well as dysfunctions; this study focuses on the use of anonymity services. The data is part of the larger study conducted both before and after the implementation of IPRED (see Article IV below).

*Article III: The Path Dependence of European Copyright*

The third article was published in SCRIPT:ed, an interdisciplinary and multi-lingual, peer-reviewed online journal associated with SCRIPT, the Centre for Research in Intellectual Property and Technology Law, based at the School of Law, University of Edinburgh. In this article the path dependence of European Copyright is analysed via a selection of the most important directives and legislative measures taken over the last few years. It shows how European copyright is legally constructed, harmonised through international treaties as well as European regulatory efforts in terms of the Information Society Directive[7] (InfoSoc) and the IPR Enforcement Directive (IPRED), as well as the connection to the partially-implemented Data Retention Directive[8] and the ongoing process of the Telecommunications Reform Package[9] and the somewhat secretly negotiated Anti-Counterfeiting Trade Agreement (ACTA). The construction and underlying conceptualisation of copyright reproduces and is strengthened in various related, although sometimes only remotely related, legislative efforts. The article shows how this is achieved in terms of path dependence, and the consequences it gives rise to.

*Article IV: Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms*

The fourth article, co-written with Måns Svensson as first author, is submitted to New Media & Society. The article empirically demonstrates the existence of the gap between copyright law and social norms. It is theoretically founded in the sociology of law and the concept of norms as well as situated cognition to measure changes in the strength of social norms before and after the implementation of the IPRED legislation, which entered into force on 1 April 2009 in Sweden, following the EU IPR Enforcement Directive 2004/48/EC.

[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[8] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[9] The Framework Directive, the Access Directive, the Authorisation Directive, the Universal Service Directive and the e-Privacy Directive.

This law aims at enforcing copyright, as well as other IP rights, especially online. For the purpose of this study, a survey was conducted of approximately thousand respondents between fifteen and twenty-five years-of-age three months before the IPRED law was implemented in Sweden. This survey was repeated six months after its implementation in order to be able to reveal the changes in file-sharing behaviour, but perhaps more importantly, the changes in social norm strength and expectancy of compliance with the copyright regulations supported by IPRED.

# 3. Copyright regulation

Much of how copyright is regulated can be found in Article III and Article I below. However, the international treaties that have historically led to the near-global copyright system deserve further attention here, along with the key provisions of substantial copyright. Copyright is part of what is called intellectual property law, which also includes patents and trademarks. Copyright is the right that authors, composers, artists and other originators possess with regard to their literary or artistic works. This right needs no registration, unlike patents. This is the key concept of the *Berne Convention for the Protection of Literary and Artistic Works* from 1886. Copyright consists of two main sets of rights: the *economic rights* and the *moral rights*. The economic rights are the rights of reproduction, broadcasting, public performance, adaptation, distribution and so on, and the moral rights—droit moral—include the author's right to object to any distortion, mutilation or other modification of his/her work that might be harmful to his/her honour or reputation. National copyright regulations are linked to international treaties and, in the Swedish case, also to EU law. The Berne Convention, for instance, is an international agreement and consequently not EU law, however the wide ratification of this treaty has contributed to harmonising or streamlining national regulations on copyright.

The Berne Convention is an international agreement that has been widely disseminated to include 164 members in 2011, including China (1992), USA (1989), Russia (1995) and Sweden (1904). The Convention stipulates a few minimum demands on what national regulations should include, for example the duration of copyright protection. The other long-standing treaty is the *Paris Convention for the Protection of Industrial Property* of 1883, which in 2011 includes 173 members. The World International Property Organisation (WIPO) administers the Berne and the Paris Conventions, as a 'Specialised Agency' under United Nations. In December 1996, the Berne Convention was complemented by the *WIPO Copyright Treaty* (WCT), which came into force on 6 March 2002 and in 2011 had been ratified by 89 countries, including

USA, China and recently Russia and Sweden. The aim of the WCT is to update copyright protection to the new digital conditions of communication "Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation" (see Preamble of WCT). The *TRIPS Agreement*—the Agreement on Trade-Related Aspects of Intellectual Property Rights—has its foundation in the Berne and Paris Conventions, but reaches further. The TRIPS Agreement is linked to membership of the WTO, which is an agency under the UN.

A common duration of copyright protection is 70 years after the death of the creator (although the Berne Convention states 50 years after the creator's death as a minimum in Article 7). The related rights of performers, the producers of phonograms (such as musical albums) and broadcasting organisations, are protected for 50 years from when they were made, which is covered internationally by the *Rome Convention*. This convention was adopted in 1961 (and has been adopted by, for instance, Russia, USA and Sweden), and the TRIPS Agreement incorporates or refers to this.

The following list presents copyright regulation as many of its parts have spread globally. In sum, some of the characteristics that can be found in most national copyright legislations include:

- The period of protection lasts the life of the copyright holder + 70 years (sometimes 50, see the Berne Convention and the TRIPS Agreement[10]).
- The period of protection for those companies who own the recordings (related rights) are mostly 50 years from the first recording (see the Rome Convention[11]).

[10] Berne Convention for the Protection for Literary and Artistic Works, last amended at Paris on September 28, 1979. Sweden signed on the 1 August 1904 and has adopted all the amendments of the Convention after that. Agreement on Trade-Related Aspects of Intellectual Property Rights signed in Marrakech, Morocco on 15 April 1994.

[11] The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

- The period of protection for performers' rights is within EU fifty years from the end of the year in which the performance (for instance on a music record) was made (see Rome Convention and TRIPS).
- No registration is needed to achieve copyright when something is created (disputes will be settled in court, although the US used to impose some requirements—the year and the © symbol, but this is less important these days when everyone has signed the same treaties).[12]
- Copyright means exclusive rights to the creation for the holder of these rights (which is a very important distinction) that are economic—for instance control over the copies and the right to sell them—and moral—that is to be attributed (mentioned) and not have the work ridiculed, for example.
- The exceptions to these exclusive rights are for "fair" use in the US, or the sharing of copies to *a few* friends within the private sphere, as in the Swedish regulation. All depending on what type of creation and for what circumstance. The line is drawn a little differently in different countries.
- Copyright law is amazingly homogeneous around the world as a result of international cooperation with treaties and conventions. Both the European Union and the US have added to strong and homogeneous copyright throughout major parts of the world. As already stated, this is what makes the analysis of its central metaphors most important, as well as scientifically measuring and understanding the social norms and social structures that copyright seeks to regulate.

[12] However, according to section 411 of the US copyright law, federal copyright claims may be submitted only if you have a federal registration at the US Copyright Office. If you do not have a registration, you can not apply for the quite major statutory damages when someone infringes your rights. This means that even if it is not a prerequisite to register the work to achieve copyright protection, technically those, who do not do so, risks to lose a lot.

# European copyright

Most of the legal development trends in copyright can be found in Article III, and especially the IPR Enforcement Directive is presented in Articles II and IV, consequently legal development is not as thoroughly presented here. Beginning with the early response to digitised networks and the diffusion of Internet, the European Community Directive on Copyright in the Information Society, *the INFOSOC Directive*, was prepared in the late 1990s and finally passed in 2001. This included narrow exemptions to the exclusive rights of the rights holder, as well as protection for "technological measures" (Article 6). This meant that more actions were criminalised and that copyright regulation around Europe generally expanded and became stronger.

In April 2004 the EU passed the Directive on Enforcement of Intellectual Property Rights, the so called *the IPRED Directive*, following what has been called the "heavy-handed influence of the American entertainment industry" (Kirkegaard 2005). Central to the debate is the fact that the directive gives the copyright holders the right, by virtue of a court decision, to retrieve the identity information behind an IP address at a certain time, when they "have presented reasonably available evidence sufficient to support its claims" (Article 6.1). The "competent judicial authorities" may then requisition such information.

Most of the provisions in the IPRED Directive were implemented in Sweden by April 1st, 2009.[13] The IPRED Directive also states that all Member States are bound by the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement), which underlines the global regulatory connection on copyright between nations, the EU and international treaties.

After the bombings in Madrid in March 2004, work began on what later became the *Data Retention Directive* in order to force Internet service providers and mobile operators to store data for the purpose of combating "serious crime".[14] The Directive proposals were heavily criticised for lack of respect for

[13] Sweden had already failed to fulfil its obligations under the directive within the prescribed time limit, as the European Court of Justice declared in a ruling on May 15th, 2008 (Case C-341/07).

[14] DIRECTIVE 2006/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006 on the retention of data generated or processed in connection

fundamental human rights.[15] The question still remains in the Swedish implementation as to whether or not this can or will be attached to copyright crimes and be used in connection with the IPRED legislation. Further, which is of extreme importance for the practice of IPRED, in September 2010 the Swedish Supreme Court asked for a preliminary ruling from the EU Court of Justice on the relationship between IPRED and the not yet implemented Directive on Data Retention for the first IPRED case that reached the court (the Ephone case, Ö 4817-09). This more or less puts all other IPRED-related cases on hold.

The *Telecoms Reform Package* highlights the key role of the Internet Service Providers, ISPs, in the conflicts around copyright. It was first presented to the European Parliament in Strasbourg on 13 November 2007 and one of the most contentious issues regards whether or not Internet users should have the right to retain their freedom without restriction until a court order is issued, before it was finalised in November 2009.[16] This was also one of the issues regarding the French "three strikes and you're out" law HADOPI.[17] Further, the secret negotiations of the Anti-Counterfeiting Trade-Agreement, ACTA, that eventually leaked, show how copyright can increasingly be understood in terms of trade, and hence, be part of trade agreements that can circumvent more democratic legislative processes on national or supranational level.

## Swedish copyright

Regarding Swedish copyright regulation as embodied in the Act on Copyright in Literary and Artistic Works (1960:729). A study was recently carried out in order to update this aging act and to modernise its language. The report

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with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[15] By both the Article 29 Data Protection Working Party as well as the European Data Protection Supervisor.

[16] Amendment 138 to Directive 2002/21/EC of the Commission proposal COD/2007/0247.

[17] HADOPI is the nickname for a French law officially titled Loi favorisant la diffusion et la protection de la création sur Internet or "Law favouring the dissemination and protection of creation on Internet", regulating and controlling the usage of the Internet in order to enforce the compliance with copyright law. The nickname is taken from the acronym for the government agency created by the law.

proposes a new copyright act to replace the present Act, which came into force in 1961. This proposal means that the provisions of the 1960 copyright act are transferred to the new copyright act, with editorial and linguistic amendments. The Swedish Copyright Commission, Ju 2008:07, submitted its final report on a new Copyright Act (SOU 2011:32) to Beatrice Ask, Minister of Justice, on 28 April 2011.[18] The proposal states that the new copyright law should be more transparent and accessible to those who have to directly apply the law and to the general public. It is proposed that the new Copyright Act and other legislative amendments enter into force on 1 January 2013.

[18] See also the preparatory legal work (SOU 2010:24) that was submitted on 8 April 2010.

# Part II – Theory and method

# 4. Why metaphors and conceptions matter to the study of norms: a theoretical bridge

The theoretical chapters outline a theory on norms that is potent enough to robustly conceptualise the findings on the social norm strength of norms corresponding to copyright in Article IV, so that they could be compared to the path dependence of European copyright analysed in Article III. The importance of online anonymity in terms of the preconditions for legal enforcement must be understood, which Merton's terminology so fittingly elucidates in Article II. Theory on conceptual metaphors, below often referred to as *metaphor clusters* to more clearly separate it from *conceptions*, have been developed and adjusted for this study in order to lift the gaze a little above these particular studies of relatively well-demarcated objects, mainly out of the work in cognitive science carried out by George Lakoff and Mark Johnson and their followers. Metaphor theory and conception analysis both serve to demonstrate the content copyright consists of, what it is that locks copyright's development into its path dependence. These theories also function as an explanatory factor in understanding *why* the social norms and the legal norms differ, why the social norm strength is as it is. Article I, picking up elements of this, is in this sense a theory-investigating article, aiming for a wide understanding in a societal context, exploring the landscape somewhat more freely than the other articles.

By stating that law is a complex cognitive and social artefact, it is also stated that traditional jurisprudential accounts of natural law and legal positivism do not do justice to the cognitive and socially entrenched conception of what law really is. Consequently, the dichotomisation of an internal and external perspective on law is broken up as concerns its usefulness and explanatory powers. This is, however, not in any way to say that law does not matter, that law is insignificant. For it does matter. And it is significant. Just not exclusively, in the dogmatic sense of the matter.

## Norms, metaphors and conceptions

In this thesis, it is the norm concept that makes it possible to measure the strength of social norms and compare it to the strength of legal norms. The definition of norms, as put forwards by Hydén and Svensson in the article entitled *The concept of norms in sociology of law* (2008) has proved to be a good theoretical foundation for understanding and scientifically studying norms of different types. This definition is tied to an operationalised model, used in Article IV, that measures the strength of norms (see Svensson, 2008 and Leo, 2010).

The definition states norms as having three essential attributes; they are 1) imperatives (directions for action) that are 2) socially reproduced and thus can be studied empirically, and are dependent on the 3) individual's perception of the expectations of his/her surroundings.

Imperatives, guiding action

Socially reproduced

The individual's perception of the surroundings' expectations of his/her own behaviour

The perceived expectations on the individual's own behaviour is operationalised and measurable as a result of Måns Svensson bringing in elements of the theory of planned behaviour from social psychology into the definition of norms (Svensson 2008). The social reproduction of norms is well anchored in sociological scholarly tradition going all the way back to the social facts and social coercion of Durkheim. However, it is suggested here that the essential attribute of norms being imperative can be successfully studied in its metaphorical detail, in order to depict hidden values and underlying conceptions. This is a claim valid especially for the norms as they are formalised, and is a way to state that they are imperative in a broader and more detailed sense than dogmatic legal analysis may reveal. The findings in cognitive linguistic theory following in this tradition are not commonly used in the sociology of law.

Conceptions and theory on metaphor clusters is used to develop a metaphor/conception analysis for a specific part of legislation, a part that describes a conception or uses a metaphor directly connected to language, perhaps "frozen" in law. It is also this conceptual dependency that is the basis of the "path" of the European copyright law, studied in Article III, which is returned to below.

Further, Svensson states that traditionally-founded theory around the norm concept focuses on the general, sometimes at the cost of the particular (2008, p. 45). The conception and metaphor theory put forward here complements norm analysis in the particular analysis of the legal imperative, by focusing on the language-based features of importance to our thoughts. In addition to this, part of the explanation of the gap between the legal and social norms can be found in these metaphorical patterns. This means that lock-in effects can be explained, as well as the sub-surface conceptions that control the surface-level linguistic forms as well as metaphorical patterns and mappings of relevance to law. It can now close in on aspects of norms, its metaphors and conceptions, in order to see how these elements play out in the analysis of the norm.

## The concept of norms in sociology of law

The sociology of law focuses on a twofold area of law and society which has affected the traditions of method and the traditions of theory in the discipline. The discipline, in its practice, is not always easily delineated in the sense that different scientists draw the line where the sociology of law ends and something else begins at different places. Relevance is often determined in relation to the theory, or perhaps method, chosen. Much of the presentation of norm theory can be found in Article IV below, but need some further presentation in order to make possible a bridge to metaphor and conception theory.

### *Defining norms from three essential attributes*

As mentioned, the definition of norms used here is based on them possessing three essential attributes (Hydén & Svensson 2008; Svensson 2008; see also Article IV). *The first* essential attribute is tied to the "ought" dimension of the norm and simply dictates that norms constitute imperatives (directions for action); *the second* essential attribute is bound to the "is" dimension and

stipulates that norms are socially reproduced and thus can be studied empirically; *the third* essential attribute is that the norm actually arises from the individual's perception of the expectations of his/her social environment. This definition of norms has been used to measure social norms in traffic (Svensson 2008) and regarding illegal file sharing before IPRED was implemented in Sweden (Svensson & Larsson 2009), where the later study was repeated six months after the implementation, giving the opportunity to compare changes in the social norm strength for Article IV.

*Imperativeness*

The first essential attribute is drawn from a scholarly tradition best represented by Hans Kelsen and his *Pure Theory of Law* (1967; see also Svensson, 2008, pp. 42-48, and Article IV). In short, it leads to the deductive approach of identifying existing law in order to outline the legal imperative. In formulating this category for the study of legal norms much knowledge of its imperatives can be found in the "internal" perspective of how precedent cases apply, how legal hierarchies rule which source will apply before the other, the validity of legislative history. These can all be balanced differently in different legal cultures, but will still be part of the conscious method used within the legal culture at hand.

However, this knowledge will not be sufficient. In fact, one of the most important points made by the empirically targeted socio-legal schools, such as legal realism, critical legal studies and the sociology of law, is that other values affect law and legal practice. Gender, social status, simple corruption, class, ethnicity and, as is developed below, thought structures, are all non-legally acknowledged factors that from time to time have been shown to exert influence. Additionally, it is here argued that metaphors are important for the understanding of how norms work, which is tied to underlying conceptions that frame and control the metaphors and imperatives. This is the essential attribute that is most clearly shared by both social and legal norms. This viewpoint is in line with scholarly traditions from both Kelsen and Durkheim. The sociologists of law following a Lund tradition have definitely formulated it this way (Baier, 2003, p. 35; Hoff & Svensson, 1999; Hydén 2000, p. 113; Leo, 2010; Svensson 2008, pp. 42-48).

One main point in this thesis is that the legal imperatives, based in text and language as they are, are imperative not only in the sense that the dogmatic legal analysis suggests, they are also imperative in the explicit metaphors that are

so inevitably used in their formulation. As Lakoff and Johnson have shown, mind, understanding and communication are "fundamentally metaphorical in nature" (Lakoff & Johnson, 1980/2003, p. 3). One consequence of the findings in cognitive science following in these footsteps over the last 30 years is that there is empirical evidence that legal language is also metaphorical in nature, which therefore counters much of the traditional view in legal analysis that regards concepts as having strict limits and as being defined by necessary and sufficient conditions (Johnson 2007; Winter 2001).

One of the cognitive scientists mentioned, Mark Johnson, argues that legal reasoning and legal concepts are based on a sort of self-image of objectivity. Johnson's main point for entering cognitive science in the study of law is that this legal "objectivist view" is based on an incorrect understanding of how thinking and language work (Johnson, 2007, p. 847). A point that is sophisticatedly elaborated in Stephen L. Winter's *A Clearing in the Forest* from 2001.

But is it the case, then, that if the exact language of law is not in fact that exact, then it must be open to *any* interpretation—unconstrained, floating and legally insecure? This is where *the embodiment* of conceptual metaphors and conceptions becomes relevant, further developed below. Law Professor Stephen L. Winter leads the way by stating that "actual examination of legal metaphors—how they work, how they come to be, how they come to be meaningful and persuasive to us as embodied, socially-situated human beings—shows that just the contrary is true: metaphor is both the product and embodiment of constraint" (Winter, 2007, p. 897).

Winter concludes that:

a) Metaphorical thought is actually orderly and systematic in operation.
b) Metaphorical (legal) concepts depend for their coherence and persuasiveness on the motivating social contexts that ground meaning.
c) Legal change (no less than stability) is contingent on, and therefore constrained by, the social practices and forms of life that give law its shape and meaning.

This reassures that metaphors in law do not mean that anything goes, on the contrary, their meanings are very much constrained, but they may reveal other meanings and other values, added or in opposition to, the formulated legal imperative as it is legally interpreted. This is where other patterns of structured meaning may appear. However, it also leaves us with the important emphasis on the social context-dependency of legal interpretation as well as the

implications that social change is likely to pose a strong challenge to law, a point not least important in relationship to the path dependence of law, as in Article III below. Winter, from the perspective of linguistics and cognitive science, reasserts the bond between law and social practice and behaviour.[19]

*Social reproduction*

Regarding the second essential attribute, social reproduction, Hydén's and Svensson's definition owes a lot to the "social facts" of Durkheim (see Svensson 2008). Emilé Durkheim's classical theories on social coercion and social facts comprise an important source of inspiration—partly because they deal with creating social changes through law and other norms, but also because they so distinctly state norms as being empirical entities (norms as "things") which can be studied scientifically:

> "A social fact is identifiable through the power of external coercion, which it exerts or is capable of exerting upon individuals." (Durkheim, 1982, p. 56).

The importance of social reproduction for norms has been an active ingredient in the sociology of law since the days of Durkheim and Eugene Ehrlich. Norms have to be reproduced within the "association", in the words of Ehrlich, to be normative:

[19] This is a method of identifying the communicative importance of norms, which is not completely new to the sociologists of law in Lund in that it has been addressed by the sociologist of law Matthias Baier in terms of using semiotics to understand norms (2003, pp. 35-36, 177). This suggests, even if it in Baier's presentation is not as explicitly tied to the imperative essence of norms as presented here, that semiotics can prove useful in analysing imperatives that are not language based. For example, even if traffic law is regulated, it is not the actual law text that likely will come to us as the imperative, but the symbolic signs of it as they are used in traffic. The traffic symbol is a symbol for a normative imperative and the specific forms of a symbol and its correlation to our mind, thinking and perception can be analysed via knowledge of semiotics, which, combined with the norm definition here, can explain the existence of social norms (for a discussion on semiotics and norms, see Baier & Svensson, 2009, p. 54f.).

> "Accordingly, social norms, whether they are legal norms or norms of another kind, always have their origin in an association; they impose an obligation only on the members of this association; and this obligation is binding upon them only in their dealings with members of the association." (Ehrlich 1913/1936/2002, p. 79).

This lies close to what several of the contemporary legal scholars who study social norms have recognised as the importance of socialisation (Cooter, 1993; McAdams, 1997; also Lessig, 1995, p. 997). Wickenberg focuses on this part of social norms in terms of interpersonal reproduction:

> "The interest for sociology of law lies in those norms that occur in a social context, which is communicated in a social community and having social means of performance, social context and social effects. Interpersonal norm—if I communicate it with others and these include the norm—it will be known as a norm." (Wickenberg, 1999, p. 262).

Many of the "norms" we talk of in everyday life are not norms in this definition. They may bear the imperative attribute in attempting to control behaviour, such as much law is formulated, but still lack the attribute of being socially reproduced and the attribute of being perceived as an expectation by an individual. Such a legal rule could then be failing to fill the definition of a norm in the Svensson and Hydén sense.

*Perception of expectations*

The third essential attribute, *the individual's perception of the surrounding expectations on his/her own behaviour*, is the attribute Svensson brought in from its well-tested environment in social psychology, inspired by the Theory of Planned Behaviour (Ajzen, 2005; Ajzen & Fishbein, 1980). The legal norm can be stated from the first two essential attributes, but its strength as a behaviour-affecting entity can be measured in the third essential attribute. This is most important if there is a discrepancy between the social and the legal norms.

Regarding the third essential attribute of norms, including both social and legal norms makes it possible to measure the strength of the legal norm in terms of individual's perception of the expectancy to comply. In this way results

stating the social pressure in place for compliance to a dictated imperative can be obtained. In a sort of triangulation between the measured norm strength, the actual behaviour and the legal imperative, important conclusions can be drawn regarding the role of law for behaviour in each specific case.

Measuring the strength of a legal norm in terms of compliance will, unaccompanied, not explain the reasons behind the action. The measurement of social norm strength in relation to a legal norm will take us one step further in an explanatory model. However, in most cases we need more explanatory hypotheses. Say, for instance, that the social norm strength is strong in relation to complying with the legal norm, but behaviour is still not in compliance, then we need to construct a hypothesis and look for further explanatory factors for why this is so. The same goes for the opposite case, when the social norm is weak but compliance is increasing. Then we know that there are factors other than social norm strength that lead to this increase in compliance with legal norms. However we can certainly conclude that an imbalance is occurring, which does not shed a very optimistic light on the legal norm.

# 5. Metaphors and conceptions

The study of metaphors is used in Article I of the thesis and the theories are additionally developed in the following section. There are two main reasons for developing these theories further here: 1) the theories are insufficiently developed in the articles, and; 2) the bridge to norm theory is not outlined (in the articles or elsewhere). The propositions of the metaphor theory presented here are the findings of a relatively new interest in metaphor theory that Nerlich and Clarke describe as metaphor's "third wave of fame" in the history of philosophy and science (2001, p. 40). It began around 1980 with Lakoff and Johnson publishing *Metaphors we live by*.[20] The core of this theory is that an expression is mapped from a source domain to a target domain. In the fields of cognitive linguistics, the metaphor is defined as an analogy (Lakoff, 1987).

The *conception theory* proposed here ties into both the conceptual metaphor theory, including 'cognitive models' of cognitive linguistics as well as concepts akin to 'figures of thought' from social science from theorists such as Asplund (1979) and Foucault (2001), and thereby bridges the divide between the two sides (Hedrén 1994). Views of "conceptions" have further been used in teaching and learning science, often to display student thinking and "conceptual change", and have played a significant role in this type of research since the late 1970s. For example, by speaking of conceptions as learners'

[20] This is a book that has become a standard text for those interested in cognitive linguistics (such as Gärdenfors, 2007), as well as the philosophy and psychology of language. It has been followed and developed by a number of scholars and publications (Johnson, 1987; Lakoff, 1987; Lakoff & Johnson, 1999; Lakoff & Turner, 1989; Reddy, 1979; Winter, 2001) and applied and discussed in various scholarly fields and disciplines such as psychology (Moser, 2000), political analysis (See Carver and Pikalo anthology, 2008, with contributions for instance from Drulák, 2008 and Walter & Helmig) and technology studies (Cass & Lauer, 2004). Of extra importance for this thesis is the legal analysis that has been made based on the work of Lakoff and Johnson (See Berger, 2004; 2007; 2009; Blavin & Cohen, 2002; Herman, 2008; Hunter, 2003; Johnson, 2007; Joo, 2001; Morra, 2010; Ritchie, 2007; Tsai 2004; Winter, 2001; 2007; 2008).

mental models of an object or an event (Glynn and Duit 1995; Treagust & Duit 2008). And, to clarify, even if the word 'metaphor' is left out of my version of conception theory, it should not be understood as something radically different to conceptual metaphor theory—merely a slight shift of focus towards a less figuratively-bound description of a framework of thinking.

## Figurative metaphors and metaphor clusters

One widespread perception of what metaphors are states that the most vivid images are used as "a device of poetic imagination and the rhetorical flourish—a matter of extraordinary rather than ordinary language" (Lakoff & Johnson 1980/2003, p. 3). In addition, metaphors tend to be viewed as exclusively linked to linguistic structures, rather than thinking and the mind. In contrast to this minimalist conception of metaphors, language and cognitive scientists George Lakoff and Mark Johnson showed that "metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature." (Lakoff & Johnson, 1980/2003, p. 3). They argue that the role of metaphor in our thinking goes much deeper and is much more fundamental than was often hitherto thought (even) in cognitive science. They claim that abstract thinking largely is metaphorical (Lakoff & Johnson, 1999).

A metaphor consists of the projection of one schema—*the source domain* of the metaphor—onto another schema—*the target domain* of the metaphor. Consider the following examples:

| **Source Domain** | | **Target Domain** |
|---|---|---|
| Lion | → | My dad |
| Journey | → | Love |

There is a major difference between these two metaphors. They both share the mapping from source domain to a target domain, that is the essence of metaphoricity, but the first one (my dad is a lion) is an easily detected and figurative metaphor where the other (love is a journey) is a conceptual metaphor, from which a number of other metaphors relating to each other in a *metaphor cluster* can be derived.

When it comes to the first example, it creates the figurative metaphor of "my dad is a lion". It is, as stated, pretty clear to most people that this is a metaphor for something, and that some aspects of the source domain are

mapped onto the target domain in order to achieve some effect on the target domain. Since there are cultural or other patterns also involved in this, these aspects are likely to relate to something similar to the assertion that my dad is strong, fierce and perhaps something of a leader—in our culture the lion is sometimes described as the "King of the Jungle" (this bears evidence on how a lion is *conceptualised*, which emphasizes its cultural dependence).[21] Consequently, the ordinary use of this metaphor would also exclude aspects from the source domain that could just as well be meaningful but are not, such as my dad is covered with fur and he eats antelope.

For the other metaphor, which describes that "Love is a Journey", there is a pattern of other expressions that follow this metaphor: it is a conceptual metaphor from which follows that it for instance is meaningful to say that "our relationship has hit a dead-end street", "we're going in different directions", or "our relationship is at a crossroads" etc. (Lakoff 1986; Lakoff & Johnson 1999, p. 123) It is meaningful to speak of several other related versions of the same Love is a Journey metaphor. This cluster of metaphors rely on a conceptual metaphor that also includes versions that might not be perceived as so clearly figurative or metaphorical, such as "this relationship isn't going anywhere". This pattern of cross-domain mapping is of extreme importance here. There is *one* conceptual metaphor, creating *one* cluster, relating to *one* conception, not many completely unrelated metaphors. Such expressions can be part of everyday language, because the Love is a Journey mapping is part of our ordinary everyday way of conceptualising love and relationships and how to reason about them.

Consequently, one concept is understood in terms of another. Metaphors are tools (to use a metaphor) that explain or offer a way of understanding a phenomenon, for example, a type of event, a behavioural pattern or observable fact in the world in terms of a more familiar concept. And, just to be clear, this theory asserts that there is a state where a journey is a journey and a lion is a lion. Where the source and target domains are the same, or the source domain is not used for targeting something else.

[21] Which, of course, may have different meaning in different cultures. In Sweden, for instance, the moose is sometimes described as the "King of the Animals", but for some reason the moose is never the source domain for targeting someone as a "King". Consequently, the sentence "you are a true moose" would only be awkward and not really meaningful, whereas "you are a real lion" may make very much sense.

# The metaphorical mind, skeumorphs and embodiment

Differences in conceptual metaphors and what is perceived as meaningful metaphors in different languages may, of course, show diversity of cultures. War metaphor in relation to argumentation may function and be deeply rooted in a language and culture, but may be completely absurd and not a functioning part of another culture that conceptualises argumentation in a different manner.

The figurative element may be more or less clear, and individuals may be more or less disposed to see the figurative elements, such as in a text. This means that we are often not aware of when we are speaking in metaphor and when we are not. While some uses are clearly and consciously metaphorical others, perhaps most in everyday speech, are only unconsciously metaphorical. We do not differentiate between when we speak in metaphor and when we do not, we are all about the *meaning* of what we say, no matter if this is metaphorical or not.

In other words, a generalisation that we can make regarding metaphor comprehension is that it is mandatory in the sense that it is *an automatic interpretation* made by us (Glucksberg, 2008). This means that literal meaning has no priority; the associative paths creating meaning are there anyway. Generally, we do not choose if we want to lean on the literal meaning. As mentioned, this is a reason for why there is a lock-in effect embedded in the way metaphors' function that mostly does not occur on an aware level of consciousness. Consequently accepted metaphors and metaphors not perceived as being metaphors create a system that is harder to criticise and is likely to be conservative.

## *Skeumorphs in the non-digital/digital divide*

Concepts are constantly transferred to new phenomena that carry similar elements. The development of information and communication technologies, combined with their massive distribution and use, has created a considerable need for labels and concepts that can describe the multitude of phenomena that follow. Although the phenomena in their technical nature are brand new, concepts for pre-existing phenomena are metaphorically transferred because they share some similar elements or associations. Some features from the previous phenomenon fit well, while others do not. Not only does the digitalisation create a need for a whole new set of metaphors, on one hand, but

it changes the definition of already present concepts, on the other. It is the latter process that here is lies in the concept of skeumorphs. Consider for instance the examples of transition from regular mail to e-mail and from photography to digital imagery. Metaphors can thus serve as a conceptual bridge between one technology and another (Cass & Lauer, 2004, p. 253). In line with this, it must be considered whether the social norms that regulated the former phenomenon, which has lent its name, can also colour the new phenomenon.

In order to better describe the partial deformation that occurs, the term skeumorph is sometimes used, especially in terms of media transition (see Cass & Lauer, 2004). A skeumorph provides us with familiar cues in an unfamiliar domain by presenting unnecessary parts that make new things appear old and familiar (Gessler, 1998). The re-use, or extended use, of a metaphor is often quite necessary and "natural". Skeumorphs are particularly interesting in the transition between non-digital and digital representations. As Cass and Lauer express it:

> "When the technological media of an artefact changes, some characteristics of the previous media are left behind, others are brought forward intact into the new media, while still others are brought forward in a modified form. In the transition between the non-digital and digital media, a learning process occurs where users employ metaphors from the non-digital representation and process to orient themselves to the novelty of the new media." (Cass & Lauer 2004, p. 255).

The concept focuses on the part of metaphorical transition that is deceptive, concluding that there is a part that is not the same as from where the metaphor is taken, that there is something false in the transition. The skeumorph concept displays a process. Cass and Lauer continue:

> "However, in practice the relationship between the non-digital and digital implementations has overlapping functionality while at the same time retaining media specific functions that are inherent to either the non-digital or digital implementation alone." (Cass & Lauer, 2004, p. 255).

The transition from analogue to digital means an excessive need for skeumorphs. In order for us to be able to navigate in the computer-mediated environment, a lexicon of metaphorical transition and concept-expansion is required. This includes legal concepts.

*Metaphors as embodied*

When stating that our minds and language are fundamentally dependent on metaphors that are dependent on cultural and pragmatic definitions, the perception of language as a more supraindividually and objectively definable entity is contradicted. Cognitive linguistics has shown that this, for instance, has implications for how categorisation is carried out (Winter 2001, p. 331). The critique, or fear, that this spurs concerns that if the objectivity of definition falls, does this mean that any meaning can be attached to a word or metaphor? The answer from the conceptual metaphor theorists to this extreme constructionstic fear lies in *the embodiment* of the metaphors (Lakoff 1993; Kövecses 2008; Winter 2001). Metaphors are based on our interaction with our physical and social environment. They are derived from bodily sensations, for instance found in *image-schemas*, such as that balance keeps you *upright*; more is *up*, for when you add things to each other, you increase the pile upwards (Lakoff 1993, p. 240). The embodiment can also be found in more obvious figurative metaphors, as in *the long arm of the law* (Berger, 2009, pp. 262-266).

In conceptual metaphor theory, embodiment is a key idea that clearly distinguishes the cognitive linguistic conception of meaning from that of other cognitively-oriented theories (Kövecses, 2008, p. 177). This means that conceptual metaphor theory is not completely uncontroversial, which has to do with its view of metaphor as a linguistic spectacular phenomenon. Traditional metaphor scholars typically resist arguments and empirical findings suggesting the conceptual roots or embodied foundation of metaphorical thought and language. In the process of something becoming meaningful, the human body plays a distinguished role (Johnson, 1987; Lakoff, 1987; Lakoff & Johnson, 1999; Gibbs, 2005). This dependency can be expressed in the words of Steven Winter:

> "Thought is not primarily linguistic and propositional, but embodied and imaginative; language is neither entirely arbitrary nor merely socially contingent, but grounded in our embodiment and motivated by our interactions with the physical and social world." (Winter, 2001, p. 47).

The embodiment of metaphors, as we will see, can serve as part in an explanation for the conceptions that seem to appropriately describe individual's life-world. If factual conditions change for, let us say communication, the metaphors that seem appropriate to describe the situation will also change. This, as will be shown, is an inherent problem for copyright law and the

metaphors embedded within this regulation. As Stephen L. Winter concludes, "concepts like Knowing is Seeing and Understanding is Grasping are embodied; they emerge from species-wide experience of learning about one's world through sight and touch." (Winter, 2001, p. 55).

While these developments within linguistics and cognitive science are innovative in some respects, these findings show links to the philosophical approaches of Nietzsche (see for instance Kofmans's Nietzsche and Metaphor, 1993), and the early sociology of knowledge developed by Karl Mannheim. Especially Nietzsche exerted an influence on Foucault, who Luc Ferry and Alain Renaut discuss as the sole representative of "French Nietzscheanism" (1990). Also Nerlich and Clarke see clear ties to thinkers such as Nietzsche, Biese and Gerber in the work of Lakoff and Johnson (2001, p. 54). The following quote from Lakoff and Johnson further illustrates this point:

> "It should be obvious from this description that there is nothing radically new in our account of truth. It includes some of the central insights of the phenomenological tradition, such as the rejection of epistemological foundationalism, the stress on the centrality of the body in the structuring of our experience, and the importance of that structure in understanding. Our view also accords with some of the key elements of Wittgenstein's later philosophy: the family-resemblance account of categorization …and the emphasis on meaning as relative to context and to one's own conceptual system." (Lakoff and Johnson, 1980, p. 182).

# Conceptions

The concept of "conceptions" developed here follows closely in the tradition of conceptual metaphor theory in cognitive linguistics, although focusing on the aspects of these underlying structures that frame, construct and control our minds, thinking and use of language. The concept of conceptions is elaborated, moving beyond the more linguistic focus the concept of conceptual metaphors have, even though the difference is not always great or even relevant. In order to avoid confusion between "conceptions" and "conceptual metaphor", the latter will often be spoken about by its consequences, the forming of "metaphor clusters".

When defining the conceptions necessary, inspiration comes from several fields of knowledge. The reason that there is such resemblance in quite disparate schools of research is probably that many strive to define the same

cognitive backdrop that, in some way or another, controls the visible phenomena that emanate from us in terms of language, images and metaphors etc. For instance, in his work entitled The Order of Things Foucault presents different "figures of thought" that he regards as the entities that somehow steer the emergence of discourse. These are, according to Hedrén, then used as fundamental structures that have not been completely exposed, at least not to their full extent, but are still possible to analyse (1994, pp. 29-30). In the preface to The O*rder of Things,* he (Foucault) speaks of "figures" or "epistemological figures". Further on in the text he uses "figures of thought" as well as "principal figures that determine knowledge" (Foucault 2001). Asplund, a Swedish sociologist, speaks of "tankefigurer", which can be translated to "figures of thought" (Asplund, 1979; Hedrén 1994, pp. 29-32). As mentioned, educational science has long used a conception of "conceptions" to theorise and understand the cognitive aspects of student learning. In this perspective, the process of how to change such conceptions is of great relevance, which has led to theories on "conceptual change" (Glynn and Duit 1995; Treagust & Duit 2008).

One of the findings of the cognitive scientists is that the subsurface structures are not only metaphorically mapped, but also work together with *cognitive models* in order to create abstract concepts (Kövecses, 2010, chapter 8). The idea of cognitive models, as Lakoff presents it, is founded on four sources: Fillmore's frame semantics (1982), Lakoff and Johnson's theory of metaphor and metonymy (1980), Langacker's cognitive grammar (1986) and Fauconnier's theory of mental spaces (1985). One way to explain the contextual cognitive model is to use the example of the concept *weekend*, used by Lakoff (1987, pp. 68-69). The concept "weekend" requires a notion of a workweek of five days followed by a break of two days, superimposed on the seven-day calendar. Lakoff explains that, "our model of a week is idealised. Seven-day weeks do not exist objectively in nature; human beings create them. In fact, not all cultures have the same kinds of weeks".

Cognitive model theory owes a lot to Fauconnier's mental spaces (1985) in that they are medium for conceptualisation and thought (Lakoff, 1987, p. 281). Lakoff explains that the idealised model does not fit the world very precisely, due to the fact that it is oversimplified in its background assumptions. There are some segments of society where idealised models fit reasonably well and yet, some segments where they do not (Lakoff, 1987, p. 70). And, translated into conception theory, the conceptions' relationship to society is a relationship in process. In stable environments, where society does not change

drastically, conceptions imply no new problems. On the other hand, a rapid change in the conditions in society might impose distance between the conception regarding a specific matter, and the specific matter itself. The link is there, but it is stretched out.

### *The difference between translatability and understanding*

The German sociologist Ferdinand Tönnies presented a theory on society in terms of a dichotomy of Gemeinschaft and Gesellschaft. The translation of these terms has been discussed in different languages, and the terms' general translatability has been discussed in relation to specific languages. It is this discussion, the one of translatability that Asplund takes up in terms of that there is an important difference between the possibilities of exact translation and the possibilities of understanding the conception underlying dichotomous terms (I am using "conception" here because Asplund speaks of the dichotomous terms as a "thought figure", Asplund 1991). Asplund claims this thought figure, this notion of Gemeinschaft and Gesellschaft, to be constantly present in fictional literature, for instance Tolstoy, Stephen King or Agatha Christie or "the Swedish rural novel", as well as in political rhetoric placing the gemeinschaftlich values into the framework of gesellschaft (Asplund 1991, pp. 13-17).

Asplund uses the concept of "thought figure" to explain the difference between *translatability* and *understanding*. Asplund expresses this as when discourses have developed in different languages, but are based on similar thought figures, or thought figures that both discourses utilise, the opportunities for understanding each other are good, even if the exact translation of the actual concepts and terms is not possible. And, on the contrary, if they develop their discourses in relation to thought figures that the other party does not utilise, they cannot understand each other. Asplund concludes that this could even be the case with two speakers of the same language (Asplund 1991, p. 16).

In metaphor theory, the historical linguist Richard Trim, influenced by Lakoff and Johnson, puts forward a comparative theory of languages that strongly resembles Asplund's presentation. Trim claims that there are probably three main combinations of two basic forms: 1) two languages share the same linguistic form and the same conceptual metaphor (this is then both translatable and understandable, in the words of Asplund); 2) two languages share the same conceptual metaphor but not the same linguistic form (it is not translatable but

understandable); and 3) two languages share neither, that is one conceptual metaphor may exist in one language with no equivalent in another or they have two different conceptual metaphors to convey the same figurative meaning (neither translatable nor understandable) (Trim 2007, pp. 28-29).

In short, they seem to aim for the same thing, Asplund and Trim, but come from different scholarly contexts. It is argued, therefore, that this conception of thought figures of Asplund's is, to a considerable degree, translatable to the theory of conception postulated here, strongly indebted to the conceptual metaphor theories of Lakoff and Johnson. It is perhaps surprising to see that Asplund found and read Lakoff's book *Women, Fire and Dangerous Things* (1987), but not that he found inspiration in it when he read it (Asplund 1991, pp. 10-12).

## An epistemological stance on metaphors and conceptions

Metaphors' connection to people's conceptions make language more democratic, in a sense. They are embodied and related to how we conceptualise our reality, not defined objectively and neither completely unrelated, nor absolutely connected to, reality. How conceptions and their relationship to metaphors are conceptualised here therefore ties into social constructivism in the sense that language and meaning are somehow constructed socially. However, as mentioned, conceptual metaphor theory does not say that any construction will do, or that it is possible to construct whatever meaning an individual may want. Instead, the patterns of how meaning is created in our metaphorical thinking seem relatively fixed, and these patterns do not always follow the more objectively defined meaning of words, language and metaphor. It is what Winter describes as "imaginative thought" which includes metaphor, and is systematic and regular rather than arbitrary and unconstrained (2001; 2007, p. 872).

A researcher in cognitive semantics, Peter Gärdenfors, ties the embodiment of meaning to our experience of the world:

> "Because the cognitive structures in our heads, according to cognitive semantics, are connected to our perceptual mechanisms, directly or indirectly, it follows that meanings are, at least partly, embodied." (2007, p. 58).

Gärdenfors differentiates between the realistic and the cognitive traditions of how meaning is constructed or achieved (2007, pp. 57-59). In semantics, Gärdenfors argues, this means that the realistic approach to the meaning of an expression is something out there *in the world*. The latter, following the cognitivist approach roughly described, states that meanings are *in the mind*, however closely related to the described cognitive mechanisms, especially perception. This means that when we see something, for instance a cat, it needs to be fitted to our conception of a cat to be able to be understood meaningfully as a cat. There is a link, but it is not direct. These processes are perceived as instantaneous and most of them are likely not to be questioned in everyday life. But every now and then things emerge that do not fit directly with any conceptions. In addition, our conceptions can move on as a result of changes in reality.

This forms an epistemological stance on the relationship between language and reality. Reality is not directly perceived, but takes part in cognitive processes that sort, frame and conceptualise reality. Neither is reality completely cut off from our conceptions, processes of mind and uses of metaphor and language. Reality is embodied in cognition in the sense that space, bodily operations and physical objects create the frame of meaning around mental or abstract things or patterns of behaviour. The important path chosen in terms of epistemology, how we know things, can be described in the words of Umberto Eco:

> "Every discourse on metaphor originates in a radical choice: either (a) language is by nature, and originally, metaphorical, and the mechanism of metaphor establishes linguistic activity…or (b) language (and every other semiotic system) is a rule-governed mechanism, a predictive machine that says which phrases can be generated and which not, and which from those able to be generated are 'good' or 'correct' or endowed with sense; a machine with regard to which the metaphor constitutes a breakdown, a malfunction, an unaccountable outcome, but at the same time the drive toward linguistic renewal." (Eco, 1984, p. 88).

The first option is chosen here, which consequently means that research is carried out in a legal system that is often formulated as being a result of the second option. The strength (and inevitable weakness) of metaphors is that they can be presented and perceived as something existing naturally and objectively, when they really are a construction that may therefore be normative in that they

are imposing a (however small) order of the world or fact of the world that is taken for granted.

*Metaphors and conceptions as frames*

The underlying conception sets the interpretative frames for what will appear to be the logical consequences of any given debate surrounding a particular phenomenon. And those who manage to control this framework will also be able to guide the development of debates. Yanow (2008) brings up the framing aspects of the metaphor by exemplifying the American debate on abortion. By framing the issue as 'pro-life', the movement against abortion, by the logic of language-use, forces the oppositional label 'anti-life'. Not wanting to be forced into such negative language, the 'for access to abortion' camp narrates itself as 'pro-choice' (Yanow, 2008, p. 228). The conception can, in other words, be perceived as a frame of mind, a frame that we may not be conscious of in any way. However when perceived, this frame-like essence of conceptions is useful in rhetoric skills. This applies also to "framing" of debates and arguments, which legislative processes are not free from. As Lakoff explains:

> "Remember, don't just negate the other person's claims; reframe. The facts unframed will not set you free. You cannot win just stating the true facts and showing that they contradict your opponent's claims. Frames trump facts. His frames will stay and the facts will bounce off. Always reframe." (Lakoff, 2005)

This is when the use of metaphors, and the framing of conceptions, although they are not necessarily perceived as metaphors and frames, has become a rhetorical strategy. Beginning from an opponent's metaphor is a difficult rhetorical stance, so choosing your own metaphor or conception from which to begin is generally a much better strategy (Herman 2008, see also Yar 2008 on rhetorical strategies in IP).

# A model for legal metaphor analysis

In order to create a clear model of how norms can be studied from a metaphor and conception perspective, at least two things that relate to the imperative essence of the norm must be clarified. Since the metaphor analysis of this thesis mainly refers to the analysis of law, the model will be constructed using this terminology. The first issue relates to time, and how expressions in law can turn

into skeumorphs as the reality they regulate develops, expands or changes. The second issue regards how these conceptual mappings between different metaphors in the same cluster relate to law and what happens when one or more of these expressions is in law and others are outside.

### *Time: the transition model*

One interesting aspect about studying legal metaphors is the view of law as a process. This is not to be mistaken for explicit legal development, when policies are remade, reformulated or in other ways redrafted, unless the core metaphors remain unchanged. To the extent the important metaphors do remain the same, the focus of this study from this perspective would then be to what extent reality changes and to what extent the meaning of the legal expressions change along with reality—are legal metaphors created or changed in the process? If so, then skeumorphs are created where the same metaphor is used for different conceptions or definitions. Although it is possible that a legal concept does not change even when a considerable amount of time has passed since the drafting of the law, it is similarly possible that much in fact has happened to the legal concept in terms of metaphoricity the longer the law has remained unrevised. For example, when the Austrian sociologist of law Karl Renner claimed that the legal context of property has remained unchanged since Roman law, over societal evolution and revolutions, part of this regulation has likely been redefined under the same name (Renner 1949). It became metaphorical, skeumorph, and then these metaphors became accepted as non-metaphorical over time. On the surface it seemed as if nothing had changed, when in fact much had.

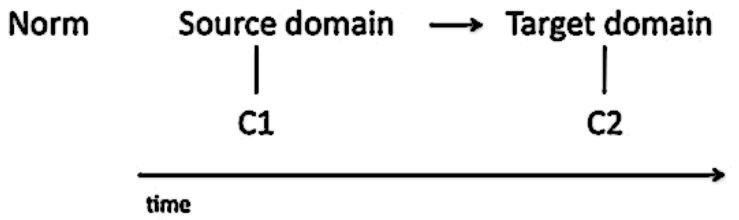


**Figure 5.1: Legal metaphor in transition**.

If reality changes drastically over time it is more likely that the metaphors relevant for a norm (in the source domain) have become skeumorphs (in the target domain), a transition that in turn can have lead to that the very same concept now is conceptualised differently (from C1 to C2 in figure 5.1). This means that what they have come to define is different to what they used to define.

### *Related metaphors in and outside law: the cluster model*

When studying a specific metaphor and realising that it is part of a metaphor cluster, the pattern also becomes relevant across the boundaries of law. For instance, while some metaphors that relate to a specific conception can be found in law, others may not. They do, however, take part in the same conceptual pattern, which means one metaphor plays a part in giving meaning to the other. If those in law have been accepted, it is also likely that those related outside the law will appear just as appropriate and meaningful. In short, if copyright is best served by control over reproduction and distribution, individuals are likely more inclined to speak of theft, piracy and trespassing as well. This is the reason that the analysis section of the thesis expands outside the explicit letter of the law and picks up related metaphors—from arguments in court, political debate or other sources.

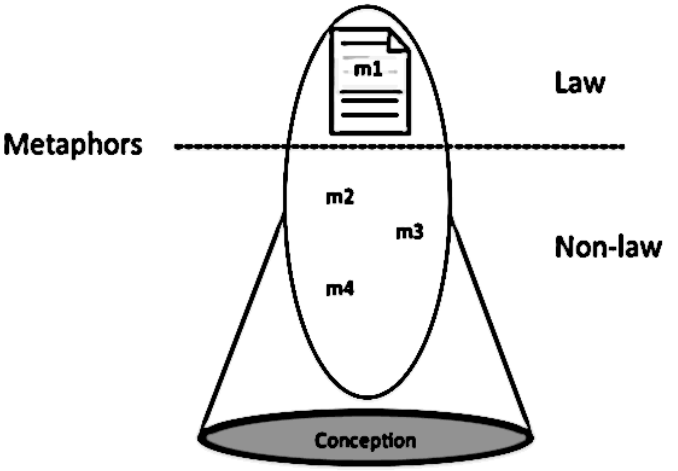


**Figure 5.2: Metaphor cluster model in relation to law**

For example, if the ”copies” and reproduction control that copyright law grants (represented by m1 in Figure 5.2) can be derived, as stemming from a conception that the protected content is, in fact, tangible and concrete objects (see conception in the base of figure 5.2), this likely leads to that other, non-legal, metaphors related to physical property and protection of tangible goods (represented by m2-m4 in the figure) can be used to support the copy-metaphor *in law*. They are all based on the same underlying conception, and may therefore be included in the same metaphor cluster of which the included metaphors may sustain the meaningfulness of the other members of the cluster. This is returned to and developed in the analysis section below.

# 6. Method

How to measure norms? And, to be more specific, how to measure both legal norms and social norms in order to compare them? How to capture a conception, how to identify the important metaphors to study? Given the research issues concerned with this thesis, the important questions for this chapter regard how to study law and social norms as well as metaphors and conceptions.

The more dogmatic legal scrutiny, when studying the legal imperatives, can rewardingly be complemented by a norm-theoretical approach in order to bring knowledge about the legal norms (Hydén 2002; Svensson 2008). This approach can be further developed, it is argued here, in its combination with metaphor and what I choose to call conception theory. This is to say that dogmatic legal analysis offers some important knowledge, but not all. It offers knowledge of the legal system, but nothing on the system's detailed relationship to social norms nor the more conceptual and language-based frameworks it supports. This means that a norm-pluralistic approach is employed in which law is defined somewhat narrowly as the formalized rules that have been expressed in statutes, laws and legal practice and whose interpretation can be guided by legislative history, in some legal cultures, and legal doctrine. I have proposed the metaphor as an important object of study in order to analytically demonstrate conceptual frames, skeumorph processes and hidden values in law. These subsurface ideational structures have been generally termed as conceptions.

This means that, in order to study legal processes of change as well as being able to compare legal norms to others (for example social norms) to some degree, use could be made of a dogmatic legal analysis as well as, in this case, knowledge of how to study metaphors in terms of their connection to conceptions. The importance of this metaphor-bound study of legal norms has theoretically been tied to the definition of social norms. There are different ways of researching social norms, most likely depending on how they are conceptualised and theoretically founded. Given the definition outlined in the

theoretical chapter, there is an elaborated model developed by Måns Svensson in his dissertation that has been used here (2008; see also Leo 2010 and Svensson and Larsson 2009).

## Studying law

Law, in the scholarly tradition of sociology of law, has been treated with a sort of duality of external and internal, a dogmatic and a sociological perspective (see Banakar, 2003; Cotterrell, 1998; Nelken, 1994). This dualism calls for a clarification here in order to position method choices in it, not least due to the fact that both legal and social norms as well as metaphors have been studied. In all four articles, law is present in some form. In most detail in Article III on legal path dependence, in relation to a political and media debate in Article I on societal paradigms, and as the direct foundation of an analysis of social and behavioural change in Article II (anonymisation and IPRED) and IV (IPRED and social norms). For instance, the data for the article on the path dependence of European copyright consists of legal material. Still, the method is not only traditionally legal, since a traditional legal dogmatic method could not, completely unaccompanied, connect to the theoretical standpoint of path dependence. The deductive method of lawyers and jurists means that the methodological approach of this profession is to analyse, debate, discuss and theorise law as doctrine - norms, rules, principles, concepts - and analyse the modes of their interpretation and validation (Cotterrell, 1998, p. 171). The aim of much legal scholarship is to clarify and influence legal reasoning in terms of a self-referential system rather than to further the public understanding of law, legal institutions or processes (Hillyard, 2007, p. 275).

Although it is necessary to detect and outline existing law, it is still also necessary to identify what it is that has led to its development, and searches are undertaken both within existing law and in other factors outside jurisprudence. This is the reason that the other articles, especially Article I, complements the "legal" article on path dependence (Article III). However, it is important to point out that it is imperative to be able to outline existing law, the internal perspective, when attempting to analyse it from the external perspective. Law, as perceived by courts and legislators, often needs to be depicted in order to observe the internal problems it can cause, for instance when implementing EU law in a member state, or when a court rules in a case such as the one against four men representing the file-sharing website The Pirate Bay, TPB. This case,

by the way, was not regarded as a particularly interesting case from a legal point of view by the Swedish Government's Special Commissioner for the revision of copyright law in Sweden, Jan Rosén.[22] The reason he can claim this, a claim that this thesis quite strongly argues against, is that he avoids the external perspective, the notion of how social and legal norms interact and, most importantly, the notion of the vast implications of the digitalisation of society. The problems and interesting issues that the case against TPB displays does not concern internal legal relations (although there are, in the opinion of the author, interesting issues here as well) as much as the relationship between law on one side and social structures on the other. If law is not placed in a societal context, then it may be possible to perceive, as Jan Rosén does, copyright law as internally coherent and therefore non-problematical.

### *Legal data in the thesis*

Copyright law in Sweden and Europe has been examined. This means, for the Swedish aspect the four main sources of Swedish law: (1) the law itself; (2) the legislative history (which plays a decisive role in this legal tradition); (3) court practice; and (4) doctrine (see Carlson, 2009, p 38f.; Pezcenik 1995; Zetterström, 2004, pp. 50-62). Much of the legal development on copyright in the EU member states is, however, undertaken as a result of development on the supranational level. The "hard law" of the Union is the treaties, regulations, directives, decisions and case law. In addition to these, there are other documents perceived as the "soft law" of the Union, non-binding instruments such as working papers, declarations and recommendations (Carlson, 2009, p. 96). Although it is generally the directives that are of primary interest to this thesis, other non-binding sources have been taken into account as well, such as Green Papers on copyright and different opinions from interest groups. The main purpose of directives, as we have seen, is to harmonise member state national legislation. A directive is binding on member states, but is still the member states that are to determine the most suitable means of enacting the directive within their national legal systems. This, and the fact that many provisions in directives are minimum requirements, has the effect that there is

[22] At a seminar at Stockholm University on 21 April 2009, four days after the verdict in the District Court on the TPB case.

occasionally a complex picture to paint when determining to what extent national legislation meets the requirements of a directive, and in what way.

Of the legal sources studied, the following are the most important (see Table 6.1):

| | |
|---|---|
| **National law** | The Swedish Copyright Act (1960:729). |
| **Swedish legislative history** | DS 2007:19 Civilrättsliga sanktioner på immaterialrättens område - genomförande av direktiv 2004/48/EG.; Prop 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, mm.; Prop. 2004/05:135 Utökade möjligheter att förverka utbyte av och hjälpmedel vid brott m.m; Prop. 2008/09:67 Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG; SOU 2007:76, Lagring av trafikuppgifter för brottsbekämpning. |
| **Court cases** | The Pirate Bay case[23]; The Ephone Case (Ä 2707- 09, Ö 4817-09, Court of Appeal Case ÖÄ 6091-09); Commission of the European Communities v Kingdom of Sweden[24]; The TeliaSonera Case (Ä 9211-09). |
| **European Directives** | The InfoSoc Directive; IPRED; The Data Retention Directive; The European Telecoms Reform Package. |
| **International treaties** | Berne Convention for the Protection of Literary and Artistic Works from 1886; Paris Convention for the Protection of Industrial Property of 1883; WIPO Copyright Treaty; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; TRIPS Agreement; Anti-Counterfeiting Trade Agreement (ACTA) |
| **European "soft law"** | Green Paper on Copyright in the Knowledge Economy, July 2008; Green Paper on Copyright and Related Rights in the Information Society, 27 July 1995; Opinion of the European Data Protection Supervisor on the proposal for the Data retention Directive[25]; ARTICLE 29 Data Protection Working Party, Opinion on the Data retention Directive[26]. |

**Table 6.1. Legal sources of the most importance to this study.**

[23] Case B 13301-06 in District Court 17 April 2009.
[24] Case C-341/07, [2008] OJ C171/11.
[25] Opinion of the European Data Protection Supervisor on the proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005) 438 final), [2005] OJ C298/1-12.
[26] ARTICLE 29 Data Protection Working Party, Opinion 3/2006 on the Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] 654/06/EN WP 119.

*The necessity of distance*

One risk of studying law and legal authority is probably that the researcher may become too influenced by the strength of the legal institution, in terms of language, conceptualisation and metaphor. It is important not to allow the legal institution to control the research machinery, the theory and the worldview. If it does, research findings will never be able to break loose from how reality is structured within the legal field, how reality is conceptualised, what metaphors prevail etc. As Niemi-Kiesiläinen concludes about the need to create distance from lawyers' methods of reading texts and from the fact that the "objective" and neutral style of legal texts tends to mask "their discursive and constructive nature" (2007, p. 81).

The institutional strength of law is, according to Banakar, "manifested by its professional ability to present its fragmented body, which consists of a variety of language games, in terms of a monolithic discourse centring around an esoteric body of substantive law." (Banakar, 2003, p. 142). Strongly autonomous institutions may allow their self-image to affect parties outside the actual institution, for example the law's "truth" as it is understood and presented by its "inside" participants and observers is placed above "outsider" descriptions (Banakar, 2003, p. 149). This does not necessarily correspond to, for instance, sociology's truth of the law's "truth" or what a cognitive linguistic analysis of metaphors in legal imperatives will find. This is supported by the realist approach in social sciences in the sense Sayer expresses it as "Social phenomena such as actions, texts and institutions are concept-dependant. We therefore have not only to explain their production and material effects but also to understand, read or interpret what they mean." (Sayer, 1992, p. 6, author's translation). This, actually, supports conception analysis as a means of deconstructing legally embedded metaphors.

## Studying social norms

Many of the studies that have been conducted in line with the social norm concept that has influenced research at the Department of Sociology of Law at Lund University have been mainly qualitative and based on interviews and/or questionnaires (see for example Leo, 2010; Bergman, 2009; Friberg, 2006; Hallerström 2006; Johansson 2011; Persson, 2010). However, with the definition of norms presented by Hydén and Svensson (2008) and developed in Svensson's thesis on traffic-related behaviour (2008) combined with the

quantitative method of measuring social norms developed in the latter publication, a strict comparison between norm strength is possible in various fields. Social norms have been explicitly measured by this Social Norm Strength Model, the SNS Model, and presented in Article IV by using a survey conducted before and after the implementation of IPRED in Sweden.

The methodological approach is, for several reasons, inductive. One of the classical thinkers in the sociology of law, Eugene Ehrlich, advocated an inductive research method very early on. In order to identify and study what he called "living law", attention should be paid to concrete observations that stretch above and beyond the narrow studies of written law. Studies should begin from below and build—induce—upwards. Jurists are often said to operate in the other direction, they deduce "truth" out of law, or abstract specific relevant material out of a larger collection of data.

### *Respondent selection and processing of data*

The method used for the norm study in presented in Article IV and on online anonymisation presented in Article II, is well described in each corresponding article and therefore needs no repetition here. However, the extent to which the methodology assists in answering the research questions, as well as the strengths and pitfalls that are not discussed in the articles, is addressed here.

### *The SNS Model*

Regarding the measurement of social norm strength, SNS, the calculations were based on survey questions that asked respondents to evaluate different relationships surrounding specific individuals in their environment (see Svensson, 2008; Svensson & Larsson, 2009). The SNS Model is based on two questions put to the respondents who took part in the study:

1. To what extent do the following people believe you should not download copyright-protected movies and music from the Internet?
2. To what extent do you consider X's opinion of file sharing to be important when you choose whether or not to download copyright-protected files?

Nine normative referents of potential importance to copyright law compliance have been identified during research preparations:

(a) Mother;
(b) Father;
(c) Other close relatives;
(d) Partner;
(e) Friends;
(f) Internet acquaintances;
(g) Teacher/boss;
(h) Neighbours;
(i) Casual acquaintances.

With respect to each of these nine referents, two aspects were assessed: normative belief strength and the motivation to comply with respective normative belief. The results of the first question were rated on a seven-point scale (*X doesn't mind /it is very important to X*) to measure normative belief strength. To assess motivation to comply, respondents rated, on a similar seven-point scale (*it is not important to me/it is very important to me*) their response to the second question.

### *Balancing self-evaluation*

The answers were compiled for each respondent and each coefficient and balanced in a calculation in order to reach the average normative belief strength on one side and the degree of influence that each respective referent exerts on the respondent's decision–making, regarding the respondent's choice whether or not to break the rules and file share, on the other. In short, on one side you get "how wrong they think it is" (normative belief strength) and on the other you get "how much they affect you" (motivation to comply). The explicit steps in this method can be found in Svensson (2008), Svensson and Larsson (2009) and to some extent in Article IV.

At this point it is time to weigh the normative belief strength against the motivation to comply. The first step in this process is to multiply the normative belief strength of each referent by the respondent's motivation to comply expressed as a quota of maximum (motivation for) compliance. The results are reported for each referent. The value indicates the degree of influence that each referent exerts on the respondent's decision–making, regarding the respondent's choice whether or not to break the rules and file share.

The respective referent's degree of influence is then weighed together for a cumulative influence of norms. Calculating the average strength of each referent cannot do this, because it would lead to the erroneous assumption that a low

value for "casual acquaintances" would weigh as heavily in decision-making as a high value for "mother". This would be unreasonable, which is obvious if considering that the respondent may indicate that they do not care at all about the viewpoint of "casual acquaintances". In that case, a low value of degree of influence could strongly influence the mean value, despite respondents indicating that they do not care about the viewpoint of "casual acquaintances". Consequently it is necessary to weigh each referent's quota of the cumulative influences on norms, from the position of each respective referent's specific degree of influence. This is done by multiplying the degree of motivation to comply (a value between 1 and 7) for each referent, by the degree of influence that the referent exerts on respondent decision-making. This is a way to use the respondents' assessment of their motivation to comply with each surrounding person's expectations. The values are reported for each referent and summarised. The motivation to comply with referent expectations is then summarised and reported.

The capacity of the norm to influence behaviour on a scale from 1-7 is then quantified by dividing the aggregate weighted referent quota, by the sum of respondent motivation to comply to influence from the respective referent. The value states the norm's capacity to influence the respondent's behaviour (on a scale of 1-7), regarding rule compliance in relation to laws on file sharing.

Each survey rated both normative belief strength and motivation to comply with the respective normative belief for each of the nine normative referents. Hence, it was possible to calculate the mean (among all respondents) normative belief strength for each referent, and in the same way, the mean motivation to comply. In order to translate this data into general social norm strength on a seven-point scale, they were processed in accordance with the SNS Model, as described (see also Svensson, 2008; Svensson & Larsson, 2009).

### *Strengths and weaknesses of the SNS Model*

An absolute strength of the SNS Model is its quantitativeness, which means that norm strength becomes comparable, both to later studies of the same norms as well as the strength of norms in other fields. Self-evaluation is included in the balancing of the model, meaning that respondents also state who in their surrounding environment actually is important for their behaviour. Of course, the possible downside could be found in the fact that the respondents may not be fully aware of the influence someone actually has, but this is probably a less significant downside. Another issue regards not the SNS

Model explicitly but the size of the sample. Who can approximately thousand kids between fifteen and twenty-five years-of-age really speak for? For several reasons, the social norm strength regarding copyright in an online context probably depends on Internet access, and the accessibility of this access. As mentioned, Sweden is a connected nation, more than 85 per cent of the population over 16 years of age have an Internet connection at home, and for most of them that means broadband (Findahl, 2010). Consequently it is held likely that the study applies best to people in an environment of similar connectivity and access to Internet in everyday use.

However, the SNS Model is probably best combined with a more qualitative approach if seeking to understand why social norm strength is as it is. This is also why, during the course of researching this thesis, the study was expanded from the quantitative SNS Model into both an analysis of the path dependence and lock-in effects of legal development, to studying the practical consequences related to online traceability of the implementation of copyright enforcement legislation, as well as analysing the legislation and the social norm from their metaphorical construction and conceptual framing.

## Studying metaphors in order to reveal conceptions

When it comes to studying metaphors and their connection to conceptions, much of the answer can be found in the theoretical outlook. The method of choosing relevant metaphors and analysing them gives, according to the Hungarian cognitive linguist Kövecses, the potential to "see to what extent and with which content the metaphors contribute to the conceptualization of abstract concepts, as well as their cognitive representation." (2008, p. 173). Given that metaphors have such a profound place in human thinking and communication, which is held for a fact by an increasing number of cognitive scientists and cognitive linguists (Kövecses, 2010), the metaphors themselves are not that hard to find, once you look for them. It is finding *the important metaphors* that is the more delicate task, those that actually reveal underlying conceptions of significance.

Metaphors are fairly visible, at least once attention is directed towards them, in contrast to their everyday use. It will then be possible to locate the "source domain" in legal language in order to describe the "target domain", and hence the metaphorical process, the skeumorphism, what has changed under the surface manifestation, so to speak. It is then the connection to the

conception is made; the sub-surface structure and the patterns spreading on a conceptual metaphor level, which requires more of a corroborating interplay between theory and method in order to reveal the significance of the chosen metaphor. This method does not correspond to how many linguists work, i.e. in a bottom-up approach that includes large structured sets of texts—corpora (Kövecses, 2008, pp. 168-170). If this were applied and a study were made of the use of metaphors in everyday language, in order to map out their meaning in communicative situations, the metaphors from a bigger body of empirical data would somehow have to be recorded, or measured and then interpreted.

The first approach, the one used here, is a top-down approach where metaphors are chosen based on their significance and the extent to which they matter in the given context. This is following a cognitive linguistic approach where researchers like Kövecses work in the tradition of Lakoff and Johnson. Law professor Anthony Amsterdam and the cognitive psychologist Jerome Bruner state in *Minding the Law* that:

> "[p]erhaps the most powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way" (Amsterdam & Bruner, 2000, p. 4).

By breaking the metaphor out of the legal formulation, it is possible to shine new light on what has become so common that we fail to see its real implications, which is the role of recontextualisation in terms of connection to a conception.

The choice of metaphors to analyse in copyright has been made in a sort of dialectic manner: some of the implications of the metaphors focused on can already be sensed, the significance of the underlying conceptions are not completely hidden at this stage. Still the analytical reconstruction of the conception must continuously reassure that the chosen metaphor speaks for the conception and is relevant to the search. If not, the choice of metaphor for study must be revised.

### *Choosing metaphors by their influence*

The degree of influence has guided the choice of the metaphors analysed. In a way this is similar to how the discourse researcher Stephanie Taylor argues for the importance of selecting highly specific documents for discourse analysis based on their powerful origin, on what they influence. The links of influence are, so to speak, what has "guided my gaze" (Taylor, 2001). The most

challenged metaphors are the goal, those that rely on conceptions that are likely to have been more challenged than others in an analogue-digital progression. The fact that the metaphors (or some of them) are present as a core part of an almost global copyright regulation constitutes what Lakoff describes as the conceptual mapping having become "conventionalised" (Lakoff 1986). It has therefore become, or perhaps rather *been,* a part of our "normal autonomic way of understanding experience" (Lakoff 1986, p. 222). It is this, it is argued, autonomic way of understanding experience that is challenged when it comes to key areas of copyright regulation in a digital society.

As shown by the metaphor cluster model above (figure 5.2), metaphors that are not explicitly found in law can be of relevance to a conceptual analysis. This is the reason Article I analyses not only "copy", which is an explicit law term, but also "piracy" and "theft" (which is a legal concept, but not in copyright law). Since law often needs to be metaphorically objectified, as Stephen Winter has shown us (2001), for us to be able to talk (and think) about law, this reification is of particular interest when it comes to property rights that regulate immaterial "things".

### *Targeted key metaphors and core conceptions*

Central to the analysis of copyright is what is described as the *copy* metaphor. This is central due to the fact that it reveals the conception of content as a physical object, which frames discussions of control over distribution and reproduction, conceptions of *property*, infringement as *trespassing* or *piracy*, or *theft* and similar metaphors, which is linked to the conceptualisation of copyright as a system of incentives. The analysis of the conception of copyright shows it as being full of holes, via Jessica Litman (2001), the creator as a solitary genius or as part of a "cultural web". Additionally, the issue of "orphan works" in copyright is analysed.

### *Metaphor in legal v. social norms*

Since different types of norms may have different types of representation, it is necessary to distinguish the methodological implications this fact has for the study of metaphors connected to it. According to Kövecses there are three distinguishable levels of existence of metaphors when following the cognitive linguistic approach: the supraindividual, the individual, and the subindividual (see Kövecses, 2008, p. 169):

> "At the supraindividual level, we find decontextualized metaphorical linguistic expressions (e.g., in dictionaries) on the basis of which we can suggest certain conceptual metaphors. At the individual level, specific speakers use specific metaphorical linguistic expressions in specific communicative situations in relation to particular target concepts. The subindividual level is the one where the metaphors receive their motivation, that is, the metaphors have a bodily and/or cultural basis."

Consequently, regarding metaphors found in explicit law text, especially those describing a central conception for the entire legislative field, it is perhaps best to study on a supraindividual level. In the case of this study, the degree of importance a particular metaphor has for the copyright system is important. For example, from many perspectives, the "copy" has a central position in copyright law.[27] The global complex of copyright is formulated in a similar manner around the protection of the copy. If then, this central concept, is both challenged and changed by the digitalisation of society we have a clear, skeumorph metaphor that is important to analyse and connect to its underlying conception, for it may bear explanatory value for the problems that have emerged in the enforcement and legitimacy of the copyright regime in times of digitalisation.

According to Kövecses (2008), the main critique of the top-down study version of metaphor studies regards the lack of knowledge of the extent the chosen metaphors actually represent a large corpus or pattern of behaviour or external structure. In the case of legally embedded metaphors this is, however, mostly not a viable critique to the extent the researcher can show the impact and importance of the actual metaphor or metaphorical pattern. This is also why Kövecses responds to this critique not by placing the top-down methodology of conceptual metaphor studies on the "supraindividual" level but on an "individual" level. This is where he sees the opportunities for more "intuitive" methodology, although stating that:

[27] For example control over copies in the Swedish Copyright Act is tied to "exemplarframställning", see Section 2 of the act (or Johansson 2010; Larsson 2010).

> "…the goals of the two levels complement each other, in that the metaphors suggested on an intuitive basis may prove to be useful in organizing the systematically identified linguistic metaphors into "larger" conceptual metaphors used at the individual level and, also, because the systematically identified linguistic metaphors in real discourse may lead to the discovery of so far unidentified conceptual metaphors." (Kövecses 2008, pp. 169-170).

This leads to the implication of connecting metaphor studies to the studies of norms in general, not only legal norms. For the study of metaphors is not exclusively tied to legal norms but may also be carried out in relation to social norms as well. This is perhaps especially interesting in the case of outlining the conceptions that participate in constructing the imperative part of social norms. One major methodological difference between studying the imperative essence of *legal* versus *social* norms is found in that the formalised character of the legal norm creates more indisputably certain and fixed metaphors, and hence "frozen" conceptions, whereas the metaphors and conceptions tied to, or underlying, the imperative essence of social norms require another type of empirical evidence of diffusion and embeddedness in people's minds and actions. One difference then, in terms of the cognitive linguistic approach, is that where legal norms and their formulated imperatives can be studied in what Kövecses calls the "supraindividual level" social norms need to be systematically identified on the "individual level". This also means that when they are to be formulated, they are more dependent on the interpretation of the specific researcher, especially when regarding social norms that have no pre-formulated legal norm to relate to.

The focus in this thesis, however, lies on the metaphors and their pattern *in law* and their underlying conceptions. Nevertheless, at the same time as the argument is for the most important metaphors to study in law, at the same time (a little less obviously) it is stated that they are important due to the fact that they are challenged by something external to law, namely the social norms corresponding to this specific legal norm.

# Part III – Results and analysis

# 7. The primary results of the articles

As indicated in the introduction to this thesis, the case of copyright can tell us about something of importance to not only IP lawyers and copyright scholars, but to anyone interested in the seemingly disparate issues of balancing public access to culture, privacy, innovation and investments in culture. The case of copyright reflects a digitalisation of many processes in society and the fact that social norms can change as a result of this digitalisation, or be somehow connected to it. The copyright case can tell us that something extremely significant has happened to the methods of distributing music, movies and other "intangible" goods that are regulated by a legislative core that, generally, was drafted in pre-digital times but amended with protectionist measures when challenged in digital times. The case can tell us some of the challenges that law faces when confronted with these changed conditions for how we can communicate. Let us first address the question of the extent to which this is a fact, and then the question of why.

A brief summary only will be given of what the articles provide in terms of answering the research questions of this thesis, formulated for the purpose of examining legal and social change connected to digitalisation. This quite naturally includes consequences that can be observed as arising from the case chosen for study in terms of copyright regulatory trend in relation to the social norms of unauthorised file sharing and the consequences of new legislation seeking to intervene with the social practices that have developed due to the Internet. The latter leads to the primary contribution this analysis brings in addition to the articles of this compilation thesis, namely an elaborated conception and metaphor analysis on the "imperatives" of the legal norm in relation to the social norm. The last part of this chapter of results focuses on the metaphors analysed in Article I, which then leads to the next chapter where the analysis is elaborated further in terms of conceptions in copyright. For it is argued here that it is in the understanding of the role of the metaphors and the underlying conceptual structures of both law and socially controlled behaviour

that in this case can explain parts of the perceived illegitimacy of (some) copyright regulation.

## The European regulatory trend in copyright when facing the digital challenge

In order to reach the detailed analysis that forms the main argument of the thesis, the one concerning metaphors and conceptions in law and norms, a brief summary of the facts that have led to this argument is necessary. The analysis of European copyright responds to the first research question. Part of what makes the gap between copyright and social norms such an issue of interest arises from fact that regulation is so homogenously formulated globally. It is a legal stronghold, harmonised through international treaties as well as European regulatory efforts. Its formulations and founding conceptions permeate into the contexts of sometimes as remotely initiated legislative effort such as the fight against terrorism (Data Retention Directive 2006/24/EC), telecom market regulation (Telecom Reforms Package) and, not least, into secretive international trade negotiations (ACTA). This strong path dependence of copyright law is what makes its social illegitimacy so extraordinarily intriguing. European copyright is path dependent to the extent that it:

- Colonises other legislative areas, creating hierarchies in the rights connected to IP, property and consumer privacy.
- Increasingly targets the ISPs as being accountable for the data that passes through their infrastructure.
- Appeals to tradition to impede change in regulatory models by privileging the status quo in terms of increased protection of copyrights. "The path" serves as a strong argument for those who benefit from its preservation.
- Is likely to contribute to lock-in effects through its formulations and metaphors of how copyright is constructed and conceptualised.

## The social norms corresponding to copyright

The second research question of the thesis refers to the strength or weakness of social norms supporting copyright online. The study conducted for Article IV, clearly reveals that the influence of the implementation of IPRED in Sweden on social norms relating to illegal file sharing is minimal. One of the points of the study was to provide information as to whether legislators have been able to narrow the gap between legal and social norms through a variety of measures. Regarding the results of the study from their perspective, they are pessimistic. Despite intense efforts by the government, during the six-month duration of the survey period after the implementation of the law, social support for copyright with respect to file sharing was still at a record low. The young people in the study did not feel any significant social pressure to abstain from file sharing, either from the adult world or from their peers.

- The social norm pressure of the age group studied regarding the extent to which illegal file sharing is socially acceptable remained low and relatively unchanged after IPRED was implemented in Sweden as compared to before.
- File sharing behaviour, on the other hand, changed. The decrease in actual file sharing was obvious as a result of the implementation of IPRED in Sweden.
- One direct consequence of implementing legislation that lacks the broad support of social norms in society is the corresponding counter-measures that are dysfunctional for the law. Enhanced non-traceability in terms of actively sought encrypted online anonymity is such a consequence.
- The generativity of the online environment contributes to the altered behavioural patterns of file sharers. They continue to share files, but under less detectable circumstances.

As mentioned above, one strength of the SNS Model for measuring norm strength used in Article IV is the quantification of the data. However, the SNS Model does fail to provide a more in-depth explanation as to why the social norm strength is as it is. In Article IV, consequently, it is stated that more qualitative studies are necessary to analyse the underlying reasons for the gap between the social and the legal in the field of copyright and the behaviour it

regulates. This thesis offers more of this wider understanding of the underlying reasons for this gap. It does so by expanding the study from the quantitative SNS Model into an analysis of the path dependence and the lock-in effects of the legal development, a study of the practical consequences related to online traceability of the implementation of copyright enforcement legislation and an analysis of the legislation and the social norm from its metaphorical construction and conceptual framing.

Since parts of the understanding of the consequences of this gap relate to either how the conceptions frozen in law counter those that are not, or relate to questions that it is necessary to discuss on a more societal level, the first focus will be on the metaphors and conceptions before proceeding with the second - all in line with the third research question of the thesis.

## Copyright and its metaphors

An argument developed in this thesis and also found in Article I is that metaphors can reveal the conceptions that they are controlled by. This means that there can be patterns of metaphors all pointing towards the same conception. In Article I it is argued that it is not only the explicit legal metaphors that are therefore of interest for study, by connection related metaphors may be of interest too, due to the fact that they stem from the same conception. This is elaborated upon in the thesis' theoretical section in terms of a model of metaphor clusters. In most jurisdictions, copyright owners have the exclusive right to exercise control over copying and other exploitation of the works. The international treaties and directives focus the control over reproduction of the protected creation. For instance, the Berne convention states that authors of literary and artistic works shall have "the exclusive right of authorising the reproduction" (Article 9); the Infosoc Directive speaks of "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction" (article 2); and TRIPS states "the right to authorize or prohibit the direct or indirect reproduction" (Art 14, section 2). If we then try to clarify what the proper metaphor to analyse then should be, this reproduction means the making of a copy, as in *copy*right, which therefore is a central theme in the global construction that copyright law represents. The Rome convention provides us with an explicit definition of "reproduction" in terms of that it "means the making of a copy or copies of a fixation" (Article 3 (e)). Further, Infosoc speaks of "the rightholder of any copyright or any right

related to copyright". This motivates the analysis of "the copy" as the central metaphor in copyright, a metaphor in the regulation connected to a control over reproduction of copies. Results of Article I in this thesis that here will be related to "copies" includes the analysis of the "theft" metaphor in relation to copyright infringement, as well as "piracy". In the analysis section these are once again discussed in terms of the conception they reveal.

### *Reproduction and distribution of copies*

Just as digital imagery in relation to traditional photography provides an arena for exploring when conceptual expansion becomes deceptive (Cass & Lauer, 2004), the focus on "copies" in copyright in a digitised world performs this function equally well (see Larsson, 2009; 2010; see Lessig on the problem of illegalised copies, 2008). As elaborated in Article I, the word "copy" elicits the act of replicating an original, which can be described as an action better situated in an analogue setting. The idea that each copy is valuable and should be protected comes from the idea that copying involves a cost. The Swedish term for copyright is more tied to "the originator's right" (Upphovsrätt) and is non-specific with regard to content, except to state that it is some type of right of an individual who has created something. Traditionally, the reproduction of copyrighted content was not an everyday act. Now, when it is impossible to do anything online without reproducing copyrighted content, the conception that the exact numbers of copies should be controlled and protected is less well adapted to modern societal conditions (see Lessig 2008, p. 269; Larsson 2009; compare Yar 2008, p. 611).

"A few samples", as is regulated in Swedish Copyright law, is problematic in a digitised context due to the simple fact that it makes little difference from a production cost perspective whether three or three thousand copies are made. This particular piece of legislation displays a judicially frozen conception that once made perfect sense, especially in under analogue conditions and in a tradition of avoiding regulating the private sphere. Today, however, this legislation is seen from a perspective affected by of the digital circumstances, and suddenly appears as artificially trying to uphold a state that is strangely out of date in relation to the conditions of reality. In order to illustrate some of the inconsistencies that a direct translation of the copy-metaphor creates in a digital context, some calculations on monetary value that the legally enforced model

imposes may be carried out.[28] Elsewhere it is calculated that a similar BitTorrent tracker to TPB (but not TPB) would be valued at approximately EUR 50 billion if the legally-supported model for calculation of damages by a fixed value for each copy in the first TPB case were to be followed, and approximately EUR 65 billion if the "other economic damages", the assumed lost sales, that the plaintiffs obtained were included (Larsson 2010).[29]

### *Theft*

The example of stealing/sharing can be used to illustrate a type of "battle of conceptions". What, from an analogue perspective is regarded as theft (an action with highly negative connotations) from a digital perspective regarded seen as something else, with less or no negative connotations. Normatively, it could be said that these actions are not comparable. The legal concept of theft is closely related to the conception connected to "copyright as property", and describes how the idea of property rights are formed in an analogue reality and transferred to a digital one, certain problems may occur (see Loughlan 2007 on "theft" and intellectual property). The theft-metaphor is problematic in the sense that a key element of stealing is that the one stolen from loses the object, which is not the case in file sharing since it is copied. The Swedish Penal Code expresses this as: "A person who unlawfully takes what belongs to another with intent to acquire it, shall, if the appropriation involves loss, be sentenced for theft to imprisonment for at the most two years." (Penal Code Chapter 8, Section 1, translation in Ds 1999:36). An example of the rhetoric on theft as well as the ISPs being seen as having a key role in copyright enforcement can be found in the deal that was struck in July 2011 between a coalition of entertainment industry groups and several major US Internet providers to fight online infringement. The key idea is to notify and educate suspected copyright infringers by sending them so-called "copyright alerts". Cary Sherman of the Recording Industry Association of America (RIAA) commented the new deal by stating, "This groundbreaking agreement ushers in a new day and a fresh

[28] These calculations occur in an article published in September 2010 in the anthology *Efter The Pirate Bay* (After The Pirate Bay) (Larsson, 2010).

[29] Just to show another example, in the US in 2003, the Recording Industry Association of America, RIAA, began its lawsuit campaign against hundreds of file sharers, which sought $150,000 in damages per song, the equivalent of approximately €134,000 at the time (McLeod 2007, p. 291). Exactly how the RIAA had decided upon this sum is, however, unclear.

approach to addressing the digital theft of copyrighted works." (Wired, 7 July 2011).

The problem of arguing that file sharing is theft of course lies in the aspect of "if the appropriation involves loss". There is no loss when something is copied, or the loss is radically different from losing, say for instance your bike. The loss lies in that you are likely to lose someone as a *potential* buyer of your product. The "theft" argument is an example of how a conception tied to a traditional analogue context is transferred to a newer, digital context.

### *Piracy*

What has already been written about the obvious and figurative metaphor of "piracy" in Article I needs no repetition other than to include it as strongly related to "copyright as property". "Piracy" relates to "theft" in the same manner that it builds on the conception that copyrighted content are objects that can be removed and taken (see also Loughlan 2006, pp. 218-219). With the metaphor "piracy" however other values follow, something of rebellion and some kind of new thinking, which was attractive enough for the opposition to the pro-copyrightists to adopt it as their own. Clear examples of this with Swedish connections are Piratpartiet ["the Pirate Party"], The Pirate Bay and Piratbyrån ["the Pirate Bureau"]. Whether the publishing house Piratförlaget ["pirate publishers"] chose their name carefully in relation to these values is unclear. What is clear is that 'the pirate publishers' was the first publisher to file a request to retrieve identity information from an ISP in order to start legal proceedings against alleged violators of their copyright when IPRED was implemented in Sweden (known as the *Ephone Case*, Ä 2707-09). It is this case that, after appeal, the Supreme Court decided to ask for a preliminary ruling by the European Court of Justice on the relationship between the Data Retention Directive that Sweden still has to implement and IPRED that has been implemented (Supreme Court Case no. Ö 4817-09, Court of Appeal Case no. ÖÄ 6091-09).

From a transitional perspective, this term will likely be functional and meaningful for the brief period of time when file sharing represents something rebellious or otherwise deviant from a widespread and accepted value system (including one supported by law). If the flows of Internet become the defining paradigm, file-sharing is not likely to continue to be regarded as rebellious or deviant, and will therefore no longer fit well with the "piracy" metaphor.

A discovery about the piracy metaphor that Litman makes is that the definition of piracy has changed over the relatively few years that it has been used to describe a copying activity. Piracy used to describe people who made and sold large numbers of counterfeit copies. Today the metaphor is used to describe any activity that involves some kind of unauthorised copying. As Litman puts it, not all of this is illegal, claiming that "the content industry calls some behavior piracy despite the fact that it is unquestionably legal" (Litman 2001, p. 85). It is a sign of how even metaphors can be socially renegotiated and expanded, and how this expansion can be affected by power structures at play.

# 8. Conceptions in Copyright

As a direct consequence of how copyright is conceptualised, the bearing metaphors that are used to talk and think about copyright will seem meaningful or not. Litman further emphasises the importance of how copyright is conceptualised:

> "When you conceptualize the law as a balance between copyright owners and the public, you set up a particular dichotomy—some would argue, a false dichotomy—that constrains the choices you are likely to make. If copyright law is a bargain between authors and the public, then we might ask what the public is getting from the bargain. If copyright is about a balance between owner's control of the exploitation of their works and the robust health of the public domain, one might ask whether the system strikes the appropriate balance." (Litman 2001, p. 79).

The point here is that, depending on how copyright is conceptualised, the debates, the arguments and regulatory efforts will be constrained within the logic walls of the leading conception. Remember Layoff's "frames trump facts" (Lakoff, 2005). The conceptual frames that copyright is debated over, regulated as a result of, will control its development. When the leading conception of copyright changed from a balance of mutual interest between creators and the public to a system focused mainly on the rights of creators, the remedy to this (newfound) lack of control would be more enforcement, more protection and more criminalisation of actions regarding unlawful distribution of content in order to increase creativity in society.

The origin and growth of copyright as a legal concept is intertwined with technical development in regards to the conditions for storing and distributing the media created; the melody that was written and recorded, the book that was printed, the photograph, and so on. If music is the focus, it is possible to observe how copyright and technology have developed side by side. But also, which is interesting to note, how creativity itself is influenced by the preconditions of technology—and of law.

One, often mentioned, purpose of copyright is the creation and development of culture (in the case of Swedish law, the legislative history of the Swedish Copyright Act states this, SOU 1956:25, p. 487). The law professor Jessica Litman describes, in general, the purpose of copyright:

> "A copyright system is designed to produce an ecology that nurtures the creation, dissemination and enjoyment of works of authorship. When it works well, it encourages creators to generate new works, assists intermediaries in disseminating them widely, and supports readers, listeners, and viewers in enjoying them. If the system poses difficult entry barriers to creators, imposes difficult impediments on intermediaries, or inflicts burdensome conditions and hurdles on readers, viewers, and listeners, then the system fails to achieve at least some of its purposes." (Litman, 2010, p. 5).

When Litman chooses the words "creation", "dissemination" and "enjoyment" to describe the purpose of a copyright system, she deliberately avoids the legal terms that could risk framing the description. She delivers the final stroke when concluding, that "The current U.S. copyright statute is flawed in all three respects." (Litman, 2010, p. 6).

However, it is probably not the exact technicalities of law that people in general debate, but the general principles or underlying conceptions that govern the exact legal formulations (see, for instance, Litman 1991). There are likely a few key conceptions—deliberate or not—that have governed the choices of metaphors to be expressed in an elaborated scheme of exact technicalities. This way copyright law can be reduced or deconstructed in the sense that it is the important key metaphors and key conceptions that need to be analysed. As is stated in Article I:

> "The Swedish Copyright Act, as likely most copyright acts, is a complex set of rules that is a patchwork of amendments from an early draft. It is not all these technicalities of the actual law that people argue and debate or think of when they think of copyright, but rather a few principles or conceptions that they mean the law should be based upon or not. These conceptions are often expressed through, or labelled by, various metaphors that do not exactly describe what they are used for, but to a lesser or higher degree are functional for the phenomena they are intended to represent." (Larsson & Hydén 2010, p. 198).

The study of metaphors in the cognitive sciences has led to expanded knowledge on the vital role of metaphors in our minds, thinking and, hence,

actions. All of which, this thesis argues, has become particularly interesting in the days of digitalisation.

## The skeumorph transition of copyright

Whenever metaphors serve as conceptual bridges between one technology and another it must be considered whether the norms that regulated the former phenomenon, which lends its name, can also stain the new phenomenon. Cass and Lauer (2004) give the example of how the abstract and new digitalised environment naturally requires concepts. Many of these where brought in from somewhat similar, but not identical, activities in the non-digital world. This metaphorical transition is likely often neglected in everyday life. And, no matter if we were able to consciously detect the metaphors, the associations that are made instantly does not prioritise non-metaphors, as Glucksberg has shown (2008).

| **Source Domain (r1)** | | **Target Domain (skeumorphs) (r2)** |
|---|---|---|
| ANALOGUE | | DIGITAL |
| mail | → | e-mail |
| trash can (to throw garbage in) | → | trash can (file deletion) |
| a copy (a record, a tape etc.) | → | a copy (.mp3, .jpg, .avi etc.) |
| theft (removing objects) | → | theft (copying digi. files) |
| chat (casual conversation) | → | chat (digi. instant messaging) |

The problem that emerges is then that whatever restraints and opportunities formed the characteristics of the source domain; they may not be the same in the target domain. In fact, the differences may be major. This is, as the third row of examples from the top might indicate, also applicable to copyright law and the objects it seeks to regulate.

Before the days of digitalised content, copyright law regulated the reproduction and rights over distribution of physical copies. That means that when a book was printed, in all the aspects of printing a book with covers, binding, ink, glue, and distributed without the authorisation of the copyright holder, this action could be judged as a violation of the rights the rights-holder receives from the law. The same applies if someone pressed vinyl records and distributed the music pressed into the plastic tracks. Today, the same regulations and the same legal concepts also regulate digitalised content.

**COPY**

| | ANALOGUE | | DIGITAL |
|---|---|---|---|
| "Album/songs" | Vinyl records, cassettes | → | .mp3, .wav etc. |
| "Album" | CD | → | .mp3, .wav etc. |
| "Book" | Print book | → | .pdf, DjVu, etc. |
| "film/video" | VHS | → | .mp4, .avi etc. |
| "picture" | Photographic pictures | → | .jpg, .gif, etc. |

This means that vital parts of the regulation of copyright have become metaphorical, or more metaphorical, regulating skeumorphs of what they were originally made to regulate. A central part of copyright is the regulation of copies of works, the right to control reproduction and distribution.

## Copyrighted content as tangible and material objects

As law professor and metaphor enthusiast Stephen Winter explains, reification—the metaphorical making of abstracts into things—is a metaphorical process of great importance to law. For instance, Winter claims, that it is not possible to talk about law without the metaphor of "object" (Winter 2001, p. 334). For a law to be broken, we must first conceptualise it as a thing that can be "broken". It must first be seen as an object that a criminal can "take into his own hands". In short, there is no law without this reification (Winter 2001, p. 334). This means that law in general seems to need metaphors of objectification, as well as copyright law in particular. In fact, much in the digital domain need skeumorphs or metaphors to be talked about or even thought of.

With the material objectification of copyrighted content follows the meaningfulness of metaphors that are dependent on this conception. From this conception, it is argued, follows a pattern of metaphors of which the metaphor of copies is central. It asserts that the content can be replicated in exact alike packages, copies, originating from an original source. These copies can then be owned, replicated, stolen and pirated, which in other words means that they can be clustered in according to a certain pattern that collectively describes the underlying conception. Loughlan speaks of "metaphor clusters" in intellectual property and analyses several clusters identified:

> "The first metaphor cluster draws upon some highly negative images of lawlessness, and violent, predatory behaviour (pirates, predators), exercised against helpless victims, or of a creature eating away at and undermining the health and well-being of innocent victims (parasites) or a thief who by stealth removes what is not his or hers from an innocent owner (poachers) or a person riding for free while others must pay (free-riders). These metaphors occur both by themselves and, frequently, together, compounding the negative effect of each metaphor."(Loughlan 2006, p. 217).

She does not term the clusters in any more distinct manner or interpret them in terms of conceptions, but the identification is nonetheless very much in line with the argument in this thesis.

### *Metaphor clusters of property*

The above-mentioned metaphor of piracy theft in a copyright context very much relates to common ideas of (non-intellectual) property. Bill D. Herman (2008) has analysed what he calls the metaphor of COPYRIGHT IS PROPERTY and hence the loan to the copyright debate of rights-based characteristics of the analogue, physical and culturally well-founded ownership, especially in real estate (see also Patry 2009, Chapter 6; and Kembrew McLeod, whom speaks of a "simulation of property", 2007, p. 275). The consequence of the rhetorical use of this metaphor is that it becomes natural to talk about someone "trespassing" i.e. hacking technical barriers, and "stealing" in the sense that they are copying, or sharing, computer files. Herman (2008) shows that the property metaphor dominates the general mental image of copyright, and therefore much of the debate and sometimes even the thinkers who seek to re-conceptualise the problems that digital content offers. Metaphors are persuasive tools to simplify complex issues, resulting in a pedagogical and rhetorical advantage (see Yar 2008) for those who propagate the conceptual links to the ownership of physical things. This, in turn, preserves the idea of copies, but also gives a similar rhetorical advantage to frame debates in terms of "theft", "pirates", "parasites", "trespassing", etc. That is, actions based on an analogue life of physical objects but as metaphorically and skeumorphically transferred in order to define the new type of actions within the digital.

As mentioned, the clusters of metaphors, of which one or a few are part of law, forces non-legal metaphors to take part in supporting the legal ones. One way to graphically describe this is through what is here termed the cluster model of metaphors.

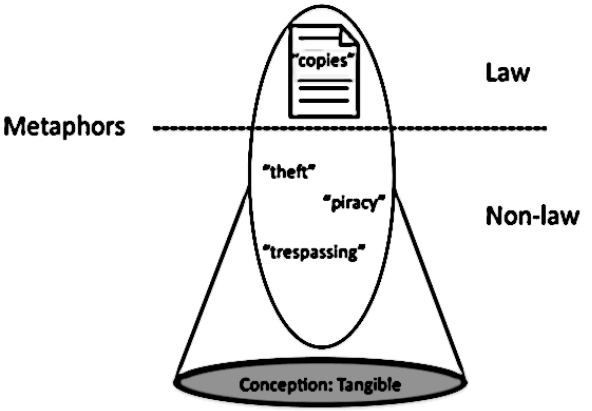


**Figure 8.1: The property cluster of tangible goods.**

It is because they take part in the same conceptual pattern, based on the same conception, that one metaphor may provide meaning to others. If the legal metaphors have been accepted, it is also likely that the related metaphors outside law will appear just as appropriate and meaningful.

## Copyright as a "system of incentives"

The further elaboration of the reification of copyright is to close in on a conception of copyright as the incentive for creativity, where creativity is viewed as something that must be incentivized (Lundblad 2007, p. 122). Article I of this thesis brings up the example of Jessica Litman's "sleight of hand" (2001, pp. 77–88). This conception of copyright as the necessary incentive has not always been central to copyright, and it comes with some rhetorical, or rather mind-framing, consequences.

Litman argues for a "metaphorical evolution" (which could be described as a change of underlying conceptions) behind American copyright legislation during the twentieth century: from the initially less expansive conception of what rights authors and creators should have, to a more reciprocal, quid pro

quo model between creators and the public, where dangers from "over-protection ranged from modest to trivial" (2006, p. 79). In the 1970s, copyright law began to be perceived as a construct that was full of holes, which was satisfactory at the time, as it was conceptualised as that the interests of owners of particular works were potentially in tension with the interests of the public, including the authors of the future. This means, according to Litman, "the theory of the system was to adjust that balance so that each of the two sides got at least as much as it needed." (Litman 2001, p 79). Litman however argues that the bargaining "conception" has gradually been replaced in favour of a model drawn from an economic analysis of law, which characterises copyright as a system of incentives. It could be said that this construction that was "full of holes" to an increasing extent became viewed as something that had to be "mended". She further argues that the success of this model lies in its simplicity, as it posits a direct relationship between the extent of copyright protection and the amount of authorship produced and distributed:

> "Any increase in the scope or subject matter or duration of copyright will cause an increase in authorship; any reduction will cause a reduction." (2001, p. 80).[30]

A consequence of conceptualising copyright as a "system of incentives" is that it leads to a beneficial rhetorical position for arguing for more protection and stronger copyright enforcement. On the other hand, it can be questioned from the perspective that it does not really reflect the truth of how creativity is best stimulated—perhaps especially so in a digital context, as Lawrence Lessig has so strongly argued for (Lessig 2008).

## The solitary genius v. the principle of continuity

The following does not deal with the conception of protecting a market in terms of controlling copies but in terms of controlling derivative work. The section displays how legal protectionism feeds from a false conception of how creativity is best stimulated. The stimulation of creativity is an ever-used and

[30] There is more on the conception of copyright as an incentive for "content providers" and copyright as a means of stimulating creativity, in Lundblad (2007, pp. 122-132).

all-positive argument. Consequently most protectionist and privacy-decreasing legislation tries to tap into this argument, in order to gain legitimacy.[31]

Does creativity stem from the hard and focused work of a solitary genius or from inspired creators standing on the shoulders of the already existing culture? How new are the new melodies, movies and paintings and to what extent do they depend on what has already been made? The answer to creativity is probably a little bit of both sides, however there are important parts of how copyright is globally conceptualised, in law, that lean towards the conception of the solitary genius. This dilemma has been relevant for a far longer than the Internet has been around, but it has been further accentuated by the opportunities of digital networks and the remix culture.

In *Copyrights and Copywrongs*, Vaidhyanathan clearly displays the "principle of continuity" in terms of music production. He focuses on the American blues tradition in order to show that not only has protection of music been dependent on which part of the twentieth century the song was recorded in—blues vs. rock that used blues riffs and structure—but also to display the creative process as an intertwined culture of "lending" and being a part of a bigger inspirational structure. It may take the form of a mix focusing differently on tradition, inspiration and improvisation but it is, most importantly, a process consisting of all these factors. Singling out who has done what is not important in the blues tradition (Vaidhyanathan 2001, pp. 117-126). Patry makes a similar claim when it comes to authorship, arguing that "no author is an island" by quoting various famous writers, painters as well as judges (2009, pp. 71-75). Lessig tells the important story of Disney's and other creators' borrowing from already existing stories (2004).

A recent case displaying a legal wrestling match between creativity as a solitary act of genius and the creator as a part in a supraindividual context or culture regards J D Salinger and an unauthorised sequel to his famous novel. J D Salinger's wrote *The Catcher in the Rye* in 1951 and it became a modern classic, especially in the US. It is easy to take onboard the relatively mundane but existential struggle of Holden Caulfield, the thirteen-year-old protagonist. He seems to be in search of a purpose beyond himself. Holden Caulfield wanted to be a lifesaver, a "Catcher in the Rye" who keeps track of the children when they play in the field, close to a cliff. The author, J D Salinger, died in January 2010, 91 years old, after a half century of particularly strong avoidance

[31] See for example (3) of IPRED.

of any public context and denial of any attempts to adapt the novel to a movie or for the stage. However, during Salinger's last year a Swedish author released what could be understood to be a sort of sequel, presenting Holden Caulfield as an old man. Under the pseudonym John David California, Fredrik Colting released the book *60 Years Later: Coming through the Rye*. The book has been called fan literature and parallels can be drawn to such books and films set in the same universe such as George Lucas' Star Wars. However, Salinger was not pleased.

Salinger could not let the new book get away, no matter that it most likely would not have received any great amount of attention if he had not taken an interest in stopping it. Salinger sued Colting in the United States District Court, Southern District New York as soon as he heard about "the unauthorised sequel". In 2009 Salinger successfully won an injunction against the publication of "60 Years Later" in America. Not long after Colting's appeal and the return of the case to the District Court, Salinger passed away. In early January 2011 his estate and Colting settled out of court. Colting agreed not to publish or otherwise distribute the book in the U.S. or Canada until "The Catcher in the Rye" enters the public domain. Notably, however, Colting is free to sell the book in other international territories without fear of interference. In addition, the settlement agreement bars Colting from using the title "Coming through the Rye"; forbids him from dedicating the book to Salinger; and would prohibit Colting or any publisher of the book from referring to "The Catcher in the Rye", Salinger, the book being "banned" by Salinger, or from using the litigation to promote the book.

This raises the question of how far the authors should have control over their works. And the longer the law allows this control to stretch, the harder it is for new works that have some type of connection to earlier works to be released. How close a derivative work can be to the original is not always easily defined legally, and often up to case law to determine, along with the owner of the first work's inclination to litigate. Both law and practice look slightly different in different countries, but the question of interest here is how far the author's right to decide stretches, as well as the duration of this right to decide. These aspects reveal the underlying conceptions embedded in copyright law of how creativity is best regulated. It is difficult to escape the fact that creativity is heavily based on past experience, that ideas are context-dependent. In the Swedish legal doctrine Karnell calls it *lex continui* (1970, p.70)—the principle of continuity. This can be compared with the drafting of the Swedish

Copyright Act, which came into force in 1960. The Auktorrättskommittén noted that:

> "…also the author builds on the achievements of art and literature field, as his predecessors have done, and works in most cases along the lines of development, which could be traced in the present age." (SOU 1956:25 s 66 f.).

Another point to ponder is to what extent Salinger's own book drew inspiration from other works. It may be noted, in that the legal superstructure extends the protection of copyright, which is both a legislative and judicial practice trend, somewhere along the way the legal regulation takes a stand for the already created over the creation-to-be. Law will be a conservator rather than a stimulator. That is the core dilemma.

Let us then place this dilemma in a digital context. Lessig makes the distinction in terms of a "Read Only" ("RO"), culture and a "Read/Write" ("RW") culture, which regards the participatory possibilities of culture. The RO culture is in this sense more founded in consumption and produced by professionals, and the RW culture includes amateur creativity and performance. With these distinctions Lessig argues that the RW culture in the sense of amateur creativity has been the dominant culture until recording opportunities opened up in the twentieth century, when the "tokens of RO culture" developed (Lessig 2008, p. 29).[32] This can be compared to Vaidhyanathan's example above of the blues tradition, which in general took place in what Lessig would call a RW culture. In a remix culture where the remix itself has a value, and the excluding constraints are that the "tokens of RO culture" are not so much a part of the inspirational "flow", not part in what was "from the cotton fields" or the supraindividual pool of accessible expressions. The focus on the composition itself is something that has developed along with recording possibilities, with copyright legislation tailing behind. As Lessig explains RO culture, he states:

[32] For a text in Swedish revolving around these themes, in terms of "participation culture" and "spectator culture" (my translation), see Haggren et al. 2008. See also Söderberg 2008, p. 129-133.

> "The twentieth century was thus a time of happy competition among RO technologies. Each cycle produced a better technology; each better technology was soon bested by something else. The record faced competition from tapes and CDs; the radio, from television and VCRs; VCRs, from DVDs and the Internet." (Lessig 2008, p. 30-31).

Lessig focuses on the actual product as a physical entity, and around this forms a culture of excluded participation. The constraints of the particular object exclude the reshaping and inspirational remixing which takes part in a RO culture. Lessig sees some benefits to it:

> "RO culture had thus brought us jobs to millions. It had built superstars who spoke powerfully to millions. And it had come to define what most of us understood culture, or at least 'popular culture', to be." (Lessig 2008, p. 30-31).

However one of Lessig's main points is that the RW culture, that includes the reshaping of the actual content more freely, has revived its strengths through digital technologies. The same unrestrained reshaping culture before "the tokens of RO culture" became prevalent is now emerging and challenging the monopoly of RO culture, challenging the conceptions frozen in both metaphors in law, business structures and by excluding artefacts.

> "The natural constraints of the analog world were abolished by the birth of digital technology. What before was both impossible and illegal is now just illegal." (Lessig 2008, p 38)

Lessig touched upon this earlier (for example in Code v2.0, 2006, p. 5-6) but the main point is that now there is no "either/or", that there need not be any trade-off between the past and the future, no choice has to be made between the RO and RW cultures: they can co-exist. And one of the obstacles to negotiate before reaching this state is rooted in the formulation of copyright law. In the growth of the analogue RO culture, law was shaped under the same conditions and constraints as the culture. Then, however, it was not law that was the most important constraint or censor on remixing media, cost was.

> "Yet though this remix is not new, for most of our history it was silenced. Not by a censor, or by evil capitalists, or even by good capitalists. It was silenced because the economics of speaking in this different way made this speaking impossible, at least for most. If in 1968 you wanted to capture the latest Walter Cronkite news program and remix it with the Beatles, and then share it with your ten thousand best friends, what blocked you was not the law. What blocked you was that the production costs alone would have been in the tens of thousands of dollars." (Lessig 2008, p 83).

This means, Lessig argues, that law has now taken over the role of censorship. And he seems to regard the legal bastion as one that is not easily adaptable:

> "Digital technologies have now removed that economics censor. The ways and reach of speech are now greater. More people can use a wider set of tools to express ideas and emotions differently. More can, and so more will, at least until the law effectively blocks it." (Lessig 2008, p 83).

This means that law has become the constraint, not the artefacts. The line of argument that Lessig follows is a heavy stroke on the rhetoric of more protection by necessity leads to more creativity. William Patry shows that when the period of copyright protection in the US increased from 50 to 70 years after the death of the creator, this resulted in fewer derivative works than before (Patry 2009, pp. 62-63). Consequently this expanded protectionism can function as a disadvantage to creators as well as the public and to the benefit of the holders of copyright, sometimes long time after the actual creator has died.

Hiding behind the metaphor of the solitary genius lies a conception that can be described in terms of people reaping what they sow, that they have the right to the benefits of what they have produced, "enjoy the fruits of their labour" (Patry 2009, p. 84). Both Loughlan (2006) and Patry (2009, pp. 78-86) develop this conception or "cluster of metaphors" in terms of "the agrarian metaphor". The framing aspects of the agrarian metaphor cluster are problematic for the public interest. As Loughlan states:

> "The 'pirate-predator-parasite' and the 'agrarian' metaphor clusters are rhetorically beneficial for the producers and owners of intellectual property rights, damaging to unauthorised users of intellectual property and possibly damaging to the public interest, in that the metaphors seem to leave no rhetorical room for a public interest argument." (Loughlan 2006, p. 223).

The agrarian metaphor in intellectual property discourse highlights only the individual nature of creation, and not the creative process as taking part in a larger culture, nor the public's interest in access to music, films, books etc.

### *Orphan works*

Another conception embedded in copyright discourse regards the relationship between the creator and the created, for instance, between the author and the book. Patry describes this relationship in terms of a spread metaphor presenting the picture that the authors are parents and the books are their children (2009, pp. 69-71, 76-78). This presumed intimate relationship between the creator and the created is troublesome in relation to another conception that regards copyright as an economic commodity. This is an example of internal conceptual battles within copyright, since both these conceptions can be found within the copyright discourse, although with different implications. Copyright as an economic commodity is the most clearly regulated, it means that a copyright can be sold or licensed. This, however, to some extent competes with the other side of the regulation, the one that regards the moral rights of the creator.

The parent-child metaphor however is part of a conceptual frame that forces other associative connections follow the same metaphorical patterns or mappings. These have graver implications for how copyright is regulated: the orphan works (see, for instance, Taylor & Madison 2006; Patry 2009).[33] The orphan works, where the originator or copyright owner cannot be found, have become an increasing issue as the duration of copyright protection has been extended (it is in many places 70 years post mortem). Even though perhaps many authors fear their "childlessness" in terms of lack of inspiration, they can never adopt these orphan works. The main problem with these regulated "orphans" is that they may, in practice, be locked away from any use. Filmmakers, writers, musicians and broadcasters fear using these works, in case "the parent", the rights holder, shows up and demands their cut. Patry describes the negative side in harsher terms:

[33] In Sweden, the metaphor is often translated in the same manner to "föräldralösa verk".

> "The orphan works 'problem' is then a problem caused by the grave mistake of abolishing formalities and extending the term of copyright to obscene levels. It is a telling indication of the impoverished policy making by national legislatures that not only can they not come up with meaningful remedial legislation to deal with the results of their own mistakes in this regard, but they appear clueless that the problem is one of their own making." (Patry 2009, p. 77).

The mistake lies in the associative response to the metaphor of "orphan works" that they need to be protected from usage without the copyright owner's permission even though the creator has likely died long ago, and the formal copyright owners have long ago lost interest in the creation.

# 9. Consequences of the gap between legal and social norms

The question of consequences includes the question of when new (path dependent) law seeks to interfere with the social practices that have developed due to Internet use. The message from the social norm study in relation to the strong path dependence of copyright shows the obvious indication that a serious chasm is truly opening up between this part of the legal system and the social norms of society. Given the gap demonstrated between copyright law and social norms, there are unconsidered consequences of reinforced enforcement, so to speak; and the legal enforcement of a copyright regulation that does not correspond to social norms risks functioning as a stimulus for counter-measures. Given the generativity of the technologies of online communication in networks, as is shown for example in Article II, these counter-measures need to be elaborated upon here. They probably mean that the legal enforcement of copyright not only risks undermining public confidence in the legal system in general but will also aid in the diffusion of technological knowledge that will undermine legal enforcement in general when it comes to computer-mediated crime.

## Generativity for the committed: (encryption) code as law

The study conducted on online anonymisation presented in Article II shows that the unauthorised file sharing of copyrighted content is at least one reason for seeking stronger anonymity online. Further, as suggested in the article, the structure and organisation of file sharing is likely to be affected when the social norm does not comply with the legal norm:

> "It is likely that a core of sharers are developing, who are more inclined to pay for anonymity services due to their anticipated need for advanced protection from being caught violating copyright laws." (Larsson & Svensson 2010, p.99).

This is a response to what is regarded as a legal intervention in a behavioural practice of parties that want no intervention. However, the fact that a smaller core of file sharers avoids the enforcement of what they perceive as a wrongful law is not a majorly alarming issue. It is quite rational. It is when encryption awareness spreads that the issue becomes interestingly relevant, not only from a copyright enforcement perspective but also from a general legal enforcement perspective.

These privacy-enhancing uses of technology can be described in terms of *code as law*, which Lessig has proposed in terms of digital technology as regulatory architecture—the fact that "cyberspace is in essence a regulated space, but regulation is less visible than it is in society at large, since it hides in architecture." (Lessig 1999; 2006; see also Lundblad 2007, pp. 18-22). Encrypted enhancement of privacy then becomes an expression of regulating and taking control over your own appearance in terms of name, geo-data and whatever information the individual wishes to share, or not. It is a means of blocking greater schemes and structures—such as the law—from attempting to add identification to your online presence.

### *A pattern-changing non-solution?*

Given that the social norm of copyright protection in terms of protecting copies is weak, the response to a far-reaching and general enforcement approach is likely to not only increase the diffusion of encryption technology but also to trigger a change in behavioural patterns regarding the sharing of popular media files. As a group of French researchers have shown regarding the impact of HADOPI1 in France, the patterns of file sharing changed, which was a more important result than any decrease in actual unauthorised file sharing (Dejean et al. 2010). Their primary results included:

- Very few "pirates" have completely stopped using traditional P2P networks.
- "Pirates" are increasingly using streamed services (legal and illegal) and one-click host services, probably because they are not covered by HADOPI.
- 50 percent of legitimate consumers also share files illegally.

Consequently file-sharing habits appeared to change, not file sharing per se. This is a result also briefly touched upon in the article on anonymisation:

> "It is however also likely that a more loosely formed group of sharers will develop, who are connected to the core shares, but who are not centrally located in the sharing process. They are using other means for sharing, such as "secret" groups and trusted networks, sneakernets and One Click hosting services." (Larsson & Svensson, 2010, p. 99).

This is related to the retrospective and locked-in development of copyright, in that the gaps between legal and social norms do interfere with each other, and with consequences that are not always predictable. Not only the social will respond to the legal, but the law will also respond to the social. Given that the social norm corresponding to the parts of copyright studied in this thesis remains low, we are likely to see structural changes in the file-sharing community, for instance an increased use of one-click host services when the "traditional" BitTorrent networks are blocked or targeted by legal enforcement.

## Generativity for law enforcement: monitoring the masses

One of the main consequences of the strong path dependence of copyright depicted in the article on European copyright is that legal enforcement is also experiencing important changes when it comes to the opportunities offered by tracking our digital traces. More data is stored, the data is stored longer, and accessibility to the data is made easier for not only policing entities but also rights holders. What is anticipated, therefore, is an escalation of measures from both "sides". The active anonymisation of those infringing copyright, however, is carried out by a smaller group, whereas the surveillance-like measures prepared and implemented by legal means strike us all. As a result, the very character of what we call the Internet is changing in the same direction. As stated in Article III:

> "…the digital networks that form the "new social morphologies" impose completely new ways of legal enforcement and mass-surveillance over the multitude of habits and secrets of our everyday lives. The "long arm of the law" has acquired an extensive reach. It now has a new potential to discover and control everyday behaviour in a way that forces us to ask questions about how far we want it to extend." (Larsson 2011, p. 30).

The first thing to consider is the generativity of the Internet, not only as concerns the functions and applications that it can offer to its visitors but also to legal enforcement and supervision. The second aspect to consider is then that general changes to the structures affect everyone, while the interest of the rights holders is much more private than public. The critical eye must measure the trend by the measurement of the generality of the surveillance—and the fact that special copyright interest gains at the expense of the privacy of everyone.

The *panopticon* is a type of prison building designed by Bentham in 1785 where all parts of the prison are overseen from one point in the centre. There are, actually, a number of prisons that have been designed following this idea. Foucault developed panopticon as a metaphor for modern "disciplinary" societies and their all-encompassing tendency to observe and normalise (see Discipline and Punish, 1991). The Swedish scholars Kullenberg (2010) and Palmås (2009), inspired by the panopticon concept, develop the term *panspectrism* in relation to the increasingly networked, logged and digitalised way of life we lead and the contemporary possibilities for surveillance. Panspectrism means that the supervisor can see more than is possible in a panoptic version of surveillance. For example, Google and Facebook, Kullenberg explains, can summon data that can say things about our lives that can be hidden even to our own awareness (Kullenberg 2010, p. 53). This brings a new form of visibility, where the aggregation of our digital traces not only reveals where we move around geographically, what magazines we follow online, what we purchase through payment cards, our search trends, the words we use when we e-mail, but also can probably pin-point our interests, innermost fears and habits and structures in behaviour. We become not only recordable in terms of what we have done, but predictable in what we will do. This panspectrism is a possibility, and it is the wet dream of the policing activities of any surveillance organisation.

## Generativity for the industry: streaming in gated communities

For the sake of argument I will here roughly divide the parties involved in or affected by copyright into three categories: the artists, the industry and the consuming public. This distinction can be questioned from several perspectives, but can serve in illustrating benefits and downsides with the contemporary trend in streamed media services offered to a fixed monthly cost. Although law is a construction, parts of copyright in practice seem to have been deconstructed by the conditions of the Internet. There is however one trend that seems to reconstruct segments of the controlled reproduction of copies, which so evidently has failed the last ten years or so, via tools of the software code itself. When software code is streamlined to support an unrevised copyright, the latter may at least partly be reconstructed by what could be described as a coded "prosthesis". This prosthesis has the benefits of making the content seem more fluid and limitless when it is streamed to a fixed monthly cost, on the consumer side, and copy-based with each copy with a certain price with reference to pre-Internet, on the producer side. It can therefore create fictively gated communities in what Zittrain describes as an appliancised network (2008), where the industry as well as mainstream consumers are satisfied. The downsides, however, in addition to contributing to the conception of creativity as being a product that consumers can consume, that is upholding the dichotomy of consumer/producer, is that whatever asymmetry of power that existed before digitalisation between artists and the production industry can now be upheld also in digital times. Parts of the disruptive force that the digitalised network offered in terms of making more efficient the organisational structures of the intermediaries are hereby restrained.

# 10. A battle of conceptions in legal and social change

The legal historian Alan Watson's theory on legal change includes the notion of law as first and foremost a conservative practice. In *Society and Legal Change* (1977), Watson states that the legal system in fact is not so much about change as it is about continuity and repetition. The argument is that legal rules, particularly rules of private law, often survive for a long time for reasons that have little or nothing to do with any factors of importance to the life of the society in which the rules function. Watson's book, as Lawrence Friedman concludes in an otherwise generally critical review of it, casts doubt on theories, which suggest some kind of close or organic connection between law and society (Friedman, 1979). Now, to what extent is this relevant to an analysis of copyright?

As stated in Article IV on intellectual property law compliance in Europe "even if there are examples of such influence, it is rare that law itself can initiate significant changes in social norms". This means that influence in the other direction is more common. Even if Watson focuses on cases where this is not so, it is likely that his focus is not significant for law as a whole but for a smaller selection. Nevertheless, this minority can be of great interest and significance for the bigger system. Attempts to actively legislate in opposition to present social norms are probably hazardous, mainly from the perspective of the legitimacy of the legal system as a normative entity allowed controlling action in the first place. This is, at least, the stance in some of the literature; if law prohibits behaviour that is widely known to be common, it may lose its legitimacy or credibility (Feldman and Nadler, 2006, p. 590; Hamilton and Rytina, 1980; Polinsky and Shavell, 2000; regarding "the information society-model" of policy making, see Lundblad 2007).

Then why? What are the reasons for law to stay out of tune with major parts of society? Path dependence, with its lock-in effects, is one suggestion when it comes to European copyright. The broadened analysis into conceptions

frozen as legal metaphors is another argument in this thesis. The digitalisation of music recordings and films along with how communication is carried out questions some of the metaphors trapped in the formalised copyright law as it is globally disseminated. The living and more "fluid" conceptions and social norms change as rapid as their technological preconditions, while law in its path dependence becomes stuck in its democratic, representative democratic or, at worst, completely undemocratic processes. The formalised metaphors, protected by strong actors structurally formed in accordance with the conceptions in line with these metaphors, are kept alive in a process of international and supranational negotiations. Here, history is used as a normative statement and an argument, locking in the path of future copyright legislation.

One way to measure the strength in a regulation may be by the ambition and commitment with which it is developed or results from. The legal trend depicted in Article III shows strong ambitions behind the protection of copyright as it is currently formulated in the multitude of regulatory demands connected to a globalised system of intellectual property rights that is spread to all EU member states. The strong interconnectedness of details of regulation, spanning the globe through treaties and trade agreements, tied to EU law by its directives, and implemented as national law in the member states shows the limited room to manoeuvre enjoyed by nations in formulating copyright their own way.

The metaphors of copyright have remained the same for a long period of time, but the reality these metaphors claim to regulate has expanded. And, in the times of digitalisation, this colonisation has gained new powers. The parts of reality claimed by these metaphors suddenly gained a completely new, dematerialised dimension. Even if law can change, in a sense, even when the letter of it has not (Renner could provide an example, 1949), this flux is not pattern-free. It is clearly constrained by the metaphors once chosen. The conceptions that guided law in its early stages continue to guide it. The metaphors fixed in copyright law shape the path dependence of its development.

## The path dependence of legal development

The historical sociologist Mahoney defines path dependence in terms of "Something that occurs when a contingent historical event triggers a subsequent sequence that follows a relatively deterministic pattern." (2000, p. 535). Mahoney, who makes a good presentation of the use of path dependence theory in historical sociology, suggests a few additional criteria of which that regarding "inertia" is of particular importance here:

> "Once contingent historical events take place, path-dependent sequences are marked by relatively deterministic causal patterns or what can be thought of as 'inertia'—i.e. once processes are set into motion and begin tracking a particular outcome, these processes tend to stay in motion and continue to track this outcome." (Mahoney 2000, p. 511).

Inertia, it seems, is often a defining feature of legal change. And in times of rapid social change, law is likely to lag (see, for instance, Christensen 1997; Pound, 1910 pp. 25-26; Watson, 1977). With self-reinforcing sequences, as explained in Article III, this "inertia" involves mechanisms that reproduce a particular institutional pattern over time. With reactive sequences, by contrast "inertia" involves reaction and counter-reaction mechanisms that give an event chain an "inherent logic" in which one event leads to another event. When transferred to legal development this inertia, as mentioned above, can be regarded as a common feature. Law, it seems, often lags behind social change.

### *The lag of the law from a metaphor and conception perspective*

In this case, copyright is the conservative legal construction that bears elements that do not fit with emerging social norms of sharing content and cultural expressions in a digitalised era of networks (Boyle 2008, Jensen 2004, Larsson 2010, Lessig 2008, Litman 2001, Svensson & Larsson 2009, Vaidhyanathan 2001, Netanel 2008). These social changes are connected to a technological development that has moved behaviour into an interconnected environment, which has brought what is often termed a networking society. The dependence of the path chosen can be explained by the lock-in effects of the unavoidable use of metaphorical concepts and conceptions. Once important key conceptions are chosen in law, they can be hard to get rid of for two reasons.

Firstly, they tend to sink below the conscious level of them being metaphors and conceptions, below the conscious level of the fact that they are thought structures framing the logic of a phenomenon, making it harder to argue for solutions outside this structure or "logic". Stating this, is to say that it is something constructed in the way key conceptions of a law shape the thought structures and frame debates, and to say that we generally tend to lose sight of this, that it is in fact a construction and tend to think that it is the true and only possible way to frame the issue. It is hard to change path when locked into such thought structures.

Secondly, key conceptions create the preconditions for other players depending on the legal setting. If the legal construction is around for long enough this can form the foundation of a whole industry's organisation, the distribution of goods, the models for trade and pricing (when the market is not free), and investments in future projects. Strong industries will form strong interest groups. In addition to this, the structures for how to distribute funds in the manner established and supported by legal conceptions may also be the origin of other structures in society (organisations to collect royalties on music, STIM in Sweden, etc.) that may have a conserving effect, which leads to legal incrementalism: small changes is the only way to go for a policy maker who is stuck in a global network of regulation. As the legal realist Roscoe Pound put it, a hundred years ago:

> "[L]aw has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning. This is an inherent difficulty in legal science, and it is closely connected with an inherent difficulty in the administration of justice according to law—namely, the inevitable difference in rate of progress between law and public opinion." (Pound, 1910, pp. 25-26).

Cognitive linguistics teaches us not only that abstract concepts are largely metaphorical but that metaphor depends on a larger context. This contextuality takes part in a social world that can also be analysed. Meaning is not only built up by the kinds of bodies and social experiences we have, it is framed and constrained by the systematic nature of cognitive processes such as metaphors. This is the reason the Internet and similar technologies have such vast implications for legal imperatives. Legal imperatives need to be placed in a context of "massive cultural tableau" (Winter, 2008, p. 375) in order to be comprehensible and understandable. Legislators, too, can only act in terms of the embedded cultural understandings that enable meaning, which Winter

describes as "an important part of any statute is not made by the legislator but is contingent on the pre-existing practices that are conventional for and constitutive of that culture." (2008, p. 375). From a norm research perspective, this ties into what Hydén states that no legal regulation is stronger than the social norms it rests upon. And the further away that the legal imperative has travelled from the social norm, or perhaps vice versa, the stronger is the need for sanctions and control for the legal imperative to be followed (Hydén, 2002 p. 272). This relationship becomes far more attention-grabbing in times of social and cultural change, due to the fact that when the contextual environment is in rapid transformation, the tacit assumptions and social sedimentations that render the legal metaphors their meaning are also on the move. Consequently legal concepts can become metaphorical if their meaning expands into new areas, and the fixed conceptions that once ensured their legitimacy may seem unjust in the eyes of a reality that has moved on.

## A battle of conceptions

Parts of the conflicts emanating from the legal regulation of copyright today can be described in terms of a battle of conceptions. The analogically-based conceptions regarding the importance of the control over reproduction of copies battles with digitally based conceptions regarding flow of media where copies in themselves are not of the same importance. This leads to an interesting counter factual question of how copyright law would have been architected if media distribution had been digital from the beginning? That is, if we had skipped the step of expensive reproduction and distribution via plastic and physical artefacts, how would we have designed the legal setting that would ensure creativity in society? This question aims at unlocking conceptions that are embedded in copyright legislation that may not be in accordance with the digital practices of today. There are parts of current copyright legislation that would probably have survived and parts that would have looked very different. If, at the same time, the creators and creativity stimulation on the one hand are examined and copyright as a market security for copyright holders on the other, the discussion on copyright could become more nuanced. The much- discussed protection of rights for seventy years after the creator's death is in practice investment protection rather than ensuring creativity stimulation.

Lakoff and Johnson state that those in power are able to impose their metaphors and are thus connected to an aspect of power concerning the

metaphors that will prevail. Even though the Lakoff and Johnson research on metaphors had nothing to do with law or regulatory language (at that time), this quote may be used in this context. Law relies on metaphors and conceptions that have been previously discussed, when it comes to copyright and the various legal constructions that have, for example, been implemented within the European Union in order to enforce copyright more easily, these conceptions rely on a metaphorical use of the language that incorporate ideas of how the world is constructed as well as what the legal regulations should state. Those who control the law and the legislative process may also, to a great extent, control the conceptions and metaphors that should remain therein. This is why the battle of the Internet has, to a great extent, to do with controlling the conceptions that construct how we regulate the Internet, and controlling conceptions has to do with power.

## The slow movement of conceptions, and embodiment as an explanation for change

The main focus, from a metaphor and conception perspective, has here been on copyright law, but implicit in what drives this analysis is that the law is challenged. And just as law is not just challenged by actual behaviour or social norms, which is studied here as well, but also challenged in how reality, as it relates to copyright regulation, is conceptualised. This motivates a short note on this behalf on conceptual change and what drives it.

When it comes to changes in conceptions that can be found in society it is likely that they in most cases only change slowly. For instance, it is not probable that conceptions that have been formed during century-long processes suddenly would disappear. On the contrary, they are likely to survive also sudden changes in reality (changes in ”the base”, as Asplund would have put it, Asplund 1979, p. 163). This means that some conceptions remain with us also from ancient times, thus making it possible for us to understand at least some of the thoughts and culture that existed at those times and remain in for example texts. However, when it comes to law and the specific conceptions that construct a particular legal norm, it is a great difference between letting a conception that is, for example, ill-suited with modern conditions *regulate* society and us being able to *understand* it. That is, there are many conceptions that still are understandable, although they may not be fit to construct what is regulating society. This may depend on how well they can adapt to the new

conditions of societal change and to what extent they collide with emerging conceptions of this change.

It is the conditions of reality that has changed quite drastically, when it comes to the possible reproduction and distribution of media, but these new conditions can be conceptualised in different ways. And an important difference between law and society when it comes to conceptions has already been mentioned, and lies in the ”fixation” of conceptions in or through law. Conceptions are in a sense more “liquid” in a social context, which means that there can be a conflict in conceptions of reality between the legally embedded and the socially entrenched and distributed. The media researcher Jonas Andersson concludes in his PhD thesis on file sharing rationalities that file sharers' motives are based on a particular “ontological understanding” of digital technology and of the nature of the network (2010). Anderssons fieldwork consisted of interviews with Swedish file-sharers, with the intention of assessing the “discursive tropes” (Andersson, 2011, p.5; Andersson, 2010). How file-sharing is understood by the file-sharers aids in the legitimization of the file-sharing, even if everyone is clear with its illegality. Andersson describes this in an article on the origins and impacts of Swedish file-sharing:

> ”File-sharing – as an ongoing, never-fully-overseeable mass exchange, a superabundance that is acted out, taking place out there – is hard to bequest with political agency, or even to invoke as a subject around which politics can be formed. Hence, defining it in terms of constituting a ‘people's movement’ or ‘folk sport’ is also to formulate it as a valid collective, and to give it a rhetorically powerful, organised form (albeit perhaps only appropriated in the abstract). It allows the phenomenon to be invoked alongside the already formulated macro entities or established institutional actors of the copyright lobby, thus serving a justificatory purpose. It lends an otherwise invisible, nebulous phenomenon a legitimizing thrust; in some way sanctioning it, for example by pointing to its documented popularity and adoption among wider layers of the population, something, which further asserts its supposedly ‘unstoppable’ nature. It is also a way of branding one's own movement in market terms.” (Andersson, 2011, p. 4).

This shows how file sharing is conceptualised by (some of the) file sharers, a conceptualisation completely at odds with conceptualisations represented by copyright law. As reality changes, conceptions are likely to change as well. Consequently, depending on how the picture of the Internet and the online environment is constructed, which metaphors prevail etc. this conception is likely to adapt to it, or rather, a different conception will come into play. And,

as the digital environment actually develops, new metaphors are required and underlying conceptions can either be altered or shifted to fit the parts necessary. This is the embodiment that explains the chain between reality and conceptions. Conceptions are not free for anyone to formulate, although they probably can be influenced, nor are they in direct contact with the conditions of reality, but they are influenced by how reality is perceived, and the metaphors that are used. However, in all of this process, this shaping and reshaping of the "ontological understanding" that affects the conceptions of digital reality, the frozen conceptions embedded in copyright law remain fixated.

# 11. Conclusions

Metaphors are not only important to the law, but are also a fundamental part of it. This means that the metaphorical transformation of abstractions into things is a metaphorical process of great importance to the law in general. For instance, it is not possible to talk about law without the metaphor of "object". For a law to be broken, we must first conceptualise it as a thing that can be "broken". It must first be seen as an object that a criminal can "take into his own hands" (Winter, 2001). There seems to be no law without this reification. This means that there is a need in law in general for metaphorical objectification as well as in copyright law that regulates digital phenomena in particular. When anything in the digital domain needs skeumorphs to be talked about or even thought of, this reification of intangible goods is easily made.

The overarching research question of the thesis is expressed as: *how do legal and social norms relate to each other in terms of the conceptions from which they emanate or by which they are constructed, and what is the role played by the explicit metaphors that express these norms?* In order to bring clarity to the dynamics expressed in the question, three additionally specified research questions were formulated. The first relates to the law, that is the legal norms of copyright and their development in Europe in recent years when challenged by digitalisation within society. The second relates to the social norms corresponding to copyright. The third question relates to metaphors in copyright and the conceptions underpinning a few key metaphors as well as copyright law as a whole.

Norm theory and methodology, the version developed within sociology of law by scholars as Svensson and Hydén, has been used to study norms. The three research questions allow the outlining of a contribution to theory development in the sociology of law, in order to better understand the relationship between the law and social norms, a relationship that is illuminated by the proposed theory of conceptions and metaphors. Furthermore, the case itself has driven the research. The issue of copyright in a digital society embodies issues of extreme interest when it comes to the challenges that the

digital society brings. Therefore, the thesis to some extent contributes to an improved understanding of what the digitalisation of so many societal processes means, a challenge that can be understood in such diverse terms as collaboration, culture, generativity, sociality, anonymity, identity, privacy, societal shifts or paradigms.

## Path dependence of copyright law

The thesis analyses vital aspects of European copyright and concludes that the trend in the last few years has been strongly path dependent. Along with this path dependence it follows that its core conceptions remain unchanged, not matter how much they may be challenged in a digital context. At the same time, they have gained more powerful means of enforcement, due to the fact that copyright protection in some vital aspects is failing. This path dependence, in turn, has consequences that includes a colonisation of other legislative areas and conflicts of rights, linked to both property and consumer privacy. The trend also includes the increasing targeting of the ISPs as being accountable for the data that passes through their infrastructure. This path dependence in European copyright means that appeals to tradition in order to impede change in regulatory models, are seen as strong arguments, by privileging the status quo in terms of the increased protection of copyrights. In short, "the path" serves as a strong argument for those who benefit from its preservation. This dependency shows lock-in effects that, in part, are a result of a conceptual construction in the law that has not adjusted or adapted to conceptions that have originated from the opportunities and constraints of a digitally networked reality. The clash between these conceptualisations can likely explain aspects of the gap between the legal and the social norms relating to copyright and file sharing. The legal response to the digital challenge resulted in a repressive contemporary trend, further emphasising the gap between the legal and the social norms. Additionally, some key legal concepts have become skeumorphs, meaning that they now *mean* more than they used to mean, and thus regulate a more phenomena, than they did prior to the digitalisation of society. This means that the legal claim has widened, but the conceptualisation of why the claim should be made, inherent in the law, has remained the same.

## Social norms of copyright

For Article IV of this thesis the strength of the social norm corresponding to copyright was measure both before and after the implementation of the IP Enforcement Directive in Sweden in 1 April 2009. The study found that although unauthorised file sharing decreased to some extent, in line with the purpose of the directive, the social norm that corresponds to copyright remained weak. This suggests that compliance with a law that is based on weak social norms requires strict enforcement in order to function. The study did not measure the long-term effects of stricter enforcement, but they are an equally relevant issue. It is possible that a social norm could develop, within time, in line with the regulation, there are examples of this in other areas, but it is also possible that such a top-down approach may backfire and have consequences that prove dysfunctional not only for the law in this context hand, but also for it as a regulatory institution of society. This is also studied in Article II of this thesis, in the case of privacy-enhancing encryption technology in relation to file sharing and legal enforcement, and it is shown that a latent dysfunction of IPRED in Sweden among the high-frequency file-sharers was an increase in the use of such technology. These results, we claim, must however be seen in a grander perspective of law in relation to social norms. Online anonymity is not only about a few services being offered for an obscure and small group in the corners of society; it is often perceived as part of the "normality" of Internet behaviour. Which draw attention to a dilemma regarding the striking of a balance between law enforcement and public trust in the system: governments need to choose their battles carefully, for fighting socially accepted behaviour may actually hinder the fight against socially non-accepted behaviour. There is much to be done as regards the possible reasons for changes in social norms, but the Social Norm Strength Model utilised in Article IV is one way to quantify norm strength and to quantitatively state the changes that occur. This is, therefore, an important tool.

## Copyright and its metaphors

One argument in this thesis is that metaphors can reveal the conceptions that control them. This means that there may be patterns of metaphors all pointing towards the same conception. A few of these metaphors are analysed in the thesis. It is not only the explicit legal metaphors that are thus of interest for study, and by extension, related metaphors may also be so, as they stem from the same conception. Copyright regulation throughout the world focuses on the control and reproduction of *copies*; a concept which, it is argued here, has become (even more) metaphorical in digital society. The word "copy" elicits the act of replicating an original, which can be described as an action better situated within an analogue setting. Furthermore, the idea that each copy is valuable and should be protected stems from the idea that copying involves a cost. When it is not feasible to do anything online without reproducing copyrighted content, the conception that the exact numbers of copies should be controlled and protected is less well adapted to modern societal conditions. This is central, because it reveals the conception of content as a physical and tangible object, which frames discussions of control over distribution and reproduction, conceptions of *property*, infringement as *trespassing, piracy*, or *theft* and similar metaphors, which all take part in the same cluster. A societal problem lies in the costs of maintaining the conception of a controlled number of copies in terms of surveillance, protection of "technological measures" such as DRM, and data retention in enforcing legislation that has a weak social representation.

## Conceptions in copyright

Depending on how copyright is conceptualised, the debates, the arguments and regulatory efforts will be constrained within the logic walls of the leading conception. The analysis of the conception of copyright shows it to be riddled with holes, according to Jessica Litman (2001), i.e., the creator as a solitary genius or as part of a "cultural web", as well as the problem of "orphan works". The Internet has questioned the conception of the solitary genius in copyright law as being a problematic model of how creativity happens. The exceptional experiment that is the Internet has proved that creativity (of some kind) thrives

without regulated incentives, especially in more collaborative forms. The artists' work and place in a wider culture is easily tracked online.

The further elaboration of the reification of copyright is to focus on a conception of copyright as the incentive for creativity, where creativity is viewed as something that must be incentivised. Litman shows that how the conceptualisation of copyright has changed over time, especially during the latter half of the twentieth century, from a mediator of interests between the authors and the public, towards the model where creativity needs to be incentivised, thus resulting in a conception of copyright as a system of "holes" that needs to be mended. The problem of conceptualising copyright as a "system of incentives" is twofold. On the one hand, it leads to a beneficial rhetorical position for arguing for more protection and more powerful copyright enforcement, and on the other hand it can be questioned from the perspective that it does not really reflect the truth of how creativity is best stimulated, and perhaps especially so in a digital context.

## A suggested theoretical contribution

The thesis suggests a theoretical contribution to legal science, particularly the part of legal science that is sociology of law. In this particular scientific domain, a norm scientific track has developed which the conception and metaphor theory proposed in this thesis is linked to. In essence, the thesis proposes the importance of metaphors when studying how norms function and the importance of using metaphor analysis in order to catch the underlying conceptual origin of a particular norm. This means that the imperatives in norms can be studied in extreme detail, and normative collisions can be derived from underlying conceptions that may be in conflict. It is findings from cognitive linguistics as well as contributions from social science and the philosophy of science that is utilised in order to construct a metaphor-conception theory for the study of norms. This leads to metaphors being important when there is a desire for social norms to support legal ones, as well as to outline of how "hidden" or unspoken aspects of law and legal concepts may control or influence our behaviour.

Conceptions, in the definition of this thesis, work as frames or structures for thought; setting the boundaries of the surface phenomena, which is the outcome in terms of language; metaphors and other expressions. Therefore, the conception is singled out as a subsurface structure that can be revealed or

searched for in the metaphors linked to it. The conception is, in this sense, not what is explicit in, for instance, a legal regulation, but that from which the legal regulation implicitly emanates, from which the regulation or a part of it is constructed. As a result of that we surround ourselves with abstract or complex phenomena, we have to utilise metaphors in order to cogitate and communicate these abstracts. The metaphors therefore may work as the researchable surface occurrence that can tell of the underlying conceptions.

Furthermore, the thesis proposes a *metaphor-cluster model* and a *transition model*, where the first means that some metaphors can be part of the same conceptual pattern that is relating to the same conception. This has the consequence that one metaphor plays a part in giving meaning to the others. This means that explicitly legal metaphors can receive support, for instance in arguments, from the use of metaphors that are not found explicitly in law, but are members of the same cluster. The benefits of the suggested transition model lie in the study of changes of meaning of a particular legal concept. This, I argue, is particularly relevant in times of rapid societal changes, where the same legal concept may be used to regulate a whole new set of phenomena, such as with part of copyright and digital copies. An inherent assumption is here the possibility that much in fact has happened to the legal concept in terms of metaphoricity the longer the law has remained unrevised. This is where the concept of skeumorphs is introduced, in order to focus the changed meaning that occurs when a concept becomes metaphorical. The idea here is to display how dependent human thinking actually is on metaphors when it comes to abstract phenomena. This is an important demonstration, not the least in relation to that the literal meaning of concepts has no priority in our thinking over the metaphorical meaning.

An important difference between legal and social norms when it comes to conceptions lies in the ”fixation” of conceptions in law. When reality changes, new socially embedded conceptions may relate to the regulated phenomena differently from how the original conceptions constructing the law do. This may result in a conflict between conceptions of reality, between those conceptions underlying and constructing legal norms and those underlying and constructing social norms. In conclusion, vital aspects of both legal and social norms are constituted by metaphors, which may be used as a key to revealing the conception that constructs the norm.

## Legal and social change

A common theme in the sociology of law can be described in terms of "the gap problem". This is in general perceived as value based differences that construct law's illegitimacy, and has often been the conceptual basis for studies of divergence between legislative promise and its performance (Nelken, 1981). The importance of social norms for the enforcement of law is often emphasised (Drobak, 2006). Consequently, legal enforcement that is performed without the support from social norms risks creating an unstable state, likely leading to directly dysfunctional consequences, and to ultimately fail its manifest purpose. The importance of informal systems of external control, early recognised by Ellickson (1998, p. 540; see also Drobak, 2006), is indisputably relevant also for copyright in a digital society. However, an aspect that the classical scholars in the tradition of sociology of law have not had a chance to reflect upon, but some contemporary American legal scholars have, is the legislative qualities of the Internet and the digital environment. One could here speak of (programming) code as law (Lessig, 1999; 2006) but also of the politics of technological artefacts, for instance dealing with "technological measures", which often are referred to as Digital Rights Management (although constantly under attack and often circumvented, Gillespie 2007). As concluded in Article IV below, on the strength of social norms corresponding to copyright, the sudden decrease in file-sharing among some groups of people after the implementation of IPRED in Sweden was likely due to the fear of being punished by the state rather than because they or their peers had changed their moral values regarding unauthorised file-sharing. They stopped as a result of a fear of getting caught and being punished and not because the element of social control had altered. A counter-measure from a group of core sharers, outlined in Article II, regarded the increased use of techniques of online anonymisation. This further supports the coded architecture as a means for directing action, although the BitTorrent protocol that much of the file-sharing is performed by is a far more obvious example. The latter displays, for instance, inherent normativity in its architecture (if you download, you also upload) that could be claimed to represent an underlying conception stemming from its creator (legislator) regarding the efficiency in communal dissemination over a network of limited capacity. This means that in a digital society, the perspective of a dynamic interplay between law and social norms from the perspective of

sociology of law may be complemented with (at least) the entity of coded architecture.[34]

However, one should not, which sometimes is the case with technological determinism, overstate the significance of the code. If one chooses the determinist perspective of information technology, one could assume that file sharing has to be uncontrolled, that information wants to be free, and that this is the inevitable path for the future. We should however not so easily accept this assumption as the truth. One must always remember that digital technologies; the code, may serve whoever can shape them. That is part of its generativity, and this is not a technological or coding process alone. Humans, corporations and laws are part of a bigger social complex that contributes towards how we think, act and conceptualise our world. This means that neither the hard laws, the architecture of our lives, nor the soft code, the social norms, languages, metaphors and conceptions alone can constitute our reality. It should be borne in mind in this context that metaphorical concepts depend for their coherence and persuasiveness on the motivating social contexts that ground meaning, and that therefore legal change, too, is "contingent on, and therefore constrained by, the social practices and forms of life that give law its shape and meaning" (Winter, 2007, p. 897). The metaphoricity in key concepts in law, as shown in the case of copyright, may offer a sort of flexibility or inertia in the law due to the skeumorph processes. The flexibility of a given metaphor is however limited, which may result in that the legal concept loses legitimacy as it is continuously stretched out in what it defines, as an early sign of coming change on a broader scale. Whenever the correlating social practices change in a fundamental manner, the law may lose some of its corresponding meaning, and one way to detect these processes is through the analysis of metaphors and their corresponding conceptions.

[34] Tentatively, one could here speak of *code norms*, as a parallel object for research to for instance social and legal norms. To describe code "as law" is in a sense to focus the controlling or sides of the Internet and digital artefacts, which is the flip side of the same coin that Zittrain describes in terms of generativity (2008). Generativity can enable a locking down, to enforce constraints, and not only to open up.

# References


Ajzen, Icek (2005) *Attitudes, personality and behavior*, Maidenhead: Open University.

Ajzen, Icek & Fishbein, Martin (1980) *Understanding attitudes and predicting social behavior*, Englewood Cliffs: Prentice-Hall.

Altschuller, S., & Benbunan-Fich, R. (2009) is music downloading the new prohibition? What students reveal through an ethical dilemma, *Ethics and Information Technology, 11*(1), 49-56.

Amsterdam, Anthony G. & Bruner, Jerome (2000) *Minding the Law. How courts rely on storytelling, and how their stories change the ways we understand the law – and ourselves*, Harvard University Press.

Andersson, J. (2010) *Peer-to-Peer-Based File-Sharing Beyond the Dichotomy of 'Downloading is Theft' vs. 'Information Wants to be Free': How Swedish File-sharers Motivate their Action*, Goldsmiths, University of London, for the degree of PhD in Media and Communications.

Andersson, Jonas (2011) The origins and impacts of Swedish filesharing: A Case study, *Critical Studies in Peer Production* - RS 1-1.

Asplund, Johan (1979) *Teorier om framtiden*, Stockholm.

Asplund, Johan (1991) *En essä om Gemeinschaft och Gesellschaft*, Göteborg: Bokförlaget Korpen.

Baier, Matthias (2003) *Norm och rättsregel. En undersökning av tunnelbygget genom Hallandsåsen*, Lund: Lund University, Department of Sociology.

Baier, Matthias & Svensson, Måns (2004) Normforskning som abduktion, in Rejmer, ed. (2004) *Normvetenskapliga reflektioner*, Research Report in Sociology of Law 2004:5.

Baier, Matthias & Svensson, Måns (2009) *Om normer,* Malmö: Liber.

Banakar, Reza (2003) *Merging Law and Sociology. Beyond dichotomies in socio-legal research*. Galda + Wilch Verlag.

Banakar, Reza (2011) *The Sociology of Law: From Industrialisation to Globalisation*, U. of Westminster School of Law Research Paper No. 11-03. Available at SSRN: http://ssrn.com/abstract=1761466

Bentham, Jeremy (1931) *The theory of legislation* 69, edited with an introduction and notes by C.K. Ogden.

Berger, Linda L. (2009) How embedded knowledge structures affect judicial decision making: A rhetorical analysis of metaphor, narrative, and imagination in child custody disputes. 18 S. *Cal. Interdisc. L.J.* 259.

Berger, Linda L. (2007) Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation, *Mercer Law Review* 58:949. Available at: http://works.bepress.com/linda_berger/5

Berger, Linda, L. (2004) What is the sound of a corporation speaking? How the cognitive theory of metaphor can help lawyers shape the law, 2 J. *Ass'n Legal Writing Directors* 169.

Bergman, Anna-Karin (2009) *Law in Progress? A Contextual Study of Norm-Generating Processes – The Example of GMES*, Lund University, Lund Studies in Sociology of Law No. 30.

Berne Convention for the Protection for Literary and Artistic Works, last amended at Paris on September 28, 1979.

Blavin, Jonathan H. & Cohen, I. Glenn (2002) Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors In Law and Commentary, *Harvard Journal of Law and Technology*, Vol. 16, No. 1.

Boyle, James (1997) A Politics of Intellectual Property: An Environmentalism for the Net, *Duke Law Journal* vol 47:87.

Boyle, James (1996) *Shamans, software and spleens: Law and the construction of the Information society*, Harvard University Press.

Boyle, James (2008) *The Public Domain. Enclosing the commons of the mind*, New Haven & London: Yale Universityt Press.

California, John Denver (2009) *60 years later: Coming through the rye*, Sweden: Windupbird Publishing.

Carlson, Laura (2009) *The Fundamentals of Swedish Law, A guide for Foreign Lawyers and Students*, Lund: Studentlitteratur AB.

Carver and Pikalo, eds. (2008) *Political language and metaphor, Interpreting and changing the world*, Abingdon and New York: Routledge.

Case B 13301-06 The Pirate Bay case in District Court 17 April 2009.

Case T 7540-09 and T 11712-09 The forbidding of Neij and Swartholm Warg to run the Pirate Bay site by the District Court.

Cass, Kimberly & Lauer, Thomas, W. (2004) Media transitions. The cases of digital imagery and e-mail, *Information Technology & People*, vol. 17, no. 3, pp. 252-267.

Castells, Manuel, *The Information Age: economy, society and culture*. Vol 1 (1996): *The rise of the network society*. Vol 2 (1997): *The power of identity*. Vol 3 (1998): End of millennium. Malden Mass, Blackwell.

Christensen, Anna (1997) Rätten i ett samhälle under förändring, in Strömholm, Stig (ed.). *Svensk rättsvetenskap 1947 – 1997*, Stockholm: Nordstedts.

Cisco Systems Inc. (June 1, 2011) Cisco Visual Networking Index: Forecast and Methodology, 2010–2015.

Cooter, Robert D. (1993) Book Review: Against Legal Centrism, 81 *California Law Review* 417, 426-27.

Cotterrell, Roger (1992) *The Sociology of Law: An Introduction*, second edition, London, Dublin, Edinburgh: Butterworths.

Cotterrell, Roger (1998) Why must legal ideas be interpreted sociologically? *Journal of Law and Society*, vol. 25, no. 2.

Danesi, Marcel (2004) *Messages, signs, and meanings: a basic textbook in semiotics and communication*, Canadian Scholars' Press Inc.

Data Retention Directive: Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

Dejean, Sylvain, Penard, Thierry & Suire, Raphaël (2010) The French 'Three Strikes Law' against digital piracy and the change in usages of pirates, M@rsouin, presented at the conference *Internet, Politics, Policy 2010: An Impact Assessment* in September 2010.

Dir. 2008:37 Kommittédirektiv. Översyn av visa frågor om upphovsrätt.

Drobak JN (2006) *Norms and the law.* Cambridge, New York: Cambridge University Press.

Ds 1999:36 A translation of the Swedish penal code into English.

Ds 2005:30, En anpassad försvarsunderrättelseverksamhet, Försvarsdepartementet.

Ds 2007:29 Musik och film på Internet - hot eller möjlighet? Justitiedepartementet.

Eco, U. (1984) *Semiotics and the Philosophy of Language*. Bloomington: Indiana University Press.

Ehrlich, Eugen (1913/1936) *Fundamental Principles of the Sociology of Law,* Cambridge, Mass.: Harvard University Press.

Ehrlich, Eugen (2002) *Fundamental Principles of the Sociology of Law,* New Brunswick: Transaction Publishers, cop.

Ellickson, Robert C. (1991) *Order without Law: How Neighbors Settle Disputes*, Harvard.

European Telecoms Reform Package, is several directives including *a proposal for* directive (COD/2007/0247) that amends 3 previous directives: Access Directive (2002/19/EC), Authorization Directive (2002/20/EC), Framework Directive (2002/21/EC), *a proposal for* a directive (COD/2007/0248) that amends 2 previous directives: Universal Service Directive (2002/22/EC), Personal Data and Protection of Privacy Directive (ePrivacy) (2002/58/EC), a proposal for a Regulation creating a new European Electronic Communications Market Authority (COD/2007/0249).

Fauconnier, Gilles (1985) *Mental spaces*, Cambridge, Mass.: MIT Press.

Feldman, Y., & Nadler, J. (2006). The Law and Norms of File Sharing, *The San Diego Law Review, 43*(3), 577-618.

Ferry, Luc & Renaut, Alain (1990) *French Philosophy of the 60s: An Essay on Antihumanism*, Amherst: University of Massachussets Press.

Fillmore, Charles (1982) Frame semantics, In The linguistic society of Korea, ed. *Linguistics in the morning calm*, Seoul: Hanshin.

Findahl, Olle (2010) *Svenskarna och Internet 2010*, .SE.

Fleischer, Rasmus (2010) Femton gastar på död mans kista – om framtidens nätpolitik, in Andersson, Jonas & Snickars, Pelle (eds.), *Efter Pirate Bay*, Mediehistoriskt arkiv, Kungliga biblioteket, Stockholm.

Forceville, Charles (2008) Metaphor in pictures and multimodal representations, in Gibbs, ed. (2008) *The Cambridge Handbook of Metaphor and Thought*, Cambridge University Press.

Foucault, Michel (1991) *Discipline and punish – The birth of the prison*, Penguin books.

Foucault, Michel (2001) *Order of Things: An Archaeology of the Human Sciences*, Routledge.

Fredriksson, Martin (2009) *Skapandets rätt. Ett kulturvetenskapligt perspektiv på den svenska upphovsrätten*, Göteborg: Bokförlaget Daidalos.

Friberg, Staffan (2006) *Normbildningsprocess genom brukarsamverkan,* Lund University, Lund Studies in Sociology of Law 24.

Friberg, Staffan (2011) *Samverkan och normativ utveckling*, Arbetsmiljöhögskolan, Lunds universitet.

Friedman, Lawrence M. (1979) Review of Watsons Society and Legal change, in *British Journal of Law and Society*, Vol. 6., No.1, pp. 127-129.

Försvarsutskottets betänkanden 2006/07:FÖU10 and 2007/08:FÖU15.

Gessler, Nicholas (1998) Skeumorphs and cultural algorithms, UCLA Anthropology, Computational Evolution and Ecology Group.

Gibbs, Raymond W. (2005) *Embodiment and Cognitive Science*, Cambridge University Press.

Gillberg, Minna (1999) *From Green Image to Green Practice. Normative Action and Self-regulation*, Lund Studies in Sociology of Law 6.

Gillespie Tarleton (2007) *Wired Shut? Copyright and the Shape of Digital Culture*, MIT Press.

Glucksberg, Sam (2008) How Metaphors Create Categories - Quickly, in Gibbs Jr., Raymond W. (ed.) *The Cambridge Handbook of Metaphor and Thought*, Cambridge University Press.

Glynn, S. M, & Duit, R. (1995). Learning science meaningfully: Constructing conceptual models. In S. M. Glynn & R. Duit (Eds.), *Learning science in the schools: Research reforming practice* (pp. 3–33). New Jersey: Lawrence Erlbaum Associates.

Gärdenfors, Peter (2007) Cognitive semantics and image schemas with embodied forces, in Krois, J., Rosengren, M. Stedele, A. & Westercamp, D. (eds.) *Embodiment in cognition and culture*, John Benjamins Publishing Company.

HADOPI: LOI n° 2009-669 du 12 juin 2009 *favorisant la diffusion et la protection de la création sur Internet.*

Hallerström, Helena (2006) *Rektorers Normer i Ledarskapet för Skolutveckling*, Lund University, Lund Studies in Sociology of Law 23.

Hamilton, V. L., & Rytina, S. (1980). Social Consensus on Norms of Justice: Should the Punishment Fit the Crime? *The American Journal of Sociology, 85*(5), 1117-1144.

Hassan, Robert (2008) *The Information Society*, Polity Press.

Hedrén, Johan (1994) *Miljöpolitikens natur*, Linköping studies in art and science 110.

Hellberger et al (2008) Never forever: Why extending the term of protection for sound recordings is a bad idea, *Institute for Information Law.*

Herman, Bill D. (2008) Breaking and entering my own computer: The contest of copyright metaphors, *Communication Law and Policy* 231-274, Volume 13, Issue 2.

Hillyard, Paddy (2007) Law's empire: socio-legal empirical research in the twenti-first century, *Journal of Law & Society*, 34: 266-279.

Hunter, Dan (2003) Cyberspace as Place and the tradegy of the digital anticommons, *California Law Review*.

Hydén, Håkan (2002) *Normvetenskap*, Lund: Lund University, Lund Studies in Sociology of Law.

Hydén, Håkan and Svensson, Måns (2008) The Concept of Norms in Sociology of Law, in P Wahlgren (ed.) *Scandinavian Studies in Law* Stockholm: Law and Society.

Hydén, Håkan & Wickenberg, Per, eds. (2008) *Contributions in Sociology of Law. Remarks from a Swedish horizon,* Lund studies in Sociology of Law.

INFOSOC directive: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

IPRED Directive: Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

Jaisingh, Jeevan (2007) Piracy on File-sharing Networks: Strategies for Recording Companies, in *Journal of Organizational Computing and Electronic Commerce*.

Jensen, Christopher (2003) The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms, in *Stanford Law Review*.

Johansson, Susanna (2011) *Samverkansprocesser i barnahus. Om organisering, makt och institutionalisering*, Lund University: Lund Studies in Sociology of Law 36.

Johns, Adrian (2010) *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, Chicago University Press.

Johnson, Mark L. (2007) Mind, Metaphor, Law, *Mercer Law Review.*

Johnson, Mark (1987) *The body of the mind: The bodily basis of meaning, imagination, and reason*, Chicago, IL, US: University of Chicago Press.

Joo, Thomas W. (2001) Contract, Property and the Role of Metaphor in Corporations Law, *UC Davis Daniel J. Dykstra Memorial Corporate Governance Symposium*.

Kang, Hyo Yoon (2006) An exploration into law and narratives: The case of intellectual property law of biotechnology, *Law Critique* 17: 239–265.

Kelsen, Hans (1957) 'The Pure Theory of Law and Analytical Jurisprudence' in H. Kelsen, (1957) *What is Justice? Justice, Law and Politics in the Mirror of Science*, 266–87.

Kelsen, H. (1967) *Pure theory of law*, Berkeley: University of California Press.

Kierkegaard, Sylvia Mercado (2005) Taking a sledgehammer to crack the nut: The EU Enforcement Directive, *Computer Law & Security Report 21*, pp 488-495.

Karnell, Gunnar (1970) *Rätten till programinnehållet i TV – Studie I Upphovsrätt, utövande konstnärers rätt och fotorätt*, Stockholm: Jurist- och samhällsvetareförbundets Förlags AB.

Kofman, Sarah (1993) *Nietzsche and Metaphor*, translated by Duncan Large, London: The Athlone Press.

Kövecses, Zoltán (2008) Conceptual metaphor theory. Some criticisms and alternative proposals, *Annual Review of Cognitive Linguistics* 6, 168-184.

Kövecses, Zoltán (2010) *Metaphor. A practical introduction*, second edition, Oxford University Press.

Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet.

Lakoff, George (1986) A figure of thought, in *Metaphor and symbol*, 1(3): 215-225.

Lakoff, George (2005) *Don't think of an elephant: Know your values and reframe the debate*, 115. Chelsea Green Publishing.

Lakoff, George (1993) The Contemporary Theory of Metaphor, in Ortony, Andrew (red.) *Metaphor and Thought* (2nd edition), Cambridge University Press.

Lakoff, George (1987) *Women, fire and dangerous things: What categories reveal about mind*. Chicago, IL: University of Chicago Press.

Lakoff, George and Johnson, Mark (1980) *Metaphors we live by*, Chicago: University of Chicago Press.

Lakoff, George & Johnson, Mark (1999) *Philosophy in the flesh: the embodied mind and its challenge to Western thought*, New York: Basic Books.

Lakoff, George & Turner, Mark (1989) *More than cool reason: A field guide to poetic metaphor*, Chicago: University of Chicago Press.

Langacker. Ronald W. (1991) *Concept, Image, and Symbol: The Cognitive Basis of Grammar*, Berlin & New York: Mouton de Gruyter.

Langacker, Ronald W. (1986) *Foundations of cognitive grammar*, vol. 1, Stanford: Stanford University Press.

Larsson, Stefan (2010) 459 miljarder kronor – om metaforer, flöden & exemplar, in Andersson, Jonas & Snickars, Pelle (eds.), *Efter Pirate Bay*, Mediehistoriskt arkiv, Kungliga biblioteket, Stockholm.

Larsson, Stefan (2009) *The darling conceptions of your time, or: why Galileo Galilei sings so sadly in the chorus*, in FREE BEER 1.0, the anthology from the presenters at Free Society Conference 2008.

Larsson, Stefan (2011) The Path Dependence of European Copyright, 8:1 *SCRIPTed* 8.

Larsson, Stefan and Hydén, Håkan (2010) Law, deviation and paradigmatic change: Copyright and its metaphors, in Vargas Martin, Garcia-Ruiz & Edwards

(eds.) *Technology for Facilitating Humanity and Combating Social Deviations: Interdisciplinary Perspectives*, IGI Global.

Larsson, Stefan and Svensson, Måns (2010) Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File-sharing, *Policy & Internet*: Vol. 2: Iss. 4, Article 4.

Leo, Ulf (2010) *Rektorer bör och rektorer gör, En rättssociologisk studie om att identifiera, analysera och förstå professionella normer*, Lund: Lund Studies in Sociology of Law 34.

Lessig, Lawrence (1999) *Code and other laws of cyberspace*, New York: Basic books.

Lessig, Lawrence (2006) *Code version 2.0*, New York: Basic books cop.

Lessig, Lawrence (2004) *Free culture: how big media uses technology and the law to lock down culture and control creativity*, New York: Penguin books.

Lessig, Lawrence (2008) *Remix: making art and commerce thrive in the hybrid economy*, New York: Penguin Press.

Lessig, Lawrence (2002) *The future of ideas: the fate of the commons in a connected world*, New York: Vintage Books.

Lessig, Lawrence (1995) The Regulation of Social Meeting, 62 *University of Chicago Law Review* 943.

Liebowitz, Stan J. (2006) File Sharing: Creative Destruction or Just Plain Destruction? *The Journal of Law and Economics*.

Litman, Jessica (2001) *Digital Copyright*, Prometheus books.

Litman, Jessica (2010) Real Copyright Reform, *Iowa Law Review*, Vol. 96, available at SSRN: http://ssrn.com/abstract=1474929

Loughlan, Patricia (2006) Pirates, Parasites, Reapers, Sowers, Fruits, Foxes…The Metaphors of Intellectual Property, *Sydney Law Review,* Vol. 28, No. 2, pp. 211-226.

Loughlan Patricia (2007) 'You Wouldn't Steal a Car': Intellectual Property and the Language of Theft, *European Intellectual Property Review, Vol. 29, No. 10, pp. 401-405.*

Lundblad, Nicklas (2007) *Law in the noise society. ICT-policy making and societal models*, PhD Thesis in Informatics, IT University, Gothenburg.

Lundström, Karin (1999) Jämlikhet mellan kvinnor och män i EG- rätten, en feministisk analys, Iustus förlag, Uppsala.

Mahoney, James (2000) Path dependence in historical sociology, *Theory and Society* 29: 507-548.

McAdams, Richard (1997) The Origin Development and Regulation of Norms, 96 *Michigan Law Review* 338, 381.

McLeod, Kembrew (2007) *Freedom of expression. Resistance and repression in the age of intellectual property*, Minneapolis: University of Minnesota Press.

Moohr, Geraldine S. (2003) The crime of copyright infringement: An inquiry based on morality, harm and criminal theory, *Boston University Law Review 83*.

Morra, Lucia (2010) New Models for Language Understanding and the Cognitive Approach to Legal Metaphors, *International Journal for the Semiotics of Law*.

Mottier, Véronique (2008) Metaphors, mini-narratives and Foucauldian discourse theory, in Carver and Pikalo (eds.) *Political language and metaphor, Interpreting and changing the world*, Abingdon and New York: Routledge.

Mottier, Véronique (2000) Narratives of national identity: sexuality, race, and the Swiss "Dream of order", *Swiss journal of Sociology*, 26: 533-558.

Nelken, David (1984) Law in Action or Living Law? In Nelken (2009) *Beyond law in context. Developing a sociological understanding of law*, England: Ashgate.

Nelken, David (1981) The 'gap problem' in sociology of law: A theoretical review, in Nelken, David (2009) *Beyond law in context. Developing a sociological understanding of law*, England: Ashgate.

Nelken, David (1994) 'The Truth About Law's Truth' in A. Febbrajo and D. Nelken, eds (1994) *European Yearbook in the Sociology of Law 1993*, 87–160.

Nerlich, Brigitte and Clarke, D. David (2001) Mind, meaning and metaphor: the philosophy and psychology of metaphor in 19th-century Germany, History of the Human Sciences 2001 14: 39.

Netanel, Neil W. (2008) *Copyright's Paradox: Property in Expression/Freedom of Expression*, Oxford University Press.

Niemi-Kiesiläinen, Johanna, Honkatukia, Päivi & Ruuskanen, Minna (2007) Legal texts as discourses, in Gunnarsson, Åsa, Svensson, Eva-Maria & Davies, Margaret (eds.) *Exploiting the Limits of Law: Swedish Feminism and the challenge to pessimism*, England: Ashgate Publishing Limited.

Ning, Yu (2008) Metaphor from Body and Culture, in Gibbs Jr., Raymond w., (ed.) *The Cambridge Handbook of Metaphor and Thought*, Cambridge University Press.

Nousiainen, Kevät (1995) Rättens system och kvinnans vardag, in Nordborg (ed.) *kvinnoperspektiv på rätten*, Iustus förlag, Uppsala.

Palmås, Karl (2010) The Pirate Bay-bacillen – tre spekulationer, in Andersson, Jonas & Snickars, Pelle (eds.), *Efter Pirate Bay*, Mediehistoriskt arkiv, Kungliga biblioteket, Stockholm.

Patry, William (2009) *Moral panics and the copyright wars*, Oxford University Press.

Persson, Lars (2010) *Pedagogerna och Demokratin. En rättssociologisk studie av pedagogers arbete med demokratiutveckling*, Lund University, Lund Studies in Sociology of Law 33.

Peitz, Martin & Waelbroeck, Patrick (2006) Piracy of digital products: A critical review of the theoretical literature, *Information Economics and Policy*.

Polinsky, A. M., & Shavell, S. (2000). The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy. *American Law and Economics Review*, Vol. 2, No. 1, pp. 223-237, 2000; Stanford Law and Economics Olin Working Paper No. 167; Harvard Law and Economics Discussion Paper No. 247.

Pound, Roscoe (1910) Law in Books and Law in Action, in *American Law Review*, pp. 12-36

Prop. 2006/07:63, En anpassad försvarsunderrättelseverksamhet.

Prop 2004/05:110 Upphovsrätten i informationssamhället –genomförande av direktiv 2001/29/EG, m.m.

Reddy, Michael (1979) The Conduit Metaphor: a Case of Frame Conflict in our Language about Language, in A. Ortony, ed., *Metaphor and Thought*.. Cambridge: Cambridge University Press.

Renner, K. (1949) *The Institutions of Private Law and their Social Functions*. London: Routledge.

Ritchie, David T. (2007) Who is on the Outside Looking In and What Do They See?: Metaphors of Exclusion in Legal Education, 58 *Mercer Law Review*.

Rock, Paul (1974) The sociology of deviance and conceptions of moral order, 14 *Brit. J. Criminology* 139.

Rome Convention: The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Salinger, J. D. (1951) *The catcher in the rye*, Little, Brown and Company.

Sayer, Andrew (1992) *Method in Social Science: A realist approach*. London: Routledge.

Schultz, M. F. (2006a). Copynorms: Copyright and Social Norms. *SSRN eLibrary*.

Schultz, M. F. (2006b). Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law. *Berkeley Technology Law Journal.*

Sonander, Anna (2008) *Att arbeta med barn som brottsoffer. -En rättssociologisk studie*, Lund studies in Sociology of Law, 27.

SOU 2007:76 Lagring av trafikuppgifter för brottsbekämpning

SOU 1956:25 *UPPHOVSMANNARÄTT till litterära och konstnärliga verk*. Lagförslag av Auktorrättskommittén, Stockholm 1956, Justitiedepartementet.

Spitz, David and Hunter, Starling D. (2005) Contested Codes: The Social Construction of Napster, in *The information society*.

Svensson, Eva-Maria (1997) *Genus och rätt. En problematisering av föreställningen om rätten*, Iustus förlag, Uppsala.

Svensson, Måns (2008) *Sociala normer och regelefterlevnad. Trafiksäkerhetsfrågor ur ett rättssociologiskt perspektiv*, [Social Norms and the Observance of Law], Lund University, Lund Studies in Sociology of Law 28.

Svensson, Måns & Larsson, Stefan (forthcoming) Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms, *New Media & Society*.

Svensson, Måns, Larsson, Stefan & de Kaminski, Marcin (2012) The Research Bay – Studying the Global File Sharing Community, in Gallagher, William T. and Halbert, Deborah (eds.) *Law and Society Perspectives on Intellectual Property Law*.

Svensson, Måns and Larsson, Stefan (2009) *Social Norms and Intellectual Property. Online Norms and the European Legal Development,* Lund: Lund University, Research Report in Sociology of Law, 2009:1.

The Swedish Copyright Act from 1960: Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.

The Swedish Penal Code: *Brottsbalk* (1962:700).

Strahilevitz, L. J. (2003a). Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks. *Virginia Law Review, 89*(3), 505-595.

Strahilevitz, L. J. (2003b). Social Norms from Close-Knit Groups to Loose-Knit Groups. *The University of Chicago Law Review, 70*(1), 359-372.

Taylor, George & Madison, Michael (2006) Metaphor, objects, and commodities, 54 *Clev St. L. Rev.* 141, 161.

Taylor, Stephanie (2001) Locating and conducting discourse analytic research, in Wetherell, M., Taylor, S. and Yetes, S. (eds) *Discourse as data. A guide for analysis*, London: Sage.

Tehranian, J. (2007) Infringement Nation: Copyright Reform and the Law/Norm Gap, *Utah Law Review* (3), 537-551.

Treagust, David F. & Duit, Reinders (2008) Conceptual change: a discussion of theoretical, methodological and practical challenges for science education, *Cult Stud of Sci Educ*, 3:297–328.

Trim, Richard (2007) *Metaphor Networks. The comparative evolution of figurative language*, Palgrave Macmillan.

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights signed in Marrakech, Morocco on 15 April 1994.

Tsai, Robert L. (2004) Fire, Metaphor, and Constitutional Myth-Making, *Georgetown Law Journal* 93.1, 181-239.

Urinboyev, Rustamjon (2011) Law, Social Norms and Welfare as Means of Public Administration: Case Study of Mahalla Institutions in Uzbekistan. *NISPAcee Journal of Public Administration and Policy*, Vol .IV, No. 1. DOI: 10.2478/v10110-011-0002-8

Vaidhyanathan, Siva (2001) *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity*, New York: New York University Press, cop.

Watson, Alan (1977) *Society and legal change*, Edinburgh: Scottish Academic Press.

Wedin, Lina (2009) *Going Green - A Study of Public Procurement Regulation*, Lund University: Studies in Sociology of Law 32.

Weinstock Netanel, Neil. 2008. *Copyright's paradox*. New York: Oxford University Press.

Wickenberg, Per (1999) *Normstödjande strukturer. När miljötematiken börjar slå rot i skolan*, Lund Studies in Sociology of Law 5. Lunds universitet.

Wingrove, T., Korpas, A. L., & Weisz, V. (2010). Why were millions of people *not* obeying the law? Motivational influences on non-compliance with the law in the case of music piracy. *Psychology, Crime & Law*.

Winter, Steven L. (2001) *A clearing in the forest: Law, Life, and Mind*, Chicago and London: University of Chicago Press.

Winter, Steven L. (2007) Re-embodying Law, 58 *Mercer Law Review*.

Winter, Stephen L. (2008) What is the "color" of law?, in Gibbs Jr., Raymond W., (ed.) *The Cambridge Handbook of Metaphor and Thought*, Cambridge University Press.

Wired 7 July 2011, ISPs to Disrupt Internet Access of Copyright Scofflaws, by David Kravets.

Yanow, Dvora (2008) Cognition meets action. Metaphors as models of and models for, in Carver and Pikalo (eds.) *Political language and metaphor, Interpreting and changing the world*, Abingdon and New York: Routledge.

Yar, M. (2008) The rhetorics and myths of anti-piracy campaigns: criminalization, moral pedagogy and capitalist property relations in the classroom, *New media & society*, Vol 10(4). SAGE publications.

Zittrain, Jonathan (2006) A history of online gatekeeping, *Harvard Journal of Law and Technology*, vol. 19, no 2.

Zittrain, Jonathan (2008) *The Future of the Internet, and How to Stop It*, London: Penguin Books.

Zittrain, Jonathan (2006b) The Generative Internet, *Harvard Law Review* 119: 1974–2040.

Åström, Karsten (1988) *Socialtjänstlagstiftningen i politik och förvaltning. En studie av parallella normbildningsprocesser*. (Social Welfare Legislation in Politics and Administration. A Study of Parallel Norm Creating Processes) Lund University Press/Studentlitteratur.

# Part IV – The articles

# Article I: Law, deviation and paradigmatic change: Copyright and its metaphors

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# Chapter 11
# Law, Deviation and Paradigmatic Change:
## Copyright and its Metaphors

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## ABSTRACT

*Drawing on debates in Sweden about Internet freedom, particularly those connected to copyright and file-sharing, and on the European legislative trend of amending copyright, this chapter analyses metaphors and conceptions in terms of a societal paradigmatic shift and the collision of mentalities. Kuhnian paradigms are wedded with the mentalities of the French Annales school of historic research. The chapter argues that the "building blocks" of these mentalities and paradigms can be studied in metaphors, in public debates or in legislation, which may reveal the conceptions they emanate from. This chapter touches upon ethical, moral and legal issues related to the digitisation of society. The relevancy of this chapter in relation to the theme of the book is found in the problematisation of "deviancy". One has to ask from what perspective or paradigm the judgment of the behaviour takes place, and in what historical context it is made.*

## INTRODUCTION

Somewhat more than one hundred years ago, labour strikes were still illegal in most European countries. Labour unions had no right to represent their members and negotiate with employers. Collective agreements were not formally accepted in Sweden until 1928. These legal instruments had quite a dramatic history before they became the leading mechanisms (especially in Sweden) for regulating the labour market. Indeed, less than 80 years ago, workers were killed in Sweden when taking part in a demonstration for labour rights (Ådalen 1931). Those supporting collective labour rights were united in their opposition to the prevailing logic of production within the guild system in the handicraft and agricultural sectors. Despite the fact that the large-scale conditions of industrial production had long been present in their sectors, it took some time before these

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instruments were accepted. Today, however, they are widely cherished in the industrialised world. Now, as we transition from an industrial society to more of an information society based on digital technology, we have reason to bring with us the experiences from earlier and similar periods of transition in industrial history.

The relevancy of this chapter in relation to the theme of the book is that it examines the question of what perspective or paradigm one is judging "deviant behaviour" from, and in what historical context it takes place. Part of what is considered deviant behaviour online is, rather, a consequence of the new system's expectations and conditions around the social norms and behaviours that the digital context offers. An understanding of this is required to effectively regulate any behaviour connected to this emerging context. If, for example, a legislator chooses the wrong battles on this issue, there are clear negative consequences for the overall respect for and legitimacy of laws and the legal system.

Ulrich Beck claims that sociology needs to change if it is to understand and explain the changing needs of a transitional society (Beck 1995, p. 231). Social science cannot rest too rigorously upon the "truths" related to the structures of the industrial age. Take copyright law as an example—it is developed in industrial society as a means of stimulating creativity and ensuring a return in profit for investments in intellectual products such as literature, music, film and other media. The "risk society", in Beck's terminology, is seen here as a label for the transitional society, since that society is still in conflict over the new practices, which are not yet legally codified. The focal point is shifted from a purely hierarchical, top-down structure towards an increasingly local influence facilitated by networking. The transition towards a new society is initiated by an unregulated bottom via an emerging core technology and its initial drivers. We can only learn how to cope with these changes in society and law by comparing them with corresponding shifts in the past. It is in times like these that labels used for describing key conceptions can be questioned and renamed. The labels used to describe phenomena in the digitised milieu online, which are often metaphorical in nature, are quite naturally borrowed from the analogue context that created them. We point out a few metaphors or conceptions that have been the subject of particularly heated debate.

This chapter touches upon ethical, moral and legal issues of the digitisation of society. A few of the illustrations used are connected to the debate in Sweden around Internet regulation, such as the copy-based formulations of the Swedish Copyright Act, the rise of a Pirate Party successful enough to win two seats in the European Parliament in 2009, and the rise of a blogosphere with political ambitions strong enough to affect the implementation of surveillance laws and other legislation. To a certain extent, we will use file-sharing as an example of deviation from copyright regulation (making it be regarded as illegal). The example is interesting from a historical perspective since Svensson and Larsson's study (2009) shows that among Swedish 15- to 25-year-olds, the file-sharing of copyrighted content is not perceived to be a deviation from social norms, despite being a deviation from legal norms. Furthermore, the debate around file-sharing and privacy has also been going on in relation to European legal trends connected to the creation and implementation of directives expanding copyright legislation (INFOSOC), its enforcement (IPRED), and the internal market (Telecom Reforms Package). These legal initiatives amend copyright or affect its enforcement, meaning that the metaphors embedded in copyright and the conceptions behind it are of interest if one seeks to understand the overarching paradigmatic battle or incompatible mentalities.

## THEORETICAL BACKGROUND

### Mentalities and Paradigms

Historically, research stemming from the famous Annales school has often used the term "mental-

ity" to describe different mindsets in different cultures or historical times.[1] The journal *Annales d'histoire économique et social* was founded in 1929, marking the starting point of the Annales school. It also came to mark a turning point in French historical research. Lucien Febvre and Marc Bloch criticised contemporary historical science for focusing too much on details and events, becoming exceedingly specific, and losing its grip on the bigger, explanatory contexts and its connection to other social scientific research (Burke 1992). The focus then shifted towards unspoken or unconscious assumptions and the structure of beliefs over longer periods of time, the so-called *long durée*.[2] We can talk here about civilisations, which Wallerstein (1974) argues have a history of development that consists of periodic cycles "such as switching between growth and stagnation, and the alternation between hegemonic power and rivalry, and related long-term trends such as increasing commoditisation and commercialisation, and increasing polarisation between the privileged and non-favoured."

Every society has its own set of core "mentalities" or belief systems that define it (Burke 1986). Using the language of the Annales school, we can talk about *la moyenne durée*, a kind of middle-to-long period of mentality dominance. We will introduce the paradigm concept in order to describe this phenomenon and what characterises a transition from one type of society to another over time.

The long historical lines of mentalities, as with any ideas of consistency, are slightly problematic as an explanatory instrument for societal change. When—and why—would there be a break in something that has persisted throughout the ages? The explanation and description of change when it comes to mentalities lies close to Kuhn's description of paradigmatic shifts. The anthropologist Robin Horton, elaborating the ideas of Evans-Pritchard and Popper, has sketched a general picture of change in modes of thought, emphasising the importance of awareness of alternatives to a given intellectual system or, as he now puts it, the relative importance of competition between theories in different societies (Horton 1982). Burke approaches the problem of explaining change with the "history of mentalities" and the passage from one system to another by stating that there is an obvious case for taking up the paradigmatic shifts of Thomas Kuhn:

*"If the great stumbling block for the history of mentalities is, as suggested earlier, 'the reasons for and the modalities of the passage from one system to another', then there is an obvious case for taking up Thomas Kuhn's notion of an intellectual tradition or 'paradigm' which may absorb or resist change for long periods thanks to relatively minor 'adjustments', but will finally crack and allow a 'Gestalt switch' or intellectual 'revolution' (Burke 1986: 446).*

The concept of a paradigm was developed in relation to changes in science. Classic examples are Isaac Newton (1643–1727) and his theory of gravitational force, and Noble Prize winner Albert Einstein (1879–1955) and his theory of relativity. The theory of paradigms, however, has mainly been developed over the last 40 years. The starting point is Thomas Kuhn's well-known book about *The Structure of Scientific Revolutions*, first published in 1962. When Kuhn refers to scientific revolutions he primarily uses empirical examples from the natural sciences. A classic example is how physics was established during the seventeenth century when Galileo Galilei rejected the hitherto dominant paradigm of Aristotelian physics and created a new conceptual system that made it possible to construct new objects for scientific knowledge. Galilei found certain anomalies in the way the motion of material things was explained within Aristotelian physics. This is often the starting point for paradigmatic change—when anomalies occur there is a risk of a crisis of legitimacy within science. The crisis might then cause some kind of revolution in the way things are perceived, which initiates searches for other explanations in

relation to relevant phenomena: "The weight of anomalies leads to a cumulative switch to other exemplars and, ultimately, to logical incompatibility between disciplinary matrices, differences in prediction, differences in vocabulary, and to an argument over competing world views and competing ways of doing science" (Fine 2002, p. 2061). It starts with the emergence of a kind of pre-paradigmatic stage of scientific development, later followed by a stage of multi-paradigmatic science. Different scientific explanations compete in relation to being the bearer of scientific truth vis-à-vis the actual problems. After some time, one of the contenders among the multiple paradigms will be regarded as more adequate than the others and thereby "wins". We then reach a stage that Kuhn calls normal science.

Different aspects dominate each of these different phases of scientific development. One of Kuhn's most important contributions in relation to understanding science is that he raised awareness of the fact that science is not only a question of cognition and theoretical aspects (see Brante 1980); what is equally important to science is the structure of the group, which collectively holds a paradigm (Kuhn 1970, pp. 176–181). A paradigm presupposes an integrated community of practitioners that shares a consistent body of belief such that a consensus emerges with regard to the phenomena one investigates, the methods one uses, and so on (Eckberg and Hill 1979, p. 928). Science is not composed of a specific type of cognitive framework alone, but is also related to psychological and sociological factors. Thus, according to Kuhn, science can be characterised as systematised and institutionalised cognitive systems. It can also be characterised as structured and institutionalised social relationships—that it is something practiced in certain institutions in society, representing the sociological dimension. Finally, science can be regarded as connected to structured and institutionalised subjects; in other words, not everyone can claim to be a scientist, only those who are accepted as scientists by belonging to certain institutions (Brante 1980, pp. 24–31).

These different dimensions alternately play a dominant role during the different stages of development within science, as mentioned above. Thus, the theoretical part dominates the normal science stage, the psychological dominates when new perspectives are developed in the pre-paradigmatic phase, and the sociological/institutional dimension dominates in the multi-paradigmatic stage, when different paradigms compete to be the one and only "truth". In these phases, metaphors and conceptions play an important rhetorical role in the development of social sciences, see more below.

As mentioned above, the theories about paradigms have been developed in relation to the natural sciences. Since nature can be regarded as fairly stable, the development of science is related to cognitive progress in understanding the way physical and biological systems are functioning. Many have tried to relate paradigm theories to sociology and social sciences.[3] Martin has argued that there is a difference between the natural and social sciences in relation to paradigms (Martin 1972, p. 54). Whereas Kuhn's natural science paradigms relate to segments of disciplines, paradigms in sociology seem to be discipline-wide or even, as in the case of historical materialism, behaviorism or action theory. While sociology lacks a clear-cut puzzle-solving tradition (Eckberg and Hill 1979, p. 925), still more important seems to be the difference in the role of science in relation to nature, compared to society. While science in relation to nature has mostly been about accumulating knowledge to help mankind exploit nature for production, science in relation to society is more a question of mirroring society. Natural science works ex ante—developing knowledge in order to make it possible for mankind to use nature. Social science, on the other hand, works ex post—trying to understand and relate to changes in society.

Paradigms in the natural sciences develop due to innovations within science, such as when Newton developed the theory of gravity after

having heard an apple hit the ground while he sat contemplating, or when Einstein invented the general relativity theory to explain certain planetary motions that Newton's theory on classical mechanics could not. The basics of what is called classical mechanics goes back to the research efforts of the early modern period, performed by, among others, Galileo Galilei, Johannes Kepler and Isaac Newton. This part of classical mechanics had been the basis for engineering and construction techniques. While the motions of the planets have not changed over the course of humankind, natural science has over time developed more precise theories for understanding these motions. In social science paradigms, societies develop continuously; they are never the same. There are specific motions for specific types of societies, and there are motions that have to be understood in terms of transitions from one type of society to another.

The shift from an agricultural society to an industrial society is one such example. Here we face a societal shift that affects the conditions for science in such a radical way that we can talk about a paradigmatic shift with consequences for all social sciences. This fundamental paradigmatic change on a societal level is captured by several social scientists using law as an indicator for describing the development of society. One of the first representatives of this school of thought was the legal historian Henry Maine, who described the evolution from status to contract (Maine 1861, 1959). The main representatives of this scientific approach include Émile Durkheim and his study, *De La Division du Travail Social* (Durkheim 1933), in which Durkheim uses the transition from criminal to civil law over time as an indicator of a society transitioning from what he calls mechanical to organic solidarity. Even Max Weber's analysis of various types of authority in which the legal authority represents a modern society can be mentioned in this context (see Gerth and Wright Mills 1991).

According to this understanding of social science paradigms, one can talk about paradigmatic changes in society as a whole, which are reflected in the conditions of the daily lives of people and in the scientific interpretation of society in different respects. Changes in society are the driving force for the paradigmatic changes of social science. Since paradigmatic changes follow a certain logic (as described above), we can count on a time lag before society and science move in lockstep. This affects not only science in a narrow sense but the understanding of society as a whole—what is regarded as right or wrong, true or false, good or bad, etc. As a consequence, we can expect that what is regarded as normal behaviour or "deviant" behaviour will undergo shifts over time. Even though many old principles of what is right and wrong in relation to human behaviour in Western societies today have their roots in canonical law and Christianity, paradigmatic changes in society create new conditions that alter opinions of what is good or bad. The same applies for principles of economic activity—new techniques may give rise to new circumstances, which make the old "rules of the game" outmoded and eventually obsolete, as in the historical case mentioned at the outset of this chapter. History is full of examples of people who, in these situations, have been punished for being forerunners and, thereby, norm-breakers.

In the following parts of the chapter, we will argue that we find ourselves at just such a critical stage in history—a point where society is undergoing dramatic changes without the benefit of having science and present-day mentalities catch up with, and articulate, these new conditions. This is not meant as a critique, since we know that these necessary mental adjustments take time, and that the time lag depends on broad societal acceptance before the new reality can take root and develop in ordinary peoples' minds. We will just attempt to create awareness about these processes and, thereby, a level of humility in relation to what is happening in the digital world.

## Metaphors and Conceptions

If mentalities describe core structures of beliefs or assumptions, they can be investigated in the context of the conceptions or "mental grids" they are constructed of, while looking for the symbols and metaphors that represent and reproduce them (Burke 1986, see Allwood 1986, p. 132-136). This can be complemented by Lakoff and Johnson's (1980) research on metaphors and metaphorical concepts. They strengthened the idea that human thought processes are mainly metaphorical—that the "human conceptual system is metaphorically structured and defined." (They equalled "metaphor" with "metaphorical concept.") (Lakoff and Johnson 2003, p. 6). Their work inspired various disciplines to develop in this direction. There are many ways to study metaphors and several schools to follow (see for instance Cameron and Low 1999, pp. 29-30). The purpose of this chapter is however not to in detail outline how to study metaphors but to connect metaphors and conceptions to mentalities and paradigm shifts. The presentation leans on the mentioned Lakoff and Johnson rather than other schools of metaphorical research, although an important distinction is here made between metaphors and conceptions.

The choice of what metaphors are used, Lakoff and Johnson argue, are sometimes connected to power (2003, p. 159 f). By this, they point out the changeability of language as depending on those who have the ability to control it. To state this is to state that a picture used in language to describe a phenomenon not necessarily is the most "true" way to describe it, that there are alternatives, and these alternatives can be limiting and controlling the conceptualisation of a phenomena in different ways. It can hence be "imposed" on us in our need to conceptualise a phenomenon, consciously or unconsciously, and to be able to control this process is to exercise power.

The conceptual system is not something that we normally are aware of. This is also the reason for our search for metaphors connected to law, in order to draw out the conceptions hiding behind them, in order to scrutinize parts of the principal foundation copyright law and its connected debates originates from (see Larsson 2009; Larsson and Hydén 2008). Metaphors carry with them a heritage of the context they are derived from. They are not always easily translated from one context to another without some kind of distortion. Metaphors controls the way people think, and describe the way in which we understand life, our world and our place in it (Morgan 1999). The problem, however, is that metaphors can be both informative and deceptive. They can be borrowed from a context where they function well, only to be used in another context where they deceive and distort. The metaphors reveal the conceptions behind them, the mental structures that form, for instance, debates on legal solutions and shapes. By looking at the linguistic labels (the metaphors) one can determine how phenomena are conceptualised in a given context. We look for metaphors in order to display "conceptions" rather than "concepts". The difference between "conception" and "concept" is here similar to how Eberhard Herrmanns exemplify the difference (2008):

*"Our conceptions of gold, for instance, are the different understandings we get when we hear the word 'gold' whereas the concept of gold consists in the scientific determination of what gold is" (Herrmann 2008, p. 63. Emphasis added).*

It is the understanding or perception of phenomena, rather than some type of definition of object, that we focus our attention to when it comes to conceptions. It is the thought structure on the one hand and its label or metaphor on the other, although it has to be said that this distinction occasionally is neither easy nor meaningful to make.

To be more specific and simultaneously focus in on the subject of copyright legislation, one can use the Jessica Litman's "sleight of hand" example (2006, pp. 77–88). Litman argues for a "metaphorical" progression (which could be described as a change of underlying conceptions here) behind American copyright legislation dur-

ing the twentieth century: from the initially less expansive conception of what rights authors and creators should have, to a more reciprocal, quid pro quo model between creators and the public, where dangers from "over-protection ranged from modest to trivial" (2006, p. 79). In the 1970s, copyright law began to be perceived as a construct that was full of holes and a threat to the interests of copyright owners. Litman argues that the bargaining "conception" has gradually been replaced in favour of a model drawn from a economic analysis of law, which characterises copyright as a system of incentives. She further argues that the success of this model lies in its simplicity, as it posits a direct relationship between the extent of copyright protection and the amount of authorship produced and distributed: "any increase in the scope or subject matter or duration of copyright will cause an increase in authorship; any reduction will cause a reduction" (2006, p. 80).

*"When you conceptualize the law as a balance between copyright owners and the public, you set up a particular dichotomy—some would argue, a false dichotomy—that constrains the choices you are likely to make. If copyright law is a bargain between authors and the public, then we might ask what the public is getting from the bargain. If copyright is about a balance between owner's control of the exploitation of their works and the robust health of the public domain, one might ask whether the system strikes the appropriate balance." (Litman 2006, p. 79).*

The point here is that depending on how copyright is conceptualised, the debates, the arguments and the regulatory efforts will be constrained within the logic walls of the leading conception. When the leading conception of copyright changed from a balance of mutual interest between creators and the public to a system focused mainly on the rights of creators, the remedy to this (newfound) lack of control would be more enforcement, more protection and more criminalisation of actions regarding unlawful distribution of content. This contemporary repressive legal trend (see Larsson, in press) rests upon this leading conception of copyright.

In short, the conceptions behind, for instance, law and metaphors create the building blocks for mentalities and paradigms. These "belief systems" could be looked upon as bundles of "schemata" or mental "grids" (or *grilles* as Foucault called them) that generally support one another, but can sometimes be in contradiction. Burke supports the idea of studying metaphors in terms of outlining the mentalities within a society or culture: "the notions of 'schema' and system may themselves be clarified if we look more closely at language, and especially metaphor and symbol" (Burke 1986, p 447). This is especially the case in terms of outlining the dissimilarities: "…if we are trying to describe the differences between mentalities, it seems a good idea to look at recurrent metaphors, especially those which seem to structure thought" (Burke 1986, p. 447, see also Allwood 1986). The fact that important metaphors are "in battle" and different imperative conceptualisations of reality seek to gain advantage over the other can be interpreted as signs of a bigger paradigmatic struggle or societal shift.

## THE STRUCTURES OF SOCIETAL DEVELOPMENT

Societies can be said to develop over time, in waves or in a cyclical manner (Hydén 2002; Ewerman and Hydén 1997). They follow the cycle any system follows: society is born, it grows up, matures, and after a time it dies and begins a process of decay. One society emerges as a reaction to the existing society, meaning that when a society has reached its peak, a new society is already under development.

We have no way of knowing what will constitute society in the future. We can, however, use the

cyclical model of societal development to predict what form society may have. Societal development shows one common feature over time. Before explaining this, we will say something about the driving forces behind development. From a long-term perspective we live in a market epoch. The fundamental conceptions and metaphors of our time are, to a large extent, formed by the mentalities belonging to the logic of a market. In the wording of the Annales school, the market represents *la longue durée* or, using Immanuel Wallerstein and the World system theory, a civilisation. In the market epoch, technology has been the prime driver of change. However, not all technological innovation has had an effect on a societal level; instead, a "core" technology is necessary for driving change, such as the steam engine at the beginning of the eighteenth century, which was used to develop new engines that could, in turn, lay the foundation for further technological advancements. The same applies to the computer today, which also represents a core technological change. A significant factor in relation to a core technology is that it is potent enough to stimulate the fantasy and imagination of people, such that their application of the new technology promotes the development of new modes of fulfilling existing human needs.

These factors also influence legal trends and developments. The development of law "follows" the cyclical development of society. We know, for example, that the feudal system in rural areas, the guild system in towns and cities (with its statutes and regulations of who was entitled to obtain a certificate as master craftsman and carry on craftsmanship), and the mercantile system with its strong regulation of trade, were deregulated during the eighteenth century and gradually replaced by a policy of non-restrictive practices and free trade policies. In the nineteenth century, new kinds of regulatory principles emerged. The *Code Napoleon* in France and *Burgerliches Gesetzbuch* in Germany heavily influenced the regulation of the market economy regarding property, contract and economic security rights. The public law system grew significantly during the twentieth century, particularly during the First and Second World Wars, when a great amount of public administrative laws were introduced. Finally, a new type of legislation flourished when we reached the peak of industrial society: the intervening regulation. During this time, from about 1970 to the present day, society has been covered by an enormous legal superstructure—just as when the handicraft and agricultural society was at its peak at the beginning of the eighteenth century.[4] Therefore, a process of deregulation is not only expected; to a large extent it has already taken place.

The first phase of the new information society faces a period of self-regulation and competing, pluralistic efforts to set the standards for the new society. The characteristics of the shift from the old (industrial) society to the new (information) society are always related to a change from large-scale to small-scale. It is a question of going back to basics (or perhaps forward to basics), namely fulfilling old human needs in a new way with new technology. With this shift we have what we can call a society in transition, which affects all of the societal dimensions mentioned above. Technology makes it possible to produce goods and services in a much more efficient way. Social conditions will change, with growing social tensions in society followed by greater differences in wealth among different sectors of society. Those who have receive more; those who do not have receive less. This is a nearly inevitable consequence of the clash between the old and new society, which creates winners and losers. For a long period of time, however, hegemonic power continues to be related to the structures and strata that belong to the old society. The existing society (reality) always has the preferential power of interpretation with regard to what is right and what is wrong. Therefore, it is not until the new society has managed to articulate its own societal solutions that one can expect a tendency to shift from the old way of living and fulfilling human

needs to the new one. For a considerable period of time, the emerging society will be without these articulations and will therefore be an unknown phenomenon. This is apparent in contemporary science in their labelling (their metaphors) of present-day Western society as being post-modern or post-industrial—labels that remain focused on technological aspects and not reflecting the transition to the new society. These articulations are what newcomers in the "fractal political" scene are trying to aggregate, such as the French La Quadrature du net, the Swedish Juliagruppen, and thinkers and academics in the blogosphere.

## LAW IN A SOCIETY OF TRANSITION

### The Swedish Case

Sweden is an interesting case since it has a developed information technology (IT) infrastructure and a high degree of Internet usage. This is tied to the political vision of Sweden as a "leading IT nation", particularly as an "information society for everyone" (Prop 1999/2000:86, p. 1; Larsson 2008, p. 30f). This is significant for Swedish IT politics in general (Sundqvist 2001; Prop 1999/2000:86, p. 130; Larsson 2005, p. 39). Of a selected group of countries in which Internet usage is high, Sweden ranks among the highest, with 80 per cent of the population online. The file-sharing of copyright-protected material is, naturally, connected to the systematic conditions of a society: its infrastructure, degree of Internet access, and usage.

File-sharing and copyright has been a widely debated issue in Swedish politics for years. In 2008, the Centre Party, the third-largest party in Swedish Parliament at that time, suggested a thorough revision of the Copyright Act. Several of the youth segments of Sweden's political parties support free file-sharing for private use, as does the Left Party, one of the smaller parties in Parliament. Also in 2008, The Pirate Bay—claimed by Wired magazine as "the world's most notorious BitTorrent tracking site"—received global attention when the four individuals behind the company were prosecuted in Stockholm (Wired Blog Network 1 February 2008)[5].

The issue of file-sharing and media content was addressed at a hearing in Swedish Parliament in April 2008. The setting itself can be questioned from the perspective of a society in transition: only legal representatives were allowed to present their cases and no advocates of file-sharing were invited to the hearing. Although the point of the hearing was to discuss the issues and how they should be handled, with no one representing the file-sharing community, it was an unbalanced approach that undermines any attempt to understand the dilemmas of modern copyright.

On 17 April 2009, four men were sentenced to one-year prison terms and fined €2.84 million (SEK30 million) for assisting in the violation of copyright law through The Pirate Bay website. Three of these men had started a so-called BitTorrent tracker site in 2003 that, over the following years, grew into one of the most used and likely the most famous file-sharing site in the world. The Minister for Culture expressed support for the conviction, which she was reported to the Constitutional Committee for (Konstitutionsutskottet, which scrutinises the government and its ministers). The Pirate Bay case has been appealed by both sides. The date for the trial is not set, but has been postponed once; it is likely to start in summer 2010.

The Pirate Bay case, along with other unpopular legal reforms regarding surveillance laws and an EU-initiated expansion of the enforcement of copyright, has most likely fuelled interest in launching a Pirate Party focused on Internet-related issues. In the June 2009 national vote, the Pirate Party won two seats in the European Parliament. The legal reforms of interest here highlight the conflicts of interest that are at play in Sweden today, reflecting a society in transition.

Svensson and Larsson's 2009 study, in which 1,000 respondents between 15 and 25 years of age expressed very little negative social pressure with regard to illegal file-sharing, showed that this social norm barely exists. Moreover, the extreme popularity of the Pirate Bay BitTorrent tracker site shows that there is something dysfunctional with copyright law in the digital domain. The response to this dysfunction so far has been an expansion of efforts to monitor and enforce existing copyright laws in the EU, mainly through the INFOSOC and IPRED directives.

In 2008, a law was passed in Sweden regarding surveillance and signals intelligence. The law and, more importantly, the debate around the law, marked a key point: it is during this debate that Internet-related outbursts from politicians and the media became a critical force in the legislative process in Sweden. Bloggers and loosely-knit networks of intellectuals, "citizen journalists", academics, programmers and others joined forces, under the common theme of privacy and integrity, to voice their opinions against the law. The expression "blog quake" was used to describe the events. The law was called the "FRA law", after the authority responsible for carrying out the surveillance task, Försvarets Radioanstalt. This authority was previously only allowed to focus its surveillance activities on radio traffic, but this was expanded to include Internet traffic at "cooperation points" (Internet service providers). The law came into force on 1 December 2009 (see Kullenberg 2009, Ds 2005:30, and Prop. 2006/07:63).[6] The exceptionally stormy debate over increased government surveillance and signals intelligence is a good example of the blogosphere and Internet activists becoming an important entity with regard to knowledge-gathering and democratic journalism, as well as establishing a political voice on issues such as free communication, privacy and file-sharing. The "FRA law" seems to have had triggered an outburst of widespread discontent regarding how the politics around the Internet had been run. It also seems to have triggered a new type of political organisation and online activism that is here to stay. Protestors have highlighted the problems that this type of mass surveillance can bring (see Kullenberg 2009, p. 39).

This can be seen in the subsequent legislative processes regarding Internet and copyright enforcement (IPRED, see below) and the European internal market (Telecommunications Reform Package), as well as, to some extent, the directive on data retention that has yet to be implemented in Sweden.

## The Telecommunications Reform Package and Copyright Amendments

The European Telecommunications Reform Package was heavily debated during 2009. Although it was presented to the European Parliament on 13 November 2007, the first vote on the legislation only occurred on 6 May 2009. The Reform Package is a cluster of directives (COM (2007) 697)[7] that is significantly focused on the role of Internet service providers. One battle over the legislation has revolved around whether or not it should be possible to regulate the ability of ISPs to disconnect Internet users based on suspected copyright violations before they are proven guilty in court. This was recently debated in France in the context of its HADOPI law.[8] Indeed, it was the French representatives in the European Parliament that sought to withdraw Amendment 138, which would ensure that a court trial preceded any potential disconnection. Another issue raised was whether ISPs should be able to determine which web pages users were allowed to visit. The battle within this debate was focused on the strength of the clauses to be included in the Reforms Package regarding the protection of individuals' rights.

Directive 2001/29/EC of the European Parliament and the European Council of 22 May 2001 regarding the harmonisation of certain aspects of copyright and related rights in an information society (the INFOSOC directive) included narrow exemptions to the exclusive rights of the rights

holder as well as protection for "technological measures", often referred to as Digital Rights Management, or DRM (Article 6). The effect of this directive was that more actions were criminalised, and that copyright regulations around Europe were generally expanded and became stronger. The directive has been criticised for focusing on the aggregators' rights rather than those of the creators (Hugenholtz 2000). Indeed, the INFOSOC directive caused some debate in Sweden, but nothing like the 2008 and onwards debate on the FRA law. Moreover, the implementation of the directive was somewhat delayed. The changes in the Swedish Copyright Act came into force on 1 July 2005 (SFS 2005:360; SOU 2003:35; Prop 2004/05:110; Larsson 2005, p. 28–29).

When the IPR Enforcement Directive (IPRED)[9] was approved by the European Parliament (9 March 2004), it caused a stir among civic organisations in the United States and Europe.[10] The directive deals with the enforcement of intellectual property and industrial rights, and its most debated aspect was the fact that the directive gives copyright holders the right (via a court decision) to retrieve the identity information behind an IP address once they have "presented reasonably available evidence sufficient to support its claims" (Article 6.1). The "competent judicial authorities" could then order the provision of such information. The implementation of IPRED in Sweden meant that most of the provisions in the IPRED directive were implemented by 1 April 2009. Its implementation was intensely debated in Sweden in 2008, and especially throughout 2009—particularly on the rights that copyright owners' representatives (such as the International Federation of the Phonographic Industry (IFPI) and Svenska Antipiratpyrån, an association of producers and distributors of film and video in Sweden) have to apply to the courts for the release of identity information from ISPs. This has even led to an increase in the use of online anonymity services (see Larsson and Svensson, in press), ISPs stating that they discard the information that IPRED targets as soon as possible, and even initiatives within online communities to create new, encrypted file-sharing services.[11]

## METAPHORS REVEALING CONCEPTIONS

The European legal trend builds on conceptions that have worked well in the industrialised and "analogue" paradigm, but less well in an Internet-connected societal paradigm. The debate and the protests show how these conceptions and metaphors are being challenged by attempts to replace them with other metaphors that better relate to conceptions of the new context of a digitised society. The rhetorical power of the old metaphors gains by having the preferential power of interpretation as mentioned above, what we also can call the "darling conceptions" of our time (see Larsson 2009; Larsson and Hydén 2008).

The Swedish Copyright Act, as likely most copyright acts, is a complex set of rules that is a patchwork of amendments from an early draft. It is not all these technicalities of the actual law that people argue and debate or think of when they think of copyright, but rather a few principles or conceptions that they mean the law should be based upon or not. These conceptions are often expressed through, or labelled by, various metaphors that do not exactly describe what they are used for, but to a lesser or higher degree are functional for the phenomena they are intended to represent. Some of these conceptions and metaphors can be found *in law* or preparatory works (an important legal source in Sweden), some can be found *outside law*, in arguments and debates aiming at the legal conceptions, or *in between*, for instance in the extensive interpretation of the process of the court case against the men behind the Pirate Bay. This section aims to discuss a number of these conceptions and related metaphors.

The arguments that support copyright and its enforcement often build on the conception, that

characterises copyright as a system of incentives, as Litman has showed (2006). The argument then leads to the fact that if copyright fails in its enforcement, there will be no incentives for new cultural expressions to be born. Since much of the debate and legislative efforts centre around copyright in a digitised society, we will put forward here a few examples of metaphors that are problematic—some of them embedded in law, others that are a part of the debate around it.

The Swedish Copyright Act divides the rights of the creator into two parts: the economic right and the non-profit (or ideal) right. The economic right itself has two parts, namely the right to produce copies of the work, and the right to make it publicly accessible. Economic right is limited in some ways, however. One example, which is of interest in the context of moving from an analogue to a digital era, is the right to produce a few copies for private use, as expressed in Section 12 of the Copyright Act, which outlines the right to "produce one or a few samples of public work" for private use.

## The Exemption for "Private Use" in Copyright Law

The exemption for "private use" builds on the concept that there is a viable dichotomy between private and public use. Generally, in Swedish legal tradition, the private sphere has been left unregulated. Copyright legislation has followed this logic, as demonstrated in Section 12 of the Copyright Act. With the digitisation, and organisation of networks, this private-public dichotomy has become a regulated conception that functions increasingly less well as a regulatory method (at least in the field of copyright). Behavioural and societal norms change in accordance with how the conditions in society change. User-generated application emerges, many industries transition from producer lead to consumer lead, and copyright is unavoidably affected by the introduction and distribution of information technology in society. This development takes place in contrast to the basic economic principles and thereby has to struggle against the long term mentalities of the market economy

## "One or a Few Samples" and "Copy"

The word "copy" elicits the act of replicating an original, which can be described as an action better situated in an analogue setting. The idea that each copy is valuable and should be protected comes from the idea that copying involves a cost. The Swedish term for copyright is more tied to "the originator's right" (Upphovsrätt) and is non-specific with regard to its content, more than it is some type of right of the individual who has created something. Traditionally, the reproduction of copyrighted content was not an every-day act. Now, when you can't do anything online without reproducing copyrighted content, the conception that the exact numbers of copies should be controlled and protected is less well adopted to the modern conditions of society (see Lessig 2008, p. 269, compare Yar 2008, p. 611). What conception you argue for here likely depend on what mentality you base your arguments upon. "A few samples" is problematic in a digitised context from two perspectives: it makes little difference from a production cost perspective if you create three or three thousand copies, and "private use" is not private in the same sense as it used to be.

## "Theft"

When the idea of property rights are established in an analogue reality and then transferred to a digital one, certain problems will occur. An obvious one, which reflects the two sides of the debate over the handling of media content, is the "copyism" of Internet communications on the one hand and "theft" on the other. From a traditional perspective, the illegal file-sharing of copyrighted content has been called theft. The metaphor is problematic in the sense that a key element of stealing is that the

individual who has been robbed physically loses the stolen object; this of course is not the case with file-sharing, since files are copied. The Swedish Penal Code expresses this as: "A person who unlawfully takes what belongs to another with intent to acquire it, shall, if the appropriation involves loss, be sentenced for theft to imprisonment for at most two years" (Penal Code, Chapter 8, Section 1, translation in Ds 1999:36). More specifically, the problem in arguing that file-sharing is theft lies in the phrase "if the appropriation involves loss". There is no loss when content gets copied, and the loss is radically different from losing a physical product, such as a bicycle. The loss in this case is cast as the individual likely losing a *potential buyer* of the product. The "theft" argument, therefore, is an example of how one idea or conception tied to a traditional analogue context is transferred to a newer, digital context and creates problems in the transfer. Ultimately, something is simply "lost in translation" (See Larsson 2009 p. 38, Yar 2008, p. 612-613).

## "Piracy"

"Piracy" is problematic in a similar sense. Even though file-sharing advocates have adopted this term and have used the Jolly Roger symbol as a logo to identify their resistance, genuine acts of piracy such as hijacking ships under violent and cruel circumstances have nothing in common with the act of copying media content and sharing it freely. A problem with a metaphor like this is that, as Lakoff and Johnson write, "the acceptance of the metaphor forces us to focus only on those aspects of our experience that it highlights, leads us to view the entailments of the metaphor as being true" (Lakoff and Johnson 1980, p. 157). This means that whatever negative value originates from the original use of a concept can remain inextricably linked to the concept and contaminate the new actions that the concept is now used to describe metaphorically. The use of the word "piracy" to describe file-sharing is a way of describing a complex new activity from the perspective of the traditional paradigm, while adding a characterisation to make it sound ruthless and "bad".

As such, this term will be functional and meaningful for the brief period of time when file-sharing represents something rebellious or otherwise deviant from a widespread and accepted value system (including one supported by laws). By the time the flows of Internet is the defining paradigm, file-sharing is not likely to be seen as rebellious or deviant, and therefore will not fit well with the "piracy" metaphor.

## ISPs as Customs Officers or Caretakers of "Mere Conduits"?

The leading principle in the EU on the liability of Internet service providers has been that of "mere conduit" (Article 12, Directive on Electronic Commerce).[12] Critics believe that legal proposals such as the Telecommunications Reform Package attempt to make the ISPs liable for the data that is being run though their systems—thereby creating a monitored Internet (see Horten 2008). The debate draws on different metaphors such as the postal system and the mailman, revealing the different conceptualisations of what it is an ISP does and, hence, what an ISP should have liability for.

The abovementioned cluster of legislation seeking to harmonise national laws on copyright within the European Union are all part of a trend of increasing control over the flow of information on the Internet. More data is being generated and retained in order to support copyright owners in their fight against illegal file-sharing of protected content. At the same time, the copyright holders' representatives have been given easier access to identification data via regulation that hands greater responsibility to Internet service providers for content that is being trafficked through their infrastructure. This is one of the reasons why the debate around net neutrality has increased.[13] Europe, with France in the forefront, has shown

tendencies of further increasing ISPs' regulatory responsibilities (Larsson 2010, in press).

## PARADIGM SHIFTS AND THE LEGITIMACY OF LAW

### Problems of Transition

To borrow from the abovementioned work of Lakoff and Johnson on metaphors, but in the wider context of this chapter: metaphors are unavoidably attached to discourse, and although they may have a very specific meaning in the discourse this meaning can change, and their use can be altered. This implies that metaphors can represent conceptions, that can be tied to an arranging order—an administrative pattern—which in and of itself stems from the analogue context of media distribution (for instance). These conceptions are likely to stand in the way when the administration is in need of change due to an evolving context. In short, digitisation has changed the context for media distribution, and the conceptions behind some parts of the way copyright is regulated today are standing in the way of the necessary changes to copyright legislation.

Many of the conceptions and metaphors scrutinised above regards the boundaries and ways of thinking about property in the digitised milieu. It is around these that a type of battle is being fought, a battle of who is to "impose" metaphors and conceptions on others, whose conceptions will lead and take precedence over the others'. This has much in common with the "rhetoric" in educational actions made by copyright interest organisations targeting children in school between eight and thirteen years that has been studied by Majid Yar (2008). Yar has looked at the ways in which

*"...the boundaries of criminal and deviant behaviour are rhetorically redefined. It suggested that current attempts to moralize intellectual property rights and criminalize their violation make recourse to a range of repertoires of justification that attempt to naturalize a capitalistic conception of private property" (Yar 2008, p 619).*

What about this "conception of private property", when it is translated to a digitised environment? Many individuals practicing illegal file-sharing do not believe that what they are doing is morally wrong or an illegal infringement on someone else's property rights. The natural and spontaneous feeling of ownership is related to the "use value" of a specific thing, not its "exchange value" on the market. Intellectual property rights are an abstract construction which, in part, has no reference to the moral world of ordinary people. It is motivated by market reasons, introduced from above, and forced upon the relevant actors. When the capitalistic economy—based on the concept of exchange value—emerged in the nineteenth century, modern society attempted to find solutions in the transition from the old to the new society, where use value and exchange value could co-exist (Christensen 1994). But when the exchange value of the product eventually took over as the dominant paradigm, the legal and regulatory framework lost its legitimacy. The new practices were guided norms other than those the laws were built on; in these situations, the law will lose, especially if the norms have "history as a tailwind". Legal regulation has to be supported by existing norms in society. While these norms can sometimes be changed by law, the law must be an expression of a desirable state in society. Otherwise, the regulation will be too costly to implement and uphold, and will be unstable over time.

### Cognitive Jurisprudence and the Predicaments of Digitised Property

Information technology changes the context of regulation vis-à-vis the concept of property. The Austrian sociologist of law and one-time federal chancellor of the Austrian empire, Karl Renner

(1870–1950), has described how the legal context of property has been the same since the time of Roman law, despite the fact that the socio-economic consequences have changed significantly since then (Renner 1949). This legal context remained unchanged by staying connected to different complementary legal instruments, related to the contract and credit systems, and the concepts of the legal person and state regulation. From the perspective of information technology, property as a legal institution has become complicated in relation to the question of how property is transferred from one owner to another. In the classical legal understanding, this is constituted by the Latin word *tradera*, which means that the thing or a representation of it on paper is literally handed over to the new owner. In a situation where an increasing amount of transactions and changes in ownership take place in an electronic form, the antiquated notion of *tradera* no longer fits. This becomes even more apparent when more and more goods take the form of software. The challenge here is whether intellectual property rights will be developed in a way that aligns with the new regulatory requirements or if the legal concept of property has reached the end of its useful life in this context.

Within the emerging discipline of cognitive jurisprudence (which builds on cognitive neuroscience), Oliver Goodenough and Gregory Decker have asked the question: Why do good people steal intellectual property (Goodenough and Decker 2006)? The authors built on the findings created by the link between the physiology of our nervous systems and how we think and translate thought into action (Goodenough and Decker 2006, p. 2). The idea is that our decision-making is formed by a combination of the genetic organisation of our brain and the influence of our physical, social and cultural environments—which all come together to inform memories and habits, and develop capacities such as conscious thought, logic and the ability to create and shape external institutions such as the law (Goodenough and Decker 2006). Emotion is also a key component in an effective legal regime (Maroney 2006). Property rules need to be powerfully rooted in our emotional reactions in order to make us recognise and respect property. It is also connected to some primitive cognitive reactions in the human brain: the brain has a structure that helps humans assign the characteristics of property to those things that we recognise as possessions. Furthermore, there appears to be a deep emotional component to our property rules, since they apply to our physical possessions. Intellectual property law, by contrast, faces more serious challenges in promoting voluntary compliance. The problem is thus not doctrinal, but emotional (Goodenough and Decker 2006, p. 13). Instead of emotions, the parts of the brain that assign property rights to creative expression and invention are activated. A different set of pathways may have evolved to reward creativity—pathways related to respect and prestige on the one hand and to keeping secrets on the other. The authors provide the following conclusion:

*"The act of spreading intellectual works sends a deeply understood message to the recipients that runs counter to the concept of property. It is a message that demands respect but not money. In this context, file-sharing makes perfect sense and is not a crime; in fact, what better way to show respect for the creator than to pass the subject matter of the acclaim on to others?" (Goodenough and Decker 2006, pp. 16-17).*

If these hypotheses are correct, there is no use of "more of the same, only harder", as reflected in the abovementioned description of legal developments in the field (Goodenough and Decker 2006, p. 18). This will not produce noticeably better results in terms of compliance. As such, it seems as though the new practices produced by technological developments will be regarded as normal and legitimate, albeit illegal. The concept of deviance pre-supposes the existence of a yardstick that identifies what is "normal". When

illegal behaviour becomes normal it may not be regarded as deviant any longer; this is the lesson of history. The present historical situation indicates that we have reason to expect something similar to happen in relation to the sharing of files, as well as in other aspects of information technology law.

## The Challenge of Transition

Copyright regulation is based on ownership and the reproduction of copies. Globally, it is solidly anchored at national, intergovernmental as well as supranational (EU) levels, has been broadened in terms of scope and criminalisation (INFOSOC), and has been strengthened in terms of enforcement (IPRED)—all as a legal response to regulations that did not function in the online milieu. It appears as though the legal construct that was developed in an analogue context is unable to incorporate or align with how the Internet is structured and with the conceptions possible in a digitised society. There is something completely different about ownership in the digital domain that does not work well in an environment where the phenomenon of making digital copies is not nearly as significant as making analogue copies.

Sweden has had the policies of an IT-savvy nation for almost two decades. The aim of these policies has been to develop infrastructure, and that information technology is good for "regional balance", for companies and job opportunities, for industry, and for the education system. Thus, on the one hand, there is and has been a strong political will to develop Sweden as a widely-connected IT nation, where the Internet is present in every home, and where everyone should be able to take part in, create and contribute to the web. On the other hand, traditional regulations and protectionist thinking is working to limit such behaviour and use of Internet. The development thinking of an industrial society has led to an infrastructure that has supported the development of norms that challenge the logic of industrial society, particularly bound to analogue reproduction and distribution of media content. This is the paradox that is being played out right now. The phenomenon is typical for a society in transition and well known from similar historical examples of societies changing from one organisational logic to another.

Some mental references belong to the passing paradigm, as do power and what can be called stakeholder interest, even within the sciences. This creates a time lag or mental delay before the new principles and norms become accepted and "mainstream". In the meantime, we have to live with contradictions, increasing social tension and economic inadequacies. Some people, being forerunners and norm-breakers, might suffer and be punished for their beliefs.

Since law is a reflection of society, legal science must understand how society changes, lest there be too strong a risk that the legal order becomes an institution that uses its powers to support the parties that act and are coming from the traditional order in society. Law will then play the role of an institution that distorts societal development to fit some interests before others, merely based on its paradigmatic kinship. The risk lies in the fact that the legal order can become a tool of power in a struggle between the paradigms, supporting one mentality before the other, and based only on which was introduced earliest. It is a task for the social sciences to question a given societal order and the "truths" that it rests upon. Law is never value neutral, something we as scientists has to reveal. The conceptions embedded in law may hinder a more fruitful transition to the new means of distribution and production, and distort the more genuine ways of stimulating creativity and cultural development, making the owners of media content that was created (or at least protected) in the latter half of the twentieth century the biggest beneficiaries. It is also social scientists' duty to help construct adequate concepts, labels, metaphors and tools for creating the new society. It is our task to look beyond the partly informational and partly deceptive metaphors of this construct. Digitisation challenges some of

the preferred conceptions of our time. It is a time of conflict, and its outcome will shape creativity, and life, to come.

## AUTHORS NOTES

The chapter touches on four central themes: Societal change and how to look at it; (copyright) laws' place in the transition; thought structures and their representations in law and debate; and Sweden as a case for the above. Many of the references in the chapter provide excellent further reading in relation to these central themes. In addition to those, here follow a few suggestions on additional reading.

For a grand take on societal change connected to information technology the modern classic trilogy of Manuel Castells' is worth looking into. *The Information Age: Economy, society and culture* is a grand synthesis managing to incorporate and tie together the reconstructions of identity, social movements, globalization, the decline of the national states, and the global criminal economy, with the transformation of work and employment the information technology revolution. See for instance the term *resistance identity*, as an identity produced by those actors who are in a position/condition of being excluded by the logic of domination, and *project identity* as a term for proactive movements that aim at transforming society as a whole, rather than merely establishing the conditions for their own survival in opposition to the dominant actors. (1997, pp. 10-12).

When it comes to a critical assessment of copyright in days of digitisation, the American law professor Lawrence Lessig is one of the leading authors. Lessig is known through a number of books on the nature of the Internet, its condition-changing force for the legal regulations, which quite naturally also regards copyright. He has extensively studied the interplay between legal regulations and Internet and its code, for instance in *Code and other laws of cyberspace* (1999), which he updated in *Code version 2.0*, (2006). Lessig has had a strong focus on culture and creativity, and what legal foundation that best would serves its preservation in a digitised world, and he drew attention to the potential harms of overregulation in *Free culture: how big media uses technology and the law to lock down culture and control creativity* (2004). He developed this critique to also include suggesting the possibilities of a hybrid economy, in *Remix: making art and commerce thrive in the hybrid economy* (2008). On the background of copyright, as it has developed in the twentieth century, see Said Vaidhyanathans *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity* (2001). Vaidhyanathan paints a bleak picture of the future and contemporary imbalance on how copyright functions as a regulative force in relation to creativity.

In a Swedish perspective, Johan Söderberg's *Allt mitt är ditt. Fildelning, upphovsrätt och försörjning* can be mentioned ("All mine is yours. File-sharing, copyright and making a living", author's translation), dealing with the historical and philosophical contexts of copyright in relation to the contemporary debate on file sharing and culture in Sweden. A case study that could be mentioned regards the recent economic development of the Swedish music industry, and was made at the Royal Institute of Technology in Sweden during 2009 by Johansson and Larsson (2009). Castells, M. (1996/2000). *The Information Age: Economy, society and culture, vol. 1: The rise of the network society*. 2nd edition, Blackwell Publishing. Castells, M. (1997/2004). *The Information Age: Economy, society and culture, vol. 2*: *The power of identity*. 2nd edition, Blackwell Publishing Castells, M. (1998/2000). *The Information Age: Economy, society and culture, vol. 3* (1998): *End of the millennium*. 2nd edition, Blackwell Publishing.

## REFERENCES


Allwood, J. (1986). Mentalitet och språk – några reflektioner. In Sällström, P., (ed.) (1986) *Mentaliteter". Funderingar kring begreppet mentalitet och möjligheten av en forskning om mentalitet*, Åbo Akademi: Publications of the Research Institute of the Åbo Akademi Foundation.

*Beck, U. (1995).* Att uppfinna det politiska. Bidrag till en teori om reflexive modernisering, Uddevalla: Daidalos.

Brante, T. (1980). *Vetenskapens struktur och förändring*. Lund: Doxa.

Bryant, C. G. A. (1975). Kuhn, Paradigms and Sociology. *The British Journal of Sociology*, *26*(3), 354–359. doi:10.2307/589851

Burke, P. (1986). Strengths and weaknesses of the history of mentalities, in *History of European ideas*.

Burke, P. (1992/1990). *Annales-skolan. En introduktion*, Göteborg Bokförlaget Daidalos AB.

Cameron, L., & Low, G. (1999). *Researching and applying metaphor*. Cambridge University Press.

Christensen, A. (1994). *Hemrätt i hyreshuset. En rättsvetenskaplig studie av bostadshyresgästens besittningsskydd.* Stockholm: Juristförlaget.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 *on the harmonization of certain aspects of copyright and related rights in the information society*, (Infosoc).

Ds 1999:36 The Swedish Penal Code.

Durkheim, E. (1933). *Emile Durkheim on the division of labour in society: Being a translation of his De la division du travail social*, with an estimate of his work by George Simpson. New York.

Eberhard, H. (2008). On the distinction between the concept of God and conceptions of God. *International Journal for Philosophy of Religion*, *64*, 63–73. doi:10.1007/s11153-008-9163-z

Eckberg, D. L., & Hill, L. Jr. (1979). The Paradigm Concept and Sociology: A critical review. *American Sociological Review*, *44*(6), 925–937. doi:10.2307/2094717

Ewerman, A., & Hydén, H. (1997). *IT och social förändring*. Byggforskningsrådet.

Fine, B. (2002). Economic Imperialism and the New Development Economics as Kuhnian Paradigm Shift? *World Development*, *30*(12), 2057–2070. doi:10.1016/S0305-750X(02)00122-5

Gerth, H. H., & Wright Mills, H. (1991). *(translated and edited) From Max Weber: Essays in Sociology*. London: Routledge.

Goodenough, O. R., & Decker, G. (2006), Why do People Steal Intellectual Property, in *The Gruter Institute Working Papers on Law, Economics and Evolutionary Biology,* Vol 4, Issue 1, Berkeley Electronic Press.

Horten, M. (2008). *The 'Telecoms Package' and the copyright amendments – a European legal framework to stop downloading, and monitor the Internet*. University of Westminster. http://www.laquadrature.net/wiki/images/0/0e/Telecom_package.paper.monica.horten.28.june.2008.v5.pdf (last visited 1 March 2010).

Horton, R. (1982). Tradition and modernity revisited, in Hollis and Lukes (eds.). *Rationality and relativism*, Mit Press.

Hugenholtz, B. (2000). Why the Copyright Directive is Unimportant, and Possibly Invalid, *European Intellectual Property Review, at 501–502*.

Hydén, H. (2002). *Normvetenskap*, Lund studies in Sociology of Law.

Kravets, D. (2008). Pirate Bay Says It Can't Be Sunk, Servers Scattered Worldwide, *Wired Blog Network*, 1 February 2008, available at http://blog.wired.com/27bstroke6/2008/02/the-pirate-bay.html.

Kuhn, T. S. (1970). *The Structure of Scientific Revolutions*. Chicago: University of Chicago Press.

Kullenberg, C. (2009). The Social Impact of IT: Surveillance and Resistance in Present-Day Conflicts How can activists and engineers work together? *FlfF-Kommunikation.* 37–40.

Lakoff, G., & Johnson, M. (1980, 2003). *Metaphors we live by*, Chicago and London: The University of Chicago Press.

Larsson, S. (2005). *Musikupphovsrätten i ett samhälle under förändring – Internet och fildelning ur ett rättssociologiskt perspektiv (Intellectual Property Rights in a Transitional Society – Internet and File Sharing from a Sociology of Law Perspective),* thesis for Master of Laws, University of Lund.

Larsson, S. (2008). *Between Daring and Deliberating, 3G as a sustainability issue in Swedish spatial planning*, Blekinge Institute of Technology, Licentiate Dissertation Series No. 2008:02, School of Technoculture, Humanities and Planning.

Larsson, S. (2009). The darling conceptions of your time, or: why Galileo Galilei sings so sadly in the chorus. In Eide, S. R. (ed.) *FREE BEER 1.0*, an anthology from the presenters at Free Society Conference 2008.

Larsson, S. (In press). The Path Dependence of European Copyright, *SCRIPT:ed.*

Larsson, S., & Hydén, H. (2008, July). *Different darling conceptions tied to different societal systems. The case of illegal file sharing in a brave new world.* Paper presented at Research Committee Sociology of Law annual meeting, Law and Justice in the Risk Society, Milan and Como, Italy.

Larsson, S. & Svensson, M. (forthcoming). Compliance or Obscurity? Online anonymity as a consequence of fighting illegal file sharing.

Lessig, L. (2008). *Remix: making art and commerce thrive in the hybrid economy*. New York: Penguin Press.

Litman, J. (2006). *Digital Copyright: Protecting Intellectual Property on the Internet, the Digital Millennium Copyright ACT, Copyright Lobbyists Conquer the Book Description, Prometheus books. Maine, H. (1861, reprint 1959). Ancient Law*. London: The World Classics.

Maroney, T. (2006). A Proposed Taxonomy of an Emerging Field. In *Law and Human Behavior* (*Vol. 30*). Law and Emotion.

Martins, H. (1972). The Kuhnian "Revolution" and its Implications for Sociology. In Nossiter, (Eds.), *Imagination and Precision in the Social Sciences. London: Faber & Faber, Morgan, G. (1999). Organisationsmetaforer*. Lund: Studentlitteratur. [*Images of Organization*, 1997, Sage Publications Inc.]

Patrick, A. O., & McBride, S. (2008). Showdown Looms over Pirated-Media Directory. Swedish prosecutors target organizers of pirate bay, a huge file-sharing guide, *The Wall Street Journal,* 11 January 2008.

Prop. 1999/2000:86 *Ett informationssamhälle för alla.*

*Prop.2004/05:110* Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m.

Renner, K. (1949). *The Institutions of Private Law and their Social Functions*. London: Routledge.

Santos, B. de Sousa (1995). *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge.

SOU 1956:25 *Upphovsmannarätt till litterära och konstnärliga verk.* Lagförslag av Auktorrättskommittén.

*SOU2003:35* Upphovsrätten i informationssamhället - genomförande av direktiv 2001/29/EG, m.m.

Sundqvist, G. (2001). *Bredbandspolitik – En tekniksociologisk analys av kommunala bredband*. STS Research reports no 2, Avdelningen för teknik- och vetenskapsstudier, Göteborgs universitet.

Svensson, M., & Larsson, S. (2009). *Social Norms and Intellectual Property. Online norms and the European legal development*. Research Report in Sociology of Law. Lund University.

The Swedish Copyright Act, Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.

Wallerstein, I. (1974). *The modern world-system*. New York: Academic P.

World Internet Institute report (2008). *Sverige i Världen 2008* [Sweden in the World 2008].

## ADDITIONAL READING

Herrmann, E. (2008). On the distinction between the concept of God and conceptions of God. *International Journal for Philosophy of Religion*, *64*, 63–73. doi:10.1007/s11153-008-9163-z

Johansson, D., & Larsson, M. (2009). *The Swedish music industry in graphs. Economic development report 2000-2008*. Stockholm: Royal Institute of Technology, and TrendMaze.

Lessig, L. (1999). *Code and other laws of cyberspace*. New York: Basic books.

Lessig, L. (2004). *Free culture: how big media uses technology and the law to lock down culture and control creativity*. New York: Penguin books.

Lessig, L. (2006). *Code version 2.0*, New York: Basic books cop.

Lessig, L. (2008). *Remix: making art and commerce thrive in the hybrid economy*. New York: Penguin Press.

Söderberg, J. (2008). *Allt mitt är ditt. Fildelning, upphovsrätt och försörjning*. Stockholm: Bokförlaget Atlas.

Vaidhyanathan, S. (2001). *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity*. New York, London: New York University Press.

## KEY TERMS AND DEFINITIONS

**Paradigm Shift:** A label used to describe scientific progress in terms of "revolutions", developed by T S Kuhn. Here expanded to describe also societal transition in connection to "mentalities".

**Mentality:** Set of unspoken or unconscious assumptions, a structure of beliefs consistent within a culture or civilisation over a longer period of time.

**Metaphor:** A figure of speech in which a word or phrase that ordinarily designates one thing is used to designate another, and a fundamental part of the human conceptual system of thought and communication. Here used, together with "conception", as parts of the building blocks or mental grids that construct mentalities.

**Conception:** A thought structure, understanding, perception or logic.

## ENDNOTES

1 The mentality concept fills an important function in terms of attention to the role that historic structures play in contemporary conflicts.

2 Among works exemplifying the *long durée,* Fernand Braudel remarked on Alphonse Dupront's study (Dupront, *Le Mythe de Croisade: essai de sociologie religieuse*,

1959, reprinted without the subtitle in 1997) of the long-standing idea in Western Europe of a crusade, which extended across diverse European societies far beyond the last days of the actual crusades, and among spheres of thought with a long life.

3 For a discussion, see Christopher G.A. Bryant (1975), and for an overview see Douglas Lee Eckberg and Lester Hill, Jr. (1979). For readers in Swedish, Thomas Brante (1980) provides an extensive elaboration of the issue.

4 The Portuguese sociologist of law, Boaventura de Sousa Santos, has used the metaphor of an overloaded camel being burdened by the load of laws (Santos 1995).

5 The Wall Street Journal published an article about Pirate Bay at the same time (Wall Street Journal, 11 January 2008).

6 Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet. Proposition 2006/07:63 En anpassad försvarsunderrättelseverksamhet. Ds 2005:30 En anpassad försvarsunderrättelseverksamhet. Betänkande 2009/10:FÖU3 Signalspaning.

7 Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services; 2002/19/EC on access to, and interconnection of, electronic communications networks and services; and 2002/20/EC on the authorisation of electronic communications networks and services.

8 HADOPI is the abbreviation for a French law officially titled *Loi favorisant la diffusion et la protection de la création sur Internet* or "law favouring the diffusion and protection of creation on the Internet", regulating and controlling the usage of the Internet in order to enforce the compliance to the copyright law. The abbreviation is taken from the acronym for the government agency created by the law.

9 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property.

10 S M Kirkegaard, "Taking a sledgehammer to crack the nut: The EU Enforcement Directive" (2005) *Computer Law & Security Report*, Vol 21, Issue 6, at page 489.

11 What in Sweden is called Prop. 2008/09:67 Civilrättsliga sanktioner på immaterialrättens område - genomförande av direktiv 2004/48/EG.

12 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on Electronic Commerce")

13 For a discussion on "net neutrality", see C.T. Marsden, "Net Neutrality and Consumer Access to Content" (2007) SCRIPTed, Vol. 4, Issue 4, 407–435.

# Article II: Compliance or obscurity? Online anonymity as a consequence of fighting unauthorised file-sharing

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# Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorized File sharing

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**Abstract**

The European Union directive on Intellectual Property Rights Enforcement (IPRED) was implemented in Sweden on April 1, 2009, and was meant to be the enforcement needed to achieve increased compliance with intellectual property online, especially copyright. This, therefore, was the manifest function of the directive. The article empirically shows changes in levels of use of Online Anonymity Services (OAS) as a result of the implementation of IPRED in Sweden, as being a latent dysfunction of the implementation The data consists of two surveys of about 1,000 people between 15 and 25 years of age, where the first survey was conducted two months prior to the implementation of IPRED, and the second one seven months afterwards. This data is complemented with OAS statistics as well as Google search engine statistics in Sweden during 2009 on a selection of phrases related to online anonymity, revealing the link between encrypted anonymity fluctuations and copyright enforcement.

The article suggests that a key to understand any relationship between IPRED and fluctuations in online anonymity can be found in the law's relationship to social norms and levels of perceived legitimacy. The implementation of illegitimate laws is likely to spur dysfunctional (for the law) counter-measures. In the case of copyright enforcement and encryption technologies, the first seems to drive the other to some extent, affecting the balance of openness and anonymity on the Internet, possibly and at worst leading to that the enforcement of legislation that has a weak representation among social norms negatively affects the enforcement of legislation that has a strong representation among social norms.

**Keywords:** anonymity, pseudonymity, encryption, vpn, social norms, manifest and latent, functions and dysfunctions, unauthorized file sharing, IPRED, copyright enforcement, sociology of law

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## Introduction

There have been a number of initiatives within the European Union to reduce illegal file sharing of copyrighted content, and to strengthen compliance with copyright legislation within the Union. One of these directives is the IPR Enforcement Directive (IPRED),[1] which was implemented in Sweden on April 1, 2009. The implementation received a lot of attention in Sweden: Internet Service Providers (ISPs) noisily defended their neutrality, their subscribers and their communication integrity, and copyright holders' representatives spoke of all the cases that could now—as a result of IPRED—be raised in court against violators of their clients' rights. In the midst of this clamour, the traceability of online actions was debated, with providers of encrypted IP VPN services claiming that the increased interest in their services was "explosive." The purpose of the directive is to regulate enforcement of intellectual property rights within the European Union by adding measures, but not by changing the substantive IP laws themselves. One such important measure is the rights holder's possibility to, by a court order, retrieve identification data connected to IP addresses from the ISPs.

This connects to larger questions of how the character of the Internet is balanced in terms of traceability and anonymity, relating to issues of legal enforcement, not only regarding copyright but also other legal areas. Anonymity—or rather, pseudonymity—can be seen as having been the normal state on the Internet, following from the way in which the Internet was built; a state only breached by choice. However, incompatible trends can be seen. As Andersson puts it in his thesis on file-sharing rationalities, "[t]he networks of the Internet, and p2p in particular, are similarly non-familial; they are essentially stranger-to-stranger, non-overseeable (at least beyond a set horizon) and strictly governed by protocol" (Andersson 2010b, 225). Contrasting with this, for private Internet use a more recent trend has been towards a less anonymized state (witness the massive numbers committed to social networks such as Facebook). In line with this, there is also a development whereby global service providers who own the physical infrastructure are increasingly moving towards so-called hosted services, i.e., software that is not present on your machine but in the "cloud." This often connects personal information in ways that can have de-anonymizing effects. Along with this development follows the transition from today's IP addresses (IPv4) to future IP addresses (IPv6), which can provide for each

[1] The directive's full title is Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

machine—including mobile phones, vehicles, clothing, and buildings—to be given its given unique address. This alone could de-anonymize a whole new set of behavioral patterns in a radical way (Andersson 2010a).

This article connects the use of Online Anonymity Services (OAS) to unauthorized file sharing of copyrighted content. The spread of encryption to enable online anonymity has been regarded both as a tool for privacy, ensuring free speech and avoiding harassment of political dissidents in repressive states, and as something that will impede criminal investigations (Lessig 2006, 45–60; Rowland 2009). It is clear that this double-edged sword, working to de-identify whichever master it serves, impacts both the character of the Internet and the character of law enforcement.

In many ways, 2009 was for Sweden the year in which "online anonymity" became a valid phrase in everybody's mind. It was the year in which at least two new operators of services that provide anonymity as a subscription started, and in which the already established ones saw a sudden increase in subscribers. One of the stronger contributors to this increase seems to have been the implementation of the IPR Enforcement Directive. This article identifies the unintended effects of the implementation of IPRED in Sweden in terms of an increase in online anonymity, placing this in a broader trend or context regarding the diffusion of techniques for anonymity online. There are several probable effects of implementation, including manifest and latent functions, as well as dysfunctions (see Merton 1936; 1949; 1976). In simple terms, manifest functions are those that are intended, and latent functions are unintended. Unanticipated consequences and latent functions are not exactly the same: a latent function is a type of unintended consequence that is still functional for the designated system, whereas the latent dysfunction is a type of unintended consequence that is self-defeating for the same. Further than this, there can be non-functions that "are irrelevant to the system which they affect neither functionally or dysfunctionally" (Merton 1949, 105). The interesting focus from a sociological perspective on law lies in finding the dysfunctions of an implemented law—the effects that directly counter the purpose of the law—which we elaborate on below. By using the terminology of Robert K. Merton, this article focuses and empirically studies the changes in levels of anonymity among 15- to 25-year-old Swedish Internet users as a result of the implementation of IPRED, and discusses other possible latent dysfunctions.

## Research Context and Questions

Although there seem to be no earlier studies conducted regarding a link between copyright enforcement and resulting fluctuations in online anonymity, there is literature on privacy issues related to online anonymity/pseudonymity and law (Froomkin 2008; Rowland 2009), privacy issues related to fighting terrorism (Rosenzweig 2005), cryptography and regulability (Lessig 2006), and the question of online anonymity itself has received significant attention over the years. There are also, of course, a wide variety of studies on unintended consequences of law, some of which described in terms of being "dysfunctions" (see Vago 2009, 22–23). Sociology of Law has been described as a discipline that generally deals with studying the consequences of law from a social scientific perspective, in order to state and study the flaws of the legal application (see, for example, Svensson 2008, 72), and this perspective often focuses on the difference between law in books and law in action—using empirical data regarding the second in order to criticize the first.[2]

Regarding online anonymity as a regulated phenomenon, Froomkin (2008) concludes that the overall U.S. policy towards anonymity remains primarily "situational, largely reactive, and slowly evolving," and that "law imposes few if any legal obstacles to the domestic use of privacy-enhancing technology such as encryption." However, it is not long ago that encryption was seen as a tool not to be used by a broader public (Levy 2001). Cryptography was in the United States (and other countries) initially regulated as munitions, and used primarily by soldiers and spies, and there were long attempts to restrict its availability and use (Levy 2001). Cryptography is today accepted as an everyday use technology, for instance when it comes to banking or corporations sharing sensitive data (see, for instance, Lasica 2005, 232), but is often seen as problematic when connected to online anonymity. The American Pew Research Center conducted a survey ("Future of the Internet IV"), which gathered opinions from prominent scientists, business leaders, consultants, writers, and technology developers. This survey contained a section regarding online anonymity, and

[2] The Department of Sociology of Law at Lund University in Sweden studies the relationship between law, policy, and social norms (see, for instance, Appelstrand 2007; Baier 2003; Bergman 2009; Hydén 2002; Hydén and Svensson 2008; Larsson 2008; 2009; Svensson 2008; Svensson and Larsson 2009). Online anonymity in relation to stronger enforcement of copyright is a good example of the main interest of knowledge for policy research that is dealt with by sociology of law studies.

about 40 percent of the surveyed experts thought that anonymous activities online would be sharply restrained by 2020 (Pew Research Center 2010, 40).

The present study is part of a bigger survey conducted at two different time points, encompassing about 1,000 Swedish Internet users between 15 and 25 years of age. The data used for this article includes questions on the usage of services for anonymous Internet browsing, as well on individuals' expectations about starting to use such anonymity services if new legislation increased the possibility of their being caught sharing files illegally. The first survey was conducted two months prior to the implementation of IPRED in Sweden, and the second one seven months afterwards—affording us the opportunity to study the consequences of the Directive's implementation.

The question of anonymity is an important indicator of legitimacy issues of law in society. A change in anonymity levels online as a result of copyright enforcement legislation tells us something about the legitimacy of copyright law, as it does about how laws can have dysfunctional and unintended aspects that counter their very purpose. The above point leads to the four research questions that have guided this research:

1. To what extent can fluctuations in online anonymity be seen as an unintended consequence of the implementation of IPRED in Sweden?
2. If so, is it dysfunctional for copyright enforcement?
3. To what extent is the use of encrypted online anonymity services connected to unauthorized file sharing of copyrighted content?
4. In what way can the relationship between IPRED and fluctuations in online anonymity be found in the law's relationship to social norms and levels of perceived legitimacy?[3]

[3] We have written elsewhere about the changes in actual file-sharing frequencies as well as social norm strength regarding unauthorized file sharing as a result of the implementation of IPRED (Svensson and Larsson, forthcoming; see also Svensson and Larsson 2009). These articles can be interpreted as regarding the *intended purpose* of the law, where the unintended consequences and the role of online anonymity have remained overlooked.

## Functions and Dysfunctions of Law

Vago (2009) describes several general types of dysfunctions of law that "may evolve into serious operational difficulties if they are not seriously considered" (Vago 2009, 22). The dysfunctions of a law can be described by the "bad" consequences, which Cass R. Sunstein (1994, 1390) describes in terms of "self-defeating," meaning measures that actually make things worse from the standpoint of their strongest and most public-spirited advocates. Sunstein points out what we here regard as being one of the key problems of empirical limitations in a dogmatically encapsulated process of law-making, the problem of unintended consequences of legal implementation: what will be the real-world consequences of an implementation? Will it fulfill its intended purpose? Will it have dysfunctions that defeat their own purpose?

By formulating the "unanticipated consequences of purposive social action" in 1936, Merton gave a higher profile to the idea of hidden effects to action. This idea has reverberated in a multitude of areas, often with reference to Merton (Aubert 1954; Brown 1992; Christie 1965; House 1968; Mathiesen 2005; McAulay 2007; Ridgway 1956; Roots 2004; Sunstein 1994). Merton defined *function* as "those observed consequences, which make for the adoption or adjustment of a given system" (1949/1968, 105). "Function" is therefore something other than "dysfunction," in the sense that just as structures or institutions could contribute to the maintenance of other parts of the social system, they also could have negative consequences for them. As a type of safety valve, for the cases when neither of the two terms above is applicable, Merton uses the term *non-functions*, which he describes as simply irrelevant to the system under consideration. This could be seen as a "survivor" from earlier historical times that have no significant effect on contemporary society (Ritzer and Goodman 2003, 241–249). As we have already seen above, functions, dysfunctions, and non-functions can either be intended (manifest) or unintended (latent). There are *latent functions* that are unintended but still operate in line with the intended purpose of the initial action. This means that *latent dysfunctions* are unintended and "negative consequences for the structures and systems under consideration" (Merton 1949/1968, 105). When it comes to law, these latent dysfunctions can be direct consequences of what Sunstein speaks of as "self-defeating legislation" (1994). From the perspective of implementing copyright enforcement legislation, unforeseen consequences that somehow aid unauthorized file sharing in violation of copyright laws are one such latent dysfunction.

## Legal and Political Context of IPRED

There have been a number of initiatives within the European Union to reduce illegal file sharing of copyrighted content, and to strengthen compliance with copyright legislation within the Union. One of these directives is the IPR Enforcement Directive (IPRED), which was implemented in Sweden on April 1, 2009. IPRED generated significant debate and protests in the media, the blogosphere, and political arenas. The EU passed IPRED in April 2004 because it was held to be "necessary to ensure that the substantive law on intellectual property … is applied effectively in the Community"; further, it was held that the "means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market" (Recital 3). Although the scope regards the entire IP spectrum, the Directive has in general been discussed in connection with copyright enforcement. The Directive refers to all Member States being bound by the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement), which emphasizes the global regulatory connection on copyright between nations, the EU as well as international treaties.

IPRED can be seen as an exception to the otherwise ruling legal principle of online anonymity, often expressed in terms of privacy.[4] The implementation of IPRED in Sweden means that intellectual property rights holders can, whenever they assume that their rights have been violated online, take their complaints to a court, which will then examine the evidence and extent of file sharing to establish if the IP address should be released or not (IPRED, Article 6.1; see Prop. 2008/09:67). If the court finds the copyright holders to have shown probable cause for that a violation of copyright has occured, the copyright holder can then send a warning to the alleged violator or take legal action against him/her, after having retrieved the identity from the ISP (Section 53c of the Swedish Copyright Act 1960:729). At the time of implementation, the parallel but (in terms of copyright-related events) interconnected case of the BitTorrent tracker site "The Pirate Bay" was unfolding in the District Court of Stockholm. The Court announced its verdict on April 17, 2009, which added to public interest in copyright and file-sharing issues in Sweden and abroad.[5]

[4] For instance, as regulated under the Data Protection Directive: Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[5] The trial against the four men behind the Pirate Bay site was followed by the international press, such as Spain's leading daily, *El Pais*, *ABC News*, the *Los Angeles Times*, and *The Telegraph* (see the reference list). The four men were sentenced to a year's imprisonment and to collectively pay about 2.84 million euros in damages to the

The pursuit of unauthorized file sharing in order to enforce copyright legislation is of course in no way limited to the IPRED directive and its implementation in the EU. A common strategy for groups of rights holders has been to collect databases of IP numbers. They see this as the key to enforcing their rights against file-sharing violators and so seek, quite naturally, to tie the identities of violators to IP numbers, giving the ISP a central role in the battle (see, for example, Vincents 2007 on copyright holder strategies). For instance, British, U.S. and Danish law firms have been sending settlement letters to thousands of consumers after IP identification was made available by ISPs. The key role of ISPs has also been the center of attention in seminal cases in the United States, for example in the *RIAA v. Verizon* case in which the U.S. Court of Appeals for the D.C. Circuit ruled against the recording industry's attempts to compel ISPs to identify their subscribers (Kao 2004). In Sweden, the implementation of IPRED made many ISPs discard identity information at an even faster rate than before, often with reference to consumer integrity—neither the Directive nor its Swedish implementation requires ISPs to retain log data for any particular period of time. Log data retention is already regulated as a result of the previous implementation of an EU Directive under the principle of protecting subscribers' integrity; it therefore obliges ISPs to not store such data longer than necessary for subscriber invoicing.[6] The implementation of IPRED in Sweden has put the log data policies of ISPs into focus, causing a number of them to publicly announce that they do not store this type of data any longer than is absolutely necessary (Gustafsson 2009). To date, this legislation has only led to two court cases, despite the initial media reports of "hundreds" of cases being prepared by copyright holder's interest groups.[7]

The Directive puts the retention of log data in focus, which will be expanded by the ongoing implementation of the data retention Directive in the EU, even though the impetus for this Directive was to battle terrorism

media companies that were the plaintiffs. Both sides appealed, and the case had yet to be decided upon at the time for the submission of this article.

[6] In Sweden the regulation today regarding the protection of privacy in electronic communication is mainly found in Chapter 6 of the *Electronic Communications Act* (2003, 389). With regard to traffic data, Section 6 states that "Traffic data that is required for subscriber invoicing and payment of charges for interconnection may be processed until the claim is paid or a time limit has expired and it is no longer possible to make objections to the invoicing or the charge." The legislation emphasizes the importance of not storing data too long, for the sake of privacy protection, following from Directive 2002/58/EC.

[7] This includes the so-called Ephone case (Case Ä 2707-09, renamed in higher court to ÖÄ 6091-09, October 13 2009) and the TeliaSonera case (Case Ä 9211-09).

and "serious crime."[8] The role of ISPs, as well as the issue of whether or not Internet access should be blocked for copyright violators, has been highlighted by the so-called HADOPI law in France (2009) and The UK Digital Economy Act (2009), putting a new duty on ISPs to cooperate with copyright owners in identifying and pursuing infringements of their copyright. This was also discussed in the drafting of the EU Telecoms Reforms Package.[9] In line with the strong copyright trend, the EU is taking part in somewhat confidential negotiations, with for instance the United States, Japan, and Switzerland, of an Anti-Counterfeit Trade Agreement (ACTA) that may lead to a significant elevation of the copyright protection for the Member States (Kaminsky 2009; Larsson forthcoming). Also, despite the implementation of IPRED, the European Union is pushing for the enactment of a related Directive that would establish criminal sanctions for various intellectual property violations. This is called IPRED2: Intellectual Property Rights Enforcement Directive 2005/0127 (see Agarwal 2010, for critical commentary).

In the months after the implementation of IPRED in Sweden, the media reported that interest in anonymity services rose strongly, and OASs

[8] DIRECTIVE 2006/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of March 15, 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, and an amendment to Directive 2002/58/EC.

[9] HADOPI is the nickname for a French law officially entitled *Loi favorisant la diffusion et la protection de la création sur Internet* ("the law favouring the diffusion and protection of creation on the Internet") which regulates and controls the usage of the Internet in order to enforce compliance with copyright law. The nickname is taken from the acronym for the government agency created by the law.

The UK government introduced the Digital Economy Bill on November 20, 2009, [HL] 2009-10. The bill "aims to support growth in the creative and digital sectors and includes measures aimed at tackling widespread online infringement of creative copyright, such as peer-to-peer file-sharing" (see the press release of November 20, 2009, "A world class digital economy for Britain", 155/09). The bill was a result of more than a year of consultation and debate, and includes plans to send warning letters to persistently unlawful file-sharers and pave the way for enduring illegal sharers to have their broadband cut off, starting in 2011.

The Telecoms Reform Package was presented to the European Parliament in Strasbourg on 13 November 2007, voted upon 6 May 2009 and finalised 25 November 2009. The reform package originates from a non-legislative resolution on "Cultural industries in Europe", generally referred to as the 'Bono Report' after the French Socialist MEP responsible for the drafting of the resolution. The reform package is a cluster of directives (COM [2007] 697) that to a great extent puts the role of the Internet Service Providers in focus.

claimed that they were having difficulty coping with all the new customers. Bloggers and net activists established websites denouncing the implementation of IPRED, and created other sites to track the court cases that were anticipated to follow from its implementation, and the petitions started in opposition to the law. Moreover, the youth sections of the Swedish political parties unified themselves in their struggle against the implementation of IPRED. Cryptography experts raised the issue that a more widely anonymous Internet would make it harder to find and counter other types of criminality, such as terrorism and child pornography.

## Online Anonymity

When Bob Kahn and Vinton Cerf began working in 1973 on what became the underlying protocol for the Internet, TCP/IP, they did it under Kahn's previously formulated ambitions; of which one was that there should be no global control at the operations level (Leiner et al. 2009, 24–25). The simplicity and openness of the underlying structure created its own success by allowing networks to connect, and other applications such as the World Wide Web (addresses) and File Transfer Protocol, FTP, to operate upon it (Leiner et al. 2009). It is the Internet Protocols, the IP addresses that have become the key to unlocking the identities of the WWW-surfers on the Internet. The bridge between the "anonymous" IP address and the offline identity is watched over by the ISPs, which keep track of their subscribers mainly for billing purposes. This is the reason why whenever anyone wants to find out the identity behind the actions committed "by an IP-number," for instance a violation of copyright, it is at the door of the ISPs that they come knocking. From a sociological point of view, the normal state of online activities can be seen as anonymous. This anonymity can be breached willingly, for instance by individuals adding information on social networking sites (which broaden the identifying aspects of their offline identity), or unwillingly, for instance when forced in a criminal investigation.

The use of the term "anonymous" can be confusing from an online perspective (see Edman and Yener 2009, for a detailed explanation of anonymity systems). While it is reasonable to speak of "levels" of anonymity, online reality has also been described in more mundane terms of being anonymous in and of itself (Morio and Buchholtz 2009). When speaking of anonymity in such a sense it is not related to the degree of traceability, but to the lack of aspects such as image, voice, and situation in the online milieu. However, for the undertaking of this article, it is the

degree of traceability that is of most importance when it comes to anonymity. The absolutist definition of anonymity (i.e. complete untraceability) holds that this type of anonymity makes it ill suited for most kinds of web interactions (Rao and Rohatgi 2000). This is why web applications are often designed for pseudonymity (that is, the traceable version of anonymity—although this is often perceived as being truly anonymous by individual performing tasks online; Du Pont 2001; Rao and Rohatgi 2000). We use the term "anonymity" in a broad sense in this article; that is, we include "true" untraceable anonymity, but mostly will deal with the pseudonymous state. To keep this clear, we will speak of activities as being more or less anonymous, and will regard anonymity as a form of scale, rather than as a single, true, anonymous state.

**Encryption for Sale**

In this article we refer to OAS as the use of IP VPN encryption services, which in general result in a technically pretty robust pseudonymity. These services provide the user with the means of avoiding having their IP numbers connected to their offline identity; often for a subscription fee. An anonymity service, or anonymity server, is a server that provides the ability to send email, visit websites, or undertake other activities on the Internet anonymously. All traffic between the user (client) and server (host) is encrypted so as not to be decipherable by third parties. There is a form of trust issue with the OAS, in the sense that they are not always held to be completely reliable, for instance in terms of maintaining connectivity.

There are a variety of services, which work in slightly different ways. With some services, users connect to the service supplier's servers with a 128-bit encrypted Virtual Private Network (VPN) connection. The encrypted VPN "tunnel" between the user's computer and the ISP server ensures that the ISP cannot determine what type of information is being sent to and from the user, which obviously prevents or impedes intrusion. The IP number that any external party can see leads to the service provider, not the client. Some services can be administered through an email account, which makes it even harder to identify the user. Services for online anonymity that can be found on the Swedish market include (the early established) Relakks and Dold.se services, and of course Ipredator[10] and Mullvad.se. In addition to these there are of course foreign services, such as the SwissVPN and Ivacy, which naturally are open for Swedish subscribers.

[10] Established in 2009 by a group related to the BitTorrent tracker site "The Pirate Bay," as a response to the Swedish IPRED law.

**Anonymous Ways Beyond the Pay services**

There are ways to browse the web and still be quite anonymous without using an anonymity service. Using Internet cafés is an example of a set-up that achieves anonymity without encryption, which is why governments in both India and Italy have implemented mandatory identification for the customers of such establishments. Per-minute Internet access in convenience stores is a growing market (at least in Sweden), providing strong levels of anonymity through open networks in train stations and libraries. Large files can be sent and received anonymously or pseudonymously by using a "one click hosting" (OCH) service; these allow users to upload one or more files to a server, either free of charge or for a premium. Most services return a URL, which can be given to people who then can download the file. If the service does not lock the number of permitted downloads to a few, the service can be used for file sharing in larger numbers. There are for instance many Internet forums that share URLs, which has further contributed to make these services a complement to p2p file sharing: one of the few studies to address this (Antoniades et al. 2009) compared the OCH service RapidShare, which attracts large amount of users, to BitTorrent file sharing in general.[11] When including the study of OCH content indexing sites, which are an essential component for file sharing using OCH services, they concluded that "in OCH services, much like in p2p file sharing systems, a very small number of users upload most files, which are often copyrighted content, favouring audio albums, video movies, and applications" (Antoniades et al. 2009, 234). This is likely true. On the other hand, once an initial upload is performed, there is little incentive to perform a second initial upload of the same content, unless this second upload comes with a useful difference such as improved quality or smaller size. This could possibly be relevant for OAS use, where the group of initial uploaders have a stronger incentive of being less traceable.

One could also speak of "offline anonymity" in the sense that if the will to share digital content is strong enough, it will occur in the form of hand-to-hand sharing via USB sticks or other storage media; generally referred to as sneakernets. Pre-paid mobile phones can also be used to access the Internet anonymously. BitTorrent sharing services providing a stronger level of anonymity than the "traditional" BitTorrent sharing services are also under development. There are also networks being established with secrecy

[11] Another example of a globally popular OCH service is MegaUpload. On the Swedish arena there is, for instance, Sprend.

for users as their primary objective. These networks, such as Freenet, are not subject to any external censorship whatsoever; employing software that released by Ian Clarke in 2000, the network does not leave traces and cannot be found by search engines. These are uncontrolled, relatively untraceable areas of the Internet that have been referred to as the "deep web," the "dark web," or "beneath the surface web" (Bergman 2001; Lasica 2005, 224f.). Other examples of networked solutions that create anonymity with extremely low traceability are The Onion Router (TOR) and i2p.

## Method

We conducted two surveys of about 1,000 Swedish Internet users between 15 and 25 years of age, including questions on the degree of use of services that anonymize Internet browsing. The first survey was conducted in January and February 2009, and the second survey in October 2009. Since IPRED was implemented between the two surveys (April 2009), the surveys give us the opportunity to study some of the consequences of its implementation.

Two interviews were also conducted, one with a representative from one of Sweden's leading pay services for online anonymity (who requested that the company remain anonymous), and one with a representative from "Sprend," a company running a one-click hosting service with a strong majority of Swedish users. Anonymity service operators are reluctant to release data regarding their subscribers, mostly due to competition reasons: they simply do not want their competitors to know how their business is doing. So in order to complement the surveys, and as a way to corroborate the connection between the implementation of IPRED and online anonymity, statistics from Google Trends have been used. These have been compared for a selection of search phrases relating to online anonymity in the geographical area of Sweden (identified by Google from IP address information). The selected phrases were: "vpn," "tor," "ipredator," "relakks," "dold.se," "mullvad," "ivacy," "anonymous," "megaupload," and "hide."

### About the Surveys

The first survey was emailed to 1,400 recipients during January–February 2009; by the end of the survey process, the respondents numbered 1,047, generating a response frequency of 74.8 percent and exceeding our target of 1,000 respondents. For the second survey, 1,477 participants were emailed,

and once again 1,047 people responded, producing a slightly lower response frequency rate of 70.9 percent. The selection was made randomly for the age group, from the CINT panel eXchange register that contains 250,000 individuals in Sweden (nine million inhabitants) that represent a national average of the population. The fact that the respondents are part of this register means that they have already agreed to participate in online self-administered questionnaires, for which they receive a minor compensation. The respondent group was limited in terms of age, to 15- to 25-year-olds, because we were mainly interested in participants who had grown up with the Internet, and who used it as a natural part of their daily lives. The questions of anonymity services asked in the study are part in a larger battery of questions regarding social norms, perceived pressure from others to comply with copyright regulation, will to pay for music and movies, etc., that is reported elsewhere (Svensson and Larsson forthcoming; Svensson and Larsson 2009).

The surveys were self-administered questionnaires (SAQ). Wolf (2008) concludes that "research has shown that respondents are more likely to report sensitive or illegal behaviour when they are allowed to use a SAQ format rather than during a personal interview on the phone or in person." Traditionally the SAQ has been distributed by mail or in person to large groups, but now SAQs are being used extensively for web surveys. Because the questionnaire is completed without ongoing feedback from a trained interviewer, special care must be taken in how the questions are worded as well as how the questionnaire is formatted in order to avoid measurement error (Wolf 2008; see also Dillman 2000 on web based surveys).

## Survey Data

The data on the general aspects of the responses to the two surveys is presented here. We then compare the relevant data on anonymity between the two surveys—from before and after the implementation of IPRED in Sweden. Additional data comes from the two interviews mentioned above.

Of the 1,047 respondents in the first survey, about 59 percent (619) were female and 41 percent (427) were male. More than 99 percent stated that they had access to a computer with an Internet connection at home. More than 75 percent of the respondents spent at least two hours a day at an Internet-connected computer at home, and about 23 percent more than six hours a day. About 6 percent spent less than an hour a day at a computer with Internet access. Downloading of content in terms of music, movies or

other files that are possibly protected by copyright is evenly spread over the categories. About one-third of the respondents download potentially copyright material more than once a week, and about one-fifth never download this type of content.

Of the 1,047 respondents in the second survey, about 60 percent (624) were female and 40 percent (418) were male. More than 98 percent said that they had access to a computer with an Internet connection at home. With regard to time spent on this computer, more than 70 percent spent at least two hours a day on it (compared to about 75 percent in the first survey), and about 21 percent spent more than six hours daily. The group that downloaded potentially copyrighted material more than once a week (including daily) decreased from one out of three to one out of five.

**Comparing the Two Surveys**

The mean age for respondents in the first survey was about 20.9 years, while for the second survey it was about 19.9 years. Although the number of answers on the survey was 1,047 both times, the exact number of respondents that answered both the question of file-sharing frequency and the question on use of online anonymity services was a little bit lower. That is why the total number in Table 1 is lower than 1047. Note that the groups of file-sharing frequency (Table 1) have been clustered in different ways in order for us to significantly shed light on the fluctuations in OAS usage before and after IPRED.

**Table 1. Usage of Online Anonymity Service in Relation to File-sharing Frequency**

| File-sharing frequency | Usage of OAS, before IPRED (%) | Usage of OAS, after IPRED (%) | Actual increase/decrease (% points) | Possible margin error (% points)* | Statistically significant or not |
|---|---|---|---|---|---|
| 1. Never file share | 2.8 (of 217) | 5.5 (of 384) | +2.7 | +/– 3.17 | No |
| 2. Never file share + Once a month at the most | 4.8 (of 459) | 5.6 (of 638) | +0.8 | +/– 2.65 | No |
| 3. Never file share + Once a month at the most + Once a week at the most | 6.5 (of 681) | 7.2 (of 797) | +0,7 | +/– 2.58 | No |
| 4. File share daily | 20.6 (of 107) | 28.6 (of 63) | +8.0 | +/– 13.5 | No |
| 5. Daily + More than once a week | 13.2 (of 325) | 23.0 (of 187) | +9.8 | +/– 7.07 | Yes |
| 6. Daily + more than once a week + once a week at the most | 11.9 (of 547) | 18.5 (of 346) | +6.6 | +/– 4.91 | Yes |
| All | 8.6 (of 1,006) | 10.2 (of 984) | +1.6 | +/– 2.56 | No |

* Given a confidence interval of 95 percent.

The main findings displayed in the table is the connection between unauthorised file sharing and OAS usage in relation to the IPRED implementation. For group 5, for instance, the share of OAS use is almost doubled after the introduction of IPRED. For group 6, the share of OAS usage increase is about as large. It is of course possible that the increase for

the ones that file-share daily would also have been statistically significant, had the selected population been bigger in the survey. However, as the numbers in brackets indicate, the file-sharing frequency was reducing quite heavily post-IPRED (compare the decrease before/after IPRED in groups 4–6 with the increase in groups 1–3). One can note that the increase in OAS share is pretty remarkable in group 1—the ones who do not file share at all—however, this is still not statistically significant.

Since the respondents received the questionnaire by email, one could ask to what extent the survey respondents tend to be more computer literate than the population as a whole. While this is a fair question, it is more relevant for populations where there is a significant divide between groups with low computer literacy and those with high. In Sweden, however, as shown by the 2008 WII report on Internet use, 94 percent of the Swedish individuals between 16 and 25 use Internet at home (WII 2008, 14). In 2010 the Internet usage among 16- to 25-year-olds is 99 percent for "sometimes" and 92 percent for "daily use" (WII 2010, 10). Although our survey excludes a group of people by being an emailed online survey, this group is likely very small.

**Additional Data—OAS Statistics and Search Trends**

The companies that run the online anonymity services are reluctant to share their statistics on subscriber fluctuations—quite understandably, they do not want to give away any information on this competitive market. An interview with a representative for one of the Swedish operators of an anonymity service revealed that the effect of the IPRED implementation was instantaneous. The increase in subscribers to the OAS was "more than double, almost a triple."[12] This was later corroborated with subscriber statistics from the company stating that the increase of subscribers during the short span from March 15 (two weeks before the implementation of IPRED) to May 1, one month after, was 298 percent. However, as the OAS representative commented, immediately after April 2009 "the increase levelled off a bit, likely due to overload in our systems. We were unprepared for the increase in demand. I believe the increase in sales could have been at least five times if we had been prepared. Many potential customers probably gave up on anonymisation, others went to alternative suppliers." This tells of an immediate increase around the time IPRED was implemented. The intense media attention received by the implementation likely played an important role in people becoming conscious of this type of service.

[12] Interview with the authors, May 2010.

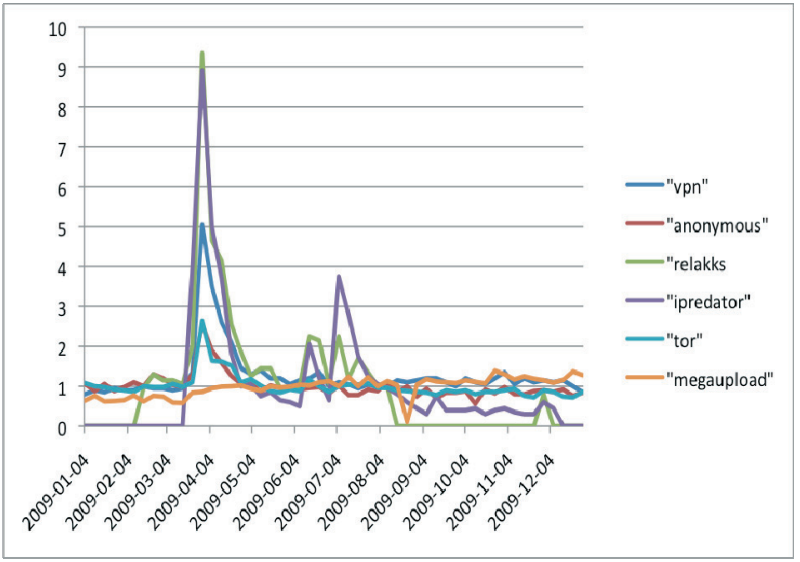
The marked, but perhaps short-lived, public interest in online anonymity around the time of IPRED's implementation can further be corroborated by search engine statistics from Google Trends (Figure 1).[13] Google Trends search engine statistics for Sweden from 2009 show that searches on words like "anonymous," "vpn," "relakks," "ipredator," and even "hide" show a remarkable peak exactly around the time that IPRED was implemented in Sweden. This goes also for "tor," which likely is aimed for the darknet routing system, but not for "MegaUpload." OASs other than ipredator and relakks, such as mullvad, ivacy, and dold.se, as well as a number of other related search terms, do not have enough search volume to show reliable statistics.

The most significant peaks are found for "relakks," "ipredator," and "vpn"; "relakks" being almost 10 times as high as the normal frequency, "ipredator" a little over eight times, and "vpn" about four times as high. The peaks last for a little more than a month, starting in mid-March and level off in the last week of April.

The one-click host "Sprend" is a relatively small service, with about 95 percent of its users based in Sweden. This is why its user statistics, following the argument in this article, could be relevant for the question of responses to the implementation of IPRED in Sweden. From the interview with the representative of Sprend, the increase of users from May 2009 to May 2010 was about 100 percent, from around 30,000 users to 60,000 (data from Google Analytics). The representative claimed that there had been a big increase in their users uploading and sending data in .zip and .rar file formats, rather than as .mp3, which is a sign of a trend regarding this service towards more efficient sharing of bigger amounts of data—copyright protected or not.

[13] For example, Google Flu Trends has proven to be a useful tool for tracking influenza outbursts, following from the quite simple fact that we tend to perform Google searches on topics that are of concern to us (Carneiro and Mylonakis 2009; Ginsberg et al. 2009).

**Figure 1. Fluctuations in Searches on Google during 2009 from within Sweden for a Selection of Words Relating to Online Anonymity[14]**




## Analysis

Although the increase of OAS use over the whole Swedish population is not significant, the increase of the share in some groups related to file-sharing frequency definitely is. Groups 4 and 5 in Table 1 show that unauthorized file sharing of copyrighted content is at least one reason for seeking stronger anonymity online. The increase from before to after the IPRED implementation was significant for these relatively high-frequency file sharers. There are other circumstances that support an increase in enhanced anonymity as a result of IPRED. As mentioned, a representative from one of

[14] The standard deviation is 10 percent, and the geographical data is based on IP address information. The data is scaled to the average search traffic for the selected search term (represented as 1.0) during the time period selected (2009). Hence, the numbers are not absolute search traffic numbers. The scaling is relative to the time period chosen (and not fixed to January 2004, as is also offered by the Google Trends). See more: http://www.google.com/intl/en/trends/about.html#7.

the Swedish OAS revealed that the effect of the IPRED implementation on subscriber numers had been instantaneous.[15] This sense of an effect was also supported by Google statistics for various Internet search terms associated with anonymity, searched for by Swedish users in 2009. The OCH service approached by the authors, Sprend (a large majority of whose users are Swedish), did not report this explicit pattern of immediate interest when the law was implemented, but they did report a constant increase over the year of 2009, doubling its users from May 2008 to May 2009. While this could be connected to unauthorized sharing of copyrighted content, there is no way of corroborating such a claim at this time, and it cannot reliably be connected to IPRED.

One can of course speculate on the motives for wanting to be anonymous online. Is it just to share files without the risk of getting caught, or are there other reasons as well? One could hypothesize around, for instance, a desire to hide other types of crime (in any organized form), or perhaps to protect oneself from being exposed to criminal acts or integrity breaches, for instance from the Firefox plugin Firesheep, that spread rapidly globally in October 2010 and was used to obtain access to people's accounts on Facebook, Twitter, and other services, over open wireless networks. There are idealists that see too strong and sweeping surveillance trends in law making in terms of data retention directives, IPRED, and signals surveillance, such as the FRA law in Sweden (Kullenberg 2009). There are likely several motives—as there are many completely legitimate and never questioned uses for encrypted communications, such as in Internet banking, password protection, or when I use the VPN service of my university to log on to its server, etc. This all ties on to the double-edged sword of encrypted anonymity: it can be used to do good and bad. It can stop governments from preventing malicious acts being done by individuals, and it can help individuals from preventing malicious acts being done by governments. The fact that we increasingly lead our lives connected to the Internet makes the traceability of our traces a sensitive and important question for new legislation in terms of privacy. Law directs power, such as who has the right to get access to identity information connected to IP addresses. IPRED puts the finger on this sensitive balance between intellectual property rights and individuals privacy. If this legally directed power is not perceived as

[15] The interest in how to be more anonymous in Sweden at the time can further be described by the fact that when the anonymity service Ipredator was first released as a work in progress in April 2009, more than 170,000 people indicated their interest in subscribing. Its not likely that all of them signed up for the following pay service, but it is still indicative of the general consciousness of these matters and the strong interest in a more active online anonymity, brought about by the implementation of IPRED.

legitimate, encryption technology is always there as a means to diminish that power. Some support can be found in our empirical data for the fact that the levels of OAS use have also increased for non-file sharers in relation to the implementation of IPRED; however, the numbers are too low to validate this hypothesis in a satisfactory manner (Table 1, group 1).

Anonymity—albeit in the somewhat traceable and weak "pseudonymous" form—can be understood as part of the status quo of online behavior; that is, users generally trust that their online activities will not easily reveal their offline identities. There are two exceptions to this trust, of which one is a voluntary release of information (such as revealing birth name, age, and pictures in social networks). The other exception is more intricate, and is tied to social norms in another way. If de-anonymization is forced by law, this will only seem just and legitimate if this law is in compliance with the structures of social norms: if it does comply, then online "trust" in anonymity will not suffer from this breakage of confidentiality, since most people will experience the breakage as just. However, if the law is not in line with social norms, this de-anonymization will likely have a negative effect on the status quo of the weaker forms of anonymity. This "trust" is adversely affected, resulting in counter-measures designed to strengthen the lost anonymity, all in line with the social norms that have been affected by the implemented law. This might lead to an escalation on both sides of what can clearly now be described as a conflict. In terms of the broader spread of online anonymity, a cold war has begun.

Linking back to the discussion earlier in this paper, it is striking that the use of anonymity services really is a latent dysfunction and not just a latent non-function; in truth, it opposes the intended enforcement of copyright legislation by helping file sharers to avoid being caught when violating copyright. In this article we mention various other ways of achieving online anonymity besides using an IP VPN encryption service: given that the legal initiatives do not overlap well with the social norms of the online community, it is likely that the use of several of these methods for achieving anonymity will increase. In fact, they are likely to have already increased in Sweden following the implementation of IPRED, although our study was not designed to identify the levels of these other types of techniques for anonymity. We have focused on the dysfunctions of IPRED implementation, and concluded the increased anonymity to be a latent effect.

## Conclusion

This study shows that unauthorized file sharing of copyrighted content is at least one reason for seeking stronger anonymity online. The increase from before to after the IPRED implementation was significant for high-frequency file sharers. These results must however be seen in a grander perspective of law in relation to social norms. Online anonymity is not only about a few services being offered for an obscure and small group in the corners of society; it is often perceived as part of the "normality" of Internet behavior. There is a dilemma here regarding the striking of a balance between law enforcement and public trust in the system: governments need to choose their battles carefully, for fighting socially accepted behavior may actually hinder the fight against socially non-accepted behavior. This dilemma has been described in general terms as that "governments are increasingly nervous of anonymous/pseudonymous traffic on the Internet and conversely users are increasingly nervous of governments using their powers to intercept and force identification of those who attempt to hide behind a cloak of anonymity for good or bad reason" (Rowland 2009, 310).

Given the generativity of the Internet, any legally enforced forced identification that breaks this veil of anonymity will have to be well founded in social norms regarding the legitimacy of the actual law, if it is not to disrupt this "trust." If not, such initiatives are likely to spur counter-measures involving the diffusion of knowledge of how to strengthen online anonymity; as well as the counter-measures of smaller elites of pro-privacy activists. The levels of the different anonymity techniques, encrypted as well as other, are a sign that describes a part of the character of online behaviour, and hence the character of the Internet.

An anticipated conclusion that requires further assessment is that the file-sharing patterns are changing in terms of visibility. It is likely that a core of sharers are developing, who are more inclined to pay for anonymity services due to their anticipated need for advanced protection from being caught violating copyright laws. Our data supports this to some extent. Antoniades et al.'s (2009) study also supports this conclusion in the case of OCHs, finding that in OCH services, "much like in p2p file-sharing systems a very small number of users upload most files, which are often copyrighted content, favouring audio albums, video movies, and applications" (2009, 234). It is however also likely that a more loosely formed group of sharers will develop, who are connected to the core shares, but who are not centrally located in the sharing process. They are using other means for sharing, such as "secret" groups and trusted networks, sneakernets, and One Click hosting services.

Given the multitude of ways in which pseudonymity can be strengthened, especially bearing in mind the weak support of the legal norms among the social norms in this case, a criminalization of the operation of anonymity services would be an especially ill-suited attempt to solve so-called "piracy-issues."[16] Not only would such an initiative likely fail to reduce anonymous sharing of files, it would further stimulate the diffusion of knowledge of encryption and other techniques for anonymity. A consequence of an increase in online anonymity, not solely for copyright violations but for law enforcement as a whole, is (as mentioned before) that any criminal investigation that tracks illegal behavior on the Internet will be set back by an increase in encrypted traffic. On the basis of this study, one can conclude that the fight against copyright violations has increased the use of encryption technologies, which will likely have a detrimental effect on police investigations regarding other crimes as well. This follows the argument made by Lessig in Code v2 (2006) that there are choices to be made about how the character of the Internet evolves, and that these choices will affect fundamentally what values are built into the network; expressed by Zittrain in terms of the risk of going from the "generative" Internet towards an "appliancised" network (Zittrain 2008). However, given the generativity of the technology—think for instance of the multiple ways for enhancing anonymity outlined above—this choice is not simply made by any content rights holder or legal enforcement without counteractions. One point here is that the attempted enforcement of legislation that has a weak representation among social norms will affect the enforcement of legislation that has a strong representation among social norms. IPRED must be seen in the light of how copyright regulation has legitimacy issues in the digitized society. Enhanced surveillance and detection methods that connects to this regulation—with EU initiatives such as the data retention Directive, possibly the Telecom reforms package, and ACTA, and with national laws like the French HADOPI and the UK Digital Economy Act—will likely not only polarize law from social norms in this area, but also lead to the diffusion of more and stronger online anonymity.

[16] With the term "piracy" being a metaphoric term with political content, and also (for many reasons) misleading connotations (see Larsson and Hydén 2011).

## References

Agarwal, N. 2010. "Evaluating IPRED2: The Wrong Answer to Counterfeiting and Piracy." *Wisconsin International Law Journal* 27: 790.

Andersson, J. 2010a. "Det Dumma Nätet." In *Efter The Pirate Bay*, eds. Andersson and Snickars. Mediehistorisk Arkiv, Stockholm: Kungliga Biblioteket.

Andersson, J. 2010b. "Peer-to-Peer-Based File-Sharing Beyond the Dichotomy of 'Downloading is Theft' vs. 'Information Wants to be Free': How Swedish File-sharers Motivate their Action." Goldsmiths, University of London, for the degree of PhD in Media and Communications.

Antoniades, D., E.P. Markatos, and C. Dovrolis. 2009. "One-Click Hosting Services: A File-Sharing Hideout." *Internet Measurement Conference, Proceedings of the 9th ACM SIGCOMM Conference on Internet Measurement*, Chicago.

Appelstrand, M. 2007. *Miljömålet i skogsbruket – styrning och frivillighet*, Lund studies in Sociology of Law 26, Lund University.

Aubert, Vilhelm. 1954. *Om straffens sosiale funksjon*, Oslo: Akad. forl.

Baier, M. 2003. *Norms and Legal Rules. An Investigation of the Tunnel Construction through the Hallandsås Ridge*. Department of Sociology, Lund University.

Bergman, A.-K. 2009. "Law in Progress? A Contextual Study of Norm-Generating Processes – The Example of GMES." Lund Studies in Sociology of Law No. 30, Lund University.

Bergman, M.K. 2001. "The Deep Web. Surfacing Hidden Value." *The Journal of Electronic Publishing* **7** (1).

Brown, B.J. 1992. "Latent Effects of Law: The Defamation Experience." *Singapore Journal of Legal Studies* 315–346 (Dec).

Carneiro, H.A. and E. Mylonakis. 2009. "Google Trends: A Web-Based Tool for Real-Time Surveillance of Disease Outbreaks." *Clinical Infectious Diseases* 49: 1557–1564.

Case ÖÄ 6091-09, October 13, 2009, Court of Appeal. Five publishing houses seeking identity information from an ISP.

Case Ä 2707-09, June 25, 2009, District Court. Five publishing houses seeking identity information from an ISP.

Christie, N. 1965. *Kriminalsosiologi*. Oslo: Universitetsforl.

Dillman, D.A. 2000. *Mail and Internet Surveys: The Tailored Design Method*. 2nd edn. New York: Wiley.

Directive 2002/58/EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

Du Pont, G.F. 2001. "The Criminalization of True Anonymity in Cyberspace." *Michigan Telecommunications and Technology Law Review* 7: 191.

Edman, M., and B. Yener. 2009. "On Anonymity in an Electronic Society: A Survey of Anonymous Communication Systems." *ACM Computing Surveys* 42 (1): 1–35.

El Pais, ELPAÍS.com—Madrid—February 18, 2009, *Los demandantes del juicio contra The Pirate Bay retiran la mitad de los cargos. El sitio de intercambio de archivos es acusado de distribuir material con derechos de autor.* http://www.elpais.com/articulo/internet/demandantes/juicio/The/Pirate/Bay/retiran/mitad/cargos/elpeputec/20090218elpepunet_3/Tes?print=1 (accessed November 29, 2010).

Froomkin, A.M. 2008. "Anonymity and the Law in the United States." In *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society,* ed. I. Kerr. New York: Oxford University Press, 2009; University of Miami Legal Studies Research Paper No. 2008-42. Available at SSRN: http://ssrn.com/abstract=1309225

Ginsberg, J., M.H. Mohebbi, R.S. Patel, L. Brammer, M.S. Smolinski, and L. Brilliant. 2009. "Detecting Influenza Epidemics Using Search Engine Query Data." *Nature* 457: 1012-1014.

Gustafsson, J. 2009. *Nätoperatörer kringgår inte IPRED*, Svenska Dagbladet, April 28, 2009. http://www.svd.se/nyheter/inrikes/artikel_2805959.svd (accessed November 29, 2010).

House, R.J. 1968. "Leadership Training: Some Dysfunctional Consequences." *Administrative Science Quarterly* 12 (4): 556–571.

Hydén, H. 2002. *Normvetenskap*, Lund Studies in Sociology of Law. Lund: Lund University.

Hydén, H., and M. Svensson. 2008. "The Concept of Norms in Sociology of Law." In *Scandinavian Studies in Law*, ed. P. Wahlgren. Law and Society. Stockholm: Stockholm Institute for Scandinavian Law.

Kaminsky, M. 2009. "The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)." *Yale Journal of International Law* 34: 247.

Kao, A. 2004 “RIAA v. VERIZON: Applying the Subpoena Provision of the DMCA.” *Berkeley Technology Law Journal* 19: 405.

Kullenberg, C. 2009. “The Social Impact of IT: Surveillance and Resistance in Present-Day Conflicts How can Activists and Engineers Work Together?” *FlfF-Kommunikation* 1: 37–40.

Larsson, S. 2008. “Non-legal Aspects of Legally Controlled Decision-Making – The Failure of Predictability in Governing the 3G Infrastructure Development in Sweden.” In *Contributions in Sociology of Law. Remarks from a Swedish horizon*, eds. H. Hydén, and P. Wickenberg. Lund Studies in Sociology of Law. Lund: Lund University.

Larsson, S. 2009. “Law as a Gate Keeper for Participation. The Case of 3G Infrastructure Development in Sweden.” In *Participative Aspects on Law – A Socio-Legal Perspective*, ed. M. Baier. Lund Studies in Sociology of Law. Lund: Lund University

Larsson, S. 2011. “The Path Dependence of European Copyright.” *SCRIPTed*. Edinburgh: School of Law, University of Edinburgh.

Larsson, S., and H. Hydén. 2011. “Law, Deviation and Paradigmatic Change: Copyright and its Metaphors.” In *Technology for Facilitating Humanity and Combating Social Deviations: Interdisciplinary Perspectives*, eds. Garcia-Ruiz et al. IGI Global. Forthcoming.

Lasica, J.D. 2005. *Darknet: Hollywood’s War Against the Digital Generation*. Hoboken, NJ: John Wiley & Sons, Inc.

Leiner, B.M. et al. 2009. “A Brief History of the Internet.” ACM SIGCOMM *Computer Communication Review* 39(5): 22-31.

Lessig, L. 2006. *Code Version 2.0*. New York: Basic Books Cop.

Levy, S. 2001. *Crypto: How the Code Rebels Beat the Government, Saving Privacy in the Digital Age*. New york: Viking Press.

Los Angeles Times. 2009. “Editorial, The Pirate Bay ruling. A Swedish court rules against a website notorious for bootlegged content. But the war rages on.” April 18, 2009. http://www.latimes.com/news/opinion/editorials/la-ed-pirate18-2009apr18,0,3705805.story (accessed November 29, 2010).<CE: Please check citations>

Mathiesen, T. 2005. *Rätten i samhället: En introduktion till rättssociologin*, [Original title: *Retten i samfunnet*]. Lund: Studentlitteratur.

McAulay, L. 2007. “Unintended Consequences of Computer-Mediated Communications.” *Behaviour and Information Technology* 26 (5): 385–398.

Merton, R.K. 1936. "The Unanticipated Consequences of Purposive Social Action." *American Sociological Review* 1: 894–904.

Merton, R.K. 1949. *Social Theory and Social Structure: Toward the Codification of Theory and Research*. Glencoe, IL: The Free Press.

Merton, R.K. 1976. *Sociological Ambivalence and Other Essays*. New York: The Free Press.

Morio and Buchholtz. 2009. "How Anonymous are you Online? Examining Online Social Behaviors from a Cross-Cultural Perspective." *AI and Society* 23: 297–307.

Pew Research Center. 2010. *The Future of the Internet IV*.

Prop. 2008/09:67 *Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG*.

Rao, J.R., and P. Rohatgi. 2000. "Can pseudonymity really garantee privacy?" *Proceedings of the 9th USENIX Security Symposium*, Denver.

Ridgway, V.F. 1956. "Dysfunctional Consequences of Performance Measurements." *Administrative Science Quarterly* 1 (2): 240–247.

Ritzer, G., and D.J. Goodman. 2003. *Sociological Theory*. 6th edn. Boston: McGraw-Hill.

Roots, R.I. 2004. "When Laws Backfire. Unintended Consequences of Public Policy." *American Behavioural Scientist* 47 (11): 1376–1394.

Rosenzweig, P. 2005. "Privacy and Consequences: Legal And Policy Structures For Implementing New Counter-Terrorism Technologies And Protecting Civil Liberty." Available at SSRN: http://ssrn.com/abstract=766484.

Rowland, D. 2009. "Privacy, Freedom of Expression and cyberSLAPPs: Fostering Anonymity on the Internet?" *International Review of Law, Computers & Technology* 17 (3): 303–312.

Sunstein, C.R. 1994. "Political Equality and Unintended Consequences." *Columbia Law Review* 94 (4): 1390–1414.

Svensson, M. 2008. *Social Norms and the Observance of Law, [In Swedish. Sociala normer och regelefterlevnad. Trafiksäkerhetsfrågor ur ett rättssociologiskt perspektiv*]. Lund Studies in Sociology of Law. Lund: Lund University.

Svensson, M., and S. Larsson. 2009. "Social Norms and Intellectual Property. Online norms and the European legal development." Research Report in Sociology of Law. Lund University.

Svensson, M., and S. Larsson. forthcoming. Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms.

The Swedish Act on Copyright in Literary and Artistic Works – Act 1960:729, of December 30, 1960. Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.

*The Telegraph*. 2009. "What does The Pirate Bay Ruling Mean for the Web?" by Claudine Beaumont, April 17, 2009. http://www.telegraph.co.uk/technology/news/5170684/What-does-The-Pirate-Bay-ruling-mean-for-the-web.html (accessed November 29, 2010).

Vago, S. 2009. *Law and Society*. Upper Saddle River, NJ: Pearson Prentice Hall, Cop.

Vincents, O.B. 2007. "When Rights Clash Online: The Tracking of p2p Copyright Infringements vs. the EC Personal Data Directive." *International Journal of Law and Information Technology* 16(3): 270-296.

Wolf, James (2008) Self-Administered Questionnaire, *Encyclopedia of Survey Research Methods*, SAGE Publications. [Last visited 10 December, 2010]. http://www.sage-ereference.com/survey/Article_n522.html.

World Internet Institute. 2008. *Svenskarna och Internet 2008*. Hudiksvall.

World Internet Institute. 2010. *Svenskarna och Internet 2010*. Hudiksvall.

Zittrain, J. 2008. *The Future of the Internet. And How to Stop It*. New Haven and London: Yale University Press.

# Article III: The Path Dependence of European Copyright

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# THE PATH DEPENDENCE OF EUROPEAN COPYRIGHT

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## Abstract

This article analyses the path dependence of European copyright. It shows how copyright is legally constructed, is harmonised through international treaties and European regulatory efforts in terms of InfoSoc Directive and the IPRED, and is also affected by the Data Retention Directive and the Telecommunications Reform package. Furthermore, the "secretly" negotiated ACTA agreement is discussed as it may impose stronger copyright on Member States. This means that the formulations and metaphors of how copyright is constructed and conceptualised contribute towards various lock-in effects as the dependence on the given path increases.

The strong path dependence of European copyright law results in regulation that suffers from legitimacy issues. Copyright construction is a legal complex that in general is based on ideas of the conditions of an analogue world for distribution and production of copies, but it is armed with increasingly protective measures when faced with human conduct in the context of digital networks. To some extent, this most probably involves the expansion of the concepts and metaphors that once described only non-digital practice. The trend in European copyright is therefore strongly protectionist, through the expanding and strengthening of rights and their enforcement, and in that it is self-reinforcing, being locked into certain standards.

The path dependence of European copyright serves as a strong argument for those who benefit from its preservation, signalling that there are power structures supporting the colonisation by this specific legal path of other legal paths that protect other values, such as consumer privacy or versions of integrity. There is a clear tendency in targeting the ISPs and other intermediaries in attempts to keep the copyright path intact. The development of European copyright, in its broad sense, not only re-builds the Internet in terms of traceability, but also law enforcement in terms of mass-surveillance.

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The digitalisation of society requires that new questions be asked as to how legal enforcement is or can be performed with regard to the mass-surveillance of the multitude of habits and secrets in our everyday lives. This means that there is a growing political responsibility for balancing privacy concerns and new and extreme possibilities for recording behaviour by means of data logs and digital supervision, all of which is part of the enforcement of copyright as a result of its strong path dependence. Thus, the path dependence of copyright leads to an imbalance of principal importance between the interests at stake. The imbalance lies in that a special interest is allowed to modify methods of legal enforcement from the reactive and particular to the pre-emptive and general. The special copyright interest gains at the expense of the privacy of everyone.

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## 1. Introduction - legal path dependence and social norms

The development of law is generally conservative and retrospective. Values embedded are long lasting and consequent upon the main principle of predictability.[1] At the same time, the problem addressed in this article is not that legal development follows a path, but, in relation to a historically relatively sudden shift in society, that the dependence on this path within law has become too strong, and hence, too retrospective, in the sense that it has failed to incorporate the social changes now at hand. Law is often prone to falling behind social change, and this gap causes conflict between the social and the legal spheres.[2]

That there is something very inconsistent and discordant between online behaviour and copyright regulation has been well documented and widely discussed.[3] There is a growing amount of research that portrays the problems of applying unrevised copyright regulation in a digitalised society, in terms of creativity, cultural aspects and privacy as well as a dominant industry's struggle for power.[4] *SCRIPTed* contributes to

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[1] See for instance A Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Stockholm: Fritzes, 1995), at 89-90; V Aubert, *Continuity and Development in Law and Society* (Oslo: Norwegian University Press, 1989), at 62; N Luhmann, *Rechtssoziologie* (Reinbek bei Hamburg: Rowohlt, 1972), at 31ff.

[2] See R L Abel, "Law as Lag: Inertia as a Social Theory of Law" (1982) 80 *Michigan Law Review* 785, or A Christensen, "Rätten i ett samhälle under förändring" in S Strömholm (ed), *Svensk Rättsvetenskap, 1947 – 1997* (Stockholm: Nordstedts, 1997).

[3] S Larsson "The Darling Conceptions of Your Time, Or: Why Galileo Galilei Sings So Sadly in the Chorus" in SR Eide (ed), *Free Beer 1.0* (FSCONS, 2009) available at http://www.lulu.com/items/volume_67/7897000/7897083/1/print/book.pdf (accessed 3 February 2010), at 27-46, the anthology from the presenters at Free Society Conference 2008; L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books 2004); L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (London: Bloomsbury Academic, 2008); U Lewen, "Internet File Sharing: Swedish Pirates Challenge the U.S." (2008) 16 *Cardozo Journal of International & Comparative Law*; J Litman, *Digital Copyright: Protecting Intellectual Property on the Internet, the Digital Millennium Copyright Act, Copyright Lobbyists Conquer the Internet, Pay Per View...Pay Per Listen...Pay Per Use, What the Major Players Stand to Gain, What the Public Stands to Lose*, 2nd ed (Amherst: Prometheus Books, 2006), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=jessica_litman (accessed 3 February 2010); S Morris, "Pirates of the Internet, at Intellectual Property's End with Torrents and Challenges for Choice of Law" (2009) 17 *International Journal of Law & Information Technology* 282-303; H Selg and L-E Eriksson, *Broadband Technologies Transforming Business Models and Challenging Regulatory Frameworks: Lessons from the Music Industry* (Music Lessons - Deliverable 4 2006); M Svensson and S Larsson, *Social Norms and Intellectual Property: Online Norms and the European Legal Development*, Research Report in Sociology of Law (Lund: Lund University, 2009), at 1; S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001); O Vincents, "When Rights Clash Online: The Tracking of P2p Copyright Infringements vs. the EC Personal Data Directive" (2008) 16 *International Journal of Law & Information Technology* 270-296.

[4] The privacy of ordinary people is a growing issue in the digitalising society. In addition, Marsoof has identified this in the context of South Asia, although Marsoof's perspective does not elaborate the possibility of conflicting interests also being embedded in law. See A Marsoof, "The Right to Privacy in the Information Era: A South Asian Perspective" (2008) 5 *SCRIPTed* 553-574; L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2002).

the debate on different aspects of the regulatory dilemmas of digital practices, or on social change resulting from an increasingly connected society.[5] I link to this by closing in on the question of why European legal development with regard to copyright and related legislation during the growth of the Internet have failed to encompass the changes in behaviour and social norms that have followed. The argument concerns law and the historical and retrospect aspects of legal development in relation to social changes. In order to outline how path dependent European copyright is, and in what way, along with those consequences that derive from this dependency, I undertake a detailed analysis of the most recent directives that amend explicit copyright legislation as well as the most important ones that are affected to some degree by copyright. Their implementation in Sweden has been chosen as a case study since the copyright dilemma in terms of illegal file sharing is highly active and at stake there and also to illustrate the gap between an EU directive and its implementation.

I proceed in three stages. Firstly, I develop a theoretical framework for my conceptualisation of path dependence. Secondly, I show the most important regulatory bodies of interest on a European supranational level, i.e. InfoSoc, the IPRED, the Data Retention Directive, the Telecoms Reform Package/ACTA, and their implementations in Sweden where relevant, and I also point out the applicable aspects that contribute to forming "the path". Thirdly, I elaborate the lock-in effects of copyright development in Europe, and I conclude with the main general and also specific consequences of the path dependence at hand.

## 2. Path dependence of law

Although much of it has concerned technological development, the literature on path dependence may apply with equal force to legal development.[6] Regulatory regimes

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[5] For instance, in relation to copyright. Graham Reynolds' example of "mashup music" and copyright regulation in Canada relates to creativity and the boundaries of copyright relating to the work of Lawrence Lessig. See G Reynolds, "A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada" (2009) 6 *SCRIPTed* 639-668; L Lessig, see note 3 above. The practice of "mashing up" music and sounds digitally in order to create whole new works, sometimes with the original sources surprisingly unrecognisable, ties in with questions of "unlocking IP" that R Clarke and D Kingsley discuss in relation to open access and journal content, and the role of the commons and public domain, as analysed in an Australian case study by G Greenleaf. See R Clarke and D Kingsley, "Open Access to Journal Content as a Case Study in Unlocking IP" (2009) 6 *SCRIPTed* 234-258; G Greenleaf, "National and International Dimensions of Copyright's Public Domain (An Australian Case Study)" (2009) 6 *SCRIPTed* 259-340. J B Meisel analyses the development of competition in the delivery of digital content to consumers that, for instance, file sharing in peer-to-peer (p2p) networks implies in "Entry into the Market for Online Distribution of Digital Content: Economic and Legal Ramifications"(2008) 5 *SCRIPTed* 50-69. The new possibilities of the Internet raise the question of how privacy is re-formulated, or re-regulated. Marsoof draws attention to the increased "need to protect the privacy of the individual from invasions not only by the State, but also from others who seek to profit from such intrusions", see A Marsoof, note 4 above. This "new" question or dilemma of privacy is also touched upon up by S Nouwt in relation to information privacy and data privacy, specifically in relation to Location Based Services and geo-information about citizens, see S Nouwt, "Reasonable Expectations of Geo-Privacy?" (2008) 5 *SCRIPTed* 375-403

[6] See, for instance C P Gillette, "Lock-in Effects in Law and Norms" (1998) 78 *Boston University Law Review* and O A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 *Iowa Law Review* 601.

provide obvious analogies to technological standards.[7] Legal developments have been analysed in terms of path dependence, especially by American scholars, with reference to the classic text *The Path of the Law* by Oliver Wendell Holmes.[8] Predictability, as described by the legal scholar Peczenik, is "one of the basic values in democracy and a state governed by law", and many legal theorists hold that the norm of "jurisdiction and the actions of public authorities in a democratic state should be predictable".[9] The Norwegian sociologist of law Vilhelm Aubert speaks of law as something that serves to safeguard expectations, one of five main tasks of law, and as Niklas Luhmann has argued, its most important one.[10] This predictability can also account for the often-incremental development of law, the minor steering towards a retrospective activity that changes mostly in evolutionary rather than revolutionary terms. This retrospectivity, this "past-dependency" of law, in the terms of the American Judge Richard A Posner, is probably not a problem when society changes according to stable curves.[11]

In terms of technologies, there are huge advantages to standardisation, which makes it lock in certain conditions.[12] These standards solve coordination problems among users, allowing them to constitute a network beneficiary for those who use the same technology.[13] Gillette adds an element of power to the otherwise relatively cold equation of transactions costs, in much of the literature on path dependence. The dominant interest groups can, supported by the regulatory standards, use their powers to ward off emerging attempts for regulatory change. This is the reason why, if one seeks to understand the whole picture, one has to include those actors who depend on regulation, in order to understand its development.

Furthermore, a factor that perpetuates lock-in effects and has to do with metaphors and conceptions of legal development, somewhat similar to the "rhetorical repertoires" of international organisations studied by Halliday et al., but which mostly draw on the findings of the conceptual metaphor school founded by George Lakoff

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[7] See M Adams, "Norms, Standards, Rights" (1996) 12 *European Journal of Political Economy* 363-375.

[8] S J Burton (ed), *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.*, (Cambridge: CUP, 2000).

[9] A Peczenik, see note 1 above, at 89-90. For a case study related to legal predictability, see S Larsson, "Non-Legal Aspects of Legally Controlled Decision-Making – The Failure of Predictability in Governing the 3G Infrastructure Development in Sweden" in H Hydén and P Wickenberg (eds), *Contributions in Sociology of Law: Remarks from a Swedish Horizon*, Lund Studies in Sociology of Law (Lund: Lund University, 2008).

[10] V Aubert, *Continuity and Development in Law and Society* (Oslo: Norwegian University Press, 1989), at 62; N Luhmann, see note 1 above, at 31ff.

[11] R A Posner, "Past-Dependency, Pragmatism, and a Critique of History in Adjudication and Legal Scholarship" (2000) 67 *University of Chicago Law Review* 573.

[12] S J Liebowitz and S E Margolis, "Path Dependence, Lock-In, and History" (1995) 11 *Journal of Law, Economics and Organization* 205. P A David, "Clio and the Economics of QWERTY" (1985) 75 *American Economic Review* 332–337.

[13] C P Gillette, see note 6 above, at 818.

and Mark Johnson in the 1980s.[14] Gillette speaks as if the lock-in effects are always conscious and are therefore an outcome of power struggles and transaction costs. These struggles for power, to a high degree, probably are, but there is also an element of the language-based legal means that include metaphors, categorisations and labels used to make certain conceptions that are supported in law.[15] Although these metaphors can be used very much consciously, as in copyright education efforts, they may just as well be part of an unconscious but language-based pattern that functions as a type of standardisation.[16] It is just not as visible as other standards. Gillette does not see these conceptual lock-in effects that emanate from the retrospect practices of a law-making nature, but they have been shown to be relevant when it comes to copyright.[17]

Mahoney, who analyses the use of path dependence as an analytical tool in historical sociology, divides the types of path dependencies into self-reinforcing sequences and reactive sequences.[18] Mahoney broadly defines path dependence as something that occurs when a "contingent historical event triggers a subsequent sequence that follows a relatively deterministic pattern". In relation to the two categories of path dependence, Mahoney concludes that in the case of a self-reinforcing sequence this means that "the contingent period corresponds with the initial adoption of a particular institutional arrangement, while the deterministic pattern corresponds to the stable reproduction of this institution over time". Mahoney contrasts this with the reactive sequence, where the contingent period "corresponds with a key breakpoint in history, while the deterministic pattern corresponds with a series of reactions that logically follow from this breakpoint".[19] As we will see, self-reinforcing path dependency is very much relevant to the development of the European copyright regime.

## 3. European Copyright in the days of the Internet

The development of copyright is directly connected to contemporary technological development. It is the networking technologies that have challenged the legislation, thus leading to amendments in order to cope with the new technical and social changes. A series of legislative initiatives have been taken to strengthen online compliance with copyright regulation. This article presents four of the most

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[14] T C Halliday, S Block-Lieb, and B G Carruthers, "Rhetorical Legitimation: Global Scripts as Strategic Devises of International Organizations" (2010) 8 *Socio-Economic Review* 77-112. See G Lakoff and M Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).

[15] See for instance M Johnson, "Mind, Metaphor, Law" (2007) 58 *Mercer Law Review* 845-868.

[16] On copyright education and its rhetoric, see M Yar, "The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom" (2008) 10 *New Media & Society* 605-623.

[17] See more on this in S Larsson and H Hydén "Law, Deviation and Paradigmatic Change: Copyright and its Metaphors" in M Vargas Martin et al. (eds) *Technology for Facilitating Humanity and Combating Social Deviations: Interdisciplinary Perspectives* (IGI Global, 2010) and S Larsson, "459 miljarder kronor – om metaforer, flöden & exemplar" in P Snickars and J Andersson (eds), *Efter Pirate Bay* (Stockholm: Mediehistoriskt arkiv, Kungliga biblioteket, 2010).

[18] J Mahoney, "Path Dependence in Historical Sociology" (2000) 29 *Theory and Society* 507-548.

[19] *Ibid*, 535.

important recent regulatory initiatives in the European Union that either have had an explicit focus on copyright, or an indirect, but important effect, as well as a brief outtake about future development.

- The *European Community Directive on Copyright in the Information Society* ("InfoSoc Directive") was tabled in December 1997,[20] and the directive was passed in 2001.[21] It was implemented in Sweden on 1 July 2005.
- The *Intellectual Property Rights Enforcement Directive 2004/48/EC* ("IPRED") was approved by the European Parliament on 9 March 2004, and implemented in Sweden on 1 April 2009.
- The *Data Retention Directive* aims at harmonising the regulation of the Member States, who require telephone operators and Internet Service Providers to retain personal data.[22] This will play a role in the enforcement of copyright, and how this will happen is explained in this article. It has yet to be implemented in Sweden.
- The European *Telecoms Reform Package* was widely debated in the Swedish press in 2009. It was presented to the European Parliament in Strasbourg on 13 November 2007 but not voted on until 6 May 2009. This is a cluster of directives that are being prepared (COM [2007] 697),[23] which includes aspects of the role of the Internet Service Providers and which will also play a role in the enforcement of copyright violations.
- The imminent future developments can be interpreted from the outcome of the international negotiations on the *Anti-Counterfeiting Trade Agreement* ("ACTA"), a multilateral agreement negotiated outside WTO

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[20] European Commission, *Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, COM/97/0628 final – COD 97/0359, [1998] OJ C108/6, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997PC0628:EN:HTML (accessed 14 March 2011).

[21] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, [2001] OJ L167/10-19, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML (accessed 14 March 2011).

[22] *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC*, [2006] OJ L105/54-63, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:EN:HTML (accessed 14 March 2011).

[23] European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on access to, and Interconnection of, Electronic Communications Networks and Services, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services {SEC(2007) 1472} {SEC(2007) 1473}*, COM/2007/0697 final – COD 2007/0247, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0697:FIN:EN:HTML (accessed 14 March 2011).

processes and protections, and to some extent the *Green Paper - Copyright in the Knowledge Economy* from July 2008.

### *3.1. Stronger Copyright: The InfoSoc Directive*

The initial proposal for the European Community Directive on Copyright in the Information Society was tabled in December 1997[24] and the directive was passed in 2001.[25] This followed the *Green Paper on Copyright and Related Rights in the Information Society* of July 1995.[26] One of the original two purposes of the directive was to bring the laws on copyright and related rights in the European Union into line with the *WIPO Internet Treaties*, in order to set the stage for joint ratification of the treaties by the member states and the European Community.

The second goal of the InfoSoc Directive was to harmonise certain aspects of substantive copyright law across the European Union. The Directive states the importance of legal protection of copyright and related rights with regard to the "information society" in article 1.[27] The Directive has been criticised for focusing on the aggregators' rights rather than the creators', and that it is "primarily geared towards protecting the rights and interests of the 'main players' in the information industry (producers, broadcasters and institutional users), not of the creators that provide the invaluable 'content' that drives the industry".[28] During the almost eight years from the first proposal in 1997 to Sweden's implementation in 2005, much happened on line in terms of techniques and technology for communicating in general on the "information superhighway" mentioned in the Green Paper from 1995. In terms of organised file sharing initiatives for music and films etc., the architecture went from the centralised unstructured peer-to-peer system of Napster to the first decentralised file-sharing network, Gnutella, in 2000 and then to Kazaa in 2001. From 2002 through 2003, a number of popular BitTorrent services were established, including The Pirate Bay.[29]

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[24] European Commission, *Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, COM/97/0628 final – COD 97/0359, [1998] OJ C108/6, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997PC0628:EN:HTML (accessed 14 March 2011).

[25] *Directive 2001/29/EC*, see note 21 above.

[26] European Commission, *Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society* – COM (95)/0382 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0382:FIN:EN:PDF (accessed 14 March 2011).

[27] See I Brown (ed) *Implementing the EU Copyright Directive* (FIPR 2003).

[28] P B Hugenholtz, "Why the Copyright Directive is Unimportant, and Possibly Invalid" (2000) 22 *European Intellectual Property Review* 501-502. See also P B Hugenholtz, M van Eechoud, S van Gompel, L Guibault and N Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Alphen aan den Rijn: Kluwer Law International, 2009).

[29] J Zittrain, "A History of Online Gatekeeping" (2006) 19 *Harvard Journal of Law and Technology* 253-298 gives a good historical exposé up until 2006 and includes Napster, Aimster, Gnutella and Grokster. See also L J Strahilevitz, "Charismatic code, social norms, and the emergence of cooperation on the file-swapping networks" (2003) 89 *Virginia Law Review* 505 on Napster and Gnutella. See D

The InfoSoc Directive includes protection for "technological measures" which often are referred to as Digital Rights Management, DRM (article 6). This criminalisation of the circumvention of technological measures has been seen by critics as a way to authorise copyright more powerfully than ownership in terms of consumers buying music for example, but at the same time being restricted as to what they are allowed to do with the purchased product (for example, the owner of a music CD who cannot copy it in order to play it in his or her car).[30] The protection of technological measures is not new to the Swedish Copyright Act, but the version prior to the InfoSoc Directive implementation applied only to computer programmes.[31] The directive was implemented among the Member States, mainly between 2003 and 2004, by Denmark, the Czech Republic and Greece at an early date and by Sweden, Finland, Spain and France at a later one.[32] The original last implementation date for the InfoSoc Directive was 22 December 2002, but only Denmark and Greece had implemented it by then. In Sweden, the proposal from the governmental commission (the SOU) was presented in 2003.[33] In the following government draft bill 2004/05:110, legal changes were accepted by the Parliament and came into force on 1 July 2005.[34]

The digital technologies from the mid-1990s provoked worldwide and interdisciplinary debates on their potential impact on the non-digital world. It is in this context that the European Council called for a report on "the problems" of the information society. The report often referred to as the Bangemann Report, after the chair of the group that produced it, concluded that the protection of intellectual property was of the greatest importance. The InfoSoc Directive has meant a wider scope for copyright and a criminalisation of more actions.[35] For the legal concepts that

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Spitz and S D Hunter, "Contested Codes: The Social Construction of Napster" (2005) 21:3 *The Information Society* 169-180 on the social construction of Napster.

[30] See T Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press, 2007), at 181-185.

[31] S 57a Swedish Copyright Act. This protection follows art. 7.1c in Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes.

[32] G Westkamp, "The Implementation of Directive 2001/29/EC in the Member States" (Queen Mary Intellectual Property Research Institute, February 2007), available at http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf (accessed 1 July 2010), at 79-81.

[33] SOU 2003:35 (Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m.).

[34] Prop 2004/05:110 (Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, mm.), SFS 2005:359. In addition the government draft bill 2004/05:135 "Utökade möjligheter att förverka utbyte av och hjälpmedel vid brott m.m." brought with it some changes for the *Swedish Copyright Act*, and was in force by 1 July 2005. SFS 2005:360; SOU 2003:35, Prop 2004/05:110, see S Larsson, *Intellectual Property Rights in a Transitional Society: Internet and File Sharing from a Sociology of Law Perspective* (In Swedish. Musikupphovsrätten i ett samhälle under förändring – Internet och fildelning ur ett rättssociologiskt perspektiv), Master of Laws Thesis, University of Lund (2005), at 28-29. Sweden had received a reprimand from the European Court of Justice for the delay that had already occurred.

[35] For the UK implementation, see T Cook, "UK Implementation of the Copyright in the Information Society Directive" (2004) 20 *Computer Law & Security Report* 17-21.

once described the reproduction and protection of pieces of vinyl and other plastic materials, a sudden enlargement had to be undertaken to include digital formats in increasing use. The legal concepts that describe and regulate the analogue practices became metaphorical in the sense that they were held to regulate emerging practices of a different format, with new (digital) restraints and possibilities, unlike their existing analogue counterparts.[36] An emphasis was placed on the control of an environment, which at the time lacked this very feature.

### *3.2. Enforcing Copyright: IPRED and its implementation in Sweden*

Looking back on the origins of the Enforcement Directive, the Commission presented a Communication in November 2000, announcing a series of practical measures intended to improve and intensify countermeasures against "counterfeiting and piracy in the single market". As part of these measures, the Commission forwarded a proposal for a directive harmonising the legislation of Member States so as to strengthen the means of enforcing intellectual property rights.[37] Even then, around the time the IPRED was approved by the European Parliament (9 March 2004),[38] it caused a stir amongst civil rights groups in the United States and Europe.[39] In April 2004, the EU passed the Directive on the Enforcement of Intellectual Property Rights, the so-called IPRED Directive. It was established because it was "necessary to ensure that the substantive law on intellectual property….is applied effectively in the Community" (Recital 3). Recital 4 of the Directive explicitly relates it to copyright legislation according to the TRIPS Agreement.[40] Although its scope covers the entire IP spectrum, the Directive has generally been discussed in terms of copyright enforcement. Central to the debate is the fact that the directive gives the copyright holders the right, by virtue of a court decision, to retrieve the identity information behind an IP address at a certain time, when they "have presented reasonably available evidence sufficient to support its claims" (article 6.1). The "competent judicial authorities" may then requisition such information. The IPRED is a minimum

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[36] See S Larsson and H Hydén, see note 17 above.

[37] For the Portuguese implementation of IPRED and an example of what choices are made when implementing a directive into national law, see M Lourenço Carretas, "Os Novos Meios de Tutela Preventiva dos Direitos de Propriedade Intelectual no Direito Português (The New Means of Preventive Protection of Intellectual Property Rights in Portuguese Law)" (2008) 5 *SCRIPTed* 455-481.

[38] *Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (OJ L157, 30.4.2004)*, [2004] OJ L195/16-25, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:HTML (accessed 1 July 2010).

[39] S M Kirkegaard, "Taking a Sledgehammer to Crack the Nut: The EU Enforcement Directive" (2005) 21 *Computer Law & Security Report* 488-495, at 489.

[40] Recital 4 of IPRED, *Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.4.2004)*, [2004] OJ L195/16-25, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:HTML (accessed 1 July 2010).

directive, meaning that the member states can stipulate national conditions that are even more favourable to the rights holders than the directive prescribes (article 2).

Sweden did not meet the requirements of article 8 of the Directive. To do so required that the Swedish law introduce provisions that give holders of intellectual property rights, a right to information about the infringer.[41] This was one of the most widely debated issues in Sweden, because copyright holders' representatives, such as the IFPI and the Antipiratbyrån, could apply to the courts to approve the release of identity information from ISPs (S 53 c of the Swedish Copyright Act). For such an injunction to be issued by the court, requires neither that the applicant identify the infringers nor that infringement has been intentional or grossly negligent. It is enough that probable cause has been shown that a person has committed an infringement or a violation, according to s 53 c Swedish Copyright Act.[42] It requires the court to have found that an infringement has occurred, which means that in implementing the directive, Sweden lowered the requirement below that contained in it the Directive and also departed from the proposed level in the preparatory memorandum.[43]

The injunction is aimed at ISPs and describes the relationship between them and the copyright holders (their representatives). This is an expansion of rights linked to IPR, in the name of enforcement of the latter. Implementation meant that the majority of the provisions in the IPRED were in force by 1 April 2009.[44] To date, this legislation has led to only a few court cases in Sweden, of which no more than two are of interest here. This is despite the initial reports in the media of "hundreds" of cases being prepared by copyright holders' interest groups and the rough estimate of preparatory legal work on an estimated 400 to 800 cases per year.[45]

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[41] See DS 2007:19, Civilrättsliga sanktioner på immaterialrättens område - genomförande av direktiv 2004/48/EG, p. 170 f. and Bill Prop. 2008/09:67, Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG, at 128 f.

[42] Bill 2008/09: 67, at 259.

[43] DS 2007:19, s. 190 f. The explanation for departing from the proposal was that there were considered to be good reasons that such regulation would fit in better with the Swedish system and mean that the effect of the injunction evidence in a following trial against infringers would diminish. Furthermore, it was pointed out that this is not contrary to the directive, as it would benefit the copyright holders (see Article 2.1 of the Ipred Directive), Bill 2008/09: 67, at 149 ff.

[44] Draft bill Prop. 2008/09:67, Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG. In a European Court of Justice ruling on 15 May 2008, Sweden was found to have failed to incorporate the Directive into domestic law within the prescribed period, see *Commission of the European Communities v Kingdom of Sweden*, Case C-341/07, [2008] OJ C171/11, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:171:0011:0011:EN:PDF (accessed 1 July 2010).

[45] See Prop 2008/09:67, at 255 on the estimate. The first of the two mentioned actual cases, the *Ephone Case*, involves five publishing houses that attempted to retrieve identity information from an ISP on an individual who was using a server to share audio books. Just a few hours after the law was implemented, these five publishers submitted an application to the district court (Case Ä 2707-09). The district court found that there was sufficient evidence of the alleged copyright violations; the case was, however, appealed by the ISP and the higher court did not find that the evidence showed probable cause that a violation of copyright had occurred, due to the fact that a password was needed to access the server content and no evidence was presented regarding the extent of distribution. The publishers appealed, and the Supreme Court granted a review permit in January 2010. However, when the case was scheduled for trial in September 2010, the Court decided to ask for a preliminary ruling by the

In general, the IPRED highlights the issue of the ISPs' position as being increasingly targeted because they are the key to identifying information behind the IP numbers, on the one hand, and are also the guardian of their customers' privacy, on the other. The two aforementioned Swedish cases underline this. An interesting aspect of both cases is the defendants' claims that the Data Retention Directive, although not yet implemented in Sweden, is applicable in a way that would hinder the legal use of the rights that the IPRED law grants the copyright holders. No court agreed until the *Ephone* case was granted a review permit for a hearing in the Supreme Court in September 2010, which acknowledged the legal uncertainty of the non-implemented Data Retention Directive with regard to the application of the IPRED implemented in Sweden by asking the European Court of Justice for a preliminary ruling in the matter, and its response is still pending. This underlines the complex and uncertain but applicable role of the Data Retention Directive with regard to European copyright.

### *3.3. Combating "Serious Crime": The Data Retention Directive*

The Data Retention Directive amends *Directive 2002/58/EC* in order to force operators of public telephone services and Internet Service Providers, ISPs to keep data such as calling number, user ID and identity of a user of an IP address for a period of between six months and two years. The aim is to "ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law".[46] Though the scope of government-mandated data retention may vary, at its core is the requirement that ISPs collect and store data that track the Internet activity of their customers.[47] In December 2005, the European Parliament passed the Data Retention Directive.[48] The origin of the directive was the fight against terrorism in response to the Madrid and London bombings in 2004 and 2005.

We may ask why this is relevant in the copyright context. A first step in answering this question is to conclude that the Data Retention Directive lacks clarity with regard

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European Court of Justice on the relationship between the Data Retention Directive that Sweden still has to implement and the implemented Ipred (Supreme Court Case nr Ö 4817-09, Court of Appeal Case ÖÄ 6091-09). The outcome of this preliminary ruling will definitely affect a similar but later case, the *TeliaSonera Case*. It involves four movie companies represented by the Swedish Antipiratbyrån, which filed a lawsuit at the district court in order to retrieve information on the individual(s) running a site called Swetorrents. They claimed that the site was illegally sharing copyright-protected material. The ISP, TeliaSonera, did not reveal information that could identify the alleged copyright violators, referring instead to its customers' integrity. The district court accepted the movie companies' claim, and the ISP appealed the case to a higher court, which ruled in favour of the movie companies. This compelled the ISP to apply for leave to appeal to the Supreme Court, which still has to decide whether or not to try the case (Case Ä 9211-09).

[46] Article 1, s 1 of the Data Retention Directive.

[47] See C Crump, "Data Retention: Privacy, Anonymity, and Accountability Online" (2003) 56 *Stanford Law Review* 191-229 for a perspective on American legislation regarding data retention after the 9/11 terrorist attack. See C DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive" (2010) 11 *German Law Journal* 291-318 for the German perspective.

[48] *Directive 2006/24/*EC, see note 22 above.

to three main issues. It does not define what is meant by ''serious crime'' and instead leaves this task to each Member State's national law; it does not limit access to retained data to specifically designated law enforcement authorities, as it refers only to ''competent national authorities''; and it leaves it up to each Member State's national law as to when access to data is permitted, all of which are relevant to copyright enforcement, depending on where the line is drawn in each of the three cases.

Furthermore, the directive targets the role of the ISPs and their relationship to the customer by weakening the latter's privacy rights. The former Directive, 2002/58/EC, established a principle that traffic data must be erased as soon as storage is no longer needed for purposes relating to the communication itself (including billing). The Data Retention Directive entails a breach of this principle. The European Data Protection Supervisor ("EDPS"),[49] was harsh in its criticism of the proposal, and actually termed it illegal.[50] Criticism of this kind was also voiced by the Article 29 Data Protection Working Party, which is an independent EU body for the data protection of privacy.[51] It concluded with regard to the directive that it "encroaches into the daily life of every citizen and may endanger the fundamental values and freedoms all European citizens enjoy and cherish".[52] The Article 29 Data Protection Working Party continues by stating that it is "of utmost importance that the Directive is accompanied and implemented in each Member State by measures curtailing the impact on privacy".[53]

The important choices to be made by the Member States in implementing the directive related to the data storage period (6-24 months), exactly what data should be

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[49] The EDPS is an independent supervisory authority devoted to protecting personal data and privacy and promoting good practice in the EU institutions and bodies.

[50] *Opinion of the European Data Protection Supervisor on the proposal for a Directive of the European Parliament and of the Council on the Retention of Data Processed in Connection with the Provision of Public Electronic Communication Services and amending Directive 2002/58/EC (COM(2005) 438 final)*, [2005] OJ C298/1-12, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:298:0001:01:EN:HTML (accessed 14 March 2011), section 8.

[51] Article 29 Data Protection Working Party was established according to article 29 of the *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, [1995] OJ L281/31-50, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML (accessed 14 March 2011). Its duties are described in article 30 of the Directive 95/46/EC and article 15 of the *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)*, [2002] OJ L201/37-47, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:EN:HTML (accessed 14 March 2011).

[52] Article 29 Data Protection Working Party, *Opinion 3/2006 on the Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC*, [2006] 654/06/EN WP 119, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp119_en.pdf (accessed 14 March 2011), at 2.

[53] *Ibid.*

stored, and who should be obliged to retain them (should small operators have to?). The question of who should pay for data retention and data delivery when data have been requested has also been very widely debated, and different Member States have adopted different solutions. Some commentators believe that media companies will seek to lobby national governments to include file sharing in the definition of ''serious crime'' so that data can be accessed for this purpose.[54] In general, the directive touches on the fundamental concern about what extended access to traffic data in a digitalised society will bring, irrespective of the intentions behind it. Specifically, the directive aims to harmonise the regulation by the Member States of telephone operators and ISPs, with a view to retaining personal traffic data.

In examining the case of the Swedish implementation of the Directive, there are a few questions about data retention that are of relevance to the copyright path. An important question, as previously mentioned, is whether or not the Directive will override the IPRED. Secondly, when it comes to the "serious crimes", it is not only about the data storage period, but also about what levels of criminal penalties will allow the police to obtain and use subscriber identification.[55] In late 2010, the media reported that a proposal was being prepared that would diminish the necessary severity of the crime, so that the police could also retrieve traffic data from the ISPs for crimes punishable only by a fine. This would include copyright crime, often referred to as illegal file sharing.

The Data Retention Directive aims at aiding the prosecution of criminal cases, while the IPRED relates to civil cases. This probably means that the traffic data stored under the provisions of the Data Retention Directive cannot be used to aid copyright holders' representatives in a civil law case for damages for copyright infringement. This will in turn probably require some sort of dual database for the ISPs. The type of data that the copyright holders have the right to obtain from the ISPs, as a result of the implementation of the IPRED, is often already erased by the ISPs in accordance with the principle of consumer privacy. These data will probably still be available to some extent as a result of the implementation of the Data Retention Directive. This means that the Data Retention Directive may aid the IPRED and the copyright holder's case against illegal file sharing, a consequence of the Data Retention Directive that never was mentioned in its draft stages.

The copyright owners' interest groups collect IP numbers that they believe violate the rights of their clients. In order to link the IP number to the persons behind the actions, these groups need to approach those who have access to this link, the ISPs. Since present legislation on ISP responsibilities focuses on the integrity of the subscribers, the ISPs generally do not store the data for a long period. Some ISPs even stated that they store traffic data for the minimum time possible, when the IPRED was implemented in Sweden in 2009. Implementing the Data Retention Directive therefore helps the case of the copyright holders in that changing the responsibilities of the ISPs from being prohibited from storing the data for an unnecessarily long

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[54] M Taylor, "The EU Data Retention Directive" (2006) 22 *Computer Law and Security Report* 309-312.

[55] SOU 2009:1 En mer rättssäker inhämtning av elektronisk kommunikation i brottsbekämpningen, at 72-73.

period, to being obliged to store the data for a longer time.[56] The ISPs will no longer be able to lawfully choose to discard the data logs as soon as the billing purposes have been fulfilled when the Data Retention Directive is implemented. This was according to the draft bill set to be done 1 July 2011 in Sweden but was postponed in a vote in the Swedish Parliament 16 March 2011 for at least a year from the original date of implementation.[57]

### *3.4. The Telecoms Reform Package, ACTA and the future*

In order to see some of the future outcomes of this regulatory path a few on-going or otherwise related processes must be presented: The European *Telecoms Reform Package,* the *Anti-Counterfeiting Trade Agreement* (ACTA), and the *Green Paper - Copyright in the Knowledge Economy* from July 2008.

The Telecoms Reform Package was presented to the European Parliament in Strasbourg on 13 November 2007, voted upon 6 May 2009, and finalised on 25 November 2009. The reform package originated from a non-legislative resolution on "Cultural industries in Europe", generally referred to as the "Bono Report" after the French Socialist MEP responsible for drafting the resolution. The reform package is a cluster of directives (COM [2007] 697) that to a great extent focus on the role of ISPs.[58] It comprises five different EU directives, and its total scope is vast and only of limited relevance here.[59] Much of this regulation has already been implemented in Swedish law, through the Electronic Communications Act (2003:396) and a few sections in a law on standards for broadcasting of radio and television.[60] The Commission's initial proposal for the Telecom Package was presented to the European Parliament and Council as the "Better Regulation Directive" and "Citizen Rights Directive", 16 November 2007.[61] During the Parliament's examination of the Commission's proposals, a number of amendment proposals were produced. Of the 126 amendment proposals to the Better regulation directive and 155 amendment

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[56] In Sweden the regulation currently applying to the protection of privacy in electronic communication is primarily contained in the sixth chapter of the *Electronic Communications Act* (2003:389). As regards traffic data, section 6 states that "Traffic data that are required for subscriber invoicing and payment of charges for interconnection may be processed until the claim is paid or a time limit has expired and it is no longer possible to make objections to the invoicing or the charge".

[57] Sixty-two members of the Swedish parliament voted to postpone the proposal, while 281 members voted not to. But under the rules of so-called minority plating it is sufficient for one-sixth of the members voting in favor of a postponement in order to reach this effect. The EU directive however states that the member states should implement the directive by 15 September 2007. When it comes to Internet access, e-mail and Internet telephony, there is an option to postpone the implementation. This option has been used by Sweden, see SOU 2007:76, *Lagring av trafikuppgifter för brottsbekämpning,* at 17-18. Nevertheless, Sweden is likely to be fined by the European Court for failure to implement the directive within the time limits.

[58] European Commission, see note 23 above.

[59] The directives have been abbreviated as the Framework Directive, the Access Directive, the Authorisation Directive, the Universal Service Directive and the e-Privacy Directive.

[60] Lagen (1998:31) om standarder för sändning av radio- och TV-signaler.

[61] COM (2007) 697 and COM (2007) 698.

proposals to the Citizens rights directive (in that first reading on 24 September 2008), it was proposal 138 for the Better regulation directive and proposal 166 on the Citizen rights directive that were the most widely debated, in media, on blogs, and in the EU Parliament and the Council. These stated that users' access may not be restricted in any way that infringes their fundamental rights, and (166) that any sanctions should be proportionate and (138) require a court order. In May 2009, the French representatives wanted to withdraw amendment 138, which ensures that court proceedings precede a possible disconnection. At the same time, the issue of disconnecting Internet users for suspected copyright violations before they are proven guilty in court has been highlighted in France through the three-strikes HADOPI-law.[62] A compromise version of the amendment was eventually adopted by the European Parliament in November 2009 replacing the requirement for a "prior ruling by the judicial authorities" with the requirement for a "prior fair and impartial procedure". The Telecoms reform package reaffirms how the copyright path may colonise a variety of types of regulations. This time it was highlighted by the ISPs' key position in the battle over copyright enforcement and the attempts made by strong forces to disassemble consumer protection in the case of disconnecting copyright violators from Internet access.

When it comes to the future development of copyright within the EU, there are conflicting initiatives. On one hand, the EU takes part in the confidential negotiations of the Anti-Counterfeit Trade Agreement ("ACTA") which will significantly elevate the level of copyright protection on a global level, and, on the other, the EU speaks of the importance and need to "promote free movement of knowledge and innovation as the 'Fifth Freedom' in the single market", presented in the Green Paper on Copyright in the Knowledge Economy 2008, a document inviting participation in these issues.

This begins with the ACTA, a plurilateral agreement negotiated secretly by around a dozen countries. Although the negotiations have been hidden from public view, an ACTA text dated 18 January 2010 was leaked in March 2010, followed by an official EU version published 21 April 2010 and the final version of 3 December 2010.[63] One difference between the leaked document and the official ones is that the parties' opinions are not stated in the latter. The leaked version dated 18 January 2010 reveals that the U.S., unsurprisingly, is an IP maximalist here, pushing for strong provisions. The question of privacy interests is of very great importance when analysing the ACTA, since the agreement seems to increase data sharing with both other countries and with rights holders.[64] The official document of 21 April, in short, seems to picture

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[62] HADOPI is the abbreviation for the oversight agency mandated by the French law officially titled *Loi Favorisant la Diffusion et la Protection de la Création sur Internet* or "Law Favouring the Diffusion and Protection of Creation on the Internet", regulating and controlling the usage of the Internet in order to enforce its compliance with copyright law.

[63] For the December 2010 version of the ACTA, see http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf (last visited 14 March 2011).

[64] See the blog post of M Kaminski, "The Anti-Counterfeiting Trade Agreement" (25 March 2010) http://balkin.blogspot.com/2010/03/anti-counterfeiting-trade-agreement.html (accessed 14 March 2011) who wrote an article on ACTA also before the document was leaked, M Kaminsky, "The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)" (2009) 34 *Yale Journal of International Law,* at 247.

an active, pro-rights holder role for ISPs and other online intermediaries. The ACTA may also limit the type of services that can fall into a "mere conduit" exception to notice-and-takedown. Once again, the ISPs are identified as the key target. Although the draft versions to a high degree targeted ISP liability, the most controversial enforcement measures proposed in the initial stages of the negotiations of the ACTA have been narrowed down in its final version.[65] All in all, the ACTA however shows that there are strong international forces that seek to extend the means of enforcing copyright undemocratically, at the expense of ISP neutrality.

The purpose of the Green Paper on copyright in the knowledge economy is to "foster a debate on how knowledge for research, science and education can best be disseminated in the online environment". The Green Paper aims to set out a number of issues connected with "the role of copyright in the 'knowledge economy"'.[66] The problem here is the lock-in effects of the legislative path that EU has taken with regard to copyright. The way that it proposes to "unlock" some of the aspects is to broaden the exemptions under copyright. The Green Paper has been said to highlight the need for serious research and a dialogue on the future of the InfoSoc Directive, especially as regards competing policies in the areas of "consumer protection, telecoms regulation and electronic commerce".[67] The Green Paper states that "a high level of copyright protection is crucial for intellectual creation." "Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large", and at the same time it seeks to acknowledge the essence of no protection for certain groups as well as types of creativity, for instance "user-created content".

It is the legal heritage of a strongly path-dependent copyright that creates this contradictory stance, in its attempt to grasp the online flow without being able to diverge from the legally locked-in path.

## 4. Analysis and discussion

There are at least five main findings in a path dependence analysis of European copyright development. Most of them have already been pointed out, but here they will be collated and further elaborated. These are presented in the following subchapters, where the first, the legitimacy issue, deals with the fundamental conflict between social and legal norms, making the path dependence analysis important in the first place; the second deals with how the preservation of the path is being undertaken, the third describes how the copyright path and its inherent conceptions colonise other legal paths, at the expense of other values; the fourth fairly succinctly highlights the targeting of the ISPs in this development; and the fifth, on the other hand, elaborates how the increased use of data traceability in legal enforcement has implications for

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[65] See the *Opinion of European Academics* on the final versio of ACTA, http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf (last accessed 14 March 2011).

[66] *Green Paper - Copyright in the Knowledge Economy (2008)* 466 (July 2008), at 3.

[67] S S Jakobsen, R Nielsen, T Riis, A Savin, and K Østergaard, "Comments on the Commission's Green Paper on Copyright in the Knowledge Economy" (1 December 2008). Available at SSRN: http://ssrn.com/abstract=1310196

how privacy should be handled. Finally, a brief section suggests future possible research in line with this article.

### *4.1. The legitimacy issue*

As mentioned, the gaps between regulation, social norms and conduct have been widely discussed and stated in the literature.[68] This stems in part from the fact that the global copyright construction is a legal complex that in general is based on ideas of the conditions of an analogue world for distribution and production of copies, but it is armed with increasingly protective measures when faced with human conduct in the context of digital networks. Around this regulation an industry emerged mainly during the second half of the twentieth century that is dependent on the ability to enforce this type of law against those who attempt to benefit from the immaterial work of others. This dependency is expressed in terms of control over copies and distribution. Every copy was inevitably connected to a physical object, which demanded an investment. In this analogue context, this construction is functional, without too many anomalies in terms of breach of this control. Although, in a digital context, where the distribution costs are close to zero and making copies does not need any investment, this control is fundamentally breached, with the consequence that law and practice does not correspond well. This non-digital versus digital divide plays an important role in the legitimacy of copyright laws. The legal answer to the Read/Write environment of the Internet technologies, to borrow terminology from Lawrence Lessig, has been a constant increase in regulatory efforts to maintain the prevailing constraints of a Read Only conception of copyright.[69] This is where the concepts of copyright law becomes the metaphors of copyright, where these standardised modes of conceptualising how copyright best serves its purpose are preserved in law, regardless of the external changes in society. This is where the transaction costs of legal change become manifest, to the extent that the cost becomes remarkably high for shifting the path for copyright regulation. This kind of change seemingly provokes a political struggle, and the legal domain cannot abandon certain legally embedded conceptions; the law lags behind. There are transaction costs attached to such a fundamental change of ideas embedded in law, especially for one so locked into national, international and supranational law and treaties.

The media industry's struggle to push illegal file sharing of copyrighted content into a legitimate market in conformity with copyright laws has been described by many in terms of a "war".[70] This metaphor not only strongly emphasises how common illegal file sharing is, but the aggressive legal and other measures the industry (especially in the United States) has taken in the battle as well. This "war" has led copyright owners' interest groups to employ a very active strategy in collecting evidence against violators of the regulation,[71] which highlights the distance and the clash between the

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[68] See note 3 above.

[69] L Lessig, see note 3 above.

[70] See, for instance, the excellent description of this metaphorical use in terms of "war on piracy" in the preface of L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

[71] See for instance O Vincents, see note 3 above.

behaviour and social norms of some groups on the one hand, and the laws that try to regulate this behaviour and change these social norms on the other hand.[72]

### *4.2. Preserving the path*

The path dependence of European copyright serves as a strong argument for those who benefit from its conservation. Appeals to tradition impede change by privileging the status quo in terms of an increased protection. The reason why these appeals still prevail as dominant ones is probably a consequence of the linkage to a strong industry protecting and voicing them, thereby complementing the internal functions of path dependence. As has been mentioned, the "adoption of a particular institutional arrangement" in copyright had already been undertaken before Internet came into being, and the deterministic pattern of this "self-reinforcing sequence" over the last few years had corresponded with the stable reproduction of this institution over time.[73] It had already been self-reinforced, reproduced and legitimised when it became fundamentally challenged by the development of digitalised networks.

The legal path, when it becomes strongly dependent, is related to internal legal "legitimating processes" in the sense that increasing legitimating processes are marked by a positive feedback cycle in which an initial precedent about what is appropriate forms a basis for making future decisions about what is appropriate. As a result, a familiar cycle of self-reinforcement occurs: the institution that is initially favoured sets a standard for it own legitimacy; this institution is reproduced because it is seen as legitimate at this stage; and the reproduction of the institution reinforces its internal legitimacy.[74] This should in the perspective of social change relating to Internet and similar technologies be seen as an internal legal legitimacy, not necessarily connected to external social norms and the behaviour of ordinary citizens today, when the institution has reached an own momentum, albeit not without support from the actors benefitting from its continued dominance.

A negative implication of this "standardisation", according to Gillette, is that the incentive to produce an improved system is discouraged, because no single user within the existing network can be induced to shift to the new system without assurances that a critical mass of potential users will do likewise. As an analogy, Gillette claims, regulatory regimes that share the characteristics of lock-in could be as vulnerable to path dependence as technological standards:

> Where those who are favoured by the status quo can organise with ease relative to those who are disfavoured (that is, where those who favour the status quo can form a dominant interest group), they are likely to take advantage of that position whenever an inkling of change arises.[75]

The revisions of copyright the last ten years shows an interesting incremental approach. In terms of what analysis is perceived as necessary when developing

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[72] M Svensson and S Larsson, see note 3 above.

[73] J Mahoney, see note 18 above.

[74] For the general process of legitimation in path dependence, see *Ibid*, at 523-524.

[75] C P Gillette, see note 6 above, at. 820.

copyright regulation, it merely reinforces values already in position. There are no signs of deregulation or decreasing protection, indeed the opposite is the case, assuming that the concepts and metaphors used will also function in a digital environment under proper control. It is a "disjointed incrementalism", that in the words of Etzioni seeks to "adapt decision-making strategies to the limited cognitive abilities of decision-makers and to reduce the scope and cost of information collection and computation".[76] This decision-making focuses on close goals instead of comprehensive ones, through a limited analysis. The successive composition reduces the need for theory, or for a detailed understanding of social changes outside the control of the law. Minor adjustments to a model that has been working fairly well for a considerable time are a decision-making model used by policy makers. This is where the (paradigmatic) shift between an analogically anchored way of communicating (in the broadest sense) and a digital one inevitably leads to policy-related problems.[77]

### *4.3. Colonising other paths*

As has been mentioned, there are power structures that contribute to make this legal path colonise other legal paths. When concerned interests, relying on the power balances of the regulation drafted in non-digital times, seek to maintain their position, other values that the law protects become secondary. Not only does the path dependency incorporate a broadened criminalisation of types of actions, but as more actions become criminal, it also affects the hierarchy of rights, as with the non-circumvention of technical measures.[78] Furthermore, if the Data Retention Directive describes how copyright enforcement can become embroiled in legal efforts against terrorism, the Telecoms reform package shows how it can get tangled up in telecommunications market issues. For that matter, the ACTA shows how copyright can increasingly be understood in terms of trade, and hence, be part of trade agreements that can circumvent more democratic legislative processes on a national or supranational level. The effect of copyright distribution and the formulations for how copyright is constructed and conceptualised are reproduced and strengthened in various related and sometimes only remotely related legislative efforts. A directive that is drafted to fight terrorism, such as the one on data retention, which combats an activity with extremely low legitimacy in social norms, can end up in including the struggle against illegal file sharing of copyrighted content, an activity with extremely high legitimacy in terms of social norms.

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[76] A Etzioni, "Mixed-Scanning: A "Third" Approach to Decision-Making" (1973) *Public Administration Review* 219.

[77] For a paradigmatic perspective in relations to metaphors and conceptions of copyright, see S Larsson and H Hydén, see note 17 above.

[78] See the "circumvention of technological measures" in InfoSoc directive and consider ownership of a CD in comparison to the copyrights holders' technical protection of copies of that CD. T Gillespie, see note 30 above, at181-185.

### *4.4. Targeting the ISPs*

From the strong path dependence of copyright there derives a clear tendency to target the ISPs and other intermediaries in an attempt to keep the copyright path intact. The IPRED is a clear example of this, and also the Telecoms Reform Package and, the ACTA further emphasise this fact. There are plans to revise the IPRED, and a recent report from the Commission discusses that the currently available legislative and non-legislative instruments are not powerful enough to combat online infringements of intellectual property rights effectively, which leads to the conclusion that ISPs could be further targeted and involved:

> Given intermediaries' favourable position to contribute to the prevention and termination of online infringements, the Commission could explore how to involve them more closely.[79]

In addition, the exact implications of the Data Retention Directive for copyright are not clear, but it will probably affect copyright enforcement, as outlined above, by ensuring that identification information is stored. The key role of the ISPs is, however, also part of a bigger issue that concerns the character of the Internet as we know it and the features and possibilities for the online enforcement of the law.

### *4.5. Looking ahead: Pushing the limits of effective legal action*

Law is in many aspects very dependent on its history, in the sense that history matters. Concepts and principles create paths that also lock in future legal directions. The problem here is not that legal developments relate to its past, or lock in standardised modes of prescribed conduct. On the contrary, these elements serve as parts of the strong legal principle of predictability. However, problems occur when they relates to the past in such a manner that it fails to include or to grasp important changes in society, and it is so locked in that it cannot even consider alternatives that might be more efficient, given the new conditions in society. In short, problems occur when law is too path dependent in relation to social change.

This development shows that the fight against file sharing risks being drawn into legislative contexts of fundamentally different origin and legitimacy. A significant predicament regards the fact that a directive that is drafted to fight terrorism, an activity with extremely low legitimacy in social norms, can end up in including the struggle against illegal file sharing of copyrighted content, an activity with extremely high legitimacy in social norms.

The development of European copyright, in its broad sense, not only re-builds the Internet in terms of traceability (the IPRED and possibly the Data Retention Directive) but also legal enforcement in terms of mass-surveillance. Since this is a

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[79] "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee or the Regions', *Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights*, at 7. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF (last visited 14 March 2011).

strong claim, the analysis has to be elaborated further. This paper shows the legislative and supranational responses to the problems that copyright faces in the digital milieu and the legislative developments where the authoritarian trend in copyright-related European legislation is striking. This cluster of legislation that seeks to harmonise the national legislations of the European Union are all part of a trend for increasing control over the flows on the Internet. More data are being generated and retained in order to support the copyright owners' fight against the illegal file sharing of protected content. At the same time, the copyright holders' representatives are given easier access to identification data through regulation assigning greater responsibility to the ISPs for content that is being trafficked through their infrastructure. This is one of the reasons that the debate around net neutrality has widened.[80]

A relevant question here is whether the price for the enforcement of copyright is acceptable in terms of decreased privacy for all. This shows that following the copyright path in legal development is not an independent trend but one that also affects other very important values, which is something that is not always considered in the process. Thus file sharing and copyright are closely linked to issues of privacy and the character of the Internet, and. there are different values that oppose each other. It is of interest to note that copyright legislation, seemingly, is path dependent and inviolable while privacy regulation is not, or at least not as strongly.

The Internet can be used by citizens to circumvent authority and governments use the Internet and related technologies to respond to this. There is, however, always a limit to the effectiveness of legal action, although this is hard to draft in detail. Roscoe Pound seeks to lay down principles suggested by a consideration of basic characteristics of modern law, and advances the fact that law can only deal with "the outside", the law cannot attempt to control social norms and beliefs but only observable behaviour.[81] This is even more interesting in the context of Internet-related behaviour, considering the newly emerging opportunities to "observe behaviour" on such a vast scale. Never before has there been so much collectable information revealing the inner thoughts and every-day habits of an increasingly connected society. This poses new questions as to who has the rights to do what with this information, it shapes the strategies of the copyright protectors, it magnifies the question of the role of the ISPs, and it certainly asks to what extent the law should stipulate a centrally located collection of, for instance, traffic data in order to enforce whatever laws the legislator seeks to enforce. As the Internet develops, the effectiveness of legal regulation meets new obstacles with respect to controlling actions on line. On the one hand, the possibilities that the medium provides have an impact on the prerequisites for social norms, which also affects compliance with copyright legislation, as well as give new tools for resistance to legal enforcement.[82]

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[80] For a discussion on "net neutrality", see CT Marsden, "Net Neutrality and Consumer Access to Content" (2007) 4 *SCRIPTed* 407-435.

[81] R Pound, "The Limits of Effective Legal Action" (1917) 27 *International Journal of Ethics* 150-167.

[82] See S Larsson and M Svensson, "Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File Sharing" (2010) 2 *Policy & Internet*, available at http://www.psocommons.org/policyandinternet/vol2/iss4/art4/ (accessed 14 March 2011).

On the other hand, central to this article is that the digital networks that form the "new social morphologies" impose completely new ways of legal enforcement and mass-surveillance over the multitude of habits and secrets of our everyday lives. The "long arm of the law" has acquired an extensive reach. It now has a new potential to discover and control everyday behaviour in a way that forces us to ask questions about how far we want it to extend.

Law enforcement is expanding in terms of the possibilities for control, surveillance and identification that the digitalised and networked society can offer. The possible "nodality" of legal enforcement is greater than ever before. The IPRED is one such European Union response to the circumvention of copyright legislation that the Internet has brought about. One must ask who can, for instance, really guarantee the legitimate uses of the massive traffic data collection in which the Data Retention Directive results.

While describing the "generativity" (and citing Zittrain) of the Internet technologies, the Internet policy researcher Margetts asks in what way the Internet serves as a platform for policy innovation.[83] One answer can be found in the growing responsibility of balancing integrity concerns and new and extreme possibilities for recording behaviour by means of data logs and digital supervision. The potential of technology and its embeddedness in all aspects of social life test the limits on the effectiveness of legal action in determining the borders of legitimacy. Where to draw this line is, hopefully, a political question, and, ideally, this question will be decided in a democratic manner. It is important to be clear about the fact that the development of a general mass surveillance of the entire population is not an issue to be taken lightly or a development that should be allowed to pass unscrutinised.

### *4.6. Future research*

This article contributes to a knowledge base pertaining to the legal aspects of a dilemma relating to illegal file sharing, copyright regulation and its role in social and societal developments. A detailed and deeper understanding of these developments probably requires a more comprehensive research approach including studies of social norms and a greater understanding of what is happening online, or socially, in conjunction with network lifestyles. One could also imagine that a more detailed study of the origins of the directives would tell us more about transnational law-making; the interests that have been able to influence this process, the kind of forces are at play, and those who have the power to influence the process, etc. Questions of further interest are, e.g., to what extent there are hidden aspects of international considerations, perhaps involving global politics related to trade and "strong" versus "weak" countries that shape the regulatory formulations.

In terms of path dependence in copyright, this study has focused on the days of the Internet, meaning the last decade or so, but it would be of interest to see a more historical study of the development of the copyright complex, how it grew, and

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[83] H Margetts, "The Internet and Public Policy" (2009) 1 *Policy & Internet*, at 11-13, available at http://www.psocommons.org/policyandinternet/vol1/iss1/art1

evolved its "particular institutional arrangement" throughout the twentieth century, in the words of Mahoney.

## 5. Conclusion

Copyright's strong path dependence has been elucidated by describing how copyright is legally constructed and harmonised through international treaties as well as recent European regulatory efforts, in the form of InfoSoc Directive and the IPRED. The Data Retention Directive and the Telecommunications Reform package highlights the ISPs as being increasingly conceptualised as the key to identity information about copyright violators, on the one hand, and as guardians of subscriber privacy on the other hand, while they themselves advocate neutrality and a "mere conduit" as their leading principle. Furthermore, the "secretly" negotiated ACTA agreement may result in imposing stronger copyright on Member States, which the US is seemingly striving to achieve. The underlying formulations of how copyright is constructed and conceptualised is reproduced and strengthened in various related and sometimes only tenuously related legislative efforts.

From a socio-legal perspective, copyright regulation suffers from legitimacy issues. The global copyright construction is a legal complex that in general is based on ideas of the conditions of an analogue world for distribution and production of copies- but armed with increasingly protective measures when faced with human conduct in the context of digital networks. To some extent, this most probably involves expansion of the concepts and metaphors that once described only non-digital practice but now form standardised ways of creating new law. The trend in European copyright is protectionist, through the expanding and strengthening of rights and their enforcement, and in that it is self-reinforcing and locked in to certain standards. The path dependence of European copyright serves as a strong argument for those who benefit from its preservation, signalling that there are power structures that support the colonisation by this legal path of other legal paths that protect conflicting rights.

There is a clearly visible tendency in targeting the ISPs and other intermediaries in an attempt to keep the copyright path intact. The development of European copyright, in its broad sense, not only re-designs the Internet in terms of traceability but also law enforcement in terms of mass-surveillance. The digitalisation of society requires that new questions be asked as to how legal enforcement is or can be performed in terms of mass-surveillance of the multitude of habits and secrets in our everyday lives. This means that there is a growing political responsibility for balancing integrity concerns and new and extreme possibilities for recording behaviour by means of data logs and digital supervision. Thus, the path dependence of copyright leads to an imbalance of principal importance between the interests at stake. The imbalance lies in that a special interest is allowed to modify methods of legal enforcement from the reactive and particular to the pre-emptive and general. The special copyright interest gains at the expense of the privacy of everyone.

# Article IV: Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms

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# Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms


## Abstract

The gap between copyright law and social norms has been widely discussed, and we have empirically demonstrated its existence. Theoretically founded in the sociology of law, the study uses a well-defined concept of norms to quantitatively measure changes in the strength of social norms before and after the implementation of legislation. The ”IPRED law” was implemented in Sweden on 1 April 2009, as a result of the EU IPR Enforcement Directive 2004/48/EC. It aims at enforcing copyright, as well as other IP rights, when they are violated, especially online. We conducted a survey three months before the IPRED law came into force, and it was repeated six months later. The approximately one thousand respondents between fifteen and twenty-five years-of-age showed, among other things, that although actual file- sharing behaviour had to some extent decreased in frequency, social norms remained unaffected by the law.



Keywords

Social norms, Theory of Planned Behaviour, IPRED, IPR Enforcement Directive, Copyright, Intellectual Property, File sharing, Internet, Law, Enforcement

# Introduction

The sharing of computer programs, movies and music via the Internet marks an *all-time-high* in the persistent controversy between intellectual property owners and the users of different reproduction technologies. The gap between law and norms has in this field been widely discussed (See, e.g., Feldman and Nadler, 2006: 589-591; Altschuller and Benbunan-Fich, 2009; Jensen, 2003; Lessig, 2008; Moohr, 2003; Schultz, 2006a; Schultz, 2006b; Strahilevitz, 2003a; Strahilevitz, 2003b; Svensson and Larsson, 2009; Tehranian, 2007; and Wingrove et al., 2010). Among a large segment of the population of Europe, illegal file sharing via the Internet has gradually become a natural element of everyday life. People who would never otherwise engage in criminal activities, for some reason find it acceptable to violate intellectual property rights (see Goodenough & Decker, 2008).

In this article, we argue that dealing with legal compliance is preferably examined in a cognitive perspective, and more specifically, where cognition is seen as situated. In the latter instance, one adopts the view that knowledge is inseparable from social, cultural and physical contexts (Suchman, 1987; and also pioneers in this area, e.g., Brown et al., 1989; Greeno, 1989; Greeno and Moore, 1993; Lave, 1988 and Suchman, 2006). In this perspective, the cognitive processes are highly dependent on shared expectations, social norms and social control (both formal and informal). A situated-cognition approach emphasises the sociology of law[1] and social psychology (rather than neuroscience, as do Goodenough and Decker in their above-mentioned work) and also group norms rather than functional neurological structures. In order to understand situated cognition in relation to illegal file sharing, we will examine social control through the dynamics between formal (legal) and informal (social) norms. We focus on socio-legal developments in Europe and the current trend towards greater use of

[1] The sociology of law studies matters that pertain to the interplay between legal rules and decisions, on the one hand, and other aspects of society, on the other hand. See e.g. Aubert (1972), Hydén (1978), Mathiesen and Berg (2005), and Stjernquist and Widerberg (1989).

surveillance and sanctions in cases of the file sharing of copyright protected material via the Internet (Larsson, 2011a; 2011b; Vincents, 2007). Our ambition is to compare this legal trend with current changes in corresponding social norms. Central questions in this study are the extent to which social norms relating to file sharing support the current legal trend in this field, and the extent to which legal change and law enforcement strategies influence social norms.

The trend in Europe with regard to copyright during the last decade has been extremely path-dependent and also repressive in terms of adding aspects of centrally located control of data retention and identity traceability (Svensson and Larsson, 2009; Larsson and Svensson, 2010; Larsson, 2011a; 2011b). In a global perspective, the European Union has played a leading role in creating stronger copyright protection. Key regulatory initiatives in this area within the European Union are INFOSOC (Directive2001/29/EC) and IPRED (Directive2004/48/EC). However, other legislation also affects the enforcement of copyright, such as the Data Retention Directive (Directive2006/24/EC), while copyright is also involved in different legislative procedures such as the European Telecoms Reform Package and the Anti-Counterfeit Trade Agreement, ACTA (Larsson, 2011b). The overarching goal within the EU is to harmonize the national legislation of the different EU Member States with regard to Information and Communications Technology (ICT), thereby achieving greater control over the use of the Internet. This is considered to be essential, if the objective is to support copyright owners in their fight against illegal file sharing. In addition, copyright holders' representatives are being given legal tools that allow violators to be identified. There is also a trend towards allocating greater responsibility to Internet service providers for the type of content that is transmitted sent through their infrastructure.[2]

The role of social norms in relation to copyright and online behaviour has been discussed and analysed from different perspectives. Jensen (2003) states that the copyright industries have developed strategies to tie copyright protection to tangible property norms. He concludes that these rhetorical strategies are likely to widen existing gaps between legal rules governing

[2] One example of this is the proposed plurilateral trade agreement Anti-Counterfeiting Trade Agreement (ACTA), another is the aforementioned Telecom Reforms Package. See also the French development with regard to HADOPI.

copyright and social norms, thereby reinforcing already significant barriers to collective action that obstruct efforts to construct a self-enforcing digital 'copyright norm'. Moohr (2003) speaks of a 'competing social norm' and Schultz (2006a) advocates the use of the concept of 'copynorms' to analyse social norms in relation to copyright, as they 'moderate, extend, and undermine the effect of copyright law'. Strahilevitz (2003a) analyses the influence of social norms in loose-knit groups or in situations where interactions are anonymous. Strahilevitz (2003b) also analyses the ability of file-sharing software to reinforce descriptive norms in themselves, as this creates the perception that unauthorised file sharing and distribution is common behaviour, and one even more prevalent than it actually is. Strahilevitz made his claim in 2003, and file sharing has subsequently increased and developed in terms of technology and techniques.

Feldman and Nadler (2006) undertook an experimental study of the influence of law on social norms relating to the file sharing of copyrighted content. They surveyed a group of college students who proved to believe that peer-to-peer file sharing is common practice and who thought that this practice would become less socially acceptable if violators were subject to shaming penalties. The students also expressed less willingness to engage in file sharing if violators were subject to the revocation of university network privileges. Interestingly enough, the law did not influence perceptions of file-sharing norms in the absence of sanctions, nor did the moral justifications affect the practice of unlawful file sharing.

It is well known that social norms and law impact on each other; sometimes the law can be a strong influence for change in social norms 'by forcing a change in conduct that gradually becomes accepted throughout society or by inducing a change in the perception of the propriety of certain conduct' (Drobak, 2006: 1). However, even though there are examples of such influences, it is rare that law in itself can initiate significant changes in social norms. The influence in the other direction is far more obvious, since law is shaped by, and dependent on, the social and economic structures of society (Drobak, 2006; Ellickson, 1991; Ellickson, 1998; Ellickson, 2001; Hydén, 2002; Morales, 2003; Svensson, 2008, and Vago, 2009). Any attempt to legislate in opposition to current social norms is highly hazardous, especially since failure to achieve legal compliance undermines public confidence in the legal system. If the law prohibits behaviours that are widely known to be common, it may lose legitimacy or credibility (Feldman

and Nadler, 2006: 590; Hamilton and Rytina, 1980, and Polinsky and Shavell, 2000).

In order to study the relationships between social norms in this area and the legal trend, we examine the situation in Sweden, focusing on the implementation of IPRED (Directive2004/48/EC) on 1 April 2009. For many reasons, Sweden provides an interesting example, which has been reported in the international media for several years. Some of the most popular file-sharing technologies have been developed in Sweden, and one of the most notorious file- sharing services on Internet, The Pirate Bay, has been hosted within the country. In April 2009, a Swedish court convicted four men linked to this service, each of whom were sentenced to a year in prison and ordered to jointly pay $3.6m in damages to leading entertainment companies. In the 2009 European Parliament elections, the Swedish pro-file sharing Pirate Party secured more than 7% of the votes and thus won two seats. At the same time, Swedish enterprises such as the legal music sharing website Spotify challenge all the laws of conventional media economics.

In principle, copyright in Sweden has always meant that it was forbidden to share protected material on the Internet without the consent of the rights holder. However, it has been very difficult to punish those who engaged in this kind of activity, since in practice it has not proved possible to identify individual file sharers. The absence of functioning legal tools, surveillance and sanctions has contributed to the development within society of a large measure of acceptance of this type of crime, and, quite simply, people have not taken the law seriously. However, on 1 April 2009, the IPRED law came into force in Sweden.

In theory, the implementation of IPRED in Sweden means that intellectual property rights holders can, whenever they assume that their rights have been violated on line, present their complaints to a court, which will then examine the evidence and extent of file sharing, in order to establish whether or not the Internet service providers should release the IP address (IPRED, Article 6.1). In practise the IPRED law, as it is called in Sweden, has not been actively used so far, since Swedish Internet service providers (ISP) have chosen to challenge it in court. Representatives of intellectual property rights holders say that they are waiting for the final legal decisions on the first cases before acting on a wider scale.

However, today file-sharers theoretically run a risk of being identified and may face high levels of damages; fines and, in serious cases,

imprisonment. In popular parlance, this change in the law has been described in terms of file sharing of copyrighted content being forbidden, when in fact it was the basis of law enforcement that changed. *Netnod Internet Exchange in Sweden*, a neutral and independent organization for the establishment and operation of the national Internet exchange points, reported an almost 40% drop in the volume of Swedish Internet traffic on 1 April, 2009, the day on which IPRED was implemented. Barely a year later, Internet traffic was back at roughly the same level as before the IPRED law was passed. However, much of this recovery seems to be a result of a dramatic increase in streamed traffic, such as YouTube, Spotify and various film-on-demand services.

There are examples of experimental attempts at the measurement of social norms in relation to illegal file sharing, such as those mentioned by Feldman and Nadler (2006). Even if the issue of whether the law has the potential to affect social norms is frequently discussed in the sociology of law, few empirical surveys in this field have previously been undertaken. This study therefore constitutes a rare attempt to use defined concepts and a developed research model to measure changes in the strength of social norms before *and* after a new law is passed. This article describes the results of two surveys of the strength of the social norms that condemn the file sharing of copyright material via the Internet. The first one was conducted three months prior to the implementation of IPRED and the second six months afterwards. The measurement method applied to social norms in relation to the legal regulations used in this study was developed within the author's Department (Svensson, 2008), and it was influenced by a model developed by the two social psychologists Icek Ajzen and Martin Fishbein (1980), and, in particular, by their theory of planned behaviour (TPB) as described by Ajzen (2005) and Fishbein and Ajzen (2009). The method is a socio-legal one that has previously been used, for example, in order to measure social norms in relation to traffic safety laws and regulations (Svensson, 2008). In that particular study, the method provide capable of describing the differences in strength among the social norms that relate to speeding, seat belt use and drunk driving. On a scale ranging from 1-7, the Social Norm Strength (SNS) supporting legal compliance with regard to speeding measured 3.76; to seat belt use, 4.38 and to drunk driving, 4.80. That study is directly comparable to this one on file-sharing norms and we shall revert to it in the analysis section.

# Theoretical framework

## The concept of norms

The socio-legal definition of norms used in this article is based on their having three essential attributes (Hydén and Svensson, 2008; Svensson, 2008; and Larsson, 2011a).[3] The first is that norms are individuals' perception of surrounding expectations regarding their own behaviour; the second one tells us that norms also are materialized expressions that are socially reproduced and thus can be studied empirically, while the third one states that norms are carriers of normative messages. Hence, norms have a 'ought' dimension and constitute imperatives (directions for action). These three essential attributes reflect three different paths in the scientific study of norms. i.e., social psychology, inspired by Muzafer Sherif (1966), social science, inspired by Émile Durkheim (1982), and legal science inspired by Hans Kelsen (1967).

## Norms—an aspect of situated cognition

In the very title of one of his most renowned essays, George Simmel poses the question '*Wie ist Gesellschaft möglich?*' (How is society possible?) (Simmel and Edholm, 1995). His answer is founded on the premise that there must be harmony between societal development, on the one hand, and individual human characteristics and impulses, on the other. In other words, every human being is part of the social context and influences other individuals, whilst simultaneously being an individual influenced and shaped by the social environment. Interaction between individuals allows for mutual/shared decision-making: a simple thesis that could be stated in order to define the very essence of large bodies of social theory. What separates

[3] The definition of norm that is used in this study is a result of an ontological analysis following the *Essence and Accident model* created by Irving M. Copi (1954), who in his turn based the model on Aristotle's work.

different orientations within social theory from each other is predominantly the viewpoint of the processes underlying mutual decision-making. From a functionalist sociology of law perspective that follow the tradition of Émile Durkheim, it is mainly through norms in society (both legal and social) that mutual decision-making arises. Norms in turn constitute social controls, which are decisive for shared expectations, and from the individuals' perspective, for part of their situated cognition.

## Law and social norms

The concept of social control was introduced into sociological literature by Small and Vincent (1894), but originated in theories developed by Auguste Comte [1798-1857], who stressed the connection of every single individual with all others through a multitude of links, by means of which human beings live naturally in a connected feeling of solidarity (Comte and Mannheimer, 1979: 61). These links involve, in particular, a common view of moral issues. In relation to the law, one often discusses common and collective viewpoints on moral issues on the basis of 'the public sense of justice', i.e., a sense of justice that results in informal social control and social norms.

Robert C. Ellickson, a professor at Yale Law School, was one of the first legal scholars to fully recognize the importance of socially enforced norms. He states that 'much of the glue of a society comes not from law enforcement, as the classicists would have it, but rather from the informal enforcement of social norms by acquaintances, bystanders, trading partners, and others'; and he continues 'informal systems of external social control are far more important than law in many contexts, especially ones where interacting parties have a continuing relationship and little at stake' (Ellickson, 1998: 540).

Social norms guide people's actions and social interaction to a greater degree than does the law (Drobak, 2006). In organization theory and economics, in particular, it has been possible to demonstrate the importance of informal norms in human behaviour. The law and the social norms act in tandem in that they have an effect on the behaviour of society, while it is also known that they have an effect on each other. Furthermore, the social norms have a powerful effect on the wording of laws in that the way that this is often done deliberately reflects society's morals and values. However,

the opposite effect also plays an important role in society, as when the law compels a change in behaviour, which sometimes leads to changes in social norms (Drobak, 2006). In such cases, people tend to revise their view of what is right and wrong in such a manner that these values change in the direction of the behaviour that they have been compelled to adopt. People also tend to make demands of others in a manner that agrees with these altered values. It may be that this is a matter of people not seeing any reason why others should continue to behave in a manner that they themselves have been forced to change, and so they give others directives to act and comply with the rules in the same way as they have done.

Legal changes initiate processes that in the course of time result in changed social norms. This relates in particular to such changes that include strong signals in the form of extensive surveillance and severe sanctions. In that the law has elicited changed behaviour through coercive structures and, by extension, paved the way for social norm formation processes, social control has also been activated. People now have to relate, not only to the risk of being caught, convicted and punished that has arisen because of the law, but also to the risk of being condemned by their peers. The sanctions that can be associated with social control can be very severe and may involve anything from a loss of respect to financial losses in the form of difficulties on the labour market or of lost business.

Feldman and Nadler (2006: 591) divide the law and economics of norms (LEN) into three groups. The first category argues that using law to shape social norms is likely to disrupt the desirable functions of those norms; the second group argues that law is unlikely to lead to any change in the functioning of norms; and, the third group views laws as an important tool that could move social norms in the direction desired by policy makers.

# Methodology—measuring social norms

## Departure from the theory of planned behaviour

The method of measuring Social Norm Strength (SNS) in this study is closely linked to the theory of planned behaviour (TPB) developed by Icek Ajzen (2005) and Martin Fishbein and Icek Ajzen (2009). This theory explains how subjective norms play a crucial role when people form intentions. In the following, we show how the model for calculating subjective norms developed by Ajzen and Fishbein can be used together with the socio-legal definition of norms described above, in order to calculate the strength of social norms.

## Research model step-by-step

The first task is to identify categories of people who are of importance to the respondents from a social control point of view (normative referents). Nine normative referents of potential importance to copyright law compliance were identified during research preparations, i.e., mother, father, other close relatives, partner, friends, Internet acquaintances, teachers/bosses, neighbours and casual acquaintances. With respect to each of these nine referents, two aspects were assessed: normative belief strength and the motivation to comply with each respective normative belief. For example, the question 'To what extent is it your mother's opinion that you should not download copyright-protected movies and music from the Internet?' was rated on a seven-point scale (1=*she does not mind*, *7=it is very important to her*) to produce a measure of normative belief strength. To assess motivation to comply, respondents rated, on a similar seven-point scale (1=*it is not important to me, 7=It is very important to me*), the question, 'To what extent do you consider your mother's opinion of file sharing to be important when you choose whether or not to download copyright-protected files?'.

Each survey respondent rated on the seven-point scales both normative belief strength and motivation to comply with the respective normative belief, for each of the nine normative referents. Hence, we are able to calculate the mean (among all respondents) normative belief strength for each important referent, and in the same way, the mean motivations to comply. In order to translate these data into general social norm strength on a seven-point scale, they were processed in the following stages[4].

1. The results of the first question 'To what extent is it referent (a-i)'s opinion that you should not download copyright-protected movies and music from the Internet?' were compiled.
2. The results were processed in order to show a mean value for question 1 (on a scale of 1-7) for each category of normative referents. This value represents the strength of normative belief (n).
3. The results of the second question 'To what extent do you consider referent (a-i)'s opinion of file sharing to be important when you choose whether or not to download copyright-protected files?' were compiled.
4. The results were processed in order to show a mean value for question 2 (on a scale of 1-7) for each category of normative referents. This value represents motivation to comply (m).
5. The mean values for question 1 were weighed against those for question 2 for each normative referent. The weighed value represents the Social Norm Strength (SNS) and shows the social norm's capacity to influence the respondents' behaviour. 1=no SNS and 7=maximum SNS. If the result is SNS=7 it means that all respondents have indicated a 7 (it is very important to them) in question 1 for all nine referents; and all respondents have indicated a 7 (it is very important to me) in question 2 for all nine referents. A low mean value in question 1 (e.g. 1=*they do not mind*) weighed against a low mean value in question 2 (e.g. 1=*it is not important to me*) can mathematically result in a value below 1 (the respondents do not care about the opinion of the referent, who in turn does not

[4] For the exact formula, see appendix A.

care about the action of the respondent). For example, if the motivation to comply (m) is 4, it represents 4/7 of maximum motivation to comply (max=7/7); and if the strength of the normative belief is very low (1); it results in (4/7)x1=<1). However, these results will then count as 1=*no social norm strength.*

## Identifying the normativity of the norm

One of the essential attributes forming the socio-legal concept of norms is the behavioural instruction in itself (the imperative), which could be described as the normativity of the norm. This attribute is in accord with 'Kelsen's legal norms' and The Pure Theory of Law. Kelsen views the legal system as a system of 'oughts', and for Kelsen it is as if norms become norms precisely because they are action instructive. The physical dimension of the norm is, in Kelsen's mind, of no analytical interest whatsoever. The wording of copyright legislation varies to a certain extent from one country to another, while at the same time it is tightly controlled by international agreements, which limits its variation. For this survey, we have proceeded on the basis of Swedish law, where the Act on Copyright in literary and artistic works (1960:729) is the governing law. The normative basic message (the fundamental 'ought') is most easily found by means of the special penal regulation in the Act on Copyright in literary and artistic works, Chapter 7, Article 53, first paragraph. This stipulates that anyone who, in relation to a literary or artistic work, commits an act which infringes the copyright enjoyed in the work under the provisions of Chapters 1 and 2 or which violates directions given under Article 41, second paragraph, or Article 50, shall, where the act is committed wilfully or with gross negligence, be punished by fines or imprisonment for a maximum of two years. It is, in other words, forbidden to commit copyright infringement (and violations are punished by the state).

However, even if the normative message of the law is most easily identified by means of its penal wording, it is in the field of civil law and thanks to the right to damages that the law acquires its greatest weight. The situation here is more complicated and is described by reference to such things as the rights of the author of the work and the user's limited scope to act, in combination with the general right to damages. However, in essence the normative message of civil law is the same as that of criminal law, i.e.,

that it is forbidden to commit copyright infringement (and violations entitle the copyright holders to damages).

In translating the legal 'ought' (that it is forbidden to commit copyright infringement) into a social 'ought' (linked to file sharing of movies and music via the Internet), we obtain a social normative sentence that expresses the following, that one should not engage in illegal file sharing of music and movies via the Internet. The question that this study raises is whether the above social normative sentence corresponds to a social norm and if so, how strong that norm is. We will also examine how norm strength has been affected by the implementation of IPRED.

## About the surveys

We conducted two surveys of approximately one thousand Swedish Internet users between fifteen and twenty-five years of age. The first survey was conducted in January and February 2009 and the repeat study in October 2009, during which period IPRED was implemented in Sweden (on 1 April 2009). The surveys allow us to analyze some of the consequences of IPRED'S implementation. The first survey was e-mailed to 1,400 recipients, of whom 1,047 responded, generating a response frequency of 74,8%. For the second survey 1,477 participants were e-mailed, and once again 1,047 responded, which gave a slightly lower response frequency rate of 70,9%. The selection was made randomly for the age group, from the CINT panel exchange register that contains details of 250,000 individuals in Sweden (a country with nine million inhabitants), and which represents a national average of the population. The fact that the respondents are on this register means that they have agreed in advance to participate in online self-administered questionnaires (SAQ), and receive a small fee for taking part in a survey. The fact that the surveys were SAQ is of great relevance in this context, as it has been shown that respondents are more likely "to report sensitive or illegal behaviour when they are allowed to use the SAQ format than during a personal interview over the telephone or in person" (Wolf, 2008). When conducting web-based surveys there can be no ongoing feedback from interviewers, which is why special attention must be paid to how the questions are formulated, as well as to how the questionnaire is formatted, in order to avoid measurement errors (Wolf, 2008; Dillman, 2000). However, web-based SAQs are especially suitable when addressing

online behaviour, since this targets individuals who have access to and use the Internet.

We chose not to use the same respondents for the repeat study. In fact, we made sure that none of the initial respondents were addressed in the second survey. The reason for this is that we are conducting studies of individuals' beliefs and in doing so there is a risk that the answers in the repeat study will be influenced by the respondents' participation in the first study (Dahmström, 2011: 330).

Of the 1,047 respondents in the first survey, 59% (619) were female and 41% (427), male. Their mean age was 20.9 years. More than 99% stated that they had access to a computer with an Internet connection at home. More than 75% of the respondents spent at least two hours a day at an Internet-connected computer at home, and about 23% more than six hours. About 6% spent less than an hour a day on line.

Of the 1,047 respondents in the second survey, 60% (624) were female and 40 percent (418), male. Their mean age was 19.9 years. More than 98% percent stated that they had access to a computer with an Internet connection at home, and slightly more than 70% spent at least two hours a day on line, and about 21% more than six hours per day.

# Empirical Findings

Table 2-4 shows the SNS-data collected before and after the implementation of IPRED. Firstly, the respondent's perceptions of important referents are presented in terms of the *strength of normative belief* (n) and the *motivation to comply* (m), and then the Social Norm Strength (SNS) is calculated, which represents the capacity of a social norm to influence behaviour towards legal compliance. All data in Table 2-4 are presented on a scale from 1 to 7. SNS values below 1 indicate that there is no significant Social Norm Strength. We have chosen to present the results of three different groups. Table 2 shows the SNS-data for all the respondents in each study and is therefore the most important one. In the next two tables we show the SNS-data for two extremes. Table 3 shows data for the respondents who claim to file-share on a daily basis and Table 4, data for the respondents who reported that they never file-share.

Table 1 shows the respondent's reports on how often they file-share, both in the survey conducted before the implementation of IPRED and the one conducted afterwards. The data in this table therefore can be regarded as a self-reported effect study, while it also provides information on how to understand the quantitative relationship among the three groups (Table 2-4).

**Table 1. How often the respondents illegally download copyright protected material.**

| | Study 1 (before IPRED) | Study 2 (after IPRED) | Statistically significant change (2-tailed) |
|---|---|---|---|
| Never | 21.6% (217 persons) | 38.9% (383 persons) | Yes (P<0.001) |
| Once a month at a maximum | 24.0% (242 persons) | 26.1% (258 persons) | |
| Once a week at a maximum | 22.0% (222 persons) | 16.1% (158 persons) | |
| More than once a week | 21.6% (218 persons) | 12.5% (124 persons) | |
| Daily | 10.6% (107 persons) | 6.4% (63 persons) | Yes (p=0.001) |

Before the implementation of IPRED, 21.6% of the respondents reported that they never file-share, and six months after IPRED this figure was almost 38.9%. At the same time, the percentage of respondents who claimed to be file-sharing on a daily basis decreased from 10.6% to 6.4%. Both the increased number of those who never file-share and the decrease in those who reported file-sharing on a daily basis are statistically significant. In conclusion, Table 1 suggests that IPRED have had an effect on file sharing around the time of the implementation. The following three tables show the SNS-data before and after IPRED.

**Table 2. Selection: all**

| Important referents | Study 1 (before IPRED) | | Study 2 (after IPRED) | |
|---|---|---|---|---|
| | Strength of normative belief (n) | Motivation to comply (m) | Strength of normative belief (n) | Motivation to comply (m) |
| (a) Mother | 2.42 | 2.97 | 2.95 | 3.22 |
| (b) Father | 2.28 | 2.96 | 2.82 | 3.20 |
| (c) Other close relatives | 2.06 | 2.23 | 2.26 | 2.42 |
| (d) Partner | 1.57 | 3.29 | 1.97 | 3.46 |
| (e) Friends | 1.53 | 2.96 | 1.86 | 3.03 |
| (f) Internet acquaintances | 1.44 | 1.88 | 1.75 | 2.04 |
| (g) Teacher/bosses | 2.62 | 2.11 | 2.98 | 2.24 |
| (h) Neighbours | 1.72 | 1.50 | 1.98 | 1.74 |
| (i) Casual acquaintances | 1.64 | 1.55 | 1.86 | 1.72 |
| **Mean** | **1.92** | **2.39** | **2.27** | **2.56** |
| **Statistically significant change (2-tailed)** | | | **no (P=0.135)** | **no (P=0.580)** |
| **Social Norm Strength** | **<1** | | **<1** | |

Table 2 shows that in general there are only very weak social norms promoting compliance with the law in the case of file sharing. In fact, the respondents feel no substantial social pressure from any of the important referents, and furthermore, the respondents claim that they only care slightly about the opinion of any of the important referents with regard to file sharing. Furthermore, it is of significance that there is no major change in social norm strength between Study 1 prior to IPRED and Study 2 after IPRED.

**Table 3. Selection: File sharing on daily basis**

| Important referents | Study 1 (before IPRED) | | Study 2 (after IPRED) | |
|---|---|---|---|---|
| | Strength of normative belief (n) | Motivation to comply (m) | Strength of normative belief (n) | Motivation to comply (m) |
| (a) Mother | 1.95 | 2.15 | 1.76 | 2.32 |
| (b) Father | 1.72 | 2.23 | 1.82 | 2.24 |
| (c) Other close relatives | 1.75 | 1.56 | 1.79 | 2.02 |
| (d) Partner | 1.24 | 2.48 | 1.40 | 2.90 |
| (e) Friends | 1.23 | 2.36 | 1.46 | 2.49 |
| (f) Internet acquaintances | 1.22 | 1.67 | 1.48 | 1.91 |
| (g) Teacher/bosses | 2.22 | 1.56 | 2.48 | 1.98 |
| (h) Neighbours | 1.61 | 1.16 | 1.84 | 1.68 |
| (i) Casual acquaintances | 1.51 | 1.27 | 1.87 | 1.63 |
| **Mean** | **1.60** | **1.83** | **1.77** | **2.13** |
| **Statistically significant change (2-tailed)** | | | **no (P=0.324)** | **no (P=0.170)** |
| **Social Norm Strength** | **<1** | | **<1** | |

**Table 4. Selection: Never file sharing**

| Important referents | Study 1 (before IPRED) | | Study 2 (after IPRED) | |
|---|---|---|---|---|
| | Strength of normative belief (n) | Motivation to comply (m) | Strength of normative belief (n) | Motivation to comply (m) |
| (a) Mother | 3.13 | 3.45 | 3.68 | 3.94 |
| (b) Father | 2.91 | 3.39 | 3.54 | 3.85 |
| (c) Other close relatives | 2.54 | 2.76 | 2.70 | 2.96 |
| (d) Partner | 2.19 | 3.78 | 2.48 | 3.86 |
| (e) Friends | 1.96 | 3.41 | 2.26 | 3.51 |
| (f) Internet acquaintances | 1.87 | 2.25 | 2.05 | 2.36 |
| (g) Teacher/bosses | 2.85 | 2.53 | 3.31 | 2.84 |
| (h) Neighbours | 1.93 | 1.80 | 2.18 | 2.11 |
| (i) Casual acquaintances | 1.80 | 1.81 | 2.06 | 2.09 |
| **Mean** | **2.35** | **2.80** | **2.70** | **3.06** |
| **Statistically significant change (2-tailed)** | | | **no (P=0.233)** | **no (P=0.475)** |
| **Social Norm Strength** | **1.04** | | **1.32** | |

From Tables 3 and 4 we can see that neither of the two groups (file sharing daily and never file- sharing) experiences any social control influencing their decision on whether or not to file-share. Even those who never file share report a minimal Social Norm Strength of 1.04 on a scale from 1-7, and there is no statistically significant increase after the implementation of IPRED. The respondents are all young people between fifteen and twenty-five years old and there are no indications in the data that the society is applying any social pressure to them to comply with the law. Those who choose to never file-share obviously do so for reasons other than social norms.

The survey also included questions on whether the respondents themselves believe that enforcement has a potential influence on them in favour of compliance in the case of file sharing. With regard to whether the respondents think that copyright enforcement laws will stop them or others from file sharing illegally, 28.5% percent thought they would, and 71.5% did not think they would, in the first pre-IPRED study. This can be

compared to the slightly increased figure of 38.1% who responded yes, and hence the slightly decreased figure of 61.9%, who stated no, respectively, in the second, post-IPRED study. As to the question whether the respondents think that it is wrong to file-share merely because it is illegal, 24.0% answered "yes", and 76.0%, "no" in the first study. In the second study, 30.1% answered "yes" to that question and 69.9%, "no". These changes in beliefs and opinions are statistically significant ($p<5\%$) and could be an indication that norms will gain acceptance over time if legal pressure is continuously applied.

# Discussion and conclusions

This study takes its departure from a situated cognitive perspective on legal compliance and thereby theoretically focuses on the sociology of law and on social psychology. More precisely, it focuses on norm research within those two disciplines. Furthermore, a quantitative model for measuring social norm strength in comparison with legal norms has been used. One can pose the question as to why it is important to acquire knowledge about whether the social norms of society support the legal trend when it comes to copyright in relation to file-sharing. One answer is that people in general do not obey the law but rather they abide by the informal social control, and the law has very little chance of bringing about general compliance without the support of the social norms. Our results indicate that the implementation of enforcement strategies in Sweden has at least not triggered any sudden changes in the strength of social norms relating to illegal file sharing, thus supporting the claims of the second LEN category presented by Feldman and Nadler (2006: 591), who argue that law is unlikely to lead to any change in the functioning of norms. However, the fact that IPRED actually changed people's behaviour with regard to compliance contradicts that conclusion. We know that behavioural change sometimes leads to changes in the social norm structures, even when the former has occurred as a result of enforcement strategies.

Our survey shows that one possible cause why people in common ignore copyright on line is the lack of social norms that reinforce the legal framework (compare with Goodenough & Decker, 2008). Generally, people

observe informal social control, and when the law, as in this instance, lacks a social equivalent, there are only weak incentives for them to comply with it. As stated by Feldman and Nadler (2006), there are a number of laws that are widely ignored, including traffic laws (Cheng, 2006) and tax laws (Braithwaite, 2003). When it comes to traffic laws, the recent study described in the introduction above is comparable to our study of norms. The traffic safety study used the SNS-model when examining the strength of the social norms that correspond to the three road traffic regulations applying to speeding, seat-belt use and sobriety. It showed stronger social norms in respect of the regulations on drinking and driving, less strong norms when it comes to rules on seat-belt use and relatively weak social norms with respect to regulations on speeding. However, even in comparison to the speeding regulation, the legal provisions applying to illegal file sharing are particularly poorly anchored in the social norms of society, and they show a weak SNS.

The empirical answer to the question whether the implementation of IPRED in Swedish legislation on April 1 2009 was able to influence social norms is an interesting one. This influence is marginal and thus the pedagogical effect of the law does not come into play. By contrast, it can be seen that considerably more respondents state that they never file-share in Study 2 than is the case in Study 1 (See Table 1). This means that the implementation of IPRED actually has had an effect on file sharing as such, but this deterrent effect is either of an individual or a general preventive kind. In other words, it was due to the fear of being punished by the state that some individuals chose to stop file sharing and not because they themselves or people in their lives have changed their minds on the issue itself. They stop as a result of a fear of getting caught and being punished and not because the social landscape has altered. Young people do not subscribe to the arguments on which the law rests and neither do those people who are close to them. However, some young people do submit to the authorities and the threat of punishment.

Given the gap shown to exist between copyright law and social norms, there are likely negative and unconsidered consequences of the enforcement strategies. Legal enforcement of a copyright regulation that does not correspond with social norms risks working as a stimulus to counter-measures. Given the generativity of the technologies of online communication in networks, these counter-measures may imply an increased diffusion of techniques of online anonymisation. This means that

the legal enforcement of copyright not only risks undermining public confidence in the legal system in general, but also facilitates the diffusion of technological knowledge that will undermine legal enforcement in general when it comes to computer-mediated crime (Larsson and Svensson, 2010).

The laws of society comprise and rest upon the social norms that we as a collective express through our actions. This does not necessarily imply that the law must be preceded by social norms that already exist. Legal history offers many good examples of laws that eventually proved successful but were passed in opposition to the prevailing opinion of the times. The ideas upon which these laws were based gained a foothold in the public debate and in time changed the social norms. The prohibition in the Parental Code in Swedish law against the corporal punishment of children by their parents is one such example, while the same applies to the view of homosexuality in many countries, where the legislation leads the way.

One of the points of this study has been to provide information as to whether legislators have been able to narrow the gap between legal and social norms through a variety of (legal) measures. Considering the results of our study from their perspective, the results have been disheartening. Despite the intensive efforts of the government during the six-month duration of the survey period after the implementation of the law, social support for copyright with respect to file sharing is, at the time of Study 2, still remarkably low. The young people who participated in the study do not feel any significant social pressure to abstain from file sharing, from either the adult world or their peers. As mentioned, the quantitative approach of this study gives an opportunity to discuss the file-sharing and copyright issue from a macro perspective, to describe the socio-legal landscape, and to undertake, for example, before/after studies such as this one. There are, nonetheless, limitations inherent in the quantitative approach that suggests a need for future qualitative research that complements the understanding of file sharing and legal compliance from a situated-cognitive perspective. This could include the impact of other factors such as the media's role in communicating legal revisions, or a more language and conceptual metaphor-based approach to copyright formulations and functions in comparison with a digitalised society (Larsson, 2011a). Furthermore, a follow up-study of the same survey as in this study might prove useful in confirming, refuting or nuancing the long-time effects of IPRED's implementation that are suggested here.

The struggle over illegal file sharing and its survival or demise is the obvious indication in the media that a serious chasm is truly opening up between the legal system and the social norms of society. The inability of legislators to induce people to fall in line shows the strength of the social changes now under way. There is evidence that the Internet and the new technologies are changing society in a radical way, and that copyright and the dilemma of unauthorised file sharing may represent a socio-legal challenge that is greater than the one that merely indicates copyright regulation in a digital context. This highlights the importance of understanding the issue, since it could be crucial for questions of the social, economic and technological structures of the future as well as interrelated issues of privacy in a connected world.

# References


1960:729 Lag om upphovsrätt till litterära och konstnärliga verk. Stockholm

Ajzen I (2005) *Attitudes, personality and behavior.* Maidenhead: Open University Press.

Ajzen I and Fishbein M (1980) *Understanding attitudes and predicting social behavior.* Englewood Cliffs, London: Prentice-Hall.

Altschuller S and Benbunan-Fich R (2009) Is music downloading the new prohibition? What students reveal through an ethical dilemma. *Ethics and Information Technology* 11: 49-56.

Aubert V (1972) *Rättssociologi.* Stockholm: Aldus/Bonnier.

Braithwaite V (2003) Dancing with tax authorities: Motivational postures and non-compliant actions. In: Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion.* Aldershot: Ashgate Publishing, 15-39.

Brown JS, Collins A and Duguid P (1989) Situated Cognition and the Culture of Learning. *Educational Researcher* 18: 32-42.

Cheng E (2006) Structural Laws and the Puzzle of Regulating Behavior. *Northwestern University Law Review* 100: 655-718.

Comte A and Mannheimer O (1979) *Om positivismen.* Göteborg: Korpen.

Copi IM (1954) Essence and Accident. *The Journal of Philosophy* 51: 706-719.

Dahmström K (2011) *Från datainsamling till rapport.* Lund: Studentlitteratur.

Dillman DA (2000) *Mail and Internet Surveys: The Tailored Design Method.* New York: Wiley.

Directive2001/29/EC Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001: 10–19.

Directive2004/48/EC Directive 2004/48/EC of The European Parliament and of the Council of 29 April 2004 On the enforcement of intellectual property rights. OJ L 157, 30.4.2004: 45–86.

Directive2006/24/EC Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. OJ L 105, 13.4.2006: 54–63.

Drobak JN (2006) *Norms and the law.* Cambridge, New York: Cambridge University Press.

Durkheim É and Lukes S (1982) *The rules of sociological method.* New York: Free Press.

Ellickson RC (1991) *Order without law: how neighbors settle disputes.* Cambridge, Mass; London: Harvard University Press.

Ellickson RC (1998) Law and Economics Discovers Social Norms. *The Journal of Legal Studies* 27: 537-552.

Ellickson RC (2001) The Evolution of Social Norms: a Perspective from the Legal Academy. In: Hechter M and Opp K-D (eds) *Social Norms.* New York Russell Sage, 35-75.

Feldman Y and Nadler J (2006) The Law and Norms of File Sharing. *The San Diego Law Review* 43: 577-618.

Fishbein M and Ajzen I (2009) *Predicting and changing behavior: the reasoned action approach.* New York; Hove: Psychology Press.

Goodenough OR and Decker GJ (2008) Why do Good People Steal Intellectual Property? *Law, Mind and Brain, Ashgate, 2009*.

Greeno JG (1989) A perspective on thinking. *The American psychologist* 44: 134-134.

Greeno JG and Moore JL (1993) Situativity and symbols: Response to Vera and Simon. *Cognitive Science* 17: 49-59.

Hamilton VL and Rytina S (1980) Social Consensus on Norms of Justice: Should the Punishment Fit the Crime? *The American Journal of Sociology* 85: 1117-1144.

Hydén H (2002) *Normvetenskap*, Lund: Lund University, Lund Studies in Sociology of Law.

Hydén H (1978) *Rättens samhälleliga funktioner* (The Societal Functions of Law), Doctoral dissertation, Lund: Studentlitteratur.

Hydén H and Svensson M (2008) The Concept of Norms in Sociology of Law, in P Wahlgren (ed.) *Scandinavian Studies in Law* Stockholm: Law and Society.

Jensen C (2003) The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms. *Stanford Law Review* 56: 531-570.

Kelsen H (1967) *Pure theory of law.* Berkeley: University of California Press.

Larsson S (2011a) *Metaphors and Norms. Understanding Copyright Law in a Digital Society.* PhD thesis in Sociology of Law. Lund: Lund University.

Larsson S (2011b) The Path Dependence of European Copyright, 8:1 *SCRIPTed* 8.

Larsson S and Svensson M (2010) Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File-sharing, *Policy & Internet*: Vol. 2: Iss. 4, Article 4.

Lave J (1988) *Cognition in practice: mind, mathematics and culture in everyday life.* Cambridge: Cambridge University Press.

Lessig L (2008) *Remix: making art and commerce thrive in the hybrid economy.* New York; London: Penguin Press.

Mathiesen T and Berg M-L (2005) *Rätten i samhället: [en introduktion till rättssociologin].* Lund: Studentlitteratur.

Moohr GS (2003) The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory. *Boston University Law Review, Vol. 83, No. 4, 2003*.

Morales A (2003) *Renascent pragmatism: studies in law and social science.* Aldershot: Ashgate.

Polinsky AM and Shavell S (2000) The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy. *American Law and Economics Review, Vol. 2, No. 1, pp. 223-237, 2000; Stanford Law and Economics Olin Working Paper No. 167; Harvard Law and Economics Discussion Paper No. 247*.

Schultz MF (2006a) Copynorms: Copyright and Social Norms. *SSRN eLibrary*.

Schultz MF (2006b) Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law. *Berkeley Technology Law Journal*

Sherif M (1966) *The psychology of social norms.* New York: Harper & Row.

Simmel G and Edholm Ea (1995) *Hur är samhället möjligt? - och andra essäer.* Göteborg: Korpen.

Small AW, Vincent and Vincent GE (1894) *An Introduction to the Study of Society.* New York: American Book Co.

Stjernquist P and Widerberg K (1989) *Rätten i samhällsbyggandet.* Stockholm: Norstedt.

Strahilevitz LJ (2003a) Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks. *Virginia Law Review* 89: 505-595.

Strahilevitz LJ (2003b) Social Norms from Close-Knit Groups to Loose-Knit Groups. *The University of Chicago Law Review* 70: 359-372.

Suchman LA (1987) *Plans and situated actions: the problem of human-machine communication.* Cambridge: Cambridge University Press.

Suchman LA (2006) *Human-machine reconfigurations plans and situated actions.* Cambridge, New York: Cambridge University Press.

Svensson M (2008) *Sociala normer och regelefterlevnad. Trafiksäkerhetsfrågor ur ett rättssociologiskt perspektiv*, [Social Norms and the Observance of Law], Lund University, Lund Studies in Sociology of Law 28.

Svensson M and Larsson S (2009) *Social Norms and Intellectual Property. Online Norms and the European Legal Development,* Lund: Lund University, Research Report in Sociology of Law, 2009:1.

Tehranian J (2007) Infringement Nation: Copyright Reform and the Law/Norm Gap, *Utah Law Review* 2007: 537-551.

Vago S (2009) *Law and society.* Upper Saddle River, N.J.: Pearson Prentice Hall.

Vincents OB (2007) When Rights Clash Online: The Tracking of P2p Copyright Infringements vs. the EC Personal Data Directive. *International Journal of Law and Information Technology* 16: 270-296.

Wingrove T, Korpas AL and Weisz V (2010) Why were millions of people *not* obeying the law? Motivational influences on non-compliance with the law in the case of music piracy. *Psychology, Crime & Law*.

Wolf J (2008) Self-Administered Questionnaire. *Encyclopedia of Survey Research Methods.* Sage Publications.

# Appendix A

(1)

| i | i |
|---|---|
| 1 $X_{1,1} \ldots X_{1,9}$ | 1 $Y_{1,1} \ldots Y_{1,9}$ |
| . | . |
| . | . |
| . | . |
| 7 $X_{7,1} \ldots X_{7,9}$ | 7 $Y_{7,1} \ldots Y_{7,9}$ |

(2) (I) $a_1 = \sum_{i=1}^{7} i x_{1,1} / \sum_{i=1}^{7} x_{1,1}$

.
.
.

(IX) $a_9 = \sum_{i=1}^{7} i x_{1,9} / \sum_{i=1}^{7} x_{1,9}$

(3) (I) $b_1 = \sum_{i=1}^{7} i y_{1,1} / \sum_{i=1}^{7} y_{1,1}$

.
.
.

(IX) $b_9 = \sum_{i=1}^{7} i y_{1,9} / \sum_{i=1}^{7} y_{1,9}$

(4) $$p_1 \cdot \cdot \cdot p_9 = \frac{a_1 b_1}{7} \cdot \cdot \cdot \frac{a_9 b_9}{7}$$

(5) $$z = \frac{b_1 p_1 + \ldots b_9 p_9}{b_1 + \ldots b_9}$$

X states the values that respondents indicate as to how the normative referents view them
Y states the values that respondents indicate as to how they view the normative referents
a1-a9 states the external norm strength for each normative referent, respectively
b1-b9 states susceptibility to norm influence by each normative referent, respectively
Z states the norm's capacity to influence behaviour (SNS)