The darling conceptions of your time, or: why Galileo Galilei sings so sadly in the chorus

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The darling conceptions of your time,

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3.1 Law, social change and conceptions

"People in power get to impose their metaphors", wrote Lakoff and Johnson in their ground-breaking work Metaphors we live by, on structures of metaphors and concepts and the manifest part in human thinking and communication that metaphors and concepts play. They strengthened the idea that human thought processes are mainly metaphorical and said that the "human conceptual system is metaphorically structured and defined". By "metaphor" they actually meant "metaphorical concept"[2]. Their work inspired many disciplines to develop in this direction.

Conceptions, like metaphors, carry with them a heritage of the context from which they were derived. They are not always easily translated from one context to another without some kind of distortion. One can go even further: conceptions and metaphors are ways of thinking. They describe the way we understand life, our world and our place in it. The problem is that metaphors and conceptions can be both informative and deceptive. They can be taken from a context where they function well, to be used in a context where they

deceive and distort (see for instance [3]). The starting point of this article is that conceptions can be tied to a specific world order, to a way in which a society is organized: in its politics, administration, government and, very importantly, its regulation. This leads to what the title asserts: societies change and the conceptions that have been more or less deeply founded in them can face problems when translated into a new context. This article uses the examples of file sharing and Internet and copyright legislation to show the clashes of such a societal transition and the conceptions embedded. And it does this via the lyrics of a song about the astronomer Galileo Galilei. Before I go into detail on this perhaps unexpected diversion I want to elaborate the role of technology in relation to social norms and legal regulations.

This article is about metaphors, or rather conceptions, and about law and social change connected with technology. Technology often has an important role in social and normative transitions[4]. Digital technology has changed the conditions of communication and has therefore caused a changed behaviour in society in connection to what can be perceived as normative change, for instance regarding file sharing of media content. To illustrate the battle of conceptions tied to this I use the example of stealing/sharing. What from an analogue perspective is seen as theft, an action with highly negative connotations, is from a digital perspective seen as something else, with less or no negative connotations. Normatively, one could say that these actions are not comparable. Technology can be seen as the prime mover of the social changes creating the contemporary copyright dilemma. I am focusing on technology in the sense that other parallel processes that are part of the paradigmatic transition are neglected (for a grander picture, see [5, 6, 7], and for a stronger focus on law and legislative paradigmatic change in a global perspective, see [8, 9]), but I am still interested in the consequences of how technology rearranges society and creates various conditions for norms.

Each society regulates differently. One can here talk about rules of the game. Every society, like every game, has its own set of rules that define that society or that game. Historically, social evolution has often been connected to technological innovations. The combustion engine took a central position in what later became known as the industrialized society, an urbanizing era of factories and production, following the rural society tied to agriculture and trade (see [10, 11, 12]). With each type of society comes a specific type of legal "darling" conceptions tied to the patterns of behaviour relevant for

this type. Some conceptions are in conflict when society changes, some new conceptions emerge.

In general, some of the conceptions embedded in law and the debate around, for instance, file sharing are dependant on the preconditions of reality, which also form the conceptions that are used in legal regulations. The aim of this article is to highlight and describe a few of the conceptions that have been developed under conditions for communication and media distribution other than what prevails today. A fact that creates a tension between regulation and reality. But, what has the song I mentioned about Galileo Galilei to do with this?

When working on an article in Swedish for an anthology published in the fall of 2008, I decided, being both a socio-legal scholar and a musician, to write a song that pedagogically illustrated the problem both in its lyrics and in the fact that it was to be released under the Creative Commons Licence Attribution, non-commercial. Both the book, *FRAMTIDSBOKEN: vol 1.0*[13], and the song were released online and could be downloaded freely. It meant that the song was neither buyable nor sellable (according to the licence). It could not be used for commercial activities without my consent. You could say that the song embraced the power of the flow, rather than the flow of power. It was, and of course still is, shareable, searchable and downloadable.

A couple of principally very interesting conceptions that create a high amount of tension in society today are tied to online behaviour, content distribution and legal regulation. The idea of letting a song display the issue is pedagogically of double interest. I use a song because it is a question of transition and the music medium will here illustrate change. It also illustrates the search for darling conceptions of our time, by revealing, discussing and challenging them. It is also a test. To practically look to the ideas of creative commons licences as a way for creators to make the rights granted by law – copyright law – a little less protective by the consent of the creators, and likely a little more adapted to the practice of Internet, file sharing and flow of media. You could say that the song forms a meta-pedagogical display: it both tells the story of societal transition in terms of a battle of conceptions, as well as in itself exemplifying a contemporary issue regarding legal regulations and social change when released for free sharing online. The song is about Galileo Galilei and is called *The darling conceptions of your time*.

3.2 Galileo Galilei and the Darling conceptions of your time

Conceptions and metaphors are ways of understanding things. They can be the results of a social construction, meaning that it is not a matter of true or false. It is a construction made to serve a purpose. A metaphor, for example, is not necessarily more true because it has been around for a longer time than a newer one.

Let us turn to the first two verses of the song that will continually (and fictitiously) play along while the reader reads the article. Picture a three man combo playing in the corner of a bar. Every now and then a few lines of what they are singing are heard through the murmur of the crowd scattered throughout the room. You see a double bass, hear the soft snare drum and suddenly a voice starts to sing:

I see a learned man watching the sky
His mind is forming a question
He trembles when he starts to realize
There is something wrong with how the sun passes the sky
There is something wrong with how the sun passes the sky

The court declared the conviction
and the mumbling crowd awaited no reply
It expected no contradictory claims
There is nothing wrong with how the sun passes the sky
There is nothing wrong with how the sun passes the sky

These are the two opening verses of the song "The darling conceptions of your time". Think of the famous astronomer Galileo Galilei as the "learned man watching the sky". Galileo Galilei found out something that clearly challenged a darling conception of his time. Earth was not central in the planetary system surrounding us in space, the sun was. In addition to this, he proved this bold statement empirically. He constructed a pair of binoculars, made the mathematical calculations, and concluded that he had a new truth to reveal. The earth was not in the centre of the universe as we know it. The planets can not be revolving around the earth: "Earth is revolving around

the sun, and I have seen it!" The Church was outraged (on Galilei, see for instance [14]).

A remarkable fact is that he was not even the first one to make the claim. Copernicus had mathematically come to the same conclusion a couple of years earlier. That is why it is called the Copernican view. He did not however look, empirically measure and see that the sun could not be rotating around earth. He was also not punished as harshly by the Church, which also acted as a court, as was Galileo. Galileo came to a cross roads where he had to choose between the truth, as he had investigated it empirically, and the law, which found his deeds to be wrong. To challenge some of the darling conceptions can be experienced as a challenge to the system, which was likely in this case. It was not merely about the planetary organization in space, it also questioned who should be the true interpreter of the order of things. It was about who should have power over the conceptions that should rule as truth. Galileo challenged this and as a result had to choose between standing by his findings and risking his life or to deny what he regarded as true and staying alive.

He chose life. Maybe truth seemed a little less important when faced with the risk of being burned on a pile of wood. Maybe truth even seemed a little less right. "And still it is moving", he allegedly said very quietly, sitting on his chair on a podium, surrounded by a hostile and mumbling mob on either side and behind him. In front of him sat the tribunal, which is the court of the Church, and the very same court that had accused him. Galilei spent his remaining days in house arrest.

As indicated by the very first sentence in this article, the one from Lakoff and Johnson, the conceptions that prevail have some kind of connection to power. The law is a commonly used instrument of control by the State. A successful law not only imposes behaviour, but also often conceptions of how the world is and should be arranged. However, in a connected world the centralised power is challenged in some aspects. The social norms that control behaviour on the Internet do not necessarily apply to a legislation that functioned well in a pre-digital era. As put by Castells:

> "...the power of flows take precedence over the flows of power."[15]

It has to do with a transition, the view of the world, and what the prerequisites are when it comes to communication between peers and distribution

of media content. One could express it as if earth is the natural scientific depiction of our planet and the world is the social construction that social science deals with. There are structures in society – legal, economic and social – that interact and depend on each other. When prerequisites drastically change, there is a need for a new balance in these structures. Finding this balance takes time, and will create winners and losers along the way. This applies, for instance, to the structures of news and media production in a centralised society, as it shifts towards a more decentralised version of possibilities in finding alternative media, alternative broadcasts, alternative methods of production, or even co-production of media content. This rips the keys out of the hands of the former key holders within news organisations, governments and media producers. Social science has to deal with the conceptions embedded in the conflict, to sort out the old and describe the new that may take its place, just like Galileo. Over time, the strong influence of the Church declined and its role as the interpreter of truth regarding earth's place in space was lost. The scientific approach evolved, a school of reason and empirical sciences took a greater place in society.

3.3 The battle of what the Internet should be

In a historical sense, the Internet is very new. The impact of digitalisation has however in a short time led to what Castells describes as the Network Society. How the Internet was designed in terms of what type of information that would be embedded in the communication was paradigmatically different from how most legal regulation and legal systems have been constructed. Legal systems generally operate in a national domain, relying on information regarding where an action has taken place geographically, as well as the age of a person if there is a special relation between involved individuals etc., in order to find out if the action was criminalised or not, as well as how hard the actions should be penalised within given restrictions. The Internet lets people act across national borders without revealing their ages, whereabouts or what relationships people have. The communication is, or at least has been, this free. This type of freedom, or lack of control, is under attack from strong legislators throughout the world, where the traditional media industry is a heavily investing instigator and lobbyist. More layers of control over the flows of the Internet mean that existing analogi-

cally preconditioned models for the market can survive. On the other side stand the critics claiming that the control needed for these models to still function is such an utterly over-dimensioned control that it threatens grand values such as privacy and free speech. Questions that need to be addressed here are what balance should we strive for, what is lost and what is gained when more aspects of control are added to the layers of the Internet? And in the case of copyright, is this for the sake of creativity or for the sake of an industry with an aged market model? In order to understand this we need to take a brief look into the copyright construction.

3.4 Copyright

The origin and growth of copyright as a legal concept is intertwined with the technical development in regards to the conditions for storing and distributing the created media; the melody one wrote and recorded, the book, the photograph and so on. If we focus on music, we will see how copyright and technology have developed side by side. But also, which is interesting to note, how creativity itself is influenced by the preconditions in technology. One purpose of copyright is the creation and development of culture (if we want to dig into Swedish law-making history, the preparatory work for the Swedish copyright law states this, SOU 1956:25 s 487). The legal regulation in itself has no justification in addition to stating systemic conditions that are culturally stimulating and ensuring future innovations.

Copyright law is amazingly homogeneous throughout the globe as a result of international co-operation with treaties and conventions. Both the European Union and the U.S. have added to a strong and homogeneous copyright throughout major parts of the world. A few of the characteristics that can be found in most national copyright legislations are that:

- the period of protection lasts the life of the copyright holder + 70 years (sometimes 50, see the Berne Convention and the TRIPS Agreement[1])

[1]Berne Convention for the Protection for Literary and Artistic Works, last amended at Paris on 28 September, 1979. Sweden signed on 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.

- the period of protection for those companies who own the recordings (related rights) are mostly 50 years (see the Rome Convention[2])
- no registration is needed to achieve copyright when something is created (disputes will be settled in court. The U.S. used to have some demands – the year and the © symbol, but that is less important these days when everyone has signed the same treaties)
- copyright means exclusive rights to the created for the creator or the holder of these rights (which is a very important distinction) that are economic – for instance control over the copies and to sell them – and moral – that is to be attributed (mentioned) and not have the work ridiculed, for instance
- the exceptions from these exclusive rights are for "fair" use in the U.S., which is the sharing of copies to *a few* friends, like in the Swedish regulation, within the private sphere. All depending on what type of creation and for what circumstance. The line is drawn a little differently in different countries

These characteristics have mainly been developed during the twentieth century and are very much tied to a technological development that has allowed distribution of content[3]. These characteristics have been developed in an analogue setting where heavy investments were needed for most of the production, reproduction and distribution. Some of the characteristics show examples of being darling conceptions of an industrialized society which has been embedded in incredibly well-spread, global and strong regulations. At the same time, some of these characteristics are now challenged due to the changes in preconditions for production, reproduction and distribution that the digitalisation and rise of a network society contributes to.

An example: the concepts and specific terminology of Swedish copyright stems to some extent from the preparatory works of 1956, prior to the Copyright Act from 1960 (it speaks of the expanding possibilities of reproducing

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

[3]Of course, printed material reached a distribution revolution after the Gutenberg press and legal protection and the ideas of copyright has been around before the twentieth century. But it was the 1886 Berne Convention that set out the scope for copyright protection which originally meant maps and books but today has grown to become a significant regulated conception in relation to sound recordings, films, photographs, software etc.

sound with innovations such as the magnetophon – basically an early and huge tape recorder). Of course, the act has continuously been changed over the years, but many of the terms are still used. This development has led to a legal regulation that is so complex that even legal experts think it is complex. In fact, when some additions were made to the law in 2005 (to harmonize with the INFOSOC EU directive) the real experts on legal construction in Sweden, the Council on Legislation (Lagrådet), concluded that it had been desirable to do a complete editorial review of the Copyright Act instead of implementing the "patchwork" that the changes in the law now meant. The Council however stated that it understood the hurry to implement the directive (Prop 2004/05:110, appendix 8, p 558). Sweden had already received a remark from the EG Court for a delay[16].

This shows two things. It shows that the architects behind the legal construction thought analogically, and it shows the strong interconnection that the many national legislations have *via* international treaties as well as the European Union. The freedom to rethink copyright law is limited, or at least not easily made, seen in the international perspective. Still, the regulating process seems to lack a critical element in the legislative trend so far. The policy makers seem to be beyond all doubt that the legislative tradition on copyright is not only to be followed but the protection should also be expanded. A strong and unified copyright (see for instance the INFOSOC directive[4] in the EU) and a strong enforcement of this copyright (for instance the IPRED[5]) are in this perspective seen as the only measures that will ensure innovation and creativity in society. There seems to be no room for doubt here. If copyright protection is failing, the only answer to be reached in this way of thinking is to enhance the enforcement, the control of data streams and all online behaviour.

Another example from Sweden would be the so called Rehnfors investigation from 2007. The investigation regarded music and movies on the Internet and was conducted by the governmentally appointed Cecilia Rehnfors (Ds 2007:29). The investigation concluded that the legal services on the Internet

[4]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.

[5]DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004 ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS.

often had an unsatisfactory range of content to offer, but also launched the idea that the Internet operators should be given a responsibility to control that their subscribers did not participate in copyright infringements. This proposal was of course met with great opposition from the operators (Dagens Nyheter 3 September 2007). The increased operator responsibilities had been proposed by copyright organizations, such as IFPI (Ds 2007:29, p 207). The development of technical safety measures was seen as a key issue (Ds 2007:29, p 16).

The issue of file sharing and media content was up for a hearing in the Swedish Parliament in April 2008. However, even the setting can be questioned from a society in transition perspective: only legal alternatives were allowed to present their case. No advocates of file sharing were invited to the hearing. It was stated by a spokesperson for the hearing that:

> "Several people can bring forward the arguments that for instance the Pirate Bay has, such as the secretary of the Rehnfors investigation [see Ds 2007:29 above] Johan Axhamn. He knows most of the arguments" (http://url.ca/f6pd 12 Mar 2008, author's translation).

There was no one representing the file sharing community, even though the purpose of the hearing was to speak about and to collect knowledge regarding how the issue of file sharing and copyright issues should be handled. This is an unbalanced approach that is problematic if one attempts to understand the dilemmas of modern copyright, to say the least. It also illustrates how conceptions legally formalised can blind real attempts to solve problems connected to societal transition.

3.5 A legal trend

The development towards an increased protectionism in copyright, and the proposals of how this protection should be undertaken, is part of a legislative trend seeking to take control over the Internet and its communication. The exceptionally stormy debate regarding increased governmental signals intelligence (scanning internet traffic) is a national Swedish example (Ds 2005:30, prop. 2006/07:63) from the Summer of 2008. The new law was heavily questioned, resulting in the forming of interest groups to stop it. A wave of

bloggers protested, and members of Parliament received lots of e-mails and letters begging them to vote no.

To describe the European legal trend I start at 2001 when the European Community Directive on Copyright in the Information Society, *the INFOSOC Directive*, was passed which included narrow exemptions to the exclusive rights of the rights holder as well as protection for "technological measures" (art 6). This meant that more actions were criminalized and that the copyright regulations around Europe generally expanded and became stronger. In April 2004 the EU passed the Directive on Enforcement of Intellectual Property Rights, the so called *IPRED directive*, following what has been called "a heavy-handed influence of the American entertainment industry"[17]. It had been set up as it is "necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market." (Recital 3). The IPRED directive also states that all Member States are bound by the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement), which aligns the global regulatory connection on copyright between nations, the EU as well as international treaties. After the bombings in Madrid in March 2004 the work started on what later became the so called *Data retention directive* in order to force Internet service providers and mobile operators to store data in order to fight "serious crime"[6]. This was heavily criticized by both the Article 29 Data Protection Working Party as well as the European Data Protection Supervisor for lacking respect for fundamental human rights. The question still remains in the Swedish implementation whether or not this can or will be attached to copyright crimes and be used in connection to the IPRED legislation, depending on how "serious crimes" will be defined in national law in relation to copyright crimes. Recently it is *the European Telecoms Reform Package* that has been heavily debated. It was presented to the European Parliament in Strasbourg 13 November 2007 but voted upon 6 May 2009.

[6]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.

This cluster of legislation seeking to harmonize the national legislations of the European Union all points to the obvious trend of adding control over the flows of the Internet.

3.6 Darling conceptions

What are the darling conceptions tied to the legal order that creates the tension in relation to the digital practice of today? There are a few conceptions that are problematic in the transition to a digitalised society. Legitimacy is a key question here. However, before we are even able to discuss questions of legitimacy, we need to sort out a few things regarding the ideas and the meaning of both law and the debate around copyright and legislation.

3.6.1 Theft

When the idea of property rights are formed in an analogue reality and transferred to a digital one, certain problems occur. An obvious problem, which has shown the two sides of viewing the handling of media content in the debate, is the sharing and copying of internet communication on one side and the "theft" on the other side. When seen from a traditional point of view, the illegal file sharing of copyrighted content has been called theft. However, the 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). To be specific, the problem of arguing that file sharing is theft 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 an idea or conception tied to a traditional analogue context is transferred to a newer, digital context. Something is, however, lost in the translation.

3.6.2 Control over copies

The global construction of copyright has resulted in fairly homogeneous copyright laws throughout the world. This has been done *via* international agreements (such as the Berne Convention and the TRIPS agreement), harmonisation within the European Union (such as the INFOSOC directive of 2001), and copyright cooperation amongst for instance the Nordic countries in Europe. A part of this construction is the control of copies that the rights holders are granted. As mentioned above, this can be seen as a logic and conception that was born and functioned well in an analogue reality. Control was still possible, unlike today's enormous task to control all online activities for all people, regardless, if the behaviour has to do with illegal file sharing or not. In a time where production, reproduction and distribution of each copy demanded an investment that was not ignorable, the legal protection of the control over copies makes sense. On the other hand, in a time where reproduction and distribution costs are ignorable the legal protection of the control over copies does not make the same self-evident sense. The development is probably that the market is moving from being product based to being service based. You deliver access to media rather than selling it in pieces. The control of copies, and the idea that it is the copies that need to be controlled in order to have a functioning market, is a darling conception of analogue times.

3.6.3 Private/public relationship

Generally, in Swedish legal tradition, the private sphere has been left unregulated. The copyright legislation has followed this logic, such as section 12 in the Copyright Act above. With digitalisation and organisation in networks, this private-public dichotomy has become a regulatory conception that has less and less value in society. The private is not so private and the public is not so public any more, in a sense. It is a regulatory method that functions less and less well, at least in the field of copyright. The item-based reality of an analogue production has now become digital and copy-based. Behaviour and societal norms change in accordance with how the conditions for them change. As the user generated web (2.0, as some call it) arises, many industries go from being producer driven to consumer driven, and copyright is unavoidably affected by the introduction and distribution of new informa-

tion technology. This leads to questions about integrity and what type of society we want.

3.6.4 Creativity of the few produces for the consumption of the many

Behind this conception lies the idea of an investment demanding production and distribution, mentioned above. This conception stems from the idea that a few key persons decide what the masses will need and like. Think about the few big record companies or the old state owned TV channels in Sweden. It also applies to the traditional logic of news reporting. What is regarded as news was a centralised decision to make. "Democratize democracy" said the socio-legal scholar Boaventura de Sousa Santos when speaking of the empowerment of the third world at a conference in Milan in the Summer of 2008. Let us think about that quote for a moment. It is about a model for decision-making. The Internet stands for a widespread decision-making of content. It is the many who decide what is interesting, not the few key persons. The quote could be used for saying: do not construct systems around a few key persons of power when it comes to the potential creativity of the masses. Democratize creativity in the system, because creativity should not be decided over by the few. Let the many decide. Democratize democracy.

The "democratic culture" is an expression used by John Holden[18] to describe what in some areas of the industry is called Web 2.0, meaning that content in online products is to a large extent created and driven by the users. It is as a peer-to-peer product rather than an ever so smart product originating from the wits of one genius. Compare a traditional centrally produced encyclopaedia to the collectively produced Wikipedia. Some solutions can not be thought out centrally, and nothing singular can replace the social web. This is a beneficiary aspect of "the flow" of media content that the digitalisation brings with it.

3.6.5 Ownership and property

The Swedish legal scholar, Dennis Töllborg, regards the introduction of the Internet as a hegemonic revolution, similar to those earlier in history when our view on society and ourselves were radically changed. Creation is still central and imitation is always strong as a model for norm-building, but there

is a difference, and that is the value-base. The idea is still free, but when ideas materialize in a digital way and leave their mechanical existence, the material relation to physical control over what you consider as your property, is missing. When the idea loses its reference to the physical world, the value the usage brings once again becomes dominating for what we regard as legitimate and fair. The exchange value, coupled with exclusive intellectual property rights for the owner, cannot and should not be protected, since the idea behind the Internet is, according to Töllborg, at stake in the example of file-sharing. In this situation the former legal understanding of property rights will be invalid. Töllborg argues that you cannot claim ownership to something which is not possible to transform into something material, to a physical object. This will be the understanding of ownership, according to Töllborg, in the new hegemonic era[19]. The fact that there are a lot of people arguing for old solutions, does not change Töllborg's prediction. It is only a sign of the inevitable fight between different darling conceptions of your time, taking place when a society is in a phase of transition, and the idea of property in a digital context is part of the battle.

So, to finish the five examples of problematic darling conceptions in relation to digitalisation the three man combo is suddenly heard from the corner, singing something about a battle between the old and the new:

Can you feel it too?
The old world measuring the new
Can you feel it too?
The old world claiming the truth

I know you've heard it too
That the questions that we ask ourselves
in the passed way of thinking
won't solve the problems of the new

3.6.6 Conclusions: the battle of conceptions

There seems to be a battle not only over how to organize society but also about conceptions. The analogically based conceptions regarding the importance of the control over the reproduction of copies battles with the 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 that we can use to activate our minds. How would copyright laws have been designed had media distribution been digital from the beginning? That is, if we had skipped the step of a demanding distribution and reproduction *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 practice of today. There are parts of copyright legislation of today that probably would have survived and parts that would have looked different. If we at the same time look at the creators (and creativity stimulation) on one side and copyright as a market security for copyright holders on the other, we could nuance the discussion of copyright a bit. The much discussed protection of rights for seventy years after the creators' death is aiming at the copyright holders rather than at the creators and creativity stimulation.

Let me also address the scholars and the law-makers: legal science must understand how society changes. Otherwise, there is a high risk that the legal system could turn into an institution that uses its powers to support the parties that act and are coming from the traditional order in society, meaning an institution that distorts the societal development to fit some interests before others. And this is the consequence of that the legal regulations has first appeared in the same time as the old structures and parties emerged(mixed-up syntax). These ageing parties will receive support, not because they represent something more true or more just, but simply because they are the next to kin of the emperor, so to speak. The legal order then becomes a tool for power in a struggle between the old and the new, rather than a democratically legitimate interpreter of what is right and just.

In using the above mentioned work of Lakoff and Johnson on metaphors, applied on the grand context of this article, conceptions are unavoidably attached to discourses, and although they may have a very specific meaning in the discourse their meanings can change, and their uses can be altered. This implies that conceptions can be tied to an arranging order, an administrative pattern, in itself stemming from, for instance, analogue conditions of distributing media. These conceptions are likely to stand in the way when the administrative system is in need of a revision due to a change in the conditions. In short, the digitalization changes the conditions for distribution

of media, and the conceptions tied to copyright are standing in the way of the needed revision of copyright legislation.

Let me get back to the initial quote from Lakoff and Johnson ("People in power get to impose their metaphors"[2]), and state that even though the research on metaphors of Lakoff and Johnson had nothing to do with law or regulatory language, the quote can be used in this context. Law relies on metaphors and conceptions that have been discussed above, when it comes to copyright and the various legal constructions that for instance have been implemented within the European Union in order to enforce copyright more easily, these conceptions rely on a metaphorical use of the language that incorporates ideas of how the world is constructed as well as what the legal regulations should say. Those who control the laws and the legislative process can also, to a large extent, control what conceptions and metaphors should remain therein. This is why the battle of the Internet to a large extent has to do with controlling the conceptions that construct how we regulate the internet, and controlling those conceptions having to do with power.

When the idea of property rights are formed in an analogue reality and transferred to a digital, certain problems occur. An obvious problem, which has shown the two sides of viewing the handling of media content in the debate, is the sharing ideal of internet communication on one side and the "theft" on the other side. It is a battle of ideas, but also of conceptions of reality.

There is a risk that copyright goes from being a stimulator of creativity to a conservator of rights holders. It sort of implies that the most important media content is already created. "Now let's protect those who did it (or rather, hold the rights for those who did it)", which is a sad implication. It is conservative and will more likely stifle innovation, which is the direct opposite to the rhetoric that surrounds the law and its enforcement. This leads to an aim to control and to over-regulate protection of copyrighted content. It misses the point that *all* creativity is born out of a context, out of a culture, and that too much regulated protection will be *bad* for creativity[7].

The copyright regulation should not *primarily* be aimed at helping publishing houses, record companies or similar middle men to survive. They do

[7]Even legal scholars have referred to this as *lex continui*. See [20]. See also the preparatory works for the Swedish Copyright Act, SOU 1956:25 s 66 f.

not have a value in themselves for the copyright legislation to meet. Culture is however influenced by how the conditions are formulated. As technology has developed that has influenced storage of information, expanded duplication or distribution possibilities so have different opinions been heard. Some claim that the incentives to create disappear when the originators no longer have full control over the copies. Internet and file sharing however affects different types of creativity differently. The film industry may stand before a larger transition or challenge than the music industry, due to its larger and more expensive projects. However, in the changes of the premises for storage and distribution, and communication, one can establish that some types of creativity will likely see harsher times, and other types of creativity will definitely thrive. It is a part of the change. Let us not forget that totally new forms also will emerge, many without retrieving any revenues from the existing copyright system whatsoever.

Is copyright strong or weak in these days of digitalization? And what will happen in the future? Lawrence Lessig, the Stanford Law professor and Creative Commons Licence promoter, paints a bleak picture of when it comes to the balance between content that should be accessible and that which should be protected. He sees a development towards an increase in protecting copyrighted material:

> "We are not entering a time when copyright is more threatened than it is in real space. We are instead entering a time when copyright is more effectively protected than at any time since Gutenberg. The power to regulate access to and use of copyrighted material is about to be perfected. ...in such an age, the real question for law is not, how can law aid in that protection? But rather, is the protection too great? .... But the lesson in the future will center not on copy-right but on copy-duty – the duty of owners of protected property to make that property accessible."[21].

An important question that lurks behind these disputes of ideals is what kind of protection can exist without an absurd amount of control over human actions? Communication technology is not just a bad habit of the young generation, it is a fundamental part of how this generation leads the life. In a study conducted in February 2009 by a Swedish research project called

Cybernorms, with more than 1000 persons between 15 and 25 years old, the results clearly indicated that there existed no social norms that hinder illegal file sharing. And the surrounding persons of these youngsters imposed no moral or normative obstruction for the respondents' file sharing of copyrighted content[8]. In line with this the study also found that more than 60 per cent of the respondents rather paid for services that made them anonymous online and kept on illegally file sharing than paying for the content[9]. Many were however willing to pay for content, but not *via* the traditional model of paying for each piece. It was the flow that was of importance, for which the respondents were willing to pay, and in which the copyrighted content was included among other things.

When speaking of law and social norms one is often inclined to speak about the legitimacy of the legal regulations. The biggest threat to a law is losing its legitimacy. When a law is less right, it is no longer the trusted interpreter of what actions are right and wrong in terms of the social norms. One could claim that no law is stronger than the underlying social norms (which Håkan Hydén[22] does), and that the social norms are functions of the conditions for them. The conditions that are embedded as conceptions in copyright law have fundamentally, or even paradigmatically changed. The preconditions for the social norms have drastically changed as society has become digitalised. The social norms among many and the law do not match.

Law is strongly interconnected with society. Do not mistake behaviour in a society simply for a function of its laws, and that it therefore is easy to change society. This is where a problem lies, connected to legitimacy of legal regulations. The understanding of this article is that conceptions can be tied to a specific world order, to a way in which a society is organized. This leads to what the title is asserting: societies change and the conceptions that have been more or less deeply founded in them can face problems when translated into the new context. Clashes are inevitable. The rules and norms will collide and confuse. The example of file sharing, the Internet and the copyright debate has here been used to show the clashes of such a societal transition and the conceptions within.

[8] I am part of this research group, tied to Lund University in Sweden. See http://url.ca/f6pe for a presentation in Swedish. See also the debate article from the research group published in Dagens Nyheter 23 February 2009 http://url.ca/f6pg

[9] http://url.ca/f6ph visited 14 June 2009.

Say it with a song

The song *The darling conceptions of your time* is a creative expression. It is also an experiment, an attempt to understand and to test a non-traditional model for content distribution and the functionality of the copyright regulation *via* the Creative Commons Licence. I am still the creator, but I make a contract with anyone who wants to do something with the song. It is a way to meet the new conditions for distribution and creativity. I am handing over the song to the commons to use, to re-mix, to share, or not. Democracy decides.

So, the changes and the embedded problems have to do with how we view society, what interpretations we make of the conditions it brings. It has never been as searchable and interconnected as it is today, bringing along a type of vulnerability and questions about how this interconnectedness is used.

And from the corner of the bar, when most guests have left, the three man combo still plays. One pictures the last drunken man at the very end of the bar, Galileo Galilei, who unsteadily rises to silence the imagined mumbling crowd around him with a movement of his hand. He looks a bit sadly towards them, and then starts to sing with a broken voice:

It's not the eyes that fool you
It's not the ears that can't hear
It's the darling conceptions of your time
that makes you feel this way
that makes you feel this way

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