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When Morality and Legislation Diverge

On the disrespect for legislative measures regarding illegal file sharing, as seen in the light of Vilhelm Lundstedt's and Karl Olivecrona's theories.

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Contents

Summary

Statistics show that approximately 20 % of the Swedish population regularly engage in illegal file sharing activities, and in some age groups the figure is higher than 50 %. The general moral attitude is, to consider copyright infringements on the Internet as a socially acceptable behaviour. While the record industry and judicial system have both monetary and other reasons to fight illegal file sharing, both the technological and the moral development are combating these efforts.

The legal realism as represented by Vilhelm Lundstedt is based on the idea that the legal system is founded, not on moral values but on the greater good of the community. In his argumentation on penal law, Lundstedt accentuated that the primary function of punishment is to uphold the respect for the legal system and the Penal Code. A successful legal system and its individual legal rules must be able to get a hold of the general public morality and pull it in the desired direction, creating moral values that, in turn would make the Penal Code effective and respected. Legal rules must be supported by consistent punishment, and if they are not, the entire system will be undermined. Actions which the legislator has labelled as improper for civilized society, have punishments attached to them, and to uphold this connection between behaviour and consequence is of vital importance. The consistent enforcement of legal rules cannot be dispensed with.

Also, Karl Olivecrona is a prominent representative of the realistic legal theory. His reasoning is based on hard facts and the reality that can be perceived, discarding mysticism and religion. The law does not consist of divine commands, nor is it built on commands stemming from an actual person posing as the legislator. Olivecrona focused on the legislative process, the formal procedure behind the law and the psychological effects that a promulgated law gives rise to. In his view, legal language serves as a means of social control, and while legal terms may in reality be hollow

words, they also serve as signposts with strong associations to legal concepts. He discarded the idea of the bindingness of law, and consequently argued that the legal system consists of organized force. A legal system unsupported by the use of organized force will become hollow and disrespected. Through legal sanctions directed at individuals, the backbone of society is maintained. Legal rules that are not enforced will eventually succumb as the interdependency between legal sanctions and law observance cannot be disregarded.

Lundstedt's and Olivecrona's legal realism offer two possible solutions to the problem of illegal file sharing, as well as other cases of diverging morality and legislation: the legal system can either strive to enforce the law to a greater extent, convicting a majority of the offenders and thereby seizing general morality; or, it may be necessary to re-shape the law, in closer correspondence to the common so-called sense of justice. The first alternative is more or less impossible to follow through, for a number of reasons; (i) the technical development has made it possible to share files anonymously, at least in relation to the judicial system, (ii) the social norm and moral attitude have not been affected by either IPRED or the conviction of the founders of The Pirate Bay, (iii) with the existing moral attitude it is impossible for the legislator to successfully fight illegal file sharing, as the moral norm generally prevails over legal values. Also, (iv) attempts to enforce and strengthen the copyright law have met with resistance, and counter-measures have been taken to secure anonymity online. This cold war in the digital world spills over into other areas of law, thus risking undermining the legal system. And finally, (v) one must ask if it is really in the best interest of the state and the legal system to even try to enforce a law that is not in correspondence to the general moral attitude.

The second alternative is to re-shape the law. In doing so, the legislator should consider (i) that digital copyright should be separated from the existing copyright law, and (ii) that the new law should correspond more closely to the moral values in society.

Sammanfattning

På vilka värderingar och grundläggande teorier baserar sig vårt rättsystem och vad är lagens bindande kraft? Hur kan dessa teorier förklara klyftan mellan moraliska regler och lagregler?

Denna uppsats består av tre delar. De två första delarna [Kap. 2 och 3] är mer deskriptiva och består dels av ett kapitel om illegal fildelning, dels av en analys av skandinavisk rättsrealism, framför allt Vilhelm Lundstedts och Karl Olivecronas skrifter. Den förstnämnda behandlar fildelning som en folkrörelse, och visar klart på hur den allmänna rättskänslan och moralen skiljer sig från det beteende som lagen förväntar sig. Den andra delen tecknar en bild av Lundstedts och Olivecronas idéer främst om lagarnas sociala och moralbildande funktion. Detta inkluderar rättssystemets ursprung och natur, samt dess bindande kraft.

Uppsatsens tredje del [Kap. 4] väver samman de två första kapitlen. Eftersom del ett och två behandlar ämnen som inte till sin natur har ett självklart samband, så kräver analysdelen mer utrymme. Min slutsats är att den rättsrealism som Lundstedt och Olivecrona representerar ger två möjliga lösningar när moralen och lagstiftningen går stick i stäv. Antingen kan lagstiftaren sträva efter att upprätthålla och genomdriva Upphovsrättslagen, och därigenom försöka gripa tag i den allmänna moralen; eller så måste lagen ge vika. Det förstnämnda är mer eller mindre omöjligt vad gäller illegal fildelning, av flera olika anledningar. För det första har den tekniska utvecklingen gjort det möjligt att fildela anonymt, åtminstone realistiskt sett. För det andra har alla försök att stärka lagstiftningen, såsom IPRED eller domen mot The Pirate Bay, inte lyckats omforma den sociala eller moraliska normen. För det tredje är det under den nuvarande allmänna rättskänslan omöjligt att bekämpa illegal fildelning enbart genom strängare lagar, eftersom den moraliska kompassen alltid står över lagens riktmärken. För det fjärde kan åtgärder som riktas mot fildelningen vara kontraproduktiva och leda till kraftiga motreaktioner som sprider sig långt

utanför upphovsrättens område. Ökade ansträngningar för att bevara anonymiteten leder till att även andra former av brott blir svårare att utreda. Sist men inte minst måste man fråga sig om det är en god idé att ens försöka genomdriva en lag som saknar stöd hos befolkningen.

Om man misslyckas med att upprätthålla lagen är en reform nödvändig, och den nya lagstiftningen måste närmare motsvara den allmänna rättskänslan. En sådan reform måste beakta att digital upphovsrätt på avgörande sätt skiljer sig från den traditionella upphovsrätten, samt ta hänsyn till den allmänna moralen och opinionen.

Preface

This thesis is based on an essay written for the 15 credits course Scandinavian legal thinking in the autumn term 2009, entitled 'The foundations of general respect for the law in Karl Olivecrona's legal theory – Applied to the present and to the extensive problems of infringements on copyright on the Internet'. Since then, both the idea and the problem have grown to an incredible extent, which has made this essay both tricky and inspiring to write. I hope I have been able to bring the Scandinavian legal realists back to life, showing that their ideas are not just part of a theoretical and antiquated argument, but constantly topical and fundamental to the legal system. Without reflection, we accept the ideas of Lundstedt and Olivecrona as cornerstones in the legal society, and it therefore seemed natural to me to view the new legislative dilemma of illegal file sharing in the light of their legal theories.

I owe great thanks to my father for his perseverance and flow of ideas, and to my mother for her constant support. I must also express my gratitude towards my tutor Uta Bindreiter, who has been a constant source of reassurance at times when I really needed it. Finally, as with most of my achievements, this essay would not have been accomplished without the loving support of my boyfriend.

Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement.
DKK	Danish kroner, the currency of Denmark.
DVD	Digital Versatile Disc or Digital Video Disc, An optical disc storage media format.
IFPI	International Federation of the Phonographic Industry.
Infosoc	Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society, 22 May, 2001.
IP (Address)	Internet Protocol (Address), provides host or network identification.
IPRED	Intellectual Property Rights Enforcement Directive (2004/48/EG, April 20 2004).
kB	Kilobyte, the unit for digital information.
TPB	The Pirate Bay (legal case).
URL	Uniform Resource Locator, used for the addresses of web pages (e.g. http:///www.example.com).
VPN	Virtual Private Network, a computer network.

1 Introduction

1.1 Background

Google was born in late 1997[1] and would later become one of the most successful children of the Internet (born in the early 1990's). Today, almost a third of the world population are using the Internet[2] and *to google* has been recognized as a verb by The Merriam Webster Dictionary[3]. The rapid globalization and interconnection of continents and people have benefits as well as drawbacks. One of the larger and more important points of conflict is the phenomenon of copyright infringements. Piracy, the illegal sharing of copyright protected material via the Internet, is an ever-growing problem, not only for the copyright holders but also for the legislator. A law that cannot be effectively enforced is a potential threat to the legal system. Given the belief that the failure to control piracy is not an isolated issue but an important part of a system that may crumble in the absence of a sustainable solution, it is natural to search for answers within the foundation of the system itself.

The Swedish legal system is closely tied to the doctrine of Scandinavian legal realism, which saw the light of day in the first decades of the 20th century. With invaluable contributions from the founding father of the so-called Uppsala school of Philosophy, Axel Hägerström (1868-1939), and his disciples Vilhelm Lundstedt (1882-1955) and Karl Olivecrona (1897-1980), the doctrine of Scandinavian Legal Realism was to have considerable influence upon Swedish legal thinking. All of these pioneers were dead long before Google even was considered. However, as is often the case with good ideas and well-founded thinking, their legal doctrine is far from outdated. Or so it seems, at least.

[1] http://whois.dnsstuff.com/tools/whois.ch?ip=google.com&cache=off
Most recently updated: 2010-09-15, Most recently accessed: 2011-01-16.
[2] http://www.internetworldstats.com/stats.htm
Most recently updated: 2010-06-30, Most recently accessed: 2010-01-16.
[3] http://www.merriam-webster.com/dictionary/google
Most recently updated: unknown, Most recently accessed: 2010-01-16.

In this essay, illegal file sharing refers to unauthorized sharing of data via the Internet, either by copying and sharing original files or by forwarding copies that have already been made, both without owning the rights to the original. This can be done via a file sharing program, encoded or open, or through other technical solutions. The constant growth and expansion of the Internet, together with the development of new hardware and software technique, have made it possible and easy for users to share data almost anonymously across the world and, what is more, to do it for free. Statistics show that about 20 % of the Swedish population are actively sharing unauthorized files, and another 18 % have done so previously but stopped since.[4] This can be put in perspective by reviewing statistics regarding other types of criminal activity: of the Swedish population, about 5-6 % are convicted criminals.[5] This shows that for one reason or another, people who normally are law-abiding in other areas of legislation, seem to think that it is perfectly alright to violate copyright laws online.

The purpose of this essay is a twofold one. Firstly, to investigate into the origins of people's disobedience vis-à-vis the copyright law that criminalizes file sharing. The focus of interest will be to investigate and explain the mechanisms that make a valid law disrespected. Assuming that laws are generally obeyed and respected, our understanding of why this particular law is not respected, is a key issue to understanding the legal system as a whole.

Secondly, this essay purports to find some stable ground in an area of law where trends are fluctuating. Since statistics are constantly changing, this treatise will focus less on numbers and more on the general picture. The investigation will thus provide insight into the complex of problems regarding digital copyright and, in extension, lead to some much needed propositions of comprehensive and sustainable solutions.

[4] World Internet Institue, *Svenskarna och internet 2010,* 2010-10-26, p. 48.
[5] Martens, Peter & Holmberg, Stina, *Brottslighet bland personer födda i Sverige och i utlandet*, BRÅ Rapport 2005:17, Stockholm.

1.2 Previous legal research

As regards file sharing, previous legal research is rich and diverse. The problem has been attacked from various perspectives, including the value of artistic creation, the philosophy of the hacker movement, the right to cultural freedom, John Locke's labour theory of property[6] as well as numerous other starting points. The same applies to legal research regarding immaterial rights in general. Also, there is an abundance of analyses concerning the legal theories of the Scandinavian legal thinkers. However, neither Olivecrona nor Lundstedt put their focus on immaterial law, and they are not considered as authorities in this area of law. Therefore, references and connections between their respective legal theories and the field of immaterial law problems are few and far between.

At the core of the set of problems relevant to this essay, lie the questions of civil disobedience and of the validity of legal rules. These issues have been explored and analyzed previously and there is some pertinent material to be found.

While previous legal research takes some effort to find, especially in some areas of law; the actual legal situation is far less complicated. File sharing without the consent of the copyright holder is illegal under the Swedish legislation as well as in most other, if not all, civilized states. There are no legal rules dealing specifically with copyright infringements on the Internet; instead, digital copyright has been automatically subsumed under the respective paragraphs of the 1960 copyright law.

Research that tries to link the motives behind illegal file sharing to the legal thinking of Scandinavian legal realism as represented by Lundstedt and Olivecrona, is much more difficult to find. In this context, the research project called *Cybernormer (Cybernorms)*[7] must be mentioned. This is a project within the field of Sociology of Law, which aims to explore both social and legal processes sprung from the changing information technology. *Cybernorms* includes numerous reports that border on the

[6] E.g. in Söderberg, Johan, *Allt mitt är ditt, Fildelning, upphovsrätt och försörjning*, Stockholm, Bokförlaget Atlas, 2008.
[7] http://www.cybernormer.se.

subject of this treatise, e.g. *Social Norms and Intellectual Property. Online Norms and the European Legal Development.*[8] It would, perhaps, be too rash to claim that this essay is unique in combining the two issues. However, it is not exaggerating to say that the following treatise offers a novel perspective on file sharing.

1.3 Research questions

Given the twofold purpose of the essay (as seen under 1.1 above), the research question can be formulated in two parts: To which extent can Lundstedt's and Olivecrona's theories assist us, mainly in explaining the motives behind the wide-spread disrespect vis-à-vis a valid law, but also in preparing for a future solution to the problem?

1.4 Delimitations

This essay is concerned with file sharing and piracy, using relevant parts of the legal theories of Olivecrona and Lundstedt to explain the ineffectiveness of the law and the collective behaviour of pirates. Since Scandinavian legal realism will be in focus, Hägerström's philosophy must also be considered and explained in some detail. Both Olivecrona's and Lundstedt's legal theories will be used as a model for explaining the complex of problems regarding file sharing. More recent realistic theories, however, will not be mentioned, nor doctrines from other schools of philosophy. With respect to Lundstedt's and Olivecrona's theories, neither of them will be mapped out in its entirety. Instead, focus will lie on the parts that relate to the binding force and social function of law. Arguments which are contiguous and overlapping on to these two areas will not be excluded, but have minor significance.

[8] Larsson, Stefan & Svensson, Måns, *Social Norms and Intellectual Property. Online Norms and the European Legal Development,* Research Report in Sociology of Law, Vol. 1, Lund University, 2009 (November 20, 2009).
Available at SSRN: http://ssrn.com/abstract=1598288.

Although numerous problems are associated with file sharing -- such as e.g. artistic freedom, the right to compensation for one's work and economical losses for the music- and computer game industries -- the focus of this essay will be to explain why the law is being violated in a kind of routine manner. In spite of the legislator's efforts to sharpen copyright and Internet laws, the file sharing movement has not been subdued, and future prospects of suppressing it seem rather bleak.

The traveaux préparatoires of the copyright law[9] will not be considered, partly because the law is based on constitutional and fundamental values, partly because digital copyright did not constitute a problem at the time they were written.

The part on file sharing will focus on why people refuse to obey the law, and technical details will be sparser. File sharing will be considered a popular movement and the corresponding legal rules will be discussed as a part of the legal system that is mostly ignored by the citizens. File sharing constitutes an area of research, legislation and popular debate that is rapidly changing, and precisely for this reason, the present text will only consider the developments up to January 16, 2011, and disregard legal cases, propositions and other development after this date.

Only Swedish legislation will be considered. International, illustrative examples of successful solutions to the problems will nevertheless be considered as well, in view of the fact that the Internet is a global institution and must be treated as such. Neither existing nor future European Union law will be considered to its full extent, although this essay recognizes that it exerts influence on the Swedish legislation both in the present and in the immediate future. Even if the focus of this essay will be on Sweden, it must be stressed that file sharing is not an isolated movement, but a global concern that cannot be solved in any given state by this particular state alone.

[9] Prop. 1960:17; 1LU 1960:41 and 1960:43; Rskr 1960:406.

1.5 Method and materials

In this essay, the legal-dogmatic method will be used under application of the theories of Lundstedt and Olivecrona in order to explain the file sharing problematic.

Evidently, the legal doctrines of Lundstedt and Olivecrona must be closely examined. For this purpose, *Law as Fact* (Olivecrona, 1971) and *Till frågan om rätten och samhället* (Lundstedt, 1921) will be widely used, along with other prominent works by the two. Technical details and statistics regarding the Internet and the file sharing movement will be taken from reliable electronic sources, since it is important to have recent data of a phenomenon that is characterized by constant change and development. Some doctrine regarding the philosophical and historical context of copyright law in general and file sharing in particular will also be studied, particularly *Allt mitt är ditt, Fildelning, upphovsrätt och försörjning* (Söderberg, 2008) and *Medie- och immaterialrätt* (Rosén, 2003). Literature regarding civil disobedience, validity and Scandinavian legal realism will be taken from all relevant time periods, whereas material on file sharing must be more recent and up to date.

1.6 Structure

The following chapter 2 will examine file sharing as a phenomenon and popular movement. The origin, growth and extent of piracy and illegal file sharing will be mapped out and analyzed. Currents and trends regarding measures taken against file sharing, stemming both from the legislator and outside sources, will be surveyed and explained. In order to analyze why file sharing is a popular movement, in spite of being illegal, it is of vital importance to investigate both current developments and the moral attitude.

Chapter 3 will describe and analyze the legal doctrine of Lundstedt and Olivecrona, with focus on the so-called binding force of law and the social function of legislation. In this part of the essay, it is essential to find out

why, according to these philosophers, people choose to obey or disobey the law in general, and specific laws in particular.

Finally, chapter 4 will join together chapters 2 and 3 and attempt to explain file sharing in terms of Scandinavian legal realism. This final part will not only shed light on why file sharing is so common and so hard to stop, but also hint at plausible and sustainable solutions.

2 File sharing as a popular movement

2.1 Background

The term illegal, or unauthorized, file sharing refers to illegal sharing of data via the Internet, either by copying original material or by forwarding copies that have already been made. The concept includes both active and passive sharing of illegal copies and, in extension, it also includes services that make files available and easy to download to anyone and everyone around the world. However, the purpose of this essay is not to study file sharing per se, nor to scrutinize legal cases or to investigate questions of liability.

File sharing as such is not illegal, but the sharing of files is illegal if the material in question is protected by copyright and the copyright holder has not consented to free distribution of his works. The copyright law, *Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk*, protects such material. This is a general law applying to all forms of creative work, and there is no specific law that regulates copyright on the Internet.

The explosive expansion of the Internet, alongside the rapid development of new technical solutions and coding, has made it possible to share data and files across the globe. File sharing must be regarded as an international problem and treated as such, although this essay will focus only on tendencies in Swedish society and the Swedish legal system. Having said that, it must also be stressed that it is more than likely that most Swedish citizens who share files illegally, do so without regard for national borders. In other words, a Swedish person who up- or downloads a file, is likely to share it with users outside the Swedish territory. Inevitably, this complicates both the theoretical discussion and the issue of legal sanctions. Anyone with access to an Internet connection and a basic idea of where to search, can find films, music, texts and other information within seconds. Files are not only easily available: equally important, they are free. This must be considered as one of the main reasons why people share files, although it is

widely known to be illegal. It is also one of the primary reasons why copyright holders and distributors are so persistent in trying to claim reparations and bring pirates to justice. Owing to the development of new techniques, it has actually become possible to share files anonymously, which makes it virtually impossible to find and impose legal sanctions on individuals sharing files illegally.

2.2 Scope

Statistics show that about 20 % of the Swedish population between the ages of 16 and 74 have used a file sharing program at least once. In some age groups the percentage is even higher, and for men between ages 16 and 34, the number is as high as 48-57 %.[10] While these statistics are a few years old, they still provide a clear contrast to the percentage of Swedish citizens convicted of any crime; thus clearly demonstrating that the legal rules against illegal file sharing are more disrespected than the law in general. Only about 5-6 % of Swedish citizens have been convicted of a crime,[11] and these statistics include all kinds of crimes and all forms of legal sanctions. Current statistics confirm these numbers, and the World Internet Institute has reported that in 2010, about 20 % of the Swedish population or 24 % of Internet users, share files. In addition, 18 % of Internet users have previously shared files but are no longer doing so.[12] Thus, file sharing is not generally regarded by the population as an anti-social or criminal behaviour. Actually, it might be considered a popular movement.

As mentioned above,[13] the purpose of this essay is to offer an explanation as to why people in general do not respect the copyright law that forbid illegal file sharing. This behaviour cannot be explained as a general disrespect for the legal system or the constitution. This format does not allow for an exposition of possible solutions and therefore, this essay does not aim at solving the problem. The purpose is simply to find the root of the

[10] SCB Press release, 2006-12-18, nr 2006:343, IT statistics.
[11] Martens, Peter & Holmberg, Stina, *Brottslighet bland personer födda i Sverige och i utlandet*, BRÅ Rapport 2005:17, Stockholm.
[12] World Internet Institue, *Svenskarna och internet 2010*, 2010-10-26, p. 48.
[13] See p. 8 above.

problem, thus identifying the factors that have given rise to the discrepancy between general moral attitude and the law in this area. This will point not at specific solutions but in the direction that is most likely to lead to a sustainable reform of the legal rules in question.

2.3 Pirates and ideology

The debate on file sharing, piracy and immaterial law on the Internet is multi-faceted and comprises a host of endless possible discussions. The motives behind illegal file sharing are hard to establish definitely, but more than one explanation for the behaviour of file sharers is possible. These motives will be briefly expounded on.

Regarding illegal file sharing, there are obvious political incongruences, and a self-evident argument cannot be presented either in favour of the community of file sharers nor their opponents. Among pirates, i.e. those that share files, there is an almost total consensus that there is a rift in society between those who understand the Internet and those who do not. This is a variation of the myth of the death of ideology, according to which the class society and the battle between liberalism and socialism has been replaced by another form of ideology. According to this point of view, the only thing left to be found is the most rational administration of society.[14] In his book *Allt mitt är ditt: fildelning, upphovsrätt och försörjning (What's mine is yours: file sharing, copyright and maintenance)*, Johan Söderberg takes as his starting point the opinion that the challenge against copyright is a political conflict that cannot be understood without reference to the traditional political system.[15] As one of the few comprehensive and updated sources on file sharing, this book offers a variety of perspectives, not all of which will be reflected in this essay. However, this book will be referred to throughout this chapter.

[14] Söderberg, 2008, p. 45.
[15] Ibid. p. 14.

2.3.1 Immaterial rights and the theory of labour

As a distinct area of law, immaterial rights are based on both moral and philosophical traditions. A recurring theme in the motives behind legal rules of this nature, is the right of the artist or creator to get paid for his work -- an argument of justice that can be traced back to John Locke's theory of value, property and labour.[16] According to Locke's theories, man has an undoubted right to the fruits of his labour. This is also a fundamental idea of modern society.[17] The root of the problem, viewed in this light, is the view of work and the people's motivation to work. On the *one* hand, work can be seen as a necessary evil in a system where people strive to satisfy their personal needs with the least possible amount of effort. On the *other* hand, one may argue that work is a part of every human being, whereas rest is not the state of equilibrium that people strive for.[18] This is one of the ideological cornerstones in the debate, but it is not the only one.

As long as the predominant view on work and the motivation to work is that everybody has an undisputed right to be compensated directly for his work, the legislation cannot change. We must therefore ask ourselves what motivates artists to create, now and in the future. Is economical compensation the only motive, or will artists continue to create and spread their works for the pleasure of others and themselves? The theory that artists are motivated by the sheer joy of creating has been labelled a rather naive attitude, since nothing is free in modern society and it is untenable to work for free. But in reality, the question of money and compensation can be solved via new technical solutions, such as imposing taxes on Internet suppliers and/ or connections, advertising or otherwise. Although such solutions would be quite easy to design and impose, such reforms cannot be considered until the view on labour changes.

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[16] Locke, John, *Two Treatises of Government,* Book II: An Essay Concerning the True Original, Extent and End of Civil Government [The Second Essay], Chapter 5
Available at: http://www.lonang.com/exlibris/locke/index.html
Most recently updated: unknown, Most recently accessed: 2011-01-16.
[17] Söderberg, 2008, p. 26.
[18] Ibid. pp. 28-.

2.3.2 The global aspect

A unique feature of illegal file sharing as compared to other areas of law, is its global aspect. A national law prohibiting file sharing is in reality quite ineffective, since people all over the world can gain easy access to computers and servers across the globe. In order to be effective, legislation on immaterial rights must be harmonized internationally and enforced in every state. To illustrate this, Söderberg adduces the case of DVD-Jon, which is a legal case against a Norwegian hacker who created and spread a program that removed the technical protection on DVDs and thus made it possible to make illegal copies. In doing so, he committed a crime according to the US legislation, but not according to the Norwegian legal system, and therefore his case was acquitted.[19]

This is only one aspect of the global problem. Another one is of course the unstoppable nature of file sharing and data. Once a document, file, movie or musical piece has been shared on the Internet, it remains there forever. It is extremely difficult, if not impossible, to retract and delete a specific piece of music, video or text, as the data rapidly spread across the globe and end up on countless computers and servers. Information is easily spread all over the world, and it seems to be impossible for any country to win the battle against illegal file sharing on its own.

2.3.3 The economic aspect

In 2007, the music and film industries claimed to have lost $6,2 billion due to file sharing. This figure is based on the assumption that every downloaded copy is equivalent to an unsold copy. From the view of an economist, this assumption is erroneous and the real relation and calculation is far more complex. Economic theories agree that price is an essential factor when an individual decides whether or not to purchase a product. When the price is zero (as is the case with illegal file sharing copies), a considerably greater number of individuals will procure the commodity,

[19] Söderberg, 2008, p. 37.

then when they have to pay market price.[20] This complicates the calculation and makes all estimation more uncertain. Although most people agree that the industry must lose at least some money, and that presumably the figure is not insignificant, it is difficult to arrive at a trustworthy estimate.

2.3.4 The aspect of legal sanctions

A comparison of the legal sanctions taken against file sharing and those taken against physical thefts, illustrates an interesting fact: both the cultural industry and the police treat file sharing and theft differently when taking legal measures against offenders. While a previously unpunished shoplifter can probably escape with a rebuke, individual file sharers are more severely punished if they are identified and prosecuted. Focus will then shift to the total loss for the industry and propositions to sharpen the legislation are motivated by the total losses for the music and film industries.[21] The difference is motivated, partly by the commercial purpose of file sharing, partly because theft and copyright are regulated in separate laws, but following this argument through leads to other controversies. In order to successfully and completely control file sharing and the networks that make files available, every user must be closely monitored even before crimes have been committed or even suspected. The investigational work of the police would then have to include all Internet users[22] which, in reality, is an outright impossibility, regardless of the efforts that are made to make it possible in theory. Obviously, copyright holders are aware that the police lack resources to investigate and prosecute every file sharer, and have therefore demanded that some police tasks must be delegated to private industries. However, this would be a dangerous development, since a jurisdiction placed under private auspices, in the hands of private companies, could undermine legal security.[23] This must be considered a rather drastic measure and an unfortunate development: if realized, such a

[20] Söderberg 2008, p. 45.
[21] Ibid. p. 56.
[22] Ibid. p. 57.
[23] Ibid. p. 59.

reform would have to be extremely well-justified. In extension, such a discussion would lead to a debate on the defence of democracy and copyright holders, including the industry, would argue that we must strive for obedience to the law. In civilized society, each individual has undertaken a responsibility to follow the laws that have been passed by majority decisions. In the case of file sharing, the democratic legitimacy of such legal rules can be questioned.[24]

Ideally, a legal rule represents the common will of the members of the community. Frequently, the legal system comes close enough to this ideal of giving rise to a general respect for the legal system, and citizens therefore abide by those rules that they do not approve of as well. Law abidance is not merely based on a general fear of punishment, but equally motivated and regulated through social sanctions. There is a general opinion that criminal behaviour violates the social contract, which we have all agreed on and are a part of. If moral norms are absent, it is indicated that the corresponding legal rule lacks legitimacy among the proposed subjects. This rift is extremely obvious as regards the field of immaterial rights where, on the one hand, the government considers severe legal sanctions and, on the other, most citizens consider file sharing, even of copyright protected material, to be an activity that should not be regulated by legal rules at all.[25]

2.3.5 The technical aspect

Finally, technical development must be seen as one of the key issues in the analysis of file sharing. Indeed, this is a factor that makes all other arguments seem less relevant. Today, it is possible and easy for file sharers to download and share files more or less anonymously. Encryption is now sufficiently sophisticated, and traffic cannot be easily tracked and traced to individuals. While data on Internet use is often available to the Internet suppliers, they have so far refused to share this information with strangers, i.e., the police or copyright holders. The result is a crime where the criminal

[24] Söderberg 2008, p. 59.
[25] Ibid. p. 61.

cannot be identified – or, better, a crime where the crime in question cannot be defined. Thus, even if immaterial laws were ideologically motivated, harmonized, and sharpened, and even if resources were uncovered and assignments delegated, it would still be difficult to find and prosecute most file sharers.

We are left with a law that cannot be enforced. Having arrived at this conclusion, it remains to be explained why people violate this particular part of the legislation, and why the moral standards have developed in this direction.

2.4 The file sharing debate: two main trends

In the current debate on file sharing, a number of distinct trends can be identified. In this essay, two main trends are presented. The *first* one is the tendency of the legislator to sharpen the law and provide the police and prosecutor with new ways to fight file sharing. This policy has also been adopted by copyright holders and the industry, in their effort to get file sharers convicted to pay large sums in damages. Although this process is still ongoing, it is a reasonable conclusion that this course of action has been less successful, and has not succeeded in changing neither the moral attitude nor the behaviour of citizens.

The *second* trend has evolved within a different environment, further away from the legislator and closer to the file sharing community. This trend is the growth of *streaming* and similar technical solutions. If traditional file sharing is compared to breaking in into an enormous data bank, stealing what you want and taking it back home; streaming can be compared to legally borrowing a copy of the file in question. In technical terms, streamed media are multimedia that are constantly received by the user, as presented by the provider. The term streaming is thus derived from the delivery method, and not from the media itself. This trend includes the growth of Spotify (music), Voddler (film) and similar services, but it also includes the development of iTunes (music and video) etc. and the tendency to give the

customer easy access to media, at a low cost and without much effort. In this category, new technical solutions protecting computer software and games must also be included. This course of action has been far more successful in influencing the behaviour of people and has proven that neither the legislation, nor the cost of data are the primary motives behind file sharing.

2.4.1 IPRED

The much debated EU-directive (and consequently part of the Swedish legislation) commonly referred to as IPRED[26] is an example of, how the legislator's efforts to regulate and influence the behaviour and moral standard in society, have failed. For the purpose of this essay, it is not necessary to discuss or explain in detail the content of the IPRED law.

The primary purpose of IPRED is to extend the legal measures that can be taken against illegal file sharers and to aid the legal authorities in gathering evidence against individuals who share files illegally. While the precise content of IPRED is of less moment in this context, its influence on file sharing is far more interesting. IPRED came into force on April 1st 2009, and in the following days, it seemed as if the amount of data shared within the Swedish part of the Internet had dramatically decreased.[27] These statistics are taken from Netnod[28], a foundation that operates national exchange points and continuously measures the kB [amount] of data that are exchanged through these points. In other words, this is not an absolute measurement or estimate of illegal file sharing, but includes all data and all forms of information. However, the halving of traffic from one day to another cannot be explained only by normal variation or a general decrease in the use of Internet services. It is reasonable to assume that the amount of illegally downloaded data did decrease exactly because IPRED had come

[26] 2004/48/EG, April 20 2004, *Intellectual Property Rights Enforcement Directive*, enforced in Sweden by the Ipred-law also known as the file sharing law, officially *Civilrättsliga sanktioner på immaterialrättens område* which came into force October 1, 2009.

[27] http://www.idg.se/2.1085/1.221785/internettrafiken-dyker
Most recently updated: 2009-04-01, Most recently accessed: 2010-12-10.

[28] http://www.netnod.se
Most recently updated: Daily, Most recently accessed: 2010-12-10.

into force, but absolute certainty in numbers cannot be achieved. However, even if we acknowledge that IPRED had a clear effect on the behaviour of people, this effect proved to be very short-lived. In the beginning of 2010, the amount of data that passed through the national exchange points increased again and reached levels higher than before IPRED. Again, it is reasonable to assume that illegal (and possibly legal as well) file sharing is responsible for most of this increase. The attached statistics[29] show that while traffic seems to have decreased significantly in the days or weeks following IPRED, it then slowly but steadily has increased again. Today, the traffic load is greater than before IPRED.

It is important to stress that these statistics cannot be taken as a true representation of illegal file sharing, both because not all Internet traffic passes through these exchange points, and because not all of this traffic represents illegal file sharing. In addition to this, it seems as if legal file sharing, and thus traffic, has increased. The primary reasons for this is probably streaming and other forms of file sharing that offer free data or easily available data at low cost.

2.4.2 Streaming

While the legislator has issued additions to copyright laws, other solutions to the problem of file sharing have evolved elsewhere. As mentioned above, streaming for instance, is not a product of the legal system but rather, a solution sprung out of necessity and the insight that the file sharing movement is unstoppable. Streaming offers a legal alternative to file sharing, and as such it is presumably a part of the explanation for the increased traffic load mentioned in subsection 2.4.1. For the present purpose, it is not necessary to analyze streaming in great detail, but a few points of interest shall be pinpointed.

The market for streaming seems to have existed even before the technical part had developed. It could be argued that streaming has developed from a

[29] See Supplement for Internet traffic statistics from Netnod exchange points.
http://stats.autonomica.se/mrtg/sums_max/All.html
Most recently updated: Daily, Most recently accessed: 2010-12-10.

general wish to obey the law and stop sharing files illegally, however, without being inclined to behave differently. If this theory is adopted, it seems as if the unwillingness to obey the law were not primarily based on disrespect for the legislator, nor an expression of a general disrespect for the authorities. The matter is more complicated, since the arguments include economical and ideological statements, such as e.g. the commonly expressed maxim ”information should be free”. The motive behind file sharing may vary, but it seems to be the case that people are open to legal alternatives and might even prefer them. The well established general respect for the legal system is perhaps not strong enough to completely divert established behaviour, but sufficiently strong to generate minor adjustments and adaptations. The ambition to find a legal solution that fits an established illegal behaviour instead of ignoring the legal rule in question completely, suggests that the constitution and the legislator are not the focus of disobedience but rather, that it is the specific law of copyright, applied to illegal file sharing, that is considered absurd.

Although the music and film industries claim to lose enormous amounts of money every year, the copyright law is poorly enforced when it comes to illegal file sharing. Legal cases and convictions are few in number, but there are some interesting examples. Despite the efforts of the legislator to stress the severity of copyright infringements on the Internet, most people continue to share files illegally. As this topic is now widely discussed generally as well as specifically (such as in the legal case analyzed below) it can no longer be explained by ignorance.

2.4.3 The Pirate Bay debate

The legal case and prosecution of the founders of The Pirate Bay (TPB) is highly interesting for a number of reasons. It has recently been tried in the court of appeal (November 26, 2010).

The three accused were sentenced to between 4 and 10 months in prison (the fourth accused was unable to attend, and has therefore not been sentenced

yet), and are to pay ca. 300 million SEK in damages.[30] The prosecutor argued that the accused (unnamed here, as their individual liability and punishment is of less interest) had co-operated under a mutual understanding, in the organization, administration, systematization, programming, financing and operation of TPB, a service for file sharing. Thereby, they created a functional service for file sharing, compiling a data base and storing torrent files[31] which, in turn, were intended as a means to violate the copyright law.[32]

The accused in this case were not regular users or file sharers, but were prosecuted for accessory to crime against the copyright law. In other words, this was an attempt on the part of the legal system to stop file sharing at its source, and to make it harder to find and share files by shutting down services which make sharing easy and systemized.

2.4.3.1 Key points of interest

First and foremost, the geographic location of the principal crimes was an inevitable point of discussion. TPB is not a national service but available all over the world. If neither the identity of the perpetrator nor the geographic location of the crime is known, it is impossible to hold anyone responsible for accessory within the Swedish legal system.[33] In this particular case, the court of appeal reached the conclusion that the existence of torrent files in the TPB database was an essential element of the principal crime. Since servers were located in Sweden, the Swedish court of law was qualified to judge.[34]

Secondly, the perpetrators of the principal crimes remained unknown. In theory, TPB has been part of millions of copyright infringements on the Internet, but none of these individual crimes have been identified (although the legal case in question pinpoints certain movies and artistic works). The

[30] HovR B 4041-09, 2010-11-26, pp. 2-5.
[31] A torrent file contains data [URLs of multiple trackers and integrity metadata] about all the pieces that constitute a [music or video] file. In simpler words, it constitutes a map to finding all individual pieces to said file.
[32] Ibid. p. 7.
[33] Ibid. p. 8.
[34] Ibid. p. 9.

court of appeal argued that it had been confirmed that unknown perpetrators had committed the principal crimes, objectively speaking.[35]

Thirdly, the concept of accessory had to be discussed and defined. The accused had supplied unknown users with a possibility to upload and store torrent files, they had offered a database connected to a catalogue of torrent files, supplied a possibility for others to search for and download torrent files and also supplied functionality, which made it possible for users to share files through the tracker function of the TPB service.[36] Even if TPB had not been a necessary prerequisite for the individual principal crimes, the court of appeal argued that the service had made it easier and faster for users to transfer copyright protected material to the public, through illegal file sharing.[37] The court also argued that it had been made clear that TPB had predominantly been used to download music, film and games; of which most were illegal to share since they were unauthorized.[38] The court of appeal discussed the dilemma of accessory, and of accessory to accessory, concluding that the courts should exercise caution in holding Internet or broadband suppliers responsible as accessories to crimes committed by their users.[39]

Fourthly, the court of appeal discussed the extent of file sharing as a problem in society. It argued that in the case of TPB, there was a concrete risk that users would download and spread protected material for commercial purposes.[40] Such violations of copyright through illegal file sharing, were considered by the court as a problem in society that had spread extensively in recent years.[41] The court found that illegal file sharing had quickly reached proportions that make general prevention extremely important. Infringements on copyright as seen in the case of TPB, justified especially harsh sanctions and a presumption for imprisonment.[42]

[35] HovR B 4041-09, 2010-11-26, p. 10.
[36] Ibid. p. 11.
[37] Ibid. p. 13.
[38] Ibid. p. 14.
[39] Ibid. p. 18.
[40] Ibid. p. 23.
[41] Ibid. p. 24.
[42] HovR B 4041-09, 2010-11-26, p. 25.

2.4.3.2 Items for discussion

The TPB case brings to the fore at least four problem areas. *First* of all, all use of the Internet in general and the geographical aspect of illegal file sharing in particular, is a source of endless problems and dilemma. Had the TPB servers not been located in Sweden, and the founders not been Swedish citizens, it would probably have been impossible to prosecute the accused within the Swedish legal system. There are numerous other similar services located abroad that can never be subject to Swedish legislation, regardless of the number of Swedish users. Thus, if we consider things from a larger perspective, it seems as if the TPB case had been unique and a rare opportunity for the Swedish legal system to administer justice. Indeed, we would be lucky to see another case and conviction like this one. It is far more likely, however, that while a few individual file sharers may be apprehended, most of them will not be prosecuted, and that the copyright law will continue to be poorly enforced.

Secondly, this problem is closely tied to the problem of anonymity and traceability. It remains to be seen how the IPRED law will be used, but this far, no Internet suppliers have been ordered to surrender their data of file sharing and file sharers. The European Court of Justice will decide how IPRED is to be interpreted and applied, and the verdict of the court may well lead to a greater number of convictions, since the police and judicial system will gain resources that make it possible to identify file sharers and their crimes.

Thirdly, a further possible complication is the mix of legal and illegal activity that similar services may provide. The court of appeal identified this problem and concluded that services which predominantly function as useful tools for legal activities (thus benefitting society), may be allowed, even if it is possible to use that same service for illegal purposes.[43] While this argument was unsuccessful in the case of TPB, it may well be successful in other cases. It is quite possible that the founders of similar services will succeed in arguing that they only intended legal data to be shared. And indeed, some services may be used for both purposes.

[43] Ibid. p. 14.

Fourthly and finally (and most importantly), the preventive effects must be discussed. The court of appeal stressed that illegal file sharing was a growing problem that affected the entire society and could not be combined with the fundamental values of our legal culture. While the individuals behind TPB were sentenced to both imprisonment and large damages, the preventive effect is debatable. Why? Because TPB has never been successfully shut down. All attempts to block and close down the service had a very limited effect and lasted only for very short periods of time. TPB is still functional and active, with users across the world. There are also a number of similar services with servers spread globally -- some more encrypted and protected than others.

2.4.3.3 Preventive effects and the nature of illegal file sharing via the Internet

In conclusion, it seems as if this rare opportunity for the judiciary system to bring the individuals behind a file sharing network to justice, must be considered a failure. The service in question has not been stopped -- on the contrary: it has been given a lot of free publicity as well as space in the media. While the sanctions for the four accused are quite severe, it seems unlikely that the regular user will identify himself with the founders of a world-wide service and thus stop to share files illegally in fear of being prosecuted. While this should by no means lead to the conclusion that it would be right to refrain from prosecuting criminals just because their conviction does not serve the intended purpose, it must still be acknowledged that this conviction seems rather ineffective.

Such is the nature of the Internet and copyright infringements owing to illegal file sharing: it cannot be stopped by the use of traditional methods and indictments.

2.4.4 The question of liability and the effectiveness of legal sanctions

In his book *Medie- och immaterialrätt,* Jan Rosén has identified some of the most current and important questions in the field of immaterial and media law. He pinpoints the issues of applying exclusive disposition in the digital environment, the demand of the general public to access material contra legal protection of exclusive rights of the creator, and the need to find sustainable ways to use the Internet and all of its functions. The development of new technique, along with increasing transnational traffic and automated services have highlighted problems regarding liability.[44]

Certainly, Rosén's book is a few years old, and this is an area of law that moves forward quickly; however, most of the conclusions and arguments presented there are still relevant.

In 2003, Rosén identified a tendency to value the trademark in itself, and to award investments and goodwill associated with it.[45] As globally available technique has developed, demands have risen to make exclusive rights include the private sphere as well.[46] While the fundamental values of immaterial law have not been completely replaced, there is a tendency to focus less on the creative process and more on the demands of the industry to protect investments.[47] While the exclusive rights protected by the copyright law can hardly be expanded further, it is recognized that the possessors have a need for extended protection in the digital and electronically available environment.[48]

In order to extend protection and enforce copyright law, it is of vital importance to investigate and clarify what constitutes an infringement and who is liable. The Internet is characterized by the possibility for millions of people to interact and contribute to its content. When material protected by copyright is made available, be it in the form of text, music, video or otherwise, a long chain of service providers is involved. This includes

[44] Rosén, Jan, *Medie- och immaterialrätt,* Uppsala, Iustus förlag, 2003, p. 5.
[45] Ibid. p. 16.
[46] Ibid. p. 24.
[47] Ibid. p. 29.
[48] Ibid. p. 25.

computers, routers and other forms of file management, sometimes automatic and sometimes managed by people.[49] The relation between the service provider and the actual information may vary, from an abstract technical contact to clear management of specified files.[50]

Rosén makes a distinction between content providers who can quite easily be identified to have disposal over protected material, and those who are harder to find. The content provider category includes everyone who provides the public with media that is protected by copyright, and everyone who publishes or forwards files. A user of this category is labelled a posting content provider.[51] The question of liability is complicated by the fact that content providers can act anonymously or operate within legal systems that are less effective. New technique makes it unclear whether it is the owner of a service that offers illegal file sharing, or the actual users that download these files, or both, that should be held responsible and considered to have protected objects at their disposal.[52]

Rosén argues that on *one* hand, it would, in his words; be appropriate to adapt the legal system to practical reality. On the *other* hand, it would also be possible to relocate the right of artists and distributors to be compensated; to the area of civil law. While this model is already in force in some of the Nordic countries, such a reform could lead to decreased clarity and order regarding economic compensation.[53]

2.5 Possible solutions

The inefficacy of legal reforms, and the relative success of new technical solutions stemming from record, music and film industries have been demonstrated above. But what does the future have in store? Can the legislator hope to improve moral standards and behaviour, and is it possible for the industry to win back customers?

[49] Rosén, 2003, p. 78.
[50] Ibid. pp. 78-79.
[51] Ibid. p. 79.
[52] Ibid. p. 81.
[53] Ibid. p. 169.

2.5.1 Legislative solutions

While IPRED and the Infosoc Directive[54] have not yet proved successful in changing behaviour, the national legislator and the European community have not given up. The most recent development in Community law is ACTA, the Anti-Counterfeiting Trade Agreement, which was finalized on November 15, 2010. The agreement aims to establish a comprehensive international framework to ”assist EU member Parties in their efforts to effectively combat the infringements of intellectual property rights (...) in particular (...) piracy”. The final version includes provisions on the enforcement of intellectual property rights, co-operation mechanisms and the establishment of best practice.[55]

Thus, if the legislator has failed both nationally and internationally, this means that the industry is on the verge of ruin and that piracy has undermined the creative process by minimizing compensation? By no means. This is far from the truth, and the industry has proven to be both creative and flexible in an ever-changing market. It turns out that legal file sharing can compete with its illegal equivalence, even if it is not free.

2.5.2 Industry solutions

There are at least three different ways in which the music and film industry has tried to fight file sharing. One is to offer a multimedia experience beyond the music or movie in itself. Another is to protect material through encryption, encoding, or via other technical solutions. A third one is to focus on new technical solutions which are easy to use. While at first it may look as if the cost of illegal file sharing (which is more or less equal to zero) were the decisive factor, it seems to be the case that easy availability may be even more important.

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[54] Directive 2001/29/EC, Directive on the harmonisation of certain aspects of copyright and related rights in the information society, 22 May 2001.

[55] IP/10/1504, *Joint statement on the Anti-Counterfeiting Trade Agreement (ACTA) from all the negotiating partners of the agreement*, found at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1504&format=HTML&aged=0&language=EN&guiLanguage=en
Most recently updated: 2010-11-15, Most recently accessed: 2010-12-10.

An example of the first method is mentioned in *Dan Sabbagh´s* article ’Going Alternative. Can digital subscriptions and new media steer record companies through uneasy times?’ where the author refers to the album Plastic Beach by Gorillaz. Buyers of that album were given a special code that gave access to extra material, such as computer games, manga-style videos and live audio. The record distributor in question, EMI, was convinced that this would be successful and allowed people to listen to this album for free.[56] This is an example of an original way to secure customers and to help fight illegal file sharing. As artists say: ”the music industry isn't in crisis, the recording industry is”.[57] In fact, the accessibility of MySpace, YouTube and other Internet services have made it possible for artists who are unestablished and unknown, to become famous overnight. Along with the traditional medium of television, these channels have also been increasingly used by established artists and companies. TV programs such as American Idol (and national editions), Britain's Got Talent, X Factor and similar competitions have increased sales for record companies that have signed the newly discovered artists. Premiering singles or music videos on YouTube makes them instantly available to the entire world and at low cost, and the use of social media such as Twitter, Facebook and blogs do the same.[58] According to artists, it is a good time to be a fan of music and new bands and the plummeting profit for the record industry does not indicate a subsiding interest in music. In short: with creative and inventive solutions, as well as a will to change, it is probably possible for the record industry to increase sales.

There are a number of examples of programs and services that are designed to make it easier to share or download files legally. Streaming is one variation on this theme, including Spotify and Voddler. Spotify offers licensed music available to consumers for free, a solution made possible through the use of advertisements interspersed between songs. In May 2010, 7 million people hade registered to use Spotify. Representatives claim that

[56] Sabbagh, Dan, *The music industry: Going Alternative,* TIME, May 17 2010, p. 41.
[57] Ibid. p. 42.
[58] Ibid.

Spotify is generating a decent amount of revenue to pay for the music it has licensed.[59]

All of the services mentioned above, being legal alternatives, have sprung from the hacker movement born a decade ago, and from the semi-legal codes and programs that were written then. TIME magazine has listed Shawn Fanning (creator of Napster, one of the first user-friendly programs that allowed people to share files transnationally), Jon Lech Johansen (also known as DVD-Jon and prosecuted for his encryption of the technical protection of DVDs, referred to under subsection 2.3.2), Justin Frankel (who coded WinAmp, a program that made it possible to play mp3-files on any computer, a part of the file sharing revolution) and Bram Cohem (creator of the BitTorrent file sharing system, which made it easier to share large files in small portions; still used by most file sharers) as the four young men who changed the way the world works by writing code. They didn't change the world with laws, but with brilliant software. Their radical ideas were turned into code, i.e. programs, and released on the Internet for free.[60] The revolution they started has brought change to the entire entertainment industry, but the changes have not been as radical and disruptive as some have predicted.[61] *Lev Grossman* of TIME magazine asks if digital piracy has destroyed the music industry and Frankel answers: ”No. Has the music industry had to adapt? Sure, and many would say for the better”.[62] The pirate apocalypse has not happened, and seems to be further away now than a year ago. In the US, piracy has turned out to be far less disruptive for the content producers than anybody had predicted. A strong link between piracy and lost sales has not been found at all, and any conclusion regarding the relation between the two is inconclusive at best.[63]

A significant example of the success of legal alternatives is Apple's iTunes, which has developed into the next generation of the buy-per-song

[59] Sabbagh TIME, p. 42.
[60] Grossman, Lev, *The men who stole the world*, in TIME, December 6 2010, p. 48.
[61] Ibid.
[62] Ibid.
[63] Ibid. p. 51.

model. Songs are not free to download, but very easy to find and offered at a low cost.[64]

Adding all of these factors and inventive solutions, it is clear that while the record and music industries may have lost some ground in recent years, it is not impossible to win back some customers and find new domains. Why did iTunes succeed, despite not being free, in a world where illegal and free file sharing seems unstoppable? Lev Grossman finds the answer in Apple's relentless focus on simple and attractive user interfaces, which have made it easy to access music. The streamlined service allows users to download and transfer music without problem. Although illegal file sharing solutions are free, they are often riddled with ads, porn, spyware and other garbage; and legal solutions offer an easy way to avoid all this. Even if it costs money and the use of the purchased files is restricted, iTunes have proven immensely successful. As it turns out, there really is something that can compete with free. Easy.[65]

This prompts us conclude that the legislative road to a solution is not the only one, and perhaps not the best one either. Legal reforms have been moderately successful at best. Even the entertainment industry seems to have realized that the legal system cannot provide them with a sustainable solution, and although they still try to see to it that some pirates are prosecuted and sentenced to pay damages, they have also put a lot of energy into user-friendly and attractive legal solutions which they can control.

While jurists may argue that it would be both foolish and unthinkable to annul laws against file sharing, it seems as if the industry will do just fine without them.

[64] Sabbagh TIME, p. 42.
[65] Grossman TIME, p. 51.

3 The basis of respect for the law

3.1 General background

3.1.1 On validity and valid law

As part of the general background, a shorter analysis of the term ”valid law” is in order. For the purpose of this short introduction to the discussion on valid law, *Juridikens metodproblem* by Aleksander Peczenik will be used. In his first chapter, Peczenik points out that valid law and law is essentially the same thing, as validity is one of the characteristics of law.[66]

Before the Scandinavian legal realists came upon the scene, the greater part of legal thinkers maintained that the concept of valid law could not be explained without resorting to that which the realists used to call ”metaphysics”. According to this view, the law is not only an empirical phenomenon; rather, the validity of a rule of law refers both to the observable factuality and to a validity of a metaphysical character.[67]

While some legal theorists argue that the law consists of actual human conduct, others argue that the law consists of psychological processes, such as our experiences and perceptions. It is also possible to argue that the law is a combination of the above. Aleksander Peczenik, on his part, restricts his use of the concept valid law to include only rules, not behaviour or mental experiences.[68] He argues that a legal rule can be defined as a clause that is used to classify actions as either obligatory, forbidden, allowed or otherwise.[69] Not all rules are valid in a legal sense, and by way of example, Peczenik mentions moral rules and rules that regulate language or games.[70] He then proceeds to the issue of which characteristics are common to all

[66] Peczenik, Aleksander, *Juridikens metodproblem,* Stockholm, AWE/ GEBERS 1980, p. 27.
[67] Ross, Alf, *On Law and Justice,* The Lawbook Exchange Ltd, 2004, p. 18. – A special case.
[68] Peczenik 1980, p. 27.
[69] Ibid. p. 31.
[70] Ibid. p. 33.

valid rules of law, and what qualities rules that are not valid are lacking. Here, Peczenik argues that a complete analysis of the validity of a legal rule must consist of two distinct parts, namely: (i) the internal aspect of validity, i.e. whether the rule is consistent with the legal system and promulgated according to the correct formal procedure, and (ii) the external aspect of validity, i.e. whether the legal system as a whole is acceptable.[71]

In theory, it is possible that two separate and independent legal systems are valid at the same time and in the same territory. This is the case e.g. in states where the Catholic Church has an established position.[72] Peczenik concludes that the doctrine of legal sources, alongside the constitution, plays an important role in the discussion on the validity of legal rules.[73]

Within different systems of legal theories, the view on validity differs. Peczenik divides the legal theories he discusses into four groups, namely: (i) natural law theories, (ii) realistic theories, (iii) sceptical theories and (iv) formalistic theories.[74]

All kinds of *natural law theories* assume that all valid rules of law correspond to natural law and that all valid rules of law should be obeyed simply because they correspond to natural law.[75]

Realistic legal theories take their starting point in empirical reality. Legal realist, *Vilhelm Lundstedt* denies the possibility of valid norms that are not produced and enforced by the state. Rules of law within the legal system can only be considered valid if they are in force.[76]

The realistic school has also given rise to more *sceptical theories,* and this is where Peczenik locates *Karl Olivecrona's* theory. Olivecrona dismisses the concept of binding force as something that does not exist in the world of time and space. Nevertheless, people tend to believe in the binding force of the law, which can be explained through (i) historical references and the transition from magic and religious ceremonies to modern law, (ii)

[71] Peczenik 1980, pp. 45-46.
[72] Ibid. p. 47.
[73] Ibid. p. 51.
[74] Ibid. p. 34.
[75] Ibid.
[76] Zamboni, Mauro, *Law and Legal Politics: Vilhelm Lundstedt and the Law-maker Function,* Associations 6 (1), 2002, p. 40.

psychological factors, as people tend to have a need for submission and (iii) sociological factors, which explain the powerful sensation of bindingness that the legal system invokes.[77]

Dismissing the theory of the basic norm[78] (which falls under the formalistic theories category), Olivecrona argued instead that the discussion on, whether certain rules possess oughtness, i.e. validity, or not, is useless from a scientific perspective since this is not a scientific problem. To ascribe binding force to a legal rule is to proclaim that is ought to be followed, which is a value judgment.[79] Olivecrona argued that because no reason is given for the validity of the basic norm and because all other norms are derived from the basic norm; no reason is given for the validity of any norms.[80] Thus, Olivecrona discarded the problem of validity and proceeded to study the actual nature of legal rules. He argued that while it is impossible to render a system of rules binding or not, we can still investigate which rules are considered binding, to what extent they are actually followed and enforced, and how the legal system changes.[81]

According to the theory of Scandinavian legal realist *Alf Ross*, the statement that a rule of law is valid, is a prediction that this rule will be applied in future legal cases and decisions. This theory is also known as the prognosis theory.[82] His theory on valid law is colourfully illustrated through the example of a game of chess. By calling a rule of chess valid, we mean

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[77] Peczenik 1980, p. 40.

[78] Represented by Kelsen, the theory of the basic norm takes its starting point in the basic norm, which is a mock rule that we accept as a prerequisite in order to understand the legal system and the validity of the constitution. While Olivecrona did not enumerate all the existing theories of the validity of law, as he considered such a digression unnecessary for his purpose of investigating the law, he did consider Kelsen's well-known theory of the basic norm and criticized it in detail. He used this theory as an example of how hopeless it would be to attempt to give a rational account of the concept of valid law. Kelsen regarded validity as an inherent property in the law. He also argued that all legal rules are derived from the basic norm, which is valid because it is presupposed to be valid. The reason for the validity of the basic norm cannot be investigated or explained further. According to Kelsen, the validity of legal rules or norms cannot be derived from facts, but from a higher norm that has empowered some authority to create a new norm. Thus, the validity can be traced to a higher norm until the basic norm is reached. Behind the basic norm, there are no further norms. Kelsen argued that the basic norm is a necessary prerequisite of the positivistic interpretation of the law.

[79] Olivecrona, Karl, *Law as Fact*, London, Stevens & Sons, 1971, p. 112.

[80] Ibid. p. 114.

[81] Ibid. p. 113.

[82] Peczenik 1980, pp. 36-37.

that within a certain group of people, this rule is effectively obeyed. Ross argued that the players feel socially bound by the directive of the rule.

In the example of chess, the concept of validity has two separate elements: one must consider both the actual effectiveness of the rule, which can be done by outside observation. However, one must also consider the way in which the rule is felt to be motivating and socially binding.[83] It is impossible to ”step outside” the example or the given circumstances, as the phenomena of chess can only become phenomena of chess when placed in relationship to the norms of chess.[84] Similarly, legal phenomena constitute a coherent system, and we can interpret legal actions only within this system as a whole.[85] Ross claims that valid law refers to ”the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of ’law in action’”. In other words, Ross refers only to norms that are experienced to be socially binding and, thus, effectively followed and enforced.[86]

3.1.2 On civil disobedience

Since this format does not allow for a lengthy analysis of civil disobedience, this chapter is restricted to a brief summary. For this purpose, Dan Hanqvist’s work *Civil olydnad: Om staten, lagen och moralen (Civil Disobedience: On the State, the Law and morality)* will be used.

In the Swedish legal system, there are no legal rules that deal explicitly with civil disobedience.[87] Civil disobedience and the reasons behind it can only be considered with regard to the punishment. Courts may apply both objective and subjective criteria, the latter concerning what the defendant has realized or should have realized regarding the nature and consequences of his actions, and his motives and intentions.[88]

[83] Ross 2004, p. 16.
[84] Ibid. pp. 16-17.
[85] Ibid. p. 17.
[86] Ibid. p. 18.
[87] Hanqvist, Dan, *Civil olydnad: om staten, lagen och moralen*, Juristförlaget, 1993, p. 124, with reference to NRt (Norsk retstidende (Norge)) 1981.21 p. 23, 27.
[88] Ibid. p. 129.

In the introduction to his work Hanqvist outlines his prerequisites for civil disobedience. He identifies the basic requirements for civil disobedience as actions which (i) are carried out in a spirit of fundamental loyalty to a certain political, social and legal system, (ii) are motivated by public morality and political standpoints, (iii) constitute an infringement of the law, (iv) are committed openly, publicly and with an awareness of the legal consequences that may follow and (v) are non-violent. Actions which fulfil all five requirements constitute civil disobedience simpliciter. Actions which meet none, or only a few, of these requirements may constitute civil disobedience secundum quid.[89]

Hanqvist's point of departure is that law and morality are two conflicting norm systems.[90] Identification of, and attack on, immoral legal norms is possible only if law and morality are distinctly separate.[91] With this in mind, Hanqvist proceeds to deal with the problem of the general moral obligation to obey the law. He presents a spectrum of arguments, with two extreme positions. On one end of the spectrum, he places the legalistic idea that the law must be followed simply because it is a duty to do so. He also presents the idea that there is a prima facie obligation to obey the law in general, but that this obligation can be outweighed by other motives of higher value. At the other end of the spectrum, Hanqvist places the idea that there is no universal moral obligation to follow the law, although specific obligations cannot be excluded.[92] Hanqvist affiliates himself with the latter idea, claiming that the law lacks general legitimacy.[93] If an authority binds individuals, it must be shown that that authority is justified by reasons which actually bind these individuals. Public authority is after all founded on a moral obligation between citizens.[94] Hanqvist concludes the law lacks general legitimate authority. Any authority that is involved in the legal

[89] Hanqvist 1993, p. 27.
[90] Ibid. p. 35.
[91] Ibid. p. 37.
[92] Ibid. p. 61.
[93] Ibid. p. 67.
[94] Ibid. p. 69.

system, stems from the independent moral reasons that are expressed through legal rules.[95]

In this context, three different theses on authority and obedience are presented, namely: *First*, (i) the thesis of preclusion, which claims that the mere fact that an authority demands a certain action, is a reason to carry out this action; other reasons to perform this action are irrelevant.[96] *Secondly*, (ii) the thesis of dependence, where each authoritative decree must be founded on reasons that are independently relevant to the addressees and the action in question.[97] *Thirdly* and finally, (iii) the thesis of normal justification, stating that a total justification of an authority does not only require valid reasons for the acceptance of this authority; but also that there are no arguments against such a justification.

That far, the prerequisites for civil disobedience are established by Hanqvist. In the second part of his work, Hanqvist accounts for the views of other authors with respect to civil disobedience. In the following, the argument of some of these authors will be rendered.

Among the most interesting of these are the arguments of *H. T. Klami*. In Klami's view, norms or rules which are perceived to be unjust, but existing within a fair and justified legal system, are not necessarily a threat to the entire system. Rather, he saw a parallel between this situation and the normal legal order of basic rules and their exceptions. The fundamental principle is that the legal order is legitimate, and individual norms that are not, do not represent a threat but an exception.[98] Therefore, Klami looks upon civil disobedience as an element of the dynamics of law.[99] In such situations where the law is not compatible with the moral values of authorities and citizens, Klami clearly advocates caution, so that obsolete parts of the legislation are not automatically dismissed without formal procedure.[100]

[95] Hanqvist 1993, p. 72.
[96] Ibid. p. 57.
[97] Ibid. p. 58.
[98] Klami, H. T., *Om civil olydnad,* 1983 p. 269, as referenced in Hanqvist 1993, p. 80.
[99] Hanqvist 1993, p. 82.
[100] Ibid. p. 119.

Hanqvist also presents *F. R. Berger*, who argues that civil disobedience is not only harmless to the rest of the legal system, but that it can actually act as a stabilizing factor for law and order. Civil disobedience can identify and remove disorder or injustice created by the legal system.[101] To this, Hanqvist submits two main counter-arguments: *First*, he argues that while minor disorders or injustices created within the legal system may not pose a threat to the general safety, civil disobedience may give rise to such disorders. *Secondly*, if everyone engaged in behaviour that constitutes civil disobedience, chaos would be likely to follow.[102]

Furthermore, Hanqvist makes a reference to *Michael Walzer*, who looks upon civil disobedience as a collision between different norms. The duty to obey the law, originating from the state, gets into conflict with a duty not to obey, originating from other duties within smaller groups.[103] If civil disobedience can be defended on moral grounds, the question arises whether these grounds can and should be acknowledged as legally binding. Hanqvist stresses that civil disobedience in itself is not criminal, but that the carrying-out of civil disobedience may indirectly constitute crimes.[104]

Finally, Hanqvist adduces *Ronald Dworkin* as an important figure in the debate on civil disobedience. As regards the nature of law, Dworkin's theory of law as integrity is one of the most influential contemporary legal theories.[105] Dworkin argues that immoral law should be opposed by the citizens, but that the minority must carefully consider the arguments of the majority, and that violence or terror can never be justified.[106] Regarding punishment, Dworkin argues that it is not a matter of course that a person exercising civil disobedience should accept punishment.[107] As to this, Hanqvist goes a step further and argues that an immoral law does not only

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[101] Berger, F. R., *Law and Order and Civil Disobedience*, Inquiry 13:254, p. 907 & 909, as referenced in Hanqvist 1993, p. 88.
[102] Hanqvist 1993, p. 90.
[103] Walzer, M., *The Obligation to Disobey*, Ethics 77:163, p. 167, as referenced in Hanqvist 1993, p. 111.
[104] Hanqvist 1993, p. 113.
[105] Dworkin, Ronald, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Mass : Harvard University Press, 1996.
[106] Dworkin, Ronald, *A Matter of Principle*, Widerstandsrecht in der Demokratie, Oxford, Clarendon Press, 1986, p.30, as referenced in Hanqvist 1993, pp. 105-106.
[107] Hanqvist 1993, p. 150.

give the individual a right to violate it, but that the same right to resistance applies to the punishment as well.[108]

A majority of the authors who address civil disobedience are in agreement that civil disobedience must be an open and public action.[109] The method of civil disobedience is rendered ineffective unless the purpose of communicating with opponents and to create a public discussion is achieved.[110]

3.1.3 Should illegal file sharing be considered civil disobedience?

As mentioned in subsection 3.1.2, in the Swedish legal system there are no rules that explicitly deal with civil disobedience. Civil disobedience can only be a factor in determining the legal sanctions after a conviction. In their judicial decisions, the courts may consider objective and subjective criteria.

In the introduction of his book on civil disobedience, Hanqvist gives five prerequisites for civil disobedience, see subsection 3.1.2. To meet these criteria, actions must be (i) carried out in a spirit of fundamental loyalty to a certain political, social and legal system, (ii) motivated by public morality and political standpoints, (iii) constitute an infringement of the law, (iv) are committed openly, publicly and with an awareness of the legal consequences that may follow, and (v) are non-violent.[111]

In the case of illegal file sharing, individual file sharers may be resumed to have highly diverging motives. Paying attention to this, all the points above will be examined one by one in the following.

Firstly: Is illegal file sharing an action carried out with loyalty to the political, social and legal system? The answer is: Yes, most file sharers respect the constitution and abstain from committing other crimes. As shown in subsection 2.2, the number of copyright infringements online is a far more common crime than any other crime, and there are no indications

[108] Hanqvist 1993. p. 155.
[109] Ibid. p. 149.
[110] Ibid. p. 150.
[111] Ibid. p. 27.

on increasing criminal behaviour throughout society. Furthermore, people seem willing to choose legal alternatives, if they are easy to use, relatively cheap and available. This is shown by the growth of streaming services such as Spotify and by the increasing share of digital copies for the total revenue of the recording industry. The success of iTunes, which offers user-friendly legal file sharing at low cost, is another example.

Secondly: Is file sharing motivated by public morality and political standpoints? On this point opinions may diverge, since the individual motives of file sharers are not uniform. While there is a faction on file sharers dedicated to different forms of piracy ideology, and even a political party with the legalization of file sharing as a main objective (Piratpartiet); most users probably do not have any political motives for their illegal file sharing. On the other hand, public morality is a strong issue in the debate. As will be discussed below, the general sense of justice and public morality do not condemn illegal file sharing and hardly consider it a criminal act at all. This is a very important point, and perhaps the most troubling and interesting one. It seems as if public morality may well be the reason behind the growth and scope of file sharing.

People in general may lack political motives to share files illegally and not reflect over their reasons. This can be contrasted with the traditional view on civil disobedience, as a conscious act or form of protest. If public morality has incorporated the concept of file sharing as a legal activity to such an extent that most people hardly reflect over the moral dilemma of committing a crime, should this be considered as an argument for or against labelling illegal file sharing as civil disobedience?

On the *one* hand, a crime committed mechanically should, perhaps, not be considered civil disobedience, nor awarded a milder legal sanction. On the *other* hand, a general public attitude so strong that it permeates the community, should perhaps be considered a strong motive. Finally, one must nevertheless ask if the general sense of justice that allows illegal file sharing is part of an ideology, or just a convenient attitude to get something for free. Even if the right for artists to be compensated for their work must not necessarily be incompatible with file sharing, it seems unlikely that the

idea that all information should be free (in the sense that artists and distributors will not be compensated) is as widespread as the idea that file sharing ought to be legal.

Thirdly: Does file sharing constitute an infringement of the law? Yes, undoubtedly. To download files illegally is definitely against the law, although it may be discussed what forms of accessory to illegal file sharing that constitutes a crime.

Fourthly: Is illegal file sharing committed openly, publicly and with an awareness of the legal sanctions that may follow? Again, file sharers are not a homogenous group. While some take a political standpoint in favour of legalizing all file sharing, others actively try to hide their activities and use encryption. It seems that most file sharers try not to have their actions exposed. Anonymity and traceability on the Internet is not a clear-cut question, and this point might be discussed at length. Suffice it to say that at present, most file sharers try not to share files openly, but rather via services that make them harder to trace and prosecute.

Finally: Is file sharing a non-violent activity? Yes, definitely. It is also an action that requires almost no physical activity and no interaction with other people. While file sharing may result in monetary losses which are astronomical, it includes no form of physical violence or theft.

In conclusion: File sharing fails to meet all of the prerequisites as presented by Hanqvist. However, the failure to meet all the requirements can be considered debatable, depending on whether the assessment is based on individual file sharers and their diverging motives, or on the most active and political faction, or on a cross-section of the entire group.

3.2 Hägerström and the origins of Scandinavian Legal Realism

In dealing with Scandinavian legal realism, one will inevitably come across the theories of the Swedish philosopher Axel Hägerström. In order to introduce and understand the theories of Olivecrona and Lundstedt, the ideas of Hägerström must first be briefly mapped out and analyzed. Albeit

having been contemporary to Lundstedt, the two have a different outlook on law and society and thus Hägerström will be dealt with separately.

3.2.1 Background

The school which came to be called 'Scandinavian Realism' took its point of departure in the teachings of Hägerström and his view on law and legal science. *Jes Bjarup* points out that the Scandinavians continuously stress the importance of philosophy in relation to jurisprudence, to gain proper legal knowledge and understanding of the legal system.[112] Also, he emphasizes that while it would be easy to consider Scandinavian realism as a school of the past, this would be to ignore that the ideas emanating from this school are still viable and can provide insights into various matters of legal knowledge.[113]

Generally speaking, the Scandinavian legal realists based their theories on the insight that if legal science was to be a genuine science (on a par with the natural sciences), it had to deal with the impurities of its object of investigation.[114]

In the work of Hägerström, two main issues can be distinguished: On the one hand his theory of reality and knowledge (denying the existence of our ideal, metaphysical world); on the other hand, his moral philosophy (or what later on came to be called his value nihilism).

It has been pointed out that Hägerström gave too much of his time and energy to the task of unveiling and discarding previous legal doctrine, which inter alia had the unfortunate effect that his own arguments are rather difficult to follow. However, Hägerström was lucky in that his disciples (Vilhelm Lundstedt, Karl Olivecrona and Alf Ross), more or less succeeded in introducing a new view on law.[115]

[112] Bjarup, Jes, *The Philosophy of Scandinavian Legal Realism,* Ratio Juris, Vol 18, No. 1, March 2005, p. 14.
[113] Ibid. p. 2.
[114] Zamboni 2002, p. 38.
[115] Bjarup 2005, pp. 1-2.

On the origin of the legal system, Hägerström argued that the law is an inevitable condition of culture and thereby brought the questions of reality and knowledge into focus.[116]

3.2.2 Legal doctrine

At the core of the doctrine that Hägerström developed, lies the belief that the study of law and legal terminology should be based only on what can be observed, and he focused on thoughts on the *character of reality*.[117] It was his firm opinion that we must seek to destroy metaphysics, and instead proceed to reality and real objects.[118] He took an empirical view on the legal system that is differential to the camp of legal realism. His philosophy of *reality and knowledge* is founded in the idea that there is only one world, the sensible world placed in time and space. Hägerström therefore rejected the existence of a meta-physical or supernatural (super sensible) world beyond what we can experience.[119]

Hägerström is commonly labelled a value nihilist, and he argued that neither ethical nor aesthetic values exist in reality. The moral nihilism of Hägerström implies that actions cannot be labelled good or evil, as such valuations are neither true nor false. Consequently, there are no moral rights or duties for any person to do anything, although Hägerström stressed that this is no implication that people should act immorally. His moral nihilism implies that there can be no moral knowledge.[120] Statements regarding value must therefore be self-contradictory, as they aspire to describe the world but at point of fact can only convey emotional expressions.[121] According to Bjarup, Hägerström's metaphysical view of morality is a version of nominalism, that acknowledges only moral words and no moral concepts. Moral words can be used to express emotions, as well as to regulate the behaviour of people and their relations. This means that moral science can

[116] Bjarup 2005, p. 2.
[117] Ibid. p. 3.
[118] Ibid. pp. 2-3.
[119] Ibid. p. 3.
[120] Ibid. p. 5.
[121] Ibid. p. 4.

never be a teaching in morals itself, but only a study about morality.[122] As there is no moral knowledge or moral teaching, morality must be reduced to an issue of personal conscience.[123]

As pioneers often do, Hägerström spent a considerable amount of time trying to falsify other current theories. A telling example is the synopsis to his essay *Is Positive Law an Expression of Will?,* in which he systematically discards all forms of will-theories. Towards the end, he has falsified all possible versions, pointing out weak points such as conflicting facts, circular arguments or other impossibilities. He finished by expressing his firm opinion that he has now exhausted all possible varieties of the will-theory.[124] Obviously, the conclusion must be that the law cannot be assumed to originate from an active will within society. There are no facts that support the idea that law is the expression of a powerful will.[125]

In his work, Hägerström referred to the legal order as a social machine, in which the cogs are men.[126] At an early stage, he had arrived at the insight that it would be impossible to find facts corresponding to legal concepts, and that we are actually dealing with ideas that have nothing to do with reality. Legal science can offer information about the magical use of legal vocabulary and the relation between legal language and human behaviour, but cannot give any information about the conceptual content of the law.[127] Hägerström found that the legal notions in question could not be reduced to anything in reality, simply because they had their roots in traditional ideas of mystical forces and corresponding bonds.[128] Therefore he argued that any effort on the part of the jurisprudence to convert its ideas to actual expressions of will, was in vain. It was a useless effort to explain ideas that lack any basis in reality, by referring to something else that has no real basis. Neither can the sensible reality be described in mathematical

[122] Bjarup 2005, p. 4.
[123] Ibid. p. 8.
[124] Hägerström, *Inquiries into the nature of law and morals*, Stockholm, Almqvist & Wiksells, 1953, p. 55 (from *Är gällande rätt uttryck av vilja?,* 1916).
[125] Hägerström 1953, p. 11.
[126] Bjarup 2005, p. 8.
[127] Ibid. p. 9.
[128] Hägerström 1953, p. 16.

concepts[129], and Hägerström thus reduced legal rules to behavioural patterns maintained by the use of force.[130]

3.2.3 Binding force

Hägerström rejected the idea of the existence of bindingness, as well as the idea that the law was infused with the will of the legislator.[131] He also rejected the idea of moral concepts embedded in human nature or their actions.[132] If they existed, such rules would lack a counterpart in sense-experience and thus mystify the truth.

Instead, Hägerström argued that laws originate in the reality of social facts.[133] In his writings about the fundamental problems of law, he concluded that the maintenance of the legal order presupposes social instinct, a positive moral disposition and a fear of external coercion.[134] By this, he meant that an individual who contemplates committing a crime, i.e. violating the law, is subjected both to other men's moral reactions and social pressure as well as to the feeling of duty within himself.[135] Hägerström stressed that social instinct and morality are not the only forces in operation, but that the actions of so-called authorities are of essential importance as well.[136] When social instinct fails to prevent an individual from breaking the legal barriers, this individual cannot be allowed to go unpunished. In the event that social instinct should fail, authorities must make sure that crimes committed have tangible consequences. The rules of coercion must constantly be maintained and enforced, or else social instinct will be compromised and strained. If the demand for justice and just punishment is not satisfied in the minds of the people, a feeling of displeasure arises and leads to feelings of revenge. This mechanism is also effective when turned

[129] Bjarup 2005, p. 3.
[130] Ibid. p. 9.
[131] Ibid. p. 6.
[132] Ibid. p. 4.
[133] Ibid. p. 7.
[134] Hägerström 1953, p. 352.
[135] Ibid. pp. 350-351.
[136] Ibid.

inward, as a reaction against a violation of the sense of duty.[137] In short: criminals or criminal acts that go unpunished put the entire legal order in jeopardy.[138] Regarding criminal activity, Hägerström pointed out that the Penal Code exerts an internal compulsion on a potential criminal, in the sense that he feels he ought to refrain from e.g. theft in order to avoid the consequences attached to the deed.[139]

Hägerström wrote extensively on the concept of duty. Among other things, he argued that it was the acceptance of a social norm which produced the feeling of duty, and not the other way around.[140] This means that the subject receives legal commands and expressions, putting them together in his own mind and assuming that they have something in common, and that this is what creates a social and moral norm.[141] Unless a feeling of duty is present, an action will not be perceived as wrongful, neither at the time when the action takes place nor later on.[142]

Hägerström saw the interaction and interdependence of law and morality, and he tied legislation and psychology closely together.[143] He said that the inner moral compass or command would always prevail over external commands, regardless of how powerful they may be. Moral commands are not just another influence striving to influence an individual, but have a special sanctity and stands out as the command which one ought to obey.[144]

3.3 Foundations of the law according to Lundstedt

Chronologically, Lundstedt was active in the time-period between Hägerström and Olivecrona. However, since their active periods overlapped, they can also be considered contemporaries to some extent. Without doubt,

[137] Hägerström 1953, p. 201.
[138] Ibid. p. 353.
[139] Ibid. p. 128.
[140] Ibid. p. 162. – Later on, this idea would be taken up, and elaborated, by Lundstedt (see p. 53 below).
[141] Ibid. p. 164.
[142] Ibid. p. 169.
[143] Ibid. p. 8.
[144] Ibid. p. 208.

they were influenced and challenged, spurred and criticized by each other. Olivecrona's and Lundstedt's respective theories developed side by side for some years; then their authors parted company. Since Olivecrona continued to be active for more than 20 years after the death of Lundstedt, it is logical to deal with the latter first. According to both Olivecrona and Lundstedt, jurisprudence deals with conceptual analysis as a historical inquiry into the origin of the law as well as with the use of legal concepts – both in the positive law and in legal science.[145]

3.3.1 Background

After his death, colleagues spoke of Vilhelm Lundstedt as a passionate, devoted and untiring fighter for his cause and his ideas. Thus, *Zeth Höglund* wrote that Lundstedt was permeated with the idea that a scientist must not only interpret and observe the world, but change it as well.[146] Lundstedt was not afraid to throw himself into pressing issues, current legal cases and hot topics. With all the fire of his flaming soul, he took a stand and fought vigorously for his opinion.[147]

In the aspect mentioned above, Lundstedt distinguished himself from the pattern of behaviour exhibited by Hägerström, who was mainly concerned with philosophical matters. Their fundamental view on law and society were nevertheless similar, and Lundstedt looked upon Hägerström as his mentor and teacher. After their first meeting in 1914, Lundstedt realized that until then, he had not been focussing on reality and on a scientific approach to the legal system.

More often than not, Lundstedt's texts are larded with references to Hägerström's teachings. Thus, he begins the preface to *Principinledning* by referring to the insights given to him by Hägerström as the basis of his work.[148] The following year, in his work *Till frågan om rätten och*

[145] Bjarup 2005, p. 10.
[146] Höglund, Zeth, (introduction to) *Vilhelm Lundstedt, Tänkare och kämpe*, Stockholm , 1956, p. 7.
[147] Ibid. p. 12.
[148] Lundstedt, A. V., *Principinledning*, Uppsala, Appelbergs boktryckeri AB, 1920, p. 5.

samhället, he acknowledges that Hägerström is not always as easily available to the reader as he would prefer, at least not "to others than the somewhat logically trained".[149] He felt as his responsibility to present a more complete and comprehensive review of the polemics on penal law, primarily stemming from Professor of Criminal Law *Johan Thyrén*.

Also, Lundstedt's later works are dedicated to Hägerström. The strong influence he exerted on Lundstedt is perhaps best shown in the introduction to Lundstedt's last work *Legal Thinking Revised* (published posthumously in 1956), where Lundstedt states that "it is with joy and a strong sentiment of humility that I acknowledge my indebtedness to Axel Hägerström".[150]

Thus, Lundstedt was at least in the beginning, dependent on Hägerström's ideology and view on law. In Lundstedt's view, Hägerström have decisively shown that the foundation of jurisprudence was nothing but a compact mass of metaphysics, and that other jurists and legal scholars had little or no knowledge of this problem.[151]

Under Hägerström's influence, Lundstedt argued that legal science must take its point of departure in observable reality and sense experience. He consciously tried to counter-argue the traditional view of legal system. Current theories, he said, were based on superstition and mysticism.[152] He pointed out that the established legal order was the root of moral codes in society, rather than the other way around.[153] In his view, upholding general respect for the law and impartial courts were the cornerstones of democracy,[154] and these two elements can cause chaos if unbalanced.

At the core of Lundstedt's theories was the idea that the legal system is not founded on moral ideas, rather, is based on what is good for the community as a whole; that is to say, based on the Common Weal as the foundation for both the legal system and its development.[155]

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[149] Lundstedt, A. V., *Till frågan om rätten och samhället*, Uppsala, Appelbergs boktryckeri AB, 1921, p. 6 (My translation).
[150] Lundstedt, A. V., *Legal Thinking Revised*, Uppsala, Almqvist & Wiksells, 1956, p. 7.
[151] Lundstedt, A. V., *Superstition or Rationality in Action for Peace?*, London, Longmans, 1925, p. 8.
[152] Höglund 1956, p. 9.
[153] Landqvist, John, *Vilhelm Lundstedt, Tänkare och kämpe*, Stockholm, 1956, p. 56.
[154] Höglund 1956, p. 19.
[155] Nergelius 2006, p. 138.

With respect to penal law, Lundstedt made it absolutely clear that individual cases and individual criminals are of minor importance, compared to the society and the legal system as a whole. The function of punishment was not primarily to penalize a criminal action but, rather, to uphold respect for the legal system and the Penal Code.[156] Within a successful legal system, legal rules must manage to pull common morality in the desired direction. The moral beliefs of the citizens will then in turn make the Penal Code effective.[157] To support penal paragraphs, punishments must be delivered without fail and if the courts lag behind, the entire system is threatened. Actions that have been deemed improper and unfit for civilized society, have a certain punishment attached to them. In Lundstedt's view, upholding this connection between action and consequence is of vital importance and must consistently be enforced.[158]

Keeping this in mind, one cannot wonder at Lundstedt engaging himself for court cases and for individuals who, he believed, had not been given justice or had been falsely accused or sentenced. It has been said of Lundstedt that the most revolutionizing about his work, was his passion and his intensely detailed arguments.[159] He fought for his opinions, seemingly unable to leave criticism unanswered. His counter-arguments and criticism are often sharp and without compromise. His final remarks in *Till frågan om rätten och samhället* bring forward his aversion against unscientific doctrine. Indeed, Lundstedt claims to have been utterly surprised by his opponents' complete disregard for the discrepancy between their doctrine and the corresponding reality.[160] In short, Lundstedt was a passionate, energetic and untiring individual. He had strong beliefs and believed strongly in fighting for them. We must be thankful for his disposition.

[156]Olivecrona, Karl, *Vilhelm Lundstedt, Tänkare och kämpe*, Stockholm, 1956, pp. 25-26.
[157] Ibid. p. 26.
[158] Ibid. pp. 26-27.
[159] Höglund 1956, p. 9.
[160] Lundstedt 1921, p. 147.
He entered into polemics with *Johan Thyrén*, among others; with whom he clearly disagreed and made a point of leaving no single part of his legal theory unscrutinized.

3.3.2 The social function of punishment

Among the Scandinavian legal realists, Lundstedt must be regarded as their most politicized representative. According to *Mauro Zamboni*, he focused more on proclaiming the goals that the law should try to achieve, than on analyzing the legal phenomena per se.[161] Even the shortest and most generic summary of Lundstedt's achievements does not omit to highlight his view on penal law and the function of punishment. While other legal thinkers put more focus on the criminal and his punishment, Lundstedt maintained that the effect of general prevention was the primary function of penal law. At the core of the raison d'être of punishment lays the function to react against mere tendencies to commit crimes.[162] According to Lundstedt, the legal machinery should be organized on the basis of the predominant valuations of what is good for the general public and community as a whole.[163] Also, he reversed the traditional view on the relationship between morality and law, by arguing that the general moral attitude against crime that exists within the community, is conditioned by the maintenance of criminal law.[164]

Further, he argued that the community deliver punishments for its own good. The duty to refrain from crimes is a duty to the community; hence, violations i.e. crimes, are offenses against the community.[165] Conceptions of righteousness have originated in a common sense of justice which, in turn, has generated from the law itself as well as the factors that promote the development of the law. In the end, the fundamental basis of law is not the public legal conscience but the welfare of the community.[166]

3.3.2.1 Primary function of punishment

According to Lundstedt, punishments are justified in so far as they are a necessary condition for the enforcement and maintenance of the norm they

[161] Zamboni 2002, p. 39.
[162] Höglund 1956, p. 11.
[163] Lundstedt 1956, pp. 161-162.
[164] Ibid. p. 233.
[165] Lundstedt 1925, p. 53.
[166] Ibid. p. 23.

stem from. Upholding the force of penal law is essential for the existence of society, since it cannot function without it.[167]

Lundstedt argues in the following way. The government does by no means have a right to punish, but the continuous existence of penalties is a result of the same forces that once created society itself.[168] The state has a legal cause for punishment only if the criminal has violated his duty against the state, and this duty must have been determined by the state beforehand.[169] In Lundstedt's view, the social instincts of man are an undisputed fact, and it is of lesser or no importance to find the origins of these psychological tendencies. He simply stated that in jurisprudence, we must assume the existence of the community as an irrevocable fact. Since the very idea of society implies the existence of criminal law, it is unnecessary to search for the origins of either.[170] Nevertheless, we can establish that consistency in penalizing those actions that have been deemed criminal and anti-social, is a necessary condition for the survival of society.[171] Lundstedt even argued that criminal law was an absolute necessity for the existence of the community. He thereby discarded the idea that criminal law was based on moral guilt, blame and other types of wrongfulness.[172] In modern society, the function of punishment must be to empower commands and decrees. The function of commands, i.e. legal rules, in turn is to direct the common moral sense not to commit criminal acts. Without the existence of unyielding punishment, the legal rule corresponding to the punishment in question is undermined and gradually becomes ineffective and disrespected.[173] In order to direct general morality against criminal activities, it is simply necessary to resort to punishment as reactions against crimes.[174] Thus, Lundstedt asserted that the primary function of punishment

[167] Lundstedt 1920, p. 23.
[168] Lundstedt 1921, p. 19.
[169] Ibid. p. 68.
[170] Lundstedt 1925, p. 45.
[171] Lundstedt 1921, p. 19.
[172] Lundstedt 1925, p. 154.
[173] Lundstedt 1921, p. 81.
[174] Lundstedt 1956, p. 232.

must unconditionally be to (i) generate and (ii) maintain a general moral instinct against crimes.[175]

3.3.2.2 The deterring element of punishment

Before Lundstedt's times, the prevailing philosophy of punishment amounted to that the primary function of penalty was to deter the criminal. Lundstedt did not deny that fear of penal suffering can play some role as a motive for people to abstain from committing crimes, but he considered this element of punishment to be of minor and subordinate importance.[176] Compared to the importance of moral instinct, he considered the deterrent effect to be almost negligible and unworthy of mentioning.[177] He argued that general fear of punishment could never attain strength and power over people, if counteracted by moral forces. If morality and law should diverge, moral commands will always prevail.[178]

Therefore, Lundstedt held that at the time of the criminal action, fear of punishment cannot play any role in the moral struggle within the criminal. A deterring effect must presuppose a conscious reflection of the consequences on acting anti-socially or engaging in criminal behaviour. Since the perpetrator will only be under instinctive powers when he considers committing a crime or refraining from it, his subconscious impulses towards committing a crime can only be counteracted by opposing moral impulses.[179] It is the mere existence and maintenance of the criminal law that acts as a counterbalance to the temptation to engage in criminal behaviour.[180] Thus, fear of physical suffering does not serve as a motive for people to refrain from committing crimes.[181] If that had been the case, and criminal law really had only operated as a deterrent, then many crimes would have been very common and been committed as soon as the criminal

[175] Lundstedt 1921, p. 121.
[176] Lundstedt 1920, p. 105.
[177] Lundstedt 1925, p. 48.
[178] Lundstedt 1921, p. 29.
[179] Lundstedt 1956, p. 235.
[180] Lundstedt 1925, p. 51.
[181] Lundstedt 1921, p. 130.

felt convinced he could escape detection and punishment.[182] Instead, the primary element of deterrence, is fear of moral suffering and exclusion from society.[183] However, the act of formal criminalization of certain actions have another primary cause, namely to create a penal norm that will exert moral influence on society.[184]

3.3.2.3 The moral-forming element of punishment

A duty without any emotional basis will lose all importance and be unable to influence society and individuals, Lundstedt argued.[185] When the government and the legislator formally criminalize anti-social actions, the criminalization in itself will steer general consciousness towards the idea that a certain way of acting is required by society.[186] In other words, in creating and maintaining the Penal Code, the government will also create morality. Over time, social pressure can become so powerful, that criminal actions are no longer considered an option. Every impulse towards these actions is suffocated by social pressure, even before it surfaces the conscious mind.

According to Lundstedt, laws influence the social-psychic attitude of all individuals in society, thereby creating an environment where morality is accumulated. The pressure from the surrounding milieu, where everybody contributes to the moral power-generating centre that requires obedience of the laws, is what generates and maintains a moral attitude that suppresses impulses to commit crimes and anti-social actions.[187] Lundstedt left no room for interpretation in this question and clearly stated that moral instinct is the primary factor in deterring people from committing crimes. This moral instinct is produced by the Penal Law, and the real, social purpose of punishment must be to continuously generate this moral instinct.[188] To put it

[182] Lundstedt 1956, p. 229.
[183] Lundstedt 1921, p. 116.
[184] Lundstedt 1920, p. 74.
[185] Ibid. p. 12.
[186] Ibid. p. 23.
[187] Lundstedt 1956, p. 166.
[188] Lundstedt 1921, p. 113.

in other words: according to Lundstedt, the essential function of criminal law is to get hold of the general moral instinct.[189]

3.3.3 On law and morality

3.3.3.1 Criminalization and punishment

Having established that the primary function of punishment is to generate and maintain a general moral instinct within society and individuals, it becomes essential to investigate into the issue of, how morality can be shaped and affected. In a predictable legal system, people know that criminal actions will be punished before they actually are.[190]

Lundstedt argued that criminalization in itself evoked a general idea on, how to act.[191] Again, he focussed on the psychological aspect of penal law and stated that the psychological fact that society appears as a commanding power, is the decisive factor to the individual.[192] Even if Lundstedt rejected the idea of a commanding will as the basis of the law, he thus acknowledged the psychological effects of an established legislator. In order for punishment to grasp general morality, it must be strictly regular and non-sporadic.[193] Sporadic punishments are ineffective, because the inevitability of penal suffering is vital for the survival of penal law and society as a whole. A punishment unable to permeate society and the moral attitude is powerless: only consistent and regular punishments, properly attached to the corresponding criminal activity, can give rise to popular belief that this particular consequence will always follow if one commits the prohibited action. The action in question will then be considered reprehensible.[194] Lundstedt said that people would naturally refrain from actions which continuously prove to be harmful and destructive. This regards both actions that are formally criminalized and actions that are not prohibited through

[189] Lundstedt 1956, p. 166.
[190] Lundstedt 1921, p. 17 (Here, Lundstedt refers to the argumentation of Hägerström).
[191] Lundstedt 1920, p. 23.
[192] Ibid. p. 28.
[193] Ibid. p. 24.
[194] Ibid. p. 61.

legal rules.[195] In order to achieve the high intensity of the sense of duty required for criminal, anti-social actions, society must rely on regular punishments.[196] Criminalization in itself is insufficient, even if it is sometimes effective in affecting ethics and morality, and the inevitable punishment is an essential element in maintaining penal law and other legal rules.

3.3.3.2 Proportional punishment

Apart from being inevitable and regular, punishments must also be reliable and result in some form of suffering. According to Lundstedt, the unconditional suffering associated with certain actions, is what endows the command with proper power.[197] The penal norm must be determined and social values must be ranked and prioritized with relation to each other. Criminal actions must not only be paired with any punishment, they must be paired with a definite and proportional punishment. More severe violations of the social norm must result in more severe punishments, and vice versa. This evaluation must also stand close to the general sense of justice.[198] In order for punishment to seize general morality, it must constitute suffering in proportion to the social value that has been violated through the crime. Since it is of greater importance to maintain social rules that are more fundamental, more severe punishment must follow after a more serious violation.[199] For the sake of social welfare, higher values must be better protected, and this is done only if moral instincts are more stable.[200] Hence, homicide is severely punished, whereas e.g. parking offences only result in minor fines.

[195] Lundstedt 1921, p. 109.
[196] Ibid. p. 110.
[197] Lundstedt 1920, p. 25.
[198] Ibid. p. 59.
[199] Lundstedt 1921, p. 114.
[200] Lundstedt 1956, p. 230.

3.3.3.3 When morality and legislation diverge

It was obvious to Lundstedt that legislation and general morality must be in harmony. The social valuations of the legislator must correspond to general valuations in the community. It is of vital importance, then, that the legislator does not get into conflict with the general moral attitude.[201] While it is important to deliver punishment where punishment is due, it is equally important not to deliver punishment in other situations. Punishing actions that are not generally considered to violate social norms, will have a demoralizing effect on society by undermining the authority of the penal law.[202] The same is true for penal norms that are unable to get a hold of general morality and direct the general consciousness. Lundstedt claimed that disrespected legal rules have a destructive effect on society, in so far as they are demoralizing and bring disrespect on other rules or to the legal system as a whole.[203] Thus, a disrespected paragraph is not only ineffective, but a threat to the entire system as well.

Lundstedt illustrated this point by adducing examples from Swedish legal history. He referred to two paragraphs in particular, the first one being the annulled decree against 'lönskaläge' (extra-marital sexual relations). This paragraph became a dead letter in the penal law, because no one had respect for it.[204] As the second example, Lundstedt adduced the legislation on the ban on alcohol. As long as restrictions were reasonable and moderate, they were respected by the public. However, when restrictions became absolute, people reacted violently and with complete disregard for the legislation in question. Lundstedt argued that this was a clear example of a punishment that was unable to grasp and re-shape general morality. The consequences were inevitable -- the legislation on alcohol had to undergo radical changes.[205] Therefore -- Lundstedt argued -- it was fundamental for the proper functioning of the legal system that the law corresponds to the general legal conscience and the feeling of justice.[206]

[201] Lundstedt 1956, p. 149.
[202] Lundstedt 1920, p. 76.
[203] Ibid. p. 25.
[204] Lundstedt 1921, p. 121.
[205] Ibid. p. 122.
[206] Zamboni 2002, p. 40.

3.3.3.4 Social pressure

In line with the above, Lundstedt argued that social pressure and social exclusion was far more important than punishments executed by the state. Again, it must be emphasized that the deterring element of punishment is primarily moral, and unrelated to physical suffering.[207] Social pressure will accumulate over time and with generations, as an entire generation exerts internal pressure on itself. Coming generations will more or less automatically realize that anti-social actions are not accepted and refrain from them without reflection.[208] This implies that the significance of the so-called common sense of justice is all but an illusion. Instead, the maintenance of legal rules over long periods, perhaps even hundreds of years, have formed the foundation of moral rules.[209] Over time, social pressure will become omnipresent and exert such pressure on individuals that committing criminal actions does not even arise as a possibility. Every impulse is directly smothered by social pressure.[210]

In Swedish law, insufficient knowledge of a norm prohibiting a certain action is irrelevant as an excuse for committing the action in question.[211] Thus, if morality and law were not corresponding, one would be obliged to learn the entire legislation by heart. Society must require an absolute duty against crime, which must be inevitable and directed towards the type of action in question. In the words of Lundstedt, the so called wrong action in its general character, must be absolutely refused.[212] Thus, the social function of criminal law is to maintain the moral instinct towards crimes, or as he put it: to stir up a general moral attitude against them.[213]

Regarding the presence of witnesses, Lundstedt wrote that neither the recidivist nor the first time criminal would commit crimes in the presence of the police or other witnesses.[214] Every criminal will seek an opportunity where he can remain unseen and avoid punishment, the obvious reason

[207] Lundstedt 1921, p. 116.
[208] Ibid. p. 112.
[209] Lundstedt 1925, p. 132.
[210] Lundstedt 1921, p. 113.
[211] Ibid. p. 11.
[212] Ibid. p. 88.
[213] Lundstedt 1956, p. 229.
[214] Lundstedt 1921, p. 106.

being fear of punishment.[215] However, this argument is only valid for actions that are generally condemned. By way of contrast, the following analysis will discuss actions that are criminalized but not considered immoral.

3.3.3.5 On the creation of new legislation

Lundstedt addressed the question of new legislation briefly. He argued that when the valuations of the legislator get into conflict with the general valuations of the public, and the legislator finds that in his opinion the public have based their opinion on false conceptions; the public opinion cannot be followed automatically. Should this situation arise, the legislator has three alternatives: He could (i) remain passive and wait for general valuations to change, either by elucidation or conviction; or (ii) he could take action and create a legislation that goes against general morality, but this is only possible if he is confident enough in his evaluation that he sees no risk in creating moral opposition against the new law. Or, he may (iii) find it best to submit to general opinion, even though he finds it untenable.[216]

Having outlined these possibilities, Lundstedt pointed out that one must be careful to make sure that in establishing new laws, they must not get into conflict with how the community within a state has previously operated. Otherwise, the public may consider the new part of the legislation arbitrary or unjust, advantageous to some or disadvantageous to others.[217] The starting point for new legal rules must, therefore, be the attitude of the general public, stemming from the feeling of justice, or what Lundstedt called the common sense of justice.[218] When the legislator introduces a new legal norm, he must be aware that laws are not established for himself but for the greater good of the community. It is therefore important not to aim for goals that contradict the aim of the common sense of justice.[219]

[215] Lundsted 1921, p. 117.
[216] Lundstedt 1956, p. 152.
[217] Ibid. p. 154.
[218] Zamboni 2002, p. 41.
[219] Ibid. p. 43.

Lundstedt recognized that in the process of making new laws, it may be very difficult to find a point of view that undoubtedly is the most beneficial to the community. The reason for this is obviously that the legal machinery is extremely complicated and that relations between factors are almost impossible to survey. In such cases, it is of vital importance to recognize that the law should be formed and interpreted according to the principles of public welfare.[220]

Lastly, a final quote from Lundstedt -- to be kept in mind for the coming analysis. He ends his example taken from the legislation on alcohol by stating that, to anticipate all misunderstandings, he wishes to underline that he does not take a position for or against the people that acted against the ban on [alcohol]. He only wants to say that it was impossible for them to understand that they did something wrong, and there lies the heart of the matter.[221]

3.4 Foundations of the law according to Olivecrona

Of the legal thinkers presented in this essay, Karl Olivecrona is the one who was active closest to our time period. He died first in 1980, that is to say, at a time when the network that would later become the Internet was in its infancy. Even if he had been more focussed on immaterial law and copyright, he was not given the chance to comment on illegal file sharing and the growing disrespect for copyright laws. Nevertheless, since his legal theory is comprehensive and detailed, numerous conclusions on these matters can be drawn from his views.

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[220] Lundstedt 1925, p. 157.

[221] Lundstedt 1921, p. 123.
”Till förekommande av allt missförstånd framhålles, att jag icke alls yttrar mig om, huruvida alla dessa människor hade rätt i sin uppfattning, att de icke gjorde något ”ont” mot samhället, när de möjliggjorde sig ett dagligt bruk av snaps till maten. Jag säger blott, att det var dem omöjligt att fatta, att de gjorde något ”ont”, och det är därpå det hänger.”
”To anticipate all misunderstanding, I must emphasize that I am not at all commenting on whether people were right in their opinion that they did nothing wrong to society by enabling themselves to drink snaps on a daily basis. I merely say, that it was impossible for them to understand that they did something wrong, and therein lies the heart of the matter.” (My translation)

3.4.1 Background

It has been said[222] of Olivecrona that his theory was much better thought out than Lundstedt's. Olivecrona was a prominent jurist who succeeded in popularizing Hägerström's legal philosophy. Many of Olivecrona's theses have their counterparts in the less accessible texts written by Hägerström.[223] Through Olivecrona and Lundstedt, the legal philosophy of Hägerström was transmitted to the next generation of legal thinkers and jurists.[224]

Taking his point of departure in Hägerström's insights, and completing his arguments,[225] Olivecrona developed a more sceptical approach to legal rules and legal concepts. Both Olivecrona and Lundstedt were pupils of Hägerström,[226] and their legal thinking is closely related.

In the preface to his work *Om lagen och staten (On law and the state),* Olivecrona accentuates the importance of Hägerström and Lundstedt and points out that he did not have much criticism to adduce but strived to develop their theories on the reality of the legal system.[227] Olivecrona regarded Hägerström as his revered and beloved master, and he said that his endeavour to treat law as fact could never have been accomplished without the basic knowledge provided by Hägerström. His indebtedness to his teacher also prompted him to administer Hägerström's literary heritage: thus, he edited and published e.g. the famous collection *Inquiries into the nature of law and morals* as well as *Rätten och Viljan (Law and Will),* where he also carried on a controversy concerning incorrect interpretations and misinterpretations of Hägerström's.[228] Similarly, he expressed gratitude towards Lundstedt, thanking him for both inspiration and enlightenment.[229]

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[222] Thus, e.g., Peczenik p. 16 describe Olivecrona's work as considerably more detailed.
[223] Nergelius 2006, p. 138.
[224] Ibid. p. 139.
[225] Fries, Martin, *Karl Olivecrona – forskaren och vännen,* Introduction to *Festskrift to Olivecrona,* Stockholm, 1964 p. 10.
[226] Bjarup 2005, pp. 1-2.
[227] Olivecrona, Karl, *Om lagen och staten,* Lund, C. W. K. Gleerup Lund, 1940, p 7.
[228] Fries, 1964, p. 17.
[229] Olivecrona, Karl, *Law as Fact,* Köpenhamn, Einar Munksgaard/ Humphrey Milford Oxford, University Press, 1939, p. 7.

Olivecrona's own theories have been praised for their extraordinary clarity.[230]

Olivecrona is a prominent representative of Scandinavian legal realism. Instead of searching for the origins of the constitution, he argued that humans naturally tend to form societies, to design rules and to strive to follow them. He relied on hard facts and the perceivable reality alone, rejecting mystical or religious explanations of human behaviour within the legal system. Olivecrona dismissed the idea of absolute truth, and therefore he argued that the correctness of legal statements must always be considered relative. According to him, no definitive and undisputed truth can ever be found, and it is therefore important to scrutinize reality.

Further, Olivecrona held that it was erroneous to view the law as commands, stemming from a real person. Theories that try to trace the origin of such commands to the sovereign or the state, are equally misleading, because they deal in abstract non-realities. Instead, Olivecrona focussed on the legislative process and the formal procedure in promulgating a law. Proposals that continue to develop and finally end up as formally promulgated rules of law, will gain a significant hold over people's minds. According to Olivecrona, the formality behind the law plays a decisive role in creating what is called ‘binding force’, which is only achieved through specific psychological effectiveness.

Also Olivecrona clearly reversed the traditional view on the historical relationship between moral values and law, arguing that morality is the product of a long tradition of applying legal rules (a view taken over from Lundstedt). Olivecrona concentrated on legal language, and argued that language has become a technique of social control. Legal terms may be no more than hollow words, to be sure, they serve as signposts which are strongly associated with legal concepts.[231]

It was not only as a legal scholar that Olivecrona was appreciated. Thus, it was said of him that he was a person free from prejudice and rigid dogmatism, and that he had an open-minded way of thinking. In the

[230] Fries 1964, p. 10.
[231] Olivecrona, Karl, *Law as Fact*, London, Stevens & Sons, 1971, p. 251.

Festskrift (i.e. Tribute) to Karl Olivecrona, Martin Fries says that there are two types of people: those who focus on things and those who focus on themselves. Without doubt, was Olivecrona a person so focussed on events, things and questions that he immersed himself in them, thereby nearly forgetting his own self.[232] His devotion to his work and passionate nature is evident to all who take part of his arguments.

3.4.2 The legal system and the state

Investigating into the issue of legal rules, Olivecrona found that it was impossible to disregard the fact that they are closely connected with the state.[233]

In general, the state is evidently a much younger institution than the legal order in itself.[234] People have formed communities with working legal systems long before the concept of the state was introduced. As mentioned above,[235] Olivecrona rejected will-theories and notions of an expression of will as the basis for the legal system. He did not place such a power in neither the hands of the state or of those in power. He had other views on the relationship between the state and the legal system, and he started his argument by explaining what it was that made the state so different from other institutions.

According to Olivecrona, the most prominent characteristic of the state, that definitely separates it from all other associations, is its legitimate use of weapons and physical force. Both the police and the military power are attributes which are unique of the state.[236] Although it is an important factor, violence is seldom used on the subjects of the state. People do not ordinarily associate the state with violence but, rather, identifies it as a power with the authority to create laws that can be enforced. The state is primarily seen as the origin of binding laws, and as an institution that rules and judges.

[232] Fries 1964, p. 20.
[233] Olivecrona, Karl, *Rättsordningen*, Lund, Liber Läromedel Lund, 1976, p. 261.
[234] Ibid. p. 265.
[235] See p. 64 above.
[236] Olivecrona 1976. p. 262.

Olivecrona stresses that the physical and psychological powers are woven into each other and that they must be viewed as co-dependent. In the absence of physical power, the psychological forces can no longer exercise the same influence on people, and vice versa.[237] In the concluding paragraphs of his chapters on the legal system and the state, Olivecrona points out that the relative power of the state is clearly dependent on the respect for a permanent system of rules, i.e. for the constitution.

3.4.3 Legal language and reality

Legal language and its relation to reality are both extensively dealt with in Olivecrona's work, and the focus is mainly on the central legal terms *right* and *responsibility*.[238] The word *right*, for example, does not signify anything at all, not in reality and not in an imaginary world either. In this sense, legal terms lack semantic reference.[239] However, even if no rights or duties can be discovered from the external aspect, an observer cannot settle for a study of the movements of people, listening to the sounds as they are speaking. The external observer must interpret speech and motives, in order to understand how legal ideas are generated and how they influence behaviour.[240]

In his analysis of legal language, Olivecrona differentiated between two distinctive functions of legal language, namely, the directive function and the informative function.[241] A word or legal term -- such as *mine* or *yours* -- can only have a directive function if the terms are associated with certain legal ideas.[242] The word *mine* indicates that something belongs to me, that is to say, others cannot legally take it or dispose of it without my permission. The word *right* in itself denotes nothing according to Olivecrona, but as shown in the example above, words can indicate and depict legal circumstances and consequences. The use of legal words is a starting point from which more comprehensive, detailed and specific information can be

[237] Olivecrona 1976, pp. 267-.
[238] Olivecrona 1971, p. 135.
[239] Ibid. p. 183.
[240] Ibid. p. 216.
[241] Ibid. p. 254.
[242] Ibid. p. 255

gathered. Olivecrona observed that people are, on the whole, generally content with the conclusions and assumptions following from a simple statement such as *this object is mine.* It is important to keep in mind that the information must be verified and extended before more serious decisions are made based on the initial assumptions, but the community is nevertheless well served by the use of concise legal terms.[243]

The informative function, on the other hand, is only effective within a comprehensive and efficient legal system. Legal terms are primarily guiding (that is, normative in contrast to descriptive).[244] Legal language has not been designed to depict the objective reality but, rather, to effectively direct the actions of the community and the citizens. Olivecrona concluded that legal language is actionalistic, and he contrasted this with the descriptive language used in the field of science. Legal language must be supported by a significant system of ideas.[245]

Eventually, Olivecrona's argument on statements concerning the existence of rights and duties as well as legal terms and their informative function, develops into an argument on correctness and truth. Olivecrona distinguished sharply between the two. He argued that legal statements could only exert influence on the behaviour of people if they are perceived to be correct. However, he also concluded that it was impossible to ascertain the correctness of legal statements empirically. The use of legal terms -- such as *this object is mine* -- is based on the existence of a system of rules regulating various aspects of the community. Without reference to a comprehensive system and the rules within that system, the question of correctness is meaningless and cannot be answered.[246] Correctness can never be anything but relative, and outside the comprehensive system of rules and shared values, there is no ground for establishing the correctness of legal statements. The logical consequence is that legal statements cannot be accurately labelled as neither true nor false.[247] Olivecrona considered the

[243] Olivecrona 1971, p. 254.
[244] Olivecrona 1976, p. 227.
[245] Ibid. p. 255.
[246] Olivecrona 1971, p. 259.
[247] Ibid. p. 261.

distinction between correctness and truth to be of crucial importance,[248] and he levelled sharp criticism against the general view on legal concepts as being natural phenomena. In the process of fitting legal phenomena into a coherent and non-contradictory view of the world, correctness and truth must always be kept separate.

Nowadays, and in contrast to ancient societies, people no longer believe that legal effects are brought about through words and magical acts.[249] The use of appropriate words is still important, however, and Olivecrona recognized this practice as being useful. He found that there are numerous instances of formulae that fulfil social functions, e.g. the marriage ceremony. Their content may be regarded as nonsensical from an intellectual point of view, but the words still have a purpose and a function.[250]

The regularized and repetitive nature of legal language can perhaps be explained as a remnant of magical rituals, but Olivecrona held that it was simply a necessity in order for legal language to exert social control.[251] Words are important tools in many legal transactions, and in studying the function of the legal system, the function of these tools must be considered as well.[252] When legal words are used in the proper way and under the proper circumstances, they become points of reference for consequential ideas on how to behave. Such ideas on correct behaviour within the society are part of human life and upbringing, and are introduced already at an early age. Legal and social sanctions interact to uphold and impress such consequential ideas.[253] The internal aspect of law, being the internal reasoning of a person who considers himself a member of a community, includes accepting legal rights and duties and also judging others according to the same standard.[254] This is the origin of social sanctions, and we direct them both towards others and ourselves.

[248] Olivecrona 1971, p. 267.
[249] Ibid. p. 231.
[250] Ibid. p. 238.
[251] Ibid. p. 253.
[252] Ibid. p. 246.
[253] Ibid. p. 252.
[254] Ibid. p. 215.

Language may seem like a frail tool, Olivecrona concluded, but in reality, and in a favourable setting, it is a powerful instrument of social control.[255]

3.4.4 The nature of legal rules

The pragmatic and realistic nature of Olivecrona's legal thinking permeates his view on the formation of legal rules as well as all his other areas of interest. He argued that the purpose of legislation is, to create a certain order in the community, or in some part of it. In order for new laws to fulfil their purpose, they must succeed in giving rise to certain ideas concerning conduct and actions in the mind of the recipients. A legal rule must be perceived as a rule that stipulates behaviour in accordance with a pre-determined pattern in the minds of the citizens. Thus, legal rules can be divided into two elements: (i) the actual content and ideas the rule seeks to convey, and (ii) the form of expression in which this is done.[256]

Concerning the *first* element, Olivecrona said that it was insufficient to just prescribe a pattern of behaviour: legal rules must also create a motive for people to actually observe the designated pattern. The most common method to create a motive is, to tie legal rules to unpleasant consequences that come into force for those who act in a different manner.[257]

Concerning the *second* element, Olivecrona pointed out that the form of expression given to legal rules was highly important in order to successfully influence the conduct of people in general. The legislative text should not be regarded as an expression of the legislator's will or wishes that people should behave in a certain manner, nor as advice on, how to behave in order to achieve advantages or avoid negative consequences. The law uses the imperative mood, and simply says that people *shall* do this, and *shall not* do that. The imperative is characterized by not referring to valuations, thus being unconditional.[258] On a purely grammatical level, legal rules are not

[255] Olivecrona 1971, p. 254.
[256] Ibid. pp. 115-120.
[257] Ibid. p. 116.
[258] Ibid. p. 119.

always written in the imperative mood,[259] but may also use the indicative mood. Regardless of the grammatical form, the law is always put forward in an imperative sense, as this is a form that effectively makes people feel obliged to obey and adapt their behaviour to fit the desired pattern. Also, in order for legal rules, or the law in general, to be effective, the recipients must be accustomed to receiving commands: the citizens must be prepared and trained to respond to legal commands.[260]

3.4.4.1 The origin of legal rules

In the realm of legal history, Olivecrona discovered several examples of legal issues that have developed from magical acts or ceremonies. The so-called legal performatives have their origin in the language of magic which, as such, is a natural and logical development. The reason why the legislator has continued to use the imperative form long after having detached himself from magical procedure, is that it has proven extremely effective and suitable for the purpose.[261]

In his studies of legal history, Olivecrona realized that we could observe changes in, and additions to, a pre-existing law, but that we can never find the true origin of a legal system. While it is an inevitable truth that every legal rule must have a historical origin, it is a common and highly plausible occurrence that this origin has been lost in the course of history.

Thus, it is often only possible to study alterations within a given legal system.[262] According to Olivecrona, history only shows us the transition from customary, magical-religious rules to a body of rules called law.[263] In his view, the general acceptance of the legislative process as a regular phenomenon must be regarded as an important turning point. By accepting the legal system, people gave the legislator a possibility to introduce new

[259] Olivecrona 1976, p. 117.
[260] Olivecrona 1971, p. 127.
[261] Olivecrona 1976, p. 245.
[262] Olivecrona 1971 p. 110.
[263] Ibid. p. 103.

rules in a peaceful way -- something that is highly effective psychologically as well.[264]

In analyzing legal language, Olivecrona pointed out a dilemma. On the *one* hand, legal rules are expressed in the imperative mood. On the *other* hand, there is no commanding subject.[265] Although legal rules do not originate from a commanding person in power, their imperative character is nevertheless effective in directing the people's behaviour. The actual existence of a right to command is, in reality, irrelevant: it would only be a necessary condition for the effectiveness of the said command, if this right were a mystical force within the commander himself. Olivecrona argued that in reality, the psychological effect of a command is the only relevant factor. If the addressee is under the impression that the commander actually has a right to command, naturally he will respond to, and obey, those commands.[266] As the distance between the person in command and the recipient becomes wider, the commands will naturally take the form of independent imperatives.[267] According to Olivecrona, legal rules should therefore be classified as detached, or independent, imperatives.[268]

3.4.4.2 The formation of legal rules

In modern society, legal rules are introduced into the legal system through a suitable procedure, namely, legislation in the form prescribed by the constitution. Sometimes, legal rules may also come into existence through the activity of courts and judges, or by customary practice.[269]

Olivecrona identified three distinct phases: (i) the drafting of the text, (ii) the decision to transform the draft into a legal rule and (iii) the act through which this transformation is achieved.[270] A text that passes through all three stages, a significant change takes place: the new legal rule can begin to affect society in a drastically different way than a proposition or a draft ever

[264] Olivecrona 1971, p. 104.
[265] Ibid. p. 119
[266] Ibid. pp. 123-124
[267] Ibid. p. 129.
[268] Ibid. p. 130
[269] Ibid. p. 86, pp. 105-109.
[270] Ibid. p. 87.

could have done. Contrary to the opinion of some of his contemporaries, Olivecrona held that this effect was not of a mystical nature[271] but, in reality, simply a matter of cause and effect. The effects of the legislative act lay on the psychological level, and was primarily explained by the fact that laws belong to a larger body of rules commanding universal respect.[272] New legal rules are transferred into a system of rules that people have respect for, and feel obliged to follow. The legal system as a whole is revered and ultimately considered to protect the safety of the community and its citizens.[273] Promulgating a proposal, i.e. attaching the term *law* to the text, may seem insignificant; but it actually gives rise to very strong psychological effects.

In modern society, respect for the constitution is profoundly established, and a text in the form of a law is generally considered, by the citizens, to be binding upon themselves and others.[274] This requires a general respect for the constitution and the legal system. Without this respect, it would be impossible to create new legal rules. The effectiveness of constitutional imperatives is a prerequisite that gives legitimacy to laws made in accordance with the same constitution. According to Olivecrona, the legislator, in promulgating a law, takes advantage of a psychological mechanism and a pre-established attitude within people's minds.[275]

Thus, the legislative process consists of the preparation of a certain type of text and the passing of this text through formal procedure, a process where a number of persons with certain positions participate (members of the Parliament, democratically elected by the people).[276]

Olivecrona held that we can never find the origin of the constitution. Therein, he was following Lundstedt. As mentioned above,[277] they agreed that there is no definite point of origin to be found in history; rather, it was a question of a process that stretched over a long period of time. Humans have

[271] Olivecrona 1976, p. 142.
[272] Olivecrona 1971, p. 90.
[273] Olivecrona 1976, p. 143.
[274] Olivecrona 1976, p. 155.
[275] Ibid. p. 143.
[276] Ibid. p. 158.
[277] See p. 54 and p. 70 above.

formed communities and legal systems since time immemorial, and well before the first historical record discovered by science. Humans have a natural tendency to form societies, Olivecrona argued, and it follows that rules are designed and obeyed. This is a human phenomenon that cannot be explained further and simply must be accepted as a prerequisite.[278]

On the question of, how laws have been created, Olivecrona held that there was no general and universally true answer. The origin of each constitution in each state, must be investigated separately.[279] With no origin to be found, it stands to reason that we cannot consider the formation of rules to be completed either. Instead, the formation of rules must be considered as a continuous process.[280] The constitution serves as a power source for the entire legal system, but the individual acts and legal rules can be annulled and replaced by new ones.[281]

3.4.4.3 Legal rules and psychology

In the machinery of society, a promulgated law becomes a cog in the machinery of society, and it has inevitable behavioural and psychological effects on people.[282] Olivecrona dismissed all theories explaining this by reference to mystical, magical, religious or other metaphysical forces. Instead, he argued that the connection is to be found on the psychological level. The purpose of all legislation is to affect or change the actions of individuals, and this can only be achieved by influencing intellectual life.

The act of promulgating a law is one link in a psychological chain of cause and effect. This is a fundamental part of social life.[283] The most important element of the legislative act is the constitutional form, endowing legal rules with psychological effectiveness and constituting a method to reach and

[278] Olivecrona 1976, p. 163.
[279] Olivecrona 1971, p. 96.
[280] Ibid. p. 112.
[281] Ibid. p. 104.
[282] Olivecrona 1976, p. 142.
[283] Ibid.

influence the people's minds.[284] The act of promulgation is a sign, gaining its practical meaning only *because* citizens are prepared to respond to it.[285]

Having analyzed legal language in function and form, Olivecrona returned to the psychological fact that a person who is convinced that he has a right, will generally have a feeling of power and assertiveness, especially in a conflict.[286] Legal rules interact to put psychological pressure on e.g. a debtor.[287] People have learned to obey the law and to pay attention to the legislator. The law is intimately connected to emotional life, evoking feelings of reverence, respect, security and fear. Because legal effects are supposed to be in force, psychological effects will take place, which is to say that there is interdependence between the two.[288]

As Olivecrona pointed out, the human desire to form communities and a legal order is so strong, that it can be transferred to rules proclaimed outside a pre-existing constitution, e.g. during a revolution.[289] Just as new legal rules can come into force through unconstitutional procedure, they can also be put out of force in the same way. This cannot only happen through revolutionary activities, but also when a legal rule becomes so alienated from society and general philosophy of life, that it is no longer enforced. Also, a legal rule may meet the fate of being forgotten, i.e. becoming obsolete.[290]

3.4.5 Bindingness

Although Olivecrona admitted that legal rules create a feeling of bindingness, he rejected the idea that the law had binding force. The idea of a binding force of law is an expression of respect for the constitution, but does not correspond to any real facts. While Lundstedt argued that there are legal rules in the scientific sense only, through behavioural patterns

[284] Olivecrona 1976, p. 147.
[285] Ibid. p. 154.
[286] Ibid. p. 212.
[287] Ibid. p. 223.
[288] Olivecrona 1971, p. 222.
[289] Olivecrona 1976, p. 258.
[290] Ibid. p. 259.

informed by the method of social welfare, Olivecrona had a different view: he, too, rejected the idea of legal rules with binding force as metaphysics, but he considered the law to be more of a link in the chain of cause and effect.[291]

3.4.5.1 The binding force of legal rules

Olivecrona rejected the idea that legal rules have binding force per se. He begins his argumentation by stating that the legal system is generally regarded as a collection of rules which are binding and effective for the entire society.[292] Maintaining that legal rules lack binding force and, consequently, are unable to establish legal relations, Olivecrona rejected the idea that the function of the law was to guide human behaviour through the establishment of such relations. As regards the function of legal rules, he held that they exist in order to cause human behaviour, and that they succeed in doing so because of their suggestive character.[293] To Olivecrona, the absence of binding force must also result in the conclusion that legal rules cannot establish legal relations at all.[294]

In investigating the nature of the legal system scientifically, the first task must be to scrutinize and criticize the idea of binding force, and to discuss whether or not it actually is a real phenomenon.[295] While it can be argued that the system of legal rules is 'binding' on people in the realistic sense of this expression, and thus has a firm grip on us all, this is not what we mean by 'binding force'. Olivecrona points out that binding force is not identical with the fact that crimes are generally followed by punishment.[296] While the representatives of other legal theories argue that sanctions are the result of someone violating a binding rule, Olivecrona pointed out that this was a logical impossibility, since we must then assume that 'binding force' is

[291] Bjarup 2005, p. 11.
[292] Olivecrona 1940, p. 11.
[293] Spaak, Torben, *Karl Olivecrona's Legal Philosophy: A Critical Appraisal*, p. 71.
Not printed yet, but soon to be published. I am very greatful to Professor Spaak for having been given the opportunity to read the relevant chapters in advance.
[294] Spaak, p. 73.
[295] Olivecrona 1940, p. 13.
[296] Ibid.

something prior to the sanction.[297] Nor is 'binding force' equal to the experience and feeling of being bound by legal rules, even if it generates obstructive emotions and reactions. There must be a clear distinction between, on the *one* hand, binding force in itself and, on the *other* hand, the common experience of being bound and restricted.[298] Further, Olivecrona stressed the bindingness of the law is perceived to be unconditional and absolute. The actual bonds that bind us to the law must nevertheless be described as relative in their nature, since the social organization and societal order determine if sanctions will be applied or not.[299]

With this in mind, Olivecrona concluded that the binding force of the law is obviously not a real force and not connected with reality at all. It is not located in the world of time and space. In actual social life, it is possible to observe and study a number of facts that determine the behaviour of people, but legal rules constitute only one of these factors. The absolute binding force of law is elusive and cannot be definitively placed within the social context.[300]

It follows that the law must be perceived as something *above* the natural order -- *above* reality. This would place the law outside the world of time and space and in a world of its own. This is unreasonable, however -- as Olivecrona points out. Nothing can be placed in relation to facts in the world of time and space if it does not belong to this world. If we give the legal system such a position it becomes meaningless and self-contradictory (here, he clearly follows Hägerström).[301] All efforts to argue scientifically that the legal system has a binding force beyond the actual pressure exerted on people, are pointless and lead to contradictory and absurd arguments.[302] It is impossible to escape the conclusion that the law is a link in the chain of cause and effect, giving it a place among other facts in our world of time and space; it cannot, at the same time, belong to another world.[303] Having

[297] Olivecrona 1939, p. 13.
[298] Olivecrona 1940, p. 15.
[299] Olivecrona 1939, p. 13.
[300] Olivecrona 1939, p. 15.
[301] Olivecrona 1940, pp. 15-16.
[302] Olivecrona 1939, p. 17.
[303] Ibid. p. 16.

established this, the rest of Olivecrona's argument is focused on the reality of (physical) things and 'binding force' as a psychological reality.[304]

If we stick to the facts -- Olivecrona goes on to argue -- then the concept of binding force is a psychological reality of vital importance, but nothing more. The strong feeling of bindingness that the legal system invokes gives rise to psychological effects which, in turn, can be studied. To ascribe binding force to the law is to objectify this feeling of bindingness.[305]

Olivecrona did not deem it necessary to formulate a definition of law: a description and analysis of the facts, he said, was all he was going to attempt.[306] Regarding the binding force of law, his conclusion was that it is only was an idea in the human mind.[307]

3.4.5.2 Legal rules and the use of force

While Olivecrona clearly separated the concept of the binding force of law from the relationship between crime and punishment, he also regarded the use of force as an important issue and treated it separately and in great detail. In order to maintain respect for legal rules, regular use of force is necessary. The threat of force is not the only reason why people choose to obey the law, since other factors -- such as upbringing, ethical teachings, habits, propaganda etc. -- can be equally, or even more, important. However, legal sanctions simply cannot be dispensed with, since there is a strong interdependence between legal sanctions and law observance.[308]

When Olivecrona uses the terms force, violence or coercion, he refers to the actual use of physical force, but also to the psychological pressure of an irresistible power than can use physical force whenever it is necessary.[309] Most modern states make use of such organized force, and the strength of this organization is so overwhelming that resistance is known to be useless.[310] The concept of law must include the use of force in an organized

[304] Olivecrona 1940, p. 19.
[305] Ibid. p. 20.
[306] Olivecrona 1939, p. 26.
[307] Ibid. p. 17.
[308] Olivecrona 1971, p. 272.
[309] Olivecrona 1940, p. 127.
[310] Olivecrona 1939, p. 125.

and regulated form. This legal form of force must be separated from all other forms of violence (of an illegal nature).[311]

If legal rules do not have binding force in the traditional sense of the concept, it then follows -- or so Olivecrona argued -- that the legal system in point of fact consists of organized force.[312] If we accept that the concept of the binding force of law is all but an illusion, then we must also accept that the legal system entails force. Every state must have such an organization of overwhelming strength, maintaining the legal system and using force to suppress other forms of violence.[313] When we are saying that law is guaranteed by force, our meaning is that the legal system is backed by actual force.[314] Organized force is an omnipresent element of all civilized societies.

This force can be subdivided into three different forms: (i) police interventions against disturbances, (ii) execution of punishment and (iii) execution of civil judgments. In all three cases, physical force or coercion is possible but seldom used.[315] Indeed, Olivecrona argued that although the legal system depends on the use of organized force, [316] it is in the best interest of the state to keep physical force in the background as much as possible. While society is based on the existence of a legal system, that system in turn must contain rules on organized force and on the use of it. This form of organized force is the body and frame of social life.[317]

The consistent and regular use of organized force has inevitable consequences to the people who are directly affected, but this is not the primary function of the use of force.[318] The social significance of organized force can be understood only if we consider the effects on society as a whole, and on all of its members and their conduct. Olivecrona pointed out that the immediate consequences of individual sanctions are relatively insignificant, considering the general psychological pressure that is an

[311] Olivecrona 1939, pp. 126-127.
[312] Olivecrona 1940, p. 125.
[313] Ibid. p. 128.
[314] Olivecrona 1939, p. 129.
[315] Olivecrona 1940, pp. 125-126.
[316] Ibid. p. 130.
[317] Ibid. pp. 134-135.
[318] Ibid. p. 137.

inevitable result of the existence of organized force.[319] This form of force, always present in the minds of the people, will over time become so powerful that it controls the behaviour and actions of millions of people that have never been directly subjected to it. This element of the use of force is far more important to society than the direct punishment of criminals.[320]

In other words: the law can only be considered firmly established, when the main 'independent imperatives' have been internalized as moral values.[321] Therefore, it stands to reason that in the absence of the force of law, we can expect important and dangerous changes as regards moral values and standards of society.[322]

3.4.5.3 Law and morality

Following Lundstedt, Olivecrona reversed the traditional relationship between law and morality and maintained that the law comes first, giving rise to, influencing and preserving moral attitudes.

Having discussed the binding force of legal rules and the use of force, Olivecrona turned to the question of, how to distinguish between legal rules and moral rules.[323] In his view, the legal system only includes rules that are connected to the state.[324] Legal rules constitute the primary influence on the individual, since they exist and exert influence on our minds while our moral ideas are forming. The law is one of the most important factors that contribute to our moral disposition and valuations.[325] The moral standard of each individual is inevitably influenced by the fact that we all grow up in a society where the legal machinery has existed since times immemorial.[326]

While legal sanctions cannot be dispensed with, the fear of punishment is not the primary source of moral inhibitions. Over time, moral values make e.g. murder unthinkable, an option that does not appear as a real

[319] Oliverona 1940, p. 138.
[320] Ibid. p. 139.
[321] Spaak, p. 110.
[322] Ibid. p. 111.
[323] Olivecrona 1940, p. 42.
[324] Ibid. p. 43.
[325] Ibid. p. 149.
[326] Olivecrona 1939, p. 153.

possibility.[327] While fear of legal sanctions is not the primary motive for us to abstain from criminal behaviour, the mere knowledge of the existence of regular and consistent punishment, must be considered to have an essential influence on our attitude towards legal rules.[328] However, such legal sanctions must be motivated by generally accepted and reasonable motives, so as not to create a mental, psychological conflict, where people are driven in two different directions: on the one hand, it may seem tempting to commit crimes, but on the other hand people fear legal sanctions. In a situation where this applies to a significant part of the community, Olivecrona would say that it was a question of a terrorist regime.[329]

With respect to changes in the existing law, Olivecrona held that moral ideas are certainly among the most important motives that dictate new legal rules. Other driving forces may include self-interest, and as Olivecrona points out, it is easy to disguise such interests by referring to moral standards or ideas. Therefore it is impossible to uphold any illusion that the sense of justice, i.e. moral ideas, is the only basis for new legislation.[330] Only by a thorough analysis of the motives behind alterations in the law or new legislation, may we possibly discover the real causes of such alterations. In Olivecrona's view, it was obvious that any scientific explanation of the motives behind new legislation has to be of a very general character.[331] In the last analysis, it serves no useful purpose to discuss whether law is based on justice or on expediency,[332] but searching for the motives behind the law and punishment, we shall eventually find reasons of self-preservation and other primitive emotions.[333] He found that throughout history, self-interest has always come out on top when in conflict with moral standards and feelings.[334]

[327] Olivecrona 1940, pp. 140-141.
[328] Ibid. p. 142.
[329] Ibid. p. 144.
[330] Olivecrona 1939, pp. 162-163.
[331] Ibid. p. 163.
[332] Ibid. p. 164.
[333] Ibid. pp. 165-166.
[334] Ibid. p. 167.

In conclusion: If the legal system is not based on by the use of organized force, the legal rules will become hollow and disrespected.[335] Through legal sanctions directed towards comparatively few individuals, the moral backbone of the entire society will be maintained.[336] To put it bluntly (as Olivecrona did): the legal system constitutes force, and at its extreme, it can be described as superior physical force.[337] A monopolization of force is an absolute necessity for civilized life and a vital condition for both economic and cultural life.[338] Olivecrona insisted, emphatically, that we cannot dispense with the use of force under any circumstances, since the interdependence between legal sanctions and the observance of the law is so strong.

Legal rules, which are not backed by legal sanctions, will eventually fall prey to other interests in society.

[335] Olivecrona 1940, p. 151.
[336] Ibid. p. 152.
[337] Ibid. p. 159.
[338] Olivecrona 1939, p. 175.

4 Analysis

4.1 The motives behind the Swedish copyright law[339]

In a recent case, a Swedish court of appeal argued that copyright infringements constitute an attack on fundamental values of our legal culture.[340]

This argument refers to The form of Government ch. 2 § 19 (RF 2:19) which states that authors, artists and photographers hold the rights to their works, in line with rules that are imparted through other parts of the legislation. In other words: the theory of labour, according to which every man has the right to the fruits of his labour, has been made part of our constitution. It is difficult to recommend a society where artists would not have the right to be compensated for their work. Regardless of one's political orientation or moral compass, most people probably agree that it is impossible to imagine a sustainable society where things are free of charge. Nevertheless, the financial aspect of file sharing has more than one dimension.

First of all, some estimates of losses calculated by the entertainment industry may not consider the relationship between price and copies sold. This problem seems to have been noticed and given more thought recently. In any case, the court of appeal has noted that the industry cannot be granted damages for every downloaded copy, but that estimates must be calculated cautiously.

Secondly, and more important, the right for artists to be compensated and the phenomenon of file sharing are not inevitably antagonistic. If all file sharing -- regardless of the nature, type and origin of the file in question -- were to become legal, this would not necessarily lead to the collapse of neither the entertainment industry, nor result in the demise of entertainment as such. In reality, the difference would probably be quite small, since most

[339] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[340] HovR B 4041-09, 2010-11-26, p. 14.

file sharers are never brought to justice anyway. Such an argument -- that it would be best to except file sharing from the copyright law -- is difficult to combine with the theory of labour which is a fundamental part of our legal system. However, if we disregard moral ideas and focus strictly on the reality of things, there are possible models for compensation that do not require a strong copyright law but still sustain the fundamental values of the theory of labour.

4.2 Should the copyright law as applied to illegal file sharing, be considered a valid law?

As shown in subsection 3.1.1, Vilhelm Lundstedt denied the possibility of valid norms not produced and enforced by the state. Within the legal system, legal rules can only be considered valid if they are in force. Against the background of this legal theory, it is highly questionable whether the copyright law as applied to illegal file sharing should be considered valid. Technically, the law is certainly in force but in reality, it is not enforced since most individual violations are never discovered, much less subjected to prosecution.

Karl Olivecrona had similar ideas of validity, although he explicitly discarded the problem of validity in favour of investigating the nature of legal rules. He argued that it was impossible to render a system of rules binding or not, but that we can investigate which rules are considered binding and to what extent they are actually followed and enforced. Judging by the number of Swedish file sharers and the number of indictments and convictions, it can be concluded that a by no means negligible part of the population do not consider themselves bound by the copyright law and are not punished when they behave according to this moral attitude.

In the opinion of Aleksander Peczenik, a complete analysis of the validity of any legal rule must consist of (i) the internal aspect of validity and (ii) the external aspect of validity. The former includes an analysis of, whether the rule is consistent with the legal system and formal procedure, and the latter

is a question of, whether the legal system in itself is acceptable. In the case of the Swedish copyright law, the external aspect of validity can be dealt with summarily. There is no reason to question the legal system as a whole, and indeed most citizens never do, regardless of their views on illegal file sharing. As to the internal aspect of validity, the copyright law per se cannot be questioned. The only way to argue that the copyright law is not a valid law, would be to argue that it has not been promulgated according to procedure, because the copyright law has automatically incorporated the new phenomenon of digital copyright without reflection. Actually, it would be difficult to argue that the copyright law is not consistent with the legal system and the constitution, and even more difficult to argue that abolishing the law or excluding digital copies from copyright protection, would be in line with the fundamental values of our legal culture.

In conclusion, the values of the copyright law and the motives behind it must be considered valid. The application of the existing copyright law to the digital world is more questionable, however.

4.3 Traditional copyright compared to digital copyright

In comparing copyright infringements online and outside the Internet, one quickly identifies so many points of difference that it must be discussed if one should treat this as two different areas of law. Certainly, there are a number of fundamental similarities between them, but these are obvious enough.

First of all, one must consider the ease with which one can copy and spread copyright protected material online. Illegal or legal, files only occupy a small portion of your hard disk, and this makes it easy to accumulate enormous amounts of film or music. It is possible to store an almost unlimited number of movies or songs in your living room, or thousands of protected works that only take up the physical space of one CD or book. To physically copy a book, page by page, or to make a physical copy of a movie or CD, is quite different from copying files from one computer to

another. It can be done faster, cheaper, more discretely, and with only minimal effort.

Secondly, data cannot only be copied easily, but can also be spread all over the world in seconds. The Internet is a globally available service, and all of its users are connected to a network that is readily accessed from practically anywhere. To share files without effort, either passively (by sharing files) or actively by downloading, is possible regardless of the geographical location of the seeder (uploader) and downloader. This is a huge difference compared to physical copies, which cannot be shared instantaneously, or at such a low cost in such large numbers. Since one can get files from anyone and give data to anyone, there is really only a need for one original copy of each film, song or otherwise.

Thirdly, the number of copyright infringements on the Internet is far greater than the number of infringements in the real, physical world. This is not a natural part of the phenomenon, but a reality in contemporary society. It suggests that people in general treat copyright in the physical and digital world as separate fields of law. Some Gallup polls indicate that nearly a majority of the population (at least in some age groups) have at some point downloaded illegal files from the Internet. In other words: it requires considerable more effort and resources to enforce copyright law on the Internet. Most people would even agree that in reality, it is impossible. Considering these differences (and possibly a few more), a discussion of pre-Internet copyright law and copyright online seems justified.

Seen in this light, one possible conclusion is that the pre-existing copyright law has been applied to the concept of file sharing without having passed the formal procedure. The legislator never considered whether digital copyright should be treated differently than copyright in the physical world. This may explain why file sharing is not considered a crime and why the psychological effect on people is comparatively weak.

4.4 Future developments

While it is hard to predict the future in any respect, there are some developments regarding file sharing which must be discussed. As mentioned in subsection 2.5, solutions may come both from within the legal system and from the entertainment industry outside of it. It goes without saying that the two most certainly will interact.

4.4.1 IPRED

In spite of having been in force since October 2009 (in Sweden), the IPRED law has that far been toothless. No Internet supplier has been forced to surrender data regarding the activities of their users and customers, and all of them refuse to do so. IPRED is now subject to review in the European Court of Justice, which will decide if Telia is right in refusing to give up the information they have. Most likely, the ruling will not be in favour of the Internet suppliers, thus forcing them to give data on illegal file sharing to companies in the entertainment industry.

In Germany, a similar law has been in force for two years, and the development there may be an indication where Sweden is heading. German film distributors regularly engage law firms to contact individuals who have shared certain movies illegally. By sending warning letters, offering people a choice of either paying a relatively small sum of money or going to court, companies have noticeably increased their revenues. The movie *Antichrist* by Lars von Trier has yielded 5,5 million DKK through this method, which is more than the total amount of profit gained through sales of DVDs and movie tickets.[341]

Legal experts agree that this might be a possible development in Sweden as well. However, is it really an acceptable and just model for enforcing the law? Such a development would, in reality, place legal sanctions in the hands of private companies. While it is open to go to court and have their case decided by a judge within the legal system, most will probably pay

[341] Jurjaks, Arvid, *Hot får fildelare att betala*, Sydsvenskan December 29 2010.

their 'fines' instead, as demonstrated by the German model. While this may be quite effective and make people choose legal alternatives as well, it is a dangerous development to let other organizations than the state enforce the law.

4.4.2 The negative spiral of anonymity

In a recent article, researchers *Måns Svensson* and *Stefan Larsson* have identified unintended effects of the Swedish implementation of IPRED. They found that there is a trend of increasing online anonymity which has created a negative spiral.[342] Their survey is focused on anonymity through pay services or otherwise. Among other methods, they identify the use of IP VPN encryption services, which they consider a technically pretty robust pseudonymity. Such services offer a way for users to avoid having their IP number (i.e. their online trace) connected to their offline identity, and they take a subscription fee to do so. Traffic between the user and the anonymity server in question is encrypted and not decipherable by outside parties.[343] In their analysis, Svensson and Larsson argue that IPRED has put the finger on the sensitive balance between intellectual property rights on the one hand and individual privacy on the other.[344] Thus, Internet users (including illegal file sharers), have used the method of encryption to diminish the power stemming from the law and to strengthen their anonymity -- an action that is firmly anchored socially. A de-anonymization law which is not in line with social norms, the authors argue, is likely to have a negative effect of weaker forms of anonymity as well. As the legislator creates new laws, counter-measures are taken to strengthen the anonymity that is lost.

This is a result of the violation of the social norms that are affected by the law, and it may lead to an escalating conflict.[345] In conclusion, the authors stress that fighting socially accepted behaviour may actually be an

[342] Larsson, Stefan & Svensson, Måns, *Compliance or Obscurity? Consequences of Fighting Unauthorized File Sharing,* Policy & Internet (2010), Vol 2. Iss. 4 Article 4, p. 4.
[343] Ibid. p. 12.
[344] Ibid. p. 21.
[345] Ibid. p. 22.

impediment to the fight against socially non-accepted behaviour,[346] thus undermining the legal system.

4.4.3 Legal alternatives

Within the industry, legal alternatives are improving and becoming increasingly attractive to users. While physical sales still account for the majority of the recording industry's revenues, digital copies are narrowing the gap. According to the 2010 report of IFPI (International Federation of the Phonographic Industry), digital channels now account for 25.3% of all trade revenues (this regards only record companies, i.e. not film or other forms of artistic work). The Swedish market is among those which saw digital sales grow by more than 40% in 2010, making it one of the 20 most successful countries in this respect.[347] Thus, it is possible, without doubt, to make people choose legal alternatives. This format does not allow for an analysis of the respective preferred strategies, but it is sufficient to establish that a violently enforced copyright law is not the only possibility.

4.5 Law and morality

In this chapter, I shall attempt to answer the research questions within a coherent argumentation. *First* of all: to which extent can Lundstedt's and Olivecrona's theories assist us in explaining the motives behind the wide-spread disrespect for the valid law that protects copyright online?

Secondly, how can these theories help us prepare for a sustainable future solution?

4.5.1 Lundstedt: Punishment and the social function of the legal system

Lundstedt argued that the primary function of penal law and punishment was general prevention. In his view, legal rules must pull common morality

[346] Larsson & Svensson 2010, p. 23.
[347] IFPI, *Recoding industry in numbers 2010 (RIN 2010).*

in the desired direction, creating moral beliefs which, in turn, will make the Penal Code efficient. The function of punishment is, thus, to uphold the respect for the legal system.

In the case of illegal file sharing, the absence of indictments and legal sanctions is painfully evident. At the present moment, the IPRED law has a promising future for the judicial system and may serve as a tool to extract data on illegal file sharers in the future. That far, however, 613,000 Swedes share files every week (2006)[348] and very few of them will ever be held liable. Why is this? The answer falls into two main parts.

First of all, it is difficult to track down and identify the respective Internet users. The hacker movement is constantly evolving and getting better at encryption and at covering up the tracks of illegal file sharing. While it is possible to anticipate some measures and create legal rules against the encryption and circumvention of technical solutions to protect copyright protected material, this is presumably a battle that can never be won. If the general public morality does not change (and a majority of the population strives in the opposite direction of the government and legislator), the numbers are clearly in favour of the people.

Secondly: to identify all illegal file sharers would require an enormous amount of resources and would, probably, only be possible if all activities online were monitored. Apart from being expensive and time consuming, this would also lead to moral dilemmas. Personal integrity is an important value in our society, and most people would probably not agree to have all their online activities monitored.

Thus, the copyright law as regards illegal file sharing online has not been enforced and backed up by legal sanctions. It has been unsuccessful in grasping general morality and directing it. The legislator considers the concept of copyright to be one of the fundamental values of our legal culture, but has not succeeded in conveying this attitude to the citizens.

Lundstedt argued that the general moral attitude against crimes, is conditioned by the maintenance of criminal law. The law itself serves as the origin for the common sense of justice, and the purpose of the entire legal

[348] World Internet Institute, *Svenskarna och Internet*, 2006.

system is to promote what is best for the society. Since illegal file sharing has not resulted in consistent and reliable legal sanctions, the general moral attitude against copyright infringements on the Internet has not developed in the direction of the law. The law has not been maintained strongly enough to convey the message that the copyright law exists in order to promote the welfare of the society, despite the fact it has strong roots in the theory of labour, which most people consider fair and a part of their sense of justice. In other words: the copyright law is indeed founded on the greater good of the society and, therefore, serves the purpose that Lundstedt wanted to see in the legal system; but the legislator has failed to enforce the law, and therefore people have lost respect for it.

Lundstedt argued that in order to shape and affect morality, punishment must be strictly regular (non-sporadic). People will refrain from actions that over time prove to be harmful and destructive, i.e. punishable. In the case of illegal file sharing, most people not only elude punishment, but even get a reward for their criminal behaviour, namely, they get something for free. Thus, people have a motive to commit the crime in question but they have no motive to abstain.

According to Lundstedt, consistency in penalizing actions which we consider anti-social and criminal is a necessary condition for the survival of society. In modern society, the function of legal sanctions is to empower commands which, in turn, have the function to direct common moral sense towards not committing any crimes at all. The primary function of punishment is, then, to generate and maintain a general moral instinct against crimes. Lundstedt found that without the existence of reliable and unyielding punishment, the legal rule in question would be undermined and gradually become ineffective and disrespected. This is precisely what happened in the case of illegal file sharing. In the absence of reliable, consistent and unyielding punishment, the legislation has become subject to widespread disrespect. It follows that it probably is quite useless to deliver harsher sentences or to try to shut down illegal file sharing services. The only method that would make any difference according to Lundstedt is, to punish the unwanted behaviour of all individuals who engage in it. At the

present, the number of illegal file sharers is huge, and the task of punishing all of them is intimidating. It would have been wise to intervene before the problem escalated to the present level.

On the fear of punishment, Lundstedt expressly argued that it could never attain power over people as long as moral forces counteract. When morality and law diverge, moral commands will always prevail. While the maintenance of the legal system as a whole exerts moral influence on society, individual legal cases have less of a deterring effect. From this, one has to draw the conclusion that the much debated and highly noticed legal case of The Pirate Bay will probably have a very small effect on the file sharing community. While Lundstedt considered individual cases to be of high importance in the sense that they are a part of the system, he disregarded the deterring effect almost completely.

Thus, the case of TPB cannot exert moral influence on its own and, therefore, has no preventive effect. Actually, the result may be the opposite. Lundstedt maintained that criminal law must consist of suffering in proportion to the social values that have been violated. If the suffering is not proportional to the social values that have been violated, then punishment fails to seize general morality and to pull it in the desired direction. While the legislator may consider copyright as one of the fundamental values of society, the people seem to think otherwise. Hence, the sentence of both imprisonment and large sums in damages, may seem unfair and unjustified. This does not imply that TPB should have been acquitted; however, it will probably not have the general preventive effect which the court of appeal intended it to have.

4.5.2 Lundstedt: When morality and legislation diverge

When a legal rule has become disrespected, Lundstedt argued, it has a destructive effect on society, since the demoralizing effect may spread and affect other parts of the legal system. Thus, a disrespected rule is indirectly a threat to the entire system.

Lundstedt adduced the example of the disrespected Swedish legislation on restrictions on alcohol, and concluded that when it became clear that the law could not re-shape general morality, it had to undergo radical changes. This is perhaps where we will end up with the copyright law and file sharing on the Internet. One of the unwanted effects of IPRED is, that users have taken measures to protect and strengthen their anonymity. As the fight against copyright violations has escalated, it has increased the use of encryption services and technologies. A side-effect of the increased use of such services is a negative effect on police investigations concerning other crimes online as well (e.g. vilification and threats).[349] This clearly proves that the prediction that disrespected laws will undermine the legal system is correct and highly relevant in the case of illegal file sharing. In cases where the legislator is unsuccessful in enforcing the law, by means of creating supporting legal rules or convictions in high profile legal cases, it may be inevitable that this field of law has to be re-shaped.

On the issue of new legislation, Lundstedt argued that new legislation must take its point of departure in the attitude of the public and in what he called the common sense of justice. He recognized that it may be very difficult to find a point of view that would decidedly be most beneficial to the community. This is indeed the case when it comes to file sharing in particular and online activities in general.

To abolish the copyright law altogether is not really an alternative. To except all online file sharing from the law does not seem like an unproblematic solution either. While a state commission has been devoted to investigating certain areas of copyright law and will present their results on April 8th, 2011, that inquiry does not include digital copyright as a separate issue.[350] Either way, the focus must remain on what is best for the community, which is not an easy question to answer. On the *one* hand, it may be argued that it is best that information is free. On the *other* hand, it may well be argued that the right for all to enjoy the fruit of their labour is

[349] Larsson & Svensson 2010, p. 24.
[350] Information from the Government, *Upphovsrätt (Copyright law)*, http://www.regeringen.se/sb/d/1920
Most recently updated: 2010-04-08, Most recently accessed: 2011-01-05.

more important. Then again, the existence of a copyright law that is applied to the Internet is perhaps not the only way to achieve this. The record industry have already shown that it is possible to increase the number of digital copies sold, and e.g. iTunes have proven to be a successful source of proceeds. Customers have not only approved of the monetary cost: they have also accepted that music bought online comes with technical protection that prevents files from being shared and distributed. In other words, models that protect both income and copyright per se, are already in existence outside the legal system.

4.5.3 Olivecrona: The nature of legal rules

According to Olivecrona, legal rules consist of two elements: the actual content and ideas it conveys, and the form of expression. He argued that it is not sufficient to prescribe a pattern of behaviour; a legal rule must also create a motive for people to act accordingly. The most common method to achieve this is to attach punishment to legal rules. Olivecrona also argued that the legislative text should be put forward in the form of an imperative, thus making people feel obliged to obey. In the case of illegal file sharing, both these points have been compromised to a certain degree.

First of all, the legislator has failed to give people any motives to refrain from copyright infringements on the Internet. While the copyright law is not incorrectly formulated per se, it was not written with infringements online in mind. The text has not been altered to deal separately with physical and digital copies. While this falls outside Olivecrona's core argument (which mainly considered grammar and the use of legal terms as signposts), it can be argued that the copyright law has failed to properly incorporate the new phenomenon of copyright online. Thus, people have not been given any signposts, that is to say, legal language was inadequate in this respect. Since the legal terms of the copyright law have not been connected to the concept of illegal file sharing, people have failed to associate their behaviour with the legislation.

Secondly, and in the same sense, it may be argued that the copyright law, as applied to illegal file sharing, has not passed the formal procedure to become a promulgated law. If we recognize that digital copyright is sufficiently distinctive to be considered a new field of law, then we must also accept that the current copyright law could be considered illegitimate. In order to create a law, Olivecrona argued, the process must include two essential elements: the preparation of a certain type of text and the passing of this text through formal procedure. In the case of copyright and file sharing, this would include re-shaping, or at least re-evaluating, the legal rules in question and then having them pass the formal procedure. Whether this would lead to alterations, new legislation or only minor adjustments is not relevant within this context: it is the process in itself that is important. At the present, digital copies and infringements of copyright have automatically been embraced by a copyright law that existed before these concepts had come into being.

4.5.4 Olivecrona: Bindingness and the use of force

Whereas Olivecrona rejected the idea of bindingness in the traditional sense, he recognized that the concept of binding force is a psychological reality of vital importance. The legal system typically invokes a strong feeling of bindingness which, in turn, gives rise to psychological effects. Maintaining respect for legal rules requires the regular use of force. The threat of force is only one of many reasons why people refrain from criminal behaviour, but nevertheless we cannot dispense with legal sanctions and must remember the interdependence between legal sanctions and law observance. Actually, Olivecrona insisted that the legal system is dependent on organized force, but he also emphasized that it is in the best interest of the state to use as little physical force as possible. He ascribed more importance to the use of psychological pressure in the form of an irresistible power that can use physical force at any moment, should it become necessary.

This view is similar to Lundstedt's on the importance of punishment as a factor in seizing general morality. In the absence of legal sanctions, the psychological effect on people is reduced, and the social pressure is not strong enough to control the people's behaviour. In the case of illegal file sharing, the absence of force in the form of punishment of those individuals who have violated the copyright law, has resulted in disrespect for the law itself. When organized force is applied, it creates a general psychological pressure that is far more important than individual sanctions.

Once again, the conclusion must be that the answer lies in the number of convictions, not in the harshness of individual sentences. Olivecrona argued that the existence of regular and consistent punishment has essential influence on our attitude towards legal rules. It is important, however, that such legal sanctions are motivated by generally accepted and reasonable motives.

This is an important point to remember when considering any form of re-shaping of the copyright law. Since the current law has failed to grasp general morality, it may be inevitable that common moral values must influence the law instead. Should the existing law become subject to change, moral ideas -- or so Olivecrona argued -- are among the most important motives that dictate new legislation. He also held that the monopolization of force by the state was an absolute necessity for both economic and cultural life. While it is understandable that private companies strive to uphold the law and their right to compensation, it would be unfortunate if the state lost control over legal sanctions. Private company resources would undoubtedly make it possible to identify a larger number of illegal file sharers -- but at the cost of separating legislation from the state.

It is difficult to find a simple, sustainable and comprehensive solution to the problem of illegal file sharing. It is particularly difficult at present, when the problem has grown to record levels. There is no doubt that something must be done eventually. Let us recall Olivecrona's words: legal rules that are not backed up by legal sanctions will eventually fall prey to other interests in society. This process has already started, and to reverse it will be a gruelling task.

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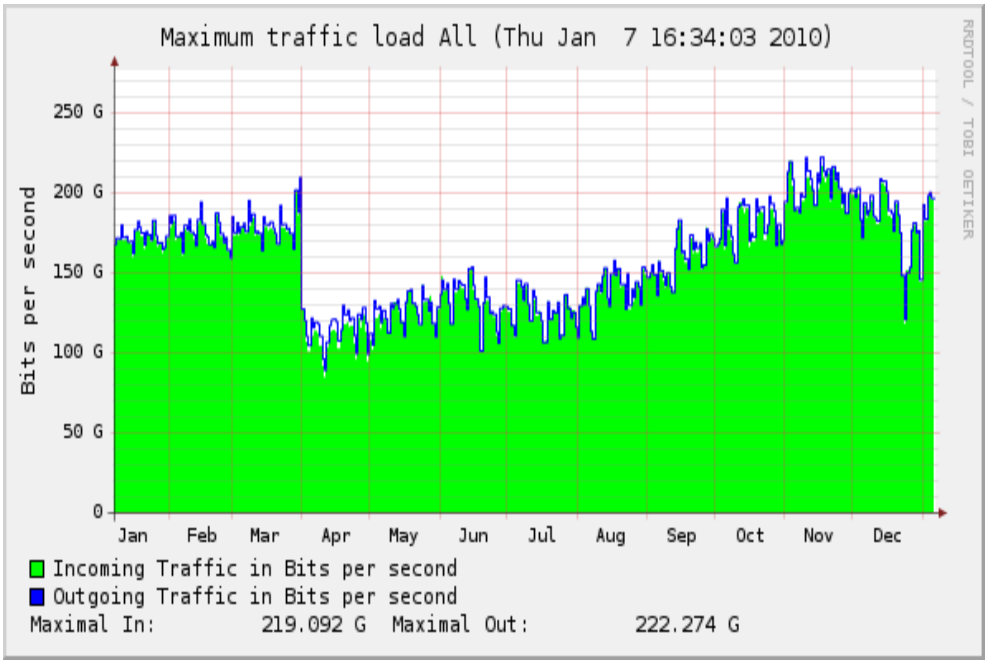

Figure 1: Traffic load in national Swedish exchange points January 2009 - January 2010.

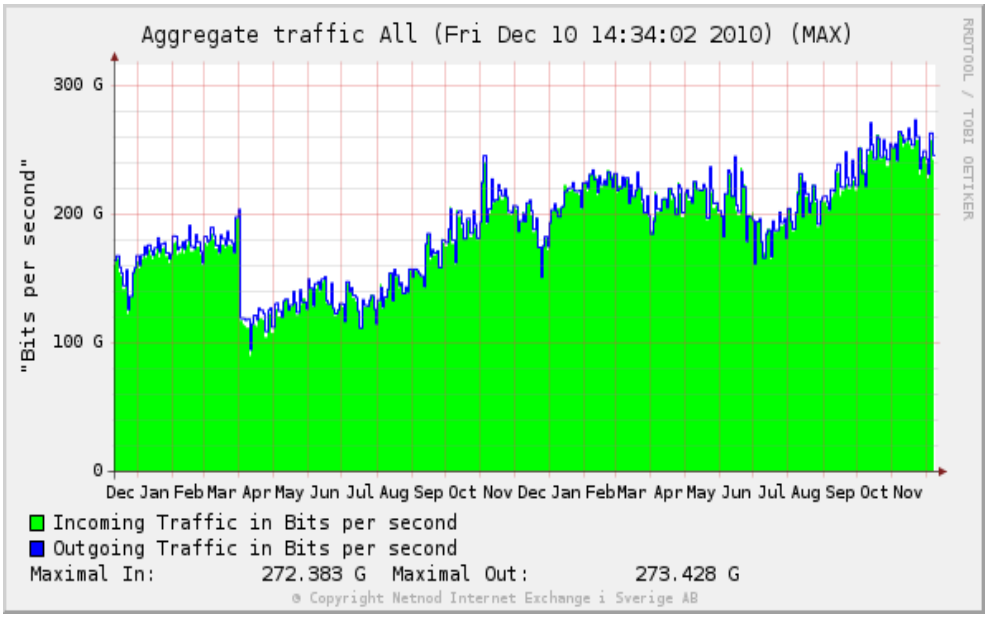

Figure 2: Traffic load in national Swedish exchange points December 2008 - December 2010.