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Copy Me Happy: The Metaphoric Expansion of Copyright in a Digital Society

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Abstract The article uses conceptual metaphor theory to analyse how the concept of "copy" in copyright law is expanding in a digital society to cover more phenomena than originally intended. For this purpose, the legally accepted model for valuing media files in the case against The Pirate Bay (TPB) is used in the analysis. When four men behind TPB were convicted in the District Court of Stockholm, Sweden, on 17 April 2009, to many, it marked a victory over online piracy for the American and Swedish media corporations. The convicted men were jointly liable for the damages of roughly EUR 3.5 million. But how do you calculate damages of file sharing? For example, what is the value of a copy? The article uses a model for valuating files in monetary numbers, suggested by the American plaintiffs and sanctioned by the District Court in the case against the BitTorrent site TPB, in order to calculate the total value of an entire, and in this anonymous *other*, BitTorrent site. These calculated hypothetical figures are huge—EUR 53 billion—and grow click by click which, on its face, questions some of the key assumptions in the copy-by-copy valuation that are sprung from analogue conceptions of reality, and transferred into a digital context. This signals a (legal) conceptual expansion of the meaning of "copy" in copyright that does not seem to fit with how the phenomenon is conceptualised by the younger generation of media consumers.

Keywords Copy · Copyright · Metaphor · Conceptions · Pirate Bay

1 Introduction

When hearing Rob Reid's intriguing TED talk *The $8 Billion iPod*, it becomes inevitably clear that there is something dubious about the calculation of value of

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media products in a digital environment.[1] In the U.S., Congress may designate a maximum $150,000 fine for "willfully" pirating a single copy of a single song under the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.[2] This number is, according to Reid, "grotesquely divorced from the actual damages and harm caused by a single instance of piracy" [53] and regarded as "frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive" by some critics [54, p. 441]. The American music industry has sued more than 30,000 persons under this law, and since the consequences of losing would be devastating to the defendants, the majority settled without challenging the industry. As a result, the maximum $150,000 per song fine has never actually been imposed [53] but is used as a power tool in the extremely asymmetric settlement negotiations. It does, in addition, address the notion of *copies* in copyright, and under what assumptions they should be valued and that this valuation be legally upheld in a digital society. In a relatively recent Swedish case against the world famous BitTorrent tracker The Pirate Bay (TPB), this question was drawn to its ultimate conclusion [13, 14]. In District Court in April 2009, the four defendants were found guilty for assisting in violations of copyright law through the Pirate Bay site. They were sentenced to one-year prison terms and fined roughly EUR 3.5 million (SEK 30 million). Both sides appealed, and the three that were re-tried in the autumn of 2010 were all found guilty yet again and sentenced to higher damages of approximately EUR 5.4 million (SEK 46 million), though somewhat shorter prison sentences. In the TPB case, the figures per copy are exceptionally more modest than in the US regulation, and aim at what songs and movies cost in stores, as DVD and CD, but still rely on core assumptions that follow from an analogue and copy-based handling of media [31]. These assumptions are tested in this article, via the calculation of the value of an entire other (anonymous) BitTorrent site, using a model sanctioned by the District Court of Stockholm in the case against TPB.

The copy-based conception of handling, controlling and distribution of creative expressions is very homogenous in the global copyright regime [36, 37]. In most jurisdictions, copyright owners have the exclusive right to exercise control over copying and other exploitation of the works. The international treaties and directives focus the control over reproduction of the protected creation. For instance, the Berne convention states that authors of literary and artistic works shall have "the exclusive right of authorising the reproduction" (Article 9); the European Infosoc Directive speaks of "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction" (article 2); and TRIPS states "the right to authorize or prohibit the direct or indirect reproduction" (Art 14, section 2). The Rome convention provides us with an explicit definition of "reproduction" in that it "means the making of a copy or copies of a fixation" (Article 3 (e)). Further, Infosoc speaks of "the rightholder of any copyright or any right related to

[1] Rob Reid, TED talks *The $8 Billion iPod* [52]. See also the explanatory blog post Reid, The numbers behind the copyright math, http://blog.ted.com/2012/03/20/the-numbers-behind-the-copyright-math/ (last visited 14 August 2012).

[2] See http://en.wikipedia.org/wiki/Recording_Industry_Association_of_America (last visited 14 August 2012).

copyright." This motivates the analysis of "the copy" as the central concept in copyright, tightly connected to a control over reproduction of copies.

Given that the conditions under which digital media are distributed have changed so fundamentally—from having been stored on various types of well-defined and delimited plastic objects to being disseminated as digital files in networks—the concept of "copy" has expanded to embrace a number of new phenomena consisting of a multitude of file formats for storing and distributing information in digital form. These phenomena possess attributes that resemble those of the original ones (i.e. reproducibility) but also attributes that do not (non-materiality). The fact that copies in a copyright sense once only meant physical entities and now mean both physical as well as digital entities describes a conceptual development of "the copy". It is even possible to reflect upon a future where they no longer are perceived as physical entities. This may be more likely for some types of copies than others. For example, computer games may, in practice, be less of physical entities than books were at an earlier stage in time, but they are still regulated by the same legal construction. Much historical semantic change, as argued by Berkeley linguist Eve Sweetser, is attributable to metaphor: "if a word once meant A and now means B, we can be fairly certain that speakers did not just wake up and switch meanings on June 14, 1066. Rather, there was a stage when the word meant both A and B [57, p. 9]." It is reasonable to think that for a number of concepts that are metaphorically expanded to fit in a digital existence, that stage is about now. However, we tend to need to reuse older concepts to describe new phenomena. Cass and Lauer focus on this conceptual transition in terms of conceptual metaphor theory as a way to support the concept of *skeumorphs* [16]. They use the example of the transition from analogue photography to digital imagery and describe the conceptual borrowings and dependence of the analogue predecessor in order for us to make use of the digital ditto. This comes with both advantages as well as disadvantages in terms of conceptual lock in [see also 34, 38]:

> When the new artefact is described using terminology from a prior iteration, this influences one's intent and encounter with the new artefact. The new artefact is initially understood using the norms and interpretive scheme of the old artefact, which aids in both transition to and adoption of the new medium [16, p. 252].

This means that conceptual metaphor theory can be used to understand how the concept of copies is expanding to also include digital copies and in what sense this understanding of digital copies "us[es] the norms and interpretive scheme" of the physical predecessors. To practically illustrate the problems associated with "copy thinking" in a digital context, this article uses statistics from a file sharing tracker site (similar to, but not, The Pirate Bay) and the monetary values per file that the District Court used in the case against The Pirate Bay [13]. The goal is to calculate what an *entire* site, such as The Pirate Bay, would be worth according to this established, legally sanctioned model. The sum would likely be enormous—demonstrating the ultimate logic of this method of valuing files. This is a way of criticising legal assumptions based on how linguistic and conceptual processes function. Even though the figures in the U.S. example mentioned above may seem

perverted in comparison to the more modest figures found in the TPB case, the latter still signals that there is something lost in translation (or impossible to translate) when the control-over-copy-conception is applied in a digital context. The purpose of the article is to better understand how copyright is challenged by digitalisation. Or, differently put, how current copyright is ill fitted with contemporary digitalised reality:

RQ1: How is the legal conception of a copy challenged in a digital environment?
RQ2: To what extent is this relevant for non-legal debates and rhetorical framing?
RQ3: Which assumptions in copyright, based on analogue preconditions, are the most challenged in a digital context?
RQ4: How is this relevant in relation to the difference between legal and social norms?
RQ5: What can this case teach about change in people's conceptions of reality?

In order to answer these questions, this article argues, in line with the cognitive linguists that follow in the footsteps of Lakoff and Johnson regarding conceptual metaphor theory, that our thinking is essentially controlled by metaphors and conceptions [27–30, 32, 35, 36, 61]. A conceptual metaphor analysis of this legal construction holds similar benefits to the narrative analysis, namely that it "uncovers hegemonic processes" [19, p. 56]. Images and conceptual frameworks largely determine how we understand our reality, and communicate and thereby fundamentally argue and debate. I contend that there is a widespread idea that our thinking is more objectively based than it actually is. The type of constructionism argued for can also be viewed from the perspective of power. Those who maintain control of metaphors and conceptions will be able to shape the discussion to their own advantage. As a sociologist of law, I make the point that this dynamic also manifests in the formulation of law as a dialectical process that incorporates technological progress, social change, etc. Law also adds an aspect of formal power, in line with sanctioned metaphors and conceptions.

2 Metaphors and Conceptions

Conceptual metaphor theory is applied and discussed in various scholarly fields and disciplines such as psychology [48]; political analysis [12] with contributions, for instance, from Drulák [17] and Walter and Helmig [60]; sociology of law [32, 33, 35, 36] and technology studies [16]. Of extra importance for this article is the legal analysis that has been made based on the work of Lakoff and Johnson; for example, Berger's work on rhetorical choices in Supreme Court decisions [7], including child custody disputes [8, see also 6 and 9]; Johnson's analysis of the misleading "objectivist" perspective in law [21]; Morra's analysis of the cognitive approach to legal metaphors [47] and Winter's *A clearing in the forest* [61, see also 62–64]. In addition, Tsai, for example, describes the historical scepticism towards the role of metaphor in law [59]. A few scholars have focused on copyright and its enforcement from a conceptual metaphor perspective, such as Herman in an analysis of copyright as property [20]; Loughlan in an analysis on metaphors in Intellectual Property [45]; and Yar regarding rhetorical strategies in Intellectual Property [65]. In a perhaps

less theoretical, but empirical and argumentative way, Patry deconstructs copyright law from a metaphorical perspective [50].

In short, a metaphor is a "tool" that explains or offers a means of understanding a phenomenon—such as a type of event, a behaviour pattern or a worldly phenomenon—in terms of a better-known concept. We regard life as a journey (with a starting point and destination), or the Internet as a network (for which certain aspects of various types of networks can be used in a symbolic sense to describe configurations of computers and servers) [see 33]. A common perception is that metaphors are primarily illustrative devices of poetic imagination and rhetoric, an expression of extraordinary, rather than ordinary, language [28, p. 3]. Metaphors tend to be regarded as mere linguistic phenomena, as opposed to conceptual. In contrast to this minimalist notion, Lakoff and Johnson have shown that metaphors are omnipresent in our daily lives, not only in language but also in thought and behaviour. Lakoff and Johnson's *Metaphors We Live By* [28] has come to influence much of contemporary linguistic and cognition research. The book asserts that metaphors are deeply routed in our way of thinking. They exemplify with a conceptual "argument is war" metaphor: your assertions are *indefensible*, he *attacked* all of my arguments, my statement was totally *annihilated* by his rebuttal, he aimed *straight at the target* during the subsequent debate [28]. In other words, the ordinary conceptual systems that guide our thoughts and actions are fundamentally metaphorical in nature (see also Max Black's *Models and Metaphors: Studies in Language and Philosophy* [10]). In the words of Bjerre:

> The cognitivists propose that metaphor, far from being a post hoc embellishment of already-formulated thought, is a tool with which the mind constructs concepts in the first place. Metaphor doesn't just express thoughts in an interesting way; it helps to determine or discover them. Metaphors are a way in which we understand. In a word, they are not just linguistic, but conceptual [11, p. 105].

Further, Lakoff and Johnson argue, metaphors arise from interactions with our physical and social surroundings, in terms of *embodiment* [29, see also 22, 24, 26, 32, 51, 61, 63]. Bjerre gives a useful example of an embodied metaphor with 'mental capacity': "This word is literally a reference to containers rather than to mental power, and of course, the mind is not literally a container of any kind" [11, p. 104]. This embodiment, or borrowing from a material reality and bodily and spatial relations, is likely especially visible in the digital discourse. For example, when one seeks to explain what TPB really is, one inevitably uses embodied metaphors such as torrents, swarm, domain, tracker, etc., and it seems to have been a key argument in the TPB case regarding to what extent TPB was, in fact, a "bulletin board", a "platform" or a "search engine", which was of direct relevance for the outcome in the case [58]. These conceptual processes more or less have to refer to already established concepts, which thereby become normative in controlling the conceptions of the new phenomena (such as TPB). The underlying conceptual metaphor or idea controls the allegedly rational use of language to describe a particular phenomenon, and it does so via metaphor and its system for linking concepts. In relation to the construction of copyright law, such underlying conceptions establish a provisional framework for the logical consequences of the phenomenon under debate

[36]. And whoever succeeds in controlling this framework can also manage the course of debates about copyright legislation [20, 65].

In brief, the way that conceptual metaphors are constructed discloses the cultural bias of our thinking [35, 36]. If rigid thinking related to metaphors and conceptions is to be understood, it must be elevated to a conscious level where it can be perused and examined. Given that metaphors are so fundamental to thinking and communication, the fact that the same is true of the legal system should come as no surprise. But there are several, very important problems related to the role of law in distributing power and in cases where the legitimacy of the law is at stake—which are also inevitably related to the highly troubling confusion of "being right" in a narrow, dogmatic sense with being true in an empirical sense. Reality and law do not always go hand in hand.

Metaphors as launched by Lakoff and Johnson often collide in a revealing manner with a more formal view of meaning and truth. Of particular relevance are objective, literary and linear ways of thinking, which regard metaphors simply as colourful, figurative linguistic symbols or expressions to clarify a point [29, see also 21]. This includes the law and legal matters. According to Tsai, legal researchers have often understood metaphors as a perversion of the law at worst—and as a necessary but temporary vessel for argument at best: Metaphors are vague and untidy; they are subjectively appealing, in contrast to the explicit legal argumentation that constitutes the strict, authentic core of the law [59, p. 186]. This particular idea, by the law and about the law, has survived tenaciously through thick and thin. Jeremy Bentham, for example, contended that metaphors were the antithesis of legal reasoning [5]. In other words, the traditional legal view that metaphors occupy an insignificant place and play an unimportant role is poles apart from the findings of linguistic and cognition research ever since the 1980s.

Johnson, for example, has used these insights to study the language-bound legal system [21, see also 62–65]. He asks how we can better grasp the dynamic by which the law understands and draws conclusions about the world. Some of the answers are available from legal cognition research, i.e., the encounter of thought processes with legal concepts and decision-making [21]. According to Johnson, legal reasoning and legally based concepts proceed from an "objectivist" self-image. Inherent to such perceived objectivity is the notion that the concepts have strict boundaries, defined by necessary and sufficient conditions. It has been described in terms of "the illusion of transparency" [62]. In line with this approach, Berger has analysed the ways that custody disputes can be described in terms of metaphors and narratives. Her conclusion is that legal decision-makers cannot avoid being influenced by myths, metaphors and symbols [8], an argument also supported by Bjerre [11].

3 The Pirate Bay Case and the Calculation of Value

Before going into details in the case of The Pirate Bay, I need to point out the rather obvious metaphorical content of the name itself. I have elsewhere [36] made the point that the metaphor is double-sided in terms of being used both by the pro-file sharing side to describe something rebellious and innovative as well as by the

pro-copyright side to claim proprietary ownership over content. It is also a concept that is not completely fixed in its meaning. For example, the definition of piracy has, according to Litman [44], changed over the relatively few years that it has been used to describe the activity of copying. Today, the metaphor is used to describe any activity that involves some kind of unauthorized copying, despite the fact that much of this copying is legal. "Piracy" is by some seen as a transitional concept that may serve a purpose for a briefer time but is likely to have a diminishing role as the discourses around file sharing calm down:

> [The term will likely be] meaningful for the brief period of time when file sharing represents something rebellious or otherwise deviant from a widespread and accepted value system (including one supported by law). If the flows of Internet become the defining paradigm, file-sharing is not likely to continue to be regarded as rebellious or deviant, and will therefore no longer fit well with the "piracy" metaphor [36, p. 97].

The widely reported prosecution of The Pirate Bay led to a conviction in April 2009. The District Court found the four defendants guilty of complicity in violating the copyright act. The court referred to Articles 2 and 54 of the Swedish Copyright Act [25] to the effect that anyone violating its provisions is required to compensate the copyright holder [13, p. 85]. If the violation was wilful, compensation was also to be paid for damages other than loss of payment. It is worth noting that damages were based on the loss that the person committing the *main violation* had occasioned the plaintiffs—rather than the complicity of the defendants. One crucial issue during the trial was, as mentioned, the value of a file. The trial primarily concerned "complicity in violating the copyright act" in a specific number of cases—making 21 music albums, two songs, eight films, one television series and four video games available to the general public [13, pp. 57–58]. The four defendants were convicted and sentenced to 1 year in prison. In addition, they were to compensate the plaintiffs for their losses and court costs. Some of the loss involved "reasonable compensation for utilisation" as prescribed by the copyright act. If the violation was intentional, "compensation for other loss" should also be due [13, pp. 99–101].

In the following sections I will first present how the court reasoned in relation to the calculation of value, and then proceed to, in my opinion, the most interesting model for such a calculation, put forward by a group of the plaintiffs. In order to understand the details of the inherent problems that this model leads to—a site can be valued to EUR 53 billion and grow click-by-click—I present how such a calculation is made according to this particular model approved by the court.

Finding a method for calculating these types of losses is no easy task—and requires reflection. The companies chose various methods of calculating compensation. In determining the size of compensation, generally accepted legal practice is to use various rates (or the like) to construct a hypothetical licence fee. According to the Stockholm District Court, the absence of such rates does not mean that reasonable compensation is not to be paid. Under such circumstances, it is incumbent on the court to assess the matter [13, p. 95]. The Nordic film companies decided to use a hypothetical fee—and the court approved their model. The model was based on the assumption that the Swedish market had six million Internet users, and that neighbouring countries had approximately the

same number. An expert with "long experience as a senior executive in the Swedish film industry" stated that a reasonable licence fee for the three popular Wallander films would be approximately SEK 700,000 (approx. EUR 80,000) and that a reasonable licence fee for the less popular *Pusher 3* would be SEK 150,000 (approx. EUR 17,000) [13, pp. 96–97]. The geographical focus on Sweden in that model is not particularly elaborated upon. It is safe to say that TPB has had a very Swedish focus, not the least due to that the founders are Swedish and much of the initial activity seems to have been located to Sweden. But since the site shifted to English, and given the global popularity of the site, a calculation model based on Swedish consumption is not really rooted in the factual situation. In a recent survey on the file sharing community that was conducted via the actual TPB website by the Cybernorms research group, it was concluded that slightly over half of the 76,000 respondents were located in Europe (54.7 %) and 27.7 % were located in North America [56, see also 42]. The Court is in a sense merely cutting the Gordian knot in accepting that calculation model.

Although this calculation model proceeds from a number of assumptions—and reveals an ingrained concept that a legal case must be linked to a single country—the second calculation model is arguably of greater interest from a metaphor perspective. The Swedish record companies and American film companies used a method of identifying what they "should have been paid" for each individual download of their copyrighted works [13, p. 98]. Use of this calculation method makes several things obvious. The record companies stipulated a theoretical loss of EUR 6.50 per album and EUR 0.70 per song multiplied by the number of downloads [13, p. 97]. The American film companies proposed an approximate cost of between SEK 222.50 (approx. EUR 26) and SEK 261.47 (approx. EUR 30) for the films and SEK 415.81 (approx. EUR 48) for the television series. The District Court found that to be too high and lowered the prices to a more standardised SEK 150 (EUR 17) and SEK 300 (approx. EUR 35) [13, p. 99].

Statistics from one of the other popular BitTorrent tracker sites in autumn 2009 can be used to assess the underlying assumptions of "copy" in copyright. Approximately ten billion downloads had been performed via this other website (statistics that were shared with the author with an agreement on that the name of the BitTorrent tracker should not be revealed). What the files would have been worth if one of the models that the District Court deemed reasonable in the case against The Pirate Bay were to be used can thus be calculated. However, the court questioned the reliability of the counter on The Pirate Bay's website as evidence for establishing the number of downloads. This was only one of the three reasons cited for reducing the number of downloads used to calculate damages by 50 %; the other two reasons had to do with geographical considerations and judicial analogies from illegal file sharing to other right of disposition under copyright law that is performed in connection with calculating the value of copies.[3] Based on the conclusion that half of the number specified by the counter was probable, the District Court found—

[3] The other two reasons stated for reducing the number of downloads specified by the company by 50 %—in addition to possible unreliability of the counter on The Pirate Bay's website—are that the calculation was intended for a type of right of disposition under copyright law other than the illegal file sharing that the case against The Pirate Bay involved in Sweden. The figures could also have been independent of geography.

with certain misgivings—that the actual model for calculating the value of damages was reasonable, which—all things considered—validates the copy metaphor in this connection.

To avoid an obvious criticism of my use of download statistics from another BitTorrent site in calculating value, I will also reduce my figure by 50 % to just under five billion downloads. I am doing so even though not all the reasons for which the District Court reduced the number of downloads by 50 % are relevant here. My point—that enormous amounts can be calculated and in some ways constructed—will still be eminently clear. Assuming as the District Court did that a large majority, say 90 %, of downloads entail copyright violations, a quick calculation shows that at least 4.42 billion illegal downloads were performed via this anonymous site.

$$(9{,}828{,}507{,}127/2) \times 0.9 = 4{,}422{,}828{,}207.15$$

If the statistics from the anonymous BitTorrent tracker are followed, it is obvious that most downloads were film, music and television series. However, several assumptions have been made for the sake of clarity. In the first place, it is reasonable to stick to the assumption that 90 % of downloads were illegal, regardless of category. Not because it by necessity must be true, but to follow the assumptions sanctioned by the District Court. A total of 27.99 of illegal downloads were films and 25.01 % were music. Thus, there were 1.24 billion illegal downloads of film and 1.11 billion illegal downloads of music on the anonymous BitTorrent tracker. TV series accounted for 20.67 % of the offering, which translates to 914 million illegal downloads. The results presented below are rounded off to the nearest integer.

Film: $4{,}422{,}828{,}207.15 \times 0.2799 = 1{,}237{,}949{,}615$
Music: $4{,}422{,}828{,}207.15 \times 0.2501 = 1{,}106{,}149{,}335$
Television series: $4{,}422{,}828{,}207.15 \times 0.2067 = 914{,}198{,}590$

If these results are then used to calculate "reasonable compensation for utilisation" in the manner applied by the District Case in the case against The Pirate Bay according to the claims of the record and film companies, the amounts start to be rather high. If compensation is based on SEK 150 multiplied by the number of downloaded films, the result is approximately SEK 186 billion (approx. EUR 22 billion). If a corresponding calculation is made of music with the additional assumption that 75 % are albums, for which the District Court approved a price of EUR 6.5, and 25 % are individual songs, for which the District Court approved a price of EUR 0.7, the current exchange rate yields a value of SEK 52 billion (approx. EUR 6 billion) for albums and SEK 1.9 billion (approx. EUR 120 million) for individual songs—or close to SEK 54 billion (EUR 6.5 billion) for music as a whole.

Film: $1{,}237{,}949{,}615 \times 150 = 185{,}692{,}442{,}277$
Albums: $1{,}106{,}149{,}335 \times 0.75 \times 62.7 = 52{,}016{,}672{,}460$
Individual songs: $1{,}106{,}149{,}335 \times 0.25 \times 6.75 = 1{,}866{,}627{,}002$

In addition, TV series can be valued at SEK 300 each (EUR 35). My somewhat rough approximations require an assumption, since I do not know what percentage of downloads were individual episodes, an entire season or a number of seasons. But a reasonable assumption is that a majority of people download entire seasons—so that a minority download single episodes. The assumption here is then that 80 % of downloads are entire seasons and 20 % are single episodes. Entire seasons may seem to be overbalanced by this approach, but this is counterbalanced by the omission of single episodes in the calculation below, particularly because the District Court did not determine their price. The District Court valued the individual seasons at SEK 300—which yields a total of approximately SEK 219 billion (approx. EUR 25 billion) based on my calculation.

$$914{,}198{,}590 \times 0.8 \times 300 = 219{,}407{,}661{,}700$$

To sum up, the total value of illegally downloaded music, films and television series from a popular BitTorrent tracker site similar to The Pirate Pay can be calculated at approximately SEK 459 billion (approx. EUR 53 billion) in accordance with a legally sanctioned model based on the production of copies.

$$\text{(film) } 185{,}692{,}442{,}277 + \text{(albums) } 52{,}016{,}672{,}460 + \text{(individual songs) } 1{,}866{,}627{,}002 + \text{(television series) } 219{,}407{,}661{,}700 = 458{,}983{,}403{,}440$$

EUR 53 billion is a lot of money. It is more than half the budget of the Swedish public sector in 2010. But it is nevertheless the value that the calculation model sanctioned by the District Court—based on the copy metaphor under copyright law—yields for a single BitTorrent tracker (in 2009). Not only that, but I have reduced the number of downloads by 50 % for the sake of my mathematical exercise, which is only partially relevant in comparison to the District Court's reasons for reducing The Pirate Bay's statistics by 50 %.[4] If the argument for "other financial loss" awarded to the plaintiffs in the case against The Pirate Bay were also applied and the proportion of the loss in terms of other damages were to form the basis of the calculation, the damages would increase by approximately 50 % to some SEK 688 billion (approx. EUR 80 billion). The above figures are huge however you slice them, but are nevertheless a logical consequence of the District Court's calculation method. How should these results be interpreted? Depending on the perspective, the focus can be on copyright law, i.e., faith in the construction that revolves around the value of individual copies. That would reasonably cause dismay about the enormous amounts of money that the copyright industry is losing out on. The logical, but somewhat hasty, response in that case would be to demand even stronger measures against file sharing in order to recover such enormous income [which is the trend, see 34, 37]. The alternative interpretation is to consider whether

[4] Considering that my goal has been to show the kinds of amounts that may be arrived at by using the price per copy approach in connection with file sharing statistics—i.e., not calculating on the basis of Swedish file sharing per se or whether the judicial analogy from illegal file sharing to other right of disposition under copyright law actually works—it would have made just as much sense to skip the 50 % reduction that the District Court applied to the number of downloads in the case against The Pirate Bay. Another significant difference is that the plaintiffs in the case against The Pirate Bay specified a figure based on a simple counter, whereas I have allowed the site owners themselves to provide the statistics.

there is a fundamental flaw inherent to translating the concept of the value of copies to a digital context.

4 Discussion

The relative reasonableness of the damages awarded in the case against The Pirate Bay stems from the choices that the plaintiffs made. However, it is obvious that those who sued the men responsible for the site intentionally focused on only a small number of works—and a relatively limited period during which file sharing occurred. Let us not forget that these numbers carry with them a *semiotic content*, symbolizing something as they are presented (which is evident not the least in Rob Reid's intriguing TED talk mentioned in the introduction of this article). If many works and more copyright holders had been assembled into a campaign, the amounts would have been so large that an outcry by the general public would certainly have ensued. The Swedish tradition for awarding more modest (in relation to, for example, the U.S.) damages would clearly have been set aside. Whether that would have influenced the actual judgement of the court is another matter—legally speaking, the dichotomy of *right* and *wrong* is just as valid regardless of the amount—but it would have compromised the perceived legitimacy of the judgement and shed light on the dilemma posed by attempting to value files in specific monetary terms.

4.1 RQ1: The Law and Digital Copies

Cognition researchers have demonstrated that metaphors are necessary for thought processes [21, 22, 26–30]. Metaphors provide us with images that allow us to talk about abstractions; they are deeply rooted in our language and mental outlook. Conceptual metaphors are the very building blocks of associative thinking. Nevertheless, these building blocks are not value-neutral: conceptions frame thought structures that bring out functional aspects of some phenomena while concealing or diverting others [36]. A tricky part is found in the lack of awareness of the power of metaphors and conceptions, the fact that they tend to be rather modest and retiring, that they are taken for granted in our language and remain out of reach of our everyday awareness and still in part are a construct which may have a number of alternatives that could distribute power in various ways. Depending on how copyright is conceptualised, debates and arguments follow naturally in its wake [2, 20, 33, 35, 36, 45, 50, 65]. Potential legislative amendments will always be hopelessly trapped within the logical walls inherent to prevailing ideological structures. Once the leading but underlying conception of copyright has morphed from a balance of mutual interests between creators and the general public to a system that focuses on the rights of copyright accumulators, the response to an essentially dysfunctional copyright system is to introduce more sanctions, more control, stricter punishment and further criminalisation of associated behaviours (or technologies) [34, 37]. Critics end up in a position where—trapped in the

prevailing notion on which regulation is based—they have to explain why they are against artists, musicians and authors. No matter that this is more rhetoric than facts.

It is in this sense that the concept of copy in copyright is renegotiated in a digital context to also include digital copies conceptualised in a similar way as for physical copies. This negotiation is rhetorically underbuilt by other concepts mainly relating to physical property in order to make this renegotiation seem just and the following means for enforcement seem meaningful, which I develop more below (RQ2). However, I've attempted to use conceptual metaphor theory in order to clarify the conceptual development that is at hand and to support the argument that digital and analogue copies are phenomena based on essentially different conditions, but sharing a few similarities that keeps this conceptual bridge (legally) intact. The above mentioned media development researchers Cass and Lauer use the term "skeumorph" in order to analyse how conceptual development is occurring in a metaphoric fashion [see also 36, pp. 62–66, 101–104]. The skeumorph is in a way metaphoric in the sense that the name of one phenomenon (such as analogue photography) is reused when talking and thinking about a similar but still different phenomenon (such as digital imagery) [16]:

> When new artefacts are presented to the public, many times they are described with metaphoric allusions that are grounded in prior iterations of that artefact. These metaphors assist people in their transition to understand and use new technological processes and artefacts [16, p. 252].

This means that it is in many ways very meaningful to speak of and conceptualise digital copies in a similar fashion as we do with analogue copies. This is however in some particular aspects not meaningful, and can be described as a conceptual lock-in that prevents us from clearly seeing where the conceptual expansion is failing. To the extent that the value of a copy should represent costs for manufacturing it, which is to some extent meaningful for physical products, is not meaningful in a digital context. There are constraints also to the expanding metaphor (or skeumorph):

> After collective learning about the new artefact that occurs, artefact users may discover new functionalities beyond what the 'transitional functions' suggest and places where the metaphor breaks down [16, p. 252].

There are other reasons for the legally enforced per-copy-valuation, and some of them are historical and derived from its analogue background. We must however be aware of the construction to see where it reaches its boundaries.

4.2 RQ2: Rhetorical and Conceptual Consequences

The manner in which metaphors and conceptions act on a subconscious level harbours a restrictive, conservative and difficult-to-criticise tendency, which makes this type of analysis important, not the least in order to "uncover hegemonic processes", in the words of Halbert [19, p. 56]. Herman [20] has analysed the metaphor of "copyright is property" and shown how rights-based characteristics borrowed from something that is a well-established in an analogue, physical and cultural sense (ownership—primarily property—rights) have also been brought to

bear on copyright issues. One consequence of the rhetorical use of this metaphor is that hackers who circumvent technical obstacles to copying are described as having "broken in" [20, p. 1]. This context very much relates to common ideas of (non-intellectual) property. Herman's analysis signals a loan to the copyright debate of rights-based characteristics of the analogue, physical and culturally well-founded ownership, especially in real estate [see also 50, Chap. 6, and 46, whom speaks of a "simulation of property", p. 275]. The consequence of the rhetorical use of this metaphor is that it becomes natural to talk about someone "trespassing" i.e. hacking technical barriers, and "stealing" in the sense that they are copying, or sharing, computer files. Herman shows that the property metaphor dominates the general mental image of copyright, and therefore much of the debate and sometimes even the thinkers and scholars who seek to reconceptualise the challenge that digital content offers for the law. Metaphors are persuasive tools to simplify complex issues, resulting in a pedagogical and rhetorical advantage for those who propagate the conceptual links to the ownership of physical things [65]. This, in turn, preserves the idea of copies, but also gives a similar rhetorical advantage to frame debates in terms of "theft", "pirates", "parasites", "trespassing", etc. [39]. That is, they are actions based on analogue conditions and physical objects but are metaphorically transferred in order to define new types of actions under digital conditions [36, pp. 102–104, 38, see also 45]. Even if "trespassing", "piracy", and "theft" is to be found outside copyright law in a strict lingual sense, they support the conception of copyright as tangible property, and frame the conception of the "copy" as an entity that logically require legal protection in terms of time, access, reproduction and distribution [2].

4.3 RQ3: Challenged Assumptions

Copyright is a global regulatory structure supported by international treaties, as well as EU and Swedish law. This article maintains that the ostensibly insignificant aspect of copyright law that focuses on monitoring the number of copies produced is a manifestation of an idea or conceptual metaphor that embraces much of the copyright system—and that is in conflict with current reality. The conclusion of the District Court in the case against The Pirate Bay that proper compensation for the plaintiffs was approximately SEK 30 million (approx. EUR 3.5 million)—a figure that at least is somewhat possible to comprehend—stemmed from a calculation based on the value of only a small number of works. Applying time-honoured analogue conceptions for calculating value to the categorisation of digital flows in terms of copies gave rise to a fundamentally different practice—which would still generate absurd, astronomical amounts if the reasoning were pursued to its logical conclusion.

As mentioned, the global dissemination of copyright has led to relative homogeneity in most of the world. This has been accomplished through international agreements (such as the Berne Convention and TRIPS Agreement) and harmonisation within the European Union (such as the INFOSOC and IPRED directives), as well as legal collaboration among the Nordic countries, etc. [34, 37]. Some of this construction concerns control of accessibility and artistic works, but more importantly the control of copies granted to the copyright holder. According to

Article 2 of the Swedish Act on Copyright in Literary and Artistic Works [25], which is relevant in the TPB case, "Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by making copies of it and by making it available to the public…". This provision can be viewed as an idea that was born out of, and worked well in, an analogue world where reproduction and distribution of copies related to actual physical artefacts. Under such conditions, legal protection for control of copies was clearly based on the manner by which the material was disseminated. The law kicked in when someone printed unauthorised copies, often with the intention of selling them, given that such activities were costly. The prevailing assumption seem to be that people listen to music and watch films, as well as consume and store media, according to the patterns that prevailed in an analogue world. For instance, nobody would probably purchase the same album twice, much less ten times. Or, as is probable in BitTorrent file sharing, download the complete Beatles collection just to find a handful of songs you like and erase the rest. An assumption in the per-copy-calculation of value is that downloading something for free with the click of a mouse is a sure indication that it would have been purchased under other circumstances—occasionally for quite a lot of money. Even though economic theory would state that the value of a work would have little to do with the cost of reproduction or distribution the argument is used by the pro-copyright side in the debate as something leaning towards a "right to be paid" [45, 50, pp. 78–79]. There is a notion in the cultural industries that artists (often voiced by the middle men, the production companies) should be able to live off what they create. Economic theory would in this regard be brutally honest. If nobody is willing to pay, then the value of the creations is zero.

This can be seen as that law is artificially supporting a partly very weak market. The market, however, may be weak only if one looks at the focused buying and selling of actual movies and music (etc.) but not necessarily if you view it as a consumption including broadband access, merchandise, live concerts, movie theatres, and a whole range of technological equipment such as smartphones, iPods and computers, that is necessary for taking part of the cultural artefacts. This, of course, has been observed by the content industry the last few years, which has lead to a restructuring of the market in terms of ISPs selling stream-solutions, computer developers to start with music sales, etc.

The dilemma associated with controlling copies also embraces the well-established dichotomy between public and private. According to Article 12 of the Swedish Copyright Act [25], "Anybody is entitled to make, for private purposes, one or a few copies of works that have been made public." However, it is fairly obvious that the line between public and private has radically shifted in a digital context. A number of researchers have called attention to the focus of copyright on copies and the problems associated with specifying the right to control the number produced [36, 43]. That was reasonable in an analogue context when every copy was a physical object but creates a slew of difficulties when translated to a digital context. Even commercial actors that perpetuate a flow-related metaphor such as streamed media must adopt the concept of copy when it comes to counting the number of times that a consumer has clicked to download files. Agreements with

copyright holders rely on this approach. The idea of copy dominates within this framework.

4.4 RQ4: Social Norms and Copyright

Whatever conclusions are drawn about this particular case of copies in copyright, the figures in the example above reveal that copying of audio and video media (legal or otherwise) is in many ways socially acceptable behaviour in contemporary society [as concluded in a number of studies, 1, 18, 40, 41, 55, 56]. The question then arises as to the democratic value of disseminating such media. How can such a powerful social norm be handled when it does not correlate with the way that such behaviour is currently regulated?

Can legislation that promotes stronger and expanded copyright prove successful in practice? If so, at what price? A number of studies reveal that measures are taken by file sharers to be less traceable online [2, 3, 4, 23, 41, 42] especially as a response to harsher copyright enforcement [40, 41]. Is it even possible to secure compliance with such regulation when social norms are so different? Furthermore, the political question arises as to whether such regulation should even be attempted if legitimacy and democracy are to be given their due. Whom is legislation designed to protect? The general public? Culture as an end in and of itself? Market structures and middlemen? A more general question about the legitimacy of the law can also be posed since current legislative trends seem to be criminalising the behaviour of most young people.

4.5 RQ5: Change in Conceptions

Litman's *Digital Copyright* [44] argues that a kind of metaphorical progression—i.e., a shift in underlying assumptions—formed the basis if U.S. Copyright legislation in the twentieth century [44, pp. 77–88]. It began with a fairly narrow perception of the rights that authors and originators were to be granted, and increasingly focused on a reciprocity model that regulated the relationship of a creator to the general public. In the 1970s, copyright began to be regarded more as an incentive model. Litman maintains that the idea of negotiation has gradually been replaced by a model that proceeds from an economic analysis of legislation to define copyright as a system of stimulus measures. She asserts that the success of this model stems from its simplicity, given that it presumes a direct correlation between the scope of copyright and the number of authors whose works are produced and distributed. This framing or logic states that stronger copyright leads to more creativity. This particular regulatory approach, no matter that it can be questioned on a number of accounts, is tightly wedded with the control of reproduction and distribution of copies.

Born Digital by John Palfrey and Urs Gasser [49] argues that the new generation has a completely different attitude to music than the generation that was introduced to the Internet at a later stage in life. They do not think of recorded music in the form of LPs, audiotapes or CDs that can be bought at a record shop. Music for them is a digital phenomenon that can be downloaded, transmitted and shared with family

and friends. This is where the "flow" metaphor acquires cogency, as a polemic against the idea of copy and its control. If we believe the narrative of those who have grown up in the embrace of this omnipresent digital network, it will shape our view of a number of contemporary phenomena related to IT policy, copyright and file sharing. In a recent study on file sharing and media behaviour, which included focus group interviews with 15–16-year olds, the conception of how media is represented became evident. All participants in the focus group study claimed that music and movies were an important part of their lives. Yet, no one claims to even remember having actually paid for digital purchase of either individual tracks or full albums, and physical CDs seem to be a forgotten media [56]. One could therefore argue that parts of the conflicts emanating from the legal regulation of copyright today can be described in terms of a battle of conceptions [36]. The analogically-based conceptions regarding the importance of the control over reproduction of copies battles with digitally based conceptions regarding flow of media where copies in themselves are not of the same importance:

> It is the conditions of reality that has changed quite drastically, when it comes to the possible reproduction and distribution of media, but these new conditions can be conceptualised in different ways. And an important difference between law and society when it comes to conceptions has already been mentioned, and lies in the "fixation" of conceptions in or through law. Conceptions are in a sense more "liquid" in a social context, which means that there can be a conflict in conceptions of reality between the legally embedded and the socially entrenched and distributed [36, p. 125].

An enticing futuristic perspective emerges: the role of the Internet in human life, its emerging character and the posture assumed by contemporary policy. What is happening now—and what will it be like later on? This forward-looking approach harbours an inevitable perspective that concerns generations not the least in the sense that members of the next generation have been born as users of information technology without necessarily regarding themselves as technologically competent. It is simply interlaced with their lives. Their existential notions—as well as their conceptual metaphors—are rooted in this context. Although a flow-based exchange does not necessarily eradicate the concept of "copy," reflection outside the existing, legally formulated way of thinking becomes all that more urgent. Nor is it necessary to present one of the concepts as more correct than the other in some kind of objective sense. What is interesting is how such metaphorical thinking works in an empirical setting. Each of the conceptual models offers certain advantages and disadvantages. However, one of them is legally sanctioned and established as part of a powerful, worldwide regulatory process.

5 Conclusions

In the transition from analogue to digital society with all the associated changes in social patterns, work organisation, public policy, democracy, creativity and reproduction—not to mention the role of the law—mental images, metaphors and

their underlying conceptions will alternately be turned topsy turvy and remain constant. In order to fathom the social norms and behavioural changes that are in the making, as well as the legal and political challenges involved, greater understanding is required of the ways that language and law interact. Some legal elements work well in the new context, some not so well, and previous thought patterns should not be allowed to hold sway to the point that new ones cannot be recognised. This means that metaphors are far from innocent. Those that the legal system employs are inevitably linked to power in one way or another. The law is an ubiquitous instrument of sanctioned governmental control. Successful legal regulation not only prescribes behaviour but includes conceptions about how the world is and should be arranged. However, a plugged-in world calls into question centralised power as the legitimate interpreter of right and wrong. Social norms that have emerged in relation to behaviour based on the changes that the Internet has brought about do not have to be consistent with the way that analogue technology worked before the advent of the Internet. Surrounded by a denationalised world, Castells argues that the new social morphology, the new structures, shake the previously established order—"the power of flows takes precedence over the flows of power" [15, p. 500].

In this case, copyright in a digital society describes a case of conceptual legal change of metaphorical importance. This means that the digital and physical copies that copyright regulates are in many ways similar, yet significantly different phenomena. The important difference lies in that they do not share the same constraints. The copyright-depending (U.S.) industries may make use of this conceptual confusion between intellectual property and property rhetorically. In order to speak and think of the abstract entities, they become embodied and conceptualised in physical terms. The legal conception of copies and the importance of control over their distribution and reproduction may be less meaningful to those, often younger, that are used to the sharing of copies in a digital environment. This fact may be part of the explanation for why the social norms correlating to copyright are weak in these groups. In brief terms, the essence of "culture-bearing products" is conceptualised as more volatile or flow-like than that which is regulated in the control-over-copies-based copyright.

This means that there are legal and policy implications following from the flow-metaphor and the conceptualization of the world it represents. Firstly, it does not make sense to count copies. The number of copies is not a logical conception to regulate in a digital setting. Secondly, and related, the effort to control copies in contemporary IP is misdirected. The artificiality of the boundaries that are created in order to maintain these boundaries and protections are likely not seen as an outcome of natural constraints by large segments in society, which tend to boost the perceived illegitimacy of the law. This also regards geographically bound jurisdictions. In short, the law is not regulating reality as reality is perceived. The distance between the social conceptualization and the legal conceptualization is wide enough for the social contract to be broken in this case. This probably supports the idea that if there is any willingness to pay for media, it would relate more to a flow-based conceptualization of content consumption.

If one were to speculate on the gap between social and legal norms, with regards to copyright from a cognitive perspective, it seems as though the aspects of control over

copies that most contemporary regulation is based upon just does not correlate well with how the younger generations understand reality in terms of media consumption. This would then mean that in order to reinstate existing version of contemporary copyright, without a change in its underlying conceptions, to be fully functional the legislator must not only appeal to rational decision-making (and the fear of getting caught) by an extreme enforcement [55], but this must also be complemented with a whole set of constraints to be enforced upon the digital environment. This environment likely needs to be locked in and limited to function in a similar fashion to the material reproduction and distribution of copies so that people eventually conceptualise this environment as naturally limited and constrained.

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