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Published in:
Linguaculture

2012

[Link to publication](#)

Citation for published version (APA):

Larsson, S. (2012). 'No Man is an Island': Why the 'solitary genius' is too narrow an approach to creativity in a digital context. *Linguaculture*, 3(2), 117-125. <http://journal.linguaculture.ro/en/archive/74-volume-3-number-2-2012.html>

Total number of authors:
1

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“NO MAN IS AN ISLAND”: WHY THE “SOLITARY GENIUS” IS TOO NARROW AN APPROACH TO CREATIVITY IN A DIGITAL CONTEXT

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ABSTRACT

This article focuses on the perception of creativity found in copyright law, which conflicts with the ways in which creativity seems to develop in daily practice; the idea of a “solitary genius” is, thus, contrasted to that of a contextually and culturally dependent creator. Copyright is arguably too focused on the former image and fails to acknowledge or embrace the latter. In addition, the digital context which is also taken into account has contributed in many ways to broadening our views on creative practices and collective collaboration. The norm perspective found in the discipline of Sociology of Law, which constitutes the theoretical support for our analysis, is of relevance to understand creative practices in relation to law. Furthermore, it is used in order to highlight the ways in which many legal concepts have been both challenged as well as transformed and expanded in the attempts to regulate the digital domain, specifically. Finally, the analysis also demonstrates that new expressions and metaphors are formed in an attempt to grasp and capture the new social and creative practices in an online context, while traditional concepts may suffer a “conceptual lock-in.”

Keywords: *norms, creativity, metaphors, digital, copyright*

1. INTRODUCTION

Copyright has been criticised for representing a conception of creativity that is too generously constructed from a romantic notion of a “solitary genius”, who creates original pieces regardless of contextual or other cultural input, inspiration or borrowing (Arewa 2006; Larsson 2011a; Patry 2009; 2011; Rose 1993). According to Woodmansee (1994), the established knowledge at the time of the first copyright law was that each artist worked within a tradition, and that the artist’s job was to carry on

this tradition. The author was, thus, viewed not so much as a worker but as an inspired genius whose literary qualities were the result of hidden and mysterious inner processes. Even though the creative process may continue to seem “mysterious”, the main argument, here, is that it is not so much a socially detached “inner process”; it is both socially and contextually dependent, and by no means detached from the culture that the creator is a part of. We will see that from both a legal, cognitive and norm perspective, the perception of creativity in copyright law is too narrow and too individualistic to capture much of the creative practice. This, as Rose (1993) argues, has survived to form an underlying view of creativity as very much an individualistic feature underpinning contemporary copyright:

Copyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors. Until recently, the dominant modes of aesthetic thinking have shared the romantic and individualistic assumptions inscribed in copyright. But these assumptions obscure important truths about the processes of cultural production (Rose, 1993, 2).

This critique has been voiced for some time now and can be seen in a yet brighter light within a digital context (Boyle 2008; Larsson 2012; Lessig 2008). Rose emphasizes the role of technology in the “moral idea” of copyright in that its modern formation is produced by “printing technology, marketplace economics, and the classical liberal culture of possessive individualism” (142). This, in my view, is an important point to focus on: the techno-cultural dependence of the legal concept itself. This also means that the concept of creativity is likely negotiated in close combination with the artefacts and infrastructure that are in place to support it. As Rose states, the copyright institution is an institution “whose technological foundation has recently turned” (142), a fact that also inevitably changes the very foundation of creativity *per se*, as well as the norms connected to it and regulating it. The Internet, and how we communicate and interact in a digital context, contributes to how copyright legislation is challenged, not only in terms of lack of control over distribution of content but also in terms of how culture and its expressions, as well as creativity itself, are conceptualized and understood (Larsson 2012b, 1022).

Does creativity stem from the hard and focused work of a solitary genius or from inspired creators standing on the shoulders of an already existing culture? How new are the new melodies, movies and paintings, and to what extent do they depend on what has already been created? This article focuses on how creativity is played out in practice in an attempt to relate these practices to the concept of creativity embedded in copyright law. It therefore uses the concept of norms in a socio-legal perspective in order to display the normative gap between that which is socially and

culturally embedded and that which is legally formalized, in order to present the more significant consequences of this mismatch.

2. NORMS AND LAW

The norm perspective as a theoretical model, as well as a focus for empirical studies, has been the object of common and long-standing interest within sociology of law and socio-legal research (Hydén and Svensson 2008; Larsson 2011a; Larsson et al 2012a; Svensson 2008; Svensson et al. 2014). Hence, a basic challenge lies in understanding relations and interdependencies between legal and social norms (Aubert 1972; Larsson 2011a; Svensson 2008). Already, at the beginning of the twentieth century, Sumner (1906) claimed that legislation had little or no independent influence on behaviour, and he emphasized social norms as the important regulator. He claimed that if laws were abided by, it was due to the fact that they corresponded to, possibly originated in, and were at least supported by prevalent norms. Sumner ascribed little reformatory influence to laws, which he stated: “[v]ain attempts have been made to control the new order by legislation. The only result is the proof that legislation cannot make mores” (77).

The norm perspective is a way to understand legitimacy, or the absence thereof, in relation to law. For example, there is a risk that if a law prohibits widely common behaviours, it may lack legitimacy or credibility on a broad scale (Polinsky & Shavell 2000). The importance of social reproduction for norms has been an active ingredient within sociology of law since the days of Durkheim and Ehrlich. This entails a focus on the social sphere and its importance for behaviour and human practices, rather than an overarching focus on law and the legal control of the same. However, as in the case of copyright, there can be aspects in the legal norm that directly collide with its social counterpart. This is commonly described in terms of *a gap between the social and the legal norms* (Banakar 2011; de Kaminski et al. 2013; Larsson 2011a, 2012b; Nelken 1981; Svensson and Larsson 2012).

3. COPYRIGHT NORMS AND CREATIVITY

The American intellectual property expert James Boyle notes that copyright regulation has increased its claims throughout the major part of the twentieth century; however, there is no evidence that this fact has actually encouraged the development of creativity. Boyle argues that, in the last fifty years, copyright has expanded its protection and that this has been done “almost entirely in the absence of empirical evidence, and without empirical reconsideration to see if our policies were working”

(236). This “evidence-free” development runs, according to Boyle, on “faith alone” (236). Law professor Patry shares Boyle’s perspective, emphasizing that there must be a good relationship between what a law should do and what it actually does:

For regulations to be effective, we must be able to quantifiably measure our success (or lack thereof) in achieving the intended purposes. The first step in fixing copyright laws, then, is fixing the way we enact them. Our current laws are based on rhetoric and faith, not on evidence. Unless our laws are based on empirically sound evidence tailored to meet the stated objectives, they do not stand a remote chance of achieving those objectives (Patry 50).

This could be linked to the early Nordic scholar of sociology of law, Vilhelm Aubert, who, in an article on a study on housemaid regulation concludes that “[i]t is also remarkable how references to facts or probable facts could run contrary to available evidence. It suggests that the legislator, on occasion, moves within a social reality very narrowly circumscribed by his political duties to party ideology and electorate, and not to scientific truth” (Aubert 125).

The socio-legal perspective on norms outlined above is of key interest in relation to copyright, I argue, particularly when one seeks to understand not only the lack of compliance to copyright, but also when one wants to assess to what extent copyright is actually fulfilling its purpose of stimulating creativity. The underlying conceptions of how creativity and innovation work and are stimulated are described in the IPR Enforcement Directive (IPRED) that was approved by the European Parliament in 2004 and implemented in the member states of the EU between 2005 and 2009 (Larsson 2011b). The near globally homogenous copyright regime is strongly centred on the assumptions that control is an uttermost necessity in stimulating creativity and innovation, which, in this Directive, is expressed in the following terms: “...without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment is diminished. It is, therefore, necessary to ensure substantive law on intellectual property” (paragraph 3, IPRED).

The problem is that IPRED also provides a strongly individualistic approach to the protection of cultural expressions which, in fact, rely heavily on contextual influence and on what Arewa (2006) describes as “borrowing practices.” Arewa focuses on musical authorship in her analysis of how this type of creativity occurs in practice and relates it to the concept of creativity, as found in copyright, stating that this “individualistic and autonomous vision of musical authorship, which is central to copyright law, has deemphasized the importance and continuity of musical borrowing practices generally” (Arewa 547). Arewa, therefore, sees the role that copyright regulation plays in shaping culture by favouring some types of creativity and abandoning others:

Copyright is, thus, not only shaped by conceptions of authorship but is also a powerful force in melding notions of authorship and delineating appropriate and inappropriate methods of artistic production. As a consequence, what is characterized as unacceptable copying within copyright law can play a critical role in determining what types of cultural production may occur (583).

The dilemma discussed here is that the legal protectionism of contemporary copyright seems to feed on a false notion of how creativity is best stimulated. The stimulation of creativity is an ever-used and all-positive argument. Consequently, most protectionist and privacy-decreasing legislation tries to tap into this argument, in order to gain legitimacy, as in the quote from the IPRED document above. However, there are important elements in the manner in which copyright is globally conceptualised in law that lean towards the concept of the “solitary genius.” This dilemma has been relevant for far longer than the Internet has been around, but it has been further emphasized by the opportunities of digital networks and the remix culture. Consequently, the questions which arise are: What are the concepts through which we *understand* creativity, and what are the artefacts it is linked to?

4. NEWSPEAK AND OLDSPEAK; THE NEED FOR NEW CONCEPTS

Just as the connection between language, concepts and reality is detected in the Orwellian *oldspeak/newspeak*, the cognitive scientists George Lakoff and Mark Johnson (1999) have shown how metaphors are fundamental for our abstract thinking. Metaphors, they say, are not mere lingual expressions but conceptually relevant and connected to reality through “embodiment.” When reality changes, for example, in the way in which media is both produced and distributed, the concepts that have been used for these processes are challenged, expanded and possibly also shown as insufficient (Larsson 2013b). We, therefore, experience a need for new concepts that can capture the new structural conditions (Larsson 2012). Larsson (2011b; see also 2012b; 2013a) has used conceptual metaphor theory to analyse how a few key concepts in copyright law are challenged and expanded in the era of digitization and the whole new set of phenomena that it brings about. For example, “copy” in copyright does not mean the same today as it did in a pre-digital era. According to Larsson, this is one of the aspects that can explain how the lack of legitimacy of the law is weakened in a digital society (compare Andersson Schwarz and Larsson 2013).

There are a number of writers (e.g. Tapscott and Williams 2008; Howe 2008) that have set out to capture how creativity in terms of collaboration is affected by the digital medium. They set out to

understand what drives mass collaboration in a digital environment – an organisational form that copyright law is probably not well designed for – and do so in terms of *wikinomics*. Tapscott and Williams search for effective business models and, therefore, have a pragmatic and open relationship to copyright law; they discuss in detail how different business models offer varied legal challenges. Howe (2008) sets out to capture the creative force in the collective reception of a new potential in the digital society. He does it in terms of *Crowdsourcing* and has a clear focus on (future) business. The T-shirt company Threadless is sometimes brought forward to represent a type of crowdsourcing occasionally termed *crowdvoting* (Brabham 2008). The company selects the T-shirts it sells by having users provide and vote on designs, which are then printed and available for purchase. Despite the company's modest size, thousands of members provide designs and vote on them, making the website's products truly created and selected by the crowd, rather than the company.

One debate in copyright, particularly in relation to the American discourse on Intellectual Property, relates to aspects of loss for the copyright holder that the copyright infringement, through online piracy, triggers. The American copyright industry often speaks of “theft” (Loughlan 2007). This is a framing of the digitally mediated actions of online piracy that emphasizes the “property” in IP and makes it easier to conceptualize the media content to be locked in and controlled by central actors. Patry sees this as highly problematic, and even detrimental to creativity, and he regards current views as the result of “media corporations’ efforts to recast the limited privilege of copyright as real property, and to thereby equate all copying with theft” (Patry 90).

This is the Orwellian point in its essence, where “newspeak” is meant to control thought by the (lack of) concepts in language; however, this time it is the old words that are unsophisticated and rough. 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 (cf Larsson 2013b). If we are to capture the collaborative practices that boom in a digitally mediated network, we also need to elaborate the necessary concepts to achieve that, in order to avoid a conceptual path dependence and lock-in.

3. CONCLUSION

If we accept that the purpose of copyright is to encourage creativity, this view raises the question of what type of creativity is intended to be stimulated. Digital development and the Internet have shown that a tremendous amount of cultural expressions are created without any legal protection, and it is a fact that a significant number of these expressions

are contrary to the existing and very extensive protection provided by contemporary copyright. The conditions of the underlying technology for both creative expressions, as well as their distribution and reproduction, have a vital importance in the way in which we understand – and regulate – copyright. If we cumulate the various tracks outlined above relating to why creativity should not be too narrowly and individualistically regulated, the following should be focused on:

1. *Technology*: Particularly, digital, and especially when connected in networks. Digital technology not only de-materializes the artefacts that carry the cultural expressions in a way that very much challenges traditional (legal) views, but also enables networked communities and collaborations to organize in a scale that was previously unheard of.
2. *Social norms*: Particularly, in relation to legal norms. Any regulation that maintains a gap between what is perceived as right and reasonable in society and how the same issue is regulated by law is greatly challenged.
3. *Cultural and contextual dependence*. Many researchers emphasize the inevitable dependency on the context. The “borrowing practices” seem fundamental.
4. *Conceptual dependence*. The way in which we speak and think of creativity and copyright is to some extent determined by the concepts and metaphors we use. If technology structurally rearranges our society, then the old concepts risk becoming inadequate, and we may find ourselves in need of new concepts and metaphors in order to frame, understand and conceptualize the new phenomena or new aspects of old phenomena.

I have argued that the Internet and the digitization of society question the idea of the “solitary genius” as the most appropriate perception and protective model for copyright. For example, certain types of creativity seem to flourish and are spread and encouraged without a strongly regulated incentive. There are two obvious problems to the approach that this idealized image of creativity offers. First, it appears to have, at least partially, little empirical support (Boyle 25ff.; Patry 49 f.). On the contrary, it could well be argued that it leads to a skewed image of creative practices in terms of how meaning in language is created, how socialization is a key for human development, etc. Secondly, since the idea of the incentive, and the conviction that a strong protection is the only way forward, are so strongly prevalent within copyright debate and legislation, this leads to a rhetorical advantage for those who require longer and stronger protection. This may, in turn, lead to consequences that may be detrimental to aspects such as personal privacy, as well as –

and this is somewhat irksomely ironic – to new creative ways of expression.

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