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# Karl Renner and (Intellectual) Property—How Cognitive Theory Can Enrich a Sociolegal Analysis of Contemporary Copyright

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This article deals with copyright regulation meeting the quite rapid societal changes associated with digitization, and it does so by reinterpreting Karl Renner's classical texts in the light of contemporary cognitive theory of conceptual metaphors and embodiment. From a cognitive theory perspective, I focus on the notion that the legal norms only *appear* to be unchanged—the Renner distinction between form and function. This includes social norms, technological development, and changes in social structures in general, which create a social and cognitive reinterpretation of law. This article, therefore, analyzes the contemporary push for copyright as *property*, which I relate to historical claims for copyright as property as well as de facto legal revisions in intellectual property faced with the challenges of digitization. Of particular relevance here is what Renner described in terms of property as an “institution of domination and control,” and thus the increased measures for control that are added to a digital context in the name of copyright.

## Introduction: Between Form and Function

**K**arl Renner, the Austro-Marxist and early contributor to sociology of law who also became the first prime minister of the young Austrian nation, focused on the role of property and contract in changing Western European societies. In the early twentieth century, he used the rather fierce metaphor of *Chronos* to describe the progression of property by stating that “[t]he evolution of property does not rest, it is like a Chronos who devours—other people’s children” (Renner 2010/1949: 110).<sup>1</sup> In this sense, I will also focus on the notion of property and its shifting claims over time. Influenced by the Marxist theories of his time, Karl Renner’s theoretical examination includes a conception of society as a dialectics between a legal superstructure and an economic base (Grace & Wilkinson 1978: 94). This means that Renner relies on a Marxist

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<sup>1</sup> It is unclear if he thereby repeats a rather common confusion between the Titan Cronus/Cronos/Kronos—that devoured children—and Chronos, the personification of time in pre-Socratic society.

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perspective to construct a sociological theory of law (Treviño 2008: 119–27). Of key interest in Renner’s work is the analytical separation between legal institutions from their *social functions*—that is, in the words of Kahn-Freund (1949/2010: 3), “the factual results of their application.” Renner stresses that it is not law that drives the changes in its *substratum* when he argues, for example, that such as “economic change does not immediately and automatically bring about changes in the law” (Renner 2010/1949: 252).

As Renner so clearly addresses change, it is of particular interest how he conceptualizes what it is that changes in relation to what he conceptualizes in law and legal norms that do not change. Renner offers a view of how the form can remain constant even in transitional times, but at the same time, its content or function can be considerably modified. This article offers a contemporary perspective from the cognitive sciences on how the meaning of legal concepts can change with the context in which we shape their meaning. Renner’s empirical study on the changing functions of property norms does, according to a commentator, demonstrate “the significance of non-legislative developments in the law” and additionally identifies the potential for negotiating “legislative involvement both before and after it does or does not take place” (McManus 1978: 186).

### **Renner and (Intellectual) Property**

Specifically, this article deals with copyright regulation meeting the rapid societal changes associated with digitization as a case of an unresting (intellectual) property making colonizing claims over broadened fields of digital content. As mentioned, I do so by reinterpreting Karl Renner’s classical texts in the light of contemporary cognitive theory of conceptual metaphors and embodiment. *First*, I ask to what extent Karl Renner’s theories on property can be used for an analysis of contemporary intellectual property (IP); *second*, I ask in what sense IP is conceptually expanding as a concept in a digital context, displaying a need for conceptual metaphor theory for its analysis, and in what way such an analysis may be combined with and aided by Renner’s theories; *third*, I ask in what way the digital content is conceptualized as material and tangible objects and what this means; and *fourth*, I ask, following Renner’s argument on the institutions of control that follow property, to what extent this aspect of control is relevant also in the case of intellectual property in a digital society. The fourth point may very well be regarded as the most important here, in terms of how copyright and IP in many ways have been accentuated in the transition from regulating physical phenomena to also regulating digital dittos. As

I explain further below, it is crucial for the argument of this article to see how the digital environment in combination with the aspects of control that IP supports contributes, in fact, to collapsing traditionally supported distinctions between gaining access to a work, using it, and reproducing or copying it. Whether it relates to measurement of reading, shrewdly formulated as “Your E-book is Reading You” in a *Wall Street Journal* article by Alter (July 2012) or conceptualized in terms of Digital Rights Management (DRM) and “copy-locks,” or seen in the architectural settings of streaming services like Spotify, the development remains clear: copyright’s claim is expanding in the digital domain. Although there are exciting methodological possibilities to be derived from, for example, the possible measurement of people’s media use, an established tool in the “data-driven” decision-making processes of internet-based ventures, and controlling the uses of digital artifacts, the focus here is on the aspect of control that this entails, which follows from a property-like copyright regulation operating in a relatively new dematerialized environment.

Although there has not been a continuously strong use or reinterpretation of Karl Renner’s texts over the more than a hundred years since his first works were published, there have been revivals every now and then, particularly when *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* was translated into English in 1949 with an introduction by Kahn-Freund (Kann 1951; Laski 1950) and in the 1970s when a new edition was published (Auerbach 1980; Bottomore & Goode 1978; Kinsey 1983; MacDonald 1977; Robson 1977; Shannon 1977; cf Treviño 2010). Renner’s ideas have also been cited in relation to participation and property rights (Leader 1999) and, perhaps, particularly in relation to sociolegal research on land law (Whitehouse 2010). In 1977, Peter Robson wrote a well-informed article on Renner stating that “the ideas of Renner are still apt today in examining property and society. What has occurred has been changes in the appearance of property, but consistency in its function as an institution of domination and control” (Robson 1977: 221). With regards to property, contracts, and issues of control connected to it as a central function in society, it is rather uncomplicated to find a contemporary application for at least parts of Renner’s work. In line with this, the debate on contemporary IP, particularly from an American perspective, seems to be increasingly focused on claims from the copyright industry that IP should become more property-like. This also follows on a broad trend related to increasingly consolidate copyright in a digital society to be an “institution of domination and control,” which I will return to later.

When Karl Renner provided us with the classical description of how property had been transformed over a period of time in its

social function, but not in its form, the role of property in a digitized world was, of course, not even imaginable. However, Renner's description is relevant for such an analysis, too. There are relevant parallels in contemporary society, I argue, to how "[c]hanges in society had successfully altered the form as well as the social function of property," as Robson (1977: 221) puts it. In addition, and as a driver for this article, I see a need for chiseling out more detail with the tools Renner provided us, and I therefore propose a complementary use of cognitive theory on conceptual metaphors in order to enable a more detailed study of the legal conceptual change at hand; when the letter of the law does not change, but its meaning does, this may be assessed by its dependence on context and societal relevance for its interpretation.

From a sociolegal perspective, as stated by many before me, it is of key importance to study and theorize changes in the meaning of legal language over time. This article demonstrates this dependency from the perspectives of language, cognitive science and conceptual change. The American lawyer David Mellinkoff writes that "[t]he law is a profession of words," emphasizing the absolutely central role of language in law (Mellinkoff 1963: vi). This highlights the importance of understanding how language, meaning, and mind are constructed and also linked to the broader study of law, legislative change, and legal argument in relation to a social or societal context (cf Amsterdam & Bruner 2000). There are a number of studies that touch on cognitive theory in order to understand and analyze the legal fields, to explore, for example, how courts employ selective literalism (Tiersma & Solan 2004), or how even blind people, in a conceptual sense, "see race" because the understanding of race stems from interpersonal and institutional socializations, and not a visual essence (Obasogie 2010).

The development of law, as stated by several legal scholars, is generally conservative and therefore often retrospective. Embedded values are long lasting and consequent upon the main principle of predictability (Aubert 1989: 62; Luhmann 1972: 31ff; Peczenik 1995: 89–90). This has been described and analyzed in terms of the "path dependence" of law (Larsson 2011a, 2011c). Legal reasoning has its method in which categorization is a key and inertia a virtue. As Steven Winter concludes:

... the structure of legal reasoning is essentially the same: it strives to reduce a complex problem to a policy, principle, propositional rule, or some other set of necessary and sufficient criteria. In theory, these definitional criteria will allow professionals to delineate legal categories with greater precision, draw appropriate distinctions, and then make correct decisions. (Winter 2007: 870)

However, as both Winter (2001, 2007) and Johnson (2007) have pointed out, this approach makes it hard to explain how law changes and adapts to new social circumstances. These issues have been addressed continually for many decades. Hohfeld, for example, complained that: “Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional” (Hohfeld 1913: 24). This addresses the difficulties of shaping and creating the language-based legal “tool” that should on the one hand be predictable and reliable, and on the other hand is constantly reinterpreted in a changing societal context.

Karl Renner analyzed the relationship between legal concepts of property and contract and patterns of social change in the development of capitalism in Western Societies. His most important contribution was the aforementioned *The Institutions of Private Law and Their Social Functions* (Renner 2010/1949), first released in German in 1904 and translated into English by A. Schwarzschild, with an introduction and extensive comments by Otto Kahn-Freund, in 1949. Here, Renner argues that law can adapt to changed social circumstances without necessarily changing its form or structure. In the words of Cotterrell, Renner argues that “[l]egal concepts can remain in the same form while fundamentally changing their social functions” (Cotterrell 1992: 49), which has been labeled by Kahn-Freund as the “functional transformation of the untransformed norm” (Renner 2010/1949: 6). Renner concludes that the legal “substratum” of property—“the social substructure”—had been completely revolutionized during the nineteenth century in Western Europe. It is against this fact that the legal setting must be displayed:

Let us begin with this cardinal fact: the law of property has not changed. The Code Civil, the Prussian Land Law, the Austrian Civil Code and so forth—all these codifications that record the victory of the property norm, contain norms that are still valid today. The property norms of the new German code are even somewhat stricter than those of the earlier codifications. There has been no change of norms. (Renner 2010/1949: 87)

The startling fact is that this occurs during a time of enormous economic and societal change, not the least due to industrialization. How is it that the legal form can remain constant and yet regulate a society that is fundamentally different? Renner’s analysis is relevant not only for his particular case, but for legal conceptual development at large—perhaps, especially in relation to when society undergoes rapid transformation. A year after the English translation of Renner’s book was published, Harold J. Laski

reviewed it in a law journal (Laski 1950). In addition to celebrating O. Kahn-Freund's commentary, Laski addresses the change in legal norms in terms of their "functional content" and "inner essence":

Since society is always dynamic, behind norms which often seem timeless there is infiltrated into the formal appearance a functional content which alters their inner essence at every turn of the road. (Laski 1950: 390)

Without more thoroughly focusing on the ontological issues that arise regarding the inner essence of legal norms (which is done by Svensson 2013 and Svensson & Larsson 2012), our focus here lies in what we may see from a cognitive perspective, how changes in the language-based "substratum" of law can be addressed. Laski explains, based on Renner's work, that "legal norms are only apparently unchanged; at some time, they must either be interpreted in terms of purposes their makers never foresaw, still less desired, or they are overturned by those who can no longer accept what the original purposes do to the citizens of a society" (Laski 1950: 390; see also Aubert 1972: 87f; MacDonald 1977; Shannon, 1977).

Because of the fact that "law can adapt to change in ways that may not be readily apparent on the face of legal doctrine" (Cotterrell 1992: 49), the proposed approach allows for a detailed study of the legal surface structures in explicit linguistic forms of expression that have the potential to reveal the underlying thought structures that govern a particular legal construction. It may thus show change in meaning where the specific concepts remain the same (Larsson 2011b: 131–32, 2013b). This, in my view, opens up paths toward a complementary, theoretical contribution drawn from findings in cognitive theory and, in particular, conceptual metaphor theory. The main point of connecting metaphor theory to legal analysis is to understand how the linguistic expressions and metaphors, are linked with underlying conceptions and how our thinking thereby is framed and controlled by the metaphors that have become prevalent and which constrain or steer mental processes (Johnson 2007; Winter 2001). Here I thus argue that cognitive linguistics is significant to studies of the law. The important findings not only take into account the fact that metaphors play a much more fundamental role in mind and language than is traditionally acknowledged in theories of law (Johnson 2007), but also concerns the framing aspects of conceptions and metaphors (Lakoff 2005; Larsson 2011b). This is further emphasized by the process of *embodiment* of metaphors, and, hence, law (Larsson 2013a). In simple terms, law is in need of reification in order to be talked

and thought about. This process, therefore, is of great interest to anyone concerned with understanding law's place in society as a cognitive, lingual and cultural artifact.

### The P in IP

From a cognitive theory perspective, I focus on the notion that legal norms only *appear* to be unchanged. In fact, their meaning may be in constant flux, but I contend that these changes need not be of a conscious character. Rather, we tend to live with the context that is changing the meaning. This context includes social norms, technological development, and changes in social structures in general that create a social and cognitive reinterpretation of law (Larsson 2013c). This article, therefore, specifically deals with copyright regulation meeting the rapid societal changes associated with digitization. I will first address the contemporary trend of treating or arguing for IP as property and then continue to contrast this with a historical perspective.

In most jurisdictions, copyright owners have the exclusive right to exercise control over copying and other exploitation of their works. International treaties and directives focus on the control over reproduction of the protected creation. For instance, the Berne convention states that authors of literary and artistic works shall have “the exclusive right of authorising the reproduction” (Article 9); the Infosoc Directive speaks of “the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction” (Article 2); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) states “the right to authorize or prohibit the direct or indirect reproduction” (Art 14, section 2). In 1982, the famous pro-copyright lobbyist and Motion Picture Association of America president Jack Valenti argued in the U.S. Congress for equating “creative property owners” with other property owners (Lessig 2004: 116f). Already, the use of the term “creative property” is a first step toward framing intellectual rights into a tangible goods property right. This is a mere example of how the pro-copyright industry makes property-based claims regarding the intangible goods that are being copied in the digital sphere because they are beneficial to this industry. To argue for equating copying with theft is yet another, albeit simple, way to colonize the digital phenomena with conceptions based in a physical environment. Herman (2008) shows that the notion of (tangible) property dominates the general mental image of copyright, and therefore much of the debate, resulting in a sort of pedagogical and rhetorical advantage (Yar 2008) for those who propagate the conceptual links to the ownership of *physical* things. It then becomes an educational task of “teaching” IP when copyright, in fact, to some extent seems



dysfunctional in a digital environment (Larsson 2011b; Larsson & Svensson 2010; Svensson & Larsson 2012). This is neither a completely external nor internal question for the law. For example, the statutory definition of copyright in the U.K. Copyright, Patent and Designs Act 1988, section 1, in fact, states that “Copyright is a property right.”

Jakobsson has analyzed the contemporary shift of power from “content providers” to what he calls the “openness industry,” including those players that benefit from lack of control on media distribution such as YouTube, Google, etcetera. Copyright regulation is central for his analysis:

The for a long time dominant view that copyright is a limited monopoly—limited in time and in terms of the privileges that the copyright owner has in respect of the work—allegedly in recent decades have been replaced by a view that sees copyright and ownership as one and the same. (Jakobsson 2012: 71)

This change of perspective is likely to have strengthened copyright holder positions (Lemley 2005). According to Jakobsson, the increased use of the concept of IP can be understood by the development of an increasingly neoliberal-influenced media politics (Jakobsson 2012: 72), and Jakobsson argues that this is particularly true concerning the United States where the protection of private property has strong cultural roots. Even in Europe, it is probably easier to defend copyright by referring to an intuitive understanding of ownership than with abstract reasoning about time-limited monopoly (Jakobsson 2012: 71–72, see also Loughlan 2007). The reasons, however, are not merely the outcome of conscious strategy or a rhetorical claim. I have elsewhere (Larsson 2013d) studied how the valuation of copyrighted content was appraised in the Swedish case of *The Pirate Bay* in order to calculate the damages for the four convicted founders of the site. The study reveals a number of problematic assumptions that followed the click-by-click valuation used by the American complainants, a model that the Court approved. I show how a number of key assumptions are sprung from analog conceptions of reality, and transferred into a digital context. This is a clear sign of a hard-to-detect, legal conceptual expansion of the meaning of “copy” in copyright that does not “fit with how the phenomenon is conceptualized by the younger generation of media consumers” (Larsson 2013d: 1; see also Larsson & Hydén 2010), which is of much greater general interest than one particular court case. The embodiment of the abstract digital phenomena makes it deceptively easy to compare them with a notion of an already present phenomenon of physical copies, and uses a similar logic for how to



deal with the digital equivalents. The problem is that this is a deception; they are not the same.

### Copyright as Property, Historically

While there is indeed an increasing push to treat IP as property in contemporary digital society, this phenomenon is not entirely new. Strong property notions underpinned the early development of IP; the push to use property notions to enhance the protection of rights holders seems in some sense to be cyclical and reactive. The reason can likely be found in the strengths that notions of property have—and have had throughout history. By framing copyright in terms of property, much is gained for those that hold the rights of copyright.

The conception of copyright and the link to the notion of property has changed over the years both in terms of who ought to receive protection, for what reason, and for what type of creations. Historically, this becomes evident if we look at a time before the Romantic notion of the author grew strong, before the idea of the “solitary genius” was established. For example, Schottenius Cullhed (2012) has shown how the fourth-century poet Faltonia Betita Proba has been differently regarded through the centuries. Proba wrote *Centos*, which refers to a method of composing, by which sentences and phrases are extracted from one or several texts and then put together in order to form a new text with a different meaning, resembling some kind of collage or assemblage today. Although positive responses to Proba’s work can be found from the eighth to the seventeenth century, the perspective changes during the nineteenth and twentieth centuries. Now this form of poetry is no longer considered “real” literature, but is instead seen to be a disrespectful theft and misrepresentation of the originals. During the late-eighteenth century, as Woodmansee (1984, 1994) has discussed, the modern idea of the author as a literary individual emerges. The notion of an “inspired genius” has played a part in strengthening copyright protection, which Hemmungs Wirtén (2004) shows through an analysis of the role Victor Hugo played in the establishment of the first international treaty on IP, the Berne convention.

However, historically, and one could argue today as well, there has been confusion about the role of authors and the industry benefits of strengthening authors’ rights. Rose describes this as a “contradiction between the romantic conception of authorship—the notion of the creative individual—that underlies copyright and the fact that most work in the entertainment industry is corporate rather than individual” (Rose 1993: viii). Although Rose focuses on eighteenth-century Britain and “literary property,” his perspective

is vital in exposing the origins of property. When the Statute of Anne was enacted in 1710, it was in part a legislative extension of a long-standing practice of the ancient London guild of printers and booksellers, the Stationers' Company (Rose 1993: 4). An innovation in the Statute, however, was the limited term of protection, while the guild's protection was, or had been, perpetual. Authors of this time, in the early 1800s, were still very much dependent on patronage and writing was only to a very small extent an autonomous trade with its own economic strengths. The London booksellers sought to maintain their position by establishing that copyright was perpetual, despite the claims of the statute. While the booksellers' strength was still very much reliant on their intimate connection to, or appropriation of, the authors themselves, interestingly enough, their claims had a rights-based approach stemming from common-law rights of property transferred to them by the authors. These rights of property were dependent on the classical liberal discourse represented by John Locke's notion of the origins of property in acts of appropriation from the general state of nature (Rose 1993: 4f). This meant an extension of the liberal theory of property, now targeting the work of the authors. This "immaterial" property was here argued to be no less real and permanent than any other kind of estate. The confusion between the interests of the artists and those of the publisher, and the rhetorical use of this confusion, was early on exploited by publishers in the eighteenth century version of copyright law in the United Kingdom. And when it came to controlling copyrighted works, the publishers gained strength from John Locke's theories on the rights following from property (cf Volgsten 2013: 77f). The reason for this was that the alternative, a license solution, would be less beneficial to the publishers.

Even though property-based claims of copyright are not new, copyright itself has changed immensely over the years, particularly in its scope and reach. While it originally concerned authorship over books, it now also concerns music, architecture, software code, photography, etc. This displays the inevitable connection to the reproducing technology. As Eisenstein said before digitization entered the stage in *The Printing Press as an Agent of Change* (Eisenstein 1980: 121): "[u]ntil it became possible to distinguish between composing a poem and reciting one, or writing a book and copying one; until books could be classified by something other than incipits; how could the modern game of books and authors be played?" Rose, too, notices the technological foundation of the regulation, and it is quite remarkable that even if Rose in the early 1990s had not yet seen the breadth of online creativity we witness today, he saw the construction of the institution of copyright as fundamentally challenged by digital technology:

Copyright developed as a consequence of printing technology's ability to produce large numbers of copies of a text quickly and cheaply. But present-day technology makes it virtually impossible to prevent people from making copies of almost any text—printed, musical, cinematic, computerized—rapidly and at a negligible cost. (Rose 1993: 142)

Rose emphasizes the role of technology in copyright's "moral idea" in terms of its design having originated in "printing technology, marketplace economics, and the classical liberal ownership individualism" (Rose 1993: 142). This means that the benefits of the "propertization" of copyrighted goods have been around at least as long as the Gutenberg press. But how should the particular technological development from material to immaterial reproductions of copyrighted goods be regarded—as a change in degree or a change in kind? Renner may not be very helpful here, but in terms of what he calls the development of the social substratum, he claims that it "knows evolution only, not revolution" (Renner 2010/1949: 253); that is, its development is a gradual process rather than the outcome of leaps. When it comes to the technological and ontological change that is relevant for IP in a digital context, I will return to this later in terms of "control."

### **Between Legal and Social Norms**

The gap between law and what can be termed social norms has, in the field of illegal file sharing of computer programs, movies, and music via the internet, been widely discussed (Altschuller & Benbunan-Fich 2009; Feldman & Nadler 2006; Jensen 2003; Larsson 2011b, 2012a; Larsson, Svensson, & de Kaminski 2012a; Larsson et al. 2012b; Lessig 1999, 2008; Moohr 2003; Schultz 2007; Strahilevitz 2003a, 2003b; Svensson & Larsson 2009, 2012; Tehranian 2007; Wingrove, Korpas, & Weisz 2010). Several studies have shown that a large segment of the global population sees illegal file sharing via the internet as a natural element of everyday life, irrespective of the IP regulations of the state (Andersson Schwarz & Larsson 2013; Goodenough & Decker 2008; Svensson & Larsson 2012). In addition, or perhaps consequently, there is a counter-narrative to the protectionist push. NGOs such as the *Electronic Frontier Foundation* (EFF) propagate digital rights and list what they consider patent abuses. The *open source movement* supports the use of open source licenses (such as Mozilla Firefox and Android), as opposed to traditional proprietary software (such as Microsoft Office). Furthermore, *Creative Commons* is a well-known concept and movement in the copyright field and a good example of how writers, composers, photographers, and other creators can

modify and oversee their copyright claims. On a more political level, there are a number of Pirate Parties in different countries; the Swedish Pirate Party, for example, received two European Parliament seats in the 2009 election, and the German Pirate Party received 9% of all votes in the 2011 regional Berlin Parliament election.

### Conceptual Legal Change

In addressing Renner's analytical approach to the difference between the legal form and its social function, IP is of particular interest—especially, when trying to understand law in a digital society. The concept brings together all aspects contained in the argument put forward here regarding social change and its relation to law: it is connected to a particular language-based legal concept; it is central to most legal and economic systems; it is of substantial metaphoric content; and it is especially challenged by digitization (cf Larsson 2013b). For example, Mark Johnson states that “we speak of intellectual property, such as ideas we have that can be copyrighted, patented, and excluded from use by others. Intellectual property is only metaphorically an entity, and it is only metaphorically transferrable to another for their use” (2007: 866). As Renner does not clearly investigate what it is that, in fact, changes in the content of the legal norms that drive social change or change in law's substratum, there is a need here to express this type of change in terms of conceptual change, a change in meaning. One way to address this cognitive dimension of legal change is through conceptual metaphor theory.

In the development of metaphor theory, Max Black's *Models and Metaphors* (Black 1962) has been influential in introducing a cognitive dimension. Black states that the metaphor is not just an aesthetic embellishment of language, but that it also organizes and transforms our perception of the original term. The cognitive metaphor studies that have inspired this article started around 1980, with Lakoff and Johnson publishing *Metaphors We Live By*. Metaphor studies have found their way into policy research and political analysis (Amsterdam & Bruner 2000; Carver & Pikalo 2008; Drulák 2008), often theoretically influenced by Lakoff and Johnson (1980, 1999), Black (1962, 1979) or the pragmatic philosophy of Schön (1979). Conceptual metaphor theory has been used for analyses of legal processes or debates relevant to law in many studies (Berger 2004, 2007, 2009, 2011; Blavin & Cohen 2002; Herman 2008; Hunter 2003; Johnson 2007; Joo 2001; Larsson 2011b, 2012a, 2012b, 2013b, 2013c; Morra 2010; Tsai 2004; Winter 2001, 2007, 2008). The key idea of metaphors is that they are analogies that allow us to map one experience (the target domain) in the terminology of another experience (the source domain), and

thus acquire an understanding of complex topics or new situations. Metaphors tend to be viewed as exclusively linked to linguistic structures rather than to thinking and the mind. In contrast to this minimalist conception of metaphors, Lakoff and Johnson have shown that a metaphor is not simply a figure of speech but a “figure of thought” (Lakoff 1986); that is, metaphors not only carry lingual, but also *conceptual* features (Lakoff & Johnson 1980). The concept of *metaphor cluster* is sometimes used to describe how concepts can be bound together over a similar underlying conception, and thereby support the meaning of each other (Larsson 2011b: 60–61, 72–73, 2012a, 2013d), for example, to analyze metaphors in copy-right and IP (Loughlan 2006).

If, for a moment, we view the concept of property from the perspective of categorization, often addressed in cognitive theory, we can first conclude that much of human reasoning and language depends on categorization (Johnson 2007; Lakoff 1987; Lakoff & Johnson 1999; Larsson 2013a; Winter 2001). According to the classical view, which often is the prevalent one in law (Johnson 2007), categories should be clearly defined, mutually exclusive, and collectively exhaustive (Lakoff & Johnson 1999: 373–414). However, a cognitive approach following Lakoff and Johnson (1999) renounces the classic approach in that it accepts that natural categories are graded (they tend to be indistinct at their boundaries) and inconsistent in the status of their constituent members. It is not that the classical view is entirely wrong, according to the cognitive approach; it is just that the categorization based on shared properties only displays a (small) part of the story (Lakoff 1987: 5). This means that even categories are to some extent culturally biased. Categorization, for example, is expressed by Bjerre (1999) as a core activity even in law: “Legal thought is, in essence, the process of categorization . . . [c]ategorizing phenomena determines how they will be treated by the legal system.” Bjerre concludes that “[t]his basic truth is particularly important to the law because so much of it consists of arranging the world into language-based categories: ‘property,’ ‘contract,’ ‘good faith,’ ‘consent,’ ‘proximate cause,’” etcetera (Bjerre 1999: 354). In terms of Renner, one could say that the categories of property and contract have remained, but their social functions have changed immensely (think of clickwrap agreements, for example). Bjerre’s intention is to show that the concept of property, too, has a “radial structure” (1999: 354), which Johnson describes in terms of its metaphorical content:

The concept “property” is not a classical category defined by a set of necessary and sufficient conditions. Instead, the concept is a vast, radially structured category with a small number of central members or prototypical cases surrounded at various distances by

noncentral members, according to principles of extension such as conceptual metaphor and metonymy. (Johnson 2007: 867)

Crucial to the conceptual change that claims IP as property lies a cognitive operation that can be described as *embodiment*. It means a borrowing of concepts from the physical and spatial, as well as the body, to make sense of abstract phenomena that may play a role in the legal conceptual change of property into a digital domain. As a part of conceptual metaphor theory, embodiment is of great importance for the process of something becoming meaningful, according to the focused strand of cognitive science (Gibbs 2005; Johnson 1987; Kövecses 2008; Lakoff 1987, 1993; Lakoff & Johnson 1999; Winter 2001). This means that there is constant borrowing in progress and interdependence on the surrounding context, the body as well as spatial relations, in order for language to become meaningful. In short, metaphors are often based on our interaction with our physical and social environment (Lakoff 1993). This is likely a process that makes it easier to speak and think of IP in terms of physical things. It fits well with what Michael Reddy first identified as the *conduit metaphor* system (Reddy 1979; see also Winter 2001: 52–56, 2007: 884), which is a systemic set of mappings from the source domain of physical objects to the target domain of mental operations that observes that physical or spatially related phenomena such as objects, seeing and grasping metaphorically are used for conceptualizing abstract concepts such as ideas, knowing and understanding: “ideas are objects,” “knowing is seeing,” “understanding is grasping” (see also Bjerre 2005). The conduit metaphor system enables us to automatically extend the conceptual mapping by modeling other actions in the physical domain—as a result of embodiment.

### **Analysis: Conceptual Transition of (Intellectual) Property**

When Karl Renner analyzed the changes in the substratum of law in societal transition from a feudal to an industrialized society, he focused on the economic institutions in a Marxist fashion. Notwithstanding, he does not deny that the changes in social functions in the long run can lead to legal change (MacDonald 1977: 8). However, when it comes to the legal substratum of property in a digital environment, this social substructure, I have argued, could be analyzed from the perspective of how concepts form and change their meaning from a cognitive point of view.

The combined metaphors of online piracy *as* theft in a copyright context very much relate to common ideas of (non-intellectual) property. Herman (2008) has analyzed what he calls

the metaphor of “copyright is property” and hence the loan to the copyright debate of rights-based characteristics of the analog, physically, and culturally well-founded ownership, especially in real estate (see also Patry 2009: chapter 6; and McLeod, who speaks of a “simulation of property,” McLeod 2007: 275). The consequence of the rhetorical use of this metaphor is that it becomes natural to talk about someone “trespassing,” that is hacking technical “barriers,” and “stealing” in the sense that they are copying or sharing computer files. Herman (2008) shows that the property metaphor dominates the general mental image of copyright and therefore much of the debate, and sometimes even for the thinkers who seek to re-conceptualize the problems that digital content offers. 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 (see Yar 2008). This, in turn, preserves the idea of copies, but also gives a similar rhetorical advantage to framing debates in terms such as “theft,” “pirates,” “parasites,” and “trespassing.” That is, the use of actions based on an analog life of physical objects, but metaphorically and “skeuomorphically” transferred in order to define the new type of actions within the digital (Larsson 2011b, 2013b, 2013d; Larsson & Hydén 2010).

When it comes to an analysis of the conceptual change that IP and property has gone through, some extra attention needs to be focused on the origins of the concept of “copyright.” Where the English focuses on the “reproduction” in *copyright*, the Swedish and Nordic countries stress the “origin” in *upphovsrätt*, and the French highlight the “author” in *droit d’auteur*. When it comes to terminology concerning “copyright,” we also frequently encounter an anachronistic treatment. The concept, and the conceptualization, has changed quite drastically over the centuries. For example, Hemmungs Wirtén studies the several centuries old historical origin of contemporary copyright and addresses the lingual differences in the times of the drafting of the 1886 *Berne Convention for the Protection of Literary and Artistic Works*, claiming that the Convention is a “negotiation between legal systems, between copyright and *droit d’auteur*, between civil law and common-law traditions” (Hemmungs Wirtén 2011: 11). This means that there have been quite different conceptualizations and cultural origins and meanings that have had to be managed within similar legal concepts. Further, what once concerned authorship and books has over the years been expanded to include composing and music, filmmaking and films, photography and photographs, and even computer programs.

When Rose (1993) and Woodmansee (1984, 1994) conducted their analyses over longer historical periods, they mainly relate to



authorship, that is, in relation to the creation of texts and books. During the late 1700s, the rights came to include composers' printed music in English law (Fleischer 2012: 122), which received no Swedish legal counterpart until nearly a century later (Volgsten 2012). Another conceptual mash-up can be found in the legal difference between copyright protection per se and so-called neighboring rights. As composers and writers receive protection as creators, so do musicians (performers) and record labels (producers of sound recordings) obtain rights relating to the specific recording. The origins of the rights to these different categories are different, but the categories are not always kept apart in public debate, which displays the blurry borders of the copyright concept.

### **Conceptual Expansion of IP and the Combo of Renner and Cognitive Theory**

If, for a moment, we accept the notion “copyright is property,” or at least let the concept of property be blurred in terms of “intellectual property,” this conceptual expansion can be seen in the details of how the storage medium has changed from physical entities to digital. Whenever metaphors serve as conceptual bridges between one technology and another, it must be considered whether the norms that regulated the former phenomenon, which lends its name, can also stain the new phenomenon (Larsson 2013b). Cass and Lauer (2004) give the example of how the abstract and new digitized environment naturally requires concepts. Many of these are brought in from somewhat similar, but not identical, activities in the non-digital world. Cass and Lauer use the example of the transition between analog photography and digital imagery. This metaphorical transition is likely often neglected in everyday life. Even if we were able to consciously detect the metaphors, the associations that are made instantly do not prioritize non-metaphors (Glucksberg 2008). I have elsewhere (Larsson 2011b) studied a number of concepts from the digital domain in order to shed some light on how copyrights concepts have expanded in a digital society (see Figure 1).

The problem that emerges, then, is that whatever restraints and opportunities formed the characteristics of the source domain may not be the same for the target domain. In fact, the differences may be major. This is, as the third row of examples below (Figure 1) might indicate, also applicable to copyright law and the objects it seeks to regulate. Before the days of digitized content, copyright law regulated reproduction and rights over the distribution of physical copies. That means that when a book was printed, in all the aspects of printing a book with covers, binding, ink, and glue, and distributed without the authorization of the copyright holder, this

Source Domain	Target Domain
ANALOG/PHYSICAL	DIGITAL
Mail	→ E-mail
Trash can (garbage bin)	→ Trash can (file deletion)
A copy (a record, a tape etc.)	→ A copy (.mp3, .jpg, .avi etc.)
Theft (removing objects)	→ Theft (copying digi. files)
Chat (casual conversation)	→ Chat (digi. instant messaging)

**Figure 1. Examples of conceptual development from analog to digital. From Larsson, 2011b.**

action could be judged as a violation of the rights the rights-holder received from the law. The same applies if someone pressed vinyl records and distributed the music engraved into the plastic tracks. Today, the same regulations and the same legal concepts also regulate digitized content.

The technologically focused concept of “path dependence” can be used to analyze copyright’s development in a digital society in order to outline its lock-in effects (cf Larsson 2011a, 2011c). This would support the notion that a “conceptual path dependence” can explain how particular conceptions embedded in (copyright) law can become a conflicting social development in transitional times. Renner, too, observes the legally relevant “conceptual path dependence” in relation to societal change as a sort of mental inertia:

The most surprising fact is the lack of social observation. Millions of people live among changing conditions, they feel daily their practical impacts, yet their theoretical implications do not become conscious to them. They think in concepts of a bygone generation. (Renner 1918: 51, translation in Aubert 1969)

This can be interpreted as an empirical approach to a legal assessment of how law is related to the conceptualizations and metaphors it relies upon. Even today, although we quickly adopt the new technologies of smart phones, emailing, and (for some of us) BitTorrent networks, it is hard to reconceptualize their meaning for law without a type of conceptual path dependency in the reuse of old concepts to understand the new (Larsson 2013b). Arguably, therefore, even copyright in a digital society suffers greatly from a “lack of social observation.”

### **Copyrighted Content as Tangible and Material Objects**

As law professor Steven L. Winter explains, reification—the metaphorical making of abstracts into things—is a metaphorical

process of great importance to law. For example, Winter claims that it is not possible to talk about law without the metaphor of “object” (Winter 2001: 334). For a law to be broken, we must first conceptualize it as a thing that can be “broken.” It must first be seen as an object that a criminal can “take into his own hands.” In short, it is hard to imagine law without this reification (Winter 2001: 334), which, as mentioned, often is termed embodiment. This means that law in general seems to need metaphors that embody a physical, spatial or some sort of contextual source domain, as does copyright law in particular. In fact, much in the digital domain seems to need metaphors to be talked about or even thought of. With the material objectification of copyrighted content follows the meaningfulness of metaphors that are dependent on this conception. Larsson (2013d) argues that from this conception follows a pattern of metaphors of which the metaphor of copies is central. It asserts that the content can be replicated in exact identical packages, copies, originating from an original source. These copies can then be owned, replicated, stolen, and pirated, which in other words means that they can be clustered according to a certain pattern that collectively describes the underlying conception. Loughlan speaks of “metaphor clusters” in IP debate and analyzes several clusters she identified:

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

In relation to (non-intellectual) property and the norms surrounding it, theft is one of the clearest breaches. It can be described in the words of sociologist of law Vilhelm Aubert: “[a]mongst those legal rules that protect the position of the owner, the regulations of theft are one of the most simple, most stable and most known” (Aubert 1972: 91, my translation). The example of “stealing” in relation to “sharing” in a digital context can be used to illustrate a type of “battle of conceptions.” What from an analog perspective is regarded as theft (an action with highly negative connotations) is from a digital perspective regarded as something else, with less or no negative connotations. Normatively, it could be said that these actions are not comparable. The legal concept of theft is closely related to the conception connected to “copyright as property,” and describes how the idea of property rights is formed in an analog

reality and transferred to a digital one, which is a process containing a number of great challenges (see Loughlan 2007 on “theft” and IP). An example of the rhetoric surrounding theft, as well as a case in which internet service providers (ISP) are seen as having a key role in copyright enforcement, can be found in the deal that was struck in July 2011 between a coalition of entertainment industry groups and several major U.S. internet providers to fight online infringement. The deal resulted in a “Copyright Alert System” that was launched February 25, 2013. The key idea is to notify and “educate consumers about the importance of copyright.”<sup>2</sup> Cary Sherman of the Recording Industry Association of America commented the deal by stating, “[t]his groundbreaking agreement ushers in a new day and a fresh approach to addressing the digital theft of copyrighted works” (*Wired*, July 7, 2011). The problem of arguing that file sharing is theft lies, of course, in the aspect of loss. There is no loss when something is copied, or the loss is radically different from losing, say for instance, your bike. The loss lies in that you are likely to lose someone as a *potential* buyer of your product. The “theft” argument is an example of how a conception tied to a traditional analog context is transferred to a newer, digital context (Larsson 2013d; Larsson & Hydén 2010). It describes a change in the substratum of property, without changing the letter of the law, in the sense that “[l]egal change (no less than stability) is contingent on, and therefore constrained by, the social practices and forms of life that give law its shape and meaning” (Winter 2007: 897).

### **Körperlich and Control**

Although the explicit focus in this article regards the underlying understanding of what property is in terms of an expanding notion of IP, this image has to be complemented with actual and explicit legal change as well. Even though I specifically address the “contextual” shift that affects the interpretation of legal norms, it is a fact that copyright regulation—whether through treaty negotiations in the name of trade, through European Union (EU) Directives, or through national law-making that is more or less affected by the intervention of strong pro-copyright lobbyists—has undergone a quite dramatic change over the last thirty years or so. Therefore, in this section, I first address the conceptual and contextual aspects of the changes; and second, the explicit legal maneuvering that has been conducted in this field. All under the notion of *control*, which I argue is of particular interest in a digital context.

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<sup>2</sup> <http://www.copyrightinformation.org> [last visited November 18, 2013].

Lakoff and Johnson (1999) claim the mind not only to be “corporeal,” but also passionate, desiring and social. They emphasize the meaning of the body in the world, its connectedness to it, and describe it in terms of “the properties of mind are not purely mental: They are shaped in crucial ways by the body and brain and how the body can function in everyday life” (Lakoff & Johnson 1999: 565). They clearly state, in terms of embodiment, the conceptual dependence on “what we walk on, sit on, touch, taste, smell, see, breathe, and move within. Our corporeality is part of the corporeality of the world” (Lakoff & Johnson 1999: 565). It means that how we understand any abstract phenomena, including ownership over digital entities, is stained by models from a physical, spatial and “corporeal” frame of understanding.

Renner uses the term “corporeal” on a number of occasions to describe the transformation that property has gone through and that it now is “no longer burdened with physical substance” (Renner 2010/1949: 217). It was the translator Schwarzschild who chose the word “corporeal”, in translation from the German “körperlich” (see pp. 81, 85, 89, 104, 107, 113, 217, 278, 293):

We see that the right of ownership thus assumes a new social function. Without any change in the norm, below the threshold of collective consciousness, a *de facto* right is added to the personal absolute domination over a corporeal thing. This right is not based upon a special legal provision. It is the power of control, the power to issue commands and to enforce them. (Renner 2010/1949: 107; see Aubert 1969: 34)

This is a process that can also be seen also in the expanding claims of contemporary IP that increasingly attempt to see “copyright as property” in terms of a physical object. This reification could be described in Renner’s words: “Legal property is a corporeal object” (Renner 2010/1949: 278). An important bridge in the conceptual claims of “copyright as property” lies in the aspects of control that have increasingly been added to the digital environment. Renner sees that the added aspect of control as matter-related only changes to “control of human beings, of the wage laborers, as soon as property has developed into capital” (in Aubert 1969: 34). In a digital domain, control is essential, too, for IP to be upheld. One of the main consequences of the strong path dependence of copyright is that legal enforcement is also experiencing important changes when it comes to the opportunities offered by tracking our digital traces, to *control* the flow of the internet, and to track the identities that breach the laws of IP. More individual traffic data are stored, the data are stored for a longer period of time, and accessibility to the data is made easier for not only policing entities but also rights holders in order to map and identify infringers of

copyright. This means a potential for new ways of legal enforcement and mass surveillance over the multitude of habits and secrets of our everyday lives (cf Larsson 2011c: 30).

From a cognitive point of view, these surveillance-like consequences of an increased push for copyright enforcement in a digital context are of particular interest. To what extent are we, for example, adapting our behavior in the awareness that we might be traceable in our online activities? What does it mean that the digital traces we leave behind in terms of traffic data, social media posts and search engine patterns offer well-functioning profiling for those who can aggregate the data? Inspired by Foucault (1991), who was inspired by Bentham's prison design, some scholars discuss the notion of *panspectrism* in relation to the increasingly networked, logged, and digitalized way of life we lead and the contemporary possibilities for surveillance in terms of that the "supervisor" can see more than is possible in a *panoptic* version of surveillance (Andersson Schwarz & Palmås 2013; cf Kullenberg 2010; Palmås 2009). To what extent, then, would it be meaningful to view copyright from Renner's perspective of control as a result of becoming (regarded as) property—and then capital?

### Changes in Legal Norms in a Digital Era

As mentioned, there has been substantial legal maneuvering in intellectual property regulation during the last few decades related to digital development; thus, I will mention a few of the most important examples later. The big shift on a global level for copyright regulation has concerned its metamorphosis into trade regulation. This goes hand in hand with a protectionist approach to both the scope of the regulation as well as the length of time that the protection is offered. The copyright historian Rose (1993) acknowledges as a key issue in his investigation the notion of the author as something inseparable from the commodification of literature. This, I argue, plays a key role also in understanding the relatively contemporary development of copyright and IP into a primarily trade-related legal construct in a global arena. Peter Drahos and John Braithwaite bear evident witness of this in *Information Feudalism* (2002). The development of control mechanisms, as well as the propertization of copyright in a digital era, need to be understood in relation to a combination of the inherent ontological shifts that digitization offers, which writers like Lessig and Zittrain often address, and the commodification of cultural expressions caused by the shift in copyright to become a global trade-issue, on which writers like Drahos and Braithwaite focus. While the latter may explain why some of the stalemate exists, for

example its path dependence, the former displays the seriousness of the matter.

In *Information Feudalism* (2002), Drahos and Braithwaite show how global IP is subordinated to trading interests, notably the TRIPS Agreement appears to be designed by a small group of U.S.-affiliated industry stakeholders at the helm (2002: 10f.). TRIPS is, of course, interesting from a copyright perspective, because it sets up copyright minimum standards for the majority of members of the World Trade Organization. This means that although the traditional arguments for a stronger copyright are there in the shape of protecting authors and artists, the content of the legislation is focused on industrial concerns.

Beneath the dissembling rhetoric about the need to protect authors and provide incentives lay a harsh global economic reality of cartelized publishing industry, price fixing, and world market agreements (Drahos & Braithwaite 2002: 76).

Drahos and Braithwaite show the face of the industry and lobbyism and the entanglement in law-making on a global level. This has also been evident in the secrecy surrounding the recent *Anti-Counterfeit Trade Agreement*, which was negotiated among a dozen nations' representatives in 2010–2011 (Larsson 2011c), receiving substantial critique (Geiger 2012). The method of secrecy as a way to effectively change national intellectual property legislation by circumventing every democratic concern seems to be reproduced in the on-going Trans-Pacific Partnership, where the United States continuously acts as a strong pro-protectionist enforcer (cf Patry 2012).

At an EU level, the so-called *Intellectual Property Rights Enforcement Directive* (2004/48/EC) was approved by the European Parliament on March 9, 2004. This Directive, which was implemented in national legislations, was aimed at making it easier for the copyright holders and their representatives to extract identification data from the ISPs when an IP-number was suspected to have been involved in infringement in any IP. A study concluded that the legal change did not make the younger generation feel that it was morally wrong to break copyright law in regards to file-sharing copyrighted content. The social norm was equally weak before and after the directive was implemented in Sweden (Svensson & Larsson 2012). When it comes to national legislations of particular interest, the British *Digital Economy Act* of 2010, the French *Haute Autorité Pour la Diffusion des œuvres et la Protection des Droits sur Internet* (HADOPI), and the U.S. *Digital Millennium Copyright Act* (DMCA) stand out. The first two relate very much to traceability in the digital context by pushing for obligations for ISPs regarding the traffic they mediate, as in the aforementioned deal between the U.S. content industry and ISPs to create a “Copyright Alert System.” The ISPs are



expected to collaborate with copyright owners, to identify infringers, send notifications to alleged infringers, and keep copyright infringement lists (Mendis 2013). The Digital Economy Act shares with the HADOPI the threat that disconnection from the internet can follow after three warnings. This rather disproportionate punishment is part of the law despite the fact that the Digital Economy Act “is unlikely to succeed in its central purpose to control unauthorized digital copying” (Mendis 2013: 60). U.S. Congress passed the DMCA in 1998 and it strengthened copyright in a number of ways, of which Lessig regards the “anticircumvention” provision as “particularly troubling” (Lessig 2002: 188). The DMCA includes a regulation of devices that are designated to circumvent copyright protection; this regulation is also found in *InfoSoc Directive*. The DMCA has been criticized for disrupting the balance between content owners and the public. According to Vaidhyanathan (2001), the DMCA results in that “content providers can set the terms for access to and use of a work. There is no balance if the copyright owner has all the power” (Vaidhyanathan 2001: 159). The “anticircumvention” is part of what sometimes is called DRM. Even if DRM is, in practice, failing, it has been strongly promoted by a pro-copyright, industrial discourse. This has been seen by critics as a way to authorize copyright to become even more powerful than ownership, for example, in terms of consumers buying music CDs yet still being restricted in what they are allowed to do with the purchased product (Gillespie 2007).

### Why IP Is Reaching Further in the Digital Context

One of the aspects of a far-reaching copyright regime in a digital context is that it, in fact, reaches further than traditional property rights. The copyright holder can claim more strongly control over the ways in which products should be used than the producers of, for example, a chair can. Vaidhyanathan (when he analyzes DMCA) describes this in terms of an erosion of the first sale doctrine (in U.S. law):

When a work is sold, the copyright holder relinquishes “exclusive” rights over it yet retains “limited” rights, such as restricting copying or public performance. But under the first sale doctrine, the consumer can highlight a book, copy portions for private, non-commercial use, resell it to someone, lend it to someone, or tear it up, without asking permission from the copyright holder. Because the DMCA allows content providers to regulate access and use, they can set all the terms of use. (Vaidhyanathan 2001: 175)

From a conceptual point of view, digitization means that the addressed area of copyright law has increased, and it is an

ontological change; the works do not exist in the same way that they used to exist. The storage devices used to be physical during the era that created what Lessig (2008) calls the “Read Only culture,” that is, where production was separated from those who consumed. In a digital context, this type of “copy control” is harder to maintain, which has to a high extent boosted what Lessig consequently calls the “Read/Write culture” and has made policy makers respond with expansion. This ontological shift of the protected works is of key relevance when analyzing the shift that copyright has undergone in a digital society. Perhaps, Vaidhyanathan (2001: 152) says it the most lucidly:

The digital moment has also collapsed the distinctions among three formerly distinct processes: gaining access to a work; using (we used to call it “reading”) a work; and copying a work. In the digital environment, one cannot gain access to a new story without making several copies of it.

This is also what Lessig has found to be an exaggerated focus on copies: “[f]or while it may be obvious that in the world before the internet, copies were the obvious trigger for copyright law, upon reflection, it should be obvious that in the world with the internet, copies should not be the trigger for copyright law” (Lessig 2004: 140). Vaidhyanathan states that this focus has led the policy makers to a troublesome choice: “now that the distinctions among accessing, using, and copying have collapsed, copyright policy makers have found themselves faced with what seems to be a difficult choice: either relinquish some control over copying or expand copyright to regulate access and use, despite the chilling effect this might have on creativity, community, and democracy” (Vaidhyanathan 2001: 152–53). This sheds some light on what it is that is conceptually new and particularly troublesome in the digital context when it is compared with the more than century-old legislative conception of copyright as linked to property.

The issue of control, therefore, seems to be the key battle in the copyright war. Renner comments on the aspects of control that follow with the institution of property:

Supervision is delegated to special functionaries, and thus relations of super-ordination and subordination are made into an organic whole. Thus the institution of property leads automatically to an organization similar to the state. Power over matter begets personal power. (Renner 2010/1949: 107)

With control follows the type of “architectural” imperatives for behavior that can be found in the particular setting in which any transaction takes. Here, one could speak of “code as law” in the

sense that Lawrence Lessig claims, in which the digital domain, too, is subordinate to the exact conditions that the (programming) code allows (Lessig 1999, 2006). Where Lessig's object of analysis is the digital code in relation to regulation, Renner's object of analysis is property, for example, related to production and factories, and regulation:

Wage labor is a relation of autocracy with all the characteristics of despotism. The factory is an establishment with its own code with all the characteristics of a legal code. It contains norms of every description, not excluding criminal law, and it establishes special organs and jurisdiction. (Renner 2010/1949: 114)

This, of course, is one of the reasons Renner has been seen as an inspiration within the sociology of law field: this idea that not only is state law the important, normative imperative, but also that the factory is an establishment with its own code. This is also the reason Lessig's account dealing with programming code *as* law is valuable to those working on sociolegal topics.

One can therefore conclude that the development of copyright in a digital society is twofold: on the one hand, the strength of the protection that copyright law postulates has never been stronger; on the other hand—given its copy-based control aspirations vis-à-vis massive illegal file-sharing—its enforcement and connection to social norms have never been weaker. I have elsewhere elaborated upon how the digital moment has changed our perception of what “should” be protected and that the law tries to “artificially” maintain constraints that were lost when moving from analogous storage devices to digital. This, in other words, is of key interest for identifying how people perceive the legitimacy or illegitimacy of the legal construction in light of its conceptual expansion (Larsson 2013d: 17).

## Conclusion

The key focus here has been to study conceptual legal change by adding a cognitive, theoretical perspective to address the same question that Karl Renner addressed: “How is it that the law of property can remain unchanged and still function in a very much changed society?” Recognition of metaphorical thought, and the methods of conceptual analysis, demonstrates how legislative statutes express significant aspects of our social reality that cannot be devalued by reductive approaches to legal reasoning. Although the meaning is very much bound to specific patterns, these patterns can, and probably often do, differ from the “objectively” defined

patterns of meaning. In terms of property law and the way in which IP has developed in a digital society, I argue that core concepts, to a high extent, remain the same—in the same form—but have altered in their social function, or substratum, to use Renner’s terminology. This also goes for a number of underlying conceptions of control over copies, more protection, an increase of control functions—which in parallel to Renner’s analysis—seem to follow with the propertization of copyright. Albeit the legal construction is in a sense similar from before, the regulatory claims have expanded—because of that, a complete new set of (digital) actions and phenomena have emerged to be claimed—without a change in terminology. Of particular interest here, and perhaps as an indicator on propertization and substratum change, is what Renner described as an “institution of dominion and control” tied to property. At the same time, we may remind ourselves that although there is a contemporary trend pushing for the notion of “copyright as property,” these arguments are not unheard of through the ages before digitization. The notions of property, which legitimizes ownership and control, may here be seen as a conceptual tool for copyright holders to argumentatively strive for, in order to gain support for restraining cultural flows and public uses of texts, music, and movies. One can also notice here that the trend of colonizing more phenomena, becoming stronger and more protectionist in a digitizing society is also affecting other legal fields, for example concerning privacy, which is in line with Renner’s intense metaphor of Chronos, where property—like Chronos—“devours other people’s children.”

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