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Metaphors, law and digital phenomena: the Swedish pirate bay court case

STEFAN LARSSON*

Abstract

This article uses conceptual metaphor theory to develop the concept of ‘skeumorphs’ (reuse of old concepts for new phenomena) in order to analyse the Swedish The Pirate Bay court case. In line with conceptual metaphor theory, which states that abstract thinking is largely metaphorical, the article argues that this is true also for digital phenomena that, thus, are largely understood through metaphors and skeumorphs. Also, when attempting to understand and conceptualize new digital phenomena such as The Pirate Bay (TPB), law in a digital society is inevitably affected. Hence, new phenomena can be fought over in a ‘battle of metaphors’, in the TPB court case, for example, evidenced by the arguments of seeing TPB as ‘a platform’, ‘bulletin board’, or an ‘impure search engine’. This, here argued, was of key relevance for the outcome of the case.

Keywords: metaphors; conceptions; skeumorphs; The Pirate Bay; copyright; intellectual property; conceptual development

1. Categorization, digitization and law

On 17 April 2009, the District Court in Stockholm announced its verdict for the founders of the BitTorrent file-sharing site The Pirate Bay (TPB). The four men were convicted for assisting in violations of copyright law and

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they were sentenced to one-year prison terms and to pay damages of roughly euro 35,00,000 (SEK 30,000,000). This case, here argued, displays a number of significantly interesting questions that can be found in the intersection of social change, technological development, not least in terms of digitization, and most importantly, our understanding of both digital phenomena and law. Central to this article, therefore, is understanding digitization in terms of conceptual change—how metaphors and *skeumorphs*¹ (reuse of old concepts for new phenomena) are necessary to understand digital phenomena—as well as guiding our conceptualization of the particular phenomenon. This also plays a role in legal processes, that is, in the practice of categorizing phenomena in legal circumstances. Therefore, the purpose of this article is to develop a deeper understanding of to what extent metaphors and skeumorphs are relevant for law in a digital society. The case chosen for this analysis is the legal case of The Pirate Bay (TPB), which was prosecuted both in Stockholm’s District Court² as well as in the Svea Court of Appeals,³ because it displays a number of the features relevant for understanding conceptual change and practices of categorization relevant for law in a digital society. For example, a key question to address in terms of conceptualizing new phenomena concerns what TPB ‘is’, or ‘was’, for the time period that was of relevance for the trial. How was the legal process struggling with this question—analogously and metaphorically? Of particular relevance, here, is the use of concepts such as ‘platform’, ‘search engine’, ‘bulletin board’, and TPB as ‘entrepreneurs’ while at the same time describing an activity by relying on embodied metaphors such as ‘torrents’, ‘domain names’, ‘links’, ‘swarm’, etcetera.

In order to address and answer these questions, I use cognitive theory on conceptual metaphors. This follows in the scholarly tradition of George Lakoff and Mark Johnson,⁴ which addresses the consequences for law by writers such as Steven F Winter, especially in *A clearing in the Forest: Law, Life, and Mind*,⁵ and others.⁶ A key feature of metaphors is that one concept, from the source domain, is projected on other concepts, the target domain, in order to create an effect of meaning. There is, however, a widespread notion of metaphors as a rather language-based exception to ordinary talk and thinking, as ‘a device of poetic imagination and the rhetorical flourish – a

¹ From Greek: *skeuos*—vessel or tool, *morphe*—shape.

² Tingsrätten, case B 13301-06, 17 April 2009.

³ Hovrätten, case B 4041-09, 26 November 2010.

⁴ G Lakoff and M Johnson, *Metaphors We Live By* (University of Chicago Press 1980). This is a book that has become a standard text for those interested in cognitive linguistics. It has been followed and developed by a number of scholars, see M Johnson, *The Body of the Mind: The Bodily Basis of Meaning, Imagination, and Reason* (University of Chicago Press 1987); G Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal about Mind* (University of Chicago Press 1987); G Lakoff and M Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (Basic Books 1999); G Lakoff and M Turner, *More than Cool Reason: A Field Guide to Poetic Metaphor* (University of Chicago Press 1989).

⁵ SL Winter, *A Clearing in the Forest: Law, Life, and Mind* (University of Chicago Press 2001).

⁶ For example, S Larsson, *Metaphors and Norms. Understanding Copyright Law in a Digital Society* (Lund University, Lund Studies in Sociology of Law 2011).

matter of extraordinary rather than ordinary language'.⁷ One specific group of cognitive linguists, however, have disputed this notion since the 1980s from the perspective that metaphors are not only language-based but form an important part of our conceptual system and how we understand and categorize reality.⁸ This includes the notion of an experiential base of understanding that borrows concepts from bodily or spatial references to bring order to abstract phenomena—often referred to as embodiment⁹—and has influenced disciplines such as political studies,¹⁰ psychology¹¹ and technology studies.¹² Of extra importance for this thesis is the legal analysis that has been made based on the work of Lakoff and Johnson,¹³ particularly when it has been concerned with both law and technology.¹⁴

A key notion underpinning the argument in this article is the need for studying the particular implications that the digital environment brings for law. This can be related to the 'law of the horse' debate from the second half of the 1990s in which Judge Frank H. Easterbrook¹⁵ argued for the general perspective—the lack of need for a specific 'cyberlaw' field—and Lawrence Lessig was the most prominent counterpart.¹⁶ Lessig pointed out a number

⁷ Lakoff and Johnson, *Philosophy in the Flesh* (n 4) 3.

⁸ *ibid.*

⁹ *ibid.*; Michael Reddy, 'The Conduit Metaphor: a Case of Frame Conflict in our Language about Language' in A Ortony (ed), *Metaphor and Thought* (CUP 1979); Winter, *A Clearing in the Forest* (n 5).

¹⁰ See Carver and Pikalo (eds), *Political Language and Metaphor, Interpreting and Changing the World* (Routledge 2008), with contributions for instance from Peter Drulák, 'Identifying and Assessing Metaphors: Discourse on EU Reform' and Jan Helmig and Jochen Walter, 'Discursive Metaphor Analysis: (de)construction(s) of Europe'.

¹¹ Karin Moser, 'Metaphor Analysis in Psychology – Method, Theory, and Fields of Application' (2001) *Forum: Qualitative Social Research*, vol. 1, 1–11.

¹² Kimberly Cass and Thomas W Lauer, 'Media Transitions. The Cases of Digital Imagery and E-mail' (2004) *17 Information technology & People* 252–67.

¹³ See Linda L Berger, 'What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor can Help Lawyers Shape the Law' (2004) *2 J Ass'n Legal Writing Directors* 169–208; 'Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation' (2007) *58 Mercer L Rev* 949–90; 'How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes' (2009) *18 S Cal Interdisc LJ* 259–308; 'The Lady, or the Tiger? A Field Guide to Metaphor and Narrative' (2011) *Washburn L J* 50: 275–318. Thomas W Joo, 'Contract, Property and the Role of Metaphor in Corporations law' (2001) *UC Davis L Rev*, 1–59; Mark L Johnson, 'Mind, Metaphor, Law' (2007) *58 Mercer L Rev* 845–68; Lucia Morra, 'New Models for Language Understanding and the Cognitive Approach to Legal Metaphors' (2010) *23 Int J Semiot L* 387–405; Robert L Tsai, 'Fire, Metaphor, and Constitutional Myth-Making' (2004) *93 Georgetown LJ* 181–239; Winter, *A Clearing in the Forest* (n 5); SL Winter, 'Re-embodiment Law' (2007) *58 Mercer L Rev* 869–97; 'What is the "color" of Law?', in Gibbs Jr, Raymond W, (ed), *The Cambridge Handbook of Metaphor and Thought* (CUP 2008) 363–79.

¹⁴ Jonathan H Blavin, and I Glenn Cohen, 'Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors In Law and Commentary' (2002) *16 Harvard J L & Technol* 265–85; Bill D Herman, 'Breaking and Entering my Own Computer: The Contest of Copyright Metaphors' (2008) *13 Com L & Pol* 231–74; Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' (2003) *91 Cal L Rev* 439–519; S Larsson, 'Copy Me Happy – The Metaphoric Expansion of Copyright in a Digital Society' (2012) *Int J Semiot Law*, online first.

¹⁵ The origin is a 1996 cyberlaw conference presentation by Easterbrook, which he later published, see Frank H Easterbrook, 'Cyberspace and the Law of the Horse' (1996) *4 University of Chicago Legal Forum* 207–16.

¹⁶ Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) *113 Harvard L Rev* 501–46; for an even more developed account, see L Lessig, *Code and Other Laws of Cyberspace* (Basic books 1999). For a contemporary development, see C Reed's *Making Law for Cyberspace* (OUP 2012).

of ontological issues (eg the essence and implications of the coded architecture) that he allowed to testify to the need for specific legal attention to not only what the digital domain brings to law but also, in fact, when it acts with legal normativity in itself. When code, de facto, is law. Although I argue for a specific interest in what digitization means for legal concepts, the conceptual legal change can by no means be narrowed down to be relevant only for digitization—it is just that this specific shift is very broad, happens over a short period of time and near global, which makes it particularly interesting to study. Anyone who has studied the classical socio-legal scholars, such as Karl Renner, knows that the legal concepts may remain the same, while their function will transform as society transforms, no matter to what technology or reason the transformation can be linked.¹⁷

When it comes to law, technology and metaphor, this article does not specifically address the common-law legal reasoning but will likely be of strong relevance nonetheless due to the extensive analogizing from precedent that the common-law tradition brings. When re-using relevant principles from the past and applying those principles to new settings, the conceptual bridges between concept and phenomena may be either stretched or reinterpreted. Sometimes not without a certain amount of creativity on the one hand or conceptual path dependence on the other.¹⁸ Patricia L. Bellia, and others, addresses these specific challenges regarding old concepts and metaphors when faced with a legal issue in a digital matter and stresses that we must be ‘acutely aware of the metaphors that lawyers and judges employ when thinking about Internet legal issues’.¹⁹ The early (in terms of the Internet) analyses of metaphors of relevance for our understanding of digital issues relate to the concepts that describe the digital in the first hand, such as ‘web’,²⁰ and ‘cyberspace’ (as a place).²¹ Before I continue by addressing the multitude of metaphors of relevance for law regulating digital phenomena, and the specific case with TPB, I would like to develop the theoretical account with regards to how we think and speak of abstract matters through metaphors.

Lakoff and Johnson, two central cognitive metaphor scientists, claim, ‘our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature’.²² This means that unlocking the metaphors constantly present in our language, minds and—as is argued here—law, can reveal to us how they are connected, what values and associations they bring, and on what conceptions they are founded. Metaphor is

¹⁷ K Renner, *The Institutions of Private Law and Their Social Functions* (Transaction Publishers 1949); for a more contemporary perspective, see Peter Robson, ‘Renner Revisited’ in Elspeth Attwool, (ed), *Perspectives in Jurisprudence* (Glasgow University 1977) 221–35.

¹⁸ cf chapter two in PL Bellia and others, *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age* (Thompson Reuters 2011).

¹⁹ *ibid* 26.

²⁰ *ibid* 26.

²¹ Blavin and Cohen (n 14); Hunter (n 14).

²² Lakoff and Johnson, *Philosophy in the Flesh* (n 4) 3.

not just a figure of ‘speech’; it is a figure of ‘thought’.²³ In line with this, there has been a growing awareness of the importance of understanding the practices of ‘categorization’ within cognitive linguistics, since the 1970s. Scholars like George Lakoff have, via empirical evidence, strongly emphasized that how we conceptualize the world is deeply dependent on categories, and that categories are—as opposed to a common and rationalistic view—not necessarily ‘clearly defined, mutually exclusive and collectively exhaustive’.²⁴ In fact, they claim that categories are graded (they tend to be indistinct at their boundaries) and inconsistent in the status of their constituent members.²⁵ These practices of categorization, I argue, become evident whenever a new phenomenon emerges, one that previously lacked a name. This is, I additionally argue, of further significance in a digital society, or rather, in a society in the process of becoming more digitalized and interconnected through massively embedded technologies such as the Internet.²⁶ When a new phenomenon actually emerges—as with many digital phenomena—it will likely be judged and understood in terms of already present phenomena and their already accepted concepts. For example, Cass and Lauer²⁷ describe the connection between analogue photography and digital imagery in terms of the latter as a ‘skeumorph’ of the first.²⁸ Digital imagery bears enough resemblance to analogue photography to be accepted as meaningful, despite the fact that it only shares a few attributes and constraints of the former phenomenon.

2. The Pirate Bay

The Pirate Bay is interesting due to that it is likely the most famous and resilient BitTorrent tracker in the world. It was started in 2003 and has constantly been increasing in number of visitors, regardless of any conviction against its founders or attempts to block it in national legal regimes.

²³ G Lakoff, ‘A Figure of Thought’ (1986) 1 *Metaphor and Symbol* 215–25.

²⁴ Lakoff and Johnson, *Philosophy in the Flesh* (n 4) 373–414.

²⁵ AG Amsterdam and J Bruner, *Minding the Law. How Courts Rely on Storytelling, and How their Stories Change the Ways we Understand the Law – and Ourselves* (Harvard University Press 2000); Lakoff, *Women, Fire and Dangerous Things* (n 5); Winter, *A Clearing in the Forest* (n 5).

²⁶ See S Larsson, ‘Conceptions in the Code: What “the copyright wars” Tell about Creativity, Social Change and Normative Conflicts in the Digital Society’ (2012) 4 *Societal Studies* 1009–30.

²⁷ Cass and Lauer (n 12).

²⁸ The term *skeumorph* is used in archaeology, for example, to describe the phenomenon of when pottery has imitated metal objects, see WD Kingery, *The Social and Cultural Contexts of New Ceramic Technologies* (American Ceramic Society, Northwestern University 1993), or when tombs have been prepared with home-like features in order to satisfy a culturally embedded belief that the dead need these amenities on their ‘journey’, see E Bloch-Smith, *Judahite Burial Practices and Beliefs about the Dead* (Sheffield Academic Press 1992) 188. Further, the skeumorph concept has been used in design studies for similar loans of style or shapes that may lead associations from a new object to an older and already established one. Larsson uses the concept in order to analyse the (conceptual) development of copyright as a legislation with its key concepts developed in pre-Internet times facing tremendous problems when using the same concepts in a digital environment, see Larsson, *Metaphors and Norms* (n 6).

According to the site-ranking company Alexa, in May 2008, TPB entered the top 100 of the most visited sites globally and by November the same year had 20 million unique peers for the first time since the site was launched.²⁹ In April 2011, it had climbed to number 86 and in May 2012, it had reached place 63 for the most visited sites in the world with more than 5 million registered users.

On the 17 of April 2009, four men were sentenced to one-year prison terms and fined roughly euro 35,00,000, (SEK 30,000,000), for assisting in violations of copyright law through the Pirate Bay site. 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 euro 54,00,000, (SEK 46,000,000), but somewhat shorter prison sentences.³⁰ The fourth defendant did not show up and was reportedly ill and living in Cambodia at the time. On the 12 of February, the Swedish Supreme Court denied the appeal, which meant that the decision in the Svea Court of Appeal stands.³¹

There is a growing amount of literature on, and analysis of, The Pirate Bay, from a number of perspectives. There are articles on technological aspects,³² the political implications³³ and from a legal perspective, on Intellectual Property (IP) law in general,³⁴ the case in particular³⁵ and the aspect of secondary liability for intermediaries.³⁶ One contribution that is relevant to understand TPB is the Swedish anthology *Efter The Pirate Bay*, (translates to: *After The Pirate Bay*), from late 2010.³⁷ This anthology, edited by the media researcher Jonas Andersson Schwarz (added Schwarz to his name in 2013) and the head of research at the Swedish Royal Library, Pelle Snickars, included many of the key Swedish writers on digital politics and Internet research. There are some articles in this anthology that deal with

²⁹ See Torrentfreak 18 May 2008, <<http://torrentfreak.com/the-pirate-bay-100-popular-080518/>> accessed 5 June 2013 and the web information company Alexa.

³⁰ 26 November 2010, Case B 4041-09.

³¹ The defendant that was ill at the negotiations in the Court of Appeal, failed to appear also at a later date, why the district court verdict was set for him.

³² A Adrian, 'Copyright Protected Works and the Territoriality Principle: The Pirate Bay Deep-Sixed' (2006) 22 Computer Law & Security Report 392–401.

³³ F Miegel and T Olsson, 'From Pirates to Politicians: The Story of the Swedish File Sharers who became a Political Party' in N Carpentier and others (eds) *Democracy, Journalism and Technology: New Developments in an Enlarged Europe* (The intellectual work of ECREA's 2008 European media and communication doctoral summer school 2008).

³⁴ T Touloumis, 'Buccaneers and Bucks from the Internet: Pirate Bay and the Entertainment Industry' (2009) 19 Seton Hall J Sports & Ent L 253–81; C Kirchberger, *Cyber Law in Sweden* (Kluwer Law International 2011); Ulric M Lewen, 'Internet File-Sharing: Swedish Pirates Challenge the U.S.' (2008) 16 Cardozo J Int'l & Comp L 173–205.

³⁵ M Bogdan, 'Cyberspace Pirates Walk the Plank: Some Comments on the Swedish Judgment in the Pirate Bay Case' (2010) 4 Masaryk University J L & Technol 113–26; Michael A Carrier, 'The Pirate Bay, Grokster, and Google' (2010) 15 J I P Rights 7–18.

³⁶ L Helman, 'Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement' (2009) Columbia Law School 2–56; J Andreasson and K Schollin, 'Goda och onda medhjälpare—Är du socialt adekvat, lille vän? Om Pirate Bay-målet betydelse' (2011) SvJT 534–56.

³⁷ J Andersson and P Snickars (eds), *Efter The Pirate Bay* (Kungliga Biblioteket 2010).

metaphorical aspects of TPB, whether in terms of a court case or as a political and technical phenomenon. For example, Nina Wormbs grasps the overall picture by analysing how technology itself bears a metaphorical function.³⁸ Jonas Andersson Schwarz's contribution breaks down the Internet into two types of metaphors, the fish net versus the spider web.³⁹ Peter Jakobsson discusses the commons as a widespread metaphor that has been used to criticize the organizational and legal structures of the media world.⁴⁰ Daniel Johansson analyses the flow metaphor 'music like water', which Larsson elaborates on, to highlight the absurdity of an estimate of the value of 'digital' copies based on a model originating from valuation of physical copies.⁴¹

Larsson calculates the (fictive) value of a BitTorrent site 'like' TPB based on all downloads and thereby displays how copyright law is founded on a conception of the reproduction of copies as tangible goods.⁴² He develops this further elsewhere.⁴³ Another contributor, Leif Dahlberg, has elaborated on his contribution in English and shows no restraints when it comes to dealing with law and its metaphoricity, as he discusses the TPB verdicts in relation to, 'liquid spatiality that characterizes the activities of the pirate' and the 'juridical liquid space that is created in his or her wake'.⁴⁴ Rasmus Fleischer devotes part of his contribution to an overview of how different forms of water over the years have been used as metaphors for what happens in computer networks.⁴⁵ Fleischer continues with a characterization of TPB, which is of relevance to this article: 'Question: What was the Pirate Bay? Answer: during the first decade's second half, The Pirate Bay was a wide variety of things – that somehow held together', and describes this in terms of 'assemblage', which I will return to below.⁴⁶

Copyright law in a digital society has been extensively debated and criticized over the past 15 years or so. In the late 1990s, a highly critical perspective towards what the Intellectual Property regulation meant for creativity in a digital domain emerged among a group of American scholars. Law professor James Boyle was early in identifying copyright as one of the crucial issues in the construction of the information society in *Shamans, Software and*

³⁸ N Wormbs, 'Det digitala imperativet' in J Andersson and P Snickars (n 36) 140–50.

³⁹ J Andersson, 'Det dumma nätet' in Jonas Andersson and P Snickars (n 36) 49–72.

⁴⁰ Peter Jakobsson, 'Obegränsad kommunikation, obegränsad konkurrens' in Jonas Andersson and P Snickars (eds) (n 36) 87–104.

⁴¹ D Johansson, 'När alla blir radiokanaler och frisörer', chapter in J Andersson and P Snickars (eds) (n 36) 105–23.

⁴² S Larsson, '459 miljarder kronor – om metaforer, flöden & exemplar' in J Andersson and P Snickars (eds) (n 36) 173–95.

⁴³ See Larsson, *Metaphors and Norms* (n 6).

⁴⁴ L Dahlberg, 'Pirates, Partisans, and Politico-Juridical Space' (2011) 23 L & Lit 262–81.

⁴⁵ R Fleischer, 'Femton gatar på död mans kista – om framtidens nätpolitik' in J Andersson and P Snickars (eds) (n 36) 259–80.

⁴⁶ *ibid* 263.

Spleens: Law and the Construction of the Information Society.⁴⁷ He was followed by scholars such as Lawrence Lessig, often dealing with aspects of the coded architecture or the implications of how easy remixes are done in the new medium,⁴⁸ Jessica Litman⁴⁹ and Said Vaidhyanathan,⁵⁰ who all criticized different aspects of IP in relation to the digital. Copyright has been increasingly criticized from several perspectives, for example, from the perspective that the legal norms do not reflect social norms, which may pose a democratic issue to legislation.⁵¹ It is also in this light the analysis of the TPB case can be viewed, bearing in mind that there is something about the digital development that has led to a systemic challenge to IP regulation which, according to some commentators, is linked to that we experience reality differently; that is, the matter that copyright used to regulate is not the same matter anymore.⁵² As stated, this article uses the case of TPB and its encounter with legal procedure in the case against the four men held as being behind TPB in order to show how important the metaphorical process is to law. Of exceptional relevance for this particular court case, here argued, is how a conceptual reuse in a translation of analogue concepts to describe digital phenomena is imperative for the outcome in the case.

3. Skeumorphs and conceptual development

Concepts are constantly transferred to new phenomena that carry similar elements. The development of information and communication technologies, combined with their massive distribution and use, has created a considerable need for labels and concepts that can describe the multitude of phenomena that follow.⁵³ Although the phenomena in their technical nature are brand new, concepts for pre-existing phenomena are metaphorically transferred, because they share some similar elements or possible associative paths; for example ‘computer virus’ or ‘cyber-trespass’.⁵⁴

⁴⁷ J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1996); cf J Boyle, ‘A Politics of Intellectual Property: An Environmentalism for the Net’ (1997) 47 *Duke L J* 87–116; J Boyle, *The Public Domain. Enclosing the Commons of the Mind* (Yale University Press 2008).

⁴⁸ Lessig, ‘The Law of the Horse’ (n 16) *Code and other laws of cyberspace*, cf L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin books 2004); L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

⁴⁹ J Litman, *Digital Copyright* (Prometheus books 2001).

⁵⁰ S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York University Press, cop 2001).

⁵¹ Reed (n 16) 121–28; cf Y Feldman and J Nadler, ‘The Law and Norms of File Sharing’ (2006) 43 *The San Diego L Rev* 577–618; J Karaganis, V Grassmuck and L Renkema, *Copy Culture in the US and Germany* (Columbia University, The American Assembly 2012); M Svensson and S Larsson, ‘Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms’ (2012) 14 *New Media & Society* 1147–163.

⁵² Larsson, *Metaphors and Norms* (n 6).

⁵³ Cass and Lauer (n 12) 255; Larsson, ‘Copy Me Happy’ (n 14); Larsson, *Metaphors and Norms* (n 6).

⁵⁴ M Klang, ‘A Critical Look at the Regulation of Computer Viruses’ (2003) 11 *Int’l J L & Infor Technol* 162–83. Mary WS Wong, ‘Cyber-trespass and ‘Unauthorized Access’ as Legal Mechanisms of Access Control: Lessons from the US Experience’ (2006) 15 *Int’l J L & Inform Technol* 90–128.

Some features from the previous phenomenon fit well, while others do not. A skeumorph provides us with familiar cues in an unfamiliar domain by presenting parts that make new things appear old and familiar.⁵⁵ The re-use, or extended use, of a metaphor is often quite necessary and ‘natural’:

When the technological media of an artifact changes, some characteristics of the previous media are left behind, others are brought forward intact into the new media, while still others are brought forward in a modified form. In the transition between the non-digital and digital media, a learning process occurs where users employ metaphors from the non-digital representation and process to orient themselves to the novelty of the new media.⁵⁶

This is to emphasize how familiar and ‘non-digital representations’ take part in a process of conceptual change that is at least to some extent deceptive, and to some extent likely to be qualitatively informative. The skeumorph is a concept that can be used to describe just that process.⁵⁷ Consider, for instance, the examples of transition from regular mail to e-mail or from analogue photography to digital imagery.⁵⁸ The skeumorph means a type of reuse of information, but a reuse that comes with benefits as well as pitfalls. The professor and postmodern literary critic N. Katherine Hayles brings forward this double sidedness in the skeumorph:

The new becomes more acceptable when it refers back to the earlier iteration that it is displacing, while the earlier iteration becomes more valuable when it is placed in a context where we can experience the new. A skeumorph simultaneously focuses on the past and future, while reinforcing and undermining both.⁵⁹

In this use of older concepts, recognition is created, but it is a deceptive recognition. It is important to notice that the skeumorph is not entirely a physical entity; the reason it can create this recognition in the first place is due to that it collaborates with our cognitive images, our conceptions and how we understand reality. The skeumorph is a type of metaphor that is often in the literature represented by an object. Some speak of skeumorphs as ‘material metaphors’, since the term is often used in terms of the design of artefacts that bear some resemblance to older and established artefacts.⁶⁰ Cass and Lauer, on the one hand, emphasize physicality

⁵⁵ N Gessler, *Skeumorphs and Cultural Algorithms*, UCLA Anthropology, Computational Evolution and Ecology Group (1998).

⁵⁶ Cass and Lauer (n 12) 255.

⁵⁷ Larsson, *Metaphors and Norms* (n 6) 62–63, 101–02.

⁵⁸ Cass and Lauer (n 12).

⁵⁹ KN Hayles, *How We became Posthuman. Virtual Bodies in Cybernetics, Literature, and Informatics* (University of Chicago Press 1999) 17.

⁶⁰ Gessler (n 54).

and materiality in the term, but on the other describe its direct link to cognition:

People use physical (skeumorph) and conceptual metaphors to orient themselves with new technology by understanding new functions in terms of earlier technological versions. Since new technology is adopted at varying rates and varying times, multiple versions exist at any given time.⁶¹

This is the reason why the skeumorph cannot only be described as physical entities. It is in the interpretation that the important aspects lie. This is also why Cass and Lauer extend their definition:

Skeumorphs, in addition to being physical features, can also take the form of ideas or metaphors. When new artifacts are presented to the public, many times they are described with metaphoric allusions that are grounded in prior iterations of that artifact. These metaphors assist people in their transition to understand and use new technological processes and artifacts. When the new artifact is described using terminology from a prior iteration, this influences one's intent and encounter with the new artifact. The new artifact is initially understood using the norms and interpretive scheme of the old artifact, which aids in both transition to and adoption of the new medium. After collective learning about the new artifact that occurs, artifact users may discover new functionalities beyond what the "transitional functions" suggest and places where the metaphor breaks down.⁶²

Note that it has implications for norms too, according to Cass and Lauer. By borrowing an understanding of a phenomenon from an older concept, the norm connected to that older concept will likely connect also to the new phenomenon. A main interest here is how this dialectic between the old and the new is relevant for not only how we metaphorically interpret aspects of our reality, but also for how this process sustains whatever normativity that accompanies the first object or entity and is transferred to the latter, where 'the new artefact is initially understood using the norms and interpretive scheme of the old artefact'. This, I argue, is of clear relevance also for legal developments connected to technological evolution, including digital phenomena such as TPB.

For example, when we conceptualize TPB, we are inevitably surrendering to a conceptual reuse that is massive: it is found in a 'domain' name, relying on 'torrents' to be found by a search 'engine', taking place in a 'swarm' and has nowadays moved into using 'magnet' 'links'. It is important to remember that this is not something strange or an abnormality. It depicts how conceptual developments happen, in the sense that 'abstract thought is largely

⁶¹ Cass and Lauer (n 12) 252.

⁶² *ibid* 255.

metaphorical’,⁶³ and therefore a natural part of our conceptions. This, as mentioned, is however particularly evident in times when new types of phenomena emerge more frequently (likely connected to when society, for whatever reason, is changing more rapidly than the ‘normal’ rate). It is this conceptual development that we can study, based on findings in cognitive sciences on conceptual metaphors during the last four decades.

4. Metaphor theory

Addressed here is how law is affected by conceptual reuse regarding digital phenomena. To understand skeuomorph processes, we can use conceptual metaphor theory. A common-sense notion of metaphors is that they are figurative and linguistic decoration in language or tools for communicating some kind of spectacular effect. This means that there is likely a widespread notion of the metaphor as simply an ornament of words, bearing no deeper meaning for our thinking and our minds. As outlined above, conceptual metaphor theories contradict this. They accept the figurative metaphors’ place as surface-level expressions in language but, more importantly, show how the metaphor has a fundamental—conceptual—role in how our thinking and meaning-making works. However, if we concentrate on the conceptual importance of metaphors, we soon see how some metaphorical expressions are connected in clusters.⁶⁴

The propositions of metaphor theory are the findings of a relatively new interest in metaphor theory that Nerlich and Clarke describe as metaphor’s ‘third wave of fame’ in the history of philosophy and science.⁶⁵ It began around 1980 with Lakoff and Johnson publishing *Metaphors we live by*. The core of this theory is that an expression is mapped from a source domain to a target domain. In the fields of cognitive linguistics, the metaphor is sometimes defined as an analogy (Lakoff, 1987). I have already mentioned that metaphors are analogies which allow us to map one experience (the target domain) in the terminology of another experience (the source domain) and thus to acquire an understanding of complex topics or new situations. Consider the conceptual metaphor ARGUMENT IS WAR for a moment. Lakoff and Johnson use it to describe how the combination of various elements forms around a conceptual metaphor:⁶⁶

- Your claims are ‘undefensible’.
- She ‘attacked’ every weak point in my argument.
- His criticisms were ‘right on target’.
- I ‘demolished’ her arguments.

⁶³ See Lakoff and Johnson, *Metaphors We Live By* (n 4) 3.

⁶⁴ S Larsson, ‘Metaforerna och Rätten’ (2012) 2 *Retfærd Nordic J L & Justice* 69–93.

⁶⁵ B Nerlich and David D Clarke, ‘Mind, Meaning and Metaphor: The Philosophy and Psychology of Metaphor in 19th-Century Germany’ (2001) 14 *History of the Human Sciences* 40.

⁶⁶ Lakoff and Johnson, *Philosophy in the Flesh* (n 4) 4.

The conceptual metaphor determines what a socially meaningful use of the language for a given phenomenon is and it does so through metaphor and its connected systems or mappings. Differences in conceptual metaphors in different languages may, of course, show diversity of cultures. The conceptualization of argumentation in terms of war may function and be deeply rooted in a specific language and culture.⁶⁷ This means that this conceptualization is not necessarily meaningful in another culture that conceptualizes argumentation in a different manner. The description of how argumentation is conceptualized in terms of war means that there is one conceptual metaphor, not many completely unrelated metaphors. Such expressions can be part of everyday language, because the Argument is War mapping is part of our ordinary, everyday method of conceptualizing argumentation and how to reason about it. This is what Lakoff and Johnson and their colleagues have shown and developed in terms of conceptual metaphor theory.

The figurative element may be more or less clear, and individuals may be more or less disposed to see the figurative elements, such as in a text. This means that we are often not aware of when we are speaking in metaphor and when we are not. While some uses are clearly and consciously metaphorical, others, perhaps most in everyday speech, are only unconsciously metaphorical. We do not differentiate between when we speak in metaphor and when we do not. We are all about the ‘meaning’ of what we say, no matter if this is metaphorical or not. In other words, a generalization that we can make regarding metaphor comprehension is that it is mandatory in the sense that it is ‘an automatic interpretation’ made by us.⁶⁸ This means that literal meaning has no priority; the associative paths creating meaning are there anyway. Generally, we do not choose if we want to lean on the literal meaning. As mentioned, this is one reason for why there is a lock-in effect embedded in the way metaphors function that largely does not occur at an aware level of consciousness. Consequently, accepted metaphors and metaphors not perceived as being metaphors create a system that is harder to criticize and is likely to be conservative.⁶⁹

4.1 – *Metaphors and law*

Many people interested in legal analysis and influenced by this school of metaphor theory begin their presentations with this conflicting perspective

⁶⁷ Steven L Winter expresses the cultural construction to meaning in terms of that ‘Meaning is a shared social phenomenon that constrains how we as embodied and culturally situated human understand our world’, Winter, *A Clearing in the Forest* (n 5) 315.

⁶⁸ S Glucksberg, ‘How Metaphors Create Categories – Quickly’ in Raymond W Gibbs Jr, (ed), *The Cambridge Handbook of Metaphor and Thought* (CUP 2008).

⁶⁹ On this ‘framing’, and to some extent rhetorical aspects of this, see G Lakoff, *Don’t Think of an Elephant: Know Your Values and Reframe the Debate* (Chelsea Green Publishing 2005) and (n 4) 70.

on metaphors in law. They often do this by citing the early American legal realist Justice Cardozo who observed, ‘metaphors in law are to be narrowly watched, for though starting as devices to liberate thought, they end often by enslaving it’.⁷⁰ Ironically enough, Cardozo’s statement, as Loughlan points out, uses at least two important metaphors (‘liberation’ and ‘slavery’).⁷¹ Consider, also, ‘devices’ and the use of what sometimes is called the ‘source-path-goal-schema’, in this case represented by the notion that the use of metaphors in law has a beginning and an end.⁷²

One importance of metaphor research here lies in what I pointed out as the dangers of metaphor not being perceived as metaphorical. When the metaphors are not perceived as metaphors, the conceptions behind will be perceived as the only possible alternative for the purpose of a given regulation. Any attempted revisionary arguments will then be framed within the prevailing conception, no matter what arguments are produced. This is so unless the conception is analytically unlocked and displayed via the metaphors that reproduce it. This means that legal decisions, as well as legislation, are framed and conceptualized in a particular way without us even seeing alternative frames or conceptualizations. Some legal scholars, such as Linda Berger, have used conceptual metaphor theory to study hidden values in decision-making in court.⁷³ Her conclusion is that lawmakers cannot avoid being affected in their decision-making by myths, metaphors and symbols. Berger studies cases that concern determining which parent is most suited to be granted custody when there often is no rational basis to choose one parent over the other. Decisions must, however, be taken and instead of doing this under the false impression that those decisions are pure and objective, Berger sees the solution in raising the awareness of how meaning is produced in the legal field. William Patry is yet another legal scholar who accentuates the importance of metaphors, in his case in what he describes in terms of the ‘copyright wars’. He is very critical of how the American copyright lobby has managed to use metaphors surrounding copyright to their advantage.⁷⁴ The combination of Berger and Patry can therefore work to highlight the importance of studying hidden values within the decision-making in the court case against *The Pirate Bay*, which so clearly is linked to the ‘copyright wars’, and therefore includes a number of metaphors either pro or con the protective elements in copyright.

⁷⁰ Berger (n 13); Herman (n 14); W Patry, *Moral Panics and the Copyright Wars* (OUP 2009); Winter, ‘What is the “color” of law?’ (n 13).

⁷¹ P Loughlan, ‘Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property’ (2006) 28 *Sydney L Rev* 215–16.

⁷² Lakoff and Johnson, *Philosophy in the Flesh* (n 4) 33.

⁷³ Berger, ‘How Embedded Knowledge Structures Affect Judicial Decision Making’ (n 13) 262–66; G Lakoff, ‘The Contemporary Theory of Metaphor’ in A Ortony (ed), *Metaphor and Thought* (CUP 1993). Zoltán Kövecses, ‘Conceptual Metaphor Theory. Some Criticisms and Alternative Proposals’ (2008) 6 *Annual Rev Cog Ling* 168–84; Winter, *A Clearing in the Forest* (n 5).

⁷⁴ Patry (n 69).

5. The Pirate Bay as a metaphoric court case

When the Svea Court of Appeals convicted the founders of TPB in November 2010, it was for aiding in crime against Swedish Copyright Law on the grounds that this service promoted the sharing of copyright material without the authors' consent.⁷⁵ The wording in chapter 23, paragraph 4, part 2 of the Swedish Criminal Code reads:

Responsibilities in this code are prescribed for a specific act, it shall be imposed not only on those who carried out the deed, but also the one that facilitated this by giving advice or assistance. The same shall apply in relation to what in another law or regulation is a criminal offense for which imprisonment is prescribed.⁷⁶

The problems and interesting issues that the case against TPB displays do not necessarily concern internal legal relations (although, there are, in the opinion of this author, interesting issues here as well) as much as the relationship between law on the one side and social and cognitive structures on the other. Only when law is 'not' placed in a societal context may it be possible to perceive copyright law as internally coherent and therefore non-problematical. The media researcher Andersson offers a characterization of TPB—by its links to and entanglements with different actors and actions:

... a service like TPB is "sticky"; the abundance of connections and interrelating actions acts like glue, and ties both venture capitalism, party politics, partisanship and even the idea of stewardship of a sensible cultural ecology into its vortex. TPB was never simply one thing; it can be seen as a conservator of a mainstream cultural supply, as well as a radical opponent to the big media corporations, as a harbinger of free media distribution or, conversely, as a hedonist absorption of mere self-gratification – and much more.⁷⁷

This act of interpreting the existence and identity of TPB is relevant also as a legal activity performed in court. And the outcome of this activity, this labelling of metaphors, has direct consequences for the outcome of the case, for the judgment of guilt or non-guilt, and for the measurement of penalty and damages. It simply, but directly, ties to the cognitive approach of labelling abstract concepts and deals with what could be termed a 'conceptual battle' that took place in the TPB case. One central question in the Pirate Bay case was the question of what the Pirate Bay 'is', (or 'was' in the time frame selected for the case) and to what extent this existence could be regarded

⁷⁵ Case B 4041-09.

⁷⁶ BrB 23:4, 2 st: 'Ansvar som i denna balk är föreskrivet för viss gärning skall ådömas inte bara den som utfört gärningen utan även annan som främjat denna med råd eller dåd. Detsamma skall gälla beträffande i annan lag eller författning straffbelagd gärning, för vilken fängelse är föreskrivet.'

⁷⁷ See J Andersson, 'The Origins and Impacts of Swedish Filesharing: A Case Study' [2011] CSPP - RS 1-18.

as either actively participating in copyright infringement or merely more passively aiding the behaviour of the users of the site. Much of the liability was tied to a debate centring this dichotomy of active or passive participation, and the battle in the case was to a large extent fought through attaching different metaphors to TPB. This conceptual debate has its roots in argumentation that employs different metaphors to frame characteristics in an active or passive mode.

Sometimes, TPB is described as a 'platform' where others carry out their sharing. For example, in the District Court case, one of the defendant's legal counsellors, Jonas Nilsson, points out that the copyrighted works do not pass through the Pirate Bay's computers: 'All the Pirate Bay does is passively provide an empty platform'.⁷⁸ This characterization is also relevant for the services the Pirate Bay depends on in terms of Internet access, broadband and storage. By labelling TPB as a 'platform', the defendant connects to a rather rich field in which digital intermediaries have strategically used this metaphor.⁷⁹ 'Platform' is what Tarleton Gillespie calls a structural metaphor that 'though it may go unnoticed by the casual listener or even the speaker, gives the term discursive resonance'.⁸⁰ In this particular extended case, a legal middle step is also developed when the aspect of time is added to the characterization if the passive contributor of a service neglects to avoid participating in illegal actions, even though the contributor has become aware of their illegality. The middle step may be found in the passive contributor becoming conscious of its contribution. All of which leads back to what the Pirate Bay 'is'. For example, Monique Wadsted, of the law firm MAQS that represented a range of major movie labels and computer game companies in the TPB case, claimed in the Court of Appeal that TPB does not represent a 'passive site'. She claimed that the categories on the site make it easier to find torrents and, therefore, the site has made it easier for users.⁸¹ On the other hand, one of the defendants, Fredrik Neij, claimed that 'The Pirate Bay is a transmission service, not a storage service'. Therefore, the defendants should not be liable to any copyright violations that occurred via the site due to the release from liability that service providers receive through the E-Commerce Directive.⁸² He also claimed that TPB should be regarded mainly as a search engine.⁸³ So, should TPB be seen as a 'search engine' or a 'bulletin board'? To what extent should the

⁷⁸ Day 12 in first instance of case nr B 13301-06: 'Allt Pirate Bay gör är att passivt tillhandahålla en tom plattform.' SR <<http://sverigesradio.se/sida/gruppsida.aspx?programid=3402&grupp=7006&artikel=26723>> accessed 5 June 2013.

⁷⁹ See n 18 above, 68–73.

⁸⁰ T Gillespie, 'The Politics of "Platforms"' (2010) 12 *New Media & Society* 347–64.

⁸¹ Day 2 in the Court of Appeal, 29 September 2010, see Svenska Dagbladet <http://www.svd.se/naringsliv/digitalt/dag-2-svdse-rapporterade-direkt-fran-the-pirate-bay-rattegangen_5422679.svd> accessed 5 June 2013.

⁸² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

⁸³ Day 2 in the Court of Appeal, (n 80).

founders be seen as ‘entrepreneurs’? Is it meaningful to speak of TPB as an ‘assemblage’? The latter is relevant not least in terms of the generative nature of the underlying technology. To label a set of functions in transition is to shoot at a moving target, which, in this case, has legal consequences when valuing the meaning and significance of the case for the future.

5.1 – *TPB as a search engine*

The question of seeing TPB as a search engine or ‘search service’ was debated in both the District Court as well as in the Court of Appeal. For example, in the District Court, the prosecutor asked the expert witness Kristoffer Schollin if TPB is a ‘storage service’. Schollin replied, ‘Yes, but only a very limited one’ and preferred to call it a ‘search engine’, (or ‘service’ in direct translation), as the defendants had described it in interrogation.⁸⁴ Present in the case was the question of how to relate that to the fact that a technology in a sense is neutral, that it can be used for both good and bad (legal and illegal) purposes. To what extent, then, should the inventor of this technology be liable for its uses? In attempting to find a way to relate to this question, the Svea Court of Appeal concluded:

In essence, these theories mean that an offense which involves a conscious risk-taking for a detrimental effect under certain conditions may still be allowed depending on the circumstances such as the nature of the danger, which values the risks target, the social value of the offense, what precautions that have been possible and justified, etc.⁸⁵

The court then addressed this dilemma in terms of search engines, which is a function embedded in TPB, due to both YouTube and Google being mentioned by the defendants. A search engine that can assist in illegal distribution of content can still be legitimate, according to the court, but it has to be dominated by legitimate use to ‘public benefit’:

If a search engine is characterized by primarily being a valuable tool in lawful activities and generally to public benefit, if this legitimate use dominates, but distribution or transmission of illegal material in spite of precautions cannot be ruled out, the operation of such a service, from an objective point of view, may be regarded as permitted in accordance with the aforementioned theories.⁸⁶

⁸⁴ Day 8 in the first instance in the case against The Pirate Bay, Case nr B 13301-06. See Dagens Nyheter, 26 February 2009, <<http://www.dn.se/kultur-noje/rattegangen-mot-pirate-bay—dag-8>> accessed 5 June 2013.

⁸⁵ Case B 4041-09, 26 November 2010, p 24: ‘I huvudsak innebär dessa teorier att en gärning som innefattar ett medvetet risktagande för en skadlig effekt under vissa förhållanden ändå kan vara tillåten med beaktande av sådana omständigheter som riskernas art, vilka värden riskerna riktar sig mot, själva gärningens sociala värde, vilka försiktighetsåtgärder som varit möjliga och befogade m.m.’

⁸⁶ Case B 4041-09, 26 November 2010, p 24: ‘Om en söktjänst till sin karaktär är sådan att den i första hand är ett värdefullt verktyg i laglig verksamhet och allmänt samhällsnyttig, om denna legitima användning dominerar, men spridning eller överföring av olagligt material trots försiktighetsåtgärder inte kan uteslutas, kan

Should TPB be regarded as a search engine? And if this search engine is ‘a valuable tool in lawful activities and to a general public benefit’ then it would also be regarded as legitimate from a legal point of view.⁸⁷ References in the TPB Court of Appeal case were made to the Google search engine, on both sides. This judgment of intent was a central issue in the case. However, as Andreasson and Schollin point out, the requirements for establishing this intent to constitute contributory copyright infringement were significantly lowered in the Court of Appeal, as well as the Court having to address the debatable assessment of the ‘social adequacy’ of a service. This means that the Court lowered the standards for what is deemed as contributory infringement, which would then probably include any general search engine, but tried to balance up this vast criminalization with an evaluation of whether the service is ‘socially adequate’, ie if it is of predominantly legal use as well as to the ‘general public benefit’.⁸⁸ This assessment is not easy to arrive at in a lot of cases and perhaps it is doubtful if it is even possible.

Peter Danowsky, legal counsel for the record industry association International Federation of the Phonographic Industry (IFPI), described in his closing argument in the Court of Appeal Google as a ‘pure search engine’, implying that the TPB focus on torrent files makes it impure in terms of being a search engine (or service).⁸⁹ Note the metaphorical content of ‘purity’ here in connection with ‘search engine’ and the negative connotations that are embedded.

5.2 – *TPB as a bulletin board*

Legal scholar Kristoffer Schollin was heard as an expert witness in the case, and stated, ‘the best way to describe a tracker is that it is like a bulletin board’.⁹⁰ In the Court of Appeal, the prosecutor argued that TPB be seen as an ‘electronic bulletin board’.⁹¹ In this case, it would mean that the prosecuted would be seen as actively involved in copyright infringement if TPB were to be legally classified as an electronic bulletin board.⁹² From a

driften av en sådan tjänst i objektivt hänseende komma att bedömas som tillåten med stöd av nyss nämnda teorier.’

⁸⁷ Case B 4041-09, 26 November 2010, p 24.

⁸⁸ Case B 4041-09, 26 November 2010, p 24; cf Andreasson and Schollin (n 35) 541.

⁸⁹ In Court of Appeal, 12 October 2012, see Svenska Dagbladet, <http://www.svd.se/naringsliv/digitalt/slutpladeringar-i-pirate-bay-rattegangen_5493311.svd> accessed 5 June 2013.

⁹⁰ Day 8 in the first instance of the case against The Pirate Bay, Case nr B 13301-06. See Dagens Nyheter, 26 February 2009, <<http://www.dn.se/kultur-noje/rattegangen-mot-pirate-bay—dag-8>> accessed 5 June 2013. In Swedish: ‘Det bästa sättet att beskriva en tracker är som en anslagstavla’.

⁹¹ Day 7 in the Court of Appeal in the case against TPB, 12 October 2012, Case B 4041-09.

⁹² The so-called BBS-law (Act on Responsibility for Electronic Bulletin Boards, 1998:112) was adopted in 1998 and applies to services that electronically convey messages. The purpose of the Act is to establish responsibility for the provider to keep an eye on the bulletin board and to remove messages that clearly constitute incitement, hate speech, child pornography, unlawful depiction of violence or messages where the posting user manifestly infringes on copyright.

metaphor theoretical approach, it forces us to apply what we know about the source domain (bulletin boards > electronic bulletin boards) to the target domain (TPB). The constant battle in court over TPB regarding the dichotomy of active/passive not only targets the characterization of the actual functions of the website or the BitTorrent technology but also ‘the individuals’ accused of being responsible for TPB. The prosecutor argued for legally supported metaphors that would frame the accused as playing an active role in supporting illegal file sharing (contributory copyright infringement) and the defence arguments used legally supported metaphors that would frame the accused as passive or inactive.

5.3 – *TPB founders as entrepreneurs*

Were the accused ‘entrepreneurs’? How did the court regard this? Was it good or bad? Each metaphor is connected to specific values, of which some also are legally relevant. For example, if the individuals responsible are entrepreneurs, then a profit value is easily argued for. And the distinction of whether or not the activity is aimed at making a profit or not is very relevant to the calculation of damages in the case. The District Court concludes that TPB has been run as a ‘commercial project’, which, as stated in preparatory legal works, indicates that a tougher sentencing is appropriate.⁹³ Palmås, a social scientist and entrepreneurship analyst, addresses the fact that the court in grave terminology described the cunning and ambition with which TPB operated as additionally incriminating, and concludes that these are the same type of innovative traits that we teach the students to take on the world with:

The District Court’s ruling suggests that it was not possible to demonstrate the financial benefit, but also listed other entrepreneurial traits of the accused as damaging factors. The TPB founders worked as a team, they investigated the appropriate organizational forms, and tried to think creatively about different sources of revenue – they had, in other words, practiced what we are today trying to teach to the thousands students of entrepreneurship at the country’s universities and colleges.⁹⁴

In short, the same characterization that is especially attractive in innovation is here found to be especially incriminating. Another way to put it is that TPB made money from the online distribution of music and movies where the industry itself had failed to do so.

⁹³ Case nr B 13301-06, p 79. Preparatory legal work prop. 1981/82:152, p 18.

⁹⁴ K Palmås, ‘The Pirate Bay-bacillen – tre spekulationer’ in J Andersson and P Snickars (n 36) 196–211, my translation. See also K Palmås, *Prometheus eller Narcissus. Entreprenören som samhällsomvälvare* (Korpen Koloni Förlag 2011).

5.4 – *TPB as assemblage*

Regarding the identity and existence of TPB, Fleischer has, for example, called it an assemblage.⁹⁵ In his contribution to the Swedish anthology *Efter the Pirate Bay*, he explains that The Pirate Bay was ‘a name of an assemblage of software, hardware, people, and symbols. No single component meant something by itself, but the explosive force arose from its reconciliation’.⁹⁶ The terminology has its theoretical roots in a French tradition that includes Gilles Deleuze and Felix Guattari,⁹⁷ and has been developed by Manuel DeLanda.⁹⁸ The point here is to present an alternative to seeing TPB as a seamless whole, to explicitly point out the multitude of functions sorted in the particular setting it consists of. The challenge that quite naturally follows from this is, what does it mean when these functions are re-arranged at a later point? To what extent does a court case dealing with TPB anno 2006 also regulate TPB anno 2013?

Describing TPB in terms of an assemblage emphasizes the notion of a construction put together consisting of different pieces, each with its own significance. And what has been assembled can also be disassembled, decentralized and distributed. However, the legalization of the activities TPB stands for demands a personalization of the abstract or assembled entity that TPB is. The first grand problem of a networked activity is the one of picking the people most important to this networked activity. Even at this point, it is hard to draw the line. There are likely to be a large number of participants who have contributed, each in their own way. The roughly outlined categorization of law does not easily fit into the great diversity of roles in a digital environment, where identity and types of contribution can differ considerably, and not even individuality needs to be an important distinction. In order to understand the organizational form of TPB, at least five main functions can be identified as necessary for a BitTorrent tracker site to work:

1. Domain name. The website needs to be found by its users, and have some sort of functioning interface.
2. Internet access. The website needs to be accessible through the Internet.
3. Search engine. Although many different categorizations of the torrents may be considered, a search engine is very helpful if the database is extensive. Which brings us to the . . .
4. . . . database of torrent files. Since no actual media content is found under the domain name, the actual web page, the torrents that show

⁹⁵ Fleischer (n 44).

⁹⁶ *ibid* 264.

⁹⁷ G Deleuze and F Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press 1987).

⁹⁸ M DeLanda, *Intensive Science and Virtual Philosophy* (Continuum International Publishing Group Ltd 2005).

exactly where this content can be found need to be gathered somewhere. It is these that are searchable. They, of course, need to be accessible.

5. Tracker. This feature communicates with the peers using the BitTorrent protocols, which can be termed the clients (this is however not used with ‘magnet links’). Clients that have already begun downloading also communicate with the tracker periodically to negotiate with newer peers and provide statistics; however, after the initial reception of peer data, peer communication can continue without a tracker.

So, in short, there are three main functions behind the website, namely, the search engine, the torrent database, and the tracker that has to be connected to Internet and tied to a domain name. It is these three main functions that have been associated with TPB in the court cases. In the Svea Court of Appeal, they were instructed to examine points 3, 4, and 5, as well as the functionality of the users who are able to upload torrents.

6. Liability of the functions

In order to understand the future challenge for law here, it is important to understand that the ‘assembled’ functions can be disassembled and spread out over different legal jurisdictions and operated by a number of different subjects. This highlights the question of to what extent these parts of assemblages such as TPB are liable for what the whole assemblage leads to. In the aftermath of the first court verdict regarding TPB (1 April 2009), some of these other functions were also targeted by the same plaintiffs as in the TPB case. The responsibilities of the people providing the necessary building blocks are dependent on the legally accepted criteria for what the site is, or is not, doing. Number 2, above, concerns Internet access; on 21 August 2009, the District Court of Stockholm issued an interim injunction against Black Internet AB, stating that the company had contributed to copyright infringement by providing Internet access to the Pirate Bay file-sharing service.⁹⁹ A group of major movie and music companies from both Sweden and North America filed this suit against the broadband provider shortly after the court decision in the District Court Case against TPB. The step from passive contributor goes via the contributor becoming conscious of the nature of its contribution. Legally, this is how the passive contributor can become liable, because they have neglected the fact that their contributions are transformed into illegal actions. The suit resulted in that Black Internet stopped delivering Internet access for TPB, which for about a day went offline before it had rerouted its access. Black

⁹⁹ T 7540-09, T 11712-09, 21 August 2009.

Internet appealed the District Court decision (3 November 2009) without success.¹⁰⁰

Number 5, above, concerns the BitTorrent tracker. While filing the suit against Black Internet, the group of major American movie companies simultaneously filed a suit against Internet Service Provider (ISP) Portlane for offering services to BitTorrent tracker OpenBittorrent as well as against two of the convicted in the TPB case, Fredrik Neij and Gottfrid Svartholm Warg, in order to prohibit them from participating in the operation of the file-sharing service, including the tracker. The law firm, MAQS, demanded that Portlane deny Internet access to the tracker function. The District Court did not, however, rule in favour of the American companies.¹⁰¹ The District Court stated that according to the legislative history of the Swedish Copyright Act,¹⁰² it is clear that more of an intermediary role is required than provision of Internet access for liability for contributory copyright violations. The Court's evaluation was that the application of copyright provisions in the manner the plaintiffs argued would mean too far-reaching responsibility for an ISP. They would be forced to exert control over what a tracker holder does and the extent to which the tracker was involved in copyright infringement or not. A significant distinction from the characterization of TPB in this case, in relation to the characterization of TPB in the original case, is that here, the case regards TPB in its organizational form in 2009 when the tracker function, at least, was no longer directly connected to TPB, while in 2005–06 more functions were assembled under the same TPB flag. The court however ruled in favour of the movie companies regarding the two convicted in the TPB case. The decision was appealed and the Court of Appeal upheld the decision against Neij and Svartholm Warg. It also overruled the District Court regarding Portlane and banned Portlane from providing Internet access to a specific tracker (tracker.openbittorrent.com) involved in TPB.¹⁰³

Fredrik Neij and Gottfrid Svartholm Warg, having just been convicted in District Court in the TPB case were, through the decision in District Court and later the Court of Appeal, prohibited from participating in the operation of the file-sharing service and risked a fine of euro 58,000 if they were found doing so. However, later the same year (2009), TPB announced that it had closed its tracker down since the service now relied on so called magnet links that allow peer-to-peer sharing without a central tracker to guide the swarm. Consequently, as a sum, instead of shutting down the activity that was assisted by the BitTorrent tracker, the parallel torrent technology developed into becoming independent enough to no longer rely on a tracker. This describes what Jonathan Zittrain has expressed as 'generativity', that is, the

¹⁰⁰ Case Ö 7131-09, Svea Court of Appeal, Black Internet, 21 May 2010.

¹⁰¹ Case T 17127-09, 1 December 2009.

¹⁰² Prop. 2004/05: 110.

¹⁰³ Cases Ö 8773-09 and Ö 10146-09, Svea Court of Appeal, Black Internet, 21 May 2010.

possibility of restructuring and rebuilding that in many instances has been a characteristic of the digital coded medium.¹⁰⁴ This is a main reason for why this medium is so hard to control from a central point of view, for example, for law.

7. Future outlook: Generativity in decentralization

In order to concentrate on the future of peer-to-peer (p2p) sharing, I return to the possible disassemblment. As can be seen from the differentiation into several necessary functions, none of these need to be located at the same place, under the same pirate flag, so to speak. They may be extremely decentralized in terms of both geographical location and collective metaphors. This further complicates the characterization of what a site such as TPB is, and it further asks rather intriguing questions in relation to an incredibly geographically and concept-dependent regulation of copyright. If a BitTorrent tracker site of the early TPB character were to be sued for complicity in copyright infringement, issues to be covered would include:

1. In which country, and hence, under which legal jurisdiction?
2. Which of the functions is illegal? Or is it the combination of
 - (a) Search engine and interface?
 - (b) Torrent database? (and)
 - (c) BitTorrent tracker?

And then, what if the search engine is run by one party, the torrent database by another in another country, and the tracker function by a third party in yet another country? And what if the search engine not only finds torrents, but anything, along with the fact that the tracker aids in the sharing of a great deal of non-copyright infringing material, combined with the fact that the torrent database contains all kinds of both copyrighted and non-copyrighted material? The opportunities for decentralization are all here. It could be said that BitTorrent sites are becoming meta-p2p. That is, decentralized catalysts for decentralized file sharing. And, of course—with Zittrain’s ‘generativity’ in mind—there are other protocols that take over, or versions of the same protocol, that offer even more decentralization, more of the nodes in communication with each other as well as being strongly encrypted, such as the ‘magnet link’ Distributed Hash Table (DHT) that began to emerge in 2009. DHT may be described as a large ad hoc network of peers, passing on information requests about torrents without a central server, meaning no control

¹⁰⁴ J Zittrain, *The Future of the Internet, and How to Stop It* (Penguin Books 2008); J Zittrain, ‘The Generative Internet’ (2006) 119 *Harvard L Rev* 1974–2040.

or single point of failure. This means that no tracker function is necessary. By moving to a more decentralized system of handling tracking (DHT + PEX) and distribution of torrent files (magnet links), BitTorrent becomes even less centrally definable, meaning no central tracker that can be downloaded and no reliance on a single server that stores and distributes torrent files, and hence, no centrally located individuals to be held responsible.

8. The normative implications of skeumorphs

Which generalizable facts can we learn from the TPB case in terms of re-using conventional concepts in new circumstances, what implications follow from judging the new with concepts from the past? For one, skeumorphs come with normativity, and it is the past being normative in relation to the future. Already existing concepts and artefacts are constantly measuring the future and new phenomena, as expressed by Larsson:¹⁰⁵

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.

In this sense, we can never be free in our judgment of the new and abstract. We need concepts and we need to conceptualize the new. But what I argue in this article is that we need to be aware of this ‘conceptual path dependence’, particularly to what extent it is taking part in legal development and court cases that send people to jail and condemn them to eternal poverty. We need to be aware of what Katherine N. Hayles means when she refers to a skeumorph as something that ‘simultaneously focuses on the past and future, while reinforcing and undermining both’.¹⁰⁶ It is this conceptually bound normativity that controls our actions and thinking when we immediately know how to use a digital camera, but at the same time are constrained in our actions by our understanding of it being based on and mimicking an analogue phenomenon.¹⁰⁷

The ‘undermining’ aspect of the skeumorph lies, here, in that the digital phenomenon used by any of the legal skeumorphs describes an analogue presence that exists over constraints that are significantly different from

¹⁰⁵ Larsson, *Metaphors and Norms* (n 6) 101.

¹⁰⁶ Hayles (n 58) 17.

¹⁰⁷ How norms function, especially social norms in relation to legal norms, has been studied and conceptualized in the discipline of Sociology of Law. See for example Håkan Hydén and Måns Svensson, ‘The Concept of Norms in Sociology of Law’ in Peter Wahlgren (ed), *Scandinavian Studies in Law* (Law and Society 2008); M Svensson, *Sociala normer och regelbeteendena. Trafiksäkerhetsfrågor ur ett rättssociologiskt perspektiv*, [Social Norms and the Observance of Law], (Lund University, Lund Studies in Sociology of Law 28, 2008). This is done, particularly in relation to digitalization and copyright norms, in Larsson (n 7); Svensson and Larsson (n 50).

those that the digital phenomena exist over. A parallel can be drawn to the use of the concept of ‘copies’ in copyright legislation.¹⁰⁸ It means taking an earlier concept and reusing it in a new context under different constraints and conditions. The benefits are clear. We understand the new quickly, and the transition is in many aspects seamless and functional (we understand digital entities in terms of singular copies in a similar way to one physical copy being different from another physical copy). The downside, perhaps not as clearly expressed, relates to the fact that the conditions under which the latter concept, the skeumorph, exists are fundamentally different.

The sum of the damages in the TPB court case was calculated on a small number of downloads of a smaller number of works during a limited amount of time. The main model for this calculation, according to the American claimants, was based on a per download value; that is, each copy meant a value. Now, in a skeumorphic fashion, there are a number of assumptions connected to this model for calculating value. For example, it assumes that the digitally mediated behaviour online surrounding the ‘consumption’ of music, movies and games follows the same pattern as more traditional consumption of physical artefacts. It assumes that the loss that the producer suffers from digital downloads are the same or very similar to the loss that a producer suffers from when a commodity is stolen. In short, it follows the extreme control-of-copies-lock-in that copyright regulation has drafted during the second half of the 20th century. The clearest example might be the related concept of ‘theft’ of these copies. Theft in a physical environment means that the object is removed and lost for the one who is robbed. The consequences are very much different in a digital context, wherefore the concept of ‘theft’ needs to be considerably expanded to be truly meaningful also for this act.

9. Conclusions

The TPB case is of interest from many angles. Not only as a portrait of the obvious challenge to a legal construction, but also because it reveals some of the underlying dilemmas in the construction of this particular regulation in the digital context. Further, the case clearly illuminates the dilemmas of applying a legal construction formulated to control making copies and their distribution to an environment that has so fundamentally revolutionized both the reproduction of copies as well as distribution. In fact, it is argued here, this case may be used to illustrate that parts of copyright have become metaphorical in the sense that the reality it attempts to regulate has changed essentially. The concepts have received new meaning, or perhaps more properly put, the concepts have colonized new practices and therefore ‘mean’ more. In general, the key propositions of this article

¹⁰⁸ Larsson, ‘Copy Me Happy’ (n 14).

are: (i) Metaphors are fundamental to language and mind—abstract thinking is largely metaphorical; (ii) Digital phenomena are largely understood through metaphors and skeumorphs; (iii) Law, in a digital society, is inevitably affected by this—concepts become skeumorphs (their meaning changes over time, although retaining some connection to a (normative) past).

Skeumorphs, that is the reuse of old concepts for new phenomena, come with a price. Although they offer a quick understanding of new phenomena, they also to some extent hide the novel aspects of these new phenomena. In the TPB court case, the prosecutor argued for legally supported metaphors that would frame the accused as playing an active role in supporting illegal file sharing (contributory copyright infringement), and the defence arguments used legally supported metaphors that would frame the accused as passive or inactive. By categorizing the activities as either active or passive in relation to the on-going, undisputed file sharing somehow linked to TPB, the founders of TPB would be held liable or not liable for aiding any copyright infringement this file sharing leads to.

Legally, the outcome of this battle of metaphors regarding the TPB is of extreme importance. Speaking of skeumorphs and the metaphorical practice of moving a concept from a source domain to a target domain, notice the extreme need for metaphors when naming and describing the coded entities and the digital organization in this case: the torrents, the tracker, the search engine, peers in a network, links, magnet links, etcetera. And in the legal search for a metaphor that appropriately describes TPB, the unavoidable tools are inescapably more metaphors, such as TPB as a ‘platform’, ‘bulletin board’, search ‘engine’ etcetera. This means that metaphor is not incompatible with legal reasoning. Rather, it is an inevitable part thereof and, in suggestion, a part that is of extra importance in terms of conceptual development in times of more rapid transition—for example, when a new technology is introduced. Bjerre, for instance, concludes that ‘the lesson for legal analysis is not to shun metaphor, or to seek liberation from it, but rather to realize that this aspect of thought is part of how the law functions, and that we can use it as an opening for reform though we must also live within its constraints’.¹⁰⁹

When it comes to TPB, given the possible rearrangements of the functions included in a site like TPB, it must not be forgotten that the original TPB case regarded TPB ‘as it was organized’ in 2005–06. The extent to which the case will function as a precedent for other cases and the extent to which the 2005–06 version of TPB is in any way able to symbolize p2p file sharing via the BitTorrent protocol when the very infrastructure has changed is also unclear. The form of organization, the existence, the ‘is’, has changed, probably towards using even more of the inherent strengths of the Internet: heading for maximum decentralization not only in its users, but

¹⁰⁹ Carl S Bjerre, ‘Mental Capacity as Metaphor’ (2005) 18 *Int’l J Semio L* 101–40.

also in its functionality of connection of users. The benefits of the verdict are therefore hard to find. If we view the question from the angle of Intellectual Property regulation, a number of studies have concluded that the weak support for upholding copyright law online is both well spread and intact also after 2009.¹¹⁰ This means that four individuals have been punished for aiding a behaviour and normative precondition supported by a majority of the younger generation. The claimants, who won the court case, spent large sums on lawyers' fees for winning a case that only renders a right to damages that they most likely never will be able to retrieve and a hard to estimate bad-will amongst the young generation of file sharers all around the globe. This should especially be seen in the light that the site itself is still operating and is more popular than ever.

¹¹⁰ S Altschuller and R Benbunan-Fich, 'Is Music Downloading the New Prohibition? What Students Reveal Through an Ethical Dilemma' (2009) 11 *Ethics and Information Technology* 49–56; Feldman and Nadler (n 50); Svensson and Larsson (n 50).