DIFFERENT DARLING CONCEPTIONS TIED TO DIFFERENT SOCIETAL SYSTEMS - the case of illegal file sharing in a brave new world

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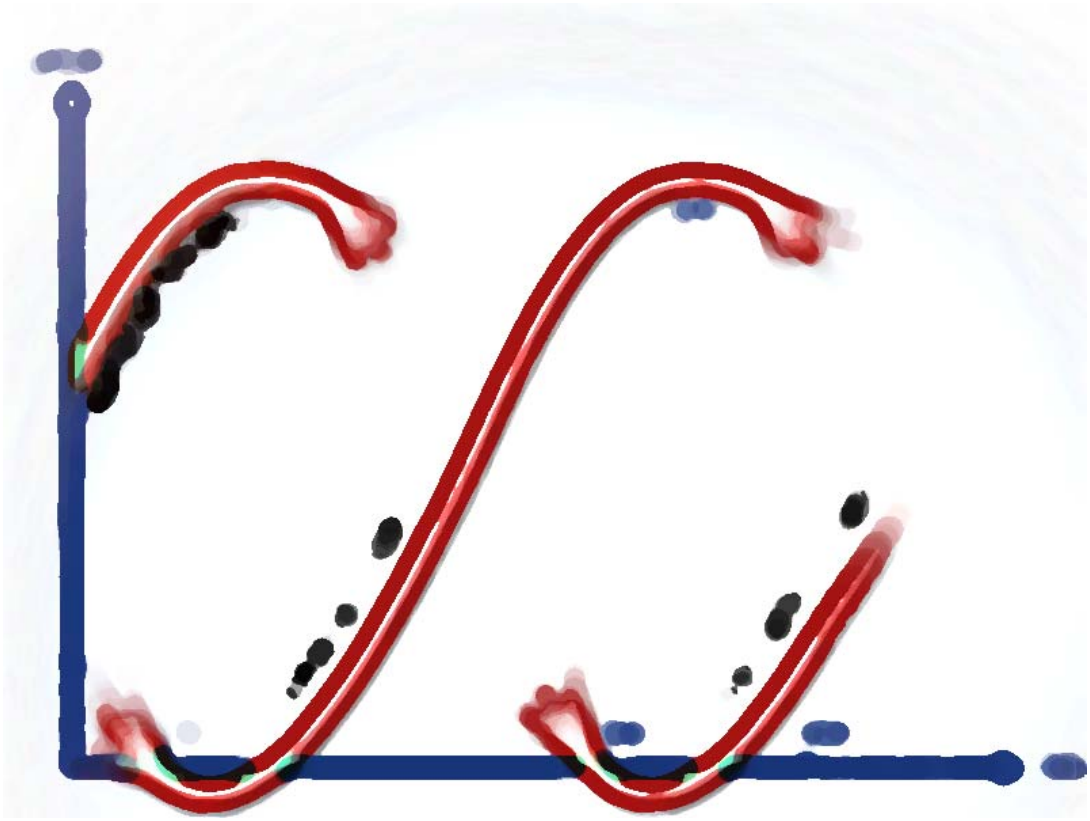

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A work in progress by

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Abstract

Different societies regulate differently. Historically, social evolution has often been connected to technological innovations. The combustion engine took a central position in what later became known as the industrialized society, an urbanizing era of factories and production, on its hand following on the rural society tied to agriculture and trade. With each type of society comes a specific type of legal (darling) conceptions tied to the patterns of behaviour relevant for this type, some new in conflict, some old and lasting. Every transition mean a time of legal and normative change, a time of battles between different legal conceptions, a time of uncertainty in some fields. It is in this perspective we regard the concept of Risk Society. With each type of society follows a birth, a growth, a maturity and a death. In this perspective the industrial society is dying, and the information society is being born, side by side, in both conflict and consensus. With each cyclic turn of a society follows a certain logic attached to the present phase of the society. The upcoming society with its norms, cultures and world view deriving from it, will in many cases be colliding with the regulations and world view based on the old premises.

The article describes the differing legal conceptions tied to an industrial society in transition into another, more information based society, via the example of illegal file sharing and copyright. The term ”risk society”, referred to in the theme of the conference, is derived from Ulrich beck. Beck claims that sociology needs to change if it is to understand and explain the changing needs of a transitional society (Beck 1995:231). Social science can not too rigorously rest upon the “truths” related to the structures of the industrial age. Copyright law is developed in the industrial society, as a means to stimulate creativity and ensure returning profit for investments in immaterial products such as literature, music, moviemaking and other media. Digital technology changes the preconditions, and the causes for changed behaviour in the society to what can be perceived as normative change, a spread pattern of what is accepted as right and wrong at a specific area, for instance regarding file sharing of media content. What in an analogue perspective is seen as theft, a morally still strong anti-value, is in the digital perspective seen as something else, with less moral anti-value.

The “risk society” is here seen as a label on the transitional society containing conflict tied to the new practices, not yet legally codified. The focal point is shifted from a pure hierarchic top down structure towards an increased local influence combined with net-working. The transition towards a new society is initiated at an unregulated bottom, via an emerging core technology and its initial driving contributors. We can only learn how to cope with these changes in society and law by comparing with correspondent shifts earlier in history of mankind. That is what our paper deals with.

Keywords: Sociology of law, transition, risk society, industrial society, copyright law, Illegal file sharing, new world, legal conceptions,

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1.0 Introduction

As Boaventura de Sousa Santos put it, back in 1995: ”From the paradigm of modernity we have come to a new paradigm which by now can only be defined inadequately” (1995, p 569). In this article we focus a shift in how actions are arranged in society, and actually the inherent ways of which things exist, in connection to how they then can be owned. In this perspective we use the term “digitalization” as a revolutionary (rather than evolutionary – even if evolution sometimes takes great leaps) step from “industrialization”. Sure, it is a network society, but it is the digitalization that creates a key challenge to the legal ways of regulating the part of society and the part of the idea of ownership that is connected to copyright.

Although inadequate term or not, we ask, like Boaventura de Sousa Santos, for a paradigmatic visualization or, simply put, to take a step back and ponder the construction of law and society in days of transition – a construction to a great extent born and matured in an industrialized society under analogue preconditions. The lack of sight is problematic, as we will see below in the case of the Swedish copyright debate, as norms change of what is perceived as right and wrongful actions when the normative change is inevitably connected to a grander societal change and in conflict with legal regulations of the aging (dying) era.

Technology has often an important role in the social and normative transitions. Digital technology changes the preconditions for communication and the causes for changed behaviour in the society to what can be perceived as normative change, a spread pattern of what is accepted as right and wrong at a specific area, for instance regarding file sharing of media content. What in an analogue perspective is seen as theft, a morally still strong anti-value, is in the digital perspective seen as something else, with less moral anti-value. Technology can be seen as the prime mover of the social changes creating the copyright dilemma of the industrialized world. We are focusing technology in the sense that other parallel processes that are part of the paradigmatic transition are neglected (for a grander picture, see Manuel Castells 1996, 1997, 1998, and for focus on law and legislative paradigmatic change in a global perspective, see Santos 1995, 1995b, for instance), but still interested in the consequences of how technology rearranges society and creates various conditions for norms.

Different societies regulate differently. One can here talk about rules of the game. Every society, like every game, has its own set of rules of the game that defines that society or that game. Historically, social evolution has often been connected to technological innovations. The combustion engine took a central position in what later became known as the industrialized society, an urbanizing era of factories and production, on its hand following on the rural society tied to agriculture and trade. With each type of society comes a specific type of legal (darling) conceptions tied to the patterns of behaviour relevant for this type, some new in conflict, some old and lasting.

”People in power get to impose their metaphors”, wrote Lakoff and Johnson in their ground breaking work on structures of metaphors and concepts and their manifest part of human thinking and communication in 1980. They strengthened the idea of that human thought processes are mainly metaphorical, and expressed it as that the “human conceptual system is metaphorically structured and defined”, and meant by “metaphor” really “metaphorical concept” (Lakoff and Johnson 1980, p 6). Their work inspired various disciplines to develop in this direction.

Conceptions are, like metaphors, carrying with them a heritage of the context they are derived from. They are not always easily translated from a context to another without some kind of distortion. One can go even further: Conceptions and metaphors are a way to think, they describe the way in which we understand life, our world and place in it (Morgan 1999). The problem is that metaphors and conceptions can be both informative and deceptive. They can be lent from a context where they function well to be used in a context where they deceive and distort. The pre-understanding of this article is that conceptions can be tied to a specific world order, to a way in which a society is organized: in its politics, in its administration, in its government and its regulation. This leads to what the title is asserting: societies change and the conceptions that has been more or less deeply founded in them can face problems when to be translated into the new context. This article uses the example of file sharing, the Internet and the copyright legislation to show the clashes of such a societal transition and the conceptions moving with it.

Every transition means a time of legal and normative change, a time of battles between different legal conceptions, a time of uncertainty in some fields. It is in this perspective we regard the concept of Risk Society. With each type of society follows a birth, a growth, a maturity and a death. In this perspective the industrial society is dying, and the information society is being born, side by side, in both conflict and consensus. With each cyclic turn of a society follows a certain logic attached to the present phase of the society. The upcoming society with its norms, cultures and world view deriving from it, will in many cases be colliding with the regulations and world view based on the old premises.

The term ”risk society”, referred to in the theme of the conference, is derived from Ulrich beck. Beck claims that sociology needs to change if it is to understand and explain the changing needs of a transitional society (Beck 1995:231). Social science can not too rigorously rest upon the “truths” related to the structures of the industrial age. Copyright law is developed in the industrial society, as a means to stimulate creativity and ensure returning profit for investments in immaterial products such as literature, music, moviemaking and other media. The “risk society” is here seen as a label on the transitional society containing conflict tied to the new practices, not yet legally codified. The focal point is shifted from a pure hierarchic top down structure towards an increased local influence combined with net-working. The transition towards a new society is initiated at an unregulated bottom, via an emerging core technology and its initial driving contributors. We can only learn how to cope with these changes in society and law by comparing with correspondent shifts earlier in history of mankind.

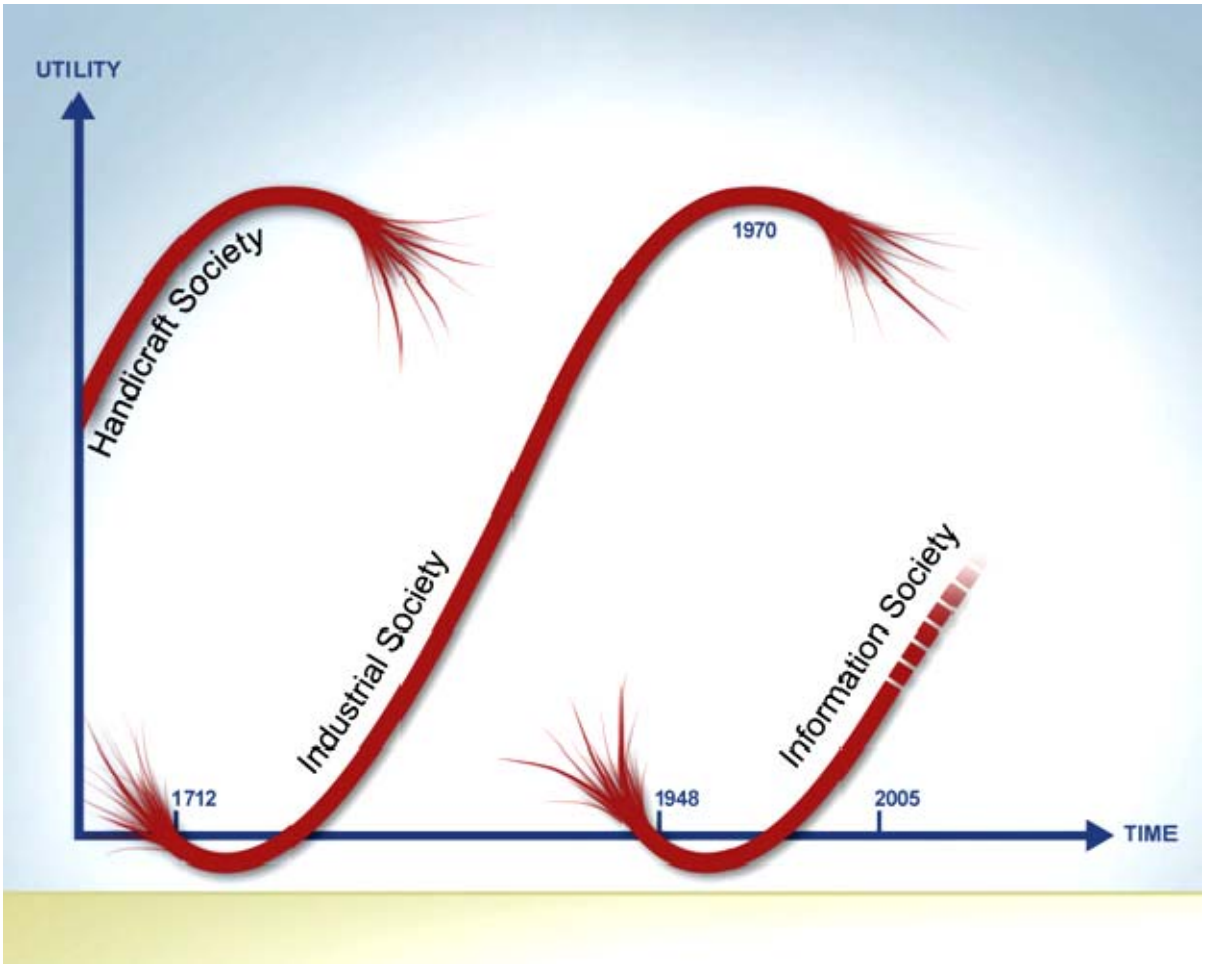
The perspective here is then that the present is a time on the verge or in the middle of a transitional period. A period of choice, although the way to choose is not a simple one. And a guide in this choosing can be to look back and compare the choices made before. The aim of the article is to describe the differing legal conceptions tied to an industrial society in transition into another, more information based society, via the example of illegal file sharing and copyright in general and the copyright debate in Sweden, in particular.

2.0 General perspective

Societies can be said to develop over time as waves or S-curves. They follow the cycle which any system follows. Society is born, it grows up, becomes mature and after a time it dies and

falls into a process of decay. One society emerges as a reaction on the existing. This means that when a society has reached its peak, a new society is already under way, as in the following figure:

Figure 1: Societal change as curves.



The figure shows the development in the industrialised western world that characterizes Sweden, but also other European countries and USA, partly even Japan. The figure shows the last three centuries. It is possible to follow the pattern historically. These S-curves represent different phases within a larger civilisation, which covers approximately 1000 year, the market epoch.

We have no way of knowing what will constitute society in the future. We can, however, use the cyclical model of understanding societal development and, thereby, predict what form society may have in the future. Societal development shows one common feature over time. Before explaining this, we will say something about the driving forces behind development. In the Market epoch, technological change has been the prime mover. However, not all technological innovation has an effect on a societal level, rather a kind of core technology is necessary, like the steam engine in the beginning of the 18th century. It was used in order to develop new engines, which in turn could lay the foundation for further technological development, etc. The same goes for the computer. It represents a core technological change. After the invention of the transistor in 1948 in Bell's laboratories in the U.S.A., the foundation was laid for the development of the micro chip and the computer. With the

development of the personal computer, another step was taken, which furthermore was advanced by the construction of the Internet. We are still waiting for the establishment of the necessary infrastructure and the integration of multi-media solutions. A significant factor in relation to a core technology is that it is potent enough to stimulate the fantasy and imagination of people, so their application of new technology promotes the development of new modes of fulfilling old human needs.

These factors influence also the legal development trends. The development of law "follows" the S-curves. If we look at the figure above, we can notice that the feudal system in the countryside and the guild system in towns and cities with its statutes and regulations of who was entitled to get a certificate as master craftsman and carry on craftsmanship and the mercantile system with its strong regulation of trade, were both deregulated during the 18th century and gradually replaced by a policy of non-restrictive practices and free-trade policy. In the 19th century a new kind of regulatory principles emerged. Through the so called *Code Napoleon* in France and *Burgerliches Gesetsbuch* in Germany, the regulation of the market economy got its features. This applies to the rules regulating property, contract and economic security rights. During the 20th century the public law system grew. Especially at the time of World War I and World War II, a great amount of public administrative laws were introduced. And when we had reached the peak of the industrial society a new type of legislation flourished, the intervening regulation. At this time, from 1970 up to the present, society is covered by an enormous legal superstructure just as when the handicraft or agricultural society was found to be at its peak in the beginning of the 18th century[1]. Therefore a process of deregulation, not only is expected, but also to a large extent already has taken place.

Before that, however, we can expect growing regulation related to increasing control over the individuals. Any centralised political system seems to need high degree of surveillance of their citizens. We have the examples of the police systems within the former Communist regimes in Soviet Union and eastern Europe, such as KGB and Stasi in fresh memory. These kind of systems have now been complemented by a number of new trans-national surveillance and information systems in Europe. We have to keep in mind that the power and the vested interests belonging to the upper curve in the figure. And the more the system represented by this curve loses its attraction for people, the stakeholders in the political and the economic systems have to use different means of control in order to stay in power. The Norwegian Sociologist of law, Thomas Mathiesen, has regarded this development as a global phenomenon in the industrialised world. He talks about a trend towards *Lex Vigilatoria* (Mathiesen 2008). He has seen this as an example of "law without a state" in the way Gunther Teubner has done in relation to Lex Mercatoria (Teubner 1997). Mathiesen ask himself: "Do we, in recent developments in the late 20th and early 21st century, see signs of a developing independent global control system, a kind of frightening lex vigilatoria of political and social control? Global control without a state?" (Mathiesen 2008:120) The mechanisms for this seems to be twofold (cf Mathiesen 2008). One is horizontal integration and interlocking of the different systems of control. The various information systems are established, as well as operated, by the same, or professionally very similar, organizations and agencies. Mathiesen is talking about a kind of customary law on an international level, where the various systems, once they are up and running, interlock further through informal agreements and arrangements which rapidly expand their practices (Mathiesen 2008:121). The systems expand by internal sociological forces and logic, which would be worthwhile to investigate and map in a larger research project in order to understand and thereby oppose and contain

[1] The Portuguese Sociologist of Law, Boaventura de Sousa Santos, has made use of the metaphor of an overloaded camel being borne down by the load of laws (Santos 1995b).

them. The other mechanism is the tendency of increasing untiedness and "de-coupling" from the nation-states. There seems to be a relationship between the "horizontal" integration and interlocking forces of the different systems, and the "vertical" weakening of ties to the nation-state agencies. The more integrated and interlocking, the more de-coupling from the nation-state institutions they will be. In this process the forces will be de-nationalised and the citizens without both political influence and legal remedies.

The development of mass surveillance systems covering everyone may be viewed as a final surveillance stage (cf Zedner 2007. See also Statewatch analysis. 2007a). Echelon, the US initiated spy system, involving Britain, Canada, New Zealand and Australia, comes close to this. Echelon makes it possible to take down vast amounts of telecommunications data from satellites, finding relevant information by means of a system of code words. It is uncertain how far the technology has come, but it has the potential of "total control". There are similar systems within Europe and in Sweden we have recently introduced a law, which comes into force the January 1st 2009[2]. This law gives the right to a public authority, FRA, the National Defence Radio Establishment as it is officially rendered in English, (the Swedish national authority for signals intelligence) to do search of communications on telephone and internet traffic passing Swedish borders. This law has the formal potential to be more or less a tool for total surveillance. The history is an illustration of the diffuse process of incremental growth of surveillance mentioned above. There are many information systems developing in Europe and in the US, Canada and elsewhere in the industrialised world, reflecting new norms within the transnational information and surveillance systems, norms emphasizing a future-oriented monitoring of categories of people thus expanding the ideas of racial and other profiling into a system of risk profiles of whole groups (cf Mathiesen 2008:102). In the aftermath of this development, darling legal concepts and principles of our time, like rule of law (Rechtsstaat) and legal certainty will be killed by being deprived of their content.

If we look at the lower curve in the figure above, we will find more promising tendencies. These, by the way, create challenges for the older society's – the upper curve – way of life and production, which in its turn add the tensions in society and the need for control in the interests of the elites of the society. The first phase of the new information society faces a period of self-regulation and pluralistic efforts to compete for setting the standards for the new development. The characteristics of the shift from the upper S-curve to the lower are always related to a change from large scale to small scale. It is a question of going back to basics, or rather, forward to basics, namely fulfilling old human needs in a new way with support of the new technology. In this shift, we get what we can call a society in transition, which affects all of the societal dimensions mentioned above. Technology makes it possible to produce goods and services in a much more efficient way. Social conditions will change, with growing social tensions in society followed by greater differences in wealth among different sectors of society. Those who have, get more. Those who do not have, get less. This is a nearly inevitable consequence of the clash between the old and the new society that creates winners and losers. For a long period of time, however, hegemonic power continues to be related to those structures and strata belonging to the old society. The existing (reality) has always the preferential power of interpretation as regards what is right and what is wrong. Therefore, it is not until the new society has managed to articulate its own societal solutions

[2] The infected and controversial background of the law is reflected in the history of the law. The FRA-law is the label of many amendments in law and a new law, proposed by the government in a government bill, 2006/07:63 and discussed in the parliament for the first time June 2007. It was then accepted with 146 in favour and 143 against the law. Since the law could be said to infringe human rights, the law had to be accepted in a second vote after a year. The 18ht of June 2008, after several discussions in the Parliament, the FRA-law was finally adopted.

that one can expect a tendency to shift from the old to the new way of living and fulfilling human needs. During a considerable period of time, the emerging society will be without articulations and therefore will be an unknown phenomenon. This is apparent in contemporary science in the labelling of present day Western society as being post-modern or post-industrial, etc.

The economic system will change radically in the aftermath of the introduction of the new information technology. The way of doing business, for instance by using the Internet in so called e-business, will change. The system of production and distribution of goods and services will be totally different. The economy will turn from being based on production (plans) to being oriented towards the demands of consumers. Through new digital technique the possibility to communicate consumers' demands will make it possible to take the interests of consumers as a starting point for the economic process, in a way which was unthinkable in the old production system, based on mechanics. Finally, the political/administrative system and the state will exert pressure for change, like it did during the 19th century when the system of the four estates (in Sweden) was substituted by the parliamentary system based on political parties.

What is labelled the risk society by Ulrich Beck goes hand in hand with what is called the post-modern or post-industrialised society. Both these descriptions of tendencies in contemporary western societies can be seen as indiciations of the transition from the industrialised to an information society. The problem for social science is that this transition so far mainly is visible in the technical innovations, not in society itself, even if they most certainly are present. What sociologist, so far, has noticed is the decomposition of the industrial model of organizing and doing things. Zygmundt Bauman describes this in terms of everything evaporates. There is no longer any truth. Everything goes. This can be seen as expressions of the mentality of the transitional stage which we belong to, in between industrial and informational society, where it is not a question of either or, but "both and", as Ulrich Beck has described it (Beck et al. 1994). The challenge for us as social scientists is both to let us free from the darling concepts or our time and capture the emerging tendencies in new concepts or giving old concepts a new content. This development can also be said to be reflected in the legal culture and the legal system. Different darling conceptions of our time are not valid any longer for large groups in society. We will use the opinion about file-sharing as an example of how the new technic give rise to another understanding of intellectual property rights among the users compared to the music and film industry.

The information technology changes the conditions of regulation for the concept of property as a whole. The Austrian sociologist of law and federal chancellor in the Austrian empire, Karl Renner (1970 – 1950), has described how the legal content of property has been the same from Roman law onwards, despite the fact that the socio-economic consequences have changed in significant aspects over the years (Renner 1949). By being connected to different complementary legal instruments, related to the contract, the credit system and the concept of the legal person. In the perspective of the information technology, property as a legal institute has gotten into trouble in relation to the question of how property is transferred from one owner to another. In classical legal understanding this is constituted by the Latin word *tradera*, which means that the thing or a representation of it in paper literally is handed over to the other person, to the new owner. In a situation where more and more transactions and shifts of ownership take place in the form of e-business, the old fashioned way of talking about handing over in terms of tradera no longer fits. This becomes even more apparent when more and more goods take the form of software. The challenge here is if intellectual property

rights will be developed in a way that fits into the new regulation needs or if the legal concept, property, has come to a dead end.

3.0 Specific perspective: the copyright example

Copyright is the right that authors, composers, artists and other originators have to their literary or artistic work. The basic thought with copyright is that the legal order should protect creativity and that originators are ensured a control over the economic use besides the non-profit interests associated with the created (which, in the case of Sweden can be referred to the preparatory legal work SOU 1956:25 p 487). This is in Sweden supported by the protection that the Constitution (Regeringsformen) gives to authors, artists and photographers according to RF 2:19. The primary purpose can thereby be said to give the originator compensation for the work that has been laid down in the artistic work. The compensation is not intended only to apply for the results of the work itself, but also for the investments that are made in form of experience and that can be desired for third party (Nordell 1997, p 17).

The word "copy" itself puts focus on the act of replicating an original, which can be described as an action more placed in an analogue setting. The idea of that each copy is valuable and should be protected comes from the idea that copying is tied to some sort of cost. The Swedish term for copyright is more tied to "the originators right" (Upphovsrätt) which is more unspecified to its content more than that it is some type of right that is connected to the one who has created something.

The Swedish Copyright Act divides the rights that the creator has in two parts: the economic right and the non-profit, or ideal, right. The economic right has two parts, namely the right to produce copies of the work and the right to make it publicly accessible (2§). The work becomes public when it is publicly performed, shown or when legitimate copies are spread to the general public. Also the non-profit or ideal right, the so-called *droit moral*, consists of two parts (3§URL). Firstly, the author has a right to be stated in connection to the work to the extent and in the way that good manner requires when the work is made publicly available. Secondly, he or she has the right to oppose that the work is altered in an insulting offensive manner or that the work is made publicly available in a way or context that his or her literary or artistic reputation is violated. The economic right is however limited in various ways. An example on such a limitation, which is of interest in the context of moving from an analogue to a digital era, is the right to produce a few copies for private use expressed on section 12 of the Copyright law: **"**Each and ever one may for private use produce one or a few samples of public work."

Generally, in Swedish legal tradition, the private sphere has been left unregulated. The copyright legislation has followed this logic, exampled by section 12 in the Copyright Act above. With the digitalisation and organisation in networks this private-public dichotomy has become a regulatory conception that has less and less value in society, and displays a regulatory method that functions less and less well, at least in the field of copyright. The item-based reality of an analogue production goes digital and copy-based. Behaviour and societal norms change in accordance to how the conditions for the same change. The user generated web (2.0) arises, many industries go from producer lead to consumer lead, and copyright is

unavoidably affected by the introduction and distribution of information technology in society.

Copyright has been debated to and fro for several years, but particularly intense and by interests in polarisation the last five to ten years. The reason is the development of digital technology in communicating networks. The focus here is the digitalisation of many activities in every-day life, especially those that have an effect on copyright. The classic dichotomy in copyright is the one between the protection of ones creation and the common use of culture or information; where to draw the line between the one and the many. It is either question about a weak protection for ideas and a big commons, or a strong protection for ideas and bigger difficulty for creators to use existing material. In the argumentation around copyright you can hear voices claiming that a strong protection for ideas is a necessity, for the market and the incentives to invest in production of intellectual property, and you can hear voices claiming the development and the creativity instead suffocate from a too protective copyright. The latter mean that a bigger commons, a bigger field of free material to use in a creative process stimulates innovation and ensures cultural reproduction. Today, regulation and behaviour does not meet. Not everyone is optimistic of the creativity stimulating setting of copyright legislation today. Vaidhyanathan (2001, p 116) expresses the copyright development like this:

> ”Somewhere between the two extremes there must be a formula that would acknowledge that all creativity relies on previous work … yet would encourage – maximize – creative expression in multiple media and forms. But because twentieth-century copyright law has been a battle of strong interested parties seeking control a market, not a concerted effort to maximize creativity and content for the benefit of the public, we have lost sight of such a formula along the way.”

The origin and growth of copyright as a legal concept is intertwined with the technical development as regard the conditions in order to store and to distribute the created media; the melody one wrote and recorded, the book, the photograph and so on. If we here focus on music we will see how copyright and the technology have developed side by side. But also, which also is of interest, how creativity itself is influenced by the preconditions in technology. The purpose of copyright is the creation and development of culture. Law in itself has no justification of its own in addition to stating systemic conditions that are culture stimulating.

It is not primarily the survival of publishing houses, record companies or similar middle men that the copyright regulation should aim to see to. They do not have a value in themselves for the copyright legislation to meet. Culture is however influenced by how the conditions are formulated. When technology is developed that influences storage possibilities or duplication or distribution possibilities so has through history many voices been heard. Some claim that the originators incentives to create disappears when they no longer has full control over the copies. This is likely the case regarding some kinds of creativity. The movie industry may here stand in front of a larger transition than the music industry, due to its larger and more expensive projects. But in the changes of the premises for storage and distribution, and communication, one can establish that some types of creativity will likely see harsher times, and some types of creativity will definitely thrive. It is a part of the change. The Swedish copyright debate will here serve as an example of how file sharing and copyright is connected and disputed.

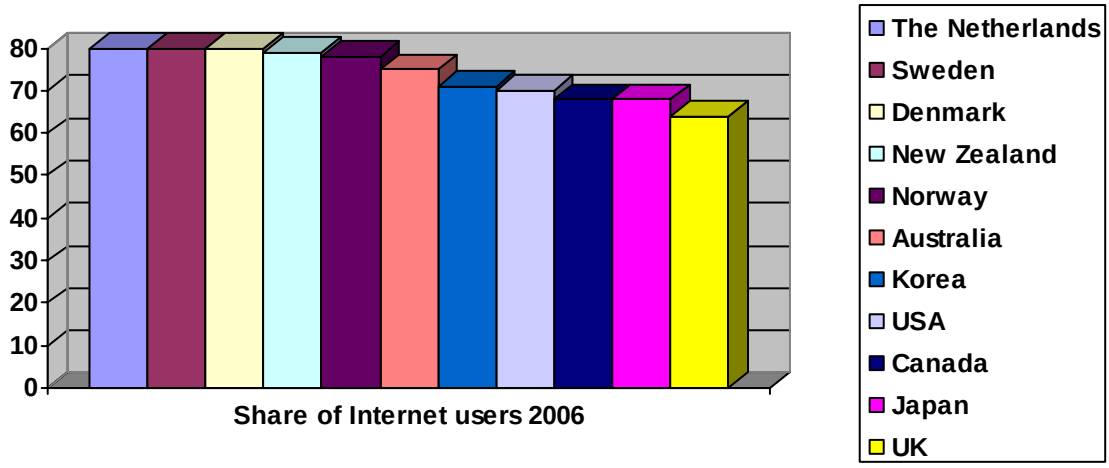
Is copyright strong or weak in these days of digitalization? And what will become? Regarding what content should be open and what should be protected, Lawrence Lessig, the Stanford Law professor and Creative Commons Licence promoter paints a bleak picture of when it

comes to balancing the two. He sees a development of growing locking in of copyrighted material:

> "We are not entering a time when copyright is more threatened than it is in real space. We are instead entering a time when copyright is more effectively protected than at any time since Gutenberg. The power to regulate access to and use of copyrighted material is about to be perfected. …in such an age, the real question for law is not, how can law aid in that protection? But rather, is the protection too great? …. But the lesson in the future will center not on copy-right but on copy-duty – the duty of owners of protected property to make that property accessible. (Lessig 2006, p 175).

4.0 Copyright debate and background in Sweden

Sweden is an interesting case since it has a developed IT infrastructure and a high degree of Internet usage. This is tied to the political vision of Sweden as a "leading IT nation", especially in the vision of an "information society for everyone" (prop 1999/2000:86, p 1, Larsson 2008 p 30 f.). This is significant for Swedish IT politics in general (Sundqvist 2001, prop 1999/2000:86 p 130, Larsson 2005a p 39).



Source: Sweden in the World [Sverige i Världen 2008], a report by the World Internet Institute, p 11.

Of a selected group of countries where Internet usage is high, Sweden is still among the highest with its 80 per cent of the population. File sharing and of copyright protected material is of course connected to the systematic conditions of a society: the infrastructure, and the internet access and usage.

File sharing and copyright has been a widely debated issue in the political sphere of Sweden the last year, and the Centre Party, the third biggest party in Swedish Parliament, recently suggested a thorough revision of the Copyright Act. Several of the youth segments of the parties in Sweden are pro a free file sharing for private use (SvD.se 11 2008), as is the Left Party of Sweden, one of the smaller in Parliament (SvD.se 8 June 2008). File sharing of copyrighted material is common in Sweden, and there is an organized movement containing for instance Piratbyrån (the "Piracy bureau") and Piratpartiet (the "Piracy Party"), and a blogosphere discussing the issue extensively (try a search for "fildelning" AND "blogg").

Pirate Bay, claimed by the Wired magazine to be “the world's most notorious BitTorrent tracking site”, got global attention when the four responsible behind it was prosecuted in Stockholm in January 2008 (Wired Blog Network 1 February 2008). The Wall Street journal wrote about Pirate Bay at the same time (Wall Street Journal, 11 January 2008).

Between 700 and 900 million songs are downloaded on file sharing networks in Sweden during 2007, according to an investigation done by STIM, the Swedish Performing Rights Society (SvD.se 21 May 2008). Stim did during the spring present a proposal for broad band clients to pay a higher cost for their subscription and in return get legal access to downloading media content (Computer Sweden 20 May 2008). This proposal has been criticized, among others from the perspective that it builds upon an aged view of a select few produces media content for the consuming masses, which would lead to that a lot of creators would not receive a share of the benefits that would go to the traditional creators.

The legal development parallel to the broadened file sharing behaviour in Sweden has been to make copyright stronger and more protectionistic. This is partly because of the EU membership, and the obligations to harmonize the EU law. The INFOSOC directive (2001/29/EG) from 2001 caused some debate in Sweden, and the implementation of it was delayed. The changes in the Swedish Copyright Act meant a few steps towards a stronger copyright, with more actions being criminalized in relation to sharing files via the Internet and were in force from 1 July 2005 (SFS 2005:360, SOU 2003:35, Prop 2004/05:110, Larsson 2005a, p 28-29).

The concepts and specific terminology of Swedish copyright stems to some extent from the preparatory works of 1956 prior to the Copyright Act from 1960. Of course, this has been changed continuingly over the years, but many of the terms stick. And this development has lead to a legal regulation that is so complex that even legal experts think it is complex. In fact, when some additions was made to the law in 2005 (to harmonize an EU directive) the real experts on legal construction in Sweden, the Council on Legislation (Lagrådet), concluded that it had been desirable to do a complete editorial review of the Copyright Act instead of implementing the “patchwork” that the changes in the law now meant. The Council however stated that it understood the hurry that was present to implement the directive (Prop 2004/05:110, appendix 8, p 558). Sweden had already received a remark from the EG Court for the delay that already was present (Larsson 2005a p 28-29).

During 2007 an investigation regarding music and movies on the Internet was conducted by the governmentally appointed Cecilia Rehnfors (Ds 2007:29). The investigation concluded that the legal services on the Internet often had an unsatisfactory range of content to offer, but also launched the idea of that the Internet operators should be given a responsibility to control that their subscribers did not participate in copyright infringements. This proposal was met with great opposition from the operators (Dagens Nyheter 3 Sep 2007). The increased operator responsibilities had been proposed by copyright organizations, such as IFPI (Ds 2007:29, p 207). The development of technical safety measures was seen as a key issue (Ds 2007:29, p 16).

The issue of file sharing and media content was up for a hearing in the Swedish Parliament in April 2008. Already the setting can however be questioned from a society in transition perspective: only legal alternatives were allowed to present their case. No advocates of file sharing were invited to the hearing. It was stated by a spokesperson for the hearing that:

> "Several persons can bring forward the arguments that for instance the Pirate Bay has, for instance the secretary of the Rehnfors investigation [see Ds 2007:29 above] Johan Axhamn. He knows most of the arguments" (www.realtid.se 12 Mar 2008, author's translation).

At the same time that the incentive with the hearing was to speak about and to collect knowledge regarding how the issue of file sharing and copyright issues should be handled, there were no one representing the file sharing community. This is an unbalanced approach that is problematic if one attempts to understand the dilemmas of modern copyright, to say the least.

The development of an increased protectionism in copyright, and the proposals of how this protection should be undertaken, is one of several recent policy decisions pointing in a direction away from a free society when it comes to rights of not being recorded when communicating through the Internet, surfing habits etc. The above mentioned exceptionally stormy debate regarding increased governmental signals intelligence (scanning internet traffic) is another example (Ds 2005:30, prop. 2006/07:63). It was heavily questioned resulting in the forming of interest groups to stop the law, a wave of bloggers protesting, and members of Parliament witnessing that they received lots of e-mails and letters begging them to vote no. A third example is the prolonged storage of Internet data traffic of the operators' subscribers, a task that the operators now have to perform. It was an EU level initiative (the EU directive 2006/24 EG on data retention), that was criticized by the European Data Protection Supervisor and later, when the Swedish proposal was put forward, by the Swedish Integrity Protection Committee (SOU 2007:22, see p 287).

5.0 General perspective revisited: Problems of the transition

Legal science must understand how society changes. Or else there is a too strong risk that the legal order turns into an institution that uses its powers to support the parties that act and are coming from the traditional order in society, meaning an institution that distorts the societal development to fit some interests before others, as a consequence from that the legal regulations has first appeared in the same time as the old structures and parties emerged. These aging parties will receive support, not because they represent something more true or more just, but simply because they are the next to kin of the emperor, so to speak. The legal order then becomes a tool for power in a struggle between the old and the new, rather than a democratically legitimate interpreter of what is right and just.

In using the above mentioned work of Lakoff and Johnson on metaphors, applied on the grand context of the article: conceptions are unavoidably attached to discourses, and although they may have a very specific meaning in the discourse their meaning can change, and their use can be altered. This gives that conceptions can be tied to an arranging order, an administrative pattern, in itself stemming from analogue conditions of distributing (for instance) media. These conceptions are likely to stand in the way when the administration is in need of a revision due to change of conditions. In short, the digitalization changes the conditions for the distribution of media, and the conceptions tied to copyright are standing in the way of the much needed revision of copyright legislation.

When the idea of property rights are formed in an analogue reality and transferred to a digital, certain problems occur. An obvious, which has shown the two sides of viewing the handling of media content in the debate, is the copyism of internet communication on one side and the "theft" on the other side. Seen from a traditional outlook the illegal file sharing of copyrighted content has been called theft. The metaphor is problematic in the sense that a key element of stealing is that the one stolen from loses the stolen object, which is not the case in file sharing, since it is copied. The Swedish Penal Code expresses this as "A person who unlawfully takes what belongs to another with intent to acquire it, shall, if the appropriation involves loss, be sentenced for theft to imprisonment for at most two years" (Penal Code Chapter 8, section 1, translation in Ds 1999:36). To be specific, the problem of arguing for that file sharing is theft lies in the aspect of "if the appropriation involves loss". There is no loss when content gets copied, or the loss is radically different from losing, say for instance your bike. The loss lies in that you likely lose someone as a *potential* buyer of your product. The "theft" argument is an example of how one idea or conception tied to a traditional analogue context is transferred to the newer, digital context, and therefore creates some kind of problem in the transfer. Something is lost in the translation.

In the same sense is "piracy" problematic. Even though file sharing advocates has picked up on this term, and used it as a logo and element in a resistance identity, the original acts of piracy, the hijacking of ships under violent and cruel circumstances, have nothing alike with the act of copying media content and sharing it freely. A problem with a metaphor like this is, like Lakoff and Johnson write, that "the acceptance of the metaphor forces us to focus only on those aspects of our experience that it highlights, leads us to view the entailments of the metaphor as being true" (Lakoff and Johnson 1980: 157). This means that whatever bad value that comes from the original use of a concept can travel with the concept and contaminate the new actions the concept now is used to describe metaphorically. The use of the word "piracy" to describe file sharing is a way to describe a complex new activity from the perspective of the traditional paradigm and at the same time wanting it to sound ruthless and bad in itself.

Following the reasoning by Renner, mentioned above, we should expect that the concept of private property would survive and be the same even in the next societal era, the information society, but connected to certain legal institutions. Renner described how a property right originally in the Roman law was a relation between a subject and an object, a thing, which gave the subject the right of total disposal of the thing. A thing could also be another human being, a slave. When an organization became a legal subject, on equal footing with a natural person, the property right (of an organization) made it possible for the owner of that property to decide what another person should do. The worker had to obey the company owner. The ownership even could be distanced from the relation between the actual worker and people in charge of the company representing the owner. The capitalist, however, had the power to decide in the last instance. The power for the employer over the employees has never been based on formal ownership. It is more a question of an ownership-like relationship, something which the legal doctrine never has come to grip with, but nevertheless has accepted via different legitimating legal constructions, different in various countries but all with the same result. The relation between the employer and the employees has never given the employee anything else but a partial "ownership". It has only been a question of obligation to obey during the working hours. During the workers´ leisure time they were free to do what they wanted. Later on the property right was shared between the private owner and the state. Via intervening rules of different kinds, restrictions on the free disposal of a thing were set up. This was especially the case in relation to the use of real estate. Via law certain obligations were put on the owner, as for instance, not to exploit the worker, cheat the consumer or

destroy the nature. Another construction which created a kind of shared ownership was an effect of the introduction of a credit and mortgage system. The Bank or financial institution was a potential or shared owner of the "thing".

When the intellectual property right concept was invented in the 19th century, the idea of property right was extended to intangible things, like patent, copyright and protection of designs. These ideas are now applied in order to try to regulate the virtual world following on the digital technique. There is, however, a difference. The original intellectual property rights were invented in the analogue world and they were above all in practice regulating a commercial relation between two professionals, the inventor and the exploiter of the right. In this perspective the construction with "all rights reserved", appears to be logic and rational. In the digital world the situation changes due to the technique. The digital product will belong to the inventor or creator, but it can always be reproduced with minimal effort and costs. This makes the concept of theft formally inadequate. This rule of the game does not fit any longer. The question arises if a new rule defining a crime is required or this is a sign of changing ideas behind the game that gives the act the legitimacy of being legal. One factor pointing in direction of the latter development is that the intellectual property rights not any longer is primarily a question between professionals. The problem with file-sharing, which we use as an example and indicator of a tendency, is something which affects a large proportion of a young generation as consumers of music and film. As users and consumers they follow what the technique gives them opportunity to. In all probability this is something hard to change via moral or other arguments. The inherent tendency of oligopoly and monopoly in the large-scale economy of the old society, the upper curve, has given rise to prices which are not motivated by economic reasons and is far from what the consumers are willing to pay. The inventor and creator can of course said to be the loser in this process, but for their sake there is not much at stake. The dominant share of the revenue is anyway going into the pockets of the distributor, as a result of an obsolete market structure. Creator can be economically compensated by live performances, or other activities in relation to the created, which also is a trend in at least Swedish music industry.

Further more these mostly young people practicing file-sharing do not experience what they do as illegal infringements in the property right of someone else. The natural and spontaneous feeling of ownership is related to the use value of a thing, not to the exchange value on a market. Intellectual property rights are an abstract construction, which has no reference to the moral world of ordinary people. It is introduced above and forced upon the actors motivated by market reasons. When the capitalistic economy – with its base in the exchange value - emerged in the 19th century, the modern society tried to find solutions in the transition from the old to the new society, where the use value and the exchange value could co-exist (Christensen 1994). But when the exchange value of the product later on comes to take over, the legal regulation loses its legitimacy. The practice is guided by other norms than those the law is built upon, and in this situation law will lose, especially if the norms have "history as a tailwind". Legal regulation has to be supported by existing norms in society. These can sometimes be changed by law, but then the law has to be an expression of a desirable state of art in society. Otherwise the regulation will be too costly to implement and uphold and unstable over time. The Swedish legal scholar, Dennis Töllborg, regards the introduction of internet as a hegemonic revolution, similar to those earlier in history when our view on society and ourselves is radically changed. Creation is still central and imitation is always strong as a model for norm-building. But there is a difference. The value-base will be different. The idea is still free, but when ideas materialize in a digital way and leave their mechanical existence, then the material relation to physical control over what you consider as

your property, is missing. When the idea loses its reference to the physical world, then the use value once again in history becomes dominating for what we regard as legitimate and fair. The exchange value, coupled to exclusive intellectual property right for the owner, cannot any longer and should not be protected since the idea behind the internet game is precisely what is at stake in our example - file-sharing - a question of sharing. In this situation the former legal understanding of property rights will be invalid. You cannot claim ownership to something which is not possible to transform into something material, to a physical object. This will be the understanding of ownership, according to Töllborg, in the new hegemonic era (Töllborg 2008). The fact that there are a lot of persons arguing for old solutions, does not change Töllborg´s prediction. It is only a sign of the inevitable fight between different darling conceptions of your time, taking place when a society is in a phase of transition.

Sweden is definitely[3] and Europe seems to be a too small scientific community in order to form a critical mass, large enough to be able to articulate alternatives to the present legal order. It seems that especially legal experts in intellectual property rights seem to be those who strongest defend the present intellectual property right regime. The universities in the US are obviously large enough and with a mentality to create alternatives to the existing regulation. As a sign of this, a conference with 140 university professors was hold spring 2006 at Stanford Law School Center for law and society, celebrating the 10th anniversary of James Boyles book, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, where he introduces the idea about the need for a public domain, a kind of cultural environmental movement in order to protect the human living conditions, in the same way as the protection of the nature. The public domain is necessary in order to safeguard the open society and protect the individuals against a maximized intellectual property rights regime. His idea is that society is damaged if the cultural rights for everyone are limited by the intellectual property rights of a minority. Boyle is one of the founding Board Members of Creative Commons, which is working to facilitate the free availability of art, scholarship, and cultural materials by developing innovative, machine-readable licenses that individuals and institutions can attach to their work, and of Science Commons, which aims to expand the Creative Commons mission into the realm of scientific and technical data. Here is not the space and place to elaborate on the arguments for the one or the other of different suggestions on how to deal with the problems related to intellectual property. The ambition here is according to the title of our article to put the finger on a darling conception of our time that in one way or another will demand de-construction and re-definition in the course of the growth of the digital society.

6.0 Conclusions – the darling conceptions of our time

The understanding of this article is that conceptions can be tied to a specific world order, to a way in which a society is organized: in its politics, in its administration, in its government and its regulation. This leads to what the title is asserting: societies change and the conceptions that has been more or less deeply founded in them can face problems when to be translated into the new context. Clashes are inevitable. You cannot play different games at the same time. The rules and norms will collide and confuse. The example of file sharing, the Internet and the copyright debate in Sweden has been used to show the clashes of such a societal

[3] With few exceptions, as the just referred to Dennis Töllborg and his former colleague, Christina Ramberg.

transition and the conceptions moving with it. The Swedish copyright and file sharing debate fits well with the idea of societal development in terms of s-curves, and the conflicting perspectives that can be tied to the different societies. We offer a vision of how our contemporary society can be interpreted in the days of when the digitalisation is about to mature.

Sweden has had the politics of an IT-nation over almost two decades. The aim has been to develop infrastructure, it is good for "regional balance", for companies and job opportunities, for the industry and for the education etc. A millennial governmental bill named "An information society for everyone" (prop 1999/2000:86) stated that "Given that Sweden already is a leading IT nation the ambition should be that Sweden as first country becomes an information society for everyone" (Prop. 1999/2000:86, p 1, author's translation). So, on one side there is, and has been, a strong political will to develop Sweden as a widely connected IT nation, where Internet should be present in every home, where everyone should be part of it, to create and contribute to the web, and on the other side traditional regulations and protectionistic thinking working to limit such behaviour and use of Internet. The development thinking of an industrial society has lead to an infrastructure that has supported a development of norms that challenge the logic of the industrial society, especially as bound to analogue reproduction and distribution of media content. This is a type of paradox that is being played out right now. The phenomenon is typical for a society in transition and well-known from similar situations earlier in history when society changes from one organisational logic to another. The mental references belong to the old society. So do power and what can be called stakeholder-interest, even within science. This creates a time-lag or mental delay before the new principles and norms, setting up the new game, become accepted and mainstream. In the meantime we have to live with contradictions, increasing social tensions and economic inadequacies.

It is a task for the social sciences to question a given societal order and the "truths" that it rests upon. The dichotomy of producer – consumer, for instance, is losing in relevance as an empirical entity, although the legal structures support it. The conceptions embedded in law may hinder a more fruitful transition to the new means for distribution and production and distort the more genuine ways of stimulating creativity and cultural development, making the owners of media content created (or at least protected) in the last half of the 20th century the biggest beneficiaries. But it is also a scientific duty to help to construct adequate concepts and tools for creating the new society. In relation to the transition to an industrialized society Christensen (1997, p 110) in general terms develops the purpose of the law in a transitional society:

> "The most important task of law is to discern the new normative practices and the new normative conceptions that are being developed in society and to give these a legal body in the shape of new regulations. Law can have more or less readiness for discovering and accepting these normative changes in society." (author's translation).

It is our task to look behind the partly informational and partly deceptive conceptions of this construction. The digitalization challenges some of the darling conceptions of our time. It is a time of battle, and the outcome of it will shape the creativity, and life, to come.

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