

## Copyright and the Story of the Author

The question I want to address here is if and how you can read copyright law as a story of the author. This will take the form of two case studies and some methodological reflections. The question of reading law as narratives is not a new one. The late 70s and early 80s saw the birth of a new interdisciplinary approach to legal studies called Law and Literature. As the name suggests this was an attempt to open up the traditional way of interpreting legal texts to impulses from the field of literary theory. The law and literature method of legal interpretation was a way to defy the claimed autonomy of legal texts by regarding them as narratives among others that could be read pretty much the same way as a scholar of comparative literature would read a literary text. As such it can also be regarded as yet another example of what has been called ‘the linguistic turn’: the great interest in textuality and narrativity that swept over the world of humanities and social sciences during the 80s, causing paradigmatical changes within several academic disciplines.<sup>1</sup>

Like many other interdisciplinary concepts Law and Literature boomed and faded during the 80s and 90s, which probably makes it old news to most readers. So, this should neither be the time nor the place to dwell upon Law and Literature. But since it has left us an analytical perspective that I think can help us to better understand the law as an expression of contemporary culture I would nevertheless like to take it as a starting point for this paper. The central question that occupies me concerns what the law can tell us about the author and its role in society if we read it as a story. Since the main object of my research is the history of Swedish copyright law I will take this as my first example – an example that I think is quite representative for the development of copyright in an international perspective. However, this paper will not only deal with the object of study but also with the method in question. At the moment my aim is not to study the Swedish copyright laws but to take a critical and maybe even slightly unfair look at the methodological perspective of the Law and Literature tradition and ask myself what you actually can learn from reading the law as literature.

For now, I will try to keep the analysis of the legal texts as short and as general as possible. I will do this not only because I cannot expect foreign readers to be that interested in

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<sup>1</sup> For a further account for the development and the basic principles of Law and Literature see Richard H. Weisberg, “Text Into Theory: A Literary Approach to the Constitution”, *Georgia Law Review*, 1986, Vol. 20:939.

the legal particularities of a country like Sweden but also because I am still at a very early stage where I have not yet made any more comprehensive analyzes of the legal texts. This short account for Swedish copyright legislation will thus take the form of a first glance at copyright law, dealing with the most obvious story that meets the eye when you try to read the law as a number of chronologically written stories of the author.

### Reading the Law as a Narrative – a Case Study

Historically, the Swedish copyright legislation has undergone five fundamental transformations that can be dated to 1810, 1877, 1919, 1960 and 2005. Apart from the last one, all of these years imply the birth of a new copyright law starting 1810 with the *Statute for the freedom of the press*.<sup>2</sup> As the name suggests this was not primarily a copyright law, but it was the first Swedish law that explicitly granted the author in stead of the printer the rights to the work he had produced. In 1877 this right was removed from the *Statute for the Freedom of the Press* and codified in the *Law regarding property rights to texts*:<sup>3</sup> Sweden's first separate copyright act. This law was in force for about 40 years before it in 1919 was replaced by the *Law regarding Rights to Literary and Musical works*:<sup>4</sup> a new and more comprehensive law adapted to the international rules stipulated by the Berne Convention – the first international copyright convention that Sweden had ratified in 1904. In an effort to harmonize the Scandinavian copyright laws the *Law regarding Rights to Literary and Musical Works* was in 1960 replaced by the *Law regarding Copyright to Literary and Artistic Works*,<sup>5</sup> which is the copyright law in force today. When it comes to the current transformation it is not really a matter of a new copyright act, but rather of major amendments and revisions of the law from 1960 that might very well prove to be a turning point in modern Swedish copyright law.<sup>6</sup>

Copyright acts, at least in the Swedish case, tend to be fairly easy to read as reflections of the cultural development in general. After a swift thematic analysis of these five legal texts it is possible to pinpoint some of the major tendencies in the transformation of the western culture during the last two decades. The gradual expansion of copyright legislation, where every new law is by far more comprehensive than its predecessor, is of course in itself an expression for the growing complexity and the growing commercial relevance of the circulation of cultural and immaterial property. The commodification of culture is naturally closely connected to the development of copyright, which is in essence a way to regulate the

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<sup>2</sup> *Tryckfrihetsförordningen*, 9/3 1810.

<sup>3</sup> *Lag angående eganderätt till skrift*, SFS 1877:28.

<sup>4</sup> *Lag om rätt till musikaliska och litterära verk*, SFS 1919:381.

<sup>5</sup> *Lag om upphovsrätt till litterära och konstnärliga verk*, SFS 1960:729.

<sup>6</sup> "Upphovsrätten i informationssamhället – Genomförande av direktiv 2001/29/EG", Prop. 2004/05:110.

work as a commodity. Consequently, the rapid expansion of the immaterial economy during the post war era also finds one of its most obvious expressions in the copyright act of 1960, where not just the ownership to literary and cultural works but also the trade with such works are regulated in as much detail as the circulation of most other commodities.<sup>7</sup>

Closely connected to the commodification of culture is also another central theme in the modern world: internationalization. In 1886 the Berne Convention was founded as a way to combat transnational book piracy and establish internationally coherent rules for translation of foreign literature. This was a quite obvious expression for a general insight that copyright was not just a national but an international question – an insight that Sweden eventually seemed to share since they ratified the convention in 1904. The understanding of copyright as an international issue also shows in the Swedish copyright act of 1919 where foreign works for the first time gets the same legal protection as Swedish literature.<sup>8</sup> From then on, the various changes of the Swedish copyright laws have to a large extent been a matter of reactions or adaptations to the international development. Many of the amendments have been directly caused by changes of the Berne Conventions and the copyright act of 1960 was primarily motivated as an attempt to harmonize the Scandinavian copyright laws. The current changes of the copyright act can be viewed as an extension of this strive for legal harmonization on a much larger scale. This time it is a matter of fulfilling the decrees of the European Union to internationally harmonize national legislations and adapt them to the information society. That this is a matter of an international and not just a European harmonization shows in the striking similarities between the proposal at hand and the American Digital Millennium Copyright Act.<sup>9</sup>

A third factor that has played a crucial role for the development of Copyright legislation is the technological development. This is the most obvious theme that runs through every copyright act since 1810. Read chronologically (and including a few amendments) the copyright acts provide a timeline for the mediatechnological development of the 19<sup>th</sup> and 20<sup>th</sup> century. This can be seen in the frequent inclusion of new art forms (such as photography and film) as works protected by the law, but also in the constant attempt to adapt the law to new technological ways of distributing culture (such as radio, television and the internet). It is enough to glance through the amendments made to the copyright act of 1960 to see that the mediatechnological development has been a constantly growing influence on the copyright legislation since the seventies. In the late eighties and early nineties one can also see the

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<sup>7</sup> SFS 1960:729, Ch. 3, § 27-42.

<sup>8</sup> SFS 1919:381, § 3; SFS 1919:384.

<sup>9</sup> Prop. 2004/05:110, p. 1.

outlines of a digitalized society take shape in the inclusion of computer programs and digital distribution in the copyright law,<sup>10</sup> a process that culminates in the current revision of the copyright act.

These three general themes of the modern world, commodification, internationalization and technological development, all find their expression in the transformation of Swedish copyright law. But at the base of this development rests a fourth theme that cuts through all the other ones, namely the question of literary property. As several scholars of law as well as of comparative literature has shown, literature has not always been regarded as the self-evident property of the author. In fact, the conception of the literary work as the authors' property is a social convention that can be dated to the 18<sup>th</sup> century and the birth of the romantic author.<sup>11</sup>

In this context, the *Statute for the Freedom of the Press* can easily be interpreted as the first legal expression of the author as an owner of the text he has produced. This is by no means a far fetched conclusion since the legal text clearly says that "Every text is the property of its author or its legal proprietor".<sup>12</sup> Considering the rest of the legal text, it does however seem that the affirmation of the author as the owner of the text is not just a matter of literary property but also of legal responsibility. The *Statute for the Freedom of the Press* is not a copyright act but an act for the freedom of the press, with the main purpose of abolishing censorship. This means that the state renounces the right to read and reject publications in advance, but it does not mean that anyone is free to print anything he likes. In fact, the *Statute for the Freedom of the Press* contains a long and detailed account for subjects unfit for publication. To enforce such a law it has to be possible to hold someone responsible for potential violations of it and identifying the author as the owner of the text also identify him as responsible for it. Rather than guaranteeing the author some kind of natural right to the text, the main purpose of making the author the owner of his text might just as well have been to dictate the responsibilities and accountabilities of different literary actors, putting the author in the line of fire.

In the Swedish case, it seems like it is not until 1877 that the law recognizes the author as an owner of his own work in his own right. It is now that the law defines the work as a property that can be sold, given away, inherited and dealt with like any other property,

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<sup>10</sup> SFS 1989:396; SFS 1992:1687.

<sup>11</sup> See for instance Martha Woodmansee, "The Genius and the Copyright: Economic and legal Conditions of the Emergence of the 'Author'", *Eighteenth-Century Studies*, Volym 17, Nr. 4; or Mark Rose, *Authors and Owners: The Invention of Copyright*, (Cambridge & London, 1993) for a closer examination of the birth of copyright, literary property and the romantic author.

<sup>12</sup> *Tryckfrihetsförordningen*, § 1:8.

which can be regarded as one of the cornerstones of modern copyright law. A cornerstone that is to be further elaborate on in later copyright acts as well as in the second part of this paper.

### Contextualizing the Law – Another Case Study

This is what you can learn from taking a quick look at the law as literature: as a story about the author in modern capitalist society. It might be a good start but it do seem like this reading still provides us with somewhat limited information. Do we really need to read the law to realize that internationalization, technologization and commodification of culture have been major forces in modern society? And can we really rely on the new information we actually get from reading legal texts as stories about society in general, information that is probably open to a lot of different readings?

What it do show however is that the progression of the law is closely intertwined with changes within contemporary culture and society at large. But in the study of cultural, political and social change the law is really just the tip of the iceberg. Deducing a general cultural order from certain specific legal texts is in my view a far to simplistic approach to the law, and this is exactly the point of many proponents of Law and Literature as well. As I suggested in the beginning, this has so far been a rather unfair account of the Law and Literature method, applying the most narrow form of literary interpretation to legal texts.

If we for instance turn to James Boyd White, professor of Law at the University of Michigan and one of those who took part in developing a literary approach to legal studies in the early eighties, we meet a much more elaborated form of Law and Literature method than the one I have practiced above. White regards the law as a language which means that understanding the law, just like understanding literature, is in essence a communal act.<sup>13</sup> Just like language and literature the law gets its meaning from a cultural context and must also be interpreted in relation to this context. The question one must ask oneself is not ‘what does the law mean in itself’ but “what this language by this speaker in this context means”, which requires the ideal reader of the law to be not just an expert on the law but also an expert on the context, the legal, social, political and aesthetic culture, in which the law exists.<sup>14</sup>

So, reading the law is a good start, but it is not enough. To understand the law in its cultural context I think that we also have to read it in relation to literary and legal debates, to intertextual readings of literary texts and to studies of the law in practice – i.e. to case studies. One good example of such a reading is a book called *Authors and Owners: The invention of Copyright* by Mark Rose, professor of English at University of California. Here, Rose looks at

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<sup>13</sup> James Boyd White, "Law as Language: Reading Law and Reading Literature", *Texas Law Review*, 1982:60, p. 415.

<sup>14</sup> White, p. 440.

the birth of the *Statute of Anne*, the English copyright act from 1710 that came to be the world's first copyright act, and how this was closely intertwined with the role of the romantic author as an original genius and with the conception of literature as the natural property of the author. In doing so he partly relies on analyses of the legal text, comparing early drafts with the final version, but the major part of his work deals with court-cases, public debates and literary texts of the 18<sup>th</sup> century.

If you read the *Statute of Anne* the way I have read the five (or four and a half) Swedish copyright acts – that is, regarding the law as a narrative in itself – you get the impression that this is really the birth of copyright: that it is the first time that someone can lay claim on a literary work. This seems like a reasonable conclusion since the *Statute of Anne* actually defines the author as someone who owns the exclusive right to print and publish the work he has produced for a period of 14 years unless he himself disposes of it to someone else. Yet, like the Swedish *Statute for the Freedom of the Press*, this is not necessarily an expression of an understanding of the author as someone by natural right entitled to his own work. It might just as well be a pragmatically motivated means to a political end. In this case the subtitle of the law – “An Act for the encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies” – implies that copyright is here primarily viewed as an incitement for cultural production.<sup>15</sup> The main purpose of the law seems to be to stimulate the cultural life in general rather than to acknowledge some morally grounded rights of the author. This is also confirmed by the attempts to regulate the book market in favor of the reading public and not just the authors and the booksellers that shine through in parts of the law, most evidently in the parts that seek to prevent overpricing of books.<sup>16</sup>

Let us take this as a starting point for a closer look at the *Statute of Anne*, assisted by Mark Rose. If you read the *Statute of Anne* the way that Rose has read it, considering contemporary cases, debates and literary texts, you get a picture that partly confirms my initial reading but also opposes and enriches it. The first thing you learn is that the *Statute of Anne* is definitely not the first time that someone lays claim to a literary text. Compared to the common law-practices that existed before 1710 the *Statute of Anne* is actually an attempt to limit the possessive claims that the booksellers had laid on literature during the 17<sup>th</sup> century. Until 1710 the book market was almost exclusively dominated by the Stationers Company – the national guild for printers and booksellers. According to common law it was the Stationers Company's job to allot the rights to publish literary works within the members of the guild.

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<sup>15</sup> *Statute of Anne*, p. 261.

<sup>16</sup> *Statute of Anne*, p. 263.

Even though this was not a matter of literary property in the modern sense but rather of privileges to publish certain texts that the state granted certain actors, it still meant that only printers and booksellers could own literary privileges. Like within modern copyright these rights were exclusive, but unlike modern copyright they were also eternal. Once a bookseller got the rights to a text it was his to hold forever or to sell to the highest bidder, causing a flourishing trade with literary privileges.

*Statute of Anne* was to a large extent a codification of practices that already existed within common law, but with two major exceptions: it declared authors to be potential owners of their works and it limited the term of copyright-protection to 14 years. This was an obvious attempt to break the monopoly of the Stationers Company. Making authors potential owners of literature, and thereby competitors to the printers and booksellers, were not such an immediate threat as it might seem: most authors was still dependant of the members of the Stationers Company to finance the publication which let the printers and sellers keep on dictating the conditions. Limiting the term of protection was however a hard blow against the Stationers Company whose main assets – the literary privileges – were all of a sudden loosing their value.

This caused a series of debates and court-cases throughout the 18<sup>th</sup> century and the Stationers Company's main argument against a limited copyright was, ironically, the authors absolute right to his own work. At the core of this argument lies the classical, liberal discourse of property, articulated by John Locke. According to Locke every individual has an inalienable property in his own person and when he, through labor, uses his own person to transform the raw material that nature provides into a product, then this product is his unquestionable property. This meant that property was no longer a social convention but a natural right and that no one could justly be denied the fruits of his labor. By regarding the text as the fruit of the author's labor the Stationers Company could claim that literary property was a natural right that could not be limited in term, but that the author was of cause in his full right to sell. In the end the Stationers Company failed to influence the legislators on this account, but as a by-product they managed to replace the old discourse of literary privileges with a new discourse of literary property that has survived until today.<sup>17</sup>

In response to the property discourse, another discourse was taking shape during the mid 18<sup>th</sup> century: namely the discourse of the original genius. Unlike the property discourse, which was mainly the product of the booksellers, this discourse was primarily fostered by the authors themselves. Facing the risk of being reduced to mere producers of commodities

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<sup>17</sup> Rose, pp. 51.

authors, such as Edward Young and Samuel Richardson, started to spread the image of the author as a transcendental genius who through the use of his creativity and his inner, imaginative powers created works of literature that were original expressions of the authors own personality.<sup>18</sup> It was this conception of the author that in the late 18<sup>th</sup> and early 19<sup>th</sup> century found its warmest proponents among the English and German romanticists.

This discourse did not oppose the property discourse; on the contrary, it blended well with it. So well that the conception of the literary text as both an original, unique work and the natural property of the author mixed into a twin-discourse that, according to Rose, has laid the conceptual foundations for modern copyright thinking. It was this twin-discourse that, mediated by the romanticists, spawned the first generation of copyright acts outside of England: the French, German and Swedish acts from the late 18<sup>th</sup> and early 19<sup>th</sup>, but also the American *Copyright Act* of 1790 which was more or less a copy of the *Statute of Anne*.

So, in a sense you can say that the *Statute of Anne* actually marks the birth of the author as the original creator and natural owner of his work. Not in the sense that the law expresses this view of the author – which it does not – but in the sense that it partly initiated the transformation of the author in this direction. What we see here is a good example of how revisions of the law causes changes in the cultural field that in their turn will form and find their expression in future legislation. Methodologically, this mutual influence of the legal and the cultural field implies that reading the law as a narrative in itself is not a sufficient method. It shows that the law is a text that finds its meaning in a cultural context and must be read in relation to this context as a whole, as well as to intertexts from other fields within the culture.

Practically, it can of course also be regarded as a hidden justification for my own research: as a way to show why the laws of the past are not just a matter of the past but also embodies discourses that might actually be crucial for the understanding of the controversies and the confusion that we can see in the copyright debate of today. A debate that bears a striking resemblance to the debate of 18<sup>th</sup> century England, not only in the discourses it utilizes but also in the strategy of the record companies of today to claim to the rights of the artists in order to justify their own commercial and legal interests.

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<sup>18</sup> Rose, pp. 114.



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